

Introduction

THIS BOOK ADDRESSES the convergence effort concerning EU public liability law. While presenting the two constituent systems, it proposes that the two sets of EU public liability case-law form an operational whole. When these two sets are taken together, they form, it is submitted, a sufficient critical mass of case-law which forms a viable basis for its future development

This introductory chapter will set out briefly the essential development of the two EU public liability systems (section I), present the themes of the book (section II) and its structure (section III).

I. EU PUBLIC LIABILITY LAW AND ITS CONVERGENCE

A. Liability of the European Union

The non-contractual damages liability of the European Union stems from the original Treaty Establishing the European Economic Community (1957). The provision concerning non-contractual liability of the Community, which first appeared in Article 215(2) EEC, later became Article 288(2) EC. The current provision, following the entry into force of the Lisbon Treaty,¹ is now in Article 340(2) of the Treaty on the Functioning of the European Union ('TFEU').² Despite changes in the Article number, the substance of the current Article 340(2) TFEU is the same as in the original Treaty, with the exception that the Lisbon Treaty extended the coverage of liability from Community to Union as of 1 December 2009. The current treaty provision in Article 340(2) TFEU now obliges the Union, in the case of non-contractual liability, to make good any damage caused by its institutions in the performance of their duties, in accordance with the general principles common to the laws of the Member States. Exclusive competence to rule on liability has always been attributed to the Courts of the European Union in Luxembourg,

¹ The Lisbon Treaty which entered into force on 1 December 2009 brought about several changes which also affect damages liability (the European Community was fully replaced by the European Union, the Treaties were renamed and articles renumbered, and the Courts got new names). The changes resulting from that Treaty have been taken into account as appropriate.

² The 'Treaty establishing the European Community' (EC) was renamed by the Lisbon Treaty as the 'Treaty on the Functioning of the European Union' (TFEU), and the articles were renumbered. A correspondence table is attached to the final act.

2 Introduction

namely the Court of Justice of the European Union ('ECJ'), the General Court of the European Union ('GC', ex-Court of First Instance 'CFI') and the Civil Service Tribunal ('CST').³

Since the creation of the Communities, the ECJ has worked out a restrictive set of liability criteria for the liability of the Community, starting from the *Schöppenstedt* case-law (ECJ 1971).⁴ However, during the last two decades, the restrictive and much criticised liability criteria developed by the ECJ have been opened up and some almost astounding judgments on liability have been delivered. The development has been incremental, based on individual judgments. For example, *Mulder* (ECJ 1992 and 2000), a well-known series of damages cases relating to the Community milk quota regime, marked a turning point in the number of applicants.⁵ The first *Schneider* case (CFI 2002), a competition law case relating to annulment of a Commission decision declaring a merger incompatible with the Treaty, was followed by a damages claim of more than 1663 million euros, largely accepted at first instance (CFI 2007), although reduced considerably on appeal (ECJ 2009).⁶ Before its extension to the Union, the overarching coverage of the liability principle was confirmed to include all of the Community, including the actions of the European Ombudsman in *Lamberts* (CFI 2002; ECJ 2004).⁷ Finally, in *FIAMM* (CFI 2003, ECJ 2006), the two Courts considered the issue of strict liability in EU public liability law.⁸

B. Liability of the Member States

The development of the damages liability criteria of the Member States for breaches of EU law has been even more remarkable. This form of liability was also the

³ These names apply since the Treaty of Lisbon. In the text, preference is given to the new name, which will be used as a generic term, save when the text refers to a specific judgment handed down by a given court; then of course the name of the court as it then was is used, ie the CFI until 30 November 2009.

⁴ ECJ Case 5/71 *Zuckerfabrik Schöppenstedt v Council* (damages claim dismissed) [1971] ECR 975 [11].

In this book, the number in square brackets after the page number refer to paragraph of the judgment. Moreover, references to the cases in the corpus text will include the abbreviation of the EU court and the year. They are made to help the reader, as the study contains frequent references to case-law and created over a period of time, and there have been recent important changes. It would appear somewhat awkward and maybe too demanding for the reader to recall that AG Roemer gave his opinion in *Vloeberghs* (ECJ 1962), whereas *Arizmendi* (GC 2009) is from a different court, another century – and post-*Bergaderm* (ECJ 2000).

⁵ ECJ Joined Cases C-104/89 and C-37/90 *Mulder (No 1) and others v Council and Commission* (liability established) [1992] ECR I-3061, ECJ Joined Cases C-104/89 and C-37/90 *Mulder (No 2) and others v Council and Commission* (quantum) [2000] ECR I-203.

⁶ CFI Case T-310/01 *Schneider Electric v Commission* (annulment action; annulled, no appeal) [2002] ECR II-4071; CFI Case T-351/03 *Schneider Electric v Commission* (damages action; liability established, appealed C-440/07 P) [2007] ECR II-2237; ECJ Case C-440/07 P *Commission v Schneider Electric (No 1 extent of liability)* (liability reduced on appeal to less than €2m) [2009] ECR I-6413 and ECJ Case C-440/07 P *Commission v Schneider (No 2 quantum)* (damages awarded €50000) [2010] ECR I-0000.

⁷ CFI Case T-209/00 *Lamberts v Ombudsman* (dismissed, appealed C-234/02 P) [2002] ECR II-2203; ECJ Case C-234/02 P *Médiateur (Ombudsman) v Lamberts* (appeal dismissed) [2004] ECR I-2803.

