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Mr. Federal Councillor Guy Parmelin
Federal Department of Economic Affairs, Education and Research (EAER)
Swan Lane 2
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Bern, September 9, 2022

Consultation: Federal Law on the Audit of Foreign Investments

Dear Federal Councillor

SwissHoldings is a cross-sector business association and currently represents 61 Swiss corporations in the industrial and service sectors (excluding the financial and insurance sectors). Our members are major issuers on the capital market; they account for around 66 percent of total Swiss market capitalization (as of March 31, 2022). We were invited to comment on the above-mentioned ordinance as part of the consultation process that opened on March 30, 2022. We would like to thank you for this opportunity and are pleased to accept it.

Summary of the position and concerns of the association

- Foreign direct investment is central to Switzerland. In the small and open Swiss economy, the prosperity of the population and the competitiveness of companies depend directly on integration into global value chains.
- Since Swiss companies themselves are among the largest direct investors abroad, Switzerland has a particular interest in access to international investment markets that is as non-discriminatory and transparent as possible. Switzerland is most likely to achieve this if it shows itself to be open to foreign investment.
- The Federal Council presented a Regulatory Impact Assessment (RFA) on the preliminary draft as part of the consultation process. The RIA concludes that the cost-benefit ratio of such a new law is unfavorable: for this reason, the panel remains opposed to the introduction of an investment audit. It considers the existing legal framework to be sufficient. SwissHoldings supports this position.
- However, the question of whether Switzerland should introduce an investment audit cannot be assessed in isolation from international developments. If OECD member states introduce restrictions on certain foreign investments across the board, this must be taken into account when assessing the Swiss regulatory approach - not least to prevent a pull effect being triggered on the Swiss economy.
- In this context, the present draft represents a compromise. In order to keep the legal risks for the economy as small as possible, such a state intervention mechanism should be examined in the context of a targeted, administratively lean and transparent design. It is also important that the regulation is compatible with Switzerland's existing obligations under international law .

A. Introductory remarks

In the future, the federal government is to examine takeovers of security-relevant companies by foreign investors. On May 18, 2022, the preliminary draft for such a new investment review law was published and put out to consultation. Previously, Parliament had called for a corresponding legal basis by adopting motion 18.3021 Rieder. It is proposed to introduce a notification and approval requirement for certain acquisitions of domestic companies.

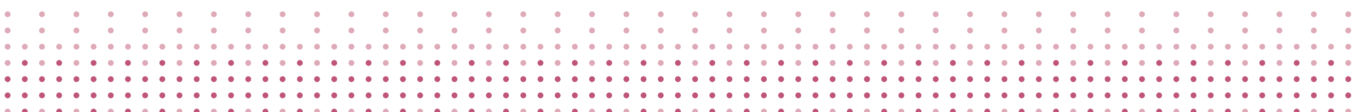
As a small, open economy, Switzerland has traditionally been very open to foreign direct investment. In contrast to other OECD countries, Switzerland does not have a general mechanism for systematically reviewing foreign investment projects (investment control or review). In principle, foreign direct investments above certain turnover thresholds are subject only to a review under competition law.
Nevertheless, critical infrastructures in Switzerland are already protected today, as the relevant companies are mostly owned by the public sector or there are special legal regulations.

Foreign direct investment is central to Switzerland and its economy. In the small and open Swiss economy, the prosperity of the population and the competitiveness of companies depend directly on their integration into global value chains. According to current OECD figures, Switzerland ranked 8th among the largest direct investors worldwide in 2021, with a total of USD 1,456 billion. The number of Swiss companies invested abroad (over 19,000) and the number of people employed there (over 2 million) is also impressive. From the operating activities of these companies, investment income amounting to over CHF 77 billion flowed back into Switzerland in 2020 (around 11% of GDP). In addition, there are substantial direct and indirect tax revenues from companies with direct investments every year.

Since Swiss companies themselves are among the largest direct investors abroad, Switzerland, as an open economy, has a special direct interest in access to international investment markets that is as free, non-discriminatory and transparent as possible. In the view of the association, Switzerland is most likely to achieve this if it shows itself to be open to foreign investment. The Federal Council presented a regulatory impact assessment on the preliminary draft as part of the consultation process. The RFA concludes that the cost-benefit ratio of such a new law is unfavorable: for this reason, the body continues to oppose the introduction of an investment audit. It considers the existing legal framework to be sufficient. SwissHoldings supports this position.

