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# Private Equity in Russia

2020 Edition

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## Private Equity in Russia

Dechert partnered with *Getting the Deal Through* on their annual Market Intelligence Private Equity Guide. The 2020 Guide invites leading practitioners to reflect on evolving legal and regulatory landscapes and global trends. Private equity experts from Dechert's Moscow office provided the Russia content which is in Q&A format and is reproduced below.

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## TRANSACTION FORMALITIES, RULES AND PRACTICAL CONSIDERATIONS

### Types of private equity transactions

#### 1. What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Private equity transactions are carried out using a variety of structures. The most common investment vehicles are limited liability and jointstock companies (assuming the transaction is structured via a Russian holding company). Given the relative novelty of private equity structures in Russia, private equity funds generally tend to set up offshore and invest in Russian companies via offshore vehicles.

Russian law provides for establishment of 'investment partnerships' and 'unit investment funds'. Investment partnerships were introduced to create a vehicle for private equity funds similar to a general partner with limited partners in other jurisdictions, however, they are still not widely used and do not provide the same advantages, including tax advantages, as foreign structures. Unit investment funds are subject to extensive regulation and are more commonly used as collective investment vehicles for retail investors rather than by private equity firms for their acquisitions.

Buyouts and going-private transactions are not typically carried out using private equity structures in Russia although there is no prohibition on doing so. An investor or, more often, a consortium of investors, seeking to acquire control over a Russian private company, may purchase more than 50 per cent of the issued capital of such company or establish a new holding company. A pool of investors often provides equity for such acquisitions, although loan financing is also used. Buyouts of a public company and going-private transactions must comply with mandatory provisions of the Russian Civil Code, the Joint Stock Companies Law and other applicable rules and regulations with respect to public companies (ie, voluntary and mandatory offers to acquire shares of a public company, a right to request a buyout of shares ('appraisal rights'), etc).

### Corporate governance rules

#### 2. What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

Russian law does not contain any corporate governance rules applicable to private equity transactions. Parties to private equity transactions are required to comply with the provisions of the Russian Civil Code, the Joint Stock Companies Law, the Limited Liability Companies Law and other applicable rules and regulations with respect to corporate governance of a target, similar to parties in other types of transactions. As private equity transactions are normally structured through limited liability (LLC) or joint stock (JSC) companies (assuming there is no controlling entity based offshore), investors should take into account different legal regimes applicable to stakeholders in LLCs and JSCs in terms of governance rights, access to information, rights of pre-emption. Certain corporate governance issues may be set forth in a shareholders' agreement. If a transaction is structured using an offshore investment vehicle, key governance decisions will not be subject to Russian law (although certain Russian imperative norms will need to be taken into account and complied with when entering into a shareholders' agreement in respect of the governance of Russian operating entities).

While there are no particular advantages in going-private specifically in a leveraged buyout or similar private equity transactions in Russia, a private company will not be obligated to comply with certain statutory or stock exchange requirements and restrictions applicable to public and listed companies, including in respect of corporate governance. Where a buyout or similar transaction is carried out by state-backed investment funds, a target may be further subject to certain specific requirements (eg, audit), though such transactions are often carried out via offshore vehicles. Where such transactions are carried out by private equity funds set up by industrial groups, a target may be further subject to certain internal corporate rules and regulations.

Where a target is or later becomes a public company following a private equity transaction, the general corporate governance rules for public companies will apply. Publicly listed companies are subject to more extensive corporate governance regulations including listing, transparency, disclosure and stock exchange rules. A number of requirements may also be applicable to private equity transactions, including notification to regulators when certain stakes in public companies are acquired (disposed of). Russian law does not provide any exemptions in respect of corporate governance matters for private equity investors.

### Issues facing public company boards

- 3. What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?**

Going-private or other private equity transactions with respect to public companies may be subject to voluntary or mandatory tender offer requirements, as well as a requirement (applicable under certain conditions) to buy out shareholders who vote against a going-private transaction. If there is a voluntary or mandatory tender offer in a public 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 do 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. There is, however, no mandatory requirement to set up special board committees, unless otherwise provided for by a company's internal regulations.

