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Harmonizing Tort Law

A Comparative Tort Law and Economics Analysis

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Harmonizing Tort Law: A Comparative Tort Law and Economics Analysis

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Abstract

This paper presents a review of the literature on comparative tort law and economics. It pays special attention to the economics arguments against and in favour of harmonization of tort law in Europe.

Keywords

Comparative tort law and economics, European private law, tort law, economic analysis of tort law, harmonization, regulatory competition

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15.1 Introduction

[435] Differences between tort law systems can be analysed from different perspectives. Take for instance liability for pure economic loss, which is prototypical of an ongoing debate among comparative tort law scholars. Tort law systems in Europe diverge considerably in their dogmatic approach to such cases, regarding both the extent to which such claims are acknowledged at all and the legal reasoning used for doing so. In common law systems, the so-called 'exclusionary rule' is predominant. Germanic legal systems are hostile to claims for pure economic loss, but do acknowledge certain categories in which protection is offered. Contrastingly, the franco-legal systems tend to be more receptive to claims for pure economic loss as such. There are historical, dogmatic and technical legal explanations for the differences in treatment of pure economic loss and indeed differences between tort law systems as a whole. These explanations have been reported extensively in legal literature and they explain the differences between the main families of tort law in Europe to a considerable extent.

By contrast, comparative law and economics offers both a positive and normative economic analysis of these differences between tort law systems. Cf. M. Faure, 2003, p. 33-34. For example, in the area of pure economic loss, see the comparative economic analysis of pure economic loss by Francesco Parisi, 2003, Francesco Parisi, Vernon Valentine Palmer and Mauro Bussani, 2007. Concerning pure economic loss scholars have put forward several economic justifications for upholding the 'exclusionary rule'. Others have argued that under specific circumstances there are good reasons for allowing claims for pure economic loss. This illustrates that comparative law as well as law and economics have much to gain from a mutual exchange of insights and ideas. On this topic see, e.g., W. Bishop, 1982; M.J. Rizzo, 1982; W. Bishop, 1982*; W. Bishop, 1982; William Bishop, 1986; Israel Gilead, 1997; Fernando Gómez and Juan Antonio Ruiz, 2004; Giuseppe Dari-Mattiacci and Hans-Bernd Schäfer, 2007.

[436] The positive comparative law and economics analysis usually focuses on the central idea that differences between tort law systems are the result of differing values and preferences in domestic politics, legislation and courts. Cf. M. Faure, 2008, p. 40. Systems may thus spontaneously develop in converging or diverging directions. On the economics of convergence see, e.g., the game-theoretical analysis of convergence by Arnald J. Kanning, 2003, p. 12 ff. The topic of convergence is closely related to the economic analysis of 'legal transplants'. See, e.g., Ugo A. Mattei, Luisa Antonioli and Andrea Rossato, 2000, p. 509 ff.; Jörg Fedtke, 2006, Ugo A. Mattei, 1997, p. 101 ff., 434 ff.; A. Ogus, 1999, p. 409; Heico Kerkmeester and Louis Visscher, 2003, p. 5 ff. On methods of convergence see, e.g., Jan Smits, 2006, p. 66-67.

A comparative analysis also allows us to test the effectiveness of legal regimes and to perform cost-benefit analysis on the various alternative tort systems. Such comparative

analysis may show that the reduction in tertiary accident costs of hospital injuries in legal systems adhering to a no-fault compensation scheme is superior to legal systems using fault-based tortious liability in such cases. See, e.g., the comparative legal and economic analysis by Rui Cascão and Ruud Hendrickx, 2007.

Moreover, comparative law and economics may show that, although the legal reasoning and historical roots of specific items within tort law systems vary, the ultimate rationales may be identical. Cf. the distinction between 'working rules' and 'legal formants' by Ugo A. Mattei, Luisa Antonioli and Andrea Rossato, 2000, p. 507 (cf. Ugo A. Mattei, 1997, p. 69 ff), or between actual and superficial differences by A. Ogus, 1999, p. 405. In this respect, for instance, both strict liability and fault-based liability with a rebuttable presumption of fault may serve exactly the same goals although the legal foundations are not identical. Cf. M. Faure, 2003, p. 60. As far as the normative comparative analysis is concerned, such efforts are usually set against the background of the Calabresi framework. Seminal Guido Calabresi, 1970. Cf. R. Cooter and T. Ulen 2008, p. 336 ff. For Europe, see, e.g., Hans-Bernd Schäfer and Claus Ott, 2004, p. 113 ff.

