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The review by Nina N. Baranowska

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Tort Law in the European Union (2015) originally published as a monograph in the multi-volume *International Encyclopaedia of Laws: Tort Law* analyses loss compensation under primary and secondary European Union (EU) law. Gert Bruggemeier breaks the subject matter of his monograph into two groups. The first part analyses the non-contractual liability for breach of EU law, taking as a centrepiece the liability of the EU (Article 340 (2) TFEU) and next liability of the Member States and liability of the private parties. The second part concentrates on the civil non-contractual liability, putting the emphasis mostly on product liability law.

From the very beginning, the Author places the monograph in the private law perspective, and analyses the subject matter from a tort lawyer's point of view. This is the important contribution to EU tort law literature, which still seems underestimated by European private lawyers.[1] Although the author sceptically points out that the tort law of the EU does not exist in the EU law (p.13), he consistently reconstructs the liability elements within the EU law, taking as a relevance point the private law concepts, which makes the monograph intellectually intriguing for tort lawyers. The reason the complex approach was rarely embarked on is the specific nature of EU law devoid of general rules on liability, and its multilayered system where the interplay between EU and national law is of key importance. The attempt to systematise the existing tort law mechanisms within the EU law and to provide comprehensive overview on EU tort law increase book's ambitions.

The monograph is divided into **two Books**: Non-contractual Liability for Breach of EU law (Book I) and Civil Non-contractual Liability (Book II). The

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1 The liability schemes existing in the EU law structure initially have not been the subject of research in renowned and comprehensive comparative scholarly work (compare *Unification of Tort Law Series* by the European Group on Tort Law).

subject matter of the monograph is followed by **General Introduction**, including the formation of the structure and legal personality of the EU (with the critical assessment of the Treaty of Nice and the fail of the Constitution of Europe, as well as a sceptical opinion on a further EU's integration) and the judicial system with the role of the national courts in upholding the EU law including the importance of premilinary rulings.

In **Book I**, the author discusses liability of the EU, liability of Member States and liability of private parties, which are covered under an umbrella of 'breach of EU law that confers rights to private parties'. The chapters are distinguished based on the entity that commits a breach (the EU, Member State and private party) (p. 33, 41). Such classification draws some comments. First of all, each of the three types of liability under discussion has a different legal basis and is dealt with by different judicial bodies judicial body based on a various procedures. Only cases of the EU liability are settled substantively by the CJEU on the basis of primary EU law (Art. 340 (2) TFEU). The other two types are settled by national courts based on national regulations, and the role of CJEU boils down to establish basic conditions of liability and a minimal level of protection for the injured parties. In practice, solutions of national legal systems may significantly differ in details. Thus, while the EU liability can be discussed to a greater extent, in the case of the liability of the Member States and private parties, this is possible only in the model approach. Although the author recognises this distinction, it is blurred in some parts of the book. Second, the adoption of the 'breach of law' criterion makes it necessary to distinguish other independent grounds of non-contractual liability of the EU, including liability for lawful acts, whereas the basis for the assessment of all cases of EU liability is Art. 340 (2) TFEU. Another consequence of focusing on „breach of law" criterion is is that the monograph omits interesting cases of unjustified enrichment. Although not belonging to the tort law in the classical approach, the cases of unjust enrichment are settled on the basis of Art. 340 (2) TFEU, which shows the practical meaning of this provision and its wider scope of application.

In **Part I** (**Non-contractual Liability of the EU**), the author presents the opinion that Art. 340 (2) TFUE encompasses two distinct variants of liability: vicarious liability (including quasi-vicarious type) and breach-of-law liability. Unlike the general approach in the CJEU case law, the author identifies different conditions of both variants of liability – in case of vicarious and quasi-vicarious liability the conditions are based on general principles common to the laws of the Member States, while in case of breach of law CJEU creates its own liability rules (p. 39–41).

Vicarious (personal torts of individual officials and employees) and quasi-vicarious liability (torts of EU executive officers, EU bodies and institutional organs), according to the author, are traditional State liability for torts in public

office committed by EU servants or bodies, based on the fault (faute personelle or organisational fault) (p. 43–44). The author points out that vicarious liability of the Union is neglected and misallocated in the breach-of-law division of the EU non-contractual responsibility and it should be reconsidered as an independent field of EU liability. However, no further considerations or answers are given to the questions of whether demonstrating the absence of fault will exempt from liability, who should prove fault and what criteria should be taken into account to assess the fault (degree of fault).

