

# Kluwer Competition Law Blog

## Swiss Foreign Investment Control on the Horizon – Federal Council Issues Preliminary Draft Legislation

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Switzerland is one of the world's largest recipients of foreign investments – but does not yet have a general regime for the systematic screening of foreign investments.

As mandated by Parliament, the Federal Council, the Swiss government, has now issued a preliminary draft legislation for public consultation proposing to introduce a foreign investment regime in Switzerland. With the proposed introduction of foreign investment control, Switzerland is following an international trend towards stricter regulation of foreign investments.

### Background

With the published preliminary draft legislation, the Federal Council is implementing a motion submitted by Beat Rieder in February 2018 to the Council of States, one of the chambers of Parliament, which aimed at introducing a foreign investment regime. The Federal Council had requested Parliament to reject the motion, arguing that the introduction of foreign investment control was “*neither expedient nor necessary*“. Despite the negative recommendation of the Federal Council, the motion was subsequently adopted by both chambers of Parliament, thus mandating the Federal Council to draft a legal basis to introduce foreign investment control in Switzerland.

The Federal Council continues to oppose the introduction of a foreign investment regime. Its preliminary draft legislation, which has now been published, accordingly provides for a targeted and administratively lean regime. Together with the proposed legislation, the Federal Council has issued an explanatory report and an impact assessment report.

### Scope of application

The proposed regime applies to (1) the acquisition of control over (2) Swiss undertakings by (3) foreign investors.

1. Same as in competition law, an acquisition of control is any transaction by which one or more investors directly or indirectly acquire control over an undertaking or parts thereof. Unlike in

some other states, the mere acquisition of minority shareholdings is not subject to review. However, in case of a publicly held company, for example, a share of 20 or 30 percent of the voting rights may be sufficient to acquire control, if there is a dispersed ownership structure.

2. As regards the definition of “Swiss undertaking”, the preliminary draft legislation presents two alternatives for discussion in the public consultation. According to the broader definition, any entity registered in the Swiss commercial register is considered a Swiss undertaking. In contrast, the narrower definition excludes entities from the scope of application that are part of a group of companies which has its registered office and head office outside Switzerland.
3. An investor is “foreign” if it has its registered office and head office outside Switzerland or is controlled by one or more persons abroad or by a foreign state or – in case of a natural person (with exceptions) – does not have Swiss citizenship. The preliminary draft legislation enables the Federal Council to agree to reciprocal exemptions with other states, provided that public order and security are safeguarded.

### **Acquisitions subject to approval**

The preliminary draft legislation provides for a cross-sector as well as a sector-specific review, with a *de minimis* exemption applicable in both cases.

The cross-sector review applies to any acquisition by a foreign investor that is directly or indirectly controlled by a state entity, whereby the sector-specific review applies also to private foreign investors in case of acquisitions in certain sectors. Regarding the sector-specific review, a distinction is made between acquisitions of (i) undertakings active in sectors traditionally deemed relevant for national security such as the supply of defence equipment, the operation of power plants or the supply of important security-relevant IT systems for Swiss authorities; and (ii) undertakings operating critical infrastructure such as university hospitals, railroad infrastructure or important food distribution centres. For the latter (ii), only acquisitions exceeding a turnover threshold of CHF 100 million have to be notified, according to the proposal.

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

### **Approval procedure**

The foreign investor must submit a notification to the State Secretariat for Economic Affairs (SECO) before the acquisition is completed. Following the notification, the SECO has to decide within one month (phase I) whether the acquisition can be approved or whether an in-depth review has to be initiated. If an in-depth review (phase II) is initiated, the SECO has another three months to examine the planned acquisition in more detail and to decide on approval.

With the exception of cases of minor importance, the SECO must decide on an approval in agreement with the so-called co-interested administrative units, which differ from case to case, and after consulting the Federal Intelligence Service. An approval can be made subject to requirements or conditions.

The Federal Council decides on approval (i) if the SECO or another co-interested administrative unit opposes the approval of the acquisition or (ii) if the SECO and the other co-interested administrative units are of the opinion that the decision is of significant political importance.

If no decision is taken within the applicable time limits, the acquisition is deemed to be approved. However, the SECO may extend the deadlines if the parties have obstructed the review or if required information from a foreign authority is outstanding.

### **Approval criteria**

In the approval procedure, the competent authority examines whether the acquisition could endanger or threaten public order or security. The preliminary draft legislation provides for a list of approval criteria that must be taken into account in particular. These include, for example, whether the foreign investor engages in espionage, whether it is subject to sanctions, whether it might gain access to sensitive data or whether the acquisition could result in significant distortions of competition. The list of approval criteria is not exhaustive.

Vague legal terms such as “public order and security” give the authority wide discretion in its assessment. The understanding of what constitutes “public order and security” is also constantly evolving. Therefore, the introduction of a foreign investment regime would lead to more legal uncertainty. However, the SECO is required to publish an annual report with aggregated information on the reviews conducted, which might help mitigate the legal uncertainty.

### **Judicial protection**

The preliminary draft legislation provides for the decisions to be communicated to the foreign investor and the Swiss undertaking by the SECO, even in cases where the Federal Council decides on approval. Through this mechanism, the foreign investor and the Swiss undertaking are given the right to appeal, which would otherwise not be possible against decisions of the Federal Council (unless expressly permitted by law). However, unlike under general administrative procedural law, the right to appeal does not apply to affected third parties. In addition, in cases of significant political importance, judicial review is limited to examining whether procedural safeguards have been observed or whether there has been an abuse of discretion.

### **Outlook**

The public consultation period for the preliminary draft legislation lasts until 9 September 2022, after which the Federal Council will prepare an updated draft and submit it to Parliament for debate. Considering the current political climate, it seems likely that Parliament will adopt – in one form or another – a law introducing foreign investment control in Switzerland. It remains to be seen what form the final legislation will have.

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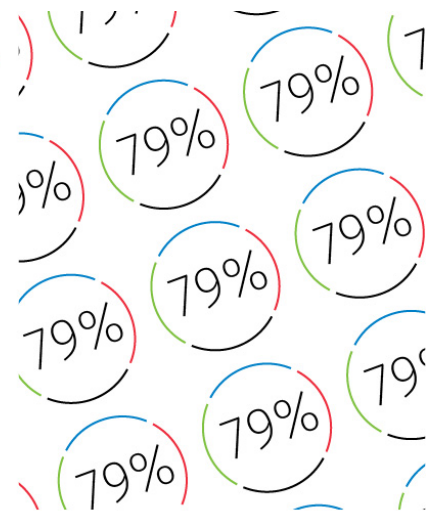
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