However, it should also be borne in mind that the question of whether Switzerland should introduce an investment test cannot be assessed in isolation from international developments. If OECD member states introduce restrictions on certain foreign investments across the board, this must be taken into account when assessing the Swiss regulatory approach - not least to prevent a pull effect being triggered on the Swiss economy.

Planning and legal certainty in the context of takeovers is of central importance for foreign investors and domestic target companies alike. The investment review process falls during the particularly critical period of an acquisition transaction between the so-called *signing and closing.* If a transaction fails due to such a review, this results in significant costs for both parties. In order to keep these legal risks for business as small as possible, such a state intervention mechanism should be examined in the context of a targeted, administratively lean and transparent design.



B. Detailed comments on the preliminary draft of the federal law (incl. accompanying report)

We are pleased to comment on the preliminary draft of the Federal Act and the explanations in the Explanatory Report as follows:

1. Section: General provisions

Article 1 *"Purpose*

According to the preliminary draft, the purpose of the law is to prevent threats to public order and security. To this end, acquisitions of critical infrastructures by foreign investors will be subject to a licensing requirement. The investment review is thus limited to security-related aspects. It is not the purpose of the investment review to prevent distortions of competition by foreign investors close to the state. Nor does the law aim to protect Swiss jobs in principle or to support specific sectors or industries.

SwissHoldings considers it essential that the Federal Council - in contrast to its key points for an investment audit law published in August 2021 - has not anchored the prevention of general distortions of competition as an objective of investment auditing in the preliminary draft for an investment audit law (IPG-E). Investment controls represent a massive encroachment on the fundamental right of economic freedom guaranteed by the Federal Constitution. Unlike other countries, whose basic laws only guarantee individual areas of economic activity such as the freedom to choose a profession, economic freedom in Switzerland is conceived as a comprehensive basic right. Exceptions are only granted if competition is impaired or public safety is endangered (national defense, protection of the population and health). This principle must be upheld.

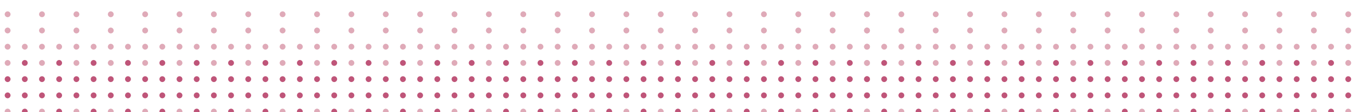
The Federal Council's choice to limit the purpose of the investment audit also ensures that Switzerland complies with its obligations under international law. This is of central importance from the association's point of view: Switzerland is bound by the provisions of the GATS/WTO when it comes to the question of the design of a possible investment audit law. Both agreements allow exceptions with regard to their core principle of non-discrimination only for constellations in which the predominantly public interest, such as the public order and security of a contracting state, is at risk.

1. Section: General provisions

Article 3 *"Terms*

With regard to the definition of a domestic company, SwissHoldings prefers variant 1 envisaged by the Federal Council in the consultation draft. The chosen limitation must necessarily meet the requirement of a "level-playing field". An exemption for foreign subsidiaries in Switzerland from the audit obligation - as would be implied by variant 2 - would also lead to an undesirable distortion of competition.

With reference to the Agreement on the Free Movement of Persons (FMPA) between Switzerland and the European Union (EU), the draft provides for exemptions for foreign investors, provided they are natural persons from the "EU/EFTA" area. It should at least be



examined whether the corresponding exemption could not also be extended to legal entities from this legal area.

2. Section: Approval requirement
Article 4 *"Acquisitions Subject to Approval*

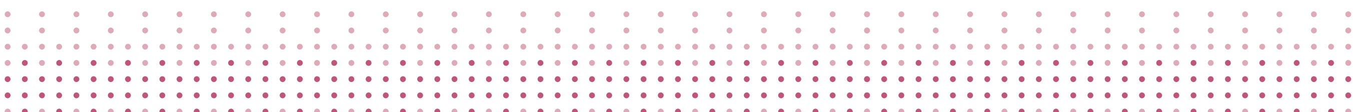
In the view of the Association, in order to ensure a targeted and lean regulatory approach, it is correct that the takeover of a domestic company by a foreign private investor without state affiliation is in principle not subject to a notification and approval requirement, and that consequently a differentiation is made in the approval requirement between foreign state-owned or state-affiliated and foreign private investors. The Federal Council shares the assessment that the greatest risks for the objectives of an investment review set out in Art. 2 IPG-E are most likely to result from "system competition" between state-related and non-state-related companies.

