

# Contents

<i>Acknowledgements</i>	v
<i>Abbreviations</i>	xiii
<i>List of Tables and Figures</i>	xv
<i>Tables of Cases</i>	xvii
<i>Table of Statutes</i>	xxxii
<b>1 Introduction</b>	1
I. EU Public Liability Law and its Convergence	1
A. Liability of the European Union	1
B. Liability of the Member States	2
C. Convergence as an Approach to get ‘Beyond <i>Braserie</i> and <i>Bergaderm</i> ’?	3
II. Research Issues	6
A. The Aim and the Research Questions	6
B. Added Value: is it Still Worth a Try to Dig into <i>Francovich</i> , and EU Liability?	6
III. Structure and Terminology	10
A. Structure	10
B. Some Terminological Points and Limitations	12
<b>2 Parameters of Convergence</b>	15
I. Convergence and Divergence in European Public Liability Law	15
A. Characterising ‘Convergence’ and Adjacent Concepts	15
B. Four Types of Convergence: Top-Down, Bottom-Up, Horizontal and Spill-over	17
C. Convergence v Divergence and Risks of ‘Convergence Fundamentalism’	20
II. Convergence Approach and General Methodological Issues	21
A. The Added Value of the ‘Convergence Approach’ in this Study	21
B. Methods and Approaches	23
C. Doctrine on EU Law Public Liability	24
D. Situating the Study in the Field of EU Law	25
III. Criteria for Assessing the Case-law	25
A. EU Public Liability Law as Case-law	25
B. Locating the Sources of Law for EU Public Liability Law	26

C. Some Criteria for Assessing the Case-law on EU Public Liability Law	30
IV. Structural Aspects for Comparing the Main Features of the Two Liability Systems	38
V. Introduction to 'Rights'	39
A. 'Rights', 'a Rule of Law Granting Rights to Individuals', 'Individual Rights' and 'Subjective Rights'	39
B. Path to Convergence for the Condition Concerning 'Rights'	41
C. Hypothesis for Assessment of the Rights Criterion in Chapter Five and Chapter Six	42
VI. Introduction to 'Breach' and 'Fault'	43
A. Overview	43
B. Procedures for Establishing Breach of EU Law in the Two Liability Systems	44
C. Qualifying Breach for Damages Purposes	47
D. 'Sufficiently Serious Breach' as an Autonomous EU Law Concept, and the Role of 'Discretion'	51
<b>3 Contexts of Convergence</b>	<b>55</b>
I. Constitutional Context of EU Public Liability	55
II. Public Liability in National Law	59
A. Overview of National Public Liability Laws	59
B. Convergence of National Public Liability Laws	62
C. Remarks in Relation to Public Liability in EU Law	64
III. Other Public Liability Systems	66
A. Public Liability in the Agreement for the European Economic Area (EEA)	66
B. Breaches of the European Convention of Human Rights (ECHR)	68
C. Responsibility and Liability under International Law	69
D. Public Liability in Canada and the United States	70
IV. Private Liability for Breaches of EU Law	70
V. European Convergence of Private Law Liability	71
A. Academic Work in the Universities, the Commissions, the Study Groups	72
B. Judges and Practitioners	73
C. International Conventions	73
D. European Union Directives	74
E. The Case-law of the ECJ	76
VI. European Convergence of Administrative Law	77