15.2 *Tort law as domestic preference*

Comparative economic analysis would start with the assumption that differences in law stem from differences in domestic preferences. From an economic perspective, such differences in law are not to be deplored if they originate from differences in preferences. They may even contribute to competition between legal systems in providing the best legal order to their citizens. See M. Faure, 2003, p. 78.

Normative economic analysis, however, may be sceptical of certain domestic preferences, for instance because these preferences promote the use of tort law as an instrument of wealth redistribution or because these [437] preferences set inefficiently high levels of care standards. See Gerhard Wagner, 2005, p. 1300. See also Richard Craswell, 1991, Duncan Kennedy, 1982.

Regarding the development of legal systems, it has been pointed out that spontaneous convergence of legal systems is more likely to occur in those areas of law that are designed primarily to facilitate trade. In more interventionist areas of law – including tort law – such spontaneous convergence is said to be less likely to occur because of the strong divergence in domestic preferences regarding the level of protection. See A. Ogus, 1999, p. 418.

Indeed, if tort law is first and foremost a system used for setting the preferred level of reduction of accident costs, the operation of tort law very much depends on domestic risk appetite and perception. For instance, it has been argued that the fact that the UK does not have strict liability for motor vehicle accidents and France does, should be explained by differences in domestic preferences regarding reduction of accident (occurrence and) costs. See A. Ogus, 1999, p. 414; T. Hartlief, 2002, p. 226. Regarding accident cost, it is therefore

sometimes said that some tort law systems focus more on prevention of accidents and others are primarily concerned with reducing secondary and tertiary accident costs. See Ulrich Magnus, 2002, 214-215. Note that domestic preferences regarding tort law cannot only be found in the choice of the level of reduction but also in the position on moral and socio-economic issues such as, e.g., whether to allow claims for wrongful life and whether fundamental democratic rights such as freedom of speech are to be protected with tort law.

As mentioned, differences between tort law systems may stem from different risk appetites, for instance as a result of different valuations of human life and of the societal value of activities causing accident risks. Risk perception may vary as well. Differences in risk perception may result in inefficient standards of conduct under negligence rules. There is some evidence of imprecise risk assessment by courts under the influence of cognitive distortions in judicial probability judgement. See, e.g., Ilan B. Vertinsky and Donald A. Wehrung, 1991; Paul Slovic, 2001; W. Kip Viscusi, 1992; W. Kip Viscusi, 1998; Jonathan Baron, 2000; Cass. R. Sunstein, 2000; Richard Wilson and Edmund A. C. Crouch, 2001; Cass R. Sunstein, 2000b; Jeffrey J. Rachlinski, 1998.

Although this may naturally be considered to be the error cost of a negligence rule, it cannot be ruled out that similar distortions emerge when domestic legislatures decide to introduce certain liability regimes. Introduction of strict liability for a specific ultrahazardous activity in a given country in response to a salient disaster may thus be the result of a legislative availability bias rather than a balanced risk assessment.

A case in point concerns liability for inherently dangerous activities. It [438] poignantly shows how legal systems can arrive at different tort law solutions to the same problem. Such differences in the treatment of inherently dangerous activities may signal differences in domestic risk appetite, but may also be caused by variation in risk perception. Moreover, such differences may also be explained by the bounded ability to assess risks in the first place. Note that this also demonstrates the limits of true harmonization of liability for inherently dangerous activities. Comparative analysis of liability for inherently dangerous activities demonstrates that certain risks are not present in all countries, which may justify differences in tort law regimes and may explain different risk appetites. Moreover, it also illustrates that one court may find a certain activity to be dangerous and another court may not. Consider, for example, the 'general clause' of liability for dangerous activities in Portuguese and Italian legal systems. The list of activities that are and are not considered dangerous under these legal systems seems rather unbalanced. See further W.H. van Boom, 2008.

