Foreign Investment Review

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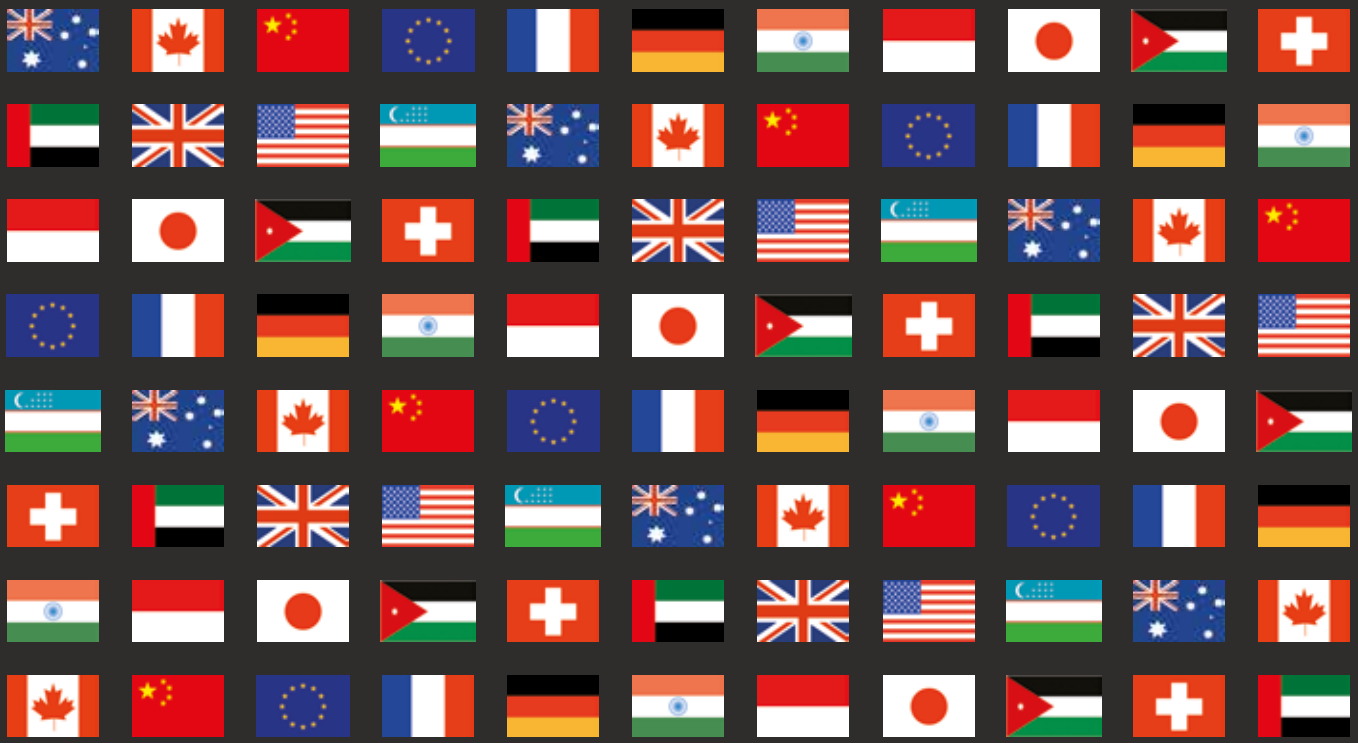

2019

GETTING THE DEAL THROUGH

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Foreign Investment Review 2019

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Preface

Foreign Investment Review 2019

Eighth edition

Getting the Deal Through is delighted to publish the eighth edition of *Foreign Investment Review*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new article on the European Union.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
December 2018

Switzerland

Stephan Erni, Astrid Waser and Eric Olivier Meier

Lenz & Staehelin

Law and policy

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

There are no generally applicable Swiss acts (such as catch-all rules in foreign trade legislation) that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest regardless of the industry sector. Foreign investments are, in principle, not hampered by significant barriers and there are no substantial discriminatory effects on foreign investors or foreign-owned investments in Switzerland. However, foreign investments in companies engaged in certain regulated industries and sectors in Switzerland (such as banking services or owning or operating real estate properties) might require governmental permission or approval. Further, with respect to certain state-licensed undertakings and services such as the telecommunications or nuclear energy sectors, granting a state licence to a foreign undertaking (or to an undertaking with foreign investors) may, among other things, depend on whether reciprocal rights are granted in the country of the respective undertaking or investor. In light of Switzerland's rather relaxed policies of benevolent non-interference towards foreign investment and because of its economic and political stability, transparent and fair legal system, reliable and extensive infrastructure and efficient capital markets, it is fair to say that Switzerland is a highly attractive destination for foreign investors.

