Conclusions

Citation for published version (APA):

Bergkamp, L., Faure, M. G., Hinteregger, M., & Philipsen, N. J. (2015). Conclusions. In L. Bergkamp, M. Faure, M. Hinteregger, & N. Philipsen (Eds.), *Civil liability in Europe for terrorism-related risk* (pp. 330-337). Cambridge University Press. Cambridge Studies in International and Comparative Law
<https://doi.org/10.1017/CBO9781316178997.013>

Document status and date:

Published: 01/01/2015

DOI:

[10.1017/CBO9781316178997.013](https://doi.org/10.1017/CBO9781316178997.013)

Document Version:

Publisher's PDF, also known as Version of record

Document license:

Taverne

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy

If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

CONCLUSIONS

LUCAS BERGKAMP, MICHAEL FAURE,
MONIKA HINTEREGGER AND NIELS PHILIPSEN

In this book, we explored the civil liability of security firms and high-risk facility operators to third parties for damage caused by terrorism under European laws. Over the last several decades, Europe has suffered the consequences of multiple acts of terrorism. In response to the threats posed by terrorists, the European Union and nation States created counter-terrorism strategies. As part of such policies, some countries established compensation funds to ensure that victims of terrorist attacks receive some relief. The 9/11 attacks marked the beginning of the “war on terror”, a war that cannot be won definitively.¹ Beyond the massive direct and indirect damages, the 9/11 attacks raised the spectre of possible repeat strikes and even more deadly terrorist action. In this context, the role of civil liability in the fight against terrorism has been questioned.

International liability treaties do not specifically deal with liability for damage caused by terrorists. As discussed in Chapter 1, the international regimes governing liability for damage caused by aircraft and space objects, nuclear installations, oil and other hazardous substances channel liability exclusively to the operator of the relevant activities, to the exclusion of other parties involved such as security firms. Further, liability under these conventions is strict, but typically subject to a financial limit. Such a model, we found, is not ideal because it tends to reduce or eliminate prevention incentives for parties other than operators and for operators above the financial limit.

Likewise, European Union legislation has not specifically addressed liability for terrorism-related risk, although the EU did adopt legislation regarding the fight against terrorism. As discussed in Chapter 2, Member States may be liable under the *Francovich* doctrine if they act or fail to act in violation of EU law and, as a result, increase the chances of a terrorist attack. Of the potentially relevant EU legislative instruments, only the

¹ Smil 2012, 61.

ELD and PLD impose potential liability on private parties with respect to damage caused by terrorists. Interestingly, while the ELD provides a defence if the operator took “appropriate safety measures”, the PLD imposes liability if a “defective” product causes harm and provides for a “state-of-the-art” defence; thus, both instruments reflect a fault element, which limits exposure in relation to damage caused by terrorists. Other EU regulatory regimes may indirectly affect liability exposure for terrorism-related risk, inasmuch as compliance with applicable safety standards may mitigate against liability and non-compliance may contribute to a finding of negligence or even constitute negligence *per se*. The EU rules regarding cross-border litigation, on the other hand, probably have only a small effect on actual liability exposure.

In the final analysis, liability for damage caused by terrorists is chiefly a function of national law. To understand in detail how this issue plays out, we surveyed and compared the relevant national liability laws of seven EU Member States and reported the result of this analysis in Chapters 3 to 5. Security firms and facility operators are exposed to liability under fault-based and product liability rules; strict liability rules play only a minor role. The liability exposure of security firms *vis-à-vis* both their customers and third parties is determined on the basis of the contract between the security provider and the customer. Fault-based liability requires the breach of a duty of care, the scope and substance of which, in turn, is determined by contract. Thus, a security provider is able to limit its liability exposure by detailing its obligations to provide security in the contract and complying with such obligations. Specifically, the facility operator may be liable *vis-à-vis* third parties under fault-based liability rules or under strict liability concepts if the activity is deemed “hazardous”; train stations are not usually considered as hazardous activities, but could be deemed hazardous, depending on whether the concept of hazard applies to the risk of a terrorist attack. Under fault-based liability rules, the facility operator may be liable if it chose a level of security that is too low for the facility involved (e.g., no scanning is conducted for *semtex* at an airport), or otherwise did not meet its duty of care. Where the facility operator provides services to a transportation service provider (e.g., an airport), like the security provider, the operator may define its obligations by contract and these obligations could also define its duty of care *vis-à-vis* third parties, such as the users of the facility (e.g., passengers and other persons). If the operator did not meet its obligations to provide security, it may be liable also *vis-à-vis* third parties. Whether a security firm or operator is liable depends also on the nature and proximity of the damage; pure

economic loss sustained by third parties is often not compensable and some damage may be considered too remote. Under concepts of national law, the operator of an activity and the security provider may be jointly and severally liable. While the burden of proof lies with the claimant, the standard of proof varies between the Member States surveyed. Where special strict liability regimes apply, the fact that damage was caused by a terrorist attack is qualified as “force majeure” or “an act of God” in most countries and thus the operator or security provider will not be liable for the ensuing damage. Finally, in some countries, special compensation schemes for victims of terrorism have been established, which tend to effectively reduce the liability exposure of operators and security firms. All in all, this analysis does not suggest that operators and security firms are exposed to unlimited and uncontrollable third-party liability for damage caused by terrorists. On the contrary, national liability laws enable operators and security firms to avoid liability by demonstrating compliance with their duty of care, which can be defined by contract. Importantly, in none of the Member States surveyed have operators or security firms been held liable for damage caused by terrorists, and there are no signs of a liability crisis or an impending liability crisis.

