7. EU agency tort law and its limited role in controlling agencies

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1. INTRODUCTION

1.1 Controlling EU Agencies through Tort Law

This chapter deals with the function(s) of the laws on non-contractual liability (hereafter: EU agency tort law) in controlling the operation of agencies of the European Union, and how this idea of controlling agencies through EU agency tort law is related to the substantive laws on the non-contractual liability of these agencies. More specifically, this chapter focuses on the question whether and, if so how, the pros and cons of controlling agencies through EU agency tort law are enshrined in the substantive conditions for examining the lawfulness (or unlawfulness) of the operation of the agencies.

Section 2 will provide an overview of the EU agency tort law regime, with a particular focus on the substantive conditions that have to be met for establishing unlawfulness.[1] Given the aim and length of this chapter this discussion will not be exhaustive. A selection of topics that are relevant for examining the functions of EU agency tort law in controlling agencies will be discussed. In Section 3, a conceptualization of EU agency tort law will be made. This will be done by examining EU agency tort law under two paradigms: the 'interpersonal repair paradigm' and the 'public control paradigm'. Both paradigms provide different benchmarks for assessing the operative domain, and hence scope, of EU agency tort law. Although the ideas about the functions of EU agency tort law differ fundamentally under these two paradigms, both paradigms justify, or even require, a restricted role of EU agency tort law in controlling agencies. To substantiate this argument, the two conceptualizations of EU agency tort law will be related to the substantive requirements for establishing non-contractual liability. In particular, the question will be addressed

[1] Thus other grounds for non-contractual liability, such as the doctrine of unjust enrichment, will not be addressed.

as to how the notion of tort law as an instrument of controlling agencies relates to the substantive conditions for examining the unlawfulness on the part of the agency. The answers to this question lead to the central argument of this chapter, contending that the conditions for examining non-contractual agency liability can partly be explained and justified by the fact that non-contractual liability might actually *undermine* the adequate functioning of agencies. The assumed (potential) negative extra-judicial effects of EU agency liability on the functioning of EU institutions and agencies, and the (lack of) possibilities for the courts to control these potential negative extra-judicial effects, seems to be an important policy consideration for judicial restraint in accepting non-contractual liability. Ultimately, this implies that, although EU agency tort law can be complementary to other control mechanisms, one should not rely on it too heavily for purposes of controlling agencies.

1.2 Two Important Methodological Restraints

The reasoning of this chapter is subject to some important methodological restraints. First, this chapter is not based on (primary) empirical research into the actual effects of the threat of agency liability on the operation of these agencies. Secondary empirical research into the effects of tort law on behaviour in general has been considered, although an analysis of this literature reveals that there is (still) a knowledge gap concerning the actual influence of tort law on the operation of EU agencies. This inevitably means that the analysis of EU agency tort law's potential to control behaviour is based particularly on legal considerations that are present in literature and case law. Thus, this chapter illustrates *legal*, and non-empirical, ideas about the role of tort law in controlling agencies. Secondly, from Section 3 onwards, examples within the General Court's and the CJEU's case law will be used to illustrate the problematic relationship between EU agency tort law and the idea of controlling agencies through tort law. These illustrations do not suggest that such considerations always play a decisive role in the courts' reasoning, nor do they provide insights into the relevance and normative weight which the courts attach to them in their decision making. For such an analysis, qualitative empirical research into the relevance of societal impact questions for the courts' decisions consisting, for instance, of interviews with the judges, is needed. Nonetheless, the fact that elements in the reasoning of both courts relate to the limitations of tort law as a control mechanism is an indication that questions about the impact of liability on the agencies are relevant.

2. OVERVIEW: THE LAWS ON NON-CONTRACTUAL AGENCY LIABILITY

2.1 The Basis for Non-contractual Liability

On the basis of Article 340 (2) of the Treaty on the Functioning of the European Union (hereafter TFEU), if certain conditions are met the EU is under an obligation to cover the damage that its institutions have caused to Member States, undertakings and/or individuals.[2] Damage caused by servants of the EU in the performance of their duties can also give rise to non-contractual liability. The scope of Article 340 (2) is broad. Liability can arise for both acts and omissions, and various activities of the EU's institutions can give rise to non-contractual liability on the part of the EU, such as the adoption of regulations and legislation, or a lack thereof, a failure to take appropriate administrative steps, breaches of principles of good administration, breaches of fundamental rights, inadequate supervision of bodies to which power has been delegated, and physical acts or omissions.[3] Article 340 (3) TFEU deals with the non-contractual liability of the European Central Bank (hereafter ECB). The founding acts of those agencies that are the subject of analysis in the subsequent chapters of this book all contain provisions concerning their non-contractual liability which are similar, or often even identical, to the wording of Article 340 (2).[4] These provisions refer to Article 340 (2) TFEU as the relevant regime for examining the non-contractual liability of these agencies.

