
1. What do we mean by ‘EU tort law’?

Paula Giliker

1 INTRODUCTION

A *Research Handbook* on the theme of European Union (EU) tort law naturally lends itself to the question: what do the contributors mean by ‘EU tort law’? Why confine the study to this term? How does EU tort law differ from the tort law¹ of each European Union member state and to what extent is it a distinct entity? The lawyer is also instinctively inclined to examine EU tort law from the perspective of his or her own jurisdiction and consider what, if any, difference it will make to his or her own system of tort law.² Whether Greek, German, French or English, how does EU tort law affect me? Further, it is not a phrase with which we may be wholly familiar. Few of us will have followed modules on EU tort law or perhaps even considered it as a discrete category of law. Nevertheless, as this book shows, EU tort law is a topic of considerable importance in relation to many areas of law even if it is not generally identified as a collective whole and of particular importance to practitioners. In reality, all European private lawyers will have studied or relied upon EU tort law, whether he or she was aware of it at the time or not, and the extent to which EU law has become part of our national laws of tort is one of the strongest themes of this book. The national tort law of EU member states has been influenced by EU directives in topics ranging from product liability to unfair commercial practices. These provisions are ultimately subject to the supervision of the Court of Justice of the European Union (CJEU). Member states (and their courts) are further subject to potential liability for breaching EU law if, for example, the state fails properly to implement directives which give citizens individual rights which they should be able to pursue at national

¹ I use the word ‘tort’ for convenience, but in civil law systems, including the mixed law jurisdiction of Scotland, tort is commonly termed ‘delict’ or, more broadly, described as part of ‘non-contractual’ or ‘extra-contractual’ liability.

² See Günter Frankenberg, ‘Critical comparisons: re-thinking comparative law’ (1985) 26:2 Harvard ILR 411, who highlights the difficulty of the comparativist adopting a neutral perspective.

law.³ The long-standing influence of EU tort law (which we can trace back to the 1980s) has also impacted on our legal culture, although again such influences may not be identified as ‘foreign’ but regarded as part of the natural evolution of our national systems of private law. Identifying the nature, content and influence of EU tort law is the central purpose of this text.

In this chapter, my aim is straightforward. I seek to clarify what we mean by ‘EU tort law’ and highlight its importance in shaping the private law of European member states. I start by distinguishing it from the more commonly used term of ‘European tort law’. This, it is argued, is a loose term covering a number of different topics, both normative and substantive. EU tort law, in contrast, can be defined more precisely. I also ascertain what distinguishes EU tort law from EU law more generally before examining whether we can identify the emergence of general principles of EU tort law. Finally, as a UK lawyer, I comment on the implications of Brexit – the vote in the UK referendum of 23 June 2016 in favour of the UK leaving the European Union. It will be argued that EU tort law will still be relevant to UK lawyers, despite the uncertainties caused by the Brexit vote, both in the short and long term. The theme of EU tort law thus remains of importance to European lawyers both within and outwith the European Union.

2 ‘EU TORT LAW’ VERSUS ‘EUROPEAN TORT LAW’: WHAT DO WE MEAN BY EU TORT LAW?

The words ‘Europe’ and ‘European’ have a number of differing meanings. ‘Europe’ has been encapsulated as a political ideal, a woman, the sun, a figure in Greek mythology and so on.⁴ The *Oxford English Dictionary* adopts a more prosaic geographical definition: ‘A continent of the northern hemisphere, separated from Africa to the south by the Mediterranean Sea and from Asia to the east roughly by the Bosphorus,

³ So-called *Francovich* liability, which is, in turn, classified as tortious liability: see C6/90 *Francovich v Italian Republic* [1991] ECR I-5357; [1993] 2 *Common Market Law Reports* (CMLR) 66, C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany*; *R v Secretary of State for Transport Ex p Factortame (No 4)* [1996] ECR I-1029; [1996] 1 CMLR 889 and C-224/01 *Köbler v Austria* [2003] ECR I-10239; [2004] QB 848.

⁴ See Denis de Rougemont, *The Idea of Europe* (Macmillan, New York 1965) 6–19.

the Caucasus Mountains, and the Ural Mountains'.⁵ The word 'European', however, merits six different meanings,⁶ ranging from the vague 'relating to or characteristic of Europe or its inhabitants' to the more political 'a person who is committed to the European Union'. The latter highlights that the term 'European' is not always used objectively to denote a race or geographical area, but can mean a sense of identity or commitment to an ideal. It can signify a belief in the merits of the European Union (or even the European Convention on Human Rights which is not the same thing), a shared culture and a sense of shared values which owes little to the geographical.⁷ It does not necessarily signify a loss of national culture or values, merely an evolution, although this does not mean that member states will not regard it as a threat nevertheless.⁸ Its idealised form was captured by Polish nineteenth-century Romantic poet Julius Slowacki:

If Europe is a Nymph,
Then Naples is her bright-blue eye,
And Warsaw is her heart.
Sebastopol and Azoff,
Petersburg, Mitau, Odessa: These are the thorns in her feet.
Paris is the head,
London the starched collar,
And Rome – the scapulary.⁹

If the term 'European' therefore has a number of meanings, some of which indicate the subconscious (or even overt) political leanings of the speaker or writer, then is the term 'European tort law' more restrictive? Can we narrow this down to a legal norm applicable within a specific context? The answer is, unfortunately, no. 'European tort law', like the

⁵ See <https://en.oxforddictionaries.com/definition/Europe> (accessed 28 June 2017).

⁶ See <https://en.oxforddictionaries.com/definition/european> (accessed 28 June 2017).

⁷ Consider the rather bizarre example of the Eurovision Song Test/*Concours Eurovision de la chanson* which has been run by the European Broadcasting Union since 1956. In an attempt to unite countries in song, Eurovision adopts a very loose use of the term 'Euro' including Turkey, Russia, Georgia and Azerbaijan and, since 2015, even Australia.

⁸ See Martijn W. Hesselink, 'The case for a common European sales law in an age of rising nationalism' (2012) 8 *European Review of Contract Law* (ERCL) 342.

⁹ Translation by Norman Davies, *Europe: A History* (Bodley Head, London 2014) 1. The poet naturally saw his own native capital as at the heart of Europe!

term ‘European’, carries with it a multitude of meanings, but also attitudes – neutral, positive, hostile – to this topic.¹⁰ It is, in reality, an umbrella term, which Oliphant has rightly described as ‘a multi-layered concept with several planes of existence’.¹¹ For some, European tort law represents an idealised statement of a common set of principles uniting European legal systems, such as those set out by the European Group on Tort Law.¹² For others, it is simply a reference to the different ‘tort’ laws of Europe. It can also be used to identify specific legal systems, such as European Union law or European Human Rights law, and, indeed, a number of authors have used the term ‘European’ to cover both, despite their distinct identities.¹³ Its very imprecision renders it difficult to pin down and, in particular, distinguish the normative (should there be a harmonised or unified European law of tort?)¹⁴ from the substantive (is there legislation or case law we can identify which can be classified as European tort law?).

