

# Law Department

## Competition Law

### Revision of the Cartel Act

<b>Current status</b>	<p>On 12 February 2020, the Federal Council instructed the Federal Department of Economic Affairs, Education and Research (WBF) to prepare a draft for public consultation.</p> <p>As far as it is known, several elements of the 2014 failed revision of the Cartel Act will be taken up again.</p> <p>The Federal Council's <b>main aim is to modernize merger control</b>. It states in detail that the change from the current qualified market dominance test to the Significant Impediment to Effective Competition Test (SIEC test) will adjust the test standard of the Competition Commission (COMCO) to international experience. The fundamental difference between the market dominance test applied in Switzerland and the SIEC test to be introduced is the level of the intervention hurdle. The SIEC test could prohibit mergers or impose appropriate conditions if they led to a significant obstacle for competition. Under the current test standard, this would only be possible if effective competition would completely be eliminated through a merger. Two studies commissioned by the State Secretariat for Economic Affairs (SECO) would show that positive effects on competition in Switzerland could be expected from such a change.</p> <p>Additionally, in accordance with the parliamentary decision of 5 March 2018, the Federal Council intends to include two requests of Motion Fournier 16.4094 "Improving the situation for SMEs in competitive processes" in the revision. The Federal Council states that, on the one hand, regulatory deadlines would be introduced for the competition authorities and courts in order to speed up administrative procedures. On the other hand, the Motion Fournier demands compensation for parties in all phases of the administrative procedure under competition law, and now also for proceedings before the Competition Commission (COMCO).</p> <p>According to the Federal Council, two further technical elements from the 2012 revision of the Cartel Act, which was rejected by parliament, are also to be dealt with. On the one hand, the civil anti-trust law should be strengthened and, on the other hand, the opposition procedure should be improved (see the media release including the mentioned studies in detail under the following <a href="#">link</a>).</p> <p>However, the elements mentioned by the Federal Council do not include the following elements in particular, which were expected in the 2014 revision: institutional reform, compliance defense, individual sanctions.</p>
<b>Outlook</b>	<p><b>The consultation is expected to be opened in the third or fourth quarter of 2021.</b> SwissHoldings accompanies the bill and will participate in the consultation process.</p>

# Popular initiative "Stop the high-price island - for fair prices" and indirect counter-proposal by the Federal Council

<p><b>Current status</b></p>	<p>The <a href="#">federal popular initiative "Stop the high-price island - for fair prices"</a> was formally launched in January 2018. It aims to incorporate various elements of previous parliamentary proposals to combat the so-called "price island of Switzerland" by means of competition law into the Constitution. These are to include measures to ensure the non-discriminatory procurement of goods and services abroad and to prevent restrictions of competition caused by unilateral behaviour by companies with strong market power.</p> <p>The Federal Council recommends that the initiative is rejected. In August 2018, the <b>Federal Council proposed that the "fair price" initiative</b> be confronted with <a href="#">an indirect counter-proposal</a>, which is very similar to the initiative in the main aspects. Also after the review process, the Federal Council maintained its decision in favour of the indirect counterproposal already presented and adopted a corresponding <a href="#">dispatch</a> on 29.5.2019.</p> <p>The National Council and the Council of States have both discussed the bill. Both Councils recommend rejecting the initiative but have agreed to the counterproposal (the National Council with 161 votes to 27 and 2 abstentions and the Council of States with 30 votes to 11) and have accepted the proposal in the overall vote (National Council with 154 votes to 27 with 4 abstentions and Council of States with 30 votes to 12 with 2 abstentions).</p> <p>At the beginning of this year, the first round of the difference adjustment procedure ("Differenzbereinigungsverfahren") began. The preparatory commission of the National Council discussed the differences (see link to press release) and the National Council and Council of States will discuss them in the upcoming spring session. The remaining differences concern the re-importation clause and the ban on private geo-blocking.</p> <p>SwissHoldings opposes both the initiative and the counterproposal (in its various versions) and welcomes proposals that are aimed at defusing the counterproposal, in particular for the following reasons: The initiative and the counterproposal will not lower prices. At the same time, however, the fair price initiative and the counterproposal lead to significant negative effects. In particular, they lead to a disproportionate restriction of economic freedom and considerable legal uncertainties and therefore unnecessary (compliance) costs will arise. It is also doubtful whether the required regulation will be enforceable in practice. In general, the question also arises as to whether the initiative and the counterproposal are the right way forward in a high-wage country like Switzerland. These are just a few of the many reasons why the initiative and the counter-proposal are not the right choices.</p>
<p><b>Outlook</b></p>	<p>SwissHoldings continues to advocate the positioning described above.</p>

