17. The future of EU tort law

Paula Giliker

1 INTRODUCTION

This Research Handbook has highlighted the diversity and breadth of European Union (EU) tort law. When we think of EU tort law, we think of sources of EU law, be they primary or secondary legislation or decisions of the Court of Justice of the European Union (CJEU) which have given individual EU citizens the right to sue for compensation primarily in their own national courts for wrongs committed against them. In the first part of the book, the contributors to this volume have identified sources of EU tort law arising in a variety of ways: institutional liability of the EU, state liability for breach of EU law, treaty provisions (competition law) and liability arising as a result of directives (product liability, data protection law, employment law, financial services law, unfair commercial practices liability) or as a result of the transposition of directives (personal injury claims supported by the intervention of the Motor Insurance Directives). Lawyers, practising or otherwise, may not think of these areas of law as interconnected, but as the authors have highlighted, commonalities exist. Together they provide a framework of rights for citizens which seek to compensate the vulnerable, the deprived and the misled. From a UK perspective, the value of highlighting the nature of these rights is of real importance lest a state, which seeks to leave the EU, fails to recognise the value of EU tort law to its citizens.

In this chapter, I reflect on the nature of EU tort law, its problems but also its successes, and the extent to which tensions remain between EU tort law and its application in the national courts. I also examine whether it is now possible to identify an emerging culture of EU tort law and the debates this provokes, both in the different responses of EU states to the idea of ‘Europeisation’ and the success (or otherwise) of harmonisation projects which seek to create a foundation for a ‘European law of tort’. In examining the future of EU tort law, my aim is to demonstrate to lawyers that this is an important area of law which is increasing in scope. It is vital that EU citizens both recognise the benefits of EU tort law and take advantage of the rights it provides.
2 EU TORT LAW AS A SOURCE OF RIGHTS

In examining EU tort law, it is important first to identify its scope. As indicated in Chapter 1 of this Handbook, EU tort law is sometimes confused with ‘European tort law’ – a broad term which includes rights deriving from EU law, European human rights law, sources of soft law and academic proposals to harmonise European tort law. Alternatively it might be interpreted narrowly as the non-contractual liability of the EU, as stated by Articles 268 and 340 Treaty on the Functioning of the European Union (TFEU), or as Francovich liability rendering the state liable for breaches of EU law. In reality, EU tort law extends beyond the law as stated in Chapters 2 and 4 of this Handbook to include a diverse range of areas of law ranging from product liability – permitting consumers to sue for compensation on the basis of strict liability for defective products that harm their person or (within limits) their personal property – to measures which protect the economic interests of consumers against misleading and aggressive practices, providing a pan-European floor to remedying economic torts. While there remain subject areas where EU regulation has yet to translate into non-contractual liability for breach – environmental law being an obvious example – in many other regulatory environments, such as financial services, data protection and competition law, the issue of compensation in tort has become a matter of growing importance. As the contributors have shown, this is a dynamic and expanding area of law whose importance should be recognised.

A number of key characteristics may be identified which provide challenges for national courts applying the rules of EU tort law. First, it is an area of law that defies that private law/public law divide. Public authorities are held accountable for compensation. Not all member states

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2 See Chapter 2 in this Handbook.
4 See Chapter 4 in this Handbook.
6 See Chapters 6, 8 and 10 in this Handbook.
will be comfortable with this. Secondly, EU tort law may challenge the taxonomy of national law. Its provisions mingle with alternative remedies in criminal and public law. Stauch notes that in relation to data protection law, it is doubtful that reliance on private law mechanisms alone can offer an adequate basis for dealing with data protection risks. Riefa and Saintier also highlight in their chapter that remedies for breach of the Unfair Commercial Practices Directive cross the borderline between contract and tort; the Directive providing remedies for unfair business-to-consumer commercial practices occurring before, during and after a commercial transaction in relation to a product. For Davey, the EU Motor Insurance Directives have created ‘a shadow tort regime’ in his analysis of their impact on personal injury claims in national courts. Thirdly, EU tort law creates a new source of rights that represent the values and beliefs of a union of European states, not an individual state. This may give rise to decisions which conflict with domestic state policy and give rise to hostility and criticism at a local level. In employment law, for example, Mulder highlights in Chapter 8 the emergence of pre-contractual duties, breach of which has given rise to non-contractual liability in areas as potentially sensitive and policy-driven as trade union liability for collective action and anti-discrimination law.

EU tort law acts, therefore, as a source of rights to individuals, but inevitably will give rise to tensions between decisions at EU level and those of the national courts.

3 THE RELATIONSHIP BETWEEN EU AND NATIONAL TORT LAW

The above analysis indicates that the emergence of EU tort law has not necessarily been a painless experience, either for litigants or the national courts seeking to interpret these new sources of law. EU law presents particular challenges for the common lawyer in that he or she will be dealing with new methods of statutory interpretation and sources of law.

