



INTERNATIONAL COMPETITION LAW: GLOBAL LITIGATION ISSUES

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I. INTRODUCTION

1. The following working paper is submitted by AGON PARTNERS¹ for the European Conference of the New York State Bar Association in Winterthur in March 2015.
2. A symbiosis of common and civil law as well as private and public enforcement.
3. This thesis provides an introduction to private enforcement of antitrust law in the first section and public enforcement of antitrust law in the second section throughout three following jurisdictions: The US, whose antitrust law can look back upon a long development since the 19th century, Switzerland, where cartels were generally accepted until the first Antitrust Act in 1964 came into force and finally the EU will be analyzed as a third jurisdiction, where viewpoints of different Member States have to be combined.
4. An overview of the different jurisdictions and enforcement activities invites some reflection on the respective advantages and disadvantages of each regime. As one will see there are three fully different approaches and methods of enforcement.
5. The third section addresses three controversial issues of antitrust law. Beginning with the principle of 'ne bis in idem', we consider, that the interweaving of criminal law and administrative law and the internationalization of antitrust law can endanger fundamental legal principles and poses a serious challenge to contemporary constitutional states.
6. As a second topic, we discuss the Leniency Program. As a special program for antitrust law, it can help to detect cartels and is an efficient tool to enforce antitrust law around the world. However, the program not only enables relief from full public sanctions, but also carries certain risks for a cooperating undertaking.
7. As a last controversial issue, we will discuss class actions, a very popular tool in the US and at the same time a rather difficult subject in the EU as well as in Switzerland. Class actions can promote the popularity of private enforcement, as seen through the US experience, and yet at the same time can introduce an excessively process oriented culture.

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II. PRIVATE Enforcement

8. Over 90 % of antitrust cases in the US are brought by way of private enforcement, which has been the case for over 4 decades.² In the EU as well as in Switzerland, in contrast, the common approach is public enforcement. There are several reasons for this absence of private enforcement in Europe in contrast to the popularity of private enforcement in the US.

A. United States

9. The significance of private enforcement in the US is, by far, greater than that of in Switzerland or the EU. In contrast to the two civil law jurisdictions, the US as a common law jurisdiction provides many incentives for private civil enforcement.

1. Founding principles

10. To assess our current position and to gain an understanding of US antitrust law, the following section will explain some basic principles.

a. Legal Basis

11. The legal foundation of antitrust law in the US in general is the Commerce Clause of the Federal Constitution of the US.³ Federal antitrust law stands on three major pillars: The Sherman Act, the Clayton Act and the Federal Trade Commission Act.

12. The Sherman Act was passed in 1890 and was the original legal basis for antitrust law. Its purpose is to protect the guarantees of the constitution and ensure individual rights as well as free competition. The most important sections of the Sherman Act are Section 1 and 2, which are the substantive legal prohibitions, comparable with Articles 101 and 102 TFEU of the EU and Article 5 and 7 CartA of Switzerland.⁴ As the regulations of the Sherman Act were considered to have become insufficient, additional regulations – the Clayton Act and the Federal Trade Commission Act – were brought into force.⁵

13. Passed in 1914, the Clayton Act amends the Sherman Act. Its aim is to provide mechanisms for civil enforcement of the US antitrust laws and to provide additional substantive anti-trust laws, such as the legal standard of review of mergers. One of the most important sections regarding civil enforcement is Section 4, describing, inter alia, damage actions and treble damages – tools with the power to strengthen civil enforcement.⁶

² Sourcebook of Criminal Justice Statistics Online, www.albany.edu/sourcebook/pdf/t5412004.pdf, last visited: 11/20/2014.

³ NAGEL, Rz. 278.

⁴ BRODER, p. 15 f.

⁵ SULLIVAN/GRIMES, p. 952.

⁶ BRODER, p. 16 f.

14. The FTC Act also came into force in 1914. Its main goal was to establish the Federal Trade Commission (FTC). The FTC Act is only enforceable by the FTC and vests this authority with the powers to prevent using unfair methods of competition. Another notable section is the power of the FTC to take action in the federal court to claim civil penalties for violations.⁷

15. As we consider private enforcement, it should be noted that litigation before federal courts, where private enforcements are usually pursued, is governed by The Federal Rules of Civil Procedure.⁸

b. Historical Change

16. With the new regulations in effect from 1914, the potential for private enforcement was enhanced, but did not enjoy great popularity until 1940. Reasons for this limited application of private antitrust enforcement can be found in the Great Depression in the 1930s and World War II. In the economic boom during the post-war era, companies recovered. . Among the first reactions to this economic growth and a recurring threat of cartels were antitrust prosecutions by the governmental authorities. However, around 1960 significant class actions combined with treble-damages began to surface, such that private enforcement became increasingly popular.⁹ Nowadays, private enforcements have reached a constant level since 1985. ¹⁰ In *Hawaii v. Standard Oil Co. of Cal*, the Supreme Court described the purpose of the Clayton Act's authorization of treble damages as being to encourage persons to serve as "private attorney[s] general".¹¹

2. Initiation and performance of a Private Action

17. The forthcoming section offers an overview of a private action. First, we will consider the parties who have the capacity to sue and then in the second part we will consider procedural execution and, finally, we will touch on the consequences and sanctions.

a. Who has the capacity to sue?

18. The US system draws the circle of potential claimants very broadly. According to the federal antitrust laws, all persons or entities suffering harm as a result of an antitrust violation have the right to pursue a claim – including both companies and end-users alike.¹² Furthermore, the DOJ and the FTC have authority to pursue antitrust violations through civil enforcement, which they commonly employ with respect to alleged conduct that is less clearly in violation of the antitrust laws and which does not warrant, e.g., criminal enforcement by the DOJ.¹³

⁷ BRODER, p. 22 f.

⁸ BRODER, p. 217.

⁹ BRODER, p. 7.

¹⁰ NAGEL, Rz 274.

¹¹ *Hawaii v. Standard Oil Co. of Cal.* 405 U.S. 251, 262 (1972).

¹² FOER/STUTZ, p. 64f.

¹³ Further information about the public enforcement may be found in chapter 2; Broder, p. 187.

19. One type of claimant is the direct purchaser, whose capacity to sue is clearly recognized.¹⁴ An indirect purchaser of products is excluded from claiming antitrust damages. With the *Illinois Brick* doctrine, the Supreme Court states that only direct contractors of cartel members are entitled to sue, to avoid multiple recoveries. However, some states have passed laws allowing indirect purchasers to sue.¹⁵

20. As already stated, direct purchasers are entitled to pursue a claim but indirect purchasers are not. Related to the law on indirect purchasers, it is essential to consider the passing-on defense. Assume that we are in a simple supply chain with a manufacturer, a retailer (the direct purchaser) and a consumer (the indirect purchaser). The manufacturer violates antitrust law and the retailer pays the overcharge as a first step. The retailer for his part may now pass on the overcharge to the consumer. Even though this happens, the US system does not allow the defendant's (manufacturer) argument that the plaintiff (direct purchaser) has passed on the damages to the next market level, respectively to the consumer (indirect purchaser).¹⁶ If this argument were to be accepted, it would let the defendant escape liability, as the indirect purchaser is not entitled to sue. The passing-on defense is applied in Switzerland as well as the EU, the difference here is that an indirect purchaser is entitled to sue.

b. Execution of a process

21. **Where to file a claim.** Federal courts mostly decide US antitrust cases. Most of the cases brought against antitrust violations begin in a trial court, also called the District Court.¹⁷ Unless a case settles, this first step will end with a decision made by a judge or a jury. Appeals can be brought before a Circuit Court of Appeal.¹⁸

22. Section 12 of the Clayton Act regulates territorial jurisdiction. The regulation provides a relaxed attitude towards venue requirements. It states, that suit may be brought against a corporation in any district "of which it is an inhabitant, or wherever it may be found", which includes any district in which an undertaking is a resident or performs business.¹⁹ In many anti-trust issues, there have been several similar cases brought in different District Courts more or less at the same time. It may make sense to combine the claims and handle them in a single court through a process called consolidation. This process has its own rules - Rules of Procedure of the Judicial Panel on Multidistrict Litigation (J.P.M.L.R).²⁰

¹⁴ FOER/STUTZ, p. 72.

¹⁵ *Illinois Brick co. v. Illinois*, 431 U.S. 720; BRODER, p. 62f.

¹⁶ FOER/STUTZ, p. 72.

¹⁷ The official title of federal trial courts is „United States District Courts“.

¹⁸ The official title of circuit court of appeal is „United States Courts of Appeals“.

¹⁹ BRODER, p. 197.

²⁰ 28 U.S.C. §1407; BRODER, p. 215.

23. **How a Case proceeds in Federal Courts.** We turn to consider the process within the Federal Court. The following explanations refer to proceedings in a District Court.²¹

24. A case always begins with a plaintiff's complaint, followed by a defendant's response. The defendant can admit or deny the allegations and/or issue a counterclaim.²² A defendant may, in the alternative, file a motion to dismiss the complaint for failure to state a claim upon which relief may be granted.

25. As a next step, pretrial discovery is an important tool in US private litigation. It can be described as the pretrial exchange of information. The pretrial discovery is all about gathering facts. One party may interrogate the other party and both parties can collect documentary evidence. A key motive behind this tool is the fairness of the process in order to prevent surprises at trial.²³ Especially in antitrust litigation, pretrial discovery plays an important role. Many violations of antitrust law are covert; the discovery phase permits a plaintiff extensive access to company records, which may be reviewed for evidence of the alleged manipulations of competition. Antitrust cases are also usually economically complex, and pre-trial discovery procedures permit extensive participation by economic experts and the opportunity to take evidence from these experts. Thirdly, the exposure to large damages amounts, which are trebled, requires a pretrial discovery phase to reveal all relevant information.²⁴

26. Usually after the discovery phase, the involved parties have the opportunity to seek summary judgment. A party – defendant or plaintiff – may seek summary judgment if they believe that the facts are undisputable. To elaborate, the judge looks at the evidence in the way most favorable for the counterparty not seeking summary judgment. If the judge feels that this party would never win the case, summary judgment will be granted and the case ends before trial begins.²⁵ The attitude towards summary judgment in antitrust cases has changed over the last decades, from a 1962 Supreme Court decision stating that summary judgment should be ordered sparingly in antitrust cases to²⁶, in a 1986 Supreme Court case the statement that summary judgment can serve a valuable screening function in antitrust conspiracy cases based on parallel conduct.²⁷

27. Based on the facts the parties have gathered, the trial is the phase designed to resolve the dispute. The parties may choose a trial with a jury composed of ordinary citizens. The judge's duty is to ensure a fair and efficient process but lawyers are primarily there to perform the trial. After the lawyers have presented their arguments, it is up to the jury to decide the case. If there is no jury, the judge alone will decide.²⁸

²¹ BRODER, p. 217.

