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Switzerland introduces investment screening (FDI) – with its characteristic restraint:

In today's final vote, the Swiss Parliament approved the Investment Screening Act (ISA). Switzerland is thus introducing an instrument to monitor foreign direct investments (FDI) in Switzerland. This article summarises the content and, above all, the scope of application of the new law and provides an initial assessment.

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Switzerland introduces investment screening (FDI) – with its characteristic restraint

In today's final vote, the Swiss Parliament approved the Investment Screening Act (ISA). Switzerland is thus introducing an instrument that is already familiar to around 80% of OECD countries: a state screening procedure to monitor foreign direct investments (FDI) in Switzerland. The political debate in this respect often referred to the "*Lex China*" because the takeover of Syngenta by the Chinese conglomerate Chemchina prompted various parliamentary initiatives that have now led to the new law.

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A. What is the purpose of the ISA?

The ISA pursues security policy objectives. Its protected interest is public order and security in Switzerland. Parliament debated extending the scope of protection to include the supply of essential goods and services. In the end, this idea was abandoned.

Foreign investment is generally considered positive and important for the Swiss economy. Switzerland likes to refer to its traditional openness towards foreign investors and, as a rule, rightly expects such investments to have prosperity-enhancing effects. Only in transactions where an ex-ante risk assessment gives reason to believe that they could jeopardise or threaten public order or security should the federal government intervene, either by imposing conditions on the transaction or by prohibiting it altogether. These rather vague criteria give the authorities a great deal of discretion in assessing individual cases, which could make it difficult to plan transactions – a disadvantage that is, however, greatly mitigated by the narrow scope of the law.

B. Which transactions are covered?

In Parliament, the position of the Federal Council and the business community prevailed, according to which the scope of application of the ISA should be narrowly defined. The law covers the acquisition of a domestic company by a foreign *state* investor in a security-critical sector. Depending on the sector, a de minimis or turnover threshold may also apply.

When determining whether a takeover has taken place, the ISA refers to the definition of control in the Cartel Act (Article 4(3) Cartel Act). This creates legal certainty because it is based on familiar concepts. In terms of content, this means that only the acquisition of (sole or joint) control is covered by the ISA. A minority shareholding without control rights is not covered by the ISA.

A domestic company is defined as one that is entered in the Swiss Commercial Register. The definition of a company under competition law applies (Article 2(1bis) Cartel Act): a company is defined as a purchaser or supplier of goods or services active in the economic process regardless of its legal and organisational form. This criterion is therefore also clear and simple. As a result, the acquisition of a domestic subsidiary of a foreign group of companies falls within the scope of the ISA. The same applies to the acquisition of a foreign group with a Swiss subsidiary.

There was heated debate over whether only acquisitions by state-controlled foreign investors or also by private foreign investors should be covered. In the end, the former position prevailed. Foreign investors are defined as foreign state bodies, companies under the direct or indirect control of a foreign state body, or persons acting on behalf of a foreign

state body. The Federal Council may exempt certain countries. This restriction to state investors severely limits the scope of application of the ISA, but at the cost of difficult definition issues. This creates considerable scope for circumvention, which was strongly criticised by the minority in the parliamentary debate. The law is primarily directed against the destabilising or geopolitical intentions of totalitarian states. In these states in particular, the boundaries between private economic activity and state influence are usually largely blurred, and these states are unlikely to help create transparency in this regard.

Only acquisitions of target companies operating in legally defined sectors are covered by the ISA. In particularly sensitive sectors, every acquisition is recorded if the target company reaches the legal de minimis threshold (at least 50 full-time positions worldwide or global turnover of at least CHF 10 million in the two previous financial years). This applies to:

- manufacturers of armaments or dual-use goods that are of critical importance to the army and other security institutions and whose export abroad is subject to authorisation under the War Material Act (for armaments) or the Goods Control Act (for dual-use goods);
- operators of certain energy and water supply infrastructures; and
- providers of central security-related IT services.

In less sensitive sectors, a turnover threshold applies (global turnover of the target company in the previous two financial years of at least CHF 100 million). This applies to (certain):

- hospitals;
- pharmaceutical companies;
- transport infrastructure operators;
- railway infrastructure operators;
- operators of major food distribution centres;
- telecommunications network operators;
- financial market infrastructure operators; and
- systemically important banks.

C. How is the procedure structured?

The procedure is closely modelled on the merger control procedure under competition law (notification by the acquiring company prior to implementation, one-month Phase I review, three-month Phase II review, with the possibility of an extension). A prohibition on implementation applies until approval is granted.

The State Secretariat for Economic Affairs (SECO) conducts the procedure in agreement with the State Secretariat of the Federal Department of Foreign Affairs (FDFA) and the State Secretariat for Security Policy and other administrative units, and after consulting the Federal Intelligence Service. The Federal Council decides if an administrative unit opposes the approval or if there are significant political implications. Only the Federal Council can issue a prohibition of a transaction.

The decision can be appealed before the Federal Administrative Court. It remains to be seen to what extent the court will review the appropriateness of discretionary decisions or refrain from doing so, as this is ultimately a *security policy* decision.

D. Assessment

As only foreign *state* investors are covered, the number of proceedings under the ISA is likely to be rather low. In the few proceedings affected, the coordination effort involved in complex international transactions will increase further as a result of an additional proceeding. At least it should be possible to coordinate the timing with antitrust merger control, provided that the respective authority does not make excessive use of a Phase II review and the possibility of extending the review period.

In the case of transactions subject to notification, it remains to be seen to what extent the ISA procedure can achieve its goal of protecting Switzerland's legitimate security interests. It should be relatively easy for the respective authority to assess the importance of the target company for public order and security in Switzerland and thus the potential extent of damage. The key factors here are questions about the substitutability of the target company's services, products and infrastructure and its access to security-relevant information or sensitive personal data. However, it is likely to be much more difficult to assess the good reputation and guarantee of proper business conduct of a foreign investor.

There is also a certain unease regarding the many transactions that are not subject to notification requirements. Precisely because of the restriction to foreign *state* investors – and possibly also because of the relatively high turnover threshold – transactions that could pose a threat to public order and security in Switzerland could escape scrutiny.

E. Outlook

The law is subject to an optional referendum. It is expected to come into force in 2027 at the earliest, once the Federal Council has issued the implementing provisions by way of ordinance.