Economic analysis of tort law and the European civil code

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Economic Analysis of Tort Law and the European Civil Code

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1 Introduction: The Contribution of Law and Economics of Tort Law to the Harmonisation Debate

In this paper chapter I address the potential contribution of the economic analysis of law to the debate concerning the need for the harmonisation of tort law in Europe. The focus of this paper chapter will indeed mainly be on this harmonisation issue. It is important to stress this since the economic analysis of law could be useful to a study of European integration at various levels.

1.1 A Search for Principles

A first important advantage of the economic analysis of tort law is that it enables a debate concerning the economic functions of tort law. The economist will not immediately analyse all the legal refinements of the tort law system, which has the advantage of focusing on goals and functions of tort law at a more general, abstract level.

Economic analysis of tort law has for instance stressed that the goal of tort law should be the prevention of accidents. This focus on the reduction of accident costs has the advantage that law and economics will focus on the main principles that underlie the tort law system. Thus economic analysis could, for instance, explain why many European tort systems have chosen a strict liability regime for hazardous activities and have kept a negligence/fault regime for non-hazardous activities. Economic analysis of tort law builds on the well known theories of Calabresi[1], Landes/Posner[2] and Shavell[3] who argue that a strict liability rule will especially be useful in case of hazardous activities. Strict liability is considered by economists as the tool to provide incentives to injurers to adopt an optimal activity level.

By focusing on these relatively straightforward ideas, economic analysis of law can make clear what economic background underlies (usually implicitly) specific rules of tort law. It is precisely in this way that I believe economic analysis of tort law can contribute to European integration and hence to a possible European Civil Code. Indeed, if it would be possible to identify the economic reasons for a specific liability regime (to which, I argue, economics can offer a useful tool) the comparative 657

lawyer could verify whether differences between the tort rules in various legal systems are in fact merely optical differences (whereby only the use of legal technique differs) or whether these differences are the result of varying values and preferences. Differences concerning the legal technique used are often related to various legal traditions and are hence the result of, to put it simply, dogmatic and doctrinal traditions within a specific legal system. On the other hand these dogmatic and doctrinal differences should not be underestimated. Some will argue that these differences in legal

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[1] Calabresi, G., *The costs of accidents, a legal and economic analysis*, New Haven, Yale University Press, 1970. For a summary of Calabresi's work on tort law see *inter alia* Faure, M.G., "Calabresi and Behavioral Tort Law and Economics", *Erasmus Law Review*, 2008, vol. 1(4), 75-102.
[2] Landes, W. and Posner, R., "The positive economic theory of tort law", *TortGeorgia and Law Review*, 1981, 851-924.
[3] Shavell, S., *Economic Analysis of Accident Law*, Cambridge, Harvard University Press, 1987 and Shavell, S., *Foundations of Economic Analysis of Law*, Cambridge, Belknap, 2004, 175-287

culture are so important that they are even unbridgeable.[4] Here I see a useful task for economic analysis of law. Law and economics can show that, although there are important differences between the legal systems as far as the specific legal technique is concerned, the underlying (economic) balance of interest and preference can often be similar. By, thus focusing on the functions and goals of liability law in the various legal systems, law and economics may, by merely scrutinising the legal techniques which are used to achieve a specific result, show that differences between some legal systems are not as huge as one may at first sight believe.

The negative aspect of this benefit of the economic analysis of tort law is that economics will indeed simplify the working of tort law by not addressing the details of the legal technique. There is the unavoidable disadvantage of the economic analysis which focuses on functions and goals and hence usually not on legal detail. Undoubtedly this focus on principles of tort law and on the instrumental goals tort law (more specifically the prevention of accidents) will lead some lawyers to argue that economics hereby simplifies the more nuanced and refined legal reality of tort law. Partially that is undoubtedly the case. One could equally argue, however, that the simplification may, more specifically from an integration perspective, have the major advantage of focusing precisely on the underlying similarities in a tort law system. Behind the surface of various legal techniques similar principles, goals and preferences can hide. By focusing on these underlying principles instead of on the peculiarities of the legal technique used, I believe the economic analysis of tort law can contribute to a "bridging of the unbridgeable".[5]

Within the scope of this contribution I will not focus on the basic economic analysis of tort law. This analysis is now widely accepted within the European academic world. Many traditional tort lawyers now also make use of economic arguments.[6] It seems, however, more interesting to stress the possible contribution of the economic analysis of tort law to the European integration process and more particularly to the European Civil Code.

1.2 Critical Analysis of the European Tort Law

A second benefit of the economic analysis of tort law for European integration concerns the simple fact that economic methodology can be used to take a critical look at

[4] This – debated – point of view has repeatedly been defended by Legrand; see (among others) Legrand, P., "The impossibility of legal transplants", *Maastricht Journal of European and Comparative Law*, 1997, 111. See also Van den Bergh, R., "The Uneasy Case for Harmonising Consumer Law", in Heine, K. and Kerber, W. (eds.), *Zentralität und Dezentralität von Regulierung in Europa. Schriften zu Ordnungsfragen der Wirtschaft*, Stuttgart, 2007, 186-195 and Van den Bergh, R., "Der Gemeinsame Referenzrahmen: Abschied von der Harmonisierung des Vertragsrechts?", in Eger, Th. and Schäfer, H.B. (eds.), *Ökonomische Analyse der Europäischen Zivilrechtsentwicklung. Beiträge zum X. Travemünder Symposium zur Ökonomische Analyse des Rechts*, Tübingen, Mohr Siebeck, 2007, 111-126.

[5] See Van Gerven, W., "Bridging the unbridgeble. Community and national tort laws after Francovich and Brasserie", *International Comparative Law Quarterly*, 1996, 507-544.

[6] See e.g. as far as Germany is concerned Kötz, H. and Wagner, H., *Deliktsrecht*, 9th edition, Neuwied, Luchterhand Verlag, 2001, 17-20.

existing European legislation and thus to provide a critical perspective for judging European legislation.