Two outstanding attempts to pin down European tort law illustrate these tensions. Professor Christian von Bar’s two-volume work, *The Common European Law of Torts*,¹⁵ sought to identify the common elements of the law of torts of all the member states of the European Union, founded on the belief that the approximation of European laws

¹⁰ See, for example, the special issue of (2009) 20(2) *King’s Law Journal* 189–308, discussing different perspectives on European tort law. See also Cees van Dam, ‘European tort law and the many cultures of Europe’ in Thomas Wilhelmsson, Elina Paunio and Annika Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (Kluwer Law International, Alphen aan den Rijn 2007) 57–80.

¹¹ Ken Oliphant, ‘European tort law: a primer for the common lawyer’ (2009) 62 *CLP* 440, 444.

¹² European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Springer, 2005) (also known as ‘PETL’). See also Bernard A. Koch, ‘The “European Group on Tort Law” and its “Principles of European Tort Law”’ (2005) 53 *American Journal of Comparative Law* 189–205.

¹³ See, for example, Oliphant (n 11) 448–66; Paula Giliker, *The Europeanisation of English Tort Law* (Hart, Oxford 2014). This can be justified on the basis that both are sources which can affect the content of the national system of tort law – in the United Kingdom by virtue of the European Communities Act 1972 and the Human Rights Act 1998.

¹⁴ For the difference between harmonisation and unification in European private law, see Jan M. Smits, ‘Convergence of private law in Europe: towards a new *ius commune*’ in David Nelkin and Esin Örüciü, *Comparative Law: A Handbook* (Hart, Oxford 2007) 219, 220.

¹⁵ Christian von Bar, *The Common European Law of Torts*, vols 1 and 2 (OUP, Oxford 1998 and 2000).

should not be left to the directives and regulations of Brussels alone. To this end, von Bar engaged in a thorough, detailed and extensive analysis of the relevant court rulings and academic writings of all the jurisdictions (at that time) of the European Union to distil a European common law of torts. This is a truly impressive piece of work and, in retrospect, we can see that it lays the foundation for the work of the Study Group on a European Civil Code (SGECC, chaired by von Bar)¹⁶ whose work influenced the tort provisions of the *Draft Common Frame of Reference*, prepared by the SGECC and the Research Group on EC Private Law (Acquis Group) for the European Commission.¹⁷ Yet this work examines European tort law in a very broad essentially normative sense. It identifies substantive law in 16 jurisdictions, but as a means to determine commonality and move towards some form of harmonised law. While this may be the future of European tort law (and if so, such research is very valuable indeed), in terms of substantive law, it gives merely a snapshot of various European legal systems in action. Its main value therefore is to academics and possibly legislators in providing alternative formulations of the law of tort likely to stimulate comparative analysis and provide a basis for new proposals to improve existing law. This is not what we mean by EU tort law. In contrast, Cees van Dam in his more student-orientated text, *European Tort Law*,¹⁸ favours a broader approach examining legislation, legal literature and case law of the European Court of Human Rights, the CJEU and the highest courts in France, Germany and England. This is perhaps a more conventional comparative law text which recognises the importance of EU tort law as part of the umbrella term 'European tort law' which he expressly acknowledges as difficult to define. This very informative book seeks to cover the range of European tort law research topics varying from harmonisation or unification of the law of different European states to the law of tort (or delict) of any individual European state.¹⁹ It is a fascinating and detailed text, written in a way to engage students, academics and practitioners alike, but again covers a very broad remit. Its ambition does, however, mean that the

¹⁶ See <http://www.sgecc.net/> (accessed 28 June 2017).

¹⁷ See Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Vols I–VI* (Sellier, Munich 2009 and OUP, Oxford 2010) in which an international team of researchers analysed the diverse national traditions of private law to compile a codified set of principles of European law for the law of obligations and core aspects of the law of property.

¹⁸ Cees van Dam, *European Tort Law* (OUP, Oxford 2006, 2nd edn 2013).

¹⁹ *Ibid.*, 4.

section on EU tort law is limited in scope; the bulk of the text addressing the operation of ordinary tort law at a national level (using the examples of France, Germany and England) with reference to the impact of EU and European Human Rights law. While laudable, van Dam's book indicates that to reach the depth of analysis needed for the *Research Handbook* it is necessary to delimit the remit and find a way of addressing a form of European tort law which provides the reader with insight and permits the contributors to offer detailed critical analysis.²⁰

The topic of EU tort law is therefore chosen advisedly. It represents an identifiable topic: the tort law of the European Union. This may be created by primary or secondary legislation or by decisions of the CJEU. EU tort law may thus be found in directives (such as the Product Liability Directive 1985/374/EEC), regulations (such as the General Data Protection Regulation 2016/679),²¹ in treaty provisions (such as Articles 268 and 340(2) of the Treaty on the Functioning of the European Union) or in cases such as *Francovich and Bonifaci v Italian Republic*.²² It may be created directly or indirectly, for example, insurance law directives have arguably directly affected the operation of tort law defences in personal injury cases, but also have indirectly made possible extensions of civil liability at both national and supra-national level. It does not, however, include areas of regulation, such as environmental law, which do not give rise to non-contractual liability for breach.²³

²⁰ A further example may be found in Ken Oliphant and Barbara C. Steininger (eds), *European Tort Law: Basic Texts* (Jan Sramek, Vienna 2011). This includes English versions of basic tort law texts from 27 national systems in Europe with additional chapters on EU law (EU tort law and EU conflict of laws) and the European harmonisation projects. Again this provides a useful tool for scholars and students, but inevitably lacks the depth needed for a project of this kind.

²¹ Provisions concerning choice of law for tort claims may also be found in the Rome II Regulation (EC) No 864/2007/EC on the law applicable to non-contractual obligations. This is a specialist matter of private international law and readers are referred to the excellent Edward Elgar *Research Handbook on EU Private International Law* edited by Peter Stone and Youseph Farah (Edward Elgar, Cheltenham, UK and Northampton, MA 2015).

²² Joined cases C-6/90 and C-9/90 [1991] ECR I-5357; [1993] 2 CMLR 66.

