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**Jannis
Zafeirakos**

Generation

**Foreign Direct
Investments:
Investitions-
prüfgesetz**

Nr. 2



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Foreign Direct Investments: Investitionsprüfgesetz

Jannis Zafeirakos*

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I. Introduction

In today's globalized economy, cross-border investments have become a crucial tool for corporations to expand their reach and capitalize on new opportunities in capital-seeking regions. However, the legal landscape surrounding cross-border investments is complex and multifaceted, with numerous limitations and restrictions that can impact the ability of investors to fulfil their ambitions. This paper first classifies different types of cross-border investments before studying the current limitations on FDIs in Switzerland. Then, the author explores some critical aspects of the proposed IPG draft. Particular attention is given to the approval and recourse procedures under the IPG and the role of the ECHR in this context.

1. Cross-Border Investments

Cross-Border Investment (CBI) refers to all capital flows, both private and public, between countries.¹ CBIs can take up the form of investing in, acquiring, and setting up companies, buying and selling immovable property, repurchasing securities, receiving dividends and interest, granting credit, investing in funds, and acquiring intellectual property rights – as long as capital is transferred transnationally.² International trade, which is the exchange of goods and services, is not considered a type of cross-border investment.³

¹ African Development Bank Group, NEPAD, Regional Integration and Trade Department, no. 2, September 2013, available at: <[² ECJ, 16 March 1999, Trummer and Mayer, C-222/97, N 21; see European Commission, Case law guide of the European Court of Justice on articles 63 et seq. TFEU, Free Movement of Capital, available at: <\[https://finance.ec.europa.eu/system/files/2018-11/160223-guide-case-law-free-movement-capital_en.pdf\]\(https://finance.ec.europa.eu/system/files/2018-11/160223-guide-case-law-free-movement-capital_en.pdf\)>, 9 et seqq.](https://www.afdb.org/en/documents/document/regional-integration-brief-intra-sadc-cross-border-investments-33585#:~:text=Cross-Border Investment (CBI),Regional Economic Community (REC)>.</p></div><div data-bbox=)

³ See regarding the interplay of both economic activities Abamu/Pietrzak, 106 et seqq.; FDIs and FPIs are both CBIs.

2. Foreign Direct Investments

FDIs establish a direct business interest in a foreign country. The investments are of a lasting and controlling nature. Examples of FDIs include establishing a subsidiary in another country (“Greenfield Investment”), acquiring or merging with an existing foreign company, starting a joint venture partnership with a foreign company, and acquiring real estate.⁴ The threshold for company stock investments is typically set at 10% ownership or voting power.⁵

3. Foreign Portfolio Investments

FPIs are more short-term oriented, hence more volatile and easily liquidable.⁶ The most common example is the purchase of securities and financial assets in the secondary market without gaining major influence over the foreign investment target.⁷

4. Transaction Transparency

Transparency does pose a challenge to analyzing statistical evidence in this regard. Cross-border investments into private companies that do not exceed the 10% benchmark often do not trigger state disclosure duties.⁸ Investments into publicly listed companies are to be reported to the stock exchange starting from a lower benchmark and usually regardless of a cross-border element to

⁴ Cf. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I of 21 March 2019 (henceforth “Regulation (EU) 2019/452”), Art. 2 para. 1.

⁵ International Monetary Fund, Statistics Department, Direct Investment: 10 Percent Threshold, 1 September 2004, available at: <<https://www.imf.org/external/pubs/ft/bop/2004/04-31.pdf>>; OECD, Foreign direct investment statistics, Explanatory notes, available at: <<https://www.oecd.org/daf/inv/FDI-statistics-explanatory-notes.pdf>>; Duce Maitena, Definitions of Foreign Direct Investment (FDI): a methodological note, 31 July 2003, available at: <<https://www.bis.org/publ/cgfs22bde3.pdf>>.

⁶ Corporate Finance Institute, Foreign Portfolio Investment (FPI), 15 March 2023, available at: <<https://corporatefinanceinstitute.com/resources/wealth-management/foreign-portfolio-investment-fpi/>>.

⁷ Wu/Li/Selover, 645 et seqq.

⁸ As part of the SNB’s survey activities, foreign investments in the size of 10% or more of voting power or 1 mil. CHF or more of transaction value are to be disclosed, see SNB, Cross-border participations: Annual survey, Notes, available at: <<https://emi.snb.ch/en/emi/inv/INP/1.5>>, N 2 et seqq. and 6 et seqq.; cf. also SNB, Cross-border capital linkages, available at: <<https://emi.snb.ch/en/emi/INV>>; companies incorporated in the US have to report foreign investors with ownership or voting rights over 10%, see 22 U.S.C. Chapters 46 and 46a.

the transaction.⁹ According to a report from 2019, only 21% of SMI stock ownership is publicly evident.¹⁰ Hence, (i.a.) due to insufficient public resources, most publications on CBIs solely cover FDIs and neglect FPIs.¹¹

II. Current FDI Limitations

Switzerland is known to be one of the freest economies globally.¹² Nevertheless, some regulatory provisions limiting investments specifically pertain to foreign investors.

1. Art. 3^{bis} et seqq. BankG

If a prospective bank is under the controlling influence of one or more foreign nationals, the FINMA may set additional conditions during the bank's licensing procedure or, if the controlling influence arises after the license has been ob-

⁹ In Switzerland, the benchmark is 3% for listed companies, see Art. 120 FinMIA; 10% ownership in banks and financial market infrastructures is to be reported to the FINMA, see Art. 13 BankV and Art. 9 para. 5 FinMIA; further special provisions apply, see FINMA, Rundschreiben 2018/2, Meldepflicht Effektengeschäfte, 4 November 2020, available at: <<https://www.finma.ch/de/~media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2018-02.pdf?la=de>>; see also Art. 2-5 FinMIO-FINMA; with Art. 37 FinMIO, the Federal Council tries to gain information on the beneficiaries of all SIX securities transactions, however, the effectiveness and appropriateness of the provision are controversial, see SK-Borens/Baumann, FinMIA 39 N 36 et seqq.; companies listed on the NYSE fill out the Schedule 13D or 13G form reporting acquisitions of 5% or more equity ownership to the SEC, see SEC, Schedule 13D Under the Securities Exchange Act of 1934, available at: <https://www.sec.gov/Archives/edgar/data/1418091/000110465922042863/tm2211757d1_sc13d.htm>.

¹⁰ Zimmermann Heinz/Zimmermann Yvonne Seiler, Besitzverhältnisse an börsenkotierten schweizerischen Unternehmungen, Eine Analyse des "SMI expanded" Aktienuniversums, 13 February 2019, available at: <https://www.seco.admin.ch/dam/seco/de/dokumente/Publikationen_Dienstleistungen/Publikationen_Formulare/Wirtschaftslage/Strukturwandel_Wachstum/Branchenanalysen/Studie_Besitzverhaeltnisse_boersenkotierten.pdf.download.pdf/Studie_Besitzverhaeltnisse_boersenkotierten_ch-Unternehmungen.pdf>, 6 et seqq.; Rasch Michael, Wem gehört der Schweizer Aktienmarkt?, in: NZZ, 21 February 2015, available at: <<https://www.nzz.ch/finanzen/aktien/wem-gehört-der-schweizer-aktienmarkt-ld.1519>>; as per direct communication with the SER, the information collected, saved, and evaluated (also by the nationality of the beneficial owner) by the SIX and forwarded to the FINMA has increased significantly, making the 20% figure potentially obsolete.