Although the liability of operators and security firms is predicated chiefly on fault and contract, insurance can still play a useful role in managing such liability in an efficient manner, as discussed in Chapter 6. The main barriers to an effective insurance market, however, are the highly correlated nature of the risks concerned, the high insurance capacity required and the lack of sufficient historical data and predictability. These issues can be mitigated where the government accepts the role of reinsurer of last resort. As a result of such government back-up and sophisticated insurance techniques, terrorism-related risk has become insurable again after insurers reduced or cancelled coverage following the 9/11 attacks.

In addition to insurance, contractual liability limitations can help to mitigate liability exposure. The analysis presented in Chapter 7 demonstrated that security providers, unlike companies in other sectors such as software, may not be able to negotiate limitations on their liability in contracts with their customers, in particular where the government or public agencies purchase security services or products in a regulated public procurement process. The combination of exposure to large terrorism-related liabilities (even if based solely on fault) and the inability to limit such exposure by contract (and to obtain adequate insurance coverage, which, by definition, is subject to financial limits) might render security providers uniquely vulnerable to such liabilities. This does not mean,

however, that their liability exposure must therefore be directly limited, but it may mean that there is possibly exceptional liability exposure that may require policymakers' attention. The advantages of a liability limitation must be weighed against its disadvantages, such as the potentially negative effects of such a measure on liability's objectives in terms of deterrence (prevention), risk allocation and loss-spreading.

Liability is one way to compensate damage caused by terrorism, but it is not the only way. Alternative systems that modify or exclude liability include the US Safety Act and victim compensation funds. These systems are reviewed in Chapter 8. In the US, the lawsuits following the 9/11 attacks had a chilling effect on some economic activities and resulted in significant reduction of the availability of insurance coverage for terrorism-related risk, including cancellation of insurance policies in some cases. These adverse consequences prompted US Congress to adopt the Terrorism Risk Insurance Act,² which requires that insurance companies offer coverage of business property and casualty losses,³ as well as the Safety Act, which provides a mechanism for limiting the liability of the security industry and certain high-risk operators. The US Safety Act was specifically intended to stimulate innovation in security technology by mitigating the threat of civil liability. In Europe, the adoption of the US Safety Act and the continuing threat of terrorist attacks raised the question of whether the European Union should take action to limit civil liability for terrorism-related risks. Arguments have been made that the EU should adopt a regime like the US Safety Act, or at least a liability limitation for the benefit of the security industry. The liability litigation environment in Europe, however, is different from the litigation environment in the US, in terms of both procedure and substantive law. For instance, discovery does not exist in Europe and punitive damages are basically non-existent. Further, national social security regimes and specific terrorism funds and public-private partnerships in the European Union provide monetary compensation to victims, which reduces the need to rely on the liability system for purposes of compensating damage caused by terrorist attacks. Thus, even if there is a good case for the Safety Act in the US, it does not follow that there is a case for an EU Safety Act.

An alternative that limits liability exposure in a different way is government-mandated first-party insurance, which is also discussed in Chapter 8. Such programmes have been established for natural disasters

² Pub. Law 107–297, 116 Stat. 2322.

³ The act excludes losses due to nuclear, biological or chemical attacks, however. 2004, 172.

in France and a few other countries. They typically involve mandatory insurance contracted by victims and provide comprehensive coverage. Although possibly useful to address natural disasters, this model is not appropriate for terrorism-related risk, because it would reduce the incentives to prevent terrorist attacks. Further, ex-ante, structured compensation funds and ex-post ad hoc victim compensation programmes, which compensate victims out of public revenues or specific contributions, effectively provide subsidies to industry, or diminish the deterrent effect of liability if operators are no longer exposed to liability to the same extent. Consequently, these types of government-supported compensation mechanisms are not the ideal solutions for redressing damage arising from terrorism-related risks.

Liability for terrorism-related risk might have to be limited on the ground that unlimited liability would be enterprise-threatening. Differential treatment of high-risk facility operators and security firms for liability purposes could be justified if it could be shown that these firms are exposed to an excessive degree of liability, suffer from structural inability to deploy risk mitigation strategies, or underinvest in innovation due to the threat of liability. Each of these arguments have been reviewed in Chapter 9. None of them, however, was found to be persuasive. There is some US evidence that unlimited liability would have an adverse effect on the development and deployment of innovative security technology and systems, but the situation in Europe with its much less litigious environment is quite different. We concluded that there are no persuasive arguments to support the proposition that unlimited liability for terrorism-related risk has an enterprise-threatening effect on enterprise within the EU.

