

Editorial

Public and Private Enforcement of European Private Law: Perspectives and Challenges

1. Introduction

Legal scholars across Europe traditionally studied law from the internal perspective, that is, the perspective of a judge. Indeed, the rules governing private relationships were conventionally enforced by the judiciary at the initiative of private parties through the means available within private law. The characteristic private law approach to enforcement requires, for example, that the defendant pays compensation to a person directly harmed by the defendant's breach of the private law rule. In the course of private adjudication, civil courts across Europe also played an important role in the development of private law by filling in open-ended private law norms, such as good faith, good morals, or public policy. Substantive private law rules were thus closely connected to individual private enforcement. The link between the two was reflected in the development of legal education and classical legal scholarship in Europe.

This traditional image of enforcement in the field of private law, however, no longer reflects the reality in the areas governed by European private law, such as consumer law, financial services law, energy law, or telecommunications law. Not only has the Court of Justice of the European Union (CJEU) become increasingly influential in shaping the judicial private enforcement landscape in these fields. The EU legislator has also been promoting the public enforcement of European private law by administrative agencies as well as its extra-judicial private enforcement, thus pushing for a move away from litigation before civil courts.

These developments give rise to many questions about the shape of public and private enforcement of European private law in each specific field, the interplay between these two enforcement modes, and the implications of the changing enforcement reality for the multi-level EU legal order and the law as such. These issues were central to a discussion at a conference on *Public and Private Enforcement of European Private Law: Perspectives and Challenges*, which was held on 25 April 2015 at the University of Groningen (the Netherlands).¹

1 The conference was organized by the Department of Private Law and Notarial Law of the University of Groningen in collaboration with the Groningen Centre for Law and Governance (GCL), Groningen Graduate School of Law (GCSL) and the Royal Netherlands Academy of Arts and Sciences (*KNAW*).

Apart from my introductory piece, this Special Issue of the European Review of Private Law contains the elaborated versions of the papers presented at this conference. The seven contributions selected for publication therein aim to enhance the body of knowledge concerning the public and private enforcement of European private law² and to foster further debate on this topic. In the present context, the concept of European private law is understood in a broad sense and embraces all legal rules of EU origin concerning relationships between private parties regardless of the nature of the law – public or private – in which they have been included in national legal systems.

Before introducing each contribution (s. 5), I will outline below three major developments which will be addressed in more detail in this Special Issue. In particular, I will discuss the growing role of the EU in the enforcement landscape (s. 2), the rise of administrative enforcement and extra-judicial private enforcement in the European private law domain (s. 3), and the increasing need for conceptualizing the interplay between public and private enforcement within a particular context (s. 4).

2. The Growing Role of the EU in the Enforcement Landscape

Originally, the role of the EU in the enforcement of European private law was rather limited. The EU's restraint in this area was dictated by the principle of procedural autonomy. As it is well known, this principle implies that it is generally for the Member States to decide how substantive private law rules of EU origin are to be enforced in national legal orders. Although the procedural autonomy remains an important principle of EU law, it has progressively changed its meaning. Today, this principle no longer implies a complete separation of EU and national spheres in enforcement issues in the sense that the enforcement of European private law belongs to the exclusive competence of the Member States.

2 On this topic see, for example, W.H. VAN BOOM & M. LOOS (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Groningen: Europa Law Publishing 2007); F. CAFAGGI & H.-W. MICKLITZ (eds), *New Frontiers of Consumer Protection: The Interplay between Private and Public Enforcement* (Antwerpen/Oxford/Portland: Intersentia 2009); H.-W. MICKLITZ, 'Administrative Enforcement of European Private Law', in R. Brownsword et al. (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing 2011), p 563; CH. HODGES, *The Reform of Class and Representative Actions in European Legal Systems – A New Framework for Collective Redress in Europe* (Oxford: Hart Publishing 2009); O.O. CHEREDNYCHENKO, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?', 22. *ERPL (European Review of Private Law)* 2014, p 37; W.H. VAN BOOM et al. (eds), *The Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Farnham: Ashgate 2014).