# Corporate and capital market law

## Covid 19 and General Assemblies

<b>Current status / outlook</b>	<p><b>General Assemblies 2020:</b> This year the Federal Council issued a ban on events due to the developments regarding Corona. This led to a conflict with the need for companies to hold their general meetings in the spring, namely, to allow the payment of dividends. In order to resolve the conflict, the Federal Council then <b>issued a regulation</b> for this year's General Meetings <b>by way of emergency law, according to which the organizer can order that the participants can exercise their rights exclusively: a) in writing or in electronic form; or b) through an independent proxy appointed by the organizer.</b> In addition, Q&amp; A on the subject have been published on the website of the Federal Office of Justice.</p> <p><b>General Assemblies 2021:</b> For the year 2021, the members of SwissHoldings depend on clear regulations and legal certainty. Accordingly, the association welcomes the fact that in the summer of 2021, the Federal Council extended the provisions of the 2020 General Assemblies until the end of 2021 (cf. Art. 27 of Ordinance 3 on Measures to Control Coronavirus (Covid-19) (Covid-19 Ordinance 3)).</p>
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## Completed revision to corporate law and upcoming minor revisions in corporate law

<b>Current status/</b>	<p><b>Adoption of the company law revision:</b> After a very long history, the revision of the Stock Corporation Act was finally completed this summer. An essential part of the revision was the transfer of the ordinance against excessive remuneration into the law of obligations. The revision also includes various technical adjustments.</p> <p>SwissHoldings welcomes the fact that the revision of the Stock Corporation Act has now been completed in the interest of legal certainty. In terms of content, it is particularly important that the ordinance against excessive remuneration has not been significantly tightened.</p> <p><b>Effective Date:</b> The majority of the provisions of the revision of the Stock Corporation Act are expected to come into force early/mid-2022, possibly even as late as 2023.</p> <p>Art. 293a SchKG of the company law revision, which extends the provisional moratorium from four to eight months, has already taken effect (on October 20, 2020). Furthermore, the Federal Council has set the gender guidelines (with long transition periods) as well as the transparency provisions in the raw materials sector into effect on January 1, 2021.</p> <p>SwissHoldings positions itself with regard to the entry into force as follows: It suits us if it is communicated early enough when which provisions will come into force, so that member companies can sensibly prepare for the new provisions; an early entry into force is not (necessarily) something that our member companies want.</p>
<b>Outlook</b>	<p>Now that the corporate law revision has been completed, several upcoming law revisions are emerging.</p> <ul style="list-style-type: none"><li>- <b>Commercial Register Ordinance:</b> Now that the revision of the law has been completed, the administration has started to work on the implementing ordinances, resp. the Commercial Register Ordinance. The corresponding consultation was opened on February 17, 2021. It will last until May 24, 2021. The main focus of the consultation is on provisions regarding the more flexible incorporation and capital requirements newly resolved in the revision of stock corporation law,</li></ul>

as well as on share capital in foreign currencies (catalog of permissible foreign currencies for capital). See the media release and the consultation documents under the following [link](#). SwissHoldings will participate in the consultation process.

- **Regulation on Proxy Advisors:** In the deliberations regarding the corporate law revision (and also already in the course of the revision of the SIX Directive on Information Relating to Corporate Governance), parliamentarians have repeatedly discussed a provision that wanted to regulate proxy advisors. The regulation under discussion wanted to regulate proxy advisors through transparency obligations for issuers. SwissHoldings opposed the regulation under discussion at the time, in particular because it would have meant that problems in connection with proxy advisors would have been regulated by a selective regulation, which would have been "on the back of the issuers/companies". In the end, the provision was not included in the revision of the stock corporation law, which we very much welcome.

As a reaction to this, Motion 19.4122 (see [link](#)) was adopted, with the following wording: The Federal Council is instructed to present an amendment to the law (e.g. to the Financial Market Infrastructure Act) in order to disclose and avoid any conflicts of interest of proxy advisors in listed stock corporations. International developments are to be taken into account.

A corresponding revision of the law can be expected accordingly.