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7 As discussed in the comparative study of Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Intersentia, Antwerp 2016). The UK, for example, has generally restrictive rules in relation to public authority liability in the ordinary law of tort.
9 Chapter 9 in this *Handbook.*
with which he or she is not familiar. Common lawyers, in particular, will struggle with the absence of any formal doctrine of *stare decisis*. It would be wrong, however, to assume that such problems are confined to the common law jurisdictions of the EU. Lock, for example, in an article on *Francovich* liability, highlights the concerns of both common and civil law courts in applying this new form of tort law liability in the national courts. Riefa and Saintier in Chapter 11 in this Handbook report problems implementing the Unfair Commercial Practices Directive in both civil and common law jurisdictions arising from ambiguity in the Directive itself. Equally, the last European Commission report on the operation of the Product Liability Directive indicated ongoing concerns at the operation of the Directive, notably in the UK where the costs of proceedings discouraged consumers from bringing claims but also in relation to other civil law jurisdictions. White, in Chapter 5, remarks on the difficulties experienced in France, for example, in reconciling the aims of the Product Liability Directive with its own policies on consumer protection. This led to the decision of the CJEU in *Commission v France* that the maximum harmonising nature of Directive 85/374 precluded France from making suppliers liable to the same extent as

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11 Lord Denning (perhaps the most English of common lawyers) expressed the views of many in 1974 when he spoke of the imprecision and lack of interpretation clauses found in EU legislation: *Bulmer v Bollinger* [1974] Ch 401, 425: ‘It is the European way’.

12 Tobias Lock, ‘Is private enforcement of EU law through state liability a myth? An assessment 20 years after *Francovich*’ (2012) 49(5) CML Rev 1675. See also Ken Oliphant, ‘The liability of public authorities in comparative perspective’ in Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Intersentia, Antwerp 2016) para 5, who finds that both common and civil law jurisdictions have limited EU law’s influence on the public authority liability by restricting it to specific issues.


14 Ibid, 4.

15 Case C-52/00 ECLI:EU:C:2002:252; [2002] ECR I-3827. This case followed earlier proceedings of a similar nature: Case C-293/91 *Commission v France* [1993] ECR I-1. The decision of the CJEU did not, however, prevent a third trip to Luxembourg before this matter was resolved: see Case C-177/04 ECLI:EU:C:2006:173; [2006] ECR I-2461 (failure to take
producers. In particular, the Court noted, Article 13 of the Directive precluded member states from maintaining a general system of product liability different from that provided for in the Directive.\textsuperscript{16} French law, in fact, only brought its final version of the Directive into force in April 2006\textsuperscript{17} (the deadline for implementation of the Directive being 30 July 1988)\textsuperscript{18} and the insertion of the provisions of the Directive into the iconic French Civil Code remains controversial to this day.

The interface, therefore, between EU law and the national courts, discussed in Part I of this book, is not always straightforward. Reflecting on Part I, four key factors may be identified as affecting the assimilation of EU law into the national tort law system, namely, (1) the different objectives of EU and national tort law, (2) the classification of EU tort law as a distinct area of law, (3) the absence of a requirement of ‘fault’ and (4) a lack of guidance due to the limited number of Article 167 TFEU preliminary references. These will now be examined in more depth.

\section*{3.1 The Different Objectives of EU and National Tort Law}

What links the different areas of law which constitute EU tort law is the provision of tortious remedies for victims. The primary goal of compensation must, however, be considered in the light of the aims and objectives of EU law. In seeking to provide citizens with effective and non-discriminatory remedies, the contributors have highlighted the importance placed by the courts on matters relating to the internal market and free movement of workers in their interpretation of provisions of EU law. White, for example, comments in her chapter that the key to understanding Directive 85/374 and its stunted development in terms of consumer protection is the fact that it is interpreted as a harmonising measure adopted in the context of the internal market. This is consistent with the observations of EU scholar Guido Comparato that directives are the necessary measures to comply fully with the judgment in C-52/00 Commision \textit{v France}).


\textsuperscript{17} Loi no 2006-406 du 5 avril 2006 relative à la garantie de conformité du bien au contrat due par le vendeur au consommateur et à la responsabilité du fait des produits défectueux.

characterised by an economic functionalist approach: ‘their fundamental aim is the establishment of the common market and other objectives appear as subordinate to the former’. Granger notes also that Francovich liability is seen as having two goals: improving state compliance with EU law in addition to protecting individuals’ rights. In her overview of compensatory remedies in EU law in Chapter 3, Leczykiewicz comments that the EU is not in principle interested in creating its own compensatory remedies – they exist to perform an enforcement function for EU rules and rights and in this way further the objectives of the EU.

What this means is that in awarding remedies for breach of EU tort law, the courts do not simply pursue the goal of compensation, but also other goals notably that of deterring defendants from breaching EU law. Odudu and Sanchez-Graells in Chapter 6, for example, find it accepted that, at least in part, the private enforcement of competition law is intended to promote general deterrence. This is particularly so in the case of stand-alone private damages claims, where the damages action is intended to achieve both a deterrent and a compensatory effect. Yet even in the case of follow-on actions (which form the majority of cases) where private claimants seek damages on the back of a prior public enforcement decision and where the goal of the action is therefore solely compensatory, they note that the case law of the CJEU is influenced by the goal of deterring competition infringements when prescribing procedural and substantive standards. They argue that ‘[t]his creates tension between domestic laws on torts and the demands placed on such laws by those seeking to vindicate their competition law rights – often at the expense of the internal coherence of domestic systems of tort and rules of...

19 Guido Comparato, Nationalism and Private Law in Europe (Hart, Oxford 2014) 9. Consider, however, the critique of the ‘conditions-of-competition’ argument as a basis for European intervention into the domain of tort law by Michael Faure in Chapter 16 of this Handbook.

20 See Communication from the Commission on quantifying harm in actions for damages based on breaches of Art 101 or 102 of the Treaty on the Functioning of the European Union (OJ C 167/19, 13.6.2013), para 1; Paolisa Nebbia, ‘Damages actions for the infringement of EC competition law: compensation or deterrence?’ (2008) 33 EL Rev 23 who argues that uncertainty as to what the primary aim of private enforcement is (or should be) in the EU context originates from a confused reading of what exactly ‘effectiveness’ means.

