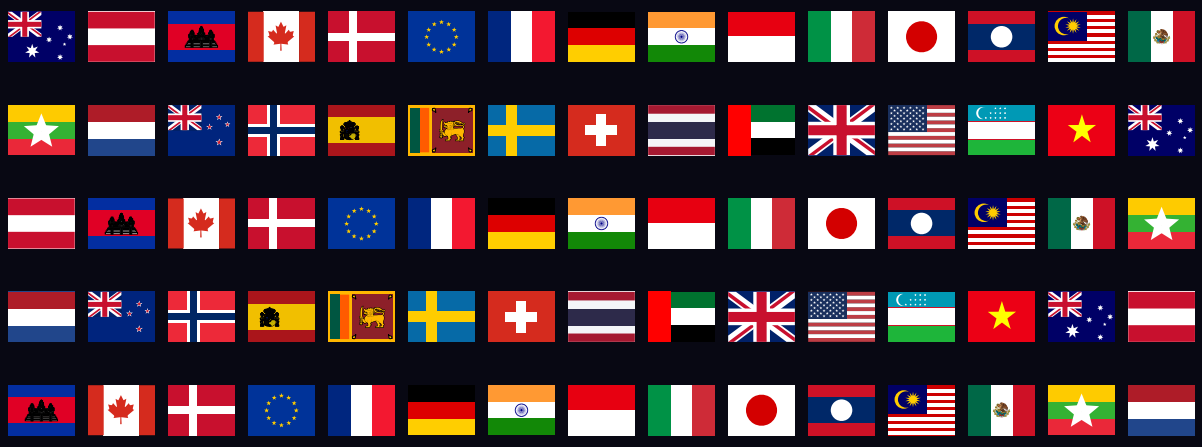
FOREIGN INVESTMENT REVIEW

Switzerland



LEXOLOGY
Getting The Deal Through

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Foreign Investment Review

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Quick reference guide enabling side-by-side comparison of local insights, including into law, policy and relevant authorities; procedure, including thresholds and timelines; substantive assessment, including interagency and international consultation, remedies and rights of challenge and appeal; relevant recent case law; and other recent trends.

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Switzerland

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LAW AND POLICY

Policies and practices

What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Switzerland is (still) pursuing a very liberal and open approach towards foreign investments. In principle, no significant barriers or discriminatory measures apply to foreign investments in Switzerland, and there are as yet no generally applicable Swiss laws that prohibit or require a systematic screening of foreign investments. Nonetheless, foreign investments in certain industries and sectors (such as banking services or owning or operating real estate properties) may require government permission or approval. Further, although licensing proceedings usually do not distinguish between Swiss and non-Swiss applicants, the granting of licences in certain sectors such as telecommunications or nuclear energy to a non-Swiss person or entity (as defined in the relevant act) may depend on whether reciprocal rights are granted in the home country of the relevant investor. In addition, certain permissions and authorisations are issued on a local (ie, cantonal or even municipal) level, and it needs to be assessed on a case-by-case basis as to whether the granting of this permission or authorisation depends on the applicant's nationality, foreign residence or domicile. With regard to currency exchange, no controls exist on inbound investments or the repatriation of profits and capital on disinvestments.

Owing to Switzerland's economic and political stability, transparent and solid legal system, reliable and extensive infrastructure and efficient capital markets, Switzerland is a highly attractive destination for foreign investments. In addition to benefiting from these advantages, non-Swiss investors often receive specific tax incentives. The current tax regime allows all the 26 cantons (states) to set their own foreign investment attraction policies within a set framework. For practical project support, investors may also appreciate the assistance given by the cantonal economic development agencies. It is therefore hardly surprising that Switzerland is one of the world's largest recipients of direct investments and frequently used as a location for international headquarters, trading companies and other entities coordinating international operations (principal companies, shared services and logistics centres, research and development facilities etc).

As foreign investment control regimes have become more and more common on a European and even international level, in Switzerland too discussions have started regarding the introduction of a potential new Swiss foreign investment control regime. In May 2022, the Federal Council published a first draft of the legislation for consultation. Based on the results of the public consultation, the Federal Council is currently preparing a draft bill for submission to the parliament. The law is not expected to enter into force before 2024.

Law stated - 06 December 2022

Main laws

What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

There are currently no generally applicable Swiss laws that prohibit or require a systematic screening of foreign investments on the basis of national interest and regardless of the industry sector concerned. The main Swiss laws generally governing (foreign and non-foreign) investments are:

- the Swiss Code of Obligations; and
- the Swiss Federal Act on Cartels and Other Restraints of Competition (the Cartel Act) and the Ordinance on the Control of Concentrations of Undertakings (together with the Cartel Act, the Competition Law).