⁸ CFI Case T-69/00 *FIAMM and FIAMM Technologies v Council and Commission* (dismissed, appealed C-120/06 P) [2005] ECR II-5393, ECJ Joined Cases C-120/06 P and C-121/06 P *FIAMM and Fedon v Council and Commission* (appeal dismissed) [2008] ECR I-6513.

creation of the ECJ, but in contrast to the liability of the Union, the Treaty contained no express legal basis for such Member State liability. The existence of that principle was laid down in *Francovich* (ECJ 1991).⁹ The Court based the liability of the Member States on the effectiveness of Community rules. Effectiveness would be impaired, and protection of rights which individuals derive directly from Community law weakened, if they would not be able to obtain redress from breaches by Member States. The court laid down three criteria which must be fulfilled for liability.

The jurisdiction to rule on Member State liability lies with the Member State courts, applying in part EU law, in part national damages law. The applicability of this principle in all sectors of Member State activity when applying EU law has been progressively and expressly confirmed in the case-law: first for legislative action in *Brasserie du Pêcheur* (ECJ 1996),¹⁰ then for administrative action in *Norbrook* (ECJ 1996)¹¹ and *Hedley Lomas* (ECJ 1996)¹² and finally, and more controversially, for judicial action, in *Köbler* (ECJ 2003) and *Traghetti* (ECJ 2006).¹³

C. Convergence as an Approach to get ‘Beyond *Brasserie* and *Bergaderm*’?

The convergence and mutual alignment of these two liability systems is the most recent issue. Albeit the three essential conditions for liability were the same in the two liability systems (breach of an EU law obligation, existence of actual damage, and a direct causal link between the two), the detailed criteria in the two systems originally developed in different directions. The criteria for Community liability for legislative acts – which in reality has been the main category of liability situations – were laid down by the ECJ in the restrictive criteria of the *Schöppenstedt* judgment (1971).¹⁴ The criteria for Member State liability as established in the *Francovich* judgment (1991) were less strict.¹⁵ However, some years later, in *Brasserie du Pêcheur* (1996), the ECJ ruled that the criteria for the two liability systems should not, ‘in the absence of particular justification’ be different in like circumstances. The Court of Justice affirmed in *Brasserie du Pêcheur* a statement of principle that protection of the rights which individuals derive from European Union law cannot vary depending on whether a national authority or a Union authority is responsible for the damage.¹⁶ The first case concerning liability of the Union where this alignment of conditions was put into practice was *Bergaderm* (ECJ 2000).¹⁷ It was here

⁹ ECJ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECR I-5357 [33], [40].

¹⁰ ECJ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

¹¹ ECJ Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531.

¹² ECJ Case C-5/94 *Hedley Lomas* [1996] ECR I-2553.

¹³ ECJ Case C-224/01 *Köbler* [2003] ECR I-10239 and ECJ Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177.

¹⁴ ECJ *Zuckerfabrik Schöppenstedt v Council* (n 4) [11].

¹⁵ ECJ *Francovich and Bonifaci* (n 9).

¹⁶ ECJ *Brasserie du Pêcheur and Factortame* (n 10) [42].

¹⁷ ECJ Case C-352/98 P *Bergaderm and Goupil v Commission* (appeal dismissed) [2000] ECR I-5291.

that the *objective of convergence of the two liability systems*, which forms the focus of this study, was first established by the ECJ.

Convergence of the two public liability systems will be used here as an approach to enhance the understanding of their functioning. One of the fundamental purposes of European integration is to increase *coherence* in the European legal arena by reducing and flattening *divergences*, through various mechanisms in different areas. To present, in schematic form, how convergence works in general within European integration, this interactive process can be simplified so as to make the different relationships more clearly visible. Figure 1.1 depicts EU law as the upper level, and Member State law as the lower level.

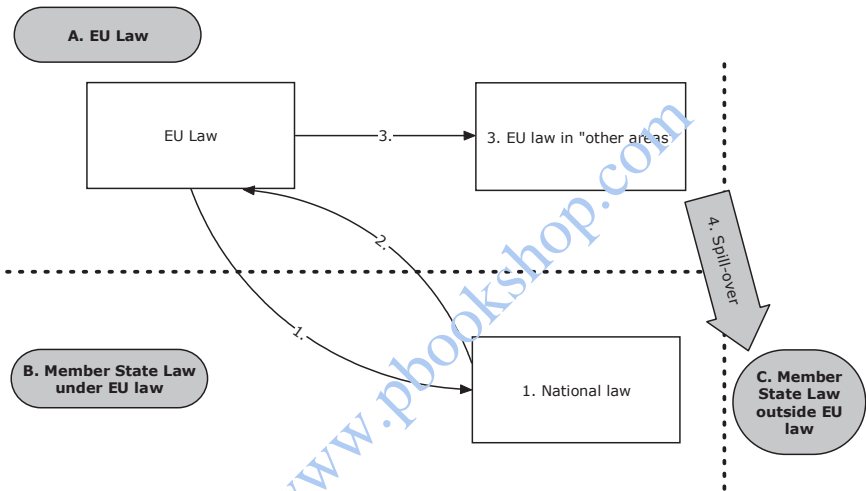


Figure 1.1 Basic Relationship between EU Law and National Law

The basic interactions can be described through the following phases. The (1) first phase relates to the general effects of EU law in Member States: direct effect, primacy and interpretation in conformity. The (2) second phase, or relationship, is thus the 'refined feedback' effect on EU law. This could result for example from difficulties which become apparent in implementing a directive. When a directive is amended on the basis of a new Commission proposal, a Member State can suggest amendments to the Commission proposal based on its national law/problems, which, when adopted, become EU law. Further, a (3) third relationship is the convergence between various areas within the different sectors of EU law.

