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Latest developments on direct foreign investment controls in Switzerland

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Direct foreign investments in Swiss companies are currently not subject to state approval. This is in contrast with the majority of EU and all G7 member states, which have established foreign investment controls in recent years.

Until now, the Federal Council has considered that it is not necessary to regulate foreign investment controls by law due to the existing rules in place and in the interest of economic development. However, in response to political pressure, the federal government has been tasked with the development of a draft law in this regard, the main characteristics of which were presented on 25 August 2021. A final draft of a new federal law is not expected before spring 2022.

1. Background

In order to protect Switzerland's competitiveness and attractiveness as a business location, National Councillor Rieder asked the Federal Council to create a legal basis to regulate the acquisition of Swiss companies by foreign investors through a motion that was submitted in February 2018 ("Rieder Motion").

In a statement of May 2018 and a detailed report of February 2019, the Federal Council argued that it was not necessary to introduce investment controls due to the high amount of direct foreign investments and the large number of workers employed in Switzerland by subsidiaries of foreign corporations. Moreover, the Federal Council indicated that the majority of companies that provide critical services, such as passenger transport or postal and telecommunications services, are already owned by the state. Regarding systemically important banks, the Federal Council considers that the supervisory authority FINMA has sufficient control mechanisms in place to adequately protect the Swiss economy.

Unimpressed by the Federal Council's stance, both the Council of States in June 2019 and the National Council in March 2020 adopted the Rieder Motion and instructed the Federal Council to prepare a draft law on foreign investment controls.

2. Intended investment controls

2.1 Possible scenarios

As the Federal Council has so far refused to introduce investment controls through legislation, it emphasized in its media release dated 25 August 2021 ("Media Release") that Switzerland's openness to foreign investors and the attractiveness of Switzerland as a business location must be taken into account if such controls are to be introduced. The Federal Council stated that the endangerment of companies by foreign state-owned or state-related investors is to be feared, but that private foreign investors could also fall under the obligations to notify and to seek an authorization. The relevant requirements in this regard will have to be defined more precisely within the draft law, as will the definitions of a "domestic company" and a "takeover".

The Media Release does not comment on the circumstances under which a notification and approval obligation will apply, which could include factors such as the amount invested, the new ownership structure of the concerned Swiss company or the origin and type of financing. The focus of the intended investment control measures is on Swiss companies:

- that provide essential services that cannot be replaced within a short period of time;
- that supply essential armament components for the Swiss Armed Forces or for international space infrastructures in which Switzerland participates;
- that provide essential security-relevant IT systems for state authorities;
- that provide access to particularly sensitive personal data that could be obtained by criminal actors;
- whose acquisition by a foreign state or state-related investors would lead to a significant distortion of competition.

2.2 Two-step assessment procedure

The assessment of whether an intended investment requires approval is to take place in one or two steps.

In the first step, under the direction of the State Secretariat for Economic Affairs (SECO), an authority will, within a short period, need to evaluate whether the proposed investment requires an in-depth approval procedure in a second step. This is the case if there are concerns that the investment could endanger public order or security or lead to significant distortions of competition. If this is not the case, the second step is not necessary and the investment can take place.

If the authorities involved in the first step disagree as to whether or not the aforementioned conditions are met, the Federal Council makes the final decision. This two-stage review process is essentially in line with the foreign investment control models in place in many countries.

3. Conclusion and outlook

These developments in the area of foreign investment controls come as no surprise in light of recent international events. The Media Release only outlines the content of the planned controls on foreign investments in broad strokes. In the interest of legal certainty, there is reason to hope that the requirements and the steps of the two-stage assessment procedure will be clearly defined. As a large number of actors are involved in major M&A transactions, it is all the more important to quickly clarify whether a notification requirement will apply, as the consequences of non-compliance will be very drastic.

The Cartel Act provides for a comparable obligation to notify the Federal Competition Commission (COMCO) if certain turnover thresholds are exceeded in the case of an intended merger of two companies. In the future, it will be necessary to clarify if a parallel foreign investment control procedure will need to take place as well as the potential effects on a transaction.

The draft foreign investment control law, which is not expected before the end of March 2022, will be followed by a consultation period and then by parliamentary debates. At this point in time, it is not yet possible to assess whether parliament will introduce foreign investment controls. In view of the political controversy surrounding this topic, the debates in the Federal Parliament are likely to drag on for some time.

Please do not hesitate to contact us if you have any questions about foreign investment controls in Switzerland.

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