The diesel emissions scandal: perspectives of consumer law and capital markets law enforcement - an intradisciplinary analysis

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ENFORCING CONSUMER AND CAPITAL MARKETS LAW

The Diesel Emissions Scandal

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THE DIESEL EMISSIONS SCANDAL – PERSPECTIVES OF CONSUMER LAW AND CAPITAL MARKETS LAW ENFORCEMENT

An Intradisciplinary Analysis

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I. THE ENFORCEMENT OF CONSUMER LAW AND CAPITAL MARKETS LAW IN THE DIESEL EMISSIONS SCANDAL

A. A HETEROGENEOUS PICTURE OF ENFORCEMENT

Looking at the ways of law enforcement in the diesel emissions scandal, but also at its intensity and speed, huge differences between the various countries examined in this book become apparent: In the US 'VW was hit from every angle':[1] In a 'concert of government and consumer claims' violations of all possible regulations such as consumer and commercial law, environmental standards as well as rules governing misleading advertisement etc. were prosecuted.[2] Within a few months a settlement was negotiated between private claimants from all over the US and VW. Even criminal law aspects were addressed.[3] Questions of capital markets law regarding the Volkswagen bonds have also been settled with

1 See above Amy J Schmitz, 'Enforcing Consumer and Capital Markets Law in the United States' in this book Section V (hereafter Schmitz, 'US').
2 See above Schmitz, 'US' (n 1) Section II.
3 *United States v Volkswagen AG*, Case 16-CR-20394 (E.D. Mich.); see above Maximilian Weiss, 'Securities Litigation against VW and Porsche: The 10 Billion Euro Marathon Walk' in this

the SEC.[4] But not only private claimants but above all state authorities reacted astonishingly quickly at federal and state level.[5]

Wheels turn slower in Europe. Also, within Europe a variety of different instruments of law enforcement are actually used, such as individual and collective civil actions, including forms of hybrid enforcement whereby public authorities bring consumer claims before civil courts, as well as regulatory and administrative sanctions along with criminal prosecution.[6] In Germany the diesel emissions scandal even gave rise to the introduction of a new collective redress instrument, that is the model declaratory action (*Musterfeststellungsklage*).[7] Yet, the picture within Europe is very heterogenous and an overall assessment shows that so far individual and collective redress claims within Europe faced significant difficulties both with regard to substantive and procedural law and that the intensity and severity of the measures taken, and sanctions imposed is significantly lower than in the US.[8] It is particularly striking in comparison with the US, but also with other countries such as Australia[9] and Brazil,[10] that there is still no collective redress instrument on the European Union level that would enable aggrieved consumers let alone capital investors to assert their claims for damages in a bundled manner through one single claimant as

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book Section III. (hereafter Weiss, 'Securities Litigation against VW and Porsche'); see above Schmitz, 'US' (n 1) 27ff.

4 The ADR securities class action in the US has been settled: *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation MDL*, No. 2672 CRB (JSC) (Judgment) (N.D. Cal. 10 May 2019); see above Schmitz, 'US' (n 1) Section III.B.; see above Weiss, 'Securities Litigation against VW and Porsche' (n 3) fn 51. In principle, however, there is only responsibility if the company has listed its own shares, see *Morrison v National Australia Bank Ltd* (2010) 561 U.S. 247. The position is similar in other states, see above Weiss, 'Securities Litigation against VW and Porsche' (n 3) fn 16.

5 Schmitz, 'US' (n 1) Section III.A.

6 See the country chapters above as well as Tanja Domej and Patrick Honegger-Müntener, 'Enforcing Consumer Law in Europe and Beyond: Similarities and Differences' in this book Section I. passim (hereafter Domej and Honegger-Müntener, 'Consumer Law in Europe').
In Germany, criminal investigations have so far been initiated against the former Chairs of the management boards of Volkswagen AG (Winterkorn) and Audi AG (Stadler), but the opening of criminal proceedings is still pending, see Martin Hesse and Alexander Preker, 'Dieselskandal. Die Strafakten der Autobosse' *Der Spiegel* (Hamburg, 31 July 2019) <http://www.spiegel.de/wirtschaft/unternehmen/diesel-affaere-die-strafakten-der-autobosse-a-1279809.html>.

7 See ss 606ff of the German Code of Civil Procedure (*Zivilprozessordnung – ZPO*) as amended by the Act on the Introduction of a Civil Procedural Model Declaratory Action (*Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage*) of 12 July 2018, BGBl 2018 I, 1151 and above Caroline Meller-Hannich, 'Enforcing Consumer and Capital Markets Law in Germany' in this book Section I.B.1.d (hereafter Meller-Hannich, 'Germany').

8 See the conclusions drawn by Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section IV. as well as the individual country chapters above.

9 See above Peter Cashman, 'Enforcing Consumer and Capital Markets Law in Australia' in this book Section II. (hereafter Cashman, 'Australia').

10 See above Claudia Lima Marques, 'Enforcing Consumer and Capital Markets Law in Brazil' in this book Sections II.B. and III.A (hereafter Marques, 'Brazil').

representative. However, in April 2018 the European Commission launched a proposal for a Directive on representative actions for the protection of the collective interests of consumers[11] and this proposal is remarkable because, unlike the earlier Directive 2009/22/EC,[12] it is not limited to injunctions but provides for the entitlement of consumer associations as 'qualified entities' to bring representative actions seeking measures eliminating the continuing effects of the infringement of consumer law such as, *inter alia*, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid.[13] The proposal has just been politically adopted in the trilogue procedure by the European Commission (EC), the Council of the European Union and the European Parliament.[14]

Thus, most Member States of the European Union have yet to receive rulings on the diesel emissions scandal from the highest courts and it is uncertain whether the Court of Justice of the European Union (ECJ) will comment on the decisions under consumer law or capital markets law in the future. In Germany, at least a settlement was recently reached in the newly introduced model declaratory proceedings against Volkswagen AG[15] to the benefit of about 262,500 qualified consumers who joined the proceedings on good grounds, which obliges Volkswagen AG to pay compensation sums of between €1,350 to €6,257 to each consumer depending on the vehicle concerned.[16] Furthermore, the German Federal Court of Justice (BGH) finally handed down a first seminal decision against Volkswagen in an individual action, stating that Volkswagen acted unconscionably and awarding a used car buyer damages in the form of a rescission of the sales contract. However, the purchase price is only to be

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11 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC [11 April 2018] COM(2018) 184 final, 2018/0089(COD) (hereafter Proposal for a Directive on representative actions, COM(2018) 184 final).

12 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/30.

13 See art 5(3) in conjunction with art 6(1) subpara 1 of the Proposal for a Directive on representative actions, COM(2018) 184 final (n 11).

14 Endorsement of 30 June 2020 (ST-9223/2020). For the course of the legislative process, see <https://eur-lex.europa.eu/legal-content/DE/HIS/?uri=COM:2018:0184:FIN>.

15 The action was filed by the Bundesverband der Verbraucherzentralen und Verbraucherverbände on 26 November 2018 at the Higher Regional Court of Braunschweig (OLG Braunschweig) – 4 MK 1/18 and more than 400,000 consumers enrolled to the proceedings; for details see above Jutta Gurkmann, 'A Qualified Entities Comment on Consumer Law enforcement' in this book Section III. (hereafter Gurkmann, 'Consumer Law Enforcement') as well as <http://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Klageregister/Klagen/201802/KlagRE_2_2018.html>.

16 For the pertinent press releases of both parties see <http://www.vzbv.de/pressemitteilung/vzbv-und-vw-erzielen-vergleich-fuer-betrogene-kaeufer>, as well as <https://vergleich.volkswagen.de/de.html>. It is reported that 90% of the affected consumers have accepted the settlement offers.

reimbursed less compensation for the kilometres travelled by the buyer with the car[17].

Considering that in Germany buyers of about 2.8 million cars are affected by the diesel emissions scandal[18] this means, however, that the majority of buyers will continue to be left without compensation.

Also, the outlook in Europe under capital markets law is only partly optimistic. Since Volkswagen shares were admitted to official stock exchanges only in Germany, foreign courts have regularly declined jurisdiction over the matter.[19] Claims for damages under capital markets law also differ considerably from one Member State to another: conditions of entitlement to claim cover everything from simple negligence to intent.[20] In Germany, the bundling of legal claims under the German Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz* – KapMuG) has so far proved only partially successful in other proceedings[21] and the Higher Regional Court (OLG) of Braunschweig has not yet reached a decision in the Volkswagen KapMuG case on the failure to make an ad hoc announcement.[22] The German Federal Court of Justice (BGH) or the Court of Justice of the European Union will review decisions. It will therefore be a long time before a final and legally binding decision is reached.

As far as public enforcement is concerned, in several Member States of the European Union public authorities were rather reluctant in the diesel emissions scandal to take action against Volkswagen[23] even though it is well known that Volkswagen had violated provisions of environmental, civil and consumer law as well as competition and capital markets law. The pertinent European secondary legislation such as, among others,[24] Regulation (EC) No 715/2007

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17 See BGH, Judgment of 25 May 2020, VI ZR 252/19, NJW 2020, 1962 and a comment by Beate Gsell, Frankfurter Allgemeine Zeitung (Frankfurt, 27 May 2020) 16.

18 For details see, e.g. the information given by Stiftung Warentest under <http://www.test.de/Abgasskandal-4918330-0/>.

19 See Section I.A. n 4ff above.

20 For an analysis, see above Rüdiger Veil, 'Private Enforcement in European Capital Markets Law – Perspectives for Reform – The Example of the Obligation to Disclose Inside Information' in this book Sections I., II. (hereafter Veil, 'Private Enforcement in European Capital Markets Law').

21 Kapitalanleger-Musterverfahrensgesetz (German Capital Markets Model Case Act) of 16 August 2005, BGBl I/2437; Reform of 19 October 2012, BGBl I/2182. For an overview of the criticism of the German Capital Markets Model Case Act (KapMuG), see Thomas MJ Möllers and Franz C Leisch, in Thomas MJ Möllers and Heribert Hirte (eds), *Kölner Kommentar zum WpHG* (2nd edn, Carl Heymanns Verlag 2014) §§37b, c mn 523ff; more positively Klaus Rotter, '14 Jahre KapMuG – Ein etabliertes Instrument zur Bewältigung von Massenschäden am Kapitalmarkt' [2019] VuR 283ff.

22 See above Weiss, 'Securities Litigation against VW and Porsche' (n 3) passim.

23 See for the UK John Sorabji, 'Enforcing Consumer and Capital Markets Law in England and Wales' in this book Section I.A. who explains the UK Government's reluctance to take action against Volkswagen with the intention 'to await developments, and the conclusion of investigations, in Germany by relevant German authorities'.