An assessment of convergence and divergence would necessarily have to be completed by an assessment of what happens at national level as a whole. Apparently this analysis should consist of two elements: what has taken place in a Member State in implementing this one specific remedy, and what effects that has had beyond the specific area in question (4), in terms of convergence spill-over.

The construction presented above can be transposed to the law concerning public liability in damages. Mutual interaction between national public liability law and two public liability systems created at EU level could be schematised as follows.

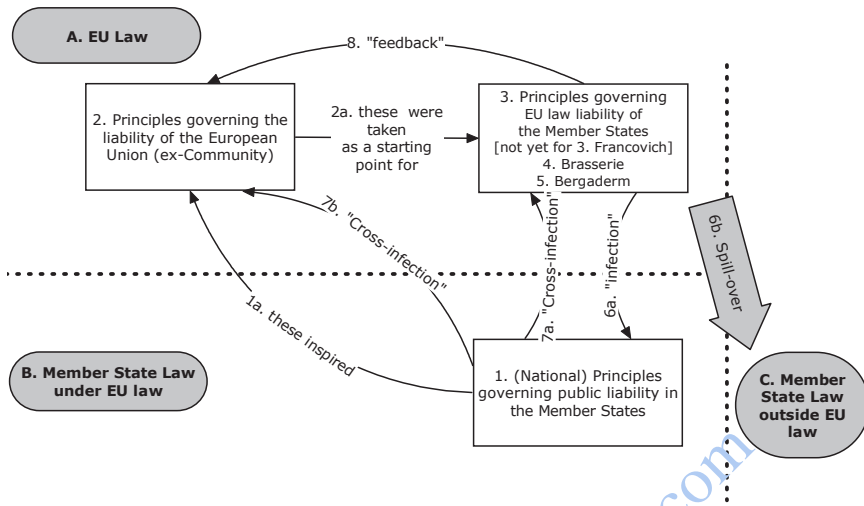


Figure 1.2 Cross-infection (Cross-fertilisation) of the Public Liability Law of the Member States and that of the European Union

Although the picture becomes slightly more complicated, three essential relationships should be noted, namely the relationship between EU law and national law, the mutual relationships between the two liability systems within EU law, and the spill-over effect on Member State law outside the EU law field.

In the picture, the starting point is (1) national principles governing public liability in damages in Member States. These inspired the (2) principles governing the liability of the Community (now: Union), the famous *Schöppenstedt/Adams* conditions. In turn, these principles influenced the formulation of conditions for Member State liability for breaches of EU law, even if not yet in (3) *Francovich*, but already in (4) *Brasserie du Pêcheur* and (5) *Bergaderm*. Oddly enough, in the current situation EU liability principles (6a) 'infect' national systems, which again provide (7a) 'cross-infection' to EU level, both to Member State liability conditions, as well as (7b) conditions governing Union liability. What is more, the 'infection' (6a) and the 'cross-infection' (7a) have a spill-over effect on national law (6b), going beyond the field of application of EU law.

One of the characteristics of public liability in damages in EU law is that all convergence and approximation of law takes place *without the intervention of the EU legislator*. In view of the democratic legitimacy or democratic deficit of the European Union, the role of democratic processes and public participation in policy-making is important. Here, however, EU level policy is formulated by the EU courts in Luxembourg without intervention by the Union legislator. In this respect it is clearly different from legislation-driven areas, such as the internal market, where the essential part of legal norms is enacted by the EU legislator, nowadays increasingly with the participation of the European Parliament. For public liability law in the EU, no external institution exists which can encourage or inhibit, promote or prevent, development of the law. This is carried out solely by the EU courts.

II. RESEARCH ISSUES

A. The Aim and the Research Questions

The aim of this study is to present the two public liability systems established in EU law from the standpoint of their parallel assessment. In view of that, the study purports to discuss and find answers to the three following research questions:

Systematisation. The first research question is to make visible and present the law at the current state of development of the two public liability systems in EU law, including systematising case-law (the law) and through applying some specific tools and approaches to better grasp future issues.

Parallel assessment. The second question is to assess the similarities and differences between the two systems, discuss the roles of the EU courts and the procedural differences. An attempt should also be made to find out how potential new issues in each system could be solved by learning from the 'other' system. This would also include highlighting problems in application of the criteria and practical application of the criteria ('law in action'), such as an overview of successful cases, success rate of damages cases, observations on applicants and nature of the cases.

Contextualisation. Thirdly, the question is to place public liability for breaches of EU law in context, beyond *Bergaderm* and to show the connections with convergent developments in general, including the more general convergence based on European Union law and others, and the role of this area of law in the context of the constitutionalisation of the European Union.