In the first place, the procedural autonomy of the Member States has been increasingly limited in the secondary EU legislation. For example, by adopting the Consumer Protection Cooperation Regulation³ and a number of sector-specific measures, such as the Markets in Financial Instruments Directive I (MiFID I)⁴ and Markets in Financial Instruments Directive II (MiFID II),⁵ the EU pushed Member States to ensure the existence of administrative agencies designed for securing the smooth functioning of the markets and, what is more, consumer protection in such markets. In some areas, the EU law even prescribed the establishment of *European* administrative agencies. This has been the case, for instance, in the field of financial markets where, in response to the recent financial crisis, a new institutional framework for financial supervision was created – the European System of Financial Supervision (ESFS). The latter is formed by three European Supervisory Authorities (ESAs) – the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), and the European Insurance and Occupational Pensions Authority (EIOPA) – the European Systemic Risk Board (ESRB), and local supervisory authorities.

In the area of private enforcement, too, the EU legislator has adopted such important measures as the Directive on Consumer ADR⁶ and the Regulation on Consumer ODR.⁷ In addition, many EU directives in the field of European private law contain procedural rules concerning the burden of proof, means of proof, legal costs, or the free choice of a lawyer. For example, the rules on the burden of

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- 3 Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October on cooperation between national authorities responsible for the enforcement of consumer protection laws, *OJEU* 2004 L364/1, as subsequently amended (see consolidated text in EUR-LEX). This Regulation organizes cooperation between national consumer protection authorities with respect to intra-community infringements of the laws to protect consumers that implement the EU legislation listed in Annex.
 - 4 Directive 2004/39/EC of the European Parliament and of the Council of 21 Apr. 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *OJEC* 2004 L 145/1 (MiFID I).
 - 5 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), *OJEU* 2014 L 173/149 (MiFID II).
 - 6 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, *OJEU* 2013 L 165/63 (Directive on Consumer ADR).
 - 7 Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, *OJEU* 2013 L 165/1 (Regulation on consumer ODR).

proof can be found in the Product Liability Directive,⁸ the Consumer Sales Directive,⁹ and the Unfair Commercial Practices Directive.¹⁰

Quite apart from the growing importance of the EU secondary legislation in shaping the enforcement landscape, the procedural autonomy of the Member States has also been progressively limited by the well-known principle of effectiveness as interpreted and applied by the CJEU. The analysis by Reich in this context is particularly illustrative.¹¹ Based on the Court's case law and the EU fundamental right to an effective remedy laid down in Article 47 of the EU Charter of Fundamental Rights, Reich distinguishes three functions of the principle of effectiveness: (1) the eliminatory function, (2) the hermeneutical function, and (3) the remedial function. The eliminatory function of the effectiveness principle is derived from the well-established case law of the CJEU under which national law cannot render the exercise of the EU rights practically impossible or excessively difficult.¹² As its name already suggests, this function is about eliminating obstacles to effective protection of the rights conferred on individuals by EU law rather than creating remedies for the breaches of EU law in the national legal orders.

While the eliminatory function thus reveals the negative dimension of the effectiveness principle, the latter also has a positive dimension which is reflected in its hermeneutical and remedial functions. The hermeneutical function implies a positive *effet utile* or 'full effectiveness' test as developed by the CJEU in *Manfredi*.¹³ Under this test, by interpreting EU primary and secondary law, the judge should establish the EU rights that must be protected by *adequate* remedies (*ubi ius, ibi remedium*). In the context of consumer *acquis*, this could lead, for example, to the extension of liability provided for by a particular EU measure to cases not explicitly mentioned therein, as illustrated by the CJEU's judgment in

8 Council Directive 85/374/EEC of 25 Jul. 1985 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products, *OJEC* 1985 L 210/29, Art. 7.