1.2.1 Example: Product Liability

Economic analysis could for instance be used to verify whether the European Directive on Product Liability was actually necessary to realise a market integration, as it claims. From an economic point of view it can easily be argued that it is relatively doubtful whether the European Directive can reach the goal of harmonisation. The lowering of administrative costs which could be reached as a result of harmonisation can never be achieved through the European Product Liability Directive. Everyone (also tort lawyers) agree that there are so many uncertainties and references to national law within the directive that it can never reach the goal of harmonisation of marketing conditions.[7] The harmonisation of marketing conditions, which was mentioned many times in the considerations preceding the directive, was probably only the formal goal in order to give the European authorities competence in this area. Since, however, this directive could never reach a harmonisation of marketing conditions, its most important goal was probably the desire of the European bureaucracy to show that they were able to produce a legislative document in an important area of private law, namely product liability. The recent green paper and the following report of the Commission to the Council concerning product liability have, however, made it clear that, with the exception of Austria, the national legislation implementing the directive is hardly used. The product liability directive therefore does not serve any practical goals.[8] This is just one example to show that economics can provide an interesting input for judging the efficiency of European legislation. Law and economics scholars have also examined other European legislation in the area of private law, such as the European initiatives in the area of the liability for the suppliers of ser-vices.[9] Law and economics can obviously fulfil this critical role not only for already existing European legislation, but also for new legislation to come, such as the contents of a European Civil Code. Moreover, economic analysis of law has also been used to critically analyse the White Paper on Environmental Liability[10] which eventually led to the Directive on Environmental Liability.[11]

2 Positive Versus Normative Analyses

The way law and economics will provide this critical analysis is by using the efficiency criterion. On the basis of the efficiency criterion it will be established whether a certain legal regime will promote social welfare or not. Many lawyers argue that, though this may be an interesting criterion, it is not decisive, since the goal of law is certainly not just to promote efficiency. However, in this respect it is important to make a difference between the positive economic analysis of law on the one hand and normative economic analysis on the other hand. In a positive economic analysis economics is used to analyse the economic effects of the law as it is, without necessarily indicating that efficiency is a value by which legal rules can be judged. Such a positive economic analysis can be highly useful since it often includes effectiveness tests. Thus economic analysis allows us, as an example, to test whether the goals set by the (European) legislator can actually be reached with the instruments used. This information is obviously useful for any assessment of a legal framework. In a normative economic analysis, efficiency is used as a criterion to judge legal rules. Many lawyers may have more difficulties with that. But even if one accepts that the law serves purposes other than efficiency, economic analysis can still provide useful information, for example, on the costs and benefits of a specific legal regime.

2.1.3 Division of Labour Within Federal Systems

[7] See for a more detailed analysis Faure, M., "Product liability and product safety in Europe: harmonisation or differentiation?", *Kyklos*, vol. 53, 2000, 467-508.
[8] For more details see Faure, M., "Product liability and product safety in a federal system: economic reflections on the proper role of Europe", in Marciano, A. and Josselin, J.M. (eds.), *The economics of harmonising European Law*, Cheltenham, Edward Elgar, 2002, 131-177.
[9] See Curran, C.H., "The burden of proof and the liability rule for suppliers of services in the EEC", *The Geneva Papers on Risk and Insurance*, 1994, 85-98.
[10] COM(2000) 66 final.
[11] Directive 2004/35/CE on Environmental Liability with regard to the prevention and remedying of environmental damage. See in this respect the contributions in Faure, M. (ed.), *Deterrence, Insurability, and Compensation in Environmental Liability. Future Developments in the European Union*, Vienna, Springer, 2003. For an economic analysis of the application of the subsidiarity principle to environmental liability see the doctoral dissertation by De Smedt, K., *Environmental Liability in a Federal System. A Law and Economics Analysis*, Antwerp, Intersentia, 2007.

A third and important contribution of the economic analysis of law to the European integration process is that economics has focused a lot of attention on the division of competences within federal systems. This is a topic which, in a European legal perspective, is obviously relevant to the subsidiarity principle. From an economic perspective the question which is addressed in the economics of federalism is what the optimal level would be for specific types of regulation.

This literature, which deals with the optimal division of competences within federal systems, seems also quite relevant for the harmonisation debate concerning tort law. Law and economics scholars have indeed paid quite a bit of attention to the possible goals, functions and economic effects of a harmonisation of tort rules.[12]

The economic criteria which are advanced in the literature in favour of harmo-nisation can indeed also be applied to the various areas of tort law, such as environmental liability, product liability or medical malpractice. In all of these cases it is possible to indicate, with the use of economic instruments, what the possible benefits of harmonisation may be. It is understandable that so far the harmonisation debate has more specifically concentrated on domains such as environmental liability and product liability. Those are two areas were we can typically expect "transboundary torts", meaning that the argument in favour of harmonisation may be stronger precisely in those areas. Moreover, product liability has so far been one of the only areas of tort law where the European Commission has successfully enacted legislation leading to a (partial) harmonisation. As we already mentioned above with respect to environmental liability, a directive was promulgated on 21 April 2004 with respect to the prevention and remedying of environmental damage.

With respect to environmental liability the European Commission is also undertaking initiatives in the direction of a (more modest) harmonisation. See in this respect the well-known White Paper on Environmental Li-ability issued by the European Commission on 9 February 2000.[11] Meanwhile this White Paper has resulted in a real draft directive on the prevention and restoration of significant environmental damage[12]It is, however, not only interesting to apply the economic criteria for centralisation on typical transboundary torts, such as environmental liability and product liability. Economics can equally be used to answer the question whether Europe should strive for a more general harmonisation of (parts of) general tort law. This is of course not an academic question at all, given the initiatives towards the harmonization of tort law in Europea European Civil Code. In this respect, one can for example point at the principles of European tort law drafted by the European Group on Tort Law.[13] More recently, the so-called Draft Common Frame of Reference (DCFR) prepared by the study group on a European Civil Code also contains a book on non-contractual liability arising out of damage caused to another.[14]

The economics of federalism seems to be a particularly appropriate way of looking at harmonisation efforts in Europe because the European Commission has been using economic arguments to justify its harmonisation efforts for some time. More specifically the argument has long been advanced that harmonisation of law, including private law, is necessary in order to harmonise the conditions of competition within Europe.[15] One aspect of this paper contribution is devoted to an analysis of whether this "economic" argument for the harmonisation of the conditions of competition is indeed a valid economic justification for harmonisation. Moreover, applying the economics of federalism to the harmonisation of tort law within Europe also has the advantage that a balanced view can be presented of the need to harmonise tort law. Indeed, economic analysis does not come up with black or white statements in favour of or against harmonisation, but allows balanced criteria to be advanced on the basis of which those areas and topics which may be good candidates for harmonisation are indicated.

Of course the reader should be aware that applying the economics of federalism to the harmonisation issue

[12] See for instance as far as environmental law is concerned Faure, M., "Harmonisation of environmental law and market integration: harmonising for the wrong reasons?", *European Environmental Law Review,* 1998, 169-175; Faure, M. and De Smedt, K., "Should Europe harmonise environmental liability legislation?", *Environmental Liability,* 2001, 217-237 and see for the area of medical malpractice Faure, M., "Kompensationsmodelle für Heilwesenschäden in Europa mit Ausblick auf die EG-Rechtsharmonisierung", *Zeitschrift für Europäisches Privatrecht*, 2000, 575-600.

[13] European Group on Tort Law (ed.), *Principles of European tort law. Text and commentary*, Vienna, Springer, 2005. For a critical evaluation see Van den Bergh, R. and Visscher, L., "The Principles of European Tort Law: The Right Path to Harmonization?", *European Review of Private Law (ERPL)*, vol. 14, 2006, 511-543.

