

# Table of Contents

Acknowledgments	VII
Summary	IX
Glossary	XXXVII
Bibliography	XLV
<b>Title I: The Role of Consumers in Competition Law</b>	5
<b>Introduction</b>	6
<b>Chapter One: Consumer Protection as a Goal of Competition Law</b>	7
<b>Introduction</b>	7
<b>§ 1 Goals of U.S. Antitrust Laws</b>	7
A. Overview of the American Antitrust System	8
1. Definition	8
2. Evolution	8
a. Historical Perspective	9
i. 1890–1902	9
ii. 1903–1915	10
iii. 1916–1935	11
iv. 1936–1973	12
v. 1974 to Date	13
b. Major Federal Statutes	14
i. Sherman Act	14
(1) Section 1: Trusts	14
(2) Section 2: Exclusionary Conduct	15
ii. Clayton & Hart-Scott-Rodino Acts	17
iii. Robinson-Patman Act	18
iv. Federal Trade Commission Act	19
B. Evolution of Purposes in American Antitrust Theory	20
1. Pre-Chicago Goals	20
a. Early Cases	20
b. Judicial Activism	21
2. Chicago School	22
a. Theory	22
b. Criticism	23
3. Post-Chicago Principles	24
<b>§ 2 Goals of E.U. Competition Laws</b>	25
A. Legal Foundation	25
1. Text of Article 101 TFEU	25

2. Text of Article 102 TFEU	26
<b>B. Goals of EU Competition Law</b>	<b>27</b>
1. In General	27
2. Specific Goals	28
a. Economic Freedom	28
i. Measuring Restrictions of Economic Freedom	28
ii. Ancillary Restraints	29
iii. Agreements Creating Competition	29
b. Internal Market	30
c. Economic Efficiency	31
<b>§ 3 Goals of Swiss Competition Law</b>	<b>32</b>
<b>A. Evolution of the Swiss Competition Law System until 1995</b>	<b>32</b>
1. Pre-Cartel Act Period	32
a. Intern Kartellzwang	33
b. Extern Kartellzwang	33
c. Price Supervisor	34
2. 1962 Cartel Act	34
a. In General	34
b. Private Law	35
c. Public Law	36
3. 1985 Cartel Act	37
a. In General	37
b. Private Law	38
c. Public Law	39
i. Competition as an Institution	39
ii. Balance Method	40
iii. Efficient Competition	40
<b>B. 1995 Cartel Act: A Paradigm Shift</b>	<b>42</b>
1. In General	42
2. Constitutional Foundations and Objectives of the 1995 Cartel Act	45
a. Constitutional Foundations	45
i. Article 96 § 1 FC	45
ii. Articles 94 § 1 & 27 § 1 FC	45
iii. Article 97 § 2 FC	46
iv. Article 2 § 1 FC	46
b. Objectives of the 1995 Cartel Act	47
<b>Conclusion</b>	<b>48</b>
<b>Chapter Two: Private Enforcement &amp; Consumer Standing</b>	<b>51</b>
<b>Introduction</b>	<b>51</b>
<b>§ 4 Private Enforcement &amp; Consumer Standing in the United States</b>	<b>51</b>
<b>A. Text of 15 U.S.C. §§ 15 &amp; 26</b>	<b>51</b>
1. Text of 15 U.S.C. § 15	51

2. Text of 15 U.S.C. § 26	52
B. Requirements Related to Standing	53
1. Any Person	53
a. Evolution	53
b. Specific Issues	54
i. Competitors	54
ii. Hostile Takeovers	55
iii. Employees	56
iv. Passing-On Offense & Defense	56
(1) General Rule: Hanover Shoe & Illinois Brick	56
(2) Exceptions	58
2. Business & Property	59
3. Antitrust Injury	59
4. Antitrust Causation & Target Area	60
5. Interstate Commerce	61
C. Other Procedural Issues	61
1. Statute of Limitations	61
a. Duration of Statute of Limitations	61
b. Accrual of a Cause of Action	62
c. Tolling the Statute of Limitations	62
2. Antitrust Class Actions	63
3. Proving Damages	64
4. Prima Facie Evidence	65
<b>§ 5 Private Enforcement &amp; Consumer Standing in the European Union</b>	<b>65</b>
A. Treaty and Regulatory Background	65
B. Case Law	66
1. Courage Ltd. v. Crehan	66
a. Facts of the Case	66
b. Questions to the Court	67
c. Holding of the Court	67
2. Manfredi v. Lloyd Adriatico Assicurazioni	68
a. Facts of the Case	68
b. Questions to the Court	68
c. Holding of the Court	69
3. GT-Link A/S v. De Danske Statsbaner	69
a. Facts of the Case	69
b. Questions to the Court	70
c. Holding of the Court	70
<b>§ 6 Private Enforcement &amp; Consumer Standing in Switzerland</b>	<b>71</b>
A. Article 12 of the 1995 Cartel Act	72
1. Text of Article 12 of the 1995 Cartel Act	72
2. Standing to Sue	72
a. Person	72
b. Third-Party to, or Member of, an Illicit Agreement	75