The second type of liability distinguished in this part is breach-of-law liability, which is not a tort (fault) committed by a public servant/institution but 'normative incident' constituted by unlawfulness of a legislative, a judicative or an administrative act or omission (wrongful acts) (p.55). Liability is triggered in the case of 'relevant breach', whose assessment depends on the scope of discretion. In case of wide margin of distraction manifest breach is needed (gross malfunctioning/maladministration), while in case of no discretion plain unlawfulness is sufficient. This widely accepted distinction is complemented by the author's original recognition of the third category concerning institutional fault in cases without discretion but with high uncertainty in a situation of factual (scientific) and legal complexity, which requires due diligence (sound administration). The author rightly criticises that the current formula of 'sufficiently serious breach' means everything and nothing. (p. 64).

Although the above-mentioned the distinction between two types of liability proposed by the author is intriguing, the author does not thoroughly explore the liability conditions. When it comes to a causal link, the author quite categorically states that the causal link is simply assessed by 'but for test', which is based on general principles common to the laws, and elements such as directness and certainty are normative criteria and thus they do not belong to the matter of causation (p. 69–70). This is undoubtedly a view with which one can argue and which depends on the general understanding of the causal link in law and the relationship between factual and normative causation. Even if the author distinguishes normative elements from causation, in his monograph he does not analyse the notion of 'directness', which prevails in the CJEU case law. In case of damage, the more detailed deliberations are included in the section 'Consequences of Liability', which on the one hand is consistent with the book's structure, but on the other it can be onerous for the reader's attention. Interesting section is devoted to fault. The author indicates that fault is required in vicarious liability cases (organisational fault in quasi-vicarious liability), but the elements of fault can be found also in the case of breach of law: in institutional fault in cases of high complexity, and gross maladministration in cases including wide discretion (p.73–74).

In **Part II** (**Liability of Member States**), the author analyses the key decision given in a preliminary ruling proceeding, which constitutes a general framework for Member State liability. As the key to the responsibility of the state, the author indicates not the *Francovich* doctrine (which in his view is incorrectly used as a synonym for Member State liability), but the tradition of *van Gend en Loos*, as the first and broadest area of application (p. 89). This section also tackles with liability for breach of State's duty to protect the internal market (free movement of goods, persons, services, capital and now data, p. 90) and liability for judicial bodies of last instance (detailed analyses of the case *Kobler*, which ends up as a hollow victory, and the case *Traghetti* are presented). Relatively much space has been devoted to criticism of the ruling in the case *A.G.M.-COS. MET*, which the author examines from the perspective of the state vicarious liability that was unfortunately omitted by the Court. Interesting insights regarding the overlapping of the causation with breach of law have been noticed in cases *Brinkmann* and *Leth* (p. 102).

Part III (**Consolidation: Liability of Public Authorities for Breach of EU Law**) is devoted to the common elements of liability of public authorities for breach of EU law and analyses the cases: *Brasserie du pecheur, Handley Lomas* and *Bergaderm* (p. 105–110).

Part IV (**Liability of Private Parties for Breach of EU law**) analyses the main decisions in the area of liability of private entities for damage caused to another private entity in case of breach of EU law. First, the author discusses the lack of horizontal direct effect of primary and secondary law (cases: *Walrave and Koch, Bosman, Deliege, Fra.bo SpA* and *Defrenne II*) and the role of consistent interpretation. The author's concerns about the way in which consistent interpretation fits in the traditional canon of interpretative methods seem excessive because consistent interpretation does not create new methods of interpretation, but allows for choosing among the methods existing in national law the one which is the most EU law-friendly. What is worth to mention is that, in fact, the remarks on consistent interpretation are actual also in case of Member State liability, not only private parties' liability. In my opinion, what is also missing is noticing the problem of monitoring, in practice the proper interpretation of EU law in national law systems and the more complex problem of publicisation of private law.

Second, the author discusses third-party effects on fundamental rights of the EU charter (freedoms and fundamental rights, cases *Viking, Laval* and *A.G.M.-COS.MET*) and emphasises the role of compensation rules in competition law (*Courage Ltd* and *Manfredi*). In spite of the fact that the monograph was published before the implementation date of the Directive on antitrust damages actions (2014/104/UE), this part would have been more interesting if the author had included his assessment of solutions proposed in the Directive.