[14] Von Bar, Chr., Clive, E. and Schulte-Nölke, H. (eds.), *Principles, Definitions and Model. Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Sellier, München, 2008. For a critical evaluation see Eidenmüller, H., Faust, F., Grigoleit, H-Chr., Jansen, N., Wagner, G. and Zimmermann, R., "Der gemeinsame Referenzrahmen für das europäische Privatrecht. Wertungsfragen und Kodifikationsprobleme", *Juristenzeitung*, 2008, 529-550. The same contribution has also been published in English in Eidenmüller, H., Faust, F., Grigoleit, H-Chr., Jansen, N., Wagner, G. and Zimmermann, R., "The common Frame of Reference for European Private Law – Policy Choices and Codification Problems", *Oxford Journal of Legal Studies*, vol.28 (4), 2008, 659-708. See also Jansen, N., "Traditionsbegründung im europäischen Privatrecht. Zum Projekt eines 'gemeinsamen Referenzrahmens'", in Eger, Th. and Schäfter, H-B (eds.), *Ökonomische Analyse der Europäischen Zivilrechtsentwicklung*, Tübingen, Mohr-Siebeck, 2007, 74-110. See also the contributions in Schulze, R., Von Bar, Chr. and Schulte-Mölke, H. (eds.), *Der Akademische Entzurf für einen gemeinsamen Referenzrahmen. Kontroversen und Perspektiven*, Tübingen, Mohr-Siebeck, 2008.

[15] This argument has been strongly crticised in law and economics literature. See *inter alia* Van den Bergh and Visscher *supra* note 13.

means that I will only provide "one view of the cathedral".[16] As was mentioned above, I do not deal with the basic economic analysis of tort law. Moreover, the harmonisation issue is addressed only from an economic angle in this paper. Although I have argued above that I think that economics can provide an interesting contribution to the harmonisation debate, I want to repeat that I realise that this really is just one view of the cathedral. One may indeed well argue that there may be other, non-economic, arguments for a harmonised liability system, such as the belief that this will lead to a higher degree of victim protection than Member States could achieve when using national liability law.[17] But even if non-economic arguments are advanced to justify European harmonisation, it seems important that in future European documents these reasons are clearly explained within the scope of the subsidiarity principle.

3 Some Lessons from the Economic Debate

European private law and the trend towards harmonisation have a lot of support in Europe today. For many traditional lawyers differences between the legal systems are undesirable and they plead in favour of a harmonisation, also in the field of tort

law.[18]

Symptomatic in that respect is are of course the project above mentioned harmonization projects such as the principles of European Tort Law and the Draft Common Frame of Reference.[19]for the European Civil Code. Within this contribution I will not deal with the complicated question through what kind of legal techniques such a harmonisation of tort law in Europe could be realised; I will also not deal with the issue on which domains of tort law the differences between the Member States would be the greatest today. However, I would like to address the question, using economic analysis, of whether a harmonisation of tort law is indeed desirable and if so for which domains. One can indeed not escape the impression that today for many lawyers, especially those enthusiastic for a European Civil Code, this question seems implicitly to be answered in the positive. I believe, however that the economic perspective, more particularly the economic theory of federalism can provide an important contribution to the harmonisation debate. Economics can, more specifically, indicate which areas of tort law might be good candidates for harmonisation and which not.

What are the most important results of this economic literature?[20]

3.1 Starting Point: Respect Variousying Preferences

The starting point for the economist addressing the question of centralisation seems to be totally different than that of many policymakers (or certainly politicians) at the European level. The starting point for the economist is that differences are as such not bad, on the condition that these differences in legal systems also reflect varying preferences of citizens.[21]

The starting point for a law and economics scholar is therefore that differences between legal systems should in principle be respected. Furthermore, economists would even argue that these differences can increase the quality of the legal system since legal systems will compete to offer their citizens the highest quality of legal rules.[22]

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[16] Paraphrasing the words of Calabresi and Melamed (Calabresi, G. and Melamed, D., "Property rules, liability rules and inalienability: one view of the cathedral", *Harvard Law Review*, 1972, vol. 85, 1089-1128).

[17] This argument is briefly discussed below in section 4.2.

[18] See for instance Janssen, MN., "Auf dem Weg zu einem Europäischen Haftungsrecht", *Zeitschrift für Europäisches Privatrecht*, 2001, 30-65; Koziol, H., "Das Niederländische BW und der Schweizer Entwurf als Vorbilder für ein künftiges Europäisches Schadenersatzrecht", *Zeitschrift für Europäisches Privatrecht*, 1996, 587-599; Magnus, U., "European perspectives of tort liability", *European Review of Private Law*, 1995, 427-444 and see also Nieuwenhuis, J.H., "Wat is een onrechtmatige daad? Europese perspectieven", *RMThemis*, 1998, 242-248.

[19] For a critical legal-political analysis of the coming into being of this Draft Common Frame of Reference see the dissertation by Van Zelst, B., *The Politics of European Sales Law*, Boston, Wolters-Kluwer, 2008, but for a different perspective see Smits, J., "European Private Law and Democracy: a Misunderstood Relationship", in Faure, M. and Stephen, F. (eds.), *Essays in the Law and Economics of Regulation. In Honour of Anthony Ogus*, Antwerp, Intersentia, 2008, 49-59.

[20] Obviously it is not possible within the scope of this paper to deal with the very rich economic literature concerning harmonisation. Therefore within this contribution I will merely present the most important results of the economics of federalism. Those interested in the details are referred to the literature in footnotes.

[21] This idea is, by the way, also to be found in the work of many lawyers. See in this respect for instance the interesting inauguration address of Smits, J., *The good Samaritan in European private Law*, Deventer, Kluwer, 2002, 43, who argues in favour of a "praise of diversity".See also Smits, J., "The Future of European Contract Law: on Diversity and the Temptation of Elegance", in Faure, M., Smits, J. and Schneider, H. (eds.), *Towards a European Ius Commune in Legal Education and Research*, Antwerp, Intersentia, 2002, 239-256.

[22] See in that respect Ogus, A., "Competition between national legal systems. A contribution of economic analysis to comparative law", *The International and Comparative Law Quarterly*, 1999, 405-418; Ogus, A., "The contribution of economic analysis of law to legal transplants", in Smits, J. (ed.), *The contribution of mixed legal systems to European law*. Antwerp, Intersentia, 2001, 27-37 and Van den Bergh, R., "Subsidiarity as an economic demarcation principle and the emergence of European private law", *Maastricht Journal of European*

Some will of course react to this idea by saying that it is doubtful whether the fact that, for instance, in Portugal lower amounts for non-pecuniary losses would be awarded than say in Germany, really reflects the preferences of the Portuguese citizens. This would then mean that national legislation would not sufficiently reflect the preferences of its own citizens. This is, however, a very dangerous reasoning, at least if this were to be used as a reason for harmonisation. Indeed, if it is considered that the national (in my example Portuguese) legislator or judge is not be sufficiently capable of establishing the amount of non-pecuniary losses in accordance with the preferences of the citizens of his own country, the whole democratic nature of the decision making process in the particular state, in the example Portugal, is actually put in doubt. Moreover, even if one were to agree with these critics of the preference argument that national legislators and judges are not capable of producing legislation which really reflects the preference of the citizens, there is still no reason to assume that the European legislator would do better in that respect. Why should we assume that European bureaucrats in Brussels would be more able to find out what the preferences are of the Portuguese than Portuguese legislators and judges could? Here one can notice that the supporters of harmonisation are in fact of the opinion that they would know better than national legislators or judges what is good for the European citizens. Such a harmonisation argument seems, however, dangerous and paternalistic since it disrespects national preferences.

