Rotterdam Institute of Private Law

Rotterdam Institute of Private Law
Accepted Paper Series

European Tort Law

An Integrated or Compartmentalized Approach?

W.H. van Boom[•]

Published in: Antoni Vaquer (ed.), European Private Law Beyond the Common Frame of Reference – Essays in Honour of Reinhard Zimmermann, Europa Law Publishing 2008, p. 133-149 (original page numbers are referred to in brackets [page])

[Afternote: after conclusion of this paper the Draft Common Frame of Reference was presented. Contrary to my suggestion in the text, the DCFR does contain rules on tort law.]

[•] Professor of Private law at the Rotterdam Institute of Private Law, Erasmus University Rotterdam, The Netherlands. The author gratefully acknowledges helpful comments and suggestions by Simon Whittaker and Siewert Lindenbergh. The text was finalized in January 2008, subsequent developments were not included.

ERASMUS UNIVERSITEIT ROTTERDAM

Abstract

The existing modest body of European tort law is, by necessity, an organically grown set of various rules, entered into force as a result of piecemeal legislative effort, sometimes of a contradictory nature in practice, and always lacking the dogmatic depths and overarching aspirations that national systems of private law tend to have. Working with this material necessitates a compartmentalized approach. By addressing the policy issues involved in each of these torts one by one, the European Union can make harmonized tort law more attainable.
Rather than discussing the intricacies of tort theory, the quest should be aimed at finding a *concrete balance* between the interests of those involved in *specific torts* – businesses, consumers, and the insurance industry. In this paper I try to demonstrate that such an approach would take us away from projects aimed at restating 'Principles' and would lead to a more compartmentalized approach. Social and cultural divergence and differences in domestic preferences in the tort area do not necessarily exclude some level of harmonization in concrete 'tort files' as long as there is the political will and perceived need for harmonization. This paper identifies a number of torts that seem more ready for harmonization than others.

Keywords
European private law, tort law, harmonization, Common Frame of Reference, enforcement

Table of content

I. Introduction

[133] The 2007 Lleida Congress in honour of Reinhard Zimmermann centres around the Common Frame of Reference. Let me admit that I am not an experienced 'CFR watcher', but that I was nevertheless struck by the fact that in the English language, the CFR memoranda and reports refer to a common frame of reference relating to *contract law*, whereas somehow in Dutch this is consistently translated into *verbintenissenrecht*. In Dutch legal terminology, however, "verbintenissenrecht" is the *law of obligations* rather than the law of contracts and therefore also includes tort law, restitutionary remedies, benevolent intervention and unjust enrichment. Some much for a common frame of reference! My first proposition here would be that a common frame of reference will inevitably get lost in translation.[1]

Having said that, as I understand the CFR undertaking is an attempt to restate and perhaps eventually 'horizontally' harmonize the community's consumer contract law acquis even further by method of technocratic committee process in the best of EU tradition of comitology.[2] Moreover, it seems that along the way the CFR endeavour has somehow converged with the Principles project of the Study Group on a European Civil Code. Officially, the CFR does not include tort law issues.[♦] So we could stop here and not be bothered with tort law in relation to the CFR. There is, however, a good reason for looking into tort law as it may be operating 'behind the scenes' of contract law. Indeed, the CFR undertaking does shed some light on the position of tort law. In the EU commission's second report on the CFR it is said that there is consensus among the CFR participants "that the CFR should contain the topics directly related to the existing EU contract law *acquis* in combination with general contract law issues which are relevant for the *acquis*"[3] and that during the CFR work "several voices advocated including certain general contract law issues that are relevant for the existing EU contract law *acquis*."[4]

[134] To include 'general contract law issues' in the CFR work poses a problem of demarcation with tort law. It has been pointed out rightly before that the dividing line between tort and contract varies from country to country.[5] So, if the EU is designing a

---

[1] Cf. M.W. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience', in: Stefan Vogenauer and Stephen Weatherill (ed.), *The Harmonization of European Contract Law - Implications for European Private Laws, Business and Legal Practice* (Oxford 2006), p.55 fn. 68. Note that Christian von Bar et al., 'Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code', (2002) *European Review of Private Law*, p. 193 fn. 14 seem to turn the argument around and imply that the Dutch translation is the better one.

[2] For an overview of what the CFR is or may be, see, e.g., Hesselink (2006), cited above fn. 1 at p.52 ff. with further references.

[♦] **[Afternote: after conclusion of this paper the Draft Common Frame of Reference was presented. Contrary to my suggestion in the text, the DCFR does contain rules on tort law.]**

[3] Report from the Commission - Second Progress Report on The Common Frame of Reference, COM/2007/0447 final, p. 8-9.

[4] *Idem*, p. 11.

[5] See, e.g., R. Zimmermann, 'Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact', in: H. Koziol and Barbara C. Steininger (ed.), *European Tort Law 2003 (Tort and Insurance Law Yearbook)* (Vienna/New York 2004), p.10 f.; Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe - A Comparative Study* (München 2004), p. 11 ff., p. 44 ff.

common frame of reference regarding contract law in general, it may have to decide under which heading to file problems of precontractual duties of care, of providing a quasi-contractual protection in tort to third parties, somehow linked to a contract, and the matter of dealing with legal relationships in chains of contracts. In short, it may have to engage in defining and dividing contracts and torts in some respects. Such a task seems rather difficult, to say the least.[6]

Having said that, it must be stressed that tort law *as such* is not on the regulatory agenda of the EU.[7] And rightly so. Who needs harmonized tort law? In the sense of a dogmatically coherent system of abstract rules, harmonized tort law seems rather superfluous. Why would we need a European standard on the issue of subjective or objective fault in tort law? Why would we need a uniform minimum age for tortious capacity of children? Why would we need to have uniformity on abstract notions of wrongfulness, duties of care and the like?

