

## RUSSIA: FOREIGN INVESTMENT IN THE OIL AND GAS SECTOR

# 俄罗斯石油天然气领域的并购机会

文/文森·艾尔斯律师事务所

多年来，为满足中国经济增长对原油的稳定需求，中国的能源公司对收购俄罗斯联邦石油天然气资产表现出极大兴趣。然而，这些尝试大多无功而返。今年2月，中俄签订了250亿美元的石油协议。这一协议的签署，或将预示着中国公司直接竞购俄罗斯上游领域资产有望再有斩获。不过，2008年5月，俄罗斯颁布了一些限制外国公司投资俄罗斯战略性行业的新法律规定，在俄罗斯石油天然气领域寻求并购投资机会的中国公司必须考虑这些法律将对其造成的影响。

### 战略性行业法

战略性行业法规定，外国公司要收购那些对俄罗斯国防及国家安全具有战略意义的特定行业的俄罗斯公司，无论这些收购是否会导致直接或间接“控制权”的变化，外国投资者须预先获得政府相关部门的批准。对于战略性行业法所涉多数行业，“控制权”的标准为：拟进行交易将导致外国投资者收购战略性公司50%以上的具有表决权的股份的处置权（即意味着此项收购须委员会预先批准）。然而，对于投资石油天然气行业，以及收购持有对联邦具有重要意义的气田的许可证的公司控制权而言，相关规则更为严格，仅仅收购该等公司10%及以上股份即须委员会批准。另外，对于中国石油公司（其中多数由国家控制）而言尤为重要，如果拟定收购方为外国政府或由外国政府所控制的实体，则仅仅收购5%及以上具有表决权的股份即符合“控制权”标准，从而须获得委员会的预先批准。同时，禁止该等收购方收购10%或更多的股份。

### 迄今的经验

俄联邦反垄断服务局是有关处理收购战略性公司控制权申请，并将申请递交委员会批准的政府机构。据称，截至2009年2月，反垄断局已经收到来自外国投资者的45份申请。鉴于迄今为止的经验及自战略性行业法通过10个月来获得批准的收购案数量有限，获得委员会的同意似乎已构成希望收购俄罗斯战略性公司控制权的外国投资者的严重障碍。很明显，战略性行业法还处于其发展的初级阶段，并在其适用和实施当中仍存在许多模棱两可之处。

### 待解决的事宜

战略性行业法实施至今还未能就为外国投资者就该法的模棱两可之处提供任何清晰的解释。造成这种局面的主要原因在于，委员会未能公布其决定的理由，而且反垄断局自身对该法应如何适用及其自身在该过程中的作用明显缺乏了解。战略性行业法中模棱两可之处目前包括以下几点：对联邦具有重要意义的底土区块；推定控制；附条件的批准及时间性问题等因素。

目前，尚难评价该法律对俄罗斯外商直接投资并购的影响。不过，我们希望，至少对中国能源公司来说，投资石油和天然气上游领域的环境正在改善。

For a number of years, Chinese energy companies have showed great interest in acquiring oil and gas assets in the Russian Federation, in order to secure a stable supply

of hydrocarbons to support China's growing economy. Such attempts have largely proved unsuccessful, with only a few proposed acquisitions reaching successful completion. The 2006 acquisition by China Petrochemical Corporation (Sinopec) of Russian oil company Udmurtneft (51% of which was shortly afterwards sold by Sinopec to Russian major Rosneft), and Sinopec's joint venture (again, with Rosneft) in part of the Sakhalin-3 project in the Far East of Russia, remain the only substantial direct investments by Chinese companies in the upstream sector in Russia. However, there is hope that the announcement in February this year of a \$25 billion loan by the China Development Bank to Rosneft and Russian oil pipeline operator Transneft, in exchange for the supply of a reported 300,000 barrels per day of Russian crude (representing around 10% of China's current demand), will signal the start of further Chinese success in the bid to acquire direct upstream assets.

This article examines the terms, and early implementation by the Russian authorities, of new laws introduced in May 2008 which restrict the ability of foreign companies to invest in a number of strategic industries in Russia, and the implications of which will need to be considered by any Chinese company exploring investment opportunities in the Russian oil and gas sector. The new laws are referred to collectively in this article as the "Strategic Industries

Law".

