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Articles

Paula Giliker

What Do We Mean By EU Tort Law?

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Abstract: This article will examine what we mean by the term ‘EU tort law’ and why it is important to recognise EU tort law both as a concept providing remedies to citizens in EU and national courts, but also as an area of law which, notably in the context of national courts, is under-theorised and in danger, therefore, of being incorrectly applied. EU tort law is subset of a broader category which may be termed ‘European tort law’. It crosses sectors as diverse as consumer, employment, competition and financial services law. It provides citizens with rights, often to compensatory damages, for breach of interests protected by EU law. Fundamentally, it plays a vital role in ensuring the effectiveness of EU law. It will be submitted that only by focussing on what we actually mean by EU tort law will we gain an understanding of its content and rules and be able to address problems in its application.

I Introduction

What do we mean by ‘EU tort law’ and why is this question important? Writing in the *Journal of European Tort Law*, it might be thought that the answer to this second question is self-evident – JETL describes its aim and objectives as ‘contribut[ing] to the analysis and development of tort law in Europe’¹ – but ‘tort law in Europe’ is a vague phrase and here is used deliberately to be inclusive. In reality, when we discuss ‘European tort law’, we are using an umbrella term to describe what the editor of this journal has called ‘a multi-layered concept with several planes of existence’,² which include proposals for harmonised principles (such as the Principles of European Tort Law (PETL)),³ European Court of Human Rights (ECHR) tort law⁴ and EU Tort law itself. Ken Oliphant in his study identified two forms of EU tort law: (i) claims relating to the liability of EU institutions brought under art 340(2) Treaty on the Functioning of the European Union (TFEU),⁵ where the case is brought before

¹ <<https://www.degruyter.com/view/j/jetl>> (accessed 9 October 2017).

² *K Oliphant*, *European tort law: a primer for the common lawyer* (2009) 62 *Current Legal Problems* (CLP) 440, 444.

³ *European Group on Tort Law*, *Principles of European Tort Law* (2005). See, generally, *BA Koch*, *The “European Group on Tort Law” and its “Principles of European Tort Law”* (2005) 53 *American Journal of Comparative Law* (AJCL) 189.

⁴ See *A Fenyves/E Karner/H Koziol/E Steiner*, *Tort Law in the Jurisprudence of the European Court of Human Rights* (2011) and, at a domestic level, *J Wright*, *Tort Law and Human Rights* (2nd edn 2017).

⁵ ‘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

the Court of Justice of the European Union (CJEU) to establish the non-contractual liability of the Union and obtain compensation for damage caused by unlawful acts and conduct committed by Union institutions and bodies,⁶ and (ii) cases brought against the Member State and private parties in the national courts.⁷ We may therefore define ‘EU tort law’ as tort law (and I use the term ‘tort law’ for convenience, but as synonymous with civil law notions of ‘non-contractual liability’) whose source is that of EU law, not the national legal system. While the liability of EU institutions under art 340(2) TFEU is perhaps the most obvious example of EU tort law – the Treaty specifically refers to ‘non-contractual liability’ and makes provision for reparation – this first category has received considerable attention from commentators and so will not form the focus of this article.⁸ In contrast, less attention has been directed to the second category of EU tort law claims: those where the source of liability is that of primary (Treaties) or secondary (Directives, Regulations) EU legislation or Court of Justice of the European Union (CJEU) case law, but where the law is applied, not by the courts of the EU, but by the *national* courts of Member States in line with the interpretation given by the CJEU. As will be seen, this second category is characterised by the fact that most claims will arise in sector-specific contexts in which the tortious remedy is part of a framework of rights given to EU citizens in the field of consumer law, employment, competition, financial services law and so on. As yet, there have been only limited attempts to identify a common binding factor: that these are all claims based on EU tort law.⁹

My article will seek to rectify this omission and highlight the nature of EU tort law as applied by the national courts of the European Union. It will seek to draw together its disparate sources, identify problems which exist as to its application by the national courts and examine to what extent tensions still exist between the EU and the national courts in this field. EU tort law gives EU citizens the right to tortious remedies in the national courts. This presents a challenge to the autonomy of domestic tort law doctrine, but also to the courts to set aside their national modes of interpretation (‘national preferences’) and acknowledge a particular vision of tortious or non-contractual liability reflecting the values of EU law, notably that of enhancing the effectiveness of EU law itself. As this article will show, this

performance of their duties.’ Consider, for example, CJEU 2.12.1971, 5/71, *Schöppenstedt v Council of the European Communities*, ECLI:EU:C:1971:116; CJEU 4.7.2000, C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA v Commission*, ECLI:EU:C:2000:361.

⁶ See *K Gutman*, The evolution of the action for damages against the European Union and its place in the system of judicial protection (2011) 48 Common Market Law Review (CML Rev) 695.

⁷ From a substantive perspective, however, the division is not water-tight. For example, art 340(2) TFEU (in its previous incarnation of art 215(2) EEC Treaty) proved influential in the key State liability cases of Joined Cases C-46/93 and C-48/93, 5.3.1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd*, ECLI:EU:C:1996:79. See *P Aalto*, Public Liability in EU Law: *Brasserie*, *Bergaderm* and Beyond (2011).

⁸ See eg *T Heukels/A McDonnell* (eds), *The Action for Damages in Community Law* (1997) and *HG Schermers/T Heukels/P Mead* (eds), *The Non-Contractual Liability of the European Communities* (1988); *A Albors-Llorens*, Remedies against the EU institutions after Lisbon: an era of opportunity? [2012] Cambridge Law Journal (CLJ) 507; *K Gutman*, The non-contractual liability of the European Union: Principle, practice and promise, in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017); *P Craig/G de Búrca*, *EU Law: Text, Cases and Materials* (6th edn 2015) Ch 16.

⁹ See, however, *H Koziol/R Schulze* (eds), *Tort Law of the European Community* (2008). *Kellner*, however, concedes in his ‘Comparative Report’ that ‘the contributors to this project created “EC tort law”, which does not actually exist as a systematic body of law, by inferring general rules from assorted and very heterogeneous directives, regulations and judgments’ at 560.

exercise has not proven easy. It will be argued that the problems identified in this article can only be resolved if the courts (and lawyers generally) gain a clearer focus on the particular nature of EU tort law actions.

II Identifying EU tort law

At a basic level, we can define EU tort law as tort law, the source of which is EU, not national, law. It is law which, by virtue of membership of the European Union, becomes part of the national legal system and which supplements and, where necessary, supplants national principles of law. EU membership thus signifies that national law will be subject to the primary legislation (the Treaties)¹⁰ and secondary legislation (regulations, directives and decisions)¹¹ of the EU. As supreme authority on matters of EU law, the CJEU also 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.¹² Cases such as *Francovich v Italian Republic*¹³ and *Courage Ltd v Crehan*¹⁴ highlight the judicial activism of the CJEU as a source of remedial rights.

