SwissHoldings

# Law Department

As of July 2023

# Competition Law

## Revision of the Cartel Act

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<tr><td>Current Status<br><br>& Outlook</td><td>The Consultation on the Revision of the Cartel Act:<br><br>On November 24, 2021, the Federal Council opened a consultation on the partial revision of the Cartel Act (KG). The corresponding preliminary draft proposed various changes regarding merger control. Specifically, it involved a change from the current Qualified Market Dominance test to the Significant Impediment to Effective Competition test (SIEC test). Additionally, regulations in the area of Civil Antitrust Law were added, and the preliminary draft included changes in the area of opposition proceedings. The Federal Council also incorporated two demands from the current Qualified Market Dominance test to the Significant Impediment to Effective Competition test (SIEC test). One of these demands was Motion 16.4094 Fournier, which aimed to improve the situation of SMEs in competition proceedings by introducing deadlines and party compensation for the first instance proceedings before the Competition Commission. Finally, the preliminary draft included a proposal for implementing the Motion Français, adopted in June 2021: “the revision of the Cartel Act must consider both qualitative and quantitative criteria to assess the inadmissibility of a competition agreement.” (link media release and consultation documents).<br><br>SwissHoldings participated in the consultation (link consultation response) and positioned itself as follows:<br><br>- The bill needs to be substantially revised because important elements, namely the inclusion of an institutional reform and the consideration of compliance efforts in the assessment of sanctions, are missing. These must find their way into the revision work.<br>- Regarding institutional reform, the goals of the institutional reform considered in 2012 are to be pursued. This relates in particular to a necessary improvement in the rule of law through the separation of investigation and decision-making.<br>- The consideration of compliance efforts in the assessment of sanctions could, for example, be included in the Cartel Act by way of an addition to Art. 49a para. 5 VE-KG and be structured similarly to the regulation in Germany.<br>- In SwissHoldings' view, the introduction of the proposed elements in the preliminary draft - with the exception of the important implementation of the Motion Français - has a subordinate role compared to the inclusion of institutional reform and the consideration of compliance efforts.</td></tr>
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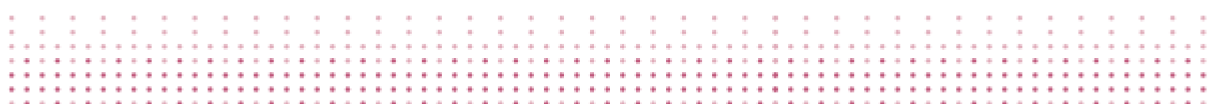

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|  | **A Proposal for Institutional Reform and a Bill for a Minor Revision of the Antitrust Law:**<br><br>On March 17, 2023, the Federal Council instructed the Federal Department of Economic Affairs, Education and Research (EAER) to submit a dispatch on the partial revision of the Cartel Act (KG) by mid-2023, which was completed on May 24, 2023 (see link to media release incl. dispatch and draft). Furthermore, the Federal Council has instructed the EAER to submit a concrete proposal for institutional reform to the Federal Council in parallel during the first quarter of 2024 (link to media release and documents).<br><br>**SwissHoldings very much welcomes the fact that institutional reform, as one of our central concerns, will now become part of the revision work. We have been advocating for** a so-called court model**,** if possible, to be chosen for institutional reform. The association is currently studying the draft of the minor revision of the Cartel Act in detail and is in the process of formulating its position. |
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## Foreign Subsidies Regulation (FSR)