²³ Dir 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) establishes a framework based on the polluter pays principle to prevent and remedy environmental damage. As the ELD deals with the 'pure ecological damage', it is based on the powers and duties of public authorities (the 'administrative approach') as distinct from a civil liability system for 'traditional damage' (damage to property, economic loss, personal injury): see

In examining substantive law, this does not mean, however, that we cannot also go on to consider normative questions such as whether the introduction of EU tort law has led to a cultural change in the tort laws of member states (addressed in Part II of this volume) or whether EU tort law may be seen as a first step to harmonisation or indeed whether its interpretation has been influenced (or even shaped) by such harmonisation proposals (examined in Part III of this volume). It does mean, however, that this volume has a clear and defined analytical framework – that of identifying the rules of EU tort law and their impact on the law of EU member states.

3 IDENTIFYING THE 'TORT' IN EU TORT LAW

3.1 The Relationship between EU Tort Law and EU Law

It is helpful first of all to set out briefly the legal framework of EU law before examining the distinctive characteristics of EU tort law, and, in 3.2, highlighting four points which should be borne in mind when studying EU tort law. Traditionally when identifying sources of EU law, we think in terms of primary legislation (the treaties²⁴) and secondary legislation (regulations, directives and decisions).²⁵ Under the principle of sincere cooperation – stated at Article 4(3) TEU – member states are required to take 'any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. Increasingly we need also to refer to judicial decision-making (primarily of the CJEU) which is

<http://ec.europa.eu/environment/legal/liability/> (accessed 28 June 2017). The courts have acknowledged that the environmental directives do not grant rights to individuals and are insufficiently precise and unconditional to generate 'direct effect' before the national courts: see Case 380/87 *Enichem Bas v Comune di Cinisello Balsamo* [1989] ECR 2491, para 23; Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* [1994] ECR I-483, para 15. See, generally, Ludwig Kramer, *EU Environmental Law* (8th edn, Sweet and Maxwell, London 2015); Maria Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (2nd edn, Hart, Oxford 2014).

²⁴ The principal treaties being the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). The rights, freedoms and principles set out in the EU Charter of Fundamental Rights also have the same legal value as the treaties: Art 6(1) TEU.

²⁵ Art 288 TFEU. Soft law also exists, for example, non-binding recommendations and opinions under Art 288 TFEU.

important not only in ensuring ‘that in the interpretation and application of the Treaties the law is observed’,²⁶ but also in the development of general principles built up and interpreted by the CJEU including proportionality, legal certainty, legitimate expectation, natural justice, equality and subsidiarity.²⁷ As the supreme authority on all matters of EU law, the CJEU plays a significant role in fashioning seminal principles of the European legal order which define the very nature of the European Union and in the creation of the internal market by requiring the removal of national trade barriers.²⁸

The key point is that to understand EU law, we need to appreciate that it involves multi-level governance. This will impact on member states and their courts. For member states, in matters regulated by binding EU law, EU law takes precedence over the municipal law of the state.²⁹ The supremacy of EU law means that domestic courts are required to give legal effect to its provisions and, where necessary, bring domestic law into line with EU law.³⁰ Provisions of EU law may also be directly applicable or have direct effect rendering them automatically enforceable in national law without the need for any further enactment.³¹ The doctrine of indirect effect further requires that national courts should interpret existing legislation in line with EU law.³² This inevitably creates

²⁶ Art 19(1) TEU.

²⁷ See Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th edn, OUP, Oxford 2014) ch 6. Art 6.3 TEU further states that ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union’s law.’

²⁸ See Paul Craig and Grainne de Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP, Oxford 2015) 63. See also Takis Tridimas, ‘The Court of Justice and judicial activism’ (1996) 21 *EL Rev* 199.

²⁹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Stephen H. Bailey, Jane P.L. Ching and Nick W. Taylor, *The Modern English Legal System* (5th edn, Sweet and Maxwell, London 2007) 5-054.

³⁰ Case 6/64 *Costa v ENEL* [1964] ECR 58; Case 106/77 *Simmenthal* [1978] ECR 629. See, generally, Craig and de Búrca (n 28) ch 9.

³¹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, [1964] CMLR 105 and Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337. See, generally, Craig and de Búrca (n 28) ch 7.

³² Case 14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135; Cases C-397–403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835.

tension at member state level. It has given rise to disputes relating to competence,³³ notably in relation to the activism of the CJEU or European Commission, and to questions as to the ability of EU law to change fundamental principles of national law. In one infamous example, familiar to all UK lawyers, the European Court of Justice ruled that EU law required the national court to do everything to secure the effectiveness of the Court's judgment and that this would include the grant of interim relief, whose effect would be to suspend temporarily the operation of a UK statute, even if there was a rule of national rule precluding doing so at the time.³⁴

Such controversy is not, however, confined to matters of public law. As this text will show, it is relevant to private law, including the law of tort/delict. That such matters are often overlooked is problematic. In the early days of the EU, it was assumed that, bearing in mind the original six member states had fully functioning codes dealing with private law, the Treaty of Rome would be exclusively public in inspiration and scope.³⁵ However, as Weatherill has indicated,³⁶ this was unlikely to remain the case in a treaty dealing with matters such as competition law and free movement, once, of course, the potential for impact on private law was realised. Further, as the EU expanded and became more politically active, it was inevitable that private law matters would fall within its remit, in particular as a result of the emphasis placed on establishing or ensuring the functioning of the internal market.³⁷ This led to the development of EU-wide rules on matters which might affect inter-state trade including product standards and consumer rights.³⁸

³³ Art 5(2) TEU provides that the EU must act only within the limits of the competences conferred upon it by the member states in the treaties to attain the objectives set out therein. Competences not conferred upon the EU in the treaties remain with the member states. Art 5(3) expressly acknowledges the principle of subsidiarity.

³⁴ Case C-213/89 *R v Secretary of State for Transport ex p Factortame Ltd* [1990] ECR I-2433. Consider J. Hanlon, 'Factortame: does Britannia still rule the waves?' [1993] *Denning Law Journal* 61.

³⁵ Daniela Caruso, 'The missing view of the cathedral: the private law paradigm of European legal integration' (1997) 3 *ELJ* 3.

³⁶ Stephen Weatherill, 'Competence and European private law' in Christian Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (CUP, Cambridge 2010) 58.

³⁷ Art 26 TFEU (ex Art 14 TEC).

³⁸ Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (3rd edn, CUP, Cambridge 2014) 671.