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[2] See also art. 47(3) of the Charter of Fundamental Rights of the European Union. The Charter, however, does not replace or modify the non-contractual liability regime of the TFEU and the conditions that need to be fulfilled for establishing liability. See art. 51 (2) of the Charter, No. 1, Annexed to the Lisbon Treaty concerning the Charter of Fundamental Rights of the European Union 2012 C 326/02. See for more on this topic Angela Ward, 'Damages under the EU Charter of Fundamental Rights' (2012) ERA Forum 12, 597 (in particular).

[3] Paul Craig, *EU Administrative Law* (3rd edn, OUP 2018) 690.

[4] For European Food Safety Authority see Regulation (EC) No. 178/2002, L 31/1, art. 47 (2); for European Asylum Support Office see Regulation (EU) No. 439/2010, L 13/11, art. 45 (3); for Eurojust see Regulation (EU) No. 2018/1727, L 295/138, art. 78 (3); for European Fisheries Control Agency see Regulation (EC) No. 768/2005, L 128/1, art. 21 (3); for European Aviation Safety Agency see Regulation (EC) No. 216/2008, L 79/1, art. 31 (3); for European Securities and Markets Authority see Regulation (EU) No. 1095/2010, L 331/84, art. 69 (1); and for Single Resolution Board, see Regulation (EU) No. 806/2014, L 225/1, art. 87 (3).

2.2 Examining the Lawfulness of the Acts and Omissions of Agencies

In its case law, the CJEU has given an autonomous interpretation of the requirements for non-contractual liability of the EU's institutions. This case law is partly based on the principles of the Member States on non-contractual public authority liability.[5] There is a vast amount of literature on the conditions that have to be met for establishing non-contractual liability, which cannot be discussed in detail.[6] Therefore, only the main elements will be discussed. In *Bergaderm*,[7] a case dealing with the liability of the EU for a Commission directive restricting the use of certain cancer-causing substances in suntan lotion, the current standard for examining agency liability was introduced. In that case the CJEU aligned the substantive requirements for non-contractual agency liability, particularly the requirements for establishing unlawfulness, with the laws on non-contractual Member State liability for breaches of EU law.[8] Since *Bergaderm*, the following requirements for establishing non-contractual agency liability have to be met:[9] (1) the claimant has suffered actual damage; (2) there is a sufficiently serious breach of a rule of EU law (unlawfulness) which must be (3) intended to confer a right on individuals (*Schutznorm*);[10] and (4) there is a direct causal link between the wrongful act attributable to EU institutions and agencies or their agents and the (5) actual damage. These requirements must all be met for establishing liability, although there is no obligation for the EU's courts to examine the conditions in a particular order. If one of the conditions is not met, an assessment of the

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[5] See for instance Ken Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective* (Intersentia 2016).

[6] See in general Koen Lenaerts, Ignace Maselis, Kathleen Gutman and Janek T. Nowak, *EU Procedural Law* (OUP 2014) 480–550.

[7] Case C-352/98 P *Bergaderm and Goupil v Commission* ECLI:EU:C:2000:361, [2000] ECR I-5291.

[8] See Pekka Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Bloomsbury 2011) 81–102.

[9] Next to substantive requirements there are also procedural requirements, such as requirements relating to admissibility or limitation periods, which will not be addressed here. See on this distinction Kathleen Gutman, 'The Evolution of the Action for Damages against the European Union and Its Place in the System of Judicial Protection' (2011) 48 *Common Market Law Review* 695, 738–749; See also Kathleen Gutman, 'Liability for Breach of EU Law by the Union, Member States and Individuals: Damages, Enforcement and Effective Judicial Protection' in Adam Lazowski and Steven Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016) 450.

[10] Some see requirements 2 and 3 as one requirement. See Gutman, 'Liability for breach of EU law' (n 9) 450–451.

other criteria is not needed.[11] This, among other things, means that sometimes liability can be dismissed without examining the unlawfulness of the agencies' acts or omissions.

For the analysis of the control function of EU agency tort law, the second requirement on unlawfulness and the third requirement of a *Schutznorm* are of particular importance,[12] since both determine to what extent the agencies' operation is subject to a review on the basis of the laws on non-contractual liability. These rules ultimately determine the level of autonomy which EU agency tort law provides to the agencies in shaping and implementing their policies, regulations and physical acts. In order to examine unlawfulness, the question is whether the agency manifestly or gravely disregarded the limits on its discretion and when there is no discretion or only limited discretion, the mere infringement of EU law *may* be sufficient to establish a serious breach.[13] As such, the nature (see above in Section 2.1) of the contested act or omission in question is irrelevant for examining unlawfulness,[14] and this test applies to all kinds of acts or omissions of agencies. Although the level of discretion left to the agency is an important consideration in examining unlawfulness, it is not decisive. In addition, the complexity of the situation(s) to be regulated, difficulties in the application or interpretation of the legislation and whether the breach was intentional or voluntary are all considered in examining liability.[15]

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[11] E.g. Case C-257/98 P *Lucaccioni v Commission* ECLI:EU:C:1999:402, [1999] ECR I-5251, paragraphs 13 and 14.