EU tort law, therefore, represents one specific example of domestic law changed by the EU legislation and case law. It is distinctive in that, primarily, it gives victims the right to bring a remedy in tort (or non-contractual liability) within the national court system. National courts are therefore dealing with claims for compensation whose source is not based on domestic legal provisions, but rather motivated by policies struck at EU, not national, level.¹⁵

What this means in practice is that EU legislation, combined with the judicial activism of the CJEU, has created a body of law which national courts must apply, but which is not necessarily consistent with existing law nor using the familiar terminology of the national tort law system. A common lawyer and a German lawyer will look in vain in EU tort law for a ‘duty of care’ or *geschützte Rechtsgüter* found in iconic case law such as *Donoghue v Stevenson*¹⁶ or para 823(1) of the *Bürgerliches Gesetzbuch* (German Civil Code, BGB).¹⁷ A

¹⁰ 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.

¹¹ Art 288 TFEU. Soft law also exists, for example, non-binding recommendations and opinions under art 288 TFEU.

¹² See *Craig/de Búrca* (fn 8) 63. See also *T Tridimas*, *The Court of Justice and judicial activism* (1996) 21 *European Law Review* (EL Rev) 199.

¹³ Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci*; [1993] 2 *Common Market Law Reports* (CMLR) 66.

¹⁴ CJEU 20.9.2001, C-453/99, *Courage Ltd v Crehan*, ECLI:EU:C:2001:465, as discussed in *S 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.

¹⁵ It should be noted, however, that in some cases, competition law being a primary example, domestic law may have been remodelled to reflect EU law which leads to a substantial overlap at both levels.

¹⁶ [1932] *Appeal Cases* (AC) 562, used by Neil MacCormick as a running example of common law reasoning in his work, *Legal Reasoning and Legal Theory* (1978).

¹⁷ ‘A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.’

French lawyer might find reference to a *lien de causalité*, but without any guarantee that it will be defined in the same way as the domestic doctrine.¹⁸ It is imported law, but one where the CJEU continues to govern its interpretation and indeed can give interpretative guidance through the art 267 TFEU preliminary reference procedure.¹⁹ We might view it, therefore, as a distinctive type of legal transplant²⁰ where the donor retains control over the transplanted law.

Yet identification of this particular area of law is not always a straightforward exercise. In some cases, it is clear. For example, as stated above, art 340(2) of the TFEU expressly refers to the non-contractual liability of EU institutions. Equally, Directive 85/374/EEC on Product Liability²¹ makes it clear from its first recital that it concerns the liability of the producer for damage caused by the defectiveness of products. Regulations, such as the Rome II Regulation (EC) No 864/2007/EC²² on the law applicable to non-contractual obligations, are also obviously of relevance to tort law.²³ It is important, however, to look beyond the headlines. While most domestic tort lawyers will be familiar with these provisions, EU tort law does not stop here. Judicial activism means that Treaty provisions such as arts 101 and 102 TFEU on competition law have been found to give rights to damages, albeit this is not formally stated in the Treaty itself.²⁴ The decision of the Court of Justice in *Courage*,²⁵ developed in *Manfredi*,²⁶ makes it clear that the possibility of claiming compensatory damages is needed to encourage compliance with the obligations that arts 101 and 102 TFEU impose.²⁷ As the CJEU stated in *Courage*:²⁸

¹⁸ Y Lequette/P Simler/F Terré, *Droit civil: Les obligations* (11th edn 2013) Les délits et quasi-délits: La responsabilité civile: Ch 3: Lien de causalité.

¹⁹ For a critical appreciation of the preliminary reference procedure, see *T Tridimas*, Knocking on heaven's door: fragmentation, efficiency and defiance in the preliminary reference procedure (2003) 40 CML Rev 9.

²⁰ As classically stated by A Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn 1993). See also M Graziadei, *Comparative Law as the Study of Transplants and Receptions* in: M Reimann/R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2007).

²¹ 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 [1985] Official Journal (OJ) L 210/29.

²² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40. See also Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119/1 which deals with the liability of controllers and processors of personal data. See eg art 82: Right to compensation and liability.

²³ See P Stone/Y Farah (eds), *Edward Elgar Research Handbook on EU Private International Law* (2015).

²⁴ On the development of damages actions in EU competition law, see *D Ashton/D Henry*, *Competition Damages Actions in the EU: Law and Practice* (Elgar Competition Law and Practice Series, 2013); *I Lianos/P Davis/P Nebbia*, *Damages Claims for the Infringement of EU Competition Law* (2015) and *B Balasingham*, 15 years after *Courage v Crehan*: the right to damages under EU competition law (2017) 1 European Competition and Regulatory Law Review (Co Re) 11. See, in particular, *N Dunne*, Antitrust and the making of European tort law (2016) 36 Oxford Journal of Legal Studies (OJLS) 366, who examines the contribution made by EU competition law to the emergence of a distinct European tort law through the harmonisation of the substantive and procedural rules governing private competition enforcement via tort mechanisms.

²⁵ C-453/99 *Courage*.

²⁶ CJEU 13.7.2006, C-295/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECLI:EU:C:2006:461, paras 60–64.

²⁷ See, generally, *O Odudu/A Sanchez Graells*, The interface of EU and national tort law: competition law. in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017).

²⁸ C-453/99 *Courage*, para 25 f (originally art 85 EEC Treaty).

The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the [Union] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [Union].

This quotation highlights both the importance and role of EU tort law in this field. It also stresses the contribution the national courts make in fulfilling the goals of EU law. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law. These rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness).²⁹ On this basis, compensation for actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*) plus interest must thus be made available in the national courts.³⁰

Equally, in its famous *Francovich* ruling, decided 27 years ago, the CJEU ruled that the remedy of state liability for violation of EU law was ‘inherent’ in the Treaty,³¹ and in *Brasserie du Pêcheur/Factortame*,³² the ECJ specified the three conditions under which liability for violation of EU law would be established: (1) a rule of law intending to confer rights to individuals; (2) a sufficiently serious breach and (3) a direct causal link between the breach and the damage.³³ Marie-Pierre Granger has commented that: ‘What lawyers call “*Francovich* liability” lies, together with the doctrines of direct and indirect effect and the obligation of Member States to provide effective judicial remedies,³⁴ at the heart of the judge-made framework for the decentralized private enforcement of EU law.’³⁵ In other words, the case law of the CJEU must also be regarded as a significant source of EU tort law which is, by its very nature, evolving. The challenge for national courts is one of applying the law consistently with EU principles of non-discrimination and effectiveness, with reference to CJEU case law on the matter. This is very different to addressing national systems of precedent or adhering to the codal provisions found in the relevant civil code.

