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COMPENSATION FOR MIGRANTS DAMAGES FROM GUARANTEE FUND

ABSTRACT

This article will deal with the question of whether migrants from Asian and African countries are entitled to a compensation for the damage caused by a motor vehicle for which a compulsory insurance contract has not been concluded, from the assets of the guarantee fund. Migrants who were injured by the use of an uninsured vehicle in the Republic of Serbia addressed the Association of Serbian Insurers with a claim for damages. The Association of Serbian Insurers refused such requests on the grounds that the Serbian citizen in the country from which the migrant originated could not receive such compensation in the same case.

By an inductive method the author will, proceeding from individual decisions of the Association of Insurers of Serbia answer the question whether migrants in the Republic of Serbia can receive compensation for damage from the assets of the guarantee fund. By the dogmatic method, the author will come to the conclusion that the positive regulations of the Republic of Serbia grant migrants the right to compensation from the guarantee fund, but only if there is a guarantee fund in the country from which the migrant comes from, from which a Serbian citizen could be compensated. The axiological method will be applied at assessing the value by the specified conditions. The comparative method will be used to clarify whether according to the regulations of other countries located on the so-called “the Balkan route”, migrants are entitled to receive compensation from the funds of the guarantee fund. The author will conclude that the countries, while adjusting to EU membership, should acknowledge migrants compensation for damages from the guarantee fund.

Keywords: *insurance, migrants, compulsory insurance in traffic, guarantee fund*

1. INTRODUCTION

The European migrant crisis reached its peak in 2015. It did not equally affect all European countries, and those exposed to the crisis had various reactions. Some of the European countries, which are the ultimate destination of migrants, including refugees and economic migrants, patiently kept receiving and taking care of them, some countries only allowed their free passage, and some countries viewed mi-

grants as a security threat that can emerge on their borders.¹ More than 769,000 migrants to Europe entered the so-called Balkan route². Migrants on this route kept coming from Greece, via Macedonia (in fewer cases through Bulgaria) to Serbia. At the end of 2015, Hungary raised a wired fence and closed the border first towards Serbia (in mid-September), and then towards Croatia (in mid-October), which is why Croatia was on the path to the final destination of migrants - Austria and Germany.³

Migrants are exposed to various risks on their journey. In the course of the year 2015, accidents occurred when traveling at sea,⁴ but also in motor vehicles.⁵ In the aspirations of people from war-affected, unstable or poor countries to emigrate and the restrictive immigration policies of more stable and advanced countries, the idea of smuggling people has been encouraged.⁶ Human smugglers use motor vehicles for their forbidden deals. It is possible that the documents for these vehicles are forged, that the license plates are false, that the ownership data are not true, or that vehicles that are not properly registered or insured are used during the transportation of illegal migrants. Migrants are therefore at risk of being victims of traffic accidents caused by uninsured motor vehicles.

Such accidents happen and leave serious consequences. One of them happened on February 24, 2015, about 4 hours after midnight in southern Serbia, on the road between the Macedonian border and the city of Niš, near the town of Leskovac, or the village of Donje Krajince. In this accident, 41 people from Asian and African countries were injured and all of them were transported in one Fiat Ducato van.

¹ Tatalović, S., Malnar, D., *Sigurnosni aspekti izbjegličke krize*, Političke analize, Vol. 6, No. 23, 2015, p. 23

² Grba-Bujević, M., Dragosavac, M., Janev-Holcer, N., Važinić, D., *Odgovor zdravstvenog sustava Republike Hrvatske na migrantsku krizu u razdoblju od 16. rujna do 31. prosinca 2015*, Liječnički vjesnik, Vol. 138, No. 3-4, 2016, p. 99

³ Čapo, J., *The security-scape and (In)Visibility of Refugees: Managing Refugee Flow through Croatia*, Migracijske i etničke teme, Vol. 31, No. 3, 2015, p. 387

⁴ E.g. In the shipwreck which took place on April 19, 2015 between the coast of Libya and the Italian island of Lampedusa 700 migrants perished, Kingsley, P., Bonomolo A., Kirchgassner, S., *700 Migrants Feared Dead in the Mediterranean Shipwreck*. The Guardian April 19, 2015
[<https://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-wo-rst-yet>] Accessed 24 February 2018

