



**INspIRE – European Integration –
Rule of Law and Enforcement**

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Results of the conference:

Enforcing Consumer and Capital Market Law in Europe: The Diesel Emissions Scandal

Beate Gsell/Thomas M.J. Möllers (eds.), forthcoming

Public and private law enforcement and in particular mechanisms of collective redress in the different jurisdictions have often been compared. However, the conference and planned book differ from previous projects in that they combine an international and intradisciplinary approach to legal comparison with the reference to an actual and concrete global collective damage event (the diesel emission scandal). In this way, we strive to achieve precise results achieved on a broad comparative legal basis about the strengths and weaknesses of the different forms of public and private law enforcement. Finally, the project is not limited to an analysis of the applicable law but also offers suggestions to improve the law de lege ferenda.

The planned book, that will be published by Intersentia in Oxford in 2020, is based on the results of the international conference on 'Enforcing Consumer and Capital Market Law in Europe' that took place at the University of Augsburg on 23 and 24 May 2019. It had been a very successful conference with productive discussions on the legal situation in the individual countries. The project focuses in particular on the different approaches in the various legal systems to enforce Consumer and Capital Market Law and uses the specific example of how different legal systems cope with the diesel emission scandal. Volkswagen sells diesel vehicles in the entire world, which lead to the tampering with the emission values being known in the entire world. The diesel scandal has implications for the deceived consumer who purchased a faulty product. At the same time, the investor, who was not informed about



the scandal on time, was also deceived. Based on decided and pending cases, the book demonstrates how fast and efficient authorities, but also private claimants, can take steps against the violation of rights.

1. The international and intradisciplinary analysis will firstly be based on country reports. The country contributions have a uniform structure due to two given case studies and questions. Thus, specific remedies for legal enforcement will be analysed. In many countries, the authorities are investigating the Volkswagen corporation as well as its affiliates, such as Audi. The authorities impose fines, arrest employees or issue driving bans. In many member states of the European Union, victims or their representatives are suing for damages. Especially helpful are different types of bundled claims or group and class action suits, which by now have been filed, for example, in the Netherlands, the UK, Germany, and Austria. In view of the above, three areas had been examined: law enforcement by public institutions, law enforcement by private players and the connection of these legal processes. The country reports had been accompanied by two to three comments of practitioners. Renowned lawyers have shared their extensive practical experience in Capital Market and Consumer Law enforcement. They have highlighted problems in daily work and discussed proposals on how to make enforcement more effective in Europe. Outside the European Union certain legal systems have proven to be more effective in solving problems with the diesel emission scandal than others, such as the USA, but also Australia, Brazil, and China. In contrast, in various countries of the European Union such as Germany and Austria there are obvious gaps in effective law enforcement of Capital Market Law as well as Consumer Law.

2. In the second part, the different instruments of enforcing Consumer Law and Capital Market Law are contrasted with each other in a comparative legal analysis. Thus, instruments and measures that have proved effective or less effective in individual states are examined. On the basis of this critical assessment, country analysts should advance the current state of discussion in several countries of the world and member states of the EU. Firstly, *public sanctions* had to be considered: How come the public authorities in the US are so effective? How is the relation between the public authorities and the prosecution designed? Which possibilities of comparing the measures exist? Do eliminations of consequences, damages, and skimming of profits (by fines) exist? In which countries is there a deterrent fine? Compared to private enforcement, how strong is the monitoring and law enforcement by public authorities or other public bodies? Secondly, in the area of *private claims* we discussed claim bundling, group and class action suits, disclosure rights, simplifications to prove the causation and to determine damages. What forms of *collective actions* are available (class action, collective redress, representative action, etc.)? Who is entitled to bring an action? How can collective redress actions possibly be financed? Have substantive assignment models developed for the process-based



bundling of compensation claims (myflight/myright, etc.)? How do they possibly fit into the respective procedural landscape? Does facilitation to give proof exist – how is the burden of proof distributed? Are there any demands for information against the alleged injuring party? Are remedies such as eliminations of consequences, damages, and skimming of profits available? Where does the damages regime work? Where the skimming of profits? And thirdly we discussed the *general procedural law* and in particular the correlation between parallel or consecutive legal processes: Is there a binding effect of decisions by public authorities and interruption of the lapse of time? Is a coexistence of several legal actions possible? What is the binding effect of judgments for subsequent proceedings? Are there any procedural simplifications in Consumer and Capital Market Law? When is the statute of limitations for collective redress suspended?

