Competition Compliance 2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, China, the European Union, Italy and Ukraine.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Peter Crowther of Winston & Strawn LLP, for his continued assistance with this volume.

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LEGAL AND REGULATORY FRAMEWORK

Key legislation

1 | What key legislation governs competition in your jurisdiction?

Competition law is governed mainly in the Swiss Federal Act on Cartels and other restraints of Competition of 6 October 1995 (the Swiss Cartel Act), which, since that date, has been revised several times.

Also of relevance are the Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance) of 17 June 1996 and the Ordinance on Sanctions imposed for Unlawful Restraints of Competition of 12 March 2004 (Cartel Act Sanctions Ordinance).

There is an agreement with the EU about cooperation and coordination, including the exchange of information (Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition law of 17 May 2013 (OJ L 347/3)).

All these texts are available in English.

Unfair competition is governed by the Federal Act against Unfair Competition of 19 December 1986 and price disclosure by the Ordinance on the Disclosure of Prices of 11 December 1978.

Enforcement

2 | Which authorities are charged with enforcing competition law in your jurisdiction and what is the extent of their powers?

The main competition law enforcement authority is the Swiss Competition Commission (ComCo). It has the power to:

- investigate and report on markets;
- issue opinions regarding new legislation;
- investigate anticompetitive behaviour (including the ordering of dawn raids, the seizing of evidence, and the hearing of witnesses);
- approve concentrations;
- approve, upon notification, agreements to enter into amicable settlements or to declare such an agreement invalid;
- issue administrative sanctions for breach of competition law of up to 10 per cent of the turnover in the last three business years; and
- in certain limited cases, issue criminal sanctions of up to 100,000 Swiss francs.

The Competition Commission may also render expert advice to other authorities and to the civil law courts. Its secretary's office may be asked for secretarial advice which it will upon request render in writing.

Further authorities are the Swiss Federal Price Monitor (Preisüberwacher). For certain industrial sectors, specific authorities may have limited competition-related competencies (eg, Finma for banks).

Except for cases involving undertakings abusing market dominance, competition law is enforced through the civil law courts.

Consequences of non-compliance

3 | What are the consequences of non-compliance with competition law?

Non-compliance with the Swiss Cartel Act can lead to action for damages by damaged parties in civil law courts. However, in the main, enforcement of the act is carried out by the Competition Commission opening an investigation.

The investigation may result in an amicable settlement including behavioural undertakings (eg, continuing to deal with certain counterparties). It may also result in administrative sanctions of up to 10 per cent of the turnover in the last three business years (special calculation rules apply to banks and insurance companies), or in case of breach of the concentration notification obligations, of a sanction of up to 1 million Swiss francs. Non-compliance with duties to notify the Competition Commission under the Swiss Cartel Act may be sanctioned with administrative sanctions of up to 100,000 Swiss francs.

In certain limited cases (ie, breach of an amicable settlement undertaking or non-compliance with a Competition Commission decision), criminal sanctions of up to 100,000 Swiss francs may apply, or up to 20,000 Swiss francs in cases of breaches of information duties or executing a concentration without providing a notification.

Guidance

4 | Do the authorities issue guidance on compliance with competition law?

The Competition Commission publishes its practices and known court decisions in the journal *RPW*, about five times per year.

It also publishes announcements on its approach to certain topics. Many of these mirror European Union block exemptions, but contrary to block exemptions, they are only informational circulars on the practices of the Commission.

Through its secretary's office, the Commission also renders specific advice on questions submitted to it.

Finally, civil law courts are encouraged to submit competition law issues to the Commission for expert opinion.

Other legislation and relevant practices

5 | Do any other laws outside the main competition legislation regulate competition in your jurisdiction, including any sector-specific regimes? Do they cover any other anticompetitive practices not caught by the main legislation?

Certain sectoral rules may apply: in general, provisions establishing an official market or a price system prevail over the competition law rules.

Under the agreement with the EU on Air Transport, the Competition Commission has specific competencies to assess subsidies.

COMPLIANCE PROGRAMMES

Commitment to competition compliance

6 How does a company demonstrate its commitment to competition compliance?

Demonstrating a commitment to competition compliance can take various forms. The most common are:

- implementing a code of conduct (and often the publication of the code on the undertaking's website);
- setting up a formal competition law compliance programme; and
- providing periodic training sessions for the employees, which may be done in electronic form.