### Disclosure issues

- 4. Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?**

There are no heightened disclosure issues in connection with going-private transactions or other private equity transactions in Russia. The same rules with respect to disclosure apply whether or not transactions are carried out by private equity funds or are in respect of going-private transactions. Shareholders holding 5 per cent or more of voting shares of an issuer are required to disclose information on their controlling persons. Shareholders having a right to dispose, directly or indirectly, of 5 per cent or more of the voting shares of the issuer must disclose information on acquisition or disposal of the said voting shares or acquisition or disposal resulting in that shareholder's interests going higher or falling below 5, 10, 15, 20, 25, 30, 50, 75 or 95 per cent of the voting shares of the issuer. Investors acquiring over 30 per cent of an issuer's shares based on mandatory or voluntary tender offers are required

to disclose information that such tender offer has been submitted, as well as the contents of the offer. Additional disclosures may apply to going-private transactions or other private equity transactions depending on the industry sector in which the target operates (eg, banking, etc). Russian law does not impose particular disclosure requirements specifically in the context of going-private transactions other than those relating generally to mandatory tender offers and other matters discussed in this questionnaire.

## Timing considerations

### 5. What are the timing considerations for negotiating and completing a going-private or other private equity transaction?

There are a number of timing considerations, which should be taken into account when negotiating and completing a going-private or other private equity transaction.

Where the target is a private company, the time to comply with the rights of first refusal of shareholders should be taken into account (ie, the timeline for sending offers and receipt of statements of refusal to exercise buyout (appraisal) rights). A corporate approval (ie, the timeline for notifying directors or shareholders, convening the board of directors or general participants' meeting to approve a transaction, etc) and other requirements set forth in the constitutive documents of a company should also be factored into the timeline.

Parties to going-private or other private equity transactions where a target is a public company must comply with timelines and procedures set out in the Joint Stock Companies Law (eg, disclosure requirements, mandatory tender offer provisions, etc).

If private equity transactions are subject to merger control (antimonopoly) clearance by the Russian Federal Antimonopoly Service (the thresholds are relatively low), the timeline will need to be extended to take into account the time required to prepare a comprehensive set of documents to obtain approval from the Russian Federal Antimonopoly Service. The timing depends on the complexity of a transaction (eg, whether the transaction has a notable influence on the market or not). In addition to merger control (anti-monopoly) clearance, private equity transactions involving a foreign investor may also require approval under the Strategic Sectors Law (where a target is a strategic entity) and (or) the Foreign Investments Law, or both.

Acquisition of interest in Russian limited liability companies by a foreign entity may complicate the process and extend the timeline because such acquisitions require notarisation by a Russian notary public, which in turn requires a foreign investor to collect, notarise, legalise and deliver to Russia various documents required for transaction notarisation.

Where a buyout takes place in the form of an auction, private equity investors should consider the timelines and procedures applicable to auctions and tenders under Russian law.

## Dissenting shareholders' rights

### 6. What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Under Russian law, termination of the status of a public company requires the approval of 95 per cent of the shareholders at a general shareholders' meeting. Thus, a shareholder and/or a group of shareholders holding not less than 5 per cent plus one share may be able to block a going-private transaction.

Furthermore, if an acquirer acquires more than 30, 50 or 75 per cent, respectively, 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 at the request of such shareholders. Thus, shareholders may be able to block a going-private transaction by rejecting the offer. An acquirer may choose to carry out a voluntary tender offer prior to launching a going-private transaction.

## Purchase agreements

### 7. What notable purchase agreement provisions are specific to private equity transactions?

Historically, investors structured private equity transactions in such a way that the principal transaction documents, including purchase agreements were governed by foreign law (mainly English law) to benefit from foreign legal concepts (eg, representations, warranties, indemnity obligations, exit rights, put and call options).

Legal reform carried out in Russia over the past decade has introduced Russian legal concepts similar to western norms and best international practices. Currently, Russian law includes most of the legal concepts and instruments that parties commonly use when structuring their private equity transactions, including M&A transactions, in western jurisdictions, although they may differ from their western analogues in certain respects.