[12] See inter alia *Bergaderm and Goupil v Commission* (n 7) paragraphs 43 and 44; Case C-472/00 P *Commission v Fresh Marine* ECLI:EU:C:2003:399, [2003] ECR I-7541, paragraph 24; Case C-312/00 P *Commission v Camar and Tico* ECLI:EU:C:2002:736, [2002] ECR I-11355, paragraph 54. See for the latter e.g. Case C-198/03 P *Commission v CEVA and Pfizer* ECLI:EU:C:2005:445, [2005] ECR I-6357, paragraph 65. See Craig (n 3) 689.

[13] See e.g. Case C-440/07 P *Commission v Schneider Electric* ECLI:EU:C:2009:459, [2009] ECR I-6413.

[14] Lenaerts et al. (n 6) 522, see e.g. *Bergaderm* (n 7) paragraph 46, and *Commission v Fresh Marine* (n 12) paragraph 27.

[15] Kathleen Gutman, 'Liability for breach of EU law' (n 9) footnote 74. See for an interaction between these two requirements and the level of discretion: *Bergaderm* (n 7) paragraphs 33 and 40, *Commission v Fresh Marine* (n 12) paragraph 24, *Schneider* (n 13) paragraph 166 and Case T-212/03 *MyTravel Group v Commission* ECLI:EU:T:2008:315, [2008] ECR II-1967, paragraphs 31 and 38; Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe v Commission* ECLI:EU:T:2001:184, [2001] ECR II-1975, paragraph 134; Case T-364/03 *Medici Grimm v Council* ECLI:EU:T:2006:28, [2006] ECR II-79, paragraphs 79 and 87; *Commission v Camar and Tico* (n 12), paragraphs 35 and 52; *Commission v CEVA and Pfizer* (n 12), paragraphs 35 and 62. See also, by analogy, with regard to the non-contractual liability of a Member State for infringement of EU law, Case C-424/97 *Haim v Commission* ECLI:EU:C:2007:357, [2000] ECR I-5123, paragraphs 41–43.

Thus, even when the discretion is (considerably) limited, or even non-existent, other circumstances, such as the complexity of the situations to be regulated, can still be a hurdle for establishing unlawfulness.[16] A breach of the principle of good administration as such does not in itself lead to a finding of unlawfulness. The same applies, for instance, to the obligation to give reasons for a decision and obligations of due diligence.[17] And, as will be discussed in more detail in Section 3.2 and beyond, when the agency has considerable discretion and/or when the situation to be regulated is complex, the threshold for establishing non-contractual liability on the part of EU institutions and agencies is high,[18] which suggests that the potential of EU agency tort law to control agencies is rather limited in such circumstances.

2.3 Relation to Other Actions

The action for damages is an independent action with the purpose of offering the possibility of obtaining compensation.[19] In this way, the laws on non-contractual liability offer an extra possibility for the judicial protection of individuals, and potentially for examining the actions of the agencies and ultimately for controlling agencies.[20] Thus, for the admissibility of a claim for damages, no other action, i.e. an action for annulment or a failure to act, is required. This means, for instance, that persons who do not fulfil the stringent *locus standi* requirements for an action for annulment or the action for a failure to act, or whose actions are barred by the shorter limitation periods that apply to these actions can, indirectly, challenge acts of the EU or its agencies through the action for non-contractual liability.[21] Even if other actions are not possible,

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[16] Also causation can still be a hurdle. See for more possible defences Lenaerts et al. (n 6) 526–527.

[17] See for further references n 31. Case C-47/07 P *Masdar (UK) Ltd v Commission* ECLI:EU:C:2008:726, [2008] ECR I-9761, paragraphs 90–96.

[18] See e.g. Casey W. Halladay, 'A Bulletproof Vest for the Commission? Assessing the C.F.I's Judgment in MyTravel Group v. Commission' (2009/2010) 16 CJEL 131; Roberto Caranta, 'The Liability of EU Institutions for Breach of Procurement Rules' (2013) 8 *European Procurement & Public Private Partnership Law Review* 238.

[19] See Lenaerts et al. (n 6) 489–493.

[20] See on the relationship between the action for damages on the basis of non-contractual liability and other actions ibid. 488–493. Think also about the situation where an appeal on the basis of art. 263 TFEU is not possible. In such cases, the action on non-contractual liability offers an extra route for judicial protection. See e.g. in relation to OLAF; Michiel Luchtman and Martin Wasmeier, 'The Political and Judicial Accountability of OLAF' in Miroslava Scholten and Michiel Luchtman (eds.), *Law Enforcement by EU Authorities* (Edward Elgar Publishing 2017) 239.