Supplier codes of conduct (together with appropriate monitoring) are often part of an undertaking's code of conduct or compliance programme.

A letter from senior management to support the code of conduct is also recommended (indicating 'tone from the top' support of compliance).

The commitment will only be plausible if the implementation is monitored by the appropriate and suitable procedures; usually, a policy protecting whistle-blowers will be part of this.

Government compliance standards

7 Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no such standard. The International Chamber of Commerce toolkit, as well as the ISO 19600 standard, are widely known, but compliance programmes are usually tailor-made and take into consideration not only Swiss competition law but also the laws of the target markets.

Risk identification

8 What are the key features of a compliance programme regarding risk identification?

Any compliance programme must take into account the specific risk profile of a company. There is no prescribed list of such risks, as they depend on the actual business in question and the market structure, and what the main competition compliance risks are.

In a compliance programme, as a first step, companies usually identify the areas of their business that may be exposed to compliance risks (eg, typical situations where their employees are in contact with competitors, such as trade association meetings, joint venues, information exchanges, private functions and reunions). Furthermore, monitoring of market shares and market definition developments may be an important feature, as a number of Swiss small and medium-sized enterprises are market leaders in a (usually small) segment of the market. Finally, monitoring legal developments to become aware of new trends in the application of competition law should form part of the risk identification (regulatory risk).

Risk assessment

9 What are the key features of a compliance programme regarding risk assessment?

In general, compliance programmes and risk maps categorise risks along two lines: the likelihood of the risk materialising and the seriousness of the consequences.

The risk assessment must be updated at least once a year, as well as each time there is a reorganisation of the company or significant changes to the market take place.

The resulting inherent risks are then usually quantified in a risk matrix as low, medium or high.

Risk mitigation

10 What are the key features of a compliance programme regarding risk mitigation?

Risk mitigation must address each inherent risk identified specifically and appropriately. The main tool to mitigate risks is the compliance programme, including employee training and regular controls (eg, debriefing after a trade fair where an undertaking's employees met competitors). Specific instructions must be given to each employee about permissible and impermissible behaviour. This may include the recording of conversations with competitors, attendance of legal counsel in certain reunions and meetings, the opening of confidential reporting lines for employees and the implementation of information firewalls. Furthermore, risk mitigation should include actions to mitigate the effects of breaches that took places, such as guidelines regarding dawn raids and potential leniency programmes. Finally, risk mitigation should include document and data retention guidelines.

Compliance programme review

11 What are the key features of a compliance programme regarding monitoring and review of business practices?

Periodic reviews of an undertaking's compliance programme must be part of the programme for it to meet high standards of suitability and seriousness.

A review should also be made if the company's structure changes (especially if acquisitions are made or joint ventures are formed) and if the markets change (eg, the company's market share increases because a competitor leaves the market).

Reviews should not be limited to a formal review of the programme, but should also review and analyse the behaviour of employees with client or competitor contact, and analyse past events that may be of relevance.

Effect on penalties

12 Will an established competition compliance programme have any effect on penalties?

The existence of a compliance programme is not explicitly mentioned as a mitigating factor in the Ordinance on Sanctions imposed for Unlawful Restraints of Competition of 12 March 2004. However, the Swiss Federal Administrative Court (the court of appeal against decisions of the Swiss Competition Commission) has repeatedly held that, subject to it meeting minimum standards, a compliance programme may lead to a reduction of sanctions at the discretion of the authorities. The court has not yet rendered a judgment in which it reduced a sanction imposed due to the existence of a compliance programme.

HORIZONTAL DEALINGS

Arrangements with competitors

13 How does competition law govern arrangements with competitors?

According to the Swiss Cartel Act, agreements that significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency, as well as agreements that lead to the elimination of effective competition, are illicit. After a recent Federal Court decision, it is currently unclear whether justification on grounds of economic efficiency can only be claimed if a fixed number of grounds listed in the Swiss Federal Act on Cartels and other restraints of Competition of 6 October 1995 (the Swiss Cartel Act) are met or whether other grounds may be claimed. Although all such agreements

or concerted practices may be held to infringe competition law, only certain agreements (or concerted practices) among actual or potential competitors can result in direct sanctions as they are presumed to lead to the elimination of effective competition. These include the direct or indirect fixing of prices; the restriction of quantities of goods or services to be produced, obtained or supplied; and the allocation of markets geographically or among trading partners.

Exchanging information

14 | Can a company exchange information with its competitors?