If the different legal systems are compared to each other, it is apparent that the United States, but also e.g. Australia, have very fast and effective enforcement of the law. With the fines in the United States amounting to 30 billion dollars, these can, without doubt, be described as impressive. Nevertheless, there is a risk of excessive liability, as the substantial damages amount to far less. In Europe in some countries the exact opposite can be seen. There is insufficient legal enforcement because public authorities and courts react considerably slower and far less decisively than in the United States or Australia. Apart from well-known differences between the legal systems, in particular the reticence in continental Europe towards punitive damages this appears to be due at least in part to a lack of effective procedural instruments of collective redress as well as to an insufficient interaction between public and private law enforcement.

3. Based on the findings of the current situation, in the last part of the book, proposals for improvements and suggestions for reforms are made with the aim of giving impetus to European and national legislation. However, when searching for improvement suggestions, the solutions of particularly effective legal systems such as the US-American law or the Australian Law cannot simply be incorporated unchanged into European law. A reasonable compromise combining effective enforcement with respect for the prevailing legal concepts and values in Europe and at the same time avoiding excessive and abusive litigation needs to be found. Four areas can be distinguished:

a) In the area of *public enforcement* criminal fine regulations need to be optimised in order to improve their deterrent and compensatory effects. It is e.g. not very convincing if the fines in Germany are used for University renovations by the federal states instead of serving environmental protection or the affected citizen. It should also be discussed if a criminal liability for companies should be introduced. In order to avoid conflicts of interests between national authorities and national enterprises, a devolution of interference competences to the European level should be considered in cross-border



cases affecting the internal market. The past has shown, that individual vehicle licensing agencies did not proceed with the necessary assertiveness against unlawful activities.

b) In the area of *private enforcement*, there is a particular need for reform in two respects: On the one hand the traditional concept of damages needs to be expanded towards a more flexible understanding, not limited to the granting of precise compensation for the specific loss suffered by an individual. In addition to the international comparisons, intradisciplinary comparisons with other areas of law (e.g. European Competition and State Aid Law) can be drawn. The European Damages Directive 2014/104/EU leaves room for very different approaches to the concept of damage. For example, it is conceivable to harmonise the skimming of profits on the European level. On the other hand, compensatory collective actions should be introduced at European level, as envisaged in the Proposal for a Representative Actions Directive COM(2018) 184. However, not only consumer associations should be entitled to bring such actions, but also other representatives such as specialised law firms. If the European legislature is not willing to extend standing to lawyers, it must be ensured by other means that the respective representatives are provided with sufficient financial means in order to be able to conduct the collective actions effectively. Moreover, at least with regard to minor damages, the opt-out-system should be adopted in order to overcome the individual victim's so called rational apathy, leading to the automatic participation of all injured parties in the scope of the proceedings. Alongside information claims could be granted to the individual states analogously to the Damage Directive 2014/104/EU.

c) It also seems beneficial to better *connect private and public enforcement*. This way, e.g. the state or a state's representative could act as the claimant for all affected citizens. Information claims against public authorities could reduce the information deficit of the data plaintiff. Decisions by public authorities could have a binding effect and lead to an interruption of the lapse of limitation periods. Such legal instruments already exist in the area of Antitrust Law.

d) Finally, *internal company investigations* are of particular interest. These can be particularly effective, as the company itself is the best-informed legal subject for avoiding violations of the law; the company is an information monopolist. Many forms of monitoring under company law already exist, such as the supervision by certified public accountants and the supervisory board, as well as internal controlling and compliance. Because misconduct as not yet been adequately sanctioned, these company internal supervisory structures have often been circumvented. If the fines were significantly increased and the monitoring-systems applied better, this would also improve the internal company monitoring.

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