In **Part V** (**Joint liability and Consequences of Liability**), the author discusses joint liability of the EU and Member State, as well as the EU and private parties, including recourse claims between those entities. The significant problems of lack of procedure enabling to bring one claim against two parties and the subsidiary role of Member State liability and the EU liability have been emphasised.

The consistent distinction between vicarious liability and breach-of-law liability is also maintained while discussing damages. In case of vicarious liability, the author indicates: personal injuries (medical treatment, physiotherapy), consequential damages, non-economic loss (which should be assessed by lex loci delicti), wrongful death (which has not yet been considered) and grief and trauma (liability of the insurer); however, in those cases, some doubts may be raised by the mention of the case *Haasová*, which deals with liability between private entities, and not vicarious liability. In case of breach of law, pure economic loss, mostly loss of profit, and actual loss (damnum emergens) are identified. Clarifying the relationship between loss of profits and future loss would require a broader comment (p.141). In staff cases, the author emphasises the role of loss of chance. The author's view according to which punitive damages are not covered under discussed liability scheme seems to be right interpretation and seems reasonable.

This part, however, pays scant attention to interests and ignores the distinction between default interests and compensatory interests, the moment of calculating interests and their rates. Limitation period based on Art. 46 of Status is also only briefly discussed, without an in-depth analysis (p.143–145).[2]

In Summary and Commentary of this part (p. 147–149), the author critically assesses the role of non-contractual liability for breach of EU law in fulfilment of EU law effectiveness. Equally interesting, though omitted by the author, issue concerns the reactions of national courts to the principles of Member State liability and liability of private parties formulated by the CJEU and the effectiveness of these principles in the practice of dispute resolution by national courts. As the examples from national case law show, in many cases national courts avoid using the CJEU rulings, and, even if they refer to them, they tend to interpret national law in a way that results in not awarding damages.[3] This is enhanced by the lack of an unambiguous understanding of the conditions of liability, which leaves room for the broad interpretation of national courts.

Part VI concerns two special cases of responsibility of the EU. The first one is liability for damage by lawful acts based on fair compensation. Taking into

2 The role of limitation period in tort law area has been recently recognised by the European Group on Tort Law in the ongoing project: Principles of European Tort Law – Prescription and Time Limits in Tort.

3 Compare W. Matti, A-M. Slaughter, Revisiting the European Court of Justice, International Organization, Winter 98, vol. 52, issue 1, p. 177.

account the renowned case law (*FIAMM*), the author claims like most of the legal scholars that a right to a fair compensation under EU law does not exist (p. 155). At the same time he is in favour of AG Maduro's arguments and the rationale of the concept of fair compensation, which he finds in equality and distributive justice. That means that the legal ground for fair compensation would be not Art. 340 (2) TFEU but independent and autonomous remedy (p. 158).

The second one is staff cases (employee–employer like relationship). The author lists the interests protected in staff cases,[4] and next he concludes that staff cases are different to tort law, because they do not focus on direct bodily injury and consequential non-material harm but they are a special principal–official relationship that delivers the ground for the compensation.

BOOK II (Civil Non-contractual Liability) analyses certain types of liability law regulated by sectors in secondary law (directives and regulations), which however do not form a complex liability system. Some of the elements in this part of the monograph, published in 2015, require an update with regard to the entry into force GDPR and to current Commission's work on developing principles that can serve as guidelines for possible adaptations of applicable laws at EU and national level relating to new technologies.[5]

In Book II, the author rightly focuses on product liability. As regards damage, it is worth to mention the author's views on: the possibility of covering by the Directive the damage caused to embryo; distinguishing from personal injuries: injury to body and injury to health (case *Veedfald* and *Boston Scientific*); excluding from the Directive's scope loss of use and pure economic loss.

When it comes to the notion of 'product', the author considers as a product any professionally and for economic purpose manufactured moveable thing (Art. 2 and Art. 7). Based on that, products are parts of human body (e.g. organs, only when they are processed and stored (p. 176)), industrial by-products (residues are the problem of environmental law, p. 177) and computer software (only when it is stored on a tangible medium).