This is not, however, the only problem. Much of EU tort law has been developed by means of directives, which, in contrast to regulations, are not directly applicable into national law.³⁶ On this basis, while binding as to the result to be achieved, directives permit the

²⁹ See CJEU 10.7.1997, C-261/95, *Palmisani v Istituto nazionale della previdenza sociale (INPS)* ECLI:EU:C:1997:351, para 27.

³⁰ CJEU C-453/99 *Courage*, para 29; C-295/04 *Manfredi*, paras 62, 95 and 100.

³¹ CJEU C-6/90 and C-9/90 *Francovich*, para 35.

³² CJEU joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, para 42. For a critical analysis, see *T Tridimas*, Liability for breach of Community law: growing up and mellowing down? (2001) 38 CML Rev 301.

³³ CJEU C-46/93 and C-48/93 *Brasserie du Pêcheur*, para 51.

³⁴ Now codified in art 19(1) of the Treaty on the European Union (TEU).

³⁵ *M-P Granger*, *Francovich* liability before national courts: 25 years on, has anything changed? in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017) 94. See also *M-P Granger*, National applications of *Francovich* and the construction of a European administrative *ius commune* (2007) 32 EL Rev 157.

³⁶ Art 288 TFEU.

national authorities of each state to choose the form and method of their transposition.³⁷ This gives states valuable flexibility, permitting them to find the best means of integrating the new laws into their legal system and, if necessary, amending the wording to one more likely to reflect their own legal terminology.³⁸ This is, however, a fine line: too much divergence can lead to enforcement proceedings by the Commission under art 258 TFEU, as the UK and France found out in relation to their transposition of the Product Liability Directive.³⁹ Relying on directives does mean that key decisions, such as the wording of the provision and how it is to be integrated into national law, lie with the State.⁴⁰ Even where states ‘copy out’ the wording of the instrument in question,⁴¹ the means by which it is implemented are likely to vary from state to state. While transposition may make the source of rights obvious, for example, sec 1(1) of the UK Consumer Protection Act 1987 makes express reference to the directive,⁴² it is more commonly less obvious, for example, by placing new provisions in pre-existing codes, legislation or consolidating legislation or in secondary legislation such as a statutory instrument. Consider, for example, the Management of Health and Safety at Work Regulations SI 1999/3242 in UK law, which are part of numerous regulations which implement EU Health and Safety Directives, but give little indication in their title of their EU source. Minimum harmonisation directives also may make little impact on systems where the rights in question are already protected and therefore little, or no, change to national law is required, although the Commission and CJEU have expressed concern that such an approach would not achieve the clarity and precision needed to meet the requirement of legal certainty, particularly in the field of consumer protection.⁴³

A further difficulty lies with the sector-specific nature of the directives. Here, tort liability may be simply part of the overall scheme of protection. Tortious remedies have arisen as a result of EU intervention in areas as varied as consumer, competition, employment, non-discrimination, intellectual property, insurance and financial services law

³⁷ Art 288(3) TFEU. For a critical appraisal of the choices made in the process of transposition, see *DG Dimitakopoulos*, *The Transposition of EU Law: ‘Post-Decisional Politics’ and Institutional Autonomy* (2001) 7 *European Law Journal* (ELJ) 442.

³⁸ The wording must, however, reflect the content of the directive. 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 9.4.1987, 363/85 *Commission v Italy*, ECLI:EU:C:1987:196, para 7.

³⁹ See ECJ 29.5.1997, C-300/95, *European Commission v United Kingdom*, ECLI:EU:C:1997:255 and ECJ 25.4.2002, C-52/00, *European Commission v France*, ECLI:EU:C:2002:252.

⁴⁰ For a critical appraisal of the discretion awarded to states, see *T Vandamme*, *Democracy and Direct Effect: EU and National Perceptions*, in: S Prechal/B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (2008).

⁴¹ This is a popular choice in some Member States (notably the UK, but also Denmark to some extent) in that it avoids the possibility of ‘gold plating’ (giving rights beyond those required under the directive in question).

⁴² ‘(1) This Part shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly.’

⁴³ See ECJ 10.5.2001, C-144/19, *Commission v Netherlands*, ECLI:EU:C:2001:257, para 21 on the Netherlands’ transposition of Directive 93/13/EEC, as discussed in *MW Hesselink*, *The ideal of codification and the dynamics of Europeanisation: The Dutch Experience* (2006) 12 *ELJ* 279, 283 f. Hesselink notes, however, that while the litigation led to amendment of two articles of the Dutch Civil Code, their link with European law is in no way apparent and the Dutch publishers of the Civil Code do not even refer to the directive in a footnote.

and yet are not perceived as contributing to ‘national’ tort law. Horton Rogers commented accurately that:⁴⁴

where there is [EU] activity in a particular area it may follow that there are provisions of [EU] law which would or might be classified by the municipal lawyer as ‘tort’ but they are essentially interstitial and, looked at from a broad tort viewpoint, appear almost random.

In the field of financial services, for example, the professional liability of investment advisers has been affected by the implementation of the Markets in Financial Instruments Directive (MiFID)⁴⁵ and the MiFID implementing Directive.⁴⁶ Keith Stanton has observed that few English tort lawyers are aware that EU financial services directives lay the foundation for a body of law which grants significant protection to purchasers of financial products.⁴⁷ This is despite the fact that sec 138D(2) of the UK Financial Services and Markets Act 2000⁴⁸ provides a remedy for persons damaged by significant examples of mis-selling of financial products.⁴⁹ Jule Mulder has noted similar issues arising in relation to the transposition of the EU equality directives in Germany. Here, as interpreted by the CJEU, the directives have led to the development of new claims in tort at a national level. The need for effective and equivalent remedies has contributed to the development of new non-contractual claims in damages and yet this is seen simply as a matter of employment, not tort, law.⁵⁰ These are but two examples of a wider problem of the breadth of remedial intervention due to EU law which, as Oliphant has commented, ‘is a larger and more significant category than is commonly appreciated’.⁵¹

The influence on national tort law may also be indirect. There has been, for example, considerable controversy on how the EU insurance law directives might impact on the national rules relating to personal injuries claims against negligent drivers, notably in the context of defences raised against claimants,⁵² but also in the context of *Francovich* liability claims against the State.⁵³ Perhaps surprisingly, however, EU tort law does not extend to environmental law. Here Directive 2004/35/EC on Environmental Liability establishes a framework based on the polluter pays principle to prevent and remedy environmental

⁴⁴ *WVH Rogers*, EC Tort Law and the English Law, in: H Koziol/R Schulze (eds), *Tort Law of the European Community* 365.

