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GENERAL LEGAL REGULATION OF CIVIL LIABILITY FOR CAUSED DAMAGE IN THE EUROPEAN UNION LAW

1. Introduction

The subject of this paper is the issue of civil liability for caused damage and the general legal rules, which regulate this issue within the European Union law. This subject is inspired by the significance of the regulation of the civil-legal liability in the European Union law, mostly due to the increased number of obligation relations incurred by causing damage. We believe that it is part of the obligation law, i.e. of the tort law, which at present is of great significance for every legal system because the causation of damage is closer to the agreements as a source of obligation relations, and the civil-legal liability of the tortfeasors becomes an issue setting a requirement and imminent necessity for its complete regulation.

In legal terms the most important, basic forms of legislative acts which the European Union can adopt are the Regulations and Directives, although there are a number of softer forms of law provided

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by the basic treaties for establishing the EU, or forms that have evolved in practice. The Regulation is fully legally binding and directly applicable in all Member States, while the Decisions are fully legally binding to whom they refer to. The Directives, on the other side, represent one of the basic instruments for compliance used by the European Union institutions to align or coordinate the different laws of the Member States in different areas.

During the analysis of the Regulations and Directives enforced in the European Union there are legal rules, which refer to the civil liability for caused damage, but their number is very small, and this especially refers to the rules with general content. Regarding Regulations, in the European legislation there is only one Regulation that sets the issue of civil-legal liability on general level, i.e. the Regulation No. 864/2007 of 11 July, 2007 for applicable law for non-contractual obligations (Rome II). Regarding the Directives, in the European law there are numerous Directives, which refer to the regulation of the civil-legal liability in one specific case – the motor vehicles. In order to regulate this issue, or precisely insurance against civil liability in respect of motor vehicles, four Directives are adopted. The first is the European Council Directive 72/166/EEC of 24 April 1972 on compliance of the law of the Member States regarding insurance against civil-legal liability in respect of motor vehicles and introduction of compulsory insurance against such liability.[1]The second is the European Council Directive 84/5/EEC of 30 December 1983 on compliance of the law of the Member States regarding insurance against civil-legal liability in respect of motor vehicles. The third is the European Council Directive 90/232/EEC of 14 May 1990 on compliance of the law of the Member States regarding insurance against civil liability in respect of motor vehicles and the last one is the Directive 2000/26/EC of the European Parliament and of the European Council of 16 May 2000 on compliance of the law of the Member States regarding insurance against civil liability in respect of motor vehicles.

In order to clearly and rationally regulate this issue, these four Directives[2] are codified together with the Directive 2005/14/EEC of the European Parliament and of the European Council of 11 May 2005 on the amendments of the Council Directives 72/166/EEC, 85/5/EEC, 88/357/EEC, 90/232/EEC and the Directive 2000/26/EC of the European Parliament and of the Council

1 This Directive is amended in terms of Article 2 with Council Directive 72/430/EEC adopted on 19 December 1972.

2 I.e. Directive 72/166/EEC of 24 April 1972, Directive 84/5/EEC of 30 December 1983, Directive 90/232/EEC of 14 May 1990 and Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000.

on insurance against civil liability in respect of motor vehicles. As a result of the codification, the Directive 2009/103/EC of the European Parliament and of the Council has been adopted on 16 September 2009 on the insurance against civil liability in respect of motor vehicles and introduction of compulsory insurance against such liability.

In this manner, there is a lack of regulation on general level of the issue of civil liability for caused damage, and to the tort law as one major and significant area in the EU law, especially having in mind that nowadays such legal relations are more and more significant, becoming as significant as the contractual obligations within the legal system of every country, and the European Union alike.

This lack has been perceived in the European Union and there are strides for its elimination by establishing and operation of the European Group on Tort Law.[3] The most significant results of the work of the European Group on Tort Law are the Principles of the European Tort Law (hereinafter: Principles). This group cooperated with the European Commission of Tort and Insurance Law[4] in Vienna. Within the work program of this cooperation, the group presented the Principles on a public conference in Vienna on 19.05.2005 and 20.05.2005. Although they represent a model of general principles for most of the issues of the tort law and have objective to serve as a basis for promotion and harmonization of the tort law in Europe, we believe that at the same time they present one significant move of the international law towards general principles of civil liability for caused damage on international level. The reason for this opinion is the fact that within the international legal sources, chronologically speaking, firstly we encounter international legal acts, principles and models that regulate the civil liability of the contractual parties in the contracts for the international sale of goods. This refers to the following international instruments:

- The United Nations Convention on Contracts for the International Sale of Goods (CISG) in Vienna from 1980;
- The UNIDROIT Principles of International Commercial Contracts (UPICC)[5] from 1994; and
- The Principles of the European Contractual Law (PECL) published in 1994 and first amended in 1999.