24 See also above Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section II.A with regard to art 13 of the Directive 2005/29/EC of the European Parliament and of the

on type approval of motor vehicles (Euro 5 and Euro 6) which aims to ensure a 'high level of environmental protection'[25] requires Member States to provide for 'effective, proportionate and dissuasive' penalties applicable for infringement of the respective European provisions and to 'take all measures necessary to ensure that they are implemented'.[26] However, since Germany, Italy, Luxembourg and the UK have not properly implemented these provisions, the Commission is now taking the matter to the European Court.[27] Yet, in Germany at least the public prosecutor's office has so far imposed fines on Volkswagen AG, Audi AG, and Porsche AG for the violation of 'supervisory responsibilities', calculated in such a way that the unlawfully obtained profits were disgorged[28] and in addition each company had to pay €5 million.[29]

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 [2005] OJ L149/22 (hereafter Unfair Commercial Practices Directive 2005/29/EC) and art 24(1) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/22 (hereafter Consumer Rights Directive 2011/83/EU); see with regard to such penalties also art 9(4) (h) Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L345/1.

25 See recital 1.

26 See art 13 (1) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information [2007] OJ L171/1; see also arts 30 and 46 of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) [2007] OJ L263/1.

27 European Commission, 'Air quality: Commission takes action to protect citizens from air pollution' (*Press Release*, 17 May 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3450>; 'EU-Kommission verklagt Deutschland: Scheuer findet ein Detail „zutiefst realitätsfern"' (*Merkur*, 17 May 2018) <http://www.merkur.de/politik/eu-kommission-klage-deutschland-diesel-skandal-luft-zr-9877270.html>. See also Lene Kohl, 'Practitioner Comment on Consumer Law Enforcement in Europe' in this book Section II.A (hereafter Kohl, 'Practitioner Comment').

28 According to s 17(4) of the German Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten* – OWiG) fines shall exceed the economic benefit that the offender has derived from the administrative offence.

29 Thus for VW the total amount of the fine was €1 billion, see Staatsanwaltschaft Braunschweig, 'VW muss Bußgeld zahlen' (*Press Release*, 13 June 2018) <https://staatsanwaltschaft-braunschweig.niedersachsen.de/startseite/aktuelles/presseinformationen/vw-muss-bussgeld-zahlen-174880.html>; for Audi the total amount war €800 million, 'Audi zahlt 800 Millionen Euro Bußgeld' (*Zeit Online*, 16 October 2018) <http://www.zeit.de/mobilitaet/2018-10/dieselskandal-audi-zahlt-800-millionen-euro-bussgeld> and for Porsche the total amount was €535 million.

Against this background it does not come as a surprise that just recently it has been alleged in public media by the Federal Office responsible for vehicle registration (*Kraftfahrtbundesamt*) that the German Federal Ministry of Transport has been too hesitant in investigating the possible use of manipulative software in older Euro 4 diesel vehicles, and that therefore a prescription of claims of injured parties is imminent.[30]

And also, as regards the public enforcement of European consumer law as well as European rules on unfair commercial practices[31] the respective public authorities in the Member States are developed very differently and endowed with varying degrees of financial and other resources and consequently not in all Member States such authorities do operate very powerfully.[32] However, it should be noted that the European legislature has just recently enacted the 'New Deal for Consumers' Omnibus Directive (EU) 2019/2161 on a better enforcement and modernisation of Union consumer protection rules, dating from 27 November 2019[33] and thus taken desirable steps to improve enforcement of consumer law through penalties, in particular by imposing the obligations on the Member States to introduce fines for infringements of the respective European law by companies at a level that is at least 4 per cent of the trader's annual turnover in the Member State or Member States concerned.[34]

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30 See with regard to Josef Streule and Lisa Wreschniok, 'Beim Audi-Skandal droht Verjährung' (*Tagesschau*, 8 December 2019) <http://www.tagesschau.de/investigativ/br-recherche/kba-verzoegerung-aufklaerung-101.html>.

31 For an analysis of the situation with regard to European competition law, see Thomas MJ Möllers and Andreas Heinemann (eds), *The Enforcement of Competition Law in Europe* (Cambridge University Press 2007) 361ff (hereafter Möllers and Heinemann, *Enforcement of Competition Law*).

32 See above the overall assessment by Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section II.A. that 'fines for breaches of consumer protection law do not seem to be very effective, as far as can be judged on the basis of the national reports'; see also recital 5 of the recently enacted Directive (EU) 2019/2161 (see immediately below before and with the next note): 'Current national rules on penalties differ significantly across the Union. In particular, not all Member States ensure that effective, proportionate and dissuasive fines can be imposed on traders responsible for widespread infringements or widespread infringements with a Union dimension.'

33 See Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7 (hereafter Consumer Omnibus Directive (EU) 2019/2161).

34 See art 3 (6) of the Consumer Omnibus Directive (EU) 2019/2161 (n 33) for the new art 13(3) of the Unfair Commercial Practices Directive 2005/29/EC (n 24); see art 4(13) of the Consumer Omnibus Directive (EU) 2019/2161 (n 33) for the new art 24 (3) of the Consumer Rights Directive 2011/83/EU (n 24); furthermore Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 has been added to the list of European Consumer Law Directives for which infringements are to be sanctioned by such penalties has been enlarged, see art 1(4) of the Consumer Omnibus Directive (EU) 2019/2161 (n 33) for the new art 8b of Directive 93/13/EEC on unfair terms in consumer

The Omnibus Directive (EU) 2019/2161 has yet to be transposed into national law.[35]

B. BETWEEN OVER-ENFORCEMENT AND UNDER-ENFORCEMENT

As far as the assessment of this heterogeneous finding is concerned, this also turns out – unsurprisingly – to be heterogeneous, and in this respect the diesel emissions scandal illustrates very clearly what is already generally known and has been discussed for a considerable time: on the one hand, rapid and drastic measures, such as those taken in the US in particular, can be regarded as particularly efficient in deterring the violation of consumer and capital markets law.[36] Yet, the extent to which and to whose benefit such a 'punishment' of an unlawfully acting company may go, whether or not it is appropriate, for example, that settlement proceeds from Volkswagen in the US serve to finance electric buses for US cities[37] is obviously open to disparate assessments.

Thus, on the other hand and in particular with regard to the US the allegation of over-enforcement and abusive litigation is often made, which is considered being fuelled by the famous 'toxic cocktail' of various elements of substantive and procedural law, such as punitive damages,[38] the American rule for attorneys' fees as well as the admissibility of contingency fees, jury trial, extensive discovery burdens and modest pleading standards.[39] It is alleged that class actions are brought primarily in the interest of lawyers[40] and that the deterrent potential of

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contracts. Penalties at such a level are already stated by art 83(4)–(6) of Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation – GDPR) [2016] OJ L119/1.

35 The directive must be implemented into national law of the Member States by 28 November 2021 and applied by 28 May 2022, art 7 of the Consumer Omnibus Directive (EU) 2019/2161 (n 33).

36 In detail, see Alexander F Peter, 'Warum die Initiative » Law – Made in Germany « bislang zum Scheitern verurteilt ist' [2011] JZ 939ff; Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.6.

37 For details see <https://uspirg.org/sites/pirg/files/reports/National%20-%20Paying%20for%20Electric%20Buses.pdf>.

38 See *Cooper Industries, Inc v Leatherman Tool Group, Inc*, 532 U.S. 424, 432 (2001): '[punitive damages], which have been described as "quasi-criminal", [...] operate as "private fines" intended to punish the defendant and to deter future wrongdoing'; see also *BMW of North America, Inc v Ira Gore, Jr*, 517 U.S. 559, 568 (1996): 'Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.' On punitive damages see further Thomas MJ Möllers, *Legal Methods* (Beck-Hart Publishing-Nomos 2020) ch 5 mn 145 (hereafter Möllers, *Legal Methods*).

39 See above the differentiated analysis of Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Sections III.A.2., 6. and 7. and IV. with further references.

40 Insinuated by Schmitz, 'US' (n 1) Introduction see above.

the high costs resulting from loss of a case often forces the (presumed) perpetrator of the damage to *settle* against his will instead of giving him the opportunity to defend himself adequately in a necessarily time-consuming trial.[41] And indeed, with payments of more than US$26 billion agreed by Volkswagen, it is rather obvious that it is no longer just about compensating damages or skimming illicitly gained profits.[42]

Certain incentives to conclude a settlement cannot be rejected per se, precisely because they can serve to provide efficient compensation to a large number of victims. But excessive economic pressure imposed on the (presumed) perpetrator to yield to a speedy settlement and to accept the payment of large sums of money as punitive damages is particularly problematic under the aspect of the presumption of innocence, which, e.g. in Germany, as an expression of the principle of the rule of law, has constitutional status.[43] Furthermore, from a European perspective it may be considered incompatible with the principle of proportionality, which also derives from the rule of law and prohibits excessive state sanctions.[44]

If one further attempts to analyse the European situation and to explain why, in the VW diesel emissions scandal, the measures against Volkswagen have so far been significantly more tentative than in the US, *Domej and Honegger-Müntener*[45] pinpoint the reasons for this hesitancy in the enforcing of consumer law by way of collective redress very well, when emphasising that 'the European legislature does not have a coherent vision of collective redress' and that 'the

41 Insinuated by Schmitz, 'US' (n 1) Introduction see above.

42 In the past, motor vehicle manufacturers were exposed to product liability lawsuits, which ultimately led to relatively manageable claims for damages because the conditions for punitive damages were not met. See *Lee v Volkswagen of America, Inc*, 688 P.2d 1283 (Okla. 1984); *MacDonald v General Motors Corp*, 784 F.Supp. 486 (M.D. Tenn. 1992); *Kudlacek v Fiat S.p.A.*, 244 Neb. 822 (Neb. 1994). The VW diesel scandal has at least not resulted in immediate deaths. They were probably prosecuted for their years of covering up and denying the defeat technology to the US authorities. For the facts, see Schmitz, 'US' (n 1) Section I.

43 As expressed by BVerfG, Order of 26 March 1987, 2 BvR 589/79, BVerfGE 74, 358, 370 – Unschuldsvermutung; the presumption of innocence and the right to defence are also guaranteed by art 6(2) and (3) of the European Convention on Human Rights as well as by art 48 of the Charter of Fundamental Rights of the EU.

