SwissHoldings

Law Department

Competition law

Revision of the Cartel Act

Current Status	On February 12, 2020, the Federal Council instructed the Federal Department of Economic Affairs, Education and Research (EAER) to prepare a consultation draft. As far as can be seen/known already, several elements of the revision of the Cartel Act, which failed in 2014, will be taken up again. Above all, the Federal Council would like to modernize merger control. Specifically, it states that by changing from the current qualified market dominance test to the Significant Impediment to Effective Competition test (SIEC test), the standard of review of the Competition Commission (WEKO) will be adapted to international experience. The fundamental difference between the market dominance test applied in Switzerland and the SIEC test to be introduced lies with the intervention hurdle. With the SIEC test, mergers could be prohibited or subject to appropriate conditions if they lead to a significant impediment to competition. Under the current standard of review, this would only be possible if a merger eliminated effective competition. Two studies commissioned by the State Secretariat for Economic Affairs (SECO) would show that such a change could be expected to have positive effects on competition in Switzerland. In addition, in accordance with the decision of Parliament of March 5, 2018, the Federal Council intends to include two requirements of Motion Fournier 16.4094 "Improving the situation of SMEs in competition proceedings" in the revision work. The Federal Council states that, on the one hand, regulatory deadlines would be introduced for the competition authorities and courts to speed up administrative proceedings. On the other hand, the Fournier motion calls for compensation for the parties in all phases of administrative antitrust proceedings, including proceedings before the Competition Commission (WEKO). Furthermore, according to the Federal Council, two additional technical elements from the 2012 revision of the Cartel Act, which was rejected by Parliament, should also be addressed. On the one hand, the civil antitrust law is to be strengthened and on the other hand, the opposition procedure is to be improved (cf. in detail the media release including the studies mentioned under the following link). However, the elements mentioned by the Federal Council do not include the following elements, which were envisaged in the 2014 revision: Institutional Reform, Compliance Defense.
Outlook	The consultation is expected to be opened towards the end of 2021 or 2022. SwissHoldings is accompanying the bill and will participate in the consultation process.

SwissHoldings

Motion Français 18.4282

Current Status / Outlook	The motion Français 18.4282 (cf. link) demands the following: "In order to make the legislation in the field of competition more effective and to reduce the uncertainties regarding its application, the Federal Council is requested to clarify Article 5 of the Antitrust Act. This amendment should make it possible to determine the facts of the unlawful competition agreement, considering both qualitative and quantitative criteria." SwissHoldings spoke and speaks in favor of the motion. We accordingly welcome the fact that the Council of States adopted the motion on December 15, 2020, and the National Council on June 1, 2021. SwissHoldings will accompany the draft amendment of the law (be it in or outside the revision of the Antitrust Act) and will continue to advocate for this concern.

Corporate and capital market law

Completed revision of stock corporation law and current and upcoming revisions in stock corporation law

Current Status	**Adoption of the revision of the Stock Corporation Act**: After a very long lead-up, the revision of the Stock Corporation Act was completed in the summer of 2020. An essential part of the same was the transfer of the Ordinance against Excessive Compensation into the Code of Obligations; furthermore, it contains various technical adjustments. **Entry into force:** The majority of the provisions of the revision of the Stock Corporation Act are expected to enter into force at the beginning of or even in the course of 2023. Art. 293a SchKG of the company law revision, which extends the provisional moratorium from four to eight months, has already come into force (on October 20, 2020). Furthermore, the Federal Council has brought the gender guidelines into force (with long transition periods) and the transparency provisions in the commodities sector as of January 1, 2021.
Outlook	**At the regulatory level,** now that the revision of the Stock Corporation Act has been completed, there are various ongoing or upcoming revisions of provisions in the Stock Corporation Act: - **Commercial Register Ordinance:** After completion of the revision of company law, the ordinance provisions on the new provisions of the revision of company law are still needed. In this regard, the Federal Council has (so far) only planned amendments to the Commercial Register Ordinance. It has carried out a corresponding consultation from February to May 2021 (see link to the corresponding media release incl. consultation documents). The consultation draft mainly contains provisions on the formation and capital regulations as well as on share capital in foreign currency. - SwissHoldings has participated in the consultation process: The bill is, like the revision of the Stock Corporation Act, a technical bill and contains few sensational changes. SwissHoldings welcomes the consultation draft and its thrust and submitted mainly selective, technical amendment concerns in the consultation (see link to consultation response).

