

Table of Contents

PREFACE V

TABLE OF CONTENTS VII

TABLE OF ABBREVIATIONS XV

BIBLIOGRAPHY XIX

 I. ARTICLES/BOOKS/REPORTS..... XIX

 II. CASE LAWXLV

 1. *United States*XLV

 2. *European Union*XLV

 3. *Switzerland*XLVI

 4. *Others*XLVI

 III. LEGISLATIONXLVI

 1. *United States*XLVI

 2. *European Union*XLVII

 3. *Switzerland*XLVIII

 4. *China*XLIX

 5. *Brazil* L

 6. *Others* L

 IV. OTHER CITED SOURCES LI

A. INTRODUCTION1

 I. OVERVIEW.....1

 II. OUTLINE AND PURPOSE3

B. STATUS QUO OF PUBLIC ANTITRUST ENFORCEMENT6

 I. UNITED STATES6

 1. *Institutional Structure*.....6

 a) Department of Justice..... 7

 b) Federal Trade Commission 7

 c) State Attorneys General..... 8

 2. *Procedure*9

 a) DOJ Antitrust Enforcement Procedure 9

 i) Civil Enforcement..... 9

 ii) Criminal Enforcement..... 10

 iii) Business Review Letters 11

 b) FTC Antitrust Enforcement Procedure 11

c) Judicial Review	12
3. <i>Leniency</i>	13
a) Corporate Leniency	13
b) Individual Leniency	14
II. EUROPEAN UNION	15
1. <i>Introduction</i>	15
2. <i>Institutional Structure</i>	16
a) Directorate General for Competition	17
b) European Courts	18
i) European Court of Justice	18
ii) General Court	18
iii) Independence and Expertise	19
3. <i>Procedure</i>	20
a) Overview	20
b) Criminal Enforcement	20
c) Commitments and Settlements	21
i) Commitments under Regulation 1/2003	21
ii) Special Settlement Procedure for Cartel Cases	22
4. <i>Leniency</i>	24
5. <i>Interaction between EU and National Antitrust Enforcement</i>	25
a) Decentralization of European Antitrust Law Decision-Making	26
b) Interaction Between EU and National Antitrust Authorities	26
c) Member State Authority to Displace Treaty Antitrust Norms	27
III. SWITZERLAND	28
1. <i>Institutional Structure</i>	28
a) Competition Commission	28
b) Secretariat of the Competition Commission	28
2. <i>Procedure</i>	29
a) Investigation and Decision-Taking	29
b) Judicial Review	30
c) Penalties and Sanctions	31
3. <i>Leniency</i>	31
IV. CHINA	32
1. <i>Institutional Structure</i>	32
2. <i>Procedure</i>	34
a) Penalties and Sanctions	34
b) Settlements	34
c) Abuse of Power of Government Officials	35
d) Transparency of Investigation and Decision-Finding	35
e) Independence of Antitrust Enforcement	36
3. <i>Leniency</i>	37
4. <i>Implementation of the Anti-Monopoly Law</i>	37

a)	Provisions on Monopoly Agreements.....	37
b)	Provisions on Abuse of Position	38
V.	BRAZIL.....	39
1.	<i>Institutional Structure</i>	39
2.	<i>Procedure</i>	41
a)	Overview.....	41
b)	Fines.....	41
c)	Criminal Enforcement	42
d)	Settlements	43
3.	<i>Leniency</i>	43
4.	<i>Competition Advocacy</i>	45
a)	Promotion of Competition and Illustration of Antitrust Enforcement	45
b)	Perception of Antitrust Enforcement	46
C.	STATUS QUO OF PRIVATE ANTITRUST ENFORCEMENT	47
I.	UNITED STATES	47
1.	<i>Overview</i>	47
2.	<i>Right of Action</i>	48
3.	<i>Class Actions</i>	49
4.	<i>Damages</i>	50
5.	<i>Contingency Fees</i>	51
6.	<i>Discovery</i>	52
II.	EUROPEAN UNION.....	53
1.	<i>Overview</i>	53
2.	<i>White Paper</i>	55
3.	<i>Directive on Private Damages Actions</i>	56
4.	<i>Implication of EU Law on National Private Enforcement</i>	58
III.	SWITZERLAND.....	59
1.	<i>Overview</i>	59
2.	<i>Right of Action</i>	60
a)	Legal Basis.....	60
b)	Consumers.....	60
c)	Consumer Associations	61
d)	Class Actions	62
3.	<i>Damages</i>	63
4.	<i>Contingency Fees</i>	63
5.	<i>Burden of Proof</i>	64
IV.	CHINA	64
1.	<i>Overview</i>	64
2.	<i>Class Actions</i>	65