Next, the author focuses on the notion of 'defect' as a central and the most controversial notion of EU product liability. Defects that are covered by the Directive concern: manufacturing defects (flaws), design (construction) defects and instruction warning defects. According to the author's view, common opinions on a uniform category of product defect and recognising product liability as strict liability are only half-truth (p.180). Product liability in the monograph is presented as a hybrid – a quasi-strict liability. On the one hand, strict (no-fault) liability is applied for manufacturing defects (defectiveness comes from a factual

4 Including remuneration, career progress, recruitment, health and enjoyment of life.

5 In 2018 the Commission selected the Expert Group on liability and new technologies (E03592), http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3592.

deviation from other item of the same production process, and it does matter if a deviation could be avoided) and to the extent in which Member States exclude development risk defence. On the other hand, the objective negligence liability of enterprises is applied in regular construction (design) and instruction defects (the normativity of the defect and safety category constitute the structural analogy to negligence law, and courts proceed as they do in cases of negligence – in order to determine 'defectiveness' they have to assess normative alternative standard of safety) (p. 180–181, 184).

In case of the notion of 'producer', the author analyses the entities that can be liable under the Directive. When it comes to exclusionary grounds, the author focuses on development risks, which are restricted to design or construction defects (flaws and one-offs are not covered) (p.188). The way development risk defence is regulated, the author reads as political compromise, which in fact burdens the risks on the victims. The author also raises the issue of caps for damages in cases of serial losses (damage resulting from death/injury caused by identical products with the same defect), prescription (the problem of unavoidable error on the producer – the limitation period remains unaffected towards the right producer) and a cut-off period that leads to the extinction of rights (the bitter of the case *O'Byrne I*) (p. 189–190).

In Conclusion (p. 191–192), the author criticises that the Directive does not cover commercial property and non-material damage, excludes development risks for design defects from EU product liability law and does not provide a remedy in cases of producer's failure to monitor the product nor oblige it to react properly (e.g. through post-sale warning). However, in my opinion, the Conclusion lacks the author's considerations on the directions of product liability development in terms of technological development, including considering the separation of medicines from the current regulation, establishing presumptions of the existence of a defect and a causal link and extending the notion of product for intangible goods based on data. The problem of new technologies has been already recognised by the European Commission and the formation of the Expert Group on liability and new technologies (E03592).

The author also presents the failure of adapting service liability directive (p. 193), rightly searching for the reasons for failure in too heterogeneous field of services, and close relations to contractual relations.

In **Part VIII** (**Additional Civil Liability**), the author claims that in environmental law liability regime has not been introduced; liability of traffic and carriage is regulated by international conventions; and in case of GDPR liability rules have so general and non-specific nature that establishing precise rules burden national courts.

To sum up, the author presents his readers with the uneasy area of liability for damages in the EU law and, in a consistent manner, and as far as possible,

systematises these issues among the 'juristic jungle' p. 33. The assumed goals forced the construction of the monograph focused on systematising private-law elements and the attempt to comprehensively discuss them (especially visible in Book I). The attempt to look at the EU tort law comprehensively led to the situation in which less attention has been devoted to the liability conditions, and in many fragments the reader may not be sure whether issues discussed collectively in the same scope will apply to the liability of the European Union, Member States or private parties.

To facilitate orientation among the discussed issues, it would be desirable to add an introduction (apart from the General Introduction), which would clearly present the main idea of the monograph, the adopted criteria for the division of issues, the overview of the main text, the objectives of the argumentation and the justification of sometimes surprising statements. Taking into account that the aim of this monograph is to present EU tort law in the systematised way, such an introduction could be a valuable guideline (road map) for readers.

The author demonstrates a remarkable ability to include in a skilful and non-overwhelming manner historical and legal threads, which explain the development of the line of CJEU jurisprudence and show the regularity outlined in the development of the EU tort law (e.g. p. 37, 53, 152, 165–168). The author, when it is necessary, also cites the AG opinions, which were not always accepted by the Court but which significantly contribute to the development of tort doctrine (e.g. AG opinions in cases *Veedfald* and *Boston Scientific*).

The monograph, however, lacks, in my opinion, a critical analysis and highlighting problems regarding the application of the EU law by national courts on the basis of internal regulations and the national procedure (in cases of Member State liability, private party liability and product liability). It is worth emphasising the issues related to how little we know about the factual interaction between CJEU and national courts, as well as insufficient use of preliminary ruling procedure by national courts, and the way of monitoring of compliance of national legal practices with EU law. These problems are essential for applying private law in practice, taking into account that not all of the disputes are resolved before courts (or they do not reach higher instances) and there are not effective mechanisms that enable to investigate this interaction. The omission of these problems in the monograph can be explained by its limited scope, although their inclusion would undoubtedly affect the practical problems associated with the functioning of the tort law mechanisms, and not just the recognition of the issue of responsibility in a model way.