

Newsletter No.

169

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## Swiss Federal Council publishes draft Legislation to screen Foreign Investments:

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 on 18 May 2022 published its draft of the Federal Act on the Control of Foreign Investments and initiated the respective consultation procedure. In its explanatory report on the consultation draft, the Federal Council, consistent with its previous position, advises against introducing new legislation as it considers the cost/benefit ratio to be unfavourable and the existing regulations to be sufficient. Likewise, the in-depth regulatory impact assessment commissioned by the State Secretariat for Economic Affairs (SECO) comes to the same conclusion. The consultation will run until 9 September 2022.

# Swiss Federal Council publishes draft Federal Act on the Control of Foreign Investments and initiates consultation procedure



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In its announcement dated 18 May 2022 (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 explanatory report to the consultation draft (the **Explanatory Report**) and an in-depth regulatory impact assessment (the **Regulatory Impact Assessment**) prepared by the State Secretariat for Economic Affairs (the **SECO**). In line with the Swiss Federal Council's previously expressed investor friendly approach, the investment control regime as proposed by the Draft ICA focuses on approval requirements applicable to state-related foreign investors and acquisitions of targets of great importance to public interests or state policy. Furthermore, the Draft ICA does not provide for general notification requirements.



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## I. Contemplated Scope of Swiss Investment Control Regime

### 1. Overview

The Draft ICA submits transactions in or outside of Switzerland that lead to the direct or indirect acquisition of control (see 2.) in a qualified Swiss enterprise or its material assets (see 3.) by a foreign acquirer (see 4.) to the approval requirements. Therefore, the draft ICA follows the impact principle. The below summarises the aforementioned elements.

### 2. Trigger event

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 Cartel Act and in particular not only includes the formal acquisition of ownership in a controlling stake/material assets, but also other transactions which (theoretically) enable the foreign investor to

exercise a controlling influence on the conduct of business of the qualified Swiss enterprise. 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 Explanatory Report, a stake of 20-30% may already be sufficient to exercise control.

### 3. Target entities being subject to approval requirements

With respect to the question whether an enterprise is to be considered a Swiss enterprise, the Draft ICA contains two different bill proposals: (i) one that submits domestic subsidiaries of ultimately foreign controlled groups, i.e. groups with registered seat and principal office outside of Switzerland, to the investment control regime and (ii) one that exempts such enterprises from investment control (a Swiss enterprise falling within the territorial scope of the Draft ICA hereinafter referred to as a **Swiss Enterprise**).

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. If one of the above thresholds is surpassed by a Swiss Enterprise (a **Relevant Target**), three different categories of transactions trigger approval requirements: (i) investments by foreign state-controlled investors (**Category 1**), (ii) investments into Relevant Targets active in certain specifically sensitive sectors (**Category 2**) and (iii) investments into large Relevant Targets active in certain sensitive sectors (**Category 3**).

**Category 1:** The Federal Council's proposal deems that investment control shall mainly aim to review investments made by state-related investors and this, irrespective of the specific sector in which the Relevant Target is active. Consequently, the Draft ICA submits investments into a Relevant Target made by foreign state-controlled investors always to the approval requirements, irrespective of the specific sector in which the Relevant Target operates. On the other hand, investments by foreign private investors are only subject to approval requirements, if the below additional criteria of either Category 2 or Category 3 are met.

**Category 2:** The acquisition of a Relevant Target active in the following sectors or providing the following goods/services of fundamental importance, irrespective of whether such acquisition is made by a foreign state-controlled or private investor, is subject to the approval requirement:

- acquisition of a Relevant Target 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;
- acquisition of a Relevant Target producing goods whose export is restricted under the War Material Act or the Goods Control Act;

- acquisition of a Relevant Target 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 Relevant Target operating or owning domestic power stations for the production of electricity with a capacity of 100 MW or more;
- acquisition of a Relevant Target operating or owning domestic high-pressure natural gas pipelines;
- acquisition of a Relevant Target supplying water to more than 100,000 domestic inhabitants; and
- acquisition of a Relevant Target supplying important security-relevant IT-systems or providing respective IT-services for domestic authorities.