Caruso³⁹ has observed that while at first member states claimed autonomy in private law matters, over time private law became subsumed into a functionalist logic, leading to the presumption that it was acceptable to harmonise parts of private law if justified by the goal of market integration.⁴⁰ Twigg-Flesner agrees, noting that while the role of the CJEU in developing European private law, primarily through its interpretation role under the preliminary reference procedure,⁴¹ has been important, the bulk of European private law is in reality the result of the legislative harmonisation agenda pursued by the EU, primarily in pursuit of its objective of creating an internal market.⁴²

The operation of this agenda in the field of EU tort law can be traced back to the 1980s. While not always be described expressly as ‘tort’ law, the EU has been increasingly willing to impose non-contractual liability as a means to preserve the effectiveness of EU law⁴³ and promote the rights of individual EU citizens. This has taken many forms from treaty provisions relating to anti-competitive behaviour to directives protecting consumers against defective products and unfair commercial practices to broader regulatory measures which protect employees, those injured in motor vehicle accidents, investors and ordinary citizens claiming compensation for damage and distress caused by breach of data protection laws. The role of the CJEU has also been of vital importance in this area of law in creating, for example, new areas of tort law (*Francovich* liability), but also in its interpretation of existing treaty provisions such

³⁹ Daniela Caruso, ‘Private law and public stakes in European integration: the case for property’ (2004) 10(6) ELJ 751.

⁴⁰ She maintains, however, that in European legal discourse, the old public/private divide continues to exist in that states seek to resist harmonisation by highlighting the connection between their private laws and those ‘public’ matters still immune from Europeanisation.

⁴¹ Art 267 TFEU. See Thomas de la Mare and Catherine Donnelly, ‘Preliminary rulings and EU legal integration: evolution and stasis’ in Paul Craig and Grainne de Búrca, *The Evolution of EU Law* (2nd edn, OUP, Oxford 2011) ch 13.

⁴² Christian Twigg-Flesner, *The Cambridge Companion to European Union Private Law* (CUP, Cambridge 2010) 2.

⁴³ The principle of effectiveness means that the conditions for reparation of loss or damage laid down by national law must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation: see *C-261/95 Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-4025, para 27. For its use in the context of compensatory remedies, see *Case C-326/96 Levez v Jennings* [1998] ECR I-7835.

as Article 340(2) TFEU (non-contractual liability of EU institutions)⁴⁴ and in its interpretative guidance under the Article 267 TFEU preliminary reference procedure.⁴⁵ One of the aims of this *Research Handbook* is to identify the 'hidden' areas of EU tort law of which private lawyers may not be fully aware. The key connecting factor is that these are areas of law where the individual citizen can pursue a claim against an individual party (be it a private individual, a public body or even the state) for a remedy in tort – in most cases the award of compensatory damages for losses which can be attributed to the defendant.

3.2 Points to Remember in Examining EU Tort Law

In the chapters that follow, the interpretation and development of EU tort law will be examined. These chapters will highlight the diversity of the areas of law in which EU law grants individual citizens the right to sue for a tortious remedy, but will also provide a critical appreciation of the nature of legal development in these areas of law. What is clear is that at present there is no overarching pan-European law of tort, but rather a number of specialised forms of liability.⁴⁶ We might also consider to what extent EU tort law has 'spilled over' into national law in encouraging national courts to interpret domestic, non-EU law, in a manner consistent with changes introduced at EU level.⁴⁷

Here, I confine my analysis to four general comments. The first is to highlight the challenges that EU tort law presents to national lawyers, in

⁴⁴ 'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.' Consider, for example, *Laboratoires Pharmaceutiques Bergaderm SA v Commission* [2000] I-5291. See Pekka Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Hart, Oxford 2011).

⁴⁵ See, for example, *C-453/99 Courage Ltd v Crehan* [2001] ECR I-6297, as discussed in Sara Drake, 'Scope of *Courage* and the principle of "individual liability" for damages: further development of the principle of effective judicial protection by the Court of Justice' (2006) 31(6) *EL Rev* 841. For a critical appreciation of the preliminary reference procedure, see Takis Tridimas, 'Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure' (2003) 40 *CML Rev* 9.

⁴⁶ See Markus Kellner, 'Tort law of the European Community: a plea for an overarching pan-European framework' (2009) 17 *European Review of Private Law* (ERPL) 133; Helmut Koziol and Reiner Schulze (eds), *The Tort Law of the European Community* (Springer, Vienna and New York 2008).

⁴⁷ Discussed, for example, in Chapters 3 and 6 of this volume.

both codal and non-codal systems of law. EU law is supreme and therefore must be integrated into national law. This may require changes to well-established legal rules and, in codal systems, decisions whether to amend long-standing civil codes or implement EU tort law using distinct instruments thereby undermining, to a certain extent, the comprehensive nature of the civil code.⁴⁸ More pertinently, such measures serve to challenge national perceptions of both the role and objectives of the law of tort in each jurisdiction. The 1985 Product Liability Directive,⁴⁹ for example, imposing strict liability on producers of defective products, raises questions relating to the role of strict liability in the law of tort and the costs it places on producers especially where the national economy is weak. As a maximum harmonisation directive, it will also restrict the national courts from granting consumers a higher level of protection which might have existed previously.

Secondly, it should be noted that EU law also brings with it new modes of reasoning and interpretation. Chalmers et al note the use of purposive or teleological reasoning in the judgments of the CJEU, although they are critical that it has a tendency to slipperiness and unpredictability.⁵⁰ The Court has stated that ‘every provision of [EU] law must be placed in its context and interpreted in the light of the provisions of [EU] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’.⁵¹ This requires judges (and lawyers generally) to identify the distinct nature of EU tort law and that different methods of reasoning and indeed sources (notably decisions of the CJEU) will be applicable. The aim also is for courts across the EU to engage in consistent interpretation

⁴⁸ For the difficulties this raises in codified legal systems, see Wulf-Henning Roth, ‘Transposing “pointillist” EC guidelines into systematic national codes – problems and consequences’ (2002) 10 ERPL 761, although the tensions he notes in terms of coherence and consistence are equally applicable in common law systems.

⁴⁹ Council Dir 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: [1985] OJ L 210, 29.

⁵⁰ Chalmers et al (n 38) 176–7. For other criticism, see Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP, Cambridge 2012) 274–5.

⁵¹ Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, para 20. See, generally, Giliker (n 13) ch 2.

of the provisions of EU law, assisted by the Article 267 TFEU preliminary reference procedure.⁵² Weatherill has commented on the difficulties this raises for national private lawyers who are expected to adapt to EU law methods after decades of perceiving EU law as, more or less, an enterprise engaged in creating new or extended patterns of public law.⁵³

Thirdly, it is important to recognise that in interpreting EU tort law, market integration arguments are influential. Their significance is highlighted by Article 114 TFEU, which empowers the EU to adopt measures which harmonise law in member states provided that they have as their object 'the establishment and functioning of the internal market'. Where, therefore, as in the majority of cases in this field, Article 114 TFEU is relied upon as the constitutional basis for the directive, the courts will have to take into account the fact that it is a measure whose primary goal is to remove barriers to trade and boost inter-state trade. A good example of the tension between market integration goals and those of consumer protection may be found in the decision of the European Court of Justice in Case C-52/00 *Commission v France*⁵⁴ on the Product Liability Directive. Here, the ECJ held that to ensure undistorted competition between traders, to facilitate the free movement of goods and to avoid differences in the level of consumer protection the Directive must be seen as a maximum harmonisation directive.⁵⁵ Such an interpretation has been described as 'surprisingly rigid' by commentators, demonstrating an instance where improved consumer protection has been subordinated to

⁵² This is a topic which has troubled many comparative lawyers, most notably, Pierre Legrand who argues that this is culturally impossible due to the plurijural nature of European legal systems: see Pierre Legrand, 'Against a European civil code' (1997) 60 MLR 44 and 'European legal systems are not converging' (1996) 52 ICLQ 81.

