

## **AMENDED AND SUPPLEMENTED REQUIREMENTS FOR GOVERNMENT COMMISSION APPROVAL OF TRANSACTIONS (OPERATIONS) WITH UNFRIENDLY PERSONS**

12 June 2023 saw publication of an excerpt (*Schedule 1*) from the minutes of a meeting of the Government Commission for control over foreign investment in the Russian Federation (the Government Commission) establishing a new approach to approving transactions (operations) with so-called unfriendly persons<sup>1</sup> and payment of dividends thereto by Russian companies (Minutes). Minutes No. 171 replace Government Commission minutes No. 118/1 and No. 143/4 regulating the same matters.

The new minutes contain the already customary criteria (such as requirements for an independent appraisal of a business/assets, a discount of at least 50% on the market value and an obligation to make a voluntary payment to the Treasury), as well as a number of new ones, appearance of which was evidenced at different times by media publications and unofficial drafts of the given document. The majority of the amendments concern precisely transactions (operations), while the approaches to payment of dividends have remained virtually the same.

Below, you will find a review of the updated criteria in relation to both approval of transactions (operations) and issue of permits to pay dividends to unfriendly persons.

### **Approval of transactions (operations)**

Above all, it is important to note that the updated list of criteria is still formally applied only to transactions (operations) involving disposal of securities, including shares, and interests by foreign unfriendly persons. So, for other transactions, particularly involving disposal of real property, the given criteria are not applicable.

Moreover, proceeding from existing practice, it is highly likely that the Government Commission will apply the updated criteria to all transactions on which no decision had been made when Minutes No. 171 were published, no matter when the application was submitted and reviewed.

Minutes No. 171 set the following criteria for approving transactions (operations):

#### *Old criteria<sup>2</sup>*

- availability of an independent market value appraisal of the assets by an appraiser recommended by the Ministry of Finance<sup>3</sup>;
- availability of a conclusion regarding the appraisal report by an SRO from the list recommended by the Ministry of Finance<sup>4</sup>.

*Even though this requirement was previously formulated as a recommendation, in fact such a conclusion was already required by the Government Commission for approving transactions;*

- sale of an asset at a discount of at least 50% on the market value determined by the appraiser;
- establishment of KPI for the purchaser and (or) the target company, which could include:
  - ✓ maintenance of the technological potential and main form of economic activity of the target company;
  - ✓ retention of jobs;
  - ✓ fulfilment of obligations under contracts concluded with other legal entities.

<sup>1</sup> Foreign unfriendly persons or persons under their control

<sup>2</sup> Criteria that were already in place in one form or another

<sup>3</sup> List of appraisers (appraisal organisations) recommended by the Russian Ministry of Finance for assessing the market value of assets: [https://minfin.gov.ru/ru/permission/79-81?id\\_57=301496-perechen\\_otsenshchikov\\_ot\\_senochnykh\\_organizatsii\\_rekomendovannykh\\_dlya\\_provedeniya\\_otsenki\\_rynochnoi\\_stoimosti\\_aktivov](https://minfin.gov.ru/ru/permission/79-81?id_57=301496-perechen_otsenshchikov_ot_senochnykh_organizatsii_rekomendovannykh_dlya_provedeniya_otsenki_rynochnoi_stoimosti_aktivov)

<sup>4</sup> List of self-regulating organisations of appraisers recommended for providing an expert opinion as per article 17.1 of Federal Law No. 135-FZ dated 29.07.1998 on "Appraisal Activities in the Russian Federation": [https://minfin.gov.ru/ru/permission/79-81?id\\_57=301783-perechen\\_samoreguliruemyykh\\_organizatsii\\_otsenshchikov\\_rekomendovannykh\\_dlya\\_provedeniya\\_ekspertnogo\\_zaklyucheniya\\_v\\_sootvetstvii\\_so\\_statei\\_17.1\\_federalnogo\\_zakona\\_ot\\_29.07.1998\\_\\_135-fz\\_ob\\_ot\\_senochnoi\\_deyatelnosti\\_v\\_rossiiskoi\\_federatsii](https://minfin.gov.ru/ru/permission/79-81?id_57=301783-perechen_samoreguliruemyykh_organizatsii_otsenshchikov_rekomendovannykh_dlya_provedeniya_ekspertnogo_zaklyucheniya_v_sootvetstvii_so_statei_17.1_federalnogo_zakona_ot_29.07.1998__135-fz_ob_ot_senochnoi_deyatelnosti_v_rossiiskoi_federatsii)

*The changes relating to the given criterion affected only the wording, which now specifies the types of KPI, providing for the possibility of establishing KPI for both the target company and the purchaser. So-called "responsible ministries" are charged with exercising control over observance of KPI;*

- payment to the Federal Treasury of 5% (for a discount on the transaction price of less than 90%) or 10% (for a discount on the transaction price of over 90%) of the market value of the assets within three months of transaction completion.

