

Law Department

Competition Law

Revision of the Cartel Act

Current status	<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 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.</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 link).</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.</p>
Outlook	<p>The consultation is expected to be opened in the third or fourth quarter of 2021. SwissHoldings accompanies the bill and will participate in the consultation process.</p>

Motion Français 18.4282

Current status	<p>Motion Français 18.4282 (cf. link) calls for the following: "In order to make legislation in the field of competition more effective and to reduce uncertainties regarding its application, the Federal Council is requested to</p>
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	clarify Article 5 of the Cartel Act. This amendment should make it possible to determine the facts of an unlawful agreement to compete, taking into account both qualitative and quantitative criteria. SwissHoldings agrees with the motion and supports the motion. We accordingly welcome the fact that the Council of States adopted the motion in last winter's session.
Outlook	The National Council's Committee for Economic Affairs and Taxation (WAK-N) will discuss the motion on 17 May 2021. We will continue to campaign for the approval of the motion.

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

Current status / Outlook	<p>The federal popular initiative "Stop the high-price island - for fair prices" was formally launched in January 2018. It aimed 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 recommended that the initiative is rejected. In August 2018, the Federal Council proposed that the "fair price" initiative be confronted with an indirect counter-proposal, 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 dispatch on 29.5.2019.</p> <p>The National Council and the Council of States have meanwhile discussed the bill and rejected the initiative, but accepted the counter-proposal in the final vote. The counter-proposal takes up the initiative in essential points. The initiative committee had accordingly announced before the final vote that it would withdraw the Fair Price Initiative if Parliament accepted the counter-proposal in the final vote and there was no successful referendum.</p> <p>SwissHoldings regrets that the counter-proposal has been accepted.</p>
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Corporate and capital market law

Completed company law revision and recent upcoming minor revisions in corporate law

Current status	<p>Adoption of the company law revision: After a very long history, the revision of the Stock Corporation Act was finally completed last summer. An essential part of the revision was the transfer of the ordinance against excessive remuneration into the law of obligations. 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>Effective Date: 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>
Outlook	<p>Now that the corporate law revision has been completed, several upcoming law revisions are emerging.</p> <ul style="list-style-type: none">- Commercial Register Ordinance: 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, 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.- Ordinance on the counter-proposal to the Responsible Business Initiative: The Federal Council opened the consultation on the ordinance to the counter-proposal to the Responsible Business Initiative on April 14, 2021. It will run until July 14, 2021. The proposal is being analyzed by SwissHoldings from both a CSR and a legal perspectives (cf. in particular the comments below in the section of the Department of Economy).- 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.

- **Regulation in connection with the bill against abusive bankruptcies:** The bill aims to prevent debtors from abusing bankruptcy proceedings in order to discharge their obligations (bankruptcy riding) by means of various measures in the Code of Obligations, in debt enforcement and bankruptcy law and in criminal law. The bill also includes measures under stock corporation law. In particular, the Federal Council proposes to codify the case law on so-called shell company trading.

The bill has so far been discussed by the Council of States' Committee for Legal Affairs (RK-S) and is expected to come before the Council of States in the coming summer session. However, the finalized proposal with the decisions of the RK-S in detail is not yet available.

From the SwissHoldings point of view, it is particularly important that the bill avoids the - possibly even unintentional - inclusion of provisions in the parliamentary process that would have a negative impact on members.

- **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.

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

Parliamentary initiative 21.400 RK-NR "Temporarily extend permit requirement under Lex Koller to permanent establishment properties" and the Covid 19 Act

Current status / outlook	<p>The National Council's Legal Affairs Committee had drafted a parliamentary initiative which wanted to temporarily extend the permit requirement under Lex Koller (i.e. during a special situation pursuant to Article 6 of the Epidemics Act or an extraordinary situation pursuant to Article 7 of the Epidemics Act and for two years after the end of the special or extraordinary situation) to business premises properties.</p> <p>The content of the initiative was then also included in revision of the Covid-19 Act, which was discussed in the previous spring session.</p> <p>SwissHoldings spoke out firmly against the initiative as well as the proposal, which was identical in certain elements, and opposed it. We therefore welcome the fact that both the initiative and the provision in the Covid 19 Act were ultimately rejected and are now off the table.</p>
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This year's proposal in the Covid-19 bill regarding a dividend ban in case of short time working

Current status / outlook	<p>Last year, a ban on dividend payments in the event of short-time working was discussed in parliament, which was subsequently rejected and not included in the legislation, which SwissHoldings very much welcomes.</p> <p>Also this year, there was a corresponding proposal for a dividend ban in the case of short-time work, which was also briefly taken up by the press: This time, however, it was only a minority proposal in the National Council's preliminary committee (Committee for Economic Affairs and Taxation WAK-N), which was then rejected by the National Council and should therefore be off the table again, which SwissHoldings very much welcomes.</p>
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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 in the most recent meeting) are also discussed.
Outlook	SwissHoldings will continue to promote the mutual exchange between the member companies.

Code of Civil Procedure Revision- Collective Redress – Legal professional privilege for Inhouse Counsel

Current status / Outlook	<p>In 2018, a consultation to amend the Code of Civil Procedure was carried out. It particularly concerned the reduction of cost barriers, collective legal protection, and the implementation of the Markwalder parliamentary initiative (16.409) for the right to refuse to testify and disclose for employees in internal legal services.</p> <p>The Federal Council then presented its dispatch on the revision of the CCP on 26 February 2020 (see link to the media release and to the dispatch and the Federal Council's draft). It decided to remove collective redress from the draft and to deal with it separately at a later date. It also decided to retain the provision on the protection of professional secrecy for in-house lawyers in the Federal Council's draft.</p> <p>The bill then went to the preliminary advisory committee of the Council of States (Committee for Legal Affairs of the Council of States, RK-S), which discussed the bill through last 13 April 2021.</p> <p>SwissHoldings has for a long time already campaigned against the instruments of collective redress and very actively for the introduction of professional secrecy for Inhouse Counsel in its version of the Federal Council. The bill will now go to the Council of States in the summer session. The positioning of SwissHoldings in detail on the resolutions of the RK-S with regard to this will be available on the website of SwissHoldings.</p>
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Data protection

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

Current status	<p>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 autumn session 2020 and is expected to come into force at the end of 2022.</p> <p>Ordinances: The adopted law is followed by the enactment of the ordinance(s). The consultation is scheduled for June 2021.</p> <p>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.</p> <p>Schrems II decision: The decision mainly determines the following:</p> <ul style="list-style-type: none">- EU-US Privacy Shield is void with immediate effect.- Standard contract clauses are still valid under increased conditions. <p>The decision leads increased legal uncertainty.</p>
Outlook	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.