Other important laws specifically addressing foreign investments in specific sectors include the following:

- the Swiss Federal Law on Acquisition of Real Estate by Persons Resident Abroad (the Lex Koller);
- the Swiss Federal Banking Act (the Federal Banking Act) and the Federal Act on Financial Institutions (the Financial Institutions Act);
- the Swiss Federal Act on Telecommunications (the Telecommunications Act) and the Federal Ordinance on Telecommunication Services;
- the Swiss Federal Nuclear Energy Act (the Nuclear Act);
- the Swiss Federal Act on Radio and Television (the Radio/TV Act); and
- the Swiss Federal Aviation Act (the Aviation Act) and the Swiss Federal Aviation Ordinance (the Aviation Ordinance).

In the following sectors or industries, all (Swiss and non-Swiss) investors have to apply for a government licence and are, thus, subject to review by the competent federal authorities:

- postal services;
- the rail industry;
- commercial vessels;
- the aviation industry;
- power and gas installations;
- radio and television broadcasting;
- the war material industry; and
- the lotteries and gambling industry.

Law stated - 06 December 2022

Scope of application

Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

Most Swiss laws concerning investments or transactions in Switzerland make no general distinction between foreign and domestic investments and transactions. Most of the sectors where investors have to apply for a government licence to invest in are to some extent subject to industry-specific regulation and, thus, any investment, whether Swiss or not, may be subject to some form of official approval or licensing requirement. Given that there is currently no Swiss law providing for a systematic investment screening of foreign investments, we will address below the main scenarios in these industries, in which the fairly broad notion of national interest may affect the outcome of a review, licensing or approval proceeding conducted by the competent authority.

The Lex Koller

The direct or indirect acquisition of real estate in Switzerland by non-Swiss investors is subject to rather tight restrictions under the Lex Koller, in particular if residential or other non-commercial property is concerned. Hence, the

qualification of real estate as residential or commercial under the Lex Koller is key, as properties used for commercial purposes (such as offices, manufacturing facilities, warehouses and storage areas, shopping centres, shops, hotels or restaurants) can be acquired with few (or no) restrictions, while residential properties can only be acquired if an authorisation is issued. In practice, the competent authority grants these authorisations on rather limited grounds. Restrictions affecting the acquisition of commercial properties concern premises that (1) contain residential parts or areas, (2) contain land reserves on construction land, (3) are empty, or (4) are acquired in anticipation of a company's expansion in the short or medium term but with no concrete plans to build at the time of the acquisition.

The main goal of the Lex Koller is to prevent direct or indirect acquisitions of residential real estate by foreign or foreign-controlled companies. Both direct investments in real estate and the acquisition of even a single share in a residential real estate company are generally prohibited. Thus, the term 'acquisition' is defined rather broadly under the Lex Koller and extends also to mortgage financings granted by foreign investors and banks (particularly, if certain loan to value thresholds are reached). However, in practice, there still exist ways in which foreign investments in residential real estate can occur, for example by setting up a joint venture in collaboration with a Swiss partner who retains effective control.

EU and European Free Trade Association (EFTA) nationals with residence in Switzerland, as well as United Kingdom (UK) nationals with residence in Switzerland since before 1 January 2021 and other third-country nationals with a valid residency authorisation (a C permit), may acquire residential properties without any restriction under the Lex Koller.

Finally, under the Lex Koller, the Swiss Federal Council is required to prohibit a transaction involving real estate property if this acquisition endangered national policy interests. While statistics in this respect are confidential and not publicly available, the Swiss Federal Council exerts its broad discretion judiciously and does not unreasonably reject a transaction.

The Federal Banking Act

Granting a licence to a bank incorporated under Swiss law is subject to additional licensing requirements if non-Swiss persons directly or indirectly hold more than half of the voting rights, or if they have a controlling influence through other means. However, it is required that, in each case, these non-Swiss persons hold a 'qualified participation'. A participation is deemed a 'qualified participation' if it amounts to 10 per cent or more of the capital or voting rights of the bank or if a foreign investor has a controlling influence through other means. In practice, the Swiss Financial Market Supervisory Authority (FINMA) often requires the disclosure of participations of 5 per cent or more for its assessment of whether the requirements of a banking licence are continuously met. In particular, one or several of the following additional licensing requirements may apply:

- The corporate name of such bank must not indicate or suggest that it is controlled by Swiss persons or entities.
- The countries in which the holders of a qualified participation have their registered office or their domicile must grant reciprocity. This means that Swiss residents and entities must have the possibility to operate a bank in the respective country, and that such banks are not subject to more restrictive provisions compared to non-Swiss banks in Switzerland. This reciprocity requirement may not be imposed if barred by any obligations to the contrary in international treaties (as, for example, in relation to the member states of the WTO).
- FINMA may request that a bank be subject to adequate consolidated supervision by a non-Swiss supervisory authority if it forms part of a group active in the financial sector.

