

# Private Enforcement of European Competition and State Aid Law

## International Competition Law Series

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### VOLUME 82

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# Private Enforcement of European Competition and State Aid Law

Current Challenges and the Way Forward

Edited by

Ferdinand Wollenschläger  
Wolfgang Wurmnest  
Thomas M.J. Möllers

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Analysis and the Way Forward

*Ferdinand Wollenschläger & Wolfgang Wurmnest* 355

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## CHAPTER 1

# Introduction

*Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M.J. Möllers*

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- I. Private enforcement of EU competition and state aid law in the European Union
  - A. Private enforcement of EU competition and state aid law is on the rise
  - B. Private enforcement of EU competition law after Directive 2014/104/EU
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## **I. PRIVATE ENFORCEMENT OF EU COMPETITION AND STATE AID LAW IN THE EUROPEAN UNION**

### **A. Private enforcement of EU competition and state aid law is on the rise**

This book is the fruit of an international conference that took place in Augsburg on 22 and 23 November 2018.<sup>1</sup> It addresses two key areas of EU law in which private law enforcement has become increasingly important over the last years, albeit to a different extent: EU competition law and EU state aid law. Both areas are examined from the EU perspective and from the perspective of the national law of selected Member States. In a concluding section, the country reports are evaluated from a comparative perspective to identify enforcement deficits and to discuss how the existing legal framework can be improved. In addition, it is evaluated to what extent the strengthening of private enforcement of competition law has a spill-over effect on the area of state aid law, a field in which the private enforcement of the EU law prohibition of unlawful state aids is ripe for being strengthened and possibly harmonised through a European instrument. Also taken into consideration is whether the private enforcement of state aid law projects its own spill-over effect in the field of competition law.

The section on competition law enforcement has the following background: The EU Member States have recently finished implementation of the so-called *Damages Directive* (Directive 2014/104/EU),<sup>2</sup> which covers important issues – but not all areas – of private enforcement of competition law. Furthermore, the Damages Directive provides full harmonisation in relation to many, albeit not all issues. The legal framework is therefore not completely harmonised in Europe, leaving room for forum shopping.<sup>3</sup> In view of this new legal framework, the ‘law in action’ for the enforcement of the European competition rules in various Member States is examined, in the process focusing on damages claims against cartels, which are currently the most common form of private law enforcement. This compilation is one of the first to be published after the transposition of the Damages Directive.<sup>4</sup>

The background of the section on state aid law is the following: In view of limited administrative capacities at the European level, the trend towards decentralising the review of state aid systems and the structural deficits associated with state aid law being enforced by national authorities (themselves responsible for breaches of state aid

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1. On the conference see Cornelia Kibler and Simon Zechmann, *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* [2019] EuZW 73–75; Johannes Stapf and Benedikt Wössner, *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward – Konferenz in Augsburg am 22. und 23.11.2018* [2019] NZKart 96–98.
  2. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014], OJ L349/1.
  3. Jürgen Basedow, *Die kartellrechtliche Schadensersatzhaftung und der Wettbewerb der Justizstandorte* [2016] Basler Juristische Mitteilungen 217, 239; Wolfgang Wurmnest, *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie* [2017] NZKart 2, 10.
  4. For a similar study see Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (OUP 2018).



law), the importance of private enforcement for an effective enforcement of EU state aid law has been continuously stressed and the number of cases before national courts has increased. Nonetheless, there is room for improvement both in terms of numbers and the efficiency of private enforcement. The main challenge results from the fact that, despite its importance, private enforcement has not been harmonised. Hence, the obligations resulting from EU law have to be enforced according to rules of national law which diverge greatly and do not provide for specific remedies. Against this background, a first step to strengthening private enforcement of state aid law is to analyse the mechanisms of enforcement available within the national legal orders. This allows identifying not only key obstacles to private enforcement in the relevant procedural and substantive rules but also best practices. On this basis and with regard to the experiences gained in the area of competition law, the need for a harmonisation on the EU level is explored, notably with regard to claims for damages, which form the basis of the recently adopted Directive 2014/104/EU in competition law. Such an analysis – which also includes the current case law, particularly in view of recent developments on both the EU and national levels – is at present not available in book form.

The book has a tripartite structure: The first part takes a closer look at the law of private enforcement of EU competition law after the implementation of the Directive 2014/104/EU. The second part deals with the European foundations of private enforcement of state aid law. The final part draws the strings together and evaluates the tool of private enforcement from a European and comparative perspective.

