

Competition Law in Switzerland

Pranvera Këllezi

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Law and Practice in a European Context

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Pranvera Këllezi
Geneva, Switzerland

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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 Simple economic assessments have been replaced by complex legal reasoning justifying why we should abandon assessment of economic facts.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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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.

Abbreviations

ACCI	Appeals Commission for Competition Issues, until 2009 (Rekurskommission für Wettbewerbsfragen/Commission de recours pour les questions de Concurrence/Commissione di ricorso in materia di concorrenza)
ACL	Federal Act on Administrative Criminal Law of 22 March 1974 (RS 313.0)
APA or Administrative Procedure Act	Federal Act on Administrative Procedure (RS 172.021)
BBl	Swiss Federal Journal (Feuille fédérale/Foglio federale (FF)/Bundesblatt)
B2B	Business to business
B2C	Business to consumers
bn	Billion
c./ca.	Circa
Cartel Act or CartA	Federal Act on Cartels and other Restraints of Competition (RS 251)
CASO or Cartel Act Sanctions Ordinance	Ordinance on Sanctions imposed for Unlawful Restraints of Competition (RS 251.5)
CC	Swiss Civil Code (RS 210)
cf.	Compare
CFI	Court of First Instance of the ECJ (before 1 December 2009)
CH	Switzerland
CHF	Swiss franc
CH-EU Agreement on Competition	Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (OJ L 347, 3.12.2014, p. 3; RS 0.251.268.1)

CH-EU Air Transport Agreement	Agreement between the European Community and the Swiss Confederation on Air Transport (OJ L 114, 30.4.2002, p. 73; RS 0.748.127.192.68)
CH-DE Agreement on Competition	Agreement between the Department of Economic Affairs, Education and Research of the Swiss Confederation and the Federal Ministry of Economics and Climate Protection of the Federal Republic of Germany on Cooperation and Coordination of Competition Authorities of 1 November 2022, FF 2023 313 (Abkommen zwischen dem Departement für Wirtschaft, Bildung und Forschung der Schweizerischen Eidgenossenschaft und dem Bundesministerium für Wirtschaft und Klimaschutz der Bundesrepublik Deutschland über Zusammenarbeit und Koordinierung der Wettbewerbsbehörden vom 1. November 2022, BBl 2023 313.)
CJEU	Court of Justice of the European Union (after 1 December 2009)
CO	Federal Act on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations (RS 220)
COMCO	Swiss Competition Commission, Bern
COMCO-Secretariat or Secretariat	Secretariat of the Swiss Competition Commission, Bern
Consolidated Jurisdictional Notice	Commission Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings, OJ C95, 16.04.2008, p. 1
CrimC	Swiss Criminal Code of 21 December 1937 (RS 311.0)
CPC	Swiss Civil Procedure Code of 19 December 2008 (RS 272)
CrimPC	Swiss Criminal Procedure Code (RS 312.0)
CR _n	Concentration Ratio measuring the percentage market share held by <i>n</i> largest undertakings
Cst	Federal Constitution of the Swiss Confederation of 18 April 1999 (RS 101)
DE	Germany
De minimis Notice	Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (de minimis), OJ C 291, 30.08.2014, p. 1
DEBA	Swiss Federal Act on Debt Enforcement and Bankruptcy (RS 281.1)
Directive 2014/104	Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements

	of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1
Draft law of 23 May 2023	Draft law of 23 May 2023 amending the Cartel Act
e.g. or eg	For example
EAER	Federal Department of Economic Affairs, Education and Research
EC	European Community
ECHR	European Convention for Human Rights of 4 November 1950 of the Council of Europe
ECJ	European Court of Justice (before 1 December 2009)
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
Explanatory note on instruments of investigation	COMCO Secretariat, Explanatory note of 6 January 2016 on Selected Instruments of Investigation
Explanatory note on leniency program	COMCO Secretariat, Explanatory note and form of the Secretariat of 8 September 2014, Leniency program (voluntary report)
Explanatory note on merger notification	COMCO, Merger notification, notification form and explanatory note of 21 October 2014
Explanatory note on relative market power	Explanatory note of the COMCO Secretariat of 6 December 2021 regarding relative market power
Explanatory note on the notifications of a restriction on competition	COMCO, Explanatory note and form of 21 October 2014, Notification of a restriction on competition
Explanatory note to the Verticals Notice	Explanatory Note of the Competition Commission to the Notice on the assessment of vertical agreements of 12 December 2022
FAC	Swiss Federal Administrative Court, St. Gallen (Bundesverwaltungsgericht/Tribunal administratif fédéral/ Tribunale amministrativo federale/Tribunal amministrativo federale)
FCC	Federal Criminal Court, Bellinzona, Canton of Ticino
FCP	Federal Act of 4 December 1947 on Federal Civil Procedure (RS 273)
FF	Swiss Federal Journal (Feuille fédérale/Foglio federale/Bundesblatt (BBl))
ff	And following
FINMA	Swiss Financial Market Supervisory Authority