⁴⁵ European Parliament and Council Directive 2004/39/EC [2004] OJ L 145/1. A revised version (MiFID 2: 2014/65/EU) has been adopted: see <http://ec.europa.eu/finance/securities/isd/mifid2/index_en.htm> (accessed 9 October 2017). The application date is now scheduled to be 3 January 2018.

⁴⁶ Commission Directive 2006/73/EC [2006] OJ L 241/26.

⁴⁷ See *K Stanton*, Investment advice: the statutory remedy (2017) 33 *Journal of Professional Negligence* (PN) 153.

⁴⁸ This makes actionable as a species of the tort of breach of statutory duty failure to comply with certain rules laid down in the handbooks issued by the bodies which regulate the industry.

⁴⁹ *Stanton* (2017) 33 PN 153, 154.

⁵⁰ See *J Mulder*, Employment law, in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017).

⁵¹ Oliphant (2009) 62 CLP 440, 448.

⁵² See eg CJEU 30.6.2005, C-537/03, *Candolin v Vahinkovakuutusosakeyhtio Pohjola*, ECLI:EU:C:2005:417; CJEU 9.7.2011, C-409/09, *Lavrador v Companhia de Seguros Fidelidade-Mundial SA*, ECLI:EU:C:2011:371. See, further, *J Davey*, A compulsory diet of chickens and eggs: the EU Motor Insurance Directives as a shadow tort regime, in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017).

⁵³ See *J Marson/K Ferris/A Nicholson*, Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives [2017] *Journal of Business Law* (JBL) 51; *Delaney v Secretary of State for Transport* [2015] England and Wales Court of Appeal (EWCA Civ) 172; [2015] 1 *Weekly Law Reports* (WLR) 5177.

damage.⁵⁴ Its focus is on administrative regulation, based on the powers and duties of public authorities, rather than civil liability. Further, 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.⁵⁵ Not all directives, therefore, give rise to EU tort law even if they may be said in a loose sense to be attempting to ‘remedy a wrong’.

Some of the blame for the lack of visibility of EU tort law lies, however, with the EU itself. Directives are often the result of compromises between states in Council⁵⁶ with the final version of the directive lacking detail, notably in the field of remedies.⁵⁷ The 1985 Product Liability Directive is unusual in setting out in art 9 the kind of damage recoverable under the Directive, but even this is without prejudice to national provisions relating to non-material damage. Lack of detail may also represent an attempt to demonstrate cultural sensitivity, for example, in respecting the fact that the division between contract and tort law might not be the same in every Member State or where states have divergent policies on matters such as pure economic loss. This highlights an underlying competence issue: as EU law must respect the Member States’ rights to administrative self-organisation and to procedural autonomy – subject only to the general requirements of effectiveness and equivalence of remedies – this will limit how far directives can go, unless (exceptionally) their core matter is that of remedies.⁵⁸ While flexibility does facilitate harmonisation of laws in the very different legal systems of the EU,⁵⁹ the net result is that it makes it more difficult for national courts to apply remedies consistently and to ascertain whether a tortious remedy is appropriate.

The Unfair Commercial Practices Directive 2005/29/EC⁶⁰ provides a good illustration of these concerns. The Directive provides for a blanket ban on unfair commercial practices, but does not mention the word ‘tort’ (or any civilian equivalent) in either its provisions or its recitals. Nevertheless, it, de facto, provides a remedy for economic torts in that it covers the

⁵⁴ 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 (ELD). See, generally, *L Kramer*, EU Environmental Law (8th edn 2015); *M Lee*, EU Environmental Law: Challenges, Change and Decision-Making (2nd edn 2014).

⁵⁵ See ECJ 13.7.1989, 380/87, *Enichem Bas v Comune di Cinisello Balsamo*, ECLI:EU:C:1989:318, para 23; ECJ 17.11.1993, C-236/92, *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* ECLI:EU:C:1993:893, para 15.

⁵⁶ See *Dimitakopoulos* (2001) 7 ELJ 442, 446 f; *S Prechal*, Directives in EC Law (2nd edn 2005) 33 f.

⁵⁷ See eg art 17 of Council Dir 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16: ‘Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, *which may comprise the payment of compensation to the victim*, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them’ (emphasis added). Prechal notes, (fn 56), that often the only explanatory text the implementing authorities can rely on is the directive’s preamble, often expressed in non-committal terms.

⁵⁸ Thank you to Albert Sanchez Graells for highlighting this point.

⁵⁹ *Craig/de Búrca* (fn 8) at 108. See also *A Johnston/H Unberath*, European private law by directives: approach and challenges, in: C Twigg-Flesner, The Cambridge Companion to European Union Private Law (2010) Ch 7.

⁶⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

entire pre-contractual, contractual and post-contractual decision-making process for consumers.⁶¹ Christine Riefa and Séverine Saintier have commented that the absence of the notion of ‘tort’ in the Directive is all the more surprising in that it requires, at art 11(2), Member States to offer ‘tort-like’ remedies, including interim as well as final injunctions for the cessation or prevention of unfair commercial practices.⁶² The editorial to a special edition of the *Journal of European Consumer and Market Law* in 2015 commented that 10 years after the entry into force of the Directive, its impact on the respective private laws of Member States remained unclear with some national legislators introducing special provisions for consumers harmed by unfair commercial practices, but others still debating the issues: ‘As a consequence of the vagueness of the Directive, the national solutions vary greatly and the question of the relationship between general contract, tort and unfair competition law...is far from being answered in a clear, coherent and satisfying way.’⁶³ As a result, while some states, such as Austria, implemented the Directive as part of the national tort law in its pre-existing rules on unfair competition,⁶⁴ other Member States incorporated the rules without identifying whether the rules fell within the remit of tort, contract or any other category of law,⁶⁵ or adopted, in the case of the UK, a narrow approach. The UK only introduced a private right of action in 2014 under the amended Consumer Protection from Unfair Trading Regulations 2014⁶⁶ in the form of a right to unwind the contract, a right to get a discount and a right to claim damages. Here, despite the fact that the Unfair Commercial Practices Directive is one of maximum harmonisation,⁶⁷ lack of specificity in the directive itself has led to confusing divergence in the national implementation of an instrument seeking to offer consumers protection in a market where they are particularly vulnerable.