²² BRODER, p. 220.

²³ FIELD/KAPLAN/CLERMONT, p. 70; MAUET, p. 173.

²⁴ FOER/STUTZ, p. 181.

²⁵ HAY, p. 573 f; BRODER, p. 221.

²⁶ Poller v. CBS, 368 U.S. 464, 473.

²⁷ Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574.

²⁸ BRODER, p. 223.

28. After judgment is entered, either party can appeal the outcome of the process to the next higher court.²⁹

c. Consequences and Sanctions:

29. Besides claiming for injunctive relief, private plaintiffs can claim treble damages. Treble damages are foreign to European- and Swiss law, not only concerning antitrust law, but generally. Section 4 of the Clayton Act, however, provides for the automatic trebling of any actual damages awarded to a plaintiff after trial.³⁰ Treble damages can be a great incentive for private plaintiffs. The US Supreme Court explains the purpose for heavy sanctions: "... the purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."³¹

3. Special Characteristics

30. When exploring the US system of private antitrust enforcement, several issues appear strange to those not familiar with this jurisdiction. The following is a brief analysis of several notable differences.

a. Contingency fees

31. Contingency fees for lawyers act as a strong incentive in private antitrust cases. A contingency fee is a fee based upon success at trial. Both parties to the arrangement – the plaintiff and the lawyer – can benefit financially from this cost distribution, especially in antitrust cases, where a high level of damages can be expected in a successful case. Plaintiffs' attorneys, for example, are often eager to handle follow-on claims on a contingency fee basis, as they are more confident of success. The advantage for plaintiffs is that they can avoid the high attorney costs that antitrust cases necessarily bear.³²

b. Prima Facie Effect for Final Judgments

32. The Clayton Act provides that a final judgment obtained in a federal antitrust action brought by the DOJ will be prima facie evidence of the same violation of antitrust law in any private follow-on action. Moreover, legal or factual issues decided in a prior antitrust action may be given estoppel effect in a subsequent private action. However, findings by the FTC in actions brought under Section 5 of the FTC Act are not given preclusive effect in subsequent private litigation;³³ the prima facie effect of final judgments in actions filed by the DOJ provides private plaintiffs and their counsel a strong incentive to file follow-on private actions.

²⁹ BRODER, p. 224.

³⁰ BRODER, p. 17; SULLIVAN/HOVENKAMP., p. 70.

³¹ Zenith Radio Corp. V. Hazeltine Research, Inc., 395 U.S. 100, 130-131.

³² FOER/STUTZ, p. 49.

³³ 15 U.S.C. §; In Canada, the Competition Act provides that a guilty plea is prima facie proof in civil actions for damages in a violation of the criminal provisions of the Act.

Private cases commonly follow DOJ enforcement actions for the additional reason that the DOJ tends to pursue more per se claims, which are less burdensome for private plaintiffs to pursue than cases where the more stringent standard of the rule of reason applies.³⁴

c. Criticizing private enforcement

33. Although private enforcement is very popular in the US, there is no shortage of criticism. Some call for restraint, others for abolition. One oft-stated concern is that plaintiffs' lawyers take advantage of the lucrative fees thereby leading to no real public benefit. A further issue results from the popularity of class action law suits. This tool, which simplifies suits for victims, and therefore is justifiably discussed as an advantage, can also be a threat for potential defendants.³⁵

B. Switzerland

34. On one hand, the public authority of ComCo is the body that enforces antitrust law; on the other hand victims have the possibility to defend themselves against violations of Swiss antitrust law before civil courts. The necessity of private enforcement is given as it is the only way to claim for damages and for other related private matters. However practical implementation faces many stumbling blocks. Although Switzerland's effort to strengthen private enforcement with the CartA³⁶ 1995 was partly successful and the Swiss antitrust law has its origins in private law, the practical implementation and actual use of private enforcement is not satisfactory.³⁷ In the first 13 years, only 45 private enforcements were registered in Switzerland.³⁸

1. Foundations

35. Some basic principles about the Swiss antitrust law will be explained in the following section. Firstly, an overview about the Swiss antitrust legislation will be given. Secondly, a brief historical introduction into the Swiss antitrust law will be presented.

a. Legal basis

36. The Swiss Constitution has in Article 96³⁹ a Competition Policy stating, "the Confederation shall legislate against the damaging effects in economic or social terms". Paragraph 2 even specifies the duties and mentions the fight against abuse of dominant position and unfair competition.⁴⁰ In Article 27⁴¹ of the Federal Constitution economic freedom is guaranteed. It is a

³⁴ BRODER, p. 17.

³⁵ Class actions will be discussed in detail under chapter 3; FOER/STUTZ, p. 1ff..

³⁶ Cartel Act, Federal Act on Cartels and other Restraints of Competition.

³⁷ JACOBS, p. 209; HEINEMANN, Strukturberichterstattung, p. 50.

³⁸ Evaluationsgruppe Kartellgesetz, p. 6.

³⁹ Article 96 Cst.

⁴⁰ ZÄCH, N 140 f.

⁴¹ Article 27 Cst.

personal fundamental right, not only vis-à-vis the state but also between persons. This represents the legal basis for a private enforcement.⁴²

37. The first Federal Act on Cartels and other Restraints entered into force in 1962, the last revision was in 2003. According to Article 1 of the current CartA, the purpose of this legislation is “to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy”.⁴³ This act regulates not only substantial law, but also the prerequisites and procedures for private and public enforcement.⁴⁴ Article 12 CartA is the basis of Swiss civil enforcement in anti-trust law and stipulates the possible claims.

38. Swiss civil courts use the rules of procedure from the Swiss Civil Procedure Code (CPC), enacted in 2008, for private claims. Even though, this act is federal law, it also governs cantonal jurisdiction.⁴⁵

b. Historical background

39. Swiss antitrust legislation is comparatively young and characterized by a number of revisions. The first CartA of 1962 showed some weaknesses. Many complaints were too narrow to meet expectations and the grounds for possible justification were numerous.⁴⁶ The second CartA of 1985 showed some clarifications in contrast to the one of 1962.⁴⁷ However, it did not take long until the next revision came. In 1995 another attempt took place. An intended objective of the total revision of 1995 was the strengthening of private enforcement.⁴⁸ This intention was realized by dedicating a whole chapter (Article 12 ff. CartA) to private enforcement.⁴⁹ But ten years later, success did not follow.⁵⁰ The last and partial revision of 2003 did not change anything concerning civil enforcement.⁵¹ The attempt of a further new revision was rejected in summer 2014.

2. Initiation and performance of a Private Action

40. The following chapter gives an overview about the parties entitled to sue, the process itself and possible sanctions.

⁴² ZÄCH, N 237.

⁴³ Article 1 CartA.

⁴⁴ HEINEMANN, Strukturberichterstattung, p. 51; Article 12 ff CartA.

⁴⁵ DAVID/JACOBS, p. 301; HEINEMANN, Strukturberichterstattung, p. 51; ZÄCH, N 891.

⁴⁶ ZÄCH, N. 151.

⁴⁷ ZÄCH, N 152 f..

⁴⁸ Botschaft KG 95 (BBI 1995 I), 587.

⁴⁹ Botschaft KG 95 (BBI 1995 I), 587; Art. 12 ff KG.

⁵⁰ JACOBS, p. 209.

⁵¹ Botschaft KG 95 (BBI 1995 I), 587.

a. Who has the capacity to sue?

41. A proper plaintiff has to prove that he is prevented from commencing or continuing to compete as a result of unlawful restraints of competition (Article 12 (1) CarA).⁵² Any natural or legal person being thereby restricted in competing therefore has the capacity to sue. Competitive relationships are not necessary, which allows participants of the competition on every market level to sue.

42. In contrast to the US system there are three significant differences: (1) Consumers are not entitled to sue. (2) An indirect purchaser rule does not exist. Hence, a party that is only indirectly injured can also claim.⁵³ (3) The third difference is that the passing-on defense is accepted. If the defendant can show that the plaintiff passed the unlawfully increased prices on to the next lower level of the market, the passing-on defense applies and the plaintiff does not bear any more damages.⁵⁴ The connection between the indirect purchaser rule and the passing-on defense is briefly explained: Assuming that the prices were passed on to the next lower level, the direct purchaser does not have the capacity to sue any more. It is then the indirect purchasers turn to claim for damages.

43. But what if damages can be passed on to the last market stage – the consumers? Consumers and consumer associations do not have the capacity to sue under the CartA as they are not *hindered from starting or continuing* to compete.⁵⁵ In case the defendant can prove a complete passing-on, he is not at all liable under private enforcement.⁵⁶ This also leads to the conclusion that consumers must rely on the action of ComCo to enforce antitrust law – financial restitution excluded.⁵⁷

b. Execution of a process

44. **Where to file a claim.** Article 14 CartA clarifies the point that that cantons have to determine one single instance for assessing Cartel infringements.⁵⁸ The courts to make this determination are Swiss civil courts. As cantons are responsible for the judicial organization, the chosen courts vary from canton to canton. The result is that most of the cantons choose a commercial court.⁵⁹ Cantons without a commercial court mostly elect the cantonal Supreme Court (Oberstes Gericht).⁶⁰

45. Even though it is a matter of civil enforcement, the ComCo is entitled to examine cases concerning restraints of trade. Therefore courts have to submit the matter to the authority to

⁵² ZÄCH, N 877; HEINEMANN, Strukturberichterstattung, p. 63.

⁵³ BORER, p. 532; HEINEMANN, Strukturberichterstattung, p. 63.

⁵⁴ HEINEMANN, Defizite, p. 31.

⁵⁵ As seen above, being hindered from starting or continuing to compete is a requirement for the capacity to sue.

⁵⁶ HEINEMANN, Strukturberichterstattung, p. 70.

⁵⁷ BORER, p. 532 f.; ZÄCH, N 881; JACOBS, p. 213.

⁵⁸ HEINEMANN, Strukturberichterstattung, p. 51.

⁵⁹ DAVID, N 865; SPÜHLER/DOLGE/GEHRI, p. 21.

⁶⁰ ZURKINDEN/TRÜEB, p. 83.

obtain an expert opinion (Article 15 CarA).⁶¹ To establish the admissibility or inadmissibility of a restraint of trade both – the civil- and the public enforcement routes – use the same provisions (Article 5 and 7 CartA).⁶²

46. **How a case proceeds in a Swiss Court.** The actual trial before civil courts must generally be preceded by a conciliation procedure with the aim of achieving a settlement. As there is only one responsible cantonal instance, a conciliation procedure will not be held.⁶³ Therefore, a plaintiff is entitled to submit a statement of claim directly to the court. This action will initiate the main court proceedings where plaintiff and defendant can establish the facts.