The choice of subject matter of the study, and the choice of approach, builds upon earlier research I have done in respect of public liability in EU law.¹⁸

B. Added Value: is it Still Worth a Try to Dig into *Francovich*, and EU liability?

Studies concerning various aspects of EU public liability law would seem to be numerous, in fact all too numerous to be cited or listed in full.¹⁹ By taking a more

¹⁸ Although I have been working with Member State liability for some time, it was the convergence aspect which re-ignited my interest in this area. My initial interest in public liability in damages started with Member State liability in the mid-1990s. The research done at that time concentrated on Member State liability and one of the key purposes was to systematise Member State liability case-law, see P Aalto, *Jäsenvaltion vahingonkorvausvastuu EY-oikeudessa [Damages Liability of the Member States in EC Law]* (Helsinki, Kauppakaari, 1999); P Aalto, 'Twelve Years of *Francovich* in the European Court of Justice: A survey of the Case-law on the Interpretation of the Three Conditions of Liability' in S Moreira de Sousa and W Heusel (eds), *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle* (Cologne, Bundesanzeiger, 2004) and P Aalto, 'Valtion korvausvastuu yksilölle unionin oikeuden rikkomisesta [State Liability for Individuals for Breaches of Union Law]' in H Kaila and E Pirjatanniemi et al (eds), *Yksilön oikeusasema Euroopan unionissa – Individens rättsställning inom Europeiska Unionen: Juhlakirja Allan Rosas – Festschrift Allan Rosas* (Turku/Åbo, 2008).

¹⁹ In this respect, the visionary works made before the two systems even existed are very interesting, see eg, P Pescatore, 'Responsabilité des États membres en cas de manquement aux règles communautaires'

narrow starting point, and limiting the assessment to some of the published doctoral dissertations in this field (without any attempt at being exhaustive, or even representative), the following groups emerge.²⁰

Liability of the European Community (now: Union) has given rise to the first group of dissertations, which include the works of Lysén (1976), Fines (1990), Czaja (1996), Wakefield (2002) and Patrão (2008).²¹

The liability of Member States has given rise to the second group which consists of works treating Member State liability in general terms. Such works, focusing on *Francovich* and preceding *Brasserie du Pêcheur*, include for example dissertations by Albers (1995), Cornils (1995), Henrichs (1995), Seltenreich (1997) and Zenner (1995).²² For the post-*Brasserie* period, there are dissertations by Hidien (1999), Beljin (2000), Schoißwohl (2002), Säuberlich (2005) and Nacimiento (2006).²³

Certain authors have concentrated on a specific sector: Fetzter (1994) and Sencovic (2000) analysed liability of the national legislator,²⁴ while Bertelman (2005), Wollbrandt (2005) and Scherr (2009) examined judicial liability.²⁵

(1972) (Parta Quarta) *Il Foro Padano* 9–24 and D Simon and A Barav, 'La responsabilité de l'administration nationale en cas de violation du droit communautaire' (1987) *Revue du Marché Commun et de l'Union Européenne* 165–74.

²⁰ This presentation attempts to cover some of the doctoral dissertations published in English, French, German and Swedish regarding either component of EU damages liability.

²¹ The year in parenthesis refers to the publication year, which is in many cases later than the year the work was actually defended. G Lysén, *The Non-Contractual and Contractual Liability of the European Economic Communities* (Uppsala, 1976); F Fines, *Étude de la responsabilité extracontractuelle de la Communauté économique européenne* (Paris, LGD, 1990); A Czaja, *Die Außervertragliche Haftung der EG für ihre Organe* (Baden Baden, Nomos, 1996) and J Wakefield, *Judicial Protection through the Use of Article 288(2) EC* (The Hague, Kluwer Law International, 2002) and A Patrão, *Responsabilidade Extracontratual da Comunidade Europeia* (Coimbra, Almedina, 2008).

²² C Albers, *Die Haftung der Bundesrepublik Deutschland für die Nichtumsetzung von EG-Richtlinien* (Baden-Baden, Nomos, 1995); M Cornils, *Der gemeinschaftsrechtliche Staatshaftungsanspruch. Rechtsnatur und Legitimität eines richterrechtlichen Haftungsinstituts* (Baden-Baden, Nomos, 1995); C Henrichs, *Haftung der EG-Mitgliedstaaten für Verletzung von Gemeinschaftsrecht* (Baden-Baden, Nomos, 1995); S Seltenreich, *Die Francovich-Rechtsprechung des EuGH und ihre Auswirkungen auf das deutsche Staatshaftungsrecht: ein Rückblick fünf Jahre nach dem Ergehen des Francovich-Urteils* (Constance, Hartung-Gorre, 1997) and M Zenner, *Die Haftung der EG-Mitgliedstaaten für die Anwendung europarechtswidriger Rechtsnormen* (Munich, V. Florenz, 1995).

²³ JW Hidien, *Die Gemeinschaftsrechtliche Staatshaftung der EU-Mitgliedstaaten* (Baden-Baden, Nomos, 1999); S Beljin, *Staatshaftung im Europarecht. Konturen des Haftungsinstituts, Mitgliedstaatliche Pflichten und subjektive Gemeinschaftsrechte, Innerstaatliche Durchführung* (Cologne, Carl Heymanns Verlag KG, 2000); B Schoißwohl, *Staatshaftung wegen Gemeinschaftsrechtsverletzung: Anspruchsgrundlage und materielle Voraussetzungen (f. Österreich)* (Vienna, Springer, 2002); U Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht: Eine Untersuchung der Mehrpersonenverhältnisse*, 2005) and P Nacimiento, *Gemeinschaftsrechtliche und nationale Staatshaftung in Deutschland, Italien und Frankreich* (Baden-Baden, Nomos, 2006).

