

ENFORCING CONSUMER
AND CAPITAL MARKETS LAW

The Diesel Emissions Scandal

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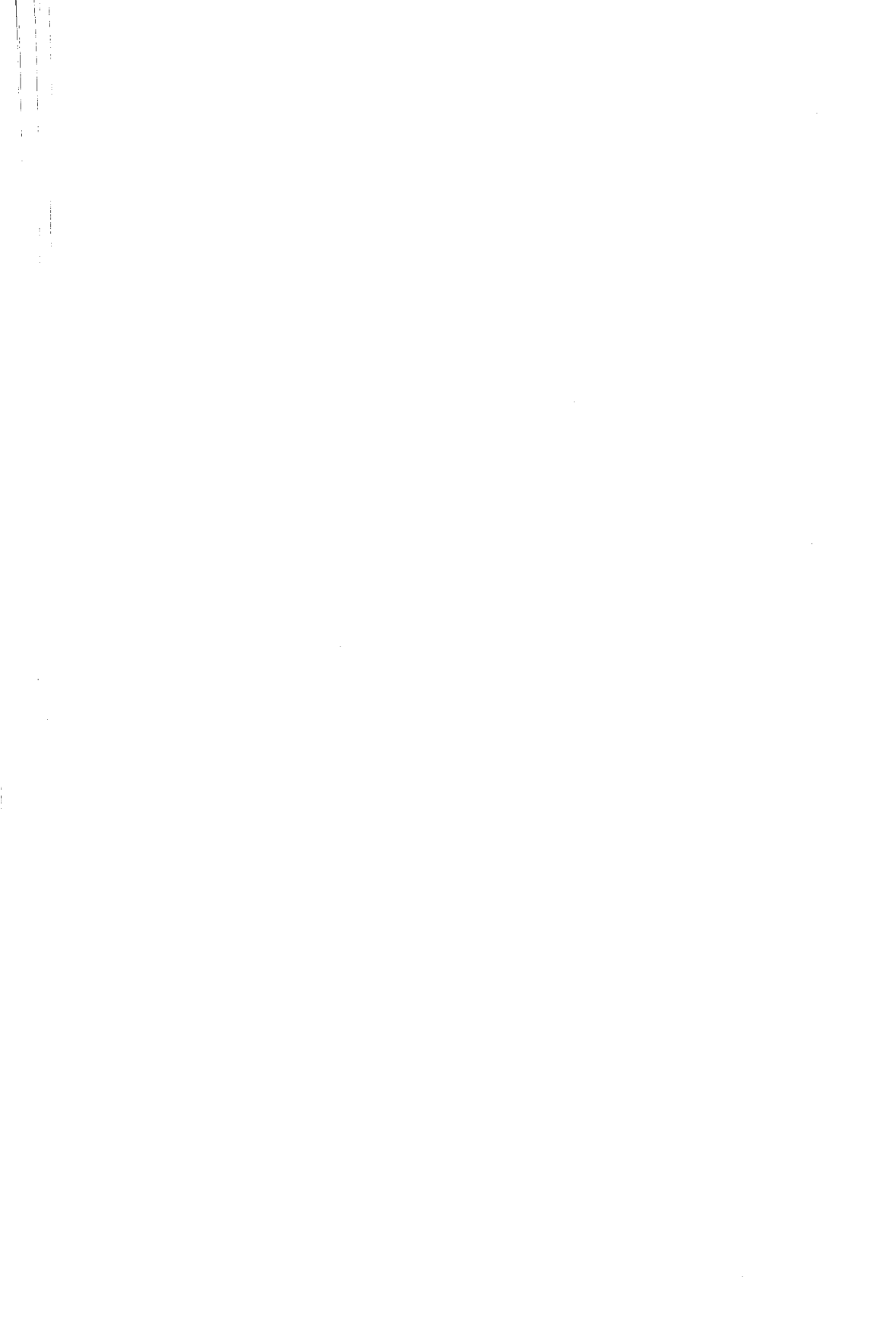
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PART I
INTRODUCTION