[21] Paul Lasok and Timothy Millet, *Judicial Control in the EU: Procedures and Principles* (Richmond 2004) 82–83 with references.

for instance preparatory actions for which no action for annulment under Article 263 (4) TFEU is available, an action for damages is still a possibility. Also, an annulment of the decision or legislation of the EU's institution or agency is not a prerequisite for obtaining compensation on the basis of the laws of non-contractual liability.[22] However, the annulment of a decision of the relevant authority does not *ipso jure* give rise to non-contractual liability. A further legal qualification of the damage causing event(s), conforming to the previously mentioned criteria, is thus needed. Nonetheless, a failure to make use of the possibilities of other available actions, such as the action for annulment, could be taken into account in examining liability: the applicant's failure to have recourse to another action might lead to the denial of liability.[23]

3. CONCEPTUALIZING EU AGENCY TORT LAW

3.1 Two Paradigms

In the following sections, the legal criteria for the assessment of unlawfulness on the part of agencies will be placed in two paradigms. These paradigms serve as a tool to conceptualize EU agency tort law. First, the 'interpersonal repair paradigm' will be discussed, and then the 'public control paradigm'. Both paradigms provide foundational guidelines for determining the operative domain, and hence the scope, of EU agency tort law. This operative domain in turn determines the normative framework for assessing when non-contractual liability is justified.

3.2 The Interpersonal Repair Paradigm

The paradigm of interpersonal repair is the prevailing paradigm in tort law scholarship.[24] Under this paradigm, tort law's operative domain is the bipolar relationship between the defendant, i.e. an agency, and the claimant, i.e. an individual, Member State or company. Within this relationship tort law provides the grounds for determining whether the defendant, an EU agency, must compensate the victim for the damage which it has allegedly caused. By

[22] Under *Plaumann* an annulment was needed for establishing non-contractual liability. See Case 25/62 *Plaumann v Commission* ECLI:EU:C:1963:17, [1963] ECR 95, however nowadays no annulment is needed, with some exceptions. Craig (n 3) 682; Lenaerts et al. (n 6) 489–490, 492–493.

[23] Lenaerts et al. (n 6) 491.

[24] E.g. Jules L. Colement, 'Tort Law and the Demands of Corrective Justice' (1992) 67 *Indiana Law Journal* 349; Tony Honoré, *Responsibility and Fault* (Hart Publishing 1999); Ernest J. Weinrib, *The Idea of Private Law* (OUP 2012).

providing for the possibility of obtaining compensation, tort law ultimately offers the possibility to restore the balance in the relationship between the claimant and the defendant that has been damaged by the contested act(s) and/or omission(s) of the agency. Non-legal policy goals which could also be served by tort law, such as influencing behaviour, controlling decision making or loss spreading, are not relevant from this perspective and hence should not affect the application of the conditions for examining agency liability in specific cases: what is decisive is whether *this* agency acted wrongfully against *this* defendant.

The relationship between EU agency tort law and the interpersonal repair paradigm is complicated. On the one hand 'the action for damages plays a key role alongside other routes to ensure effective *judicial protection for individuals*', as Gutman stresses.[25] On the other hand, questions of agency liability, particularly those that relate to liability for legislative or policy-making issues, often have (non-legal) implications that go beyond the relationship of the two parties, thereby transcending the bipolar relationship between the parties and the domain of offering the possibility of interpersonal repair. It is worth mentioning in this respect that an obligation to pay damages is ultimately funded by EU public money. Liability thus has (some) impact on the available budgets of agencies and subsequently on the policy choices that agencies must make in the prioritization of budgets. Therefore, to a certain extent, agency liability lies outside tort law's operative domain of offering interpersonal repair, which implies that under this paradigm judicial restraint in the area of non-contractual agency liability is required.

The field of tension between the interpersonal repair paradigm and EU agency tort law, which stems from the fact that judicial protection for individuals can also have societal side-effects, first becomes clear in situations of complex legislative and policy issues, which by their nature require the balancing of multipolar and sometimes contradictory public interests. In such cases, the laws on non-contractual liability leave considerable autonomy to the agencies, thereby limiting the role of tort law in assessing the choices made by the agency. Thus, for instance, in *MyTravel Group* the General Court considered that 'sufficiently serious' 'does not comprise all errors or mistakes, even if these mistakes have some gravity, since the application of competition rules are complex delicate and subject to a considerable degree of discretion'.[26] In addition, in several ways the *Schutznorm* provides a mechanism to delineate the scope of EU agency tort law. An example of this is the fact that a failure to observe a provision on the division of powers between the institutions, as

[25] Kathleen Gutman, 'Liability for breach of EU law' (n 9) 448.
[26] *MyTravel Group v Commission* (n 15) paragraph 40.