²⁴ R Fetzter, *Die Haftung des Staates für legislatives Unrecht: zugleich ein Beitrag zum Staatshaftungsrecht der Europäischen Gemeinschaften, der EG-Mitgliedstaaten, der Schweiz und Österreichs* (Berlin, Duncker & Humblot, 1994) and P Sencovic, *L'évolution de la responsabilité de l'État législateur sous l'influence du droit communautaire* (Brussels, Bruylant, 2000).

²⁵ H Bertelmann, *Die Europäisierung des Staatshaftungsrechts* (Frankfurt, Lang, 2005); J Wollbrandt, *Gemeinschaftshaftung für judikatives Unrecht* (Osnabrück, dissertation.de, 2005) and KM Scherr, *The Principle of State Liability for Judicial Breaches. The case Gerhard Köbler v. Austria under European Community Law and from a comparative national law perspective* (Florence, European University Institute, 2008).

Some thematic studies on Member State liability are closely connected with recent events: Gratias (1999), Böhme (2009) and Emsinghoff (2009) examined state liability for bank supervision.²⁶

One recurring theme has been the liability of the European Union for legal action, in particular in the context of the rules regarding the World Trade Organisation (WTO). This was examined eg by Görgens (2005), Held (2006), Höher (2006), Steinbach (2009) and Thies (2009).²⁷

The obvious question that any study relating to Member State liability faces is what added value, if any, can it offer? It is well-known that for Member State liability, *Francovich* and *Brasserie du Pêcheur/Factortame* have for some time been the two judgments which have given rise to a considerable number of books, articles and case comments.²⁸ Even if liability of the Community/Union has been more in the margins of research interest for some time, comments on specific questions at least have been abundant. Despite the large number of comments, it is submitted that this study could bring some new elements and approaches to the discussion, for the following reasons.

The first reason is that in the post-*Bergaderm* commentaries, rather surprisingly, the convergence aspect of the two systems does not seem to be sufficiently addressed. In fact, there does not appear to be any overarching study from the convergence point of view. One explanation for this can be that, speaking from experience, dwelling on the case-law of the two systems is rather a laborious task. It is easier to concentrate on just one system.

The second reason justifying the subject matter is that considerable new case-law is available under the two systems, which would benefit from an attempt at systematisation.

The third justification is that existing systematic assessments of one or both systems are inevitably becoming outdated, in particular due to *Bergaderm*. So far, there seems to be no up-to-date work covering the convergence aspect of the two liability systems.²⁹

²⁶ M Gratias, *Staatshaftung für fehlerhafte Banken- und Versicherungsaufsicht im Europäischen Binnenmarkt* (Baden-Baden, Nomos, 1999); M Böhme, *Staatshaftung für fehlerhafte Bankenaufsicht nach deutschem und europäischem Recht* (Baden-Baden, Nomos, 2009) and JF Emsinghoff, *Entschädigung für Eigentumseingriffe infolge rechtmäßiger Rechtssetzungsakte der Europäischen Gemeinschaft* (Baden-Baden, Nomos, 2009).

²⁷ S Görgens, *Die außervertragliche Haftung der Europäischen Gemeinschaft für Verletzungen des WTO-Rechts durch ihre Organe. Die Haftung bei Nichtumsetzung von Entscheidungen des Streitbeilegungsgremiums der WTO* (Berlin, Duncker & Humblot, 2005); S Held, *Die Haftung der EG für die Verletzung von WTO-Recht* (Tübingen, Mohr Siebeck, 2006); K Höher, *Die Haftung der Europäischen Gemeinschaft für Verstöße gegen das WTO-Recht: eine Untersuchung am Beispiel des WTO-Bananenstreitverfahrens* (Baden-Baden, Nomos, 2006); A Steinbach, *Die Haftung der EG und ihrer Mitgliedsstaaten für WTO-Rechtsverletzungen aus rechtswissenschaftlicher und ökonomischer Perspektive* (Berlin, Duncker & Humblot, 2009) and A Thies, *The Liability of the European Community for Conduct in the Context of International Trade Disputes* (Munich, 2009).

²⁸ See eg, the case notes listed on the database 'Notes aux arrêts de la Cour', available on the Court's website.

²⁹ See eg, T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (The Hague, Kluwer Law International, 1997) or a more recent book discussing the two systems (but not from the convergence aspect) A Biondi and P Farley, *The Right to Damages in European Law* (Alphen aan der Rijn, Kluwer Law International, 2009).

Despite the quantity, parallel studies on the two systems are very rare, and the good ones are, at best, somewhat ageing, or even outdated.³⁰

In addition to the systemic aspect relating to convergence, several reasons explain why public liability for breaches of EU law in general as such does well merit a study.

In the first place, the rule of law consists of several elements and also includes the damages liability of public authorities. Public damages liability is one aspect of the web of remedies available to a person whose EU law rights have been infringed. The mere existence of this remedy is one of the elements that contribute to the unique expression of a system of rule of law that the European Union represents through the constitutionalisation process.³¹

Secondly, public liability is an important remedy for many applicants: it is at the same time a remedy of last resort after all other remedies have been exhausted and a remedy in which applicants are called upon to quantify in monetary terms the losses claimed in a more or less substantiated manner and sometimes in mind-boggling figures.³² It is also an important remedy: it is often invoked and it has also led to regular litigation before the EU courts.

