

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Wernhard Möschel and Florian Bien (Eds.), *Kartellrechtsdurchsetzung durch private Schadenersatzklagen?* Baden-Baden: Nomos, 2010. 318 pages. ISBN: 978-3-8329-5169-6. EUR 69.

Private enforcement of antitrust law is increasing in prominence both in practice and in academic writing. The European Commission has committed itself to improving the conditions for private damage actions in this area of law and is currently working on a legal framework to this effect. The book reviewed here critically addresses the plans for reforms by the European Commission as expressed by its White Paper on damage actions for the breach of EC antitrust rules (COM(2008)165) and the unofficial draft Directive that circulated in 2009. The volume is based on a symposium by the Studienkreis "Wettbewerb und Innovation", held in September 2009 in Tübingen, and comprises eight articles of impressive quality, based on the presentations by academics and practitioners at the symposium. The articles are divided into two groups, the first focusing on the basic principles and comparative law, and the second dealing with the individual proposals of the White Paper and draft Directive. Each of the articles will be briefly discussed below, followed by an overall assessment of the book.

Beschorner and Hüsichelrath illustrate the economic aspects of private enforcement of antitrust law and thereby provide a valuable economic background for the predominately legal analysis in the further chapters of the book. The focus is on the compensatory function of private enforcement after a cartel has been uncovered, which is to be distinguished from the incentive function regarding the uncovering of cartels. The article identifies the questions of who is entitled to damages and calculation of damages as the main challenges that need to be addressed. The authors set out economic arguments in favour of the passing-on defence and conclude that, in spite of possible negative effects under certain circumstances, it constitutes a necessary instrument in order to ensure compensation that reflects the amount of the actual damages suffered. This part should be read in conjunction with Bulst's article later in the book and provides a good example of how this article complements the legal analysis in the remainder of the book. Moreover, the article touches on the problematic interrelation of damage actions and leniency regimes and briefly points out possibilities that limit the leniency applicant's joint and several liability in order to secure the effectiveness of the leniency programme. While highlighting the difficulties in allocating specific damages to individual members of a cartel, the authors argue in favour of limiting the leniency applicant's liability to damages incurred by direct customers. Overall, the article addresses issues of high current interest, as is demonstrated by the Commission's work on a draft Guidance Paper on quantifying harm, and provides a useful introduction to the underlying economic aspects.

Krenzer outlines the French perspective on private antitrust enforcement. Unlike US law or, recently, in parts also German law, the French legal order does not provide for specific provisions to deal with damage claims for breaches of antitrust rules but instead relies on its general civil code. Therefore the French legal system presents an interesting example in the context of private damage actions. The article covers the standard topics of passing-on defence, jurisdiction, collective redress, stand-alone and follow-on actions, as well as the protection of leniency applicants. It contains only occasional comparative elements but provides an informative overview of the status quo of private antitrust enforcement in France.

Becker takes a comparative approach and explores the common features of and differences between the US and the EU approach to damage actions. Given the influence of US antitrust law on the European discussion of private enforcement, both as a point of reference and criticism, the article adds an important perspective. The author points out that most criticism of the US system is rather unspecific as it does not identify the exact provisions that ought to be avoided at the European level. Therefore Becker aims to shed light on the US provisions by comparing them to the European approach, mainly by reference to the White Paper. The article addresses the common objections against the US system, namely the high incentives to file a lawsuit, the high financial burden imposed on the parties by extensive pre-trial discovery, the high amounts of damages and the potential for abuse. The author concludes that the fear of "American conditions" is unfounded as regards the White Paper, since the proposals differ significantly from their American counterparts and resemble instruments and mechanisms that are already in force throughout the national legal systems of the Member States. As the other articles in the book repeatedly draw on the US system as an example, this article provides a helpful understanding of the US approach to private antitrust enforcement.

Hempel's contribution deals with collective redress. The article takes stock of the current state of collective redress in EU law and refers to Germany and the US by way of comparison. Hempel evaluates possible instruments of collective redress and distinguishes between voluntary and involuntary grouping of claims, the latter including collective actions brought by the State and by representative bodies. The author stresses the importance of establishing clarity about the goals pursued before deciding in favour of a particular concept of collective redress. In particular, compensation and deterrence bring about different requirements regarding the features of potential instruments. As has been evidenced by the Commission's recent initiative on collective redress, which included a joint information note (SEC(2010)1192) and a public consultation paper (SEC(2011)173), the matter is high on the Commission's agenda. Despite having been partly outdated by these recent initiatives, the well-structured and precisely formulated article still provides valuable background reading.