- **Possible regulation on loyalty shares:** Within the scope of the revision of Corporate law, a regulation was further discussed that would introduce so-called loyalty shares. In the end, it was not adopted. Instead, the Council of States submitted a postulate, according to which the Federal Council is instructed to present a report on the possible advantages and disadvantages as well as the effects of the proposed regulation discussed in the revision of the company law. According to the postulate, the report should also include a comparative legal analysis of the possible implementation options under Swiss company law and the extent to which action is required in this area (see the [link to the postulate for details](#))

This could lead to regulation in the future.

- **Regulations in connection with the submission against bankruptcy abuse:** The aim of the law is to use various measures in the Code of Obligations, debt collection and bankruptcy law and criminal law to prevent the bankruptcy proceedings from being abused by debtors to discharge their obligations (see [link to the documents on curiavista](#)).

Within this context, measures under stock corporation law are also under discussion. In particular, the Federal Council proposes to codify the decisions of the Federal Court on the trade in shell companies "Mantelhandel". Further proposals on stock corporation law could be incorporated into the bill: So far, only the preliminary commission of the Council of States has discussed the transaction and decided to examine in more detail whether the measures proposed by the Federal Council are sufficient enough to put a stop to bankruptcy abuse. The administration will now carry out the necessary clarifications and the commission will then continue its deliberations (only) in spring/summer 2021.

SwissHoldings follows the developments in these areas and continues to actively promote the interests of its member companies in the area of corporate law.

## Amendment of the Money Laundering Act

<p><b>Current status/ Outlook</b></p>	<p>On June 1, 2018, the Federal Council opened the consultation process on the amendment of the Money Laundering Act. On 26 July 2019, it then issued the dispatch (see <a href="#">link</a> to media release and the relevant documents). Afterwards, the preparatory commission of the National Council as well as the National Council decided to reject the bill in the beginning (“Nichteintreten”). The preparatory commission of the Council of States and the Council of States agreed on the bill and discussed it. On October 9, the preparatory commission of the National Council then discussed the matter again; it has now accepted the bill and discussed the matter. In the end, however, it rejected the bill in the overall vote (“Ablehnung in der Gesamtabstimmung”). The rejection in the overall vote is procedurally equivalent to rejecting the bill in the beginning (“Nichteintreten”). The National Council then accepted the bill and sent it to its preparatory committee for further detailed discussion. On February 5, the committee discussed the bill again and approved it in the overall vote. The National Council will now discuss the bill again in the spring session.</p> <p>The aim of the proposal is to take into account the Federal Council's financial market policy strategy for a competitive Swiss financial center and the most important recommendations of the country report of the Financial Action Task Force (FATF)The part of the bill that is controversial in parliament concerns above all the point that various advisory service providers (e.g. lawyers) should also be covered by this law.</p> <p>The member companies of SwissHoldings are only marginally affected by the content of the bill. Accordingly, SwissHoldings had only submitted a brief <a href="#">consultation response</a> as a part of the consultation process, whose specific concerns related to the Federal Council bill were largely taken into account by the Federal Council, and is now accompanying the bill from a distance</p>
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## Consultation on the regulations of ad hoc publicity and further adjustments

<p><b>Current status / outlook</b></p>	<p>In 2016, the SIX had already conducted a consultation on the revision of the regulations on ad hoc publicity, in which SwissHoldings had participated at the time.</p> <p>The SIX then contacted this year the participants in the consultation process at the time and provided the following information: "Due to political negotiations (i.a. regarding exchange equivalence with the EU), dialogues with a range of regulatory bodies (mainly FINMA), and also, in particular, the complex legal and regulatory environment surrounding the ad hoc publicity regulations, further discussions and analyses have been taking place since that time, some of which pertain to recognized international standards" The participants in the consultation process at the time were consulted accordingly on various amendments to the Listing Rules, the Directive on Information Relating to Corporate Governance and the Directive on Ad Hoc Publicity.</p> <p>In our statement, we voiced that we continue to support the direction of the approach, which largely refrains from the concept of certain "per se" facts. We have also stated that the proposal still requires various adjustments and what these adjustments consist of (see <a href="#">link</a> to the detailed opinion).</p> <p>The upcoming regulation remains to be seen.</p>
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# Parliamentary initiative 21.400 RK-NR 21.400 "Temporarily extend permit requirement under Lex Koller to permanent establishment properties"