For state-licensed undertakings and services, no distinctions are generally made between foreign and domestic applicants. However, with respect to certain state-licensed undertakings and services such as the telecommunications or nuclear energy sectors (see question 3), granting a state licence to a foreign undertaking (or to an undertaking with foreign investors) may, among other things, depend on whether reciprocal rights are granted in the country of the respective undertaking or investor. In addition, certain local permissions and authorisations are issued on a cantonal (state) level and need to be assessed on a case-by-case basis as to whether the grant of, for example, a cantonal licence in a given sector might depend on the nationality or foreign residence or domicile of the applicant.

With regard to currency regulations and exchange controls no controls exist on inbound investments or the repatriation of profits and capital on disinvestments.

The fact that Switzerland is frequently used as a location for international headquarters, trading companies and other entities coordinating international functions and sales (principal companies, shared services and logistics centres, R&D facilities, etc) is evidence that the above-mentioned liberal policy in relation to foreign investments is attractive. Such firms are, in principle, treated in the same way as Swiss companies, but can often benefit from special tax incentives. The federal government allows all the 26 cantons (states) to set their own foreign investment attraction policies within a set framework. For practical project support, investors may appreciate the assistance given by the cantonal economic development agencies.

2 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?

As mentioned in question 1, there are no generally applicable Swiss acts that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest, regardless of the industry sector. The main laws generally governing (foreign and non-foreign) investments in Switzerland are:

- the Swiss Code of Obligations; and
- the Swiss Federal Act on Cartels and Other Restrictions 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);
- 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).

Generally, state-licensed sectors, where all (foreign and non-foreign) applicants for a state licence are subject to review by the Swiss government and authorities, are, among other things, the following:

- 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.

3 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?

So far, most Swiss laws concerning investments or transactions in Switzerland make no general distinction between foreign and domestic investments or transactions. Most of the above sectors (see question 2) are regulated industries and, thus, any (foreign and non-foreign) investment may be subject to a review and possibly an approval requirement. Given that there is no generally applicable Swiss act that prohibits or requires a specific screening or approval of foreign investments in Switzerland on the basis of national interest regardless of the industry sector, in question 3 we will describe the main scenarios in the above-mentioned industries (see question 2) where the national interest, in general, can decide whether or not a transaction or investment is approved by the competent authority.

The Lex Koller
The acquisition of real estate in Switzerland by foreign investors or foreign-controlled companies is subject to rather strict restrictions under the Lex Koller, in particular if residential or other non-commercial property is concerned. Hence, the qualification of real estate from a Lex Koller standpoint is important, since 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, authorisations to foreign investors or foreign-controlled companies to acquire residential properties are granted on rather limited grounds. Restrictions affecting the acquisition of properties used for commercial purposes concern commercial premises that (i) contain residential parts or areas, (ii) contain land reserves on construction land, (iii) are empty, or (iv) 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 the acquisition 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 not allowed. Thus, the concept of an 'acquisition' under the Lex Koller is defined broadly 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 that investments in residential real estate can be achieved by foreign investors (eg, in collaboration with a Swiss partner in the context of a joint venture, who would retain effective control over the joint investment).

EU and EFTA nationals with residence in Switzerland or other third-country nationals with a valid residency authorisation (C permit) can acquire residential properties without any restriction.

Finally, the Swiss Federal Council is required to prohibit a transaction involving real property if such acquisition endangered the national policy interests. While no statistics regarding actual prohibition by the Swiss Federal Council are available (since this is very sensitive and confidential information), the Swiss Federal Council exerts its broad discretion judiciously in that respect and does not unreasonably reject a transaction.

Banking law
If foreign nationals directly or indirectly hold more than half of the voting rights of, or have, otherwise, a controlling influence on, a bank incorporated under the laws of Switzerland, then the granting of the banking licence is subject to additional requirements. In particular, the corporate name of a foreign-controlled Swiss bank must not indicate or suggest that the bank is controlled by Swiss individuals or entities and the countries where the owners of a 'qualified participation' in a bank have their registered office or their domicile must grant 'reciprocity', that is:

- Swiss residents and Swiss entities must have the possibility to operate a bank in the respective country; and
- such banks operated by Swiss residents are not subject to more restrictive provisions compared to foreign banks in Switzerland.