In the academic discussion on European harmonization of private law, the proponents of harmonization of tort law argue that a pan-European system of tort law would serve goals of equal treatment of wrongs and rights and equal protection of, e.g., business interests in Europe (level playing field, ironing out alleged 'economic distortions'). Opponents tend to stress that business strategy in Europe is indifferent to the details of tort law systems and that differences between the legal systems stem from genuine differences in *preferences* of domestic legal policy.[8] Although I am not an expert, I would think that the latter **[135]** argument is not entirely sound from a European policy perspective: the basic idea of harmonization is in fact to discuss, negotiate and then agree on a pan-European preference (indeed, it is the basic idea of the EU itself).
Some authors justify non-intervention at the EU level with the "regulatory competition" rationale.[9] Suffice to say here that EU politics are not always driven by the concept of regulatory competition, especially when consumer interests are involved.[10] Moreover, the theory of regulatory competition in the field of tort law seems to overestimate the rationality of tort law systems and how they evolve. Rather than a flexible tax on corporate or individual behaviour, which can be raised or lowered annually in order to adjust to market circumstances, tort law is perceived by many to reflect socio-legal and cultural preferences which are not easily adjusted in view of some 'legal competition' paradigm.

---

[6] Cf. Gerhard Wagner, 'The Project of Harmonizing European Tort Law', (2005) *Common Market L.Rev.*, p. 1296.
[7] Cf. Ulrich Magnus, 'Europa und sein Deliktsrecht - Gründe für und wider die Vereinheitlichung des ausservertraglichen Haftungsrechts', in: Helmut Koziol and Jaap Spier (ed.), *Liber Amicorum Pierre Widmer* (Vienna/New York 2003), p.221.
[8] For an overview of the main arguments pro and contra, see, e.g., Michael G. Faure, 'Product Liability and Product Safety in Europe: Harmonization or Differentiation?' (2000) *Kyklos*, p. 467 ff.; M. Faure, 'How Law and Economics May Contribute to the Harmonisation of Tort Law in Europa', in: R. Zimmerman (ed.), *Grundstrukturen des Europäischen Deliktsrechts* (Baden-Baden 2003), p.31 ff.; Gerhard Wagner, 'The Virtues of Diversity in European Private Law', in: Jan Smits (ed.), *The Need for a European Contract Law* (Groningen 2005), p. 3 ff.; Wagner (2005), cited above fn. 6, p. 1269 ff. Cf. Roger Van den Bergh and Louis Visscher, 'The Principles of European Tort Law: The Right Path to Harmonization?' (2006) *European Review of Private Law*, p. 514 ff.; Jan Smits, 'European Private Law: A Plea for a Spontaneous Legal Order', in: Deirdre M. Curtin et al., *European Integration and Law* (Antwerpen 2006), p.67 ff.
[9] Cf. Wagner (2005), cited above fn. 6, p. 1271.
[10] For the law and economics analysis, see, e.g., Faure (2000), cited above fn. 8, p. 467 ff.

At the end of the day then, the only practically and politically relevant question therefore is whether there is both a *need* and a *political will* for harmonizing tort law in Europe.[11]

I very much doubt that there is an objective need for harmonizing tort law *in general*. Generally speaking, tort law is considered to be about protecting interests – life, property, economic interests to some extent – against wrongs, whereas contract law is about the exchange of goods and services. Initially, the harmonization of laws in the EU was considered to be an instrument of European economic policies. From the outset, harmonization efforts concerning contract law have made more sense than those concerning tort law. If domestic contract law systems are indeed an obstacle to smooth exchange within the European market, then there may be sound policy arguments for some level of unification of contract law. But this rationale for harmonization does not appear to be equally forcefully present in the case of tort law.[12] Tort law as it stands in Europe today seems to play such a relatively minor role in the decision making of both businesses and consumers, that it seems unlikely that differences in tort law would distort any economic level playing field. Admittedly, this might well be because on a more abstract level, tort law systems in Europe are rather similar. By and large, all these systems offer compensation in some cases of death and personal injury; they all protect property rights and they all tend to be **[136]** reluctant in allowing unbridled claims for pure economic loss.[13] Moreover, by and large, tort law systems in Europe invariably tend to be less than fully predictable in outcome, expensive in operating, damned by business and cherished by the legal profession.[14] So, even in this respect tort law systems are rather alike.
Obviously, there are major differences between the legal systems at a concrete level.[15] Causation, heads of damage, the position of children in tort law, strict liabilities, they all tend to differ from country to country. But on a more abstract level and from a societal point of view, tort law systems in Europe seem to be rather similar in operation and relative unimportance. We tend not to commit torts every day, but we definitely do enter into contracts every day.