¹¹ Li/Filer, 80.

¹² See The Heritage Foundation, 2023 Index of Economic Freedom, available at: <<https://www.heritage.org/index/ranking>>.

tained, through an independent supplementary licensing procedure.¹³ A controlling influence subsists when foreign investors who are considered qualified investors together hold a majority of the voting power and are bound to act synergistically.¹⁴ The 10% (Art. 3 para. 2 let. c^{bis} BankG, qualified investor)¹⁵ and 50% (Art. 3^{bis} para. 3 BankG, controlling influence) benchmarks and their exemptions for exceptional circumstances correlate with the issues of corporate and state control in the context of FDIs (see below [Chapters III.2.](#) and [III.3.](#)) if a domestic bank is the target of a foreign investment.¹⁶

2. Lex Koller

Switzerland's real estate market restrictions targeting foreign buyers are some of the most stringent of all Western democracies.¹⁷ Foreign nationals acquiring Swiss real estate generally require approval from the canton at the location of the property.¹⁸ If the real estate's utilization is commercial then no authorization is required, exempting domestic target companies that do not invest in residential property from the Lex Koller scrutiny in the context of FDIs.¹⁹

¹³ Art. 3^{bis} para. 1 and Art. 3^{ter} BankG.

¹⁴ Art. 3^{bis} para. 3 BankG; as public banks' shares are predominantly in public float, they are typically not subject to this limitation, see e.g. UBS, Shareholder distribution, Information about the distribution of shareholders by category and geographical location, 30 June 2023, available at: <<https://www.ubs.com/global/en/investor-relations/investors/shareholder-information/shareholder-details/distribution.html>>; while the bond between the investors need not be established through a formal contract, this flexibility does not trigger a burden of proof reversal, cf. BankG Comm.-Roth/Schwob, BankG 3^{bis}, 3^{quater}, 3^{ter} N 4; alternatively, one single foreign investor with a majority voting power also meets the condition.

¹⁵ A qualified investor under Art. 3 para. 2 let. c^{bis} BankG is an investor with at least 10% of company equity ownership or voting power. However, in exceptional circumstances the 10% limitation can be disregarded, see BankG Comm.-Kleiner/Schwob, BankG 3 N 250 et seqq.

¹⁶ For further literature on foreign-controlled banks in Switzerland Werlen, 24 et seqq.

¹⁷ The only Western countries with similarly restrictive limitations on real estate include Australia and some eastern European countries, see OECD, FDI Regulatory Restrictiveness Index, 2019, available at: <<https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX#>>; from a business perspective, considering that the Lex Koller has been in place since 1983 and that Swiss real estate prices have been constantly among the highest worldwide, the effects on real estate prices that a softening of Lex Koller would have may be worth analyzing, cf. Gholipour, 39 et seqq.

¹⁸ See Art. 2 and 15 ANRA; several exemptions apply, see i.a. Art. 2 para. 2 and Art. 7 ANRA.

¹⁹ Art. 2 para. 2 let. a ANRA; in detail Menghini/Ammann, 435 et seqq.

III. Bundesgesetz über die Prüfung ausländischer Investitionen (IPG)

1. Motion Rieder (18.3021)

With similar critique coming from neighboring European countries,²⁰ concerns about the influence of foreign investors arise. In his motion, Rieder expresses fears about foreign government-related companies abusing investments to capture and politically utilize domestic innovation.²¹ In its response, the Federal Council refers to the government's service public responsibility.²² Service public is the politically defined goal of ensuring that the population has access to goods and services for normal needs. For the government, it has the meaning of a mandate to act in order to achieve this goal.²³ The range of goods and services concerned is steadily rising and includes drinking water, electricity, foodstuff, housing, waste disposal, education, medication, public transportation, payment services, media coverage, and many more.²⁴ The Federal Council does acknowledge that FDIs into these industries can impose a risk to public security, order, and fair competition. Yet, it argues that services that deserve protection from FDIs are state-controlled or state-governed and therefore not open to FDIs.²⁵ The author suspects that the Federal Council misjudges the instruments utilized to warrant the service public. In many instances, such as housing and foodstuff, the state's primary measure is to merely set conditions for the market to efficiently supply the goods and services, leaving the industries largely open to FDIs. Switzerland's free market economy would be severely damaged if all industries that classify as service

²⁰ See e.g. Doll Nikolaus, Chinas Übernahmeorgie in Deutschland hat eine gefährliche Schattenseite, in: Welt, 6 June 2017, available at: <<https://www.welt.de/wirtschaft/article165247764/Chinas-Uebnahmeorgie-in-Deutschland-hat-eine-gefaehrliche-Schattenseite.html>>.

²¹ Motion Rieder (18.3021), "Schutz der Schweizer Wirtschaft durch Investitionskontrollen", 26 February 2018, available at: <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20183021>> (henceforth "Motion Rieder").

²² Motion Rieder (FN 21); the SP proposes the literal inclusion of the service public into the IPG, see Sozialdemokratische Partei der Schweiz, Bundesgesetz über die Prüfung ausländischer Investitionen (Investitionsprüfgesetz, IPG), 9 September 2022, available at: <<https://www.sp-ps.ch/wp-content/uploads/2022/09/SP-Stellungnahme-Investitionspruefgesetz-IPG-1.pdf>> (henceforth "SP Comment").

²³ See the definition in Botschaft zur Volksinitiative "Pro Service public", 14 May 2014, in: BBl 2014 3805, 3810.

²⁴ Botschaft zu einer allgemeinen Verfassungsbestimmung über die Grundversorgung, 8 May 2013, in: BBl 2013 3407, 3415.

²⁵ Amtl. Bull. SR 2018, 419 et seqq.

public and/or are considered worth protecting against FDIs had to be bought up and controlled by the state because no softer measures against FDIs are available.

Also, Rieder primarily aims to protect highly innovative, patent-dependent, and globally competitive companies. It's questionable whether state-owned companies form an integral part of that scope, or if the Federal Council overestimates its own market output.²⁶

The author opines that if one were to consider FDIs a risk to the Swiss economic landscape, the state's service public responsibility is no adequate instrument to diminish such risk.

While the Federal Council rejected it, the National Council and the Council of States accepted the motion, ordering the Federal Council to draft legislation.²⁷ The proposal by the Federal Council, albeit not final,²⁸ fundamentally challenges Switzerland's current FDI policy and therefore deserves close examination.

