

# *Introduction: The Transformation of Enforcement—European Economic Law in Global Perspective*

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## I. THE ORIGIN, PURPOSE AND CONTENTS OF THIS PUBLICATION

THIS BOOK ON *The Transformation of Enforcement—European Economic Law in Global Perspective* contains a selection of written contributions prepared for the European University Institute (EUI) June 2013 international conference on ‘The Transformation of Enforcement—European Economic Law in Global Perspective’.<sup>1</sup> The conference was organised as part of the larger project ‘European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation’.<sup>2</sup> The book investigates enforcement through the lens of the objective of the European Research Council (ERC) project—that is to analyse a normative model, which could shape a self-sufficient European private legal order in its interaction with national private law systems.

Within this larger project framework, this book answers one of the most pressing issues in current European economic law and its enforcement. In search for a new legal architecture for transnational economic transactions and their enforcement, numerous commentators have ventured into proposing new theories and bases for European economic law and transnational

<sup>1</sup> [https://blogs.eui.eu/erc-erpl/event/transformation-of-european-law-enforcement/?instance\\_id](https://blogs.eui.eu/erc-erpl/event/transformation-of-european-law-enforcement/?instance_id) (last visited 9 August 2015).

<sup>2</sup> See <https://blogs.eui.eu/erc-erpl/> (last visit 10 August 2015) and on the design of the overall project H-W Micklitz and Y Svetiev (eds), *A Self-sufficient European Private Law—A Viable Concept?* EUI Working Paper 2012/31 (ERC-ERPL 01/2012); H-W Micklitz, Y Svetiev and G Comparato (eds), *European Regulatory Private Law—The Paradigm Tested*, EUI-ERC Law 2014/04.

private law.<sup>3</sup> Most of these research efforts have, however, focused upon either selected areas of law, such as competition law, consumer law and financial services, or selected issues in the realm of enforcement, such as, for instance, class actions.<sup>4</sup> Furthermore, most of the conceptual overarching research efforts have substantially neglected the realm of enforcement. Few researchers have devoted thoughts to the question of a coherent enforcement architecture for European economic law in an ever more transnational setting.<sup>5</sup> Thus, this is the first book which thoroughly examines and compares enforcement transformations in various areas of law. It brings together the leading international and European scholars in a variety of disciplines to share and compare the experiences and learnings in different areas of law. In doing so, the book draws upon an interdisciplinary approach that includes law, economics and political sciences. Ultimately, it adds to the existing body of literature in European economic law by offering a cross-disciplinary perspective that was formerly non-existent.

This publication is rooted in a wide and regulatory understanding of enforcement. It is argued that the system has turned into a regulated market for law enforcement. With the ultimate enforcement authority remaining vested in state institutions, the European enforcement regime can be characterised as a regulated market for rendering dispute resolution and justice. In this regulated market, the monopoly of enforcement by the state has been broken by the emergence of ever greater private enforcement powers in the shadow of the law. Justice is understood as a service and enforcement as a market. The guiding norm in the market for law enforcement service has become competition between the diverse enforcement mechanisms. Thereby, it is in particular traditional judicial avenues of law enforcement that are pressurised into redefining their role in this market for law enforcement. Building on this understanding of enforcement, it is argued that political agendas and functional approaches have led to the emergence of a distinct regulatory governance approach which aims at coping with

<sup>3</sup> *Les Grandes Théories du Droit Transnational* (2013) 1 *Revue internationale de droit économique* (special issue), with contributions from K Tuori; B Kingsbury, N Krisch, RB Stewart; H Muir Watt; Ch Joerges, F Roedel; F Cafaggi; R Zimmermann; G-P Calliess, M Renner; A Fischer-Lescano, G Teubner; P Schiff Berman, RIDE 2013, Numéro 1–2, 1–256.