21 That is, where private claimants seek to demonstrate an infringement of competition law that is not the object of public enforcement.
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civil procedure’. In Chapter 8, Mulder also identifies express recognition by the CJEU that the need for effective and equivalent remedies against employee discrimination requires member states to provide sanctions that are capable of guaranteeing ‘real and effective judicial protection’ and ‘have a real deterrent effect on the employer’.

The question of punitive damages adds a further dimension to this debate. Such damages are not compensatory in the slightest – their aim is to punish defendants and deter others from committing similar infringements. It is also a topic which has traditionally divided the common and civil law. As Helmut Koziol once said, ‘continental civil law systems disapprove of punitive damages’. While the position of the CJEU remains that stated in Manfredi – that ‘in the absence of Community provisions governing the matter, it is the legal system of each Member State which governs questions such as that of the award for harm flowing from infringement of the Community … rules’ – Mulder notes that such damages were in fact ultimately awarded by the Swedish court in Laval. Here, the claimant had failed to evidence the exact amount of financial loss, but since it was assumed that there was some damage and Swedish law allowed for it, punitive damages were awarded. EU law, therefore, challenges national assumptions of the role of tort law and, in so doing, diminishes the remedial autonomy of member states.

22 Chapter 6, p 159. See also Ioannis Lianos, Peter Davis and Paolisa Nebbia, Damages Claims for the Infringement of EU Competition Law (OUP, Oxford 2015).
23 See C-14/83 Von Colson v Land Nordrhein-Westfalen EU:C:1984:153; [1984] ECR 1891, para 23. This has now also been incorporated into Art 18 Directive 2000/54/EC.
24 Rookes v Barnard (No I) [1964] AC 1129, 1221 per Lord Devlin.
26 Case C-295/04 Manfredi v Lloyd Adriatico Assicurazioni SpA EU:C:2006:461; [2006] ECR I-6619, para 88, provided that the compensation for the harm in such a case is not less favourable for the injured person than the compensation which he could have obtained by similar domestic actions.
This places EU tort law in a distinct context to that of the ordinary principles of national tort law, particularly in systems where deterrence and punishment are not generally regarded as relevant to the award of tortious damages. Niglia in Chapter 12 argues that: ‘In the peculiar context of market-based integration, tort law in its European clothes is a tool aimed at “protecting” not just individuals claiming damages from a wrong but sheer market competitiveness.’\(^{28}\) On this basis, if EU tort law is to be interpreted purposively, then this context has to be borne in mind by the national courts. Further, the guidance of the CJEU must be read within this framework. EU tort law is not, therefore, solely victim-led or focused on principles of full compensation, but far more nuanced. When examining EU legislation whose objectives are expressly stated to be those of addressing distortions in competition and removing barriers to trade, it is impossible to interpret the law without these goals in mind. Clearly this presents real challenges for national tort law systems. As we saw above, the dominance of risk-based reasoning in French law, which is strongly protective of victims,\(^ {29}\) clashed openly with the maximum harmonisation Product Liability Directive which, in effect, reduced victim protection in France to a common European standard. The UK courts have also struggled to determine whether competition law should permit a claim in restitution (unjustified enrichment) or whether this would undermine national principles of compensation in tort.\(^ {30}\) The very mechanisms of ‘effectiveness’ and the maximum harmonisation character of certain directives limit national court discretion and mean that differences will potentially arise between national and EU tort policy in the national courts. As acknowledged by Craig and de Búrca, ‘[n]ational courts are expected to engage in a context-specific proportionality analysis of any restrictive provisions of national law and to dis-apply...

\(^{28}\) Chapter 12, p 326.


\(^{30}\) Devenish Nutrition Ltd v Sanofi-Aventis SA [2008] EWCA Civ 1086; [2009] Ch 390, para 135 taking the latter view. Arden LJ commented in that case that ‘The doctrine of effectiveness is … directed to ensuring sufficient remedies rather than the fullest possible remedies. An action for compensatory damages fulfils the requirements of sufficiency.’
these whenever necessary to give effect to EU law’. More bluntly, Leczykiewicz comments that traditional tort lawyers will simply have to accept that EU tort law is ‘impure’ and, from their perspective, overly influenced by policy elements.

3.2 The Classification of EU Tort Law as a Distinct Area of Law

Such differences in policy and objectives present real challenges for the national courts. If EU tort law does not fall squarely within the domestic tort law framework, how is it to be assimilated into the national legal system? A number of contributors have noted that this assimilation simply has not occurred. Stanton, for example in Chapter 10, finds that tort claims arising under the Financial Services Directives are loosely classified in English law under the tort of breach of statutory duty, but nevertheless treated as distinct claims. Indeed, a glance at any English tort law textbook would immediately establish that these claims receive no mention when discussing the law of tort in England and Wales. Similarly, in Chapter 4, Granger observes that, at times, Francovich liability seems to operate in a parallel universe, providing for the application of a separate set of procedural and substantive conditions for damage claims based on EU law, while leaving largely untouched national liability regimes. Further, Mulder finds that, in Germany, the adoption of the General Equal Treatment Act (GETA) has reduced the importance of claims in tort and instead developed a distinct European non-contractual claim for damages. Davey, perhaps more cynically in Chapter 9, speculates whether this can be explained by an anti-Europeanisation agenda by judges who remain committed to their own domestic policy framework. We can perhaps be a little more conciliatory in noting a natural adherence by judges to their own domestic tort law policy and perhaps subconscious resistance to external norms which clash with the policy framework in which domestic lawyers have been

32 See Chapter 3 in this Handbook.
33 This is true of much of EU tort law, save occasional references to Francovich liability (see, for example, Mark Lunney and Ken Oliphant, Tort Law: Text and Materials (5th edn, OUP, Oxford 2013) 617 ff) which are unlikely to survive Brexit.
34 In his case, a model of insurance (and tort) which is separate in nature and subject to the market. On resistance to Europeanisation, see, further, Comparato (n 19).
educated, have practised and indeed normally utilise in relation to tort law judgments.