## **B. Private enforcement of EU competition law after Directive 2014/104/EU**

1. The part on private enforcement of EU competition law starts with a chapter on the European perspective written by *Wulf-Henning Roth* (Universität Bonn). *Inter alia*, this chapter explains the European concept of private enforcement of competition law as it is manifested in the Damages Directive. In addition, the relationship between public and private enforcement is highlighted, and tensions between the older case law (based on EU primary law) and the Damages Directive are evaluated. The European perspective is completed by a comment from *Johannes Holzwarth* (European Commission). He explains the European Commission's private enforcement policy and takes a look at proceedings pending before the European Court of Justice to evaluate their impact on private enforcement; further, he touches upon the draft guidelines on the passing-on of cartel overcharges.

2. The subsequent chapters contain national reports for five selected countries, thereby exploring the law in action following the implementation of the Damages Directive. The book first considers three legal systems of EU Member States which have considerable experience with the private enforcement of competition law. These jurisdictions are Germany, the United Kingdom and the Netherlands.

The German report is written by *Jens-Uwe Franck* (Universität Mannheim). *Germany* transposed the Damages Directive by amending the Act against Restraints of

Competition in June 2017.<sup>5</sup> As Germany has a relatively long tradition of competition law, it had already implemented reforms several years earlier to foster the enforcement of competition law by private plaintiffs. As a result, there is a significant body of case law in Germany on claims for damages arising from competition law infringements which are only in part affected by the transposition of the Damages Directive.

The *United Kingdom* is one of the leading European jurisdictions for claims in respect of damages arising from competition law infringements. There is a considerable amount of case law, and the UK has also attracted many foreign plaintiffs harmed by international cartels. The Damages Directive was transposed in March 2017.<sup>6</sup> As the UK has maintained more favourable rules for plaintiffs as far as this was compatible with the Directive and has also introduced measures of collective redress, its rules may serve as model for other states wishing to improve their legal framework for actions for damages. The UK report, which also tries to assess the impact of Brexit on private enforcement (based on a ‘no-deal’ scenario and based on the Withdrawal Agreement) is written by *Florian Wagner-von Papp* (Helmut Schmidt Universität/Universität der Bundeswehr Hamburg).

The Dutch report is a joint effort by *Rogier Meijer* and *Erik-Jan Zippro* (Zippro Meijer Advocaten). *The Netherlands* transposed Directive 2014/104/EU in January 2017.<sup>7</sup> Even before the transposition of the Directive, this country was an attractive forum for plaintiffs seeking compensation for competition law infringements. Not only national but also many international cases were litigated before Dutch courts. In addition, the Netherlands introduced measures for collective remedies.

In addition to these jurisdictions, the book takes into account the national systems of two states where such private enforcement actions have – at least from the view of the outsider – only recently emerged in greater numbers. In *France*, the private enforcement of competition law was on the rise even before the transposition of the Damages Directive in March 2017.<sup>8</sup> In addition, France is a very important civil law jurisdiction whose tort law system has influenced many other codifications in southern Europe. The French report was written by *Rafael Amaro* (Université de Caen Normandie).

In *Italy*, Directive 2014/104/EU was implemented by Legislative Decree no. 3/2017.<sup>9</sup> Given that prior to this point the system of private enforcement of competition

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5. Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen of 1 June 2017, BGBl. 2017 I, 1416.

6. The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, Statutory Instruments 2017 no. 385 of 8 March 2017.

7. Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht of 25 January 2017, Staatsblad van het Koninkrijk der Nederlanden 2017, 28.

8. Ordonnance no. 2017-303 of 9 March 2017 and Décret no. 2017-305 of 9 March 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles, JORF no. 59 of 10 March 2017, no. 29 and no. 31.

9. Decreto Legislativo 3/2017, Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell’Unione europea, Gazzetta Ufficiale no. 15 of 19 January 2017.

law seemed to be underdeveloped, the Italian contribution, written by *Enrico Camilleri* (Università degli Studi di Palermo) focuses on the changes and evaluates whether and to what extent they will foster private enforcement.

3. Since it would go beyond the scope of the publication to deal with all legal issues related to private enforcement, the editors have predefined four sets of questions that all the rapporteurs have addressed. These questions concern key issues of private enforcement.