As a result, pressure groups advancing the harmonization of tort law as a body of law seem to be absent. This might have been different if there were stark contrasts be-

[11] Political will is even more relevant in light of the technical obstacle of competence of the EU to harmonize tort law. What would be the basis in the EU Treaty? On the issue of competence see, e.g., Ulrich Magnus, 'Towards European Civil Liability', in: Michael Faure et al. (ed.), *Towards a European Ius Commune in Legal Education and Research* (Antwerpen 2002), p.208 ff.
[12] Cees van Dam, *European Tort Law* (Oxford 2006), p. 133 ff.; Van den Bergh and Visscher (2006), cited above fn. 8, p. 514 ff. Contrast, e.g., Guido Alpa, "Principles of European Tort Law': A Critical View from the Outside', (2005) *European Business Law Review*, p. 957 ff. (stating that drafting Principles of European tort law is a 'fundamental need for a society with European aspirations' (p. 960) and that in doing so 'fundamental rights (…) will be better protected'(p. 974)); Magnus (2002), cited above fn. 11, p. 205 ff.
[13] In a similar vein, Magnus (2002), cited above fn. 11, p. 206 ff. Admittedly, pure economic loss as such is treated very dissimilar in Europe, but even the legal systems most favourable for claims for pure economic loss (e.g., France) limit the extent of such claims with other instruments (e.g., proof of damage, calculation of damage, causation).
[14] On the typology of tort law in action, see, e.g., Willem H. van Boom, 'Compensating and preventing damage: is there any future left for tort law?' in: Hugo Tiberg and Malcolm Clarke (ed.), *Festskrift till Bill W. Dufwa – Essays on Tort, Insurance Law and Society in Honour of Bill W. Dufwa - Volume I* (Stockholm 2006), p.287 ff., with further references.
[15] Wagner (2005), cited above fn. 6, p. 1281; Jaap Spier and Olav A. Haazen, 'The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law', (1999) *ZEuP*, p. 474 ("The legal systems of Europe have much in common, but the differences should not be underestimated.").

tween the various tort law systems in Europe and if this affected private interests considerably. Imagine for instance, that one member state in Europe adhered to a system of US-style class action with contingency fees and severe punitive damage in case of corporate wrongdoing. Then there might be a stronger political case for change, either for that particular member state to conform to others, or vice versa. Businesses would surely favour ironing out the extravagancies of this exotic system, and lawyers would undoubtedly take an opposing view since such an exotic system serves the bar's private interests best. In such an economic force field tort law harmonization would be a more of a political issue. In reality, it is not.

In the absence of pressure groups at a European level advocating change in tort law, it seems that the political relevance of harmonizing tort law in Europe is limited to isolated cases. I will return to this issue later. Suffice to conclude here that, if I am right in arguing that European tort law systems are indeed rather similar in the abstract, it seems logical for the EU not to engage in harmonizing tort law as a system but merely to repair the weak spots and iron out those parts of tort law that actually stand in the way of European internal market policies.

Having said that, there can be parts of tort law that might 'need' harmonization from a EU policy perspective. State liability for breach of community law is a good example of a specific category of torts that has in effect been harmonized **[137]** already – albeit with some aspects left to domestic tort law – in the interest of European legal unity. And there may be other examples, as we will see shortly. Then there is a case, not for harmonizing a *unitary* concept of European tort law, but for a *compartmentalized approach* in which some torts are subject to EU legislative or judicial attention and others are not.

In this paper, I will try to make a preliminary inventory of these torts that may 'need' harmonization. Note that the verb 'need' leaves a wide margin of appreciation and does not reflect objective necessity;[16] the EU will not stop functioning properly if these torts are not harmonized[17] (nor does it currently dysfunction without a uniform contract law, I might add). The idea is, however, that on the balance of costs and benefits of harmonization, for some torts the benefits of harmonization may outweigh the costs. So, in a way, the verb 'need' should better be read as 'be ready for'…

In the process of identifying the torts 'ready for' harmonization efforts, I will address the points of departure that can currently be found in EU legislation for a body of European tort law (§ 2). Then, I will turn to the areas which seem to be the most likely candidates for further harmonization in the near future (§ 3). Finally, I will conclude on the feasibility of both an integrated and a compartmentalized approach in European tort law.

Finally, by way of 'disclaimer' it should be noted that since the concept of tort law in itself is not a uniform concept, not all European tort law systems will consider some of the areas dealt with in this paper to be part of tort law. In the following I will try to identify these 'border areas' where applicable.

[16] As Spier and Haazen (1999), cited above fn. 15, p. 477 rightly observe, little in this world is necessary in the strict sense.
[17] Note that tort law is not unified in the United States of America either, but rather left to the individual state legislatures and courts, notwithstanding informal ALI Restatement unification efforts.

II. State of affairs in EU tort law

Broadly speaking, the state of affairs of EU tort law is as follows. There are but a few EU Directives that directly pertain to tort law. Indirectly, however, a more considerable number of Directives have bearing on what is traditionally considered to be part of tort law. Carrier liability for death and personal injury, for instance, can be considered to be part of transport law but may also be considered to be part of EU tort law as it deals with protection acknowledged legal interests. Here, I will give a brief overview of the most relevant EU Directives pertaining to tort law.

II.1 Products liability

The 1985 Products Liability Directive[18] is the 'cornerstone' of EU tort law, simply because it is the most comprehensive set of EU tort law rules available.
[138] The Products Liability Directive seems to be of major theoretical importance, but in practice, the impact appears to have been minimal. The Directive has become an integral part of European product safety policy nonetheless,[19] and the European Commission seems satisfied with the operation of the Directive.[20] Its value for identifying issues of importance in tort law should not be underestimated. The Directive gives a European floor to several important aspects of tort law, such as reasonable consumer safety expectations as a founding concept, defences under strict liability regimes, joint and several liability, fault of the injured person, limitation periods, and the compulsory nature of strict liability.
The Directive is by no means a complete harmonization effort, much is left to domestic legislation (How is damage calculated? What are the exact consequences of joint and several liability?). Moreover, the Directive is a compromise between consumer interests and business interests, which is demonstrated, e.g., by the fact that it uses a threshold for claiming and leaves the exclusion of the "development risk defence" to member states.[21]

II.2 Environmental damage

The 2004 Environmental Liability Directive[22] can hardly be considered to be part of general tort law, as it primarily addresses the relationship between polluting 'operators' and the State, more in particular recourse actions by the State and forced intervention and precautionary measures. All genuine private law aspects seem to have been removed in the legislative process.

