LEXOLOGY.

Mergers & Acquisitions in Russia

2018

Dechert LLP

M&A in Russia

Dechert partnered with *Lexology* on their annual Lexology Navigator – a comparative global Q&A guide. The guide invites leading practitioners to introduce the specific legal position of a particular jurisdiction and the fundamental issues and considerations in the relevant subject area. M&A experts from Dechert's Russian corporate practice provided the Russian M&A content in Q&A format.

Please click here to access the original guide first published on *Lexology*.

Dechert Authors

Laura M. Brank
Partner, Corporate
Moscow
E: laura.brank@dechert.com
T: +7 499 922 11 00

Evgenia Korotkova
National Partner, Corporate
Moscow
E: evgenia.korotkova@dechert.com
T: +7 499 922 11 60

Kirill Skopchevskiy
Associate, Corporate
Moscow
E: kirill.skopchevskiy@dechert.com
T: +7 499 922 11 64

Pavel Dunaev
Associate, Corporate
Moscow
E: pavel.dunaev@dechert.com
T: +7 499 922 11 62

Country Snapshot

Trends and Climate

What is the current state of the M&A market in your jurisdiction?

Dechert LLP: 2018 has seen an increase in the aggregate value of inbound M&A transactions after a period of slowdown caused by a number of geopolitical factors, including sanctions and the fall in oil prices. M&A investment as of the end of August 2018 was $5.6 billion (according to Thomson Reuters), comparison with $3.7 billion inbound M&A investment seen in the same period of 2017, although the total number of deals has decreased in comparison with the same period in 2017.

Have any significant economic or political developments affected the M&A market in your jurisdiction over the past 12 months?

Dechert LLP: The recent transition from recessionary economic conditions has triggered some growth in M&A activity. Expectations of a return to a more cooperative relationship with the United States after the election of President Trump were not met and were followed by further geopolitical tensions and the tightening of an EU and US sanctions regime against Russia, which may hinder further significant growth in the M&A market involving western investors. Investments by non-western parties appears to be increasing but the process is slow.

Are any sectors experiencing significant M&A activity?

***Dechert LLP*:** According to *KPMG's Russian M&A Review 2017*, major M&A activity has shifted away from the energy and extractive industries towards other sectors, including the telecommunications and media industry, consumer sector, innovations and technology sector and agriculture. Nevertheless, energy and the mining industries still appear to hold the leading position, in terms of both the number of deals and deal value.

The following sectors saw the largest number of deals announced in Russia in 2017:

- energy and extractive industries;
- real estate and construction;
- consumer retail;
- agriculture;
- banking services and insurance;
- innovations and technology; and
- other services.

In terms of aggregate deal value, the energy and extractive industries sector is followed by banking services and insurance, real estate and construction, innovations and technology, consumer retail and other services.

Are there any proposals for legal reform in your jurisdiction?

Dechert LLP: There have been a number of new laws introduced over the past few years. Historically, many Russian M&A transactions involving foreign investors were structured in a way such that foreign law (particularly English law) governed the principal transaction documents. In order to make Russian

law more attractive and bring Russian legal concepts closer to western practices, multi-staged legal reforms have been implemented over the past 10 years or so in Russia. The most significant and long-awaited changes include the following:

- The joint stock companies law was amended to allow the acquisition of shares via public takeover bids;
- The rules relating to major and interested party transactions were made less vulnerable to abuse;
- Multi-stage changes were made to the anti-monopoly law, including efforts to make merger control rules more comprehensive and transparent; and
- The concepts of debt-to-equity conversion, irrevocable power of attorney and option agreements, escrow accounts, as well as terms similar to representations and indemnities, were introduced.

Nevertheless, in the absence of consistent Russian court practice in relation to the application of many of these changes, many investors (and Russian parties) still choose English law when structuring aspects of M&A transactions involving Russian entities. At the same time, given the recent de-offshorisation trends and the relevant initiatives of Russian government, including the enforcement of legislation on controlled foreign entities, as well as a closer cooperation of Russian tax authorities with their foreign counterparts, result in an increasing number of transactions being structured under Russian law. The imposition of strict sanctions on large Russian conglomerates, most notably Rusal, and the lingering threat that similar restrictions could be imposed on entities on the so-called Kremlin List, is further pushing domestic investors to exclusively Russian jurisdiction for their transactions.

