

Newsletter No.

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## Swiss Federal Council Sets Forth Key Elements of a Swiss Investment Control Regime:

Following the decision of the Swiss Parliament dated 3 March 2020, in which it tasked the Swiss Government with proposing a draft bill for the introduction of foreign investment controls and the set-up of a respective licensing authority, the Swiss Federal Council has published an announcement on 25 August 2021 setting forth the key features of a Swiss cross-border investment control regime. In such announcement, the Swiss Federal Council has identified key industries and categories of investors that might be subject to investment controls and has proposed a two-tier decision process for reviewing the admissibility of investments (initial review and decision by the State Secretariat for Economic Affairs (**SECO**) and, in case of non-approval of an investment, a second review and decision by the Swiss Federal Council). A consultation draft of the respective bill is expected to be published by the end of March 2022.



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In its announcement dated 25 August 2021 (the **Announcement**), the Swiss Federal Council published the key concepts of a Swiss investment control regime to be proposed by it to Parliament in the form of a draft bill, the first draft of such bill being expected to be published for public consultation by the end of March 2022 and being subject to the regular legislation procedure, including a potential referendum. In line with the Swiss Federal Council's previously expressed investor friendly approach, the investment control regime described in the Announcement focuses on notification and approval requirements applicable to state-related foreign investors and acquisitions of targets of great importance to public interests or state policy.

### **I. Contemplated Scope of Swiss Investment Control Regime**

#### **Territorial scope**

In principle, cross-border investments that lead to the acquisition of a controlling stake in a Swiss company by non-Swiss entities/individuals will trigger the contemplated reporting and approval requirements. According to the Announcement, the Swiss Federal Council intends to present two different bill proposals to parliament: (i) one that submits domestic subsidiaries of ultimately foreign controlled groups to the investment control regime and (ii) one that exempts such companies from the investment control regime.

#### **Acquirers being subject to notification and approval requirements**

The Federal Council deems that any investment control shall mainly aim to review investments made by state-related investors and this, irrespective of the specific sector in which the target is active. Consequently, it is likely that any draft bill to be

proposed by the Swiss Federal Council will, when it comes to notification and approval requirements, not be restricted to specific sectors in case state-related investors are involved. On the other hand, investments by private foreign investors shall only be subject to notification and approval requirements in case the target is active in sensitive sectors (such sectors being further specified below).

#### **Exemptions for investors from specific foreign countries**

The Announcement expresses the Swiss Federal Council's intention to provide for the possibility to include specific exemptions applicable to investors of specific countries, provided that a reciprocal right is granted to Swiss investors under the laws of such countries as well.

#### **Target entities being subject to investment control and criteria for non-approval of transactions**

In line with its previously published report dated 13 February 2019, the Swiss Federal Council reconfirms its intention

to focus any Swiss foreign direct investment control regime on specific situations with traditionally increased risks to public interests and state policy. Such risk assessment will be of relevance to determine whether or not an acquisition by private foreign investors is subject to notification and approval requirements (cf. above) and whether such acquisitions (or acquisitions of state-related investors in general) will actually be approved by the competent governmental authority.

Critical acquisitions identified by the Swiss Federal Council concern Swiss target companies:

- that provide indispensable services that cannot be replaced within a short period of time, however, only in case such supply is no longer ensured post-closing of the acquisition;
- on which the Swiss Armed Forces critically depend for the supply with material armament components;
- on which state authorities depend for the supply with material security-relevant IT systems;
- on which international space infrastructures in which Switzerland participates depend for the supply of material components for such infrastructures;
- that enable access to a large amount of particularly sensitive personal data, however, only in case of an acquisition by a malicious acquirer; or
- that, if acquired by a non-Swiss state or state-related investor, would cause as a result of such acquisition a significant distortion of competition.

As such the catalogue is a mix of state policy and public interest alike. Notably, and although this will in practice likely be the most important exemption, the Announcement does not address potential materiality thresholds in terms

of the deal value or certain deal parameters to be reached in order to trigger notification and approval requirements.

## II. Two-Tier Investment Control Procedure

When it comes to the actual procedure of the investment control, the Announcement envisages a two-tier review process at the administrative level and a two-stage decision procedure if an acquisition is to be rejected:

- in a first step, a first review shall (rapidly) assess, whether an in-depth approval procedure is required in the light of the potential acquisition's threat to public security or a potential distortion of competition. If there is undoubtedly no such threat, no in-depth review will be carried out and the transaction in question can be closed. This initial stage of the approval process (including any in-depth review and coordination between the departments and offices involved) shall be led by the State Secretariat for Economic Affairs (**SECO**);
- provided that an in-depth review, if any, does not lead to an agreement on the approval of the transaction (because there is disagreement between the departments and offices involved) or if approval is not granted, the Swiss Federal Council itself will render a decision in a second step.

## III. Enactment of respective bill by the Swiss Parliament

The details of the Swiss investment control regime will be set forth in a separate bill to be enacted by the Swiss Parliament following the regular legislative process, such process to be kicked-off by a public consultation procedure to be started in March 2022 with the publication of the first draft bill

by the Swiss Federal Council. It is expected that the parliamentary consultations will not start before 2023 and it is currently (still) not possible to foresee the outcome of the proceedings, i.e. whether foreign direct investment controls will ultimately be introduced in Switzerland at all, and, if so, how the detailed rules will look like. For the time being, Switzerland continues to apply its liberal approach welcoming foreign direct investments without any generally applicable controls (further details on the current legal situation can be found in our [Newsletter No. 133](#)).

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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