



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

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Results of the conference:

**Private Enforcement of European Competition and State Aid Law:
Current Challenges and the Way Forward**

Ferdinand Wollenschläger, Wolfgang Wurmnest and Thomas M.J. Möllers (eds.), forthcoming

1. The international conference that took place in Augsburg on 22 and 23 November 2018 and the book resulting from the conference address two key areas of EU law in which private law enforcement has become increasingly important: EU competition law and EU state aid law. Both areas have been examined from the EU perspective and from the perspective of the national law of selected member states. In a concluding section, the country reports have been evaluated from a comparative perspective in order to identify enforcement deficits and to discuss how the existing legal framework can be improved. In addition, it has been evaluated to what extent the strengthening of private enforcement of competition law has a spill-over effect in the area of state aid law, a field in which the private enforcement of the EU legal prohibition against unlawful state aid should be strengthened and possibly harmonised through a European instrument.

2. The first part of the book deals with private enforcement of EU competition law. It starts with a chapter on the European perspective written by *Wulf-Henning Roth* (Universität Bonn), explaining the basic structure of the Damages Directive 2014/104/EU and evaluating the tensions between the new regime and the older case law based on EU primary law. The European perspective is completed with a comment from *Johannes Holzwarth* (European Commission) on the EU



Commission's private enforcement policy and the (then) draft guidelines on the passing-on of cartel overcharges.

The subsequent country reports analyse selected issues regarding the transposition of the Damages Directive 2014/104/EU, such as the question of which entity is liable for damages, the reach of the binding effect of decisions of national competition authorities and the rules on prescription (limitation of actions). In addition, the country reports evaluate the general institutional framework for private enforcement and describe the impediments to private enforcement and also instruments that are considered to be beneficial to private enforcement of competition law. A particular focus lies on mechanisms of collective redress introduced by national lawmakers as such instruments are a key in overcoming the rational apathy of consumers harmed by competition law infringements. Some of the selected countries have more and some have less experience with private actions for damages for competition law infringements. The reports cover the following EU member states: France (*Rafael Amaro*, Université de Caen Normandie), Germany (*Jens-Uwe Franck*, Universität Mannheim), Italy (*Enrico Camilleri*, Università degli Studi di Palermo), the Netherlands (*Rogier Meijer* and *Erik-Jan Zippro*, Zippro Meijer Advocaten, Amsterdam) and the United Kingdom (*Florian Wagner-von Papp*, Helmut Schmidt Universität/Universität der Bundeswehr, Hamburg).

The key findings of the contributions can be summarised as follows: The European report has argued that the rules of the Damages Directive are in line with EU primary law, even if the European legislature has altered the older case law of the European Court of Justice that was based on the principle of effectiveness, a principle deriving from primary law. As the conformity of some of the Directive's rules with EU primary law is, however, disputed, it is submitted that national courts should initiate preliminary reference proceedings when confronted with such a matter. The national reports have shown that the Directive's rules – as far as they were analysed in this study – were implemented in conformity with the Directive's spirit. In addition, the transposition of the Damages Directive has ameliorated the legal framework for private actions in all jurisdictions analysed, albeit to a very different extent. There is also a growing body of case law on private enforcement. Many cases have been reported from Germany, the Netherlands and the UK. Also in France there is private competition law enforcement, though less in the area of follow-on actions against cartel members. Up to now, the Italian legal framework and court practice have seemed to be not very favourable for the recovery of damages resulting from competition law infringements.



The overall picture presented by the reports shows, however, that the enduring discussion on the adoption of a European instrument on damages claims resulting from competition law infringements coupled with the legislative amendments introduced by the member states have brought life to this area of law in the last years. Given that the Damages Directive only harmonises selected legal rules and in part follows the minimum harmonisation approach, national lawmakers and courts still play a major role in constructing a sound and effective system of competition law enforcement through private actors. Many of the impediments to private enforcement mentioned in the country reports can be fixed only at the national level, given the limited competence of the EU in the area of civil procedural law. Such impediments may flow from the lack of specialised courts, high litigation cost, courts lacking sufficient resources to handle complex actions for damages, or rules of proof that do not reflect the complexity of competition law.

3. The second part on the book analyses the private enforcement of EU state aid law. It first introduces the general EU law framework (*Fernando Pastor-Merchant*, IE University), while a second contribution specifically focuses on the role of the European Commission as well as its co-operation 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 especially in the ECJ's case law – but also in the practice of the EU Commission – are sketched. A particular focus lies on the different functions that national courts play in the area of state aid law.

Since, the private enforcement of 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 following chapters of the second part 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 di Torino), the Netherlands (*Jacobine van den Brink*, University of Amsterdam, and *Willemien den Ouden*, Leiden University), Spain (*Luis Arroyo Jiménez* and *Patricia Pérez*, University of Castilla-La Mancha) and the United Kingdom (*Christopher Bovis*, University of Hull).



With regard to key findings and in terms of general relevance, many national reports have stressed that private enforcement plays only a limited role in state aid law. Nevertheless, a certain general importance has been noted for the Netherlands, and there is, moreover, a definite significance in the Netherlands and Italy in the context of public procurement litigation. Furthermore, as a general observation, some progress has been noted. With regard to the availability of damages, which may constitute a strong incentive for competitors to embark on the route of private enforcement, as the example of competition law shows, a certain, albeit limited progress has been noted for some of the legal orders considered. However, it remains true that the difficulties with regard to proving causation and the existence of a damage remain crucial, and the evaluation of damage continues to be problematic; moreover, it is disputed whether and under which circumstances receiving illegal state aid may give rise to liability and constitute unfair competition. Finally, information deficits which have been observed constitute a significant obstacle for competitors with regard to pursuing private enforcement.

4. The comparative study in the last part of the book reveals that there is only a limited cross-fertilization between the rules on the private enforcement of EU competition and state law. Some spill-over effects from the area of competition law to the area of state aid law can be traced in academia, though not in legal practice. By contrast, one cannot identify any spill-over from state aid law to competition law.

The discussion on possible actions to further strengthen the private enforcement of competition law in Europe reveals that – after adoption of the Damages Directive – the majority of work needs to be done at the national level by lawmakers and courts to provide for an effective system of private enforcement. At the European level, the EU Commission should, in the years to come provide as much support as possible on the application of the Damages Directive by drafting guidelines on many issues. The recently adopted passing-on guidelines are a promising first step. More guidelines of this nature need to follow, and they should be regularly updated. Additionally, opinions published by expert groups composed, for example, of scholars and judges could provide valuable information for courts. Another gap in the current legal framework that optimally would be filled by EU law is the lack of functioning mechanisms of collective redress for private competition law claims in many member states, such as Germany, France and presumably also Italy. If this gap cannot be closed at the European level, the national legislatures should amend the existing framework to close



enforcement gaps. Finally, new rules could be added to the Damages Directive in the middle and long run to further harmonise the law.

The discussion on possible actions to strengthen the private enforcement of state aid law in Europe reveals the key role of access to information; however, it remains disputed whether lowering the standards with regard to entitlement to damages (burden of proof, evaluation of damage) is feasible. Moreover, in view of the remaining difficulties in rendering private enforcement more effective, the option of improving public enforcement also has to be considered. In this regard, entrusting national competition authorities with monitoring state aid law might be a sensible way forward.