In addition, Russian laws regulating foreign investment into the country were significantly amended through the Law on Amendments (Federal Law 165-FZ, July 18 2017), which could tighten control over foreign investment in Russia and, if not clarified, or if the enforcement practice turns to be negative, have a chilling effect on inbound M&A activity in Russia. Most importantly, pursuant to the Law on Amendments, any transaction undertaken by a foreign investor with respect to any Russian company may require prior approval from a commission headed by the prime minister and consisting of representatives of various state authorities, should the prime minister determine that such approval is required for national defence and state security reasons. Previously, only transactions involving foreign investors acquiring control over companies operating in the so-called ‘strategic’ sectors or certain other transactions conducted by foreign states or international organisations required the commission’s approval. The legislation is clearly intended to be similar to US and other laws allowing the government to reject foreign investment if such investment raises security concerns.

Legal Framework

Legislation

What legislation governs M&A in your jurisdiction?

Dechert LLP: The principal laws are as follows (this list is non-exhaustive, and all laws are as amended):

- the Civil Code;
- the Joint Stock Companies Law (Federal Law 208-FZ, December 26 1995);

- the Securities Market Law (Federal Law 39-FZ, April 22 1996);
- the Competition Law (Federal Law 135-FZ, July 26 2006);
- the Strategic Sectors Law (Federal Law 57-FZ, April 29 2008); and
- the Foreign Investments Law (Federal Law 160-FZ, July 9 1999).

Regulation

How is the M&A market regulated?

Dechert LLP: The key regulatory agencies involved in the Russian M&A market are:

- the Russian Central Bank, which oversees the securities market; and
- the Federal Anti-monopoly Service, which has regulatory oversight over merger control, foreign investment into 'strategic' sectors of the economy and general anti-monopoly regulation.

Other state authorities may also be involved, depending on the sector.

The applicability of laws and regulations to an M&A transaction will depend on:

- its nature (eg, transaction structure and size of the acquired stake);
- the parties involved (eg, foreign or Russian, private or state owned);
- the economic sector(s) in which the target is operating; and
- the types of asset involved (including whether the target is a listed company).

Are there specific rules for particular sectors?

Dechert LLP: Yes. For example, transactions involving banking, insurance or telecommunications and media companies are subject to specific restrictions.

Types of acquisition

What are the different ways to acquire a company in your jurisdiction?

Dechert LLP: A share purchase transaction would be the most common way, including direct acquisitions and acquisitions via public takeover bids (voluntary and mandatary offers and minority shareholder buy-outs).

Asset purchases are not common for a number of reasons, including tax consequences and the fact that generally licences are not transferable and the liabilities of a selling entity remain with that entity.

Preparation

Due diligence requirements

What due diligence is necessary for buyers?

Dechert LLP: Buyers should carry out comprehensive due diligence on the target, as even small mistakes can have major consequences, given the form-over-substance nature of Russian law. The

scope can vary greatly depending on numerous factors (eg, the target's history, whether it is a listed entity and the number of shareholders). At a minimum, it should be confirmed that:

- the target was properly established;
- the target is in compliance with its tax obligations;
- the seller owns the shares free and clear of encumbrances; and
- share transfers were properly documented.

Information

What information is available to buyers?

Dechert LLP: The information available to buyers typically depends on whether the target is a private or public company.

For private companies, publicly accessible data is often limited. Therefore, the seller typically supplies information in response to a diligence request prepared by the buyer's counsel.

In certain instances – including where a public company has registered a securities prospectus – the company must disclose various information to the public. Therefore, certain public company documents may be publicly available (eg, at www.e-disclosure.ru or on the company's website), including:

- quarterly reports;
- consolidated financial statements;
- foundation documents;
- certain shareholder information;
- information on affiliates; and
- information on material agreements and events.

What information can and cannot be disclosed when dealing with a public company?

Dechert LLP: Restrictions on information received from a public company include:

- information classified as confidential;
- information constituting state secrets;
- insider information; and
- information containing personal data.

Disclosure would ordinarily be made on the basis of a non-disclosure agreement or subject to the receiving party having received necessary clearance (eg, for state secret information). The volume of information about a public company that a selling shareholder may have will also depend on the size of its stake.

Stakebuilding

How is stakebuilding regulated?

Dechert LLP: Stakebuilding is regulated by the Joint Stock Companies Law and the Securities Market Law.

The issuer, the acquirer and the seller must disclose the direct or indirect acquisition/disposal of 5% of voting shares or any acquisition/disposal resulting in the acquirer holding more /the seller holding less than 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75% or 95% of voting shares.