47. During the main court proceedings in particular, the defendant can respond to the statement of claim. Thereafter, the judge decides whether a second exchange of information between the parties is needed; if not, the main hearing will be initiated. During the main hearing both parties have the possibility to make statements. The proceeding for taking evidence follows the main hearing. This part is provided to gather evidence on disputed facts. After all these stages, the judge will pass judgment.⁶⁴ According to Article 72 FSCA, decisions made by a cantonal court can be appealed to the federal Supreme Court, the highest instance in Switzerland.⁶⁵

c. Consequences and Sanctions

48. In Switzerland one has the possibility to assert different types of claim. Besides the entitlement of claiming for removal or omission of the competitive obstruction, laid down in Article 12 CartA, there is the possibility of claiming financial damages and compensation for personal harm in the same article. However, compensation for personal harm is applied very reluctantly and to a very limited extent by Swiss courts.⁶⁶ Another legal claim would be the entitlement to profits, earned unlawfully.⁶⁷ Furthermore, the court can declare all or part of a contract invalid or impose an obligation to enter into a contract.⁶⁸

49. Precautionary measures have gained an important role, as they allow for rapid action. The application of precautionary measures is subject to special requirements such as urgency of the matter as well as the existence of a cease and desist title.⁶⁹

50. These legal claims can basically be demanded cumulatively.⁷⁰ In the vast majority of private antitrust cases, the defensive character, namely the invalidity of contracts, prevails.⁷¹ All

⁶¹ DAVID, N 870; e.g. RPW 2003, p. 471: Bestattungsinstitut.

⁶² DAVID, N 863.

⁶³ Article 198 (f) CPC in conjunction with Article 5 (1) (b) CPC.

⁶⁴ DENOTH, p. 34.

⁶⁵ Article 72 ff. FSCA.

⁶⁶ BORER, p. 535.

⁶⁷ ZÄCH, N 852; BORER, p. 535.

⁶⁸ Article 13 CartA; ZÄCH, N 884 ff.

⁶⁹ BORER, p. 547.

⁷⁰ BORER, p. 535.

these aforementioned claims would not be enforceable through public enforcement in the same way, as they are within civil enforcement.⁷²

3. Special Characteristics

51. Some further issues in connection with Swiss antitrust law have to be addressed. The following section briefly shows the problem arising for claimants with the limitation period and follow-on claims; the burden of proof; and the difficulty of calculating damages.

a. The issue of limitation periods and follow-on claims

52. The limitation period issue is of importance regarding the follow-on claims. Claims for damages and satisfaction, for example become time-barred according to Article 60 (1) CO. This means a relative limitation period of one year and an absolute limitation period of ten years. Regarding the countless disadvantages of private enforcements, filing a follow-on claim would have benefits. Nevertheless, Swiss law contains a very restricted policy for limitation periods. There is no special provision for the interruption of the limitation period in anti-trust law, not even if the authority has initiated proceedings. This results in a serious threat to the follow-on claim, as the aggrieved party does not have the possibility to await the outcome of the public enforcement.⁷³

b. Burden of proof

53. Despite the facilitation of the burden of proof in some areas of the antitrust law, one of the main reasons for the insignificance of civil enforcement is the difficulty of adducing evidence. Secretly practiced cartels are still hard to track and it is fairly difficult to prove the economic characteristics of an antitrust law violation, such as the geographic dimension of the markets or necessary market dominance.⁷⁴ A pretrial discovery phase, as in the US, does not exist.

c. Calculating Damages

54. The biggest incentive of a private claim is also one of the biggest hurdles. The claimant has to quantify damages. Due to the complicated economic considerations it is difficult to calculate damages. Most of the damages are of a hypothetical nature: an aggrieved undertaking would have to elaborate damages upon future assumptions of profits or it would have to prove the prices they would have paid, without an agreement on prices.⁷⁵

⁷¹ HEINEMANN, Kartellzivilrecht, p. 138.

⁷² DAVID, N 864.; JACOBS, p. 210.

⁷³ HEINEMANN, Strukturberichterstattung, p. 91.

⁷⁴ HEINEMANN, Strukturberichterstattung, p. 98.

⁷⁵ JACOBS, p. 220.

55. One would assume that a follow-on claim would facilitate this awkward aspect. This is not the case however because even if ComCo has already decided on a case, and the plaintiff files a follow-on claim, damages will not be calculated by the authority.⁷⁶

C. European Union

56. This chapter analyzes the private enforcement of the EU competition rules. Civil claims can be asserted under national law before the courts of the member states only.⁷⁷ Private actions under EU competition law have been rare ever since. Between 2004 and 2007 there were only 96 claims for damages in EU member states.⁷⁸ However, a modernization of EC competition law in 2004 has partly led to an increase.⁷⁹

1. Foundations

57. In the following section, an overview about the central legislation as well as a short historical background to European private enforcement will be given.

a. Legal basis

58. The Treaty of the Functioning of the EU (Article 101 TFEU) outlaws agreements restricting competition and in Article 102 TFEU abuse of market dominance.⁸⁰ However, the Treaty does not include explicit regulations governing private enforcement but both Articles have a direct effect and can therefore be seen as the basis for private parties to claim before national courts.⁸¹

59. The regulation on the implementation of the rules on competition (EC) No 1/2003 states in Article 6, that national courts are responsible to assess antitrust cases.⁸² This regulation came into force in 2004.⁸³

b. Historical Background

60. One of the aims of the EU was to build one single market. The importance of a competition law is therefore unquestionable. Already in the ECSC Treaty of 1951 there was a ban on cartels.⁸⁴ However, the last innovation came in 2004 with the regulation on the implementation of the rules on competition (Regulation (EC) No 1/2003). With this regulation, antitrust law

⁷⁶ HEINEMANN, Defizite, p. 31.

⁷⁷ JUNGHEIM/WEISS, p. 450.

⁷⁸ JONES/SUFRIN, p. 1085; KRAUSKOPF/SCHALLER, p. 291.

⁷⁹ VAN BAELE / BELLIS, p. 1209.

⁸⁰ HOFFMANN, p. 3.

⁸¹ VAN BAELE / BELLIS, p. 1209.; JONES/SUFRIN, p. 1083.

⁸² LORENZ, p. 53; KLEES, p. 12.

⁸³ KLEES, p. 13.

⁸⁴ European Coal and Steel Community.

gained its current decentralized character, where Member States are obligated to apply European antitrust law.⁸⁵

2. Initiation and performance of a Private Action

61. The following section provides an overview of the proceedings of a private action in the European Union.

a. Who has the capacity to sue?

62. In one very central issue concerning private enforcement, the EU is way ahead of Switzerland: the capacity to sue for consumers. The ECJ stated in the decision *Courage and Crehan*⁸⁶ that everyone, who has suffered from a restraint of trade or a similar prohibited behavior, is eligible to claim. In the case of *Manfredi*⁸⁷, the ECJ confirmed this principle.⁸⁸

63. The decision, whether or not a Member State wants to follow the principle of passing-on and the indirect purchaser rule, was in the competence of Member States. The directive on antitrust damages states, that indirect purchasers are entitled to claim for damages but they still bear the burden of proof. However this burden of proof will be facilitated as the indirect purchaser only has to prove that a passing-on has occurred to its detriment. Member States will now have two years to implement the new regulations into their national laws.⁸⁹ This shows a similarity to the Swiss law.

b. Execution of a process

64. **Where to file a claim.** The responsibility of national courts to make an assessment is regulated by law in Article 6 (EC) No 1/2003.⁹⁰ However, national courts may only handle cases not presenting a Community interest.⁹¹ Although national courts have full powers to enforce EU competition law, they mainly apply procedural rules of their national laws. Another requirement is that national procedural laws have to be compatible with the general principles of EU law. Namely, the principle of effectiveness and the requirement that remedies must be adequate and assure effective judicial protection for EU rights. Thus, the enforcement before a national court must not be excessively difficult; it must be possible for any person.⁹²

⁸⁵ JUNGHEIM/WEISS, p. 389.

⁸⁶ ECJ, Judgment of 20.9.2001, Rs. 453/99 (*Courage*), SpA. 2001, I-6297, (para. 26).

⁸⁷ ECJ, Judgment of 13.7.2006 C-295-298/04 (*Manfredi*), SpA, 2006, I-6619, (para. 61).

⁸⁸ HOFFMANN, p. 58; BAEL/BELLIS, p. 1222; KLEES, p. 271.

⁸⁹ European Commission, Actions for Damages, Directive on Antitrust Damages Action, ec.europa.eu (competition/antitrust/actions for damages damages/damages directive), last visited: 2.10.2015.

⁹⁰ LORENZ, p. 53; KLEES, p. 12.

⁹¹ VAN BAEL/BELLIS, p. 1210.

⁹² VAN BAEL/BELLIS, p. 1243; JONES/SUFRRIN, p. 1083 f; HOFFMANN, p. 58.

c. Consequences and Sanctions

65. Competition law regulations can be relevant in terms of civil law in two respects. First they can serve as a defense against a contractual claim (*shield litigation*). This leads to invalidity of the respective anticompetitive agreement. On the other hand they are a basis for compensation claims (*sword litigation*).⁹³ The ECJ emphasizes the significance of compensation for damages in the event of violations against the law as a mean of deterrence.⁹⁴

66. In detail it can be said that a violation against Article 101 TFEU will lead to the invalidity of a respective agreement, can be basis for compensation for damages, the basis for a claim for removal or injunctive relief.⁹⁵

67. The enforcement of Article 102 TFEU is much vaguer than the enforcement of Article 101 TFEU. The lack of a regulation, in the way that Article 101 TFEU provides, leads to the fact that national laws govern a respective violation. According to German law (§ 33 ARC), for example, claims for compensation for damages, removal or injunctive relief are possible.⁹⁶

3. Special Characteristics

68. The European Union contains some further important issues concerning private enforcement in antitrust law. A selection will be given in the following section.

a. Gathering evidence from other Member States

69. The Commission has been vested with substantial investigative powers. As national courts are bound by national procedural rules, they may have more restricted possibilities to gather evidence. For private parties it is therefore still difficult to gather and secure evidence if situated in other Member States.⁹⁷ This fact is a clear disincentive to private enforcement in the EU and might be one aspect that leads to the unpopularity of it.

b. Harmonization of National Rules

70. The European Commission tries actively to facilitate claim for damages by implementing new regulations and simultaneously harmonizing national rules. Already in 2005, the Commission made an attempt to make private enforcement more attractive. The Green Paper on damages actions for breach of the EU antitrust rules was issued, followed by a White Paper in 2008. Thereafter a proposal for a directive on antitrust damages actions was submitted.⁹⁸ Fi-

⁹³ KLEES, p. 268.