Private equity transactions governed by Russian law generally contain standard legal concepts such as pre-closing conditions and specific conduct of business provisions, warranties and disclosures, material adverse change and other termination provisions, as well as sanctions clauses. A condition precedent to obtain financing, however, is relatively rare.

## Participation of target company management

### 8. How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer should discuss management participation following the completion of a going-private transaction?

Participation of management of the target company in a going-private transaction is less common in Russia. Some companies (usually those with participation of foreign capital) may have an employee or management equity plan. Otherwise, management may be invited to acquire shares in a target company based on the terms of a particular transaction. Generally, senior employees are incentivised via a bonus structure.

If there is no an employee or management equity plan in a target company and an investor is not interested in retention of management following the completion of a going-private transaction, the investor may terminate employment agreements with CEOs and members of a collective executive body (if any) without complying with certain employment termination rules applicable to non-executive employees. In this case, they would generally be provided with compensation as set out in their employment agreements or internal regulations of the target, but, in any case, not less than three months' average salary.

Russian law does not contain specific provisions related to management participation in a going-private transaction, including any timing requirements. In relation to managing shareholders, general rules regulating a going-private transaction apply.

## Tax issues

### 9. What are some of the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

As noted previously, private equity deals are often structured through acquisition of non-Russian (offshore) holding structures (eg, because foreign regulations generally offer more flexibility and a wide variety of legal constructions), which means that various tax jurisdictions would be involved in the deal. Such non-Russian (offshore) holding structures are subject to various withholding taxes (dividends, interest, capital gains, etc) based on double-taxation treaties. Russian authorities have recently begun to renegotiate double-taxation treaties (eg, certain changes were adopted in 2020 in relation to the treaties with Malta, Cyprus and Luxembourg) and scrutinise offshore deals if the buyers are controlled by Russian persons (eg, in an effort to collect tax from the parties, reduce the benefits provided by double taxation treaties, reclassify foreign entities as Russian tax residents).

Starting from 2015, Russian tax legislation has been supplemented to include new controlled foreign company (CFC) rules that are subject to periodic changes. These rules set out: (1) that a CFC is a non-Russian company controlled by a Russian tax resident whose revenue may be subject to taxation in Russia in certain cases; (2) that a Russian controlling person must inform the Russian authorities of such control; (3) a test for tax residency of CFCs; and (4) a concept of beneficial ownership of income. These rules have greatly affected the tax structures chosen by parties to a private equity transaction as, inter alia, they now need to understand what offshore revenue may be subject to taxation in Russia. In addition, starting from the end of 2017, members of international groups of companies are obliged to inform the Russian authorities on participation in such group and other information or documents on the group on a periodic basis.

The possibility to deduct interest arising from debt financing is mainly regulated by the thin capitalisation rules that have also been amended recently and depend on a number of factors (who participates in the financing, purposes of financing) and thus, require a separate tax analysis.

Share acquisitions are not classified as asset acquisitions for tax purposes and are generally not taxable. Sale of shares (equity interest) in a Russian company would be subject to profit tax instead on individuals and legal entities, unless such persons own the shares (equity interest) for more than five consecutive years (in such a case, no profit tax is generally paid subject to a number of exceptions (eg, shares should not be listed).

In terms of executive compensation, there are no special provisions regulating carried interest in Russia (therefore, many tax structures that are customary in other countries, are not applicable in Russia). If an executive is employed at the Russian company level, payment to such executive (either through golden parachute payments or deferred compensation plans) will be subject to income taxation in Russia.

## DEBT FINANCING

### Debt financing structures

### 10. What types of debt financing are typically used to fund goingprivate or other private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

The raising of debt financing specifically for going-private or other private equity transactions is not common. Bonds (including high-yield, although Russian law and market practice do not make this distinction specific) in Russia are commonly used to finance ongoing operations of their issuers, and some of that funding can be allocation to private equity transactions. Generally, debt issued in Russia is either state, corporate or municipal. Issuances are predominantly in Russian roubles. Foreign currency issuances (Eurobonds) have been relatively rare since 2014, although had picked up prior to covid-19 occurring. Russian law does not impose specific restrictions in terms of financial assistance, margin loans or taking of security in a private equity or going private context (subject to ensuring that a particular type of security is permissible under Russian law), although certain general requirements exist (eg, relating to compliance with thin capitalisation rules), as well as transfer pricing restrictions.