3 More on the group at: http://civil.udg.edu/tort/

4 More on the Institute on the official website: http://www.ectil.org/

5 In 2004 the Principles were amended with several new provisions, but regarding their content, i.e. regarding the fact that none of the amendments refers to the issue of civil-legal liability, we find relevance with the version from 1994.

On the other hand, within the international law we do not find legal sources which govern civil liability for caused damage on international level and therefore we believe that the existence of a model of general principles of the tort law within the European law also represents, as already mentioned, a significant movement of the international law towards general principles of civil liability for caused damage on international level. Therefore, hereinafter in this paper these shall be thoroughly reviewed and analyzed, and to some extent compared with the rules of our [Macedonian] legislation. But before we approach analyzing them, we consider important to present the content of the Regulation, since it contains rules that are in force in the European legal system.

2. The significance of the Regulation No. 864/2007 of 11 July 2007 on regulation of civil-legal liability for caused damage in the European Union

The provisions of this Regulation, as it derives from its title, refer to the law applicable to non-contractual obligations. This term – non-contractual obligations under the Regulation is treated as a term that by its content varies from one EU Member State to another. Because of this situation in the EU Member States, the concept of non-contractual obligations mentioned in the Regulation is perceived as an autonomous one. In terms of structure, this Regulation consists of seven chapters relating to the determination of the law to be applied in case of non-contractual obligations. One of the types of non-contractual obligations recognized by this Regulation are the obligations arising from the damage. These relations are presented in the second Chapter of this Regulation, entitled "Tort". In this Chapter, Article 4 presents a general legal rule which states that: "*Unless otherwise provided for with this Regulation, the law applicable to a non-contractual obligation arising out of a tort shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of the event occurred*." Although this provision undoubtedly is of general nature, however, according to its content it is a direction norm, which in itself does not contain a general legal rule which would apply to regulating issues arising out of civil-legal liability, but directs to the law of a particular State as applicable to regulate a particular case of civil liability for caused damage. According to this general provision, the applicable law determined in this manner (law of the country in which the damage occurred) provides the answer to the fundamental question: whether there is

a civil liability in a particular case or not. Apart from this general rule, in the same article, two cases have been identified to which the general rule in not applicable. The first case is laid out in paragraph 2 and refers to the situation where the person claimed to be liable and the person sustaining damage have their habitual residence in the same country at the time when the damage occured. In this situation, according to the mentioned rule, the law of the country in which the both parties have their habitual residence is applicable. The second case is stipulated in paragraph 3 of the same article and refers to the existence of certain circumstances which indicate connection of the tort with a country other than the countries indicated in the first and the second paragraph of this Article, in which case the law of that other country shall apply.

Apart from this general rule, the same Chapter also contains provisions that determine the applicable law to regulate the non-contractual relations arising from damage in individual cases such as: damage caused by a product,[6] non-contractual obligation arising from an act of unfair competition,[7] environmental damage,[8] non-contractual obligation arising from an infringement of an intellectual property right[9] and liability provisions in respect of damage caused by an industrial action carried out by an employee or an employer or the organization representing their professional interests.[10]

The next Chapter of this Regulation applies to legal rules that determine the applicable law in other cases of non-contractual obligations, or, more precisely, in the case of unjust enrichment (Article 10), act performed without due authority – negotiorum gestio (Article 11) and liability arising out of fault in conclusion of a contract – culpa in contrahendo(Article 12). The presented obligations may also include civil liability for caused damage especially in cases where despite the obligation or in relation to it, between the same parties there is damage that occurred as a result of a tort.