These licensing requirements apply if a Swiss bank becomes foreign controlled as described above, or if the already participating non-Swiss holders of a qualified participation change. In the latter case, a new special licence for foreign-controlled banks must be obtained prior to this event.

The Financial Institutions Act also contains similar requirements for financial institutions other than banks. In particular, the Financial Institutions Act extends the above-mentioned provisions for foreign-controlled banks to securities firms. Furthermore, if a non-Swiss financial institution applies for an authorisation to establish a branch or representative office in Switzerland, FINMA may make the granting of this authorisation contingent upon a guarantee of reciprocity with the state in which the relevant non-Swiss financial institution or the non-Swiss persons holding qualified participations have their place of residence or registered office. Lastly, as a general principle, non-Swiss fund management companies may not establish branches or representative offices in Switzerland.

The Telecommunications Act

Subject to international obligations to the contrary, the competent licensing authority may prohibit telecommunications service providers organised under foreign law from using radio frequencies or addressing resources (such as telephone numbers) or refuse to grant a licence for using the radio frequency spectrum if the respective country under which the company is organised does not grant reciprocal rights.

The Nuclear Act

Subject to international obligations to the contrary, the Swiss Federal Council may refuse to grant the general licence required to build or operate a nuclear installation to companies organised under foreign law if the respective country in which the company is domiciled does not grant reciprocal rights. In addition, foreign companies must have a branch registered in the commercial register in Switzerland.

The Radio/TV Act

Subject to international obligations to the contrary, the competent licensing authority may refuse to grant broadcasting licences to a foreign-controlled legal entity, a Swiss legal entity with foreign participation or a natural person without Swiss citizenship if the respective foreign country does not grant reciprocal rights to a similar extent.

The Aviation Act

Unless international treaties provide otherwise, transporting passengers or cargo by aircraft commercially to and from Switzerland requires an operating licence from the Federal Office of Civil Aviation (FOCA). The applicable Aviation Act and Aviation Ordinance distinguish between domestic and foreign carriers. The FOCA only issues an operating licence to a carrier domiciled abroad if, inter alia, no material Swiss interests are affected and the respective foreign country permits Swiss companies to transport persons or cargo commercially to an equivalent extent. In justified cases, the requirement of reciprocity may be waived.

While, as shown above, there are various industries in which the foreign ownership of an acquirer is to be taken into account when a particular transaction or investment is reviewed, in none of these industries or sectors is national interest the sole decisive criteria for the permissibility of such a transaction or investment. An exception to this only exists under the Lex Koller where the main goal is to prevent the ‘selling off of the Swiss homeland to foreigners’ and where the Swiss Federal Council may, in its discretion, consider national policy interests. As it would go beyond the scope of this overview to answer the below questions for all relevant industries and sectors, the focus is set on those industries and sectors where the majority of foreign investments occur, namely the banking and the real estate industry.

Law stated - 06 December 2022

Definitions

How is a foreign investor or foreign investment defined in the applicable law?

There is no generally applicable legal definition of 'foreign investor' or 'foreign investment' under Swiss law. Rather, most acts that stipulate provisions on foreign investment contain a specific legal definition intended to serve the purpose of the relevant act.

The Lex Koller

The legal definitions contained in the Lex Koller distinguish between natural persons and companies (consisting of legal entities and companies capable of owning property but having no legal personality). With respect to natural persons, the following persons are defined as 'persons abroad':

- nationals of EU and EFTA countries who are not resident in Switzerland;
- nationals of the UK who have not already been resident in Switzerland since before 1 January 2021; and
- nationals of other countries who do not have a valid Swiss residency authorisation (a C permit).

With respect to companies, the Lex Koller covers:

- companies with their statutory or actual seat outside Switzerland; and
- companies with their statutory and actual seat in Switzerland, in which persons abroad hold a dominant position (according to article 6 of the Lex Koller).

The Lex Koller also applies to buyers who are not subject to the Lex Koller but who intend on buying real estate on behalf of a person abroad.

