Competition Compliance 2020

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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 Bulgaria, Mexico, Norway and Romania.

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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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Switzerland

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Niederer Kraft Frey

GENERAL

General attitudes

1 | What is the general attitude of business and the authorities to competition compliance?

Companies are generally aware of compliance obligations and have compliance programmes, although in particular for smaller undertakings, the fact that the legal obligations and rules are often not clear makes it difficult to set up a stringent compliance programme that does not unduly hinder business. Authorities seem willing to accept that a company compliance programme may reduce the company's fault for a breach (leading to reduced sanctions), but only if the compliance programme meets high standards of suitability and seriousness, and only if compliance law was breached by employees not belonging to senior management.

Government compliance programmes

2 | 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.

Applicability of compliance programmes

3 | Is the compliance guidance generally applicable or do best practice and obligations depend on company size and the sector of the economy it operates in?

In general, competition law obligations apply to all undertakings, and in the past, the Swiss Competition Commission has also taken action against undertakings with a small turnover. Best practice and obligations depend, among other things, on:

- company size;
- the position of the company on the market (such as market shares);
- the sectors of the economy it operates in;
- the distribution system used;
- market transparency; and
- the organisation of the market participants (whether there are trade associations, an information exchange, standards to be agreed, etc).

4 | If the company has a competition compliance programme in place, does it have any effect on sanctions?

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 Federal Administrative Court (the court of appeal against decisions of the Swiss Competition Commission) has repeatedly held that, subject to standards of suitability and seriousness and if the compliance law was breached by employees not belonging to senior management, a competition 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 actually reduced a sanction imposed owing to the existence of a compliance programme.

IMPLEMENTING A COMPETITION COMPLIANCE PROGRAMME

Commitment to competition compliance

5 | How does a company demonstrate its commitment to competition compliance?

Demonstration of commitment to competition compliance can take various forms. The most common forms are implementing a code of conduct (and often publication of the code on the website of the undertaking), 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 thereof) are often part of the code of conduct or the compliance programme. A letter from top management ('tone from the top') to support the code of conduct is recommended. The commitment will only be plausible if the implementation is monitored by appropriate and suitable control procedures; usually, a whistle-blower policy protecting whistle-blowers will be part of it.

Risk identification

6 | 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; it depends on the actual business in question and the market structure, and what the main competition compliance risks are. There is no prescribed list of those risks. In a compliance programme, companies usually identify as a first step 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

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

As in general in compliance programmes and risk maps, risks are usually categorised along two lines (ie, likelihood of the risk materialising and seriousness of the consequences). The risk assessment must be updated at least once a year as well as each time a reorganisation of the company or significant changes of the market take place. In a risk matrix, the resulting inherent risks are then usually quantified as low, medium or high.

Risk mitigation

8 | 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 competitors were met). 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 place, such as guidelines regarding dawn raids and potential leniency programmes. Finally, risk mitigation should include a document and data retention guideline.

Compliance programme review

9 | What are the key features of a compliance programme regarding review?

Periodic review must be part of the compliance programme for it to 'meet high standards of suitability and seriousness'. A review should also be made (1) if the company structure changes, in particular if acquisitions are made or joint ventures are formed, and (2) if the markets change, for example, the market share of the company increases because a competitor leaves the market. Review 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.

DEALING WITH COMPETITORS

Arrangements to avoid

10 | What types of arrangements should the company avoid entering into with its 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 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. These are presumed to lead to the elimination of effective competition and include (1) the direct or indirect fixing of prices; (2) the restriction of quantities of goods or services to be produced, obtained or supplied; and (3) the allocation of markets geographically or among trading partners.

Suggested precautions

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

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

- 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 Competition Commission for an (informal and officially non-binding) review. Only in exceptional cases will a formal notification of an agreement to the Competition Commission be made.

CARTELS

Cartel behaviour

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

The Competition 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; thus, 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.

Avoiding sanctions

13 | Under what circumstances can cartels be exempted from sanctions?

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.

Exchanging information

14 | Can the company exchange information with its competitors?

Information exchange with competitors is problematic. Criteria used to assess it are similar to those in EU law and entail the contents (if the information relates to strategy or prices), the level of aggregation (how specific the information is), the actuality, the frequency, the homogeneity of the products and market concentration. If the information is publicly

available but not accessible to all competitors easily and for no cost, or if uncertainty is diminished by the information exchange, even the exchange of publicly available information may be illegal.

LENIENCY

Cartel leniency programmes

15 Is a leniency programme available to companies or individuals who participate in a cartel 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 the event 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 (criminal sanctions against individuals may only apply if they are in breach of certain procedural obligations); thus, the question of leniency programmes for individuals does not arise.

Complete immunity from sanctions is granted if the undertaking:

- is the first to report the infringement 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, continuously cooperates with the authorities; 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 at first kept confidential, but at a later stage of the proceedings, other cartel participants may be granted access to the file.

