

Switzerland: Draft Investment Screening Act

Draft law for the introduction of foreign investment control in Switzerland

In brief

On 15 December 2023, the Federal Council adopted a draft Investment Screening Act (the "**D-ISA**"). To date, Switzerland has no overarching regulation for the review of foreign investments as prevalent in other countries. The D-ISA intends to introduce sector-specific investment control in Switzerland to prevent takeovers of Swiss companies operating in critical sectors by foreign state-controlled investors (public or private investors that are directly or indirectly controlled by a state) if these takeovers endanger or threaten public order or security in Switzerland. The D-ISA will go into parliamentary deliberation, during which it may be accepted, rejected or amended. The D-ISA is not yet in force and is not expected to enter into force before 2025.

Practical implications

If an investment screening act is enacted that follows the draft legislation, the new law would have a major impact on foreign state investors (foreign public investors and foreign state-controlled private investors). Foreign state investors may require approval in the future if they intend to invest in Swiss companies, particularly if their investments are directed toward critical sectors. For takeovers that might present such implications, it is prudent to incorporate provisions in the contractual agreements that account for the possibility of extended review periods or the event of non-approval.

According to the current draft of the legislation, it is anticipated that only a minimal number of takeovers would be affected by the new law. Private foreign investors are not affected by the new legislation if they are not directly or indirectly controlled by a foreign state. Consequently, Switzerland is expected to continue its tradition of being receptive to foreign direct investment.

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Main elements of the draft Investment Screening Act

The purpose of the D-ISA is to prevent takeovers of Swiss domestic companies acting in particularly critical sectors by foreign state-controlled investors if these takeovers endanger or threaten public order or security in Switzerland.

According to the D-ISA, an investment is screened and subject to approval by the responsible authority under the following conditions:

1. A takeover;
2. by a foreign state investor;
3. of a Swiss domestic company;
4. in a critical sector;
5. if certain thresholds are reached.

Scope

The D-ISA applies to takeovers of domestic private and public companies by foreign state investors. Private foreign investors are not subject to the D-ISA.

Takeover

A takeover is a transaction by which one or more investors directly or indirectly acquire control of one or more previously independent companies or parts of these companies, in particular through a merger, an acquisition of a shareholding, or the conclusion of a contract. Control means that an investor can exercise a decisive influence on another company's activities. This is the case if the investor has the opportunity to determine strategy, key management issues and general business policy. It is not decisive to what extent control is actually exercised; the mere possibility of exercising a decisive influence is sufficient. The D-ISA applies to direct and indirect acquisition of control, e.g., by interposing one or more subsidiaries. If a company is jointly controlled by two or more investors and control is transferred to only one of these investors, for example, this would also be considered a takeover by this investor (transfer of joint control to sole control).

A pure minority holding that does not lead to the acquisition of control over a domestic company is not subject to the authorization requirement. However, if a minority shareholder acquires control by other means (e.g., by entering into a shareholders' agreement that provides the minority investor with certain contractual control rights beyond typical minority shareholder protection), such minority shareholding is subject to the authorization requirement.

If a company establishes a subsidiary or if a new company is established from scratch (so-called greenfield investment), this is not covered by the D-ISA and is therefore not subject to authorization.

For the assessment of control under the D-ISA, it is appropriate to rely on established Swiss merger control practice and case law.

Foreign investor

The definition of "foreign investor" in the D-ISA is limited to foreign state bodies, companies directly or indirectly controlled by a foreign state body, and natural or legal persons acting on behalf of a foreign state body. In contrast to the previous draft, purely private foreign investors are not subject to the D-ISA.

Swiss domestic company

A Swiss domestic company is a company that has been entered into the Swiss commercial register, regardless of whether it is part of a group of companies with its headquarters and head office outside Switzerland. The term "company" is defined broadly and is based on Article 2 (1bis) of the Swiss Cartel Act. To be considered a company, the legal and organizational form is irrelevant. The only decisive factor is whether it demands or supplies goods or services in the economic process.

Critical sectors

Article 3 D-ISA defines which takeovers are subject to authorization. The authorization must be obtained before the transaction has been completed. The D-ISA covers the sectors that are considered particularly critical in terms of a danger or threat to public order or security in Switzerland. The following critical sectors are defined in the D-ISA:

- Companies that manufacture goods or transfer intellectual property that are essential to the operational capability of the Swiss Armed Forces, other federal institutions responsible for national security, or space programs;
- Companies that operate or control the domestic transmission grid for electricity or distribution grids at grid level 3 or lower, through which at least 450 gigawatt-hours are sold annually;
- Companies that operate or control domestic power plants for electricity production with a capacity of 100 megawatts or more;
- Companies that operate or control domestic high-pressure natural gas pipelines;
- Companies that supply water to more than 100,000 inhabitants in Switzerland;
- Companies that supply or provide central security-relevant IT systems or services for domestic authorities;
- Domestic university hospitals and general hospitals with centralized care;

- Companies that are active in the research, development, production or distribution of medicinal products, medical devices, vaccines or personal medical protective equipment;
- Companies that operate or control significant domestic hubs for the transportation of goods or passengers, namely ports, airports or transshipment facilities for combined transportation;
- Companies that operate or control domestic railroad infrastructures;
- Companies that operate or control significant domestic food distribution centers;
- Companies that operate or control domestic telecommunications networks;
- Companies that operate or control systemically important financial market infrastructures;
- Systemically important banks.

According to Article 3(3) D-ISA, the Federal Council will receive the power to temporarily extend the authorization requirement to additional categories of Swiss domestic companies. This extension would initially be for a period of 12 months, with an option for renewal for another 12 months, thereby allowing for a potential total duration of 24 months. This provision introduces a flexible mechanism to adapt to changing economic and security landscapes, ensuring that the scope of regulation remains dynamic and responsive to evolving needs.