2. The Term “Company” under the IPG

In the IPG draft, companies are defined as consumers or suppliers of goods or services active in commerce regardless of their legal or organizational form (Art. 3 let. b IPG). The IPG Report refers to Art. 2 para. 1^{bis} CartA, which constitutes the same functional definition of a company.²⁹ International acquisitions of private Swiss entities are usually structured as acquisitions of holding entities purposely incorporated to govern the operating company's shares and carry out the acquisition.³⁰ It is questionable whether these holding entities fall under Art. 3 let. b IPG and Art. 2 para. 1^{bis} CartA. The company does

²⁶ Cf. Belloc, 824 et seqq.

²⁷ Amtl. Bull. NR 2020, 47; Amtl. Bull. SR 2018, 446.

²⁸ Bundesrat, Medienmitteilung, Investitionsprüfgesetz: Bundesrat beschliesst Ausarbeitung eines Entwurfs, 10 May 2023, available at: <<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-95018.html>> (henceforth “Federal Council Press Release”).

²⁹ EAER, Bundesgesetz über die Prüfung ausländischer Investitionen, Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens, 18 May 2022, available at: <<https://www.news.admin.ch/newsd/message/attachments/71560.pdf>> (henceforth “IPG Report”), 16.

³⁰ Also called Special Purpose Vehicles (SPVs), see Wyss Lukas/Winzap Maurus, Leveraged acquisition finance in Switzerland: recent trends in structural features, 1 June 2014, available at: <

not need to fulfill the characteristics as a legal entity but as an economic unit.³¹ An economic unit is a corporate structure that gives one legal entity control over the other(s).³² Thus, holding entities with control over operational entities make up a company (Art. 3 let. b IPG) and their acquisition may fall under the IPG.

One of two versions of the IPG excludes companies incorporated in Switzerland if they're part of a corporate group structure with headquarters abroad (Art. 3 let. c IPG).³³

3. Foreign State Control

If the foreign acquirer is directly or indirectly state-controlled, and the domestic target company employed 50 or more full-time employees or generated at least 10 mil. CHF annual revenue on average in the past two years, approval by the SECO is required (Art. 4 para. 1 let. a and para. 2 IPG).³⁴ According to the IPG Report, the element of state control is to be aligned with the corporate control of an economic unit as described above.³⁵ This alignment can lead to a variety of conflicts, since the control that a state exercises over an associated company is oftentimes differently shaped than the control a parent company has over its subsidiaries.³⁶ To grasp all forms of state control and adhere to the report's wish for uniformity, a wide understanding of control is essential throughout the IPG.³⁷

³¹ Candreia, N 87; see also DIKE-Heizmann/Mayer, CartA 2 N 30 et seqq.; Kubli, 139.

³² Another definition of an economic entity is the corporation in Art. 963 CO, see BSK-Amstutz/Gohari, CartA 2 N 112.

³³ One argument for that exception is that it unburdens authorities since almost half of potentially scrutinized FDI transactions fall under the exception, see IPG Report (FN 29), 17; however, the author opines that the unequal treatment this would provoke is not in accordance with Art. 8 FC.

³⁴ IPG Report (FN 29), 25.

³⁵ IPG Report (FN 29), 19; [Chapter III.2](#).

³⁶ Bär & Karrer, one of the officially consulted commentators, proposed a customized definition, see Bär & Karrer, Stellungnahme Bär & Karrer AG zum Vorentwurf eines Bundesgesetzes über die Prüfung ausländischer Investitionen, 9 September 2022, available at: <https://media.baerkarrer.ch/karmarun/image/upload/baer-karrer/qxesqz4hxwlypf3xg192.pdf> (henceforth "B&K Comment"), 7 et seqq.

³⁷ Cf. § 55a para. 3 no. 1 AWV.

IV. IPG Approval Procedure

1. Timeline and Competency

It's the foreign acquirer's responsibility to submit the screening request to the SECO.³⁸ Under Art. 6 para. 2 IPG, the Federal Council is free to determine the necessary documents to be submitted for the approval procedure to commence; however, some relevance to the approval criteria is in order.³⁹ In this first procedural stage, which is bound to a one-month deadline, the SECO is obliged to consult with the NDB and is permitted to involve other administrative units of the central federal government into the process as Concerned Parties. These Concerned Parties are selected on a case-by-case basis and need to concur with the SECO on direct approvals, otherwise the in-depth screening process ensues.⁴⁰ In its commentary, the SP raises the question of whether the SECO, an authority that typically favors a pro-business stance and has exhibited a discerning attitude towards FDI screenings in general,⁴¹ is the appropriate body to screen transactions.⁴² Furthermore, the author questions whether under the draft law the SECO has adequate incentives or a clear legal duty to involve critical authorities as Concerned Parties.⁴³ Also, the consulted cantons denounce that only federal administrative units can be involved.⁴⁴ Indeed, as the affected domestic companies are presumably of national signif-

³⁸ Art. 6 para. 1 IPG.

³⁹ This constraint is indicated in Art. 12 IPG, limiting disclosure requirements to information that are necessary for the screening.

⁴⁰ Art. 7 para. 1 and Art. 10 IPG.

⁴¹ The SECO generally endorses economic liberalism, see Art. 5 para. 2 let. a, c, and d OV-WBF; however, in the SECO's regulatory impact analysis that the SP references, the SECO does not appear all too critical about FDI screenings, see Meyer Niclas/Braun Markus/Huddlestone Christopher, in: SECO (Ed.), *Regulierungsfolgenabschätzung zur Einführung einer Investitionsprüfung*, May 2022, available at: <https://www.seco.admin.ch/dam/seco/de/dokumente/Publikationen_Dienstleistungen/Publikationen_Formulare/Regulierung/BereitsdurchgefuehrteRFA/rfa_einfuehrung_investitionspruefung.pdf.download.pdf/RFA-Einfuehrung-Investitionspruefung.pdf> (henceforth "SECO Impact Analysis"), 14 et seqq. and 47 et seqq.

⁴² SP Comment (FN 22).

⁴³ The IPG Report mandates the SECO to base its decision on administrative competencies, which the author opines is too broad and should be legislatively specified as a binding duty, see IPG Report (FN 29), 27.

⁴⁴ Staatssekretariat für Wirtschaft SECO, Bundesgesetz über die Prüfung ausländischer Investitionen, Bericht über die Ergebnisse der Vernehmlassung, 18 April 2023, available at: <<https://www.news.admin.ch/newsd/message/attachments/78097.pdf>> (henceforth "Consultation Results"), 13.

icance (cf. [Chapter III.1](#)), their importance to the individual canton they are incorporated in is immense.⁴⁵ Therefore, a federalist inclusion, whether compulsory or optional, would be reasonable.