44 See in particular art 9(4) last sentence and art 12 sentence 1 of Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws of 12 December 2017 [2017] OJ L345/1 where like in other European secondary legislation it is stipulated that measures of enforcement and in particular penalties imposed on companies for the violation of European Union law shall be proportionate. This principle originally is derived from the case law of the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*), see Fernand Schockweiler, 'Die richterliche Kontrollfunktion: Umfang und Grenzen in Bezug auf den Europäischen Gerichtshof' [1995] EuR 191, 200; the principle of proportionality was set out in ECJ, C-292/97 *Karlsson and Others* [13 April 2000] ECR 2000 I-02737 at [45]; ECJ, C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [13 July 1989] ECR 1989 2609 at [18]; Paul Craig and Gráinne de Búrca, *EU Law* (6th edn, Oxford University Press 2015) 551; Möllers, *Legal Methods* (n 38) ch 10 mn 70ff.

45 See above Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section IV.

reason probably is not that the individual actors have no such vision. They just have very different, and often irreconcilable, visions of what the collective redress landscape should look like and indeed, whether there should be such a landscape at all'.

Accordingly, there is already disagreement about the appropriate level of enforcement and as to whether consumer rights are violated at all and whether enforcement in the interest of consumers is therefore desirable when environmental standards are violated by car manufacturers and public health aspects are concerned, while economic loss to the individual consumer might perhaps be difficult to prove.[46]

Furthermore, the European discussion on collective redress appears still to be dominated to a considerable extent by the intention to avoid abusive litigation. The scepticism towards elements of the US system, such as the opt-out mechanism, is not always well substantiated, let alone sufficiently questioned and this often makes a sober analysis of the pros and cons of the various models established in the respective countries,[47] including European countries,[48] more difficult.[49] The fear of abusive litigation is often accompanied by a great reluctance towards contingency fees and third-party funding,[50] while at the same time entities entitled to bring court actions for the benefit of consumers are manifestly lacking sufficient financial resources for doing so on a larger scale.[51]

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46 See above Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section I. with further references and with reference in n 7 to ECJ, C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [8 March 2011] ECR I-01255 at [44ff]: see also above Marques, 'Brazil' (n 10) Section II.B. who explains that in Brazil collective redress mechanisms are not only aiming at the protection of homogeneous individual interests or rights collective interests or rights as well as diffuse rights in the sense of trans-individual rights of an indivisible nature.

47 See for the advantages of the Australian system above Cashman 'Australia' (n 9) passim.

48 See above with regard to opt out-elements of collective redress mechanisms for damages within Europe with regard to Denmark Anders Schäfer, 'Enforcing Consumer and Capital Markets Law in Denmark' in this book Section I.C.3.a.ii. (hereafter Schäfer, 'Denmark'); Willem van Boom and Charlotte Pavillon, 'Enforcing Consumer and Capital Markets Law in The Netherlands' in this book Section II.A. (hereafter van Boom and Pavillon, 'Netherlands') and Portugal, Henrique Sousa Antunes, 'Enforcing Consumer and Capital Markets Law in Portugal' in this book Section II.A.1.a) and for a comprehensive analysis Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.2.

49 See above Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.2. are right to complain that the discussion about abusive litigation is 'largely based on rhetorics and anecdotal evidence'.

50 See above Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.6.: 'The rules on third-party funding of collective actions have been and will presumably remain a central battleground in the European collective redress debate'.

51 See for problems of funding collective actions to the benefit of consumers above Schäfer, 'Denmark' (n 48) Section IV. with regard to class actions initiated by the Danish Consumer Ombudsman; Emmanuel Jeuland, 'Enforcing Consumer and Capital Markets Law in France' in this book Section I.C.4., with regard to the French 'action de groupe', introduced in 2014

The lacking consensus within Europe as to the desirable level of law enforcement and as to its preferable instruments is accompanied by difficulties arising from substantive law. Insofar as the imposition of damages is considered being limited to the only purpose of compensating the losses suffered by the victims, consequently, the exact amount of the respective individual damage and its causation by the allegedly unlawful act is to be established and proved.[52] However, such requirements of establishing and proving the respective individual damage are not only likely to increase the individual victim's so-called 'rational apathy' towards possible court actions but can also considerably aggravate the procedural burden on the respective courts and make the court procedures cumbersome and time-consuming.[53]

While recognising that the prevention of abusive litigation is legitimate, that the right of alleged perpetrators to an effective defence is indispensable and that the appropriate judicial handling of complex issues requires considerable time, the overall experience of the diesel emissions scandal and, more specifically, the fact that the vast majority of European purchasers of affected diesel vehicles, as well as capital investors, have not (yet) received compensation, nevertheless suggest that there is a law enforcement deficit in Europe.

It can therefore be concluded that the challenge for legislatures in Europe, and above all for the European Union legislature, is to find ways to a higher level of law enforcement by providing an effective mix of public and private enforcement instruments which overcome under-enforcement to the detriment of the individual victims and the public interest in the respect of the law, but at the same time avoid over-enforcement to the detriment of (alleged) perpetrators. And this challenge is all the greater because, in an effort to strike an appropriate balance between conflicting enforcement and defence interests, not a single model can be identified as an undisputed panacea and as clearly superior.

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by the 'loi Hamon' under which only 14 associations are authorised to bring a group action (action de groupe), and an association may bring only one action at a time.

52 See for the controversial discussion in Germany on the extent to which buyers of diesel vehicles suffered damages caused by Volkswagen and on the extent benefits of use can be credited to mitigate damages on the one hand Michael Heese, 'Nutzungsentschädigung zugunsten der Hersteller manipulierter Diesel-Kraftfahrzeuge?' [2019] VuR 123–29 and on the other hand Thomas Riehm, 'Deliktischer Schadensersatz in den „Diesel-Abgas-Fällen"' [2019] NJW 1105–11.

53 That is why, for example, the recommendation of the procedural law department of the 72th Deutscher Juristentag in Leipzig 2018 (German Jurists Forum), *de lege ferenda* in the context of a new group action to be introduced, to permit liquidated damages in order to enable as many victims as possible to be compensated and at the same time make the procedure more efficient, makes perfect sense, see Ständige Deputation des Deutschen Juristentages (ed), *Verhandlungen des 72. Deutschen Juristentages Leipzig 2018, Vol II/1* (CH Beck 2019) K 75 recommendation no 31.

II. THE WAY FORWARD

In the following, based on the experiences with the diesel emissions scandal gathered in this book and by evaluating the relevant regulations and instruments in other fields of law, such as competition law in particular, some specific suggestions for the European Union legislature will be recommended in order to improve consumer and capital markets law enforcement in the future. First, it will be discussed to what extent activity at European level is desirable in the European multi-level system (A). Then, the strengthening of private enforcement (B) and public enforcement (C) should be discussed as well as the interplay of public enforcement, collective actions and private individual actions (D) and finally, the question of how to improve law enforcement within the company itself (E) is particularly interesting. In an intradisciplinary comparison, it will be established that European competition law can often show the way forward in search of a balanced middle way between over-enforcement and under-enforcement.

A. THE NECESSITY OF (FURTHER) INTERVENTION AT EUROPEAN LEVEL

The subsidiarity principle of article 5(3) of the TEU allows European Union intervention only to the extent that European institutions are better placed to act than the individual Members. The Volkswagen scandal very clearly raises the question as to which legislative and executive measures are desirable or even needed at the European level.

1. Further Legal Harmonisation of Enforcement Instruments

European harmonisation of enforcement instruments can be justified by the purpose of ensuring a level playing field, that is to avoid a race to the bottom and the respective forum shopping with claimants picking the most advantageous jurisdiction.[54] These considerations are clearly reflected in the recitals of the EU-Antitrust Damages Directive 2014/104/EU:[55] it aims to create legal certainty by avoiding forum shopping.[56] These considerations also apply to consumer protection and capital markets law.

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54 See above van Boom and Pavillon, 'The Netherlands' (n 48) Section III.B.2; Petra Leupold, 'Enforcing Consumer Law in Austria' in this book Section IV.B.

55 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 (hereafter Antitrust Damages Directive 2014/104/EU).

56 Recitals 7 and 9 of the Antitrust Damages Directive 2014/104/EU (n 55) are Instructive, see above Veil, 'Private Enforcement in European Capital Markets Law' (n 20) Section IV.A.

In the authors' view, the measures advocated below,[57] and in particular a European harmonisation of the contours of private claims for damages and their enforcement including the already initiated introduction of a representative action for damages,[58] should therefore be regulated in their main features at European level. However, where, in view of the differences between the Member States, no consensus can be achieved in the legislative process on individual points or where it is simply unclear which way is best, opening clauses, which allow for heterogeneous national solutions are useful in order to achieve European solutions at all and to spur competition between the Member States, in which best practice might become apparent.[59]

2. *Subsidiary European Power of Intervention Desirable where Member States do not Take Sufficient Action*

European executive intervention should be possible where the individual Member States and their respective public authorities are too weak or unwilling to take action against violations of European Union law. As mentioned above,[60] the authorities of some Member States have been reluctant to take action against car manufacturers in the diesel emissions scandal. Similar examples of allegedly unlawful practices by companies which do not always entail sufficiently resolute intervention by Member States include the activities of international groups in the field of antitrust law;[61] and in capital markets law, the trading of globally operating rating companies[62] or participants in the capital markets who use inadmissible short sell attacks to exploit cross-border gaps.[63]

As far as Member States are under an obligation to provide for 'effective, proportionate and dissuasive' penalties against the violation of European Union law by companies[64] consideration should be given to granting the European

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57 See below Sections B. to E.

58 See above Section I.A. with n 11.

59 The idea of a competition of legal orders is being developed by Charles M Tibout, 'A Pure Theory of Local Expenditures' (1956) 64 J Pol Econ 416 ff; Albert Breton, 'Towards a Theory of Competitive Federalism' (1987) 3 Europ J Pol Econ 263 ff; Eva-Maria Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt* (Mohr Siebeck 2002); Anne-Christin Mittwoch, *Vollharmonisierung und Europäisches Privatrecht* (De Gruyter 2013) 194 ff.

60 See above under Section I.A.

61 Arts 101, 102 of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

62 Thomas MJ Möllers, 'Regulation and Liability of Credit Rating Agencies – A More Efficient European Law?' (2014) 10 ECFR 333–63.

63 This would require *de lege ferenda* a more European dimension – such as the competence of ESMA or the Directorate General for Capital Markets, Thomas MJ Möllers, 'Market Manipulation Through Short Selling Attacks and Misleading Financial Analysis' (2020) 53 The International Lawyer 91–126.

64 See already above under Section I.A. and with n 23, 25 and 33.

Commission a subsidiary competence to investigate and to take direct action against the injuring party – at least in the event that a Member State does not investigate the respective (alleged) infringement but remains inactive over a considerable period of time.

B. STRENGTHENING PRIVATE ENFORCEMENT

In the following, some relevant aspects of substantive and procedural law will be highlighted in order to show how the private enforcement of consumer law and capital markets law, which on the one hand aims at enforcing the respective private rights, but which on the other hand also serves the public interest of achieving the greatest possible respect for the applicable legal norms, could be strengthened.

