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Regulatory Agencies and Private Damages in the EU: Bridging the Gap between Theory and Practice

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Abstract: Regulatory agencies have traditionally been concerned with deterring unlawful conduct in the public interest. This article explores the emerging role of agencies in securing compensation for individuals in mass damage situations resulting from violations of EU private law. It identifies three main models of the relationship between administrative enforcement and private law remedies, notably damages, within the agencies' operation: (1) separation, (2) complementarity, and (3) integration. These models reflect elements of the current legislative and agency practices in a variety of jurisdictions across different areas of EU private law and provide an analytical framework for assessing such practices in terms of their potential to reconcile the pursuit of the public interest with a concern to ensure justice between private parties. The analysis points to the need to systematically rethink the prevailing regulatory theory concerning the tasks of regulatory agencies along the lines of a holistic approach to deterrence and compensation.

I. Introduction

Regulatory agencies of the modern state have traditionally been charged with pursuit of the public interest and operated exclusively in the sphere of public law, particularly administrative law. They typically employ a wide range of monitoring and enforcement instruments, such as inspections, warning notices and fines, so as to secure *ex ante* compliance with the law. While many agencies initially try to establish cooperation with firms and 'coax compliance by persuasion',[1] it is

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[1] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (New York: Oxford University Press, 1992), 35. See also, eg, C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework of Collective Redress in Europe* (Oxford: Hart Publishing, 2008); OO Cherednychenko, 'Cooperative or Competitive? Private Regulators and Public Supervisors in the Post-crisis European Financial Services Landscape' (2016) 35 *Policy and Society*, 103.

generally accepted that deterrence remains an important function of administrative enforcement. It allows agencies to resort to increasingly serious penalties in order to dissuade potential wrongdoers from committing regulatory violations, especially where the cooperative posture has not produced the desired effect.[2]

In contrast, justice between private individuals has commonly been viewed as a matter for private law courts. In order to vindicate his or her rights under private law, the aggrieved party will normally have to take action before such a court against the one who has wronged him or her. In the pursuit of their private interests *ex post*, that is, after a breach of the legal standard when harm has already occurred, the individuals can harness the characteristic private law remedies, notably a claim for damages. Private damages—and private enforcement more generally—have been primarily associated with compensation for aggrieved individuals, even though their deterrent function has also been recognized.[3]

This traditional division of labour between regulatory agencies and private law courts has been reflected in a strict institutional separation between administrative and private enforcement, with agencies having no role to play in the provision of redress to victims of rule breaches. At the same time, however, it has been widely acknowledged that private enforcement through the private law courts can be challenging for weaker parties, such as consumers, who face major obstacles on the way to justice, notably the lack of awareness of their rights, high cost of civil litigation, and evidential problems.[4] Alongside efforts to strengthen individual and collective private enforcement both in and out of court,[5] therefore, regulatory agencies have become increasingly involved in private law matters.[6] Over the last two decades, the European Union (EU) has played a major

[2] Cf Ayres and& Braithwaite (n 1); K Yeung, *Securing Compliance. A Principles Approach* (Oxford: Hart Publishing, 2004) 86 and 167.

[3] In particular, the Court of Justice of the European Union (CJEU) has explicitly recognized the deterrent function of private law remedies, notably damages. See, eg, Case 14/83, *Von Colson*, ECLI: EU: C: 1984: 153, para. 23; Case C-453/99, *Courage Ltd*, ECLI: EU: C: 2001: 465, paras 26–27; Case C-174/12, *Hirmann v Immofinanz AG*, ECLI: EU: C: 2013: 856, paras 43–44. See also, eg, G Wagner, 'Punitive Damages in European Private Law' in J Basedow et al. (eds), *Max Planck Encyclopedia of European Private Law* (Oxford: Oxford University Press, 2012), 1406.

[4] See, eg, M Loos, 'Individual Private Enforcement of Consumer Rights in Civil Courts in Europe', in R Brownsword et al. (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 487.

[5] See, eg, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, *OJEU* 2013 L 165/63 (Consumer ADR Directive); Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, *OJEU* 2020 L 409/1 (Representative Actions Directive).

[6] Cf H-W Micklitz, 'Administrative Enforcement of European Private Law', in R Brownsword et al. (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 563; OO Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?' (2014) 22 *European Review of Private Law*, 37; C Hodges and N Creutzfeldt, 'Transformations in Public and Private Enforcement', in H-W Micklitz and A. Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Oxford: Hart Publishing, 2016), 115, at 120; CA Hage, *Handhaving van privaatrecht door toezichthouders* (Deventer: Wolters Kluwer, 2017); C. Scott, 'Consumer Law, Enforcement and the New Deal for

role in this development, requiring Member States to set up administrative authorities responsible for public supervision and enforcement across a wide range of areas governed by EU private law, including, for example, unfair trading and consumer sales of goods,[7] and even establishing European supervisory authorities in certain sectors of the economy, such as financial services.[8] Regulatory agencies have been entrusted with a consumer protection mandate and granted extensive supervisory and sanctioning powers in the private law domain, subject to the observance of the principles of effectiveness, proportionality, and dissuasiveness.[9] This has led to the emergence of what could be called 'European supervision private law'—a hybrid legal field made up of regulatory standards to be interpreted and applied by supervisory authorities that form part of public law, but at the same time affect private law relationships.[10]

The link between regulatory agencies and private law is particularly manifest in the growing involvement of administrative authorities in dispute resolution between private parties. In mass damage situations involving consumers and occasionally SMEs, public watchdogs tend to combine traditional punitive administrative law tools, such as fines, with more 'private law'-coloured instruments, such as consumer redress schemes, supplementing private law courts and alternative dispute resolution (ADR) bodies in ensuring interpersonal justice. In this context, it has been argued that the enforcement of EU private law has become a regulated market for dispute resolution where these different actors compete with each other and where justice for consumers is a service.[11] In essence, when addressing remedial issues, regulatory agencies are concerned with both deterrence and compensation, thus undermining a conventional separation between administrative and private enforcement and serving not only the public interest, but also the private and collective interests of individuals and their groups.

Yet, this trend towards the hybridization of the agencies' functions is not entirely reflected in regulatory scholarship. While there is a variety of theories of

Consumers' (2019) 27 *European Review of Private Law*, 1279; F Della Negra, *MiFID II and Private Law: Enforcing EU Conduct of Business Rules* (Oxford: Hart Publishing, 2019).

[7] 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, *OJEU* 2013 L 345/1 (CPC Regulation).

[8] See, eg, Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, *OJEU* 2010 L 331/84 (ESMA's Founding Regulation).

[9] See, eg, F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 *European Review of Private Law*, 575.

[10] Cherednychenko (n 6), at 40.

[11] A Wechsler and B Tripković, 'Conclusions: Enforcement in Europe as a Market of Justice', in H-W Micklitz and A Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Oxford: Hart Publishing, 2016), 377.

regulation,[12] the conventional wisdom underlying them holds that the tasks of regulatory agencies must be conceived in terms of the public interest.[13] In particular, according to the otherwise competing public interest theories of regulation,[14] interpersonal justice considerations as such are generally considered to be irrelevant to the agencies' operation. The predominant justification for the involvement of administrative authorities in the enforcement of EU private law so far has been provided by the welfare economics approaches that view regulation as a correction of 'market failures', notably information asymmetries between market participants.[15] However, focusing on the public interest in the general welfare alone, these theories cannot entirely explain the growing role of administrative authorities in the core business of private law courts, that is, the provision of redress to aggrieved private individuals. All the more so, given that this new role may sit uneasily with their traditional responsibility for safeguarding the public interest. In the absence of a solid theoretical underpinning, it is not surprising that the ability and willingness of regulatory agencies to engage with private damages varies across the EU. While the EU legislator requires Member States to equip administrative authorities with related powers,[16] there are considerable variations in the institutional setting within which they operate at the national level.[17] Moreover, where such authorities do embark upon the remedial domain in private law matters, they often lack authoritative guidance on how to navigate this intricate area while still acting in the public interest.