| **Current Status**<br><br>**& Outlook** | On January 12, 2023, the **new EU Foreign Subsidies Regulation (FSR) entered into force** and it will take effect from July 12, 2023. From early February to early March, the European Commission also published its draft implementing regulation and conducted a public consultation. The final implementing regulation is expected to be adopted by the end of June 2023.<br><br>The primary objective for the regulation is to avoid distortions in the EU market caused by public subsidies from third countries. The regulation aims to transfer the existing state aid control, which applies solely to subsidies from EU member states, to subsidies from non-EU countries. Whereby empowering the European Commission as the sole enforcer with investigative tools such as (new reporting obligations and investigative powers).<br><br>Nevertheless, the regulation in its current official format is extremely problematic for companies. As it is currently constituted, it is practically impossible to implement. In particular, it should be noted that the information that may fall within the scope of the regulation goes beyond the information required for any other regulatory investigation.<br><br>Accordingly, SwissHoldings, in coordination with other associations and organizations at the European level, have been and continues to be committed to finding a better and more practicable solution here as quickly as possible.<br><br>**It is possible that the implementing ordinance will provide a more practicable solution in some cases**. However, it is now necessary to wait for the **publication, which, as mentioned above, is expected to** take place at the **end of June** 2023. |
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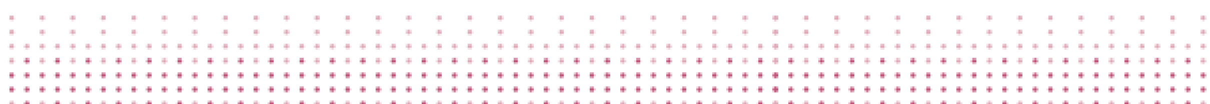

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# Corporate and Capital Markets Law

## Regulation of Beneficial Owners of Legal Entities

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<td>Current Status<br><br>& Outlook</td>
<td>In the future, as has been the case in the past, there will 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)" within Stock Corporation Law. Switzerland regulates here, in each case, within National Law to comply with these recommendations and adapts its national legislation, should the international entities mentioned (substantially) revise their recommendations. In these areas, SwissHoldings' general concern is to ensure that Switzerland is not blacklisted by such entities because it does not sufficiently implement their recommendations. At the same time, unnecessary restrictions on the freedom of action, as well as unnecessary bureaucracy for the (listed) companies must be avoided.<br><br>At the moment, the following developments should be mentioned in particular:<br><br>- Postulate 19.3634 and status report Global Forum (link Postulate): The postulate requires that the Federal Council submit a status report by the end of 2021 on the implementation of Bill 18.082, which is focused on implementing the recommendations of the "Global Forum on transparency and exchange of information for tax purposes." If necessary, the Federal Council must provide proposals for amendments. The Federal Council has now published the status report on December 3, 2021 (link status report). The report notes that international developments at the FATF, EU, and OECD levels indicate a trend towards further tightening of corporate transparency obligations. In light of this, Switzerland will analyze its national legislative bases and their effectiveness to implement appropriate options in line with the objective of the Federal Council's financial market policy in the area of integrity and international positioning.<br>- Revision of FATF Recommendation 24 on transparency and beneficial owners of legal entities: This mainly concerns the topic of beneficial owners and the introduction of a central register or an alternative mechanism for beneficial owners, as well as possible tightening of bearer shares. The revision of Recommendation 24 at the international level has been ongoing for some time. The FATF officially adopted the revised Recommendation on March 4, 2022 and held two public consultations on it in the summer and winter of 2021, in each of which SwissHoldings participated (for our position, see detailed link Opinion). It also updated its guidance in March 2023, which is intended to help countries implement the revised Recommendation 24 (link Guidance). The update was preceded by many months of intensive consultations with the private sector and external stakeholders, in which SwissHoldings was always involved.<br>- Following the adoption of Recommendation 24 at the international level, work is now underway at the national level to implement the recommendations. In the fall of 2022, the Federal Council instructed the Federal Department of Finance (FDF), in collaboration with the</td>
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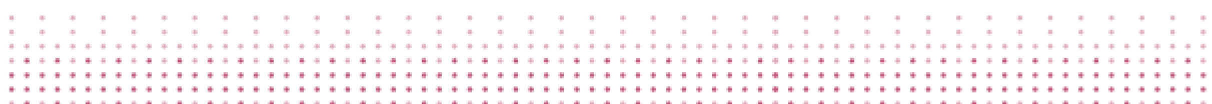