**Category 3:** Lastly, the acquisition of the following Relevant Targets, provided that they have in the past two financial years an average annual turnover (or gross income in case of banks) of at least CHF 100 million, irrespective of whether such acquisition is made by a foreign state-controlled or private investor, is subject to the approval requirement as well:

- acquisition of University hospitals and general hospitals providing central care;
- acquisition of a Relevant Target active in the research, development, production and distribution of medicinal products, medical devices, vaccines and personal medical protective equipment;
- acquisition of a Relevant Target operating or owning central domestic hubs for the transport of goods and passengers, namely ports, airports and transshipment facilities for the combined transport of national importance;

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

As showcased, the proposed investment control mainly aims to regulate investments made by foreign state-controlled investors and, in addition, applies general and sector specific materiality thresholds in an attempt to improve the cost/benefit ratio of the investment screening.

#### 4. Acquirers being subject to approval requirements

The Draft ICA sets forth the following categories of foreign investors subject to the approval requirements under the Draft ICA:

- foreign enterprises with registered seat and principal office outside of Switzerland;
- legal entities which are controlled by persons abroad or by foreign states; and
- individuals without Swiss citizenship, except for individuals from EU/EFTA member states which contemplate to acquire an entity subject to approval requirements for the purposes of self-employment activity.

The Draft ICA stipulates, that the Swiss Federal Council may exempt investors of specific countries from the approval requirement, provided that public order and security are not jeopardised by doing so. The Explanatory Report

specifically states that such exemptions may in the future reciprocally be granted to specific countries as part of close cooperation arrangements.

## II. Two-Tier Investment Control Procedure

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) if the decision is of considerable political significance, SECO shall submit the matter to the Swiss Federal Council for decision. In cases of considerable political significance, judicial review shall be limited to violation of procedural guarantees and abuse of discretion.

## 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 Explanatory Report 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 takes into account whether:

- the foreign 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 investor or his home state has attempted or is attempting to acquire information on the domestic company by means of espionage (Likelihood Criteria);
- the foreign investor is engaged in or has engaged in espionage (Likelihood Criteria);
- sanctions have been imposed directly or indirectly on the foreign investor under the Embargo Act (Likelihood Criteria);
- the services, products or infrastructure of the Relevant Target can be replaced within a reasonable period of time (Damage Criteria); and
- the foreign 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 tolls on a private 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, 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 transaction value may be imposed, i.e. in case of consummation of a transaction subject to approval requirements without approval, false statements in the approval procedure and non-compliance with measures ordered by the Federal Council as per the above.

## V. Consultation and Enactment of the Draft ICA by the Swiss Parliament

The present draft bill is obviously guided by the various foreign investment control laws that have been enacted in numerous (Western) European and Anglo-Saxon jurisdictions in recent years. It is to be welcomed that with the present draft bill, the Federal Council has attempted to prevent the sometimes blatant legal uncertainty that exists in various jurisdictions with regard to the application of investment control standards from arising in Switzerland by means of sometimes very detailed regulations. The possibility for the Federal Council to provide for further detailed regulations in an ordinance, which is provided for in various parts of the draft bill, should further contribute to transparency, predictability and legal certainty if the draft bill enters into force. However, it remains unclear whether the draft law will ever enter into force in its

present or possibly amended form. In the Explanatory Report, the Federal Council once more explicitly advised against introducing the Draft ICA (and any other new legislation in this area) as it considers the cost/benefit ratio to be unfavourable and the existing regulations to be sufficient. Likewise, SECO comes in its Regulatory Impact Assessment to the same conclusion. The consultation will run until 9 September 2022 and the Draft ICA is therefore still subject to amendments, an affirmative decision of the Swiss Parliament to enact the Draft ICA and a potential referendum. 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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