*Let us note that the new version of the given requirements sets a fixed three-month period for making the payment. Previously, the Government Commission set the period for each case separately. In addition, Minutes No. 171 propose that the given period run from the transaction completion date, whereas the previous unofficial versions of the relevant minutes proposed that the period run from the date the permit was issued and stipulated that it be paid by the purchaser. This stipulation having been deleted from the text means that both purchaser and seller may still make this payment.*

#### *New criteria*

- possibility of buyback (inclusion of a call option in the transaction) of the asset at market price within two years of the sale provided there is economic benefit for the resident seller;

*In fact, this condition restricts the possibility of approval of a call option for the seller of the assets within two years of completion of the initial transaction. We believe that buyback outside the given period will be possible either on separate grounds (as indicated by the words "as a rule"), or on the basis of a separate permit from the Government Commission (the current regulation being retained), or could be prohibited. Meanwhile, the economic benefit conditions could be interpreted as a need for the resident seller to receive a profit on sale of the asset, irrespective of its market value.*

- payment of the purchase price to an unfriendly person is possible:
  - ✓ into a type C account;
  - ✓ in roubles into an account with a Russian bank;
  - ✓ into a foreign account on the condition of payment deferral.

*Payment of the purchase price to a seller outside the Russian Federation is thus restricted by the need to agree its deferral. The deferral term will be decided by the Government Commission considering all the circumstances and conditions of the transaction under review, including the payment amount and currency. We also believe that each payment within the scope of the deferral may be linked to attainment of assumed KPI, though the minutes do not specify this directly.*

- existence of other transaction permissions.

*This applies, for example, to permission from the FAS of Russia and/or the Central Bank of the Russian Federation for a transaction, which might affect the process for obtaining approvals and prioritising obtaining them within tight deadlines;*

- listing of up to 20% of an acquired block of shares in a public joint-stock company within one year, the listing not exceeding three years. If the shares in the public joint-stock company are acquired as a result of another company merging into it, the listing of shares in the public joint-stock company within three years of the merger numbering the equivalent of up to 20% of the shares in the merged company in consideration of the conversion ratio;
- listing of up to 20% of an acquired block of shares in a public joint-stock company in the event of termination of the joint-stock company's public status or its winding up as a result of performance (fulfilment) of the transaction (operation). The listing and acquisition of public status must take place no more than three years from performance (fulfilment) of the transaction (operation);

*We believe that the idea behind the given item consists in the need to exclude the situation when, in connection with the exit of the foreign owner, the shares in the company are delisted. So the new owner must provide for such a company to be listed on the exchange (in relation to a block of up to 20%) by the given deadlines.*

Let us note separately that the previous unofficial versions of the criteria also included a number of other conditions, such as ones concerning excluding foreign persons from the asset's ownership structure and restricting subsequent overseas payment of dividends by the target company, but they do not feature in the final text of Minutes No. 171. We suppose that this might be explained in relation to dividends by such restrictions in fact already being in place within the scope of existing requirements.

### **Payment of dividends**

Minutes No. 171 retain the former approaches to considering issue of permission to pay dividends to unfriendly persons. The changes to the wordings of the criteria are essentially only technical in nature and their inclusion in the text of the minutes is determined exclusively by the previous Minutes No. 118/1 containing these criteria no longer being in effect.

*ALUMNI Partners alerts are short reviews of changes to the legislation and law enforcement practice and should not be regarded as a legal opinion or legal advice.*

If you have any questions or comments on this review, please contact us. We will be glad to discuss them with you.



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*Schedule 1*

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**EXCERPT  
from the decision of the Government Commission's Sub-commission for control over foreign  
investment in the Russian Federation  
No. 171/5 dated 7 July 2023**

**Moscow**

1. On the basis of the discussion that has taken place, in fulfilment of item 2 of the List of Russian Presidential instructions on the results of the conference on the strategy for working with assets belonging to foreign persons, and in performance of regulation of transactions (operations) between residents and non-residents of 11 April 2023 (No. Pr-1114 dated 4 June 2023), the Sub-commission has unanimously decided, on consideration of the question of the Sub-commission issuing permits for performance (fulfilment) of transactions (operations) involving disposal of securities, including shares, interests (deposits) in the charter (share) capital of Russian commercial companies (hereinafter the assets) by foreign persons connected with foreign states that perform unfriendly acts in relation to the Russian Federation, Russian legal entities and individuals (including if such foreign persons are citizens of these states or if these foreign states are their place of registration, the main location of their economic activities or of gaining profit from activities), or persons under the control of the given foreign persons, irrespective of their place of registration or main place of their economic activities (hereinafter persons of foreign states performing unfriendly acts), to proceed, as a rule, from the feasibility of establishing the listed conditions for performance (fulfilment) of such transactions (operations):