If an acquirer acquires more than 30%, 50% or 75% of the voting shares in a public company (including any voting shares in the company owned by the acquirer's affiliates), it will be obliged to launch a mandatory tender offer to acquire the voting shares held by other shareholders at market value and at the request of such shareholders. An acquirer of over 95% of the voting shares in a joint stock company may squeeze out the remaining shareholders by purchasing their shares at market value or may be required to buy out those remaining shareholders at market value.

In addition, stakebuilding in certain industries (eg, banking, insurance and mass media), as well as stakebuilding by foreign investors, is subject to restrictions and may require regulatory approval.

Documentation

Preliminary agreements

What preliminary agreements are commonly drafted?

Dechert LLP: Parties typically enter into letters of intent, memoranda of understanding, recommendation letters or confidentiality non-disclosure agreements, which may be governed by non-Russian law, given that enforceability of these documents under Russian law is questionable.

Under Russian law, the parties may enter into a preliminary agreement obliging them to enter into the main agreement under the terms specified by the preliminary agreement. Parties tend to use preliminary agreements if they want to have a reliable mechanism to oblige the other party to enter into the main agreement on the terms set out in the preliminary agreement through Russian courts. A Russian law-governed preliminary agreement is valid for one year unless stated otherwise in the agreement. If there are any disagreements between the parties with respect to the terms and conditions of the main agreement, the courts will determine these terms and conditions. There are no specific rules on disclosing preliminary agreements; however, certain provisions of these agreements may require disclosure as a material event (for a public joint stock company).

Principal documentation

What documents are required?

Dechert LLP: The documents required for an M&A transaction depend on the nature and structure of the transaction. The following documents are frequently entered into:

- an acquisition agreement;
- a shareholders agreement;
- security documents, if necessary; and
- ancillary agreements (eg, services, loan, employment, IP-related and debt assignment agreements).

Which side normally prepares the first drafts?

Dechert LLP: The buyer normally prepares the first drafts, except in the event of an auction/tender sale.

What are the substantive clauses that comprise an acquisition agreement?

Dechert LLP: If the acquisition agreement is governed by non-Russian law (parties tend to use English or New York law), the substantive clauses are similar to those seen in agreements for M&A in other jurisdictions, including provisions on:

- transaction mechanics;
- purchase price;
- representations and warranties;
- pre-closing covenants;
- indemnities;
- closing conditions; and
- termination.

If the acquisition agreement is governed by Russian law, it generally includes the following substantive clauses:

- transaction mechanics (eg, asset or stock purchases);
- representations and obligations of the parties;
- purchase price and other related provisions (eg, adjustments to purchase price, method and timing of payment);
- term and termination; and
- general provisions relating to notices, confidentiality, assignment, expenses, governing law and dispute resolution.

What provisions are made for deal protection?

Dechert LLP: Common deal protections include:

- break fees;
- support agreements;
- forced vote provisions;
- exclusivity provisions; and
- bank guarantees, notary deposit or escrow.

Some of these types of deal protection may raise competition issues under Russian law (eg, exclusivity and forced vote provisions) and certain protections commonly used in other jurisdictions (eg, exclusivity provisions) may not be enforceable under Russian law. Separate security agreements may also be executed (eg, suretyship or guarantees and pledges or mortgages). RTW insurance is rarely used in Russian M&A deals.

Closing documentation

What documents are normally executed at signing and closing?

Dechert LLP: The specifics of what is executed (and the timing of this) vary from deal to deal and may depend on the circumstances. Although signing and closing concepts are not specifically set out in Russian law, parties negotiate these provisions in a similar manner to that seen in other jurisdictions. Thus, documents often executed at signing include:

- the principal transaction agreement;
- written consents and resolutions approving the transaction and related documentation; and
- deal protection agreements.

Documents often executed at closing include:

- applicable ancillary agreements (eg, escrow agreements, IP-related documentation and employment agreements);
- certificates confirming the performance of conditions precedent; and
- transfer instruments.

Are there formalities for the execution of documents by foreign companies?

Dechert LLP: Generally, there are no specific formalities imposed by Russian law regarding the execution of documents by foreign companies.

In practice, foreign companies must present certain documents, including foundation documents and powers of attorney. A specific requirement for these documents is that they be notarised, affixed with an apostille or another form of legalisation and translated into Russian. This is required, for instance,

where an agreement must be notarised by a Russian notary (eg, the sale and purchase of a participatory interest in a Russian limited liability company), or where further filing or registration with the Russian state authorities (eg, the Federal Anti-monopoly Service) or other Russian-specialised companies (eg, registrars) is required.