### **Strategic Industries Law**

In broad terms, the Strategic Industries Law requires foreign investors to obtain prior governmental clearance for the acquisition of direct or indirect "control" over Russian companies ("strategic companies") engaged in certain industries that are listed in the Strategic Industries Law as having strategic importance for Russia's defense and national security. Strategic companies include companies holding subsoil licenses in "subsoil blocks of federal significance", which include major oil, gas, gold and copper deposits, deposits located on any internal sea, territorial sea or the continental shelf and the territories used in connection with security and defense as well as deposits of certain rare metals irrespective of the size of the deposit.

Clearance is granted by a special governmental commission established pursuant to the Strategic Industries Law, headed by the Prime Minister and called the Governmental Commission for Control over Foreign Investment in the Russian Federation (the "Commission"). In the absence of the required clearance by the Commission, the relevant transaction is deemed null and void.

For most industries covered by the Strategic Industries Law, the test for "control" is satisfied (and so prior clearance from the Commission is required) if the proposed transaction would result in a foreign investor

acquiring the right to dispose of over 50% of the votes attaching to shares in a strategic company. However, with respect to the oil and gas industry and the acquisition of control over a company holding a license in a field of federal significance, the rules are significantly more stringent, and the test is satisfied by the acquisition of a mere 10% or more of the shares in such a company. In addition, and significantly for Chinese oil companies (many of which are controlled by the state), if the proposed acquirer is a foreign government or an entity controlled by a foreign government, the "control" test is satisfied by (and prior clearance from the Commission will be required for) the acquisition of only 5% or more of the voting shares. The acquisition of 10% or more of such shares by such an acquirer is prohibited, with no possibility provided in the Strategic Industries Law for a waiver of such prohibition by the Commission.

### **The Experience So Far**

The governmental body entitled to handle applications for the acquisition of control over strategic companies and to forward them to the Commission for clearance is the Federal Antimonopoly Service (the "FAS"). Reportedly, the FAS had received about 45 applications from foreign investors by February 2009, most of which related to the acquisition of control over subsoil users, and the Commission had held two meetings at which it had cleared six transactions in total.

Two transactions approved at the first meeting of the Commission were the acquisition of 49.99 percent of Arkhangelskgeoldobycha by Archangel Diamond Corporation, an entity within De Beers group, and the acquisition of 25 percent plus one share in Sukhoi Civil Aircraft Company by World's Wing S.A., a Swiss subsidiary of Italy's Alenia Aeronautica.

At its second meeting in February 2009, the Commission approved the acquisition by Barrick Gold (Canada) of up to 80 percent of the shares in a platinum and palladium producer on the Kola Peninsula; the acquisition by a Dutch company of shares in Taganrog Ship Repairing Plant; and the acquisition by OAO Hartron (Ukraine) of shares in ZAO International Space Company Cosmostrans. The Commission postponed consideration of the application by Basic Element for the acquisition of shares in the Russian oil company RussNeft, which holds a subsoil license to the Varieganskoye field, and which qualifies as a subsoil block of federal significance. The reasons for such postponement cited by the media are somewhat inconsistent.

Accordingly, based on the experience to date and the small number of clearances given in the 10 months since the enactment of the Strategic Industries Law, the need to obtain the Commission's consent appears to be a serious obstacle to foreign investors wishing to acquire control over Russian strategic companies. It is also clear that the

Strategic Industries Law is in the early stages of its evolution, and there remain a number of ambiguities surrounding its application and implementation.

#### **Issues to be Resolved**

The implementation of the Strategic Industries Law to date has not offered much assistance to foreign investors hoping for clarity on some of the ambiguities existing within the law itself. This is largely due to the failure by the Commission to publish reasons for its decisions, as well as by an apparent lack of understanding by the FAS itself as to how the law should be applied and the scope of its own role in the process. It is to be hoped that these limitations will become less problematic in the months ahead.

Ambiguities in the Strategic Industries Law at present include the following:

Subsoil blocks of federal significance. Amendments to the Russian Subsoil Law made in connection with the adoption of the Strategic Industries Law set forth criteria to determine whether a particular subsoil block is deemed to be a subsoil block of federal significance, which criteria include the type of reserves, the volume of certain reserves as registered on the state balance, and the location of the subsoil block. In March 2009, the Federal Agency for the Subsoil Use (Rosnedra) published the list of subsoil blocks of federal significance containing nearly

1,000 items. A number of issues arise in this respect. First, there is no clarity as to whether the list is exhaustive and how quickly it will be updated following discoveries of new deposits which qualify pursuant to the Strategic Industries Law. Second, the list contains an inconsistent usage of a number of terms to describe a subsoil block, including "subsoil block", "field", even "part of the field", and the reason for such differences is not clear. Third, if several subsoil users have the right to extract subsoil resources from a field of federal significance, are all of these subsoil users deemed to be "strategic", including the users who extract resources from a smaller part of the field?