<p><b>Current status / outlook</b></p>	<p>The National Council's Committee for Legal Affairs has launched a parliamentary initiative to temporarily (i.e. during a special situation (Article 6 of the Epidemics Act) or an extraordinary situation (Article 7 of the Epidemics Act) and for two years after the end of the special or extraordinary situation) extend the permit requirement under the Lex Koller (see <a href="#">link</a>). The initiative went to the Council of States' Committee for Legal Affairs on February 22, 2021. It rejected the initiative.</p> <p>SwissHoldings is firmly against the initiative (see our positioning in detail under the following <a href="#">link</a>) and welcomes the rejection of the initiative by the Council of States' Committee for Legal Affairs.</p>
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## Compliance

### Compliance Specialist Group as a platform for the exchange of experience among the member companies - in particular on compliance management systems

<p><b>Current status</b></p>	<p>The constantly increasing compliance burden, including non-financial companies, forces them to constantly expand their company-wide compliance systems and check their efficiency. In Working Group Meetings in English the various <b>Compliance Management Systems</b> of the different member companies are presented and an exchange takes place. <b>Other topics relevant to the member companies</b> (e.g. in the most recent meeting the counter-proposal to the Responsible Business Initiative and the role of the Compliance Officer) are also discussed.</p>
<p><b>Outlook</b></p>	<p>SwissHoldings will continue to promote the mutual exchange between the member companies.</p>

### Revision of the Code of Civil Procedure - Collective redress – Legal professional privilege for in-house counsel

<p><b>Current status</b></p>	<p>In 2018, a consultation on the amendment of the Code of Civil Procedure was held. It particularly concerned the dismantling of cost barriers, the introduction of instruments of <b>collective redress</b> and the implementation of the parliamentary initiative Markwalder (16,409) for a <b>legal professional privilege for in-house counsel</b>.</p> <p>The <b>Federal Council</b> then presented its dispatch on the revision of the Code of Civil Procedure on the 26<sup>th</sup> of February 2020 (see <a href="#">link</a> to the media release as well as to the message and the Federal Council draft). It decided to remove the collective legal protection from the draft and to treat it separately. He also decided to retain the provision on the protection of professional secrecy for in-house counsel in the Federal Council's draft.</p> <p>Afterwards, the bill was submitted to the <b>preparatory commission of the Council of States</b> (Commission for Legal Affairs of the Council of States); this commission started deliberations and gave the administration various</p>
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	<p>orders for evaluation.</p> <p>SwissHoldings is <b>against the instruments of collective redress</b> and <b>explicitly and emphatically supports</b> the intended provision regarding the legal professional privilege for in-house counsel. SwissHoldings represented this position within the framework of the consultation process (see in detail the <a href="#">link</a> to our response to the consultation) and is now also actively representing it within the framework of the parliamentary process as well as in a possible separate revision of the Code of Civil Procedure on collective redress at a later date.</p>
<b>Outlook</b>	<p>The preparatory commission of the Council of States will now continue the detailed discussion at its next meeting. SwissHoldings will continue to promote the interests of its member companies in line with our positioning.</p>

## Data protection

### Data protection law, ordinance law, the equivalence decision, and Schrems II

<b>Current status</b>	<p><b>Data Protection Act:</b> In view of European developments, Switzerland too had to revise its data protection law. This was done on the one hand to meet international expectations in accordance with the future revised Council of Europe Convention 108, and on the other hand, to maintain the equivalence with the GDPR, which is very important for the economy. The revision was now adopted in the final vote in the autumn session 2020 and is expected to come into force at the end of 2022.</p> <p><b>Ordinances:</b> The adopted law is followed by the enactment of the ordinance(s). The consultation is scheduled for April 2021.</p> <p><b>Equivalence decision by the EU:</b> The equivalence decision by the EU originally announced for summer 2020 has not yet been made. It had announced that it wanted to wait for the Schrems II ruling of the European Court of Justice. However, the European Court of Justice has now delivered its ruling on 16 July 2020 (see also the following). The decision on equivalence by the EU remains to be awaited.</p> <p><b>Schrems II decision:</b> The decision mainly determines the following:</p> <ul style="list-style-type: none"> <li>- EU-US Privacy Shield is void with immediate effect.</li> <li>- Standard contract clauses are still valid under increased conditions.</li> </ul> <p>The decision leads increased legal uncertainty.</p>
<b>Outlook</b>	<p>SwissHoldings follows the developments around the above-mentioned topics and continues to promote the interests of the member firms in all these areas, in particular the maintenance of equivalence.</p>