⁵ E.g. On August 27, 2015, a truck was found in Austria, near the Hungarian border, in which there were bodied of 71 persons who suffocated. Angerer, C., Jamieson, A., *71 Dead Refugees Found in a Truck on Austria Highway: Officials*. NBS News 28. August 2015
[<https://www.nbcnews.com/storyline/europes-border-crisis/71-dead-refugees-found-truck-austria-highway-officials-n417536>] Accessed 24 February 2018

⁶ Mijalković, S., Petrović, I., *Bezbednosni rizici savremenih migracija*, Nauka, bezbednost, policija, Vol. 21, No. 2, 2016, p. 3

The accident did not involve another vehicle, nor a pedestrian. Shortly before the accident, the van swept to the right, then crossed over the emergency stopping lane and rolled out of the road. The van had the registration plate NI 051-CH.⁷ These license plates have not been issued for the van, but for the Ford Fiesta economy car.⁸ So the Fiat Ducato van was an unregistered and uninsured vehicle.

The injuries of some victims from this traffic accident were particularly severe. At least three people remained permanently disable - immobile due to injuries sustained in the accident.⁹ Due to injuries from the mentioned accident, O. S. from Bangladesh remained permanently immobile (quadriplegia). He was 17 years old at the time of the accident.¹⁰ Due to such a serious consequence of a traffic accident, the issue of damages is necessarily raised.

The guarantee fund, or similar legal institute exists in European countries. Such an institute in Europe allows the damaged person to receive compensation if damage is caused by vehicles for which the compulsory insurance contract has not been concluded. The main purpose of this institute is to provide compensation for damages in the same scope and under the same terms and conditions as if a compulsory insurance contract was concluded.¹¹

The author will try to answer the question of whether migrants from Asian and African countries are entitled to compensation for damage caused to them by an uninsured motor vehicle in countries on the Balkan route. Most attention will be paid to the law of the Republic of Serbia. The author believes that this is justified because the accident that is the reason for the writing of this article occurred in Serbia and because the largest land part of the Balkan route passes through the territory of the Republic of Serbia. Also, Serbia is expected to amend regulations on compulsory insurance in traffic.¹² A planned legal change may be an opportu-

⁷ Basic Public Prosecutor's Office in Leskovac, Record of the investigation Ktr. 321/2015 dated February 24, 2015

⁸ A check was made through the site of the Association of Serbia Insurers, [<http://uos.rs/servis-za-gradjane/> for the date 24 February 2015] Accessed 25 March 2018

⁹ Association of Serbian Insurers case file No. Gf-00734/18 and case file No. Gf-00028/18

¹⁰ Association of Serbian Insurers case file No. Gf-00028/18

¹¹ Cerović, M., *Uloga i cilj organizacije garantnog fonda u zemljama u okruženju i nekim zemljama Evropske unije*, Zbornik radova Udruženja za pravo osiguranja Srbije, Palić, 2009, pp. 241-242

¹² In an interview published in July 2017, the Secretary General of the Association of Serbian Insurers in the magazine Svjet osiguranja (World of Insurance) - Release for Serbia, Montenegro and Macedonia, announced the revision of the amendments to the Serbian regulation on the insurance of motor vehicles. Lapčić V., *Srpsko tržište osiguranja se menja na bolje*, Svjet osiguranja – Izdanje za Srbiju, Crnu Goru i Makedoniju, No. 7, 2017

[<http://www.svijetosiguranja.eu/sr/clanak/2017/7/srpsko-trziste-osiguranja-se-menja-nabolje,1623,21305.html>] Accessed 18 March 2018

nity to regulate the position of migrants who have been injured in traffic accidents caused by uninsured motor vehicles in a more equitable way.

The approach of the European Union to the issue of accession of the Western Balkan countries to the Union is called the stabilisation and association process. The aim of this process is regional and bilateral activities in order to achieve the stabilisation of the countries of the Western Balkans, and then their accession to the European Union.¹³ An integral part of the process is conclusion of the Stabilisation and Association Agreements between the countries of the Western Balkans and the European Communities and its members.¹⁴ The Republic of Serbia has concluded and ratified by law the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part in 2008, Official Gazette of the Republic of Serbia – International Contracts, no. 83/2008 (hereinafter: SAA). The fair regulation of compensation for damages caused to migrants by an uninsured motor vehicle would contribute to the European integration of the Republic of Serbia, as well as the fulfillment of the obligations that the Serbia undertook with SAA.