From an economic perspective the starting point should therefore remain a decentralisation. Starting from Tiebout's model,[23] there is reason to believe in what Van den Bergh calls a "bottom up federalisation", assuming that in principle the local level is optimal, since the local level has the best information on local problems and on the preferences of citizens. Decision making should be moved to a higher level only when there is a good reason.[24] Economic theory has indeed suggested that there may be a variety of reasons why the local level is not best suited to take decisions and that there are occasions when central decision making can lead to more efficient results.

I will now apply these criteria for centralisation and relate them to the harmo-nisation of tort law in Europe.

3.2 Transboundary Externalities or Race for the Bottom? Centralisation!

Law and economics certainly does not provide a one-sided argument against harmo-nisation. Economics argues that in many cases this idea of a competition between national legislators will not produce optimal results. Economic theory has, for instance, indicated that this will be the case if there are transboundary externalities.[25] The mere existence, however, of transboundary externality does not as such justify a total harmonisation of tort law. It merely provides an argument for the regulation of transboundary accidents at the central level.[26]

A second argument in favour of harmonisation lies in the fact that without centralisation a ruinous competition between legal systems could take place whereby states would compete with each other to attract industry with inefficient standards. This risk of a destructive competition is also indicated in the literature as "race for the bottom".[27] The basic idea is that local governments would compete with lenient legislation to attract industry. The result would be an overall reduction of the quality of legislation below efficiency level.[28]

It is, however, very unlikely that within the European context such a race for the bottom would emerge with tort law.[29] This argument indeed supposes that states compete with each other to attract industry with inefficient tort rules. First, there is no empirical evidence whatsoever that Member States would willingly enact inefficient legislation in the area of tort law in order to attract industry.[30] Second, empirical studies have indicated that the location decision of firms is based on a large number of criteria, such as the tax climate, transport, infrastructure and labour. These are obviously much more important in the location decision of firms than legislation in the

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and Comparative Law, 1998, 134. See also Van den Bergh, R., "Towards an Institutional Legal Framework for Regulatory Competition in Europe", *Kyklos*, 2000, vol. 53, 435-466.

[23] The model of C. Tiebout (A pure theory of local expenditures, *Journal of Political Economy*, 1956, 416) has been used by many scholars, such as Van den Bergh, as the basis for their economic theory of harmonisation. (See the references in the previous footnote).

[24] A major American supporter of this "presumption in favour of decentralisation" is Revesz. See, e.g., Revesz, R., "Environmental Regulation in Federal Systems", in Somsen, H. (ed.), *Yearbook of European Environmental Law*, 2000, 1-35 and Revesz, R., "Federalism and Environmental Regulation: An Overview", in Revesz, R., Sands, Ph. and Stewart, R. (eds.), *Environmental Law: The Economy and Sustainable Development*, 2000, 37-79.

[25] See Faure, M., "Towards a harmonised tort law in Europe? An economic perspective", *Maastricht Journal of European and Comparative Law*, 2001, 334.

[26] See for this "transboundary only" argumentthe many publications of Van den Bergh, R., *supra* note 22, 144-145.

[27] See – among others – Rose-Ackerman, S., *Rethinking the progressive agenda, the reform of the American regulatory state*, Macmillan Inc./Simon & Schuster, 1992, 166-170.

[28] For a detailed discussion of this argument see Esty, D. and Geradin, D., "Environmental protection and international competitiveness. A conceptual framework", *Journal of World Trade*, 1998, vol. 32/ 3, 16-19.

[29] See Faure, M., "Legal Harmonization from the Perspective of the Economic Analysis of Law", in Faure, M.G., Koziol, H. and Puntscher-Riekmann, S. (eds.), *Vereintes Europa-Vereinheitliches Recht?*, Vienna, Verlag der Österreichischer Akademie der Wissenschaften, 2008, 11-46.

[30] See Van den Bergh, R. and Visscher, L., *supra* note 13, 518-521 and for a similar analysis in the area of consumer contract law see Van den Bergh *supra* note 4.

field of private law.[31] Third, it is much more likely that states would engage in a so-called "race for the top", specifically in the area of tort law. Indeed, the primary interest of states is probably to issue legislation protecting the own citizens (who have to support politicians by re-electing them). It is indeed the own citizens of a Member State who can become victims of accidents and can therefore have a primary interest in a victim-friendly tort law.[32]

3.3 Harmonisation of Marketing Conditions? No!

An important advantage of the economic analysis of federalism is that the literature has paid a lot of attention to the traditional European argument that a harmonisation of all kinds of rules would be necessary because differences between rules would create an unequal marketing condition. The argument goes that if legislation is different, the costs for industry would differ as well, and the conditions of competition within the common market would not be equal. Levelling the playing field for European industry was therefore the central message for a long time. This argument of harmo-nisation of marketing conditions can be found in many European directives as the justification for action at European level.[33]

This argument has been thoroughly examined by economists and has been rejected as a wrong justification for harmonisation.[34] Nevertheless this argument for the harmonisation of conditions of competition has been used for a long time in Europe to justify European harmonisation in many areas. To some extent this can be understood on grounds of European legal reasoning. Indeed, it was for a long time necessary to give Europe competence to intervene in specific areas. The disadvantage of this argument is of course that the argument is so general and unbalanced that it has no distinctive power whatsoever. The argument could in fact justify much (largely unnecessary) harmonisation of all kinds of legal rules, since one could of course always argue that a legal rule has some influence on the conditions under which products or services are marketed. However, empirically the argument is not very convincing either. The legal literature agrees that if one takes, for instance, the European Directive on Product Liability (which was again based on the harmonisation of conditions of competition argument) it is relatively clear that this goal can never be achieved by this directive.[35]

The argument of the harmonisation of conditions of competition also wrongly supposes that an integrated market could only exist if the marketing conditions would be totally equal for all players. That should of course not necessarily be the case. There is, in addition, a strong counter-argument, in that there are many examples showing that economic market integration is possible (without the distortions predicted by the race-for-the-bottom argument) with non-standardised legal orders. Public choice scholars have often advanced the Swiss federal model as an example where economic market integration goes hand in hand with differentiated legal systems.[36] It is apparently possible to create a common market without the total harmonisation of all legal rules and standards. That is not to say that there may not be other arguments in favour of the harmonisation of tort law in Switzerland. Notably, the reduction-of-transac-tion-costs argument – to be discussed below – may well constitute a powerful reason to prefer one Federal Swiss tort law instead of 26 different cantonal systems. Therefore, clear steps towards harmonisation of tort law can be seen in Switzerland as well.[37] Note, however, that this is not because harmonisation would be necessary to make market integration possible.