16 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.

17 Can the company reserve a place in line before a formal leniency application is ready?

The Competition Commission operates a marker system. A marker is the declaration that the undertaking will file a leniency application. The marker must include the name and address of the undertaking as well as a contact person, the declaration that the undertaking coordinated its behaviour with other undertakings, the declaration that a leniency application will be filed, initial information about the cartel agreement, date and signature. The marker is usually sent by email to selbstanzeige@weko.admin.ch. A marker can even be sent during a dawn raid.

Whistle-blowing

18 If the company blows the whistle on other cartels, can it get any benefit?

The company may only benefit if it is itself involved in an infringement of competition law and provides evidence or information on further infringements of competition. If this is the case, its sanction reduction may be up to 80 per cent.

DEALING WITH COMMERCIAL PARTNERS (SUPPLIERS AND CUSTOMERS)

Vertical agreements

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

The Cartel Act addresses any vertical restraints of competition, and the principles of EU law are applied in general; however, only the following restraints may lead to direct sanctions: agreements on minimum or fixed prices and agreements on the allocation of territories to the extent other distributors are prohibited from selling into those territories.

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

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

For many years, vertical arrangements could only be held to be illegal if they had an effect on the market. Since the 2016–2017 Federal Court decision in the *GABA/GEBRO* case, 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 EU law (including an export prohibition) will be deemed illegal under Swiss law and may lead to sanctions imposed by the Swiss Competition Commission.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

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.

HOW TO BEHAVE AS A MARKET DOMINANT PLAYER

Determining dominant market position

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The Cartel Act defines enterprises having a dominant position in the market as meaning one or more enterprises being able, with regard to supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, offerors or offerees) in the market. If the market share held is 50 per cent or more, the undertaking is presumed to be dominant.

Abuse of dominance

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

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 to constitute abuse of market dominance.

24 | Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Exemption is possible subject to a formal notification, but no such case has ever been reported. A behaviour may, however, be justified for legitimate business reasons, such as safety requirements or the lack of creditworthiness of a counterparty.

COMPETITION COMPLIANCE IN MERGERS AND ACQUISITIONS

Competition authority approval

25 | 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 Cartel Act and the Merger Control Ordinance, planned concentrations of undertakings must be notified to the Competition Commission before their implementation if in the financial year preceding the concentration, the undertakings concerned together reported a turnover of at least 2 billion Swiss 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 million Swiss francs. For insurance companies, 'turnover' is replaced by 'annual gross insurance premium income', and for banks and other financial intermediaries that are subject to the accounting regulations set out in the Banking Act, it is replaced by 'gross income'. Notification is furthermore always (regardless of the above thresholds) mandatory if one of the undertakings concerned in a final and non-appealable decision in proceedings under the Competition Act has been held to be dominant in a market in Switzerland, and if the concentration concerns either that market or 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.

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

Notification must be made prior to implementation. The Competition Commission secretary's office provides the notifying parties, within 10 days, with written confirmation that it has received the notification and that it is complete. If the information or documents are incomplete on any material point, the secretary's office will, within the same period, request the notifying undertakings to supplement the notification. The Commission notifies the undertakings concerned of the opening of an investigation within one month of receiving the notification. If no such notice is given within that time period, the concentration may be implemented without reservation. The undertakings concerned may implement the concentration within one month of notification, provided the Competition Commission notifies them that it regards the concentration as unobjectionable.

Under a simplified notification procedure, the undertakings concerned and the Competition Commission secretary's office may mutually agree on the details of the content of the notification. In doing so, the secretary's office may grant an exemption from the duty to submit particular information or documents.

27 | If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

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

Failure to file

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

Incomplete filings will lead to questions by the Competition Commission and, therefore, to the one-month period starting at a later date (ie, only upon receiving the complete filing).

Failure to file and filing after implementation will lead to administrative sanctions of up to 1 million Swiss francs. The Competition Commission can also ask for a subsequent filing or a demerger. Furthermore, an individual who implements a concentration of enterprises without notifying the Competition Commission may be subject to criminal sanctions of up to 20,000 Swiss francs (one of the rare instances where the Cartel Act stipulates criminal sanctions against individuals).

INVESTIGATION AND SETTLEMENT

Legal representation

29 | Under which circumstances would the company and officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

In the event of an (actual or potential) conflict of interest between the company and its employees, a separate legal representation of the employee is recommended. In the event of an investigation against a company, its board members and senior management (officers) are treated as forming part of the company. Current and former employees will be considered witnesses. If the Competition Commission questions employees, it expects separate legal representation (legal representation is, however, not mandatory).

Dawn raids

30 | For what types of infringement would the regulatory 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.

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

The occupant of the premises searched has the right to be present; his or her presence is, however, 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 guidelines, also providing passwords (however, the Federal Court held on 12 September 2019 that there is no such obligation). There is no further duty to cooperate by, for example, indicating additional material and premises. The company may ask that certain data (paper or electronic files) be sealed (eg, attorney–client correspondence).

