

# **Towards an Optimal Mix of Public and Private Enforcement in Consumer Law**

A Comparative Law and Economics Analysis (package travel vs. misleading advertising)

Traditionally European Member States have relied strongly on public or private law enforcement of consumer protection laws. Enforcement landscapes seem to be becoming more mixed and the structures show signs of convergence, not least due to European legislation. More legislative proposals regarding the enforcement landscape in consumer law are pending at European level. This stresses the need for reflection on how to create efficient enforcement designs and avoid ineffective European legislation, arguably a complex and challenging exercise. This book undertakes a comparative law and economic analysis to provide some answers to these questions. Both lawyers and economists are introduced separately to the topic in the first part of the book in order to create a level playing field before the analysis starts. Even though there is more to law than economic efficiency, it is essential to incorporate economic insights about enforcement of consumer protection law in the broader policy discussion.

It is state of the start within law and economics (from the perspective of optimal deterrence) to claim that a mix of enforcement systems is preferable rather than basing enforcement on only one mechanism and also that this mix will differ for various consumer law sectors. The mixes have not yet been defined. Various economic factors have been established according to which the efficiency of different enforcement tools can be assessed. In this book these factors are refined and systematized in a three stage efficiency framework that allows analysis of economic strengths and weaknesses of different enforcement mechanisms (civil court, ADR, public agency, criminal law, group litigation and self-regulation) both generally and as applied to specific hypothetical consumer law scenarios. The case scenarios chosen to capture various contingencies of consumer law problems are a bona and a mala fide trader case scenario within package travel (substantial individual harm) and misleading advertising (trifling and widespread harm). For these scenarios the analysis makes suggestions for efficient designs. These revolve around the ability of various enforcement tools to generate the information necessary to initiate and carry out lawsuits. This is particularly problematic when considering mala fide traders who try to hide in reality or online. Other factors are the potential dilution of the enforcer's incentives and the administrative costs of the tools.

These findings, established in a model world based on European legal realities, are taken as a benchmark to assess real life situations in selected countries with different enforcement traditions (the Netherlands, Sweden and England). Path dependency positively explains how legal settings in countries have come into being and is an important factor when assessing reform potentials. There is no one-size fits all optimal mix for the whole European Union. After comparing the existing mixes with the 'optimal mixes' in the two named sectors welfare enhancing changes to the three countries are presented. Lastly by way of a personal comment that is partly underpinned by the analysis and partly by anecdotal evidence, the apparent preference at EU level for public law enforcement is evaluated.