Further, even if one were to take the (political) "common market" goal as a starting point and tort law were to be harmonised on that ground, this would still not create a level playing field since differences in, for example, energy sources, access to raw materials and atmospheric conditions will still lead to marketing conditions that favour trade.[38]

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[31] Compare Jaffe, A., Peterson, S., Portney, P. and Stavins, R., "Environmental regulation and the competitiveness of US manufacturing: what does the evidence tell us?", *Journal of Economic Literature,* 1995, vol. 33, 132-163.

[32] See on this argument for the race for the top Vogel, D., *Trading-up. Consumer and Environmental Regulation in a Global Economy,* Cambridge, Harvard University Press, 1995.

[33] It is for instance to be found literally in the considerations preceding the European Directive on Product Liability and is also often used as an argument to harmonize consumer law. See Van den Bergh, R. *supra* note 4. 198-203.

[34] In particular Revesz has examined the weakness of this "harmonisation of conditions of competition" argument and has also indicated that European scholarship has tried to rephrase this argument in "race for the bottom" terms (see Revesz, R., "Federalism and regulation: some generalisations", in Esty, D. and Geradin, D. (eds.), *Regulatory competition and economic integration, comparative perspectives*, Oxford, Oxford University Press, 2001, 3-29.

[35] Almost all authors agree on that point. See Duintjer Tebbens, H., "De Europese Richtlijn Produktaansprakelijkheid", *Nederlands Juristenblad*, 1986, 373-374; Storm, P., "Een gebrekkig produkt", *Maandblad voor Ondernemingsrecht*, 1985, 245; Van Wassenaer van Catwijck, A.J.O., "Produktaansprakelijkheid", in *Serie Praktijkhandleidingen*, Zwolle, 1986, 81 and Martin Casals, *M. and* Solé Feliu, J., "Responsabilidad por productas en España y (des)armonizacion Europea", *Revista de responsabilidad civil y seguros*, 2001, vol. 4, 1-17.For an overview see Faure, M. *supra* note 7, 467-508.

[36] Frey, B., "Direct Democracy: Politico-Economic Lessons from Switzerland", *American Economic Review*, 1994, 338-342.

[37] See Wininger, B., "L'architecture de l'Avant-projet de loi sur la responsabilité civile", *Revue de Droit Suisse*, 2001, 299-326; and see Koziol, H., *supra* note 18, 592-593.

[38] So Van den Bergh, R., "Economics in a Legal Strait-Jacket: The Difficult Reception of Economic Analysis in European Law", paper

3.4 Reduction of Administrative Costs? If Possible: Yes!

3.4.1 Bottom Up Instead of Top Down

From an economic perspective, probably the most important argument for a harmonisation of tort law (for issues that are not transboundary) is that such a harmonisation could lead to a reduction of administrative costs.[39] One could indeed easily argue that in Europe today many liability rules exist which do in fact reflect similar values and preferences, but are technically different as a result of the differences in underlying doctrines and the legal techniques used. If it were possible to uniform liability rules which do indeed reflect similar values and preferences at relatively low costs this should indeed be considered as an important advantage. This is of course the leading thought behind many initiatives which have been developed by many academic tort lawyers in Europe and who examined whether it is possible to proceed to a harmonisation of tort law.[40]

Many of these harmonisation projects are undertaken by academic lawyers who examine the existing differences between tort rules in the legal systems and try to find the largest common denominator. Such an approach, looking for a common denominator on the basis of comparative legal studies and of case law[41] seems far more promising than the approach followed by the European Commission so far. The "top down" approach of the European Commission forcing Member States to implement European legislation as laid down in directives has not proven to be very successful, especially in the area of private law. The approach chosen by the various academic study groups seems much more aimed at the search for a ius commune in tort law. Hence, their search for the common roots of the tort law systems in Europe can be considered as a "bottom up" approach. If these academic study groups were to succeed in proving that many differences between the legal systems are merely of a technical nature and can therefore be considered as often pointless incompatibilities not related to differences in values or preferences, such a harmonisation attempt, namely looking for the largest common denominator in tort law, seems far more promising than the approach followed so far by the European Commission.

3.4.2 Input of Economic Analysis

The advantage of the work of the study groups is that most of this work is also based on a specific conceptual idea of tort law. On that basis the different groups formulate proposals for the various areas of tort law as a more or less coherent framework. A major disadvantage of the European approach today is that one has the impression that the Commission at one moment presents a European Product Liability Directive, then thinks it might be a good idea to work on the liability for services and the next morning considers a directive on consumer sales. If one sees the approaches followed in these different European initiatives it becomes clear that they are so different that a fundamental vision on the function and goals of tort law is totally lacking.[3542] An approach aimed at a lowering of administrative costs whereby a largest common denominator would be sought, respecting differences between national values and preferences, would also have the advantage that an almost traditional hostility against the europeanisation of tort law could be more easily overcome. Indeed, it is clear that the

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presented at the workshop Empirical Research and Legal Realism: Setting the Agenda, Haifa, 6-9 June 1999, 10 *supra* note 4, 200-203.

[39] A somewhat related argument deals with economies and diseconomies of scale in administration. See in that respect Rose-Ackerman, S., *supra* note 27, 165-166.

[40] Within the scope of this contribution it is obviously not possible to mention all the projects that aim to achieve a harmonisation in the area of private law. As far as tort law is concerned an overview of the various initiatives is provided by Janssen, MN., *supra* note 18, 31-65. A European group on tort law, coordinated by Prof. Helmut Koziol (of Vienna) develops developed European principles of tort law. See Spier, J. and Haazen, O., "The European group on tort law ('Tilburg group') and European principles of tort law", *Zeitschrift für Europäisches Privatrecht*, 1999, 469-493. Another initiative is the major project concerning the European Civil Code supervised by Prof. Christian von Bar (from Osnabrück). See for their view on the issue of harmonisation of tort law Von Bar, Ch., "Konturen des Delikt-rechtskonzept der Study Group on a European Civil Code", *Zeitschrift für Europäisches Privatrecht*, 2000, 515-532. In 2008, his ideas have been laid down in the Draft Common Frame of Reference, discussed above.