1. *A European Right to Damages: The Antitrust Damages Directive 2014/104/EU as a Model*

In the field of antitrust law it was the ECJ which first acknowledged that 'the full effectiveness of Article 85 of the Treaty [now: art 101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.'[65] Today, however, this right to full compensation of harm is codified in the Antitrust Damages Directive 2014/104/EU.[66] By way of contrast, a private victim's right to damages is still mostly left to the autonomy of the Member States in the fields of consumer law and capital markets law:[67] As to consumer law neither the old Consumer Sales Directive 1999/44/EC[68] nor its successor, the recently enacted new Sales of Goods Directive (EU) 2019/771[69] cover a right to damages.

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65 See ECJ, C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [20 September 2001] 2001 I-06297 at [26]; see also ECJ, Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [13 July 2006] 2006 I-06619 at [61].

66 See art 3 'Right to full compensation' of the Antitrust Damages Directive 2014/104/EU (n 55).

67 See already above Section A.I. with n 19.

68 Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

69 Cf art 3(6) of the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28; cf the criticism by Gsell with regard to the Commission's proposal COM(2015) 635 final, 'Europäischer Richtlinien-Entwurf für vollharmonisierte Mängelrechte beim Verbraucherkauf – Da capo bis zum Happy End?' (2018) ZEuP 501–06. The twin Directive from the same date, i.e. Directive (EU) 2019/770 on certain aspects concerning contracts

And thus, in the diesel emissions scandal not only the damage claims of the consumer-buyers of vehicles featuring manipulative software are governed by tort law, but also contractual damage claims fall within the autonomy of the Member States. Under Italian law there is already the possibility that the consumer can sue for damages if the enterprise violated unfair competition law.[70] In Lithuania two public authorities are responsible for sanctioning violations of unfair competition laws.[71] However, in the wake of the diesel emissions scandal, just recently some progress has been made in this respect with the adoption of the 'New Deal for Consumers' Omnibus Directive (EU) 2019/2161 on a better enforcement and modernisation of Union consumer protection rules:[72] The new Directive amends Directive 2005/29/EC on unfair business-to-consumer commercial practices[73] by a provision according to which 'consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer'.[74] Such a European right to damages certainly would have been of help to consumer-buyers of diesel vehicles if it had been in force at the time the manipulated vehicles were sold, and all the more so since, for example, the prevailing opinion in German unfair competition law has so far rejected an individual consumer's right to damages.[75] It may also become important in view of the proposed Directive on representative actions for the protection of the collective interests of consumers,[76] since the scope of this Proposal is limited to the infringement of European law.[77] Collective actions for the mere infringement of the autonomous

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for the supply of digital content and digital services [2010] OJ L136/1 does not contain provisions on damages either, see Beate Gsell, in Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law* (Beck-Hart Publishing-Nomos 2020) comments on art 14 of Dir (EU) 2019/770 mn. 79ff (forthcoming).

70 See the case presented above by Marcello Gaboardi, 'Enforcing Consumer and Capital Markets Law in Italy' in this book Section I., fn 4ff.

71 See above Egidija Tamošiūnienė and Remigijus Jokubauskas, 'Enforcing Consumer and Capital Markets Law in Lithuania' in this book Section I.A.

72 See Consumer Omnibus Directive (EU) 2019/2161 (n 33).

73 See Unfair Commercial Practices Directive 2005/29/EC (n 24).

74 See art 3(5) of the Consumer Omnibus Directive (EU) 2019/2161 (n 33) for the new art 11a(1) of the Unfair Commercial Practices Directive 2005/29/EC (n 24) and already Beate Gsell, 'Das Ende der Zurückhaltung' [2018] (Issue 18) NJW-aktuell Editorial 3.

75 See, e.g. Helmut Köhler and others (eds), *Gesetz gegen den unlauteren Wettbewerb: UWG* (38th edn, CH Beck 2020) §1 mn 39, §9 mn 1.10, with further references which, however, are not very convincing in assuming that the legal situation will not change significantly as a result of the new art 11a(1) of the Unfair Commercial Practices Directive 2005/29/EC (n 24). Cf opposing opinion and a protective clause supporting *Rolf Sack*, 'Folgeverträge unlauteren Wettbewerbs' [2004] GRUR 625, 630; Thomas MJ Möllers and Andreas Heinemann, *The Enforcement of Competition Law in Europe* (Cambridge University Press 2007) 278ff; see also with regard to injunctions above Gurkmann, 'Consumer Law Enforcement' (n 15) Section II.

76 See n 11.

77 See art 2(1) in conjunction with Annex I of the Proposal for a Directive on representative actions, COM(2018) 184 final (n 11); art 2(1) of the Proposal for a Directive as amended by

law of the Member States such as, e.g. provisions of purely national tort law are therefore beyond the scope of the proposed Directive.

Yet, in the area of capital markets law the European legislature has mainly harmonised only supervisory law, whilst it is highly controversial whether further private law claims result from the *effet utile* of the respective European Law.[78]

The authors consider that, following the model of antitrust law, the enforcement of European consumer law and European capital markets law by way of private damage claims should be strengthened and therefore the European legislature should enact further European Damages Directives which provide for the right to full compensation under private law in the event of a violation of European consumer law or European capital markets law and which regulate the modalities of the enforcement of such damage claims.[79]

As regards the extent of damages provided for by the Antitrust Damages Directive 2014/104/EU, article 3(1) grants the right to full compensation, whereas, however, art 3(3) explicitly excludes overcompensation by way of punitive damages or multiple or other types of damages.[80] While the European courts do concede that damages under antitrust law have a preventive effect,[81] the Antitrust Damages Directive 2014/104/EU is unfortunately silent on this issue and the aforementioned article 3(3) rather points in the negative direction.[82] However, in academic literature there is a strong view

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the Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC – General Approach' [28 November 2019] 14600/19 (hereafter Council, 'General Approach – Directive proposal on representative actions for consumers'), at least clarifies that infringements of provisions of national law, which transpose the respective European law shall fall within the scope of the proposed Directive.

78 See above Veil, 'Private Enforcement in European Capital Markets Law' (n 20) Section I. with reference, though to the few provisions granting investors claims for damages such as art 35a of the CRA on the liability of credit rating agencies.

79 See already Thomas MJ Möllers and Franz C Leisch, in Thomas MJ Möllers and Heribert Hirte (eds), *Kölner Kommentar zum WpHG* (2nd edn, Carl Heymanns Verlag 2014) §§37b, c mn 77–84 with further references; Veil, 'Private Enforcement in European Capital Markets Law' (n 20) Section IV.B.2. with regard to liability for damages under private law for all disclosure obligations provided by European Law. Differing view Malte Wundenberg, 'Perspektiven der privaten Rechtsdurchsetzung im europäischen Kapitalmarktrecht' [2015] ZGR 124, 159 (hereafter Wundenberg, 'Perspektiven der privaten Rechtsdurchsetzung').

80 See also recitals 12 and 13 of the Antitrust Damages Directive 2014/104/EU (n 55).

81 CFI, T-329/01 *Archer Daniels Midland v Commission of the European Communities* [27 September 2006] ECR 2006 II-03255 at [140]. It is critical that this does not expressly mention the Antitrust Damages Directive 2014/104/EU (n 55), Veil, 'Private Enforcement in European Capital Markets Law' (n 20) Section IV.B.2.

82 See however s 33a(3) sentence 2 of the GWB (*Gesetz gegen Wettbewerbsbeschränkungen* – German Act against Restraints of Competition) according to which any profit made by the company as a result of the infringement is taken into account in calculating damage. See also ss 34 and 34a of the GWB for a right of the cartel authority and of associations to skim off profits and see also for a similar provision s 10 of the UWG (*Gesetz gegen den unlauteren Wettbewerb* – German Act Against Unfair Competition).

in favour of a general right to a skimming off of profits *de lege ferenda*.[83] This should also open up the discussion as to whether private law seeks to have a preventive or deterrent effect.[84] Experience shows particularly in the case of dispersed damage with very small individual losses the injured party hardly ever overcomes his rational apathy and brings an individual action.[85] The combination of a right to the skimming off of unlawfully gained profits with its procedural enforcement by way of a collective action that does not require the opt-in of the concerned victims of the infringement could be an effective enforcement mechanism.

2. *Collective Actions for Redress Measures*

a) The Proposed European Directive on Representative Actions as a Positive Development

Although, as the country chapters in this book have shown, Europe lacks a coherent vision of collective redress,[86] the bundling of similar claims into a single action, led by a single representative as claimant, is highly desirable for a number of reasons in order to strengthen effective as well as efficient enforcement of the law. These reasons are all well known.[87] Rational apathy often prevents consumers and investors from launching legal actions, which is why, especially in the case of dispersed damages, there is often no enforcement at all if collective actions are not available.[88] In addition, it also serves the general interests of procedural economy and the consistency of jurisprudence if a single collective action is brought instead of many individual actions. And

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83 For a new s 251(3) of the BGB (*Bürgerliches Gesetzbuch* – German Civil Code) *de lege ferenda*, Gerhard Wagner, *Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag* (CH Beck 2006) A 97.

84 See in detail Peter Müller, *Punitives Damages und deutsches Schadenersatzrecht* (De Gruyter 2000); Michael Heese, 'Was der Dieselskandal über die Rechtsdurchsetzung, deren Protagonisten und die Funktion des Privatrechts verrät' [2019] NZV 273, 278; Veil, 'Private Enforcement in European Capital Markets Law' (n 20) Section V.

85 See Astrid Stadler, 'Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz' [2015] Zeitschrift für die gesamte Privatrechtswissenschaft 61, 81 with further references; for the necessary strengthening of collective redress, see below Section B.2.

86 See already above Section B. before and with n 44.

87 For a detailed review see, for example, the report prepared for the 72nd German Jurists Forum in Leipzig 2018 (72. Deutscher Juristentag Leipzig) by Caroline Meller-Hannich, *Sammelklagen, Gruppenklagen, Verbandsklagen – Bedarf es neuer Instrumente des kollektiven Rechtsschutzes im Zivilprozess?, Gutachten A zum 72. Deutschen Juristentag* (CH Beck 2018) A 9ff; for a very compact analysis see Beate Gsell, Caroline Meller-Hannich and Astrid Stadler, 'Musterfeststellungsklagen in Verbrauchersachen' [2016] (Issue 5) NJW-aktuell 14–15.

88 In detail, see above Kohl, 'Practitioner Comment' (n 27) Introduction.

last but not least, the principle of due process and more precisely the procedural equality of arms is jeopardised when an individual consumer or investor who brings his action only once faces a large company that is involved in thousands of similar legal proceedings.