9 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJEC* 1999 L 171/12, Art. 5.

10 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, *OJEU* 2005 L 149/22, Art. 12.

11 N. REICH, *General Principles of EU Civil Law* (Cambridge/Antwerpen/Portland: Intersentia 2014), pp 89 ff. See also C. MAK, 'Rights and Remedies - Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters', in H.-W. Micklitz (ed.), *Constitutionalization of European Private Law* (Oxford: Oxford University Press 2014), p 236.

12 Case 33/76 *REWE Central Finanz* [1976] ECR 1989, para. 5; Case 45/76 *Comet* [1976] ECR 2043, paras 13-16; Case 199/82 *San Giorgio* [1983] ECR 3595, para. 14.

13 Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619.

Sturgeon.¹⁴ According to the Court's reasoning in this case, in light of the EU principle of equal treatment, the Air Passenger Regulation 261/2004¹⁵ should be interpreted in such a way that passengers have the right to monetary compensation envisaged therein not only in case of denied boarding or flight cancellation but also in case of long delay. The remedial function of the principle of effectiveness in turn requires that remedies available within national legal orders are *sufficient* to ensure effective protection of the rights conferred on individuals by EU law. This function can be traced, for example, in *Invitel*.¹⁶ In this case, the CJEU ruled on the effects of an action for an injunction by a consumer protection organization, in which the unfair nature of a particular contract term has been recognized, on individual consumer contracts. According to the CJEU, in such a case, the national courts are required, of their own motion, to draw all the consequences provided for by national law in order to ensure that consumers who concluded contracts to which the same term applies will not be bound by that term. The Court's reasoning suggests that if national law does not make this possible, then it does not provide for sufficient remedies and thus should be adjusted.

3. The Rise of Administrative Enforcement and Extra-judicial Private Enforcement

The growing involvement of the EU legislator in enforcement issues in the field of European private law has resulted in a move away from *judicial* private enforcement in this area. This development has been prompted by the rise of administrative enforcement, on the one hand, and that of extra-judicial private enforcement, on the other.

As has already been mentioned above, the EU has promoted reliance on public supervision and enforcement in the realm of European private law with a view to achieving specific public goals, such as market integration and consumer protection. The extent to which the EU pushed Member States to resort to administrative agencies in the private law domain varies across different areas. In some areas, such as investment services, the EU legislator envisaged a strong link between private law and public enforcement by making the private law rules part of the EU-harmonized public supervision framework and leaving Member States little choice concerning the modes of implementation and enforcement of such

14 Joined Cases C-402/07 (*Sturgeon v. Condor*) and C-432/07 (*Böck v. Air France*) [2009] ECR I-10923.

15 Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EEC) No. 295/91, *OJEU* 2004 L 46/1.

16 Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel* [2012] ECR I-0032.

rules at national level. In addition, the post-crisis era has witnessed a major move towards a greater Europeanization and centralization of financial supervision in the investment services field with the replacement of the Committee of European Securities Regulators (CESR) – a European network of national supervisory authorities – with ESMA.

By contrast, in other areas, such as unfair commercial practices and consumer credit, no such close connection between private law and public enforcement was established at EU level. Consequently, the Member States had more room for manoeuvre in determining the modes of implementation and enforcement of the European private law rules in their national legal orders, in general, and legislative techniques of enabling public enforcement of such rules, in particular. In some Member States, the private law rules of EU origin were only translated into self-standing supervision standards subject to public supervision and enforcement. By contrast, in other Member States such rules were included into the private law legislation, with or without a reference thereto simultaneously being made in the supervision legislation in order to bring them within range of administrative enforcement.