The in-depth screening process's time limit is three months, counting from its initiation.⁴⁶ If the SECO and the Concerned Parties vote unanimously against the transaction, if the SECO and the Concerned Parties deem the matter politically significant, or if no unanimous decision can be reached between the SECO and all Concerned Parties, the Federal Council gains authority to solitarily rule on the case.⁴⁷ It must reach a decision by the earliest Federal Council meeting following the three-month in-depth review period.⁴⁸ The Federal Council typically assembles on a weekly basis.⁴⁹ Therefore, if the SECO and the Concerned Parties utilize the entire three months they are given and only then forward the case to the Federal Council, it only has a few days to rule on it. This is particularly problematic when the reason for the delegation is that no unanimous decision could be reached in the up to four months prior, or when high political significance prevails, signaling controversy and therewith complexions. The author appreciates the urgency of the IPG but doubts whether a few days are sufficient to brief all seven members of the Federal Council adequately to make a qualified decision on such a matter. This time sensitivity directly conflicts with the ideal that the SECO and the Concerned Parties attempt to reach a unanimous decision during the in-depth screening in order to spare the Federal Council from overload. In the US, the president, who holds an equivalent procedural position to the Federal Council, is granted a separate deadline of 15 additional days.⁵⁰ Moreover, Art. 9 para. 2 IPG only allows the SECO to extend procedural deadlines, also referencing the Federal Council's

⁴⁵ This importance primarily comprises corporate tax revenue and local employment.

⁴⁶ Art. 8 para. 1 IPG.

⁴⁷ Art. 8 para. 2 IPG.

⁴⁸ Art. 8 para. 3 IPG.

⁴⁹ The Federal Council, Federal Council meeting, 19 July 2019, available at: <https://www.admin.ch/gov/en/start/federal-council/tasks/decision-making/federal-council-meeting.html>.

⁵⁰ 50 U.S.C. §§ 2170(d); however, one should consider that the US's in-depth screening procedure is limited to 45 days, rather than three months, see 50 U.S.C. §§ 2170(b).

deadline (Art. 8 para. 3 IPG). Thereby, under the draft law, the Federal Council would be required to request the SECO to extend its deadline when needed.⁵¹

2. Signing and Closing

The approval procedure falls between the signing and the closing of the transaction.⁵² According to Art. 8 para. 5 IPG, the legal effects of the transaction remain suspended until approval. The IPG Report references Art. 34 CartA which shares a similar wording.⁵³ The literature on Art. 34 CartA is divided regarding the effects of the suspense.⁵⁴ While some authors opine that the rights emerging out of the signing are by law conditioned to the approval and all rights are *ex tunc* nullified by reason of Art. 20 CO if no approval is granted,⁵⁵ others understand the suspension solely as a prohibition to close the transaction and Art. 20 CO only applies to premature closing actions.⁵⁶ In any case, missing approval renders signing rights directly furthering the closing of the transaction non-enforceable and parties would be well advised to contractually prearrange disintegration aftereffects.⁵⁷ If closing actions are taken pre-

⁵¹ This lays grounds for unsavory conflicts, as the SECO is bound to the EAER's presiding Federal Council's instructions (Art. 38 RVOG and Art. 7 para. 3 RVOV). Seeing that a delay without extension causes *de jure* approval of the transaction (Art. 9 para. 1 IPG), this competency gives the EAER's presiding Federal Council member immoderate powers over the other members. The only balancing guidance in place is the Federal Council's principle of collegiality (Art. 177 para. 1 FC) and the Federal Council's right of evocation (Art. 47 para. 4 RVOG); cf. FC Comm.-Biaggini, FC 177 N 19; see Art. 9 para. 2 IPG regarding the requirements for a time extension.

⁵² FDP Die Liberalen, Bundesgesetz über die Prüfung ausländischer Investitionen, Vernehmlassungsantwort der FDP.Die Liberalen, 12 September 2022, available at: <https://www.fdp.ch/fileadmin/documents/fdp.ch/pdf/DE/Positionen/2_Vernehmlassungen/2022/septembre/20220912_VL_Investitionspruefung_d.pdf>.

⁵³ IPG Report (FN 29), 26.

⁵⁴ Cf. OFK-Borer, CartA 34 N 3 et seqq.

⁵⁵ CartA Comm.-Ducrey, CartA 34 N 3.

⁵⁶ DIKE-Ritschard/Spühler, CartA 34 N 2 et seqq. and 17; somewhat in the middle of the notions SHK-Reich, CartA 34 N 3 and 6; BSK-Borer, CartA 34 N 6 and 22 shares Ritschard/Spühler's view, does however hint at an applicability of Art. 20 CO on signing rights and proposes a subsidiary power of the court to appropriately alter the signing rights in case of no approval; cf. Waser/Haechler, 316 et seqq.

⁵⁷ In practice, M&A parties regularly institute FDI clearance as a closing condition (condition precedent), see Waser/Haechler, 320; see also Waldheim Stephan/Kohlen Janneke/Rosen Anthony, Foreign Direct Investment in Europe – A closer look at developments and trends in Germany, the Netherlands, and the United Kingdom, 6 April 2023, available at: <<https://www.twobirds.com/en/insights/2023/global/foreign-direct-investment-in-europe>>.

approval, the Federal Council can impose administrative penalties and disintegration measures.⁵⁸

V. IPG Recourse

Art. 16 para. 1 IPG proclaims the general recourse framework as applicable. The IPG Report specifies that legal recourse according to the APA is available against IPG rulings.⁵⁹

1. Issuer of Contestable Rulings

As indicated in the previous chapter, negative rulings are issued only by the Federal Council. Likewise, only the Federal Council has the authority to attach conditions and obligations to positive rulings.⁶⁰

2. Federal Administrative Court

As part of the IPG draft, the Federal Council added the amendment Art. 33 let. b no. 11 to the VGG, thereby subjecting IPG rulings by the Federal Council to the jurisdiction of the FAC. In the event of an irreconcilable conflict with the exceptions in Art. 32 VGG, such as para. 1 let. a,⁶¹ it would be decided in favor of Art. 33 let. b no. 11 VGG according to the principles of *lex posterior derogat legi priori* and *lex specialis derogat legi generali*.⁶²

⁵⁸ See Art. 17 and 18 IPG; in detail Kreis, 474 et seqq.

⁵⁹ IPG Report (FN 29), 29 et seqq.; this does not sufficiently clarify the applicable due process, see Economiesuisse, Vernehmlassung: Bundesgesetz über die Prüfung ausländischer Investitionen, 6 September 2022, available at: <https://www.economiesuisse.ch/sites/default/files/publications/VNL_Investitionsprüfgesetz.pdf> (henceforth “Economiesuisse Comment”), 5.

⁶⁰ Waser/Haechler, 317.

⁶¹ [Chapter V.4](#) and [V.5](#).

⁶² That is, if no reconciling interpretation, such as a partial limitation of Art. 33 let. b no. 11 VGG in terms of Art. 32 VGG, can be applied. However the IPG Report’s clear calling for a recourse instance to the Federal Council would severely obstruct this reasoning, see IPG Report (FN 29), 29.