2. GUARANTEE FUND IN EU LAW

The first attempt to harmonize motor vehicle insurance regulations was made by the European Convention on Compulsory Insurance against Liability in respect of Motor Vehicle Damage (hereinafter: the Strasbourg Convention), which was concluded in 1959 under the auspices of the Council of Europe.¹⁵ The provision of Article, 9 paragraph 1 of this international treaty stipulates that each Contracting Party shall establish a guarantee fund or to make other equivalent arrangements in order to compensate the injured parties for damages caused by a vehicle for which the compulsory insurance contract has not been concluded. Paragraph 2 of this Article gave countries the freedom to require the recourse to foreign nationals the right to compensation through reciprocity.¹⁶

The Strasbourg convention had never become effective, due to the fact that there were very few ratifications, but it had a very strong influence on later European

¹³ Radivojević, Z., *Sporazumi o stabilizaciji i pridruživanju u pravu Evropske unije*, Zbornik radova Pravnog fakulteta u Nišu, No. 62, 2012, pp. 60-61

¹⁴ Glinčić, M., *Sporazum o stabilizaciji i pridruživanju pred Evropskim sudom pravde*, Strani pravni život, No. 3, 2013, p. 107

¹⁵ Pak, J., *Pravo osiguranja*, Univerzitet Singidunum, Beograd, 2013, p. 100

¹⁶ Council of Europe, European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles
<https://rm.coe.int/16800656cd> Accessed 24 February 2018

regulations.¹⁷ However, EU directives have gone further than the Strasbourg Convention in an effort to provide even wider protection to the injured persons.¹⁸

The Second Directive of the Council of the European Economic Community 84/5/EEC of December 30, 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ L 8 (hereinafter: the Second Directive) is the first regulation which obliged countries to set up a guarantee fund. By virtue of Article 4, paragraph 1 of the Second Directive, Member States are liable to establish or authorize an existing body which will provide damages to damaged persons in the event of damage caused by a vehicle for which compulsory insurance has not been concluded. Provision of Article 10, paragraph 1 of the current Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability OJ L 263/11 (hereinafter: the Codified Directive) is essentially identical to the said provision of the Second Directive.

The Directives did not retain reciprocity as a condition for the compensation of foreign nationals from the guarantee fund, although the Strasbourg Convention prescribed that condition. The Second Directive and the Codified Directive do not prescribe that the right of a foreign citizen to compensation for damage caused by an uninsured vehicle may be ruled out due to lack of reciprocity.

Countries with which Stabilisation and Association Agreement has been concluded should, inter alia, harmonize their law with *acquis communautaire*.¹⁹ By signing SAA Serbia committed itself to harmonizing its existing and future regulations with the Community *acquis*.²⁰ Serbia's obligation to harmonize existing and future laws with *acquis communautaire* began to apply from the date of conclusion of the SAA, and it should be fully completed within six years of it becoming effective.²¹ The SAA entered into force on September 1, 2013.²² Serbian law should

¹⁷ Ćurković, M., *Zaštita žrtava cestovnog prometa kroz instituciju garancijskog fonda*, Zbornik radova sa 26. susreta osiguravača i reosiguravača Sarajevo, Sarajevo, 2015, p. 206

¹⁸ Pak, *op. cit.* note 13, p. 102

¹⁹ Vukadinović, J., *Stabilization and Association Agreement as a special instrument of EU foreign policy*, Strani pravni život, No. 4, 2015, p. 96

²⁰ See: Article 72 of the SAA

²¹ Stanivuković, M., Đajić S., *Sporazum o stabilizaciji i pridruživanju i prelazni trgovinski sporazum Srbije i Evropskih zajednica – pravno dejstvo i značaj*, Zbornik radova Pravnog fakulteta u Novom Sadu, No. 1-2, 2008, p. 398

²² The Delegation of the European Union to the Republic of Serbia, *Stabilisation and Association Agreement*.

therefore be aligned as soon as possible with the *acquis communautaire*. Codified Directive is one of the European regulations with which Serbian law should be harmonized.