The Federal Banking Act

For the purposes of the Federal Banking Act, a 'foreigner' is:

1. an individual who has neither a Swiss citizenship nor a permanent residence permit in Switzerland;
2. a legal entity or partnership that has its registered seat outside Switzerland; or
3. a legal entity or partnership that has its registered seat in Switzerland, but is controlled by individuals as defined under (1).

Law stated - 06 December 2022

Special rules for SOEs and SWFs

Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

No special rules exist for investments made by foreign SOEs or SWFs.

Law stated - 06 December 2022

Relevant authorities

Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

As there are currently no generally applicable Swiss laws on foreign investments, there is no single competent Swiss authority to review mergers or acquisitions on national interest grounds. Depending on the thresholds set forth in the Cartel Act or the industry or sector in which a foreign investment takes place, one or more authorities may be competent to review the foreign investments either comprehensively or with respect to certain aspects.

If, for example, a bank incorporated under Swiss law is concerned, the competent authority is FINMA, whereas the Lex Koller provides that each canton has its own approval authority responsible for granting authorisations to acquire real estate located in the respective canton by persons abroad. Furthermore, under the Lex Koller, the Swiss Federal Council may upon request by the cantonal government order an exemption (and authorise an acquisition that would be prohibited otherwise) or deny an acquisition by a person abroad on grounds of public policy.

Although the Cartel Act does not contain any specific review or filing requirements relating to notions other than competition, transactions covered by the Cartel Act and meeting the respective (turnover) thresholds must be notified to the Swiss Competition Commission.

Law stated - 06 December 2022

Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The requirements for obtaining clearance or any form of approval or licence by the competent Swiss authorities are set out exhaustively in the respective laws and regulations. The competent Swiss authorities retain a certain degree of discretion to determine whether all of the requirements are sufficiently met and, as a consequence, to approve or reject a request for clearance, approval or licence. As a matter of general constitutional and administrative law, however, this discretion is generally limited, and exceeding the limits of discretion usually forms the basis of an appeal before courts. In particular, an authority must abide by the rule of law and exercise its discretion in a reasonable manner (ie, not abuse, exceed or unreasonably refrain from exercising its discretion).

Law stated - 06 December 2022

PROCEDURE

Jurisdictional thresholds

What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Again, in light of the fact that no generally applicable laws on foreign investments exist in Switzerland, there are no generally applicable thresholds that trigger a foreign investment review. The relevant Swiss laws – whose applicability may depend on various factors and not just national interest in the strict sense – do, however, contain specific thresholds and triggering requirements.

The Lex Koller

Any actions that qualify as an ‘acquisition’ of residential real estate assets in Switzerland within the broad meaning of

the Swiss Federal Law on Acquisition of Real Estate by Persons Resident Abroad (the Lex Koller) are subject to the Lex Koller if the acquiring person qualifies as a person abroad. The filing of an application for authorisation is mandatory. Failure to file an application and to obtain an authorisation for the acquisition may, among other things, lead to the acquisition being declared null and void.

The Federal Banking Act

Each individual or legal entity must notify the Swiss Financial Market Supervisory Authority (FINMA) prior to acquiring or selling a direct or indirect qualified participation in a bank organised under Swiss law. This notification duty also applies if a foreigner increases or reduces its qualified participation and thereby attains, falls below or exceeds 20, 33 or 50 per cent of the capital or voting rights in the bank. The bank itself is also required to notify FINMA of any changes triggering the notification duty of the shareholders when it becomes aware of such a change.

In the case of a foreign-controlled bank, this bank must apply for a special licence from FINMA prior to any change of a foreign holder holding a qualified participation. In its application, the bank must demonstrate all the facts based on which FINMA may assess whether the conditions for the special permit are fulfilled.

The Competition Law

The Swiss Federal Act on Cartels and Other Restraints of Competition (the Cartel Act) and the Ordinance on the Control of Concentrations of Undertakings (together with the Cartel Act, the Competition Law) cover mergers of two or more independent enterprises as well as any action (eg, acquisition of a participation and conclusion of a contract) by which one or more enterprises directly or indirectly acquire (joint) control of one or more independent enterprises or parts thereof. In general, the threshold test applied to these mergers is solely based on turnover. In particular, for the last business year prior to the merger, the enterprises concerned must have reported an aggregate turnover of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs, and at least two of the enterprises involved in the transaction must have reported individual turnovers in Switzerland of at least 100 million Swiss francs. In the case of banks, the turnover is calculated based on gross income, and in the case of insurance companies based on gross annual insurance premium.