such, does not give rise to liability since these provisions do not confer rights on individuals,[27] even though it could be said that in the end these rules protect individual interests and that breaches 'of these rules can be at the origin of possible violations of the rights of individuals'.[28] Liability in such situations will only be accepted when the institution or agency 'also, in its substantive provisions, disregarded a superior rule of law protecting an individual'.[29] One also needs to think about the fact that breaches of the principle of good administration justify the finding of unlawfulness if the particular principle, rule or right 'constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly, and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons',[30] which underscores the importance of EU agency tort law in offering the possibility of judicial protection to *individuals*. The *Schutznorm*, in other words, provides a mechanism to keep EU agency tort law in its domain of offering interpersonal repair. This is also indicated by the fact that the *Schutznorm* could be used as a mechanism to prevent agency tort law from interfering with issues of public interests. An example can be found in *Cofradía*, where liability was dismissed because the quota on anchovies had been established for the protection of geographical areas and not for the specific fishermen, even though those fishermen suffered the negative effects of those quotas.[31]

3.3 The Public Control Paradigm

The idea of *controlling* agencies through tort law relates to an instrumental perspective on tort law. This instrumental account not only requires that the EU agency tort law regime provide a mechanism to determine whether the agency

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[27] Case C-221/10 P *Artegodan v Commission* ECLI:EU:C:2012:216, paragraphs 20–22.

[28] *Artegodan v Commission*, Opinion of AG Bot paragraph 44.

[29] See e.g. *Artegodan v Commission* (n 27), paragraphs 32 and 80–82.

[30] See to this end inter alia See e.g. *Masdar* (n 17); Case T-193/04 *Tillack v Commission* ECLI:EU:T:2006:292, [2006] ECR II-3995; *Fresh Marine v Commission* (n 12); *MyTravel Group v Commission* (n 15); Case T-514/93 *Cobrecaf and others v Commission* ECLI:EU:T:1995:49, [1995] ECR II-621; Case T-160/03 *AFCon Management Consultants and Other v Commission* ECLI:EU:T:2005:107, [2005] ECR II-981; Case T-285/03 *Agraz and Others v Commission* ECLI:EU:T:2005:109, [2005] ECR II-1063 (on appeal particularly questions about the losses and damage were addressed); Case C-243/05 P *Agraz and Others v Commission* ECLI:EU:C:2006:708, [2006] ECR I-10833; Case T-309/03 *Camós Grau v. Commission* ECLI:EU:T:2006:110, [2006] ECR II-1173.

[31] Case T-415/03 *Cofradía de Pescadores v Council* ECLI:EU:T:2005:365, [2005] ECR 2005 II-4355, paragraphs 93–97. The appeal of this case was dismissed (Case C-6/06 P *Cofradía de Pescadores v Council* ECLI:EU:C:2007:702, [2007] ECR I-164).

should make good the damage it caused to the claimant, but also requires that liability and the threat of it could inform, influence, legitimize or constrain the power, behaviour, decision and/or policy making of EU agencies, thereby ultimately also safeguarding that, in the future, they are acting in accordance with the demands of the rule of (EU) law. Thus, instead of focusing on the bipolar relationship between the claimant and the agency, an instrumental account of tort law puts emphasis on improving the quality of *future* decision making and behaviour of agencies. It focuses on the impact of EU agency tort law on the operation of agencies.

At first sight, tort law is primarily an *ex post* operating control mechanism: it will be triggered after the harm-causing events have occurred and litigation has been initiated. Nonetheless, it is most important under this public control paradigm that tort law can have *ex ante* effects by influencing the operation of the agencies in the future. Such impacts can be brought about through direct and indirect impact mechanisms (hereafter direct and indirect effects). In the case of direct effects, an agency adjusts its behaviour or policies *because of a specific court ruling*. In the case of indirect effects, the reaction of various actors in society, such as other EU agencies and institutions, NGOs, industry or the media, to (the outcome or threat of) litigation is the reason for an agency to change its course. In this situation, changes are made *because of the reaction of third parties* to litigation, which, for instance, becomes apparent through public action or publicity. Unfortunately, there is relatively limited empirical knowledge about the occurrence, nature and quantity of these direct and indirect impact mechanisms on EU agencies, although in psychological literature and empirical legal studies those factors that affect tort law's potential to influence behaviour and policy making are addressed. These general insights could also be relevant for establishing the potential of non-contractual agency liability, and its possibility to control agencies,[32] in a more empirically orientated context. According to this literature, in order to examine tort's potential to influence behaviour, and thus tort's public control function, one should consider: the extent to which agencies know which (tort) obligations apply to them; the fact that not all tortious behaviour is brought before a court and/or successfully remedied; agencies and their officials might underestimate or overestimate the likelihood of being subjected to litigation;[33] and that decision- and policy making is influenced by other kinds of non-legal circumstances,

[32] E.g. Jennifer K. Robbennolt and Valerie P. Hans, *The Psychology of Tort Law* (NYU Press 2016) 22.

