

Introduction of Foreign Investment Control in Switzerland – Federal Council publishes preliminary draft legislation

As requested by Parliament, the Federal Council has published a preliminary draft legislation for consultation seeking to introduce foreign investment control in Switzerland. With the planned introduction of foreign investment control, Switzerland is following an international trend towards stricter regulation of foreign investments.

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Background

Despite Switzerland being one of the world's largest recipients of foreign investments, it does not yet have a cross-sector regime for the systematic screening of foreign direct investments in place. The newly published preliminary draft legislation seeks to introduce a targeted and administratively lean foreign investment control in Switzerland.

Acquisitions Subject to Approval

The preliminary draft legislation provides for a cross-sector as well as a sector-specific review of acquisitions. It also foresees a de minimis exemption.

The cross-sector review is intended to cover acquisitions by foreign investors that are directly or indirectly controlled by a state entity.

A sector-specific review is proposed to be introduced for acquisitions in certain sectors without restrictions to the type of investor covered (i.e. also including private foreign investors). A distinction will be made between acquisitions (i) 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 (ii) 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 CHF 100 million have to be notified, according to the proposal.

A general exemption (*de minimis*) is foreseen for acquisitions of small domestic companies (with less than 50 full-time employees and worldwide annual turnover of less than CHF 10 million in the past two business years).

According to the preliminary draft legislation, only acquisitions through which an investor directly or indirectly acquires control over a company or parts thereof have to be notified. The concept of control is modeled on competition law. Minority shareholdings without the acquisition of control are therefore not covered.

It is yet unclear whether the acquisition of Swiss subsidiaries of foreign groups of companies will also fall under the scope of application. Further, the preliminary draft legislation seeks to grant the Federal Council the power to exclude acquisitions by foreign investors from certain states from the scope of application of the new screening rules, provided that public order and security are guaranteed.

Approval Procedure

The preliminary draft legislation provides for a two-stage approval procedure.

1. After the foreign investor has submitted a notification to SECO, SECO decides within one month whether the acquisition can be approved directly or whether a more in-depth review procedure must be initiated.
2. If an examination procedure is initiated, SECO shall decide within three months whether to approve the acquisition.

In principle, SECO will have to decide on approval by consensus with other administrative offices that are also interested.

However, pursuant to the preliminary draft legislation, the Federal Council will decide on approval (i) if SECO or another interested administrative office opposes the approval of the acquisition or (ii) if SECO and the other interested administrative offices are of the opinion that the decision is of considerable political significance.

An approval may be subject to requirements or conditions.

If no decision is taken within the applicable time limits (which may be extended under certain circumstances), the acquisition is deemed approved.

Substantive Test

Substantively, the transactions are examined as to whether they endanger or threaten public order or security. According to the preliminary draft legislation, this is the case, for example, if the foreign investor is engaged in activities that have a detrimental effect on the public order or security of Switzerland or other states, or if significant distortions of competition result from the acquisition. The Federal Council grants the authority in charge a wide margin of discretion in examining individual investments.

Remedies

Both an approval and a prohibition will have to be notified to the parties by SECO in writing by issuance of a formal administrative decision. The appeals procedure against such a decision is in principle governed by the general rules on judicial review. However, in cases of considerable political significance, judicial review is limited to compliance with due process rights.

Outlook

The consultation period for the bill will last until September 9, 2022. Based on this, the Federal Council will prepare the draft legislation and probably submit it to Parliament next year. The law is not expected to enter into force before 2024.

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

Legal Note: The information contained in this Update is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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