[41] For comparisons of tort rules on the basis of case law see Van Gerven, W., Lever, J., Larouche, P., von Bar, Ch. and Viney, G., *Cases, materials and texts on national, supranational and international tort law. Scope of protection*, Oxford, Hart Publishing, 1998 and Van Gerven, W., Lever, J. and Larouche, P., *Cases, materials and texts on national, supranational and international tort law*, Oxford, Hart Publishing, 2000. 35 That was an important point of criticism of the current European tort law as developed by the European Commission. See Koziol, H., "Ein Europäisches Schadenersatzrecht – Wirklichkeit oder Traum", *JBl*, 2001, 32-33 and Widmer, P., "Die Vereinheitlichung des Europäischen Schaden-ersatzrechts aus der Sicht eines Kontinental Europäers", *Revue Héllenique de Droit International*, vol. 52, 1999, 99.

[42] That was an important point of criticism of the current European tort law as developed by the European Commission. See Koziol, H., "Ein Europäisches Schadenersatzrecht – Wirklichkeit oder Traum", *JBl*, 2001, 32-33 and Widmer, P., "Die Vereinheitlichung des Europäischen Schaden-ersatzrechts aus der Sicht eines Kontinental Europäers", *Revue Héllenique de Droit International*, vol. 52, 1999, 99. See also Koziol, H., "Rechtsvereinheitlichung of Europäischer Ebene aus privatrechtlicher Sicht", in Faure, M.G., Koziol, H. and Puntscher-Riekmann, S. (eds.), *Vereintes Europa – Vereinheitliches Recht?*, Vienna, Verlag der Österreichischer Akademie der Wissenschaften, 2008, 47-56.

resistance to harmonisation will be much stronger when national legal systems have to give up national rules which are strongly rooted in national values or tradition. This may be totally different if the national rules are replaced by another rule which is formulated, in a technically different way but still reflects the same values and preferences. If one therefore accepts that the opportunities for harmonisation (from the perspective of lowering administrative costs) should especially be seen where preferences do not differ, but only legal techniques are different, the economic approach to tort law can be very helpful to achieve this goal. Indeed, as has been explained above, the economic analysis of tort law has the advantage of focussing on functions and goals of tort law and hence, enables the study of tort law at a higher level of abstraction.[43] Thus this higher level of abstraction, essential for the economic analysis of tort law, may well enable the focus on the common roots between the various legal systems. Hence, the economic approach to tort law can provide an important contribution to the search for a ius commune of tort rules in Europe. Now that specific harmonization attempts have seen the light, more particularly the principles of European tort law and the DCFR, economic analysis could also be used (and has also been used) to critically evaluate whether the search for these principles constitutes the right path to harmonization.[44]

3.4.3 Examine the Costs of Harmonisation!

Whether the harmonisation attempts will be successful in the long run is hard to predict today. Some scholars are very pessimistic and stress the differences between the legal systems (and legal cultures) in Europe to argue that these will inhibit a harmonisation of private law.[45] From an economic perspective one can easily argue that many legal rules often serve the same goal and could therefore be harmonised, certainly if only the legal techniques used differ and not the underlying values and preferences.[46] However, in some cases these differences can be rooted so deeply in the legal cultures and traditions that the costs of harmonisation could be extremely high, maybe even prohibitive.[47] In addition, the administrative costs of harmonisation need to be taken into account. From an economic perspective it can be held that the argument of harmonisation based on the potential reduction of administrative costs (through a simplification by uniform legal rules) is of course valid only when the marginal costs of this harmonisation are indeed lower than the marginal benefits of such a unification.[48]

4 Possibilities and Limits of Harmonisation: A Few TipsCritical Appraisal

A few conclusions can be drawn from this economic analysis with respect to the potential for a harmonization of tort law in Europe.Within the scope of this book it seems interesting to point out a few suggestions following from economic analysis for the work on a European Civil Code.

4.1 Focus on Areas where Preferences do not Differ

First, it seems important primarily to focus on those areas of tort law where preferences apparently do not differEconomic literature has clearly shown that differentiation has an advantage in case where preferences between citizens largely diverge. The scope for harmonization is therefore larger in areas where preferences would not differ. One could think of the choice between a strict liability regime on the one hand and negligence/fault on the other hand. If it could be established that the legal systems largely agree on the area where a strict liability regime should be applied, then one could argue that the differences in form are merely technical and do not reflect varying preferences, so that this area would be a good candidate for harmonisation.[49]

[43] This is also suggested by Van den Bergh, R. and Visscher, L., *supra* note 13, 511-542.
[44] For a critical economic analysis of the principles of European tort law see Van den Bergh, R. and Visscher, L., *supra* note 13, 511-542. For a critical analysis of the tort roles in the DCFR see *inter alia* Eidenmüller, H. and others *supra* note 14
[45] See Legrand, P., *supra* note 4, 111. See also Legrand, P., "Antivonbar", *Journal of Comparative Law*, vol. 1(1), 2008, 13-39.
[46] See Van den Bergh, R.,*supra* note 4, 198-203.
[47] See in this respect the interesting observations by Majome, G., "Unity in Diversity: European Integration and the Enlargement Process", *European Law Review*, vol. 33, 2008, 457-481 as well as Van Dam, C., "European Tort Law and the Many Cultures of Europe", in Wilhelmsson, T. and others (ed.), *Private Law and the Many Cultures of Europe*, Kluwer Law International, 2007, 57-80.
[48] See in this respect also Van den Bergh, R., *supra* note 22, 146-148.
[49] I certainly do not want to argue that there are no differences between the Member States as far as the cases are concerned to which a strict liability rule applies. Some might argue that the differences, say, between France and the United Kingdom in that respect are huge (for an overview, see Koch, B. and Koziol, H. (ed.), *Unification of Tort Law, Strict Liability*, The Hague, Kluwer Law International, 2002 and see Van Gerven, W., Lever, J. and Larouche, P., *supra* note 41, 467-687 and see Von Bar, Ch., *The Common European Law of Torts, II*, Oxford,

The same could be argued, for example, concerning the weighing of interests the judge has to undertake in a negligence case when he has to establish a standard of care for a particular behaviour and when the wrongfulness of the behaviour of the defendant has to be established. If the research groups find out that, although the wordings and principles are dramatically different, the underlying methodology is similar, harmonisation might be possible.[50] However, the way in which a judge in a particular legal system will interpret this duty of care may again be strongly linked to differing preferences. Thus it would be possible, to be specific, to indicate that whatever methods judges use to establish negligence in a particular case, it may still be possible that, say, in a medical malpractice case the appropriate care required from a physician in Portugal may well be totally different from the care required from a physician in Germany.[51] This shows that it may be possible to call for centralisation, but that this centralisation should not necessarily be equated with harmonisation.[52] The previous example shows that it would, for example, be possible to centralise the way judges deal with the negligence standard, but this could be combined with a differentiated application of the duty of care in specific cases.[53] Thus one could use a flexible system[54] with a harmonisation of some general notions at the European level, but on the other hand retain a sufficient degree of flexibility to account for diverging preferences between Member States.[55]