15.3 *Domestic preferences and the market for tort law systems*

Concerning the market for tort law systems, it seems that theoretically speaking there are two markets. First, there is the market where potential tortfeasors and victims operate. As a rule, given prohibitive transaction costs it is impossible for potential victims and tortfeasors

to agree on the applicable tort law system. The prohibitive transaction costs is usually put forward as the justification for state intervention and the promulgation of tort law as a set of default or compulsory rules. See, e.g., Guido Calabresi and A. Douglas Melamed, 1972; Louis Kaplow and Steven Shavell, 1996; S. Shavell, 2004, p. 83 ff.

Given the fact that states design their own tort law systems, there can be a market of tort law systems, in the sense that potential tortfeasors may choose to move their activities to another jurisdiction where the tort system is more favourable. One of the preconditions for such rational calculation is that it is predictable which tort law system applies to accident-causing behaviour. In Europe, this is indeed highly predictable because as a rule the Rome II Regulation (EC Regulation 864/2007) refers to the law of the country in which the damage occurs. So, if for instance obstetricians in state A are subject to a strict liability for brain damage in neonatal and as a result the liability insurance premiums in this state are excessive, they may choose to migrate to state B where a less burdensome liability system is in operation and insurance premiums are lower. In American literature there is some empirical evidence to this effect. See, with further nuances, W.H. van Boom and Andrea Pinna, 2007.

Note that central to the theoretical analysis of the market for tort law is the assumption that 1) citizens have perfect information on alternative legal systems, 2) entrance and exit costs are low (zero transaction costs), [439] 3) there are no conflicting or competing aspects in choosing location, and 4) that competition between legal systems does not cause negative externalities. Assumptions 1, 2, and 3 may be closer to reality when the analysis is applied to businesses and when entrance and exit are not physical but virtual, as is the case with choice of law in contracts. Such choices are more difficult to make in a tort law setting. Also note that opponents of harmonization of tort law also argue that in reality, businesses in Europe are rather indifferent to the details of tort law systems. See, e.g., T. Hartlief, 2002, p. 228. This is a plausible argument, but it is unclear how it fits into the comparative economic analysis. If tort law is not a relevant aspect in business decisions, how can there be a proper market for tort law?

The 'second market' for tort law systems concerns society as a whole, in which a constituency has to choose (by means of election; A. Ogus, 1999, p. 407) between different preferred tort law systems. If country A acknowledges claims for wrongful birth and country B does not, this may be explained in terms of diverging domestic preferences. The reasoning here is that if the laws of country A have been selected through a democratic voting process, majority rule will express the majority preference. In comparative law and economics, reference is made here to Tiebout's 1956 paper on optimal provision of public goods. See Charles M. Tiebout, 1956, p. 416 ff. By allowing constituencies to vote or to vote with their feet, various legal solutions may compete and communities may thus express their preferences. Legal diversity in this theoretical analysis is thus the outcome of the diverging preferences of communities and the competition between such communities. See, e.g., M. Faure, 2003, p. 36 ff.; Roger Van den Bergh, 2000, p. 437 ff.; Roger Van den Bergh, 1994, p. 339 ff.

In our example, harmonizing the laws of countries A and B would contravene the preferences of at least one of the countries involved and would thus not maximize overall welfare. Unsurprisingly, comparative economic analysis is said to favour decentralized rather than centralized (federalized) rulemaking and to discourage harmonization of tort law as a rule. Cf. Gerhard Wagner, 2005, p. 1271. The implicit assumption in such reasoning is that if, e.g., the European Union were to harmonize tort law, this would run counter to the preferences of some of the countries involved whereas the assumption of Brussels diplomats is naturally quite the opposite.

15.4 *Differences in European tort law systems and the harmonization of tort law*

15.4.1 *General*

On comparative economic analysis in view of harmonization of European private law systems, see, e.g., [440] Michael G. Faure, 2000, p. 467 ff.; M. Faure, 2003, p. 31 ff.; Gerhard Wagner, 2005 *, p. 3 ff.; Gerhard Wagner, 2005, p. 1269 ff.; Roger Van den Bergh and Louis Visscher, 2006, p. 514 ff.; Jan Smits, 2006, p.67 ff. See Roger Van den Bergh, 2000, p. 463, for an economic step-by-step checklist for harmonization in general.