The reciprocal requirement is subject to any obligations to the contrary in governmental treaties and it is thus, in particular, not applicable to the member states of the World Trade Organization (WTO). Furthermore, the Swiss Financial Market Supervisory Authority (FINMA) may request that the bank is subject to adequate consolidated supervision by a foreign supervisory authority if the bank forms part of a group active in the financial sector.

If a bank incorporated under the laws of Switzerland becomes foreign-controlled as described above or if, in the case of a foreign-controlled bank, the foreign holders of a direct or indirect qualified participation in the Swiss bank change, then a new special licence for foreign-controlled banks must be obtained prior to such event (see article 3(2) of the Federal Banking Act).

A participation is deemed to be a 'qualified participation' if it amounts to 10 per cent or more of the capital or voting rights of the bank or if the holder of the participation is otherwise in a position to significantly influence the business activities of the bank. In practice, FINMA often requires the disclosure of participations of 5 per cent or more for its assessment of whether or not the requirements of a banking licence are continuously met.

The Telecommunications Act
Subject to any international obligations to the contrary, the licensing authority may refuse to grant radio communication licences to companies incorporated under foreign law unless reciprocal rights are granted to Swiss citizens or Swiss companies by the respective foreign states (see article 23(2) of the Telecommunications Act).

The Nuclear Act
Similar to the situation under the Telecommunications Act, subject to any international obligations to the contrary, the licensing authority may refuse to grant general licences to companies incorporated under foreign law unless reciprocal rights are granted to Swiss citizens or Swiss companies by the respective foreign states (see article 13(2) of the Nuclear Act). In addition, a foreign company must have a registered subsidiary in Switzerland.

The Radio/TV Act
In the absence of any international obligations to the contrary, a legal person controlled from abroad, a domestic legal person with foreign participation or a natural person without Swiss citizenship may be refused the broadcasting licence if the corresponding foreign state does not guarantee reciprocal rights to a similar extent to Swiss natural persons and companies (see article 44(2) of the Radio/TV Act).

The Aviation Act
Similar to the situation under the Telecommunications Act, the licensing authority may refuse to grant licences for the professional transport of passengers or goods to companies incorporated under foreign law unless reciprocal rights are granted to Swiss citizens or Swiss companies by the respective foreign states (see article 29(3) of the Aviation Act).

Further, regarding the licence to operate an undertaking headquartered in Switzerland and engaged in the aviation business for the professional transportation of passengers and goods, the Swiss Federal Council may determine to what extent such undertaking needs to be under the control of Swiss citizens (see article 27(1) of the Aviation Act). Following article 103(1)b of the Swiss Aviation Ordinance – and subject to intergovernmental agreements pursuant to which Swiss and foreign individuals or companies are to be treated equally – it is required that a Swiss headquartered undertaking is under actual control of Swiss citizens and that a majority share of such undertaking is owned by Swiss citizens. Where an aviation undertaking organised in the form of a Swiss stock corporation is concerned, more than half of the share capital must exist in the form of registered shares of which the majority is owned by Swiss citizens or by other Swiss-controlled trading companies or cooperatives – again subject to intergovernmental agreements pursuant to which Swiss and foreign individuals or companies are to be treated equally (see article 103(1)c of the Swiss Aviation Ordinance).

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 (except under the Lex Koller where the main goal is actually to avoid the 'selling off of the Swiss homeland' and where the Swiss Federal Council may, in its discretion, take into account national policy interests). As it would go beyond the scope of this overview to answer the following questions with respect to all industries and sectors we focus on those industries and sectors (namely the banking and the real estate industry), which we believe are those where the most foreign investments occur.

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

There is no definition of 'foreign investor' or 'foreign investment' that is generally applicable under Swiss law. Rather, each Swiss act that refers to these (or similar) terms and concepts, in the vast majority of cases, contains a specifically applicable definition, which fits the purpose of the relevant Swiss act.

The Lex Koller
Foreigners (individuals as well as companies) resident or based abroad, or companies based in Switzerland controlled by foreigners, are considered 'persons abroad'. Foreigners resident in Switzerland who are not citizens of a member state of the European Union or the European Free Trade Association, or persons who do not have a valid Swiss residency authorisation (C permit) are also considered as such. The law also applies to a buyer that is itself not subject to the Lex Koller but that wishes to buy real estate on behalf of a 'person abroad' according to the Lex Koller.