In addition, once the Swiss Competition Commission (ComCo) has established that a specific enterprise holds a dominant position in a relevant market, each merger transaction involving that enterprise in the market in which it holds a dominant market position – or an adjacent, upstream or downstream market – is subject to the notification requirement.

If one of the above thresholds (ie, turnover or established dominant position) is met, merger filings are mandatory.

Law stated - 06 December 2022

National interest clearance

What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

As there is no generally applicable requirement for obtaining clearance of foreign investments based on national interest, no standard notification procedure is applicable.

The Lex Koller

The application must be filed with the competent approval authority of the canton where the real estate asset is located. An application must usually contain all relevant information with respect to the acquisition and the underlying real estate asset. As the cantons are entrusted with the responsibility and authority to apply and ensure compliance with the Lex Koller, the required format and content as well as the amount of the fees charged depend on the local practice and implementing regulations of the competent cantonal authorities. As a consequence of a failure to file a Lex Koller application, and in the case of transactions that must be registered in the land registry (asset deals), the competent land registry must refuse to register the transfer of ownership and must grant the buyer a (short) deadline to obtain clearance. Otherwise, the authorities typically intervene (by requesting certain information to start investigations) whenever they become aware of the transaction (which may also be post-closing).

The filing of an application for authorisation is mandatory. Failure to file an application and to obtain an authorisation for the acquisition may, among other things, lead to the acquisition being declared null and void.

The Federal Banking Act

Each individual or legal entity must notify FINMA prior to acquiring or selling a direct or indirect qualified participation in a bank organised under Swiss law. Further, in the case of a foreign-controlled bank, the bank must file an application with FINMA for a special licence prior to any change of a foreign holder of a qualified participation.

Law stated - 06 December 2022

Which party is responsible for securing approval?

The Lex Koller

The acquiring person abroad under the Lex Koller is responsible for securing the approval of the acquisition by the competent cantonal authority.

The Federal Banking Act

The individual or legal entity acquiring or selling a direct or indirect qualified participation in a bank organised under Swiss law must notify FINMA prior to this acquisition or sale. The bank itself is also required to notify FINMA of any changes triggering the notification duty of the shareholders when it becomes aware of such a change. A foreign-controlled bank must file an application with FINMA for a special licence prior to any change of a foreign holder of a qualified participation.

Law stated - 06 December 2022

Review process

How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or ‘fast-track’ options?

The duration of the review process depends on the relevant Swiss act applicable in the individual case. However, in virtually all proceedings before Swiss authorities any and all information needed for a specific filing is to be submitted when the actual filing is first made, thereby speeding up the review process as the clock for any applicable review period typically starts running only when the filing is complete.

The Lex Koller

The duration of the review process varies from canton to canton and largely depends on the complexity of the subject matter of the acquisition as well as the composition, organisation and workload of the competent cantonal approval authority. The availability of 'fast-track' options must also be verified separately for every canton. Finally, the willingness to obtain waivers from federal appeal authorities to shorten the impact on the timeline must be assessed on a case-by-case basis.

The Federal Banking Act

The timing of FINMA's approvals or other orders largely depends on its workload. The process for securing a special banking licence in the case of a foreign-controlled bank may take three months. However, if the country of domicile or residence of the foreigner is not a member state of the WTO, the process may take longer as FINMA will have to assess whether the respective country grants the right of reciprocity.

If the acquirer is not a 'foreigner' as defined in the Federal Banking Act, no approval or licence is required and, thus, a statement issued by FINMA is available within a shorter time frame.

The Competition Law

ComCo is required to notify the involved enterprises within one month after the date of receipt of the complete notification as to whether it intends to initiate an in-depth (phase II) investigation. If no notification is made by ComCo within this period, the transaction can be completed. In practice, it is possible to shorten the one-month period in less complex filings if, prior to the filing of the formal notification, a draft filing is submitted to ComCo for its review, thereby enabling ComCo to communicate its position before the lapse of the one-month period.

Law stated - 06 December 2022

Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

As a general rule, the review must be completed before closing of the transaction, unless the applicable Swiss act provides otherwise.

The Lex Koller

The competent cantonal authority must review an acquisition before closing; an acquisition without the required authorisation becomes null and void. Further, actions to reinstate and enforce the legal status, or actions aiming at the dissolution of a legal entity, may be brought by authorities against the parties of the acquisition. In addition, financial penalties and imprisonment may be imposed.