Against this background, this article reconceives the role of regulatory agencies in the private law domain, focusing on how they approach and should approach remedial issues within the EU multi-level system of governance. In this way, it seeks to bridge the gap between regulatory theory and practice, which is particularly evident in the field of EU private law. The latter is understood here in a broad sense as a set of regulatory rules with a European origin that affect relations between private parties, regardless of the nature of the law—public or private—in which they have been transposed into the national legal order of a particular Member State.[18] The article examines the enforcement of EU private law by regulatory agencies from a holistic perspective and explores to what extent they can pursue *both* deterrence and compensation.

[12] For an overview see, eg, B Morgan and K Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge: Cambridge University Press, 2007), 16.
[13] Cf H Dagan and R Kreitner, 'The Other Half of Regulatory Theory' (2020) 52 *Connecticut Law Review*, 605, at 614.
[14] See, eg, A Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, Hart Publishing, 2004); C Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990); T Prosser, *Nationalised Industries and Public Control: Legal, Constitutional and Political Issues* (Oxford: Blackwell, 1986).
[15] Ogus (n 14).
[16] See, eg, CPC Regulation, Art. 9(4)(c).
[17] cf Mickliz (n 6), at 564.
[18] cf OO Cherednychenko, 'Rediscovering the Public/Private Divide in EU Private Law' (2020) 26 *European Law Journal*, 27, at 28; H-W Micklitz, 'The Visible Hand of European Regulatory Private Law' (2009) 28 *Yearbook of European Law*. 3.

In the sections that follow I identify three main models of the relationship between administrative enforcement and private law remedies, notably damages, within the agencies' operation: separation (Section II), complementarity (Section III), and integration (Section IV). These models occupy different positions on a broad spectrum of the involvement of administrative authorities in the provision of redress, ranging from almost none to fairly extensive. They reflect elements of the current legislative and agency practices under EU law as well as under the law of several current Member States and one former Member State in the context of consumer protection—a policy goal that lies at the core of EU private law. Based on the representative examples from different areas of EU private law, notably product safety and product liability, antitrust, unfair trading, unfair contract terms, consumer sales of goods, and financial services, the models also provide an analytical framework for assessing such practices in terms of their potential to reconcile the pursuit of the public interest with a concern to ensure justice between private parties. Each model is discussed focusing on its key characteristics, manifestations, and implications. I conclude with the summary and some final reflections on the way forward for regulatory theory and enforcement policy (Section V).

II. Separation

A. Characteristics

First, there is the separation model of the relationship between administrative enforcement and private law remedies within the operation of regulatory agencies. In this scenario, agencies do not have any role to play in the provision of redress to private parties following the infringement of an EU private law norm. Focusing on achieving deterrence exclusively through traditional administrative tools, most notably fines, administrative authorities are not empowered to ensure that aggrieved individuals receive compensation, where appropriate, in addition to or instead of the punitive fine. Nor are they equipped to facilitate compensation payouts through the administrative enforcement mechanism or willing to make use of their formal powers to this effect in practice. The imposition of administrative sanctions on the infringer for non-compliance with an EU private law norm is disconnected from the remedial issues in the private law domain, with the latter being entirely left to private law courts—and increasingly ADR bodies—to resolve. Accordingly, administrative enforcement and private law remedies exist parallel to each other, either formally or practically.

B. Manifestations

The separation between the administrative enforcement mechanism and private law remedies is particularly noticeable within the operation of the European

Commission and European agencies, which are generally concerned with serious infringements of EU private law affecting consumers in various Member States.[19] While these European institutions have administrative powers to deal with such infringements, they do not have any competence to address remedial issues arising therefrom. In particular, they are not empowered to facilitate the provision of compensation to aggrieved consumers at EU level.

Under the General Product Safety Directive,[20] for instance, if the European Commission becomes aware of a serious risk from a particular dangerous product already on the market to the health and safety of consumers in different Member States, it may require national administrative authorities to order its withdrawal from the market or its recall from the consumers to whom it has already been supplied.[21] Yet, the Commission does not have any powers to require national administrative authorities to ensure that the consumers who have suffered damage to their physical well-being or property prior to such withdrawal or recall are compensated. Consumer compensation claims for these types of damage are governed by the Product Lability Directive.[22] The latter in turn is not tailored to the standard of safety under the General Product Safety Directive, but uses its own standard of defectiveness instead,[23] relying on the established system of private enforcement by aggrieved individuals to ensure consumer redress. Neither is the Commission empowered to initiate a redress settlement or seek redress measures for serious infringements of the European product safety or defectiveness standards under the recently adopted Representative Actions Directive. The administrative powers of the European Commission in the fields of product safety and product liability are thus strictly separated from private law remedies.

A similar approach has also been adopted in the field of antitrust. While the European Commission has direct administrative enforcement powers over private actors in relation to EU competition rules laid down in Articles 101–102 of the Treaty on the Functioning of the EU (TFEU),[24] it is not equipped with any powers in relation to consumer redress in this area. In particular, the Commission is not empowered to settle compensation claims of direct and indirect purchasers, including end consumers, for harm resulting from infringements of competition law rules or to facilitate compensation payouts when making use of its power to impose fines on infringers.[25] The list of mitigating circumstances

[19] Micklitz (n 3), at 568.
[20] Directive 2001/95/EC on general product safety, *OJEU* 2002 L 11/4.
[21] Ibid, Art. 13(1) jo. 8(1)(f).
[22] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products, *OJEC* 1985 L 210/29.
[23] Cf F. Cafaggi, 'A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities' in F Cafaggi (ed.), *The Institutional Framework of European Private Law* (Oxford: Oxford University Press, 2006), 191, at 214.
[24] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJEU* 2003 L 1/1.
[25] Ibid, Art. 23.

provided in the Commission guidelines on the method of setting fines for such infringements does not make any reference to remedial commitments for the benefit of consumers.[26] Private enforcement is governed by the Antitrust Damages Directive,[27] which seeks to strengthen this traditional enforcement mechanism, in particular by allowing the aggrieved consumers to rely on the final decisions of the European Commission establishing the infringement of EU competition law in follow-on damages actions before national private law courts.[28] The Commission itself, however, does not have a proactive role to play with respect to such actions.

The separation between administrative enforcement and private law remedies is also manifest in the operation of three European Supervisory Authorities (ESAs)—the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA)—established as part of the European System of Financial Supervision (ESFS) in the wake of the 2007–2008 global financial crisis. Each ESA has a consumer protection mandate,[29] and, in addition, ESMA is also charged with a specific investor protection mandate.[30] All three ESAs have direct supervisory powers over regulated actors, including, among others, the power to temporarily prohibit or restrict certain financial activities.[31] Further, ESMA has been conferred with direct supervisory and administrative enforcement powers over certain regulated actors, notably credit rating agencies.[32] At the same time, however, ESAs have not been conceived as consumer protection/retail financial market agencies, with their primary function being to support rule-making and facilitate supervisory convergence and coordination for the

[26] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, *OJEU* 2006 L 210/2, para. 29.

[27] 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, *OJEU* 2014 L 349/1 (Antitrust Damages Directive).

[28] Ibid, Art. 9(1).