When determining the true meaning of the provision to be interpreted, its objective must be also taken into account. International general acts on motor vehicle liability insurance, including EU directives, aim to provide simple and fair compensation for injured parties.²³ Court of Justice of the European Union in the judgment *Vnuk v Zavarovalnica Triglav* noted that motor vehicle insurance directives were aimed at liberalizing the traffic of good and services, and protecting victims from the accidents caused by a motor vehicles. The development of communal regulations in the field of compulsory insurance in traffic confirms that these regulations aim to protect the injured persons from a traffic accident. The obligation of Member States to set up bodies with the task of providing compensation for damage caused by uninsured vehicles (guarantee fund), is one of the proofs that European legislator sought to strengthen the economic protection of victims of traffic accidents during the adoption and amendment of directives.²⁴

When rendering the judgment in the case *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España u Unespa — Unión Española de Entidades Aseguradoras y Reaseguradoras* the Court of Justice of the European Union assessed whether the right of the injured person to compensation for damage caused by the use of motor vehicle could be denied without explicit reference in a provision of the Codified Directive. By interpreting the said judgment, we can conclude that the right to compensation of damages to the injured party under the Codified Directive cannot be excluded by national legislation, except in the cases expressly provided for in the Codified Directive.²⁵

With in the judgment in case *Vnuk* the Court of Justice of the European Union pointed out that the provisions of the Directive should be interpreted in accordance with their objective, which is the protection of the injured parties. According to the judgment in the case *José Luís Núñez Torreiro*, it can be concluded that the Court of Justice of the European Union considers that the injured parties

¹<https://europa.rs/serbia-and-the-eu/keydocuments/stabilisation-and-association-agreement/?lang=en>
Accessed 5 May 2018

²³ Čolović, V., *Međunarodno osiguranje autoodgovornosti*, Dosije, Beograd, 2007, p. 104

²⁴ C-162/13 *Damijan Vnuk v Zavarovalnica Triglav d.d.* [2014] ECLI:EU:C:2014:2146, par 49, 50, 52, 53

²⁵ C-334/16 *José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España and Unespa — Unión Española de Entidades Aseguradoras y Reaseguradoras* [2017] ECLI:EU:C:2017:1007, par. 36

under the Codified Directive may be restricted by national legislation only if there is an explicit basis for the restriction in a provision of the Codified Directive.

Based on the understanding of the above mentioned judgments and the fact that the Codified Directive tells nothing about possibility of foreign citizens to compensate damage caused by uninsured vehicle, it can be concluded that the law of the European Union does not leave possibility for the Member States to restrict the right of a foreign nationals to compensate damage caused by an uninsured vehicle. European Union law does not allow the right of a foreign national to compensation for damages caused by an uninsured motor vehicle, to be excluded due to lack of reciprocity.

Recognition of the right to compensation of damages from the assets of the guarantee fund, regardless of the nationality of the injured party, is a standard that is desirable to be met from the standpoint of the law of the European Union.

Guarantee fund or a similar institution liable for damage caused by uninsured motor vehicle, exists and operates in the Member States of European Union. For example it Germany *Verkehrsofferhilfe e. V.*,²⁶ in France *Fonds de Garantie des Assurances Obligatoires de dommages*,²⁷ and in Italy *Fondo di garanzia per le vittime della strada*.²⁸ In these countries, damage to a foreigner caused by an uninsured motor vehicle will be compensated under the same conditions as the damage caused to a domestic person.²⁹

3. REGULATIONS OF THE REPUBLIC OF SERBIA

The guarantee fund in Serbian law was first established by the Law on the Insurance of Property and Persons, Official Journal of SRY, No. 30/1996, 57/1998,

²⁶ See: *Verkehrsofferhilfe e.V.*

²⁶ URL= <http://www.verkehrsofferhilfe.de/en/>, Accessed 6 May 2018

²⁷ See: *Fonds de Garantie des Assurances Obligatoires de dommages*

²⁷ <https://www.fondsdegarantie.fr/fgao/fonctionnement/> Accessed 6 May 2018

²⁸ See: *Fondo di garanzia per le vittime della strada*

²⁸ <https://www.consap.it/servizi-assicurativi/fondo-di-garanzia-per-le-vittime-della-strada/> Accessed 6 May 2018