Thirdly, apart from the question of 'alignment' of the two EU public liability systems and the fact there has been considerable case-law on both of them at EU level, public liability is also an area that has been rapidly developing lately in national legal systems.³³ Public liability for breaches of EU law has an inextricable link with Member State public liability systems (as to its origins, as to the application of Member State liability which takes place in the Member State) and it has in all likelihood had an effect on those systems and led to their adjustment.

Fourthly, this study could also function as a building block in an area which is expressly left out of the scope of this study. That is, the presentation and findings of this study could be useful when preparing the accession of the European Union to the European Convention of Human Rights. This is a very complex issue which involves various delicate legal and institutional questions, but also some pragmatic issues, such as those relating to the interplay of two (or more) compensation systems based on the treaties.

Finally, a number of other reasons could be used to justify this subject matter. In fact, changes in case-law and treaty structure call for an up-to-date analysis of the 'current state of state liability'.³⁴ Moreover, public liability can also be analysed as an example of how constitutionalisation of the Union works in practice.

³⁰ P Aubin, *Die Haftung der Europäischen Wirtschaftsgemeinschaft und ihrer Mitgliedstaaten bei gemeinschaftsrechtswidrigen nationalen Verwaltungsakten* (Baden-Baden, Nomos, 1982).

³¹ See below ch 3, s I.

³² eg, in CFI Case T-212/03 *MyTravel v Commission* (damages action dismissed, no appeal) [2008] ECR II-1967, the original damages claim was £518 m. In CFI Case *Schneider Electric v Commission* ECR, it was some €1663 m.

³³ See ch 3, s II below.

³⁴ To use an expression from C Harlow, 'The Current State of State Liability' (2002) (4) *Rivista trimestrale di diritto pubblico* 915–33.

III. STRUCTURE AND TERMINOLOGY

A. Structure

In order to examine the three issues set out in section II.A above, this study has been organised in the following way. First, general issues of the two liability systems are analysed through a common structure, thus highlighting the similarities and inherent differences. Second, the core convergence in EU public liability law is examined through two parameters. These correspond to the two harmonised conditions laid down for EU public liability in both liability systems, namely (1) the granting of rights to individuals and (2) sufficiently serious breach.³⁵ The structure of the study is presented in Figure 1.3 in summary form.

| |
|---|
| Ch 1 - Introduction |
| Ch 2 - Parameters of convergence <i>... s IV Structural aspects - s V Rights - s VI Breach ...</i> |
| Ch 3 - Contexts of convergence |
| Ch 4 - Alignment of the two systems |
| Ch 5 - Liability of the European Union <i>s I Structural aspects - s II Rights - s III Breach ...</i> |
| Ch 6 - Liability of the Member States <i>s I Structural aspects - s II Rights - s III Breach ...</i> |
| Ch 7 - Conclusions on convergence <i>s I Structural aspects - s II Rights - s III Breach ...</i> |

Figure 1.3 Structure of the Research

After the introductory chapter one, chapter two examines the parameters of ‘convergence’ and its function in this study. It also sets out the methodological issues, and the general framework for the subsequent presentation and assessment of the convergence parameters of the two liability systems. In other words, the methodological issues presented in this chapter are applied when the liability law of the European Union is presented in chapter five, and when the liability law concerning the Member States is presented in chapter six. Most importantly, assessment of convergence in concluding chapter seven follows the structure presented in the methodological sections.

Chapter three sets out the world surrounding EU law public liability, ie its operational context. It also examines the constitutionalisation of EU law and its relation

³⁵ ECJ *Brasserie du Pêcheur and Factortame* (n 10).

to EU law on public damages liability. Chapter four presents and analyses the process as a result of which convergence was attained. Chapters five and six, respectively, set out and assess the law relating to liability of the European Union and to liability of the Member States, following the structures and parameters laid down in the methodological sections.

Chapter seven presents the results, the conclusions on convergence, by regrouping the assessment criteria of the two systems in a vertical manner (one section on rights in EU and Member State liability, the other on breach in EU and Member State liability, and so on).

The basic structural approach chosen here is to examine the two key criteria of damages liability in both liability systems. The two elements chosen are the essential criteria for any damages liability. Therefore, it could be expected that most convergence – if any – should have been reached on these essential elements. In addition, the courts proceed in their analysis so that it is most often on the basis of these three criteria that liability is rejected. It is thus likely that one of these criteria is assessed or addressed in some way in most case-law. They are also the criteria on which there appears to be most case-law, both for EU liability and for Member State liability, emanating both from the ECJ and the CFI.