<sup>4</sup> J Basedow, J Ph Terhechte and L Tichy (eds), *Private Enforcement of Competition Law* (Baden-Baden, Nomos, 2011); F Cafaggi and H-W Micklitz (eds), *New Frontiers of Consumer Protection—the Interplay between Private and Public Enforcement* (Cheltenham, Edward Elgar, 2009); Ch Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe* (Oxford, Hart Publishing, 2009); Special Issue on European Regulatory Private Law and Financial Services (2014) 10 *European Review of Contract Law* 473–595, with an editorial from H-W Micklitz and contributions from O Cherednychenko, Y Svetiev, A Ottow, H Marjosola and F della Negra.

<sup>5</sup> With regard to transnational regulation F Cafaggi (ed), *Enforcement of Transnational Regulation, Ensuring Compliance in a Global World* (Cheltenham, Edward Elgar, 2012); with regard to EU Law, M Cremona (ed), *Compliance and Enforcement of EU Law* (Oxford, Oxford University Press, 2012).

these dynamics of the enforcement market. That governance approach is constituted of three elements—that is, of national policies of deregulation and non-regulation, of re-regulation policies at the European level and of self-regulation at the transnational level. Several contributions in this book build upon these elements—in particular the section on globalising justice.

This approach to enforcement distinguishes itself from traditional notions of the legal services industry. It views the rendering of justice as the essential service to be provided by the law enforcement system. The notion of justice denotes thereby not only access to justice but also procedural and substantive justice. Whilst access to justice is considered a condition *sine qua non*, the emphasis is in particular on the outcome of legal proceedings in terms of procedural and substantive justice. This notion builds upon the European Union (EU) holistic approach to create a genuine area of justice in the EU<sup>6</sup> and even further a genuine concept of European justice termed access justice (*Zugangsgerechtigkeit*).<sup>7</sup> It builds on theories of justice such as Rawls' social contract-based concept of justice with its reference to reasonableness and fairness of outcomes in the light of often divergent conceptions for a good life and a just society<sup>8</sup> and recognises the importance of distributive justice<sup>9</sup> and retributive justice.<sup>10</sup> However, it goes beyond. Access justice adds a layer of moral rightness to the efficiency considerations associated with the regulated market approach, though not necessarily aiming at distribution, but at guaranteeing justice in the access to the different enforcement institutions. It allows for the consideration of a wide variety of enforcement goals from compensation and over deterrence to vindication. By looking at enforcement goals, this genuine notion of justice accounts for the ever more functional approach to a European market order. Enforcement serves the functional purpose of guarding the rule of law and the economic function of increasing social welfare in new welfare economic terms.

Support for this view of justice as a service meant to secure access justice (*Zugangsgerechtigkeit*) comes from growing expectations for transparent, efficient, effective and affordable dispute resolution. These expectations are not only expressed by players in the enforcement game; they are even reflected in the laws with intellectual property law, for instance, requiring

<sup>6</sup> W van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *Common Market Law Review* 501–36.

<sup>7</sup> H-W Micklitz, 'Social Justice and Access Justice in Private Law' in H-W Micklitz (ed), *The Many Faces of Social Justice in Private Law* (Cheltenham, Edward Elgar, 2011) 3–60, also published in H-W Micklitz, 'Social Justice and Access Justice in Private Law' *EUI Working Paper* 2011/02

<sup>8</sup> J Rawls, *A Theory of Justice* (Harvard, Belknap Press, 1971); J Rawls, *Justice as Fairness: A Restatement* (Harvard, Belknap Press, 2001).

<sup>9</sup> R Nozick, *Anarchy, State and Utopia* (Jackson, Basic Books, 1974).

<sup>10</sup> Criminal justice theories ranging from retribution, deterrence, rehabilitation, incapacitation, reparation, denunciation.

enforcement to be ‘effective, expeditious, deterrent’.<sup>11</sup> Evidence in support of this view of justice comes further from a dramatic increase in the number of attorneys and the size of the legal services industry in Europe.<sup>12</sup> Industry has, thus, come to gradually realise the potential in benefitting from the ever growing understanding of justice as a service. Nevertheless, the European legal services market with its strong reliance on public authorities and consumer organisations in, for instance, consumer law enforcement, is still far from the profit-driven market approach that can be observed in the US.<sup>13</sup> As a consequence, the level of litigation in Europe is still rather low, but a steady increase can be observed. The adoption of collective consumer redress mechanisms shows further that this notion of justice as a service is valid and triggers cross-border collaboration in the legal services sector. The implication of this notion of justice as a service is not only that there will be an enhanced role for the legal services sector; rather it also grants a more active role to judges and the enforcement institutions. As such, justice as a service stresses the continued importance of enforcement institutions and, in particular, of the need to adapt traditional judicial institutions to the expectations of the market.