[29] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, *OJEU* 2010 L 331/12 (EBA's Founding Regulation), Art. 9; ESMA's Founding Regulation, Art. 9; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, *OJEU* 2010 L 331/48 (EIOPA's Founding Regulation), Art. 9.

[30] ESMA's Founding Regulation, Art. 8. In more detail on ESMA's powers in the private law domain see Della Negra (n 6), 59.

[31] EBA's Founding Regulation, Art. 9(5); ESMA's Founding Regulation, Art. 9(5); EIOPA's Founding Regulation), Art. 9(5).

[32] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, *OJEU* 2009 OJ L 302/1, as amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011, *OJEU* 2011 L 145/30 and Regulation (EU) 462/2013 of the European Parliament and of the Council of 21 May 2013, *OJEU* 2013 L 146/1 (together referred to as the CRA Regulation), Arts 36–36d.

internal market in financial services.[33] Being based on the single financial regulator model (prudential supervision and conduct of business supervision concerned with financial stability and financial consumer protection, respectively, under one roof), ESAs have also been criticized for prioritizing the former mandate over the latter one.[34] Even though ESMA's consumer/investor protection-responsibilities have been strengthened more recently,[35] this European agency does not have any redress-related powers over financial institutions. In particular, the CRA Regulation underlines the separation between administrative enforcement and private law remedies within ESMA's operation, stating that the investors' right of redress against credit rating agencies under this regulation does not prevent ESMA from fully exercising its powers to impose fines.[36]

The adoption of the separation model by the EU legislator in relation to direct and indirect enforcement powers of the European Commission and European agencies can be explained by the absence of a general competence of the Union in the field of private law as well as the political constraints surrounding the EU law-making process, notably resistance of the industry and/or Member States to the harmonization of civil liability.[37] The EU legislator, therefore, has pushed Member States to move away from this model within their legal systems so as to ensure consumer protection and, as will be discussed in more detail in the next section, to establish a link between administrative enforcement by national regulatory agencies and consumer redress in some areas subjected to harmonization. Yet, the separation model is still manifest in many Member States as well, not least because of regulatory discourse being dominated by the traditional public/private dichotomy.

The German financial watchdog, *Bundesanstalt für Finanzdienstleistungsaufsicht* (*BaFin*), is a case in point. This federal administrative authority is charged with supervision over the entire financial sector under the single financial regulator model. Yet, having traditionally focused on prudential supervision, it received its consumer mandate only in 2015. According to the newly introduced §4 (1a) of the Financial Services Supervision Act (*Finanzdienstleistungsaufsichtsgesetz* (*FinDAG*)) 2002, the *BaFin* is required to protect the collective interests of consumers and may take all 'suitable and necessary measures' to prevent or rectify violations of consumer protection legislation. Since the introduction of this provision, a critical issue for the *BaFin* has been how to integrate financial consumer protection into its supervisory activities, particularly given that this objective may conflict with financial stability.[38]

[33] N Moloney, 'EU Financial Market Governance and the Retail Investor: Reflections at an Inflection Point' (2018) 37 *Yearbook of European Law*, 251, at 262.
[34] See, eg, BEUC et al., *Proposal for the EU Financial Supervisory Reform: Open Letter*, Brussels, 27 November 2017, at https://beuc-x-2017-139_fal_proposal_for_the_eu_financial_supervisory_reform_open_letter.pdf.
[35] In more detail see Moloney (n 33), at 277.
[36] CRA Regulation, Art. 35a(6).
[37] In more detail see Cherednychenko (n 18).
[38] Y Svetiev and A Ottow, 'Financial Supervision in the Interstices between Private and Public Law' (2014) 10 *European Review of Contract Law*, 496, at 529.

For instance, penalizing a systemically important bank with a heavy fine for the infringement of conduct of business rules and/or forcing it to pay out a substantial compensation to those who have suffered loss as a result may undermine the bank's solvency and thus pose a threat to overall financial stability. The issue of whether the *BaFin* may be involved in consumer redress matters has proven particularly controversial in German legal scholarship. While the Financial Services Supervision Act does not grant the *BaFin* any explicit powers to this effect, it has been argued that 'suitable and necessary measures' in the sense of §4 (1a) *FinDAG* may include, among others, consumer redress orders.[39] However, the prevailing view rejects such an interpretation of this provision, arguing that compensation is not a function of this administrative authority, but rather a matter for private law courts.[40] It remains to be seen, therefore, whether the consumer protection mandate will enable the *BaFin* to move away from its traditional approach to financial supervision whereby administrative action has been kept separate from compensation issues.

C. Implications

As these examples illustrate, the separation between administrative enforcement of EU private law by regulatory agencies and private law remedies implies that within the agencies' operation, the function of deterrence is entirely decoupled from that of compensation. Having established a regulatory violation, an agency may impose an administrative sanction on the wrongdoer in pursuit of deterrence, but may not in any way get involved in doing justice between private individuals so as to secure compensation.

The separation model in this sense reflects the traditional division of labour between administrative authorities, on the one hand, and private law courts as well as ADR bodies, on the other. The major advantage of this scenario is that the judiciary continues to play an important role in shaping the private law of remedies, even though this role in individual litigation is increasingly shared with ADR bodies. The involvement of the courts in this domain enables the development of private law remedies through trial and error, particularly in the context of collective litigation, as well as an open and transparent debate on the legal issues at stake. At the same time, heavy reliance on civil litigation, especially in cases of mass damage, may come at a price in terms of interpersonal justice and the broader public interest.

First, even though a breach of a particular EU private law rule has been established and sanctioned by an administrative authority, in order to vindicate his or her rights against a wrongdoer and obtain compensation, an aggrieved individual will need to commence separate proceedings before a national private law court

[39] P Rott, 'Thesen zur Durchsetzung des Verbraucherschutzrechts durch die BaFin' (2019) 73 *Wertpapier-Mitteilungen*, 1189.
[40] See, eg, P Buck-Heeb, 'Missstandsaufsicht durch die BaFin nach § 4 Abs. 1 a FinDAG' (2021) 21 *Zeitschrift für Bank- und Kapitalmarktrecht*, 141.

or an ADR body. Yet, conventional economic wisdom holds that he or she typically has no incentive to do so where the damage suffered is minor while the proceedings are complex and costly.[41] This phenomenon of 'rational apathy' is particularly manifest in situations when such damage is scattered among many individual consumers, but the total social loss caused by the wrongdoer is substantial.[42] For instance, a local bank may charge excessive interest on a revolving loan facility to thousands of customers; a branded washing machine may damage the clothes of hundreds of thousands consumers due to a manufacturing defect; and an EU-wide milk cartel may overcharge millions of consumers. In such cases, apart from rational apathy, individual consumers may also display 'free-riding' behaviour, waiting for others to initiate a private enforcement action from which they can benefit, which may never happen.[43] While collective private enforcement may mitigate these problems and even enhance deterrence,[44] it is not a silver bullet for resolving the problem of interpersonal justice deficit in EU private law. In particular, it remains to be seen whether the newly established European collective redress mechanism will be widely used across the EU, given that under the Representative Actions Directive, only 'qualified entities', notably consumer organizations, may bring a lawsuit on behalf of consumers and that the issue of funding has not been satisfactorily addressed therein.[45] In the absence of any involvement of regulatory agencies in the provision of redress, therefore, justice for victims of regulatory violations may never be realized, which may also lead to under-deterrence.