⁵³ Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar, Cheltenham, UK and Northampton, MA 2013) 145.

⁵⁴ [2002] ECR I-3827, paras 17–18. See also Case C-154/00 *Commission v Greece* [2002] ECR I-3879 and Case C-183/00 *González Sánchez v Medicina Asturiana SA* [2002] ECR I-3901 (all delivered on the same day). The constitutional basis for the Product Liability Directive is Art 100 of the Treaty Establishing the European Economic Community.

⁵⁵ Maximum harmonisation requires uniformity. On this basis, member states may not adopt or maintain more stringent provisions in matters in respect of which it makes provision, in order to secure a higher level of consumer protection.

the desire to establish an integrated economic space in Europe.⁵⁶ Similar examples may be found in the labour law context in relation to treaty provisions dealing with the right to establishment and the free movement of services. The decisions of the CJEU in *Viking*⁵⁷ and *Laval*⁵⁸ indicate that the CJEU is prepared to balance the interests of trade unions to take collective action for the protection of workers against the interests of the internal market in interpreting EU law.

The development of EU tort law therefore reflects a tension between conflicting policy objectives. As Cherednychenko points out, alongside the central objective of establishing the European internal market, the EU also seeks to protect consumers, workers, small and medium sized businesses, industry and the environment, while also promoting its non-discrimination policy, which means that no clear distinction exists between public law regulation and private law.⁵⁹ On this basis, it is legitimate to enquire whether EU tort law exists to compensate private individuals whose rights have been infringed through breach of EU law or rather creates individual rights as a means to render EU law more effective and promote the values of the internal market. Indeed, we might ask what exactly does 'effectiveness' mean in this context? There are no easy answers to such questions. As subsequent chapters show, examination of the law does indicate that despite concerns of market integration, the CJEU will at times favour an interpretation which nevertheless seeks to promote the welfare of the vulnerable. A lack of consistency on this point has not assisted national courts in applying the transposed EU tort law in a uniform manner.⁶⁰

⁵⁶ Stephen Weatherill, 'Supply of and demand for internal market regulation: strategies, preferences and interpretation' in Niamh Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar, Cheltenham, UK and Northampton, MA 2006) 48.

⁵⁷ C-438/05 *Viking Line* [2007] ECR I-10779.

⁵⁸ C-341/05 *Laval un Partneri* [2007] ECR I-11767. *Viking* and *Laval* are discussed in more detail in Chapter 8 of this volume.

⁵⁹ Olga Cherednychenko, 'Private law discourse and scholarship in the wake of the Europeanisation of private law' in James Devenney and Mel Kenny (eds), *The Transformation of European Private Law* (CUP, Cambridge 2013) 149. See also Hugh Collins, 'The hybrid quality of European private law' in Roger Brownsword, Hans-W. Micklitz, Leone Niglia and Stephen Weatherill (eds), *The Foundations of European Private Law* (Hart, Oxford 2011) 453.

⁶⁰ Consider, for example, the different CJEU decisions on the meaning of 'consumer': see Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law* (Hart, Oxford 2016).

One final issue needs to be raised at this stage and it relates to the primary method in which EU legislation is introduced into national legal systems. One of the reasons why EU tort law is difficult to identify in practice is that, as the subsequent chapters will demonstrate, the most popular form of introducing EU tort law measures is through the directive. Article 288(3) TFEU provides that directives, while binding as to the result to be achieved upon each member state to which it is addressed, 'shall leave to the national authorities the choice of form and methods'.⁶¹ That is, member states are granted a degree of discretion in how to implement and integrate the directive into the national legal system. As Twigg-Flesner has commented, while regulations (which are directly applicable)⁶² are more visibly European in that they have the effect of overriding and displacing national law within its scope, directives slot into, and become part of, national law.⁶³ The ability to act through directives gives the EU valuable flexibility, particularly when the aim is to harmonise laws within the very different legal systems of the EU or to introduce complex legislative change.⁶⁴ This means that different terminology may be used to a limited extent, in particular as a means for facilitating the understanding of domestic lawyers of the new provisions introduced by the directive. In practice, therefore, EU directives will be transposed into member state law in a number of ways and this process of transposition may serve to hide the 'tort' characteristics of the laws in question, where, for example, they are not placed in the tort/delict section of a civil code or placed in legislation containing a variety of provisions relating to consumer, financial services or data protection law. Where the directive is one of minimum harmonisation,

⁶¹ See, generally, Sacha Prechal, *Directives in EC Law* (2nd rev edn, OUP, Oxford 2005) ch 5.

⁶² Art 288 TFEU. This means that their effectiveness does not depend on transposition by the member states (although changes to national law may be required to avoid a conflict with an EU Regulation): see Christian Twigg-Flesner, "'Good-bye harmonisation by directives, hello cross-border only regulation?" – a way forward for EU consumer contract law' (2011) 7 ERCL 235, 243.

⁶³ Twigg-Flesner (n 42) 4.

⁶⁴ Craig and de Búrca (n 28) 108. See also Angus Johnston and Hannes Unberath, 'European private law by directives: approach and challenges' in Twigg-Flesner (n 36) ch 7. The case law of the CJEU has indicated that the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation, provided that the transposition does guarantee the full application of the directive in a sufficiently clear and precise manner: see ECJ 9 April 1987, Case 363/85 *Commission v Italy* ECLI:EU:C:1987:196, para 7.

that is, it sets a minimum level of protection for those benefiting from its measures, then the directive may not even require any change at all if the state's legal system already surpasses this minimum level of protection or possibly only minor adjustments to existing legislation. In such cases, it becomes very difficult for national lawyers to identify what is EU law and what is not. A further complication is that the EU legislation in question may not specify the remedy for the tortious liability imposed. The 1985 Product Liability Directive is unusual in setting out in Article 9 the kind of damage recoverable under the Directive, but even this is without prejudice to national provisions relating to non-material damage and has been criticised for being unclear, for example, not clarifying whether the €500 *de minimis* limit is a cap or deductible amount.⁶⁵ A recent study noted significant differences in the assessment of damages between member states.⁶⁶ Common EU rules on tort liability may therefore not necessarily result in a common remedial framework, which again raises the question how effectively these measures are protecting the rights of citizens of the EU law.