3. Applicable SFT Procedure

For second instance recourse to the SFT, one needs to distinguish between the appeal in public law matters (Art. 82 et seqq. BGG) and the appeal in civil law matters (Art. 72 et seqq. BGG).⁶³

Generally, the determination of the applicable procedure follows the distinction between cases predominantly subject to private or public law.⁶⁴ In Switzerland, the distinction between private and public law disputes is based on multiple theories, one of the predominant ones being the theory of interests (“*Interessentheorie*”).⁶⁵ The theory of interests distinguishes acts that serve to fulfill public interests from ones that do not.⁶⁶ As the IPG serves public interests (Art. 1 IPG), so do negative rulings by the Federal Council. Another theory is the functional theory (“*Funktionstheorie*”), according to which an act falls under public law if it serves to fulfill public tasks. An act is deemed subject to a public task when the governing authority is legally mandated, pursuant to formal law, to execute such act.⁶⁷ The approval procedure is mandatory,⁶⁸ if a transaction poses a threat to public order and security, the Federal Council is obligated to rule against it.⁶⁹ The subject theory (“*Subjektstheorie*”) generally categorizes acts exercised by public, i.e. administrative entities, which includes the Federal Council, as falling under public law.⁷⁰ In conclusion, according to the theory of interests, the functional theory, and the subject theory, negative IPG rulings by the Federal Council are considered public law under Swiss law.⁷¹

However, the distinction between private and public law under the BGG is tilted by Art. 72 para. 2 let. b BGG. It prescribes that some public law cases are to be processed by the SFT in the civil law matter procedure if the cases have an immediate connection to private law. The examples listed in the BGG in no way resemble FDI cases. Although the list is not conclusive, it does serve as a

⁶³ The FAC is a valid lower instance to both procedures before the SFT, see Art. 75 para. 1 and Art. 86 para. 1 let. a BGG; neither the IPG nor the IPG Report indicate a tendency, see Art. 16 para. 1 IPG and IPG Report (FN 29), 29.

⁶⁴ Botschaft zur Totalrevision der Bundesrechtspflege, 28 February 2001, in: BBI 2001 4202, 4235.

⁶⁵ SFT, 18 January 2018, 4A_305/2017, c. 3.

⁶⁶ Cf. Administrative Court Grisons, 9 May 2023, U 22 53, c. 4.1 et seqq.

⁶⁷ In detail Rüttsche, 155 et seqq.

⁶⁸ If no request is submitted by the acquirer, the SECO initiates the approval procedure *ex officio* (Art. 11 IPG).

⁶⁹ Art. 5 para. 1 IPG.

⁷⁰ Baumgartner, 178 et seqq.

⁷¹ See in detail on all relevant theories Luks, 18 et seqq.

point of reference.⁷² Other cases tried by the SFT under Art. 72 para. 2 let. b BGG also show no resemblance to FDIs.⁷³ Therefore, IPG rulings are not subject to the appeal in civil law matters but to the appeal in public law matters.

4. Exemption Art. 83 let. a BGG

Art. 83 let. a BGG exempts the SFT's jurisdiction from recourse against rulings regarding *i.a.* the internal and external security of the country and all other issues concerning foreign affairs. The scope of Art. 83 let. a BGG entails "*actes de gouvernements*" with an overarching political element.⁷⁴ The literature opines that trade barriers fall under the exemption if qualified political interests are at play.⁷⁵

In the current draft, and per announcement even more so in the upcoming one, the emphasis of the IPG is to govern transactions involving foreign state-controlled acquirers.⁷⁶ At its core, the influence that foreign states gain over Switzerland and the resulting effects on Swiss national interests are in question. Moreover, the deciding authorities are given a broad set of criteria to base their decisions on (Art. 5 IPG), giving the decisions a rather discretionary and thereby political than strictly legal edge.⁷⁷ Furthermore, when drawing a comparison to corresponding cases and considering its institutional disposition, the NDB's obligatory involvement in the approval procedure indicates relevance to the national security.⁷⁸ The interests in FDI screenings are purely political – economic contraction and discontent from the private sector are tolerated for strategic political motives.⁷⁹ FDI screenings specifically targeting

⁷² SFT, 18 November 2010, 5A_649/2010, c. 1.1; as opposed to the list in Art. 83 BGG, which is conclusive, see CR-Aubry Girardin, BGG 83 N 15.

⁷³ See the summarized past jurisprudence SHK-von Werdt/Güngerich, BGG 72 N 25.

⁷⁴ OFK-Wiederkehr/Meyer/Böhme, APA 72 N 3 et seqq.; cf. FAC, 25 June 2019, B-6019/2018, c. 2.5; DFT 142 II 313 c. 4.3.

⁷⁵ BSK-Güngerich, BGG 83 N 28; SHK-Seiler, BGG 83 N 14.

⁷⁶ Schöchli Hansueli, "Lex China" und "Lex Russland": Der Bundesrat will die Investitionskontrolle auf staatliche Käufer von Schweizer Firmen beschränken, in: NZZ, 10 May 2023, available at: <<https://www.nzz.ch/wirtschaft/lex-china-und-lex-russland-der-bundesrat-will-die-investitionskontrolle-auf-staatliche-kaeuer-von-schweizer-firmen-beschaenke-n-ld.1737381>>.

⁷⁷ B&K Comment (FN 36), 9 et seqq.; Consultation Results (FN 44), 11; cf. SHK-Seiler, BGG 83 N 11 et seqq.; this is further emphasized by Art. 16 para. 3 IPG, limiting judicial review of FDI decisions to procedural errors and abuse of power, see [Chapter V.7](#).

⁷⁸ Cf. DFT 138 I 6; in detail Boller, 366 et seqq.; Sigrist, 83; the Federal Council's role as the issuing authority can also be interpreted in that sense, see Oesch, 1300.

⁷⁹ SECO Impact Analysis (FN 41), 37 et seqq.; cf. Yuan, 64 et seqq.

state-controlled acquirers relate to foreign affairs and, according to Art. 1 IPG, IPG rulings aim to provide national security to the country. In conclusion, IPG rulings are subject to the exemption in Art. 83 let. a BGG.

5. Counter-Exception: ECHR 6

Art. 83 let. a BGG grants the SFT jurisdiction over cases where foreign affairs and the national security are concerned but international law orders access to a judicial tribunal. Art. 6 para. 1 ECHR establishes a guarantee to access an “independent and impartial tribunal established by law” for parties in contestations over civil rights and criminal charges.

According to the ECtHR, a civil dispute concerning *civil rights* is likely present if the national jurisdiction classifies the claim in question as a matter of private law.⁸⁰ FDI rulings are considered public law under Swiss law.⁸¹ Although the national distinction between private and public law serves as an indicator, the ECtHR classifies disputes autonomously.⁸² Art. 6 para. 1 ECHR has a wider scope than Art. 72 para. 1 and 2 let. b BGG.⁸³ Disputes that are classified as administrative (i.e. public) law by the jurisdiction in question but directly and causally affect private rights and obligations are considered civil disputes under the ECHR.⁸⁴ In *Ringeisen v. Austria*, the ECtHR decided that cases on administrative measures limiting private property transfers are considered civil disputes.⁸⁵ In *Zlinsat v. Bulgaria*, the ECtHR ruled on the administrative prohibition of the execution of a hotel's FDI acquisition, considering it a matter of civil rights.⁸⁶ Negative IPG rulings directly forbid the foreign acquirer to obtain property over the domestic company, and the domestic company to transfer property to the acquirer as part of its owner's proprietary (civil) rights (Art. 25 FC). Ultimately, the ECtHR would regard IPG rulings as pertaining to civil rights.