All in all, however, the increasing importance of public supervision and enforcement in the domain of European private law has affected the substance of private law rules. It has undermined the role of civil courts in developing such rules and has led to the rise of what, in my view, could be called ‘European supervision private law’.¹⁷ I use this oxymoron to describe any body of regulatory conduct of business rules of EU origin, to be observed by businesses when dealing with their (potential) clients, which forms part of a framework for public supervision over a specified market and is subject to public enforcement. From a legal-technical point of view, European supervision private law rules in the above-mentioned sense concern the relationship between a particular business and an administrative agency entrusted with the supervisory and enforcement tasks, and hence, they do not belong to the realm of traditional private law, in particular contract law. At the same time, such rules set standards of behaviour in the relationship between a business and its (potential) client and also aim to protect the latter. In essence, therefore, European supervision private law rules affect the relationships between private parties and can thus be considered as quasi-private. In general terms, this emerging legal field is characterized by a *regulatory* focus, predominantly *ex ante* norm-setting, particularly by supervisory

17 On this emerging legal field in more detail, see CHEREDNYCHENKO, 22. *ERPL* 2014, p 37. See also H.-W. MICKLITZ, ‘The Public and the Private – European Regulatory Private Law and Financial Services’, 10. *ERCL (European Review of Contract Law)* 2014, p 473; O.O. CHEREDNYCHENKO, ‘Financial Consumer Protection in the EU: Towards a Self-Sufficient European Contract Law for Consumer Financial Services?’, 10. *ERCL* 2014, p 476.

authorities, developing *outside* national *private law* systems and being enforced by *public* bodies through *administrative* law means.

The role of civil courts in private law rule-making and enforcement has been further undermined by the growing importance of extra-judicial mechanisms of dispute resolution in the domain of European private law. As noted above, recently the EU legislator has adopted two important measures with a wide scope of application – the Directive on Consumer ADR and the Regulation on Consumer ODR – with a view to ensuring a high level of consumer protection. The Directive on Consumer ADR seeks to ensure that consumers have access to proper ADR entities in both domestic and cross-border contractual disputes arising out sales or service (including financial service) contracts with traders.¹⁸ The Regulation on Consumer ODR in turn aims to create an ODR platform in the form of an interactive website at EU level that would offer a single point of entry to consumers and traders seeking to resolve their disputes stemming from online transactions. The obligations of the Member States to establish efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes were also laid down in many sector-specific EU measures, such as the MiFID II.

4. Towards the Interplay between Public and Private Enforcement

The rise of public enforcement in the domain of European private law implies the need to conceptualize its relationship with private enforcement. It has been generally recognized that neither purely administrative nor purely private mode of enforcement in itself is sufficient to ensure the effectiveness of legal standards in practice. It is the combination of the two which is needed for achieving desired results. Many questions, however, still exist concerning the modalities of such a combination in European private law.

It is widely acknowledged in the law and economics literature that public and private enforcement should complement each other so as to avoid any conflict or overlap between them.¹⁹ The idea of complementarity implies a strict separation between a regulatory, deterrence-oriented, function of administrative enforcement pursued by public authorities, on the one hand, and a compensatory function of private enforcement exercised by civil courts and ADR entities, on the

18 Except for disputes regarding non-economic services of general interest, health, and higher education. See Directive on Consumer ADR, Art. 2(2).

19 See, for example, S. SHAVELL, 'A Model of the Optimal Use of Liability and Safety Regulation', 15. *Rand J Econ (RAND Journal of Economics)* 1984, p 271; S. SHAVELL, *Foundations of Economic Analysis of Law* (Harvard: Belknap 2004), p 589 ff.; C.D. KOLSTAD, T.S. ULEN & G.V. JOHNSON, 'Ex post Liability for Harm vs. Ex ante Safety Regulation: Substitutes or Complements?', 80. *AER (American Economic Review)* 1990, p 888. Cf. S. ROSE-ACKERMAN, 'Tort Law in the Regulatory State', in P.H. Schuck (ed.), *Tort Law and the Public Interest – Competition, Innovation, and Consumer Welfare* (New York: W.W. Norton 1991), p 80 ff.

other. Designing a perfect complementarity between public and private enforcement in a particular field is not an easy task. In fact, reinforcing one type of enforcement increases the risk of adverse side effects on the other type. Which (combination of) enforcement mechanisms are optimal in European private law is largely context-specific and will depend upon the specific case or sector. At present, however, we are witnessing only a certain degree of complementarity between public and private enforcement when administrative agencies, civil courts, and/or ADR entities tend to co-ordinate their activities in the regulatory and compensatory domains.