The major advantage of such a system would of course be that only the method in which the judge examines e.g. whether there is negligence is harmonised (which may already lead to a reduction of administrative costs because optical differences between the legal rules are removed), but at the same time differences in preferences are respected. A disadvantage is of course that differing outcomes will remain; however, if these differing outcomes correspond to differing preferences this should be considered more as an advantage than as a disadvantage. I do realise, however, that many "true believers" in harmonisation will not be very happy with this proposal. It means indeed that national judges, taking into account the preferences of national citizens can still give a different interpretation of the unified norm. Koziol for in-stance holds that for him a harmonisation has not been successful when only vague notions are harmonised and when the normative choices in a specific case are still left to the national judges or legislators.[56] Also Spier and Haazen realised this problem where they argue "the use of standards as a smoke-screen for deep disagreement creates a false consensus".[57]

I do, however, believe that sSuch a flexible system with a harmonisation of general notions at the European level creates important advantages. On the one hand it can enable a reduction of administrative costs by removing optical differences created by various legal dogmas, but at the same time a sufficient amount of flexibility is still retained, taking into account the various preferences of the citizens in the Member States.

4.2 Where Preferences Differ: Don't Touch!

There are, moreover, probably areas in tort law where the differing preferences are much stronger than the reduction of transaction cost benefits. Take the example of the amounts awarded for non-pecuniary losses. Many have argued that there are still considerable differences between the Member States in that respect.[58] However, it is relatively difficult to argue that these differences themselves lead to huge economic problems. Again, one could argue that these differences reflect differing national preferences and therefore there seems to be no point in favour of harmonisation in this area. In this case the differences are probably not just differences in legal tech-

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Clarendon, 2000, 333-432.). The point is only made that if there were – factual – agreement, say, on the strict liability of the guardian of a dangerous installation, this would mean that preferences on that point do not appear to differ.

[50] See on that point generally, Koziol, H. (ed.), *Unification of Tort Law: Wrongfulness*, The Hague, Kluwer Law International, 1998 and for a comparison of the wrongfulness concept in Austria and Germany, Koziol, H., *supra* note 34, 2001, 29-38 and Lewisch, P., "A comparison of the Negligence Concept of the German BGB and the Austrian ABGB in an Economic Perspective", paper presented at the Annual conference of the European Association of Law and Economics in Vienna, September 2001, as well as Van Dam, C.C., *Aansprakelijkheidsrecht. Een grensoverschrijdend handboek*, Den Haag, Boom Juridische Uitgevers, 2000, 143-150, Widmer, P. (ed.), *Unification of Tort Law: Fault*, The Hague, Kluwer Law International, 2005 as well as Van Dam, C., *European Tort Law*, Oxford, Oxford University Press, 2006, 184-254.

[51] Comparative research has indicated that this is indeed the case. See Faure, M. and Koziol, H. (eds.), *Cases on Medical Malpractice in a Comparative Perspective*, Vienna/New York, Springer, 2001, Dute, J., Faure, M.G. and Koziol, H. (eds.), *Liability for and Insurability of Biomedical Research with Human Subjects in a Comparative Perspective*, Vienna, Springer, 2004 and Dute, J., Faure, M.G.; and Koziol, H. (eds.), *No-Fault Compensation in the Healthcare Sector*, Vienna, Springer, 2004. .

[52] This was correctly argued in the context of environmental liability by Arcuri, A., "Controlling environmental risk in Europe: the complementary role of an EC environmental liability regime", *TMA*, 2001, 37-45.

[53] See, however, Koziol, H., *supra* note 41, 33, who argues that a harmonisation effort could not suffice with mere vague notions whereby the normative choices in specific cases would be left to the national legislators or judges. Spier, J. and Haazen, O.A., *supra* note 40, 484 also see this problem where they argue "the use of standards as a smoke-screen for deep disagreement creates a false consensus".

[54] This idea of a flexible system in tort law comes from the Austrian scholar Wilburg, W., *Die Elemente des Schadenersatzrechts*, 1941 and *Entwicklung eines beweglichen Systems im bürgerlichen Recht*, 1950. See also Koziol, H., "Rechtswidrigkeit, bewegliches System und Rechtsausgleichung", *JBl*, 1988, 619.

[55] See Faure, M., *supra* note 29, 11-46.

[56] See Koziol, H., *supra* note 41, 33.

[57] See Spier, J. and Haazen, O.A., *supra* note 40, 484.

[58] See Van Dam, C., *supra* note 50, 322.

nique and can therefore not be reduced to pointless incompatibilities. It is therefore difficult to see any transaction cost benefit from harmonisation there, whereas the disadvantages (in terms of not respecting national preferences) under harmonisation would be huge. From an economic perspective there would thus not be an argument to harmonise, say, the specific amounts awarded in the various cases of non-pecuniary losses.

In the framework of a comparison of amounts awarded for non-pecuniary losses in Europe it could indeed be established that serious differences still exist, both with respect to the question whether some victims (and their relatives) are entitled to compensation for non-pecuniary losses, but also as far as the amounts awarded are concerned.[59] Some have therefore argued that it is unacceptable that within Europe a victim who, for example, suffers the loss of an arm would receive less in, say, Portugal than in, say, Germany. They implicitly argue that there is no reason to treat those victims differently and that the call for harmonisation of the amounts awarded for non-pecuniary losses is justified.[60]

What can, again, be said about this argument from an economic perspective? *First* of all one should remember that the differences in amounts awarded for non-pecuniary losses are certainly not pointless, but may reflect differing preferences of the citizens in the various states. In this respect one should, *second*, also remember that Coase taught that every increase in protection can always be passed on via the price mechanism.[61] In other words if, for example, in the area of product liability, one would argue that the Portuguese should pay higher amounts for non-pecuniary losses for victims of product accidents, this would lead to an increase in prices. Indeed, the manufacturer will add the additional damage costs to the price of the products. The effect therefore is that consumers pay a higher price for the protection awarded. It may well be that consumers in Portugal are not willing to pay this higher price. A European intervention forcing all Europeans to come up to, say, the German level, would therefore amount to paternalism.

Third, there may well be specific reasons why certain countries have relatively low amounts of non-pecuniary losses and others have higher. To some extent this may be related to the level of social security. It is difficult to judge, but looking at the difference between the US system and the European system, some claim that the high amounts for non-pecuniary losses in the US constitute to some extent compensation for the fact that there is no general basic social security system in the US. Nevertheless, no one would claim that the European level of non-pecuniary losses should come up to the American level.

Some argue that given the higher amount of travel in Europe today (tourism), it cannot be understood why, say, a German professor would receive less for his pain and suffering if he were to have an accident in Portugal rather than in Germany.[62] That fact is, again, hardly an argument in favour of harmonisation. Indeed, the fact that the Portuguese would choose a lower level of damage awards for pain and suffering than the Germans reflects differing preferences. There is no reason why the Portuguese would – paternalistically – have to come up to the German level, just to please the German tourist. The latter can, moreover, being aware that they will not enjoy the same level of protection abroad as in Germany, seek additional protection – if they so desire – in the form of a voluntary first party insurance. Such insurance for tourists is widely available on the market. The mere fact of tourism can therefore hardly be considered as an argument in favour of harmonisation.