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| | Federal Department of Justice (FDJP), to draft a bill by the end of June 2023 to facilitate the identification of beneficial owners of legal entities (link media release). According to the media release, the bill will in particular introduce a central register for the identification of beneficial owners and new obligations for the risk-based updating of information on effective beneficial owners.<br>In order to achieve the most efficient and administratively simple implementation possible, especially for listed companies, SwissHoldings became involved in the legislative process at an early stage and will also participate in the consultation process, which, as mentioned above, should be opened shortly. |

## Regulation of Loyalty Shares

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| **Current Status & Outlook** | During the revision of the Stock Corporation Law, the implementation of loyalty shares was discussed, but ultimately, it was not included in the revised law. Instead, the Council of States presented a postulate that instructed the Federal Council to prepare a report on the proposed regulation, including its possible advantages, disadvantages, and effects discussed in the revision of Stock Corporation Law. The report was also requested to present a comparative legal analysis of the possible implementation variants and to determine if there is a need for action in Swiss Stock Corporation Law. (cf. in detail link postulate).<br><br>In response to the postulate, the Federal Council published its report on February 15, 2023, recommending against the introduction of loyalty shares (link media release and documents)The Federal Council based its opinion on the reports of two experts, whom it commissioned to prepare a legal clarification and a regulatory impact assessment to fulfill the postulate. The experts concluded that the introduction of loyalty shares is not recommended, or not without reservation.<br><br>The postulate, or rather the report, is now still on the agenda for the Committee for Legal Affairs of the Council of States on June 26.<br><br>During one of the expert clarifications, SwissHoldings was asked about the possible introduction of loyalty shares and responded that there is hardly any need for it on the part of companies, and therefore no action is necessary. In light of this, we support the Federal Council's position to maintain the status quo and refrain from introducing the possibility to create loyalty shares. |

## Possible Regulation in Stock Corporation Law- Implications of the Crédit Suisse Case

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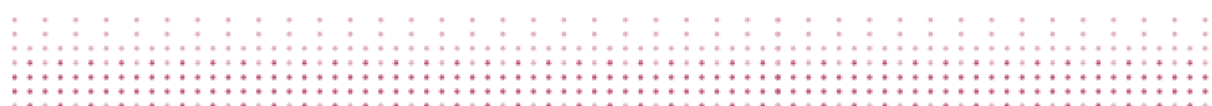
| **Current Status** | **Following the Crédit Suisse case, various motions were submitted in April.** The **Motion Chiesa 23.3448** "Systemically important companies. |



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| **& Outlook** | Ensure decisions in the interest of Switzerland" and **Motion Noser 23.3495** "Regulation on variable compensation" go beyond the regulation of financial institutions and **directly concern Stock Corporation Law, including for non-financial companies.**<br><br>According to the Chiesa Motion, the Federal Council should be instructed to take appropriate measures to ensure that the boards of directors within systemically important companies make decisions in the interests of the Swiss economy as a whole. The following requirement should apply: The majority of board members of companies defined as systemically important must hold Swiss citizenship and be a resident in Switzerland.<br><br>According to the Noser Motion, Stock Corporation Law should be amended as follows: The variable part of the compensation of all employees, which the Board of Directors can decide on in its own authority, may not exceed 15 percent of the reported net profit. If the Board of Directors wishes to increase the total variable compensation, it must propose and justify this at the Annual General Meeting. In particular, it must transparently explain how the higher amount is allocated to the various levels of employees. In the case of systemically important companies, the major part of the variable compensation must be deferred over the long term, and in a graduated manner. This deferral should be at least 3 years for lower management, and then increased in steps up to executive management, where it must be at least 10 years. In the event of a restructuring, all deferred variable compensation that has been deferred for longer than 3 years shall be forfeited.<br><br>The Federal Council proposes that the motions be rejected.<br><br>The motions were already submitted to the Council of States in the summer session. It referred both motions by motion of order - together with many other motions submitted as a result of the Crédit Suisse case - to the responsible committee for preliminary discussion.<br><br>SwissHoldings opposes the motions and recommends their rejection. The Crédit Suisse case should now be dealt with and the real economy with its well-functioning service and industrial companies should not be burdened with additional regulation in an overhasty and excessive manner. The two proposals, especially as far as they affect the real economy (via Stock Corporation Law), are unnecessary and it should be avoided to revise the Stock Corporation Law again after it has just been completely revised. Finally, it should be noted that there are no systemically important companies, but only systemically important banks, which are rightly regulated by special legislation (see the SwissHoldings session ticker under the following link for more details on the SwissHoldings position).<br><br>**Accordingly, SwissHoldings welcomes the fact that the National Council has not adopted the motions (at least for the time being), but has assigned them to the pre-consultative committee for preliminary discussion** and will continue to oppose the motions. |