4 ARE THERE GENERAL PRINCIPLES OF EU TORT LAW?

We might, however, regard the disparate areas of EU tort law as a starting point for a more ambitious step forward. The directives and other sources of EU law we examine in Part I of this volume are sector specific. They deal with particular problems relating to state liability (Chapter 4), defective products (Chapter 5) and breach of data protection principles (Chapter 7) or issues arising in particular sectors of society (for example, Chapter 8 on employment law and Chapter 10 on financial services). In *Towards a European Civil Code*,⁶⁷ Müller-Graff raises the possibility that

⁶⁵ Duncan Fairgrieve and Geraint Howells, 'Rethinking product liability: a missing element in the European Commission's third review of the European Product Liability Directive' (2007) 60 MLR 962, 974–5. Guidance was also required as to meaning of the concept of 'damage': see Case C-203/99 *Veefald v Arhus Amtskommune* [2001] ECR I-3569; C-503/13 and C-504/13 *Boston Scientific Medizintechnik* ECLI:EU:C:2015:148, paras 47 and 49. Note also the option to cap the maximum level of damages given at Art 16(1) of the Directive.

⁶⁶ Folkert Wilman, *Private Enforcement of EU Law before National Courts: The EU Legislative Framework* (Edward Elgar, Cheltenham, UK and Northampton, MA 2015) 5.33.

⁶⁷ Peter-Christian Müller-Graff, 'EU directives as a means of private law unification' in Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud Hondius,

EU directives provide a means of achieving private law unification. That is, if we piece together different pieces of the jigsaw, we gradually see a bigger picture developing which includes all the separate parts. The piecing together of this jigsaw may be gradual, occurring organically as EU tort law increases in volume. It may, however, require some intervention, rounding the corners to make the pieces fit together. This will take time and can only be a long-term aspiration.

Nevertheless, as Gutman indicates in Chapter 2 of this volume, Article 340 TFEU presumes the existence of 'general principles common to the laws of the Member States'.⁶⁸ This, in her view, denotes an explicit embodiment in the treaties of the comparative law method of the EU courts taking into account the laws of member states in the process of deciding cases in EU law.⁶⁹ Identifying these 'common general principles' is, however, a more difficult task.⁷⁰ EU tort law, as Part I of this volume testifies, does exist and has changed national law. It has led to common rules which, under the supervision of the CJEU, need to be applied with some degree of consistency across member states. Further, the CJEU through its guidance has identified principles of EU tort law which are now part of EU tort law. The judicial activism of the Court, in particular in developing *Francovich* liability, damages remedies in competition law⁷¹ and liability under Article 340(2) TFEU highlight that EU tort law is far from inert, but in reality developing constantly, albeit currently under a sector-specific approach.

C. Mak and Edgar Du Perron (eds), *Towards a European Civil Code* (4th revised edn, Kluwer Law International, The Hague 2010) 149–83.

⁶⁸ As explained above, see n 44.

⁶⁹ See also Koen Lenaerts and Kathleen Gutman, 'The comparative law method and the Court of Justice of the European Union: interlocking legal orders revisited' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (OUP, Oxford 2015) 141–76.

⁷⁰ See, generally, Takis Tridimas, *The General Principles of EU Law* (3rd edn, OUP, Oxford 2017) who argues that the exposition and application of general principles of EU law by the Court of Justice raise profound questions about the values of the EU, the rights of individuals, the interaction between EU and national law, and the role of the judiciary in shaping EU law.

⁷¹ See now also Dir 2014/104/EU 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 OJ L 349, 5.12.2014, 1–19. Dunne argues, however, that the directive primarily focuses on removing procedural barriers to claims: Niamh Dunne, 'Antitrust and the making of European tort law' (2016) 36 OJLS 366. For a critical appraisal of the Directive, see Chapter 6 in this volume.

Yet while we can argue that principles of EU tort law are already in existence, as this volume indicates, they currently develop without any clear organisational framework. The piecemeal nature of this area of law has rendered the identification of any agreed framework of European principles of tort law difficult to say the least. The detective may collate areas where principles exist, but we have yet to reach the stage of an organically emergent tort law framework. Even for the patient, it is clear that, without a guiding hand, this is unlikely to occur even over time. It will also require clear policy choices to be made as to the role of EU tort law. In removing distortions in the marketplace, do we seek to favour policies of corrective or distributive justice? Fault or risk-based liability?⁷² As the 2014 *European Tort Law Yearbook* of the European Centre of Tort and Insurance Law (ECTIL) and the Institute for European Tort Law (ETL)⁷³ acknowledges, persistent differences in European tort law cultures are still notable: from the victim-friendly approach of French law to the tortfeasor-friendly approach of Maltese law.⁷⁴ In Part II of this volume, the contributors examine to what extent a culture of EU tort law has emerged as a result of the substantive law identified in Part I. Do we see cultural change occurring as a natural result of Europeanisation or rather a ‘consensus crisis’ about the scope of the tort law institution undermining the social embeddedness of national private law systems? Can one reconcile EU tort law with the domestic tort law policies of member states? It is also important to take into account the changing membership of the EU. From the founding six countries of Belgium, France, Germany, Luxembourg, Italy and the Netherlands where the Romanistic and Germanic civil law legal tradition dominates, today’s European Union stretches from Ireland to Cyprus with potential applicants including Albania, Serbia and Turkey. Since 2004, there have been 13 new member states, dominated by the ex-Soviet bloc states including the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia (2004), Bulgaria and Romania (2007) and Croatia (2013). Inevitably, new states bring their own legal cultures to the table and raise questions of how ‘Europeanised’ these states now are, bearing

⁷² Hugh Collins, ‘European private law and the cultural identity of states’ (1995) 3 ERPL 353, 359–60.

⁷³ Both bodies that favour the identification of common principles of European tort law.

⁷⁴ Ernst Karner and Barbara C. Steininger (eds), *European Tort Law 2014* (De Gruyter, Berlin and Boston, MA 2015) 721. Note also the special edition of the *Journal of European Tort Law* (2012) which examined the different cultures of tort law in Europe.

in mind their more limited contact with the EU and very different historical backgrounds during the twentieth century. Do perceptions of tort law differ according to the socio-political background of the state and their absorption of EU values and principles? These very interesting questions are addressed in Part II of the book.