In Germany where to date no collective action for compensatory relief has been introduced,[89] the need for bundling[90] is also proven by assignment models which have emerged in practice but which often present the courts with major challenges due to the lack of adapted procedural rules and which are also controversially judged because they function on the basis of pro rata success fees and professional litigation funders benefit from them.[91]

It is therefore highly positive that a European proposal for an EU Directive on representative actions is finally on the table, which by way of contrast to Directive 2009/22/EC[92] is no longer confined to injunctive relief but also covers compensatory relief.[93]

b) Questionable Rules on Standing and Funding

It is not intended to reassess the Proposal in its entirety here;[94] rather, only two aspects which are crucial for the success of all collective redress instruments but

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89 The German Capital Markets Model Case Proceedings (*Kapitalanleger-Musterverfahren*) and the Civil Procedural Model Declaratory Action (*Musterfeststellungsklage*) (n 7) are confined to declaratory relief and therefore, even in the event of a successful outcome of the respective collective action, the injured party must subsequently enforce her individual claim by way of individual actions, see Gurkmann, 'Consumer Law Enforcement' (n 15) Section IV; however, consumer associations under German law were and are permitted to have claims assigned to them by consumers and then to bring these assigned claims to court. Yet this way of claim bundling has proven to be cumbersome, see Gurkmann, 'Consumer Law Enforcement' (n 15) Section III.

90 A combining of filed cases like the one carried out in the diesel emissions scandal by the Judicial Panel on Multidistrict Litigation (JPML), see Schmitz, 'US' (n 1) Section II.A. with fn 57, has no equivalent in German civil procedure law. Therefore, many thousands of individual actions for damages related to the diesel emissions scandal are currently pending, see, e.g. Elmar Streyl, 'Massen vor Gericht' [2019] (Issue 37) NJW Editorial who reports 64,000 individual lawsuits, about 600 of them at the Regional Court of Krefeld alone, one of the smallest regional courts in North Rhine-Westphalia.

91 For the legal admissibility of such assignment models, see BGH, Judgment of 27 November 2019, VIII ZR 285/18, [2020] NJW 208 – admissibility of legal tech providers strengthened.

92 See n 12.

93 See already above under Section I.A.; art 5b of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77) and above Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.

94 For various relevant aspects of the proposal see above the review by Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Sections III.A. and B.; see also Tanja Domej, 'Die geplante EU-Verbandsklagenrichtlinie – Sisyphos vor dem Gipfelsieg?' [2019] ZEuP 446–71.

very controversial within Europe and which are moreover interrelated should be discussed, those are the issues of who will have standing to bring the proposed representative actions and how they will be funded.

It has previously been explained above[95] that in Europe the fear of abusive litigation is sometimes very strongly emphasised and that accordingly in some countries there is a great reluctance to use commercial models of litigation funding which holds particularly true with regard to the use of contingency fees and the involvement of professional litigation funders.

At the same time, it is obvious that considerable financial resources are required in order to successfully bring collective actions. This is all the more true when the defendants are large, internationally operating companies such as Volkswagen in the diesel emissions scandal, which are prepared to spend considerable sums of money on legal representation and favourable expert opinions on the legal situation in order to defend themselves against such actions. It must therefore be stated quite clearly: if the entities with standing to bring collective actions do not have sufficient financial and organisational resources to level those of the companies typically sued, there is a risk of procedural imbalance and, in the worst case, a situation in which such collective actions can hardly ever be brought (successfully) due to lack of funds.[96]

Thus, according to media reports, Volkswagen, in connection with the lawsuits brought against it in the diesel emissions scandal before German courts, has not only commissioned litigation lawyers, but also two dozen expert opinions on legal issues.[97] It seems inconceivable that, e.g. the Bundesverband der Verbraucherzentralen und Verbraucherverbände that is the consumer association, which brought the model declaratory action against Volkswagen in Germany on the claimant side, has comparable resources.[98] Furthermore, in Germany, there is already speculation as to whether lawyers in the future will be found to represent the interests of the claimant consumer associations in model declaratory actions: Since the amount in dispute is capped by law,[99] the respective lawyers would only have been entitled to a few thousand euros in fees in the case of the model declaratory action against VW, if the lawsuit had been terminated

95 See above Section I.B. with n 46 to 50 and Weiss, 'Securities Litigation against VW and Porsche' (n 3) Section V: 'The fact that institutional investors have stepped into the ring ensures that plaintiffs fight with defendants on a level playing field in terms of financial resources.'

96 See already above under Section B. before and with n 51 with examples for such a lack of funds from the country chapters collected in this book.

97 See for a respective press report Volker Votsmeier, 'VW und die Wissenschaft: Unklare Verhältnisse bei der Aufklärung des Dieselskandals' *Handelsblatt* (Düsseldorf, 6 November 2019) <http://www.handelsblatt.com/unternehmen/industrie/abgasaffaere-vw-und-die-wissenschaft-unklare-verhaeltnisse-bei-der-aufklaerung-des-dieselskandals/25191942.html?ticket=ST-958291-7q1FZbJqjVtH0aSNchEF-ap2>.

98 See above n 15.

99 According to s 48(2) sentence 2 of the *Gerichtskostengesetz* (German Court Fees Act) they amount to a maximum of €250,000.

by declaratory judgment, even though hundreds of thousands of consumers had enrolled to the proceedings.[100] It is therefore not surprising that the law firm in question apparently insisted on an exorbitantly higher fee during the settlement negotiations, which allegedly caused the negotiations to fail temporarily at a first attempt before they were successfully concluded after all.[101]

Against this background it is doubtful whether the rules on standing and funding in the European proposal for a Directive on representative actions[102] can really ensure that the entities with standing to bring representative actions will be sufficiently powerful. For, on the one hand, only entities with a non-profit-making character shall be entitled to bring a representative action.[103] But on the other hand the proposed Directive does not regulate the way in which these entities obtain funds to finance the representative actions[104] and furthermore the obligation of the Member States to assist these entities, as contained in the original draft, has been greatly weakened in the Council's General Approach.[105]

It is therefore to be feared that, when the Directive enters into force, in Member States which are reluctant to accept third-party funding, the entities entitled to bring a representative action will not have sufficient resources to establish a genuine level playing field with powerful companies as opposing parties. It would have been preferable for the proposed Directive to prevent such

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100 See already above n 15.

101 See for this development of the model declaratory action against VW the interview with Volker Römermann who counselled the claimants' lawyers on the fees, conducted by Pia Lorenz, 'Eine Zumutung für Anwälte' (*Legal Tribune Online*, 5 March 2020) <http://www.lto.de/recht/juristen/b/kosten-anwalt-vergleich-musterfeststellungsklage-vw-goa-gebuehren/>.

102 See n 11.

103 See art 4(1)(c) of the Proposal for a Directive on representative actions, COM(2018) 184 final (n 11) and art 4a (3)(c) of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77).

104 Art 7 of the Proposal for a Directive on representative actions, COM(2018) 184 final (n 11) on funding which contained above all in the first para a duty to disclose the source of the funds used at an early stage of the action and in the second para prohibited a third-party funding the action to influence decisions of the claimant qualified entity was deleted in the further legislative procedure; according to the amended version of the proposal Member States' courts or public authorities are entitled to examine whether a qualified entity bringing a cross-border representative action for redress is funded by a third party having an economic interest in the outcome of a specific cross-border representative action and, if this is the case, reject the legal capacity of the qualified entity for the purpose of that action, see art 4b(3) subpara 2 and recital 11 and 10 of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77).

105 See art 15(1) of the Proposal for a Directive on representative actions, COM(2018) 184 final (n 11) on the one hand and art 15(1) of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77). According to the latter version of the proposed Directive the Member States must only avoid that procedural costs related to representative actions 'become insurmountable obstacles' for the respective qualified entities and concrete measures of support such as 'limiting applicable court or administrative fees, granting them access to legal aid where necessary, or by providing them with public funding for this purpose' are no longer explicitly listed in the provision itself but only in recital 39 which, however, emphasises that 'Member States should not be required to finance representative actions'.

a scenario through concrete rules on funding, for example by stipulating that a claimant entity in the event of the success of a representative action for redress should be entitled to retain part of the amount of damages to be paid by the defendant as an incentive and for the financing of future actions.[106]

3. *Information Rights and Corresponding Duties to Disclose Evidence*

Individual private as well as collective actions alleging infringements by companies, are often characterised by an information asymmetry.[107] Relevant evidence necessary to prove the prerequisites of a claim is often in the hands of the opponent or third parties, including authorities who have previously investigated the infringement. The effectiveness of law enforcement therefore depends to a large degree on the extent to which the opposing party, but also third parties and in particular public authorities, are obliged to inform the plaintiff or the court dealing with the case.[108] Thus, to this day, Volkswagen AG is withholding relevant information on the diesel emissions scandal. Although the Management Board had promised to do so, access to the results of the internal investigation carried out by the law firm Jones Day has not been granted.[109]

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106 See also art 6(3)(b) of the Proposal for a Directive on representative actions, COM(2018) 184 final (n 11), according to which the redress sought by way of a representative action in the event of dispersed damage 'shall be directed to a public purpose serving the collective interests of consumers'. However, in the Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77) the respective provision is no longer contained; see also Meller-Hannich, 'Germany' (n 7) Section I.A.3; 72. Deutscher Juristentag, 'Beschlüsse – Sammelklagen, Gruppenklage, Verbandsklagen –Bedarf es neuer Instrumente des kollektiven Rechtsschutzes im Zivilprozess?' (72. Deutscher Juristentag, Leipzig, September 2018) paras 12 and 14 <http://www.djt.de/fileadmin/downloads/72/Beschluesse_gesamt_final.pdf>. In contrast the reform of the German Capital Markets Model Case Act (n 21) increased the compensation for claimants, cf s 41a of the *Rechtsanwaltsvergütungsgesetz* (RVG – German Act on the Remuneration of Lawyers).

107 For the information asymmetry in competition law litigation see, e.g. recital 15 of the Antitrust Damages Directive 2014/104/EU (n 55); for a comparative analysis with regard to state aid law see Ferdinand Wollenschläger and Wolfgang Wurmnest, 'Comparative Analysis and the Way Forward' in Ferdinand Wollenschläger, Wolfgang Wurmnest and Thomas MJ Möllers (eds), *Private Enforcement of European Competition and State Aid Law. Current Challenges and the Way Forward* (Wolters Kluwer 2020) 378ff (hereafter Wollenschläger and Wurmnest, 'Comparative Analysis and the Way Forward'); see also above Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.7: 'Information asymmetry is likely to be a regular feature of consumer disputes.'