The above shows that the visibility of EU-sourced tort law rights has, in certain cases, been diminished by the nature of transposition (absorption into existing legislation or codes, using wording which gives little or no indication of its EU source, or making little or no impact where national law is deemed to match EU minimum standards) and by a failure to specify with sufficient clarity at EU level that tortious/non-contractual liability is intended to result. The outcome is that Member States treat the law as sector-specific and consider it in its particular context such as employment, financial services, consumer protection law etc.

⁶¹ See Recital 13: ‘In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution.’

⁶² See *C Riefa/S Saintier*, Unfair Commercial Practices Directive: remedying economic torts? in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017) 294. They argue that this has undoubtedly introduced some ambiguity with which the national legal orders have had to grapple and led to inconsistent implementation across Member States. See also *WH van Boom*, Unfair Commercial Practices, in: C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Research Handbooks in European Law series) (2016) 388–405.

⁶³ *Editorial* (2015) 4 *Journal of European Consumer and Market Law* (EuCML) 163 f.

⁶⁴ *WH Van Boom*, European tort law – an integrated or compartmentalized approach? in: A Vaquer (ed), *European Private Law Beyond the Common Frame of Reference – Essays in Honour of Reinhard Zimmermann* (Europa Law, 2008) 138. See also see *K-N Peifer*, Germany: the impact of the UCP Directive on national contract and tort law (2015) 4 EuCML 193 and, generally, *W Van Boom/A Garde/O Akseli* (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement and National Legal Systems* (2014).

⁶⁵ Eg France, Italy or Malta.

⁶⁶ See Consumer Protection (Amendment) Regulations 2014 SI 2014/870, amending the Consumer Protection from Unfair Trading Regulations 2008 SI 2008/1277 which merely established a system of administrative enforcement orders and criminal law sanctions.

⁶⁷ See Recitals 14, 15, 5 UCP Directive.

Once absorbed into the particular sector, the laws' EU origins become less conspicuous and simply seen as part of the way these sectors are regulated.

It might be argued that this does not matter so long as citizens are able to gain the benefits intended by the legislation. This, however, is the point. If States are not granting tortious remedies because the legislation does not make it clear or the law in question has been absorbed into sector-specific national law without any recognition of its source, then the law is not being applied correctly. If there is a remedy provided by EU tort law, then it must be applied accordingly to EU law, that is, with non-discriminatory and effective remedies, with reference to relevant case law of the CJEU and with an obligation under art 267(3) TFEU to make preliminary references arising under EU law (and subject to *Köbler* state liability).⁶⁸ Put bluntly, EU tort law is governed by EU law. There is a distinct danger in such cases that the law is absorbed into the national system and national modes of interpretation are adopted. This is far from complying with the broad duty placed on national courts to interpret national law in such a way so as to ensure the full effectiveness of EU law and achieve the objectives pursued by particular EU Directives.⁶⁹

III EU tort law in the national court: Interpretation and policy

EU tort law gives citizens important rights which, because of their disparate nature, often lack visibility. Identifying EU tort law is, therefore, not necessarily a straightforward exercise. While at times obvious, at other times it may be found on the outposts of consumer, financial services or employment law, with little or no recognition of the unifying concept of 'EU tort law'. In this section, I will argue that the identification of this unifying concept is an important first step, but that the courts also need to appreciate the distinctive characteristics of EU tort law if they are to ensure the correct application of the law. It is supranational law and domestic courts must give legal effect to its provisions and, where necessary, bring domestic law into line with EU law.⁷⁰ Domestic tort law can remain *provided* it does not conflict with EU law. While most legal systems have sought to identify obvious conflicts with national law, for example, in relation to the strict liability provisions of the Product Liability Directive, there is a danger that less obvious forms of EU tort law will not be addressed in this way.

The failure of national legal systems to address the distinctive nature of EU tort law has led to two main difficulties which will be addressed below:

⁶⁸ CJEU 30.9.2003, C-224/01, *Köbler v Austria*, ECLI:EU:C:2003:513 and 13.6.2006, C-173/03, *Traghetti del Mediterraneo SpA (In Liquidation) v Italy*, ECLI:EU:C:2006:391. See *Z Varga*, National remedies in the case of violation of EU law by Member State courts (2017) 54 CML Rev 51; *B Beutler*, State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle? (2009) 46 CML Rev 773.

⁶⁹ CJEU 5.10.2004, Joined cases C-397/01 to C-403/01, *Pfeiffer v Deutsches Rotes Kreuz* ECLI:EU:C:2004:584, paras 114 and 116.

⁷⁰ ECJ 15.7.1964, 6/64, *Costa v ENEL*, ECLI:EU:C:1964:66; 9.3.1978, 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, ECLI:EU:C:1978:49. See, generally, *Craig/de Búrca* (fn 8) Ch 9 and *I Sammut*, *Constructing Modern European Private Law: A Hybrid System* (2016) at 3.

- (i) How to ensure the courts interpret EU tort law correctly
- (ii) Identifying to what extent the underlying policy basis of EU tort law conflicts with the tort law values of the Member State.

A Interpreting EU tort law correctly

Domestic courts then, when applying EU tort law, must put aside national preferences in favour of the supremacy of EU law. In the case of maximum harmonisation directives, such as the Product Liability Directive and Unfair Commercial Practices Directive, the courts will be applying a harmonised set of rights which provide uniform protection for consumers regardless of where in the EU the tort took place.⁷¹ These are important goals, not aspirations, but it is not always clear that the national courts appreciate this fact. This is not, however, to suggest that this is necessarily a simple exercise. EU law brings with it new modes of reasoning and interpretation. Gerard Conway has noted the difficulties which national courts face:⁷²

The ECJ has never set out a systematic scheme of interpretative principles, giving ordinary meaning any degree of priority, and varying approaches can be found in the case law ... In its actual practice, the ordinary meaning of the text is just one consideration for the Court; objects and purposes and systemic Treaty concerns also figuring prominently.

The use, for example, of purposive or teleological reasoning in the judgments of the CJEU, is one which presents particular challenges for common lawyers in that it does not reflect their traditional way of reasoning.⁷³ The CJEU in *CILFIT* 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’.⁷⁴ Conway remarks on the clash between modes of interpretation based on the ordinary meaning of specific provisions and those which tend towards purposive, systemic interpretation gearing at a high level of generality towards advancing the general purpose of the Treaties.⁷⁵ This requires judges (and lawyers generally) to identify the distinct nature of EU tort law and to recognise that different methods of reasoning and indeed sources (notably decisions of the CJEU) will be applicable. Stephen 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.⁷⁶

⁷¹ See *S Whittaker*, *Liability for Products: English Law, French Law, and European Harmonization* (2005) and *B Keirsbilck*, *The New European Law of Unfair Commercial Practices and Competition Law* (2011) Ch 5. For a critical appraisal of maximum harmonisation directives in the field of consumer law, see *J Smits*, *Full Harmonization of Consumer Law – A Critique of the Draft Directive on Consumer Rights* (2010) 18 *European Review of Private Law* (ERPL) 5; *V Mak*, *Review of the Consumer Acquis: Towards Maximum Harmonization of Consumer Law – A Critique of the Draft Directive on Consumer Rights* (2009) 17 *ERPL* 55.