FoIA or Freedom of Information Act FSC	Federal Act on Freedom of Information in the Administration of 17 December 2004 (SR 152.3) Swiss Federal Supreme Court, Lausanne (Bundesgericht/Tribunal fédéral/Tribunale federale/Tribunal federal)
FSC (I-Civil)	The First Civil Law Division, Swiss Federal Supreme Court
FSC (II-Public)	The Second Public Law Division, Swiss Federal Supreme Court
GC	General Court of the CJEU (after 1 December 2009)
GDP	Gross Domestic Product
Guidance on abusive exclusionary conduct	EU Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7)
Guidelines on the effect on trade concept	Commission Notice—Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.04.2004, p. 81)
Guidelines on vertical restraints or EU Vertical Guidelines	Guidelines on vertical restraints (OJ C 248, 30.6.2022, p. 1)
Guidelines on the setting of fines	Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2
HCCH 1970 Evidence Convention	The Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (RS 0.274.132)
HHI	Herfindahl-Hirschman Index
HMT	Hypothetical monopolist test
i.e.	Id est (that is)
Id./Idem	The same as previously mentioned
IP	Intellectual property
kg	Kilogram
LPC	Law and Policy on Competition (RPW/DPC), official publication of Swiss competition authorities
Lugano Convention 2007	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3 (RS 0.275.12)
m	Million
m ²	Square metre
MCO or Merger Control Ordinance	Ordinance on the Control of Concentrations of Undertakings (RS 251.4)
MFN	Most Favoured Nation
min	Minutes

NAAT-rule	The non-appreciable affectation of trade rule
Note on decision-making process	Note of 21 October 2019 of the COMCO: Decision-making process of the Competition Commission in cartel investigations within the meaning of Article 27 ff Cartel Act
Note on preliminary investigations	COMCO Secretariat, Note of 19 February 2020: the conduct of the preliminary investigation explained in simple terms
Notice on amicable agreements	COMCO Secretariat's notice of 28 February 2018 on amicable agreements
Notice on ancillary restraints	Commission Notice on restrictions directly related and necessary to concentrations (OJ C 56, 5.03.2005, p. 24)
Notice on calculation schemes	Notice on the conditions for the admissibility of agreements on the use of calculation schemes under the Cartel Act, Decision of the Competition Commission of 4 May 1998
Notice on concentrations from the Secretariat	Notice of the Secretariat of the COMCO of 25 March 2009, Practice regarding the notification and assessment of concentrations
Notice on effect on trade	Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81)
Notice on sports equipment	Notice on the Homologation and Sponsoring of Sports Equipment, Decision of the Competition Commission of 15 December 1997
Notice on the relevant market	Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5)
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
p./pp.	Page(s)
para/paras	Paragraph(s)
PILA	Federal Act on Private International Law (RS 291)
PSA	Price Supervision Act of 20 December 1985 (RS 942.20)
pt/pts	Point(s)
R&D	Research and development
Regulation 4064/89	Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30/12/1989 p. 1 (no longer in force in the EU)
Regulation 1/2003	Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 4.1.2003, p. 1

Regulation 139/2004	Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1
Regulation 2022/720 or EU-VBER	Commission Regulation 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022, p. 4
Regulation 2659/2000	Commission Regulation 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ L 304, 5.12.2000, p. 7
Regulation 316/2014	Commission Regulation 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.03.2014, p. 17
Regulation 773/2004	Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18
Remarks on CASO	COMCO Secretariat, Remarks on the Ordinance on Fines
RMP	Relative market power
RPM	Resale price maintenance
RS or SR	Classified compilation of Swiss federal acts & ordinances (Systematische Sammlung des Bundesrechts/Recueil systématique du droit fédéral/Raccolta sistematica del diritto federale/Collecziun sistematica)
Secretariat or Comco-Secretariat	Secretariat of the Swiss Competition Commission, Bern
SLC	Substantial lessening of competition
SME Notice	Notice on agreements with limited market impact, Decision of the Competition Commission of 19 December 2005
SMEs	Small and medium size enterprises
SMP	Significant market power
SR or RS	Classified compilation of Swiss federal acts & ordinances (Systematische Sammlung des Bundesrechts/Recueil systématique du droit fédéral/Raccolta sistematica del diritto federale/Collecziun sistematica)
SSNIP	Small but Significant and Non-transitory Increase in Price
TCA	Telecommunications Act (RS 784.10)
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union

UCA	Federal Act against Unfair Competition (RS 241)
UK	United Kingdom
US/USA	United States of America
v	Versus
Verticals Notice	COMCO's Notice on the Assessment of Vertical Agreements of 12 December 2022