- **Consultations on ordinances on the counterproposal to the Corporate Responsibility Initiative and TCFD:** The counter-proposal to the Corporate Responsibility Initiative also still needs the implementing ordinances, which are now being drafted, and the Federal Council is planning a binding implementation of the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) for Swiss companies. To achieve this, the Federal Council has already conducted one consultation and is planning another:

- **The consultation on the Ordinance on Due Diligence and Transparency in the Areas of Minerals and Metals from Conflict Regions and Child Labor (VSoTr):** The consultation took place between April 14, 2021, and July 14, 2021 (see link to the consultation documents). SwissHoldings participated in the consultation in an inter-association statement (see link).

- **The planned consultation on benchmarks for mandatory climate reporting for large Swiss companies.** The Federal Council announced such in a media release dated August 18, 2021 (cf. link to the corresponding media release).
  At SwissHoldings, the topic is being looked after and examined from a cross-divisional CSR and accounting perspective **(cf. in particular the comments in the Economics section)** and from a legal perspective.

- **Regulation in connection with the bill against abusive bankruptcies:** The bill aims to use various measures in the Code of Obligations, debt enforcement and bankruptcy law, and criminal law to prevent debtors from abusing bankruptcy proceedings to discharge their obligations (bankruptcy riding) (see link to documents on curia vista). The bill also includes measures under company law, namely on shell company trading and audit law. So far, the bill has been discussed once by the National Council and once by the Council of States (and their preliminary advisory committees). It will now go back to the preliminary committee of the Council of States, which will discuss it on November 11, 2021. SwissHoldings positions itself as follows: The Federal Council's provisions - including those relating to stock corporation law - only marginally affect the members of SwissHoldings. For SwissHoldings, it is important above all those problematic provisions for SwissHoldings members are not included in the parliamentary process.

- **Future bill on the regulation of proxy advisors:** In the context of the deliberations on the revision of the Stock Corporation Act (and already in the context 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 via transparency obligations for issuers. SwissHoldings opposed the regulation under discussion at that time because it would have meant that one wanted to regulate (existing problems in connection with proxy advisors) via a selective regulation "on the hump of the issuers/companies". In the end, the provision was not included in the revision of the Stock Corporation Act, which we very much welcome.
  In response, a motion 19.4122 (cf. link) was adopted with the following wording: "The Federal Council is instructed to submit an

amendment to the law (e.g., the Financial Market Infrastructure Act) to disclose and avoid conflicts of interest of proxy advisors at listed stock corporations. In doing so, it considers international developments." It contains no reference, or at least no explicit reference, to regulating via duties of issuers. We welcome this missing reference.
The corresponding revision of the law will now come.

- **Future regulation of loyalty shares:** In the context of the share revision, a regulation was further discussed which wanted to introduce so-called loyalty shares. In the end, it was not adopted. Instead, the Council of States has submitted a postulate instructing the Federal Council to draw up a report on the possible advantages and disadvantages as well as the effects of the proposed regulation discussed in the revision of stock corporation law. According to the postulate, the report should also provide a comparative legal description of possible implementation variants in Swiss stock corporation law and the extent to which there is a need for action in this area (cf. in detail the link to the postulate). This could lead to a regulation in the future.

- **Proposals concerning bearer shares and beneficial owners:** In the future, as in the past, there are likely to be regulatory efforts in connection with the recommendations of the "Global Forum on Transparency and Exchange of Information for Tax Purposes" and the "Financial Action Task Force on Money Laundering (FATF)". SwissHoldings' position in these areas is essentially as follows: It is important to ensure that Switzerland is not blacklisted from such entities. At the same time, unnecessary restrictions on freedom of action as well as unnecessary bureaucracy for (listed) companies must be avoided.
In concrete terms, the following two developments are currently worth mentioning:

- **Revision of FATF Recommendation 24 on transparency and beneficial owners of legal entities:** The FATF conducted a public consultation from June 23 to August 27, 2021. The focus was on the possible introduction of a central register for beneficial owners as well as possible tightening of bearer shares. SwissHoldings participated in the consultation process in a joint submission with economiesuisse, SwissBanking, the Swiss Insurance Association and the Forum SRO. The opinion states that exceptions for listed companies are necessary in this area (in the case of an introduction of central registers as well as tightening up on bearer shares).