[33] This might be particularly problematic in tort law where standard setting is mainly retroactive.

such as political forces, public opinion, influence of lobby groups, media coverage, and heuristics and biases.

The public control paradigm can be seen in several ways. In other words, there are several ways in which EU agency tort law,[34] in theory, could influence the future operation of the EU's institutions and agencies and perform a public control function. Perhaps the most important characteristic is that tort adjudication, and more specifically the *perceived* threat of liability, could create incentives for changes in the operation of agencies. The threat of non-contractual liability could deter specific agencies which have been subjected to litigation and which have unlawfully caused harm from further breaching the law (specific deterrence), and/or it could provide incentives for agencies in general to refrain from breaching EU rules of law (general deterrence).[35] As will be discussed in Section 4.2, this threat could also lead to chilling effects, which undermine the adequate functioning of agencies. Such possible chilling effects of liability seem to be an important reason for judicial restraint in accepting agency liability.

Further, tort adjudication could lead to norm amplification or the development of standards, thereby providing the agencies with a normative framework for future decision and policy making. In a way, tort law provides a public forum for discussion on and development of the relevant tort obligations that apply to agencies. Given the broad and general scope of the rules on non-contractual liability – i.e. the laws on non-contractual liability cover a wide range of different types of behaviour – EU agency tort law, at least in theory, could provide guidance on the applicable rules. However, given the high thresholds required for establishing liability, particularly when the issue to be regulated is complex and there is considerable discretion, the current system of EU agency tort law allows the agencies a good deal of autonomy, which of course also has implications for the standard-setting role which tort law could play.

The enforcement and development of EU law obligations through the system of non-contractual liability does not depend on further action of other

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[34] I.e. the filing of a law suit, the collection of evidence, the pleadings and the verdict.

[35] See on this distinction Guido Galabresi, *The Cost of Accidents* (Yale University Press 1970); Steven Shavel, *Economic Analysis of Accident Law* (Harvard University Press 1987). See for empirical studies on tort law and deterrence Michael J. Saks, 'Do We Really Know Anything about the Behavior of the Tort Litigation System – and Why Not?' (1992) 140 *University of Pennsylvania Law Review* 1147; W. Jonathan Cardi, Randall D. Penfield and Albert H. Yoon, 'Does Tort Law Deter Individuals?' (2013) 9 *Journal of Empirical Legal Studies* 567; and Theodore Eisenberg and Christoph W. Engel, 'Assuring Civil Damages Adequately Deter: A Public Good Experiment' (2014) 11 *Journal of Empirical Legal Studies* 301.

EU enforcement agencies or institutions.[36] In this way EU agency tort law can be complementary to other control mechanisms, which is illustrated by the fact that an action for damages based on non-contractual liability is an independent action under EU law and so annulment is not a prerequisite for obtaining compensation. Consequently, enforcement and standard setting in non-contractual liability cases can lead to gap filling in EU regulations, which might be particularly welcome if the applicable rule of EU law is rather general, when some circumstances have not been addressed in the applicable regulation or when the law is ambiguous. However, each case is factually unique and the facts to a great extent determine the outcome of a case. The reasoning of the EU courts based on the general rules, as has been described in Section 2, is often tailored to the specific facts at hand, thereby leaving the broader meaning and scope of such a ruling potentially somewhat ambiguous.

Finally, tort cases can reveal and transmit information to several stakeholders and society in general, not only about the applicable obligations, but also about the actual policy making, decision making and behavioural practices of agencies. On some occasions this could lead to the signalling of (severe or frequently arising) problems in the functioning of agencies, which in turn could trigger action to improve the decision making, either by the agency itself or under the pressure of action by other actors and institutions, such as the Parliament, Commission or NGOs. Whether such control effects indeed take place seems to depend, again, on several non-legal circumstances.

4. EU AGENCY TORT LAW AS A CONTROL MECHANISM

4.1 Introduction

In Section 3 the potential benefits of EU agency tort law to control the operation of agencies have been discussed and EU agency tort law has been shown to have some potential to improve the operation of the agencies. In this section, three considerations that are relevant to the potential of EU agency tort law to operate as a control mechanism will be discussed in more depth. These considerations all relate to the potential negative effects of using tort law as a public control mechanism.

[36] On the other hand, however, given the fact that it is difficult to hold EU agencies liable, this effect should not be overestimated.

4.2 Chilling Effects and the Potential of Tort Law to Undermine the Operation of Agencies

A first potential problem with controlling agencies through tort law is that the threat of liability could also lead to defensive behaviour and consequently might steer the agencies' behaviour, policy and decision making in an unforeseen and perhaps even an undesired direction. The side-effects of tort liability, and the threat of them, might consequently actually *undermine* the adequate functioning of EU agencies.[37] These chilling effects require judicial restraint in establishing unlawfulness.