Chapter 5, "Common rules", is of particular relevance to the topic of this paper because it contains a reference to a general provision under which the law applicable to certain non-contractual obligations (including obligations arising out of damage) shall govern in particular:

1. The bases and extent of liability, including determination of persons who may be held liable;

6 See more in Article 5 of Regulation No. 864/2007 of 11 July 2007.
7 See more in Article 6 of Regulation No 864/2007 of 11 July 2007.
8 See more in Article 7 of Regulation No. 864/2007 of 11 July 2007.
9 See more in Article 8 of Regulation No. 864/2007 of 11 July 2007.
10 See more in Article 9 of Regulation No. 864/2007 of 11 July 2007.

2. The bases for exemption from liability, limitation of liability and division of liability;
3. The existence, the nature and the assessment of damage and the legal remedies claimed;
4. The measures which a court of a specific country may take, in accordance with the limits of powers conferred on the court by the process law, to prevent or terminate injuries or damage or to ensure provision of compensation;
5. The question whether a right to claim damages or certain remedy may be transferred, including by inheritance;
6. Persons entitled to compensation for damage sustained personally; and
7. Civil liability for the acts of another person.

All of the above-mentioned questions addressed in the case of civil liability, i.e. in case of obligation relations arising out of damage, are basically general, basic questions. The fact that this Regulation refers to their regulation in the applicable law of a particular country (determined by the provisions contained in this Regulation) leads to the conclusion that the general issues regarding civil liability for caused damage experience different regulation in European Union law. This leads us to the conclusion that the Regulation neither unifies the issue of civil liability in the Member States of the European Union, nor is laying down some general principles or provisions that would apply to the institute of civil liability.

Given this fact, which emerges from the analysis of the provisions of Regulation 864/2007 of 11 July 2007, we can conclude that in the enforced legislation in the European Union there are no general legal rules or principles for the institute of civil liability for caused damage, but there are only provisions that refer to the applicability of the law of a particular country, depending on the particular case, which also leads to different legal regulation. Within this Regulation not only we did not encounter general legal rules, but we also confirmed the partiality in regulating this issue.

Therefore, the continuation of this paper presents and analyses a model of general principles for most of the issues of the tort law.

3. The significance of the Principles of the European Tort Law for the general legal regulation of the civil-legal liability for caused damage in the EU law

The main objective of the Principles is to serve as a basis for promotion and harmonization of the tort law in Europe, with expectation of their use as a framework for future actual harmonization of the tort law. The

preparation of the Principles is a result of the study of the legal rules on liability for caused damage in the legal systems of the European countries, their comparison, primarily through comparative methodology of specific cases, in order to see whether their solutions are really different and – finally, identifying Principles that are common to all studied legal systems, and relate to issues fundamental to any tort law system. Therefore, the authors of the Principles believe that the Principles represent *"... a full set of principles for the majority of tort law. Though we are aware that there are still issues that need to be discussed, we believe that these Principles cover the most important issues" (*European Group on Tort Law, 2005, p. 15).

The Principles are deployed in several chapters or titles. ***The first Chapter is entitled Basic Norm*** and consists of one Article. This article is a basic rule for the occurrence of liability for caused damage and according to it *"... liability to compensate the damage that a person suffered is attributed to the person legally attributed (addressed) with this damage"* (European Group on Tort Law, 2005).

Within this article, we look at the generality of the provision, which governs the occurrence of liability and determination of the person claimed to be liable. The provision exceeds the limitation of the general liability provisions that we encounter in the civil codes in Europe. The occurrence of liability according to them, by rule is related to the existence of fault (liability based on fault). [11] This is due to the fact that until the 1930s, the liability based on fault was the only type of liability for caused damage. As a person claimed to be liable for compensation of damage appeared the person guilty for the occurrence of the damage. With the appearance of the rules on strict liability, the rule on liability based on fault no longer has the character of a general rule in the tort law because it refers to only part of the cases of liability for caused damage. After becoming aware of such development of the rules on liability for caused damage, the authors of the Principles, in the first article, determine the person claimed to be liable in a more general way.

Thus, the first Article of the Principles introduces the notion of "tortfeasor" in the tort law, a term which has been familiar with our legal doctrine,[12] and present in our positive law, i.e. term to denote a person liable for compensating damage according to the legal order. Thereby, one general provision

11 See Articles 1382 and 1383 of Code Civil, section 823, paragraph 1 of the German Civil Code, section 129 of the main text and 1295 of the new Austrian Civil Code.