c. Limited in Access to, or Exercise of, Competition	75
3. Standing to Defend	76
a. Defensive Actions	76
b. Compensatory Actions	76
4. Impediment to Competition	76
5. Illicit Impediment to Competition	77
6. Specific Actions	77
a. Setting Aside or Cessation of the Hindrance (Art. 12 § 1(a) of the 1995 Cartel Act)	77
b. Compensation and Reparation (Art. 12 § 1(b) of the 1995 Cartel Act)	79
i. Compensation	79
(1) Damages	79
(2) Causal Relationship	80
(3) Fault	80
ii. Reparation	81
c. Appropriation of the Benefits Wrongfully Earned (Art. 12 § 1(c) of the 1995 Cartel Act)	81
B. Article 13 of the 1995 Cartel Act	82
1. Text of Article 13 of the 1995 Cartel Act	82
2. Generalities	82
3. Agreements Null and Void (Article 13 (a) of the 1995 Cartel Act)	83
4. Obligation to Contract (Article 13 (b) of the 1995 Cartel Act)	83
5. Obligation to Abstain	84
6. Declaration of Illegality	85
7. Verdict Communicated to Third Parties or Published	85
<b>§ 7 Evaluation of the 1995 Cartel Act in Switzerland</b>	86
A. Overview of the Evaluation Procedure of the 1995 Cartel Act	86
1. Article 59a of the 1995 Cartel Act	86
2. Evaluation Levels and 'Effect Model'	87
3. Concept, Output and Outcome Levels	88
a. Concept and Output Levels	89
i. Concept Level	89
ii. Output Level	90
(1) Survey sent to the Cantonal Courts	90
(2) Dividing Line between Public and Private Enforcement of Competition Law	91
(3) Sufficient Means and Legal Instruments	91
(4) Strengthening of Private Enforcement	92
(5) Expert Analyses	92
b. Outcome Level	92
i. Retail Business	93
ii. Retail Banking	93
iii. Liberalization of the Energy Supply Market	94
iv. ComCo's Conclusions	94
B. Main Conclusions	95

C. Private Enforcement – Expert Reports	97
1. Presentation of the Two Expert Reports	97
a. HEINEMANN's Evaluation Report	97
b. BAUDENBACHER's Evaluation Report	98
c. Discussion on the Standing to Sue of Consumers and Consumer Associations	100
i. Consumers	100
ii. Consumer Associations	100
2. Conclusions and Recommendations	102
a. In General	102
b. Specific Recommendations	102
i. Standing to Sue	102
(1) Trade and Professional Associations	102
(2) Consumers	103
(3) Consumer Associations	103
(4) General Discussion on Collective Rights	103
ii. Passing-On Defense	104
iii. Punitive Damages	104
iv. Statute of Limitations	104
v. Rules of Evidence	105
vi. Litigation Costs & Cost Shifting	105
vii. Competent Forum	105
viii. Pre-trial Discovery	105
D. Federal Council's 2010 Draft Proposals to Revise the 1995 Cartel Act	106
1. Overview of the 2010 Draft Proposals	106
a. Competition Authority – Federal Competition Court	106
b. Opposition Procedure	108
c. Vertical Agreements	108
d. Merger Controls	109
e. International Cooperation	110
2. Private Enforcement in the 2010 Draft Proposals	111
a. Article 12 of the 2010 Draft Proposals	111
b. Article 12a of the 2010 Draft Proposals	113
c. Article 13 of the 2010 Draft Proposals	113
<b>Conclusion</b>	114
<b>Chapter Three: Protecting Consumers Holistically: Relationships Between Public &amp; Private Enforcement of Competition Law in the United States and in Switzerland</b>	117
<b>Introduction</b>	117
<b>§ 8 Public-Private Relationships in the United States</b>	118
A. Uncoordinated Relationships	119
1. Pre-CAFA Situation	119
a. Basic Relationships	119

b.	Fully Dissociated Relationships	119
c.	Follow-On Lawsuits	120
2.	Post-CAFA Situation & Proposal for Reform	123
a.	CAFA	123
b.	Proposal for Reform	124
B.	Integrated Relationships	126
1.	Introduction to the <i>Parens Patriae</i> Action	126
2.	Text of 15 U.S.C. § 15(c)(a)	128
3.	Supreme Court Curtailment of the <i>Parens Patriae</i> Action & State Reactions	129
a.	<i>Illinois Brick</i>	129
b.	<i>Kansas v. UtiliCorp United, Inc.</i>	130
c.	State Reactions and <i>California v. ARC Am. Corp</i>	131
<b>§ 9</b>	<b>Public-Private Relationships in Switzerland</b>	132
A.	Uncoordinated Relationships	133
1.	In General	133
2.	Avoidance of Contradictory Decisions	133
a.	Principle: Independent Administrative and Civil Proceedings	133
b.	Limitations on Procedural Independence	133
i.	Civil Courts	134
ii.	Competition Authorities	134
B.	Integrated Relationships	135
1.	Legal Relationships	135
a.	Article 15 § 1 of the 1995 Cartel Act	136
i.	Text of Article 15 § 1 of the 1995 Cartel Act	136
ii.	History of Article 15 § 1 of the 1995 Cartel Act	136
(1)	Federal Council's Original Proposal	136
(2)	Parliament's Modifications	136
iii.	Conditions	137
(1)	Existence of a Civil Trial	137
(2)	Challenge to the Legality of a Competition Infringement	138
iv.	Civil Courts' Legal Obligations	139
v.	ComCo's Legal Obligations	140
(1)	Obligation to Render an Expert Opinion	140
(2)	Elaboration of the Expert Opinion	140
(3)	Scope & Content of the Expert Opinion	140
(4)	Deadline to Respond	141
(5)	Fees	141
(6)	Option to Initiate an Investigation	142
vi.	Legal Implications of ComCo's Expert Opinion upon the Civil Court's Judgment	142
vii.	Reform Proposals	143
b.	Article 43 § 1 of the 1995 Cartel Act	143
i.	Text of Article 43 § 1 of the 1995 Cartel Act	143
ii.	Origin & Scope of Article 43 § 1 of the 1995 Cartel Act	143

