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Practical cross-border insights into FDI screening regimes

Foreign Direct Investment Regimes

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Q&A Chapters

Switzerland

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The current regime on foreign direct investment controls in Switzerland is liberal, with no general notification duty or approval requirement for foreign investments. However, foreign direct investments have gained increased political attention over the past few years. On 26 February 2018, a motion ("Motion") was submitted in the Counsel of States (one of the two chambers of Swiss Parliament), requesting the introduction of specific legislation and establishment of a specific authority to control foreign investments. The Swiss Federal Council (Swiss executive body) on 13 February 2019 published a report on cross-border investments and investment controls and decided against the introduction of general investment controls for the time being, and instead decided to conduct a monitoring procedure and to review the report within the next four years. Despite the Swiss Federal Counsel's negative view on introducing foreign investment controls, both chambers of the Swiss Parliament have voted in favour of the Motion, mandating the Federal Council to prepare a draft legislation for foreign investment control. In August 2021, the Federal Council specified in a public announcement key elements including a mandatory filing for foreign state or state-affiliated investors when acquiring control of domestic companies and a less extensive scope for private foreign investors. Further details and the timing of the future investment control law (if ultimately passed at all) are currently not known, but the new law is highly unlikely to enter into force before 2023.

While there are no *general* foreign investment controls under the current regime, *legal* or *de facto* foreign investment controls do apply to certain industries and sectors. In particular:

- In the banking and securities firms sector and in real estate, foreign investments require prior government approval under certain conditions.
- A number of additional business activities require a licence from the authorities. While in certain business sectors the licensing conditions include specific requirements regarding foreign investors, in particular, reciprocity requirements, the licensing conditions in other business sectors do not specifically differentiate between foreign and domestic applicants and investors.

  Business sectors with specific licensing requirements for foreign investors include:
  - aviation;
  - telecommunications;
  - nuclear energy; and
  - radio and television.

  Business sectors subject to licensing without explicit licensing requirements for foreign investors include:
  - financial industry and insurance (other than banks and securities firms);
  - casinos and gambling;
  - defence;
  - postal services;
  - commercial shipping vessels;
  - power and gas installations; and
  - railways.
- In addition, a number of significant companies that provide key critical infrastructure are owned or controlled by federal, cantonal or local authorities. The authorities may, accordingly, exercise a *de facto* (foreign and domestic) investment control in respect of these companies. These companies include SBB (Swiss federal railways), Swiss Post, Swisscom (telecom), roads, Swissgrid, (nuclear) power plants, public utility companies, Zurich and Geneva airports, Rhine ports, RUAG (defence), Skyguide (air traffic control), public hospitals, universities, etc. Note: in most of these sectors, private companies may compete with the state-controlled entities.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

There is no applicable law generally requiring a review of foreign investments in Switzerland. In the specific sectors where (foreign or domestic) investments are subject to licensing or approval requirements (see question 1.1 above), the licensing or approval conditions are set out in the respective laws. The respective conditions may include reciprocity conditions (reciprocity conditions in particular exist for licences in the financial, aviation, telecoms, nuclear power plants, and TV/radio broadcasting industries). While there is limited room for strategic considerations, the competent licensing authorities have a certain degree of discretion when assessing whether all licensing conditions are sufficiently met. In this regard, it is worth noting that the Federal Council has specifically stated in its decision of 13 February 2019 that it will give greater consideration to the question of reciprocity.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

Yes. As mentioned above, the two chambers of the Swiss Parliament have approved a motion to introduce foreign investment controls, and the Federal Council in August 2021 took its first step towards such legislation by specifying in a public announcement key elements including a mandatory filing for foreign state or state-affiliated investors when acquiring control of domestic companies and a less extensive scope for private foreign investors. No draft legsislation is available as of the time of writing this chapter and there is currently no visibility on timing. It is highly unlikely that the new law will enter into force before 2023.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

There is currently no law requiring a review of foreign investments in Switzerland generally.

Under the current legislation, certain sector-specific laws comprise specific requirements for *foreign* investments which include the following acts, together with their implementing ordinances:

- Swiss Federal Bank Act.
- Financial Institutions Act
- Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*).
- Swiss Federal Aviation Act.
- Swiss Federal Act on Telecommunications.
- Swiss Federal Nuclear Energy Act.
- Swiss Federal Act on Radio and Television.