[18] 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, as amended by Directive 1999/34/EC.
[19] See the cross reference at article 21 of the General Food Law Regulation 178/2002/EC.
[20] See COM (2000) 893.
[21] Article 9 (b) and 15(1) (b) Products Liability Directive.
[22] Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

II.3 Unfair trade practices

The recent Unfair Trade Practices Directive[23] is an extremely important Directive in the sense that it gives a pan-European floor to remedying so-called economic torts. It forbids unfair trade practices, i.e., commercial practices contrary to standards of 'professional diligence' that distort consumer behaviour materially (e.g., misleading, aggressive practices, omission of vital information). Although the Directive does not present itself as a 'tort Directive' and its ambit is confined to business-to-consumer practices, some member states did choose to implement the Directive -partially- as a species of a tort liability.[24]

[139] Moreover, the general standards used in the Directive can forebode a wider relevance for economic torts in general. Note that the Directive encapsules the earlier Directive 1984/450/EEC (amended by Directive 1997/55/EEC) on misleading and comparative advertising.

II.4 CSP liability

The Electric Signatures Directive[25] sets forth a third-party liability for Certification Service Providers. The interesting aspect here is that the EU uses tort law liability for pure economic loss vis-à-vis trusting parties as a deliberate tool for enhancement of the quality of CSPs.

II.5 Ultrahazardous activities

Here, the EU is involved in the well known Conventions on Third Party Liability in the field of nuclear energy.[26]

II.6 International traffic accidents

The Motor Insurance Directives[27] regulate, at least to a certain extent, the compulsory insurance contract terms, the insurance coverage amounts, the setting up of motor insurance funds for uninsured or unidentified tortfeasors, and the cross-border settlement (e.g., appointed claims representative) in traffic accidents. Regulating the terms of compensation under motor insurance contracts does not harmonize liability for motor vehicle accidents but it does seem to make Europe ready for the next logical step - harmonizing compensation systems for traffic accidents. For instance, article 4 of Directive 2005/14/EC states:

---

[23] Directive 2005/29/EC of 11 May 2005 on Unfair Commercial Practices.

[24] E.g., Austria (Bundesgesetz gegen den unlauteren Wettbewerb 1984 (2007 Novelle)) and The Netherlands (Burgerlijk Wetboek, art. 6:193a ff.). On the influence of the Directive on domestic tort and contract law, see, e.g., Geraint G. Howells et al. , *European Fair Trading Law; The Unfair Commercial Practices Directive* (Aldershot 2006), p. 71 ff.; cf. Simon Whittaker, 'The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws', in: Stephen Weatherill and Ulf Bernitz (ed.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29; New Rules and New Techniques* (Oxford 2006), p.139 ff.

[25] Directive 1999/93/EC of 13 December 1999 (Electronic Signatures Directive); Article 6.

[26] For an in depth overview, see Tom Vanden Borre, 'Shifts in Governance in Compensation for Nuclear Damage, 20 Years after Chernobyl', in: Michael Faure and Albert Verheij (ed.), *Shifts in Compensation for Environmental Damage* (Vienna/New York 2007), p.261 ff.

[27] Directive 2005/14/EC of 11 May 2005 amending Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC relating to insurance against civil liability in respect of the use of motor vehicles (5th Motor Insurance Directive).

"Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger."

[140] The basic idea here is that passengers should be compensated, but the effectiveness of this provision totally depends on how domestic tort law treats such contributorily negligent victims. In this sense, provisions such as article 4 create the political leeway to take the next logical step of altogether harmonizing the effect of the contributory negligence defence.

II.7 General product safety

The General Product Safety Directive[28] (GPSD) imposes general duties of care on manufacturers (e.g., recall duties) that can be of relevance in ascertaining what duties of care a manufacturer is under, apart from the strict liability under the Products Liability Directive. In this sense the GPSD may help to develop a more abstract notion of professional negligence concerning manufacturers. For example, article 5 of the GPSD provides that producers shall adopt measures enabling them to recall the defective product from consumers.

II.8 Carrier liability for personal injury and property loss

This field of transport law which was originally dominated by international treaties is now quickly becoming an integral part of EU private law.[29] It clearly aims at improving the position of travellers within the EU; improvement of the position in case of personal injury and loss of luggage is at the forefront of these developments. In short, the legislative framework is as follows:

Air carriage: Regulation 2027/97/EC of 9 October 1997 on air carrier liability (unlimited liability for death and personal injury; 100.000 SDR), amended by Regulation 889/2002/EC of 13 May 2002 (referring to the 1999 Montreal Treaty regime, extending the Regulation to cover luggage as well)

Sea and inland water: Regulation 2005/0592 of 23 November 2005 on liability of carriers of passengers by sea and inland waterways (referring to the Athens Convention 1974 and subsequent protocol 2002)

Railway carriage: Regulation proposal on international rail passengers' rights and obligations, COM(2004) 143 final (introducing harmonized liability regime)

Bus carriage: Proposal Regulation on the rights of international bus and coach passengers, scheduled for Fall 2007

[28] Directive 2001/95/EC of 3 December 2001 on general product safety.
[29] See, with further references, Jens Karsten, 'Passengers, consumers, and travellers: The rise of passenger rights in EC transport law and its repercussions for Community consumer law and policy', (2007) *J. Consumer Policy*, p. 117 ff.