iii. Admitted Third Parties	144
(1) Potential & Existing Market Actors	144
(2) Professional & Trade Associations	144
(3) National & Regional Consumer Associations	145
2. ComCo's Mediating Role	145
a. Case Study: ETA SA Manufacture Horlogère Suisse	145
b. Discussion	146
<b>Conclusion</b>	147
<b>Title II: Collective Redress Mechanisms</b>	151
<b>Introduction</b>	152
<b>Chapter One: US Collective Litigation</b>	153
<b>Introduction</b>	153
<b>§ 10 US Collective Litigation In Context</b>	153
A. Discovery	153
1. Text of Rules 26(b)(1) & 26(b)(2) FRCP	154
2. General Presentation	154
a. Origins	154
b. Purposes	155
c. Structure of Discovery Provisions	155
d. Controversy	156
3. Scope of Discovery	157
4. Limitations	158
a. Privilege	158
i. In General	158
ii. Assertion of Privilege	158
(1) Active Obligation to Assert Privilege	158
(2) Time Frame	159
(3) Privilege Log	159
b. Attorney-Client Privilege	160
c. Fifth Amendment Privilege	160
d. Governmental Privilege	161
5. Protective Orders	161
6. Sanctions	163
7. Discovery in Class Action Proceedings	164
a. Absent Class Members	164
b. Named Plaintiff	165
c. Opponents to Class Settlement	165
d. Cost of Discovery	165
e. Avoidance of Duplicative and Unnecessary Discovery	165
B. Litigation Funding and Fee Arrangements	166
1. In General	166

2. Law Firms	167
a. General Litigation	167
b. Class Actions and Mass Torts Litigation	168
i. Introduction to the Complexities of Aggregate Litigation	168
ii. Methods for Calculating Lawyers' Fees	169
(1) Common-Fund Cases & Statutory Cases	169
(2) Percentage-Fee Awards	170
(3) Lodestar-Fee Awards	170
(4) Current Standards	170
(5) Court Practice	171
3. Other Third-Parties	172
C. Punitive Damages	173
1. Current Practice	173
a. Overview of Punitive Damages	173
b. Text of § 908 of the Restatement of the Law (Second), Torts	174
c. Comment of § 908 of the Restatement of the Law (Second), Torts and Court Practice	174
i. In General	174
ii. Character of Defendant's Conduct	175
iii. Extent and Nature of Harm	176
2. Academic Proposals	177
a. Economic Approach to Tort Law	177
b. Jury Determination	178
D. Right to Trial by Jury	179
1. Origins	179
a. Seventh Amendment	179
b. Effect of the Federal Rules of Civil Procedure on the Seventh Amendment	180
2. General Principles	181
a. Current Structure of the Right to Trial by Jury	183
b. Other Issues	184
i. Conflict between Right to Trial by Jury and Other Procedural-Mechanisms	184
ii. Non-Interference of State Law in the Right to Trial by Jury	185
iii. Right to Trial by Jury and Equitable Procedural Mechanisms	185
<b>§ 11 Federal Class Actions (Rule 23 FRCP)</b>	186
A. Genesis of the Class Action Rule	186
1. Origins of the Federal Rules of Civil Procedure	187
a. Statutory Authorization of Courts to Adopt Rules of Procedure	187
b. Rules of Practice for the Courts of Equity of the United States of America	188
i. 1822 Federal Equity Rules	188
ii. 1842 Federal Equity Rules	188

