SwissHoldings

Law Department

Competition Law

Revision of the Cartel act

Current status	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. As far as it is known, several elements of the 2014 failed revision of the Cartel Act will be taken up again. The Federal Council's **main aim is to modernize merger control.** 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. 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). 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 link). 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.
Outlook	The **consultation is expected to open in the fourth quarter of 2021at the earliest or even in 2022**. SwissHoldings will participate in the consultation process.

Motion Français 18.4282

Outlook	Motion Français 18.4282 (cf. link) calls for the following: "In order to make competition legislation more effective and to reduce uncertainties regarding its application, the Federal Council is requested to clarify Article 5 of the Cartel Act. This amendment aims to make it possible to **determine the unlawful agreement to compete, considering both qualitative and quantitative criteria**". SwissHoldings continues to speak in favor of the motion. **We welcome the fact that the Council of States adopted the motion on 15 December 2021 and now also the National Council on 1 June 2021.**

Corporate and capital market law

Completed company law revision and upcoming minor revisions in corporate law

Current status	**Adoption of the revision of the Stock Corporation Act:** After a very long preparatory phase, the revision of the Stock Corporation Act was completed in the summer of 2020. An essential part of this was the transfer of the Ordinance against Excessive Compensation into the Code of Obligations; it also contains various technical adjustments. **Entry into force:** Most of the provisions of the company law revision are expected to enter into force at the beginning of 2023. Art. 293a SchKG of the company law revision has already entered into force (on 20 October 2020). Furthermore, the Federal Council has brought into force the gender guidelines (with long transitional periods) and the transparency provisions in the commodities sector as of 1 January 2021. SwissHoldings' position on the entry into force is as follows: It suits us if it is communicated early enough when which provisions will come into force so that member companies can prepare sensibly themselves for the new provisions. An early entry into force is not (necessarily) something that our member companies want.
Outlook	**At the regulatory level,** now that the revision of the Stock Corporation Act has been completed, there are various ongoing or forthcoming 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 including consultation documents). The consultation draft essentially contains provisions on the formation and capital regulations as well as on share capital in foreign currency. SwissHoldings participated in the consultation process. Like the revision of company law, the bill is 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 counterproposal to the Corporate Responsibility Initiative also still requires the implementing ordinances, which are now being drafted, and the Federal Council is planning 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 carried out one consultation and is planning another:

- **Consultation on the Ordinance on Due Diligence and Transparency in the Areas of Minerals and Metals from Conflict Areas and Child Labor (VSoTr):** The consultation took place between 14 April 2021 and 14 July 2021 (see link to 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 this in a media release dated 18 August 2021 (cf. link to the corresponding media release).

At SwissHoldings, the topic is 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. The bill has so far been discussed in the Council of States and the preliminary advisory committee of the National Council concluded its deliberations on the bill on 20 August 2021.
  SwissHoldings positions itself as follows: The Federal Council's provisions - including those relating to company law - only marginally affect the members of SwissHoldings. It is important above all for SwissHoldings members that problematic provisions are not included now in the parliamentary process.

- **Future proposal on the regulation of proxy advisors**: During the discussions on the revision of the Swiss Stock Corporation Act (and already during the revision of the SER Directive on Information Relating to Corporate Governance), the parliamentarians repeatedly discussed a provision that wanted to regulate proxy advisors via transparency obligations for issuers. SwissHoldings opposed the regulation under discussion at the time because it would have meant regulating (certainly existing problems in connection with proxy advisors) via a selective regulation "on the backs of 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) in order to disclose and avoid conflicts of interest on the part 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 issuers' duties. We welcome this missing reference.

The corresponding revision of the law is coming.

- **Future regulation regarding 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 company law. According to the postulate, the report should also provide a comparative legal description of the possible implementation variants in Swiss company law and the extent to which there is a need for action in this area (see the link to the postulate for details).
  This could lead to regulation in the future.

- **Proposals concerning bearer shares and beneficial owners:** In the future, 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)" in company law. SwissHoldings' position in these areas is essentially as follows: It is important to ensure that Switzerland is not blacklisted by such entities. At the same time, unnecessary restrictions on freedom of action and unnecessary bureaucracy for (listed) companies must be avoided.
  In concrete terms, the following two developments should be mentioned at present:
  - **Revision of FATF Recommendation 24 on transparency and beneficial owners of legal persons:** The FATF conducted a public consultation from 23 June - 27 August 2021. The main issues were the possible introduction of a central register for beneficial owners and 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 event of the introduction of central registers and 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 must submit proposals for amendments. Regulations could follow if necessary.

SwissHoldings is following developments in these areas and continues to actively advocate the interests of its member companies in company law.

Revision on SER regulations on ad hoc publicity and further adjustments

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 participated at the time. SER then contacted the participants in that consultation last year with a new consultation on the topic, where 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. This year, SER (respectively the SER Regulatory Board) has published the various corresponding amendments, as well as an FAQ (see in detail the information on the SIX Exchange Regulation website; link). - The fundamental changes came into force on 1 July 2021. - Further amendments to the new obligation to use the Connexor Reporting platform for the transmission of ad hoc notifications to SER have been brought into force on 1 October 2021 (with a transitional period; cf. in detail Regulatory Board notice no. 5/2021 of 18 August 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 then publish it on the SER website. SwissHoldings is monitoring the draft and is advocating the interests of its members.

Consultation on the regulation of Special Purpose Acquisition Companies (SPACs)

Current status / outlook	From 3 June until 23 June 2021, the SER Issuers Committee conducted a consultation on the regulation of special purpose acquisition companies (SPACs). The background to this 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 brief statement due to the limited extent to which it was affected (see link to statement).