[141]

III. Identifying torts that are 'likely candidates' for further harmonization

Harmonization and designing a CFR can go hand in hand. Indeed, the CFR work that is currently undertaken is sometimes considered to be a 'Trojan Horse' for gradual and horizontal harmonization.[30] Harmonizing by means of a CFR based on an existing 'acquis' is not possible in tort unless community tort law would be used as such a basis. I do not believe that to be the right starting point for our enquiry. Community tort law addresses the liability of EU bodies and national government agencies (e.g. in case of breach of EU law, insufficient and delayed implementation, et cetera). In some legal systems, liability of the administration differs considerably – both dogmatically and practically – from common tort law. The focus here is not liability of administrative authorities but rather tort law in general.[31] Therefore, I will not take this perspective.

If a 'Common Frame of Reference for Tort Law' is to restate and rework EU substantive law, its goals should be utterly modest and humble at first. Indeed, *finding* the actual acquis may be challenging in itself. In fact, there is hardly any acquis at present. So, with some hesitance I suggest that there are four areas that may be ready for further harmonization (in decreasing degree of likelihood): economic torts, manufacturer duty of care, cross border tourist safety, and motor vehicle accidents.

In my view, then, a Common Frame of Reference for Tort Law should not work along similar lines as followed in the work on the 'Principles of European Tort Law' and the 'Principles of European Law – Liability for Damages'. These two sets of principles were not based on the EU acquis but mostly on (what the participants perceived to be) the common core of national tort law systems.[32]

A first likely candidate is the category of economic torts. One can think of the protection of intellectual property through tort law, but also the liability for infringement of substantive rules of competition law and the liability for misleading advertising. Indeed, much has already been developed in terms of a European concept of economic torts as a consequence of the tendency to stimulate private enforcement of competition law. Having said that, the EU has not attempted harmonization of the underlying domestic tort law rules themselves. As a result, private enforcement of competition law through liability law (e.g. tortious lock out of competitors entering a specific market) is governed by **[142]** domestic rules on calculation of damages, burden of proof, time limitation, et cetera. Needless to say that these rules may vary and the efficacy of the legal system at hand as well. The EU might find itself between a rock and hard place in this respect as the subsidiarity principle may not agree with perceived needs for a level playing field for European business and an efficacious level of enforcement. If the EU is serious about stimulating private enforcement in competition law across the board, it will have to address such divergence of national

[30] References to be found at Hesselink (2006), cited above fn. 1, at p 53 fn. 58.
[31] For a combination of both perspectives, see, e.g., Wolfgang Wurmnest, *Grundzüge eines europäischen Haftungsrechts* (Tübingen 2003), p. 1 ff.
[32] For an analysis of the working method followed in drafting the Principles, see R. Zimmermann, 'Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact', in: H. Koziol and Barbara C. Steininger (ed.), *European Tort Law 2003 (Tort and Insurance Law Yearbook)* (Vienna/New York 2004), p.2 ff.

tort law rules. In essence, the same holds true for other economic torts – be it B-2-C or B-2-B torts.

The second category relates to manufacturer's duties of care. Naturally, the strict liability of the Products Liability Directive covers a lot of ground in this respect. Nevertheless, there may still be an additional converging force at work in this area, the General Product Safety Directive (GPSD). This Directive may eventually influence courts' perception of appropriate behaviour of manufacturers with regard to issues of after sales care, recall duties and similar duties of care vis-à-vis consumers in light of the safety of their products.[33]
Manufacturers are obliged under the GPSD to place only safe products on the market (article 3 (1) GPSD), having regard to, inter alia, the state of the art and technology and reasonable consumer expectations. This latter requirement directly connects the GPSD to European tort law in the sense that the consumer expectation test is the pivotal concept in the Products Liability Directive.[34]
Under the GPSD, manufacturers are also required to inform themselves of the inherent risks of the product prior to marketing and to enable themselves to effectively redress potential defects that may come to light after marketing. The recall duty laid down in article 5 GPSD is a instrument of last resort.
Obviously, the Directive does not require member states to implement the manufacturers' duties in national *tort* law. In fact, the Directive leaves it to the member states which system of enforcement to choose. If, however, national courts allow the substance of the Directive to trickle down into tort law or to converge with domestic concepts of recall duties, information duties, et cetera, the Directive may be the starting point of a concept of European manufacturers'duty of care.
Admittedly, there is the issue of full harmonization of European products liability under the Products Liability Directive. According to ECJ case law, the Directive does not allow the introduction of recall duties as a prerequisite for invoking one of the exonerating circumstances under article 7 of the Directive, nor does it allow extension of the strict liability onto others than the manufacturer.[35] It does, however, seem to allow private enforcement of the GPSD to some **[143]** extent as long as such enforcement is part of a pre-existing liability framework (such as fault-based liability) and does not constitute a competing system of liability for defective products.[36]

---

[33] On the substance of the post-marketing obligations under the GPSD, see Christopher Hodges, *European Regulation of Consumer Product Safety* (Oxford 2005), p. 129 ff.
[34] See art. 3 (3) (f) GPSD jo. art. 6 Products Liability Directive.
[35] See *Commission v France* (ECJ 25 April 2002, Case C-52/00, ECR 2002, I-3827); cf. *Commission v Greece* (ECJ 25 April 2002, Case C-154/00, ECR 2002, I-3879); *González Sanchez v Medicina Asturiana* (ECJ 25 April 2002, Case C-183/00, ECR 2002, I-3901).
[36] I do not believe that the strict and formal application by the ECJ of the full harmonization effect of Directive 85/374/EEC really stands in the way of such a development. Although the Court did rule that adding compliance to the recall duty to the conditions under which a manufacturer can exempt himself from liability was contrary to article 7 and 15 of the Products Liability Directive, it did not rule that construing a recall duty under national law as a local remedy for tortious breach of the material duties under the GPSD was contrary to article 13 Directive. Moreover, it could be argued that 'after sales duties' under general tort law principles (such as a recall duty) are altogether outside the scope of the Products Liability Directive. If, for instance, a public authority decides that a manufacturer should recall the defective product and the manufacturer refuses this may constitute both a criminal or administrative offence under the GPSD (depending on the domestic implementation of the GPSD) and a tortious breach of statutory duty vis-à-vis consumers that sustain injuries after such a breach. I would argue that since breach of statutory duties *as such* surely constitutes a source of tortious liability under domestic legal systems in the sense of article 13 of Directive 85/374/EEC (i.e. article 13 allows continuation of tortious liability for breach of statutory duties if such liability predates the Directive), the GPSD can be enforced through common tort law rules. Moreover, breach of the recall duty does not necessarily injure the same

