CEE LEGAL MATTERS

IN-DEPTH ANALYSIS OF THE NEWS AND NEWSMAKERS THAT SHAPE EUROPE'S EMERGING LEGAL MARKETS

Experts Review

December 2014

Russia

Buyback of Russian Equities Through Tender Offers

The Russian stock market is probably the most undervalued stock market in the world, with securities of some of the best Russian companies trading at multi-year lows. Many Russian corporates may consider investment in their stock at current price levels a very good opportunity for the company and its shareholders.

Russian issuers may conduct a buyback with the aim of: (i) acquiring liquid securities at an attractive valuation for use in future M&A transactions; (ii) "reserving" shares for management and employee option programs; (iii) returning cash to their shareholders; and/or (iv) decreasing share capital by cancellation of the shares acquired in a tender offer.

Buybacks can be conducted in the open market, usually through a broker placing orders on the stock exchange and over-the-counter markets, or through a tender offer. This article focuses on the less common method of buybacks through tender offers by subsidiaries of the Russian companies.

Russian Legal Considerations

As a practical matter, tender offers for shares or depositary receipts ("DRs") representing shares of a Russian issuer are made by a company in the issuer's group that is incorporated outside Russia rather than by the issuer itself. This is because Russian law sets forth exhaustive circumstances under which Russian companies may purchase their own shares, and such purchases are subject to very strict restrictions. In addition, recent changes to Russian legislation make it very difficult for DR holders to participate in issuer buybacks.

Tender offers by a foreign subsidiary of a Russian issuer, however, allow the purchase price to be in a foreign currency and to include a premium over the market price. It is best practice to obtain a fairness opinion from a reputable investment bank or an independent appraiser for determination of the purchase price.

Depending on the number of shares and DRs representing shares of a Russian issuer to be acquired by the offeror, among other questions, the following issues need to be considered: (i) antimonopoly requirements; (ii) strategic law requirements (if the issuer is a strategic company); and (iii) mandatory tender offer requirements (if an offeror seeks to acquire more than 30% of the issuer's share capital, taking into account shareholdings of the offeror's affiliates).

US Legal Considerations

If the Russian issuer has shareholders in the United States and the offer is extended to them, important US legal considerations will apply. When conducting a buyback that is made available also to U.S. security holders, it is important to determine whether the offer constitutes a "tender offer" for U.S. securities law purposes., which involves a consideration of the way the solicitation is being conducted, the amount of securities being bought back, the purchase price in relation to the market price, the terms of the offer (whether firm or negotiable), and the period during which the offer is open.

Tender offers involving purchases from U.S. residents by subsidiaries of Russian companies with no securities listed in the U.S. and that are not subject to the country's reporting requirements under the Exchange Act are subject to Regulation 14E under the Exchange Act.

The minimum requirements of Regulation 14E include: (i) A requirement that the tender offer be open for no less than 20 U.S. business days from the date the tender offer is first published or sent to security holders, and no less than an additional 10 U.S. business days if there is an increase or decrease in the percentage of securities being sought, or the consideration offered or the dealer's soliciting fee is changed; (ii) Restrictions on transactions on the basis of material, non-public information; (iii) A requirement that an acquirer must pay promptly following the expiration of the tender offer; and (iv) Prohibitions on the purchase of securities subject to the tender offer outside the tender offer from the date of the public announcement of the tender offer to its completion.

The US Securities Exchange Act of 1934 provides exemptions from some of these requirements depending on whether the Russian issuer qualifies for Tier I or Tier II exemption. Tender offers are exempt from most U.S tender offer rules if 10% or less of the class of securities subject to the tender offer is owned by "U.S. persons" (Tier I), while more limited relief is provided if 40% or less of the class of securities subject to the tender offer is owned by "U.S. persons" (Tier II). Any tender offer that is open to U.S. security holders is subject to the requirement that the offeror disclose all information to investors that may be material to their decision to sell the securities.

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