⁹⁴ ECJ, Judgment of 20.9.2001, Rs. 453/99 (Courage), SpA. 2001, I-6297, (para. 26 f.).

⁹⁵ HOFFMANN, p. 55; KLEES, p. 270.

⁹⁶ HOFFMANN, p. 70.

⁹⁷ Van BAEL/BELLIS, p. 1213.

⁹⁸ European Commission, Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States

nally on 26 November 2014, the particular directive was signed into law. The respective directive enables victims to more easily access evidence and allows more time to make claims. Furthermore, it will enhance the interaction between private damages claims and public enforcement.⁹⁹ Thanks to this new directive, the EU has made an important step towards making private enforcement more attractive and to harmonize laws of Member States.

c. **Special cooperation between courts of Member States and the European authorities**

71. The fact that national courts assess processes brings us to the concern of decentralized enforcement and the necessity of a special coordination between courts of Member States and the European authorities:¹⁰⁰

72. **Interpretation of EU law.** At first there is the issue of interpretation of EC competition law. National courts applying Articles 101 and 102 TFEU must interpret these provisions according to any interpretation adopted by the ECJ. Article 267 TFEU supplies national courts with assistance in interpreting EU law.¹⁰¹ Furthermore national courts are only allowed to apply the corresponding rules, if there are no doubts arising with regard to the interpretation.¹⁰²

73. **Binding effect of Commission decisions.** Secondly, to avoid a risk of conflicting decisions it is essential to regulate the binding effect of possible decisions already decided by commissions. There are three types to distinguish: (1) the binding effect to decisions made by the European Commission, (2) the binding effect to decisions made by national commissions and (3) the binding effect to decisions made by a national commission of another member state.

74. (1) Any national court of a member state is bound by the decision of the European Commission, as far as the issue has already been decided (Article 16 (1) (EC) No 1/2003).¹⁰³ (2) The binding effect of national commissions is different from one member state to another. In Germany and the UK the binding effect is far-reaching, whereas the Netherlands and France do not follow this principle at all.¹⁰⁴ (3) The solution of the binding effect to decisions made by a national commission of another member state is similar. Article 16 (1) (EC) No 1/2003 does not implement any such provision. The regulation is based on an autonomous decision by each

and of the European Union (11.6.2013), eur-

lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF, last visited: 15.02.2015.

⁹⁹ European Commission, Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions (10.11.2014), Europa.eu/rapid/press-release_IP-14-1580_en.htm, last visited: 15.2.2015.

¹⁰⁰ JONES/SUFRIN, p. 1094.

¹⁰¹ JONES/SUFRIN, p. 1094.

¹⁰² LORENZ, p. 53 f.

¹⁰³ ECJ, Judgment of 14.12.2000, Rs. C-344/98 (Masterfoods), SpA. 2000, I-11369.

¹⁰⁴ GRÜNBERGER, p. 153.

state legislator. Hence, binding effects of national commissions of foreign Member States differ widely.¹⁰⁵

75. **Support provided by the Commission.** Article 15 (EC) No 1/2003 regulates the cooperation between the Commission and courts of Member States. Thus, for example courts can obtain information concerning the application of EU regulations. On the other hand, Member States must transfer judgments to the Commission. Furthermore, authorities of Member States should also inform and support national courts.¹⁰⁶

III. PUBLIC ENFORCEMENT

76. A very interesting aspect when analyzing the three systems of the U.S., Switzerland and the EU lies in the design of the basic principle of public enforcement. We can distinguish between the American model and the European model. The American model functions by a competition commission examining the facts and after that bring proceedings against the undertaking before a judicial body. In contrast, the European and the Swiss competition commissions work as bureaus of investigation as well as deciding authorities.¹⁰⁷

A. United States

77. The Department of Justice' Antitrust Division (DOJ) and the Federal Trade Commission (FTC) control public enforcement of federal antitrust law in the US.¹⁰⁸ The DOJ and the FTC share the principal responsibility for US-Competition Policy. While the DOJ is the exclusive enforcer of criminal proceedings, the FTC and DOJ have overlapping competencies regarding merger control and conduct cases.¹⁰⁹

1. Competition Authorities

78. The following section will give an overview about the US authorities enforcing antitrust law as well as the cooperation between them.¹¹⁰

a. The Department of Justice

79. Within the DOJ, the Antitrust Division is responsible for antitrust enforcement. The department is led by the Assistant Attorney General for Antitrust.¹¹¹ As an operational matter, the

¹⁰⁵ GRÜNBERGER, p. 153.

¹⁰⁶ HOLM-HADULLA, p. 58 f..

¹⁰⁷ DABBAH/HAWK, p. 399; WEBER/VOLZ, p. 342.

¹⁰⁸ BRODER, p. 177.

¹⁰⁹ KOVACIC/CALKINS/LUDWIN/BÄR-BOUYSSIERE, p. 1231.

¹¹⁰ In Canada, the Competition Authority is the Competition Bureau of Canada. In the context of the criminal violations set out in the Act, the Bureau acts as investigata only, referring where deemed appropriate, to the Federal Public Prosecution Service of Canada for prosecution („PPSC“). The PPSC coordinates with the Bureau, but has ultimate say over the disposition (plea, etc.) of a criminal matter.

¹¹¹ BRODER, p. 177.

authority is divided into industry divisions (e.g., Telecommunications, Transport and Agriculture). It is headquartered in Washington D.C.¹¹² The DOJ is the only authority entitled to enforce criminal proceedings under the Sherman Act.¹¹³ The authority is an executive branch body. Its cases are only prosecuted in the federal courts.¹¹⁴

b. Federal Trade Commission

80. Five Commissioners, appointed by the President for a period of seven years, head the FTC.¹¹⁵ Its members can basically not be removed. The authority is divided into three Bureaus: Competition, Consumer Protection, and Economics. It is headquartered in Washington D.C. The FTC is the only authority administering the Federal Trade Commission Act (FTC Act).¹¹⁶ The FTC is an administrative agency. Cases can be prosecuted in federal courts or through the internal adjudication process of the agency.¹¹⁷

c. Cooperation between the DOJ and the FTC

81. There are a variety of projects where the two authorities cooperate. They generally issue joint antitrust guidelines. They also coordinate investigations to make sure that every case is evaluated federally by only one of them.¹¹⁸

82. With two authorities – the DOJ and the FTC – with more overlapping than exclusive responsibilities, cases have to be allocated to a single authority. The DOJ exclusively may bring criminal actions.¹¹⁹ For other matters, the agencies have developed a clearance process to allocate cases. In Sherman Act violations, the authorities ask for each other's clearance to ensure that no conflict arises.¹²⁰ As the investigated party, such allocation may be of great importance. An undertaking suspected of unfair competition, for example, would generally prefer to be investigated by the FTC, as they only risk a cease-and-desist order, whereas the DOJ could impose substantive fines.¹²¹

2. Enforcement for unfair competition methods

83. The procedure for public enforcement will be addressed in the coming section, divided into the initiation of the procedure, the criminal enforcement conducted by the DOJ, the proceedings of the FTC and sanctions in general.

¹¹² BRODER, p. 177; KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1230.

¹¹³ SULLIVAN/GRIMES, p. 931.

¹¹⁴ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1283; ROGERS/CALKINS/PATTERSON/ANDERSEN, p. 39.

¹¹⁵ ROGERS/CALKINS/PATTERSON/ANDERSEN, p. 38.

¹¹⁶ BRODER, p. 191.

¹¹⁷ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1283.

¹¹⁸ SULLIVAN/GRIMES, p. 932.

¹¹⁹ See above: Criminal enforcement by the DOJ.

¹²⁰ Antitrust Division Manual, Chapter VII, A-1; CENGIZ, p. 124.

¹²¹ HAWK/VELTROP, p. 23.

a. Initiating the procedure

84. The source of the information prompting an investigation by either of the two agencies can be a competitor, customer, supplier or business or trade press, or a private suit. The DOJ files a complaint if the Assistant Attorney General of the antitrust division regards business conduct as violating antitrust law. The FTC, in contrast, initiates the procedure with a majority decision by the Commissioners.¹²²

b. Criminal enforcement by the DOJ

85. Criminal enforcement of the federal antitrust law lies solely within the competence of the DOJ.¹²³ The authority investigates and prosecutes major violations of the Sherman Act. Criminal enforcement is limited to *hard-core cartels*.¹²⁴

86. The grand jury initiates criminal proceedings (Preliminary proceedings). The grand jury also supports the DOJ and issues subpoenas. Moreover, the grand jury decides whether there is “probable cause” for a committed crime. In the course of criminal proceedings, the DOJ may apply for electronic surveillance performing searches and confiscation. The power to arrest a suspect is also given.¹²⁵

87. As soon as the grand jury agrees with the charge, the DOJ initiates proceedings before the federal court. From here, the defendant is protected by certain constitutional guarantees.¹²⁶

c. Proceeding of the FTC

88. The investigation by the FTC starts with a preliminary investigation where publicly accessible information as well as surveys are evaluated. If this preliminary investigation leads to evidence of violation of antitrust law, the members of the FTC may suggest a comprehensive investigation. If then the comprehensive investigation leads to the conclusion that an undertaking is using unfair methods of competition, an administrative complaint will be submitted.¹²⁷

89. After the FTC has submitted the complaint, an administrative law judge will conduct the proceedings. The judge will come to an initial decision. Both parties – the FTC and the defendant – may appeal against this decision. However, most cases end with a settlement.¹²⁸

¹²² SULLIVAN/GRIMES, p. 934.

¹²³ BRODER, p. 177; KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1231.

¹²⁴ BRODER, p. 177; ROGERS/CALKINS/PATTERSON/ANDERSEN, p. 36.

¹²⁵ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1235.

¹²⁶ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1236.

¹²⁷ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p- 1235.