Moreover, as a second condition to the applicability of Art. 6 para. 1 ECHR, the case must pose a *contestation* that directly affects the existence, scope, or manner of exercise of such civil rights.⁸⁷ The acquirer must submit the clearing

⁸⁰ ECtHR, 12 February 2004, *Perez v. France*, no. 47287/99, N 57 et seqq.

⁸¹ [Chapter V.3.](#)

⁸² Nomos-Meyer-Ladewig/Harrendorf/König, ECHR 6 N 9.

⁸³ BSK-Klett/Escher, BGG 72 N 8.

⁸⁴ ECtHR, 9 March 2021, *Bilgen v. Turkey*, no. 1571/07, N 65; cf. Seiler, 313.

⁸⁵ ECtHR, 16 July 1971, *Ringeisen v. Austria*, no. 2614/65, N 94.

⁸⁶ ECtHR, 15 June 2006, *Zlinsat v. Bulgaria*, no. 57785/00, N 72.

⁸⁷ DFT 141 I 97 c. 5.1; BSK-Häberli, BGG 83 N 32.

request before the closing, not the signing of the acquisition.⁸⁸ A subsequent negative ruling by the Federal Council and a resulting dispute before court directly affect the existence and enforcement of these civil rights.⁸⁹

In conclusion, since both conditions are met, Art. 6 para. 1 ECHR guarantees FDI parties access to a fair and independent judicial tribunal against IPG rulings.⁹⁰

6. Guaranteed Access to Second Instance

As the FAC is considered an independent tribunal, and Art. 6 para. 1 ECHR only orders access to a single judicial review by such court, Art. 6 para. 1 ECHR does not guarantee access to the SFT as a second instance.⁹¹ Hence, the counter-exception in Art. 83 let. a BGG is not applicable and the SFT does not have jurisdiction. However, the SFT and major parts of the Swiss literature interpret Art. 83 let. a BGG autonomously, in the sense that rulings that are guaranteed access to an independent tribunal, not necessarily the court in question (SFT) itself, are subject to the counter-exception in Art. 83 let. a BGG.⁹² The landmark SFT ruling 2C_349/2012,⁹³ on which the SFT thereafter bases its jurisdiction over such cases,⁹⁴ refers to the BGG dispatch, which states that “*si ces décisions tombent dans le champ d’application de la garantie des voies de droit de l’Art. 6, § 1, CEDH – ce qui devrait rarement se produire –, le recours devant le Tribunal administratif fédéral (avec possibilité de recours au Tribunal fédéral) sera ouvert*”.⁹⁵ Although the French dispatch clearly allows recourse from the FAC to the SFT under Art. 32 para. 1 let. a VGG and Art. 83 let. a BGG, one should keep in mind that the Federal Council’s interpretation does not necessarily match the legislative teleology.

⁸⁸ See Art. 6 para. 1 IPG.

⁸⁹ [Chapter IV.2.](#)

⁹⁰ Sharing the same view IPG Report (FN 29), 29; Cf. Boller, 299 et seqq.; Schuler, 33 et seqq.; see a similar case DFT 132 I 229 c. 6 et seqq.; see the same case argued regarding financial sanctions Caroni, 189 et seqq.

⁹¹ BSK-Häberli, BGG 83 N 30; Donzallaz, N 2757; cf. OFK-Wiederkehr/Meyer/Böhme, APA 72 N 5.

⁹² BSK-Häberli, BGG 83 N 30.

⁹³ SFT, 18 March 2013, 2C_349/2012, c. 1.1.3.

⁹⁴ DFT 139 II 384 c. 2.3.

⁹⁵ Message concernant la révision totale de l’organisation judiciaire fédérale, 11 February 2001, in: FF 2001 4000, 4184; the German dispatch does not provide insights on that matter, see Botschaft zur Totalrevision der Bundesrechtspflege, 28 February 2001, in: BBl 2001 4202 (henceforth “BGG Dispatch”).

Historically, the exceptions in Art. 83 BGG were added to reduce overload of the SFT.⁹⁶ Under Art. 100 para. 1 let. a aOG, all cases relating to foreign affairs and the national security were denied recourse to the SFT as a second instance. In a case of Art. 100 aOG that related to a civil right under Art. 6 ECHR, and where the prior instance was not an independent tribunal, the SFT claimed jurisdiction.⁹⁷ The only reason that the SFT had the authority to deny the applicability of Art. 100 aOG *contra-legem* was the direct applicability of Art. 6 ECHR – a dismissal (“*Nichteintretensentscheid*”) would have violated *ius cogens* (Art. 190 FC).⁹⁸ The added caveat in Art. 83 let. a BGG was meant to merely adopt this jurisprudence and match Art. 6 ECHR, not expand the SFT’s jurisdiction.⁹⁹ In conclusion, the author doubts that the now established dual applicability of Art. 83 let. a BGG and Art. 32 para. 1 let. a VGG i.c.w. Art. 6 ECHR is legitimate.¹⁰⁰ Pragmatically, as this error widens access to courts, and the SFT itself claims jurisdiction over such cases, there is no compelling interest nor a competent authority besides the SFT itself to overturn established jurisprudence.

Furthermore, under the BGG, access to the SFT alone does not satisfy the guarantees under Art. 6 para. 1 ECHR due to its limited jurisdiction over factual issues.¹⁰¹ A broadening of the SFT’s jurisdiction for cases directly subjecting Art. 6 ECHR would be required to convert to the correct interpretation of Art. 83 let. a BGG and is being advocated in the literature as an independent matter.¹⁰² The current BGG structure of allowing second instance recourse in cases where Art. 6 ECHR is not directly applicable but on the other hand not fulfilling the ECHR criteria of a sufficient tribunal when Art. 6 ECHR is directly applicable warrants a thorough reassessment.

7. Art. 16 para. 3 IPG

In cases of political significance, the court’s jurisdiction is limited to adjudicating procedural guarantees and abuse of power (Art. 16 para. 3 IPG). Rulings based on the IPG regard civil rights under the ECHR, irrespective of whether

⁹⁶ BGG Dispatch (FN 95), 4211 et seqq.

⁹⁷ DFT 125 II 417 c. 4a.

⁹⁸ Cf. FC Comm.-Biaggini, FC 190 N 16 et seqq.; this was possible due to the self-executing nature of Art. 6 ECHR, see Müller, 165.

⁹⁹ BGG Dispatch (FN 95), 4217; PK-Aemisegger, BGG 83 N 11; BSK-Häberli, BGG 83 N 18; Hertig Randall, 125 et seqq.

¹⁰⁰ Cf. Donzallaz, N 2757.

¹⁰¹ Under Art. 104 let. b and Art. 105 aOG, if the SFT was the only juridical instance it had full jurisdiction, see DFT 132 II 47 c. 1.2; 132 II 485 c. 1.2; cf. SFT, 30 April 2019, 2C_127/2018, c. 3.1.1; Kley-Struller, 41 et seqq.; SHK-Seiler, BGG 97 N 2 et seqq.