INTRODUCTION

Beate GSELL* and Thomas M.J. MÖLLERS**

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I. THE DIESEL EMISSIONS SCANDAL AT VOLKSWAGEN AG: THE FACTS

If one wishes to analyse the enforcement of consumer protection law and capital markets law worldwide, the diesel scandal appears to present a perfect opportunity. The car manufacturer Volkswagen – and perhaps also other car manufacturers – allegedly manipulated their diesel engines in order to comply with emission requirements. As the largest car manufacturer in the world, Volkswagen sold its cars in almost every country. Volkswagen and its subsidiaries, such as Audi, had installed a 'defeat device' in their diesel engines in order to make emissions

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appear lower during emissions testing than they actually are in everyday use of the vehicles.¹ Even if the permissible emission limits in the individual countries differ to some extent, the facts of the cases – namely the manipulated diesel engines – remain the same.

II. THE BOOK INSPIRED BY THE JEAN-MONNET CENTRE OF EXCELLENCE INspIRE: PEOPLE

The Jean-Monnet Centre of Excellence INspIRE (European Integration – Rule of Law and Enforcement)² at the University of Augsburg aims to bring together several legal spheres and to collaborate across the various areas of the law, as similar questions arise in multiple Member States of the European Union. Its mission is to conduct research on European law from the perspective of legal enforcement ('law in action'). The people behind INspIRE are Thomas MJ Möllers, Ferdinand Wollenschläger, Wolfgang Wurmnest (all Augsburg), Tong Zhan (Beijing), Frédérique Ferrand (Lyon), Beate Gsell (Munich) and Enrico Camilleri (Palermo). It is funded by the Erasmus+ Programme of the European Union.

III. INspIRE's LEGAL METHODOLOGY: THE INTRADISCIPLINARY AND INTERNATIONAL APPROACH

A. LEGAL METHODOLOGY: THE THREE PILLARS

INspIRE is based on three pillars. The first 'intra-disciplinary-pillar' is particularly characteristic of the project – through this approach general topics are examined from the perspective of different fields of law. This allows for an in-depth depiction of the underlying difficulties within the framework of legal enforcement, and it enriches research with synergistic effects vis-à-vis innovative solutions existing at the macro level. Thus, the first INspIRE conference in November 2018 discussed the issue of private enforcement of EU competition

¹ On the facts from the US perspective, see United States Department of Justice, 'Volkswagen AG Pleads Guilty in Connection with Conspiracy to Cheat U.S. Emissions Tests' (*Press Release*, 10 March 2017) <<http://www.justice.gov/opa/pr/volkswagen-ag-pleads-guilty-connection-conspiracy-cheat-us-emissions-tests>>, and Amy J Schmitz, 'Enforcing Consumer and Capital Markets Law in the United States' in this book, Section II.A.

² <<http://www.caplaw.eu/en/inspire>>.

and state aid law;³ the second conference in May 2019 – the results of which are published in this book⁴ – dealt with issues surrounding the enforcement of consumer and capital markets law.

The second pillar is the transnational perspective. In Europe, a purely national perspective is too narrow because, on the one hand, it ignores the wealth of different – sometimes competing – national solutions and, on the other hand, it neglects the manifold supranational influences on the legal systems of the Member States as well as the harmonisation and innovation potential of European legislation. Therefore, the Centre of Excellence involves the participation of researchers from larger and smaller Member States of the European Union in order to generate a broader perspective. A horizontal comparison of law can serve to optimally depict the strengths and weaknesses of an individual solution, and thus mutually enrich the legal systems involved. The results of such a comparison can furthermore be exploited in the supranational Union law perspective. Various non-European legal systems – including those of the US, Australia, Brazil and China – are also taken into account as reference systems.

Finally, the research is based on a (primarily) inductive approach. The idea is to start with the specifics of different legal areas (consumer law, capital markets law, competition law, state aid law etc) and to progress to general principles. Which instruments and mechanisms of legal enforcement exist in which legal field? Are there requirements that can be generalised according to a standard of comparison, the *tertium comparationis*? Subsequently, it might be possible to draw conclusions deductively, moving from the general (back) to the specific.