The first issue concerns the question of the entity liable for competition law infringements. It was – at least before the *Skanska* judgment<sup>10</sup> of the European Court of Justice – hotly debated whether the liable party is exclusively the economic entity directly involved in the cartel or, in accordance with the principles applicable to infringement decisions of the EU Commission, also, for example, the parent company behind the cartel member where it exercises a decisive influence over its subsidiary. In this regard, there is a dispute not only as to whether the ‘economic entity doctrine’ should apply to damages claims, but also whether this transferal flows from the Damages Directive or from primary EU law.

The second issue concerns the binding effect of decisions of national competition authorities. Article 9 Damages Directive sets forth general rules. The reporters explain the scope and effects of the national implementation of these rules, which might reveal differences.

The third issue concerns the law of prescription (limitation of actions), which is of great concern in practice. The Damages Directive partly sets forth a minimum harmonisation, thus giving the Member States some leeway to structure the law. In light of these different regimes, limitation issues are of great practical importance and can incentivise ‘forum shopping’.

Finally, the national reporters should address the possibilities of plaintiffs having recourse to collective actions or (in case there are no collective-action mechanisms) pooling their claims by assignment. The Damages Directive does not touch upon collective redress mechanisms since the Member States could not reach an agreement on the specific structure of such a mechanism. However, the Commission has issued a recommendation to the Member States asking them to implement collective-action mechanisms. Some states (e.g., France, the Netherlands and Italy) have created collective actions whose effectiveness for the enforcement of competition law remains to be evaluated. In other states, such as Germany, assignment models have been emerged in legal practice allowing the pooling of claims. Both models are analysed.

In addition to these issues, all country reporters address specific issues which they believe that their respective Member State handles particularly well and also issues that raise potential impediments to the private enforcement of competition law. Each country report therefore follows the following general structure, but the reporters were of course free to adapt it to their needs:

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10. ECJ, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions* [2019] ECLI:EU:C:2019:204.

- Introduction.
- The development of private enforcement.
- What is effective and what are the impediments to private enforcement?
- Which entity is liable for damages.
- The binding effect of decisions of competition authorities.
- Prescription (limitation of actions).
- Collective actions/pooling of claims.

### C. Private enforcement of EU state aid law

1. The part on private enforcement of EU state aid law first introduces the general EU law framework (*Fernando Pastor-Merchante*, IE University), while a second contribution specifically focuses on the role of the European Commission as well as its cooperation with national courts (*Simone Donzelli*, European Commission). The concept of private enforcement of state aid law as well as its relationship with public enforcement is explored. Moreover, its development and the EU legal framework as established particularly in the European Court of Justice's case law – but also in the practice of the EU Commission – is sketched. A particular focus lies on the different functions that national courts play in the area of state aid law.

2. Since private enforcement in EU state aid law has, unlike in competition law, not been harmonised, the (national) implementation of the general EU law requirement of effective (private) enforcement of EU state aid law is of great interest. Insofar, the subsequent chapters found in this part will analyse different legal systems of EU Member States which have substantial experience with private enforcement: France (*François Lichère*, Université Jean Moulin Lyon), Germany (*Sebastian Unger/David Hug*, Ruhr-Universität Bochum), Italy (*Roberto Caranta/Benedetta Biancardi*, Università degli Studi di Torino), the Netherlands (*Jacobine E. van den Brink*, Universiteit van Amsterdam, and *Willemien den Ouden*, Universiteit Leiden), Spain (*Luis Arroyo Jiménez*, Universidad de Castilla-La Mancha, and *Patricia Pérez*, Cuatrecasas) and the United Kingdom (*Christopher Bovis*, University of Hull).

The editors have predefined key issues of private enforcement that all the rapporteurs have addressed. These are:

First, apart from an overview on the general legal framework, the contributions analyse which remedies are available under which conditions, asking further which specific obstacles in the relevant procedural and substantive as well as which best practices may be identified. Notably, the issue of damages is explored in more detail since, on the one hand, the availability of damages constitutes a strong incentive for competitors to embark on the route of private enforcement, but on the other hand their practical role seems to be limited in view of the difficulties in establishing causation and the existence of a damage. A further potential obstacle to effective private enforcement seems to be information deficits, which is why their relevance and possible counter-measures, such as competitors' claims seeking access to information, have to be

addressed. Moreover, it is asked whether specific difficulties in cross-border cases have become manifest.