- **Postulate 19.3634 (cf. link):** The postulate instructs the Federal Council to submit a status report by the end of 2021 on the implementation of Bill 18.082, "Implementation of the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes". If necessary, the Federal Council is to submit proposals for amendments. Any regulation could follow, if necessary.

SwissHoldings is monitoring developments in these areas and continues to actively advocate for the interests of member companies in stock corporation law.

SwissHoldings

Covid-19 und General Assemblies 2022

Current Status / Outlook	For the **2020 and 2021 General Meetings**, the question had arisen at the time as to how companies could hold their General Meetings when event bans were in place. The Federal Council had adopted a sensible regulation for these two years, which allowed shareholders to exercise their rights exclusively through an independent proxy designated by the organizer. For the year 2022, the issue looks somewhat different, as it is likely that event bans will no longer apply as in 2020 and 2021, but that **General Meetings with Covid certificate can be held. In addition, however, the regulation on the General Meeting on the independent proxy, which applied in 2020 and 2021, is also likely to be extended for 2022, which we welcome.** The legal basis for this has already been created (see also the link to the FAQ of the Federal Office of Justice). However, the ordinance, which effectively states that a GM is possible via the independent proxy, must now be extended.

Art. 24 FinfraV and the self-regulation concerning stock exchange

Current Status	As part of the revision to the Ordinance to the Federal Act on the Adaptation of Federal Law to Developments in the Technology of Distributed Electronic Registers, the Federal Council decided on a very problematic amendment to Art. 24 FinfraV and put it into effect on August 1, 2021. **Specifically, it calls for the complete independence of the management of the trading venue and a majority independence from the participants and the issuers.** This would effectively mean the partial end of self-regulation by the Regulatory Board, as it would now have to be independent of the participants and issuers in terms of personnel and organization. The same would probably apply to the Issuers Committee. **From SwissHoldings' point of view, the regulation is extremely problematic** – On the one hand, this is true in terms of content: The self-regulation of the stock exchange is strongly anchored in the consciousness of the local banks and issuers and allows for sensible regulation, which is issued by persons with the necessary practical experience and the corresponding expertise. This also leads to acceptance of the regulations. – On the other hand, this also applies procedurally: It is extremely problematic if such far-reaching changes are adopted in an ordinance and not in a law, for example, despite negative consultation results. Also thematically, the ordinance to the Federal Act on the Adaptation of Federal Law to Developments in the Technology of Distributed Electronic Registers is not necessarily the right place. Thus, this regulation was adopted without serious political debate. **Accordingly, it is central that a suitable solution is found here in the sense of the deletion of the decided regulation.**

SwissHoldings

Revision SER regulations on ad hoc publicity

Current Status / Outlook	In 2016, the Six Exchange Regulation (SER) had already conducted a consultation on the revision of the rules on ad hoc publicity, in which SwissHoldings had participated at that time. SER then contacted the participants of the consultation at that time last year with a new consultation on the topic, in which SwissHoldings again participated. The proposal concerns various amendments to the Listing Rules, the Directive on Information Relating to Corporate Governance and the Directive on Ad hoc Publicity. SER (resp. the Regulatory Board of SER) has now published the various corresponding amendments this year, as well as a FAQ (cf. in detail the information on the page of SIX Exchange Regulation; Link). - The fundamental changes were put into effect as of July 1, 2021. - Further amendments to the new obligation to use the Connexor Reporting platform for the transmission of ad hoc disclosures to SER came into force on October 1, 2021 (with a transition period; see in detail Regulatory Board Communication No. 5/2021 of August 18, 2021; Link). - Finally, SER plans to revise the Commentary on the Directive on Ad hoc Publicity (RLAhP) by the end of the year 2021 and to publish it on the SER website thereafter. SwissHoldings accompanies the draft and advocates for the interests of its members.

Consultation on the regulation of special purpose acquisition companies (SPACs)

Current Status / Outlook	From June 3 to June 23, 2021, the SER Issuers Committee conducted a consultation on the regulation of special purpose acquisition companies (SPACs). The background was that Finma had expressed concerns that the current provisions of the SIX Listing Rules would not provide a sufficient basis for the admission of a SPAC. Accordingly, the Issuers Committee decided to revise the Listing Rules and to issue a new Directive SPACs. SwissHoldings participated in the consultation process with a short statement due to the limited scope of its involvement. (Link to statement). It now remains to be seen how SER will proceed.