It might be argued that the reaction noted above can be explained on the basis that national courts are simply trying to avoid any potential conflict between national and EU law. By distinguishing EU tort from domestic tort law claims, the courts are seeking to ensure that the EU policy framework is observed and, it might also be argued, render the need for any preliminary reference on matters of interpretation more apparent. Yet the problem with this response is that it runs the risk of marginalising EU law. It is important also to remember that EU law is not self-contained. Matters such as remedies are often left to the domestic courts (as we saw with punitive damages above) and a policy based on separating EU from national law is inconsistent with doctrines such as indirect effect which impose an obligation on national courts to interpret domestic law consistently with directives. Under Article 19 TEU member states have an obligation to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law and, on this basis, EU law needs to operate alongside and, in case of inconsistency, instead of national law rather than being placed in a box marked with the EU flag to be used in case of emergency. Odudu and Sanchez-Graells in their chapter indicate that, in their view, isolating EU law from national law can never be a lasting solution:

[T]he development of mechanisms for the private enforcement of EU competition rules is bound to have a significant impact on the domestic tort law rules of the Member States, which could only be minimised if they decided to create special mechanisms for competition law damages actions and not extend them to other types of tort litigation. However, in the long run, it seems unlikely that such separation can be kept watertight and a certain degree of spillover to other areas of commercial litigation can be expected.35

If spillover is bound to occur, then national courts need to accept that EU tort law is part of the remedial framework provided by tort law in each member state. Once this occurs, citizens will have more visible access to rights to tortious damages as EU tort law becomes part of domestic tort law provision. The chapters in this book do suggest, however, that there is some way to go to meet this goal.

35 Chapter 6, p 183.
3.3 The Absence of a Requirement of ‘Fault’

Tort liability is principally grounded on either unreasonable conduct or risk.\footnote{See Franz Werro and Erdem Büyüksagis, ‘The boundaries between negligence and strict liability’ in Mauro Bussani and Anthony J. Sebok (eds), \textit{Comparative Tort Law: Global Perspectives} (Edward Elgar, Cheltenham, UK and Northampton, MA 2015) 202.} This gives rise to either fault-based or strict liability. The key common element is that the conduct of the tortfeasor is regarded as ‘wrongful’. Yet, the starting point in identifying ‘wrongful conduct’ is still generally that of fault. This is traditionally considered to be the most important and most general prerequisite to, and the basis of, tortious liability.\footnote{Pierre Widmer (ed), \textit{Unification of Tort Law: Fault} (Kluwer, The Hague 2005).} Hence the German Civil Code section 823(1) imposes liability on a ‘person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person’, while the leading common law case of \textit{Donoghue v Stevenson} determined that in order for negligence liability to arise, ‘the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury’.\footnote{[1932] AC 562, 579 per Lord Atkin. In common law systems, the tort of negligence remains the dominant tort.} While, in modern times, legal systems have come to see the advantages of ‘strict liability’ as a means of protecting litigants against the risks caused by modern technology and processes, commentators have noted that there is only limited consensus across Europe as to the risks for which the imposition of strict liability can be justified.\footnote{Ulrich Magnus, ‘Tort law in general’ in Jan M. Smits (ed), \textit{Edward Elgar Encyclopedia of Comparative Law} (2nd edn, Edward Elgar, Cheltenham, UK and Northampton, MA 2012) 6.4.}

In contrast to this domestic picture, EU tort law does not conform to a fault-based liability regime. The product liability regime is for clear reasons of policy one of strict liability. The condition of ‘sufficiently serious breach’ needed to establish \textit{Francovich} liability and the institutional liability of the EU does not require proof of fault. Indeed, Gutman observes in her chapter that the extent to which the EU may be held non-contractually liable on the basis of lawful acts and conduct of its institutions and bodies – referred to as Union no-fault or strict liability

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\footnote{See Franz Werro and Erdem Büyüksagis, ‘The boundaries between negligence and strict liability’ in Mauro Bussani and Anthony J. Sebok (eds), \textit{Comparative Tort Law: Global Perspectives} (Edward Elgar, Cheltenham, UK and Northampton, MA 2015) 202.}


\footnote{[1932] AC 562, 579 per Lord Atkin. In common law systems, the tort of negligence remains the dominant tort.}

– is a perennial issue in the EU.\textsuperscript{40} Odudu and Sanchez-Graells in their chapter highlight that an obligation to remedy infringement of competition law arises independent of fault, while Mulder recognises that EU equality directives create a system of objective or strict liability and that CJEU case law has clearly held that liability cannot depend on the employer’s fault.\textsuperscript{41} Davey remarks also that the Motor Insurance Directives go well beyond the normal assumptions of tort law, that is, that of comparative fault in accidents between strangers. What we can say then is that EU tort law represents a regime where wrongfulness will be determined by examining the aims and objectives of the legal instrument which grants the citizen a right to sue for a tortious remedy. The question is not what are the actions of the reasonable person, but how to ensure the effectiveness of EU law.