²⁹ See: Council of Bureaux, *Guarantee Fund Compendium D – Germany*, p. 3

²⁹ <http://www.cobx.org/content/default.asp?PageID=58&DocID=67083> Accessed 6 May 2018

²⁹ See also: Council of Bureaux, *Guarantee Fund Compendium F – France*, p. 2

²⁹ <http://www.cobx.org/content/default.asp?PageID=58&DocID=67135> Accessed 6 May 2018

²⁹ See also: Council of Bureaux, *Guarantee Fund Compendium I – Italy*, p. 3

²⁹ <http://www.cobx.org/content/default.asp?PageID=58&DocID=67141> Accessed 6 May 2018

53/1999, 55/1999 (hereinafter: ZOIL).³⁰ After this law, the Law on Compulsory Traffic Insurance was adopted, Official Gazette of the Republic of Serbia, No. 51/2009, 78/2011, 101/2011, 93/2012, 7/2013 (hereinafter: ZOOS).

ZOOS provides for the incorporation of the Guarantee Fund as a separate legal entity founded by the Republic of Serbia.³¹ The primary function of this legal entity is the compensation for damage caused by a motor vehicle for which a compulsory liability insurance contract has not been concluded.³² The initial version of the ZOOS stipulated that this legal entity should start performing its activities within two years of the Law becoming effective.³³ This deadline expired on October 13, 2011. The Law on Amendments to the Law on Compulsory Traffic Insurance, published on October 19, 2011 in the Official Gazette of the Republic of Serbia, No. 78/11, extended the deadline by June 30, 2012.³⁴ However, the Guarantee Fund, in the form provided by the ZOOS, was not formed even in the extended period, nor afterwards. The Guarantee Fund as a special legal entity founded by the Republic of Serbia does not exist at all.

Transitional provisions of the ZOOS stipulate that until the commencement of the work of the Guarantee Fund, within the meaning of this Law, the activities from its scope of work are performed by the Association of Serbian Insurers, in accordance with the previously applicable regulation.³⁵ This earlier regulation is ZOIL.

ZOIL prescribes establishing of funds that will, among other things, be intended to compensate for damage caused by uninsured motor vehicles.³⁶ ZOIL called these funds a guarantee fund. Dealing with claims and payment of compensation for damages from the assets of that fund is a public authorization, which was entrusted to the Association of Serbian Insurers by law.³⁷ The guarantee fund in the sense of ZOIL could be defined as a separate property unit managed by the

³⁰ Šulejić P., *Garantni fond u novom Zakonu o obaveznom osiguranju u saobraćaju*, Pravni život, No. 10, 2004, p. 934

³¹ Article 73 of ZOOS

³² Article, 76 paragraph 1 item 1 and Article 91 paragraph 1 of the ZOOS

³³ Article 111, paragraph 1 of the Law on Compulsory Traffic Insurance of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 51/09

³⁴ Article 2 of the Law on Amendments to the Law on Compulsory Traffic Insurance, Official Gazette of the Republic of Serbia, No. 78/11

³⁵ Article 111, paragraph 1 of the ZOOS

³⁶ Article 99, paragraph 1 item 1 and Article 104, paragraph 1 of the ZOIL

³⁷ Article 143, paragraph 1 item 5 of the ZOIL

Association of Serbian Insurers, which is intended (inter alia) for compensation for damages caused by uninsured motor vehicles.³⁸

The laws of the Republic of Serbia provide for two guarantee funds with different time-defined scope of business, which compensate the damage by two different legal regimes.³⁹ One is regulated as a separate legal entity founded by the state and the other as a property unit managed by the Association of Serbian Insurers.

Entities, competent to act in the Republic of Serbia for claims for damages caused by uninsured vehicles, do not agree on the fact which law should be applied. The courts pass verdicts mostly by applying the provisions of the ZOOS, and not the provisions of ZOIL.⁴⁰ Although, in the judicial practice, there are also opposite cases.⁴¹ The Governor of the National Bank of Serbia in the letter K.G. No. 2670/1/15 of July 13, 2015 states that the Guarantee Fund as a separate legal entity whose establishment anticipates the ZOOS has not yet been established, and therefore the provisions of the ZOIL are still applicable.⁴² The Association of Serbian Insurers considers that the right to compensation for damage caused by an uninsured vehicle is realized in accordance with the provisions of ZOIL.⁴³

The differences between the provisions of the two laws, for a damaged person from abroad, at some point could be significant.