## Revision of the Financial Market Infrastructure Act

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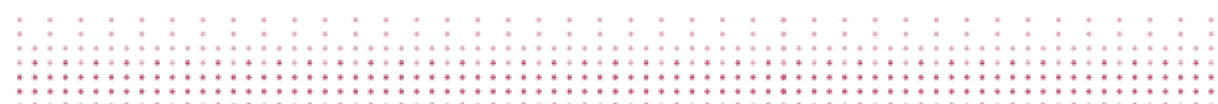
| **Current Status** | The Financial Market Infrastructure Act FinfraG regulates the licensing and |



| & Outlook | obligations of financial infrastructures. In addition to the conduct obligations of financial market participants in securities and derivatives trading. Even before it came into effect in January 2016, the Federal Council announced that the Federal Department of Finance (FDF) was to subject the FinfraG to a general review and draw up a report.<br><br>Based on this report, the Federal Council instructed the FDF at the end of September 2022 to prepare **a consultation draft on the revision of the FMIA by mid-2024** (link media release and documents). In its report, the FDF concludes that the FinfraG has largely proven its worth since it was ushered into effect. However, transparency and legal certainty are to be further strengthened in certain regulatory areas. Furthermore, the Federal Council has decided to implement the reporting obligation of small non-financial counterparties regarding derivatives transactions as of the 1st of January 2028.<br><br>SwissHoldings positions itself as follows: The proposed adjustments to derivatives regulation are fundamentally an improvement and therefore are to be welcomed. However, we clearly reject the idea that ad hoc notifications of shareholdings should be transferred from self-regulation to state regulation under the supervision of FINMA. Self-regulation has proven its worth, it should not be abandoned without good cause and should instead be retained as a locational advantage.<br><br>With this in mind, SwissHoldings is involved in the legislative process at an early stage and will advocate for the interests of its members. |
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## Future Proxy Advisor Regulation Template

| Current Status<br><br>& Outlook | In the course of the deliberations on the revision of the Stock Corporation Act (and also already in the course of the revision of the SIX Directive on Information Relating to Corporate Governance), parliamentarians 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 (definitely 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.<br><br>In response, 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 with proxy advisors at listed stock corporations. In doing so, it takes into account international developments." It contains no reference, or at least no explicit reference, to regulating via duties of issuers. We welcome this omission of these references.<br><br>The corresponding revision of the law is likely to come soon. SwissHoldings |
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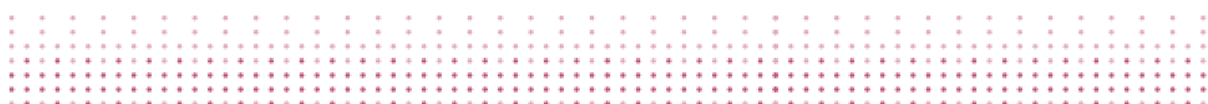

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| | is monitoring the international developments and will closely accompany the revision work in Switzerland. |