EU tort law presents us, therefore, with a particular notion of ‘wrongfulness’ which may clash with national perceptions and legal traditions. Granger in her chapter notes, for example, that despite acceptance of state liability for breach of EU law, national courts will still often look for some ‘fault’ or ‘negligence’ to hold the state liable for executive or administrative action. In particular, much will depend on how national tort law treats claims against public authorities. Oliphant, for example, in his study of public authority liability across Europe, found two major approaches to liability: one explicitly fault based and one based only on unlawfulness which some commentators referred to as strict liability.\textsuperscript{42} He also noted divergences between different fault-based systems, for example, in Belgium and France public law illegality is sufficient to establish fault, whereas the common law treats breach of duty as distinct from public law illegality. This view is supported by Granger, who observed, in an earlier article, that English courts found the concept of ‘sufficiently serious’ breach difficult to apply due to the general lack of familiarity of English judges with the idea that a mere illegality could

\textsuperscript{40} See eg Sean van Raepenbusch, ‘La convergence entre les régimes de responsabilité extracontractuelle de l’Union européenne et des États membres’ (2012) 12 ERA Forum 671, 680–81.


constitute a basis for liability per se.\textsuperscript{43} Bearing in mind the dominance of ‘fault-based’ reasoning in the common law, such difficulties are understandable and perhaps even inevitable. Certainly in examining recent cases on the Product Liability Directive 85/374/EEC in English law,\textsuperscript{44} the English courts are arguably still influenced by cost–benefit analysis when applying the Article 6 test for ‘defectiveness’.\textsuperscript{45}

It is self-evident, therefore, that the more the national system of tort law rests on notions of fault and is reluctant to hold public institutions (including the courts) liable to individuals for damages, the more difficult the courts will find the correct interpretation of EU law.

3.4 The Limited Number of Article 167 TFEU Preliminary References

Yet a solution does exist for the interpretative difficulties highlighted above. Article 267 TFEU provides that:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

Craig and de Búrca describe the preliminary reference procedure as the ‘jewel in the Crown’ of the European Court of Justice (ECJ’s) jurisdiction,\textsuperscript{46} playing a vital role in shaping both EU law and the relationship


\textsuperscript{44} Transposed as Part 1, Consumer Protection Act 1987.

\textsuperscript{45} See, for example, \textit{Tesco Stores Ltd v Pollard} [2006] EWCA Civ 393, discussed in Giliker (n 10) 48–53.

\textsuperscript{46} Craig and de Búrca (n 31) 464.
between the national and EU legal systems. Aalto argues that the value of the preliminary reference procedure is that not only does it contribute to the unity and coherence of the EU legal system, but it also offers a direct contact – a bridge – between national legal systems and the EU legal system. It is a tool, therefore, to assist national courts in the complex task of reconciling national and EU law. It is one also, Lacchi has recently argued, which is directly related to the right to effective judicial protection of citizens’ rights under EU law.

Yet, it seems to be a tool that national courts are reluctant to utilise. Granger notes in her chapter the disinclination of the courts across the EU to make preliminary references. This is despite the fact that consequences may follow from a failure of the national court to make a preliminary reference when it is legally obliged to do so. A judicial readiness to rely on the acte clair doctrine, which permits national courts to decline to refer questions on the basis that the point is clear, signifies that the Article 267 procedure is far from operating at an optimal level and that national divergences are likely therefore to occur. This is compounded by the fact that courts have also been less than willing to impose state liability for damage resulting from a breach of the duty to refer questions for preliminary rulings to the ECJ by last instance.

50 See also in relation to UK law, Anthony Arnell, ‘The Law Lords and the European Union: swimming with the incoming tide’ (2010) 36 EL Rev 57. Note also the comments of Lock concerning UK and German courts (n 12 above).
51 See Morten Broberg, ‘National courts of last instance failing to make a preliminary reference: the (possible) consequences flowing therefrom’ (2016) 22(2) European Public Law 243. Kornezov is not alone, however, in arguing that the mechanisms to enforce the Art 267(3) obligation are less than effective in practice: Alexander Kornezov, ‘The new format of the acte clair doctrine and its consequences’ (2016) 53 CML Rev 1317.
52 See Case 283/81 Srl CILFIT v Ministry of Health ECLI:EU:C:1982:335; [1982] ECR 3415 and, more recently, Case C-160/14 Ferreira da Silva v Estado português ECLI:EU:C:2015:565. The court may also decline to refer where the answer to the question cannot affect the outcome of the case. See Kornezov (n 51), who argues that recent judgments have palpably relaxed the conditions for the acte clair exception and that there is a real need to re-invigorate the efficiency of the existing control mechanisms.
courts. As White observes, the system only works where cases are referred in the first place. Her research indicates that since Directive 85/374 was adopted, there have been only two references from a UK court (concerning the same matter) and none from an Irish court. Her search of the Curia website showed that the total number of preliminary rulings directly concerning Directive 85/374, to date, was only nine. While there have been some interesting studies to identify factors that could explain why the courts of some EU member states are more likely than others to refer preliminary references to the ECJ, the fact remains that this is a missed opportunity to clarify the rules of EU tort law and render the law easier to apply and interpret at a national level.

