

Newsletter No.

198

---

## SWISS FEDERAL COUNCIL PUBLISHES DRAFT BILL TO SCREEN FOREIGN INVESTMENTS:

As announced in May of this year and in accordance with the parliamentary mandate to the government, the Swiss Federal Council has presented its draft bill together with the dispatch on the introduction of foreign direct investment controls in Switzerland before the end of 2023. The draft bill provides for a substantially reduced scope of application of the control procedure compared to the consultation draft. It is expected that only a low single-digit number of transactions per year would be reviewed. Despite these far-reaching amendments, the Federal Council itself is still of the opinion that Switzerland should entirely refrain from any general review of foreign investments and has therefore declined to submit a motion to Parliament to approve its draft bill.

---



By **Thiemo Sturny**  
Dr. iur., LL.M., Attorney at Law  
Partner  
Direct phone: +41 58 658 52 92  
thiemo.sturny@walderyss.com



and **Dimitrios Berger**  
MLaw, Attorney at Law  
Managing Associate  
Direct phone: +41 58 658 55 81  
dimitrios.berger@walderyss.com

# SWISS FEDERAL COUNCIL PUBLISHES DRAFT FEDERAL ACT ON THE CONTROL OF FOREIGN INVESTMENTS

In its announcement dated 15 December 2023 (the **Announcement**), the Swiss Federal Council published its draft of the Federal Act on the Control of Foreign Investments (the **Draft ICA**) alongside with the respective dispatch to the Swiss Parliament (the **Dispatch**), an in-depth regulatory impact assessment (the **Regulatory Impact Assessment**) and an expert opinion on public international economic law issues relating to exemptions in favour of certain states for investment screening (the **Expert Opinion**), both mandated by the State Secretariat for Economic Affairs (the **SECO**).

While the consultation draft still envisaged a relatively broad scope of application for investment reviews and proposed to review both investments of foreign state-controlled investors across all sectors and of private investors in specific, particularly critical areas, the Federal Council has now substantially restricted the scope of application in the published draft bill for Parliament. The scope of the Draft ICA is limited to investments by state-controlled investors in certain particularly critical areas. A main reason for the reduced scope is that several stakeholders had expressed unfavourable opinions during the consultation process. The primary purpose of these changes is to improve accuracy of the regulatory intervention, i.e. the ratio between necessary and superfluous reviews, and to reduce regulatory costs in view of the actual aim of the regulation itself: preventing takeovers that threaten or jeopardise public order or security in Switzerland.

Although the Federal Council is convinced that the draft legislation now published will significantly improve accuracy and reduce regulatory costs, it still takes the view that Switzerland does not require any additional regulation in this area. The Federal Council has therefore refrained from submitting a motion to Parliament to adopt the Federal Council's proposal.

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

### I.1 Overview

According to the Draft ICA, transactions in or outside of Switzerland that lead (I.2) to the direct or indirect acquisition of control (I.3) in a qualified private or public Swiss enterprise or its material

assets (I.4) by a foreign state-controlled acquirer are subject to prior approval. The below summarises the aforementioned elements.

### I.2 Trigger event: Direct or indirect control

The Draft ICA does not differentiate between share deals and asset deals.

Both types of transactions may trigger approval requirement, if control over the qualified Swiss enterprise or its material assets is acquired.

As far as the term "control" is concerned, the Draft ICA substantially follows the respective provisions of the Swiss Cartel Act and in particular not only includes the formal acquisition of ownership in a controlling stake/material assets, but also other transactions which enable the foreign state-controlled investor to exercise directly or indirectly a controlling influence on the conduct of business of the qualified Swiss enterprise (irrespective of whether such control is actually exercised or not). Accordingly, shareholders' agreements or management agreements can also fulfil the element of control. Likewise, a controlling stake does not necessarily consist of a at least 50% stake, in particular in case of listed companies with a significant free float, where according to the Dispatch, a stake of 20-30% may already be sufficient to exercise control.

In the case of mergers, the Draft ICA differs from the Swiss Cartel Act, as these are only subject to investment control if the foreign state-controlled investor acquires control over a previously independent Swiss company as a result of the merger.

### 1.3 Target entities being subject to approval requirements

Any private or public enterprise which is registered in the commercial register in Switzerland qualifies as a Swiss enterprise (a **Swiss Enterprise**) for the purposes of the ICA, regardless of its legal or organisational form and regardless of whether or not it is controlled by a foreign parent company. Swiss foreign direct investment control could therefore also apply in situations where a foreign state-controlled investor acquires control over a foreign parent company which directly or indirectly holds a subsidiary in Switzerland. The definition also includes

Swiss branches of foreign enterprises but excludes foreign entities which are actually managed in or from Switzerland.