Second, separate administrative and private enforcement actions concerning one and the same regulatory violation may also put justice for an infringer in jeopardy.[46] After all, damages can be awarded to a private party in addition to the fine being levied by and paid to the administrative authority without any coordination between the two actions. As a result, a particular infringer may end up paying *both* the high fine and full damages. For instance, a national consumer protection authority may impose a large fine on a car manufacturer for making unfounded 'green claims' designed to create the impression that its vehicles are

[41] See, eg, H-B Schäfer, 'The Bundling of Similar Interests in Litigation. The Incentives for Class Actions and Legal Actions Taken by Associations' (2000) 9 *European Journal of Law and Economics*, 183; G Wagner, 'Collective Redress—Categories of Loss and Legislative Options' (2011) 127 *LQR*, 55, at 64; F Weber and M Faure, 'The Interplay between Public and Private Enforcement in European Private Law: Law and Economics Perspective' (2015) 23 *European Review of Private Law*, 525, at 531.

[42] Wagner (n 41), at 63.

[43] See, eg, WM Landes and R Posner, 'The Private Enforcement of Law' (1997) 4 *Journal of Legal Studies*, 1, at 29.

[44] See, eg, R van den Bergh and L Visscher, 'The Preventive Function of Collective Actions' (2008) 1 *Erasmus Law Review*, 5; L Visscher and M Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 *Journal of Consumer Policy*, 455.

[45] Visscher and Faure (n 44).

[46] Cf CJS Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behavioural Control' (2011) 34 *World Competition*, 383, at 384.

'environmentally friendly', 'ecological', or 'sustainable' contrary to EU unfair trading law.[47] At the same time, this very manufacturer may also be held liable for the damage suffered by thousands of victims of this misleading commercial practice in a collective action lawsuit before the national private law court.[48] Since the consumer protection authority is not required to consider private damages to be paid when determining the amount of the fine, the cumulative effect of a private law remedy and an administrative sanction may not realize justice for the infringer. In particular, such an outcome may be contrary to the principle of proportionality,[49] even though the CJEU has so far been reluctant to establish a link between administrative sanctions and private law remedies.[50] Furthermore, while the imposition of a fine seeks to achieve an appropriate level of deterrence, the cumulative effect of separate administrative and private enforcement may be over-deterrence. Most commentators agree, however, that over-deterrence must be avoided, given that it may have a chilling effect on the firms' willingness to innovate, invest, and engage in vigorous competition.[51]

III. Complementarity

A. Characteristics

Another major model of the relationship between administrative enforcement and private law remedies within the operation of regulatory agencies is the complementarity model. In this scenario, as under the separation model, regulatory agencies are not entrusted with the power to take positive steps to ensure that in cases of violation of EU private law norms compensation is paid to aggrieved individuals, where appropriate, in addition to or instead of a punitive fine. Unlike the separation model, however, the idea of complementarity implies that

[47] Following the recent 'Dieselgate' scandal over car manufacturers falsifying emissions data, for example, the Polish Office of Competition and Consumer Protection (UOKiK) imposed a fine of EUR 27 million (PLN 120 million) on Volkswagen Poland for misleading consumers—the highest penalty in the history of UOKiK for violation of consumer law. Yet, the 'Dieselgate' scandal has rarely led to the imposition of such fines in the EU. For more detail, see BEUC, *Five Years of Dieselgate: A Bitter Anniversary*, 9 September 2020; https://www.beuc.eu/publications/beuc-x-2020-081_five_years_of_dieselgate_a_bitter_anniversary_report.pdf, 6.

[48] In some EU Member States, compensation has been awarded to the victims of the 'Dieselgate' scandal, but such cases remain rare. For Germany, see, eg, the decision of the German federal supreme court in private law matters (*Bundesgerichtshof(BGH)*) in *Dieselfall* (BGH, 25 May 2020, VI ZR 252/19, ZIP 2020, 1179). For more detail, see BEUC (n 47).

[49] cf Hodges (n 46), at 392; Cafaggi and Iamiceli (n 9), at 614.

[50] See, eg, Case C-679/18, *OPR-Finance* v *GK*, ECLI:EU:C:2014:190, paras 38–39. See also OO Cherednychenko, 'Financial Regulation and Civil Liability in European Law: Towards a More Coordinated Approach?' in OO Cherednychenko and M Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Cheltenham: Edward Elgar, 2020), 2, at 29.

[51] See, eg, RA Posner, *Antitrust Law. An Economic Perspective* (Chicago: University of Chicago Press, 1976), 222; AM Polinsky and S Shavell, 'The Economic Theory of Public Enforcement of Law' (2000) 38 *Journal of Economic Literature*, 45.

regulatory agencies have a role to play in facilitating redress, particularly private damages payouts, within the administrative enforcement mechanism. In particular, agencies may have discretionary powers to take remedial issues into account when exercising their administrative sanctioning powers in the name of deterrence, to initiate redress settlements and/or to bring a collective action for damages before private law courts. The agencies' willingness to harness such powers in practice is also an important prerequisite for the complementarity between administrative enforcement and private law remedies. Accordingly, although administrative authorities cannot directly secure enforcement of compensatory remedies for private individuals, they can and do engage with such remedies indirectly, incentivizing infringers to compensate at their own initiative or starting court proceedings. The agencies' involvement in the provision of redress to private parties under the complementarity model thus goes considerably further than under the separation model, allowing the administrative enforcement mechanism and the private redress mechanism to complement each other.

B. Manifestations

The complementarity between administrative enforcement by regulatory agencies and private law remedies in the field of EU private law currently manifests itself in two main forms. First, many agencies have specific powers to consider the issue of compensation when deciding whether or not to impose an administrative fine, and, if so, what its amount should be. While, as discussed above, the European Commission and European agencies do not have such powers, the EU legislator has promoted this form of complementarity at the national level in various areas of EU private law, notably unfair trading, unfair contract terms, consumer sales of goods, and antitrust. For instance, the Consumer Protection Cooperation Regulation[52] obliges Member States to equip national consumer protection authorities with 'the power to receive from the trader, *on the trader's initiative*, additional remedial commitments for the benefit of consumers that have been affected by the alleged infringement covered by this Regulation'.[53] This power should be included in the agencies' toolkit for monitoring and enforcement alongside more traditional administrative powers, such as a power to order the cessation of the infringement or a power to impose penalties. Further, following the recent amendments made by the Modernisation Directive[54] to the

[52] 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, *OJEU* 2017 L 345/1 (Consumer Protection Cooperation Regulation).
[53] Ibid, Art. 9(4) under (c) (emphasis added).
[54] 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 modernization of Union consumer protection rules, OJEU 2019 L 328/7.