15.4.2 *Economic analysis in the harmonization debate*

Economic analysis has definitely entered the arena of the harmonization debate. The Draft Common Frame of Reference (DCFR 2008) seems to take a principled approach: “All areas of the law covered by the DCFR have the double aim of promoting general welfare by strengthening market forces and at the same time allowing individuals to increase their economic wealth. In many cases the DCFR is simply setting out rules that reflect an efficient solution. (...) Many rules of the law on non-contractual liability for damage and even of unjustified enrichment law and the law on benevolent intervention in another’s affairs can be explained on the same basis; in any event, they should be efficient. The rules in the DCFR are in general intended to be such as will promote economic welfare; and this is a criterion against which any legislative intervention should be checked.” (p. 16). At the same time, however, it is argued that “Private law must also demand a minimum of solidarity among the members of society and allow for altruistic and social activities.”

In fact, the approach taken by the DCFR 2008 is not easily reconciled with mainstream comparative law and economics. Contrary to what the DCFR seems to suggest, law and economics would consider the efficiency paradigm to be a starting point for rejection of harmonization of European private law. Moreover, normative economic analysis may be sceptical of the idea of tort law as an instrument of wealth redistribution rather than an instrument for optimal reduction of accident costs. See Gerhard Wagner, 2005, p. 1300. Cf. Richard Craswell, 1991, Duncan Kennedy, 1982.

Economic analysis can give some guidance to the decision-making process concerning harmonization of tort law in Europe. It cannot give straightforward answers, as M. Faure, 2003, p. 35 rightly observes, but it does allow balanced criteria to be advanced for identifying those areas and topics that are good candidates for harmonization. Following a similar path, W.H. van Boom, 2008, p. 131 ff. identifies some of those areas. Undeniably, in practice, at the end of the day the only practically and politically relevant question is whether there is both a perceived *need* and a *political will* for harmonizing tort law in Europe. Political will is even more relevant in light of the obstacle of the possibly absent competence of the EU to harmonize tort law anyway. On the issue of competence see, e.g., Ulrich Magnus, 'Towards European Civil Liability', in: Michael Faure et al. (ed.), *Towards a European Ius Commune in Legal Education and Research* (Antwerpen 2002), p. 208 ff.

[441] Generally speaking, in legal doctrine the aims of tort law are considered to be the protection of interests – life, property and economic interests to some extent – against wrongs, whereas contract law aims at facilitating the exchange of goods and services. Differences between jurisdictions in contract law may merely amount to superfluous transaction costs rather than well-contemplated diverging national preferences.

The rationale for harmonization of contract law therefore does not appear to be equally forceful in the case of tort law. Moreover, tort law as it stands in Europe today seems to play such a relatively minor role in the decision making of both businesses and consumers, that it seems unlikely that differences in tort law would distort any economic level playing field. Admittedly, this might well be because on a more abstract level, tort law systems in Europe are rather similar. By and large, all these systems offer compensation in certain cases of death and personal injury; they all protect property rights and they all tend to be reluctant to allow unbridled claims for pure economic loss. In a similar vein, see Ulrich Magnus, 2002, p. 206 ff. Admittedly, pure economic loss as such is treated very dissimilar in Europe (see supra), but even the legal systems most favourable to claims for pure economic loss (e.g., France) limit the extent of such claims with other instruments (e.g., proof of damage, calculation of damage, causation). So, differences between legal systems may sometimes be more superficial than actual. Cf. A. Ogus, 1999, p. 409. Standardization of legal terminology could help distinguish actual from superficial differences, as Roger Van den Bergh, 2000, p. 443, rightly observes.