Causation, the third element, is not treated in this study. It is somewhat different in nature. In the first place, it is the only element on which the ECJ has said that there is no convergence, as Member State liability causation (or ‘direct causation’) is defined in national law. Thus there is very little ECJ case-law on causation concerning the Member States. Moreover, causation in both systems is also a highly fact-intensive criterion.³⁶

³⁶ On causation, see eg, F Smith and L Woods, ‘Causation in *Francovich*: The Neglected Problem’ (1997) *ICLQ* 925–41, AG Toth, ‘The Concepts of Damage and Causality as Elements of Non-Contractual Liability’ in T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (The Hague, Kluwer Law International, 1997). For case-law see eg, CFI Case T-138/03 *E.R. et al v Council and Commission* (no causal link, appealed C-100/07 P) [2006] ECR II-4923, [99]–[140], ECJ Case C-100/07 P *E.R. et al v Council and Commission* (appeal dismissed) [2007] ECR I-136*, Summ.pub. (order of 4 October 2007); ECJ *Commission v Schneider Electric (No 1 extent of liability)* (n 6), [190]–[205], [221] and [222]; GC Case T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04 *Arizmendi and others v Council and Commission* (damages claim dismissed, no appeal) [2009] ECR II-4883 [85]–[94]; GC Joined Cases T-252/07, T-271/07 and T-272/07 *Sungro v Council and Commission* (damages claim dismissed, no appeal) [2010] ECR II-55 and GC Case T-452/05 *BST v Commission* (damages claim dismissed, no appeal) [2010] ECR II-0000 (judgment of 28 April 2010). Of particular interest are also contributions where causation is analysed beyond the two public law liability systems assessed in this book, ie by including an ‘EU tort law aspect’ (causation in EU damages liability directives) and national systems; see on this aspect eg IC Durant, ‘Causation’ in H Koziol and R Schulze (eds), *Tort Law of the European Community* (Vienna, SpringerWienNewYork, 2008); W van Gerven and J Lever et al, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford, Hart Publishing, 2000) 395–466 and W Wurmnest, *Grundzüge eines europäischen Haftungsrechts: eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts* (Tübingen, Mohr Siebeck, 2003), 159–91.

B. Some Terminological Points and Limitations

i. 'Public Liability in EU Law'

In this study, 'public liability in EU law' is used as a joint term referring to the two EU law-based systems of non-contractual liability, namely that of the European Union and that of the Member States of the European Union, for breaches of European Union law. The choice of term was not straightforward and its two constituent parts, 'public authorities' and 'liability' should be explained.

'Public [authorities]', instead of 'government', 'crown' or 'state'. The subject matter of this study covers both the public liability in damages of the European Union for breaches of EU law, and the damages liability of the Member States of the European Union for breach of EU law. This coverage has posed some problems as to finding an appropriate term to describe the scope of the work. The joint term '*public authorities*' seems appropriate to cover them both. Even if the terms 'governmental liability'³⁷ or 'state liability'³⁸ could well be used to describe the liability situation of the Member States, the word 'crown'³⁹ would clearly be inappropriate for that purpose. The European Union can be called many things, but to refer to it as government, state, or even crown, would be inaccurate and misleading.

Starting from the Member State level, the Court has been called on to define what is covered by the concept of 'state' in an EU context. According to the constant case-law of the Court the obligations arising from Community directives are binding, inter alia, on bodies or entities subject to the authority or control of a public authority or the state.⁴⁰

This is of course a very clear and workable EU level concept. It can easily be used at Member State level, and reference can be made to state liability, both under national and EU law.⁴¹ The only problem is that the state as a legal entity does not exist everywhere. Therefore in some states or third countries the corresponding

³⁷ cf P Schuck, *Saving Government* (New Haven, Yale University Press, 1983) or J Bell and AW Bradley (eds), *Governmental Liability: A Comparative Study* (London, The United Kingdom National Committee of Comparative Law, 1991).

³⁸ cf D Fairgrieve, *State Liability in Tort. A Comparative Law Study* (Oxford, Oxford University Press, 2003) and C Harlow, *State Liability: Tort Law and Beyond* (Oxford, Oxford University Press, 2004).

³⁹ cf PW Hogg and PJ Monahan, *Liability of the Crown*, 3rd edn (Toronto, Carswell Thomson Professional Publishing, 2000).

⁴⁰ ECJ Case C-6/05 *Medipac – Kazantzidis* [2007] ECR I-4557 [43]; ECJ Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723 [49]; ECJ Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839 [30] and [31]; ECJ Case C-188/89 *Foster and others v British Gas* [1990] ECR I-3313 [18]; ECJ Case C-297/03 *Sozialhilfverband Rohrbach* [2005] ECR I-4305 [27]. See also V Kvjatkovski, 'What is an 'Emanation of the State'? An Educated Guess' (1997) *European Public Law* 329–38.

⁴¹ cf Fairgrieve, *State Liability in Tort. A Comparative Law Study* (n 38); Harlow, *State Liability: Tort Law and Beyond* (n 38); F Ossenbühl, *Staatshaftungsrecht. 5., neu bearbeitete und erweiterte Auflage* (Munich, Beck, 1998); Senkovic, *L'évolution de la responsabilité de l'État législateur sous l'influence du droit communautaire* (n 24) – State responsibility on the other hand refers to liability under public international law, cf J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge, 2002).

liability is that of ‘the crown’⁴² or that of ‘the government’.⁴³ A further complication was that this work also covers the liability of the European Union. Even if one of the above terms could be used with some force as a generic descriptor of the state, it would still not cover the European Union. Therefore ‘public authorities’ is used as the generic term. This concept seems to be fairly neutral and widely in use.⁴⁴ Accordingly, for liability, reference is made to ‘public liability’.

‘Liability’, instead of ‘tort’ or ‘non-contractual liability in damages’. As to the second part of the term: for the liability of the European Union, the TFEU mentions ‘non-contractual liability in damages’, while another possibility is ‘tort’. The doctrine has used both terms.⁴⁵ Even if ‘tort’ is handy and short, it is not fully accurate.⁴⁶ Thus preference has been given to ‘liability’.