Thresholds

For the abovementioned sectors, Article 3 D-ISA makes a distinction between sectors for which there is no turnover threshold apart from a de minimis threshold (Article 3, paragraph 1 D-ISA) and those for which there is a turnover threshold (Article 3, paragraph 2 D-ISA).

The de minimis threshold is as follows: domestic companies that, in the two preceding financial years, had an average of at least 50 full-time employees worldwide or generated annual worldwide sales of at least CHF 10 million. If the de minimis threshold is not reached, the investment is not subject to approval. The de minimis threshold applies to companies that do one of the following:

- Manufacture goods or transfer intellectual property that is essential to the operational capability of the Swiss Armed Forces, other federal institutions responsible for national security, or space programs in which Switzerland participates under international agreements, and whose export or transfer abroad is subject to authorization under the War Material Act or the Goods Control Act
- Operate or control the domestic transmission grid for electricity or distribution grids at grid level 3 or lower, through which at least 450 gigawatt-hours are sold annually
- Operate or control domestic power plants for electricity production with a capacity of 100 megawatts or more
- Operate or control domestic high-pressure natural gas pipelines
- Supply water to more than 100,000 inhabitants in Switzerland
- Supply or provide central security-relevant IT systems or services for domestic authorities

For takeovers in the other critical sectors, there is a turnover threshold. The threshold is reached if the company, in the two preceding financial years, had an average annual worldwide turnover or, in the case of banks, a gross income of at least CHF 100 million. This turnover threshold applies to the following:

- Domestic university hospitals and general hospitals with centralized care;
- Companies that are active in the research, development, production, or distribution of medicinal products, medical devices, vaccines, or personal medical protective equipment;
- Companies that operate or control significant domestic hubs for the transportation of goods or passengers, namely ports, airports or transshipment facilities for combined transportation;
- Companies that operate or control domestic railroad infrastructures;
- Companies that operate or control significant domestic food distribution centers;

- Companies that operate or control domestic telecommunications networks;
- Companies that operate or control systemically important financial market infrastructures;
- Systemically important banks.

Exemption

The Federal Council may exempt takeovers by state investors from certain states from the authorization requirement, provided there is sufficient cooperation with these states to prevent threats to public order and security. The Federal Council will define the exemption criteria in an ordinance. This is similar to a concept already applied in the Goods Control Act.

Authorization criteria

The authorization criteria are set out in Article 4 D-ISA. According to these criteria, a takeover will be approved if there is no reason to assume that public order or safety is endangered or threatened by it.

For this assessment, the following factors are, in particular, taken into account:

- Whether the foreign investor is involved in activities that are detrimental to public order or security in Switzerland or other countries;
- Whether the foreign investor attempts to obtain information by means of espionage;
- Whether sanctions have been imposed against the foreign investor;
- Whether the Swiss domestic company's services, products or infrastructure can be substituted within a reasonable period;
- Whether the foreign investor gains access to important security-related information or to sensitive personal data.

The authorization may be conditional and/or subject to requirements that eliminate the danger or threat to public order or security.

Screening authority

According to Article 5 D-ISA, the State Secretariat for Economic Affairs ("**SECO**") will be responsible for granting the relevant authorization, with the involvement of the relevant federal administrative units and after hearing the Federal Intelligence Service.

The authorization procedure provides for a so-called direct authorization, a review procedure and a tacit authorization. Upon receiving the application, within one (1) month, SECO decides whether the takeover can be authorized directly or whether a review procedure is required. If a review procedure is initiated, SECO will decide within three (3) months from the initiation of the review procedure whether the takeover will be approved.

If SECO or another interested administrative unit opposes the authorization of the takeover or if the decision is of considerable political importance, the Swiss Federal Council will decide on the authorization.

With certain exceptions, the takeover is deemed to have been (tacitly) approved if SECO does not communicate a decision within the legal deadlines. The D-ISA also provides for an emergency procedure under which the Federal Council may directly authorize a takeover subject to authorization if this is necessary to protect public order or security.

The provisions of the Administrative Procedure Act apply to the procedures provided for in the D-ISA, unless the D-ISA deviates from the Administrative Procedure Act. Only the foreign state investor and the domestic company have the right to appeal (Article 18 D-ISA).

In the event of not only the absence of due authorization (as provided for in Article 17 VD-ISA), but also of an authorization granted based on false information or noncompliance with a condition or requirement, the Federal Council may order the necessary measures to restore the conditions, including divestiture (Article 19 D-ISA). Administrative sanctions are provided for in Article 20 D-ISA.

Restorative measures and penalties

The Federal Council will receive the competence to order the necessary measures to restore the proper condition if a takeover requiring approval was carried out without approval or if a takeover requiring approval was approved based on false information or if a condition or requirement was disregarded. In particular, the Federal Council has the competence to order a divestiture.

An infringement of the authorization requirement under the D-ISA is subject to significant fines. The company resulting from the takeover will be charged with a fine of up to 10% of the annual worldwide turnover that the domestic company achieved on average in the two financial years before the takeover if one of the following criteria is met:

- A takeover subject to approval was completed without approval.
- A takeover subject to approval was completed that was approved based on false information.
- A measure to restore the proper condition was not carried out.
- A requirement or condition was disregarded.

If the annual turnover is not known and cannot be ascertained without significant effort, SECO can make an estimate.

Foreign state investors or domestic companies that do not comply with their information obligation under the D-ISA are fined up to CHF 100,000.

Next steps and outlook

The D-ISA will go into parliamentary deliberation, during which it may be accepted, rejected or amended. The D-ISA is not yet in force and is not expected to enter into force before 2025.

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