Part III asks a different question: despite these differences, is it possible to envisage at some future date harmonised principles of European tort law or at least the identification of core principles which underlie existing EU tort law measures? At present, the European Commission's proposals for harmonisation have been focused on the area of European contract law. Proposed harmonisation measures include the 2011 proposed regulation on a Common European Sales Law⁷⁵ and, more recently, the proposed directives concerning consumer contracts for the supply of digital content⁷⁶ and the online and other distance sale of goods.⁷⁷ Active debates continue across the EU as to the possibilities of some form of harmonised European contract law,⁷⁸ which the European Commission argues will provide a means for achieving its primary objective of boosting the internal market and removing barriers to cross-border trade. Soft law initiatives have also shown a preference for contract law models, including the well-known *Principles of European Contract Law* (PECL).⁷⁹ Nevertheless, the Commission-funded *Draft*

⁷⁵ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11.1.2011, COM(2011) 635 final (now abandoned).

⁷⁶ Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM(2015) 634 final.

⁷⁷ Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and distance sales of goods Brussels, 9.12.2015, COM(2015) 635 final.

⁷⁸ See, for example, Reiner Schulze and Fryderyk Zoll, *European Contract Law* (Hart, Oxford 2016); Jacobien Rutgers and Pietro Sirena, *Rules and Principles in European Contract Law* (Intersentia, Cambridge 2015); Lucinda Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (OUP, Oxford 2011); Katharina Boele-Woelki and F. Willem Grosheide (eds), *The Future of European Contract Law* (Kluwer Law International, The Hague 2007). The work of Professors Ole Lando, Reinhard Zimmermann, Martijn Hesselink and Hugh Beale is particularly notable in this context.

⁷⁹ See generally Ole Lando and Hugh Beale (eds), *Principles of European Contract Law Parts I and II* (Kluwer, Dordrecht 2000); Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds), *Principles of European Contract Law Part III* (Kluwer, Dordrecht 2003).

Common Frame of Reference (DCFR),⁸⁰ in providing an academic model law which consisted of underlying principles, definitions, model rules and commentary, did choose to include the law of tort in addition to that of contract law. In book VI (Non-contractual liability arising out of damage caused to another), the drafters proposed model rules relating to the fundamental principles of the tort law of the European Union (VI. 1:101–1:103), legally relevant damage (VI. 2:101–2:211), accountability (VI. 3:101–3:208), causation (4:101–4:103), defences (VI. 5:101–5:501) and remedies (VI. 6:101–6:302). The basic rule of tort law could thus be isolated as one where:

1:101(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.

Such proposals may be seen as radical and do not represent a simple elaboration of existing EU tort law to date. They presume also, to use the logic of the Commission, that the completion of the single market requires this development and that sector-specific measures do not suffice. At this time, the harmonisation of European tort law does not appear on the legislative agenda as the Commission struggles to gain consensus on its contract law proposals. The Commission is, for the immediate future, likely to confine itself to sector-specific directives on various topics which may give rise to rights of the citizen for tortious remedies for breach of EU rights.

Nevertheless, the academic projects examined in Part III of this volume highlight that such proposals can provide an intellectual framework in which a broader picture of EU tort law can develop and thrive. The Study Group on a European Civil Code (SGECC), for example, chaired by Professor Christian von Bar, has produced its own independently formulated principles of ‘Non-contractual liability arising out of damage caused to another’.⁸¹ These influenced book VI of the DCFR (discussed above) and have been published as part of its Principles of European Law series which tackles sales and service contracts, distribution contracts and security rights, renting contracts and loan agreements, *negotiorum gestio*,

⁸⁰ See n 17.

⁸¹ See Christian von Bar (ed), *Non-Contractual Liability Arising Out of Damage Caused to Another* (OUP, Oxford 2009), discussed further in Chapter 15 of this volume. See, further, John Blackie, ‘The provisions for non-contractual liability arising out of damage caused to another in the Draft Common Frame of Reference’ (2009) 20 *King’s Law Journal* (KLJ) 215.

delicts, unjustified enrichment law, transfer of property, and trust law, published by Oxford University Press. The European Group on Tort Law also produced its own *Principles of European Tort Law* (PETL) in 2005,⁸² which were preceded by, and built upon, the Unification of Tort Law series published by Springer. Subsequently, ECTIL and ETL have continued to produce themed works in their Tort and Insurance Law and Principles of European Tort Law series, together with an annual review of tort law across the EU in its European Tort Law Yearbooks. This academic work is not linked to any legislative programme, but seeks to find a 'common tort law' for Europe. Should, of course, any such project be envisaged then it is hoped that these projects will at least provide a starting point for discussion. For the moment, as acknowledged by former Director of the Institute for European Tort Law, Ken Oliphant, such work has the more modest role of seeking to assist in the improvement of EU legislation (the *acquis communautaire*) and the drafting of future legislation; he notes, in particular, reference to PETL in tort law reform proposals and even in some courts in the EU.⁸³ The nature of these two harmonisation projects is examined in Part III together with an examination of the harmonisation of tort law from the perspective of law and economics. We must conclude, therefore, that the task of identifying principles of EU tort law remains ongoing.

5 EU TORT LAW IN THE ERA OF BREXIT

EU tort law is therefore an area of law developing rapidly both in application (as the membership of the EU grows) and in content as the EU legislator continues to legislate in different areas of law giving rights to citizens and the CJEU develops its own body of case law in this field. Such dynamism is exciting, both in its diversity covering topics from employment law to data protection, but also in its prospects for future legal development. However, the decision of the UK in its June 2016 referendum in favour of Brexit suggests that, for the UK at least, its days are numbered. Lawyers in the UK face years of uncertainty as the government reaches a decision on how to implement Brexit.⁸⁴ It also

⁸² European Group on Tort Law, *Principles of European Tort Law* (Springer, Vienna 2005), discussed further in Chapter 14 in his volume. See, generally, Koch (n 12).

⁸³ See Oliphant (n 11) 447. See also Chapter 14 in this volume.

⁸⁴ See, for example, the discussion in (2016) 41(4) EL Rev 447–89: 'Brexit – what next?' The implications of Brexit are also considered in Chapter 7 (on data

raises fundamental questions as to the UK's future relationship with EU tort law.

In the short term, there will be no change and the UK will continue to apply EU law. As I have discussed elsewhere,⁸⁵ this will raise difficulties in relation to UK legislation which implements EU law in that while, at present, guidance should still be sought from EU law, it is not clear what the status of these provisions will be in the future. This, however, will end when Parliament repeals the European Communities Act 1972, the legal means through which EU law is binding in the UK.⁸⁶ Post-Brexit, a number of questions arise. The general consensus is that while much will depend on the terms of any agreement the UK negotiates with the EU, the bulk of EU law is likely to remain in that it would be far too difficult a task to remove all EU law from UK law. Bearing in mind that EU law has been binding in the UK since 1973, and in many cases firmly embedded in national law, to identify and nullify all such law would be a time-consuming and expensive task, likely to disrupt fundamentally the operation of domestic law. While, therefore, some of the more controversial EU measures may be repealed – and it will be interesting to see what laws employers, corporations and insurance organisations lobby against – much of the current law will remain. The UK government is unlikely, for example, to seek to diminish consumer protection against defective products, particularly as the English and Scottish Law Commissions and the Pearson Commission in the late 1970s had both recommended the adoption of a strict liability regime for personal injuries caused by defective products.⁸⁷ This raises, however, a related question. How are EU-sourced measures to be interpreted after Brexit? Will decisions of the CJEU still be regarded as a persuasive, albeit no longer

protection law), Chapter 9 (on insurance law) and Chapter 10 (on financial services and regulation) in this volume.