¹²⁸ See below: Special Characteristics, Settlements; KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1236.

d. Sanctions

90. For a criminal antitrust offence, heavy penalties and fines can be imposed. Currently, natural persons violating the Sherman Act may be sentenced to up to 10 years in prison, as well as a fine up to 10 million USD. Undertakings may be fined with up to 100 million USD. Fines of up to double the amount of the profits earned through the criminal conduct may be imposed in addition to the aforementioned penalties.¹²⁹ However, no sanctions shall be imposed on the first leniency applicant.¹³⁰

3. Special Characteristics

91. Particular themes will be highlighted in the following part. Settlements, for example, are an oft-used resolution to a process between the authorities and accused undertaking(s). In addition, a brief look at the state and local level of antitrust enforcement is instructive to put the federal system into context.

a. Settlements

92. In the majority of cases, the authorities and the defendant(s) agree on a settlement. This agreement typically requires that the defendant cease the respective conduct and refrain from future anticompetitive conduct. A settlement normally requires that the defendant issue regular reports and/or is monitored regularly by the authority.¹³¹ Settlements with the DOJ are subject to the Tunney Act, and are strictly regulated. Hence, the authority has to provide justifications for the settlement, the settlement is subject to a public hearing and potential objections can be submitted within 60 days.¹³² Settlements with the FTC on the other hand are subject to a less strict regime for approval.¹³³

b. State and local antitrust enforcement

93. Not only the DOJ and the FTC are entitled to enforce federal antitrust law. A State Attorney General can also bring a suit against an antitrust violator.¹³⁴ Such a claim can be based on either federal or state antitrust law. The state may bring the suit as a victim or on behalf of its citizens and to protect the public interest.¹³⁵

94. Furthermore, at the local level, local prosecutors can bring an antitrust suit. However, active enforcement by local prosecutors is rare. They have concurrent jurisdiction with the

¹²⁹ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1237; ROGERS/CALKINS/PATTERSON/ANDERSEN, p. 36; SULLIVAN/GRIMES, p. 937.

¹³⁰ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1238.

¹³¹ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1236.

¹³² 15 U.S.C. § 16(d)-(e).

¹³³ 16 C.F.R. § 2.34.

¹³⁴ In Canada, only the Federal PPSC can prosecute a criminal case; learning aside provincial consumer protection laws, and general tort claims, generally only the Commissioner of Competition enforces civil matters.

¹³⁵ CENGIZ, p. 122; SULLIVAN/GRIMES, p. 946.

State Attorney General to enforce state antitrust law and typically choose to work closely together with them.¹³⁶

B. Switzerland

95. With Switzerland's public enforcement, we return to the so-called European model where the Commission works as the investigative as well as the deciding body.¹³⁷

1. Competition Authorities

96. The Competition Commission (ComCo) and its Secretariat are the two central enforcers of antitrust law when it comes to public enforcement in Switzerland.

a. The Swiss Competition Commission

97. The ComCo is regulated in Articles 18-22 CartA. The authority is composed of 11 to 15 members, who are elected by the Federal Council. ComCo is not a judicial authority but more an administrative authority. The majority of the members must be independent experts (Article 18 (2) CartA); the rest can be other experts, representing the interests of economic organizations, unions or consumers.¹³⁸

98. ComCo is authorized to issue orders (Verfügungen) (Article 18 (3) CartA), notably in terms of inadmissible restraints of trade. ComCo is also competent for making recommendations or carrying out expertise.¹³⁹

99. ComCo is administratively part of the Federal Department of Economic Affairs. Although there is a close relationship to a federal institution, ComCo is largely independent. The reason why an administrative authority like ComCo is independent is that many regulatory issues involve the state as participant of the economy.¹⁴⁰ ComCo's orders can be appealed to the Federal Administrative Court. In turn, decisions made by Federal Administrative Court may be appealed to the Federal Supreme Court.¹⁴¹

b. Secretariat

100. The Secretariat is regulated by Articles 23 and 24 CartA. The law does not regulate the number of members. However, it requires in Article 24 CartA that the Federal Council shall elect the directorate; all the other members shall be elected by ComCo.¹⁴²

¹³⁶ SULLIVAN/GRIMES, p. 948 f.

¹³⁷ WEBER/VOLZ, p. 342.

¹³⁸ WEBER/VOLZ, p. 339; ZÄCH, N 953.

¹³⁹ BANGERTER, p. 1176; WEBER/VOLZ, p. 340.

¹⁴⁰ ZÄCH, N 954.

¹⁴¹ Article 47 APA; Article 31 ACA.

¹⁴² WEBER/VOLZ, p. 341.

101. The purpose of the Secretariat is to support ComCo, especially in preparing decisions until they are ready to be voted on. However, the Secretariat's main task is to carry out investigations on potential antitrust law infringements. After an examination procedure, the Secretariat initiates proceedings by ComCo. The decisions made by ComCo are also implemented by the Secretariat.¹⁴³

c. Cooperation between ComCo and the Secretariat

102. The law does not contain any information regarding the cooperation between ComCo and the Secretariat.¹⁴⁴ However, according to Article 8 of ComCo's internal rules of procedure, the President of ComCo exercises supervision of the Secretariat. Nevertheless the Secretariat is an independent authority and has the competence to investigate independently.¹⁴⁵

103. According to the relevant powers and particularly the fact that the Secretariat has barely any decision-making power, the following statement could be concluded: the Secretariat is the investigative body and ComCo is the decision-making body.¹⁴⁶ However, there are some overlaps between ComCo and the Secretariat, leading to an inadequate separation of the investigative power and the decision-making power.¹⁴⁷ The Secretariat, for instance, has the possibility to intervene in the decision-making process. ComCo's president on the other hand has the competence to order house searches performed by the Secretariat.¹⁴⁸

2. Proceedings

104. The Swiss CartA is built on three pillars: The control of agreements affecting competition, the control of enterprises having a dominant position and finally merger control.¹⁴⁹ The following chapter will show how the Secretariat and the Commission deal with the control of agreements affecting competition and the control of enterprises having a dominant position. Both are handled the same way, starting with preliminary investigations which may lead to a main investigation, followed by a ruling.¹⁵⁰

a. Control of agreements affecting competition and dominant position

105. The first step is the preliminary investigation. The purpose of this stage is to determine the cases, which are worth examining. The preliminary investigation is conducted by the Secretariat as stated in Article 26 CartA. This process will be executed either ex officio, on request of

¹⁴³ BANGERTER, p. 1222; WEBER/VOLZ, p. 341.

¹⁴⁴ WEBER/VOLZ, p. 341.

¹⁴⁵ RPW 1997/4 618 ff., 623.

¹⁴⁶ ZÄCH, N 968.

¹⁴⁷ The Assumption that there is an inadequate separation of power as just set out, is subject to a lot of criticism (please refer to the part "Violation of Article 6 ECHR").

¹⁴⁸ BORER, p. 163; Weber/Volz, p. 41 f..

¹⁴⁹ WEBER/VOLZ, p. 21.

¹⁵⁰ BORER, p. 168; BORER, p. 187; ZÄCH, N 1017.

a party, or of a third party or on request of ComCo.¹⁵¹ The Secretariat however tries to investigate as informally as possible.

106. In the course of this investigation, the Secretariat is entitled to give suggestions or to offer an amicable settlement. If undertakings accept and implement such suggestions the preliminary investigation can be ended.¹⁵² If a certain conduct leads to sanctions as defined in Article 49a CartA, the ending of the investigation is not possible at this stage, as these sanctions would remain in addition to a settlement.¹⁵³ The preliminary investigations accord with the APA (Article 39 CartA). There is no right to file inspections publicly and the preliminary investigation is not concluded with an official order (Verfügung).¹⁵⁴

107. If there was sufficient evidence found during the preliminary investigations, the Secretariat is obliged to seek agreement with the Commission to open an investigation.¹⁵⁵ The investigation as defined in Article 27 CartA assesses whether an unlawful agreement or an unlawful practice by dominant undertakings is existent.¹⁵⁶ According to Article 28 CartA, the opening of an investigation has to be published, indicating the subject of the investigation. The purpose of the publication is to invite third affected parties to take part in the investigation. The participation of third parties often facilitates and accelerates the investigation.¹⁵⁷ Thereafter, the parties are informed about the accusation against them and asked to fill in questionnaires, which are the ordinary means to find out information. Based on the information obtained, the Secretariat will examine the facts and circumstances to find a conclusion.¹⁵⁸ For a better orientation, it is important to note that all phases of the investigation are conducted by the Secretariat. However, members of the Commission are entitled to inspect the records and to attend hearings as well as ask questions. During the main investigation, the parties have the right to access the files.¹⁵⁹

108. The investigation is concluded with a ruling by the Commission. This ruling has either of the following contents:¹⁶⁰

- **Amicable settlement (Art. 29 CartA).** If the Secretariat considers a behavior as inadmissible, an amicable settlement can be proposed at this stage as well.¹⁶¹ However, in clear cases of

¹⁵¹ WEBER/VOLZ, p. 371; ZÄCH, N 974.

¹⁵² ZÄCH, N 976.

¹⁵³ ZIRLICK/TAGMANN, p. 1287.

¹⁵⁴ ZÄCH, N 975.

¹⁵⁵ Article 27 CartA; BORER, p. 173.

¹⁵⁶ BORER, p. 172.

¹⁵⁷ Article 28 CartA; BORER, p. 177; WEBER/VOLZ, p. 373; ZIRLICK/TAGMANN, p. 1315.

¹⁵⁸ ZÄCH, N 985 f..

¹⁵⁹ ZÄCH, N 988.

¹⁶⁰ ZÄCH, N 991; ZIRLICK/TAGMANN, p. 1371.

¹⁶¹ As it is already the possibility during the preliminary investigation; BORER, p. 178; ZIRLICK/TAGMANN, p. 1331.

infringement, which involves sanctions according to Article 49 (a) CartA, these sanctions remain in addition to the settlement.¹⁶²

- **Unilateral decision by the Commission.** In cases, where an infringement of Article 5 or 7 CartA had been found, the Commission will issue a ruling. In such a ruling it may order further actions to be taken by the undertaking such as commitments to refrain from agreements restricting competition or the obligation to enter into contracts.¹⁶³
- **Terminating the investigation.** Alleged infringements, which have not been proven, can be ended with a corresponding ruling as well.

109. All these rulings can be appealed to the Federal Court of Administration.¹⁶⁴

b. Sanctions

110. The system of sanctions provides different types of administrative sanctions: direct sanctions, based on Article 49 CartA, which are imposed when violating Article 5 or 7 CartA; and sanctions against violations of rulings or amicable settlements as well as infractions related to mergers (Article 50ff CartA). In addition to the administrative sanctions, criminal sanctions (Article 54f Cart A) can also be imposed.

- Direct sanctions according to Article 49 CartA were only introduced in 2003.¹⁶⁵ Before 2003 it was only possible to oblige an undertaking to cease and desist from unlawful agreements or an abuse of market power. Sanctions could only be imposed in case of recurrence.¹⁶⁶ Currently, a fine of up to ten per cent of the turnover achieved in Switzerland in the preceding three financial years is possible.¹⁶⁷
- Sanctions According to Article 50 CartA are imposed when breaching amicable settlements, a ruling of the competition authorities or a decision of an appellate body. The amount of this sanction is according to the sanction of Article 49 CartA.¹⁶⁸
- A violation of amicable settlements, administrative orders and other violations can also involve criminal sanctions. The difference between administrative sanctions and criminal sanctions is that administrative sanctions are imposed against undertakings in contrast to criminal sanctions, which are mainly imposed against natural persons.¹⁶⁹ The sentence is a fine of up to a maximum of CHF 100'000.-.¹⁷⁰

¹⁶² BORER, p. 180; ZÄCH, N 992.