Are digital signatures binding and enforceable?

Dechert LLP: Although Russian law provides for the use of electronic and digital signatures, parties tend to sign by hand, which is also a typical requirement of the Russian state authorities (should any further filings or registrations with the state authorities be required).

Nevertheless, parties can use electronic signatures (eg, facsimile or analogous methods), which should be binding and enforceable, but only if such method has been expressly agreed between the parties beforehand in a separate agreement. It is generally accepted that this separate agreement containing a provision allowing electronic signatures must be signed by hand to prove that the representatives of the parties had all of the powers required to execute the separate agreement. Agreements to be notarised by a Russian notary (eg, agreements relating to a participatory interest in a Russian limited liability company, such as a sale and purchase agreement or a pledge agreement) must be signed by hand.

Russian law provides for the use of electronic digital signatures (EDSs) as well. The parties must apply to certification centres to obtain an EDS and other necessary components (eg, encryption codes). Depending on the type of EDS used (eg, simple, qualified or non-qualified), an EDS is equal to a handwritten signature either in all cases where the EDS is qualified or only in cases stipulated by Russian law if the signature is simple or non-qualified.

Foreign law and ownership

Foreign law

Can agreements provide for a foreign governing law?

Dechert LLP: Subject to any overriding mandatory provisions in Russian law (eg, in the case of a sale of a real estate object), parties are typically free to choose the law that will govern their agreements and any such agreement should create valid, binding and enforceable rights and obligations for the parties. However, in practice, parties may not use foreign law where an agreement must be notarised by a Russian notary (eg, agreements relating to a participatory interest in a Russian limited liability company, such as a sale and purchase agreement or a pledge agreement). The mandatory requirements imposed by the jurisdiction of the parties to the transaction and the target will continue to apply to the transaction (eg, the Joint Stock Companies Law will likely apply to a merger between a Russian target and a buyer, regardless of the parties' selected governing law).

Foreign ownership

What provisions and/or restrictions are there for foreign ownership?

Dechert LLP: Russia's legal framework covering foreign investment provides equal protection for foreign and local investors. However, there are certain restrictions on the total level of foreign investment in certain sectors of the economy (eg, banking, media and insurance). In addition, foreign states, international organisations and foreign companies which do not disclose information on their actual beneficiaries to antimonopoly authorities are barred from obtaining control (ie, over 50% of shares or voting rights) over Russian 'strategic' entities (lower thresholds apply to 'strategic subsoil companies').

State law exceptions also apply to certain assets and property. For example, foreign investors are not allowed to own certain land located in border territories or other sensitive territories (eg, sea ports) and investors with more than 50% foreign ownership are allowed only to lease agricultural lands (ie, not to own).

Depending on the assets, thresholds and the structure of the transaction, an investor may require certain government approvals to acquire a stake in a Russian entity:

- Anti-monopoly approval may be required, to the extent that certain thresholds are met;
- Acquisitions resulting in a foreign investor obtaining control over a Russian company engaging in a strategic activity (of which there are 46 types) require prior approval from the Government Commission for Control over Foreign Investments (lower thresholds apply to strategic subsoil companies); and
- Certain areas (eg, investments in banking and credit organisations) may require additional clearance from the Bank of Russia.

Any proposed acquisition by a foreign investor of any rights with respect to a Russian target should be carefully considered, and the licences and activities of the target and any subsidiaries of the target should be reviewed to ensure that the activities which the entity engages in are not considered 'strategic' under Russian law. If either the target or any of its subsidiaries holds any strategic licences or perform a strategic activity, the investor may need to obtain approval or otherwise restructure the transaction.

Valuation and consideration

Valuation

How are companies valued?

Dechert LLP: The Russian Federal Appraisal Standards recognise three principal approaches to valuation, in line with the standards approved by the International Valuation Standards Council:

- The market comparison approach – a direct comparison of the company being valued with identical or comparable (similar) companies where pricing information is available. This approach also relies on general statistics and information about the market in which the valued company operates, and often uses market multiples derived from a set of comparables. The capitalisation of income method is also employed;
- The income approach – this provides an indication of value by converting future cash flow into a single current value. The value of a company is determined by reference to the value of income, cash flow or generated cost savings. Methods used are all variations of the discounted cash flow method; and
- The cost approach – the value is determined by calculating the current replacement or reproduction cost and making deductions for deterioration and other forms of depreciation. This relies on the costs of replacement and reproduction and the summation methods.