The third category concerns the safety of tourist services. Obviously, intra-community travel and tourism are an extremely important source of economic prosperity. There seems to be a political case for some level of harmonization of the compensation for death and personal injury suffered in cross-border tourism. Indeed, the EU has promulgated substantive rules on the liability of providers of package travel services– admittedly a contractual liability regime – and has recently intensified the harmonization efforts concerning liability of commercial carriers for transport accidents. As a result, personal injury caused by defective hotel services, holiday activity services and tourist transport services may well be on the way towards pan-European liability regimes.[37] The difficulty here is to define which services are included and which are not. Moreover, as it may be difficult to identify a 'tourist' as such, the more practical approach would be to target those activities which 'average tourists' engage in. This is the practical approach taken in the Package Travel Directive. A next step might be **[144]** imposing some sort of pan-European strict liability on hotel operators for death and personal injury suffered by guests during stays.

The final category is rather more political (and therefore more like a 'minefield' rather than 'green acres'): traffic accidents. With the increased movement of people in Europe, the chances of suffering injuries in traffic accidents abroad increase as well. Although traffic accidents are a major cause of death and injury in Europe, this field of the law is far from uniform. The EU has set up a comprehensive system of compulsory insurance and claim settlement, but has refrained from harmonizing liability rules. Indeed, a battle for the correct harmonization policy concerning traffic accidents has been predicted.[38] Notwithstanding the fact that currently no concrete steps towards harmonization of tortious liability for traffic accidents are being undertaken, the quality of cross border settlement has improved in the whole of the EU as a result of the Motor Insurance Directives. Moreover, the recent proposals for unification of carrier liability may also prompt further debate on unified tort liability for motor vehicle accidents. All this, however, does not conceal the fact that harmonizing traffic accident liability in general and the level of compensation in particular is extremely difficult. The level of compensation depends on the extent to which liability law is embedded – by means of, e.g., deduction for collateral benefits – in other compensation systems such as health care insurance, statutory sick pay and industrial accident compensation schemes. Therefore, harmonizing the level of compensation is so much more than just harmonizing tort law. I have strong doubts about the political feasibility of such a harmonization effort, although it is perfectly plausible that one day we will have a unitary set of conditions under which motor vehicle drivers are held liable for traffic accidents. Standards of conduct, fault, imputation of acts under influence of drugs, alcohol or physical impediment, contributory negligence, or even strict liability, all these categories may well be unified some day in a EU Directive. As

---

consumers as the defective products as such do, and therefore enforcing the GPSD through tort law does not constitute a competing system of liability for defective products. On the interpretation of article 13 in light of the ECJ rulings, see, e.g., Simon Whittaker, 'Form and Substance in the Harmonisation of Product Liability in Europe', (2007) *ZEuP*, p. 865 ff.; Jean-Sébastian Borghetti, *La Responsabilité du Fait des Produits* (Paris 2004), p. 563 ff.

[37] On the political will to harmonize safety standards, industry standards, et cetera, see, e.g., "Report on a renewed EU Tourism Policy: Towards a stronger partnership for European Tourism" by the EP Committee on Transport and Tourism, culminating in an EP resolution calling on the EC to address the issue of a specific legal instrument covering the safety of tourist services (European Parliament resolution of 29 November 2007 on a renewed EU Tourism Policy: Towards a stronger partnership for European Tourism (2006/2129(INI))).

[38] Wagner (2005), cited above fn. 6, p. 1301.

mentioned, I feel that the assessment of damage and calculation of damages is a far less likely candidate.

IV. And what about remedies?

A certain level of indirect harmonization of domestic remedies for some torts can already be witnessed as a consequence of the operation of European law. Firstly, domestic tort law is in principle considered to be an integral part of the set of remedies available for breach of European substantive rules (*Courage v. Crehan*).[39] Secondly, the ECJ case law holds that if member **[145]** states choose to allow compensation through tort law as a remedy for such breaches, the tort remedy should be sufficiently dissuasive.[40] Seminal was the Von Colson case, a gender discrimination case concerning Directive 76/207/EEC (equal treatment) and the question involved was – from a European law perspective – what private law remedy the Directive necessitated. The Directive was in fact silent on this point, so in principle the member states were free to choose between different remedies. The ECJ ruled, however, that if a member state chooses the remedy of compensation for damage,

> *"then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application."*[41]

This case, and subsequent ECJ cases, seem to hold the principle that domestic remedies in tort must have a dissuasive effect and must amount to an adequate remedy.[42] So, if for instance consumers mostly suffer non-pecuniary loss in case of

