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Investment Screening: Recent Developments With Implications for the Healthcare Sector

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Global trends in investment screening

Life sciences companies making investments that touch other jurisdictions (e.g., because the target is foreign or has foreign subsidiaries or assets) should keep in mind the following global trends in investment screening (see also Sidley Update of July 16, 2020).

1. *Transaction type:* A wide range of transactions may be subject to mandatory screening. Not only acquisitions of ownership or control may be subject to mandatory screening but other types of transactions as well, including investments of as little as 10% of corporate capital with no or very low *de minimis* thresholds, and asset deals.

2. *Target:* A wide range of sectors may be subject to mandatory screening. Given the COVID-19 pandemic, this increasingly includes the healthcare sector. For example, many EU countries now impose mandatory screening for investments in (1) healthcare infrastructure and (2) businesses developing, manufacturing, or marketing (a) pharmaceuticals, including vaccines; (b) medical devices; and (c) personal protective equipment.

3. *Investor:* A wide range of investors may be subject to screening. Whether an investor is "foreign" is to be assessed not only by reference to its place of establishment but also to its ultimate beneficial owners. For example, Swiss entities investing into the EU may be subject to screening because they are considered foreign or because they invest through offshore investment vehicles.

4. *Assessment of public order and national security:* A wide range of grounds may be considered when assessing whether a deal can be approved, must be blocked, or must be subject to conditions. Elements that are typically taken into account include whether a foreign government controls the investor and whether the investor already has investments in critical sectors. In the EU, under a new cooperation

mechanism that applies since October 11, 2020, EU countries will need to take into account concerns raised by the European Commission and other EU Member States.

A single transaction can result in investment screening in multiple jurisdictions. Depending on the jurisdictions involved, it may take several months to obtain approval, affecting the timing for closing. Significantly, investment screening authorities may clear or prohibit the investment or impose conditions on the investment. Conditions could include limits on further shareholding increases by the investor, limitations on appointing board members, or a requirement that the target's activities and industrial and technological capacities are kept locally.

As the consequences for breaching investment screening rules (e.g., a failure to notify a deal) may include nullity of the investment, fines, and criminal liability, investors are well advised to be cautious.

Developments in investment screening in Switzerland

Switzerland does not yet have an investment screening regime of the kind described above. However, a 2018 parliamentary motion, titled "Protecting the Swiss Economy through Investment Controls," called on the Swiss Federal Council to draft a bill on screening of foreign investments in Swiss businesses. The Council of States approved the motion on June 17, 2019; the National Council on March 3, 2020. The Federal Council has two years (i.e., until 2022) to prepare the draft bill.

Key takeaways for (Swiss) healthcare companies

Investors investing in the healthcare sector should take the following steps:

1. Identify and assess investment screening risks at the earliest stage of deal-making. This will inform deal negotiations and define the deal timeline. It can also help investors think through proactive solutions to preempt investment screening concerns.

2. Include appropriate contractual language in transactional agreements. For example, this language should take account of possible mandatory preclosing filings and should regulate parties' cooperation and best efforts to obtain investment approvals.

3. Overall, adopt a cautious approach, given the typically broad discretion enjoyed by investment screening authorities, the lack of clear precedents in countries with new screening regimes, and the serious consequences for breaches of relevant requirements.