

## LAW DEPARTMENT



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## Capital Market Law

### Draft Register of Beneficial Owners



### Executive Summary

*The draft for a Federal Law on the Transparency of Legal Entities seeks to enhance the integrity of Switzerland as a financial and business hub. The proposed measures include the establishment of a Federal Register of Beneficial Owners and other specific interventions to enhance the effectiveness of combating money laundering and white-collar crime. These measures are designed to align with the international standards set forth by the Financial Action Task Force and the Global Forum on Transparency and Exchange of Information for Tax Purposes.*



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The proposed [legislation](#) has two primary objectives. Firstly, it aims to enhance the transparency of legal entities to facilitate more efficient identification of Beneficial Owners by the authorities. This involves the introduction of a Federal Register of Beneficial Owners and the imposition of Anti-Money Laundering Act obligations, including corresponding due diligence requirements, on specific activities within legal advice. Secondly, the bill encompasses amendments to existing laws that aim to bolster the effectiveness of the Anti-Money Laundering efforts. This includes the revision of supervisory regulations and the implementation of additional measures in specific sectors such as real estate and precious metals trading.



### Stance

The consultation process concluded at the end of November 2023, and the received positions are currently under evaluation by the Federal Department of Finance (FDF). In line with the [adoption of Recommendation 24](#) at international level, corresponding efforts have commenced at the national level. Thus far, the Federal Council has directed the FDF, in collaboration with the Federal Department of Justice and Police (FDJP), to draft a bill no later than June 2023, aiming to facilitate the identification of Beneficial Owners of Legal Entities (see press [release](#)). As outlined in the press release, the proposed bill is expected to establish a central register for the Identification of Beneficial Owners and introduce new obligations for updating information on Beneficial Owners based on a risk-based approach.



### Ausblick

SwissHoldings, as part of the consultation process, presented its statement (refer to the position below) at the conclusion of November 2023. Anticipated further developments are foreseen in the second quarter of 2024.



 **Position**

SwissHoldings has raised specific concerns in a [consultation response](#). In particular, we consider the following points to be especially important:

- Clarification of the Term "Control": SwissHoldings advocates for a more precise definition of the term "Control" to mitigate potential confusion or conflation with the terminology employed in Company Law and that pertaining to participation transparency.
- Full Exemptions for Listed Companies and Their Subsidiaries: The association is dedicated to ensuring that listed companies and their subsidiaries are granted complete exemptions concerning specific regulations.
- Limitation of Access to Beneficial Ownership Information: SwissHoldings urges that access to information on Beneficial Owners be restricted to the minimum necessary and made available solely to relevant authorities.
- Negligent Breach of the Duty to Report and Provide Information: SwissHoldings asserts that a negligent breach of the duty to report and provide information should not be subject to the criminal provisions outlined in Article 41 of the Anti-Money Laundering Act (AMLA). Moreover, it is imperative, in our perspective, that negligence in violating the reporting obligation in Article 37 of the AMLA is not subject to criminal prosecution.

### Revision of the Financial Market Infrastructure Act (FMIA)

 **Executive Summary**

***As per a report from the Federal Department of Finance (FDF), the Financial Market Infrastructure Act (FMIA) has, by and large, demonstrated its efficacy thus far. The Federal Council is presently undertaking a routine and comprehensive assessment, with a specific focus on enhancing transparency and legal certainty in designated regulatory domains. The consultation process for these considerations is slated to commence in mid-2024.***

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In this [report](#), the Federal Department of Finance (FDF) concludes that the Financial Market Infrastructure Act (FMIA) has largely demonstrated its efficacy since its enforcement. Nevertheless, there is a need to augment transparency and legal certainty in specific regulatory domains. Additionally, the Federal Council has determined to enact the reporting obligation for small non-financial counterparties concerning derivatives transactions, which will be made effective on January 1, 2028.

 **Stance**

In this [report](#), the Federal Department of Finance (FDF) concludes that the Financial Market Infrastructure Act (FMIA) has largely demonstrated its efficacy since its enforcement. Nevertheless, there is a need to augment transparency and legal certainty in specific regulatory domains. Additionally, the Federal Council has determined to enact the



reporting obligation for small non-financial counterparties concerning derivatives transactions, effective January 1, 2028.