Constructive control. Generally (but not with respect to strategic companies holding licenses in fields of federal significance, see above), the Strategic Industries Law defines "control" as the ability of a foreign investor holding more than 50 percent of the voting shares in a strategic company "to determine decisions made by that company". However, the inclusion within the Strategic Industries Law of the concept of "constructive control", i.e. control by a foreign investor holding less than 50 percent of the voting shares, but nevertheless having voting control compared to all other shareholders creates a number of 'unknowns'. The Strategic Industries Law does not set forth any specific criteria to be used, nor any clear threshold below which a foreign

investor is deemed not to have control. In addition, it is not clear how widely the “right to determine decisions” will be interpreted by the authorities if this right is established by contract. For example, most financing agreements will give the lender negative control (or veto) over certain actions by the borrower. Does this potentially give the lender sufficient control to fall foul of the Strategic Industries Law? Similarly, interim period ‘veto right’ provisions in favour of a buyer under an acquisition agreement could potentially be treated the same way. The ambiguities are not helped by certain recent decisions of the Russian Courts which have tended to imply a level of control that might usually be thought not to exist. Such uncertainties allow unnecessary discretion to the Russian government bodies and courts, especially given the grave consequences of the breach (or deemed breach) of the Strategic Industries Law.

**Conditional Approvals.** The Strategic Industries Law allows the Commission to approve transactions subject to the foreign investor agreeing to undertake obligations to manage the strategic company in a certain way, for example to maintain the number of staff or to process subsoil resources in Russia. It is not clear how a foreign investor that acquires merely a 10% voting interest in a strategic subsoil user can possibly perform these obligations.

**Timing issues.** It is not clear whether or not, and how, the Strategic

Industries Law applies to situations in which a Russian company controlled by a foreign investor later becomes a strategic company, for example, by beginning to perform strategic activities or due to the reassessment of its subsoil resources. Neither is it clear whether, and when, it is necessary to apply for clearance in case of conditional acquisitions, such as options or pledges.

#### Summary

At the second meeting of the Commission in February, its head, Prime Minister Vladimir Putin, called for the closing of the “loopholes” in the Strategic Industries Law that allow investors to evade clearance for the acquisition of control over strategic companies. It is not clear what loopholes he had in mind, but Mr. Putin also stated that the Strategic Industries Law has to be amended to simplify the rules for “conscientious” investors to make Russia a more attractive place to invest. Reportedly, the FAS has drafted the relevant amendments and submitted them to the Government for review and subsequent submission to the State Duma.

The impact of the Strategic Industries Law on direct foreign investment in Russia is somewhat difficult to assess, as its adoption coincided with several other factors (including the conflict in Georgia and the global financial crisis) that impacted negatively on sentiment

towards Russia. There is no doubt, however, that the practical implementation of the Strategic Industries Law is far from perfect and that its declared aim (namely, the establishment of clear and transparent rules for the investment by foreigners in strategic sectors) has not yet been achieved. Potential investors are often uncertain whether a permission of the Commission is necessary in their case, have no time to use their statutory right to inquire of the FAS on whether or not they need clearance, and are very cautious about progressing transactions if the Commission has resolved to subject the acquisition to conditions. Many foreign investors are also intimidated by the Strategic Industries Law’s requirement to submit a draft business plan for the target to the FAS and the Commission to consider the applications, and by the dire consequences of non-compliance. It remains to be seen whether the amendments to the Strategic Industries Law, if and when adopted, will resolve its ambiguities, however it is to be hoped that, for Chinese energy companies at least, the climate for investment into the upstream oil and gas sector is nevertheless improving.

( 本文作者为文森·艾尔斯律师事务所莫斯科代表处合伙人 Natalya Morozova、Rob Patterson，上海代表处首席代表合伙人 David Blumental，北京代表处合伙人肖勇 )