108 See also above Weiss, 'Securities Litigation against VW and Porsche' (n 3) Section IV.B.4; Kohl, 'Practitioner Comment' (n 27) Section IV.D.

109 See above Kohl, 'Practitioner Comment' (n 27) Section II.C. However, at least the German Federal Constitutional Court came to the conclusion that a search of the offices of the law firm Jones Day in Munich and the seizure of documents relating to the 'VW diesel scandal' by the public prosecutor's office in order to access the results of the Jones Day law firm did not constitute an infringement of the fundamental rights of Volkswagen, BVerfG, Order of 27 June 2018, 2 BvR 1405/17 and 2 BvR 1780/17, [2018] NJW 2385.

In order to improve the enforcement of capital markets law and consumer law, it therefore makes sense to further harmonise the (possible) claimant's rights to information vis-à-vis the opposing party and third parties and the corresponding disclosure duties in relation to alleged violations of European law. This should include the strengthening of information rights against public authorities and the respective disclosure duties in order to facilitate the exploitation of relevant information gathered by public authorities in the course of their investigations and actions. However, it must be borne in mind that there is a complex situation with conflicting legitimate interests that need to be balanced out in a differentiated way. On the one hand, the respective procedural rules must be designed in such a way that effective law enforcement is possible, while on the other hand mere 'fishing expeditions' must be avoided and public and private interests of confidentiality and of secrecy, in particular professional and business secrecy must be taken into account.[110]

Article 15(3) subsection 1 of the TFEU gives a basic right of information against European authorities.[111] If injured parties decide to bring an action under antitrust law on the basis of a Commission decision, on the basis of article 2(1) of the Regulation (EC) No 1049/2001,[112] they may request access to documents drawn up, received and held by the Commission itself. However, article 4 of Regulation (EC) No 1049/2001 provides for numerous exceptions where access may be refused.[113] The ECJ considers a blanket refusal of access to be inadmissible and requires the Commission to carry out a 'concrete, individual assessment' of

110 See also the comparative analysis by Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.7.

111 Furthermore art 41(2)(b) of the Charter of Fundamental Rights of the EU on the 'Right to good administration' guarantees 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'. On the national level see for Germany the Freedom of Information Act (*Informationsfreiheitsgesetz* – IFG) which in s 1 grants a general right of access to information vis-à-vis the federal authorities, which, however, may refuse to provide information under the conditions specified in s 3. The details remain highly controversial, see BVerwG, Judgment of 24 May 2011, 7 C 6.10, [2011] ZIP 1313, case note by Thomas MJ Möllers and Charis Niedorf [2011] EWiR 569f; ECJ, C-140/13 *Altmann and Others v Bundesanstalt für Finanzdienstleistungsaufsicht* [12 November 2014] ECLI:EU:C:2014:2362 at [42]: professional secrecy as a limit; further ECJ, C-15/16 *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* [19 June 2018] ECLI:EU:C:2018:464 at [46]; similar rights to information against public authorities also exist at the level of the individual federal states, see, e.g. the general right to information as laid down in art 36 of the Bavarian Data Protection Act.

112 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 (hereafter Transparency Regulation (EC) No 1049/2001).

113 Access may be denied where this is necessary to protect the public interest, privacy or the integrity of the individual. The protection of court proceedings and business interests may also justify a refusal for information, art 4(2) of the Transparency Regulation (EC) No 1049/2001 (n 112).

the content of the documents referred to in the request.[114] Recently, however, the Court has defined the claim narrowly.[115]

A remarkably elaborate regime of duties of the opposing party and third parties to disclose evidence in proceedings relating to an action for damages extending to the disclosure of evidence included in the file of a competition authority, is laid down in articles 5 and 6 of the Antitrust Damages Directive 2014/104/EU[116] which codify the case law of the European Union courts and are underpinned by various fundamental principles including the principle of proportionality and the principle of transparency.[117] This regime could certainly serve as a source of inspiration for considerations *de lege ferenda* in other areas of law such as capital market law and consumer law on how to balance the respective conflicting interests and to provide for appropriate procedural safeguards.

By way of contrast, the Proposal for a Directive on representative actions[118] only contains a vague provision under the heading 'Evidence' which exclusively deals with information in the control of the defendant and does not say anything about the obligations of public authorities or other third parties to provide relevant information: the respective 'court or administrative authority may order, in accordance with national procedural rules', that relevant 'evidence be presented by the defendant, subject to the applicable Union and national rules on confidentiality'.[119] In contrast, the amended version of the Proposal includes information under the control of third parties and makes the order for presentation of information subject to an additional proportionality requirement.[120] However, by mostly referring back to national law the provision cannot serve as a suitable model for a general harmonisation of information rights and corresponding disclosure duties. Moreover, the provision is too narrow in that it only covers collective actions, although information asymmetry also affects individual court actions.[121]

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114 CFI, T-2/03 *Verein für Konsumenteninformation v Commission of the European Communities* [13 April 2005] ECR 2005 II-01121 at [74], [114].

115 ECJ, C-365/12 P *European Commission v EnBW Energie Baden-Württemberg AG* [27 February 2014] ECLI:EU:C:2014:112 at [100ff].

116 See n 54; for the interplay of the respective provisions with the Transparency Regulation (EC) No 1049/2001 (n 112) see the last sentence of recital 20 of the Antitrust Damages Directive 2014/104/EU (n 55): 'This Directive should be without prejudice to such rules and practices under Regulation (EC) No 1049/2001'; for the transposition into German law see ss 33g and 89c GWB (n 82).

117 For a detailed analysis see Anca D Chirita, 'The Disclosure of Evidence Under the "Antitrust Damages" Directive 2014/104/EU' in Vesna Tomljenović and others (eds), *EU Competition and State Aid Rules – Public and Private Enforcement* (Springer 2017) 147–73 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800910>.

118 See n 11.

119 Art 13 of the Proposal for a Directive on representative actions, COM(2018) 184 final (n 11).

120 See art 13 of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77); critical Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.7.

121 See above Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.7.

C. STRENGTHENING ENFORCEMENT BY PUBLIC AUTHORITIES

1. Fines as Suitable Penalties

Powerful public authorities are needed above all when it is doubtful whether private legal mechanisms are sufficient – for example, because there is no negotiating balance between the parties.[122] As in competition law, fines should generally focus on the sanctioning of the company rather than on the punishment of individual employees.[123] Criminal proceedings often come too late to act as a deterrent. The fines imposed on VW in Germany[124] and, above all, the fact that the unlawfully obtained profits were disgorged[125] must be regarded as an entirely positive development.

As regards the European level, the considerable increase in the amount of fines against companies violating European Union law as introduced by the 'New Deal for Consumers' Omnibus Directive (EU) 2019/2161[126] is also to be welcomed and it would be desirable for the enforcement of consumer law and capital markets law in general to be safeguarded by correspondingly deterrent fines. A further example of a tightening of sanctions is to be noted in the area of European market abuse law, where the Market Abuse Regulation (MAR)[127] and the Market Abuse Directive (CRIM-MAD)[128] have

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122 See above Kohl, 'Practitioner Comment' (n 27) Introduction and above n 94.

123 In order to catch up internationally, Germany should introduce criminal liability for companies, see for the recent development the Draft Law on Combating Corporate Crime (*Referentenentwurf eines Gesetzes zur Bekämpfung der Unternehmenskriminalität*) issued by the German Federal Ministry of Justice and Consumer Protection (*Bundesministeriums der Justiz und für Verbraucherschutz*) on 15 August 2019 and for the controversial discussion on this draft law, e.g. the news article Elisa Hoven and Michael Kubiciel, 'Verbandssanktionsgesetz – Eine kleine Revolution im Strafrecht' *Frankfurter Allgemeine Zeitung* (Frankfurt, 6 November 2019) <http://www.faz.net/aktuell/politik/staat-und-recht/verbandssanktionengesetz-eine-kleine-revolution-im-strafrecht-16471979.html>, see also Wissenschaftlicher Dienst des Deutschen Bundestags, 'Eine Übersicht zum Unternehmensstrafrecht in einzelnen Mitgliedstaaten der Europäischen Union' (WD 7-3000-070/17, 28 June 2017) <http://www.bundestag.de/resource/blob/539400/9f7fe461015429dc5f71c4c3d2816704/wd-7-070-17-pdf-data.pdf>. On this Martin Henssler and others, 'Kölner Entwurf eines Verbandssanktionengesetzes' (2017) <http://www.verbandsstrafrecht.jura.uni-koeln.de/sites/fg_verbandsstrafrecht/user_upload/Koelner_Entwurf_eines_Verbandssanktionengesetzes__2017.pdf>.

124 See above under Section I.A. with n 27ff.

125 See above under Section I.A. with n 27ff.

126 See above under Section I.A. with n 32 and 33.

127 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1 (hereafter MAR).

128 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive – CRIM-MAD) [2014]

significantly increased the framework of sanctions and fines for insider dealing and market manipulation.[129]

However, as regards the use of the proceeds from such fines by the respective Member State or other public entity, consideration should be given to linking it *de lege ferenda* to the purposes of the pertinent legal provisions infringed. This should prevent the sums in question from ending up in the general budgets. Thus, for example, in Germany the fine against Volkswagen AG was payable to the federal state of Lower Saxony, which allegedly used it to renovate hospitals and finance a fast internet and universities.[130] In contrast, the use of the proceeds from a VW settlement in the US for the compensation of buyers of diesel vehicles and for the financing of electric buses, served the purposes of the violated legal provisions, i.e. consumer protection law and environmental law. Applied to Europe, the proposed solution would have meant that more than €2 billion in fines from Volkswagen AG, Porsche AG and Audi AG[131] would have been disposable to compensate (at least to some extent) injured consumers and investors, and to provide financial support to cities in their efforts to promote clean air.[132]

Against this background article 14(3) of the Proposal for a Directive on representative actions[133] which states that the collective interests of consumers should be taken into account in the allocation of the proceeds of fines for non-compliance with the final decisions issued within the representative action therefore deserves approval.[134] Unfortunately, at the current stage of the

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OJ L173/179; on art 8f of Directive 2014/57/EU, see Petra Buck-Heeb, *Kapitalmarktrecht* (10th edn, CF Müller 2019) paras 440ff.

129 See also 81(4) of the GWB (n 82), s 120(18) of the WpHG (Wertpapierhandelsgesetz – German Securities Trading Act).

130 'Klimaschutz und Kliniken – dafür gibt Niedersachsen VWs Diesel-Milliarde aus' (*Manager Magazin*, 20 July 2019) <http://www.manager-magazin.de/unternehmen/autoindustrie/volkswagen-niedersachsen-hat-vws-abgas-bussgeld-vollstaendig-verplant-a-1278259.html>. If, on the one hand, the Minister-President of Lower Saxony, as a member of the Supervisory Board of Volkswagen AG, violates his supervisory duties, the perpetrator receives the amount that should actually benefit the victims. Regarding the obligation of the Supervisory Board to assert claims for damages against the members of the Board of Management, see Marcus Lutter, 'Wann klagt der VW-Aufsichtsrat?' *Frankfurter Allgemeine Zeitung* (Frankfurt am Main, 2 November 2016) 18.