Appraisers are not required to use more than one valuation method and have the right to determine the most appropriate approach and specific methods to use under the given circumstances. The types of value that may be determined include, but are not limited to:

- market value;
- investment value;
- liquidated value; and
- cadastral value.

Consideration

What types of consideration can be offered?

Dechert LLP: There are generally no restrictions on the types of consideration that can be offered. The most common are cash, shares and promissory notes. Material assets may also be tendered as consideration. Although not specifically required, it is common practice to expressly state the value of consideration in Russian roubles.

Strategy

General tips

What issues must be considered when preparing a company for sale?

Dechert LLP: The following questions should be raised when preparing a company for sale:

- whether the company is considered ‘strategic’ under the Strategic Sectors Law or a ‘financial organisation’ (‘credit organisation’), or otherwise operates in a protected sector;
- whether there are any restrictions in the shareholders’/participants’ agreement or under Russian law which may hinder the transaction (eg, rights of first refusal); and

- whether the company has dealings with any sanctioned entities (eg, if a sanctioned entity is a customer or client of, or provides services to, the company).

In addition, a seller will want to conduct internal due diligence to prepare the target for sale by identifying risks and ensuring that all documents and accounts are in order. Company personnel should also review any contracts that could be affected by a change of control. The seller will also want to consider whether the sale would trigger a mandatory tender offer or require other approvals (eg, anti-monopoly), so that it can prepare the necessary documents in advance.

What tips would you give when negotiating a deal?

Dechert LLP: The following should be considered:

- Have a dedicated team with the authority to make key decisions or which has direct access to decision makers.
- Be flexible and expect a number of unanticipated issues to arise.
- Have an alternative to the extent practicable.
- Hire an experienced adviser who knows how to navigate the legal and regulatory environment.
- Remember that certain western-type deal guarantees may not be enforceable in Russia.
- Keep in mind the actual and potential exposure of Russian entities to Western sanctions.
- Plan for additional time, given the need to translate documents and potentially to obtain approvals.
- Recognise that the legal system and customs are different and what works elsewhere may not work in Russia.

Hostile takeovers

Are hostile takeovers permitted and what are the possible strategies for the target?

Dechert LLP: Yes, hostile takeovers are permitted under Russian law. Russian takeover regulations generally do not provide anti-takeover protections for the target. Once the bid is launched, the only real power left for management to influence the shareholders is to provide them with an opinion and recommendations about the bid, including a proposed price for the target and its prospects. In addition, the target can solicit new bids and acquire or dispose of assets (subject to shareholder consent if the assets are in excess of 10% of total assets).

Warranties and indemnities

Scope of warranties

What do warranties and indemnities typically cover and how should they be negotiated?

Dechert LLP: As per the Civil Code, representations and warranties may extend to:

- the agreement's subject matter;
- the authority to contract;
- compliance with applicable law;
- the presence and validity of the necessary licences and permits;
- financial matters; and
- relations with third parties.

Other traditional areas are often covered (eg, tax, real estate, litigation, labour, intellectual property, and sanctions), although the enforceability of such representations and warranties is not clear yet under Russian law.

Limitations and remedies

Are there limitations on warranties?

Dechert LLP: While there are no limitations on the scope and substance of warranties, the Russian courts' treatment of warranties concerning future events – especially warranties that are structured as negative covenants – is unclear.

What are the remedies for a breach of warranty?

Dechert LLP: Generally, remedies include:

- payment of damages;
- payment of a set fine or penalty;
- refusal of one party to perform the contract; and
- a claim to invalidate the contract.

Are there time limits or restrictions for bringing claims under warranties?

Dechert LLP: It is generally presumed that a party giving false warranties, notwithstanding whether that party knew or did not know that the warranties were false when given, recognises that the other party will rely on them. This reliance presumption can, in theory, be rebutted. The contract may

specifically exclude a party's right to refuse to perform the contract in case of a breach of warranty claim. The effect of disclosure or knowledge is unclear, although these qualifiers are used in practice.

Generally, the statute of limitations to invalidate a contract is one year, and three years to void a contract.

Tax and fees

Considerations and rates

What are the tax considerations (including any applicable rates)?

Dechert LLP: Depending on the target's type of business, it may be subject to a variety of taxes and tax rates.