## Debt and equity financing provisions

### **11. What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?**

Typical conditions precedent with respect to obtaining financing are usually included in transaction documentation. The documentation relating to launching of a mandatory tender offer to acquire the voting shares held by other shareholders at market value and at the request of such shareholders is typical. Specific contribution schedules or 'trigger' events are often specified, although flexibility is generally provided for, in part because Russian law and market practice generally have a negative view and resistance towards committed loans. Generally, Russian practice has not yet developed standard form or sets of instruments or provisions relating to private equity debt financing.

## Fraudulent conveyance and other bankruptcy issues

### **12. Do private equity transactions involving debt financing raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?**

General grounds for challenging private equity transactions set forth in Russian law will apply in bankruptcy proceedings. In addition, Russian bankruptcy regulations set out specific grounds for challenging a debtor's transactions entered into within a certain period of time prior to initiation of bankruptcy proceedings, specifically: (1) suspicious transactions (ie, transactions involving unequal consideration or aimed at prejudicing creditors' rights (a one-year lookback period will apply)), and (2) preferential transactions, which result in an unfair preferential satisfaction of claims of one or more creditors under certain circumstances (a six-month lookback period applies to these transactions). These criteria will also apply to private equity/going private transactions.

## SHAREHOLDERS' AGREEMENTS

### Shareholders' agreements and shareholder rights

### **13. What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms or other equity co-investors? Are there any statutory or other legal protections for minority shareholders?**

Key protections for minority investors include:

- veto rights over reserved matters both at the shareholder and board levels;
- rights of first offer and rights of first refusal (for limited liability companies (LLCs), the right of first refusal is provided by virtue of law) or the requirement for consent to transfer shares (usually, for LLCs);

- tag-along and drag-along rights (structured via option arrangements if a deal is documented under Russian law);
- the right to nominate a certain number of board members and deadlock provisions; and
- various lock-up provisions. Some of these provisions are also reflected in the target's charter.

Depending on the form of the target (usually, an LLC or a joint stock company (JSC)), Russian law provides for various types of protections for minority shareholders, which usually cannot be disregarded by the parties. Certain matters require unanimous voting of shareholders or board of directors under the law. For example, for LLCs such matters include: reorganisation, liquidation, increase of charter capital by contribution or by set-off of claims of a single participant or a third-party, certain changes to the Charter (eg, regarding exit of participants from an LLC, contributions to property of an LLC, additional rights of participants, the procedure for profit distribution). For JSCs, such matters include: reorganisation to a non-commercial partnership, certain changes to the Charter (eg, regarding a right of first refusal to acquire newly issued shares, regarding contributions to property of JSCs). Russian law also provides for mandatory increased voting thresholds (eg, two-thirds and three-quarters) for a number of other matters (to illustrate, a shareholder owning more than 25 per cent of the shares in a JSC may block: obtaining the status of a public JSC; changes to the Charter, reorganisation; a shareholder owning more than one-third of the shares in an LLC may block certain matters, including changes to the Charter; decrease or increase in the charter capital).

## ACQUISITION AND EXIT

### Acquisitions of controlling stakes

#### **14. Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?**

Russian law sets out specific rules for acquiring shares in a public joint stock company (including by a private equity firm). According to Chapter XI.1 of the Joint Stock Companies Law, if a person intends to acquire more than 30 per cent of the total amount of shares of a public joint stock company (inclusive of shares, which are already owned by the acquirer and its affiliates), such person may offer to buy out the remaining shareholders shares (voluntary offer).

If a person acquires shares exceeding 30 per cent of the total amounts of shares of a public joint stock company (inclusive of shares that the acquirer and its affiliates already own), such person must submit an offer to all remaining shareholders of the public joint stock company (as well as to the holders of convertible securities) to acquire their shares and convertible securities (mandatory offer).

