

CIS LEGAL NEWSWIRE

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RUSSIA

Changes in Anti-Monopoly Law Introduced

Changes in the Russian Federation ("RF") Law "On Competition and Restriction of Monopolistic Activity on the Commodity Market" (the "Anti-Monopoly Law") were signed into law by President Putin on October 9, 2002, and became effective on October 12, 2002. These changes were adopted in order to address numerous loopholes in the previous version of the Anti-Monopoly Law.

Most importantly, the changes in the Anti-Monopoly Law amend the procedure for obtaining the approval of RF anti-monopoly authorities for mergers, as well as acquisitions of stakes in Russian companies (Articles 17 and 18 of the Anti-Monopoly Law). Now, a commercial entity must obtain prior approval of the anti-monopoly authorities for a merger or takeover of another entity, if the aggregate asset balance value of the entities to be merged exceeds 200,000 times the minimum wage (*i.e.*, 20 million Rubles, or approximately US \$645,200). In the past, this threshold was set at 100,000 times the minimum wage (*i.e.*, 10 million Rubles, or approximately US \$322,600). If the aggregate asset balance value of the entities exceeds 100,000 times the minimum wage but is less than 200,000 times the minimum wage, the acquiring legal entity is required only to notify the anti-monopoly authorities of the merger or takeover. The term for consideration of an application for anti-monopoly approval has been extended from a maximum of 45 days to 50 days.

In the past, the founders of a commercial entity were required to obtain prior approval of the anti-monopoly authorities in order to create a new entity if the aggregate asset balance value were to exceed 100,000 times the minimum wage. This requirement has been replaced by a simple notification requirement, and the threshold has been increased to 200,000 times the minimum wage.

The recent amendments to the Anti-Monopoly Law have also introduced new notification requirements for non-commercial organizations controlling the operations of their participants (members). Notification of the anti-monopoly authorities is required in the case of the creation of a new entity, a merger or takeover, or changes in the participants (members) of such non-commercial organization if there are more than two participants (members).

The majority of approvals that have been granted by the anti-monopoly authorities related to acquisitions of stakes in Russian companies exceeding 20% of the charter capital of such companies. In order to circumvent the prior approval requirement, many purchasers have acquired 20% stakes in various installments. The recent changes to the Anti-Monopoly Law clarified that prior approval is also needed for a series of connected purchases result-

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ing in the acquisition of a 20% stake in a company.

While the changes in the Anti-Monopoly Law appear to have liberalized certain approval/consent requirements, the anti-monopoly authorities have gained new rights with respect to controlling the activities of commercial entities on the commodities market. The amended Anti-Monopoly Law outlines in more detail the procedures and grounds according to which the anti-monopoly authorities may issue orders or instructions, and grants the anti-monopoly authorities the right to initiate court proceedings in the case of a violation of such orders or instructions.

The recent changes to the Anti-Monopoly Law have substantially revised those antimonopoly regulations relating to the definition of a group of persons and affiliates. The changes introduced broaden such definition in order to cover arrangements which previously were beyond the scope of antimonopoly regulations. These changes are relevant not only for the purpose of compliance with antimonopoly rules, but also for interested party transaction rules in the context of corporate governance, as the term "affiliate" is defined in the RF Law "On Joint Stock Companies" (the "JSC Law") by a reference to antimonopoly regulations. In particular, an individual who is employed by one company and occupies the position of chief executive officer of another entity is deemed to form a group of persons along with such companies. Companies or individuals controlling more than 50% of the votes in one company and whose nominees constitute more than 50% of the board of directors or executive board of another company are likewise deemed to be group of companies. Aside from its relevance for compliance with antimonopoly regulations in respect of the acquisition of voting interests, this change could also affect reporting requirements of shareholders under Article 82 of the JSC Law, which requires that shareholders disclose to the company information on its affiliates.