B. THE PROJECT IN CONTEXT

Apart from the two international academic conferences previously mentioned, the project seeks to reach a broader public by organising panel discussions on the enforcement of EU law. The objective is to increase insight among citizens regarding the relationships between national and European law. In 2015, an event about TTIP, the planned free trade agreement between the EU and the US,

³ 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).

⁴ The conference on 'Enforcing Consumer and Capital Markets Law in Europe' was held at the University of Augsburg on 23–24 May 2019 within the framework of the EU-funded project INspiRE.

attracted several hundred citizens.⁵ Another event organised in the summer of 2017, in cooperation with the Europa Union Augsburg and the city of Augsburg, dealt with mechanisms of collective redress.⁶ Furthermore, a panel discussion on the issue of data protection was held in November 2018.⁷

Moreover, INspIRE aims to ameliorate access to law. The established 'CAPLAW'⁸ database on German and European Economic Law is constantly being expanded with national court decisions relating to European law. Decisions of national courts that have been enacted after a preliminary ruling procedure before the European Court of Justice are translated into English and published online in the database. These judgments provide information on how the national judges methodologically adapt and apply the rulings of the European Court of Justice to national law. Until now, such judgments existed only in the respective national language, not in other languages of other Member States. Decisions collected in the CAPLAW database can also be those that – despite European relevance – have not led to preliminary rulings. The collection of such important national decisions will allow other scholars, judges, lawyers and the interested public (including journalists) to make horizontal legal comparisons, and it will thus ultimately serve the enforcement of European law.

IV. ENFORCEMENT OF CONSUMER AND CAPITAL MARKETS LAW

The diesel emissions scandal ('Dieselgate') serves as a current Mass Damage Event on which all chapters are based. The diesel scandal has implications for a consumer who purchased a faulty product. At the same time, the investor who was not informed about the scandal in a timely manner might also feel deceived. Based on adjudicated and pending cases, this book demonstrates how authorities – but also private claimants – can take steps and seek redress against the infringement of the law or of their rights without provoking an abuse of the respective instruments. In doing this, three areas are examined: legal enforcement by public institutions, legal enforcement by private individuals, and overlaps and interconnections between these two tracks of legal enforcement

⁵ Panel discussion on 5 May 2015: 'TTIP Chance oder Risiko? – Transatlantic Trade and Investment Partnership' (*TTIP a chance or a risk?*).

⁶ Panel discussion on 18 July 2018: 'Sammelklagen in der EU – Fluch oder Segen für den Verbraucherschutz?' (*Class actions in the EU – A curse or blessing for consumer protection?*).

⁷ Panel discussion on 13 November 2018: 'Google, Amazon, Facebook – Wer hat ein Recht auf meine Daten?' (*Google, Amazon, Facebook – Who has a right to my data?*).

⁸ <<http://www.caplaw.eu/en/>>. The database is (partly) available in several languages, including German, English, French and Chinese. The database is publicly accessible and generates around two million hits annually.

as well as hybrid instruments and mechanisms. There is a particular focus on collective redress by way of representative actions (class and group actions) and model case proceedings.

A. THE NATIONAL ANALYSIS: A SELECTION OF COUNTRY CHAPTERS

At the core of this book there is a collection of national contributions from Australia (Peter Cashman), Austria (Petra Leupold and Georg E. Kodek), Brazil (Claudia Lima Marques), China (Tong Zhang), Denmark (Anders Schäfer), England and Wales (John Sorabji), France (Emmanuel Jeuland), Germany (Caroline Meller-Hannich), Italy (Marcello Gaboardi), Lithuania (Egidija Tamošiūnienė and Remigijus Jokubauskas), the Netherlands (Charlotte M.D.S. Pavillon and Willem H. van Boom), Portugal (Henrique Sousa Antunes) and the US (Amy J. Schmitz). These national contributions analyse the current situation in the different countries, and specify which approach has an intended effective – or even efficient – impact, and which models have not been proven.