By and large, tort law systems in Europe have much in common: they invariably tend to be less than fully predictable in outcome, expensive in operation, damned by business and cherished by the legal profession. So, even in this respect, European tort law systems may have more in common than comparative analysis at first blush suggests. Obviously, there are major differences between the legal systems at a concrete level. Causation, heads of damage, standard of care, the position of children in tort law, strict liabilities, they all tend to differ from country to country. See, e.g., Gerhard Wagner, 2005, p. 1281; Jaap Spier and Olav A. Haazen, 1999, p. 474 (“The legal systems of Europe have much in common, but the differences should not be underestimated.”). On a more abstract level and from a societal point of view, however, tort law systems in Europe seem to be rather similar in operation

and relative unimportant to business. As a result, pressure groups advancing the harmonization of tort law as a body of law seem to be absent. This might have been different if there were stark contrasts between the various tort law systems in Europe and if this affected private interests considerably. Imagine for instance, that member state A in Europe adhered to a system of US-style class action complete [442] with contingency fees and severe punitive damage in case of corporate wrongdoing. Then there might be a stronger political call for convergence, either for that particular member state to conform to others, or vice versa. Businesses (at least those exposed to the liability regime in member state A) would surely favour ironing out the extravagancies of this exotic system, and lawyers would undoubtedly take an opposing view since such an exotic system serves the bar's private interests best. In such an economic force field, tort law harmonization would be a more political issue. In reality, there is hardly any such force field in European tort law.

Indeed, harmonization of the general part of tort law in the EU is considered by some to be politically superfluous. The common market will not stop functioning properly if torts are not harmonized (nor does it currently dysfunction without a uniform contract law; cf. Jan Smits, 2006, p. 68-69). For critical notes on feasibility of pan-European harmonized tort law, see, e.g., Stathis Banakas, 2002, p. 365 ff.; M. Faure, 2003. Furthermore, Faure (p. 63 ff.) clearly demonstrates that the cost of harmonizing tort law (e.g., the cost of legal change at the cost of ignoring local preferences) have to be weighed against the benefits (market integration, quality setting).

This said, there can be parts of tort law that might 'need' harmonization from an EU *policy* perspective. Analysing EU policy and following a step-by-step approach, I argued elsewhere that some areas of tort law are more likely than others to be object of political efforts of EU harmonization. Among likely candidates for harmonization I identified (in decreasing degree of likelihood): economic torts, manufacturer's duty of care, cross-border tourist safety and motor vehicle accidents. See W.H. van Boom, 2008.

15.4.3 *Tort law an obstacle for the mobility of persons and goods?*

In the academic discussion on European harmonization of private law, the proponents of harmonization of tort law argue that a pan-European system of tort law would serve the goals of equal treatment of wrongs and rights and equal protection of, e.g., business interests in Europe (level playing field, ironing out alleged 'economic distortions'). Magnus 2002, p. 206 f. advances the argument that the diversity of European tort law systems inhibits free mobility of persons and goods as the risk of tortious liability and the amounts of compensation vary. Roger Van den Bergh and Louis Visscher, 2006, p. 514 argue that there is no empirical evidence that tort law poses such obstacles.

Likewise, T. Hartlief, 2002, p. 228, counters the arguments put forward by Magnus with roughly the following reasoning. First, there is no empirical evidence that ingenious tort law design can constitute a comparative [443] advantage for domestic legislatures, seducing

businesses to settle in their jurisdiction. Secondly, businesses' exposure to liability will depend on the law of the market where they sell their products. Finally, it is not differences in tort law but differences in product safety regulation that may constitute substantial trade barriers.

On the argument of distortion, see also Geraint G. Howells, 200669 ff., who notes that differences in tort law can also work the other way round and pose an obstacle for cross-border marketing for manufacturers in state A, who want to market their products in state B, where the level of consumer protection under tort law is much higher than in state A.

Furthermore, Hartlief 2002, p. 229 contends that there is no need for harmonization of tort law in view of cross-border accidents. Hartlief argues that if a German tourist feels the need to buy additional accident insurance when travelling to Spain, this need actually bears witness to the fact that the Spanish people prefer lower levels of liability than the Germans do. European harmonization of the level of protection and compensation offered by liability law would amount to paternalism. Moreover, as the level of compensation reflects domestic standards of living, harmonizing compensation as such would consequently amount to wealth redistribution. Finally, if cross-border accidents are to be settled according to a European harmonized level, there is still no reason why this should also entail harmonizing purely domestic accidents.