However, it should be borne in mind here that in practice it may not always be easy to distinguish foreign companies that are directly or indirectly controlled by a state agency from private companies. There is no generally accepted definition of a state-owned enterprise. The classification provided by the OECD in this context, according to which a state-owned enterprise is defined as *"any legal entity that qualifies as an enterprise under national law and in which the government exercises an ownership function. In addition, public law institutions whose legal personality is created by specific laws should be considered as state-owned enterprises if their objectives and activities, or parts of their activities, are predominantly economic in nature."* is to be considered non-exhaustive in this context. Furthermore, experiences in other OECD member states have shown that the proof of indirect control ("ultimate beneficial investor") is basically very complex.

The preliminary draft also contains a positive list of sectors that are to be subject to the notification and approval requirement, regardless of whether the ownership structure of the investing company is public or private. In the view of the association, this list of sectors (Art. 4b/c IPG-E) is too comprehensive in that it goes beyond the most safety-critical areas in some cases. Strengthening resilience and security of supply in the event of international crises depends heavily on the quality of cross-border cooperation and is not a question of ownership structures of companies in Switzerland. This has recently been impressively demonstrated by the Corona pandemic. Less restrictive inspection obligations would also have been possible in the area of transport infrastructures (e.g. only in the case of national importance).

Furthermore, it should be borne in mind that the demarcation of which companies are active in which industry is often not clear-cut in practice. Experience from other OECD countries has shown that investors are very cautious and report more investment projects than is actually required by law. In order to increase legal certainty, the state should offer a brief binding check as to whether or not a reporting and approval obligation exists for a given investment project.

2. Section: Approval requirement
Article 5 *"Approval criteria*



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According to Art. 5 para. 1 VE-IPG, a takeover subject to notification is approved if, viewed ex ante, "there is no reason to assume that public order or security is endangered or threatened by the takeover." According to the Explanatory Report, endangerment and threat are to be understood as the product of probability of occurrence and extent of damage: If the probability that a takeover with an intrinsically high level of damage to Switzerland's security will actually endanger it is close to zero, the takeover must be approved.

The approval criteria specified in the preliminary draft, which are to be taken into account in particular when assessing a transaction subject to notification, are to be regarded as relatively vague. The list contains a large number of indeterminate legal terms which leave the authorities greater scope for discretion in assessing individual cases and whose interpretation is unlikely to be readily predictable for companies. It is therefore questionable whether this approach will achieve the draft's stated goal of ensuring the greatest possible predictability in the application of the law. In this context, however, it should also be borne in mind that such an audit law must also provide scope for the authorities to react to unforeseeable circumstances in security-sensitive areas. If the proposed law should one day enter into force, it is of central importance that the competent authority creates (more) legal certainty as quickly as possible through the comprehensive publication of thoroughly substantiated decisions - and does not establish an approval practice that is difficult to predict, as is the case in other countries.

3. Section: Approval procedure

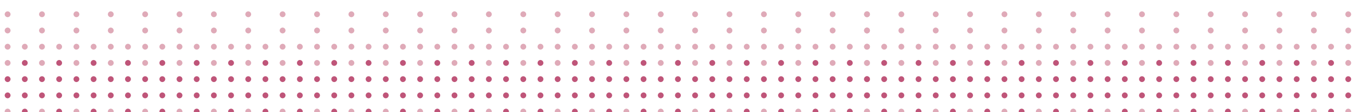
We support a two-stage procedure because it increases legal certainty for companies. In addition, such a structure enables efficient processing of the review decision. With regard to the actual review procedure, the comparative legal analysis in the Explanatory Report shows that shorter deadlines than three months are also possible (Art. 8(1) IPG-E). In addition, extensions of deadlines should be avoided at all costs. Furthermore, it is of central importance for our companies that the process for the investment review is well coordinated with any merger control proceedings. Furthermore, it is mandatory that a decision on the approval or rejection of an investment be made in writing (Art. 9(1) IPG-E).

In addition, it should be examined whether, in addition to the two-stage review procedure, the possibility of a ruling should also be provided for the companies concerned. This would demonstrably improve planning security in the context of a takeover activity.

4. Section: Data protection and administrative assistance

The protection of confidential information and data exchanged between the authorities and companies in the course of the investment review (Section 4 IPG-E) should have top priority and be guaranteed at all times - even after the actual procedure. With regard to the exchange with foreign countries, equivalent data protection provisions are also central.

Thank you for your consideration and consideration of our concerns. Please do not hesitate to contact us if you have any questions.



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Kind regards

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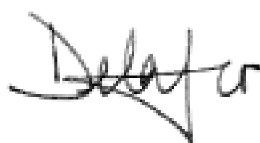

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