In a share deal, where the seller is a legal entity it will be subject to corporate profit tax at a rate of 20% levied on the balance between gross income earned (eg, the selling price) less tax-deductible expenses incurred (eg, the purchase price of shares). This tax rate is effective for Russian companies and non-Russian companies acting through a representative office in Russia (subject to certain exemptions).

If the seller is a non-Russian company, it will not be subject to Russian corporate profit tax, unless the deal involves shares or a participatory interest in a Russian target and more than 50% of the target's assets consist of immovable property located in Russia, either directly or indirectly.

If the seller is an individual, he or she will be subject to personal income tax at a rate of 13% for residents and 30% for non-residents.

Share deals are not subject to value added tax (VAT).

An asset deal will be subject not only to corporate profit tax and income tax for individuals, but also to VAT. Presently the general VAT rate is set at 18% and will be increased to 20% effective from 1 January 2019. However, the applicable rate may vary depending on the type of asset involved in the asset deal. Tax liabilities and the target's risks generally do not transfer to the buyer during an asset deal.

Exemptions and mitigation

Are any tax exemptions or reliefs available?

Dechert LLP: Russian tax law provides for a number of exemptions and reliefs, which may apply on a case-by-case basis.

For example, if the seller is a non-Russian corporation, it will be exempt from corporate profit tax, unless the deal involves shares or a participatory interest in a Russian target and more than 50% of the target's assets consist of immovable property located in Russia, either directly or indirectly.

The seller could also be exempt from corporate profit tax if it has possessed the shares (usually not publicly listed) or participatory interest to be sold for more than five years.

What are the common methods used to mitigate tax liability?

Dechert LLP: Share deals involving offshore companies instead of asset deals are quite common, since the seller will not be subject to VAT when entering into this type of deal.

All methods to mitigate tax liability are very fact specific. Given the recent de-offshorisation laws in Russia and the broad discretion provided to the authorities, any tax avoidance and mitigation schemes could face a challenge (eg, Russian tax authorities may challenge a deal involving offshore companies under the 'unjustified tax benefit' concept or, applying the doctrine of 'controlled foreign company', could impose additional taxes on a beneficiary, when in fact a non-Russian company in the deal is 'controlled' from Russia).

Fees

What fees are likely to be involved?

Dechert LLP: A party should expect to pay for legal, financial and tax adviser fees, as well as other expenses (eg, translation costs in connection with a transaction).

The deal may also necessitate the payment of statutory fees and duties (eg, notary charges and filing fees), which are not usually very significant. If the transaction is subject to approval by the Federal Anti-monopoly Service, the filing fee for receiving the relevant clearance is currently Rb35,000.

Management and directors

Management buy-outs

What are the rules on management buy-outs?

Dechert LLP: There are no specific rules regulating management buy-outs. If a manager acquires or holds a participatory interest in a Russian limited liability company or shares in a Russian joint stock company, the acquisition or shareholding falls under the general rules applicable to all participants or shareholders of the company. In practice, in the event of a buy-out, the managers often establish a new company which acts as the purchaser. Management buy-outs are still relatively rare in large Russian companies. Stock option plans for employees are not common or widespread.

Directors' duties

What duties do directors have in relation to M&A?

Dechert LLP: Generally, Russian company directors (ie, members of the board of directors, members of the management board and the general director (chief executive officer)) have no specific duties in connection with M&A activity.

Directors are generally not liable to third parties. A director must act reasonably in the interests of the company and in good faith. If a director breaches any such duties, he or she may be held liable for damages (real damage and lost profit) caused at the request of the company itself or, in certain cases, of its shareholder/participant, provided that they will need to prove that a director violated his or her duties.

An M&A transaction involving a public company requires that any insider (including the directors of the target) comply with the Federal Law on Combating the Unlawful Use of Insider Information. Such persons cannot use or transfer insider information to any third parties and a breach may result in the imposition of administrative and/criminal liability. If there is a voluntary or mandatory tender offer in a public joint stock company, the board of directors is obliged to adopt and communicate to the shareholders its recommendations with respect to the tender offer; if the board members fail to so, they may be liable for any resulting damages. Otherwise, the role of directors in the tender offer process is limited. Moreover, during voluntary and mandatory tender offers, the board of directors' authority to adopt certain key decisions (eg, an increase of a joint stock company's charter capital through the issuance of additional shares) is suspended and temporarily transferred to the general shareholders' meeting.

Employees

Consultation and transfer

How are employees involved in the process?