iii. 1912 Federal Equity Rules	189
c. Merger of Common Law and Equity: Federal Rules of Civil Procedure of 1938	189
2. Origins of Group Litigation in England	193
a. Early Group Litigation	193
b. Necessary Party Rule & Indispensable Party Rule	194
3. Origins of Group Litigation in the United States of America	196
a. Prior to Federal Equity Rule 48	196
b. Federal Equity Rule 48 (1842–1912)	199
c. Federal Equity Rule 38 (1912–1938)	200
d. Original Rule 23 FRCP (1938–1966)	203
i. Preliminary Draft	203
ii. 1938 Rule 23 FRCP	205
(1) Equitable Origins	206
(2) Nature of Representation: True, Hybrid, and Spurious	207
(3) Criticism of 1938 Rule 23 FRCP	207
B. Modern Class Action Rule (1966 Rule 23 FRCP)	211
1. Reasons behind the 1966 Amendments	211
2. Prerequisites for Bringing a Class Action	212
a. Existence of a Class	212
b. Representatives Must Be Members	215
c. Excursus: Rule 23.2 FRCP – Unincorporated Associations	216
i. Text of Rule 23.2 FRCP	216
ii. Standing of Unincorporated Associations	216
iii. Specific Issues Related to Unincorporated Associations in Class Action Context	217
d. Joinder Must Be Impracticable	218
i. Plaintiff Only Class	219
ii. Easy Joinder	219
iii. Impracticability v. Impossibility	219
iv. Size	219
v. Subsequent Events	221
e. Common Questions Must Exist	221
f. Typical Claims	224
i. Coextensiveness	224
ii. Lack of Adversity	224
iii. Individuality v. Typicality	225
iv. Flexibility Granted to the Courts	226
g. Protection of Class Interests	226
i. General Presentation	226
ii. Quality Not Quantity	229
iii. Extent of Interest	231
iv. Antagonistic or Conflicting Interests	231
v. Coextensiveness of Interest	233
vi. Attorney as Class Representative	234

3. Class Actions Maintainable	235
a. Subdivision (b)(1): Adverse-Effect Class Actions	236
i. In General	236
ii. Clause (A): Incompatible Standards of Conduct for the Opposing Party	237
iii. Clause (B): Effect on the Individual Class Members	238
b. Subdivision (b)(2): Injunctive Class Actions	239
i. Generalities	239
ii. History of the Injunctive Class Action	239
iii. Rule 23(b)(2) FRCP	240
iv. Pattern of Activity	241
v. Common Regulatory Scheme	242
vi. Final Injunctive Relief or Corresponding Declaratory Relief	242
vii. Need Requirement	243
viii. Injunctive Class Actions and Damages	244
ix. Defenses against Injunctive Class Actions	247
c. Subdivision (b)(3): Damages Class Actions	248
i. In General	248
ii. Predominance	250
(1) Total Time Calculus Rejected	251
(2) Pragmatic Approach	251
(3) Illicit Behavior	252
(4) Individual Predominance	252
(5) Redefining the Lawsuit	253
iii. Superiority	253
iv. Non-Exhaustive Factors	255
(1) Class Members' Individual Interest	255
(2) Extent and Nature of Concurrent Litigation	256
(3) Concentration of Claims in a Particular Forum	257
(4) Management Difficulties	257
(5) Other Factors	257
v. Further Complications	258
(1) Multistate Class Actions	258
(2) Administration of Judicial Relief	259
4. Procedural Issues Specific to Class Actions	260
a. Certification Issues	260
i. Determination	260
(1) In General	260
(2) Whether Preliminary Hearing is Necessary	261
(3) Issues to Be Considered by District Court	261
(4) Preliminary Hearing on the Merits & Class Certification	262
(5) Motion to Dismiss the Case & Class Certification	262
(6) Appealability	263
ii. Additional Certification Requirements	263
(1) Standing	264
(2) Mootness	264

iii. Timing of Class Certification	265
(1) Evolution of Rule 23 FRCP on Timing	265
(2) Respect of Local Rules	265
(3) General Principles	265
(4) Sua Sponte Determination & Timing	266
(5) Significance of Timing	266
iv. Alteration or Amendment of Certification	267
b. Notice	268
i. In General	268
(1) Subdivisions (b)(1) and (2)	268
(2) Subdivision (b)(3)	269
(3) Timing of the Notice	269
(4) Notification of Absent Class Members	270
ii. Content Requirements for Notice in Case of Subdivision	
(b)(3) Class Actions	271
(1) In General	271
(2) Appearance through Counsel	272
(3) Right to Opt-Out	273
(4) Binding Effect of Class Judgment	274
(5) Proof-of-Claim Form	274
iii. Mechanisms for Giving Notice	275
(1) Timing of Notice	275
(2) Modalities of Notice	275
(3) Court Notice or Party Notice	275
(4) Financial Burden	276
c. Binding Effect of Class Judgment	277
d. Managing Complex Class Actions: Subdivisions (c)(4) and (5)	278
i. In General	278
ii. Rule 23(c)(4) FRCP: Partial Class Actions	279
iii. Rule 23(c)(5) FRCP: Subclasses	280
e. Rule 23(e) FRCP: Settlement, Voluntary Dismissal, or Compromise	280
i. Overview	280
(1) Text of Rule 23(e) FRCP	280
(2) Court Approval	281
(3) Certified Class Action According to Rule 23(c)(1) FRCP	281
ii. Court Approval of Settlement, Voluntary Dismissal, or Compromise	282
(1) In General	282
(2) Burden of Proof	282
(3) Discretionary Power of the District Courts	282
(4) Fairness, Reasonableness & Adequacy Requirements	283
(5) Not All Parties Settle	285
(6) Incentives to Named Plaintiff	285
(7) Oppositions to Settlement	286