Information exchanges with competitors are problematic. The criteria used to assess whether these violate competition compliance restrictions are similar to those in European Union law and entail evaluating:

- the contents (eg, if the information relates to strategy or prices);
- the level of aggregation (how specific the information is);
- what the information exchanged consisted of;
- the frequency of exchanges;
- the homogeneity of the products; and
- market concentration.

Even the exchange of publicly available information may be illegal if it is not easily accessible by all competitors nor available to them at no cost, or the information exchange leads to a reduction in uncertainty.

Cartel behaviour

15 | What form must behaviour take to constitute a cartel?

The Swiss Cartel Act defines 'agreements affecting competition' to include binding or non-binding agreements and concerted practices, the aim or effect of which is to restrain competition. Until recently, an effect on the market was a precondition to an agreement being contrary to competition law, so that attempts could not be sanctioned. However, a Federal Court decision (*GABA/GEBRO*) newly introduced per se prohibitions, so that a clause in an agreement may be sufficient to constitute a breach of competition law, even if it has not been implemented.

Suggested precautions

16 | What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The first step to such precautions must be an assessment of the issues involved: does the risk result from an exchange of information, (potential) concerted behaviour, or a joint venture? Depending on the assessment, precautions may include such varied steps as:

- the setting up of information firewalls (including, in particular for M&A and joint venture transactions, organising and separating a 'clean team');
- aggregation of data received to ensure that the company does not have access to market-specific competitor data;
- taking minutes at each meeting with a competitor; or
- a submission of draft agreements to the secretary's office of the Swiss Competition Commission for an (informal and officially non-binding) review. (A formal notification of an agreement to the Competition Commission is only made in exceptional cases).

Exemptions and defences

17 | What exemptions, defences or other circumstances will allow otherwise anticompetitive agreements with competitors to escape sanction?

An agreement is deemed to be justified on grounds of economic efficiency if it is necessary to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally, provided that such agreement will not allow the elimination of effective competition.

Furthermore, an agreement can be notified to the Competition Commission before it entails any effect. The agreement may become effective after the notification is filed. However, the Competition Commission has five months after notification to open an investigation. If an investigation is opened, the agreement may not be upheld any longer. Notifications of agreements are cumbersome and rare. The Competition Commission published a form for submitting notifications on its website.

VERTICAL DEALINGS

Vertical agreements

18 | How does competition law govern vertical arrangements with commercial partners?

The Swiss Federal Act on Cartels and other restraints of Competition of 6 October 1995 (Swiss Cartel Act) addresses any vertical restraints of competition and the principles of EU law are applied in general, but only the following restraints may lead to direct sanctions: agreements on minimum or fixed prices, and agreements on allocating territories to prohibit other distributors from selling into such territories.

Agency agreements, as a rule, are not subject to competition law rules, provided they qualify as true agency agreements. There are no clear rules about such qualification and Swiss legal authors refer to the relevant EU notice provisions.

For many years, vertical arrangements could only be held illegal if they had an effect on the market. Since the 2016/2017 Federal Court decision in the case *GABA/GEBRO,* there is a de facto per se rule and it is sufficient that, for example, the Swiss market is closed off in a distribution agreement. This may cause problems, as a Europe-wide distribution system in line with European Union law (including an export prohibition) will be deemed illegal under Swiss law and may lead to sanctions being imposed by the Swiss Competition Commission (ComCo).

Exemptions and defences

19 | What exemptions, defences or other circumstances will allow otherwise anticompetitive vertical agreements or restrictions to escape sanction?

An agreement is deemed to be justified on grounds of economic efficiency if it is necessary to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally, provided that the agreement does not eliminate effective competition. Furthermore, an agreement can be notified to the Competition Commission before it entails any effect; after notification is filed, the agreement may become effective. However, the Competition Commission has five months after notification to open an investigation. If an investigation is opened, the agreement may no longer be upheld. Notifications of agreements are cumbersome and rare. The Competition Commission has published a form for notification on its website.

DOMINANT POSITION

Determining dominant market position

20 | Which factors does your jurisdiction apply to determine whether a company holds a dominant market position?

The Swiss Federal Act on Cartels and other restraints of Competition of 6 October 1995 (the Swiss Cartel Act) defines 'enterprises having a dominant position in the market' as meaning one or more enterprises being able, as regards to supply or demand, to behave in a substantially independent manner with regard to the other participants (ie, competitors, offerors or offerees) in the market. If the market share held is 50 per cent or more, there is a presumption that an undertaking is dominant.