M. Faure, 2003, p. 52 ff., analyses the arguments in favour of harmonization of products liability. In the case of products, it has been said that differences in products liability and safety regulation pose barriers to trade and distortions of competition and that legal uniformity may help integrate domestic markets into a common European market. Faure is critical of these arguments, as the current Products Liability Directive does in fact not produce total harmonization, the conditions of competition are never equal, a level playing field ideal is realistically unattainable and indeed detrimental to international trade. Moreover, harmonized tort law is unnecessary for the creation of a common market. Cf. Geraint G. Howells, 2006, p. 71 f.

15.4.4 *Regulatory competition vs. culture*

Top-down harmonization of tort law on a European Union level stifles competition of legal rules, some argue. Non-intervention at the EU level can thus be justified on the "regulatory competition" rationale. See, e.g., Roger Van den Bergh and Louis Visscher, 2006, p. 517. This approach may favour the current competition between the PETL and the DCFR/PEL, which nicely illustrates that more choice for domestic legislatures between various tort law rules may be superior to no choice. Cf. Raffaele Caterina, 2006, p. 162.

[444] On the other hand, applying the theory of regulatory competition in the field of tort law seems to overestimate the rationality of tort law systems and their evolution in practice. Rather than a flexible tax on corporate or individual behaviour, which can be raised or

lowered periodically in order to adjust to market circumstances, tort law is perceived by many to be a (court-operated) system reflecting socio-legal and cultural preferences which does not easily adjust to changing demand in view of a 'legal competition' paradigm. I would not go as far as Jan Smits, 2006, p. 85, who argues that (private) law is not primarily the result of conscious choice but of spontaneous development, but as far as tort law is concerned, there is an element of truth in this analysis.

In fact, the debate among legal scholars pro and contra European harmonization of private law usually turns to whether socio-legal and cultural diversity in law can be overcome. The recurring theme in the publications of Legrand is that it cannot. See, e.g., P. Legrand, 1996, p. 52 ff; P. Legrand, 1997, p. 111; P. Legrand, 2002, p. 61 ff. In tort law, there is also reference to domestic legal culture as an expression of national preferences. See, e.g., Roger Van den Bergh and Louis Visscher, 2006, p. 516. It should be noted, however, that reference to local legal culture can also be used as a disguise for local lawyers' efforts to restrain competition and to maintain their position. Cf. A. Ogus, 1999, p. 412.

15.4.5 *Cross-border externalities argument*

At first sight, it seems plausible that the issue of cross-border torts may be good cause for approximation of the tort laws of the countries involved. Note, however, that torts committed in country A causing externalities in country B may be judged according to the tort law system of country B. In Europe, this is common practice, as a result of the Rome II Regulation (EC Regulation 864/2007) which, as a rule, leads to application of the law of the country in which the damage occurs. Therefore, domestic law itself may deal adequately with cross-border externalities. For instance, negative externalities caused by a fly-by-night manufacturer of faulty products, who operates from country A and markets his flawed products in country B, can be effectively remedied if 1) tort law in country B is applicable, 2) this tort law system gives an optimal level of deterrent incentives, 3) aggrieved consumers in country B have optimal access to justice and 4) the verdicts in country B are readily executable on the assets of the manufacturer in country A.

As we can see, the assumptions needed to leave the solving of this case of cross-border externalities to domestic legal systems, are manifold. As a result, cross-border externalities in products liability cases can therefore be targeted by various instruments. Harmonization of products liability is the [445] road that was actually chosen by the EU, but perhaps harmonization of choice of law rules, free exchange of court verdicts, simple procedures for cross-border attachment/seizure and execution of assets could have sufficed from a comparative economic analysis point of view. Cf. A. Ogus, 1999, p. 417.

Generally speaking we can say that cross-border externalities are countered by (harmonized) rules of private international law that may be equally effective and less intrusive than harmonized substantive law: by applying the law of the country in which the damage occurs, the tortfeasor in country A is not able to externalize according to the lower standard of care

in country A if the tort law of the country where the damage occurs is set at a higher level. Cf. Roger Van den Bergh, 2000, p. 446.