#### Ausblick

Following this report, the Federal Council directed the Federal Department of Finance (FDF) at the end of September 2022 to formulate a consultation draft for the revision of the Financial Market Infrastructure Act (FMIA) by mid-2024 (see [press release and documents](#)).



#### Position

The proposed amendments to derivatives regulation represent a principled improvement and are, therefore, commendable. However, we emphatically oppose the notion of transferring ad hoc notifications of shareholdings from self-regulation to state regulation under the supervision of FINMA. Self-regulation has demonstrated its efficacy, and its abandonment should only occur when deemed absolutely necessary; it should be preserved as a locational advantage.

## Competition Law & Policy

### Amendment of the Cartel Act: Partial Revision



#### Executive Summary

***On May 24 2023, the Federal Council adopted the [dispatch concerning the partial revision of the Cartel Act \(23.047\)](#). The primary objective of this partial revision is to modernize Swiss Merger Control, aligning it with international standards. Additionally, the revision seeks to enhance Civil Antitrust Law and streamline the objection procedure for practicality. In connection with these goals, the Federal Council has directed the Federal Department of Economic Affairs, Education, and Research (EAER) to present a proposal for institutional reform in the first quarter of 2024. The Economic Affairs and Taxation Committee of the Council of States (WAK-S) initiated its deliberations during the same time period. SwissHoldings explicitly appreciates the inclusion of the long-requested institutional reform within the revision.***



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The transition from the Qualified Market Dominance Test to the Significant Impediment to Effective Competition Test (SIEC test) is undertaken with the objective of aligning the practices of the Competition Commission (COMCO) with international standards. As articulated in the report presented by [the State Secretariat for Economic Affairs \(SECO\)](#), the proposed modifications are designed to empower the imposition of targeted prohibitions or the approval of mergers in cases where a significant impairment of competition is identified. The proposition encompasses a streamlined notification obligation for mergers at the European level and a regulation pertaining to the extension of deadlines within the examination procedure. Another integral aspect of the legislative amendment involves the reinforcement of Civil Antitrust Law, with an anticipated extension for the right to institute legal proceedings. Furthermore, the objection procedure is slated for enhancement to render it more practicable by avoiding the immediate risk of



sanctions if an investigation is not initiated within the stipulated shortened deadline.



### Stance

At its [meeting on March 17, 2023](#), the Federal Council directed the Federal Department of Economic Affairs, Education and Research (EAER) to submit a dispatch on the partial revision of the Cartel Act (Cartel Act) by mid-2023. This was adopted by the Federal Council at its [meeting on May 24, 2023](#), whereupon the matter was passed to the WAK-S for the first Parliamentary Preliminary Consultation.

In this context, the Federal Council incorporated two requisitions from [Motion 16.4094 Fournier](#) aimed at enhancing the position of small and medium-sized enterprises (SMEs) in competition proceedings. These requisitions encompass the establishment of specific time limits and the provision of compensation for parties involved in first-instance proceedings before the Competition Commission (COMCO). Additionally, the preliminary draft includes an implementation proposal for [Motion 18.4282 Français](#), which was adopted in June 2021, and takes into consideration both qualitative and quantitative criteria.

Lastly, the preliminary draft incorporates provisions pertaining to the principles of investigation, the presumption of innocence, and the burden of proof. These provisions are included to fulfill the requirements outlined in [21.4189 Wicki](#). For more detailed information, please refer to [the press release and the consultation documents](#).



### Outlook

In January of this year, the WAK-S decided during its deliberations that there was a need for further clarification. It therefore decided to hold hearings. Due to time constraints, the hearings could not be finalised during the meetings in February and March. The committee will continue the hearings at its upcoming meeting on 2 and 3 May 2024 so that the matter can be dealt with in the summer session.