Abuse of dominance

21 | If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance?

Dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners.

The following behaviour is in particular considered unlawful:

- any refusal to deal (eg, refusal to supply or to purchase goods);
- any discrimination between trading partners in relation to prices or other conditions of trade;
- any imposition of unfair prices or other unfair conditions of trade;
- any undercutting of prices or other conditions directed against a specific competitor;
- any limitation of production, supply or technical development; or
- any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

On 9 May 2016, Swisscom (a national telecom company) was fined 71 million Swiss francs for not granting a competitor access to exclusive rights held in TV rights on football and ice hockey games. In December 2018, the Federal Administrative Court (decision not yet final) held against SIX Group, among others, that no de minimis threshold applies and that no actual effect on the market needs to be established.

Exemptions and defences

22 | What exemptions, defences or other circumstances will allow a dominant company's otherwise abusive conduct to escape sanction?

An exemption is possible, subject to a formal notification, but no such case has ever been reported. However, a behaviour may be justified for legitimate business reasons, such as safety requirements or a counterparty's lack of creditworthiness.

MERGER CONTROL

Competition authority approval

23 | Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Under the Swiss Federal Act on Cartels and other restraints of Competition of 6 October 1995 (the Swiss Cartel Act) and the Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance), the Swiss Competition Commission must be notified of a planned concentration of undertakings before it is implemented if in the financial year preceding the concentration:

- the undertakings concerned together reported a turnover of at least 2 billion francs, or a turnover in Switzerland of at least 500 million Swiss francs; and
- at least two of the undertakings concerned each reported a turnover in Switzerland of at least 100 Swiss million francs.

In the case of insurance companies, 'turnover' is replaced by 'annual gross insurance premium income' and in the case of banks and other financial intermediaries that are subject to the accounting regulations set out in the Banking Act by 'gross income'.

Notification is mandatory, regardless of the above thresholds, if one of the undertakings concerned was held to be dominant in a market in Switzerland in a final and non-appealable decision in proceedings under the Swiss Cartel Act, and if the concentration concerns either that market, an adjacent market, or a market upstream or downstream thereof.

The notification must be made by the undertaking acquiring control or, in case of a merger, jointly by the undertakings concerned.

Timing

24 | How long does it normally take to obtain approval?

Upon notification, the Competition Commission has one month to decide whether a further assessment needs to be made. If the undertakings concerned are not notified of this during the month, the concentration may be executed.

A further assessment must be finalised within four months. However, in practice, more time will be used if the Competition Commission claims it did not receive all the information it requires.

Impact of merger clearance

25 | Does merger clearance by the authority constitute confirmation that the terms in the documents comply with competition law?

As a rule, if a merger is cleared, restrictive provisions in the agreements are automatically cleared at the same time.

Exchanging information before completion

26 | Are there limits on the information that can be exchanged with the other party before completion of a merger?

Exchanges of information, in particular between competitors, remain subject to general limitations. In practice, companies work with 'clean teams' in M&A situations.

Failure to file

27 | What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any notable recent cases?

Incomplete filings will lead to questions by the Competition Commission and the start of the one-month period beginning only upon the Commission receiving a complete filing.

Failure to file or filing after implementation will lead to administrative sanctions of up to 1 million Swiss francs. The Commission can also ask for a subsequent filing or a demerger.

Furthermore, an individual who implements a concentration of enterprises without notifying the Commission may be subject to criminal sanctions of up to 20,000 francs. This is one of the rare instances where the Cartel Act stipulates criminal sanctions against individuals.

JOINT VENTURES

Competition authority approval

28 Are joint ventures required to seek clearance from the competition authority?

The assessment of joint ventures closely follows the approach taken by the European Commission, distinguishing between full-function and other joint ventures. Only full-function joint ventures require merger clearance.

Joint venture arrangements

29 When will joint venture arrangements fall within the scope of competition law?

Non-fully-functional joint ventures fall under competition law as agreements or concerted practices (ie, they are assessed to be either horizontal or vertical agreements).

LENIENCY

Leniency programmes

30 Is a leniency programme available to companies or individuals who participate in a cartel or other anticompetitive conduct in your jurisdiction?