One justification for the failure to refer raised by UK courts has been that of the delays caused by the preliminary reference procedure itself. In Office of Fair Trading v Abbey National Plc, for example, Lord Walker noted that neither side in the litigation had shown any enthusiasm for a preliminary reference because of the further delay that would be occasioned due to the backlog of preliminary references yet to be resolved. On this basis, a streamlined procedure might encourage national courts to refer rather than falling back on the *acte clair* doctrine. This would, however, require national courts to defer openly to the CJEU. Decisions such as that of *Abbey National*, where the Supreme Court found an ‘*acte clair*’ despite disagreeing with the interpretation of the law by four experienced judges in the courts below, suggest that the reluctance to make preliminary references goes beyond concerns about delays and may reflect more ingrained instincts which favour domestic resolution of problems arising in the national courts.

53 Eg German Bundesgerichtshof, *Re Accountant Aptitude Tests* (Case III ZR 294/03) [2006] 2 CMLR 55.
57 Ibid, para 48 per Lord Walker.
58 See, for example, Davies who regards the *Abbey National* decision as ‘dubious’: Paul S. Davies, ‘Bank charges in the Supreme Court’ [2010] CLJ 21. For other suggestions for reform, see Lacchi (n 49) 705–7.
4 A CULTURE OF EU TORT LAW?

Can it be said from the above that EU law has created a culture of EU tort law? The idea of ‘culture’ in this context signifies the identification of shared meanings, attitudes and values. Nelken defines legal culture as a ‘way of describing relatively stable patterns of legally orientated social behaviour and attitudes’,59 which range from the operation of the legal profession to the very values and ideas underlying the legal system in question.60 Oliphant has argued that, as a starting point, the culture of tort law embraces the following: societal attitudes towards tort law, the practice of tort law, the ‘lived experience’ of those involved in tort claims, its institutional context and the cultural values embedded in substantive tort law.61 While, therefore, we may define ourselves as ‘European’ in outlook (and on our passports), there is a distinction between a shared ‘cultural context’ which Wieacker has described as having ‘crucial religious, ideological, philosophical and scientific foundations’ in common,62 and a shared understanding and application of the values and principles underlying EU law.63 That is, we may all share similar political, moralistic and social ideals, but lawyers do not necessarily interpret the rules of EU tort law in the same way. To achieve the

61 Ken Oliphant, ‘Cultures of tort law in Europe’ (2012) 3 JETL 147, 148. See also at 149: ‘the culture of tort law encompasses “the law in action” as well as “the law in the books”, the attitudes, behaviour and experiences of ordinary people as well as those of legal elites, the deep structures of the tort system as well as its surface features, and what is taken for granted and overlooked as well as what is made explicit in standard accounts’.
63 See, for example, Gessner who argues that we can only speak of a ‘European legal culture’ in a very abstract sense and that there is a cultural lag entailing unavoidable legitimation problems; Volkmar Gessner, ‘The transformation of European legal cultures’ in Volkmar Gessner, Armin Hoeland and Csaba Varga (eds), European Legal Cultures (Dartmouth, Aldershot 1996). See also Åse B. Grødeland and William L. Miller, European Legal Cultures in Transition (CUP, Cambridge 2015) who distinguish between acceptance of ‘law in principle’ and divergence in terms of law in practice.
latter is inevitably more contentious and difficult. To Legrand, for example, it is an impossible ideal: ‘legal systems, despite their adjacency within the European Community, have not been converging, are not converging and will not be converging. It is a mistake to suggest otherwise.’

In his view, the differing mentalités of the common and civil law represent two different ways of thinking about the law, about what it is to have knowledge of the law and even about the role of law in society. In his view, the differing mentalités of the common and civil law represent two different ways of thinking about the law, about what it is to have knowledge of the law and even about the role of law in society. This, we might regard as unduly restrictive, bearing in mind that EU member states have chosen to be part of the EU and, in so doing, recognised the supremacy of EU law and of decisions of the CJEU. Nevertheless, Legrand raises the interesting question of how individuals in different member states understand EU law and whether, in particular, national courts appreciate the law beyond the rules, that is, the context of the law in question which, as seen above, is fundamental to both the teleological interpretation of the EU law, but also its correct application in the context of individual cases. What the above commentators have indicated, in my view correctly, is that having common written rules of EU law does not automatically trigger a change in national attitudes and practice. Indeed, it may, in contrast, trigger resentment and resistance or even, in the eyes of Legrand, incomprehension.

For Niglia, this is indeed a problem. While he finds consensus that tort law exists as an institution that promises to protect individuals injured by a wrong, he finds no such agreement relating to its scope, policy choices and the ranking of protected interests. Using the example of product liability, Niglia identifies the conflicting goals of EU and national tort law and, in particular, the tension in EU law between a policy of consumer protection and its dominant philosophy of market integration, discussed above. In common with others, he expresses concern at the libertarian root of sectors of European private law culture. This, in his

66 See, for example, Study Group on Social Justice in European Private Law, ‘Social justice in European contract law: a manifesto’ (2004) 10 European Law Journal (ELJ) 653–674 raising concerns of the underlying philosophy of EU contract law. See also Marija Bartl, ‘Internal market rationality, private law and the direction of the Union: resuscitating the market as the object of the political’ (2015) 21 ELJ 572–98, who argues that the reification of internal market rationality has transformed the concept of justice underpinning European private law as well as the normative basis on which it stands.
view, leads to confusion as to the scope of tort law and a threat of disintegration of the social values embedded in national private law systems, posing, at its worst, a threat to the rule of law principles of institutional competence.67