In addition, the amended Anti-Monopoly Law specifically prohibits entities from undertaking coordinated actions aimed at restricting competition on the commodities market. Commercial entities contemplating entering into an agreement or undertaking coordinated actions should now clear with the anti-monopoly authorities the proposed agreements, in order to ensure that such contemplated agreements or actions comply with anti-monopoly regulations. */E. Kuryatnikova*

Procedure for Obtaining Permission for Deferred Payment Clarified

Under Russian currency control regulations, payment under an export contract may be deferred for a term exceeding 90 days only upon special permission from an authorized RF Governmental body. For many years, the procedure for Russian residents to obtain such permission was unclear. But recently, the RF Government approved procedures for obtaining such permissions. RF Government Resolution No. 699, dated September 24, 2002 ("Resolution No. 699"), appointed the RF Ministry of Finance ("MinFin") as the authorized body in charge of issuing permits for deferring payment under an export contract. In order to apply for a permit, an exporter must submit a number of documents to MinFin, including the export contract and the so-called "transaction passport," as well as a written explanation of the reasons for the deferral and a schedule of payments. Additionally, the exporter is required to provide a written conclusion of the RF Ministry of Economic Development and Trade confirming the grounds for such deferral if the contract concerns the export of oil, gas, gems or gold, as well as certain other goods, or if payment will be deferred for a term exceeding 365 days.

Pursuant to Regulation No. 699, a permit should be issued within two months from the date that the application is submitted, provided that all of the required documents are filed. A permit may be revoked in the case of a violation its terms. Resolution No. 699 applies to contracts for which payment was deferred after September 1, 2002. */P. Gloushkov*

JSC Law Amended to Permit Interim Dividends

The JSC Law was amended recently in order to allow interim dividends. Last year, in accordance with the new version of the JSC Law, interim dividends were prohibited, although the previous version of this law allowed interim dividends. This provision of the new version of the JSC Law was unpopular,

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since it restricted, to a certain extent, the flexibility of joint stock companies in distributing profits to shareholders.

Now, pursuant to RF Federal Law No. 134-FZ, signed by President Putin on October 31, 2002 (the "Amendments"), joint stock companies are once again permitted to pay dividends quarterly. Pursuant to the Amendments, a decision to pay interim dividends must be passed within three months after the appropriate period. The Amendments apply to dividends to be paid from September 30, 2002. */P. Gloushkov*

Constitutional Court Rules on Amicable Settlements Between Creditors and Troubled Banks

In a recent ruling, the RF Constitutional Court (the "Court") refused to strike down certain provisions of Russian law concerning the restructuring of troubled banks. In particular, the ruling upheld the validity of existing procedures for concluding and enforcing an amicable settlement between a bank in the course of restructuring and its creditors (including individual depositors).

Claims to review the constitutionality of existing amicable settlement procedures were submitted by numerous individual depositors in several banks which collapsed after the August 1998 financial crisis, including depositors of the large bank SBS-AGRO, which was undergoing restructuring. The individual depositors' claims alleged that certain provisions of Russian law regulating the conclusion of amicable settlements in the case of a bank restructuring, specifically, RF Law No. 144-FZ "On Restructuring of Credit Organizations," dated July 8, 1999 (as amended) (the "Restructuring Law"), violated the individual depositors' constitutional rights.

The group of individual depositors was "forced" to conclude an amicable settlement, in which their claims against SBS-AGRO were rescheduled and SBS-AGRO's existing obligations were converted into new obligations to the creditors, even though a large number of individual depositors were against such restructuring. One factor which led to this result is the voting procedure for approving amicable settlements. Under the Restructuring Law, creditors at creditors' meetings hold

votes proportionate to the amount of their claims against the troubled bank. A decision must be taken by a majority of votes, provided that all of the secured creditors vote in favor of the proposed amicable settlement. The amicable settlement is then submitted to an arbitration court for approval. The terms of the approved amicable settlement then become compulsory for all concerned parties, including individual depositors who may have voted against the settlement. Therefore, in a restructuring situation, several large creditors may have the voting power to approve an amicable settlement on behalf of the bank's creditors (even though a large number of individual depositors in the bank whose aggregate claims are smaller vote against it).

The amicable settlement between SBS AGRO and its creditors was concluded by a representative of the creditors' meeting, as well as representatives of the bank and the Agency for Restructuring of Credit Institutions ("ARCO"), a state corporation set up to deal with certain troubled banks, which took over the bank. The amicable settlement was concluded on March 7, 2001, and approved by the Moscow Arbitration Court on May 8, 2001.