---

[39] ECJ 20 September 2001, C-453/99, ECR [2001] ECR I-6297 (*Courage v. Crehan*) paragraphs 26 and 27. See also European Commission, *Green Paper "Damages actions for breach of the EC antitrust rules"* (EU Commission 2005), p. 4. On that case, see, e.g., Assimakis P. Komninos, 'New prospects for private enforcement of EC competition law: *Courage v. Crehan* and the Community right to damages', (2002) *CML Rev.*, p. 460 ff.; Alison Jones and Daniel Beard, 'Co-contractors, Damages and Article 81: The ECJ finally speaks', (2002) *European Competition L.Rev.*, p. 246 ff.; Okeoghene Odudu and James Edelman, 'Compensatory damages for breach of Article 81', (2002) *E.L.Rev.*, p. 327 ff.; Giorgio Monti, 'Anticompetitive agreements: the innocent party's right to damages', (2002) *E.L.Rev.*, p. 282 ff.; Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht - Anmaßung oder legitime Aufgabe?' (2006) *Archiv für die civilistische Praxis*, p. 402 ff.; Van Dam (2006), cited above fn. 12, at p. 205 ff.

[40] The phrase generally used in EU legislation is that sanctions must be "effective, proportionate and dissuasive."

[41] ECJ 10 April 1984, Case 14/83, ECR [1984] 1891 (*Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*). On the dogmatic problems that the case presented under German law, see, e.g., Gert Brüggemeier, 'Haftungsfolgen, Entwicklungstendenzen im europäischen und deutschen Schadensersatzrecht', in: Claus Ott and Hans-Bernd Schaefer (ed.), *Die Präventivwirkung zivil- und strafrechtlicher Sanktionen* (Tübingen 1999), p.171 ff. and Wagner (2006), cited above fn. 39, at p. 389 ff.

[42] Cf. ECJ 22 April 1997 Case C-180/95, ECR [1997] 2195 (*Nils Draehmpaehl v Urania Immobilienservice OHG*) ruling that capping the total amount due by an employer in discrimination cases is inconsistent with the detterrence effect of the Directive. See also ECJ 23 May 1996, ECR [1996] 2553 (*Hedley Lomas*) ruling that domestic tort law concerning state liability for breach of EU law may not be framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

non-performance of travel package arrangements, then the national law of damages has to include this head of damage in assessing the amount of compensation.[43]

[146] Another trend concerning remedies that is relevant to tort law in Europe, especially with regard to personal injury, is the tendency in EU substantive law to disallow (or to consider suspect) contractual limitation and exclusion of tortious liability for death and personal injury. See, e.g., art. 5 Package Travel Directive, art. 12 Products Liability Directive, art. 3 (1) jo. Annex 1 (a) Unfair Contract Terms Directive.[44] This seems to signal the importance that the EU attaches to the compensatory function of liability: it is deemed to be a remedy of overriding importance that should not be lightly disregarded.

Another relevant issue that should not be disregarded, is the increasing attention given to remedies as tools of private enforcement. I refer to the discussion on the EC Green Paper on private enforcement in competition law,[45] but also to the collective redress mechanisms in the area of consumer rights.[46] This may be the dawn of a European collective action, serving as a counterweight to the global aspirations of the USA class action.

V. Unlikely candidates

Having identified those fields of tort law that are most likely to become subject of some harmonization effort at the EU level, we can now turn to a list of 'least likely candidates'. This list consists of four topics within tort law that I feel are the least likely to become the subject of harmonization efforts in the near future. These topics have been avoided by the European legislature and have been left to domestic private law for various reasons. The main legal reason is obviously that some of these topics fall outside the legislative powers of the EU.[47] The main political reasons are either the lack of political relevance of the topic or the absence of converging political minds. Let us now turn to the four 'least likely candidates'.
Firstly, there is the law of damages, notably in personal injury cases. As mentioned earlier, the levels of compensation in personal injury cases may depend on ancillary domestic compensation systems, such as workers' compensation, health insurance schemes and social security arrangements.[48] Harmonizing the law of damages and

[43] ECJ 12 March 2002, ECR [2002] 2631 (*Simone Leitner v TUI Deutschland GmbH & Co. KG*) ruling that article 5 of Directive 90/314/EEC on package travel is to be interpreted as conferring on consumers a right to compensation for non-material damage. In view of this EU perspective one may argue that article 6:102 PEL Liab. Dam. ("Trivial damage is to be disregarded.") is in fact inconsistent with principles of EU law, because trivial damage should not be disregarded if that would lead to what economists would consider to be a state of "Underdeterrence".
[44] Cf. von Bar and Drobnig (2004), cited above fn. 5, at p. 155 ff.
[45] European Commission, *Green Paper "Damages actions for breach of the EC antitrust rules"* (EU Commission 2005), p. 1 ff.
[46] Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests; Regulation 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).
[47] On the boundaries of the EU legislative competence in tort matters, see, e.g., Magnus (2002), cited above fn. 11, p. 208 ff.
[48] Gerhard Wagner, 'Grundstrukturen des Europäischen Deliktsrechts', in: Reinhard Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts* (Baden-Baden 2003), p.194-196 and p. 339. Cf. also the contributions to B.A. Koch and H. Koziol (ed.), *Compensation for Personal Injury in a Comparative Perspective* (Vienna 2003), p.1 ff. and to Ulrich Magnus (ed.), *The Impact of Social Security Law on Tort Law* (Vienna 2003), p.1 ff.