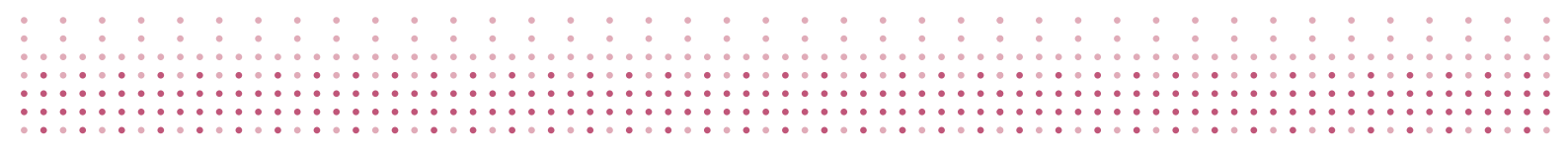


### Position

In particular, SwissHoldings anticipates a stringent implementation of the Français and Wicki Motions. Both Motions assert that authorities and courts must (once again) scrutinize the actual effects of an agreement or practice and substantiate its detrimental impact on competition. However, the draft revision fails to meet these expectations adequately. The draft disproportionately emphasizes Article 5 of the Cartel Act (CartA) concerning agreements and overlooks the analogous necessity for action outlined in Article 7 of the Cartel Act addressing unlawful conduct. In addition, there is too much room for interpretation, which makes clarification necessary (see the [SwissHoldings position paper to the WAK-S](#)).

Additionally, SwissHoldings has conveyed significant improvement suggestions to the WAK-S, including:

- Introduction of a Compliance Defense: SwissHoldings advocates for the inclusion in the Cartel Act of a provision acknowledging substantial compliance efforts, with such efforts considered in mitigating penalties, up to the exclusion of sanctions.



- Appeals Procedure: While acknowledging the positive intent of the revision to enhance the appeals procedure, SwissHoldings appreciates the proposed changes in the draft and the dispatch. However, specific clarifications are deemed necessary.
- Civil Antitrust Law: SwissHoldings opposes the extension of the right to sue to all parties affected by unlawful restraints of competition.

## Amendment of the Cartel Act: Institutional reform



### Executive Summary

***In the context of revising the Cartel Act, the reform of the competition authorities will be addressed separately, as urged by various stakeholders during the consultation process. This approach aims to prevent the revision of the Cartel Act from encountering obstacles again. The EAER, tasked with this responsibility by the Federal Council, intends to present a more detailed implementation proposal in the first quarter of 2024. Currently, several options are under consideration in collaboration with a specially appointed commission of experts.***



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Concurrently with the ongoing partial revision of the Cartel Act, the Federal Council is advancing a distinct overhaul [revision of the competition authorities](#) (hereinafter referred to as Institutional Reform). This aspect is no longer integrated into the suggested Cartel Act revision but is being addressed as a separate initiative. This approach draws on insights gleaned from the unsuccessful 2012 revision of the Cartel Act, which faced rejection twice in the National Council. The Institutional Reform primarily targets rectifying issues within administrative proceedings, particularly concerning the separation of decision-making and investigative functions. In 2012, the Federal Council advocated for the establishment of a Competition Authorities Act (CAA) in its dispatch on the revision. This proposal entails a restructuring of the prosecution process: a competition authority would conduct investigations and subsequently file an application with a first-instance competition court. This constitutes the central tenet of the proposed Institutional Reform.



### Stance

Various parties called for Institutional Reform during the [consultation process](#). During the [meeting on March 17, 2023](#), the Federal Council instructed the EAER to submit a proposal for implementation. An independent commission of experts was set up for this purpose. The recently published [final report of the expert commission](#) chaired by former Federal Judge Hansjörg Seiler, concluded that the COMCO operates effectively in principle and does not exhibit any constitutional deficiencies. Therefore, a change of system is not warranted.



### Outlook

[On March 15, 2024 based on the final report](#), the Federal Council instructed the EAER to submit a consultation draft on the reform by mid-2025. The enhanced separation will now entail the Secretariat conducting the investigation consistently without the involvement of COMCO,



which will continue to function as a part-time authority. Additionally, consideration is being given to appointing a proceedings officer to alleviate COMCO's workload. Furthermore, the Federal Council aims to strengthen the appeals process at the Federal Administrative Court by appointing specialized judges. In summary, the Federal Council is aligning with the recommendations of the Expert Commission.

## **Position**

SwissHoldings welcomes the initiation of the long-awaited Institutional Reform in conjunction with the ongoing revision of the Cartel Act. The proposed modifications demonstrate a strong dedication to modernizing and fortifying the existing institutional frameworks governing Anti-trust Law. However, careful consideration must be given to assess the feasibility and efficacy of the proposed changes, particularly regarding a potential shift in the system. SwissHoldings will articulate its position itself accordingly during the consultation process.