iii. Settlement Classes	286
iv. Settlement of Future Claims	287
v. Objectors to Settlement	288
(1) Right to Object	288
(2) Role of Objectors	288
(3) Other Issues related to Objectors	288
vi. Settlement Approval Procedure	289
(1) Settlement Hearings	289
(2) Disclosure of Connected Agreements	289
(3) Second Opt-Out Possibility	290
vii. Settlement Notice	290
(1) In General	290
(2) Notice Delivery Requirements	291
(3) Notice Content Requirements	291
(4) CAFA Settlement Notice Requirements	292
f. Class Actions in Procedural Context	292
i. Pleadings and Motions	292
ii. Intervention	293
(1) In General	293
(2) Timeliness	294
(3) Statute of Limitations	295
iii. Specific Jury-Trial Issues in Class Action Context	295
5. Conducting the Action	296
a. Subdivision (d): Orders Conducting the Class Action	296
b. Subdivision (d)(A): Orders Determining the Course of Proceedings	297
c. Subdivision (d)(B): Appropriate Notice to Protect Class Members and Fairly Conduct the Action	298
d. Subdivision (d)(C): Orders Imposing Conditions on Representative Parties or on Intervenors	299
i. Overview	299
ii. Gag Orders	299
iii. Intervenors	300
iv. Noncompliance	300
e. Subdivision (d)(D): Orders Requiring that the Pleadings Be Amended to Eliminate Allegations concerning Representation of Absent Persons	300
f. Subdivision (d)(E): Orders Dealing with Similar Procedural Matters	302
6. Appeals	302
a. Final-Judgment Rule	302
b. Class Certification Appealability	302
i. Prior to Rule 23(f) FRCP	302
ii. Text of Rule 23(f) FRCP	302
iii. Discretion of the Court of Appeal	303
(1) Committee's Suggestions	303
(2) Other Factors	304
(3) Combination of Factors	304

iv. 10-Day Deadline	305
c. Other Orders Appealability	305
d. Practice of Rule 23(f) FRCP	305
7. Class Counsel	306
a. Class Counsel Appointment	306
i. Rule 23(g) FRCP	306
ii. Standards for Appointing Class Counsel	307
b. Attorney Fees – Procedure for Awarding Fees and Nontaxable Costs	308
C. Dynamics of Rule 23 FRCP	309
1. American Common Law Theory	309
2. Courts and the Evolution of the Class Action Mechanism	312
a. Dust Litigation	312
i. 1900's – 1930's	312
ii. 1930's: First Silicosis Crisis and its Integration in Workers' Compensation Plans	314
iii. Asbestos Litigation – Regulation by Litigation	315
iv. Asbestos Litigation – Extraneous Components	317
v. Asbestos Litigation – Floodgates Opened	317
vi. Asbestos Litigation – The U.S. Supreme Court Weighs In	320
vii. Asbestos Litigation – Conclusions	325
viii. Silica Litigation – Redux	327
ix. Silica Litigation – Texas MDL Proceedings	328
b. Wal-Mart Stores, Inc. v. Dukes	332
i. Facts	332
ii. Analysis & Holding	333
iii. Discussion	335
3. Scholarly Debates	335
a. MILLER's Defense of Rule 23 FRCP	336
b. Academic Reactions to Rule 23 FRCP	337
i. Public Policy Purpose of Class Action	337
ii. Role of Scholars in Minimising Class Action Issues	339
4. Congressional Interventions	341
a. PSLRA	341
i. Context Prior to the Adoption of PSLRA	341
ii. Congressional Action	342
iii. Effect of PSLRA	343
b. CAFA	343
i. Context Prior to the Adoption of CAFA	343
ii. Congressional Action	343
iii. Effect of CAFA	345
<b>§ 12 From Class Actions to Multidistrict Litigation</b>	346
<b>A. MDL Mechanism</b>	347
1. Electrical Equipment Cases: The Origins of MDLs	347
a. Background Considerations	347

b. Specific Procedural Aspects of the Electrical Equipment Cases	348
i. Initial Pretrial Orders	348
ii. National Pretrial Hearings and Orders	348
iii. National Depositions	349
iv. National Document Production	349
v. Subsequent Stages of the National Discovery Program	349
vi. Decisions on Common Questions of Law	350
vii. Other Administrative Issues	350
2. Relationship to Class Actions	350
3. Adoption and Evolution of Title 28 U.S.C. Section 1407	351
a. Reaction to the Electrical Equipment Cases	351
b. MDL Structure	351
c. Panel	352
i. Panel History	352
ii. Panel Membership	353
d. Panel Powers	353
i. Jurisdiction	353
(1) In General	353
(2) Pretrial Proceedings	354
ii. Limitation of Panel's Powers	354
(1) Pending Actions	354
(2) Transfer of Entire Claims	355
(3) No Substantive Involvement in Cases	355
(4) Multidistrict Cases Only	356
(5) Federal Cases Only	356
iii. Appeal of Panel Decisions	356
(1) Overview	356
(2) Review of Orders Directing Transfer	357
(3) Review of Orders Denying Transfer	357
e. Procedure before Panel	358
i. Panel Rules	358
ii. Right to Appear before Panel	358
iii. Initiating Panel Proceedings	358
iv. Hearing before Panel	358
v. Tag-Along Actions	359
vi. Effect of Transfer	359
vii. Remand	359
f. Factors for Transfer	360
i. Overview and Finality of Transfer	360
ii. Section 1407(a): Statutory Requirements	360
(1) Common Issues of Fact and Law	360
(2) Convenience of Parties and Witnesses	361
(3) Just and Efficient Conduct of Litigation	361
iii. Practice of Panel	362
g. Choice of Transferee District Court and Judge	364
i. District Court	364
ii. District Judge	365