A second key issue concerns the cooperation and coordination between national courts and the European Commission, since private and public enforcement may overlap, especially in view of assessing the existence of state aid: To what extent does a decision of the European Commission to initiate a formal examination procedure produce a binding effect? Such effect is, in principle, required by EU law, but it has been qualified by national courts such as the German Supreme Civil Court (Bundesgerichtshof). Moreover, how do national courts establish the existence of state aid and to what extent do they cooperate with the European Commission in this regard; in particular, what is the relevance of requests for information/observations and of *amicus curiae* interventions under Article 29 Regulation 2015/1589?

Ultimately, the aforementioned aspects should lead to general findings on private enforcement within the national legal orders, thereby including observations on: its development (is there any reluctance to be observed, like in Germany?); any influence of competition law; its relevance and effectiveness, this including a discussion of possible improvements (key obstacles to private enforcement in the relevant procedural and substantive rules, best practices, a need for codification); and its role in the context of enforcing (EU) law, notably with respect to its relationship with public enforcement (what is the appropriateness of allocating enforcement tasks to the judiciary, also in view of the binding effect of executive decisions?).

In addition to these issues, all country reporters address specific issues which they believe their Member State handle particularly well and also those issues raising potential obstacles in their country. Each country report in the state aid part, therefore, follows the following general structure, but the reporters were, of course, free to adapt this structure to their needs:

- Introduction.
- The development of private enforcement.
- Legal framework.
- Enforcement of the standstill obligation (Article 108(3) TFEU) and of the EU Commission's final decision (remedies and information deficits).
- Cooperation and coordination between national courts and the European Commission.
- Overall assessment in view of key obstacles, best practices and the need for codification.

## **II. THE BOOK AS AN EFFORT OF THE JEAN-MONNET CENTRE OF EXCELLENCE INspiRE**

### **A. People**

The Jean-Monnet Centre of Excellence INspiRE (European Integration – Rule of Law and Enforcement) at the University of Augsburg for research on legal enforcement aims to combine several legal spheres and to collaborate across the various legal areas because similar questions arise in multiple Member States of the European Union as well. Its mission is to conduct research on European law from the perspective of legal enforcement ('law in action'). The people behind INspiRE are *Thomas M.J. Möllers*, *Ferdinand Wollenschläger*, *Wolfgang Wurmnest* (all Augsburg), *Beate Gsell* (Munich), *Frédérique Ferrand* (Lyon), *Enrico Camilleri* (Palermo) and *Tong Zhan* (Beijing). It is funded by the Erasmus + Programme of the European Union.

### **B. Methodology**

The research project is based on three pillars.

First, the 'intra-disciplinary-pillar' is of particular importance; through this approach, the problem is taken into account by treating a general topic from the viewpoint of different fields of law. This allows an in-depth depiction of the underlying difficulties within the framework of legal enforcement, and it enriches research with synergistic effects vis-à-vis innovative solutions existing at the macro level. The first INspiRE conference in November 2018 discussed the issue of private enforcement of EU competition and state aid law; the second conference in May 2019 dealt with issues surrounding the enforcement of consumer and capital market law.<sup>11</sup>

The second pillar is the comparative perspective. In Europe, a purely national perspective makes little sense, even though many approaches in research are still oriented towards this standard. By contrast, the Centre of Excellence involves the participation of, for example, researchers from Germany, France and Italy so as to acquire a broader perspective. A horizontal comparison of law can serve to optimally depict the strengths and weaknesses of an individual solution and thus mutually enrich the legal systems involved. Various other national legal systems, including those of the Netherlands, Great Britain and Spain, are also taken into account.

Finally, the research is based on an inductive approach. The idea is to start with the specifics of different legal areas (competition law, state aid law, consumer law, capital market law etc.) and to progress to general principles. In which legal fields do civil damage claims and class-action claims already exist? Are there requirements which can be generalised, a standard of comparison, the *tertium comparationis*? Subsequently, a conclusion is drawn deductively, moving from general to specific. At this point, it is not yet possible to present the final results of the INspiRE research

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11. Beate Gsell and Thomas M.J. Möllers (eds), *Enforcing Consumer and Capital Market Law – The Diesel Emissions Scandal*, forthcoming.

project. Competition law will certainly also affect other areas of law. Accordingly, legal scholars are already discussing the transferability of selected legal instruments from one field of law to another.<sup>12</sup>