1) availability of an independent appraisal report on the market value of the assets performed by an appraiser engaged in private practice and included on the list of appraisers (appraisal organisations) recommended by the Sub-commission for performing such appraisals, or an appraiser that has concluded a labour contract with a legal entity included on this list (hereinafter the independent appraisal report);

2) availability, in conjunction with the independent appraisal report, of an expert opinion prepared by an expert or experts of a self-regulating organisation of appraisers as per article 17.1 of Federal Law No. 135-FZ dated 29 July 1998 on "Appraisal Activities in the Russian Federation", included on the list of self-regulating organisations of appraisers recommended by the Sub-commission for drawing up an expert opinion as per article 17.1 of Federal Law No. 135-FZ dated 29 July 1998 on "Appraisal Activities in the Russian Federation";

3) sale of assets at a discount of at least 50% of the market value of the relevant assets specified in the independent appraisal report;

4) an obligation voluntarily to send to the Federal Treasury a sum of at least 10% of half the market value of the relevant assets specified in the independent appraisal report (if the assets are sold at a discount of less than 90% of the market value of the relevant assets specified in the independent appraisal report), or at least 10% of the market value of the relevant assets specified in the independent appraisal report (if the assets are sold at a discount of over 90% of the market value of the relevant assets specified in the independent appraisal report), within three months of performance (fulfilment) of the transaction (operation);

5) in the event of acquisition of shares constituting charter capital of a public joint-stock company, listing of up to 20% of the acquired block of shares in the public joint-stock company, whereat:

the listing is made no more than one year from performance (fulfilment) of the transaction (operation) and its performance may not exceed three years from the initial listing;

if the commercial company is reorganised through merger with a public joint-stock company – shares in the public joint-stock company with which the merger takes place numbering the equivalent of 20% of the shares in the merged company in consideration of the conversion ratio of shares in such companies on their merger, are listed within three years of performance (fulfilment) of the transaction (operation);

6) in the event of termination of the public status or winding up of a joint-stock company as a result of the transaction (operation) – listing of up to 20% of the shares in the public joint-stock company (either newly established or created as a result of the joint-stock company acquiring public status), the acquisition of public status by the joint-stock company or performance of such listing taking place no more than three years from performance (fulfilment) of the transaction (operation);

7) establishment of key performance indicators for purchasers and (or) the commercial company acquired thereby, which must require, among other things, maintenance of the technological potential and main form of economic activity of the given commercial company, retention of jobs and performance of obligations under contracts concluded thereby with other legal entities, the federal executive authority being recommended to exercise control over attainment of these indicators;

8) buyback of the asset at market value on the date the given option is realised, economic benefit to the resident owner of the asset and a limited term of validity of the permission (as a rule no more than two years from performance (fulfilment) of the initial transaction (operation) – for a transaction (operation) envisaging the possibility of buyback of the asset;

9) remittance of funds to type C accounts on conclusion of transactions (operations) to persons of foreign states performing unfriendly acts, or settlement under transactions (operations) in roubles within the Russian Federation banking system without funds being transferred outside the Russian Federation, or payment deferral if, under transactions (operations) with foreign persons, funds are transferred to the accounts of the given persons opened with banks located outside the Russian Federation and other financial market institutions;

10) the applicant holds other permits provided for in the legislation of the Russian Federation required for performing (fulfilling) a transaction (operation), information about which is supplied by the applicant.

2. The Sub-commission has taken note of the information provided by the Ministry of Finance of Russia and the Bank of Russia on approaches to decision-making on issue of permits to pay out profits (dividends) to foreign creditors in cases established by Decree of the President of the Russian Federation (hereinafter foreign creditors), as a rule in observance of the following conditions:

1) the profits (dividends) paid out do not exceed 50% of the previous year's net profit;

2) the results of retrospective analysis of payment of profits (dividends) for previous years are taken into account;

3) the foreign creditor participants (shareholders) are prepared to continue their commercial activities in the Russian Federation;

4) account is taken of the positions of federal executive authorities and the Bank of Russia on assessing the significance of the organisation's activities, and the impact exerted by the organisation's activities on the technological and production sovereignty of the Russian Federation and the socio-economic development of the Russian Federation (regions of the Russian Federation);

5) fulfilment by the applicants of their obligations to achieve the key performance indicators, as confirmed by federal executive authorities (Bank of Russia);

6) the possibility of paying out profits (dividends) on a quarterly basis on the condition of attainment of the set key performance indicators.

3. To recognise minutes of the Sub-commission meetings No. 118/1 of 22.12.2022 and No. 143/4 of 02.03.2023 as no longer in force.

True extract.

Deputy Minister of Finance  
of the Russian Federation

A.V. Moiseev