

Switzerland to introduce foreign direct investment legislation: overview

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Introduction

Switzerland currently does not have a legal mechanism for the systematic review of foreign direct investments, despite the important role that foreign investments play in Switzerland's open economy. However, the open approach to foreign direct investment has been questioned in recent years.

In February 2018 Beat Rieder, a Swiss member of Parliament, handed in a motion which demanded that the federal government create the legal basis for investment control of foreign direct and indirect investments. After the adoption of the motion by the Swiss Parliament, the government presented a first draft of the Federal Act on the Control of Foreign Investments, or the Investment Control Act (ICA), in May 2022. When this article outlines the objectives and content of the ICA, reference is always made to the draft legislation provided by the federal government. The draft legislation will soon be debated in parliament and is, thus, still subject to change. It is not yet foreseeable when the new law will enter into force.

The aim of the ICA is to prevent takeovers of domestic enterprises by foreign investors, which jeopardise the public order or security. The investment review is aimed to be deliberate, effective and administratively streamlined. The government also stresses the importance of a high degree of transparency, predictability and legal certainty.

Scope of application

Geographically, the ICA will apply to any takeover of a Swiss private or public enterprise by a foreign investor. However, the ICA states that it also applies to "facts occurring abroad, if they have effects in Switzerland". While the exact implications of this rather vague provision is not yet fully clear, it is for instance possible that takeovers of foreign companies with Swiss branch offices may come under review.

A "takeover" is defined as any procedure through which a foreign investor directly or indirectly acquires control over a domestic enterprise or a part thereof. The term "control" covers not only the purchase of shares, but also the purchase of all or substantially all assets. According to the draft legislation's explanatory report, the general threshold for a foreign investor to obtain control is a participation of at least 50% of the share capital or voting rights. Specific thresholds may, however, apply for listed companies.

A "foreign investor" is defined as:

- an enterprise whose registered office and head office are outside Switzerland;
- an enterprise which is controlled by one or more persons abroad or by a foreign state; or
- a person without Swiss citizenship who acts as a direct investor (exceptions apply in connection with EU/European Free Trade Association residents).

Takeovers subject to approval

The ICA differentiates between foreign private investors and foreign state or state-affiliated investors. The legislation's main concern seems to be state-affiliated investors.

Foreign state or state-affiliated investors are, thus, subject to an unrestricted investment control and their takeovers must always be approved. Exceptions may, however, apply if the target company does not meet certain economic thresholds.

Takeovers by foreign private investors are subject to approval in two constellations:

- Firstly, in areas with public order or security relevance (ie, where critical infrastructure elements are concerned). The ICA considers that this is the case if the target company:
 - provides, in a material way, weaponry or services for the Swiss Armed Forces or other federal institutions responsible for state security;
 - produces goods, the export of which is subject to authorisation under the Swiss Federal Act on War Material or the Federal Act on the Control of Dual-Use Goods;
 - operates a domestic electricity network;
 - operates domestic power plants with a capacity of 100 megawatts or more;
 - operates domestic natural gas high pressure pipelines;
 - supplies more than 100,000 inhabitants with water; or

- supplies critical security-relevant information technology (IT) systems or IT services to Swiss authorities.
- Second, takeovers of the following types of enterprises are also subject to approval, if the target enterprise has generated an average annual turnover (or, for banks, gross income) of at least 100 million Swiss francs (£87.7 million) in the past two financial years:
 - university hospitals and general hospitals providing centralised care;
 - enterprises engaged in the research, development, production and distribution of pharmaceuticals, medical devices, vaccines or personal protective medical equipment;
 - enterprises operating centralised domestic hubs for the transport of goods and people (eg, operators of ports or airports);
 - enterprises operating or owning domestic railway infrastructure;
 - enterprises operating or owning domestic central food distribution centres;
 - enterprises operating or owning domestic telecoms networks;
 - enterprises operating or owning systemically relevant financial market infrastructure elements; or
 - systemically relevant banks.

In any case, takeovers are not subject to approval if the target enterprise had less than 50 full-time employees and an annual turnover of less than 10 million Swiss francs (approximately £8.7 million) in the past two financial years.

The federal government may, however, also decide that for a limited period of time of maximum 12 months, further takeovers shall be subject to approval as well.

Approval criteria

The Swiss State Secretariat for Economic Affairs (SECO) approves a takeover if there is no reason to believe that the public order or safety is jeopardised by the takeover.

In its assessment, SECO considers whether:

- the foreign investor is engaged or has in the past engaged in activities that adversely affect or have adversely affected the public order or security of Switzerland or other states;
- the foreign investor or its home state has attempted or is attempting to obtain information about the Swiss target company by means of espionage;
- the foreign investor is engaged in or has in the past been engaged in espionage;
- the foreign investor is directly or indirectly subject to sanctions under Swiss sanctions legislation;
- the services, products or infrastructure provided by the Swiss company could be replaced within a reasonable period of time;
- the foreign investor would, through the takeover, gain access to security-related or other sensitive information; and
- significant distortions of competition result from the takeover.

An approval can be made subject to conditions or obligations.

Approval procedure

The takeover clearance by SECO must be granted prior to the closing of the transaction. The approval procedure is a two-tier process.

The procedure starts with the application, which must be submitted to SECO.

In the first phase, SECO decides within a month after receipt of the application whether the takeover can be approved directly or whether a review procedure must be initiated. SECO takes its decision in consultation with the interested governmental authorities and after consulted with the Swiss Intelligence Service (FIS).

If SECO and the other authorities so decide, of if there is no consensus is reached as to whether the takeover can be approved directly or whether a review procedure should be initiated, the second phase, consisting of an in-depth review of the contemplated transaction, is started.

SECO will then decide, again in consultation with the authorities concerned and after hearing the FIS, within three months whether the takeover can be approved. In certain cases (eg, those of high political relevance), the final decision will be with the federal government.

It should be noted that the validity under civil law of a takeover subject to approval remains suspended until approval has been granted. However, if no decision is made within the time limits (one respective three months), the takeover is considered as approved. An extension of the deadline is possible if the foreign investor or the target company obstructs the review procedure or if required information from a foreign authority is outstanding.