

Compensation of Private Losses

The Evolution of Torts in European
Business Law

edited by

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european law
publishers

ISBN (print) 978-3-86653-175-8
ISBN (eBook) 978-3-86653-934-1

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>.

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Production: Karina Hack, Munich. Typesetting: fidus Publikations-Service GmbH, Nördlingen. Printing and binding: AZ Druck und Datentechnik, Kempten. Printed on acid-free, non-ageing paper. Printed in Germany.

The Evolution of Torts in European Business Law

Reiner Schulze

I. Contractual and Non-contractual Liability in European Business Law

In addition to contract law, non-contractual liability is one of the core areas of European private law. Yet it is with good reason that contract law currently stands at the fore of legislative and academic work in this particular field: over past decades, comparative law and research into EU law have suggested common principles and model rules for European contract law, in particular.¹ On this basis, it presently remains to be discussed whether the future EU legislation for this field should be drafted on the basis of a common frame of reference and whether an optional European contract law shall be created via a European regulation.²

¹ Examples of such common principles and model rules are: *Ole Lando/Hugh Beale* (eds.), *Principles of European Contract Law*, Parts I and II, The Hague 2000 ("PECL"); *Ole Lando et al.* (eds.), *Principles of European Contract Law*, Part III, The Hague 2003 ("PECL"); *Giuseppe Gandolfi* (ed.), *Code Européen des contrats*, Avant-projet, Milano 2002 ("Gandolfi Principles"); *Research Group on the Existing EC Private Law (Acquis Group)* (ed.), *Principles of the Existing EC Contract Law ("ACQP") – Contract II*, Munich 2009; *Bénédicte Fauvarque-Cosson et al.* (eds.), *Principes contractuels communs. Projet de cadre commun de référence*, Paris 2008; *Bénédicte Fauvarque-Cosson et al.* (eds.), *Terminologie contractuelle commune. Projet de cadre commun de référence*, Paris 2008; *Christian von Bar et al.* (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference ("DCFR"), Outline Edition*, Munich 2009; *Christian von Bar/Eric Clive* (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference ("DCFR"), Full Edition*, Munich 2009.

² Communication from the Commission to the European Parliament and the Council – A more coherent European Contract Law – An action plan, COM(2003) 68 final, O.J. (2003) C 63/27; Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses,

However, in order to create a stable framework for the development of economic transactions and the development of private autonomy, the European Union also requires the protection of the rights of the individual and of the community. In this respect, the functioning of the Internal Market is not only dependent upon a suitable contract law, but also on legal instruments that secure, with respect to non-contractual liability, the ambit of contracting between private parties. As to contract law, the question is also asked in this regard of whether this can only occur within the national framework or whether legal science – and possibly, in part, the EU institutions – can develop common standards and should promote closer links or even an approximation of laws. This question may have indeed gained greater significance since the Charter of Fundamental Rights became binding law. Its validity underlines, above all, that the protection of an individual's rights and legitimate interests – beyond the development of the Internal Market – is an important matter for the EU as a legal community founded on common values.³ The Charter of Fundamental Rights therefore increases the necessity to approach the role of non-contractual liability, within the scope of European law, in protecting the individual.

II. Non-contractual Liability in EU Legislation and Jurisprudence

The legislative organs of the EU appear to be thoroughly aware of the growing challenges in this regard. Over past decades, a considerable *acquis communautaire* has developed in EU secondary law which concerns the non-contractual liability vis-à-vis private persons. In this respect, one can give the examples of product liability⁴, non-contractual liability for

COM(2010) 348 final, pp. 8 et seq.; Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law, 2010/233/EU, O.J. (2010) L 105/109.

³ Cf. inter alia *Vasiliki Kosta*, Internal Market Legislation and the Private Law of the Member States – The Impact of Fundamental Rights, (2010) European Review of Contract Law (ERCL), 409 et seq.; *Thorsten Kingreen*, Grundrechtsverband oder Grundrechtsunion? – Zur Entwicklung der subjektiv-öffentlichen Rechte im europäischen Unionsrecht, (2010) Europarecht (EuR), 338 et seq.