To better understand the findings of our analysis thus far, we also conducted an economic analysis of liability for terrorism-related risk. In Chapter 10, the results of that analysis were presented. This analysis identified the inefficiencies associated with the current international and EU liability regimes for other kinds of damage. With respect to alternatives to liability, the analysis suggested that a reduction in prevention incentives that may be associated with such alternatives could result in increased terrorism-related risk. It also showed that in case of a serious insolvency risk, under-deterrence may occur under a conventional liability rule. If there were proof of such an insolvency risk, that may be an argument in favour of imposing mandatory solvency guarantees, such as compulsory insurance. However, as long as there is no proof that the industry may not be able to meet its liabilities towards third parties, there may not

be an urgent reason to introduce mandatory financial security, given the substantial costs associated with such a measure.

In light of the preceding analysis, the question can now be answered whether there is a role for the EU with respect to third-party liability for terrorism-related risk and if so, what that role should be. As discussed in Chapter 11, perceived problems in the insurance market and in the market for public procurement of security goods and services may deserve further attention from policymakers, either at the EU or Member State levels. Our analysis focused on the alleged lack of affordable insurance coverage for terrorism-related risk and the impossibility of limiting liability by contract, in particular in the context of public procurement. Despite claims that terrorism-related insurance is generally unavailable, the reality appears to be more complicated; while there are well-developed markets in some Member States, coverage availability may be limited in other Member States. Further, if and to the extent that security and other firms are “forced” to accept contracts that do not provide for any limits on their liability, these contract clauses could be viewed as merely reflecting the preferences of the contracting parties; there is no reason to believe that this would reflect some “market failure”. Accordingly, it is hard to see why the EU should take action. Even if the argument that the EU should act prevails, as a matter of fact the EU would likely not support liability protection for the benefit of security firms and other economic operators, given the Member State governments’ preferences for full liability exposure.

Despite suggestions to the contrary, evidence of an impending liability crisis in the security industry is absent. The assertions of potentially “enterprise-threatening” liability exposure are not consistent with the liability standards under the laws of the seven Member States covered in this book. Thus far, facility operators and security firms have not been held liable for damage caused by terrorist attacks in Europe. No urgent EU measures are therefore necessary. In light of the complexity of national civil liability regimes, it may be helpful to launch initiatives aimed at enlightening the security industry, facility operators and, as necessary, insurers, Member States and other stakeholders about third-party liability exposure and ways to mitigate liability for terrorism-related risk.

Although security firms and high-risk facility operators in Europe are not exposed to potentially enterprise-threatening liability for terrorism-related risk, under the laws of the Member States surveyed in this book they could be held liable for damage caused by their negligent acts or omissions or by defective products, including where such damage results

from terrorist acts. In principle, subject to legal provisions regarding mitigation and the like, such liability is unlimited and thus could bankrupt a liable entity. Further, negligence and duty of care are flexible and open-ended concepts that are subject to interpretation and construction in a particular case by judges *ex-post facto*. It thus is conceivable that these concepts are construed in ways that effectively create strict liability for damages caused by terrorists, despite the fact that, as noted, we have not seen evidence of such extensive interpretations in national case law.

Even though such liability exposure in theory exists, it does not follow that liability should therefore be limited. Where liability is limited or even eliminated, the liability system is hindered in achieving its objectives, *i.e.* deterrence, risk allocation and loss-spreading. An unavoidable consequence of limiting the liability of security firms and other operators is that their incentives to invest in security may be reduced, as a result of which the preventive effect of liability would be reduced. This, in turn, might mean an increased rate of terrorist attacks or increased magnitude of harm. In addition, under a liability limitation regime, security firms and facility operators would contract less insurance or other financial guarantees to cover their liability. As a result, relative prices would be too low and over-consumption would ensue. Finally, from a distributional perspective, the consequence of a liability limitation or exclusion would be that liability's loss-spreading function would be affected and some losses would lie with the victims of a terrorist attack (unless some other loss-spreading mechanisms were established). In short, the benefits of a liability limitation should be weighed against the costs in terms of reduced prevention incentives and the related distributional consequences.

The analysis presented in this book allows us to conclude that although the case for a liability limitation is weak, civil liability for terrorism-related risk is an issue that requires the attention of policymakers, including the EU. As there is no evidence of an impending liability crisis threatening the continued existence of security firms and operators of high-risk facilities, policymakers should take time to analyse the issues, in particular any malfunctioning of the markets for terrorism-related insurance and public procurement of security services. Policymakers might anticipate possible future problems that could arise from expansive judicial construction of liability standards and consider guidance on how liability rules, in particular negligence, should be applied to cases involving damage caused by terrorist attacks. To prevent such problems from emerging, a Commission recommendation or communication, along the lines of the recommendation concerning the limitation of the civil liability of

auditors,⁴ would appear to be an adequate instrument. Possible elements of such an instrument are discussed in Chapter 11. In developing policy on this issue, the government should keep in mind that its primary responsibility is to prevent terrorist attacks from occurring, and liability for damage caused by such attacks can contribute to accomplishing this objective.

⁴ Commission Recommendation of 5 June 2008 concerning the limitation of the civil liability of statutory auditors and audit firms (notified under document number C(2008) 2274), OJ L 162/39.