Settlement mechanisms

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

During a dawn raid, a settlement will be difficult to reach, but a company may indicate that it will cooperate and file a marker. Thereafter, the company must actively cooperate if it wishes to retain its status as an applicant for a leniency application.

The Competition Commission secretary's office can close an investigation by proposing an amicable settlement with the undertaking investigated. The settlement must include clauses on how the restraint to competition will be removed, and it must be in writing. It must be approved by the Competition Commission. On 28 February 2018, the Competition Commission issued guidelines on how it will structure and approach amicable settlements. In the settlement, the undertaking agrees to change its behaviour. Officially, the settlement does not address the amount of the sanction, which is unilaterally imposed by the Competition Commission; however, the secretary of the Competition Commission informs the undertaking prior to the settlement of the approximate amount it has proposed to the Commission. In the settlement, the undertaking must renounce its right to file an appeal.

33 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 in determining whether the restraint to competition has been removed for good.

Corporate monitorships

34 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 the undertaking will be subject to administrative sanctions (up to 10 per cent of the turnover in Switzerland in the previous three business years), and the individuals may be subject to criminal sanctions (up to 100,000 Swiss francs).

Statements of facts

35 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; it may be limited, based on a weighing of the interests of the parties involved. The practice is not yet clearly settled. In a string of decisions in recent years, 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 the interests check. In balancing the interests, safeguarding the identity of a whistle-blower will be a key concern.

Invoking legal privilege

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Officers and employees cannot be compelled to give answers that would indicate that they have breached the law. Correspondence with external (but not in-house) legal counsel is privileged to the extent it serves to provide legal advice. Following a recent Federal Court decision, it is no longer entirely clear to what extent legal documents containing statements of facts only (not directly in connection with a defence in legal proceedings) are privileged (eg, findings of an internal investigation). The Competition Commission, however, has the right to ask for documents and to ask questions of fact; parties to an investigation are under an obligation to respond and to provide documents, and breach of this duty may be sanctioned by criminal fines of up to 20,000 Swiss francs.

Confidentiality protection

37 What confidentiality protection is afforded to the company or individual, or both, involved in competition investigations?

The Competition Commission may publish the name of the company it is investigating, although this is often done in a generic way only. Business secrets are protected, and the Competition Commission may not publish business secrets of a party. A party may ask for business secrets in documents submitted to the Competition Commission to be blacked out before other parties to the proceedings are granted access to the file.

Refusal to cooperate

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

If the Competition Commission has issued a formal request for information, a company refusing to cooperate may be subject to administrative sanctions (and, in the case of a final verdict, non-cooperation may result in increased final administrative sanctions), and individuals may be subject to criminal fines of up to 20,000 Swiss francs.

Infringement notification

39 Is there a duty to notify the regulator of competition infringements?

There is no such duty under competition law. Companies under prudential supervision (such as banks) may have to notify their regulator under the supervisory rules applicable to them.

Limitation period

40 What are the limitation periods for 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 orders by the authorities are subject to a statute of limitation of five years, and other criminal sanctions are subject to a limitation period of two years. Civil claims are subject to the regular limitation periods that apply (eg, for torts, one year after the damaged party received knowledge of the damage and the identity of the person liable, but in any case 10 years after the act resulting in the damage took place).

MISCELLANEOUS

Other practices

41 Does your competition regime specifically regulate anticompetitive practices that are not typically covered by antitrust rules?

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

Future reform

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

There have repeatedly been efforts to amend the Competition Act, but so far all attempts in recent yeatrs have failed. A new proposal is being drafted that should introduce the significant impediment of effective competition test for merger control (as in the European Union), introduce stricter time limits for competition proceedings and make it easier for consumers and others to file claims for damages against a competition law infringer. A draft of the proposal is expected in the fourth quarter of 2020.

Furthermore, there is an initiative (a request from the public to change the laws) pending in Parliament (the Fair Price Initiative) with the aim of ensuring that higher prices may not be charged in Switzerland compared with the European Union, and that undertakings and consumers in Switzerland may buy products abroad without being discriminated against. To achieve this, a new category of undertakings has been created: not only undertakings with market dominance should be subject to these obligations, but also undertakings with relative market dominance (ie, if the counterparty does not have sufficient possibility to buy the products from others).

UPDATE AND TRENDS

Key developments of the past year

43 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Following the Federal Court decisions *GABA/GEBRO* and *SIX*, direct sanctions may be imposed even if no effect 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.

The focus of the Competition Commission's activity in 2020 is not yet clear. In view of the current government cyber strategy for Switzerland, it may well be that activities will focus on market places and access to networks and services. Furthermore, there seem to be trends to use competition law to further other aims on the political agenda, such as carbon neutrality.

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