⁴ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. (1985) L 210/29 and Directive 1999/34/EC of

the carriage of passengers and transports (i.a. in air and train travel)⁵, the non-contractual liability in competition law (with a basis in the Treaty itself⁶), the liability in capital market law of the issuer or board members⁷, the non-contractual liability for an infringement of intellectual property rights⁸, non-contractual liability for discriminatory acts⁹, infringement of

the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. (1999) L 141/20.

⁵ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation, O.J. (2004) L 46/1; Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, O.J. (2007) L 315/14; Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, O.J. (2009) L 131/24.

⁶ See ECJ, joined cases C-295/04 & C-298/04 *Vincenzo Manfredi and Others v Lloyd and Adriatico Assicurazioni SpA and others*, [2006] ECR I-6619; ECJ, C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and others*, [2001] ECR I-6297.

⁷ In particular, Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), O.J. (2003) L 96/16; Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions, O.J. (2004) L 162/70.

⁸ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O.J. (2004) L 157/32; Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O.J. (2004) L 195/16.

⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. (2000) L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J. (2000) L 303/16; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply

data protection rights¹⁰ and environmental liability¹¹. In addition, one is to also note the extensiveness of the jurisprudence of the European Court of Justice (ECJ) and Court of First Instance based upon Art. 340 par. 2 TFEU (ex. Art. 288 par. 2 EC) and on the liability of the Member States according to EU law.

III. Challenges for Research

1. Research Approaches

Since a number of years, research has focused upon the question of overarching principles for non-contractual liability on European level. However, as was originally the case with contract law, such research into non-contractual liability in European private law was initially primarily based upon comparative studies of national laws.¹² Amongst the many comparative law research projects in this field, one can particularly speak of two important and extensive research projects: the “Principles of European Tort Law” (PETL) drafted by the European Group on Tort Law¹³ and the draft of the

of goods and services, O.J. (2004) L 373/37; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O.J. (2006) L 204/23.

¹⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. (1995) L 281/31.

¹¹ Directive 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; O.J. (2004) L 143/56.

¹² In particular, *Christian von Bar* (ed.), *Deliktsrecht in Europa: Systematische Einführungen, Gesetzestexte, Übersetzungen*, Köln et al. 1993-1994; *Christian von Bar*, *The Common European Law of Torts. Volume I: The Core Areas of Tort Law, its Approximation in Europe, and its Accommodation in the Legal Systems*, Oxford 1998; *Christian von Bar*, *The Common European Law of Torts. Volume II: Damage and Damages, Liability for and without Personal Misconduct, Causality, and Defences*, Oxford 2000; *Reinhard Zimmermann* (ed.), *Grundstrukturen des Europäischen Deliktsrechts*, Baden-Baden 2003.

¹³ *European Group on Tort Law* (ed.), *Principles of European Tort Law: Text and Commentary*, Wien 2005.

“Non-contractual liability arising out of damage caused to another” in Book VI of the Draft Common Frame of Reference¹⁴ (DCFR) based upon work undertaken by the “Study Group”¹⁵.

In a similar manner as to where contract law is concerned, over past years one can also observe a methodological change for non-contractual liability in European private law. In addition to the comparative studies, an increasing amount of research has been undertaken with regard to the question of European tort law principles or non-contractual liability in existing EU law. Whilst the comparative approach sought “common principles” or “best solutions” on the basis of national laws, the latter research approach is concerned with EU primary and secondary legislation, including the jurisprudence case law of the European Courts (i.e. the “acquis communautaire”), in seeking and determining general principles for European private law. In this respect, the research undertaken by *Wolfgang Wurmnest* on the “*Grundzüge eines europäischen Haftungsrechts*”¹⁶ (The main features of a European liability law) was groundbreaking for tort law: an aspect of the research addressed the individual legal areas of Community law (now Union law) to the extent that an *acquis communautaire* had developed with relevance for non-contractual liability. Over recent years, further studies have expanded the overview of non-contractual liability in EU law and deepened its relationship to corresponding principles in national laws.¹⁷ With respect to present European law, a further perspective is the comparison of liability principles in EU law with their counterparts in the European Convention

¹⁴ DCFR, Full Edition (n. 1).