Banking law
For the purposes of the Federal Banking Act, a 'foreigner' is:
- an individual who is not a Swiss citizen and has no permanent residence permit for Switzerland; or
- a legal entity or partnership that has its registered office outside of Switzerland or, if it has its registered office within Switzerland, is controlled by individuals as defined above.

5 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 specific regulation exists for investments made by SWFs or foreign SOEs in Swiss legislation.

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

In light of the fact that there is no generally applicable Swiss act which prohibits or requires a specific screening or approval of foreign investments in Switzerland on the basis of national interest grounds, regardless of the industry sector, there is no single competent Swiss authority to review mergers or acquisitions on national interest grounds. The competence of a specific authority rather depends on the industry or sector in which the merger or acquisition takes place.

If, for example, a bank incorporated under the laws of Switzerland is concerned, the competent authority is FINMA. If, for example, real estate property is acquired, the Lex Koller provides that each canton has its own approval authority responsible for the granting of authorisations to acquire real estate located in the corresponding canton by 'persons abroad' (see question 4 for the respective definition). Furthermore, the Swiss Federal Council may, upon request of the cantonal government, order an exemption (and authorise an acquisition that would otherwise be prohibited) 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 that would be triggered on national interest grounds, any transaction (including statutory mergers of previously independent enterprises, acquisition of control over a previously independent enterprise and acquisition of joint control over an enterprise) that meets the respective thresholds must be notified to the Swiss Competition Commission (the ComCo).

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

The prerequisites for obtaining a licence or approval from the Swiss government or competent Swiss authorities are exhaustively set out in the respective laws and regulations. The Swiss government and the competent Swiss authorities retain, however, a certain degree of discretion to determine whether all of the individual prerequisites are sufficiently met and, as a consequence, to approve or reject a request for a licence or authorisation, among others, on national interest grounds.

Procedure

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

Again, in light of the fact that there is no generally applicable Swiss act that prohibits or requires a specific screening or approval of foreign investments in Switzerland on the basis of national interest (regardless of the industry sector), there are no generally applicable thresholds that trigger a review. The relevant Swiss acts – whose applicability does not necessarily depend on national interest grounds – do contain specific thresholds and triggering requirements.

The Lex Koller
Any acquisition (or actions that qualify as an 'acquisition' within the broad meaning of the Lex Koller) of residential real estate assets in Switzerland is subject to the Lex Koller if the acquiring person qualifies as a 'person abroad' according to the Lex Koller (see question 4). 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.

Banking law
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. 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 once it becomes aware of such a change.

In the case of a foreign-controlled bank, prior to any change of a foreign holder of a 'qualified participation' (see question 3), the bank must apply with FINMA for a special licence. 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 test applied to mergers (see question 6 for a definition of mergers) under the Competition Law is based on turnover (but not on national interest grounds). The thresholds to be met are that, 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 on gross income, and in the case of insurance companies, the gross annual insurance premium is relevant.

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

If one of the above thresholds is met, merger filings are mandatory.

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

As mentioned above, there is no general national interest clearance of transactions or other investments that is generally required in Switzerland regardless of the concerned industry sector; hence, no standard notification procedure is applicable.

The Lex Koller
The application must be filed with the competent cantonal approval authority in the canton where the real estate asset is located. Predominantly, an application must contain any relevant information with respect to the acquisition and the underlying real estate asset. Since the cantons are entrusted with the responsibility and power to apply and ensure compliance with the Lex Koller, the required format and content of Lex Koller filings as well as the amount of the charged fees depend on the local practice of the competent canton. If no application was filed, for 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 can also be post-closing).

Banking law
Each individual or legal entity must notify FINMA prior to acquiring or selling a direct or indirect 'qualified participation' in a bank organised under the laws of Switzerland. Further, in the case of a foreign-controlled bank, prior to any change of a foreign holder of a qualified participation, the bank must apply to FINMA for a special licence (see also question 8).

10 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 authority.

Banking law
The individual or legal entity acquiring or selling a direct or indirect qualified participation in a bank organised under the laws of Switzerland must notify FINMA prior to such acquisition or sale. The bank itself is also required to notify FINMA of any changes triggering the notification duty of the shareholders once it becomes aware of such a change. In the case of a foreign-controlled bank, prior to any change of a foreign holder of a qualified participation, the bank must apply to FINMA for a special licence (see question 3).