The above-mentioned procedures related to mandatory offers are also applicable to the acquisition of shares of a public joint stock company exceeding 50 per cent and 75 per cent, respectively, of the total amount of shares.

If a person acquires more than 95 per cent of the shares of a public joint stock company (as a result of voluntary or mandatory offers), the remaining shareholders and holders of convertible securities have the right to oblige such person to acquire their shares or convertible securities (right to sell out). At the same time the acquirer has the right to squeeze out the shareholders and holders of convertible securities (buyout).

The Russian Central Bank, the financial regulator, oversees compliance with the abovementioned requirements. Mandatory and voluntary offers (as well as the notification on the right to sell out and buy out) must be first sent to the Russian Central Bank prior to submission to the shareholders of the public JSC. The acquirer is entitled to distribute the relevant document after 15 days unless the Russian Central Bank requests that any violations be corrected.

## Exit strategies

### **15. What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity acquirer?**

Generally, there are not any limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company.

The fiduciary management agreement or charter or an investment declaration of a private equity fund may contain certain restrictions related to the exit from a portfolio company or to an IPO of a portfolio company (as well as provide for provisions addressing any post-closing recourse for the benefit of a strategic or private equity acquirer).

Usually, the private equity fund will request a guarantee or request that a certain amount is held back from the purchase price and placed in escrow for a specified period of time or will insist on deferred payments. Insurance is generally not available.

## Portfolio company IPOs

### **16. What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?**

Based on the Joint Stock Companies Law and the Russian Civil Code, granting the shareholders of a public joint stock company a right of first refusal (including any similar rights, eg, right of first offer) is prohibited. Thus, such rights do not survive an IPO.

Tag-along rights of a minority shareholder and a drag-along right of a majority shareholder can survive an IPO. However, such rights can be established only in a corporate agreement (shareholders' agreement), consequently, the shareholders, who invest in a portfolio company after an IPO, are not bound by the corporate agreement and are not granted with tag-along and drag-along rights. The same approach is applicable to board appointment rights.

A lock-up period after an IPO is common in the Russian market. Generally, the IPO prospectus contains provisions prohibiting the pre-IPO shareholders of a company from disposing of their shares for a specified period.

## Target companies and industries

### **17. What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in industry focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?**

It is difficult to detect any trends related to going-private transactions since there have been few Russian companies that have gone private (eg, since 2013 approximately 40 companies, listed on the Moscow Exchange, the most popular stock exchange among Russian companies, have been acquired and become private). Companies that have been the target of going private transactions include banks, a large telecommunications company, a pharmaceutical distributor, a freight company and a finance organisation.

There are no industry-specific regulatory schemes that significantly limit the potential targets of private equity firms. However, as in other countries, there are certain foreign investment restrictions. In particular, any acquisition of control over a Russian company in an industry with strategic significance for security and defence of the country may require approval of or notification to Russian authorities or may be prohibited.

## SPECIAL ISSUES

### Cross-border transactions

#### **18. What are the issues unique to structuring and financing a cross-border going-private or other private equity transaction?**

There are generally no specific requirements and rules that apply to cross-border private equity transactions.

First, parties need to consider the governing law for the purchase (eg, acquisition of a stake in a Russian limited liability company would require a Russian law-governed instrument) and whether an offshore vehicle will be used for the purchase.

Second, parties need to consider regulatory issues that may impact on an acquisition. A foreign investment may require antimonopoly clearance (in comparison to other jurisdictions, the parameters for triggering clearance are pretty low), approval for an investment in a strategic company and/or other deal specific approvals. In addition, in July 2017, the Russian Prime Minister was given the right to request that a transaction, as a result of which a foreign investor acquires any equity interest in any Russian company, is subject to approval by a government commission (this procedure is generally complicated by the fact that there are no clear rules for the Prime Minister to call for such approval). That said, to our knowledge, the Prime Minister has rarely triggered such a right.

Third, parties need to consider sanctions issues applicable to an acquisition, given that certain Russian parties are the target of economic sanctions.