In all, the term ‘public liability in EU law’ has been chosen to describe the subject matter of the study, with synonyms such as ‘EU law public liability’, ‘EU public liability’. This term refers to EU law and, it contains the public elements and the notion of liability. It is thus distinguished from public liability in ‘damages under national public liability systems in Member States, and from ‘private’ tort law liability, either under EU or national systems. It also contains the subliminal distinction between the rights and remedies approaches. It puts forward the liability aspect: public authorities are to bear the consequences of their action. It is not so much about what ‘I’ can do, or what ‘I’ have the right to, but rather about a duty owed to individuals and economic operators by public authorities.

Changes following from the entry into force of the Lisbon Treaty on 1 December 2009 have been taken into account.⁴⁷ As the European Community ceased to exist and was replaced by the European Union, it has been necessary to define a somewhat consistent approach to the distinction ‘Community’/‘Union’. ‘Liability of the European Union’ is used as a generic term, even if in formal terms a distinction

⁴² Hogg and Monahan, *Liability of the Crown* (n 39).

⁴³ Bell and Bradley (eds), *Governmental Liability: A Comparative Study* (n 37); For United States, see Schuck, *Suing Government* (n 37).

⁴⁴ eg D Fairgrieve and M Andenas et al (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London, BIICL, 2002) and C Booth QC and D Squires, *The Negligence Liability of Public Authorities* (Oxford, Oxford University Press, 2006).

⁴⁵ See eg, G Lysén, *The Non-Contractual and Contractual Liability of the European Economic Communities* (n 21), C Van Dam, *European Tort Law* (Oxford, Oxford University Press, 2006) or H Koziol and R Schulze (eds), *Tort Law of the European Community* (Vienna, SpringerWienNewYork, 2008).

⁴⁶ The problems of choosing between ‘tort’ and ‘non-contractual liability’ can be highlighted by the choices of Professor Christian von Bar. His comprehensive study on damages liability was about ‘torts’ (C von Bar, *The Common European Law of Torts. Volume One* (Oxford, Clarendon, 1998), C von Bar, *The Common European Law of Torts. Volume Two* (Oxford, Clarendon, 2000)). Some 10 years later he produced a voluminous study on the same area, now about ‘non-contractual liability’ (C von Bar (ed), *Principles of European Law: Non-Contractual Liability Arising out of Damage Caused to Another: v. 7 (European Civil Code Series)* (Oxford, Oxford University Press, 2009)). In the latter he explained the change of term as follows (p xiii): ‘The title of this volume “Non-contractual liability arising out of damage caused to another” was suggested by Professor Eric Clive, Edinburgh. We have gratefully taken it up. The expression “tort law” is too tied to the Common Law tradition, while “law of delict” is too closely allied to the latin tradition and, moreover, no longer entirely correct, semantically considered, in view of the widespread forms of liability without intention or negligence.’

⁴⁷ For a concise analysis of the amendments, see M Dougan, ‘The Treaty of Lisbon 2007: winning minds, not hearts’ (2008) *Common Market Law Review* 617–703.

should be made for the liability of the European Community (up to 30 November 2009).⁴⁸ Equally, reference is made to EU law, together with other ‘union’-based derivatives (‘union law rights’, ‘acquis of the Union’, ‘Union law’).⁴⁹ For specific facts or legal situations relating to the time before entry into force of the Lisbon Treaty, reference is made to the ‘Community’. References to Treaty Articles are given to the Articles as applied at the time of the facts of the case (EEC/EC Treaty, TFEU), with additional reference to current numbering of the TFEU, where appropriate.

ii. *Limitations*

As to the *liability of the European Union*, the focus is on its non-contractual liability, and issues of *contractual* liability, foreseen now in Article 340(1) TFEU, are not addressed.⁵⁰ Moreover, for Union liability, the emphasis is on its liability towards the ‘outside’. There is no systematic discussion of *staff cases* and damages issues in that context. However, there are references to staff cases when they appear appropriate to illustrate certain developments.⁵¹

The Community, whenever used, means the *European Community*. Specific liability issues of the two other Treaties, namely liability under the European Coal and Steel Community Treaty (*ECSC*), which came to an end in 2002, and the *Euratom* Treaty, which continues to exist separately even after the entry into force of the Lisbon Treaty, are not discussed.⁵²

⁴⁸ Of course, to be fully precise, one should speak of the liability of the European Economic Community, when discussing the liability before the entry into force of the Treaty of Maastricht.

⁴⁹ Even if, once again, a distinction could timewise be made between the Community and Union based expressions, such as *acquis communautaire*.

⁵⁰ For contractual liability, see eg, T Heukels, ‘The Contractual Liability of the European Community Revisited’, in T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (The Hague, Kluwer Law International, 1997).

⁵¹ For the specificities of the staff rules, see eg, S Dalle-Crode, *Le fonctionnaire communautaire: droits, obligations et régime disciplinaire* (Brussels, Bruylant, 2008).

⁵² On ECSC liability see eg, G Bebr, ‘The Non-contractual Liability of the European Coal and Steel Community’ in T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (The Hague, Kluwer Law International, 1997) and for Euratom see eg, L Hancher, ‘Issues of Non-Contractual Liability under the EAEC Treaty’ in T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (The Hague, Kluwer Law International, 1997).