¹⁰² BSK-Dormann, BGG 105 N 18; Kneubühler, 484.

the SECO deems them politically significant.¹⁰³ Hence, the parties have the right to access an independent tribunal that has the right to “examine all the factual and legal issues relevant to the determination of the dispute” without limitations to its jurisdiction (“full jurisdiction”).¹⁰⁴ If the FAC and the SFT only have jurisdiction to assess single legal issues mandated by Art. 16 para. 3 IPG, they are not considered a sufficient tribunal with full jurisdiction under Art. 6 ECHR.¹⁰⁵ As multiple commentators have pointed out the severe inadequacy of Art. 16 para. 3 IPG, it is unlikely to ultimately come into law in the proposed form.¹⁰⁶

8. Recourse Parties

Both the acquirer and the target company have the right to recourse.¹⁰⁷ As Swiss authorities have jurisdiction over screenings, all parties to the procedure can exert rights under the ECHR.¹⁰⁸

9. Interim Conclusion

According to the amended Art. 33 let. b no. 11 VGG, the FAC is the first instance for IPG recourse. IPG rulings concern foreign affairs and the national security, hence fall under the exemption of Art. 83 let. a BGG. IPG rulings affect civil rights (Art. 6 ECHR) of the parties, therefore both the acquirer and the target

¹⁰³ The ECtHR does exclude political issues from the applicability of Art. 6 ECHR, however, it understands political issues as institutional issues, which the IPG does not raise, see ECtHR, Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), 31 August 2022, available at: <https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf>, 14; also, the ECtHR is flexible in allowing exceptions for employment issues and highly technical fields, see ECtHR, 21 June 2016, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, N 126 et seqq.; ECtHR, 6 November 2018, *Ramos Nunes de Carvalho E Sá v. Portugal*, no. 55391/13, 57728/13, 74041/13, N 178.

¹⁰⁴ ECtHR, 13 February 2003, *Chevron v. France*, no. 49636/99, N 83; ECtHR, 28 January 1983, *Le Compte v. Belgium*, no. 7299/75, 7496/76, N 29 et seqq.; in detail ECtHR, 22 November 1995, *Bryan v. the United Kingdom*, no. 19178/91, N 44 et seqq.

¹⁰⁵ See the issue being raised regarding competition clearance Brei, 328 et seqq.; cf. SFT, 30 April 2019, 2C_127/2018, c. 3.1.1; Müller, 193 et seqq.

¹⁰⁶ Consultation Results (FN 44), 13; if dual recourse was open, limitations to just the second instance are permissible.

¹⁰⁷ Art. 16 para. 2 IPG.

¹⁰⁸ The geographical background of parties does not determine the applicability of the ECHR. Instead, jurisdiction over a case in an ECHR member state is decisive, see *Nomos-Nettesheim*, ECHR 1 N 22; ECtHR, 11 December 2012, *Chagos Islanders v. the United Kingdom*, no. 35622/04, N 63; the ECHR also applies to legal persons such as corporations, see *Nobel*, 28 et seqq.

company are guaranteed access to an independent tribunal. However, as Art. 6 ECHR only grants access to a single independent court, the counter-exception in Art. 83 let. a BGG does not apply and the SFT as a second juridical instance has no jurisdiction, but in practice does claim jurisdiction. Limitations to the full jurisdiction of all courts according to Art. 16 para. 3 IPG infringe Art. 6 ECHR.

10. International Comparative

In Germany, investment screening rulings can be challenged through administrative recourse procedures.¹⁰⁹ The Regulation (EU) 2019/452 mandates member states to grant FDI parties access to recourse.¹¹⁰ In the US, double instance appeal is granted; however, the court's jurisdiction is limited to due process claims.¹¹¹

VI. Consecutive Development

The consultation procedure yielded highly repellent results from business representatives.¹¹² One primary reason stated by commentators is cost-benefit imbalance.¹¹³ Also, vagueness in the scope of applicability and decision-making considerations by the SECO are seen as problematic.¹¹⁴ Hence, the Federal Council instructed the EAER to tender a modified draft. In order to improve business-friendliness, the Federal Council demands that only if a foreign state-controlled company (see above [Chapter III.3.](#)) acquirers a domestic company in a highly critical field is a screening process due.¹¹⁵ As the examples selected to illustrate high criticality are represented in both Art. 4 para. 1 let. b and c IPG (*i.a.* armaments, energy, and healthcare), no clear reference is intended.

¹⁰⁹ See Bundesministerium für Wirtschaft und Energie, FAQ zu Investitionsprüfungen nach der Aussenwirtschaftsverordnung (AWV), 13 May 2019, available at: <https://www.bmwk.de/Redaktion/EN/Downloads/E/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?__blob=publicationFile&v=2>, 6.

¹¹⁰ Regulation (EU) 2019/452 (FN 4), Art. 3 para. 5; this is notable, as the EU formally is not a signed member of the ECHR.

¹¹¹ United States Court of Appeals for the District of Columbia Circuit, 15 July 2014, *Ralls Corp. v. CFIUS*, no. 13-5315, 13 et seqq.; cf. Metzger, 797 et seqq.

¹¹² Consultation Results (FN 44), 4 et seqq.; Staehelin Konrad, Schutz vor Übernahmen aus China: Das richtige Ziel, die falsche Methode, in: Tagesanzeiger, 7 June 2023, available at: <<https://www.tagesanzeiger.ch/schutz-vor-uebernahmen-aus-china-das-richtige-ziel-die-falsche-methode-993738340493>>.

¹¹³ Economiesuisse Comment (FN 59), 4.

¹¹⁴ Consultation Results (FN 44), 11.

¹¹⁵ Federal Council Press Release (FN 28).

After the revised draft is submitted, the National Council and Council of States will discuss, potentially modify, and vote on it (Art. 71 et seq. and 120 et seq. ParlG).¹¹⁶ If both chambers vote in favor of the draft law, a subsequent public vote (facultative referendum, Art. 141 para. 1 let. a FC) is probable.¹¹⁷ Partisan lines on the last draft were (unsurprisingly) split.¹¹⁸

VII. Conclusion and Appraisal

Compared to its Western allies, Switzerland's FDI legislation to date is particularly liberal.¹¹⁹ Hence, it's no surprise that some political players seek alignment in the form of a restrictive FDI control code as a "next logical step". Statistically inaccurate titles such as "Lex China" or "Lex Russia" may shift public conceptions emotionally,¹²⁰ but in fact, Switzerland is in no position right now to voluntarily worsen its attractiveness to foreign investors and corporations.¹²¹ It

¹¹⁶ See in detail Die Bundesversammlung – Das Schweizer Parlament, Gesetzgebung, available at: <<https://www.parlament.ch/de/über-das-parlament/parlamentsportraet/aufgaben-der-bundesversammlung/rechtsetzung/gesetzgebung#h2-1>>.

¹¹⁷ See Art. 21 para. 1 IPG; cf. IPG Report (FN 29), 31.

¹¹⁸ Consultation Results (FN 44), 4.

¹¹⁹ Except for real estate FDIs, see [Chapter II.2](#).