⁷² *G Conway*, *The Limits of Legal Reasoning and the European Court of Justice* (2012) 147.

⁷³ On the distinctive nature of the reasoning of the CJEU, see *J Komárek*, *Legal reasoning in EU law*, in: D Chalmers/A Arnall (eds), *The Oxford Handbook of European Union Law* (2015); *G Beck*, *The Legal Reasoning of the Court of Justice of the EU* (2013).

⁷⁴ ECJ 6.10.1982, 283/81, *CILFIT v Ministry of Health*, ECLI:EU:C:1982:335, para 20.

⁷⁵ *Conway* (fn 72) 147.

⁷⁶ *S Weatherill*, *EU Consumer Law and Policy* (2nd edn, 2013) 145.

Assistance in interpretation does, however, exist. Article 267 TFEU gives the CJEU jurisdiction to make preliminary rulings concerning the interpretation of Treaties and other acts of EU institutions.⁷⁷ Article 267(3) provides that a court of final instance must bring any such matter of interpretation before the Court. The preliminary reference procedure has been described as the ‘jewel in the Crown’ of the Court’s jurisdiction,⁷⁸ shaping the relationship between national and EU courts.⁷⁹ Its aim is to contribute to the unity and coherence of the EU legal system, but also offer a direct contact – a bridge – between national legal systems and the EU legal system.⁸⁰ It provides a tool, therefore, to assist national courts in interpreting EU-sourced law correctly. It also, as Clelia Lacchi has observed recently, serves to ensure the effective judicial protection of citizens’ rights under EU law.⁸¹ The aim, therefore, is for national courts across the EU to engage in uniform interpretation of the provisions of EU law, assisted by the art 267 TFEU preliminary reference procedure.

Yet, in practice, a number of commentators have observed that this procedure is not working well. National courts remain reluctant to make art 267 references, despite the potential for *Köbler* state liability from an unwarranted failure to do so.⁸² A judicial willingness to rely on the *acte clair* doctrine, which permits national courts to decline to refer questions on the basis that the point is clear or already decided by the CJEU,⁸³ means that the art 267 procedure is far from operating at an optimal level. In her study of the Product Liability Directive,⁸⁴ Fidelma White found that since Directive 85/374 was adopted, it has given rise to only two references from a UK court (concerning the same matter)⁸⁵ 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.⁸⁶ The UK

⁷⁷ Guidelines on the preliminary reference procedure also exist: see, most recently, Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings OJ C 439, 25.11.2016, 1–8, which ‘serve as a reminder of the essential information characteristics of the preliminary ruling procedure and to provide courts and tribunals making references to the Court with all the practical information required in order for the Court to be in a position to give a useful reply to the questions referred’. Note, in particular, para 5: ‘A reference for a preliminary ruling may, inter alia, prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts.’

⁷⁸ *Craig/de Búrca* (fn 8) 464.

⁷⁹ See, generally, *M Broberg/N Fenger*, Preliminary References to the European Court of Justice (2nd edn 2014).

⁸⁰ *P Aalto*, Publication review: preliminary references to the European Court of Justice (2016) 41 EL Rev 135.

⁸¹ *C Lacchi*, Multilevel judicial protection in the EU and preliminary references (2016) 53 CML Rev 679.

⁸² See *M Broberg*, National courts of last instance failing to make a preliminary reference: the (possible) consequences flowing therefrom (2016) 22(2) European Public Law (EPL) 243. Kornezov has also observed that the mechanisms to enforce the art 267(3) obligation are less than effective in practice: *A Kornezov*, The new format of the *acte clair* doctrine and its consequences (2016) 53 CML Rev 1317.

⁸³ See Case 283/81 *CILFIT* (fn 74) and, more recently, CJEU 9.9.2015, 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.

⁸⁴ *F White*, Directive 85/374/EEC concerning liability for defective products: in the name of harmonisation, the internal market and consumer protection, in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017) 134 f.

⁸⁵ CJEU 9.2.2006, C-127/04, *O’Byrne v Sanofi Pasteur MSD Ltd*, ECLI:EU:C:2006:93 and CJEU 2.12.2009, C-358/08, *Aventis Pasteur SA v OB*, ECLI:EU:C:2009:744.

⁸⁶ See eg the Danish kidney case: 10.5.2001, C-203/99, *Veedfald v Arhus Amtskommune*, ECLI:EU:C:2001:258 (request for preliminary ruling under art 267 TFEU).

Supreme Court infamously in *Office of Fair Trading v Abbey National Plc*⁸⁷ relied on the *acte clair* doctrine and refused to make an art 267 reference in circumstances where it disagreed with the interpretation of the law by four experienced judges in the courts below.⁸⁸ This is not simply a common law problem, however. Lock notes similar tendencies, for example, in Germany.⁸⁹ While there have been some interesting studies which seek 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 CJEU,⁹⁰ the fact remains that such reluctance represents a missed opportunity to clarify the rules of EU tort law and render the law easier to apply at a national level.

There is a danger, therefore, of what I term ‘national preferences’, that is, resort to domestic rules of legal interpretation and methodology being utilised in applying the rules of EU tort law. This may be inadvertent – a lower court may not appreciate that the rule in question has a source in EU law (the identification problem raised above) or lack the resources to engage with a study of EU law. Alternatively, it may be due to a lack of detail in the legislative instrument in question where matters such as remedies may be left to the national court (although subject, of course, to the principles of non-discrimination and effectiveness). We cannot dismiss, however, the possibility that the national courts themselves may be reluctant to engage fully with CJEU jurisprudence. All of these factors serve to diminish the importance of EU tort law within the national legal system and threaten its coherent and uniform interpretation across the EU.

B Identifying the underlying policy rationale of EU tort law

Even if EU tort law is identified as such, one further difficulty in applying the law is that of understanding the policy objectives underlying the decision to provide a tortious remedy in EU law. National legal systems have well-established systems of tort law which have evolved over time and possess their own distinctive policy objectives. Faced with tortious/non-contractual liability, there is a clear risk that national courts will resort to familiar methods of tort law analysis without considering whether an EU dimension is involved. This will, however, only be a problem if differences exist between the underlying policy objectives of domestic tort law and that of EU tort law.