The terms of this amicable settlement, which provided for rescheduling of payments, were less favorable for the individual depositors of SBS-AGRO than liquidation of the bank. In fact, many individual depositors insisted on the immediate liquidation of SBS-AGRO, hoping to retrieve at least a portion of their deposits in cash. However, pursuant to the terms of the amicable settlement with SBS-AGRO, all categories of creditors (not only individual depositors) were made subject to the rescheduling on comparable terms, and there were no signs of preference given to any particular creditor or group of creditors.

The Court ruled, in essence, against the individual depositors and upheld the constitutionality of the existing procedures for reaching and enforcing an amicable settlement with a bank under restructuring. In particular, the Court pointed out that the restructuring of a bank is a special procedure aimed at the financial rehabilitation of a bank. To achieve such financial rehabilitation, one measure which may be employed is to restructure obligations through amicable settlements between the bank and its creditors (represented by a creditors' meeting). A key objective of an amicable settlement is to preserve the activity of the debtor bank by restoring its sol-

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veny. In the process of reaching an amicable settlement, creditors are bound to make certain compromises in order to avoid liquidation of the debtor. Therefore, when a bank is under restructuring, it is considered acceptable if each category of creditors (including individual depositors) is able to recover amounts due to them only partially with postponement of payments, due to the overriding public policy interest of restoring the troubled bank's solvency.

The Court noted that while the RF Civil Code, the Restructuring Law and court practice take into account the interests of individual depositors, specifically in the area of an amicable settlement with a bank under restructuring, it would be unjust to establish a procedure whereby an individual depositors would receive deposits in full at the expense of reducing payments to other creditors. The Court held that policy considerations require that an amicable agreement in the restructuring process represent a reasonable balance between the interests of depositors and other groups of creditors, banks, their shareholders, as well as the state, and that it may be more important to save a bank by rescheduling its obligations than to liquidate it.

The Court found that the legislative provisions embodying this principle are constitutional. It also noted that the with the RF Parliament and RF Government are charged with determining a strategy with respect to troubled "system-forming" banks, *i.e.*, the choice of the most appropriate measures (*e.g.*, reducing operating costs, improving management, collecting debts, restructuring the bank's obligations or liquidation), but the Court is not in a position to assess economic policy approaches.

As opposed to earlier rulings in similar cases, this decision, from a lender's perspective, can be viewed as a positive development backing the stability of contractual arrangements between creditors and banks in a restructuring. */I. Glotin*

AZERBAIJAN

Recent Legal Developments in Azerbaijan

The Azerbaijani regime for production sharing agreements ("PSAs") and the significant level of foreign investment are especially notable in the absence of a comprehensive law on hydrocarbons. In fact, a draft Law "On Petroleum" (the "Draft Law") was introduced in the Milli Majlis (the Azerbaijani Parliament) over three years ago, but has yet to complete the first of three readings required before it can be adopted. Despite this delay, there is reason to believe that consideration of the Draft Law will be accelerated, and with it the beginning of a new phase in the development of Azerbaijan's petroleum sector.

Under the Draft Law in the version which we have reviewed, an executive authority (still to be determined) will direct the Government's oil and gas policy, enter into contracts on behalf of the State (including PSAs), regulate oil and gas production and issue normative acts and regulations. It is clearly intended that the Draft Law will provide sufficient legislative underpinning for PSAs and other production arrangements so that these arrangements will not be adopted by the Milli Majlis as laws following adoption of the Draft Law. The Draft Law will not apply to the 20 plus existing international contracts for the development of hydrocarbon fields, as each of these PSAs is protected by a grandfather clause. This fact alone is significant, as the existing PSAs cover almost all of Azerbaijan's currently developed and highly prospective oil and gas fields of strategic significance. In the opinion of informed observers, the remaining fields are less significant (or less probably prospective) for the country's economy, thus it is not clear what the real near term effect of the Draft Law will be. What the Draft Law does indicate, however, is that the era of stand-alone PSAs is coming to a close, perhaps because the breadth of investment in the petroleum sector is sufficient for Azerbaijan to proceed more deliber-

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ately to develop a long-term legislative base.

Among the unanswered questions in the Draft Law is the role of the State Oil Company of the Azerbaijan Republic ("SOCAR") which, although it may be contemplated to lose its role as the negotiator of PSA's (or issuer of licenses), will remain a participant in every current PSA in Azerbaijan and therefore a major market participant and producer in its own right. It is also unclear to what extent operational conditions and administrative regulations applicable to future projects can be grandfathered or covered by economic stability clauses.

