

Corner stones of new Swiss foreign investment screening regime

The Federal Council has taken its first step towards a Swiss foreign investment screening regime by specifying key elements including a mandatory filing for foreign state or state-affiliated investors when acquiring control of domestic companies and a less extensive scope for private foreign investors. The new regime shall be enforced with a two-phase screening procedure and the appointment of SECO as competent authority.

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Introduction

Led by the Swiss Parliament in 2020, the Federal Council has now published its corner stones of a Swiss foreign investment screening regime. The full draft bill for consultation is announced for late March 2022.

Scope of application

The new foreign investment bill will extensively broaden the scope of mandatory government approval of foreign investments, which is currently limited to specific requirements in few regulated industries and sectors only.

- Relevant Investors: "Foreign companies", regardless of their size and whether they are state-owned, state-affiliated or private, may potentially become subject to the new rules. Whether Swiss subsidiaries of foreign companies will be captured as foreign investors or, alternatively, as relevant targets remains to be seen.

- Relevant Targets: Any Swiss "domestic company" irrespective of its size may potentially be considered as a relevant target under the new regime.
- Relevant Industry Sectors: The notification and approval requirements distinguish between sectors and ownership structures (i.e. whether the investor is state-owned, state-affiliated or private). In particular, foreign investments made by state-owned or state-affiliated foreign investors will be subject to notification and approval in all sectors. For private foreign investors, the Federal Council intends to define specific sectors in which foreign investments may trigger notification and approval requirements.

Notification Trigger: The acquisition of "control" shall trigger the notification requirement. No reference is made to turnover thresholds. Thus, in its current form, all foreign investments would be notifiable provided that they result in an acquisition of control and the requirements set out above are met

Scope of screening

The Federal Council indicated that the objective of the screening shall be the protection of public order and security as well as the prevention of competitive distortions. This includes, for example, threats to essential infrastructures, IT and personal data.

Procedural aspects

The State Secretariat for Economic Affairs ("**SECO**") shall assess the notification in a two-phase screening process – comparable to the existing merger control process. A brief Phase I examination is either followed by clearance of unproblematic transactions or a Phase II in-depth approval procedure. Similar to the merger control regime, the parties to a notifiable transaction are prohibited from closing such transactions prior to completion of the screening or clearance, as applicable.

Additionally, the draft bill will introduce possible exceptions based on bilateral treaties between states.

Practical impact for the industry

Many of the specifics remain unclear at this point, which once more illustrates the Federal Council's scepticism towards a foreign investment regime. The new law will have to define those sectors in which foreign private investments will trigger notification and approval requirements.

However, the corner stones communicated by the Federal Council will pose new challenges for cross-border transactions involving Swiss targets and make them more complex. More specifically, in addition to a potential merger control filing with the Swiss Competition Commission, the parties to a transaction will also have to examine and eventually prepare a foreign investment notification if Swiss targets are involved. The parties will have to address this issue early in the transaction process.



Finally, the Federal Council also regards significant competitive distortions resulting from acquisitions made by state-owned or state-affiliated foreign investors as a potential threat to the Swiss economy. However, it has not specified whether the relevant criteria overlap or exceed the test under the merger control regime. It seems likely that the new regime will introduce an economic reasoning that currently lies beyond traditional antitrust analysis, making it necessary to carefully align a merger control and foreign investment filing if state-owned or state-affiliated foreign investors are involved.

Please do not hesitate to contact us in case of any questions.

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