

## Introduction

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# INTRODUCTION

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## 0.1. The problems posed by terrorism for civil liability

Terrorism raises a potential for large-scale damage. In the US, the “9/11” attacks on the World Trade Center resulted in massive property damage, thousands of cases of personal injury, pain and suffering and enormous consequential damage, including billions in lost profits.<sup>1</sup> Lawsuits were filed seeking compensation of damages totalling over one billion dollars. Among the parties sued in these lawsuits were not only public authorities, but also security firms and an aircraft manufacturer. The magnitude of this litigation caused concerns in the US over unlimited liability of security firms, which was believed to create disincentives for firms to develop and introduce new security technology. In response to these issues, the US Safety Act was enacted. This regime is intended to offer security companies protection against liability exposure.

Following these US developments and terrorist attacks in Paris, Madrid and London,<sup>2</sup> concerns have arisen in Europe about potential liability exposure for terrorism-related damage, which has been called “enterprise-threatening”.<sup>3</sup> The group of potentially liable parties is broad and includes operators of facilities such as airports, train stations, nuclear power plants, industrial installations, governments responsible for security and private security firms. Because the US Safety Act focuses on security technology, attention has been concentrated in particular on the security industry, broadly defined to include any company that develops and implements security measures to protect against terrorism.<sup>4</sup> Against this background,

<sup>1</sup> [www.iags.org/costof911.html](http://www.iags.org/costof911.html); [www.nytimes.com/interactive/2011/09/08/us/sept-11-reckoning/cost-graphic.html?\\_r=0](http://www.nytimes.com/interactive/2011/09/08/us/sept-11-reckoning/cost-graphic.html?_r=0).

<sup>2</sup> <http://www.lefigaro.fr/international/2014/09/24/01003-20140924ARTFIG00347-la-france-a-deja-ete-la-cible-de-multiples-attaques-terroristes.php#>; [www.elmundo.es/documentos/2004/03/espana/atentados11m/hechos.html](http://www.elmundo.es/documentos/2004/03/espana/atentados11m/hechos.html); [www.theguardian.com/uk/july7](http://www.theguardian.com/uk/july7).

<sup>3</sup> Bergkamp, Faure, Hinteregger and Philipsen (eds.) 2013, 291–306.

<sup>4</sup> There currently is no generally accepted definition of the security industry; this sector of industry, for instance, is not covered as such by the main statistical nomenclatures.

this book analyses civil liability for terrorism-related risk under international and European Union law and the laws of several representative Member States. In addition, we compare the liability environment in Europe to the situation in the US, which, as noted, thought it necessary to provide for liability protection for industry through specific legislation.

Terrorism involves intentional harm aimed at creating or augmenting fear and disrupting social life. The targets of terrorist attacks are selected on the basis of factors such as the level of security and the ability to cause extensive harm if security measures can be successfully circumvented. Terrorist attacks are often conducted in response to State action (e.g., military intervention in another State). These factors explain why terrorism is a special category of risk that is not just a matter of private concern for operators that may be affected by it. Liability for terrorism-related risk poses a challenge for civil liability because it can result in large-scale catastrophic damage, the size of which can easily exceed the net asset value of a liable corporation. As a result, in addition to liability, insurance or other

The market for security goods and services has three distinctive features: (1) it is a highly fragmented market and divided along national or even regional boundaries; (2) it is an institutional market, and buyers tend to be public and semi-public authorities; and (3) this market has a strong societal dimension, as personal safety is regarded as a highly sensitive area. The security industry provides products (e.g., detection equipment, alarm systems) and services (e.g., guarding services), and addresses man-made and natural risks; this book, however, covers only man-made risks, i.e. terrorism-related risk. The Commission Action Plan for innovative and competitive Security Industry lists the following: aviation security; maritime security; border security; critical infrastructure protection; counter-terror intelligence (including cybersecurity and communication); crisis management/civil protection; physical security protection; and protective clothing. In this book, only the industry producing goods and services used for preventing mitigating damages by terrorism and organised crime is considered as the “security industry”. Thus, the security industry can be defined to include “providers of products and services that are specifically intended to reduce the risks of intentional damage caused by terrorism and organized crime in the following areas: aviation security, maritime security, border security, critical infrastructure protection, and physical security protection”. The following products and services are regarded as being provided by the security industry: scanning and detection equipment for use with passengers and cargo (or other goods), including products for weapons and explosives detection, chemical and biological risk detection, and radionuclide detection, as well as services related to all of the above. The following industries are NOT part of the security industry: defence industry, building monitoring and management industry, plant automation and control industry, scientific automation industry, ICT industry, software, information technologies, other providers of products and services that are not specifically intended to reduce the risks of intentional damage caused by terrorism and organised crime, such as providers of fences, reinforced glass, etc. Note, however, that this definition has been used only to guide thinking generally; the analysis in this book has gone beyond the scope of the definition.