¹²⁰ See statistically SNB, Direct Investment 2021, available at: <https://www.snb.ch/en/mmr/reference/Direktinvestitionen_2021/source/Direktinvestitionen_2021_12.en.pdf>, 16; Imboden Priscilla, Der Bundesrat skizziert die "Lex China" – zähneknirschend, in: SRF, 25 August 2021, available at: <<https://www.srf.ch/news/schweiz/firmenkaeufe-aus-dem-ausland-der-bundesrat-skizziert-die-lex-china-zahneknirschend>>.

¹²¹ SECO, Economic Importance of Foreign Investment for Switzerland, 24 January 2023, available at: <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Auslandsinvestitionen/Volkswirtschaftliche_Bedeutung_Auslandinvestitionen_Schweiz.html>; the author points out the negative implications the Credit Suisse debacle has over Switzerland's financial sector; cf. Revill John, Analysis: Credit Suisse collapse threatens Switzerland's wealth management crown, in: Reuters, 23 March 2023, available at: <<https://www.reuters.com/business/finance/credit-suisse-collapse-threatens-switzerlands-wealth-management-crown-2023-03-22/>>; also, the OECD minimum tax will put pressure on some cantons, see Deloitte, Global Minimum Tax Rate Survey, The impact on Switzerland as a business location now and in the future, 2021, available at: <<https://www2.deloitte.com/content/dam/Deloitte/ch/Documents/tax/deloitte-ch-global-minimum-tax-rate-survey.pdf>>; see a holistic approach from before immediate crisis emerged McKinsey & Company, Switzerland Wake Up, Reinforcing Switzerland's attractiveness to multinationals, April 2019, available at: <https://www.mckinsey.com/ch/~media/McKinsey/Featured_Insights/Europe/Reinforcing_Switzerlands_attractiveness_to_multinational_companies/Switzerland-wake-up-Full-report.ashx>.

will most likely be up to the voting population to decide on Switzerland's fate in this regard. The author stresses that a holistic and farsighted cost-benefit analysis is essential.

List of Abbreviations

AG	Aktiengesellschaft, Art. 620 et seqq. CO
AJP	Aktuelle Juristische Praxis
Amtl. Bull.	Amtliches Bulletin der Bundesversammlung
ANRA	Federal Act on the Acquisition of Immovable Property in Switzerland by Foreign Non-Residents, 16 December 1983 (SR 211.412.41)
aOG	Bundesgesetz über die Organisation der Bundesrechtspflege (Bundesrechtspflegegesetz), 16 December 1943 (SR 173.110)
APA	Federal Act on Administrative Procedure (Administrative Procedure Act), 20 December 1968 (SR 172.021)
Art.	article
AWV	Aussenwirtschaftsverordnung, 2 August 2013 (GER)
BankV	Verordnung über die Banken und Sparkassen, 30 April 2014 (SR 952.02)
BBI	Bundesblatt
BGG	Bundesgesetz über das Bundesgericht (Bundesgerichtsgesetz), 17 June 2005 (SR 173.110)
BSK	Basler Kommentar
c.	consideration
CartA	Federal Act on Cartels and other Restraints of Competition, 6 October 1995 (SR 251)
CBI	Cross-Border Investment
CEDH	Convention européenne des droits de l'homme (=ECHR)
cf.	compare (confer)
CFIUS	Committee on Foreign Investment in the United States
CHF	Swiss Franc
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), 30 March 1911 (SR 220)
Comm.	Commentary
CR	Commentaire Romand
Der Schweizer Treuhänder	Der Schweizer Treuhänder, Monatsschrift für Wirtschaftsprüfung, Rechnungswesen, Unternehmens- und Steuerberatung
DFT	Decision of the Swiss Federal Tribunal
diss.	dissertation

Dr. iur.	Doctor iuris
EAER	Federal Department of Economic Affairs, Education and Research
ECHR	European Convention on Human Rights, 3 September 1953
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ed.	edition
Ed(s)	Editor(s)
e.g.	for example (exempli gratia)
et al.	and others (et alia)
et seqq.	and the following (et sequentia)
EU	European Union
FAC	Federal Administrative Court
FC	Federal Constitution of the Swiss Confederation, 18 April 1999 (SR 101)
FDI	Foreign Direct Investment
FDP	Freisinnig-Demokratische Partei der Schweiz
FF	Feuille fédérale
FINMA	Swiss Financial Market Supervisory Authority
FinMIA	Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, 19 June 2015 (SR 958.1)
FinMIO	Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, 25 November 2015 (SR 958.11)
FinMIO-FINMA	Ordinance of the Swiss Financial Market Supervisory Authority on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FINMA Financial Market Infrastructure Ordinance), 3 December 2015 (SR 958.111)
FN	footnote
FPI	Foreign Portfolio Investment
GER	Germany
GesKR	Schweizerische Zeitschrift für Gesellschafts- und Kapitalmarktrecht
i.a.	among others (inter alia)
i.c.w.	in conjunction with
IPG	Bundesgesetz über die Prüfung ausländischer Investitionen, 18 May 2022 (draft)
let.	letter
mil.	million
N	note
NDB	Der Nachrichtendienst des Bundes

NEPAD	New Partnership for Africa's Development
no.	number (numero)
NR	Nationalrat (National Council)
NYSE	New York Stock Exchange
NZZ	Neue Zürcher Zeitung
OFK	Orell Füssli Kommentar
OJ L	the Official Journal of the European Union
OV-WBF	Organisationsverordnung für das Eidgenössische Departement für Wirtschaft, Bildung und Forschung, 14 June 1999 (SR 172.216.1)
para.	paragraph
ParlG	Bundesgesetz über die Bundesversammlung (Parlamentsgesetz), 13 December 2002 (SR 171.10)
PK	Praxiskommentar
recht	recht, Zeitschrift für juristische Weiterbildung und Praxis
RIW	Recht der Internationalen Wirtschaft
RVOG	Regierungs- und Verwaltungsorganisationsgesetz, 21 March 1997 (SR 172.010)
RVOV	Regierungs- und Verwaltungsorganisationsverordnung, 25 November 1998 (SR 172.010.1)
SEC	US Securities and Exchange Commission
SECO	State Secretariat for Economic Affairs
SER	SIX Exchange Regulation
SFT	Swiss Federal Tribunal
SHK	Stämpflis Handkommentar
SJZ	Schweizerische Juristen-Zeitung
SK	Schulthess Kommentar
SMI	Swiss Market Index
SNB	Swiss National Bank
SP	Sozialdemokratische Partei der Schweiz
SPV	Special Purpose Vehicle
SR	Systematische Rechtssammlung
SR	Ständerat (Council of States)
SRF	Schweizer Radio und Fernsehen
TFEU	Treaty on the Functioning of the European Union, 25 March 1957
U.S.C.	United States Code
v.	versus

VGG	Bundesgesetz über das Bundesverwaltungsgericht (Verwaltungsgerichtsgesetz), 17 June 2005 (SR 173.32)
ZBJV	Zeitschrift des Bernischen Juristenvereins

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