¹⁶³ WEBER/VOLZ, p. 376 f.

¹⁶⁴ ZIRLICK/TAGMANN, p. 1372.

¹⁶⁵ WEBER/VOLZ, p. 384.

¹⁶⁶ DAVID/JACOBS, p. 264; ZÄCH, N 1115.

¹⁶⁷ DAVID/JACOBS, p. 268.

¹⁶⁸ ZÄCH, N 1138.

¹⁶⁹ BORER, p. 253 f..

¹⁷⁰ ZÄch, N 1146.

3. Special Characteristics

111. The following part addresses some themes of particular interest. The first paragraph is about the inquisitorial principle. In the second paragraph we will discuss the question whether Article 6 ECHR is violated respectively the principle of separation of powers is granted. In a last paragraph we are going to address the compilation of ComCo.

a. Inquisitorial principle

112. From the point of view of those concerned, the public enforcement has a clear advantage: The inquisitorial principle. This principle allows the facts to be assessed by the authorities *ex officio*. The authorities are responsible for procuring the basis of decision-making. The hurdle of private enforcement that the plaintiff has to prove is abolished by this principle, as the burden of proof lies solely in the responsibility of ComCo respectively the Secretariat which would have to gather evidence for and against the violation.¹⁷¹ However, this principle has a disadvantage for cartel victims: whoever reports an infringement, does not have any guarantee that the case will be assessed by the authority, as the prosecution is discretionary.¹⁷²

b. Violation of Article 6 ECHR?

113. In accordance with Article 6 ECHR there is an entitlement to a fair and public hearing if one is subject to a criminal charge. The separation of the examining and the decision-making authority is especially important. It is a matter of controversy as to whether the examining and decision-making actions of ComCo meet this regulation. However, the right is sufficiently respected that the decision can be appealed at a court of appeal with full recognition of this principle. This is indeed the case at present as decisions made by the ComCo can be appealed to the Federal Administrative Court.¹⁷³

c. Representatives of associations

114. As seen above, the minority of the members of ComCo are experts who represent the interests of economic organizations, unions and consumers. In the process of the last revision such representatives were considered to only represent their own associations. Academic research counters this concern. However, it is recognized that ComCo will be remodeled as a quasi-judicial authority, with the new possibility of direct sanctions and the presence of representatives of associations becoming unnecessary.¹⁷⁴

¹⁷¹ DAVID/JACOBS, p. 287; HEINEMANN, Strukturberichterstattung, p. 50; WEBER/VOLZ, p. 352.

¹⁷² ZÄCH, N 974.

¹⁷³ BANGERTER, p. 1221; KELLERHALS, p. 68; ECHR, Judgment of 27.9.2011 (A. Menarini Diagnostics s.r.l. v. Italy).

¹⁷⁴ KELLERHALS, p. 70 f.

C. European Union

115. Here again, we are in the so-called European model, with a Commission whose duty it is to investigate and to decide.¹⁷⁵

1. Competition Authorities

116. The EU has a central Competition Commission; furthermore, there are national competition authorities. The next section provides a brief overview about the European and national competition commissions and possible cooperation between them through the European Competition Network (ECN).

a. European Commission

117. At a Union level, the EU Commission is responsible for enforcing antitrust law, more precisely Articles 101 and 102 TFEU. Implementation is basically the duty of the Directorate General (DG) Competition. However, the members of the Commission decide collectively.¹⁷⁶ The Commission is a supranational body, created by the Treaty establishing the European Communities; which leads to the Commission being independent of any individual government.¹⁷⁷ Decisions made by the Commission can be appealed before the EU courts, namely before the EGC and further to the ECJ.

b. National competition authorities

118. At the level of Member States, the national competition authorities are also entrusted with the implementation of EU antitrust law (Articles 101 and 102 TFEU). This decentralized application in a comprehensive manner is only possible under Regulation 1/2003 since 2004. Until 2004, the EU Commission had a monopoly on enforcing antitrust law in Europe; afterwards, the national competition authorities had the chance to be involved and fully apply EU antitrust law as well.¹⁷⁸

c. European Competition Network (ECN)

119. To foster cooperation the European Competition Network (ECN) was created. The ECN is therefore not another authority but it is an institution through which the European Commission and the national Competition authorities can cooperate with each other through. This platform is an effective tool to fight against cross-border violations within Europe.¹⁷⁹

¹⁷⁵ See also introduction of the chapter „Public Enforcement“.

¹⁷⁶ KOVACIC/CALKINS/LUDWIN/BAR-BOUYSSIÈRE, p. 1750; WAELBROECK/STUYCK, p. 21.

¹⁷⁷ DABBAH/HAWK, p. 399.

¹⁷⁸ SCHRÖTER, p. 981; WEISS, p. 1750.

¹⁷⁹ JOHANNIS, p. 562.

2. Procedural steps of enforcement

120. The proceeding against (potential) antitrust violators can be divided into two steps. In the first step fact-finding is central. In the second step, the Commission evaluates the facts. As a consequence there may be sanctions imposed on offending parties.¹⁸⁰ The foundation of the proceeding again is Regulation 1/2003.¹⁸¹ This section will discuss the procedural steps for the Commission.

a. Fact finding

121. To initiate proceedings, there are different approaches, which can be pursued. The Commission can either act on the leniency application of a cartel member, act on its own initiative, act on information from a national authority by requesting the transfer of the case, or act on a complaint by a third party.¹⁸²

122. The first step after the initiation of proceedings is to collect further information. The Commission is vested with formal powers of investigation and may use these to investigate. Where the parties are willing to reveal information, the Commission can also act informally. The formal powers include: (1) the power to request information; (2) the power to conduct interviews; and (3) the power to inspect businesses and other areas¹⁸³

b. Procedure towards an infringement decision

123. The central task in this stage is not to gather evidence but to ask the question whether there is enough evidence to support a finding of an infringement. If the Commission believes that an infringement has happened, the next step is to issue a *Statement of Objection*, where the Commission presents evidence and the reasons for its belief. Upon receiving the *Statement of Objection*, the defendant may prepare its defense. Another possibility allowing a right to defense is the oral hearing.¹⁸⁴ As we already have come across some problems with the aspect of separation of judicial and prosecutorial powers, the hearing officer is another important avenue to imply internal checks and balances and to take countermeasures. The final decision and the finding of any infringements are made by the whole Commission.¹⁸⁵

c. Sanctions

124. The Commission can impose a fine which depends on the gravity and the duration of the infringement.¹⁸⁶ The Commission is also allowed to adjust the level of the fines at any time.¹⁸⁷

¹⁸⁰ DABBAH/HAWK, p. 408.

¹⁸¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹⁸² DABBAH/HAWK, p. 409; WEISS, p. 1760.

¹⁸³ DABBAH/HAWK, p. 409.

¹⁸⁴ DABBAH/HAWK, p. 411.

¹⁸⁵ DABBAH/HAWK, p. 412

¹⁸⁶ FRENZ, p. 921.

Fines can be imposed, where the Commission finds that there is an infringement of Article 101 and/or 102 TFEU, where there is a breach of a decision ordering interim measures, or where there is a failure to obey a binding commitment decision.¹⁸⁸ Fines can vary between up to 10% of the total worldwide turnover of the undertaking in the preceding business year for any infringement, or up to 1% for misconduct when the Commission requests information (Article 23(2) of Regulation 1/2003). Furthermore, there can be fines for various other infringements of up to 5% of the average daily turnover in the preceding business year (Article 24 of Regulation 1/2003).¹⁸⁹ After calculating the fine, the amount can be mitigated in consideration of all the circumstances. A complete immunity can only be granted if the undertaking is the first to apply, taking advantage of the leniency program.¹⁹⁰

3. Special Characteristics

125. In the coming part we will look at the investigation by national authorities and the discretionary principle used by the commission.

a. Investigation by national authorities

126. National authorities proceed ex officio or on a complaint. However the national law will determine investigation powers.

127. Besides a positive decision, national authorities can decide that there is no reason for them to take action if they find Article 101 or 102 TFEU is not violated, but in contrast to the Commission, they are not permitted to make a finding of inapplicability. In this way other national authorities as well as the Commission can still take action and are not blocked by a finding of inapplicability on a particular case.¹⁹¹

128. Article 22 of the Regulation 1/2003 gives authorization to the national authorities to investigate on their domestic territory in the name of a foreign authority which would not otherwise have the authority to conduct an extraterritorial investigation. The EU Commission can oblige national authorities to investigate within their territory as well. Although not an obligation, an authorization exists to investigate a domestic territory on behalf of another Member State. The Commission on the other hand may oblige a Member State to carry out investigations but is not obligated to do so.¹⁹²

b. Defending the Discretionary principle

129. As discussed above, the Commission acts upon different initiatives. However, any of these demands do not oblige the Commission to act. The Commission should rather decide on

¹⁸⁷ ECJ, Judgment of 17.6.1983 (Musique Diffusion Francaise), SpA 1980, 1825, (para 105, 109).

¹⁸⁸ DABBAH/HAWK, p. 425.

¹⁸⁹ DABBAH/HAWK, p. 425; FRENZ, p. 924.

¹⁹⁰ FRENZ, p. 928f..

¹⁹¹ HOSENFELDER, p. 738; WEISS, p. 1751.

¹⁹² JOHANNIS, p. 534.

a discretionary basis as to whether a case will be investigated or not. Limitation of capacity leads to this practice. In light of the possibility of parallel jurisdiction of national authorities,¹⁹³ the application of this principle appears to be even more appropriate and efficient.¹⁹⁴

IV. CONTROVERSIAL ISSUES

130. International antitrust law raises some further questions. In the following section, we address several notable areas of tension and certain developing issues.

A. Ne bis in idem

131. *Ne bis in idem* comes from Latin and means „not twice in the same“. Although it is a generally accepted principle, the three jurisdictions handle it with different approaches at a national as well as at an international level.