Instead of separating a regulatory function and a compensatory function from each other, the two functions can also be combined within one particular enforcement mechanism in order to increase its effectiveness. As a result, a hybrid form of enforcement can emerge whereby deterrence and compensation can be pursued by the same authority. Thus, for example, an administrative agency can be entrusted with providing compensation to the aggrieved consumers who have suffered losses as a result of the violation of contract-related supervision standards by businesses. In fact, some Member States are already experimenting with such hybrid enforcement forms. The most notable examples can be found in the UK in the areas of energy and financial services law. Thus, under the Energy Act 2013, the UK regulator for the electricity and gas markets – the Office of Gas and Electricity Markets (Ofgem) – has the power to make a consumer redress order when one or more consumers have suffered loss or damage or been caused inconvenience as a result of breaches by electricity and gas companies. Similarly, under the Financial Services and Markets Act (FSMA) 2000, the UK financial watchdog – Financial Conduct Authority (FCA) – has the power to make rules requiring financial institutions to establish and operate consumer redress schemes.

5. Articles in This Special Issue

These three major developments in the field of European private law, as well as the challenges posed thereby to ensuring effective enforcement in this area, are addressed in the seven contributions included in this Special Issue. First of all, an attempt to provide an overarching view on the enforcement of European private law is made by Hans Micklitz. His contribution aims to provide a preliminary analysis of the transformation of enforcement in this field and the consequences of this process for institutions, the multi-level EU legal order, and the law understood as a self-standing value in itself. The second contribution written by Franziska Weber and Michael Faure provides a law and economic analysis of the interplay between public and private enforcement mechanisms in European private law. The authors provide criteria for assessing various enforcement mechanisms in light of interdependencies between public and private enforcement. Thirdly, Albert Verheij critically analyses the trend towards enforcing private law by administrative law means and asks himself whether, in

light thereof, private lawyers should reconsider the compensatory principle of private law. The fourth contribution by Bart Krans explores the impact of EU law on national civil procedural law which is crucial for ensuring the effective private enforcement of European private law. He focuses on the so-called invisible pillar of such impact resulting from the principles of effectiveness and equivalence as developed by the CJEU, on the one hand, and the procedural rules in the EU measures, on the other.

Moving from the more general to the more specific, the next three contributions to the Special Issue take a closer look at the enforcement of European private law in the selected fields. Reinhard Steennot focuses on private enforcement in the field of unfair contract terms. He shows the limitations of the CJEU's case law on the ex officio assessment of standard terms in consumer contracts in improving private enforcement in this area and argues in favour of a combination of private and public enforcement as the best way to ensure consumer protection. My own contribution in turn explores the public and private modes of enforcing European private law, as well as the interplay between them at EU and Member State level, in the post-crisis financial services sector. Giuseppe Bellantuono explores these issues in the context of the energy and telecommunications sectors. Finally, this issue of ERPL encompasses an extended case note by Joasia Luzak and a book review by Barbara Pozzo.

In conclusion, I would like to thank all the authors for contributing to this Special Issue and the editors of the European Review of Private Law for their willingness to publish it. I would also like to wish the readers of this journal a fruitful reading. Hopefully, the articles included in this Special Issue will lead to further research and debate on the enforcement of European private law – a fascinating topic which raises many fundamental, but as yet unanswered, questions.

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