12 See Galev G., Dabovik – Anastasovska J.: Obligation Relations (in Macedonian) [Облигационо право], Skopje, 2008, p. 528

includes the cases of liability based on fault, as well as the newly emerged cases of liability without any fault (strict liability). If there is no tortfeasor in a particular case, i.e. the law does not provide for a person liable for the damage, the principle *casum sentit dominus* is applied. Under this rule, each person must compensate his/her loss (damage), except in cases where there is a legal basis for the damage to move into the sphere of other person.

According to the authors of the Principles, the first paragraph is aimed at clearly indicating the objective of the Principles. Their purpose is not to be grounds for punishment of the tortfeasor or other financial obligations that do not correspond to the damage that the plaintiff suffered. Their primary objective is compensation (restitution) to the injured party, and the secondary objective is prevention. This objective, is once again stipulated in Article 10.101.

In the second Chapter (Title II. General conditions of liability), the Principles govern the general conditions of liability. As general conditions the Principles assume ***the damage and causation***.

Regarding damage, the Principles clearly indicate the fact that each type of damage is not of legal relevance for the tort law but only "*...the damage requiring material or immaterial harm to a legally protected interest."* (European Group on Tort Law, 2005) The answer to the question which are legally protected interests is provided in Article 2:102. Neither is of legal relevance the damage arising out of illegal activities and sources and as such it cannot be compensated under these principles.

As a second condition for the occurrence of liability, the Principles assume the causation. According to Article 3: 101 of the Principles: "*An activity or conduct is a cause for damage if, in the absence of that activity, the damage would not have occurred."* From this article it appears that ***the authors of the Principles decided on the condition theory, i.e. the theory according to which the reason is the conditio sine qua non*** (indispensable condition) for the occurrence of a harmful consequence,[13] and not on the theory on adequate causal relation which today is the most prevalent learning about the causal relation in civil liability and which according to one of definitions which we encounter in the legal science is: *"...the causal relationship that exists between the adverse action, which by its strength (intensity) and type is eligible to cause damage on one, and damages incurred as a result of that action on the other hand"* (Galev, Dabovik – Anastasovska, 2008, p. 560).

13 See more on this theory in Radishich J.: Obligation law – general part, [Облигационо право – општи део], Belgrade, 2004, p. 206.

The provisions referring to the causality also regulate concurrent causes (Article 3:102), alternative causes (Article 3:103) and potential causes (Article 3:104).

Chapter 3 (Title III. Bases of liability) governs the bases of liability. The Principles recognize three types of liability, but only two grounds for liability:

- ***Liability based on fault (Art. 4:101 - 4:202)***, which exists in case of intentional or negligent violation of the required standard of conduct. This, at the same time represents the definition of liability and is given in Article 4:101;
- ***Strict liability (Art. 5:101 - 5:102)*** for persons who conduct abnormally dangerous activity for damage resulting from it. The definition of abnormally dangerous activities is stipulated in Article 5:101, paragraph 2; and
- ***Liability for others (Art. 6:101 - 6:102),*** which includes liability for minors or mentally disabled persons and liability for auxiliaries. This is only a type of liability, but not a separate ground for liability. The basis of liability in case of liability for others is the fault. This conclusion is supported by the analysis of Article 6:101 which states: *"A person in charge of another who is minor or subject to mental disability is liable for damage caused by others unless the person in charge shows that he/she has conformed to the required standard of conduct in supervision."* The provision is based on the principle of presumed fault of the person in charge. The presumed fault can be disproved, but the burden of proof that there is no fault on the side of the "presumed tortfeasor" falls on the same person. He/she is released from the presumed fault if it proves *conforming to the required standard of conduct in supervision*.

The fourth Chapter governs the cases of exclusion of liability for caused damage (Title IV. Defenses). According to the Principles, exclusion of liability for caused damage can occur in several cases. First, it is the cases when the trotfeasor acted in accordance with the legal system, i.e. the legal system excludes the unlawfulness of the harmful act. Such are the cases of self-defense, self-help, under necessity, with consent of the victim and by virtue of lawful authority, such as a license. (European Group on Tort Law, 2005).

The Principles, under separate Article (Article 7:102), govern the exclusion of strict liability which happens in case of unforeseeable and irresistible conduct of a third party or force majeure (vis major). A separate Article (Article 8:101) governs the cases when exclusion of liability is a result of contributory conduct or activity of the victim.

The fifth Chapter (Title V. Multiple Tortfeasors) refers to cases when there are multiple tortfeasors who at same time have certain relation to the caused damage. Here, among others, are the cases of solidary liability for caused damage.