For Knetsch it is, in any event, far too early to identify a culture of EU tort law. He highlights in his chapter that the existence of any form of EU tort law did not reach the consciousness of practitioners and academics fully until the early 2000s, although its origins can be traced back to the late 1980s and the transposition of the Product Liability Directive. By the turn of the century, work by leading tort lawyers such as Christian von Bar, Basil Markesinis and Walter van Gerven had led to recognition of the growing importance of tort/non-contractual liability at a European level, but while this encouraged discussion of harmonisation projects, it did not lead to proposals to consolidate the existing EU tort law framework. Knetsch raises also the inevitable definitional question raised in Chapter 1 – can we identify a culture of EU tort law when we cannot even agree on what we mean by this concept? In Chapter 1, I highlighted tensions existing between the terms ‘European tort law’ and ‘EU tort law’ and noted the fact that EU tort law itself is not generally regarded as a distinct entity, in that it is spread between areas of law as diverse as employment law and the law relating to financial services. Indeed one of the aims of this Research Handbook is to pull together EU tort law into one conceptual whole, but I would not attempt to assert that the definition offered by myself in Chapter 1 is an ‘authorised’ version accepted by all member states or commentators. Knetsch himself immediately dismisses state liability for breach of EU law as ‘an issue of pure European law’;68 a decision with which the editor herself would not agree,69 but which ably illustrates the lack of definitional clarity in this area of law.

Knetsch also identifies a divide between EU states in relation to the idea of ‘Europeanisation’. He remarks that, in contrast to Germanic states, in some Latin countries, ‘the mere idea of a European dimension of tort law is unknown’.70 For later entrants to the EU, this culture is

67 See Chapter 12 in this Handbook.
68 Chapter 13, p 344.
69 See Paula Giliker, ‘English tort law and the challenge of Francovich liability: 20 years on’ (2012) 128 LQR 541 and, indeed, Chapter 4 in this volume.
70 Chapter 13, p 353.
newer still and, inevitably, any culture, taken in the broad sense in which it is used in this section, will take time to penetrate the judicial, practitioner and indeed the citizen’s consciousness in contemplating rights whose source lies not in national but EU law. For Knetsch therefore, we are a long way from any real culture of EU tort law. For the moment, it is far too sparse and sector specific to be recognised as a coherent set of principles and concepts. This, we might speculate, would come as a relief to Niglia, bearing in mind the policy tensions he identifies between national conceptions of tort law and the distinctive nature of EU tort law itself.

From Part II of the book, therefore, we can identify a number of key issues in relation to EU tort law. First, that it is controversial. As stated earlier in this chapter, it represents values and policies which may conflict with those utilised at a national level. This gives rise to potential misunderstandings, for example, in relation to the role of fault. Second, that it lacks visibility and fails to penetrate the consciousness of the participants in the national legal system – an element, as we have seen, essential to evoke any cultural change. Thirdly, there is a lack of conceptual clarity. The absence of any commonly held perception of what we mean by ‘EU tort law’ is holding back its development and indeed recognition. Fourthly, the failure of legal participants to recognise the benefits of EU tort law is hindering the development of any culture of EU tort law. Until the participants in the legal process recognise and utilise EU tort law as a source of rights for individuals at the national and European level, then this is unlikely to change.

5 HARMONISATION

This leads us finally to the question of harmonisation. One means of invoking change is intervention at an EU level. In this sense, projects to harmonise European tort law seek to create a culture of EU tort law: raising the profile of European tort law and bringing to the attention of policy- and law-makers the benefits of a common set of tort law principles. What is interesting, however, is that, as seen in Part III of this book, the drafters draw on national tort law principles rather than those of European tort law, that is, a bottom-up rather than top-down approach to legal development. Faure, taking the perspective of law and economics, argues in favour of such an approach on the basis that ‘the local level is presumed to have the best information on the local problems and on the preferences of the citizens. Decision-making should only be
moved to a higher level when there is a good reason.' 71 Martín-Casals, in Chapter 14, eloquently describes the methodology underpinning the Principles of European Tort Law (PETL) and the significant work undertaken by its drafters and associates. This, he admits, is a soft law framework, not a legislative draft,72 and not, he stresses, supported in any way by the European Commission (in contrast to alternative projects such as the Draft Common Frame of Reference).73 It provides, therefore, what Jaap Spier has described as ‘a basis for the enhancement and harmonisation of the law of torts in Europe … a framework for the further development of a truly harmonised European tort law’.74 Inevitably, however, while seeking an approximation of European legal systems, the drafters will come to cases where either no common principles exist or where such principles are not considered ‘satisfactory’. Here ‘better’ solutions are proposed and here, policy decisions will be taken. Martín-Casals does not dispute that such decisions are not, from a social, economic and political point of view, neutral and do not possess democratic legitimacy. Nevertheless, he asserts that in engaging with such questions, the drafters are able to assist legislative commissions, judges and scholars. Blackie, in Chapter 15, reaches similar conclusions in relation to the work of the Study Group on a European Civil Code (SGECC), whose work led to Book VI of the Draft Common Frame of Reference (DCFR) on non-contractual liability. He argues that the provisions provide an additional source for lawyers using the comparative method and notes the particular insights that can be gained from looking at the tort law regime afresh. Such insights, as Martín-Casals highlights in section 3 of his chapter, have reached the attention of law-makers, for example, the PETL have been taken into account in the

71 Chapter 16, p 419.
72 Indeed, he states that ‘no member of the EGTL has ever been so naïve as to harbour the secret hope of becoming a founding father of an improbable European civil code’: Chapter 14, p 363.
The argument, therefore, is that we need to start a debate as to the content of European tort law and the drafters of such harmonisation proposals encourage legal actors to do exactly that. This does not mean that their proposals are necessarily an end-point (although inevitably they may so hope). In reality, they act as a starting-point for debate. Martín-Casals and Blackie do accept, however, that the provisions of PETL and the DCFR have not gone without criticism and that some of the criticism may be valid. These proposals must therefore evolve in the face of debate. The contributors differ, however, as to the future of tort law harmonisation. For Blackie, it is unlikely that work of this type will be undertaken again by a transnational group. Martín-Casals, in contrast, remains more optimistic, concluding that the time has come to analyse the impact of PETL and produce by 2020 a mark 2 version of the principles.