h. Tag-Along Actions	365
i. Effect of Transfer	366
i. Transferor Court(s)	366
ii. Panel	366
iii. Transferee Court	366
j. Remand	367
i. In General	367
ii. Remand Procedures	367
iii. Panel Reluctance to Order Remand	368
iv. Effect of Remand	368
<b>B. Issues in Multidistrict Litigations</b>	<b>369</b>
1. Power of Panel	369
2. Power of Transferee Court	372
a. Bellwether Trials	373
i. Non-Binding Informational Trials	373
ii. Selection Process	374
(1) Cataloging MDL Cases	374
(2) Pool of Representative Cases	374
(3) Selection of Individual Cases from Pool	376
b. Relationship between Transferee Court and Plaintiffs' Counsel	376
i. Quasi-Class Action Litigation Philosophy	376
ii. Selection and Empowerment of Managerial Counsel	378
iii. Compensation of Managerial Counsel	379
<b>Conclusion</b>	<b>381</b>
<b>Chapter Two: EU Debates on Collective Litigation</b>	<b>389</b>
<b>Introduction</b>	<b>389</b>
<b>§ 13 2005 Green Paper on Damages Actions for Breach of the EU Competition Rules</b>	<b>389</b>
A. 'Pre-2005 Green Paper': The Ashurst Studies	390
1. Ashurst Comparative Report	390
a. Collective Claims	391
b. Passing-On Defense and Indirect Purchaser	392
c. Damages	393
2. Ashurst Damages Report	393
a. Standing	394
b. Counterfactual	394
B. Background and Objectives of the 2005 Green Paper	395
C. Brief Overview of Various Themes Discussed in the 2005GP	396
D. Defending Consumer Interests	398
1. Presentation of the European Commission's Proposals on Consumer Protection	398
2. Answers from Respondents	399

a. Supportive Answers to the European Commission's Proposals	399
i. Necessary to Introduce Collective/Representative and Class Actions	400
ii. Role of Member States	401
iii. American Model for Damages Class Actions and Other Mechanisms	401
iv. Quebecoise Model for Damages Class Actions	402
v. Concerns relating to Consumer Association Actions	403
vi. Test Cases	404
b. Negative Answers to the European Commission's Proposals	404
i. General Opposition	404
ii. Already Existing Mechanisms	405
iii. Such Mechanisms Contravene Procedural Principles – Unknown to Member States	406
iv. Difficulty to Implement and Apply	406
v. Such Procedures Contravene the Separation of Power between the EU and Member States	407
vi. Such Mechanisms Pave the Way for US-Style Litigation	407
vii. Such Mechanisms Will Result in Less Transparent Legal Systems	408
viii. Such Mechanisms Will Relieve Consumers of their Responsibility	408
ix. Limited Demand for Such Mechanisms	408
c. European Institutional Responses	408
i. EP's Stance	408
ii. EESC's Stance	409
<b>§ 14 2008 White Paper on Damages Actions for Breach of the EU Competition Rules</b>	410
A. Overview of the 2008WP	410
B. Defending Consumer Interests	411
1. Presentation of the European Commission's Proposals	411
a. Representative Action	412
b. Opt-in Collective Action	413
2. Answers from Respondents	414
a. Supportive Answers to the European Commission's Proposals	415
i. Agreement in Principle	415
ii. Representative Actions	416
iii. Opt-In Collective Actions	416
iv. Specific Proposals	417
b. Negative Answers to the European Commission's Proposals	419
i. General Opposition	419
ii. Fear of US-Style Litigation	420
iii. Basic Premises Are Misleading or Ineffective	421
iv. Specifically Against Representative Actions	421
v. Specifically Against Ad Hoc Associations	422
vi. Opt-Out Class Actions Are Included in the 2008WP	422
vii. Member States' Jurisdiction	423

c. European Institutional Responses	423
i. EP's Stance	423
ii. EESC's Stance	425
<b>§ 15 2008 Green Paper on Consumer Collective Redress</b>	426
A. EU Consumer Protection in Context	426
1. Consumer Protection Institutionalism	426
2. EU Civil Litigation	427
3. EU Consumer Acquis	429
a. Collective Litigation	429
b. 2008 Proposal for a Directive on Consumer Rights	430
B. 2008GP & 2009 Consultation Paper	432
1. 2008GP	432
a. Introduction	432
b. Options	433
i. No EU Action	433
ii. Cooperation between Member States	433
iii. Mix of Policy Instruments	433
iv. Judicial Collective Redress Procedure	434
2. European Commission Consultation Paper on Consumer Collective Redress	434
3. Brief Overview of Answers from Respondents to 2008GP and 2009 Consultation Paper	435
<b>§ 16 2011 Public Consultation: Towards a Coherent Approach to Collective Redress</b>	435
A. 2011 Public Consultation	435
B. Answers to the 2011 Public Consultation	437
1. In Favor of EU Action	438
2. Opposing EU Action	440
<b>Conclusion</b>	441
<b>Chapter Three: Swiss Collective Redress Mechanisms</b>	445
<b>Introduction</b>	445
<b>§ 17 Adversarial Proceedings</b>	445
A. General Rule	445
1. Civil Law Tradition	445
2. Conventional & Constitutional Requirement: Right to a Fair Trial	446
a. Access to the Courts	448
i. Right of Access	448
ii. Limits of Access	449
b. Effective Recourse	450
c. Right to Be Heard	452