SwissHoldings

Exchange equivalence - extension of the exchange protection measure

Current Status / Outlook	As this has been known for some time, the EU granted Switzerland stock exchange equivalence only until the end of June 2019, but then did not extend it. Therefore, Switzerland had activated the measure to protect the Swiss stock exchange infrastructure on July 1, 2019. Thus, since January 1, 2019, foreign trading venues are subject to a recognition obligation if they admit certain shares of Swiss companies to trading or enable trading in such shares (for the whole and also further on the developments with the UK, cf. the following Link to the information provided by the State Secretariat for International Financial Matters, SIF). **The ordinance regulating the exchange protection measure (Link to Ordinance) is based on Art. 184 para. 3 of the Federal Constitution and is accordingly limited until December 31, 2021. The Federal Council must now ask itself whether and how it will extend the stock exchange protection measure beyond 31 December 2021.** Pursuant to Art. 7c para. 3 RVOG, the Federal Council may extend the period of validity of such an ordinance once; in this case, the ordinance will cease to be in force six months after the entry into force of its extension if, by that time, the Federal Council does not submit to the Federal Assembly a draft legal basis for the content of the ordinance. Thus, should the Federal Council decide to extend the stock exchange protection measure, it will probably also open the consultation on the corresponding law towards the end of 2021 and adopt the dispatch before mid-2022. **SwissHoldings is monitoring the proposal on an interdisciplinary basis and is advocating the interests of its member companies. Regarding the question of the extension of the stock exchange protection measure, SwissHoldings is clearly in favor of such an extension.**

Lex Koller

Current Status / Outlook	**In the context of the regulation around Covid-19, there have been several calls for the introduction of a permit requirement for the purchase for business site properties:** The Committee for Legal Affairs of the National Council had drawn up a parliamentary initiative to this effect. The content of the initiative also found its way into the draft for the revision of the Covid 19 Act via a motion in the National Council's preliminary advisory committee (Committee for Economic Affairs and Taxation of the National Council (WAK-N). SwissHoldings (as well as many other associations) decidedly opposed the initiative as well as the proposal, which was identical in essential elements, and fought it (see our position in detail under the following link). Both proposals were approved by an "unholy" broad alliance of the SP and parts of the SVP. **In the end, however, a broad middle class spoke out against them, and these proposals are now off the table.** **Subsequently, however, Motion 21.3598 was submitted as a further initiative, instructing the Federal Council to "submit the "Amendment to the Federal Act on the Acquisition of Real Estate by Persons Abroad", which it put out for consultation on March 10, 2017, to the Federal Assembly in the form of a dispatch." SwissHoldings is also opposed to this motion.** It should be noted that the 2017 consultation draft was widely rejected by the business community. It should also be considered that it would be extremely problematic if the motion were to reintroduce the requirements for the mandatory licensing of business premises.

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Compliance

Compliance specialist group as a platform for the exchange of experience among member companies - namely on compliance management systems

Current Status	The ever-increasing compliance burden, also for non-financial companies, forces them to constantly expand their company-wide compliance systems and to review their efficiency. In working group meetings in English, the various **compliance management systems** of the different member companies are presented and exchanged. Other **topics relevant to member companies** (such as China's recent "blocking statute" or the whistleblowing directive and problematic obligation to set up whistleblowing systems and investigative bodies in each EU country) will also be discussed.
Outlook	The office will continue to promote mutual exchange between the member companies on a sustained basis.

Whistleblowing Directive and problematic obligation to set up whistleblowing systems and investigative bodies in every EU country

Current Status / Outlook	A problematic development is emerging in the context of the implementation of the Whistleblower Directive in the European member states: There is a risk that the Directive will have to be interpreted and implemented in such a way that local whistleblower systems and investigative bodies will have to be set up in every EU country by companies that have more than 50 employees there. This would be problematic in two respects: On the one hand, whistleblowers would not be better protected by local whistleblower systems, and on the other hand, this would lead to a large and unnecessary bureaucratic burden. Accordingly, various actors, namely various European and foreign associations as well as SwissHoldings from Switzerland, have lobbied and are lobbying with letters and discussions for the Commission to make/prescribe a different interpretation in this regard. In addition, various foreign business associations are lobbying their national legislators to achieve the same goal. Unfortunately, these broad-based efforts by the many associations have not yet been successful. The Commission is sticking to its interpretation of the directive. The next activity on the part of the associations is a roundtable, which Business Europe is organizing with various responsible ministers/attachés from the member states. To what extent the various activities of the various associations and SwissHoldings will (be able to) ultimately lead to the goal remains to be seen.