11 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 specific industry (see below for further information). What is true, in principle, for all filings with Swiss authorities is that all information needed for a specific filing is submitted to the competent authority when the actual filing is first made. Thereby, the review process is speeded up as the clock for any applicable review period typically starts running only when the filing is complete.

The Lex Koller
With respect to 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, the composition, organisation and the workload of the competent cantonal approval authority in charge of the decision. The availability of 'fast-track' options must also be checked separately for every canton as well the willingness to obtain waivers from the federal appeal authorities to shorten the impact on the timeline of the transaction.

Banking law
The timing of the approvals or statements by FINMA, in principle, largely depends on the workload of FINMA. The process for a special banking licence in the case of a foreign-controlled bank may take three months. If, however, the country of domicile or residence of the foreigner is not a member state of the WTO, the process may take much longer. In such a case, FINMA will have to assess whether the respective country grants the right of reciprocity.

If the acquirer is not a foreigner, there is no formal approval or licence required and, thus, a statement from FINMA is available within a shorter time frame.

The Competition Law
The 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 investigation. If, within such period, no notification is made by the ComCo, the merger 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 the ComCo for review, thereby enabling the ComCo to communicate its position before the lapse of the one month period.

12 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 the parties can close the transaction, unless the applicable act provides otherwise.

The Lex Koller
The review of an acquisition under the Lex Koller must be completed before the parties can consummate the transaction; an acquisition without the necessary authorisation becomes null and void. Further, actions to reinstate and enforce the legal status, or actions aiming at the dissolution of a legal entity by authorities may be brought against the parties of the acquisition (see question 15). In addition, financial penalties and imprisonment are possible.

Banking law
While the acquisition of a qualified participation in a bank by a Swiss individual or entity triggers, in theory, only notification obligations, a foreign-controlled bank must apply to FINMA for a special licence (see question 3) in the case of any change of a foreign holder of qualified participation. If the respective special licence is not obtained prior to the closing of the transaction, the potential penalties and consequences for non-compliance can be severe; if, for example, the required notification to FINMA is intentionally not made, the person who should have filed can be punished with a monetary fine of up to 500,000 Swiss francs. Further, under the Financial Market Supervision Act, FINMA has various enforcement rights available to it that may consist, among other things, of opening an investigation, the confiscation of 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, the revocation of the licence of a supervised person or entity, or the withdrawal of its recognition or cancellation of 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 lapse of the review period (see question 11). Such provisional ban does not apply if, prior to the lapse of such one-month period, the 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, such non-complying enterprise may be required to take measures to reinstate effective competition (eg, by unwinding the transaction or by ceasing to exercise effective control).

13 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 has an existing relationship with the competent authority already. Formal guidance on which one can rely is in most cases unavailable. Though there is no specific requirement to have pre-filing dialogues or meetings, in more complex transactions in particular early information is appreciated by the competent authorities.

14 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. Lobbying is, however, not prohibited under Swiss law. The key element is that the applications with the competent authorities are accurate and complete when filed and that attorneys in charge of the filing have a good working relationship with the respective authorities.

15 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 Telecommunications Act, the Cartel Act, etc, see question 3) 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 such transaction based on national interest grounds.

Update and trends

Although there are rising discussions on a European level (the European Commission issued a proposal in 2017 for a regulation establishing a framework for screening foreign direct investments into the European Union), a fair number of Swiss politicians have become increasingly concerned about the (mostly) unrestricted access of foreign nationals and investors to direct investments into Switzerland. Among recent developments are multiple inquiries to the Swiss parliament. Three interpellations concerned acquisitions of Swiss companies by Chinese investors. In one case, the question was whether investment reciprocity exists and is of use to Switzerland in China. Two other interpellations raised the question of whether these takeovers are a threat to Switzerland's economic or foreign policy interests. Another inquiry mandated the Swiss Federal Council to examine and report on whether to take measures against foreign acquisitions in general; the results of this evaluation have not yet been published. Lastly, a motion instructing the Swiss Federal Council to create an approving authority for foreign direct investments is pending in the Swiss parliament. However, the Swiss Federal Council rejected the motion with the Swiss Minister of Economic Affairs saying he sees no necessity for any new laws or regulations in this regard.