compensation arrangements may have a role to play. Even a relatively small error, oversight or defect, as a result of which terrorists can execute their devious plans, can result in huge liability exposure. Moreover, terrorists, of course, intentionally cause harm and look for the weakest link in the chain of security (and there always is a weakest link). Operators of facilities that are exposed to terrorist attacks (e.g., airports, train stations, nuclear power plants, chemical plants, etc.) and security firms cannot necessarily limit their liability exposure by contract, in particular where contractual liability limitations have no effect vis-à-vis third parties that have suffered damage due to terrorism. Needless to say, recourse against the terrorists is almost always futile.

Civil liability does not specifically deal with terrorism-related risk. Consequently, the general liability concepts (negligence, defective product, etc.) have to be interpreted and applied to the specific case of damage caused by terrorists. The aspects that make civil liability for terrorism-related risk fairly unique may or may not influence the application of civil liability in these kinds of cases. On the one hand, the incentives created by liability will generally have a positive effect on the prevention measures undertaken by potentially liable parties. On the other hand, the question should be asked whether there is a point beyond which liability serves no further useful purpose. If there is any such point or situation, the issue arises whether some limitation of liability would be justified, in particular where other compensation mechanisms are available. Whether such a point can be identified is a function of, *inter alia*, the specifics of the application of civil liability to damage caused by terrorism-related risk. Attention to this issue is therefore warranted.

## 0.2. Potential claimants and potentially liable parties

As the discussion above suggests, terrorism-related risk is a complex risk that is beyond the control of any individual entity. Effective combating terrorism therefore requires effective action by the government as well as by various private parties. In other words, both governments and private parties may have responsibilities and, thus, potentially also civil law duties of care in relation to terrorism-related risk. Since all citizens may become victims of terrorist attacks, there is a strong collective interest in prevention of terrorism damage and the handling of damages caused by such attacks. Given this social interest, many jurisdictions have adopted laws and policies to deal with aspects of terrorism, both in terms of prevention and compensation. Indeed, as the analysis in this book shows, the

framework for dealing with terrorist risk and terrorism-related damages consists of a series of regulatory and liability programmes and mechanisms. That does not mean, however, that civil liability for damage caused by terrorism-related risk is limited by these other programmes and mechanisms; rather, they tend to supplement civil liability.

Under civil liability law, the categories of both potential claimants and potentially liable parties are wide. Potential claimants include employees, customers, consumers<sup>5</sup> who may have a contractual relationship with the liable party, as well as neighbours, users,<sup>6</sup> and other third parties, who do not have a contractual relation with the liable person. The contractual relation may make a difference since it may define the obligations of the potentially liable party and the scope of its liability for damages caused (e.g., through liability caps, standards); the issue is whether and, if so, to what extent, contracts can deviate from the extra-contractual liability regime. Where there is no contract, of course, the extra-contractual liability provisions apply to their full extent in any event. Potentially liable parties include operators of facilities, such as airports and train stations, non-security service providers operating at such facilities, such as airlines and train operators and security providers, including both service providers (e.g., guarding services) and suppliers of equipment (e.g., suppliers of detection equipment). The contractual and extra-contractual liability relations between these groups are depicted in Figure 1.