SwissHoldings

ZPO-Revision - Collective legal protection - Professional secrecy protection for in-house counsel

Current Status	In 2018, a **consultation** on the amendment of the Code of Civil Procedure was carried out. It concerned the reduction of cost barriers, collective legal protection, and the implementation of the parliamentary initiative Markwalder (16.409) for a right to testify and refuse to disclose information for employees in in-house legal services. On February 26, 2020, the **Federal Council** presented its message on the revision of the CCP (see link to the media release as well as to the message and the Federal Council draft). **In doing so, it decided to separate the collective legal protection from the draft and to deal with it separately at a later stage. It also decided to retain the provision on the protection of professional secrecy for in-house counsel in the Federal Council's draft.** The bill then went to the **preliminary advisory committee of the Council of States and the Council of States, which discussed the bill on June 16, 2021.** Regarding the protection of professional secrecy for in-house lawyers, they, like the Federal Council, have spoken in favor of a provision that seeks to introduce professional secrecy protection for in-house lawyers. However, they narrowed it down further, namely by introducing a provision according to which the protection of professional secrecy only applies "if the opposing party is also entitled to refuse under this provision or, if it has a foreign domicile or registered office, has a comparable right of refusal **under the law of that country".** **Finally, the bill went to the National Council's preliminary advisory committee**, which is currently still debating the bill. Accordingly, the flag with the resolutions in detail has not yet been published. **SwissHoldings** positions itself as follows: • **Concerning collective legal protection:** The Association is opposed to the instruments of collective legal protection and will maintain this position when this topic is discussed in a separate bill. **Regarding the protection of professional secrecy of in-house lawyers:** The association has been working for a long time and also very actively in the current consultation for the protection of **professional secrecy of in-house lawyers explicitly and emphatically supports the right to refuse to testify and refuse to issue for employees in internal legal services provided for in the Federal Council's draft** (see for our positioning in detail link to our consultation response).
Outlook	The preliminary advisory committee of the National Council will now discuss the bill and then the bill will go to the National Council. SwissHoldings will study the flag of the preliminary advisory committee of the National Council as soon as it is available and formulate the position regarding the deliberation in the National Council.

SwissHoldings

Data Protection Privacy

Data Protection Act, Ordinance Law, The Equivalence Decision and Schrems II

Current Status	**Data Protection Act:** In view of European developments, Switzerland also had to revise its data protection law. On the one hand, this is in order to meet international expectations in accordance with the future revised Council of Europe Convention 108 and, on the other hand, to preserve the equivalence with the EU GDPR, which is very important for the economy. The revision was adopted in the final vote in the autumn session 2020. We very much welcome this swift conclusion because it clears the way for the preservation of recognition of equivalence. **Right to ordinance:** The adopted law is followed by the enactment of the law on ordinances. The consultation took place from 23 June 2021 to 14 October 2021. SwissHoldings participated in the consultation (cf. Link). **Equivalence decision by the** EU: The equivalence decision by the EU, originally announced for summer 2020, has not yet been made. She had announced that she wanted to wait for the so-called Schrems II judgment of the European Court of Justice. The latter delivered the judgment on 16 July 2020 (see here immediately). The decision on equivalence by the EU remains to be seen. **Schrems II** ruling: The ruling mainly determines the following: The EU-US Privacy Shield is void with immediate effect. Standard contractual clauses are still valid under increased conditions. The ruling leads to increased legal uncertainty.
Outlook	SwissHoldings follows the developments around the above-mentioned topics and continues to support the interests of the member companies in all these areas for the maintenance of equivalence.

Further

Consultations on the Relief Act and the Regulatory Brake

Current Status / Outlook	From 28 April 2021 to 18 August, the Federal Council carried out consultations on a relief law and the regulatory brake. With the Relief Act, the Federal Council wants to consistently examine existing regulations and new proposals for relief potential. With the regulatory brake, he wants to subject regulations that place a particularly heavy burden on companies in parliament subject to a qualified majority (see in detail the Federal Council's press release of 28 April 2021 including the corresponding consultation documents under the following link). SwissHoldings welcomes the thrust of the proposals and has participated in the consultation with a statement (see link to the statement). The further steps of the Federal Council must now be awaited.