Unfair Commercial Practices Directive,[55] the Unfair Contract Terms Directive,[56] and the Consumer Rights Directive,[57] Member States must ensure that, when imposing penalties, national consumer protection authorities consider, among other 'non-exhaustive and indicative criteria', such as the gravity, scale, and duration of the infringement, 'any action taken by the trader to mitigate or remedy the damage suffered by consumers'.[58] A softer version of this rule can also be found in the Antitrust Damages Directive under which '[a] competition authority *may* consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.'[59]

The enforcement powers of the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt* (*ACM*)) may serve as an illustration of how Member States can implement such provisions of EU law in their national laws so as to ensure the complementarity between administrative enforcement and private law remedies. While the *ACM* does not have a general power to order an infringer to provide compensation to aggrieved consumers, it may facilitate consumer redress indirectly within the framework of administrative law, in line with the deep-rooted tradition of consensus-oriented decision-making and cooperation in the Netherlands. One of the instruments that can be used for this purpose is a so-called 'commitment' ('*toezegging*').[60] The firm which has acted in breach of consumer protection legislation may, on its own initiative, make a commitment to pay out compensation to consumers and request the *ACM* to declare this commitment to be binding. The *ACM* can decide to do so if it considers such a declaration to be more appropriate than the imposition of a fine or a periodic penalty payment.[61] If the *ACM* declares the firm's commitment to be binding, it may no longer impose a fine or a periodic penalty payment.[62] The *ACM* has already made use of this power on several occasions, notably in relation to

[55] Directive 2005/29/EC of the European Parliament and of the 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, *OJEU* 2005 L 149/22 (Unfair Commercial Practices Directive).
[56] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJEC* 1993 L 95/29 (Unfair Contract Terms Directive).
[57] 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, *OJEU* 2011 L 304/64 (Consumer Rights Directive).
[58] Unfair Commercial Practices Directive, Art. 13(2) under (b) (new); Unfair Contract Terms Directive, Art. 8b(3) under (b) (new); Consumer Rights Directive, Art. 24(2) under (b) (new).
[59] Antitrust Damages Directive, Art. 18(3) (emphasis added).
[60] Establishment Act on the Authority for Consumers and Markets 2013 (*Instellingswet Autoriteit Consument en Markt*), Art. 12h.
[61] Ibid, Art. 12h(2).
[62] Ibid, Art. 12h(1).

seventeen online dating websites.[63] The websites harnessed fake profiles of individuals to tempt their users to pay for chatting with 'chat operators' behind these profiles instead of real persons. The users were not informed about this commercial practice. The ACM found the practice to be misleading and accepted the commitment of the companies behind the websites to compensate around 37,000 consumers who had been harmed. The total compensation was estimated to be more than €9 million.[64] Another tool that can be used by the ACM to facilitate consumer redress is a power to lower the amount of a fine if the infringer pays damages of its own accord.[65] The fine cannot be reduced if the firm has been ordered to pay out compensation by the private law court because in such a case the 'of its own accord' requirement would not be met.[66] Further, to serve as a mitigating factor, the compensation should cover all the damage caused by a regulatory violation (and thus not only the damage suffered by the consumers who have launched a complaint).[67] Accordingly, both enforcement powers of the Dutch *ACM* discussed here establish a clear link between punitive administrative sanctions and compensation, which enables the latter to complement the former.

Second, the complementarity between administrative enforcement and private law remedies is also reflected in the powers of regulatory agencies to initiate redress settlements and/or to bring a collective action before private law courts. Although these administrative powers lean towards private law, they do not enable agencies to provide redress by ordering an infringer to pay compensation or to propose a compensation scheme. Such powers only allow them to facilitate compensation payouts in the private law domain and thus to complement the collective redress mechanism under private law. Currently, the European Commission and European agencies do not have any competence in this domain. Whether regulatory agencies can facilitate redress in the ways noted above at the Member State level depends on national legal traditions.[68] For negotiating settlements between traders and consumers and/or bringing a collective action on behalf of consumers some jurisdictions primarily rely on consumer protection organizations, whereas others rely on regulatory agencies. Both approaches are in line with the Representative Actions Directive. Under this EU measure, Member States '*may* designate *public bodies* as qualified entities for the purpose of bringing representative actions'.[69] In addition, such bodies may, jointly with traders, submit redress settlements to the private law courts for approval.[70]

[63] Besluit ACM, ACM/19/035608.
[64] ACM, Users of fake dating websites to receive over 9 million euros as financial compensation, 20 August 2019.
[65] Boetebeleidsregel ACM 2014, Arts 2.8 and 2.10 under (b).
[66] See, eg, CBb 17 March 2012, ECLI:NL:CBB:2011:BP8077, para. 9.26.5.
[67] See, eg, Besluit ACM, 15.0396.32.1.02, nrs 124–125.
[68] Cf Micklitz (n 6), at 566.
[69] Representative Actions Directive, Art. 4(7) (emphasis added).
[70] Representative Actions Directive, Art. 11(1) under (a).

In the Netherlands, for example, the *ACM* is empowered to conclude an agreement for mass damage settlement with an infringer of consumer protection legislation on behalf of those who have suffered damage.[71] The parties may request the judge to declare this agreement to be binding on all consumers affected. At the same time, however, the Dutch legislator requires the *ACM* to exercise restraint when consumer organizations seek to reach a settlement with infringers.[72] Where the *ACM* decides to intervene, it should place a notice on its website informing the public about its intention to conclude an agreement for mass damage settlement.[73] Consumer organizations have an opportunity to respond to it within ten days after the notice has been published.[74] Further, the *ACM* should suggest a third party who would lead negotiations to the infringer with whom the agency intends to reach a settlement.[75] The idea behind this rule is that the *ACM*, as an independent authority, should not get involved in the negotiating process between consumers and firms. The Dutch *ACM* thus only has a subsidiary role to play in relation to redress settlements, and has so far refrained from any intervention.[76]

In contrast, the powers of the Danish Consumer Ombudsman (*Forbrugerombudsmanden*), who is the principal enforcement authority for consumer law in Denmark, extend further. Since 2008, this authority has been authorized to institute a compensation class action on behalf of consumers in relation to violations of consumer protection legislation and to request the court to designate it as an opt-out procedure.[77] Christopher Hodges describes the experience of *Forbrugerombudsmanden* with the use of these powers as follows:

'[T]he Consumer Ombudsman is in a unique position to deal at the same time with enforcement of regulatory compliance and compensation issues, because he has powers covering both sides. ... His primary role is enforcement of the law through pursuing convictions in courts, but he is able to conclude many cases by negotiation and agreement with companies, and this ability enables him to deal with compensation and restoration of market balance through payment of compensation as part of the public sanctioning process. The Consumer Ombudsman sees his power to initiate a class action for compensation as a major element in his armoury of enforcement

[71] Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming* (*Whc*)) 2006, Art. 2.6.
[72] Regels omtrent instanties die verantwoordelijk zijn voor handhaving van de wetgeving inzake consumentenbescherming (Wet handhaving consumentenbescherming): Memorie van Toelichting, *Kamerstukken II* 2005/06, 30411, nr. 3, para. 5.6.
[73] Policy rule of the Minister of Economic Affairs on the conclusion of agreements for mass damage settlement (Policy rule mass damage) (Beleidsregel van de Minister van Economische Zaken over de totstandkoming van overeenkomsten tot de afwikkeling van massaschade (Beleidsregel massaschade)), 4 July 2014, nr. WJZ/14104938, Art. 2.1.
[74] Ibid, Art. 2.2.
[75] Ibid, Art. 3.
[76] In more detail see ELM Mout-Vos and NR de Jong, 'Schadecompensatie voor de consument, (g)een rol voor de ACM?' (2020) 38 *Journal of Economic Literature*, 302, at 305.
[77] Class Actions Act 2007, No 181. In more detail see Hodges (n 1), at 27.

tools, from which he can select in negotiations depending on the particular circumstances. He regards the unique opt-out class action power as an important potential threat ('a nuclear weapon'), which he ... would only expect to have to use rarely, but has found to be highly persuasive in negotiations. The result of having a full armoury of public and private enforcement weapons is that many cases are concluded by agreement, even if some are agreed only at the court door, and his throughput of enforcement cases is high, and low cost ...'[78]

Thus, having the power to initiate a collective action on behalf of consumers at its disposal enables the Danish Consumer Ombudsman to incentivize infringers to voluntarily pay compensation in accordance with the relevant private law rules, which is in line with the notion of complementarity between administrative enforcement and private law remedies.