Equivalence of the Swiss trading venues – question of the extension of the measure to protect the Swiss stock exchange infrastructure

Current status / outlook	As this has been known for some time, the EU only granted Switzerland equivalence of the Swiss trading venues until the end of June 2019, but did not extend it. Therefore, Switzerland had activated the measure to protect the Swiss stock exchange infrastructure on 1 July 2019. Thus, since 1 January 2019, foreign trading venues are subject to a recognition obligation if they admit certain shares of Swiss companies to trading or facilitate trading in such shares (see for the whole and also further on the developments with the UK the following link to the information provided by the State Secretariat for International Financial Matters, SIF). **The Ordinance governing the measure to protect the Swiss stock exchange infrastructure (cf. link to the Ordinance) is based on Art. 184 para. 3 Federal Constitution and is accordingly limited until 31 December 2021. The Federal Council must**

	now ask itself whether and how it will extend the measure to protect the Swiss stock exchange infrastructure beyond 31 December 2021. Pursuant to Art. 7c para. 3 Government and Administration Organisation Act, the Federal Council may extend the 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 the Federal Council does not submit a draft legal basis for the content of the ordinance to the Federal Assembly by then. Thus, should the Federal Council decide to extend the measure to protect the Swiss stock exchange infrastructure, 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 defending the interests of its member companies. SwissHoldings is clearly in favor of extending the measure to protect the Swiss stock exchange infrastructure.**

Compliance

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

Current status	The constantly increasing compliance burden including non-financial companies, forces them to constantly expand their company-wide compliance systems and to review their efficiency. In English-speaking working group meetings, the various compliance management systems of the different member companies are presented and discussed. Other topics relevant to the member companies (such as the EU Whistleblowing Directive and its impact on Switzerland and multinational companies) are also discussed.
Outlook	SwissHoldings will continue to promote the mutual exchange between the member companies.

Whistleblowing Directive and problematic obligation to set up whistleblowing systems and investigation bodies in each EU country

Current status / outlook	In the context of the implementation of the Whistleblower Directive in the European Member States, a problematic development is emerging - triggered by the legislative activities in certain (Scandinavian) countries: There is a risk that the Directive will have to be interpreted and implemented in such a way that local whistleblower systems and investigation bodies will have to be established in every EU country by companies with more than 50 employees there. This would be problematic in two respects at once: 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 continue to lobby through letters and discussions for the Commission to adopt or prescribe a different interpretation in this regard. In addition, various foreign business

	associations are working towards the same goal with their national legislators. It remains to be seen to what extent the various activities of the various associations and of SwissHoldings will (be able to) ultimately lead to the goal.

ZPO-Revision - Collective legal protection - Protection of professional secrecy for in-house lawyers

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 Markwalder parliamentary initiative (16.409) for a right to refuse to testify and disclose information for employees in in-house legal services. On 26 February 2020, the Federal Council presented its **dispatch** on the revision of the CCP (see link to the media release and to the dispatch and the Federal Council draft). It **decided to remove collective redress from the draft and deal with it separately later. It also decided to retain the provision on the protection of professional secrecy for in-house lawyers 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 16 June 2021.** Regarding the protection of professional secrecy for in-house lawyers, they, like the Federal Council, have spoken out in favor of a provision that seeks to introduce professional secrecy protection for in-house lawyers. However, they limit this more strictly, 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 its law". Finally**, the bill** went to **the National Council's preliminary advisory committee,** which is currently still discussing the bill. The decisions in detail are accordingly not yet published. **SwissHoldings** positions itself as follows: • **Concerning collective redress:** The Association is opposed to the instruments of collective redress and will maintain this position when this subject is discussed in a separate proposal. • **Regarding the protection of the professional secrecy of in-house counsel:** The Association has long been **actively** committed to the **protection of the professional secrecy of in-house counsel and** continues to do so in the current consultations. It **explicitly and emphatically supports the right of employees in in-house legal services to refuse to testify and to disclose information, as provided for in the Federal Council's draft** (for our position, see the detailed link to our consultation response).
Outlook	The National Council's pre-consultative committee will now discuss the bill and then the bill will go to the National Council. SwissHoldings will study the decisions of the National Council's pre-consultative commission as soon as it is available and formulate its position with a view to the deliberations in the National Council.

Data protection

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

Current status	**Data Protection Act:** 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 2020 autumn session. We very much welcome this swift conclusion because it clears the way for the preservation of the recognition of equivalence. **Ordinance law: The** adopted law will be followed by the enactment of ordinance law. The consultation process was opened on 23 June 2021 and will continue until 14 October 2021. SwissHoldings will participate in the consultation process. **Equivalence decision by the EU**: 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 so-called Schrems II ruling of the European Court of Justice. The Court issued its ruling on 16 July 2020 (see below). The decision on equivalence by the EU remains to be seen. **Schrems II ruling**: The ruling mainly determines the following: EU-US Privacy Shield is void as of now. Standard contractual clauses are still valid under increased conditions. The ruling leads to increased legal uncertainty. **Ordinances:** The adopted law is followed by the enactment of the ordinance(s). The consultation is scheduled for June 2021. **Equivalence decision by the EU**: 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. **Schrems II decision**: The decision mainly determines the following: - EU-US Privacy Shield is void with immediate effect. - Standard contract clauses are still valid under increased conditions. The decision leads increased legal uncertainty.
Outlook	SwissHoldings is following developments around the above issues and continues to advocate for the interests of member companies in all these areas, in particular 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 held consultations on a relief law and on the regulatory brake. With the Relief Act, the Federal Council would like to consistently review existing regulations and new bills for relief potential. With the regulatory brake, it wants to subject regulations that place a particularly heavy burden on companies to a qualified majority in parliament (cf. in detail the Federal Council's media 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 process with a statement (see link to statement).