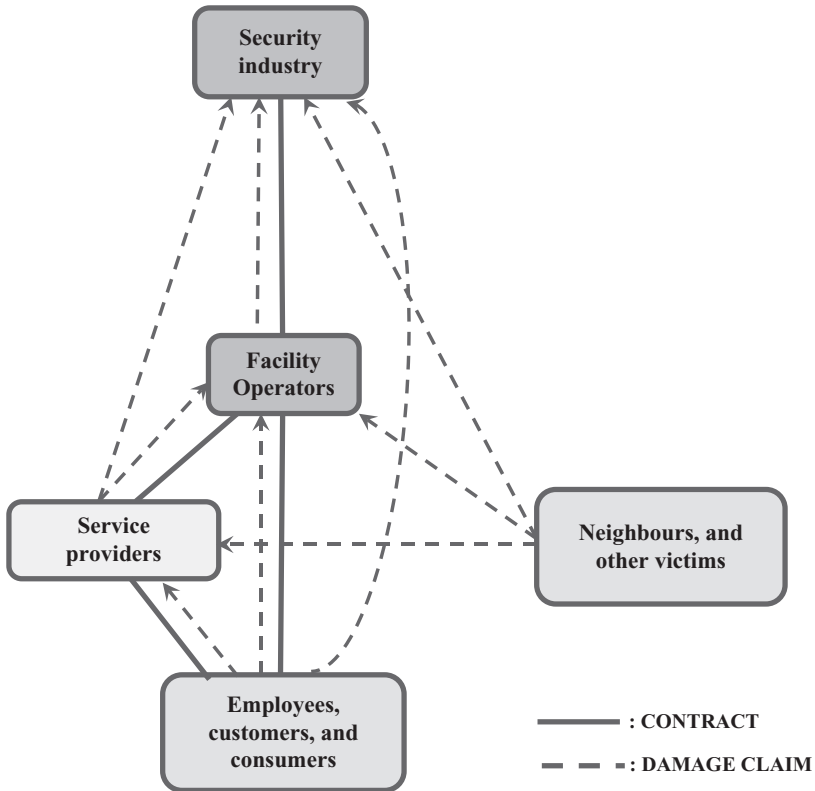
In this book, we do not address the full potential scope of liability of the State and governments. We briefly discuss Member State liability under EU law for failure to properly implement provisions of EU law. In addition, the liability of the State is covered insofar as governments or any public agencies serve as operators of facilities that may be the target of terrorist attacks, and also insofar as they may provide security services, such as guarding, subject to any special legal provisions applicable to the liability of the State.

### 0.3. Structure of analysis

Accordingly, this book examines European liability laws as they relate to terrorism-related harms. An important issue is to what extent facility

<sup>5</sup> Consumers are customers, but customers are not necessarily consumers (e.g., businesses and other professional users).

<sup>6</sup> Users may be, but are not necessarily, customers or consumers.



- *Security industry* includes service providers (guarding services, etc.) and product suppliers (suppliers of detection equipment, etc.).
- *Facility operators* include operators of industrial facilities and infrastructure (including airports).
- *Service providers* include airlines and train operators.

**Figure 1** Potential claimants and potentially liable parties

operators and security firms, both manufacturers of security goods and providers of security services, are exposed to liability for terrorism-related damage in Europe. The focus is on both potential liability exposure and actual cases. Key questions are: What standards of liability apply? What types of damages are recoverable? Are any defences available? How are cross-border cases handled?

The book, which, to a substantial degree, is based on a study conducted by the authors,<sup>7</sup> has three main parts, each comprising several chapters. In Part I, the questions identified in the preceding paragraph, as well as some related questions, are analysed under the relevant international treaties and EU legislation. Chapter 1 discusses civil liability for terrorism-related risk (TRR) under international law. Some international treaties deal with issues that may be relevant to exposure to civil liability for terrorism-related risk. From a policy perspective, international treaties may suggest models for designing appropriate liability systems for such risk. This chapter reviews several international treaties, including civil aviation, nuclear liability and oil pollution conventions. For each of these regimes, we review the key substantive law provisions, including the definition of the liable persons and the covered damage, and pay specific attention to the exemptions and defences relevant to TRR. Further, this chapter also reviews issues relating to jurisdiction and procedure. A similar perspective is adopted to analyse EU legislation in Chapter 2. Under EU law, there are two liability-related instruments that could be directly relevant to terrorism-caused harm: the Environmental Liability Directive (ELD) and the Product Liability Directive (PLD). In addition, Member States could be exposed to liability under a doctrine developed by the European Court of Justice, the so-called “*Francovich*” doctrine. Likewise, secondary EU legislation may impose obligations on private parties that help to prevent terrorist attacks. If private parties do not comply with such obligations, the spectre of liability under national law arises. In Chapter 2, the EU law relevant to the liability for TRR is analysed. The Product Liability Directive and the Environmental Liability Directive are also analysed. With respect to jurisdiction and procedure, which are relevant to cross-border cases of damage caused by TRR, this chapter discusses the EU legislation regarding cross-border claims and enforcement of judgments.

