



April 28, 2023

# THE RUSSIAN PRESIDENT SIGNED AMENDMENTS TO THE FEDERAL LAW REGARDING OVERSEAS INVESTMENTS IN COMPANIES WITH STRATEGIC IMPORTANCE FOR NATIONAL DEFENSE AND STATE SECURITY

## Introduction

On April 28, 2023, the President of the Russian Federation signed the Law No. 139-FZ (hereinafter – the "Law No. 139") amending Federal Law No. 57-FZ dated April 29, 2008 "On the Procedure for Foreign Investment in Business Entities of Strategic Importance for National Defense and State Security" (hereinafter referred to as the "Law" and "business entities with strategic importance for national defense and state security" hereinafter will be referred to as "strategic companies"). This amendment continues the trend of more stringent regulations on foreign investment in the Russian Federation.

The changes will become effective 10 days after the day of its official publication, i.e. May 9, 2023.

The main amendments are:

- Russian citizens with a residence permit or other document for permanent residence in a foreign country (hereinafter referred to as "residence permit") will be recognized as foreign investors;
- the court will be granted the right to restore to the state all the proceeds from a transaction that violates the Law;
- the strategic company will be granted the right to sue the foreign investor for damages.

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## I. Recognition of Russian citizens with residence permits as foreign investors

Prior to the adoption of Law No. 139, foreign investors were understood to be Russian citizens holding dual citizenship, among others<sup>1</sup>.

Amendments of the Law No. 139 expand the restrictions for foreign investors envisaged by the Law also to Russian citizens "who have obtained a residence permit or other valid document confirming the right to permanent residence in a foreign state"<sup>2</sup>.

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<sup>1</sup>Cl. 5 of part 2 of art. 3 of the Law.

<sup>2</sup>Parts 1, 2 of art. 1 of Law No. 139.

In practice, this means that after May 9, 2023, the acquisition of a residence permit by a Russian citizen who directly or indirectly controls a strategic company will be considered as a foreign investor assuming control of the strategic company. As a result, such a Russian citizen will need to apply for approval of the Government Commission for Control over Foreign Investment in the Russian Federation to establish control over the strategic company.

Russian citizens who exercise control over strategic companies and hold a residence permit at the moment when Law No. 139 comes into effect, must file an application for approval within 3 months of the entry into force of Law No. 139, which is no later than August 9, 2023<sup>3</sup>.

For Russian citizens who acquire a residence permit after May 9, 2023, the need to agree on the establishment of control over a strategic company will occur from the date of acquisition of the permit. The application must be submitted within 3 months of that date<sup>4</sup>.

## **II. Enabling the court to recover to the State all the proceeds of a transaction made in violation of the Law**

Prior to the adoption of Law No. 139, there were two main consequences of a transaction in respect of strategic companies in violation of the requirements of the Law:

- the nullity of the relevant transaction<sup>5</sup>;
- deprivation of voting rights of the foreign investor and its group of persons at the general meeting of shareholders of strategic company<sup>6</sup>.

The significant new development brought about by Law No. 139 is the specification of the possible consequences of a void transaction in relation to strategic companies. Thus, in applying the consequences of the nullity of a transaction, courts will henceforth be entitled to restore to the state:

- shares of a strategic company acquired without complying with the requirements of the Law;
- fixed assets of a strategic company that were the subject of a transaction for which the approval required under the Law was not obtained;
- income received as a result of such transaction<sup>7</sup>.

These consequences can apply not only to transactions, but by way of analogy also to other actions entailing the right of a foreign investor to determine the decisions of the management bodies of strategic companies<sup>8</sup>. Nonetheless, a prerequisite for the application of such a sanction is the intent of both parties to conclude a transaction or take actions entailing the establishment of control in violation of the Law<sup>9</sup>.

The amendments also advise the court applying such sanction to consider "the presence or absence of risks of preservation or emergence of a threat to the defense of the country and (or) security of the state" in case of application of the standard consequences of invalidity of a transaction – return by the parties of everything received under the transaction (bilateral restitution)<sup>10</sup>.

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<sup>3</sup>Art. 2 of Law No. 139.

<sup>4</sup>Subcl. "6" of cl. 1 of part. 5 of art. 7 of the Law.

<sup>5</sup>Part. 1 of art. 15 of the Law.

<sup>6</sup>Parts 2-5 of art. 15 of the Law.

<sup>7</sup>Cl. "6" of part 3 of art. 1 of Law No. 139.

<sup>8</sup>Para. 3 of cl. "6" of part 3 of art. 1 of Law No. 139.

<sup>9</sup>Para. 1 of cl. "6" of part 3 of art. 1 of Law No. 139.

<sup>10</sup>Para. 3 of cl. "6" of part 3 of art. 1 of Law No. 139.



Thus, in order to impose the sanction of restoring to the State, the court will have to establish and assess the following circumstances:

- violation of the requirements of the Law in the transaction;
- the intent of both parties to commit a transaction in violation of the Law;
- the presence of a threat to the defense and security of the state when applying the standard consequences of invalidity (optional).

### **III. A strategic company will have the right to claim damages from a foreign investor acting in bad faith**

The strategic company will have the right to seek compensation from the foreign investor for losses (including actual damage and lost profits) incurred by the company in connection with the foreign investor's unfair exercise of rights in relation to the strategic company acquired without complying with the requirements of the Law<sup>11</sup>.

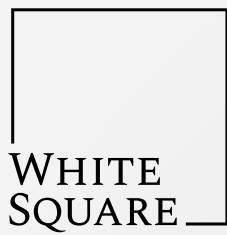
In other words, in order to recover damages from a foreign investor based on the new rule, a strategic company will need to prove that:

- the foreign investor has acted in bad faith towards the strategic company or its property while exercising his rights;
- such rights have been acquired by a foreign investor as a result of transactions or actions that violate the requirements of the Law;
- the existence of losses incurred by the strategic company due to unfair actions of the foreign investor.

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<sup>11</sup>Para. 1 of cl. "6" of part 3 of art. 1 of Law No. 139.



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