Unlike in the consultation draft, where takeovers of all Swiss Enterprises by a foreign state-controlled investor were to be subject to control (with certain de minimis exceptions), the scope of application of the Draft ICA is now limited to enterprises active in areas that are particularly critical in terms of jeopardising or threatening public order or security in Switzerland. A distinction is made between areas for which there is no turnover threshold apart from a de minimis threshold (**Category 1**) and those for which there is a turnover threshold (**Category 2**):

**Category 1:** Acquisitions of Swiss Enterprises with an average of less than 50 FTEs and an average annual worldwide turnover of less than CHF 10 million in the past two business years are always exempt from the approval requirement as per the Draft ICA. This exemption shall in particular give start-up companies unrestricted access to foreign investors, which is often crucial for a successful financing of start-ups. If one of the above thresholds is surpassed by a Swiss Enterprise, investments by foreign state-controlled investors into a Swiss Enterprise active in the following sectors or providing the following goods/services of fundamental importance are subject to the approval requirement:

- acquisition of a Swiss Enterprise supplying defence equipment or providing services which are essential for the operational capability of the Swiss Armed Forces or other institutions of the Swiss Confederation that are responsible for state security or space programmes in which Switzerland participates;
- acquisition of a Swiss Enterprise producing goods whose export is restricted under the War Material Act or the Goods Control Act;

- acquisition of a Swiss Enterprise operating or owning the domestic transmission network for electricity or distribution networks at network level 3 or lower, if sales of at least 450 GWh p.a. take place via these networks;
- acquisition of a Swiss Enterprise operating or owning domestic power stations for the production of electricity with a capacity of 100 MW or more;
- acquisition of a Swiss Enterprise operating or owning domestic high-pressure natural gas pipelines;
- acquisition of a Swiss Enterprise supplying water to more than 100,000 domestic inhabitants; and
- acquisition of a Swiss Enterprise supplying important security-relevant IT-systems or providing respective IT-services for domestic authorities.

**Category 2:** In addition, the acquisition by a foreign state-controlled investor of the following Swiss Enterprises is subject to the approval requirement if they have an average annual turnover (or gross income in case of banks) of at least CHF 100 million in the past two financial years:

- acquisition of University hospitals and general hospitals providing centre services;
- acquisition of a Swiss Enterprise active in the research, development, production and distribution of medicinal products, medical devices, vaccines and personal medical protective equipment;
- acquisition of a Swiss Enterprise operating or owning important domestic hubs for the transport of goods and passengers, namely ports, airports and transshipment facilities for the combined transport;

- acquisition of a Swiss Enterprise operating or owning domestic railway infrastructure;
- acquisition of a Swiss Enterprise operating or owning central domestic food distribution centres;
- acquisition of a Swiss Enterprise operating or owning domestic telecommunications networks;
- acquisition of a Swiss Enterprise operating or owning systemically important financial market infrastructures; and
- acquisition of systemically important banks.

The Federal Council is authorised to subject further categories of companies to the authorisation requirement for a maximum period of 12 months (extendable once by a maximum of 12 months) if this is necessary for reasons of public order or security. Furthermore, the Federal Council may exempt takeovers by foreign state-controlled investors from certain countries from the authorisation requirement, provided there is sufficient cooperation with these countries to avert dangers and threats to public order and security.

In contrast to other countries, some of which only provide for exemplary lists of subject sectors, it is to be welcomed from a rule of law perspective that the Federal Council has adopted the detailed list of subject sectors which was already contained in the consultation draft and only amended it slightly.

#### **1.4 Acquirers being subject to approval requirements**

One of the most important changes in the Draft ICA compared to the consultation draft concerns the investors subject to investment control. The Draft ICA now stipulates that only investments by foreign state-controlled investors are subject to investment control, thus excluding

private foreign investment from the regulatory scope. Foreign state-controlled investors are defined in the Draft ICA as follows:

1. a foreign governmental body (including members of government or of royal families in monarchies);
2. a company with its head office outside Switzerland that is directly or indirectly controlled by a foreign state body;
3. a company capable of owning assets (e.g. fund company) that is directly or indirectly controlled by a foreign state body; and
4. a natural or legal person acting on behalf of a foreign state body.

The broad definition of a state-controlled investor shall avoid loopholes and shall ensure that investments in which any kind of foreign state-controlled investor takes control of a Swiss Enterprise are covered by the ICA.

#### **II. Two-Tier Investment Control Procedure**

The Draft ICA provides that any person involved in a takeover can request SECO to clarify whether the takeover is likely to be subject to authorisation. However, such preliminary clarification of the authorisation requirement by SECO is non-binding.

If a transaction is subject to authorisation, the foreign state-controlled investor must submit an application for approval with SECO prior to consummation of the transaction. The actual application will need to be filed in one of the official languages of Switzerland (German, French or Italian). Supporting documentation and enclosures can also be submitted in English. The effectiveness under civil law of a takeover requiring authorisation remains deferred until authorisation is granted.

When it comes to the actual procedure of the investment control, the Draft ICA envisages a two-tier review process at the administrative level and a two-stage decision procedure for certain transactions.

- In a first step, SECO shall, in collaboration with any other interested governmental units and after consultation with the Federal Intelligence Service, decide within one month whether the transaction can be approved or whether an in-depth review shall be conducted. According to the Draft ICA, the decision that an in-depth review shall be conducted cannot be challenged. In case an in-depth review is conducted, SECO shall render its decision on whether the transaction shall be approved within three months after submission of the respective request for approval. Such decision can be challenged in accordance with the general provisions of the federal administrative procedure.