In the light of this understanding and this theoretical model, the overall challenge of the book is to explain current enforcement developments. This endeavour is undertaken at a time in which enforcement issues are high on the agenda in many fields of European economic law. These issues can be clustered into developments in particular areas of law, in two major trends—fragmentation and collectivisation, and a new governance form.

First, novel institutions, novel enforcement mechanisms and novel remedies are constantly being created in each of many distinct areas of law, such as competition law, consumer law, intellectual property law, contracts law, regulatory private law and international commercial law. Thereby, the entire enforcement regime is undergoing a profound transformation that lacks precedent. In the realm of patent law, for instance, a new title and new institutions are being created in the framework of Article 118 TFEU (Treaty on the Functioning of the European Union) in the form of a Unitary Patent regime.<sup>14</sup> In consumer law, private enforcement services such as alternative

<sup>11</sup> 1869 UNTS 299; 33 ILM 1197 (1994).

<sup>12</sup> D Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard, Harvard University Press, 2011) 79–88.

<sup>13</sup> F Cafaggi, ‘The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective’ (2009) 21 *Loyola Consumer Law Review* 496.

<sup>14</sup> Reg (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection. Council reg (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements. The text of the draft agreement on a Unified Patent Court is available here: <http://register.consilium.europa.eu/pdf/en/12/st16/st16351-co03.en12.pdf> (last visited 9 August 2015).

dispute resolution (ADR) and online dispute resolution (ODR) as well as self-regulatory enforcement mechanisms such as in the form of private arbitration are on the rise.<sup>15</sup> A strong drive towards collectivity characterises the introduction of general class actions for damages in several Member States as well as increased attention to the question of damages actions in antitrust law and the question of collective redress for consumers.<sup>16</sup> At the same time, cases such as *C-415/11 Mohamed Aziz* have shown that enforcement mechanisms have become a last resort to remedy social deficiencies of the national and European order.<sup>17</sup>

Second, an investigation into the transformation of enforcement in Europe reveals two major trends: first, the fragmentation of enforcement in Europe horizontally and vertically and, second, the collectivisation of enforcement in Europe. Both dimensions are considered to be interdependent. Policy-makers are countering the growing fragmentation of the services for law enforcement with ever stronger policy initiatives towards the collectivisation and coordination of claims on both the supply and demand side for justice. Collectivisation thus counterbalances horizontal and vertical fragmentation.<sup>18</sup>

Third, a closer analysis of the transformation of enforcement demonstrates the emergence of a new governance form for enforcement: traditionally compensatory and deterrent enforcement is being supplanted by regulatory enforcement that balances compensation, deterrence and vindication. Regulatory enforcement implies not only a novel regulatory function of enforcement<sup>19</sup> as opposed to traditional dogmatic enforcement rationales but indicates also the departure from traditional command-and-control regulation in the area of enforcement. Traditional regulation is replaced by novel cooperation mechanisms for dispute resolution between government and private actors and, thus, to some degree private regulatory litigation.

<sup>15</sup> KC Nobles, 'Emerging Issues and Trends in International Arbitration' (2012) 43 *California Western International Law Journal* 77. See eg Dir 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, 3–8.

<sup>16</sup> eg the Green Paper on Collective Redress for Consumers and its follow-up including collective ADR, the competition law 2005 Green Paper, the 2008 White Paper, the 2009 Proposal for a Council Directive on Rules Governing Actions for damages for infringements of Arts 101 and 102 of the Treaty, the Study on the Methods of Damages Calculation, Quantifying Antitrust Damages 2009, Proposal for a Directive on Antitrust Damages Actions 2013, EU Recommendation on common principles for injunctive and compensatory collective redress mechanisms 2013.