In considering, therefore, the role of harmonisation in this field, we can identify considerable resistance to top-down harmonisation. A European ‘tort law culture’ has yet to emerge despite the existence of EU tort law since the 1980s. Faure also takes the view in Chapter 16 that, in terms of law and economics, such a case cannot be made. He is critical of use by the European Commission of economic arguments, such as the need to harmonise the conditions of competition, which, in his view, provide a weak basis for harmonisation. He does not deny that there may be other, non-economic, reasons for harmonisation, but that these should be spelled out more specifically. EU tort law exists therefore, but its own distinctive cultural norms have yet to be fixed, nor are they necessarily accepted by the national courts and other legal actors. While a bottom-up harmonisation may be easier to justify, the harmonisation projects highlight that there is, at present, insufficient similarity between the tort law systems of Europe for this to operate organically and therefore that gaps must be filled by what the drafters determine to be the ‘best solutions’ which inevitably entails normative policy choices. The role of the harmonisation projects, therefore, is perhaps best analysed as a form of soft law – a draft collection of rules, definitions and principles which may or may not assist the application of EU tort law as it applies across member states. While lacking democratic legitimacy, they provide legal

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75 See also Simona Drukteiniené and Loreta Saltinytė, ‘Lithuania’ in Ernst Karner and Barbara C. Steininger (eds), European Tort Law 2015 (De Gruyter, Berlin 2016) Nos 4 ff and 56 ff.
actors with a source of inspiration which they are free to follow (or not) within the parameters of the rules of legal interpretation. The harmonisation projects described in Part III of the Handbook add an extra dimension, therefore, to EU tort law – one of inspiration and intellectual input. All European legal systems have a history of legal development influenced by the reports of academic bodies (and indeed civil servants) and the work of the SGECC and the European Group on Tort Law, European Centre of Tort and Insurance Law and the Institute for European Tort Law (ESR/ETL) may be regarded as consistent with this tradition.76

6 CONCLUSIONS: THE FUTURE OF EU TORT LAW

While, for many, EU tort law has yet to be regarded as a distinct entity, this Handbook has brought together sources of tortious liability from across EU law to demonstrate the potential for EU law to provide citizens with compensatory damages for injuries to their person, property and pocket, but also to highlight the rights that EU law gives to citizens, often underestimated by states and overlooked by the Eurosceptic. This is not to suggest that EU tort law is unproblematic – hence the need for a Research Handbook critically assessing the law and the potential for legal development. The contributors to this volume have highlighted issues of drafting, communication, procedure and the often difficult relationship between the EU and national courts. A failure, in particular, to address (and explain) the objectives and purpose of EU law, shrouded often in the language of market integration and economic regulation, has given rise to difficulties in integrating EU law into the national tort law system. This places pressure on national courts to resolve the tensions between EU and national law and this Handbook has highlighted difficulties, notably with limited use of the Article 267 preliminary reference procedure and a tendency to isolate EU law from domestic principles of tort law. EU tort law is still perceived as a ‘legal irritant’77 by many legal actors – be they judges, national legislators or lawyers generally. It is an area, therefore, crucially in need of critical analysis and it is this which this Research Handbook seeks to provide.

One key issue, therefore, is the need to resolve the tension that remains between national courts and EU tort law. For Faure, this suggests that EU law needs to pay greater attention to a ‘bottom-up’ approach, seeking to identify consumer preferences rather than impose the EU’s own preferences and ideology on member states. The question, for him, is not less, but better harmonisation. If, therefore, we regard EU tort law – that is, the giving of non-contractual rights to citizens – as a good thing, more attention needs to be paid to its implementation and in engaging legal actors at all levels in its development and application. This needs to be taken into account in terms of consultation on legal measures at EU level, but also for national courts and lawyers to take an interest in EU private law and to actively engage in dialogue with the EU institutions. In highlighting the risk of resentment, misunderstanding and confusion that may result from a purely ‘top-down’ approach, this volume hopes to assist in promoting greater dialogue between all the participants in the legal process. Greater consultation with, and listening to, legal actors at a national level is likely to render EU tort law more successful both in its implementation and also in raising awareness of its positive characteristics in giving rights to citizens.

What, then, is the future of EU tort law? The harmonisation proposals examined above suggest that EU tort law should now be seen as having three main sources: legal instruments (treaties/directives/regulations), the case law of the CJEU, but also input from academic commentators and practitioners which may influence the form and content of the first two ‘official’ sources of law. It is suggested here that there also needs to be greater input from the member states themselves, encouraging a ‘bottom-up’ approach capable of resolving some of the problems identified in this chapter and, indeed, throughout this book. The Handbook therefore ends with a call to arms. If the EU is to give citizens the right to sue in tort, then it is surely worth ensuring that this topic receives the critical attention it deserves.

attention it needs to improve existing and future legislative and judicial provision of rights. It is hoped that this Handbook will provide a starting point for a much-needed debate in this area of law.