- Provided that an in-depth review, if any, (i) does not lead to an agreement on the approval of the transaction (because there is disagreement between the departments and offices involved) or (ii) shows that the decision is of considerable political significance, SECO shall submit the matter to the Swiss Federal Council for decision, subject to full judicial review. In contrast to the consultation draft, the Draft ICA thus no longer provides for a restriction of judicial review to the violation of procedural guarantees and abuse of discretion in cases of considerable political importance.

Similar to proceedings under the Swiss Cartel Act, a takeover shall be deemed to have been authorized if no decision is taken within the one-month or three-month period mentioned above. SECO

may, however, extend these time limits if (i) the examination is hindered by circumstances for which the foreign state-controlled investor or the target company is responsible, (ii) required information from a foreign authority is outstanding, or (iii) the Federal Council decides on the authorisation.

If required for the protection of public order and security, the Federal Council may at any time directly authorise a takeover requiring approval. However, only direct authorisation by the Federal Council is possible, not direct prohibition. For the latter, the authorisation procedure must always be completed.

### III. Approval Criteria

Transactions shall be approved if a respective ex ante risk assessment confirms that public order and security are not jeopardised by the contemplated transaction. In this respect, the Dispatch states that this assessment shall be understood as the product of the probability of occurrence (**Likelihood Criteria**) and the potential extent of damage (**Damage Criteria**). If one of these variables is close to zero, the risk from a transaction also tends towards zero.

For such assessment, the competent authority in particular considers whether:

- the foreign state-controlled investor is engaged or has engaged in activities that are or have been detrimental to the public order or security of Switzerland or other states (Likelihood Criteria);
- the foreign state-controlled investor or its home state has attempted or is attempting to acquire information on the domestic company by means of espionage (Likelihood Criteria);
- the foreign state-controlled investor is engaged in or has engaged in espionage (Likelihood Criteria);
- sanctions have been imposed directly or indirectly on the foreign state-controlled investor under the Embargo Act (Likelihood Criteria);
- the services, products or infrastructure of the Swiss Enterprise can be replaced within a reasonable period of time (Damage Criteria); and
- the foreign state-controlled investor gains access to important security-relevant information or to data requiring special protection under the Data Protection Act as a result of the transaction (Damage Criteria).

If necessary to safeguard public order and security, the approval can be made subject to the fulfilment of conditions and additional requirements.

### IV. Enforcement and Sanctions

The Draft ICA provides for several enforcement measures on a civil law and administrative law level, i.a. the following:

- the legal effectiveness under Swiss laws of any transaction subject to approval requirements shall be subject to the condition precedent that the transaction has been approved in accordance with the provisions of the Draft ICA. In practice, parties will include respective conditions precedent into the investment/acquisition documentation;
- in case a transaction subject to approval requirements has been consummated without approval, based on false information or if a condition for approval has been disregarded, the Federal Council may order the necessary measures to restore the proper state of affairs, in particular order the divestiture of the participation rights in question; and
- fines of up to 10% of the average annual turnover of the target company in the two years prior to the takeover may be imposed in case of

consummation of a transaction subject to approval requirements without approval, false statements in the approval procedure and non-compliance with conditions for approval and with measures ordered by the Federal Council as per the above.

### V. Accountability and Review of Bill

The Draft ICA provides for SECO to publish a report on the enforcement of the ICA every four years, in particular anonymised and, if necessary, aggregated data and information on decisions issued and first-instance decisions on administrative actions. With the expected small number of transactions that would require authorisation and the publication of an accountability report only every four years, it is foreseeable that it would take a very long time for a (known) practice on investment control procedures to develop in Switzerland.

The Draft ICA further provides that SECO has to evaluate the necessity, effectiveness, suitability and efficiency of the ICA in a report to the Federal Council at the latest 10 years after the entry into force of the ICA. This report will be publicly available.

### VI. Conclusion

With the Draft ICA, the Federal Council has taken into account the numerous critical comments made during the consultation procedure and has presented a significantly streamlined draft bill for investment control. The draft will now first be discussed by the parliamentary committees and then by Parliament itself. It currently seems very unlikely that the law will come into force before 2025 (if at all).

The outcome of the parliamentary deliberations cannot be predicted. Given the sharp decline in M&A activity overall in the recent past - according to the Regulatory Impact Assessment, Chinese

acquisitions abroad alone have halved from their peak in 2016 to 2021 - it cannot be ruled out that the Draft ICA will suffer the same fate and quietly fizzle out as other initiatives for the introduction of investment controls following waves of investment by Anglo-American or Japanese investors in previous decades. On the other hand, it should not be overlooked that investment control regulations are widespread nowadays and that Parliament might therefore be willing to deviate somewhat from Switzerland's traditional investment-friendly approach. If the Draft ICA is approved by Parliament more or less in its current form, it is in any case foreseeable that the overall impact on foreign investment activity in Switzerland will be limited.

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.

© Walder Wyss Ltd., Zurich, 2023