The Federal Banking Act

If a Swiss individual or entity acquires a qualified participation in a bank organised under Swiss law, in theory, only notification obligations are triggered. On the other hand, if a foreign holder of a qualified participation changes, a foreign-controlled bank must apply to FINMA for a special licence. If this bank does not obtain the respective special

licence prior to the closing of the transaction, the potential penalties and consequences for non-compliance can be severe; in particular, the person who missed to file an application intentionally is subject to a monetary fine of up to 500,000 Swiss francs. Further, the Financial Market Supervision Act provides FINMA with various enforcement rights. These include, inter alia, opening an investigation, confiscating any profit that a supervised person or entity or a responsible person in a management position has made through a serious violation of the supervisory provisions, revoking a supervised person's or entity's licence, or withdrawing its recognition or cancelling its registration if it no longer fulfils the requirements for its activity or seriously violates the supervisory provisions. If FINMA has reasonable grounds for suspecting an offence, it may file criminal complaints with the Legal Service of the Federal Department of Finance.

The Competition Law

As a general rule, the consummation of a merger is prohibited until the one-month review period lapses. This provisional ban is lifted if, prior to the lapse of the one-month period, ComCo notifies the enterprises that it regards the concentration as compliant with the Competition Law. Enterprises may face a fine of up to 1 million Swiss francs if they do not comply with the provisional ban. Further, this non-complying enterprise may be required to take measures to reinstate effective competition (eg, by unwinding the transaction or ceasing to exercise effective control).

Law stated - 06 December 2022

Involvement of authorities

Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Swiss authorities are typically responsive to requests for informal guidance, in particular in those cases where the supervised or regulated enterprise already has an existing relationship with the competent authority. In most cases, there is no formal guidance available to applicants. Although there is no specific requirement to have pre-filing dialogues or meetings, early information is appreciated by the competent authorities in more complex transactions.

Law stated - 06 December 2022

When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Usually, neither government relations nor public affairs or lobbying specialists are made use of, although lobbying is not prohibited under Swiss law. The key elements of a successful proceeding are an accurate and complete application when formally filed and that the attorneys in charge of the filing have a good working relationship with the respective authorities.

Law stated - 06 December 2022

What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

If the specific Swiss acts (such as the Federal Banking Act, the Swiss Federal Act on Telecommunications and the

Cartel Act) applicable to a transaction do not require a review of a particular transaction, there is no general Swiss act that would permit the review of this transaction based on national interest grounds.

Law stated - 06 December 2022

SUBSTANTIVE ASSESSMENT

Substantive test

What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The grounds on which a transaction may be cleared, restricted or prohibited differ depending on the Swiss acts applicable to the specific case (which, in turn, depends on the industry sector concerned). Swiss authorities are generally required by law to establish the facts of the case ex officio and obtain evidence by means of the following: official documents, information from the parties, information or testimony from third parties, and inspections and expert opinions. Although the involved parties do not have the burden of proof, the parties may file additional documents and provide further information together with their application.

Law stated - 06 December 2022

To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Swiss authorities are required by law to establish the facts of the case ex officio. While the Federal Act on Administrative Procedure does not contain any generally applicable rule as to when Federal authorities may and shall consult and cooperate with officials in other countries, certain Swiss acts contain rules that deal with these questions. The Financial Market Supervision Act , for instance, provides that the Swiss Financial Market Supervisory Authority (FINMA) may request information from foreign financial market supervisory authorities in order to enforce financial market legislation. In addition, the agreement between Switzerland and the European Union concerning cooperation on the application of their competition laws provides for a framework for closer cooperation regarding their respective enforcement activities.

Law stated - 06 December 2022

Other relevant parties

What other parties may become involved in the review process? What rights and standing do complainants have?

In general, Swiss authorities may consider other parties' concerns when exercising their discretionary power; however, such other parties do not have any specific rights with respect to the proceedings unless specifically stipulated by the relevant act in question. In a proceeding before a federal authority governed by the Federal Act on Administrative Procedure, a person who falls within the definition of a 'party' (being a person whose rights or obligations are intended to be affected by the order and other persons, organisations or authorities who have a legal remedy against the order) has the right to be involved in the proceeding (which, among others, includes the right to be heard and the right to inspect files). In merger control cases governed by the Swiss Federal Act on Cartels and Other Restraints of Competition (the Cartel Act) and the Ordinance on the Control of Concentrations of Undertakings (together with the Cartel Act, the Competition Law), for instance, the Swiss Competition Commission (ComCo) will often send out

questionnaires to customers and competitors soliciting their opinion on a merger filing.