B. Exceptions	453
1. Optional & Compulsory Joinder	453
a. Optional Joinder	453
b. Compulsory Joinder	454
2. Suits by Associations	455
a. Verbandsklagen	455
b. Verbandsbeschwerden	457
c. Unfair Competition	459
d. Environmental Protection	460
e. Labor Law and Equality between Women and Men	461
f. Shareholder Protection	462
g. Health Insurance	463
3. Other Multi-Party Actions	463
a. Nuclear Civil Liability Act	464
b. Merger Act	465
c. Community of Creditors	466
<b>§ 18 Swiss Scholarly Debates</b>	<b>467</b>
A. General Opinions	468
1. STARK/KNECHT's Einführung einer Zwangsgemeinschaft für Geschädigte bei Massenschäden?	468
a. Background	468
b. Proposals	469
c. Discussion	470
2. STOFFEL's L'image du plaideur: du demandeur individuel aux intérêts de groupe	470
a. Introduction	470
b. Proposals	471
c. Discussion	471
3. ROMY's Litiges de masse, Des class actions aux solutions suisses dans les cas de pollutions et de toxiques	472
a. Mass Torts Litigation	472
b. ROMY's Assessment of Class Action Asbestos Litigation in the USA	474
i. Limited Number of Defendants	474
ii. Use of Class Action in Asbestos Cases	475
iii. Settlement	476
iv. Social Peace	476
v. Future Claims	477
c. Proposals for Switzerland	480
i. Jurisdiction of Only One Special Authority	482
ii. Grouping of Current and Future Claimants	482
iii. Separation of the Procedure into Two Distinct Phases	483
d. Excursus: JEANDIN's Parties au procès: Mouvement et (r)évolution	484
i. Legal Definition of Mass Litigation	485
ii. Jurisdiction	486
iii. Principles	486

iv. Forum	486
v. Phase I of the Trial	487
vi. Phase II of the Trial	487
vii. Settlement	487
viii. Limitation of Parties' Rights	489
ix. Some Principles Inspired from the Nuclear Civil Liability Act	489
e. Discussion	490
4. MARTHE's Les class actions et les pays de tradition civiliste	490
a. Overview	490
b. Proposals	491
c. Discussion	492
5. GORDON-VRBA's Vielparteienprozesse	493
a. Introduction	493
i. Terminology	493
ii. Purpose of Research	493
iii. Relationship between Public and Private Enforcement of 'Group Rights'	495
b. Proposals	496
c. Discussion	497
6. UMULISA MUSABY's L'accès des consommateurs à la justice	497
a. Background	497
b. Proposals	498
c. Discussion	499
B. Environmental Aggregate Litigation Discussion	499
1. Overview	499
2. TERCIER's Project	500
a. Disaster Litigation	500
b. Proposals 9 to 12	502
c. Discussion	503
C. Investor Protection Aggregate Litigation Discussion	503
1. WATTER's Project	503
2. GORDON-VRBA's Project	505
a. Analysis of the Current Situation	505
b. Investor Litigation for Direct Damages	505
c. Investor Litigation for Indirect Damages	506
3. CONTRATTO's Project	506
a. Swiss & German Approaches to Investor Protection	506
b. Proposals	508
c. Discussion	508
<b>§ 19 Associational Injunctive Action (New Article 89 FCCP)</b>	509
A. Text of Article 89 FCCP	509
B. Origins	509
C. Discussions concerning Article 79 FCCP Project	510
1. Expert Committee's Draft Proposals	510
2. Answers to the Draft Proposals	512