C. Implications

The above discussion shows that while the complementarity pattern in the field of EU private law preserves the institutional separation between regulatory agencies and private law courts in the pursuit of deterrence and compensation, respectively, this separation is not absolute. Even though agencies remain concerned with deterrence and do not get directly involved in the provision of compensation, their *modus operandi* enables deterrence and compensation to complement each other. The complementarity model in this sense brings two major improvements for the individuals concerned compared to their position under the separation model, and each of the improvements also has broader societal implications.

First, the interplay between administrative enforcement tools and private law remedies facilitates redress for victims of regulatory violations. Without the engagement of regulatory agencies with remedial issues, justice for many individuals may never be realized. This is particularly true of mass damage cases where, as discussed above, consumers often incur only minor damage while filing a lawsuit may be complex and costly. In such cases, an administrative authority may prompt an infringer to pay compensation by using or threatening to use its administrative sanctioning powers or its private law-oriented powers to initiate a redress settlement and/or to bring a collective action. In so doing, the authority may secure compensation payouts for thousands of consumers who have been charged excessive interest on a revolving loan by a local bank, for hundreds of thousands of consumers whose clothes have been damaged due to a manufacturing defect in a branded washing machine or even for millions of consumers who have paid too much for milk products because of the existence of an EU wide price fixing cartel.

[78] C Hodges, 'Delivering Competition Damages in UK', 2012, https://www.law.ox.ac.uk/sites/files/oxlaw/here_3.pdf, 1, at 18.

The weakness of the complementarity model is that achieving collective redress for consumers ultimately depends on the goodwill of both sides. Given that their enforcement policy does not aim to secure compensation as a stand-alone goal, regulatory agencies may be reluctant to address remedial issues, particularly where damages claims give rise to financial stability concerns. Where agencies do seek to facilitate redress, infringers in turn may be unwilling to cooperate. After all, the former cannot force the latter to provide redress under the complementarity model. Aggrieved individuals or their groups, therefore, may still need to go to court in order to obtain compensation. But here also lies another strength of this approach. It does not render a private (collective) enforcement mechanism superfluous and thus preserves the ability of private law courts to decide the cases that have been brought to them by individual litigants, regulatory agencies, or consumer protection organizations on the merits under the applicable national private law. The development of private law remedies, therefore, still remains to a significant extent in the hands of the judiciary. In particular, the private law courts may fine-tune traditional private law concepts to focus on collective litigation and thus set standards that could also guide an out-of-court settlement of disputes initiated by regulatory agencies in the future.

Second, the complementarity between administrative sanctions and private law remedies also has the potential to ensure justice for an infringer. As this model prompts a regulatory agency to consider (voluntary) compensation payouts when determining the appropriate administrative sanction or level of sanction, the agency may refrain from imposing a fine where the individuals who have suffered damage as a result of a regulatory violation have been compensated. A car manufacturer who has caused mass consumer damage by making unjustified 'green claims', for example, may therefore only be required to pay full damages instead of the high fine. Interestingly, the recent study of the infringers' perceptions of private damages as opposed to administrative fines suggests that those who have committed an infringement unintentionally consider the payment of compensation to be more fair than that of a fine and are willing to pay more in damages than in fines.[79] The complementarity pattern also implies that where the fine is awarded in addition to the damages, its amount would be reduced in accordance with the principle of proportionality. Sufficient deterrence may thus be achieved through damages alone or through the cumulative effect of damages and a fine. Furthermore, a coordinated approach to administrative sanctioning and redress could avoid over-deterrence and the stifling effects on innovation, investment, and competition associated with it.

[79] PTM Desmet and F Weber, 'Infringers' Willingness to Pay Compensation versus Fines' (2021) *European Journal of Law and Economics*, 1.

IV. Integration

A. Characteristics

Finally, we can observe the farthest reaches of regulatory agencies in the remedial domain under the integration model of the relationship between administrative enforcement and private law remedies. Unlike the complementary pattern in which agencies are only empowered to *facilitate* redress for victims of breaches of EU private law, the integration model implies that within their arsenals of enforcement powers, agencies have some form of discretionary power to *secure* such redress and are willing to make use of it in practice. In particular, an administrative authority may achieve compensation by ordering an infringer to create a redress scheme that would be approved by this authority and/or the court, or some independent (eg ADR) body. The exercise of this power is without prejudice to the use of its traditional administrative powers, notably the power to impose a fine or a periodic penalty payment on an infringer. In this scenario, the enforcement policy of a regulatory agency serves the goal of achieving compensation alongside other goals, such as deterrence. The provision of compensation is thus integrated within the administrative enforcement mechanism managed by the agency.

B. Manifestations

The integration model in this sense has so far received little recognition across the EU. However, it has been widely adopted by regulatory agencies in one former EU Member State, the UK, where litigation before the English courts is generally not a realistic option for consumers and SMEs given the particularly high costs involved as well as the often rigid application of common law.[80] The UK's experience provides empirical evidence to support this conceptualization and to study its practical implications in the areas subjected to EU harmonization and beyond.

The widespread adoption of the integration model in the UK has been prompted by an academic theory on 'restorative justice' which sought to link attempts by regulatory agencies to influence behaviour of regulated entities with rectification of the adverse consequences that have been caused by the infringer.[81]

[80] The decisions of the courts of England and Wales in cases involving the mis-selling of interest rate hedging products to corporate retail investors illustrate this point. See, eg, *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB); *Crestsign Ltd v (1) National Westminster Bank Plc; (2) The Royal Bank of Scotland Plc* [2014] EWHC 3034 (Ch), [2015] 2 All ER (Comm) 133. In more detail see D Bugeja, *Reforming Corporate Retail Investor Protection: Regulating to Avert Mis-Selling* (Oxford: Hart Publishing, 2019), 140.

[81] For more detail, see C Hodges, 'Public and Private Enforcement: The Practical Implications for Policy Architecture', in R Brownsword et al. (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011), 437, at 444.

Six Penalties Principles proposed by Richard Macrory have been particularly influential in shaping regulatory enforcement policies.[82] According to Macrory:

'A sanction should: 1. Aim to change the behaviour of the offender; 2. Aim to eliminate any financial gain or benefit from non-compliance; 3. Be responsive and consider what is appropriate for the particular offender and regulatory issue . . .; 4. Be proportionate to the nature of the offence and the harm caused; 5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and 6. Aim to deter future non-compliance.'[83]

These principles focus on sanctioning from the regulatory and compliance perspective, and thus not from the traditional private law perspective on justice between individuals. In essence, however, Principles 2 and 5 support a proactive role of regulatory agencies in securing compensation for aggrieved individuals and thus realizing interpersonal justice. Further, Macrory's Six Penalties Principles reflect a holistic approach to the agencies' tasks which implies the integration of remedial powers into the administrative enforcement toolkit. This approach has led to revolutionary developments in relation to compensation, particularly in collective redress, in different sectors, including financial services, energy, and antitrust.[84]

A notable example of such a development are the redress powers of the UK's financial watchdog, the Financial Conduct Authority (FCA), under the Financial Services and Markets Act (FSMA) 2000, as amended by the Financial Services Act (FS Act) 2010.[85] According to section 404 FSMA, in case of a widespread or regular failure by financial firms to comply with regulatory standards, the FCA may make a consumer redress scheme. Under this scheme, a financial firm can be required to investigate whether it has failed to comply with the law, to determine whether the failure has caused or may cause damage to consumers, and, if so, to assess what the redress should be and to make the redress to consumers.[86] The FCA may determine the scope and timing of the scheme[87] and may even make provision 'as to the kinds of redress that are, or are not, to be made to consumers . . . and the way in which redress is to be determined in specified descriptions of case'.[88] A consumer redress scheme will commonly result in the firm being required to provide monetary compensation. The principles of private law still underpin payment of compensation, but the details of damages law are often of

[82] RB Macrory, *Regulatory Justice: Making Sanctions Effective* (HM Treasury, 2006).
[83] Ibid, 10.
[83] Ibid, 10.
[84] For an overview see Hodges and Creutzfeldt (n 6), at 121.
[85] Financial Services and Markets Act (FSMA) 2000, ss 404–404A; Consumer Redress Schemes Sourcebook (CONRED).
[86] FSMA 2000, s. 404(5)–(7).
[87] FSMA 2000, s. 404A.
[88] FSMA 2000, s. 404A(1) under (d).

little importance in practice.[89] The principle of full compensation is simply applied.