131 See above under Section I.A with n 28.

132 A corresponding political demand is also made with regard to the German OWiG (*Ordnungswidrigkeitengesetz* – Act on Regulatory Offences), see Oliver Luksic (Member of German Parliament) and Wilfried Bausback (Bavarian Justice Minister) in 'Wohin fließen die Strafzahlungen aus dem Dieselskandal?' (*Deutschlandfunk*, 28 Oktober 2018) <http://www.deutschlandfunk.de/nachgefragt-wohin-fliessen-die-strafzahlungen-aus-dem.2852.de.html?dram:article_id=431290>. Instead, however, the German Government has promised a sum of €1 billion from the general federal budget for clean air in large cities.

133 See above n 11.

134 Art 14(3) of the Proposal for a Directive on representative actions, COM(2018) 184 final (n 11).

legislative process, this provision has been removed from the Proposal for a Directive on representative actions.[135]

In the Republic of China, the ordinary consumer quite often uses a kind of shaming, giving the consumer the chance to discuss emotionally defects of a product in the public.[136] In European law, the legal instrument of shaming exists, for example regulated by the MAR; here the principle of proportionality applies.[137]

2. *Monitoring as a Means of Checking Companies*

The concept of monitoring is used in the US and has also been used in the diesel emissions scandal.[138] Thereby, in the event of a legal violation by a European company it is agreed with the US authorities that it would be monitored for several years whether companies had optimised their own compliance systems in such a way that a legal violation could be largely ruled out in the future.[139] As part of a settlement, European companies are often involuntarily forced to such a compliance with US law. Whether such measures are compatible with German company law is not yet clear. A European solution would certainly be desirable here, to ensure that such monitoring is in line with European legal principles.[140]

D. STRENGTHENING THE INTERPLAY OF PUBLIC ENFORCEMENT, COLLECTIVE ACTIONS AND PRIVATE INDIVIDUAL ACTIONS

In the following, suggestions are made on how the findings gathered in the course of public enforcement can be better used for subsequent individual or collective actions for damages. In cartel cases, private damages actions are usually

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135 See above Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77).

136 Tong Zhang, 'Enforcing Consumer Law in China' in this book Section II.A.1.c) fn 23.

137 Art 34 of the MAR (n 127). Cf the relevance in the earlier section Möllers, 'Efficiency as a Standard in Capital Markets Law – The Application of Empirical and Economic Arguments for the Justification of Civil, Criminal and Administrative Law Sanctions' (2009) 20 EBLR 243, 255ff.

138 See with regard to Volkswagen above Schmitz, 'US' (n 1) Section II.C.

139 See Jürgen Wessing, 'Internal Investigations – Interne Ermittlungen im Unternehmen' in Christoph E Hauschka, Klaus Moosmayer and Thomas Lösler (eds), *Corporate Compliance* (3rd edn, CH Beck 2016) para 46; Gregor Bachmann, 'Interne Ermittlungen ohne Grenzen?' (2016) 180 ZHR 563ff.

140 Klaus Hopt, 'Interne Untersuchungen, Whistleblowing und externes Monitoring' [2020] ZGR (forthcoming).

brought as follow-on actions that is in the aftermath of decisions of competition authorities imposing penalties on the respective companies.[141] Therefore, the Antitrust Damages Directive 2014/104/EU in particular provides for mechanisms to facilitate the use of the outcome of public authority proceedings for subsequent civil actions.[142] Thus, with regard to the interplay between public and private enforcement, it is once again antitrust law that can serve as a seminal model, which should be followed for enforcement in other areas of law such as consumer and capital markets law.[143] And furthermore, such mechanisms can also be made useful for the interplay between collective actions and individual private actions for damages.

1. Suspension or Interruption of Limitation Periods

a) Suspension or Interruption of Limitation Periods as a Result of Public Authority Intervention

If private claimants cannot await the outcome of public authority proceedings because of the impending statute of limitation, then the results of such public authority proceedings cannot be reliably used for subsequent private actions for damages. That is why according to article 10(4) of the Antitrust Damages Directive 2014/104/EU,[144] the limitation period is suspended or interrupted until at least one year after the ending of competition authority proceedings which have been taken 'in respect of an infringement of competition law to which the action for damages relates'. Hence, for example in Germany, injured parties benefit under section 33h(6) sentence 1 of the Act Against Restraints of Competition (GWB) from such a suspension of the limitation period if the *Bundeskartellamt* (German Competition Authority), the EU Commission or the competition authority of another Member State initiates antitrust proceedings: injured parties can therefore await the investigations of the supervisory

141 See recital 26 of the Antitrust Damages Directive' 2014/104/EU (n 55).

142 In detail Ferdinand Wollenschläger, Wolfgang Wurmnest and Thomas MJ Möllers (eds), *Private Enforcement of European Competition and State Aid Law. Current Challenges and the Way Forward* (Wolters Kluwer 2020) passim.

143 Already discussed in Thomas MJ Möllers and Bernhard Pregler, 'Zivilrechtliche Rechtsdurchsetzung und kollektiver Rechtschutz im Wirtschaftsrecht' (2012) 176 ZHR, 144ff, translated as Thomas MJ Möllers and Bernhard Pregler, '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 27–74 (hereafter Möllers and Pregler, 'Zivilrechtliche Rechtsdurchsetzung'); approving Wundenberg, 'Perspektiven der privaten Rechtsdurchsetzung' (n 79) 124ff; Philipp Maume, 'Staatliche Rechtsdurchsetzung im deutschen Kapitalmarkrecht: eine kritische Bestandsaufnahme' (2016) 180 ZHR 358ff.

144 Antitrust Damages Directive 2014/104/EU (n 55).

authorities before bringing an action, without suffering any legal disadvantage as a result.[145] This also makes sense in terms of procedural economy because it avoids a double deployment of resources for fact-finding by avoiding an early investigation of facts by civil courts, which have to be investigated by public authorities anyway.

In contrast, neither in consumer law nor in capital markets law has a similar European regime of suspension of limitation periods by public authorities' investigations been introduced so far.[146] Thus, for example, in Germany, neither the German Capital Markets Model Case Act (KapMuG)[147] nor the provisions on the civil procedural model declaratory action (*Musterfeststellungsklage*)[148] provide for such a suspension or interruption of limitation periods resulting from related public authorities proceedings.[149]

De lege ferenda, however, the European legislator should ensure in a more general manner that public authorities' investigations of infringements of European law suspend the limitation period for related private actions for damages so as to make the findings of such public proceedings usable for subsequent private actions.

b) Suspension or Interruption of Limitation Periods as a Result of Collective Actions

Individual private enforcement can also be facilitated by allowing the individual claimant to await the outcome of a collective action and this holds particularly true with regard to actions for injunctive or declaratory relief.[150] The country chapters collected in this book have revealed considerable differences as to the effects of collective actions on limitation periods applicable to individual claims.[151] Therefore, it means a step forward when article 11 of the Proposal for a Directive on representative actions[152] states that 'the submission of a

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145 See Bundesregierung, 'Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen' [12 August 2004] BT-Drucks 15/3640, 55 <http://dip21.bundestag.de/doc/btd/15/036/1503640.pdf>.

146 But see with regard to the effect of collective actions on the prescription of individual claims below under b).

147 See above Section I.A. with n 11.

148 See above Section I.A. with n 7.

149 On this demand already, see Möllers and Pregler, 'Zivilrechtliche Rechtsdurchsetzung' (n 143) 155. It would have been conceivable, for example, that administrative fines would have been levied in Germany by the Federal Motor Vehicle Office (*Kraftfahrt-Bundesamt – KBA*) (regarding the diesel software) and BaFin (for the failure to make an ad hoc announcement).

150 See the comparative analysis of this aspect by Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.4.

151 See the various country chapters above as well as the comparative analysis of this aspect by Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.4.

152 See above n 11.

representative action [...] shall have the effect of suspending or interrupting limitation periods applicable to any redress actions for the consumers concerned'.

Furthermore, in the revised Proposal it is clarified that such a suspending or interrupting effect is not only induced by representative actions for redress measures, but also by representative actions for injunctive relief.[153] However, according to the revised Proposal this suspensive or interruptive effect works only to the benefit of 'consumers concerned by the action'[154] whereas the original Proposal extended it to 'the consumers concerned'.[155] If this modification of wording is intended to mean that only consumers shall benefit who previously opted in to the representative action or who have not opted out,[156] then this makes sense on the one hand, as it creates an incentive for an opt in and thus for overcoming individual rational apathy. On the other hand, there is no possibility for those who prefer to bring only an individual action to await the outcome of the collective action for reasons of better assessment of the litigation risk, and this can lead, especially in the case of mass damages with higher individual amounts of damage, to the courts having to deal with a large number of individual actions, which might prove pointless for the injured parties due to a later unfavourable outcome of the collective proceedings.

2. *Binding Effect of the Findings of an Infringement on (Other) Court Proceedings*

a) Binding Effect of the Findings of an Infringement by a National Competition Authority or by a Review Court under the Damages Directive 2014/104/EU

A second linkage between public and private enforcement, which again, on the one hand may facilitate the latter and on the other hand may help to avoid the double deployment of public resources, is the imposition of a binding effect of the finding of an infringement which had been established by a public authority or a court on a subsequent private action.[157]

Once again, the Antitrust Damages Directive 2014/104/EU can serve as a model here, when stating in article 9(1) that 'an infringement of competition law found by a final decision of a national competition authority or by a review court

153 See art 11 sentence 1 of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77).

154 See art 11 sentences 1 and 2 of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77). See also Meller-Hannich, 'Germany' (n 7) Sections II.A. and III.F.; Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.4.