the rules for calculation of damage therefore **[147]** seems virtually impossible. Moreover, the levels of compensation for non-pecuniary loss may depend on cultural diversity and implicit value judgements concerning life, freedom, privacy, and social solidarity.[49]
Secondly, there is employers liability for occupational injury.[50] Although a popular area of tort law in some legal systems, employers liability for accidents and occupational disease has been replaced in a considerable number of legal systems by tax-funded workers compensation outside private law.[51] Effectively, there is little to harmonize although there is a considerable amount of substantive EU legislation on occupational safety, which obviously leaves the nature of remedies to domestic law (criminal law, health inspectorate fining, etc.).[52] Moreover, the levels of compensation may depend on related compensation systems in personal injury. Worth noting is that this area of the law has in fact been excluded explicitly from PEL Liab Dam (Article 7:104 PEL Liab Dam).
The third unlikely category relates to industrial action (strike, lock out, et cetera). Liability for industrial action is unlikely to be harmonized as it is part of the domestic socio-economic balance of societal powers in employment issues, it is connected to collective bargaining processes and therefore the tort law aspects vary strongly from country to country.[53] Note that this item has also been excluded from PEL Liab Dam (Article 7:104 PEL Liab Dam).
The fourth and final category concerns general strict liabilities. A common core of general strict liabilities in Europe (for animals, children, employees, immovables, movable objects, hazardous activities) is not easily to be found. This is illustrated not only by the contrast between the recent French pre-proposal for the law on obligations in France and the Austrian and Swiss drafts,[54] but also by the stark contrast between England (virtually no strict **[148]** liabilities) and, e.g., Germany (a considerable number of strict liabilities in so-called 'Sondergesetze'). Without such a core, harmonization seems unattainable at the moment.

VI. Appraisal: making tort law tangible through compartmentalization

Cees van Dam recently argued that in the European tort law debate a general discourse on the policy issues involved is needed. He went on to state:

[49] Note that this may clash with the principle of *lex loci damni* in the Rome II Regulation (Art. 4 Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations), which provides that in case of cross-border personal injury the law of the place where the damage originates is applicable (tort law of country A, where victim sustains injuries caused by tortfeasor decides the level of compensation for victim, even if the victim is resident of country B).
[50] Cf. Jaap Spier, 'European Group on Tort Law', in: M.C. Lopes Porto (ed.), *Um Código Civil para a Europa/A Civil Code for Europe/Un Code Civil pour l'Europe* (Coimbra 2002), p.61.
[51] See the contributions to T. Hartlief and S. Klosse (ed.), *Shifts in compensating work-related injuries and diseases* (Wien/New York 2007), p.1 ff.
[52] E.g., Directive 98/37/EC of 22 June 1998 (machinery).
[53] Cf. Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), OJ L 199/40.
[54] On those reform efforts, see, e.g., P. Apathy, 'Schadenersatzreform - Gefährdungshaftung und Unternehmerhaftung', (2007) *Juristische Blätter*, p. 205 ff.; Pierre Widmer, 'Reform und Vereinheitlichung des Haftpflichtrechts auf Schweizerischer und europäischer Ebene', in: Reinhard Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts* (Baden-Baden 2003), p.147 ff.; Franz Werro, 'The Swiss Tort Reform: a Possible Model for Europe?' in: Mauro Bussani (ed.), *European Tort Law - Eastern and Western Perspectives* (Berne 2007), p.81 ff.; Irmgard Griss et al. (ed.), *Entwurf eines neuen österreichischen Schadenersatzrechts* (Wien/New York 2006), p.1 ff.; Pierre Catala (ed.), *Avant-projet de réforme du droit des obligations et de la prescription* (Paris 2006), p.1 ff.

> *In the end, this question is about what kind of Europe is to be preferred and pursued: should the emphasis be on the freedom to act, on corrective justice and regulating conduct, or should it be on protecting interests, on distributive justice and equality before the public and private burdens?*[55]

In answering these questions –which to my mind are indeed the correct questions – a compartmentalized approach seems the appropriate approach as far as tort law is concerned. Some torts are more likely candidates for harmonization efforts than others. The existing modest body of European tort law is, by necessity, an organically grown set of various rules, entered into force as a result of piecemeal legislative effort, sometimes of a contradictory nature in practice, and always lacking the dogmatic depths and overarching aspirations that national systems of private law tend to have. Working with this material necessitates a compartmentalized approach. By addressing the policy issues involved in each of these torts one by one, the EU can make tort law more tangible.

Rather than discussing e.g. the intricacies of what exactly is fault, the quest should be aimed at finding a *concrete balance* between the interests of those involved in *specific torts* – businesses, consumers, and the insurance industry. Such a compartmentalized approach would take us away from a conceptual policy discussion on 'the' goals of tort law. It has been argued that at such an abstract level there will be no agreement between the 'solidary systems' aimed at compensation and the 'individualistic systems' aimed at deterrence.[56] I think it therefore preferable not to concentrate on abstract discussions but rather to focus on a problem-solving-oriented, politically driven, piecemeal and compartmentalized strategy. These 'solidary and individualistic systems' have been able to find compromise in other economic and legal areas as well, so social and **[149]** cultural divergence and differences in domestic preferences in the tort area as such should not preclude some level of harmonization in concrete cases.

Again, it is a matter of political will and perceived need. I have tried to demonstrate that some torts seem more ready for harmonization than others. That would also make them more fit than others for inclusion in some sort of CFR undertaking. This does not imply that harmonization is imminent with regard to these branches of the law of torts. If there is one thing even more unpredictable than tort law, it is politics.

By way of final remark it must be admitted that compartmentalization does not really address the needs of consistency[57] – as the historical development of the consumer law acquis has demonstrated – but aiming for consistency through an overarching construction of European tort law on dogmatic foundations may be several bridges too far at this point in time.

[55] Van Dam (2006), cited above fn. 12, at p. 137.
[56] Wagner (2005), cited above fn. 6, p. 1302-1303.
[57] Spier (2002), cited above fn. 50, at p. 60 ("I strongly believe that one should not focus on isolated specific topics, ignoring the whole picture.").