Since international and EU law provide only part of the picture, Part II turns to the laws of the civil law jurisdictions of seven EU jurisdictions: England and Wales, France, Germany, The Netherlands, Poland, Spain and Sweden. General and specific liability laws, as well as relevant court cases, are analysed to determine the scope of the liability exposure of security providers and operators of facilities. A separate chapter provides a horizontal summary and comparative analysis of the various national liability regimes. As civil liability, in the final analysis, is predominantly a

<sup>7</sup> Bergkamp, Faure, Hinteregger and Philipsen (eds.) 2013, 291–306.

national law issue, this is the largest part of the book. Throughout this part, the main focus is on how key substantive topics are handled under the laws of the Member States concerned. This approach allows direct comparisons between the national regimes. National law imposes liability on one or more persons that have some relation with or responsibility for the damage that occurred. In the case of negligence, this typically is the person (or persons) that acted negligently. In the case of strict liability, the category is described in terms of status such as operator or owner. The scope of liability of these categories of liable persons is defined by a number of concepts. First, a key issue is the scope of the damage covered by particular liability regimes. Types of damage that may potentially be covered include material (physical) damage to property, personal injury (including medical expenses and disability), pain and suffering, and economic damages (lost profits). Further, except where liability is absolute (which is rare), the law provides for certain exemptions or exclusions and allows liable persons to invoke certain defences. National law imposes liability only if there is a causal relation between an event and the damage. Thus, causal concepts, including proximate cause and remoteness, are directly relevant to the scope of liability. Another key issue is how liability relates to regulation. This relation can work in two directions: regulatory compliance could protect potentially liable persons against claims and non-compliance could expose them to claims.

By way of introduction to Part II, Chapter 3 provides an overview of the various national liability regimes and of the tort law systems of analysed Member States. It furthermore surveys the bases of liability, relationship between tort liability and regulation, causation, attribution of liability, damages and available remedies and alternative compensation mechanisms. Chapter 4 then reviews specific cases that are relevant to the issue of liability for terrorism-related risk. The final chapter of this part provides a brief summary and comparison of the various national regimes with particular attention to the liability of the operator of dangerous activities, liability of security providers, liability for pure economic loss and environmental damage, and liability for damage caused by a natural disaster or an act of terror.

Part III of the book assesses the current liability regimes from legal and economic perspectives. The question is posed whether the existing laws are just and efficient. In answering this key question, this book treats liability as an instrument that pursues social goals, such as deterrence, compensation and risk-spreading. Where liability is excessive, security firms could decide to withdraw from the market or reduce the pace of



innovation, which would have adverse effects on security. On the other hand, where liability is too lax, security firms may underinvest in security. Should the existing laws be amended and liability be limited? If this were done, where could potential problems arise? What solutions are available to address any such issues? The book examines liability limitations and alternatives to liability, including the US Safety Act regime, compensation funds and other mechanisms. The final chapters evaluate the security industry's liability exposure and the need for protection, as well as the potential role of the European Union in matters of terrorism-related liability, insurance and related issues.

Because this book combines international/EU and national law, and positive law and policy perspectives, it covers a large territory in an integrated fashion. The intended readership is therefore large and includes lawyers, policymakers, consultants, academics, insurers and corporate executives. It should also be useful to researchers with an interest in civil liability. Some familiarity with civil liability will be assumed, although the key concepts are generally explained in the context of terrorism-related risk.