155 See art 11 of the original Proposal for a Directive on representative actions, COM(2018) 184 final (n 11).

156 This is how the amendment is understood by Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.4.

157 On this already Möllers and Pregler, 'Zivilrechtliche Rechtsdurchsetzung' (n 143) 154ff.

is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law'. Such a mechanism is not without problems, because on the one hand it limits the independence of civil courts and on the other hand it raises the question of how a civil court should proceed in cases where the respective public authority's decisions have been taken on a factual basis which would be insufficient in civil proceedings, or where the respective decision is manifestly illegal.[158] Even so, it certainly is a considerable relief to the claimant, since in the course of the action for damages there is no longer any need to prove the harmful act and the illegality.[159] However, in view of the aforementioned difficulties, a binding effect could not be ordered to such a far-reaching extent in all cases by the Antitrust Damages Directive 2014/104/EU. Instead, due to the lack of harmonisation of national administrative proceedings according to article 9(2) of the Antitrust Damages Directive 2014/104/EU the binding effect is less extensive in cross-border cases:[160] Member States are only required to grant final decisions taken in another Member State at least the status of 'prima facie evidence' in damage proceedings before their courts.

b) Binding Effect of Findings under the Proposal for a Directive on Representative Actions

In the light of the Antitrust Damages Directive 2014/104/EU, it seems appropriate for the European legislature to consider attributing a certain binding effect to administrative or judicial decisions which establish an infringement of rights in the area of capital markets law or consumer law by a company, for subsequent civil actions for damages. This should at least apply if the respective administrative or judicial proceedings comply with certain European minimum standards for establishing the facts and ensuring a fair procedure.

Against this background it does not come as a surprise that article 10(1) and (2) of the Proposal for a Directive on representative actions[161] follow the model of article 9(1) and (2) of the Antitrust Damages Directive 2014/104/EU and provide for a similarly binding effect by stating that 'an infringement

158 For both aspects see Wollenschläger and Wurmnest, 'Comparative Analysis and the Ways forward' (n 107) 363ff.

159 In this respect, see the information provided by the European Commission, 'Antitrust: Commission fines producers of CRT glass €128 million in fourth cartel settlement' (*Press Release*, IP/11/1214, 19 October 2011) <https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1214>; see also Kurt L Ritter, in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht* (6th edn, CH Beck 2019) art 30 VerfVO mn 1. But there still has to be established causation and the damage.

160 Wollenschläger and Wurmnest, 'Comparative Analysis and the Ways Forward' (n 107) 362ff.

161 See n 11.

harming collective interests of consumers established in a final decision of an administrative authority or a court [...] is deemed as irrefutably establishing the existence of that infringement for the purposes of any other actions seeking redress before their national courts against the same trader for the same infringement', whereas in cross-border cases the respective binding effect is limited to 'a rebuttable presumption'.[162] Furthermore article 10(3) of the Proposal for a Directive on representative actions[163] stipulates that a final declaratory decision issued in the procedure of representative action provided for by the proposed Directive 'is deemed as irrefutably establishing the liability of the trader towards the harmed consumers by an infringement for the purposes of any actions seeking redress before their national courts against the same trader for that infringement.'

However, particularly in view of concerns about the independence of the judiciary,[164] the binding effect as laid down in article 10(1) and (2) of the original Proposal has been weakened in the last version of the proposal: accordingly, Member States only shall ensure that the respective final decision can be used as evidence of the existence of the respective infringement 'in accordance with national law on evaluation of evidence'.[165] This modification is acceptable as long as there is no guarantee that all procedures in the Member States where such findings are made meet sufficiently harmonised standards.

Moreover, the rule on the binding effect of declaratory decisions in article 10(3) of the original Proposal has been dropped in its entirety. On the one hand, this is understandable because collective actions for a declaratory judgment with opt-in mechanisms, as permitted by the proposed Directive, become unattractive if all consumers, including those who have not joined, benefit from the outcome of the proceedings (free-riding problem).[166] On the other hand, however, it is regrettable that not all subsequent individual actions for damages are facilitated by a binding effect of the respective declaratory judgment which also means that the respective courts are burdened with the effort of a new finding of the relevant facts.[167]

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162 See for a critical assessment Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.5.

163 See n 11.

164 See recital 33 of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77).

165 See art 10 of Council, 'General Approach – Directive proposal on representative actions for consumers' (n 77).

166 This is rightly emphasised by Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.5.

167 As far as legal issues are concerned, however, even legally non-binding decisions will often have a strong factual effect on the following individual actions, see with regard to this aspect Domej and Honegger-Müntener, 'Consumer Law in Europe' (n 6) Section III.A.5.

E. STRENGTHENING THE INTERNAL MONITORING OF THE COMPANIES

1. Compliance Duties of the Management Board

The solutions proposed so far all carry one disadvantage: As long as public authorities or private individuals ignore an infringement, it cannot be stopped or punished. The informational deficit of authorities and private persons is immanent with non-public and secret internal company information. Conversely, the company knows the internal company information best, and it is to this extent an information monopolist.[168] There are two conceivable ways of compensating for this system-immanent disadvantage that authorities and private claimants have. In recent decades, internal and external monitoring has been massively tightened. Originally, German company law provided for the monitoring of internal corporate conduct in addition to controlling, auditing and risk management by the supervisory board and auditors.[169] In the meantime, extensive compliance systems have been added.[170] For years, Volkswagen had promoted these systems as a global leader; in retrospect, it is clear that its system had clearly failed.[171]

To leave the structures of a compliance system subject to the business-judgement rule at the discretion of the Management Board[172] seems too general. Volkswagen claims that only a few people had knowledge of the defeat software. Here, it should not be possible to allow the board to simply rely on a lack of

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168 On this term, see Thomas M J Möllers and Franz C Leisch, 'Haftung von Vorständen gegenüber Anlegern wegen fehlerhafter Ad-hoc-Meldungen nach §826 BGB' [2001] WM 1648, 1654; approving Oliver Rieckers, 'Haftung des Vorstands für fehlerhafte Ad-hoc-Meldungen de lege lata und de lege ferenda' [2002] BB 1213, 1217; Rüdiger Krause, 'Ad-hoc-Publizität und haftungsrechtlicher Anlegerschutz' [2002] ZGR 799, 823.

169 Cf the relevant ss 107 para 3 sentence 2, 111 of the German Stock Corporation Code (AktG) and ss 321ff German Commercial Code (*Handelsgesetzbuch – HGB*).

170 Cf No A.2 German Corporate Governance Kodex (DCGK). The introduction of a compliance codex is based on art 20 of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182/19. Cf Thomas M J Möllers, 'Europäisches Gesellschafts- und Unternehmensrecht' in Reiner Schulze, Stefan Kadelbach and André Janssen (eds), *Handbuch Europarecht* (4th edn, Nomos 2020) §18 mn 76ff (forthcoming).

171 Sönke Iwersen and others, 'Wie die Kontrolle bei VW versagte' *Handelsblatt* (Düsseldorf, 7 February 2019) <http://www.handelsblatt.com/unternehmen/industrie/dieselskandal-wie-die-kontrolle-bei-vw-versagte/23955944.html?ticket=ST-38473556-Oa0VQjh5jp1TH5dZ735m-ap2>. This could be remedied by the monitoring previously described.

172 See Barbara Grunewald, 'Informationen als Grundlage der Leitung und Überwachung' [2020] ZGR (forthcoming).

knowledge. Rather, one will have to ask to what extent important information carriers in a company have been monitored and the corresponding knowledge has been passed on. For this reason, the compliance structures must be further substantiated and thus made legally binding, so that the knowledge of individual persons can also be attributed to the management board and thus to the legal entities.[173] If the management board stipulates compliance with strict emission values, it must satisfy itself in detail that the development department is achieving them. Finally, whistleblowing should be considered as an appropriate means of disclosing scandals to the management board or the public. Here too, there are examples from European competition law, which cleverly uses the findings of game theory such as the prisoner dilemma.[174]

2. *Penalties and Incentives*

Penalties and incentives should be combined to enforce the companies' obligations. Since the WorldCom and Enron scandals, under European law the Chief Executive Officer (CEO) and the Chief Financial Officer (CFO) have to make a statement of responsibility regarding the accuracy of the annual financial statements;[175] and the liability of auditors has also been made much more stringent. Now, the CEO, the CFO and the auditor can be sued for damages if their statement had been incorrect.[176] It is possible that a personal 'compliance statement' from the Chief Legal Officer can further increase the effectiveness of the compliance system. Moreover, the increase in fines in antitrust and capital

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173 Such persons can be identified from the insider lists of art 18 of the MAR (n 127). This may include the head of the development department, for example. On the view of OLG Braunschweig to regard employees of the development department as appointed representatives, see Weiss, 'Securities Litigation against VW and Porsche' (n 3) fn 43.

174 For example, a leniency scheme ('Bonusregelung') under which only the first cartel member to uncover the cartel remains unpunished, Bundeskartellamt (German Federal Cartel Office), 'Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen in Kartellsachen – Bonusregelung' (7 March 2006) <http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Bekanntmachungen/Bekanntmachung%20-%20Bonusregelung.pdf?__blob=publicationFile&v=7>; 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' (2006/C 298/11) [8 December 2006] OJ C298/17.

175 Cf. The annual accounting oath is based on art 4(2) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L390/38. On the introduction of s 264(2) sentence 3 of the German Commercial Code (HGB), s 289(1) sentence 5 of the HGB and the comparable situation under US law after the Sarbanes-Oxley Act, see Thomas M J Möllers, 'Creating standards in a global financial market – the Sarbanes-Oxley Act and other activities: what Europeans and Americans could and should learn from each other' (2007) 4 ECFR 173ff.

176 S 264 para 2 sentence 3 of the Commercial Code (HGB) in conjunction with s 823 para 2 of the Civil Code (BGB) and s 323 para 1 sentence 3 of the Commercial Code (HGB).

markets law[177] already has the effect that companies have a vested interest in uncovering infringements. Conversely, it should have the effect of reducing penalties or fines for the company if it has set up a compliance system that has failed in the specific individual case but is fundamentally effective. Here, other legal systems seem to be more advanced than the case law of the ECJ, which does not yet provide for a privileged treatment of the injuring party for the establishment of an effective compliance system.[178] Finally, US authorities are offering whistle-blowers the prospect of high premiums.[179] This incentive can also help to identify infringements.

177 See Section II.B.1 above.

178 Rejecting the compliance defence under European competition law, see CFI, T-279/02 *Degussa AG v Commission of the European Communities* [5 April 2006] ECR 2006 II-00897 at [350]; CFI, T-352/94 *Mo Och Domsjö AB v Commission of the European Communities* [14 May 1998] ECR 1998 II-01989 at [419]; in contrast favoured by the US, France, the UK, Canada, Brazil and Spain. On this, see Alexander Eufinger, 'Berücksichtigung von Compliance-Programmen bei der Bußgeldbemessung – Vorbild USA?' [2016] Corporate Compliance Zeitschrift 209ff.

179 This can be up to 30 per cent of the fine levied by the authorities, see s 21F(b)(1) of the SEA; on this Silvelyn Wrase and Christoph Fabritius, 'Prämien für Hinweisgeber bei Kartellverstößen?' [2011] Corporate Compliance Zeitschrift 69, 70ff.