Chilling effects, for instance, played an important role in *Accorinti/ECB*, a case dealing with the liability of the ECB towards private bond holders for its role in the Greek debt restructuring programme. All claims were rejected. At the outset the General Court considered that a restrictive approach in cases of non-contractual liability for legislative activities was needed since the 'exercise of the legislative function must not be *hindered* by the prospect of actions for damages whenever the general interest of the European Union requires the adoption of legislative measures that may adversely affect individual interests'.[38] Also in *MyTravel Group*, potential chilling effects were considered in the decision that the annulment of a decision of the relevant authority as such does not establish non-contractual liability: equating the annulment of a decision with non-contractual liability would undermine 'the capacity of the Commission *fully to function* as regulator of competition a task entrusted to it by the EC Treaty, as a result of the inhibiting *effect* that the risk of having to bear the losses alleged by the undertakings concerned might have on the control of concentrations'.[39] And in *Züpke v Commission*, chilling effects also informed the General Court's assessment:

> it must be recalled that the requirement of a sufficiently serious breach of EU law seeks, whatever the nature of the unlawful measure in question, to avoid the situation where the risk of having to bear the losses alleged by the undertakings concerned *hinders* the ability of the institution concerned to fully exercise its competences in the general interest, both in the context of its activities that are regulatory or involve economic policy choices and in the sphere of its administrative competence.[40]

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[37] In some legal systems this fear of defensive behaviour is one of the main reasons for introducing legislative immunity for the liability of financial supervisors. Oliphant (n 5) 849 et seq.

[38] Case T-79/13 *Accorinti and Others v ECB* ECLI:EU:T:2015:756 [2015], paragraph 69.

[39] *MyTravel Group v Commission* (n 15) paragraph 42 (emphasis added).

[40] Case T-817/14 ECLI:EU:T:2016:157 *Züpke v Commission* [2016], paragraph 43 (appeal brought on 20 May 2016).

Particularly in situations where the agency has discretion, the potential negative effects on the functioning of institutions and agencies, and thus the public interest, of the threat of non-contractual liability can play a role. That raises the question as to what extent such considerations are relevant with respect to situations where there is no considerable discretion or no discretion at all. Also, it has to be noted that the empirical validity of these assumptions is not – explicitly – addressed. So, the question arises as to what extent and under what circumstances chilling effects take place and whether the threat of liability can also have positive effects on the functioning of agencies.

4.3 Second-guessing and Hindsight

Another problematic aspect of EU agency tort law is that the courts could be running the risk of second-guessing with the benefit of hindsight when examining unlawfulness, again particularly in the context of complex situations and when there is discretion.[41] This means that the examination of unlawfulness on the part of the agency is – unintentionally – informed by the results of the contested act or omission of the agency, i.e. the fact that damage was caused, thereby potentially neglecting the complexity of the decision-making process at the time of the contested act or omission. Courts might lack the non-legal specialism that is needed to examine complex and technical decision-making processes, for example because they do not have experts on hand to inform them about potential impact matters.

The apparent desire to avoid second-guessing might particularly be present in situations of uncertain risks where the precautionary principle is invoked. For instance, in *Bayer Cropscience AC and Syngenta Crop Protection v Commission* the General Court clearly set out its position and stressed its limited role in examining complex scientific opinions. It considered that

> within the process leading to the adoption by an institution of appropriate measures to prevent specific potential risks to public health, safety and the environment by reason of the precautionary principle, three successive stages can be identified: first, identification of the potentially adverse effects arising from a phenomenon; second, assessment of the risks to public health, safety and the environment which are related to that phenomenon; and, third, when the potential risks identified exceed the threshold of what is acceptable for society, risk management by the adoption of

[41] See in general on this issue: Willem H. van Boom and Andrea Pinna, 'Liability for Failure to Regulate Health and Safety Risk – Second-Guessing Policy Choice or Showing Judicial Restraint?' in Helmut Koziol and Barbara Steininger (eds), *European Tort Law 2005* (Springer 2006) 1–21.

> appropriate protective measures. Although the first of those stages does not require further explanation, the two subsequent stages call for clarification.[42]

Nonetheless, duty of care questions still apply to the normative choices made by the agency or institutions on the basis of such complex scientific opinions. For instance in *Züpke* the General Court considered that 'while studies and scientific opinion have to be taken into account by the EU institutions, the political choice of determining an appropriate level of protection for society lies with those institutions and not with the scientists'.[43] Nonetheless, as has been stressed in Section 4.1.2, chilling effects might occur and can be a reason for judicial restraint.

4.4 Controlling Multiple Tortfeasors

Lastly, non-contractual liability of EU agencies might remove the potential regulatory incentives of tort law on the behaviour and policies of other (national) agencies and or corporations that are under the supervision of the agency. This is, for instance, apparent when the actual implementation of EU decisions, regulations and legislation is left to agencies of the Member States. In that case, both the national and EU agency could be tortfeasors causing damage. This raises the question as to whether a claimant should bring an action against the EU agency, or against the national authority before the relevant national court. The EU's courts have exclusive jurisdiction over the action for non-contractual liability (Article 268 TFEU and the founding acts of the different agencies).