Moreover, Roger Van den Bergh and Louis Visscher, 2006, p. 518 have rightly argued that European harmonization efforts in private law do much more than simply addressing cross-border externalities. Most Directives in this field apply to both internal cases and cross-border cases alike. Regulating purely internal tort cases cannot be justified under the comparative economic analysis. In legal reasoning, it is not unusual to argue that, if cross-border cases are treated in a certain way, the principle that like cases should be treated alike demands that internal tort cases are to be subject to the same regime.

15.4.6 *Race to the bottom argument*

If the tort regime in country A poses fewer burdens on potential tortfeasors than in country B, potential tortfeasors in country B may either choose to migrate their activities to country A or exert pressure on B's government to lower standards as well. This in turn may lead to convergence of law between jurisdictions. If such convergence is the result of competition between jurisdictions, this in itself may be applauded. However, if convergence leads to a 'race to the bottom', being a state of affairs of suboptimal accident cost reduction, then such convergence may be a questionable outcome. Whether a 'race to the bottom' is a truly realistic scenario depends, however, on a number of factors including whether cost increase can be transferred onto consumers or employees, and whether countries have a preference for lowering standards. See A. Ogus, 1999, p. 413 f. Evidence of either a race to the bottom or to the top in (European) tort law is unavailable. See Roger Van den Bergh and Louis Visscher, 2006, p. 520. Cf. Roger Van den Bergh, 2000, p. 445 ff; Jan Smits, 2006, p. 77; M. Faure, 2008, p. 18 ff.

To counter a real-life 'race to the bottom', European legislative intervention by means of minimum harmonization may then be the appropriate measure to discourage substandard domestic laws. Such intervention can be assumed to be promoted by those countries that suffer from the race to [446] the bottom, i.e., the jurisdictions with a relatively high level of liability. Businesses in country A that are subject to stricter levels of care and have to pay more in damages because of the fact that the tort law regime in their country puts a heavier burden on corporate tortfeasors than in country B, will be assumed to promote an upward harmonization in order to level the playing field for their exports to country B.

15.4.7 *Reduction of (transaction) cost*

Differences in private law systems may cause persons and business to incur compliance costs when engaging in cross-border activities. This cost issue is most likely to arise in respect of differences in contract law systems. Drawing up a contract under the laws of country A may

require different legal skills than under the laws of country B. This difference constitutes transaction cost in operating any contract law system and there may be good reasons within a common market to reduce such transaction cost. Likewise, differences in tort law systems may impose transaction cost that can be reduced. If the European common market were to have different regimes of tortious liability for unfair commercial advertising, businesses operating in all the countries within this common market would have to adjust their advertising to the tort systems in all the separate countries. Naturally, this imposes costs on business. Reducing these costs by harmonizing tortious liability for unfair advertising may thus be considered – to some extent at least – an efficient reduction of the cost of doing business in Europe. Perhaps this cost reduction is what Recital 2 of the 1984 EC Directive concerning misleading advertising (84/450/EEC) is in fact referring to when it contends that “misleading advertising can lead to distortion of competition within the common market”.

So, in the end perhaps reduction of transaction cost is the most convincing justification for initiatives towards harmonization of tort law, as M. Faure, 2008, p. 28, concludes. One should take care, however, not to confuse transaction cost with the cost of domestic preferences. If national legislatures feel strongly about their liability regimes for unfair and misleading advertising, harmonizing this liability imposes costs on these member states. If national legislatures do not feel strongly about it, and in fact the national regimes are very much alike, then harmonization may come at a low cost. It may even (in theory at least) increase the supply of legal services in Europe if knowledge of the law of advertising is no longer a domestic prerogative but a pan-European service.

Moreover, it has been rightly observed that harmonizing (tort) law by using centralized standards that are to be applied by decentralized courts may in fact not harmonize at all. Cf. Roger Van den Bergh and Louis Visscher, 2006, p. 521. Furthermore, it must be admitted that minimum harmonization as [447] such will not completely put an end to legal differences and ensuing transaction cost. Cf. Jan Smits, 2006, p. 70; Jan Smits, 2005, p. 166 ff.

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