Dechert LLP: Employees do not play a significant role in M&A transactions under Russian law – it is not necessary to notify employees about a potential acquisition or seek their approval. At the same time, the target should review employment contracts with its key employees for change of control clauses.

For public target joint stock companies, voluntary and mandatory public offers are required to specify the bidder's plan with respect to the employees of the target. The board of directors is obliged to evaluate the bidder's plans with respect to the employees of the target joint stock company and adopt and communicate its recommendations to the shareholders during the tender offer process. Nevertheless, Russian law does not grant employees of a target joint stock company any rights to influence the plans of the bidder with respect to the employees.

If a trade union exists within the company and there is a collective bargaining agreement, the trade union may need to be notified of the M&A transaction (in practice, such notification rarely affects the transaction).

What rules govern the transfer of employees to a buyer?

Dechert LLP: If the transaction is structured as an equity deal, it will not affect the employment of employees of the target (ie, the initiation or completion of the acquisition does not serve as grounds for terminating the employees' contracts, except for the employment contract with the general director).

If, as a result of the transaction, the employer decides to terminate any employee of the target, the termination should be conducted according to the general rules and procedures established by the Labour Code. Depending on the grounds for termination of the employee's contract (eg, redundancy or mutual agreement), the employee must be properly notified of his or her termination and compensation payments should be made on the termination date (including unpaid salary, unpaid annual leave compensation and severance payments, as applicable). Russian law provides for certain categories of 'protected employees', meaning that restrictions or limitations are placed on the company's ability to terminate their contracts (eg, single mothers).

If the transaction is structured as an asset deal, the employees (all or some of them) may be transferred to the new company (provided that if asset deal qualifies as a 'sale of an enterprise', the new owner of the assets will be obliged to hire the selling company's employees). Termination of the employees from the selling company and their employment by the acquirer may be structured in different ways based on the agreement with a particular employee (eg, transfer of the employee from the old to the new company or termination of the employee's contract with the old company based on his or her wish and immediate employment by the new company), but it must comply with the rules and procedures established by the Labour Code.

Pensions

What are the rules in relation to company pension rights in the event of an acquisition?

Dechert LLP: The pension insurance system in Russia is governed by a number of laws, which specify the rates and payments that the employer must pay into the pension fund for each employee during his or her period of employment. Thus, irrespective of any acquisitions, the employer's statutory obligations to contribute to a pension fund remain the same.

Corporate pension plans or programmes are not very common and lack precise statutory regulation in Russia. These plans usually involve the employer and the non-governmental pension fund entering into a respective agreement. Russian law does not consider any share or asset deals with respect to the employer as grounds to alter or terminate such agreements. Therefore, in the event of an acquisition, the new owner will be bound by the existing corporate pension plans of the target.

Other relevant considerations

Competition

What legislation governs competition issues relating to M&A?

Dechert LLP: Key Russian laws governing competition issues (all as amended) include:

- the Competition Law;
- the Strategic Sectors Law;
- the Law on Natural Monopolies (Federal Law 147-FZ, August 17 1998); and
- the Foreign Investments Law.

Anti-bribery

Are any anti-bribery provisions in force?

Dechert LLP: Yes. Russian anti-bribery laws generally follow the recommendations promulgated by the Organisation for Economic Cooperation and Development. Under Russian law, the term 'corruption' extends to giving or obtaining a bribe, including commercial bribes. The Russian laws designed to combat bribery include:

- the Criminal Code;
- the Law on Combating Corruption (Federal Law 273-FZ, December 25 2008 (as amended)); and
- the Anti-money Laundering Law (Federal Law 115-FZ, August 7 2001 (as amended)).

A person may be subject to administrative and/or criminal liability for breaching these laws.

Russian anti-bribery laws also require that legal persons adopt certain anti-corruption compliance measures. For instance, under Article 13.3 of the Law on Combating Corruption, companies must adopt anti-corruption compliance measures, including:

- developing and implementing an internal compliance programme;
- designating departments or officers responsible for a company's compliance;
- cooperating with police and other law enforcement agencies;
- adopting codes of ethics;
- preventing and resolving conflicts of interest; and
- preventing the creation and use of false and altered documents.

Receivership/bankruptcy

What happens if the company being bought is in receivership or bankrupt?

Dechert LLP: Russian law does not explicitly prohibit entering into a share deal when the target is declared bankrupt or when a bankruptcy petition is filed against it. However, bankruptcy measures are mainly focused on selling assets of the company, rather than the company itself.