3.	<i>Damages</i>	66
4.	<i>Contingency Fees</i>	66
5.	<i>Burden of Proof</i>	67
6.	<i>Practical Impact and Obstacles to Private Antitrust Enforcement</i>	67
V.	BRAZIL	68
1.	<i>Overview</i>	68
2.	<i>Right of Action</i>	69
3.	<i>Class Actions</i>	70
4.	<i>Damages</i>	71
5.	<i>Burden of Proof</i>	71
6.	<i>Settlements</i>	72
D.	ELEMENTS OF EFFICIENT PUBLIC ANTITRUST ENFORCEMENT	76
I.	INSTITUTIONAL STRUCTURE	76
1.	<i>Institutional Effectiveness</i>	76
a)	Independence and Accountability	77
b)	Transparency	77
c)	Confidentiality.....	78
d)	Administrative Efficiency.....	78
2.	<i>Multi-Agency Enforcement</i>	78
a)	Advantages of Multi-Agency Enforcement	79
i)	Independence and Diversification	79
ii)	Expertise	79
iii)	Inter-Agency Competition	80
b)	Drawbacks of Multi-Agency Enforcement	80
i)	Duplication of Fixed Costs.....	80
ii)	Coordination and Differential Outcomes	80
c)	Overall Assessment of Multi-Agency Enforcement.....	81
3.	<i>Adversarial and Inquisitorial Procedures</i>	82
4.	<i>Specialized Antitrust Courts</i>	84
II.	QUALIFICATION OF INDIVIDUALS	85
1.	<i>Government Officials</i>	85
2.	<i>Judiciary</i>	88
III.	CORRUPTION AND NEPOTISM	89
1.	<i>Grand Corruption</i>	89
2.	<i>Petty Corruption</i>	90
a)	Corruption of Government Officials	91
b)	Corruption of the Judiciary	93
3.	<i>Nepotism</i>	93
IV.	COMPETITION ADVOCACY	94

V.	TOOLS TO DETECT AND ATTACK ANTI-COMPETITIVE CONDUCT	97
1.	<i>Settlements of Antitrust Cases</i>	<i>98</i>
a)	Perspective of Defendants.....	98
b)	Perspective of Antitrust Agencies.....	98
i)	Speed	99
ii)	Cost Saving.....	99
iii)	Settlement Rewards	99
c)	Case Selection	100
d)	Rights of Defense.....	101
2.	<i>Leniency Agreements.....</i>	<i>102</i>
a)	Incentives for Participation in Leniency Programs.....	102
b)	Function and Outcome of Leniency Agreements	103
c)	Limits of Leniency Agreements	104
3.	<i>Dawn Raids.....</i>	<i>106</i>
a)	Purpose	106
b)	Legal Challenges	107
i)	Privilege Against Self-Incrimination	107
ii)	Right to Privacy	107
iii)	Rights of Defense.....	108
c)	Procedural Requirements	108
i)	Search Authorization	108
ii)	Conducting the Search.....	109
VI.	PENALTIES AND REMEDIES	111
1.	<i>Fines</i>	<i>112</i>
2.	<i>Prison Sanctions</i>	<i>113</i>
3.	<i>Injunctions</i>	<i>115</i>
4.	<i>Probability of Detection and Transparency of Sanctions.....</i>	<i>117</i>
a)	Probability of Detection.....	117
b)	Transparency of Sanctions.....	118
E.	ELEMENTS OF EFFICIENT PRIVATE ANTITRUST ENFORCEMENT	120
I.	INTRODUCTION	120
II.	CLASS ACTIONS	122
1.	<i>Purpose of Class Actions</i>	<i>122</i>
a)	Bundling of Claims	122
b)	Improving Detection	123
c)	Deterrence	124
2.	<i>Interaction Between Leniency Programs and Class Actions</i>	<i>124</i>
3.	<i>Risks of Class Actions</i>	<i>124</i>
a)	Moral Hazard	124
b)	Class Actions and State Authority.....	125
c)	Criticism of Class Actions	126