Law stated - 06 December 2022

Prohibition and objections to transaction

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the competent authorities to prohibit or otherwise interfere with a transaction differ depending on the Swiss act applicable to the specific case (which, again, depends on the industry sector concerned). As an example:

Swiss Federal Law on Acquisition of Real Estate by Persons Resident Abroad (the Lex Koller)

The competent cantonal authority must review an acquisition before closing; an acquisition without the required authorisation becomes null and void. Further, actions to reinstate and enforce the legal status, or actions aiming at the dissolution of a legal entity, may be brought by authorities against the parties of the acquisition. In addition, financial penalties and imprisonment may be imposed.

The Swiss Federal Banking Act

If a Swiss individual or entity acquires a qualified participation in a bank organised under Swiss law, in theory, only notification obligations are triggered. On the other hand, if a foreign holder of a qualified participation changes, a foreign-controlled bank must apply to FINMA for a special licence. If this bank does not obtain the respective special licence prior to the closing of the transaction, the potential penalties and consequences for non-compliance can be severe; in particular, the person who missed to file an application intentionally is subject to a monetary fine of up to 500,000 Swiss francs. Further, the Financial Market Supervision Act provides FINMA with various enforcement rights. These include, inter alia, opening an investigation, confiscating any profit that a supervised person or entity or a responsible person in a management position has made through a serious violation of the supervisory provisions, revoking a supervised person's or entity's licence, or withdrawing its recognition or cancelling its registration if it no longer fulfils the requirements for its activity or seriously violates the supervisory provisions. If FINMA has reasonable grounds for suspecting an offence, it may file criminal complaints with the Legal Service of the Federal Department of Finance.

The Competition Law

As a general rule, the consummation of a merger is prohibited until the one-month review period lapses. This provisional ban is lifted if, prior to the lapse of the one-month period, ComCo notifies the enterprises that it regards the concentration as compliant with the Competition Law. Enterprises may face a fine of up to 1 million Swiss francs if they do not comply with the provisional ban. Further, this non-complying enterprise may be required to take measures to reinstate effective competition (eg, by unwinding the transaction or ceasing to exercise effective control).

In sum, if the specific Swiss acts applicable to a particular transaction do not require a review of the transaction, there is no general Swiss act that would permit the review of the transaction based on national interest grounds.

Law stated - 06 December 2022

Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

In general, the competent authority may issue a decision subject to certain conditions and requirements. These conditions or requirements may also contain undertakings of the addressee of a ruling. While the competent authority has fairly wide discretion in stipulating conditions and requirements, these conditions or requirements must be permitted by law (be it explicitly or implicitly) and comply with general constitutional and administrative principles, such as the principle of proportionality.

Law stated - 06 December 2022

Challenge and appeal

Can a negative decision be challenged or appealed?

As a general principle, any decision issued by a Swiss authority (being the first instance) and negatively affecting the addressee may be challenged or appealed either before the competent Swiss superior authority or Swiss courts. In light of the fact that there are no generally applicable Swiss laws on foreign investments, it must be assessed under each specific act applicable to the industry or sector in question as to which appeal body is competent.

Law stated - 06 December 2022

Confidential information

What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Confidential information submitted to the competent Swiss authorities is generally protected by article 320 of the Swiss Criminal Code ; hence, information qualifying as 'confidential' under this provision must not be disclosed to the public. Any person who discloses confidential information confided to him or her in his or her capacity as a member of an authority or as a public official, or that has come to his or her knowledge in the course of execution of his or her official duties, is subject to a custodial sentence not exceeding three years or to a fine.

Further, article 293 of the Swiss Criminal Code also protects secret official proceedings; any person who publishes, without authorisation, information from the files, proceedings or official investigations of an authority, which have been lawfully declared secret by that authority, is subject to a fine.

Law stated - 06 December 2022

RECENT CASES

Relevant recent case law

Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

As there are no generally applicable Swiss laws on foreign investments, there exist no recent cases relevant to foreign investment control that could be discussed here.

Law stated - 06 December 2022

UPDATE AND TRENDS

Key developments of the past year

Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

In recent years, foreign investment review regulations have become common on an international level. This has been due to the fact that both private and government-backed companies from large emerging markets have increasingly made cross-border investments. Their focus has at least partially fallen on companies from developed countries, including Switzerland. This trend has sparked a public debate in Switzerland as to whether it presents a threat to national security owing to the sale of, or foreign influence on, critical infrastructures. Another concern frequently raised is that investments by government-backed companies lead to competitive distortions.