Due to this exclusive jurisdiction it is not possible for the claimant to bring a joint action before a national court or before an EU court. In addition, as the CJEU made clear in its preliminary ruling in *First and Franex*,[44] for instance, which dealt with questions about the liability of the Belgian state and the Commission for their handling of the Belgian dioxin crisis, the substantive assessment of the EU's institutions' (and thus also its agencies') non-contractual liability and the procedural steps to be taken for that assessment, such as the establishment of the facts and the appointment of experts,

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[42] Joined Cases T-429/13 and T-451/13 *Bayer Cropscience AC and Syngenta Crop Protection v Commission* ECLI:EU:T:2018:280, paragraph 111 (Appeal brought on 27 July 2018).

[43] *Züpke v Commission* (n 40) paragraph 42. See also judgment in Case T-31/07 *Du Pont de Nemours (France) and Others v Commission* ECLI:EU:T:2013:167, ECR 2014-00000, paragraph 270.

[44] Case C-275/00 *Commission v First and Franex* ECLI:EU:C:2002:711, [2002] ECR I-10943.

is exclusively reserved to the EU's courts. This is also the case when such an assessment is needed for examining the liability of the national authority. On the other hand, under some circumstances, even when the EU's agency or institution caused the damage, the claimant is under an obligation to exhaust the national remedies, and thus to start proceedings against the national authority first. This is the case, for instance, when the claim is for recovery of amounts wrongfully levied by the national authority based on invalid EU law. An exception to this rule applies when there is no adequate remedy under national law.[45] Claims for other types of damage, such as loss of profits or non-material damage, can still be brought before the EU's courts. However, if proceedings against the national authority have been initiated, the EU's courts will wait until the national court has given judgment on any liability on the part of the Member State, in order to avoid differences in the courts' assessments and to avoid over- or under-compensating.[46] Finally, it is worth mentioning that, although the EU's courts formally only consider the liability of the EU's agencies, the (wrongful) behaviour of the national authority might be considered when applying the substantive requirements for establishing the liability of the EU institution or agency. In particular, in examining the causal link between the damage and the contested act(s) of the agency, the fact that the wrongful behaviour is (exclusively) attributable to a national authority can block the liability of the agency.[47]

This has several implications for the potential of controlling EU agencies through tort law. One could assume that these jurisdictional rules complicate the potential of EU agency tort law to control agencies because: (1) there can be uncertainty for the agency concerning those circumstances under which it might actually be held liable, which could also influence the perceived threat of liability;[48] and (2) they raise both procedural and substantive barriers for claimants in initiating proceedings against the agency, which could lead to enforcement deficits that also undermine the actual threat of liability.[49]

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[45] Case 20/88 *Roquettefrères v Commission* ECLI:EU:C:1989:221, [1989] ECR-1553, paragraph 14; Case C-282/90 *Vreugdenhil v Commission* ECLI:EU:C:1992:124, [1992] ECR I-1937, paragraph 12; Case C-351/04 *Ikea Wholesale* ECLI:EU:C:2007:547, [2007] ECR I-7723, paragraph 68; and Case C-419/08 P *Trubowest and Makarov v Council* ECLI:EU:C:2010:147, [2010] ECR I-2259, paragraph 23.

[46] See to that effect Joined Cases 5/66, 7/66 and 13/66–24/66 *Kampffmeyer and Others v EEC Commission* ECLI:EU:C:1967:31, [1967] ECR 245, paragraph 266, and Case 30/66 *Becher v Commission* ECLI:EU:C:1967:44, [1967] ESE-285.

[47] See e.g. *Trubowest* (n 45). See also Case T-304/01 *Abad Pérez and Other v Council and Commission* ECLI:EU:T:2006:389, [2006] ECR II-4857.

[48] See on the relevance of this threat Section 3.3.

[49] See Section 3.3.

5. CONCLUSION

Non-contractual agency liability is an autonomous area of law within EU law which can be an important supplement to other control mechanisms by offering the possibility for examining the actions of agencies. This complementary role might be particularly welcome if no other control mechanisms are available or where they are limited. However, if one assesses the laws on non-contractual liability from a public control paradigm, it becomes apparent that the actual role which tort law plays in controlling agencies should not be overestimated. The idea of controlling agencies through tort law has some problematic aspects, and ultimately might undermine the operation of agencies. Given the risks of chilling effects on the operation of agencies, hindsight and second-guessing when examining the operation of the agencies and the (undermining) effects of tort law in controlling multiple tortfeasors, a restricted role for tort law in influencing and controlling the operation of the agencies is paramount. Controlling agencies through tort law should be seen as a (potentially beneficial) side-effect of offering individuals the possibility to obtain compensation, not as a goal as such of tort law.