¹⁵ *Study Group on a European Civil Code* (ed.), *Principles of European Law – Non-Contractual Liability Arising out of Damage Caused to Another*, Munich 2009.

¹⁶ *Wolfgang Wurmnest*, *Grundzüge eines europäischen Haftungsrechts. Eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts*, Tübingen 2003.

¹⁷ For example, *Helmut Koziol/Reiner Schulze* (eds.), *Tort Law of the European Community*, Wien 2008; including inter alia *Aims and Scope* (*Denis N. Kellier*); *Damage* (*Antoni Vaquer*); *Causation* (*Isabelle C. Durant*); *Fault Liability* (*Meinhard Lukas*); *Environmental Liability* (*Monika Hinteregger*); *Is European Product Liability Harmonised?* (*Geraint Howells*); *Other Strict Liabilities* (*Bernhard A. Koch*); *Liability for Others* (*Miquel Martín-Casals/Josep Solé Feliu*); *Non-contractual Liability in Damages of Member States for Breach of Community Law* (*Robert Rebhahn*); *Community Liability* (*Luisa Antonioli*); *The Nature and Assessment of Damages* (*Ken Oliphant*); *Limitations of Liability under EC Tort Law* (*Ulrich Magnus*); *Limitation Periods in EC Law* (*André Pereira*); *Terminology* (*Martin Weitenberg*); *An Overview of Common Elements* (*Marc Wissink*) and comparisons of the EU Tort Law with different legal systems and families.

on Human Rights and the corresponding jurisprudence of the European Court of Human Rights.¹⁸ Furthermore, one can also note that the “Acquis Group”¹⁹ is considering succeeding its “Principles of the Existing EC Contract Law”²⁰ with a similar draft concerning the principles of the existing EU law with respect to non-contractual liability.

These research projects regarding the EU law of non-contractual liability are faced with a number of challenges with respect to their terminology and methodology. These challenges will require in-depth discussion; however, only some of these questions will be briefly outlined in the scope of this paper.

2. Terminology

From the research undertaken thus far, one can note that no uniform terminology exists to describe the particular subject-matter. The term “European tort law” is commonly used;²¹ however the adoption of the English terminology does not mean that the English terms “tort” and “tort law” – as developed in the common law tradition – can simply be adopted at European level, too.²² The term “tort” must rather gain its own “autonomous” meaning when it is used in the European context – a problem that is also faced by a large part of the terminology in European private law (from “reasonable” grounds to “trust”).

However, a similar problem is also posed by adopting the term of “delictual liability” (“deliktische Haftung” or “responsabilité délictuelle”), or similar terms (such as “responsabilité civile”) from the terminology of civil law jurisdictions. In comparison, the term “non-contractual liability” offers the advantage of referring, to a lesser extent, to one of the larger Western

¹⁸ Jan-Thomas Oskierski, *Schadensersatz im Europäischen Recht. Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK*, Baden-Baden 2010.

¹⁹ Research Group on the Existing EC Private Law (Acquis Group); information about the Acquis Group and the Acquis Principles can be accessed via the Group’s homepage: <http://www.acquis-group.org>.

²⁰ ACQP (n. 1).

²¹ Cf. for example, *Principles of European Tort Law* (n. 13); Helmut Koziol/Reiner Schulze (n. 17); Martin Immenhauser, *Das Dogma von Vertrag und Delikt*, Köln 2006, pp. 22 et seq.

²² Cf. the concerns in DCFR, Full Edition (n. 1), p. 3089 and Christian von Bar, *Außervertragliche Haftung für den einen anderem zugefügten Schaden*, (2010) ERPL, 205, in particular p. 209.