⁸⁵ See Paula Giliker, 'The Consumer Rights Act 2015 – a bastion of European consumer rights?' (2017) 37 *Legal Studies* 78.

⁸⁶ The European Union (Withdrawal) Bill (commonly known as the 'Great Repeal Bill') will repeal the European Communities Act 1972 and enshrine all EU regulations (and other EU-derived laws) in UK law as soon as Brexit takes effect. That law will only come into force on the day Britain leaves the EU, with future governments then able to unpick those laws as desired: see <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper> (accessed 28 June 2017).

⁸⁷ English and Scottish Law Commission, *Liability for Defective Products* (Law Com No 92, Cmnd 6831, 1977); Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Commission) (Cmnd 7054, vol 1, ch 22, 1978).

authoritative, source?⁸⁸ The answer must surely be yes. In a common law system where case law is a key source, to ignore decisions of the CJEU on EU-sourced material would seem pointless and unwise. Brexit does not mean, therefore, that EU law disappears – it just means that its authority is diminished.

Two more issues will also arise. Depending on what arrangement the UK reaches with the EU, will it ignore new directives or developments in EU tort law which give greater protection to citizens? Will it deny its citizens rights shared by the rest of Europe? At the very least, EU tort law will continue to be a source of inspiration and no doubt will be monitored carefully by consumers and other interest groups keen to improve the rights of UK citizens. A more interesting question arises when EU law, which remains part of UK law post-Brexit, is subject to reform at EU level. Will the UK note these amendments or merely retain a mothballed version of the pre-reform laws in its legal system?

Brexit represents a real challenge for the UK.⁸⁹ Clearly EU tort law will survive the departure of the UK from the European Union. Yet, even as a UK lawyer, it is too early to ring its death knell. It is likely that many of the provisions outlined in this book will remain part of national law and while questions exist as to their future interpretation and application by the courts, it does not mean that EU tort law will not continue to influence the development of UK law. Indeed, it is hoped that this book, by highlighting the existence of rights in different areas of law, will serve to highlight the importance of EU tort law in giving citizens the right to sue for compensation for their losses.

⁸⁸ See, for example, *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583, para 80. The Supreme Court added, however, that 'legal rules derived from EU law and transposed into UK law by domestic legislation will have a different status. They will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law.'

⁸⁹ The Institute for Government estimates that the UK Government will need an extra 500 new staff, costing up to £65 million a year, just to plan its approach to Brexit: *Planning Brexit* (September 2016), <http://www.instituteforgovernment.org.uk/publications/planning-brexit> (accessed 28 June 2017).

6 CONCLUSION AND STRUCTURE OF THE *RESEARCH HANDBOOK*

EU tort law is, as we have seen, distinct from the general topic of European tort law and focuses on rights given to EU citizens to sue (generally) for compensation in their national courts for losses attributable to the conduct of the defendant. It has many sources – the treaties, directives, regulations, decisions of the CJEU – and covers many disparate areas of law, but seeks in all these individual areas of law to provide a coherent legal framework which will be applied consistently across all member states. In seeking to enhance the effectiveness of EU law and remove barriers to trade and market distortions, EU tort law plays a valuable role in improving the lives of citizens across the EU. It is not, however, without criticism. EU law by its very nature diminishes the autonomy of states and potentially leads to cultural changes to national legal systems. This may be regarded as positive to some commentators who advocate the need for a ‘common European legal culture’,⁹⁰ but will be seen by others as threatening values inherent in the tort law systems of member states.⁹¹ The development of EU tort law has also been piecemeal and this has led to calls for some measure of harmonisation or rationalisation, or even the development of principles of European tort law which will guide legislators and courts at European and national level or possibly lay down the basis for a pan-European harmonisation project.

This *Research Handbook* seeks to facilitate a broader understanding of the importance of EU tort law in protecting the rights of European citizens, while setting out the content and nature of these rights. The following chapters develop the themes highlighted in this chapter.

⁹⁰ Martijn W. Hesselink argues, for example, that there is no reason why culture should be exclusively regarded in national terms and that such views are static and backward looking: ‘why should those European citizens who wish to further develop a common European (legal) culture be prisoners of those who want to preserve ... a monolithic and static national culture’: *CFR & Social Justice* (Sellier, Munich 2008) 77. See also Martijn W. Hesselink, ‘The case for a Common European Sales Law in an age of rising nationalism’ (2012) 8 *ERCL* 342 and Kellner (n 46) 151–4.

⁹¹ See Cees van Dam, ‘European tort law: features of a diverse landscape’ in Twigg-Flesner (n 36) 172; Cees van Dam, ‘Who is afraid of diversity? Cultural diversity, European co-operation and European tort law’ (2009) 20 *KLJ* 281; Ruth Sefton-Green, ‘Cultural diversity and the idea of a European Civil Code’ in Martijn W. Hesselink (ed), *The Politics of a European Civil Code* (Kluwer Law International, The Hague 2006) 71–88.

Chapter 2 sets out the non-contractual liability of the EU – the most obvious interpretation of what we mean by 'EU tort law'. However, as this introductory chapter has indicated, EU tort law is far richer than that. Part I seeks to indicate the key areas in which EU tort law rights have arisen, either by virtue of EU legislation or the CJEU itself. Chapter 3 highlights the complex interaction between EU law and national rules on compensatory remedies, while Chapters 4–11 focus on different areas of substantive law in which tort law remedies arise. While Part I concentrates on identifying substantive legal rights, the contributors do not simply set out the law, but offer a critical perspective of its operation in practice.

Parts II and III take a broader view of EU tort law. Does a culture of EU tort law exist and, if so, what values does it contain? To what extent do they conflict with national legal cultures? Parallel to the emergence of a culture of EU tort law, Part III examines attempts to harmonise European tort law. These projects seek to establish common principles which unite EU member states and to rationalise the currently unruly and piecemeal principles which may be identified in the current legal framework.

EU tort law is an important and often neglected topic. Its piecemeal nature renders it difficult to identify as an area of tort law, rather than part of employment law, insurance law and so on. This *Research Handbook* seeks to give it the prominence it deserves and, in so doing, offers a critical perspective of both its operation and future development.