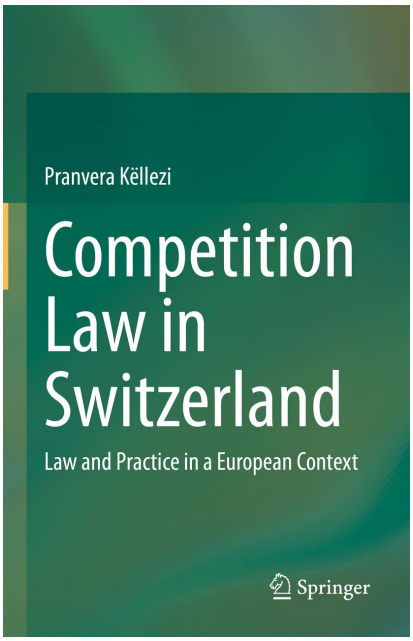

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P. Këllezi

Competition Law in Switzerland

Law and Practice in a European Context

- Presents a comprehensive overview of Swiss competition law
- Offers practical, business-oriented legal advice for international practitioners and in-house counsels
- Serves as a perfect manual for international companies selling products in Switzerland and Europe

This is the first comprehensive English-language overview of competition law enforcement in Switzerland since the introduction of direct sanctions in 2004. It discusses the key issues facing practitioners: horizontal and vertical agreements (with a particular emphasis on distribution agreements), abuse of dominance, and the newly introduced provisions on relative market power and merger control. It also provides an overview of the key procedural provisions, leniency and amicable settlements, and fines. The book subsequently analyses the main differences between Swiss and EU competition law and explains why, to what extent, and how companies should conduct a separate analysis under Swiss law. It offers a comprehensive overview and accessible analysis, based on in-depth research of case law, for practitioners and in-house counsels who need to ensure compliance with competition law on a Swiss, European or international basis. It is also a valuable guide for all practitioners, academics and students interested in understanding Swiss competition law. Enforcement of competition law in Switzerland has intensified and is becoming increasingly important for global companies selling in Switzerland. Moreover, the fines have increased over the last twenty years, and many foreign companies have had to pay substantial fines in recent years. Lastly, the Swiss Federal Supreme Court has now extended the extraterritorial application of Swiss competition law to foreign companies where sales to Switzerland are possible.

Pranvera Këllezi

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Springer

About the Author

Pranvera Këllezi is a Commissioner of the Swiss Federal Competition Commission and a practising lawyer in Geneva, where she advises companies on Swiss and European competition law and its impact on business, as well as on commercial law, data protection, corporate governance and economic regulation. She has more than 20 years of experience in advising on regulations that have a direct impact on the strategy and activities of companies. She holds a PhD from the Faculty of Law of the University of Geneva, an LL.M. in European Law from the College of Europe in Bruges and a Board Director Diploma from IMD, Lausanne.

Preface

Why Pay Attention to Competition Law in Switzerland?

Delving into Swiss competition law reveals a rich and complex set of regulatory changes that have reshaped the business environment for companies over the years. In 2003, direct sanctions for breaches of competition law were introduced, complementing an EU-style competition law adopted in the mid-1990s and the creation of the Competition Commission, an independent authority composed of lawyers and economists with extensive powers. Fines were quickly extended to foreign companies, with the BMW fine being one of the largest ever imposed for banning parallel imports between the EU and Switzerland. At the same time as removing barriers to trade with the EU, the Swiss Supreme Court also abolished any constraints on the extraterritorial application of competition law. This move allows the Swiss Cartel Act to exert its influence globally.

Fines have changed a lot of things, not only in terms of the number of enforcement decisions, but also in terms of length and their justification. Fines had to be defended and the arguments of the parties had to be given their due place. In 2007, the Federal Administrative Court replaced the ACCI, an expert body dealing with appeals, and since then there have been no economists in the appeal courts. Simple economic assessments have been replaced by complex legal reasoning justifying why we should abandon assessment of economic facts. At the same time as economic assessment and reasoning began to vanish, the length of the Federal Administrative Court's proceedings and decisions increased significantly. The Federal Supreme Court has managed to keep its rulings short, but not simple. This has done little to improve legal certainty for business.

The Forest and the Trees

The risk for practitioners is twofold: not being able to see the forest for the trees and, conversely, not being able to see the trees for the forest. The big picture and the relevant details are important in assessing regulatory risk, a process that is ultimately subjective and follows the risk appetite of the organisation. In writing this book, I have been mindful that, in practice, too much detail about fact-specific case law or

academic arguments can cloud the main assessment process. I have therefore chosen to strike a balance between the two, presenting what seems relevant to me and to a hypothetical mindful practitioner. Of course, this is also a subjective exercise, and this will give the book its individual character.

Who Should Read and Use This Book?
The book can be read by anyone. Practitioners and in-house counsels will find a wealth of information to guide them in risk assessment. This book is better used as a toolbox in which professionals can find information, sensitive points or strategic guidance that will enable them to assess the risk of conduct, make decisions on how to deal with a case or what to consider during an assessment or investigation. Academics will appreciate discovering a body of law and reasoning that can feed their curiosity and raise questions for further research. Through its varied and sometimes surprising reasoning, judge-made law is an expression of Switzerland's potential for innovation in legal reasoning, which extends beyond its economy. The book is not intended to provide legal advice in specific cases, and companies and professionals are well advised to make their own assessment. This applies particularly to the conduct of investigations and procedural issues.

Why in English?
Reflecting the composition of the Swiss economy, about 80% of the decisions are in German, the rest in French and a few in Italian. Language is still an obstacle for foreign practitioners and Swiss alike, making the process of decoding this large number of decisions and judgments inefficient. While working as an in-house counsel and later as an attorney at law, the need to find the right information in the forest and present it in French and English became increasingly urgent. This book is a contribution to the understanding of the Swiss competition law in another widely used language.

Staying up to Date
Keeping abreast of developments in competition law is stimulating. In Switzerland, a few days before the manuscript was due to be submitted, the Federal Council published a draft law on the revision of the Cartel Act. Where relevant, I have mentioned the provisions affected by the changes without commenting on the prospects of the individual proposals. The need to keep up to date remains unchanged. Everything changes, everything stays the same.

My Journey in the Field
My journey into competition law began as a student in 1998. Writing a doctoral thesis on competition law in 2000 was a process of discovery and deep immersion in EU and Swiss competition law, while an LLM in Bruges helped to unpack the EU side of the coin. This was followed by a period of intensive involvement with trade associations and companies that must apply EU and Swiss competition law, as an in-house counsel and as an attorney. While practising business law in Geneva, I have

been a member of the Swiss Competition Commission since 2016. You would think the task would be easier, and it is, but the more you know the details, the more you see the need to simplify it for the outside world. The views expressed are personal.

Geneva, Switzerland Pranvera Këllezi

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