3. Federal Council's FCCP Message	513
4. Parliamentary Debates over Article 87 FCCP Project	514
5. Article 89 FCCP: Academic Perspectives	515
<b>D. Article 89 FCCP – Class Action in Switzerland?</b>	<b>518</b>
1. Presentation of the Problem	518
2. FCCP's Unresolved Issues relating to Class Actions	519
a. Within Switzerland	519
i. On Procedure	519
ii. On the Merits	520
(1) Articles 27–30 CC and their Relationship to the Federal Constitution	520
(2) Economic Freedom and Guarantee of Ownership	521
(3) Debate over the Meaning of 'Personality'	522
(4) Means and Remedies of Protecting Personality & Article 89 FCCP	523
b. Comparison with the US Federal Injunctive Class Action	524
i. Texts of Article 89 FCCP & Rule 23(b)(2) FRCP	525
ii. Rule 23(a) FRCP – Article 89 FCCP	526
iii. Rule 23(b)(2) FRCP – Article 89 FCCP	526
iv. Excursus: Rule 23.2 FRCP – Article 89 FCCP	527
v. Article 89 FCCP: Specific Conditions	527
vi. Opt-Out	527
vii. Regulation-by-Litigation	528
c. Case Study applying Article 89 FCCP: OFRA	528
i. Facts	528
ii. Court's Analysis & Holding	529
iii. Under Article 89 FCCP	529
d. Excursus: Article 10 § 3 UCA – Standing of the Swiss Confederation in Unfair Competition Litigation	530
e. Current Discussion of Damages Class Actions – 2013 Report	532
<b>Conclusion</b>	533
<b>Title III: Proposals for Reform</b>	539
<b>Introduction</b>	540
<b>Single Chapter</b>	543
<b>Introduction</b>	543
<b>§ 20 Summary of the Proposals</b>	543
A. Summary of the Public Law-Private Law Dichotomy	543
B. Effects of the Proposals on ComCo's Secretariat	544
C. Determination of the Procedure to Follow	546

<b>§ 21 Details of the Proposals</b>	547
A. Parens Patriae Authority	547
1. Definition	547
2. Difference with the Parens Patriae authority under the HSR Act	548
B. Definition of a Group of Consumers	548
1. ComCo's Secretariat Represents a Defined Group of Consumers	548
a. In General	548
b. Consumers Residing in Switzerland	549
c. Hypotheses for Consumers Residing outside of Switzerland	549
d. Defining the Group	550
i. American Examples	550
ii. Swiss Hypothetical: The End-User Cellphone Fee Case	551
2. Consumers Play only a Limited Role in the Proceedings	554
a. Petition to be included within the Group Represented by ComCo's Secretariat	554
b. Consumer Claim Pursuant to Article 12 of the 2010 Draft Proposals	555
i. In Addition to the Group Litigation	555
(1) Mandatory Group Litigation	555
(2) Dilemma of the Unsatisfied Consumer	555
ii. Independently from the Group Litigation	555
C. Determination of the Procedure to Follow	556
1. Definition of the Nature of the Procedure to Follow	556
2. All Private Claims Are Presented before ComCo or the Designated Civil Court	557
3. ComCo's Secretariat Rules That the Case Requires the Unitary Procedure	558
4. ComCo's Secretariat Rules That the Case Requires the Binary Procedure	558
D. Pretrial Proceedings	559
1. Intervention of Other Market Actors – Third Party Intervenors	559
a. Principle	559
b. Notice	560
c. Procedure	561
d. Res Judicata Effect	562
i. Inaction of the Competition Authorities	562
ii. In Relation to the Competition Authorities' Decision	562
2. Selection of Group Counsel	563
a. Usual Hiring Process	563
b. Auction-Buyback Process	564
c. Consultation of Confidential Documents	566
d. Discussion	566
3. Overview of Group Counsel's Handling of the Case	566
4. Revocation of Group Counsel	567

E. Litigation	568
1. Unitary Procedure before ComCo & Discussion	568
a. Unitary Procedure before ComCo	568
b. Discussion	569
2. Binary Procedure before ComCo & the Designated Cantonal Court	570
a. In General	570
b. Specific Issues Regarding the Procedure before the Designated Cantonal Court	571
i. FCCP	571
ii. Cantonal Court	571
iii. Forum	571
c. Authority of ComCo's Decision	572
d. Third Party Intervention	573
e. Participation of ComCo's Secretariat	574
f. Court Fees	575
3. Role of Consumer Associations	575
F. Post-Trial Proceedings	575
1. Distribution of Damages Award to Consumers	576
a. Challenge to the Amount of Damages	576
b. Proving Damages	576
i. Other Intervening Market Actors	576
ii. Consumers	577
c. Fund Creation & Management	578
d. Fund Oversight	579
e. Minimal Damages to Consumers	579
2. Group Counsel's Fee Arrangement	579
a. General Rules on Counsel Fees	579
b. Practical Limitations to General Rules on Counsel Fees	580
i. Auction-Buyback Process' Influence on Counsel Fees	580
ii. Discussion	580
3. Role of Consumer Associations	582
<b>§ 22 Miscellaneous Effects of the Proposals</b>	583
A. Modifying the System of Appeals	583
1. Appeals resulting from ComCo's Secretariat's Determination that the Case Requires the Unitary Procedure	583
a. Chart	583
b. Explanation	584
2. Appeals resulting from ComCo's Secretariat's Determination that the Case Requires the Binary Procedure	585
a. Chart	585
b. Explanation	586
B. Potential Negative Consequences on the Current System	587
1. Additional Financial Costs	587
2. Longer Procedures	588
C. Relationship Between Fines and Damages	588

---

<b>Synopsis</b>	591
<b>Zusammenfassung</b>	601
<b>Résumé</b>	615
<b>Appendix A – American Class Action (Rule 23 FRCP)</b>	627
<b>Appendix B – Preliminary Draft of Original Rule 23 FRCP</b>	633
<b>Appendix C – Multidistrict Litigation (Title 28 U.S.C. Section 1407)</b>	634
<b>Appendix D – Rule 7.1 of the Panel on Conditional Transfer Orders</b>	637