Since 2010, compensation has been paid in a series of cases, as a result of either agreements between the FCA—or its predecessor, the Financial Services Authority (FSA)—and financial firms or the use of the formal powers.[90] For instance, in 2014, the FSA took formal action against several hundred financial firms to ensure that over £31 million in compensation is paid to more than 7000 retail investors who had suffered loss on their investment in Arch cru funds.[91] These funds were high-risk investment products that typically invested in non-mainstream assets, such as private equity and private finance, and could only be sold to investors who fully understood—and were willing to accept—the risks. Financial advisers, however, recommended Arch cru funds to many investors as low- or medium-risk products in breach of regulatory requirements. Under the consumer redress scheme, firms that gave advice to invest in these funds had to review that advice and provide redress to consumers where required.

The formal powers under section 404 FSMA 2000, however, have been rarely used. Virtually all cases are resolved by agreement between the regulatory agency and financial firms. But the threat of these powers provides a powerful incentive for voluntary consumer redress schemes, which parallels the experience of the Danish Consumer Ombudsman with its power to initiate a class action for compensation, discussed above. For example, following the engagement with the FCA, a rent-to-own firm BrightHouse, which provides household goods to customers on hire purchase agreements, has committed to compensate 249,000 customers for the damage suffered due to the firm's breach of its responsible lending obligations.[92] The FCA found that the firm did not always adequately assess whether the customers could afford loans and treat customers fairly throughout the collection process. In response to these concerns, PerfectHome has identified customers that may have been treated unfairly and has proposed redress to these customers totalling over £14.8 million in the form of cash payments and balance adjustments.

While the FCA's redress powers allow it to determine not only a firm's liability for past conduct but also the compensation to be paid, these powers do not stand alone. Importantly, they are accompanied by a mechanism that ensures coordination of the financial regulator's activities with that of courts and the Financial Ombudsman Service (FOS). In particular, the FCA can only make a consumer

[89] Cf Hodges and Creutzfeldt (n 6), at 131.
[90] Ibid, at 122.
[91] FSA, 'Consumer Redress Scheme in Respect of Unsuitable Advice to Invest in Arch Cru Funds', PS 12/24, 2012; FCA, '£31m in compensation to be paid out following FCA's Arch cru consumer redress scheme', Press Release, 27 January 2014; https://www.fca.org.uk/news/press-releases/%C2%A331m-compensation-be-paid-out-following-fca%E2%80%99s-arch-cru-consumer-redress-scheme.
[92] FCA, 'Rent-to-own provider BrightHouse to provide over £14.8 million in redress to around 249,000 customers', Press Release, 24 October 2017; https://www.fca.org.uk/news/press-releases/rent-to-own-provider-brighthouse-14-8-million-redress-249000-customers.

redress scheme where a court would award redress to consumers.[93] As the FCA Handbook further clarifies, 'the only failures a consumer redress scheme can address are those that a court or tribunal would find to have been failures at the time the activities were carried on'.[94] The FCA's powers are thus limited to the extent that the regulator cannot rely on its own subjective assessment of the reasonableness of the financial firm's actions, but should follow the law as interpreted and applied by courts. When the meaning of the law is unclear, the FCA has two options. It may either decide not to develop a scheme at all, considering the other ways in which consumers can seek redress (including through the courts), or it may take steps to clarify the law.[95] The latter can be done by seeking an opinion from a Queen's Counsel or a court declaration.[96] Further, a consumer redress scheme can be challenged. Any person (eg firms, consumers or their representatives) may apply to the Upper Tribunal, which is independent of the FCA, for a review of any rules made under section 404 FSMA 2000.[97]

C. Implications

Accordingly, the integration model abandons the institutional separation between administrative authorities and private law courts along the lines of deterrence and compensation that has traditionally dominated the regulatory and private law discourses. In this scenario, compensation is being integrated into the administrative enforcement mechanism. The latter no longer exclusively serves its traditional goals, notably deterrence, but also pursues compensation as a separate enforcement goal. Regulatory agencies may thus become more directly involved in the provision of redress resulting from breaches of EU private law than under the complementarity model which presupposes only their indirect involvement. Like the complementarity model, however, the integration model also has its strengths and weaknesses.

The main advantage of embedding compensatory remedies for private individuals within the administrative enforcement mechanism is that regulatory agencies have a robust legal basis for securing redress in cases of mass damage if they deem it necessary. The existence of an explicit formal power to this effect—which distinguishes the integration model from the complementarity one—may prompt an administrative authority to require an infringer to pay compensation even against its will. The authority may therefore order the local bank that has charged excessive interest on a revolving loan to compensate thousands of consumers; the manufacturer of the washing machine that has damaged clothes to pay compensation to hundreds of thousands of consumers; and the companies involved in a

[93] FSMA 2000, s. 404(1)(b).
[94] Financial Conduct Authority Handbook, s. CONRED 1.3.10. See also s. CONRED 1.3.16.
[95] Ibid, s. CONRED 1.3.11.
[96] Ibid, ss CONRED 1.3.12–1.3.13.
[97] FSMA 2000, s. 404D.

price fixing cartel for milk products to secure compensation payouts for millions of consumers. Furthermore, adding on a power to achieve redress to the agencies' armoury of enforcement tools may also incentivize infringers to agree on voluntary redress schemes. The adoption of the integration model thus opens up a new, relatively quick and cheap, avenue for realizing justice between private parties in cases of mass damage. It increases the aggrieved individuals' chances of obtaining compensation, since the intervention by a regulatory agency in the remedial domain removes the need for many of them to initiate or join, often lengthy and costly, civil (collective) proceedings against the infringer.

The flip side of the integration model, however, is that the agencies' direct involvement in doing interpersonal justice considerably weakens the role of the judiciary in this area. It is true that, even in this scenario, private law courts would not become superfluous. As the experience of the UK shows, redress schemes ordered by or agreed with agencies do not curtail the rights of dissatisfied consumers to take action through the courts. Further, agencies are allowed to make redress schemes only where a court would award redress to consumers and such schemes are subject to judicial review. Yet, a profound shift in the forum for delivering redress from private law courts to administrative authorities implies that the courts have far fewer opportunities to resolve disputes between private parties than under the complementarity model. The development of private law remedies in accordance with the principles of private law through trial and error, particularly in a collective setting, may therefore be at risk.

Another potential weakness of the integration model involves a lack of coordination between punitive administrative action and redress measures, which is similar to the separation model. Under the integration model, a regulatory agency may require the infringer to pay compensation in addition to an administrative fine for one and the same violation without having to assess whether the cumulative effect of both measures is in line with the principle of proportionality. This means, for instance, that a car manufacturer that has been fined for making unjustified 'green claims' may also be required to pay full damages to the consumers who have purchased its vehicles based on such claims. The integration model differs in this regard from the complementarity model which implies a coordinated approach to traditional administrative sanctioning and private law remedies. Therefore, while the integration pattern may serve justice for victims of regulatory violations well, it may not necessarily do the same for the infringer. Further, the cumulative effect of a fine and damages may be overdeterrence, as already discussed above in relation to the separation model.