As mentioned above, in addition to these laws that contain specific requirements for foreign investments, there are additional sectors and industries which are subject to licensing requirements that apply to both domestic- and foreign-controlled companies and investors.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

There are currently no generally applicable laws on foreign investment control in Switzerland, e.g. on national security grounds. The respective restrictions on (foreign) investments under the sector-specific laws described above are set out below:

(a) Banking and Finance

The transfer of a *controlling* stake in a Swiss regulated bank or securities firm to a foreign investor requires a so-called "additional licence" from FINMA.

In addition, once a Swiss regulated bank or securities firm is under foreign control, a new "additional licence" is required from FINMA whenever foreign holders of *qualified* participations in a foreign-controlled institution change (i.e. not only in case of a change of a controlling stake).

Foreign-controlled: Swiss banks and securities firms qualify as foreign-controlled when foreigners holding qualified participations directly or indirectly hold more than half of the voting rights or exert a controlling influence in any other way.

"*Foreigners*" are individuals who have neither Swiss citizenship nor a type C Swiss residence permit. Legal entities are regarded as foreign if their registered office is outside Switzerland or if they are directly or indirectly controlled by foreigners.

A *qualified participation* is deemed to exist if the person (or a group of persons) owns 10% or more of the voting rights or the capital of a bank/securities firm, or if a person by other means is in a position to substantially influence the course of business of the bank/securities firm.

The additional licence is subject to a number of conditions, in particular, reciprocity requirements (basically requiring that a Swiss-resident person or domiciled entity is permitted to acquire a controlling participation in a bank or securities firm incorporated in the country of the holder of the participation), and adequate group supervision. The reciprocity requirements do not apply with respect to member states of the World Trade Organisation, or where it would contravene other obligations under international law.

(b) Real Estate

Pursuant to the Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*), the acquisition of Swiss residential property (as opposed to industrial and business property such as office buildings and factories), be it directly or indirectly via legal entities, is subject to a licence requirement. No licence is currently required, however, for residential property investment corporations listed on a Swiss stock exchange by foreign persons (i.e. persons domiciled or resident abroad).

Under the Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*), the definition of foreign persons includes (i) natural persons and companies who are resident or based abroad, (ii) foreigners who are resident in Switzerland but who are not citizens of an EU or EFTA Member State, or do not have a type C residence permit, and (iii) Swiss-domiciled companies whose *de facto* purpose is the holding of Swiss residential property, if a person not resident in Switzerland has a controlling influence in such company.

(c) Aviation

Swiss- and foreign-domiciled companies which use aircraft to transport persons or goods on a commercial basis in Switzerland require a licence from the Federal Office of Civil Aviation (FOCA). With respect to foreign-domiciled companies, the licence may be refused if the reciprocity requirement is not met, i.e. if the foreign country in question does not permit Swiss companies to transport persons or goods commercially in an equivalent manner (Art. 29 para. 3 Aviation Act).

In addition, for Swiss-domiciled companies, the licence may be subject to the respective company being under the actual control and in the ownership of Swiss citizens (Art. 27 para. 1 Aviation Act/Art. 103 para. 1 lit. b Aviation Ordinance).

(d) Telecoms

The licensing conditions for the operating company include reciprocity conditions for foreign (controlled) companies offering telecommunication services in Switzerland (Art. 23 para. 2 Telecommunications Act).

(e) Nuclear Energy

The licensing conditions for the operating company include reciprocity conditions for foreign (controlled) companies obtaining nuclear reactor operating licences, subject to international obligations to the contrary (Art. 13 para. 2 Federal Act on Nuclear Energy). The foreign company is further required to maintain a subsidiary in Switzerland.

(f) Radio and Television

The licensing conditions for the operating company include reciprocity conditions for foreign (controlled) companies obtaining radio or television broadcast licences, subject to international obligations to the contrary (Art. 44 para. 2 Federal Act on Radio and Television).

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

The two key sectors and activities that are subject to specific approval requirements are (i) banks and securities firms, and (ii) real estate.

2.4 How are terms such as 'foreign investor' and 'foreign investment' specifically addressed in the law?

For the purposes of the banking and securities firms' law, "*foreigners*" are individuals who have neither Swiss citizenship, nor a type C Swiss residence permit. Legal entities are regarded as foreign if their registered office is outside Switzerland or if they are directly or indirectly controlled by foreigners. Foreign control is deemed to exist when foreigners hold more than half of the voting rights or exert a controlling influence in any other way.

Under the Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*), the definition of foreign persons includes (i) natural persons and companies who are resident or based abroad, (ii) foreigners who are resident in Switzerland but who are not citizens of an EU or EFTA Member State, or do not have a type C residence permit, and (iii) Swiss-domiciled companies whose *de facto* purpose is the holding of Swiss residential property, if a person not resident in Switzerland has a controlling influence in such company.