In sum, contrary to what is sometimes assumed, there may be very clear reasons why some countries have lower or higher levels of compensation for non-pecuniary losses than others. If this corresponds to differing preferences, one can, at least from an economic perspective, see no need for a general harmonisation merely based on the reason that the existence of such differences is "unjust".[63] The example, again, shows that harmonisation cannot be addressed in black and white statements. Some issues may be harmonised at relatively low cost, whereas others (which are closely related to preferences) can be differentiated. In the area of compensation for non pecuniary losses harmonisation[64] could lead to a paternalistic measure and to disrespect for the preferences of citizens. Even a call for the need to provide the same minimum protection to all accident victims within Europe can hardly justify such a paternalistic measure. However, with this statement and the reference to the need for providing a basic level of victim protection we have left the area of economics. Indeed, the reader should recall once more that in this paper chapter I have only provided "one view of the cathedral".

It is indeed still thinkable that other, non-economic arguments would be advanced to argue that a harmonisation of e.g. pain and suffering would still be necessary in Europe, for instance to guarantee the

[59] For an overview of the current differences between the Member States as far as the amounts awarded for pain and suffering are concerned see Rogers, H.W.V. (eds.), *Damages for Non-Pecuniary Loss in a Comparative Perspective*, Vienna, Springer, 2001.
[60] This argument is made by Magnus, U. and Fedtke, J., "German Report on non-pecuniary loss", in Rogers, H.W.V. (ed.), *Damages for non-pecuniary loss in a Comparative Perspective*, 2001, 109-128, and in Magnus, U., "Towards European Civil Liability", in Faure, M., Schneider, H. and Smits, J. (eds.), *Towards a European Ius Commune in legal education and research*, Antwerpen, Intersentia, 2002, 205-224; also compare Magnus, U., *supra* note 18, 427-444.
[61] Coase, R., "The problem of social cost", *Journal of Law and Economics*, 1960, 1-44.
[62] See – again – Magnus, U. and Fedtke, J., *supra* note 60, 109-128.
[63] For a similar analysis, see Hartlief, T., "Comments on Magnus, U., 'Towards European Civil Liability'", in Faure, M., Schneider, H. and Smits, J. (eds.), *Towards a European Ius Commune in legal education and research*, Antwerpen, Intersentia, 2002, 225-230.
[64] See also Hartlief, T., *supra* note 63 and Hartlief, T., "Op weg naar een Europees aansprake-lijkheidsrecht?", *TPR*, 2002, 945-953.

minimum level of protection to all European victims. Those who would advance this argument should, however, realise that Europe today does not provide such a minimum protection to accident victims either. Social security is indeed to an important extent not yet harmonised. Also the compensation after industrial accidents or occupational diseases can still be very different between the Member States. If one would therefore argue that a minimum level of protection of accident victims is necessary it seems more indicated to focus on those areas first instead of pleading for a harmonisation of compensation for non-pecuniary losses.

4.3 No Harmonisation of Conditions of Competition

In this chapter I have merely addressed the question of whether a harmonisation of tort law is needed from an economic perspective. This is not totally useless, since the European Commission itself has long advanced an economic reason (harmonisation of marketing conditions) to justify European action. That reason is, as I have tried to show in this chapter, particularly weak.

The conclusion at the normative level, however, should not necessarily be that there is no need for any European action at all with respect to tort law.[65] My main problem is that the Commission still seems to be stuck in the old jargon of the "harmonisation of conditions of competition", whereas that seems to be a weak reason for harmonisation.[66] There may be other, non-economic, reasons to justify harmo-nisation. But then these goals and expectations should be spelled out more specifically. Even those who dream of a European tort law as a political ideal (and who should realise that this may violate the preferences of citizens) can still benefit from economic analysis. Economics can help to show whether the methods of harmo-nisation chosen in a particular case can lead to the goals advertised. Moreover, those who blindly follow an unbalanced harmonisation dream should also be aware of the fact that in some cases they may (probably unknowingly) be instruments in the hands of powerful lobby groups who can benefit from harmonisation. In this respect the important lesson from the public choice school, that whenever inefficient regulatory measures are enacted there is usually a special interest group that benefits from this action, should not be forgotten.[67]

4.4 Take the Subsidiarity Principles Seriously!

Finally there remains one important lesson from economics, being that the subsidiarity principle which is often heard, but not practised in Brussels should be taken seriously within the European harmonisation debate. Many talk about subsidiarity, but when it comes to providing serious arguments why a certain issue should be better regulated at the European level than at the level of the Member States, a serious answer is usually lacking.[68] In addition it is important that serious attention is also given to the correct legal basis for harmonisation attempts with respect to tort law. If these issues are taken seriously the conclusion will probably be that a general harmo-nisation of tort law is problematic (and as I have argued, not necessaryand as has been argued above not necessary) and that a more nuanced approach of a limited harmonisation of certain general notions seems more promising. Such a balanced approach seems moreover to offer the necessary flexibility, which will allow the differing preferences of citizens in the Member States to be respected. One of the goals of this contribution chapter was to show that within the shaping of such a nuanced approach (which could take the form of general tort rules in a European Civil Code) it is possible to harmonise to a certain extent and at the same time keep the necessary flexibility. Law and economics may prove to be a very helpful instrument in this exercise.

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[65] Compare Spier, J. and Haazen, O.A., *supra* note 40, 477: "Nor is convergence or unification of private law ever strictly speaking necessary… If we favour convergence of European private law, we deem it simply *desirable*, perhaps highly desirable, but nothing more". This desirability of the harmonisation of private law in Europe is, however, highly criticised – inter alia – by Smits, J.M., "Waarom harmonisering van het contractenrecht (via beginselen) onwenselijk is", *Contracteren*, 2001, 73-74.

[66] Recently, the Commission even proposed a maximum harmonisation on those grounds for a related area: consumer contract law (COM(2008) of 8.10.2008). For a critical analysis see Faure, M., "Towards a maximum harmonization of consumer contract law?!?", *Maastricht Journal of European and Comparative, Law*, vol. 15(4), 2008, 433-445. Even though this proposal does not concern 'tort law' in the strict sense it shows the tendency of the European Commission to strive for (maximum) harmonisation in the field of private law, arguing that this would be necessary to harmonise conditions of competition.

[67] See for a discussion of harmonisation attempts from a public choice perspective Van den Bergh, R., *supra* note 22, 148-151.

[68] See in this respect the critical comments by Van den Bergh, R., *supra* note 4 and Van Dam, C., *supra* note 47.

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