III.	DAMAGES.....	127
1.	<i>Calculation</i>	128
2.	<i>Deterrence</i>	128
3.	<i>Drawbacks and Risks of Treble Damages</i>	129
a)	Moral Hazard	129
b)	Cases Suitable for Treble Damages	130
c)	Treble Damages in Combination with Class Actions	131
4.	<i>Conclusion on Treble Damages</i>	132
IV.	BURDEN OF PROOF ISSUES AND DISCOVERY	132
1.	<i>Social Benefits of Discovery</i>	133
a)	Detection and Deterrence	133
b)	Settlement Quality	134
2.	<i>Social Costs of Discovery</i>	135
a)	Costs of Discovery.....	135
b)	Abuse of Discovery	135
V.	CONTINGENCY FEES	137
1.	<i>Risk Shifting</i>	138
2.	<i>Advantages for Plaintiff Lawyers</i>	138
a)	Potentially Higher Fees	138
b)	The Lawyer as an Entrepreneur.....	139
c)	Agency Problems	140
d)	Frequency of Litigation.....	140
VI.	FOLLOW-ON ACTIONS.....	141
1.	<i>Overview</i>	141
2.	<i>Interaction between Public Sanctions and Private Damages</i>	142
VII.	RISKS AND CHANCES OF PRIVATE ENFORCEMENT.....	143
1.	<i>Why Private Enforcement Should be Limited</i>	143
a)	Divergence between Private and Public Objectives	143
b)	Avoid Over-Deterrence.....	144
2.	<i>Why Private Enforcement Should be Encouraged</i>	145
F.	INTERNATIONALIZATION OF ANTITRUST ENFORCEMENT	147
I.	OVERVIEW.....	147
II.	ANTITRUST PROTECTIONISM AND DISCRIMINATION	149
1.	<i>Trade-Flow Bias</i>	149
2.	<i>Export Cartels</i>	150
3.	<i>Import Cartels</i>	151
4.	<i>Biased Enforcement</i>	151

III.	INTERNATIONAL COOPERATION	153
1.	<i>Forms of Cooperation</i>	153
a)	Networks.....	153
b)	Classical Administrative Cooperation	154
2.	<i>Benefits of International Cooperation</i>	154
3.	<i>Limits of Cooperation</i>	155
a)	Differences in Procedures.....	155
b)	Transparency Requirements.....	156
c)	Lack of a Binding Nature	156
IV.	INTERNATIONAL HARMONIZATION	157
1.	<i>Harmonization through Networks</i>	157
a)	International Competition Network	157
b)	World Trade Organization	158
c)	Organization for Economic Cooperation and Development	159
d)	United Nations Conference on Trade and Development	159
2.	<i>Harmonization through Cooperation and Mutual Influence</i>	160
3.	<i>Benefits of International Harmonization</i>	161
a)	Improvement of Antitrust Enforcement.....	161
b)	Avoiding Discrimination of Foreign Companies.....	162
c)	Issues of Heterogeneous Antitrust Norms.....	163
4.	<i>Pre-Conditions for International Harmonization</i>	164
5.	<i>Outlook for the Future</i>	165
V.	INTERNATIONAL ANTITRUST INSTITUTIONS AND JOINT ENFORCEMENT	166
1.	<i>International Antitrust Institutions</i>	166
2.	<i>Joint Enforcement</i>	169
a)	Overview	169
b)	Benefits of Joint Enforcement Agreements.....	172
3.	<i>Effects on Non-Member Jurisdictions</i>	173
4.	<i>Obstacles to the Creation of International Antitrust Institutions and Joint Enforcement</i>	174
a)	Costs of Establishing	174
b)	Loss of Sovereignty	174
c)	Lack of a Competition Culture.....	175
d)	Method of Antitrust Interpretation.....	176
G.	CONCLUDING REMARKS	180
I.	PUBLIC ENFORCEMENT	180
II.	PRIVATE ENFORCEMENT	181
III.	KEY DIFFERENCES BETWEEN DEVELOPED AND EMERGING JURISDICTIONS ...	182
IV.	INTERNATIONALIZATION OF ANTITRUST ENFORCEMENT	184