

Foreign Direct Investment in Switzerland

Introduction

Foreign investments are not directly regulated or subject to approval under Swiss law. Swiss laws which potentially have an impact on foreign investments are the Swiss Code of Obligations (CO), the Swiss Federal Act on the Acquisition of Real Estate by Persons Abroad (so-called "Lex Koller"), certain financial markets laws such as the Swiss Act on Banks and Savings Banks or the Swiss Federal Act on Financial Market Infrastructures, and the Swiss Anti-trust Act. However, except for the Lex Koller statute, none of the mentioned statutes directly addresses foreign investments, but rather sets general rules applicable to both Swiss and foreign investors.

Who is obliged to obtain an FDI approval?

Except for the acquisition of residential property by foreign nationals (Lex Koller), there are no industries/legal sectors with restrictions explicitly targeting foreign direct investments.

What kind of transactions are covered by the FDI rules?

The only approval specifically required by foreign investors applies in the case of investments in residential property, which is, for example, the case for investment in real estate management companies or apartment hotels with a self-use right of an apartment by the foreign investor for a certain period of time per year.

How long do the proceedings last?

In case of real estate transactions, the approval might be obtained within 2 to 3 months, depending on the complexity of the transaction.

What are the consequences of breaching the regulation?

If the authorization according to the Lex Koller is not available, the land registry does not enter the person concerned as the owner of the property in the land register.

What is the name of the national authority handling the investment control issues?

There is no superior national authority handling the investment control issues.

New legislation to screen foreign investment

The legislation to screen foreign direct investment (FDI) in Switzerland was sent to consultation in May 2022 by the Swiss Federal Council. The new legislation aims to regulate the acquisition of Swiss companies by foreign investors. These acquisitions may trouble the Swiss public order which explains why the Swiss parliament instructed the Federal Council with a motion to prepare a draft of the necessary legislative basis treating this issue. This drafted legislation concerns foreign acquisitions of companies operating in the private and public sphere and is applicable on circumstances occurring in Switzerland, even if they were initiated abroad.

The aim of the legislation is to screen foreign investment, i.e. to effectively control FDI in Switzerland with transparent regulations while minimizing the administrative outlay. In addition, it is necessary that this mechanism is predictable and based on a valid source of law while respecting Swiss international engagements.

The affected investors

The main focus of this legislation is directed to foreign investors that are closely related to a foreign government and possess ties to a foreign state. The drafted legislation proposes therefore to establish an obligatory control-mechanism for the acquisition of Swiss companies by foreign investors who are either directly or indirectly controlled by a government entity independent of the sector where they operate. Furthermore, controls are proposed

for companies in sectors such as public security (Swiss army), energy (power plants, high-pressure natural gas pipelines, water supply) and technology (IT). Other possible controls are planned for companies with an annual average revenue of at least CHF 100 Million and that are active in sectors such as health (hospitals, medical research), transport (ports, airports, rail infrastructure), nutrition (food distribution centers), communication (telecommunication) and finance (banks, financial market infrastructure). It is not foreseen that small businesses fall under the screening control, as they do not reach the sales figures mentioned above.

Competence

The controls would fall in the competence of the State Secretariat for Economic Affairs (SECO), which would also be competent for the coordination of the administrative bodies involved. In general, the SECO would approve acquisitions if it can be sure that the acquisitions do not trouble the Swiss public order and safety. The SECO could connect an approval of an acquisition with possible conditions to ensure the integrity of the Swiss public order.

Procedure of the screening control

If the acquisition has to be approved by the SECO, the foreign investor needs to hand in a request. The SECO can either directly respond with an approval or initiate a screening control. If a screening control is initiated, the SECO consults the relevant administrative entities and has to communicate its decision to the foreign investor within three months from the initiation of the screening control. To decide over a possible screening control of an investment, the different relevant administrative bodies must meet in a consensus. If they fail to establish a consensus, the Federal Council makes the final decision. It is also the Federal Council that decides over a screening control if the relevant administrative bodies come to the conclusion that an acquisition should be prohibited.

Legislative process of the new legislation

There are several steps that the law must pass to be enforced. The law, or the drafted law, is currently in the pre-parliamentary phase. To pass to the next phase, the draft of the law needs to be finalized. The finalized draft together with the message of the Federal Council will be handed over to the commission of the first council. After the first council, the law is passed on to the second council, and if necessary, a conference of reconciliation is held to resolve possible differences between the two councils until an agreement is found. After the parliamentary phase, the people have the option to initiate a referendum. If no referendum is demanded, the federal law will eventually be published and come into force.

Conclusion

Currently, Switzerland can be considered as a relatively liberal country concerning foreign investment. Apart of the Lex Koller which regulates the acquisition of real estate, there are not many limitations for foreign investors. With the new drafted law which aims to screen foreign investment, the Federal Council has decided to modify the Swiss investment policy. At the same time, Swiss openness towards foreign investment is of a high importance. The new law which will possibly be enforced in some years tries to guarantee the public order while enabling Switzerland to stay an attractive investment place for foreign investors.

(September 2022)

Contact persons at GHR Rechtsanwälte AG:

Marc Grüninger, marcgrueninger@ghr.ch

Markus Brühlhart, markusbruehlhart@ghr.ch

Stephan A. Hofer, stephanhofer@ghr.ch

T + 41 (0)58 356 5000

F + 41 (0)58 356 5009

Bern Muri: Tavelweg 2, CH-3074 Bern Muri

Zurich: Seidengasse 13, CH-8021 Zurich