<sup>17</sup> HW Micklitz, 'Unfair Contract Terms—Public Interest Litigation before European Courts Case C-415/11 Mohamed Aziz' in V Colaert and E Terry (eds), *Landmark Cases of EU Consumer Law—in Honour of Jules Stuyck* (Cambridge, Intersentia, 2013) 615–34.

<sup>18</sup> Note also the concept of diagonal fragmentation which will not be pursued in this article: Ch Joerges, 'The Idea of Three-Dimensional Conflicts of Law as Constitutional Form of Transnational Governance', *RECON Online Working Paper 2010/5*.

<sup>19</sup> Compare also O Lobel, 'New Governance as Regulatory Governance' in D Levi-Four (ed), *The Oxford Handbook of Governance* (Oxford, Oxford University Press, 2012).

It is argued that this development emanates from the interplay between deregulation and non-regulation at the national level, reregulation at the European level and self-regulation at the transnational level.

In the light of these developments, it is striking that neither the political agenda nor academic reflections have so far adopted a coherent analytical and conceptual approach to these and other enforcement transformations, not in order to build a coherent system but to come to a much deeper and clearer understanding of the changes in the enforcement structure. So far academic and political endeavours have rarely transgressed the close confines of distinct areas of economic law. The overarching question about the function and role of enforcement in a European and global legal order has entirely been neglected. Interconnections with developments in the rest of the world have likewise been disregarded. And finally, it is causes and consequences of these profound transformations that have so far only superficially been analysed by leading researchers in the field.

In response to these observations, this book contains a detailed and thorough overview, analysis and critique of the transformation of enforcement in the area of European economic law by leading European and international academics. As an original contribution it constitutes a multidisciplinary research effort on the transformation of enforcement in Europe and its global interdependences. It showcases the transformation of law enforcement with reference to both European economic law (especially transnational commercial law, competition law, intellectual property law, consumer law) and to the current context of significant global economic challenges. Comparative perspectives facilitate the formation of a holistic perspective on enforcement that reaches beyond distinct theoretical accounts, political agendas, regulatory systems, industry sectors and stakeholder perspectives. As the first comprehensive and comparative analysis of the enforcement of European economic law that reaches beyond closely confined areas of law, it constitutes a crucial contribution to the theoretical and policy questions of how to design a coherent European enforcement architecture in accordance with essential principles and objectives of the EU economic order.

## II. STRUCTURE OF THE BOOK

The book is structured as follows. The introduction will be followed by six distinct parts and a conclusion. The rationale for the outline is the distinct logic, first, of building theoretical grounds, second, of looking at the demand and supply of justice through an institutional lens, third, of a distinct investigation of the Court of Justice of the European Union, and fourth, of investigating mechanisms for rendering justice. These analyses are then followed by a transnational lens that looks into transnational enforcement mechanisms. With this transnational perspective in mind, the

outline then proceeds to an investigation of the governance of justice in such transnational settings and, in particular, the issue of public accountability of enforcement. The book closes with a conclusion.

Looking at the individual parts of the book in more detail, the second chapter focuses on the nature and concept of enforcement. It looks, in particular, into the role, nature and drivers of enforcement in post-national constellations. Thus, the second part is to address the theoretical question of how enforcement theories and cultures account for various modes of enforcements (for example public, private) and their interdependences as well as for enforcement transformations and subsequent policy adaptations. In this framework, Wai analyses enforcement in the shadows of transnational economic law whilst Whytock explores governance, rights and the market for dispute resolution services in relation to the enforcement of foreign judgments. And finally, Wind addresses the question of whether legal and political culture can explain the successes and failures of European law compliance.