Unfortunately, differences do exist. Consider, for example, the seminal question of fault. When we think of national tort law, our starting point is generally that of fault-based liability, as seen in art 1240 of the *Code civil*, para 823 of the BGB, art 1902 of the *Código Civil* and so on. While risk-based analysis may encourage a movement towards strict or stricter liability, fault does seem to lie at the heart of any system of tort.⁹¹ Fault, therefore, has

⁸⁷ [2009] United Kingdom Supreme Court (UKSC) 6; [2010] 1 AC 696.

⁸⁸ See, generally, A Arnall, *The Law Lords and the European Union: swimming with the incoming tide* (2010) 36 EL Rev 57.

⁸⁹ T Lock, *Is private enforcement of EU law through State liability a myth? An assessment 20 years after Francovich* (2012) 49 CML Rev 1675.

⁹⁰ See eg L Hornuf/S Voigt, *Analyzing preliminary references as the powerbase of the European Court of Justice* (2015) 39(2) European Journal of Law and Economics (EJLE) 287.

⁹¹ See F Werro/E Büyüksagis, *The boundaries between negligence and strict liability*, in: M Bussani /AJ Sebok (eds), *Comparative Tort Law: Global Perspectives* (2015) 202.

traditionally been considered to be the most important and most general prerequisite to, and the basis of, tortious liability.⁹² 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 *Francovich* liability⁹³ and the institutional liability of the EU⁹⁴ – does not require proof of fault. An obligation to remedy infringement of competition law arises independent of fault,⁹⁵ while EU equality directives create a system of objective or strict liability and CJEU case law has clearly held that liability cannot depend on the employer’s fault.⁹⁶ Fault does not lie at the core, therefore, of EU tort law.

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. This presents a real challenge for systems premised on the centrality of fault. Ken Oliphant in his fascinating study of public authority liability across Europe noted that this divided systems – while some systems treated public authority liability as based on *unlawfulness* (which some commentators termed ‘strict liability’), others remained explicitly committed to *fault-based liability*.⁹⁷ 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. There is a clear danger, therefore, that national preferences will encourage the courts to find ‘fault-like’ conduct to justify liability, hence undermining the uniformity of EU tort law.

A second source of tension arises from the distinctive policy objectives of EU tort law, which waver between those of market integration and victim/consumer protection. EU tort law exists to render EU law more effective and to provide citizens with effective and non-discriminatory remedies. Its goal, therefore, is *not* necessarily primarily that of compensation, but that of rendering EU law more effective. On this basis, while offering compensation for injured parties, it may nevertheless give greater priority to matters relating to the internal market and free movement. Guido Comparato has observed that EU directives are characterised by an economic functionalist approach: ‘their fundamental aim is the establishment of the common market and other objectives appear as subordinate to the

⁹² P Widmer (ed), *Unification of Tort Law: Fault* (2005).

⁹³ See C-46/93 and C-48/93 *Brasserie du Pêcheur*, para 56. P Giliker, *The Europeanisation of English Tort Law* (2014) 99–103.

⁹⁴ See eg *S van Raepenbusch*, *La convergence entre les régimes de responsabilité extracontractuelle de l’Union européenne et des États membres* (2012) 12 ERA Forum 671, 680 f.

⁹⁵ See CJEU 22.10.2015, C-194/14 P, *AC-Treuhand AG v Commission*, EU:C:2015:717, para 31, with reference to *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paras 142 and 143 showing a passive infringement. See *Odudu/Sanchez Graells* (fn 27) 160–162.

⁹⁶ CJEU 8.11.1990, C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* ECLI:EU:C:1990:383. See also CJEU 22.4.1997, C-180/95, *Draehmpaehl v Urania Immobilienservice OHG*, ECLI:EU:C:1997:208, para 21.

⁹⁷ K Oliphant, *The liability of public authorities in comparative perspective*, in: K Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (2016) para 31.

former'.⁹⁸ 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. For national courts, this may be baffling. A tortious remedy is regarded per se as providing a means of compensation to the victim and so national preferences are logically going to focus on victim protection. In contrast, the uniform application of the law requires the national courts to interpret EU tort law purposively in the light of its aims and objectives and with the guidance of the CJEU. The very distinctiveness of EU tort law renders it a threat to national remedial traditions and, on this basis, its isolation and confinement to sector-specific remedial frameworks is perhaps a natural response to this threat.

This may be clearly seen in the context of competition law. Oke Odudu and Albert Sanchez Graells have observed that, at least in part, the private enforcement of competition law is intended to promote general deterrence.⁹⁹ This is particularly so in the case of stand-alone private damages claims,¹⁰⁰ 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.¹⁰¹ We can see similar tensions in product liability law where the policy of EU law has resulted in a *reduction* of the scope of compensation. In *Commission v France*,¹⁰² therefore, taking the view that Directive 85/374 should be treated as a maximum harmonisation directive, the CJEU precluded France from granting more generous protection to consumers.¹⁰³ This was premised on the view 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. This is consistent with the stated constitutional basis of the Product Liability Directive (art 100 of the EEC Treaty).¹⁰⁴ While more recent directives have relied primarily on the (qualified majority vote) art 114 TFEU for their constitutional basis, the issues are similar: the EU has the power to regulate those elements of private law which *create obstacles to trade in the internal market*. Where, therefore, the constitutional basis for intervention is that of enhancing the internal market, then there is a clear risk that

⁹⁸ G Comparato, *Nationalism and Private Law in Europe* (2014) 9.

⁹⁹ *Odudu/Sanchez-Graells* (fn 27) 156. See Communication from the Commission on quantifying harm in actions for damages based on breaches of art 101 or 102 of the TFEU (OJ C 167/19, 13.6.2013) para 1.

¹⁰⁰ That is, where private claimants seek to demonstrate an infringement of competition law that has not been the object of a previous public enforcement decision.

¹⁰¹ See *Odudu/Sanchez-Graells* (fn 27) 182.

¹⁰² CJEU 25.4.2002, C-52/00, *Commission of the EC v French Republic*, ECLI:EU:C:2002:252, para 17 f. See also 25.4.2002, C-154/00, *Commission v Greece*, ECLI:EU:C:2002:254 and 25.4.2002, C-183/00, *González Sánchez v Medicina Asturiana SA*, ECLI:EU:C:2002:255. The constitutional basis for the Product Liability Directive is art 100 of the EEC Treaty.