The last, sixth Chapter (Title VI. Remedies) governs the manners of compensation of caused damage. According to the Principles, there are the following types of compensation:

- ***Damages,*** type of compensation established as a rule where the monetary compensation should be equivalent of the damage to compensate the victim to the position he/she was in before the damage incurred;
- ***Natural restitution, i.e. restoration in kind.*** This type of compensation of damage, according to the Principles, is an exception regarding damages, which is regular type of compensation. This conclusion results from the analysis of Article 10:104 according to which: *"The injured party can claim restoration in kind instead of damages as far as it is possible and not too burdensome to the other party"*.[14]

This Chapter of the Principles governs two significant terms: pecuniary damage (Art. 10:201 – 10:203) and non-pecuniary damage (Art. 10:301) and a rule on reduction of damages (Art. 10:401).

4. Conclusion

In the era of technical and technological development in the society, the number of obligations arising from damage is increasingly growing, thereby increasing the importance of its regulation in the legal systems of individual countries as well as in the legal system of the European Union as a whole. The analysis of the existing EU legislation regarding the obligations arising from damage i.e. civil-legal liability indicates the existence of partiality regarding this issue. Its regulation is typical for each of the EU Member States and inevitable conclusion is that the rules governing the fundamental issues raised by the civil liability, such as the issue of existence of liability and grounds for it, general conditions for civil liability, damage types and manners of its compensation and related issues, differ from one country to another, to a greater or lesser extent. Within a legal system such as the EU

14 Unlike the Principles, in our legal system the natural restitution is a rule and the damages occur as a substitution of the natural restitution, in certain cases. See Galev G., Dabovik – Anastasovska J., op.cit, p. 637.

law this situation is a drawback that poorly reflects on the process of harmonization of the law, inside the EU and in relation to non-EU countries that are harmonizing their own legislation with the European Union legislation.

On the other hand, in terms of the institute for civil liability for caused damage in general, i.e. regardless whether it is caused in relation to existing obligation of out of it, at European Union level so far there is only a **model on principles** for the majority of the tort law, which includes the most significant issues for civil liability for caused damage. This model is presented to the international legal public via the Principles of the European Tort Law aimed primarily to serve as a basis for promotion and harmonization of the tort law in Europe. This model provides answers to issues like: what are the general conditions for occurrence of civil liability, what are the grounds for liability and what is the obligation arising out of the established civil liability, issues representing the basic content of the institute of civil liability.

The existence of these Principles leads the European Union law closer to harmonization of the legal rules for civil liability for caused damage, and at the same time it is a model for the third countries not part of the EU to make a comparison of their legal systems with respect to this issue, with the regulation in the Principles and eventually to make amendments in terms of compliance with what would represent future of the European tort law.

Abstract

This is a paper that reviews the question about the civil liability and its regulation on general level in the European Union law. Bearing in mind the meaning of the regulations and the directives in the EU we looked among them for general provision, but this regulation doesn't provides the law system with general rules. This means that certain questions are all regulated in different way, and the basis of civil liability differs from country to country. Having in mind the meaning of the civil liability today, and the purposes of the European Union law, Principles of European tort law were created and made available in Vienna in 2005. The Principles of European tort law identify the principles that could be found in these particular laws by comparing the particular provisions and combines them in one set of Principles which could be said that is common for all of them, in one or another way.

Резиме

Во овој труд се истражува и елаборира општата правна уреденост на граѓанско-правната одговорност за причинета штета во правото на ЕУ преку проучување на регулативите и директивите. Истите не содржат општи одредби по повод ова прашање што значи дека прашањата за основот на одговорност, постоењето на одговорност, видот и висината на надоместот на штета и слично се прашања кои се разликуваат по својата правна уреденост од земја до земја. Тој факт создава недостаток во правниот систем на ЕУ кој претендира да се хармонизира. Со оглед на ова, како и со оглед на значењето на граѓанската одговорност за причинета штета, создадени се Принципите на Европско отштетно право, и истите се во Виена во 2005 година. Трудот го става акцентот на овие Принципи бидејќи истите ги идентификуваат општите правила на граѓанско-правната одговорност кои се среќаваат во најголем дел од одделните правни системи во ЕУ и го прикажува нивото на усогласеност на европската правна мисла по повод ова прашање денеска.

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