The third part examines the supply and demand for justice. In essence, it analyses enforcement avenues and institutions with a particular focus on alternatives to traditional judicial enforcement avenues as well as the emergence of alternative and *sui generis* enforcement systems and their administration. Moreover, the part focuses on the demand for justice by a variety of stakeholders ranging from individuals to collectives and from public to private entities. It aims at exposing new avenues for justice to be rendered in a variety of areas of law. Selected examples are novel alternative dispute resolutions mechanisms as well as online dispute resolution mechanisms. The part will focus in particular on new and better modes of redress for consumers both in contract law and antitrust law. Ultimately, the third part seeks to examine the issues of fragmentation, privatisation, over-specialisation and the isolation of adjudication in Europe. In this framework, Eidenmüller and Fries analyse the design of an efficient consumer rights enforcement system in Europe. Hodges and Creutzfeldt discuss transformations in public and private enforcement, and Drexl focuses in his analysis on the interaction between private and public enforcement in European competition law.

The fourth part is devoted to an analysis of the role of the Court of Justice of the European Union (CJEU) in the enforcement of European Economic Law. It aims at delineating the role of the CJEU in comparison with further EU institutions as well as national courts and alternative dispute resolution mechanisms. In doing so, the fourth part draws specifically on specific areas of law, such as intellectual property law. Ultimately, it aims at delineating the proper role of the CJEU in the establishment of a European area of justice. In this framework, Kelemen explores the impact of the Court of Justice on the European Law Enforcement Architecture and Norrgard discusses alternatives to the CJEU in the field of intellectual property law.



The fifth part focuses on substantive law, procedural law and the law of remedies. It aims at discussing a wide range of provisions on conflict resolution ranging from settlements, procedural law to the law of damages. It thereby exposes the role and relevance of the choice of compensation schemes, such as rules for the calculation of damages, for each area of law as such. It thereby also discusses the interaction and interconnectedness of each of these mechanisms for the effectiveness and efficiency of law enforcement in each of the individual areas of law. In this framework, Hodges analyses the realities of US class actions whilst Hilty addresses the role of enforcement in delineating the scope of IP (Intellectual Property) rights. Tzankova, by contrast, reflects on the potential of case management for the resolution of mass disputes while Renda discusses private antitrust damages actions in the EU.

The sixth part addresses the wide variety of enforcement mechanisms in transnational settings. It exposes how interdependence, collaboration, co-existence, hybridisation, and competition exist between public and private national, European, transnational (for example international commercial arbitration), and international enforcement avenues and their transformations. The part looks in particular at enforcement networks and compliance mechanisms beyond compulsory enforcement mechanisms. Thus, Clavel discusses the relative merits of arbitration and state courts' litigation with a larger view on the challenges of transnational contractual enforcement. Cseres focuses on competition law enforcement beyond the nation-state and the question of whether this could be a model for transnational enforcement mechanisms.

The seventh part is devoted to discussing European economic law in its global interdependence with transnational enforcement mechanisms. The following questions will, *inter alia*, be addressed: what interdependence, collaboration, co-existence, hybridisation and competition exist between public and private national, European, transnational (for example international commercial arbitration), and international (for example WTO (World Trade Organization)) enforcement avenues and their transformations? Is a degree of national assertiveness required—and if so what degree—for sustained legitimacy of enforcement avenues as opposed to the acceptance of alternative sources of legitimacy for transnational enforcement? These questions are addressed by Hess in his contribution on the role of procedural law in the governance of enforcement in Europe. And Fernández Arroyo discusses the legitimacy and public accountability of global litigation with particular emphasis on the case of transnational arbitration.

Eventually, the conclusion by Wechsler and Tripković is, first of all, devoted to discussing the nature and characteristics of enforcement while addressing the overarching question of 'what is enforcement?'. It is further devoted to discussing transformations of enforcement in Europe (fragmentation, collectivisation) and ongoing challenges in designing a coherent,



efficient and effective enforcement system for European economic law. It lies down the foundations for a theory of the transformation of enforcement through European integration.

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<http://www.pbookshop.com>

<sup>20</sup> European Research Council under the European Union’s Seventh Framework Programme (FP/2007–2013)/ERC Grant Agreement n [269722].

<sup>21</sup> See [www.schoeller-forschungszentrum.de/index.php?id=86&L=1](http://www.schoeller-forschungszentrum.de/index.php?id=86&L=1) (last visited 9 August 2015).