In this context, discussions on the introduction of an investment control regime have also been taken up in Switzerland. In March 2020, the Swiss parliament mandated the Swiss Federal Council to draft legislation for the introduction of a foreign investment control. In May 2022, the Federal Council published a first draft of a foreign investment control bill for consultation. Based on the results of the public consultation, the Federal Council is currently preparing a draft bill for submission to the parliament. The law is not expected to enter into force before 2024.

The key elements of the new regime can be summarised as follows.

- The new regime provides a sector-specific as well as a sector-independent review of acquisitions.
- Sector-specific review:
  - Foreign private investors would only be subject to notification and approval requirements for acquisitions in certain sectors where an acquisition could threaten public order or security. A distinction will be made between acquisitions (1) of companies in sectors traditionally deemed relevant for national security such as the defence industry, operation of power plants or the supply of important security-relevant IT systems for Swiss authorities, and (2) of companies in other sectors in which risks to public order or security cannot be completely ruled out. The latter includes, for example, university hospitals or pharmaceutical companies. For the second category of companies, only acquisitions exceeding a turnover threshold of 100 million Swiss francs must be notified, according to the proposal.
- Sector-independent review:
  - With respect to takeovers by states or state-related companies, it is contemplated that any transaction will have to be notified or approved.
- The law also foresees a de minimis exemption for acquisitions of small domestic companies (excluding companies with less than 50 full-time employees and worldwide annual turnover of less than 10 million Swiss francs in the last two business years).
- Contrary to other investment control regimes, the new review obligations would only apply to the acquisition of direct or indirect control over a company or parts thereof, but not to minority investments. In addition, the new rules would apply to acquisitions of domestic companies. It is unclear whether the acquisition of Swiss subsidiaries of foreign groups of companies will also fall under the scope of application.
- A two-phase review procedure is envisaged, with a short first phase (phase I) to examine whether the acquisition can be approved directly. If not, an in-depth investigation will be initiated in a second phase (phase II). If there are no concerns that the acquisition endangers or threatens public order or security or leads to significant distortions of competition, no in-depth approval procedure would be initiated and the acquisition could be completed. An approval may also be subject to conditions.

- The State Secretariat for Economic Affairs would be responsible for the implementation and coordination of the investment control. If the involved offices were in disagreement about an approval or intended to prohibit an acquisition, the Swiss Federal Council would have to decide.

In sum, the contemplated foreign investment control bill will preserve the openness of Switzerland towards foreign investments, and prepare a well-targeted investment control in order to protect public order and security and ensure effective competition in case of the involvement of foreign states or state-related investors.

In addition, there are also discussions about an amendment to the Lex Koller that would make the acquisition of strategic energy infrastructures (hydropower plants, pipelines for the transport of gaseous fuels, the electricity grid and nuclear power plants) by persons abroad subject to approval. The proposal is currently being discussed in parliament.

Lastly, the Federal Council has also started discussions on a modernisation of the merger control provisions in the Swiss Federal Act on Cartels and Other Restraints of Competition . According to the proposal of the Federal Council, which was published in November 2021, the existing dominance test would be replaced by the Significant Impediment to Effective Competition (SIEC) Test, thereby lowering the threshold for intervention by the Competition Commission. The Federal Council is currently preparing a draft legislation.

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Jurisdictions

Australia	Gilbert + Tobin
Austria	Barnert Egermann Illigasch Rechtsanwälte
Cambodia	Tilleke & Gibbins
Canada	McCarthy Tétrault LLP
Denmark	Bech-Bruun
European Union	Allen & Overy LLP
France	White & Case
Germany	BLOMSTEIN
India	AZB & Partners
Indonesia	Nagashima Ohno & Tsunematsu
Italy	Gianni & Origoni
Japan	Anderson Mōri & Tomotsune
Laos	Tilleke & Gibbins
Malaysia	Nagashima Ohno & Tsunematsu
Mexico	White & Case
Myanmar	Tilleke & Gibbins
Netherlands	Greenberg Traurig LLP
New Zealand	Russell McVeagh
Norway	CMS Kluge
Spain	White & Case
Sri Lanka	Tiruchelvam Associates
Sweden	Bokwall Rislund Advokatbyrå
Switzerland	Lenz & Staehelin
Thailand	Nishimura & Asahi
United Arab Emirates	Afridi & Angell

USA	Cleary Gottlieb Steen & Hamilton LLP
Uzbekistan	Winfields
Vietnam	Tilleke & Gibbins