V. Conclusions and reflections

The enforcement of EU private law still leaves a lot to be desired. Legislators, regulators, and market actors in the EU and beyond are searching for new and more

effective ways to achieve redress, particularly in cases of mass consumer damage. In this context, regulatory agencies, which have traditionally been concerned with deterring regulatory violations in the public interest, have become increasingly involved in the provision of compensation to aggrieved private individuals. With this trend being not sufficiently reflected in regulatory theory, however, agencies are currently lacking an analytical framework in which to do so. To bridge the gap between theory and practice, this article has adopted a holistic approach to the functions of regulatory agencies, notably deterrence and compensation, in the field of EU private law. It has identified three ways in which the relationship between administrative enforcement and private law remedies, particularly private damages, within the agencies' operation could be conceived and has analysed them in terms of their potential to reconcile the pursuit of the public interest with a concern to ensure justice between private parties.

First, administrative enforcement and private law remedies may exist separately from each other, with only the former being a matter for regulatory agencies and the latter remaining the exclusive domain of private law courts and ADR bodies. Under the separation model, therefore, administrative authorities may not engage with redress in any form or may be unwilling to do so. This pattern preserves the ability of the judiciary to develop private law remedies in accordance with the principles of private law, particularly in collective litigation. As deterrence is entirely decoupled of compensation, however, the separation model may put justice for both victims and infringers in jeopardy and lead to under- or over-deterrence. After all, the victims may not have sufficient incentive to initiate private enforcement action, especially when they have suffered only trivial damage. Where such action does take place and results in the award of compensatory damages in addition to the imposition of a punitive fine, the combined effect of all enforcement may be unfair to the infringers.

Second, within the operation of regulatory agencies, administrative enforcement and private law remedies may complement each other. The complementarity model implies that agencies are empowered to facilitate redress by using or threatening to use their administrative sanctioning powers or powers to initiate redress settlements and/or to bring a collective action for damages before private law courts. In this scenario, administrative authorities do not become directly involved in the provision of redress and thus do not supplant the judicial ordering of private law remedies. Rather, they engage with such remedies indirectly, enabling deterrence and compensation to complement one another without completely erasing the institutional boundaries between the executive and the judiciary. The complementarity pattern, therefore, has the potential to contribute to ensuring justice—in or out of court—not only for victims but also for infringers and to avoid under- or over-deterrence. Yet, with compensation not being one of the goals of the agencies' enforcement policy, the extent to which

this potential can be realized depends on the goodwill of both the agencies and the infringers.

Third, private law remedies may be integrated within the administrative enforcement mechanism that serves compensation alongside other goals, notably deterrence. Under the integration model, regulatory agencies are empowered to secure redress for aggrieved individuals and are willing to use their discretionary powers to this effect in practice. The integration pattern thus abandons the institutional separation between agencies and private law courts along the lines of deterrence and compensation, enabling a more direct engagement of administrative authorities with remedial issues. In this way, it provides a new gateway to effectively achieving justice for victims of mass regulatory violations. At the same time, the embedding of private law remedies within the administrative enforcement mechanism may reduce possibilities for their judicial development, albeit that even under the integration model agencies do not entirely supersede private law courts in this domain. Further, in the absence of any coordination between punitive fines and compensatory damages, the integration model may fail to ensure justice for infringers and lead to overdeterrence.

These three patterns of the relationship between administrative enforcement and private law remedies are manifest in the operation of a variety of European and national agencies across different areas that have been subjected to EU level harmonization. While the separation model is still reflected in the *modus operandi* of the European Commission and European agencies as well as many national administrative authorities, the EU legislator has recently promoted the adoption of the complementarity model in the Member States. This model has been influential, for example, in the Netherlands, where it fits well into the traditional institutional and cultural setting in which conflicts tend to be resolved through a dialogue between the parties concerned, while private law courts act as backup guardians of interpersonal justice, particularly in matters of collective redress. In contrast, the UK, where the courts have played a limited role in the provision of consumer/SME redress, has gone even further and adopted the integration model in many areas.

Importantly, the three models of the relationship between administrative enforcement and private law remedies discussed here also provide an analytical framework for assessing this relationship across the entire field of EU private law, transcending the boundaries of specific sectors of economy. While the separation model reflects the agencies' exclusive focus on administrative enforcement in the name of the common good, the complementarity and integration models reveal that modern agencies seek to combine this traditional preoccupation with a concern to ensure justice between individuals. The interpersonal justice deficit in the EU underlines the need for such hybrid combinations, prompting agencies to experiment with them in mass consumer damage cases and legislators to empower agencies to do so. The increasing relevance of private law remedies to administrative enforcement can be seen as the mirror image of the growing impact of

market regulation, including EU private law, on traditional national private law.[98] While administrative authorities are entering into the 'private law'-coloured remedial domain, private law courts are being faced with regulatory standards and the underlying policy considerations. The dividing lines between public regulation and private law, between regulatory agencies and private law courts, as well as between deterrence and compensation have thus blurred. This new reality points to the need to systematically rethink the prevailing regulatory theory concerning the tasks of regulatory agencies, acknowledging their role in ensuring interpersonal justice—a role which can be reconciled with but is not reducible to the pursuit of the public interest.[99] The complementarity and integration models of the relationship between administrative enforcement and private law remedies outlined in this article could provide a basis from which a holistic approach to the agencies' tasks in the field of EU private law can be developed and offer practical guidance on how to accommodate private law remedies within their enforcement policies.

Which of the two scenarios—a more moderate complementarity model or a more revolutionary integration model—is the preferred option must be assessed taking into account not only the strengths and weaknesses of each model, but also the broader context in which a particular regulatory agency operates.[100] Relevant institutional and cultural factors include, for example, the level at which an agency has been established (EU or Member State), the balance between public and private (collective) enforcement in a particular jurisdiction (notably the role of consumer organisations vis-à-vis agencies in collective redress matters), as well as the prevailing opinion about the division of labour between agencies and private law courts. For example, the complementarity model could be more appropriate for countries like Germany where consumer protection organizations have traditionally played a major role in ensuring collective redress for consumers and the private law courts rather than administrative authorities are generally considered to be the proper forum for seeking compensation. In contrast, the integration model could be well suited for countries like the UK where regulatory agencies have been on the frontline of enforcing EU and national market regulation and where their active role in securing compensation in mass damage cases has generally been welcomed. Furthermore, to realize justice for both victims and infringers and to avoid overdeterrence, agencies that operate under the integration paradigm could incorporate some elements of the complementarity pattern so as to ensure coordination between punitive administrative penalties and private law remedies. Last but not least, it should also be considered whether the

[98] In more detail see, eg, OO Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' (2021) 84 *Modern Law Review*, 1294.
[99] cf Dagan and Kreitner (n 13), focusing on the USA.
[100] In more detail see H-W Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (Cambridge: Cambridge University Press, 2018).

European Commission and/or European agencies have a role to play in the provision of redress to victims of serious infringements of EU private law.

Further interdisciplinary research is needed to develop an integrated approach to the functions of regulatory agencies along these lines. And it is here that the legal scholarship could take the lead. But to do so, regulatory and private law scholars need to collaborate closely, think out of the box, and dare to cross the disciplinary boundaries, while at the same time not losing sight of the specificities of public regulation and private law as well as the law and other disciplines.