¹⁰³ See *J-S Borghetti*, The development of product liability in France, in: S Whittaker (ed), *The Development of Product Liability* (2010) 108–112. For French reactions to the case, see *Recueil Dalloz* (D) 2002, 2462, note *C Larroumet*; *Revue trimestrielle de droit civil* (RTD civ) 2002, 523, obs *P Jourdain*.

¹⁰⁴ The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as *directly affect* the establishment or functioning of the common market (emphasis added). See now art 115 TFEU.

improved consumer protection will be subordinated to the desire to establish an integrated economic space in Europe.¹⁰⁵

Undeniably, therefore, EU-sourced tort law, as interpreted by the CJEU, establishes a different conceptual framework to that found in national tort law. Its objectives are, understandably, linked to that of the European Union itself. It is not solely victim-led nor 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 important to have these goals in mind. While the CJEU is not always consistent in the balance drawn between conflicting policy goals,¹⁰⁶ we can identify a clear policy thread linking the goal of EU tort law to compensate private individuals whose rights have been infringed through breach of EU law with that of its justification: that it represents a means of rendering EU law more effective and promoting the values of the internal market by means of the creation of individual rights.

C A way forward?

Given, therefore, the distinctive character of EU law, integration into sector-specific law runs a clear risk of misunderstandings or misinterpretation of the law. EU tort law will, as the above analysis suggests, potentially clash with national perceptions of the goals and objectives of tort law due to its primary objective of increasing the effectiveness of EU law. There is a sense in European systems that this has been recognised to a certain extent. In the United Kingdom, for example, product liability is seen as separate from ordinary negligence claims – it is placed in a distinct part of a consumer welfare statute which expressly refers to the Directive. Keith Stanton, in his study of the impact of EU financial services directives on UK law, also noted a similar approach in this sector, where the tort law arising from the transposition of financial services directives is loosely classified as the tort of breach of statutory duty, but nevertheless treated as giving rise to distinct claims.¹⁰⁷ Jule Mulder has found parallels in Germany in relation to the transposition of the Equal Treatment directives, where 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.¹⁰⁸ Few, if any, of the classic tort (or obligations) textbooks offer coverage of EU tort law and this serves to highlight the limited impact of EU tort law on mainstream tort law teaching and doctrine.

The question remains whether this is enough to ensure the correct interpretation and application of EU tort law. In *The Europeanisation of English Tort Law*, I highlighted case law which suggested that the English courts still show an inclination to revert to cost/benefit

¹⁰⁵ *S Weatherill*, Supply of and demand for internal market regulation: strategies, preferences and interpretation, in: N Nic Shuibhne (ed), *Regulating the Internal Market* (2006) 48.

¹⁰⁶ See O *Cherednychenko*, Private law discourse and scholarship in the wake of the Europeanisation of private law, in: J Devenney/M Kenny (eds), *The Transformation of European Private Law* (2013) 149. Consider, also, the different CJEU decisions on the meaning of ‘consumer’: see D *Leczykiewicz/S Weatherill* (eds), *The Images of the Consumer in EU Law* (2016).

¹⁰⁷ K *Stanton*, Financial services and regulation, in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017).

¹⁰⁸ J *Mulder*, Employment law, in: P Giliker (ed), *Research Handbook on EU Tort Law* (2017).

analysis in applying the law relating to defective products,¹⁰⁹ and to fault when applying the ‘sufficiently serious breach’ test,¹¹⁰ even when they appreciate the distinctiveness of EU tort law. In other cases, where EU tort law has been integrated into national sectorial law, it demonstrates its chameleon-like qualities, fitting into, often uncomfortably, national sectorial law and taking the colour of its context – the law relating to consumer, employment, financial services etc – rather than being seen collectively as providing tortious remedies for EU citizens.

My argument, therefore, is that if we are to address the problems raised in this article, then more critical analysis of this area of law is needed. The concept of EU tort law needs to be defined, recognised and its unifying characteristics identified. It is not enough that it is there ‘somewhere’ in the legal system. Coherent and consistent application of EU tort law requires greater recognition of its key characteristics and the challenges it presents to national courts. Conceptualising EU tort law means that we are forced to address key questions as to its role within the national tort law framework and the extent to which the tort law systems of EU Member States are moving towards common values dictated by EU law. It should trigger also greater use of the preliminary reference procedure to obtain a dialogue between national and European courts how best to develop this area of law. Rather than a by-product of EU law, it needs to be conceived as a basis for liability across the Member States of the EU and one in need of a clearer theoretical underpinning if it is to thrive.

IV Conclusions

EU tort law exists in many forms. Its sources vary from Treaty provisions to directives to the case law of the CJEU, but share the common goal of giving remedies to EU citizens for breach of rights protected by EU law. It is evolving and arises in both private and public law. It has characteristics which distinguish it from mainstream tort or non-contractual liability, notably in its view of fault, its aims and objectives and in view of the distinctive guidance given by the CJEU in relation to its interpretation and application at the national level. In my article, I have highlighted its sources and its sector-specific origins, but also the nature of the difficulties which arise in trying to apply uniformly law – the source of which is that of the EU – in the national courts. In particular, I have highlighted problems arising from the reluctance of the national courts to make art 267 references and from the failure of courts to appreciate (as a result of the form of transposition) the need to treat EU-sourced law differently to domestic law or even to identify the possibility of granting a tortious remedy. Only limited attempts have been made to draw together a concept of ‘EU tort law’ or to consider the common issues which arise in its application and interpretation by the national courts.

The danger is that, as my article has highlighted, in failing to appreciate the true nature of EU tort law, national preferences may get in the way. This means assimilation with national provisions and reasoning which takes little account of the basis for the provision in question (as required by the teleological approach). Uniform interpretation of these

¹⁰⁹ *Giliker* (fn 93) 53.

¹¹⁰ *Ibid*, 102 f.

provisions can only take place when we accept that the source of the legal right in question does make a difference to how it is applied in the courts.

By highlighting the nature of EU tort law and the difficulties that national courts across the EU have experienced in its application, this article seeks to give courts (and lawyers generally) a clearer appreciation of what we actually mean by the term ‘EU tort law’. It is a form of words often used in passing, but, as this article has shown, a more detailed conceptual analysis reveals that it is distinct from national tort law and raises significant questions about the relationship between the EU, the CJEU and the national court. EU tort law is an important but under-conceptualised source of rights for citizens, and the difficulties it raises are under-appreciated. It is to be hoped that this article will encourage lawyers to re-appraise this area of law and engage in further dialogue on how best to address the issues raised. Only by focussing on what we actually mean by ‘EU tort law’ will we gain an understanding of its content and rules and be able to ensure its correct interpretation and application in the courts of European Member States.

Endnote:

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