1. Legal basis

132. Internationally, the principle is stated in Article 4 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Although the ECHR is an international treaty, this rule only ensures *ne bis in idem* at a national level. The same occurrence can be observed with Article 14 (7) CCPR, where the principle can also be found but is only valid at national level. These two rules are not to be confused with the internationally guaranteed *ne bis in idem* in Article 54 CISA; thanks to this rule, contracting countries are internationally bound by the principle of *ne bis in idem*.¹⁹⁵

133. In the US, the principle of *ne bis in idem* is also known as *double jeopardy*. The principle is articulated in the US Constitution in the *Fifth Amendment*.¹⁹⁶ Article 11 CrimPC states the principle of *ne bis in idem* in Switzerland.¹⁹⁷ Switzerland has also signed the CISA, hence it is bound by Article 54 CISA, which confirms the rule of *ne bis in idem* internationally. The EU, as well as its Member States also recognizes the principle of *ne bis in idem* stated in Article 54 CISA.¹⁹⁸

2. Ne bis in idem at a national level

134. The US, Switzerland and the EU deal differently with the principle of *ne bis in idem* at a domestic level. In the US, issues arise between the federal state and the decentralized jurisdiction of the states. The EU has a similar problem with constellations of Member States within the EU. In Switzerland, the doctrine manifests itself in administrative and punitive sanctions that may be imposed cumulatively.

¹⁹³ See above: National competition authorities.

¹⁹⁴ WEISS, p. 1760.

¹⁹⁵ DONATSCH/SCHWARZENEGGER/WOHLERS, p. 269.

¹⁹⁶ ROESEN, p. 157.

¹⁹⁷ DONATSCH/SCHWARZENEGGER/WOHLERS, p. 269.

¹⁹⁸ JOHANNIS, p. 561; ROESEN, p. 140.

a. United States

135. At a domestic level, *ne bis in idem* is guaranteed, but not exclusively. Conducting multiple criminal prosecutions for the same case within the same authority – either on a federal or state level - is prohibited under the application of *ne bis in idem*. However, the federal government can prosecute a defendant for the same case where a state court has already ruled and vice versa.¹⁹⁹ This results from the *dual sovereignty* doctrine: “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”²⁰⁰ This possibility may lead to multiple sanctions within the US.²⁰¹

b. Switzerland

136. Regarding antitrust law, administrative and punitive sanctions may be imposed cumulatively. It is important to consider the different target group of these sanctions. Administrative sanctions address legal persons whereas punitive sanctions address natural persons. Article 49a CartA punishes infringements of the CartA itself. Article 50 and 54 CartA have the aim of sanctioning official orders. In case of a violation of Article 49(a) CartA the criminal offence of Article 54 CartA will not be affected at the same time. This theory meets the requirement of the *ne bis in idem* principle on a national level.²⁰² However, if administrative- and punitive sanctions would have the same aim, subject matter and would sanction the same person, a cumulative sanction is questionable.²⁰³

c. European Union

137. For the EU, we presently consider constellations within the EU as “national”. If there is only one authority in charge of a case, the principle of *ne bis in idem* is applicable in whole. The Commission for example is internally bound by the principle of *ne bis in idem*. The ECJ as well as the EGC serve only as appellate court. Thus, when applying internal EU antitrust law, the Commission itself is bound by the principle of *ne bis in idem*.²⁰⁴ However, the EU has to contend with internal problems as the Union covers many Member Countries.

- o Union law vs. National law of Member States: According to the EGC the principle of *ne bis in idem* does not apply to the relationship between union law and national law of Member States, as it concerns two different legal systems.²⁰⁵ But taking into account that national authorities apply Articles 101 and 102 TFEU when deciding on an antitrust case with intergovernmental reference, the argument of “two different legal systems” is no longer valid. The doctrine, how-

¹⁹⁹ BURNHAM, p. 318, ROESEN, p. 157.

²⁰⁰ THOMAS, p. 72; United States v. Lanza, 260 U.S. 377 (1922).

²⁰¹ Bartkus v. Illinois, 359 U.S. 121 (1959); ROESEN, p. 157.

²⁰² ZÄCH, N 1106.

²⁰³ HANGARTNER, p. 278.

²⁰⁴ ROESEN, p. 140 f.; p. 229.

²⁰⁵ EGC, Rs. T-149/89 (Sotralentz SA), Slg. 1995, II-1127, 1142.

ever, gives the all-clear and points at EC No 1/2003, which aims for the decentralization of the applicability of the European rules on antitrust. Thus parallel proceedings are rare exceptions. However, in case of simultaneous fine proceedings before the commission and before national antitrust authorities of Member States, any already imposed fine should be taken account in setting the second fine.²⁰⁶

- o Member State A vs. Member State B: Article 54 CISA, which states the principle of *ne bis in idem* demands that someone is only protected by the principle, if another contracting party has already ruled on the “same facts”. If the impact of an antitrust violation affects country A and although it is the same undertaking and the same infringing action it independently affects country B, the concept of “same facts” has to be denied. As the concept of “same facts” can be denied, the ruling of authorities of two (or more) different Member States does not pose a problem, incompatible with *ne bis in idem*.²⁰⁷ However, in case of simultaneous fine proceedings of more than one Member State, the other sanctions should be taken into account when setting the fines.²⁰⁸

3. Ne bis in idem at an international level

138. As the effects doctrine prevails in antitrust law, it is easy to observe effects in different countries and therefore in determining a cross-border crime, this can lead to overlapping jurisdiction. The question arises whether all affected jurisdictions may rule on the case separately and how the US, Switzerland and the EU respectively deal with the issue.

a. United States

139. The US does not recognize foreign rulings; this is no surprise as we have already seen that the US does not follow the principle of *ne bis in idem* fully even at a national level. Moreover, the US Supreme Court decided in 1825 that the rights of the Fifth Amendment and therefore the right to *ne bis in idem* only applies to domestic prosecutions.²⁰⁹

b. Switzerland

140. A procedural bar only exists internationally, if there is a multi- or bilateral agreement.²¹⁰ As most of the European Member States and Switzerland are part of the Schengen Agreement it is normally to be taken into account. As already seen, it is not possible to punish an offence which has already been decided upon in a signatory state, according to Article 54 CISA. However, Article 54 CISA is limited by Article 55 and 56 CISA, where in certain cases, namely if the violation has affected another State as well as the domestic country a state can still decide

²⁰⁶ MÄGER, p. 57.

²⁰⁷ ROESEN, p. 246.

²⁰⁸ ROESEN, p. 250.

²⁰⁹ THOMAS, p. 78; *Antelope*, 10 *Wheat* (U.S.) 66, 12; *In Canada*, so

²¹⁰ DONATSCH/SCHWARZENEGGER/WOHLERS, p. 269.

again and previous sanctions only have to be taken into account. Not only sentenced persons but also discharged persons, fall under the rule of Article 54 CISA.²¹¹

c. European Union

141. From an international aspect, there may be a constellation where European antitrust law and antitrust law of countries outside of EU are affected. It is clear that these antitrust laws are applicable side-by-side; however, it has not yet been finally settled whether a sanction by the European Commission and a sanction by national authorities of third states violate the principle of *ne bis in idem* from an EU perspective.²¹² In a case, where the violation has already been ruled upon by the American and Canadian authorities, the EGC has ruled that a fine imposed by the European Commission was acceptable. This is because of the different aims of the proceedings: The American/Canadian rulings served to protect their domestic markets, the ruling of the European Commission by contrast the European market.²¹³

B. Leniency Program

142. All three jurisdictions, the US, Switzerland and Europe, offer an immunity or reduction of sanctions in certain circumstances. In brief, an undertaking which wants to apply for leniency would have to be the first member of the cartel who submits all relevant information to the authority and would have to cooperate fully during the entire investigation to enjoy the immunity of sanctions.²¹⁴

143. The following statement shows the importance of the leniency program: “In the first decade of the revised leniency policy, the US has revealed more cartels with the help of the leniency program than with all the other examination methods together” (SPRATLING, P.2). In light of this statement, we can clearly see how important it is to protect this process. As seen in the following section, there are however some threats to the leniency program.

1. Conflict between leniency Programs and claims for damages

144. Although the leniency program protects undertakings from official sanctions, one of the biggest risks remains: private claims for damages. During or following an investigation of the reported violation, undertakings harmed by the cartel can still claim for damages.²¹⁵ Hence, the incentive to take advantage of the leniency program is affected and its efficiency is put into question.

145. The financial consequences resulting from a damages claim can be even heavier than the sanctions avoided through participation in the leniency program, especially in the US, where

²¹¹ BAUDISCH, p. 199; GOOD, p. 93.

²¹² MAGER, p. 57.

²¹³ EGC, Rs. T-224/00 (Archer Daniels Midlands), Rn. 91.

²¹⁴ Canada has an Immunity (first-in), and Leniency Policy (second and following).

²¹⁵ KRAUSKOPF/SENN, p. 20; SWEENEY, p. 876.

treble damages have to be expected.²¹⁶ As we have seen above, the most developed private enforcement is in the US. For that reason, and because of the exposure to treble damages, the highest risk for future claims for damages lies in the US as well. Of course, in the EU and in Switzerland, where the aim is to strengthen private enforcement, the risk for potential claims continues to increase.²¹⁷

2. First-Mover disadvantage – cooperating undertakings as main targets

146. A cooperating undertaking is obligated to unveil extensive information and documentation about the cartel and the actions therein. This also includes information about the cooperating undertaking itself. While, the information is basically treated confidentially, there is still a risk that plaintiffs access and are able to use sensitive information. Especially in light of the cost off trials and as the plaintiff carries the burden of proof, they are eager to gather as much information as possible. It is therefore not surprising, that a plaintiff sues that participant of a cartel where there is the most evidence available – often the cooperating undertaking. In academic literature, this phenomenon is also known as "*the first-mover disadvantage*".²¹⁸ This risk is compounded in the US, because of the discovery rules of the Federal Rules of Civil Procedure, where claimants are able to seek documents and other evidence prior to trial.²¹⁹

3. Approach to resolving the problem

147. These two risks and the first-mover disadvantage in particular, reduce the attractiveness of the leniency program. A participant in a cartel must therefore assess whether, on balance, it is worth taking advantage of the program.²²⁰

148. In the two paragraphs above, we have identified two major disincentives to seek leniency: the general concern about being exposed to civil damage claims; and the specific concern of becoming the principal target as the "*first mover*".

149. In part, it can be said that the general risk does not advance compliance with the law to protect a violating undertaking against civil claims beyond the already-granted immunity from public sanctions. The relief from criminal and administrative sanctions should provide sufficient incentive.²²¹ To do more would arguably result in a reward. Another factor, which should not be ignored, is that the damaged victims should not be penalized by the existence of the leniency program.

²¹⁶ BOTANA, p. 72.

²¹⁷ DENOTH, p. 237.

²¹⁸ BOGE, p. 221; DENOTH, p. 238.

²¹⁹ DENOTH, p. 242; see also under: Private Enforcement, USA, Execution of a process.