In 2017, the Swiss Federal Council had proposed tightening the Lex Koller provisions. On the one hand, the proposed amendments to the existing Lex Koller regime aimed at closing remaining gaps in the law and to clarify certain controversial practical questions. On the other hand, the Swiss Federal Council again brought up 'for discussion' certain fundamental restrictions, which had been rejected by the Swiss parliament in 2014. Owing to considerable criticism from most of the political parties and interest associations during the consultation procedure, the legislative project was abandoned by the Swiss Federal Council in June 2018. From today's perspective, it therefore appears unlikely that any amendments to the Lex Koller will occur in the near future.

Regarding the substantive test in merger control proceedings under the Competition Law, the Swiss government is currently analysing a proposal according to which Switzerland would switch from the currently applied CSDP (creation or strengthening of a dominant position that eliminates effective competition) to the stricter SIEC (significant impediment to effective competition) test applied in the European Union. It is expected that the Swiss government will submit a proposal to introduce the SIEC test to the Swiss parliament. The time frame is currently unknown.

On 10 June 2018, the Swiss electorate voted on the Swiss Federal Act on Gambling (the Gambling Act), which will replace the Swiss Federal Act on Casinos and the Swiss Federal Act on Lotteries currently in force. The Gambling Act provides for various licensing requirements. In particular, the operation of a casino requires a concession that is only granted by the Swiss Federal Council if the company is a stock corporation established under Swiss law. Furthermore, the access to online gambling operated by entities having their registered seat abroad shall be blocked if such gambling offers are not licensed pursuant to the Gambling Act. The exact entry into force of the Gambling Act is currently unknown.

Substantive assessment

16 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 industry sector concerned. Swiss authorities are, by law, required to establish the facts of the case ex officio and generally obtain evidence by means of the following: official documents, information from the parties, information or testimony from third parties, and inspections and expert opinions. Though the involved parties do not have the burden of proof, the parties may, of course, file additional documents and provide further information together with their application.

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

Swiss authorities are by law required to establish the facts of the case ex officio (see question 16). While the Federal Act on Administrative Procedure does not contain any general applicable rule as to when authorities may and shall consult and cooperate with officials in other countries, there are rules contained in specific acts that deal with such questions. The Federal Act on the Swiss Financial Market Supervisory Authority (article 42(1)) provides, for instance, that FINMA may ask foreign financial market supervisory authorities to provide information in order to implement the financial market acts. 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 of their respective enforcement activities. See question 22 in relation to applicable safeguards to protect confidential information.

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

In general, Swiss authorities may take other parties' concerns into account when exercising their discretionary power; however, such other parties do not have any specific rights with respect to the proceedings unless the relevant act in question specifically sets out such rights. In a Swiss authority proceeding a person who – according to the Federal Act on Administrative Procedure – falls within the definition of a 'party' (being a person whose rights or obligations are intended to be affected by the ruling and other persons, organisations or authorities who have a legal remedy against the ruling) has a right to be involved in the proceeding (which, among others, includes the right to be heard, the right to inspect files, etc). In merger control cases, for instance, the ComCo will often send out questionnaires to customers and competitors soliciting their opinion on a filed merger.

19 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 among the various industry sectors. See questions 12 and 15.

20 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, a decision of a competent authority can be issued subject to certain conditions and requirements. Such conditions or requirements may also contain undertakings of the addressee of a ruling. While the competent authority has quite wide discretion, it is required that a condition or a requirement is permitted by law (be it explicitly or implicitly) and complies with the principle of proportionality.

21 Can a negative decision be challenged or appealed?

As a general principle, any negative decision of a Swiss authority (being the first instance) may be challenged or appealed via the competent Swiss superior authority or the competent Swiss courts. In light of the fact that there is no generally applicable Swiss act that prohibits or requires a specific screening or approval of foreign investments in Switzerland on the basis of national interest regardless of the industry sector, it must be assessed under the specific act applicable to the industry or sector in question as to which authority is the superior authority.

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

Confidential information transmitted to the competent authorities for review and clearance is generally protected under Swiss criminal law (article 320 of the Swiss Criminal Code); hence, such confidential information must not be disclosed to the public. Any person who discloses secret information that has been 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 execution of his or her official duties, is liable to a custodial sentence not exceeding three years or to a monetary penalty.

Further, the confidentiality of secret official proceedings is also protected under Swiss criminal law (article 293 of the Swiss Criminal

Code); any person who without authorisation publishes information from the files, proceedings or official investigations of a public authority that have been declared secret by that authority, in accordance with its powers, is liable to a fine.

Recent cases

23 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 acts that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest regardless of the industry sector, no cases are discussed here.

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