The reports have a similar structure, which allows for better cross-referencing, improved interaction, and comparability of results. Even so, the reporters were free to adapt the structure to their individual needs. Thus, each country report addresses two case studies concerning the diesel emissions scandal: the enforcement of the rights of consumers who bought a manipulated car; and the enforcement of the rights of investors who were informed too late about the impending scandal. Therefore, the authors of the national reports were given the following facts mirroring the current diesel scandal:

Case 1: Automobile manufacturer A produces motor vehicles whose emission values are manipulated. It is assumed that this is a material defect of the vehicle and that consumers who have bought such vehicles have suffered a loss of the vehicle's value as a result of the manipulation being revealed.

Case 2: Automobile manufacturer A produces motor vehicles whose emission values are manipulated. The stock market is informed about this situation far too late. A member of the management board, who has found out about the facts internally before publication of the information, sold his own shares before the ad hoc announcement. After A informs the stock exchange about the manipulated emission values, the company's share price falls by 50 per cent.

Various aspects are addressed within this structure: the elimination of the continuing effects of legal infringements through granting compensation of damages, skimming of profits, and penalties; the possible interlinking of public law-enforcement instruments and – individual as well as collective – civil actions; the possible binding effects of administrative and court decisions with regard to possible future

proceedings; the suspension of the statute of limitations or regarding claims for disclosure against authorities or courts; parallel proceedings; settlements etc.

The great merit of this uniform structure of the country chapters – and in particular the reference to the concrete and worldwide similar diesel emissions cases – is that the legal solutions of the individual legal systems (most of which have been generally and theoretically well known) are subjected to a concrete practical test. In this way, it is possible to compare the various approaches much more precisely and specifically with regard to their effectiveness and efficiency.

B. THE SUPRANATIONAL ANALYSIS AND REFORM PERSPECTIVE

The country chapters serve as a basis for a comparative analysis focussing on the supranational perspective of the European Union level which is provided by Tanja Domej and Patrick Honegger-Müntener for consumer law, and by Rüdiger Veil for capital markets law. In particular, the contributions examine what conclusions can be drawn from the findings, merits and shortcomings of the various national solutions in the individual countries regarding the need for intervention by the European legislature. In doing so, the form and content of such an intervention and its chances of realisation are discussed. Despite the recent EU proposal on representative actions for the protection of the collective interests of consumers,⁹ the assessment in consumer law is rather sceptical about the chances of decisive impulses for an effective system of collective litigation emerging from the EU level.¹⁰ As regards capital markets law, it is proposed to follow the example of competition law and to harmonise private liability by way of enacting a directive.¹¹

C. INSIGHT INTO PRACTICE

The country reports and the supranational analysis are complemented by comments of practitioners. Renowned lawyers share their extensive practical experience in the capital markets (Maximilian Weiss) and consumer law

⁹ 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).

¹⁰ See Tanja Domej and Patrick Honegger-Müntener, 'Enforcing Consumer Law in Europe and Beyond: Similarities and Differences' in this book, Section IV.

¹¹ See Rüdiger Veil, 'Private Enforcement in European Capital Markets Law: Perspectives for Reform – the Example of the Obligation to Disclose Inside Information' in this book, Section V.

enforcement (Jutta Gurkmann and Lene Kohl) regarding the diesel emissions scandal in Europe – especially in Germany, Austria and France. The comments exploit the pool of relevant reference cases and illustrate the individual pitfalls and difficulties as well as the cost-benefit relationship between individual enforcement options.

D. THE INTRADISCIPLINARY ANALYSIS AND REFORM PERSPECTIVE

On the basis of the national and supranational analysis, Beate Gsell and Thomas MJ Möllers conduct an intradisciplinary analysis, including further areas of law (such as European competition, company and state-aid law). Thus cross-connections are drawn between the previously elaborated analyses and findings, and the deficits and benefits of the respective solutions are highlighted. The overarching perspective is that differences in the development of law enforcement become apparent not only between European countries and non-European countries, but also between different areas of law. This serves to outline what the general way forward could and should be and leads to several recommendations *de lege ferenda*. In particular, it will be shown that some mechanisms which promote legal enforcement in European competition law could and should be transferred by the European legislature to the enforcement of consumer law and capital markets law.