Other Legislative Activity

As a prelude to the potential near term adoption of the Draft Law, Azerbaijan has adopted a range of Presidential Decrees to support entrepreneurial activity and relax bureaucracy. Although most of the Decrees are clearly aimed at improving the environment for business generally, most have the additional effect of dealing with problems likely to face investors in the petroleum sector without the protection of a sui generis PSA.

The decree "On Improving Rules for Issuing Special Permits (Licenses) to Conduct Certain Types of Activities" (the "Licensing Decree"), was issued on September 2, 2002. Before the adoption of the Licensing Decree, there were 240 types of entrepreneurial activities requiring a special permit or license (license). In addition, the state agencies issuing these licenses often maintain official barriers to obtaining licenses. The Licensing Decree eliminates the majority of the licenses required to conduct certain types of entrepreneurial activities, reducing the list to only 30 types of activities, although these still include most primary petroleum exploration and development activities, but eliminated some ancillary activities. The Licensing Decree also simplifies the rules for issuing these licenses, including a simplified procedure for submission of the necessary documents. Additionally, the state agency issuing a license must now consider applications and issue a conclusion on issuing the license within five days, and then make an official decision on issuing the license within 15 days. Previously, consideration of such applications could be delayed for long periods of time and for any number of vague reasons.

The decree "On Additional Measures in the Sphere of Maintenance and Development of Entrepreneurship" (the "Development Decree") was adopted on September 10, 2002.

Approximately US \$51 million, a significant sum in the Azerbaijan budget, has been allocated for entrepreneurship development for the period from 2003 to 2005.

The Development Decree directs the Cabinet of Ministers and Ministry of Taxes to prepare amendments to the Tax Code aimed at lowering tax rates and simplifying the tax system. These amendments take effect on January 1, 2003, and include: (1) a reduction of the profit tax rate from 27% to 25%, at the same time providing for different profit tax rates for taxpayers, depending on their entrepreneurial activities; (2) a reduction of amortization rates for several categories of basic assets (for instance, the amortization rate for construction, including oil field construction projects, will be reduced from 10% to 7%); (3) the re-introduction of the abolished export tax, which will be levied at the rate of 25% on the difference between domestic prices and the contract price of the exported item (including oil); and (4) an expansion in the application of the simplified tax system, including granting individuals engaged in entrepreneurial activity the right to use the simplified tax system.

The Development Decree introduces a number of other measures. For example, the Cabinet of Ministers has been directed to take certain steps to decrease rates for natural monopolies, such as electricity, gas, water, railways, air and marine transport, and communication services, etc. Also, changes in custom duties will be aimed at protecting domestic markets and stimulating exports, as well as establishing a free customs zone and customs warehouses. Additionally, the Ministry of Economic Development is to expedite the privatization of state enterprises and objects under its management, including major telecommunications enterprises, the national airline, and certain enterprises in the chemical and light industries. The Development Decree also removes certain obstacles to the full use of credit lines allocated by international financial credit structures to finance entrepreneurship.

On a bureaucratic level, the Development Decree requires the Ministry of Justice to remove all obstacles to state registration for entrepreneurial activities and to simplify state registration procedures. Especially important for foreign investors, certain provisions of the Development

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Decree require the Ministry of Foreign Affairs to resolve the problems of legalization of documents and introduce a simplified visa regime. Finally, the Development Decree allows investors to invest profits in any sphere of the economy (provided that a contribution to such sphere is not prohibited by other legislation) without submitting any declarations regarding the source of such profit.

Finally, on September 28, 2002, the decree "On Preventing the Obstruction of the Development of Entrepreneurship" (the "Non-Interference Decree") was enacted. The Non-Interference Decree seeks to remove obstacles to entrepreneurship that are maintained by state agencies, especially law enforcement agencies. Notably, the Non-Interference Decree eliminates the Ministry of Internal Affairs' department of anti-economic crimes, and prohibits law enforcement agencies from groundlessly interfering in an entrepreneur's activities. For example, the Ministry of Taxes has been instructed to eliminate tax audits conducted over a time period exceeding the period provided for by legislation, as well as to halt groundless repeat audits. /S. DeBeer, F. Mirzayev, H. Nasibov

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