With respect to other relevant sectors and industries, the respective (reciprocity) licensing requirements are linked to the non-Swiss domicile of the applicant or investor. Please see also question 2.2 above.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU / non-WTO), including state-owned enterprises (SOEs)?

There are no specific rules for certain foreign investors such as e.g. non-EU/non-WTO, including state-owned enterprises SOEs.

A key requirement for obtaining a licence is the full and accurate disclosure of the beneficial owner of the licence applicant. In practice, we have experienced that this may prove difficult with respect to certain SOEs for various reasons.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

The approval and licensing requirements set out above only apply to business activities in Switzerland. The applicable requirements should be assessed in each individual case, having regard to the relevant sector or business activity.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

In general, both direct and indirect acquisitions are covered by the approval and licensing requirements set out above. The applicable requirements should be assessed in each individual case, having regard to the relevant sector or business activity.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

The applicable conditions should be assessed in detail in each individual case, having regard to the relevant sector or business activity as set out under question 2.2 above.

Monetary turnover thresholds, as well as restrictions for market-dominant undertakings, apply under the general merger control requirements under Swiss competition law. However, these apply equally to Swiss and foreign investments.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

There are no prescribed thresholds that specifically apply to foreign investments.

Where sectors and business activities are subject to licensing requirements, there is a general legal claim to be granted a licence if the respective licensing conditions are met. In their assessment of a licensing application, authorities however have a certain degree of discretion (e.g. when assessing whether a qualified shareholder of a bank satisfies the fitness and properness criteria).

3.3 Is the filing voluntary or mandatory and is there a specific filing form? Are there any filing fees?

Filing is mandatory for an additional licence for banks and securities firms and for approval under the Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*).

Also, with regard to the sectors and business activities that are subject to licensing requirements, respective licence requests must be filed, and the licensing conditions generally require that significant changes must be filed.

No general filing fees apply, other than fees incurred to obtain the actual licence. These depend on the approval or licence requested.

There is no specific form that must be used.

3.4 In the case of transactions, who is responsible for obtaining the necessary approval?

For banks and securities firms, the additional licence must be obtained by the bank itself, with information to be provided by the (foreign) investor.

With respect to the Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*), the approval must be requested by the purchaser of the real estate.

With respect to other businesses subject to licensing requirements, it is generally the applicant (i.e. the operating company) who is responsible for obtaining the necessary licence.

3.5 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

It is generally possible and recommended to engage with the competent authorities at an early stage in advance of the transaction.

3.6 What type of information do investors have to provide as part of their filing?

Investors must provide all information required under the applicable law for the relevant licence. One general key requirement is the full and accurate disclosure of the beneficial ownership structure.

3.7 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

Banking: An intentional failure to make the necessary notifications with regard to qualified or controlling holdings in a bank may result in a fine of up to CHF 500,000. In case of negligent failure, the fine may amount to up to CHF 150,000 (Art. 49 Bank Act). Similar penalties exist with regard to securities firms, where intentional failure to notify is sanctioned by imprisonment of up to three years or a fine, and negligent failure is subject to a fine of up to CHF 250,000 (Art. 44 *ff.* FINMA Act). The bank or securities firm also faces the risk of revocation of its licence.

Lex Koller infringements trigger severe sanctions of administrative (e.g. revocation of permit), civil (e.g. restoration of original state, forced sale of purchased real estate) and penal nature (e.g. imprisonment of up to three years or a fine, confiscation of gains) (Art. 25 *ff.* Swiss Federal Law on Acquisition of Real Estate by Foreign Persons).

Violations and infringements of licensing conditions in other sectors or businesses may generally lead to administrative (e.g. revocation of licence) and penal sanctions (e.g. imprisonment or fine) that should be assessed in further detail in each individual case.

3.8 Is there a filing deadline and what is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

Filing deadlines apply in the sense that applications for specific licences must be made, and approval must be received, prior to the investment or start of licensed activity. The exact time requirement when to file a request depends on the specific sector and licence requested and should be assessed in due time prior to an investment.

The timeframe for review depends on the legal basis in question. More specifically:

- For banks and securities firms, the additional licence may generally be obtained within six months.
- With respect to the Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*), the timing depends, in particular, on the location of the real estate in Switzerland and the complexity of the case.
- The timing required for obtaining licences in other business sectors significantly depends on the complexity and individual factors of the case. The applicable laws generally do not foresee specific approval or waiting periods (with the exception of general merger control proceedings).
- Careful planning and a strategic approach are therefore essential for successfully obtaining required approvals in time.

3.9 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction?