In the vast majority of cases, the initiation of bankruptcy proceedings results in the liquidation of the entity and distribution of its assets among its creditors.

However, shareholders and participants in a bankrupt entity may choose their representative in bankruptcy proceeding and may actively participate in all stages of the bankruptcy procedure. They are also entitled to settle the existing debts of the bankrupt entity as well as to suggest solvency or *sanation* (financial aid) plans and payment schedules.

Law stated date

Please state the date as of which the law stated here is accurate.

Dechert LLP: Correct as of 19 October 2018.

About Dechert

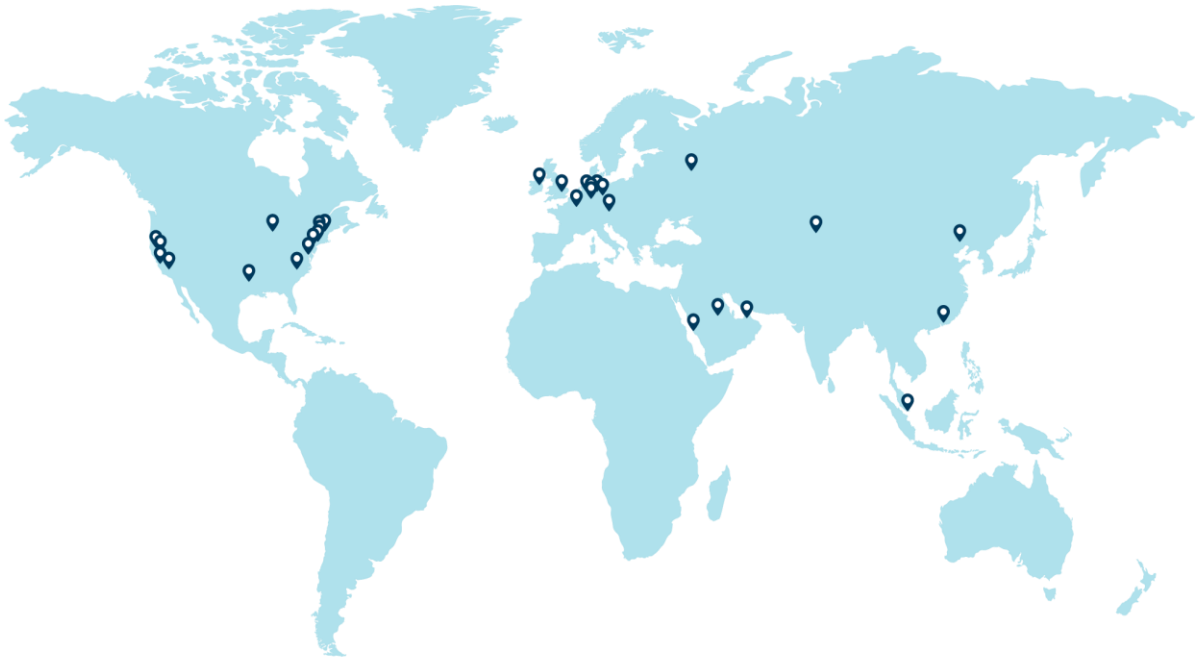
Dechert is a global law firm.

Focused on sectors with the greatest complexities, legal intricacies and the highest regulatory demands, we excel at delivering practical commercial judgment and deep legal expertise for high-stakes matters.

In an increasingly challenging environment, clients look to us to serve them in ways that are faster, sharper and leaner without compromising excellence.

We are relentless in serving our clients – delivering the best of the firm to them with entrepreneurial energy and seamless collaboration.

Dechert Around the World



Almaty	Charlotte	Hong Kong	Munich	Riyadh*
Austin	Chicago	Jeddah*	New York	San Francisco
Beijing	Dubai	London	Orange County	Silicon Valley
Bonn	Dublin	Los Angeles	Paris	Singapore
Boston	Frankfurt	Luxembourg	Philadelphia	Washington, D.C.
Brussels	Hartford	Moscow	Princeton	

* Dechert has in Jeddah and Riyadh an association with the Law Firm of Hassan Mahassni.

900+ Lawyers	**40+** Languages spoken	**27** Offices	**12** Countries

For further information,
visit our website at dechert.com

Dechert practices as a limited liability partnership or limited liability company other than in Dublin and Hong Kong.

Dechert lawyers acted on the matters listed in this presentation either at Dechert or prior to joining the firm.

Dechert LLP