Wilhelmi's article is concerned with access to evidence and disclosure and compares the German legal situation with the White Paper's proposals. The author differentiates between the obliged parties and analyses both the requirements and limitations of disclosure obligations. An interesting aspect, which has been overlooked by the White Paper and only insufficiently addressed by the working paper (SEC(2008)404), are the costs of disclosure. Wilhelmi argues convincingly that both third parties and, in case no infringement can be found, also defendants need to be reimbursed for any costs incurred in order to attenuate the potential for blackmailing. In addition, the article seeks to identify alternatives to disclosure obligations but concludes that, due to a number of shortcomings, the available options can at the most play a supplemental role. The author concludes by criticizing the vague scope of application of the proposed disclosure obligations which leads to reduced legal certainty and points to the German system as a preferable way to deal with the issue. In addition, the author suggests an explicit provision laying down the limitations of disclosure obligations, similar to the right to refuse to give evidence which can be found in German procedural law. Overall, Wilhelmi takes a rather critical but persuasive approach towards the White Paper's proposals and is right to caution against the increased potential for abuse inherent in extended disclosure obligations.

Grünberger addresses the binding effect of decisions by national competition authorities (NCAs) on civil proceedings for damages, providing a remarkable and very detailed contribution that would justify a review on its own. The author describes how binding effects of decisions by NCAs significantly improve the plaintiff's position by increasing procedural efficiency and legal certainty. Grünberger analyses the exact nature and scope of the binding effect envisaged by the White Paper, an important aspect that has inexplicably been neglected by many others. With reference to the German legal terms of *Tatbestandswirkung* and *Feststellungswirkung*, he concludes that the White Paper's proposal intends to introduce the latter and draws a parallel to Sec. 33(4) of the German Act Against Restraints of Competition. After stressing the need for an express provision that introduces the described binding effect by way of secondary legislation, the article explores the compatibility of such a provision with the separation of powers, the independence of the courts and the right to effective redress. The binding effect of decisions by NCAs of other Member States is identified as the most problematic case in this respect. However, Grünberger demonstrates that such a binding effect neither infringes primary EU law nor the ECHR. A rebuttable statutory presumption following the US example of Sec. 5(a) Clayton Act is dismissed as an alternative due to its lack of effectiveness. The article contains a remarkable and comprehensive analysis of the topic and carves out the effective legal protection against decisions by NCAs as the key prerequisite prescribed by both EU law and the ECHR.

Although partly outdated by a recent judgment of the German Federal Court of Justice (KZR 75/10 – *ORWT*) in which the court allowed the passing-on defence in Germany, Bulst contributes an excellent article on the passing-on defence and discusses the broader context of the individual problems associated with the passing-on defence. The article focuses on German law, however, it also provides a detailed and demonstrative description of the situation in England and France, all of which (at least partly) allow the passing-on defence. The author also analyses the EU law position, finding that EU law does not necessarily require the full admissibility of the passing-on defence, rather, the admission of the passing-on defence at the expense of full compensation would be contrary to EU law. Moreover, Bulst briefly sets out the US position which, contrary to the previously mentioned jurisdictions, does not permit the passing-on defence and points to the fact that a number of US States permit both direct and indirect customers to claim damages, thus creating a potential for multiple liability of infringers. Bulst presents legal policy considerations regarding the entitlement of indirect customers to damages, ways to quantify those damages, the admission of the passing-on defence and collective redress. The extraordinary depth and precision of its legal analysis and the transferability of the considerations regarding the passing-on defence make the article valuable reading with respect to EU and US jurisdictions.

Wagner-von Papp adds another perspective to the discussion by contrasting private enforcement with criminal enforcement. After recapitulating the advantages and disadvantages

of private enforcement of competition law, the author describes the historic development of criminal enforcement in Germany and takes stock of the current criminal sanctions applying to competition law infringements in Germany. The article continues with a detailed discussion of the pros and cons of an extension of criminal liability in Germany. Once again, the US is drawn upon as an example – this time of an effective system of criminal enforcement. The author comes to the conclusion that the extension of criminal liability under German law to horizontal hard-core cartels is desirable. At first glance, this article does not seem to match the overall topic of private enforcement. However, it provides a valuable appendix, as it directs the reader's attention to a possible alternative to private enforcement. Just as private enforcement cannot be evaluated independently of the public side, criminal enforcement needs to be taken into account as a third level.

Despite the constant changes in this relatively new area of law, the volume, albeit no longer entirely up to date, provides a useful discussion of the European Commission's proposals on private enforcement. The depth of the authors' analyses goes beyond that of many others and the economic background in the first part of the book usefully complements the legal analysis. One potential point of criticism would be the overlaps of parts of the articles. However, this is partly due to the format of separate articles, which proves insofar ideal as it enables the reader to look into specific aspects of private enforcement in self-contained scholarly pieces. In addition, the miscellany of articles helps to understand the broader context of the different aspects of the topic, such as the interrelation of public and private enforcement in general, and the multitude of perspectives encourages the reader to develop own positions on the topics. The contributions are convincing and the high standard of the articles reflects the expertise of the authors, making this book an interesting contribution to the academic debate in this field.

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Hamburg

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