The review must generally be completed prior to closing. This is also the case for the additional licence for banks and securities firms and for the required approval under the Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*).

3.10 Are there any penalties if the parties implement the transaction before approval is obtained? Can the parties close the transaction at global level prior to obtaining local clearance?

The consequences depend on the specific sector and licence in question. Generally, the impact of an early closing is that the (to be) licensed entity and the investor are in breach of their respective licensing conditions and approval requirements and may lose/not be granted licences or approvals. In addition, individuals may be held criminally liable (e.g. individuals pursuing banking activities without a licence; or individuals circumventing licensing requirements for acquisition of real estate by persons abroad). Finally, acquisitions closed prior to receiving the licence or approval may be null and void (e.g. regarding acquisition of real estate by persons abroad), depending on the sector.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

Third parties other than the applicants and the relevant investors are generally not involved in the approval or licensing process, and third parties do not have specific rights in the proceeding, except where the applicable law provides otherwise.

3.12 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

In general, there is no particular publicity given to the approval or licensing process, and Swiss authorities and public officials are bound by official secrecy requirements under Swiss criminal law. Authorities may, however, publish their decisions and cases, subject to the protection of business secrets. Particular rules may apply under sector-specific laws that should be assessed in further detail in each individual case. In the case of court proceedings, it should be noted that court hearings are, in general, public.

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

There are no other administrative approvals required for foreign investments as such. There are, however, rules and requirements, such as general merger control laws, that apply to all transactions, regardless of whether they are domestic or involve foreign-controlled entities.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

As there is no central authority that is responsible for foreign investment control, the identity of the competent authority depends on the approval or licence in question. For example:

- The Swiss Financial Market Supervisory authority FINMA is competent for the additional licence for banks and securities firms.
- For the Swiss Federal Law on Acquisition of Real Estate by Foreign Persons (*Lex Koller*), the competent approval authorities are designated by the canton where the real estate is located. The Federal Office of Justice has published guidelines that also include a list of the competent approval authorities (https://www.bj.admin.ch/dam/data/bj/wirtschaft/grundstueckerwerb/lex-e.pdf).
- There are specific approval authorities for obtaining licences in the other relevant sectors and industries set out above.

4.2 What is the applicable test and who bears the burden of proof?

The approval or licensing criteria differ depending on the sector or industry in question. The proceedings are generally conducted "*ex officio*". While the applicant or foreign investor does not therefore formally have the burden of proof, the competent authorities will only grant an approval or licence if the applicant or foreign investor, respectively, has provided all information required to meet the approval or licensing requirements.

4.3 What are the main evaluation criteria and are there any guidelines available?

The evaluation criteria differs depending on the relevant sector or industry in question. Guidelines are available in certain sectors. In particular, FINMA has issued guidelines for applications for banks and securities firms generally (https://www.finma.ch/en/authorisation/banks-and-securities-firms/getting-licensed/), and the Federal Office of Justice has published guidelines regarding *Lex Koller* (https://www.bj.admin.ch/dam/data/bj/wirtschaft/grundstueckerwerb/lex-e.pdf).

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Depending on the sector, the activities of foreign subsidiaries may be relevant and may be taken into account for the approval or licensing requirements. For example, where a business activity in Switzerland is subject to a licence, such licence is also required where the activities in Switzerland are conducted by a foreign (non-local) subsidiary.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

While there is limited room for strategic considerations on national security grounds, unless such criteria are specifically set out in the approval or licence conditions, the competent authorities do have a certain degree of discretion when assessing whether all approval or licensing conditions are sufficiently met. The competent authorities must exercise their discretion in a reasonable manner.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

Negative decisions by Swiss authorities can be challenged or appealed as a general principle of Swiss law. Depending on the specific sector in question, and depending on the remedy or appeal taken, the relevant procedure may be administrative or judicial in nature. A judicial appeal to a court may, in any event, be possible.

4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

The competent authorities generally have a considerable degree of discretion to accept remedies and impose conditions or requirements under the sector-specific approval or licensing requirements.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Absent a specific applicable law generally requiring a review of foreign investments in Switzerland, there is no recent enforcement practice.

The current liberal attitude towards foreign investments is reflected in the enforcement practice of the competent authorities for sector-specific approvals and requirements, where strategic or policy considerations generally do not play a significant role beyond the specific approval or licensing criteria set out in the relevant laws. Following the recent decision of the Swiss Parliament to introduce foreign investment controls in the future, and in light of international developments, we would expect, however, that the competent authorities may, within the scope of their discretion, take a more critical stance on foreign investments in specific cases.

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