²²⁰ SWEENEY, p. 877.

²²¹ DENOTH, p. 237f.

150. However, efforts are being made to address the later risk. The EU, for example, has issued certain proposals in a White Paper as to whom and when should be granted protection:²²²

- All corporate statements submitted by all applicants for leniency in relation to a breach of Article 101 TFEU, also when national antitrust law is applied in parallel.
- The protection should apply regardless of whether the application for leniency is accepted, rejected or only leads to a reduction of the fine.
- The protection should apply if a disclosure is ordered by a court, regardless of whether it is before or after the adoption of a decision by the competition authority. A voluntary disclosure of corporate statements by applicants should not be allowed at least until a statement of objections has been issued.

151. This proposal holds some promise towards securing the confidentiality of documents. However, in all three jurisdictions, it remains impossible to fully exclude the possibility that documents be made public.²²³ It seems that the situation in the US is the more serious, however, as the antitrust law follows the effects doctrine even European undertakings are not safe from an American trial with treble damages.

C. Class actions

152. A class action facilitates claims by large groups of plaintiffs. In other words: one plaintiff (Leader) claims with an outcome for several or even an enormous class, who are not parties to the proceeding. A class action allows one or more damaged parties to assert a claim for all those in a comparable situation (contractually or tortiously).²²⁴ While an efficient tool for plaintiffs, class actions raise many concerns on the side of the defendants.

1. Class actions in the three jurisdictions

153. Firstly let us consider a brief overview of the status of class actions in the US, Switzerland and the European Union.

a. The US perspective

154. In the US, Rule 23 of the Federal Rules of Civil Procedures expressly authorizes class actions.²²⁵ Rule 23 also states the requirements for a class action:²²⁶

- The number of affected persons must be big enough to make a joinder of all members impracticable (numerosity);
- the questions of law or fact must be common (commonality);
- the claims of the class representatives must be sufficiently similar (typicality); and

²²² White Paper 2008, p. 10.

²²³ DENOTH, p. 334.

²²⁴ BRAUN, p. 355; KRAUSKOPF/SCHALLER, p. 289.

²²⁵ FOER/STUTZ, p. 112; KARLSGODT, p. 22.

²²⁶ Rule 23 (a) of the Federal Rules of Civil Procedures; KARSGODT, p. 22f..

- o the class representatives and their attorneys will fully and fairly represent the interests of the absent class representatives (adequacy of representation).

155. Rule 23 and related case law provide protections to members of a putative class. First, the court must ensure that all class members have been given the best notice possible under the circumstances that claims that may belong to them have been asserted in a class action. Second, each class member must be provided the opportunity to exclude herself from any class action seeking monetary damages (i.e., to “opt out”), to preserve her ability to pursue such damages claims individually. Absent exercising this opt out right the class member will remain in the class.²²⁷ The broad availability of class actions may also explain the popularity of private enforcement in the US.²²⁸

b. The Swiss perspective

156. The Swiss civil lawsuit is oriented to individual claims. A traditional class action does not exist in Switzerland. However, two similar processes do exist: (1) the *Verbandsklage* allows associations and organizations to claim due to violation of personality. But the verdict does not affect individual members and claims for financial performance are not provided. (2) The second possible process is the joinder of parties (*Streitgenossenschaft*). Several plaintiffs could join together, if the disputes show a sufficient connection. However, each plaintiff acts independently and individually bears the financial risk of the process. Additionally, each claim is decided separately.²²⁹

157. It should be mentioned again, that consumers do not have the capacity to sue.²³⁰ Precisely for this stakeholder group it would be interesting to have the possibility of a class action, as they are likely to be affected by low-value damages.

c. The European perspective

158. The EU has issued directives for Member States on the availability of representative actions such as class actions.²³¹ However, the Union has only limited power to intervene in the civil justice of Member States.²³²

159. In competition law, class actions are possible only recently and not in all European countries. In France and the United Kingdom for example, there is a possibility for class actions, but it is limited when compared to the US.²³³

²²⁷ SCHACK, p. 81.

²²⁸ HEINEMANN, Strukturberichterstattung, p. 14.

²²⁹ Law-News, Kollektiver Rechtsschutz/Gruppenklagen, www.law-news.ch/2013/07/kollektiver-rechtsschutz-gruppenklagen, last visited: 2.1.2015.

²³⁰ KRAUSKOPF/SCHALLER, p. 298.

²³¹ KRAUSKOPF/SCHALLER, p. 295.

²³² KARLSGODT, p. 145.

²³³ Competition Act 1998 §§ 47A, B.

160. In Germany, the principle of representative actions is known, but it is more similar to Switzerland than US class action. One possibility concerning antitrust law would be a joinder of parties (Streitgenossenschaft), where several plaintiffs confront the defendant together. However, the characteristics of a typical class action would not be given as the legal consequence only affects the harmed individuals actually involved as claimants. Another option is to assign the claim to a specialized company. Thus, several claims can be pooled, one does not have to claim against a business partner and the specialized companies are often more successful. However, low-value damages, which are important as compensation in antitrust law are financially unattractive for most of these companies.²³⁴

161. In most European countries, class actions are used with restraint and with limited possibilities compared to the US. Hence it is more likely to find the system of opting-in rather than opting-out.²³⁵ However, it is important to mention, that class actions in the area of antitrust law are increasing.²³⁶

2. Positive Arguments to Support

- For low-value damages, where individual actions would fail due to the disproportionate expenses, class actions can facilitate large numbers of victims being compensated.²³⁷ The policy should be advanced so that members of a cartel cannot rely on the fact that these damages would be ignored due to disinterest. They must in fact expect a class action for damages, which could have a deterrent effect.²³⁸
- Increasing efficiency is cited as an advantage. In other words, the US law has designed an efficient process to claim damages for an unmanageable group of affected persons with fairly manageable effort.²³⁹
- Legal certainty is another cited advantage for defendants and for victims. There are no contradictory decisions, and the defendant does not face further claims.²⁴⁰
- The attractiveness of civil enforcement might increase due to class actions. Especially in Switzerland and the EU, where civil proceedings are still rare compared to the US, class actions can reduce the risk for private claimants. Conversely, this might explain in part the popularity of civil enforcement in the US, where class actions are available.²⁴¹

3. Arguments against available class actions

- It can be argued that class actions are responsible for an excessive process culture. It has been observed that initiatives for class actions come from the claimant's attorney, whose moti-

²³⁴ KRAUSKOPF/SCHALLER, p. 295 f..

²³⁵ KARLSGODT, p. 168.

²³⁶ KARLSGODT, p. 145.

²³⁷ KRAUSKOPF/SCHALLER, p. 289.

²³⁸ BRÖMMELMEYER, p. 67; HEMPEL, p. 78.

²³⁹ HEINEMANN, Strukturbericht, p. 15.

²⁴⁰ KRAUSKOPF/SCHALLER, p. 289.

²⁴¹ HEINEMANN, Strukturbericht, p. 70.

vation is based on the potential for high profit.²⁴² In contrast to the high remuneration for the attorney, it can be doubtful whether alleged victims benefit from the class action.²⁴³

- Another argument against the utilization of class actions might be that they can operate so as to pressure the defendant party to achieve an unjustified settlement (blackmail settlements).²⁴⁴
- A third risk might be that the class action can actually endanger the efficiency of the leniency program. An undertaking's preparedness to cooperate may suffer for the obvious reason that the information it delivers to the authority can be used against it in a civil process.²⁴⁵ While this risk exists in all leniency scenarios, the threat to the defendant is even greater in the face of class action type proceedings.²⁴⁶

V. CONCLUSION

162. Principles like the possibility to sue for treble damages (Section 4 Clayton Act) and to bring class actions to court or the facilitation due to the pretrial discovery are the main reasons why private enforcement is more popular in the US. Despite this popularity, the concerns relating to an excessive process culture especially in connection with class actions cannot be ignored. In contrast, Switzerland and the European Union do not have such strong incentives. On the contrary, the two European jurisdictions bear more obstacles such as the limitation period and the aspect of the burden of proof.

163. Considering public enforcement, the federal antitrust agencies of the US have far more limited formal decision-making powers compared to their European counterparts. Furthermore, as a reaction to the unpopularity of private enforcement in Switzerland and the EU, public enforcement might be the easiest and most efficient way to enforce antitrust law.

164. Let us address the controversial issues of this paper again. The recognition of *ne bis in idem* at an international level would be an important step to control conflicts of jurisdiction. However, the different handling of *ne bis in idem* does not guarantee an equal application at an international level, not to mention the national level. The US holds a clear position of not recognizing foreign rulings and therefore avoiding the principle at an international level. Switzerland refers to the existence of a multi- or bilateral agreement such as the CISA with a *ne bis in idem* rule. How the EU deals with a conflict between European antitrust law and antitrust law of third states has not been clarified yet. However, the existence of the CISA is also valid for Member States of the EU.

165. The leniency program can be an efficient way to uncover cartels. But two major issues, which reduce the attractiveness of the program, must be taken into account: The conflict between leniency programs and claims for damages in general and the "*first-mover disadvantage*". Both problems have not yet been entirely solved. However, the EU has issued certain

²⁴² HEINEMANN, Strukturbericht, p. 15.

²⁴³ CAVANAGH, p. 214.

²⁴⁴ CAVANAGH, p. 205; HEINEMANN, Strukturbericht, p. 15.

²⁴⁵ See above: Leniency Program, First-Mover disadvantage – Cooperating undertakings as main objectives.

²⁴⁶ BROMMELMEYER, p. 67 f..

proposals to resolve the latter risk. Only dealing with these two issues in one jurisdiction is not the entire solution; due to the effects doctrine, undertakings can still be threatened by a civil damages claim in another jurisdiction.

166. In contrast to the two European jurisdictions, class actions are available in the US. The necessity of class actions is widely identified in Switzerland and the EU. The recognition of such a process would give low-value damages a chance and might increase the attractiveness of currently unpopular private enforcement, which is the case in Switzerland and the EU. However, there are valid arguments against it. Class actions, for example, may result in blackmail settlements or endanger the efficiency of the leniency program.

167. We can conclude, that the antitrust enforcement methods of the US, Switzerland and The EU differ in many aspects. In some characteristics, such as class actions, the US might be a pioneer. In other characteristics, like the stronger formal decision-making powers of the authorities in public enforcement, the Swiss and European systems appear to be stronger. In further aspects, like the capacity to sue, the US and the EU are ahead of Switzerland where the consumers, as important stakeholders, do have the capacity to take action. However, all aspects have to be analyzed individually in light of the needs of each jurisdiction and in consideration of the historical background and the legal system.

168. Our expert advisers at AGON PARTNERS are available to answer any questions or provide further information.

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