If an undertaking cooperates in the disclosure and elimination of a restraint of competition, it may be fully or partially relieved from paying a fine. Leniency programmes may apply to both horizontal and vertical restraints. In cases of abuse of a dominant position, leniency may apply but not lead to a full suspension of the fine.

Individuals employed by a company are not subject to sanctions for market behaviour, so leniency programmes do not apply to individuals. Criminal sanctions against individuals may only apply if they are in breach of certain procedural obligations.

Complete immunity from sanctions is granted if the undertaking :

- is the first to report and provides the authorities with information sufficient to open proceedings, or provides evidence that enables the authorities to establish an infringement;
- has not played a leading role in the cartel;
- submits all available information and continuously cooperates with the authority; and
- ceases its participation in the infringement.

Only one undertaking can be granted complete immunity. If an undertaking is not the first to report but voluntarily cooperates and terminates its participation in the infringement, it may qualify for a reduction of up to 50 per cent of the sanction. If the undertaking also provides evidence or information on further infringements of competition, the reduction may be increased to 80 per cent.

The identity of an undertaking reporting an infringement is kept confidential at first, but other cartel participants may be granted access to the file during a later stage of the proceedings.

Beneficiaries of leniency

31 Can the company apply for leniency for itself and its individual officers and employees?

A company can apply for leniency for itself. As individual officers and employees are not subject to sanctions, there is no need to apply for leniency for these persons.

INVESTIGATION

Commencement of investigation

32 How is an investigation into a suspected breach of competition law started?

The Swiss Competition Commission, usually having received information or complaints by third parties, may either perform a market review or directly open an investigation. The opening is published and third parties may indicate their intent to participate within 30 days.

Limitation period

33 What are the limitation periods for investigation of competition infringements?

For administrative sanctions the limitation period is 10 years; the opening of an investigation may set a new period. Criminal sanctions for breach of an amicable settlement or of orders of the authorities are subject to a statute of limitation of five years, other criminal sanctions to a limitation period of two years. Civil claims are subject to the regular limitation periods applying (eg, for torts one year after the damaged party became aware of the damage and of the identity of the person liable, but in any case 10 years after the act causing the damage took place).

Information-gathering powers

34 What powers does the competition authority have to gather information?

The Competition Commission may request the information from the companies suspected and from other market participants. It may also question witnesses and order dawn raids.

Dawn raids

35 For what types of infringement will the competition authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

Dawn raids are increasingly used. They may be used to investigate any breach of competition law. The Competition Commission has issued detailed guidelines on how it conducts a dawn raid.

The search team may search both business premises and private (residential) premises, as well as vehicles. Any electronic data that the search team can access from the premises searched may be searched as well.

Dawn raids – rights and obligations

36 What are the company's rights and obligations during a dawn raid?

The occupant of the premises searched has the right to be present, however his or her presence is not a requirement.

The company has to accept the search and must cooperate to a certain extent by, for example, opening rooms and safes, and, according to the Competition Commission's guidelines, providing passwords. However, on 12 September 2019, the Swiss Federal Court held that companies do not have to surrender passwords to the Commission.

There is no further duty to cooperate by, for example, indicating additional material or premises.

The company may ask for certain data (on paper or in electronic files) to be sealed (eg, attorney-client correspondence).

Refusal to cooperate

37 What are the penalties and other consequences for refusing to cooperate with the authorities during an investigation?

A company refusing to cooperate with a formal request for information from the Competition Commission may be subject to administrative sanctions (and increased administrative sanctions in the Commission's final decision) and individuals who refuse to cooperate to criminal fines of up to 20,000 Swiss francs.

There is no general duty to notify the regulator of competition infringements, but companies under prudential supervision (such as banks) may have to notify their regulator under the supervisory rules applicable to them.

SETTLEMENT

Settlement mechanisms

38 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

It would be difficult to reach a settlement during a dawn raid, but a company may indicate that it will cooperate and file a marker. Thereafter, the company must actively cooperate if it wishes to retain the status under a leniency application.

The Competition Commission secretary's office can close an investigation by proposing an amicable settlement with the undertaking investigated. Such settlements agreements must be in writing and include clauses on how the restraint to the competition will be removed.

An amicable settlement needs to be approved by the Commission. On 28 February 2018, the Commission issued guidelines on how it structures and approaches amicable settlements. In the settlement, the undertaking agrees to change its behaviour.

Officially, the settlement does not address the issue of the amount of the sanction, which is unilaterally imposed by the Commission. However, the secretary of the Commission will inform the undertaking of the approximate amount it has proposed to the Commission prior to the settlement being agreed.