<b>4</b>	<b>Alignment of the Two Liability Systems</b>	<b>81</b>
I.	The Liability Systems in their ‘Original’ Setup	82
A.	Community Damages Liability: Conditions Laid Down in <i>Schöppenstedt</i> (ECJ 1971) and <i>Adams</i> (ECJ 1985)	82
B.	Member State Damages Liability: Conditions set in <i>Francoovich</i> (ECJ 1991) and <i>Brasserie du Pêcheur</i> (ECJ 1996)	85
II.	The ‘New’ <i>Bergaderm</i> Conditions	86
A.	<i>Schöppenstedt</i> and its Criticism by Scholars	86
B.	<i>Bergaderm</i> (ECJ 2000)	87
C.	Implementing <i>Bergaderm</i> and its Aftermath	89
D.	What has <i>Bergaderm</i> Changed in Community Liability?	90
III.	Arguments Advanced for Convergence of the Two Liability Systems	91
A.	Scarce Justification for Convergence by the ECJ	91
B.	Further Elements in the Opinions of the Advocates General	93
IV.	Nature of Convergence of the Two Public Liability Systems	96
A.	Striving for Convergence as a Fundamental Element of EU Law	96
B.	Maintaining Convergence	98
C.	Similarity – or Difference – Between Liability Situations?	99
D.	Outlook	101
<b>5</b>	<b>Liability of the European Union</b>	<b>103</b>
I.	Structural Aspects	103
A.	General Issues	103
B.	Institutional Coverage: Legislative, Executive and Judicial Branches	105
C.	Sectors of Liability: Examples	108
D.	Applicants	109
E.	Procedural Questions	109
II.	Granting of Rights to Individuals: Liability of the European Union and EU Law Rights Breach of which May Give Rise to Liability	111
A.	Introduction	111
B.	Types of EU Law Rights Invoked in Liability Case-law Concerning the European Community	111
C.	No Rights for Individuals (or No Superior Rules of Law for Protection of the Individual)	127
D.	Interim Conclusion	132

III.	Sufficiently Serious Breach: Liability of the European Union and Assessment of Seriousness of Breach in Case-law	132
A.	Assessing Breach for Liability of the European Union: from Dichotomy to a Sliding Scale	132
B.	First Limb: Existence of a Breach of EU Rule of Law	133
C.	Second Limb: the Threshold of ‘Sufficiently Serious Breach’ and the Scope of Discretion	134
D.	Wide Discretion of the EU Institutions	136
E.	Narrow Discretion	139
F.	Interim Conclusion	147
IV.	Successful Cases	148
<b>6</b>	<b>Liability of the Member States</b>	<b>153</b>
I.	Structural Aspects	153
A.	General Issues	153
B.	Institutional Coverage: Legislative, Executive and Judicial Branches	155
C.	Sectors of Liability: Examples	156
D.	Applicants	157
II.	Granting of Rights to Individuals, Liability of the Member States and EU Law Rights Breach of Which May Give Rise to Liability	158
A.	Relationship Between Granting Individual Rights in the Damages Context and Direct Effect	158
B.	Hohfeldian Framework for Analysing Rights in EU Law	162
C.	Implementing Hohfeld in <i>Francovich</i> : Rights Invoked in Member State Liability Cases in a Hohfeldian Setting	166
D.	Other Sources	170
E.	Specific Issues	172
F.	Interim Conclusion	175
III.	Sufficiently Serious Breach: Liability of the Member States and Assessment of Seriousness of Breach in Case-law	176
A.	First Limb: Existence of a Breach of EU Rule of Law	176
B.	Second Limb: the Threshold of a ‘Sufficiently Serious Breach’	178
C.	Breach, but Not ‘Sufficiently Serious’ or ‘Excusable’	179
D.	Wide Discretion of National Legislator or Administrative Authority	181
E.	Narrow Discretion of National Administrative Authority or National Legislator	182
F.	Establishing Discretion – or Defining the Branch of State Responsible?	186

G. Breach by a National Court – Liability Applies, under Specific Conditions	187
H. Breach Clearly or ‘Automatically’ Sufficiently Serious	190
I. Excursion: The <i>Test Claimants</i> Cases	191
J. Interim Conclusion	193
IV. Application in Practice and Successful Damages Cases	195
<b>7 Conclusions</b>	<b>197</b>
I. Main Aspects of the Two Liability Systems	197
II. Convergence Regarding ‘Granting of Rights to Individuals’	199
III. Convergence Regarding ‘Sufficiently Serious Breach’	202
IV. Essential Findings on Convergence	206
A. Convergence: Brought About by all Means other than Legislation	206
B. Convergence: a Laudable Objective, but Reasons for it are Understated in the Case-law	207
C. Case-law as Source for Convergence	207
D. ‘Haphazard’ Convergence by Case-law?	208
E. National Implementation – a Threat for Convergence?	210
F. Convergence in Context: Findings to Help National and EU Judges	211
G. Appearance and Effects of Convergence – Has it Meant ‘Progress’ for EU Public Liability Law?	212
H. Convergence and Joint Liability	214
V. Outlook Beyond Convergence	216
<i>Bibliography</i>	221
<i>Index</i>	235