Further, Russian deals often take longer to structure given the offshore or onshore aspects; the need to notarise, apostille and translate documents in certain cases for the Russian notary and officials (for an antimonopoly clearance or filing or registrations with the Russian state authorities). It also take a week or more for an ownership right to be registered.

### Club and group deals

#### **19. What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?**

There are generally no specific requirements and rules applying to club and group deals. However, such a transaction should be generally considered in the context of applicable competition laws (related to horizontal or cartel agreements) and may be subject to additional antimonopoly clearance of agreements on joint activities in Russia, mainly if the parties carry out not just investment activities.

### Issues related to certainty of closing

#### **20. What are the key issues that arise between a seller and a private equity acquirer related to certainty of closing? How are these issues typically resolved?**

The key issues are pretty standard in comparison to other jurisdictions. Certainty of closing depends on typical conditions to closing, such as (1) no material adverse event having occurred (which clause has been heavily negotiated following covid-19), and (2) performance of various conditions precedents which usually include receipt of antimonopoly clearance, regulatory approvals and other deal specific conditions (eg, discharging debts or restructuring). Termination (break) fees are relatively common in Russia.

## UPDATE AND TRENDS

### Key developments of the past year

#### **21. Have there been any recent developments or interesting trends relating to private equity transactions in your jurisdiction in the past year?**

Other than issues related to the CFC rules that have altered the tax implications on transactions with offshore holding companies, there have not been any recent trends of note relating to private equity transactions.

In 2015, certain measures were passed that were aimed to stimulate private equity firms to bring business onshore (in particular, with respect to profits generated by offshore companies beneficially owned by Russian residents; the duty of Russian residents to notify Russian tax authorities on equity owned in foreign companies).

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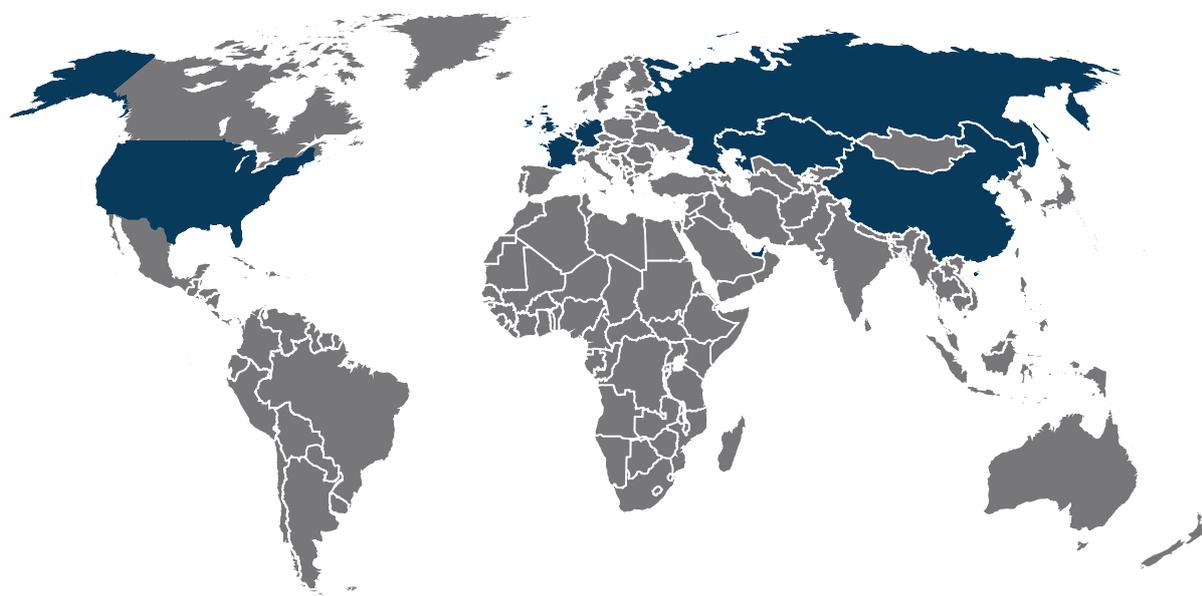
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