As part of the settlement, the undertaking must renounce its right to file an appeal.

Impact of compliance programme

39 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

In settlement negotiations, the fact that a compliance programme will be implemented or amended or enhanced may be an element that is considered to determine whether the restraint to competition has been removed for good.

Corporate monitorships

40 Are corporate monitorships used in your jurisdiction?

There have not been any precedents where a formal corporate monitorship was established under competition law. However, if a company breaches an amicable settlement, the Competition Commission may monitor its behaviour or mandate third parties to do so, and such an undertaking will be subject to administrative sanctions (up to 10 per cent of the turnover in Switzerland in the prior three business years) and the individuals may be subject to criminal sanctions (up to 100,000 Swiss francs).

Statements of facts

41 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

Agreed statements of facts may be used by claimants if they are available to them. However, as the settlement decisions are not published, claimants in actions for private damages either have to apply for access to the files or demand a copy from the defendants. The right to access the file will be assessed under the Swiss Data Protection Act, and may be limited, based on a weighting of interests of the parties involved. The practice is not yet clearly settled. In a string of recent decisions, it was established that third parties may access personal data (including the identities) of the parties of proceedings of the Competition Commission subject to a balancing of interest check. In such cases, safeguarding the identity of a whistle-blower would be a key concern.

UPDATE AND TRENDS

Recent developments and future reforms

42 What were the key cases, decisions, judgments and policy and legislative developments of the past year? Are there any proposals for competition law reform in your jurisdiction?

There have been many efforts to amend the Swiss Cartel Act, but all recent attempts have failed. There is today a new proposal drafted that should introduce the SIEC Test (significant impediment of effective competition test) for merger control, as in the European Union, introduce stricter time limits for competition proceedings, and render it easier for consumers and others to file claims for damages against a competition law infringer.

Furthermore, the 'Fair Price Initiative' (an initiative is a request by the general public to change laws) is pending in parliament, which aims to prohibit higher prices being charged in Switzerland than within the EU, and that undertakings and consumers in Switzerland may buy products abroad without being discriminated. To achieve this, a new category of undertakings would be created, so that undertakings with market dominance and undertakings with relative market dominance would be subject to such obligations, (ie, if the counterparty has no sufficient possibilities to buy the products from others). In March 2021, the Swiss parliament recommended that the initiative should be voted down, but at the same time agreed to make changes in the Swiss Federal Act on Cartels and other restraints of Competition of 6 October 1995 (the Cartel Act) that implemented most of the initiative's proposals. The main difference is that there will be no protection for Swiss producers selling products abroad cheaper than in Switzerland against reimporting such products. Furthermore, geo-blocking in online trade shall be banned. The initiative will be withdrawn if the parliamentary text becomes law.

A number of recent court cases dealt with service providers in the automotive industry and their right to claim a service contract; while some cases are still pending, in most cases the claims were denied.

Following the Swiss Federal Court decisions in *GABA/GEBRO* and *SIX*, direct sanctions may be imposed, even if no effect on competition in Switzerland can be proven. Hence, there is a considerable risk that legitimate distribution systems will be deemed illegal (and fined) under Swiss law, even if they hardly affect the Swiss market. The same may apply to the behaviour of undertakings holding market dominance – recent decisions (although on appeal) furthermore indicate that the Competition Commission is willing to define markets narrowly and find that denial of a contract is abusive, even if the contract is not objectively necessary for the applicant.

The focus of the Commission's activity in 2021 is not yet clear. In view of the current government's strategy regarding the internet and information technology, it may well be that the Commission will focus on marketplaces and access to networks and services.

Furthermore, there seems to be a trend for using competition law to further other aims on the political agenda, such as carbon neutrality.

Coronavirus

43 What emergency legislation, relief programmes and other initiatives specific to your practice area has your jurisdiction implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Competition Commission issued a press statement on 26 March 2020 confirming that Swiss competition law continues to apply regardless of the special situation regarding the coronavirus pandemic. It published its opinion on the Federal Act on the Legal Basis for Ordinances of the Federal Council regarding Coronavirus (RPW 2020/4b, 2030), stating that any public financial support rendered to print media should be limited in time. It also participated in the consultation on the Ordinance for Support of Enterprises (RPW 2020/4b, 2031) and stated that subsidies to travel agents will not fall under the agreement with the European Union on air transport.

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