### C. The project in context

Apart from the two international academic conferences already mentioned, the project tries to reach a broader public by organising panel discussions on the enforcement of EU law. The objective is to raise the insight among citizens as to the relationships between national and European law. In 2015, an event regarding TTIP, the then planned Free Trade Agreement between the EU and the USA, attracted about 250 persons.<sup>13</sup> Another event organised in summer 2017, in cooperation with the Europa-Union and the city of Augsburg, dealt with mechanisms of collective redress.<sup>14</sup> Finally, in November 2018 a panel discussion on the issue of data protection took place.<sup>15</sup>

Moreover, INspIRE aims at ameliorating the access to law. The established database on German and European Economic Law ‘CAPLAW’<sup>16</sup> is constantly being expanded with national court decisions relating to European law. Decisions of national courts that have been enacted after a preliminary ruling procedure before the European Court of Justice are translated into English and published online in the database. These

12. See Thomas M.J. Möllers and Bernhard Pregler, *Zivilrechtliche Rechtsdurchsetzung und kollektiver Rechtsschutz im Wirtschaftsrecht – Ein Vergleich der kollektiven Rechtsdurchsetzung im Wettbewerbs-, Kartell-, Gesellschafts- und Kapitalmarktrecht* [2012] ZHR 144, translated in: *Civil Law Enforcement and Collective Redress in Economic Law – A comparison between collective redress actions in competition, antitrust, company and capital markets law* [2013] Europa e diritto privato 27. Also contributing to the discussion: Philipp Maume, *Staatliche Rechtsdurchsetzung im deutschen Kapitalmarktrecht* [2016] ZHR 358, 365; Caroline Geiger, *Kollektiver Rechtsschutz im Zivilprozess* 205 et seq. (Mohr Siebeck 2015); Thomas M.J. Möllers, ‘Private Enforcement of Competition Law in Europe’ in: Henning Rosenau and Nghia Tang Van (eds), *Economic Competition Regime: Raising Issues and Lessons from Germany* 43, 51 (Nomos 2014).
13. *TTIP Chance oder Risiko? – Transatlantic Trade and Investment Partnership* [Chances and Risks of TTIP] (5 May 2015). Participants of the panel discussion: Joachim E. Menze, European Commission, Head of the Regional Office in Munich; Linus Förster, Member of the Bavarian Landtag; Christine Kamm, Member of the Bavarian Landtag; Bruno Marcon, Attac Germany; William E. Moeller, U.S. Consulate General, Consulate Munich; Thomas M.J. Möllers, University of Augsburg; Thorsten Frank, Europa-Union District Association Augsburg.
14. *Sammelklagen in der EU – Fluch oder Segen für den Verbraucherschutz?* [Class actions in the EU – A curse or blessing for consumer protection?] (18 July 2018). Participants of the panel discussion: Beate Czerwenka, Federal Ministry of Justice and Consumer Protection; Florian Popella, Bavarian Industry Association; Astrid Stadler, University of Konstanz; Ottmar Lell, Federation of German Consumer Organisations; Thomas M.J. Möllers, University of Augsburg; Thorsten Frank, Europa-Union District Association Augsburg.
15. *Google, Amazon, Facebook – Wer hat ein Recht auf meine Daten?* [Google, Amazon, Facebook – Who has a right to my data?] (13 November 2018). Participants of the panel discussion: Michael Schmidl, Attorney-at-law in Munich/University of Augsburg; Volker Ullrich, Member of the German Bundestag; Werner Hülsmann, German Association for Data Protection; Werner Stengg, European Commission; Michael Will, Bavarian State Ministry of the Interior; Rita Bottler, Bavarian Chamber of Commerce and Industry; Thomas M.J. Möllers, University of Augsburg; Thorsten Frank, Europa-Union District Association Augsburg.
16. [www.capl原因.eu/inspire](http://www.capl原因.eu/inspire) (accessed 20 August 2019). The database is (partly) available in several languages, such as German, English, French and Chinese. The database is publicly accessible and generates around two million hits annually.



judgments provide information on how the national judges methodologically adapt and apply the rulings of the European Court of Justice to national law. Until now, such judgments existed only in the respective national language, not in other languages of other Member States. Decision collected in the CAPLAW database can also be those that – despite European relevance – have not led to preliminary rulings. The collection of such important national decisions allows other scholars, judges, lawyers and the interested public (including journalists) to make horizontal legal comparisons, and it will thus ultimately serve the enforcement of European law.

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