International cooperation and protection of foreign citizens, in the nineties of the twentieth century when ZOIL had been passed, were not a priority of the Republic of Serbia. The provision of Article 107, paragraph 1 of this Law has limited the right of a foreign citizen to compensation for damages from the guarantee fund by

³⁸ ZOIL did not explicitly define the guarantee fund as a property unit managed by the Association of Insurers. However, from the provisions of Article 99, 100 and 143, paragraph 1 item 3, 4 and 5 and paragraph 3 of ZOIL it can be concluded that that the guarantee fund is a property unit managed by the Association of Insurers, intended (inter alia) for compensation for damage caused by an uninsured motor vehicles

³⁹ Slavnić, J., *Nedostaci u načinu organizovanja garantnog fonda i propisanim merama nadzora u novom Zakonu o obaveznom osiguranju u saobraćaju*, Revija za pravo osiguranja, No. 3, 2010, p. 11

⁴⁰ E.g. Judgments of the Appellate Court in Belgrade Gž. 5268/16 dated October 5, 2016 and Gž. 5926/16 dated November 17, 2016, judgment of the High Court in Belgrade, Gž. 13420/15 dated June 1, 2017, judgment of the Appellate Court in Novi Sad, 2761/17 dated September 14, 2017 and judgment of the High Court in Zrenjanin, Gž. 243/15 dated January 20, 2016 were made by applying the provisions of the ZOOS

⁴¹ E.g. The Appellate Court in Belgrade in judgment Gž. 6393/15 dated May 12, 2016 explained that the provisions of ZOIL should apply, and not the provisions of the ZOOS, due to the fact that the Guarantee Fund in the form anticipated by the ZOOS was not constituted

⁴² A letter of Governor of the National Bank of Serbia No. K.G. 2670/1/15 of July 13, 2015

⁴³ A letter from the Association of Insurers of Serbia Gf-01062/14 dated January 29, 2015 sent to the National Bank of Serbia

reciprocity. A foreign citizen who has suffered damage in the territory of Serbia, under the said provision, is entitled to compensation from the Serbian guarantee fund only if the citizen of Serbia has the same right in the country of citizenship of the injured person. Professional authorities in the Republic of Serbia, at the time of adoption of the ZOIL, considered that the compensation of damages from the guarantee fund is “one special advantage”, which “is primarily intended for domestic citizens, and only if there is reciprocity, for foreign citizens also who have suffered damage in our country.”⁴⁴

The Serbian legislator has introduced a provision in the ZOOS that excludes reciprocity as a condition for compensation of damage to a foreign citizen. Article 96 of the ZOOS prescribes that a person who is not a national citizen who suffers damage in the territory of Serbia due to the use of an uninsured means of transport has the right to compensation in accordance with that law.

A statutory provision that explicitly prescribes that a foreign national is entitled to compensation the Guarantee Fund, regardless of reciprocity, is favorable to injured foreign nationals. However, the transitional provisions of the ZOOS postponed the application of Article 96 of that law. The rule that the damage caused by an uninsured motor vehicle can be compensated irrespective of the citizenship status of the victim of a traffic accident, according to the Serbian law, will be applied after the Republic of Serbia becomes a full member of the World Trade Organization.⁴⁵ Serbia has postponed the application of the universal principle until its own admission to the international trade organization.

4. PRACTICE IN THE REPUBLIC OF SERBIA

Serbian regulations on the protection of victims of traffic accidents contain certain shortcomings. However, it cannot be said that the right of injured persons to compensation for damage from a traffic accident in Serbia is illusory, and that it is only possible in theory. The compensation for damage caused by uninsured motor vehicle in Serbia is effectively and efficiently realized.⁴⁶ Indemnification is often

⁴⁴ Jankovec, I., in: Šulejić, P., Jankovec, I., Ogrizović, D., Rajičić, B., *Zakon o osiguranju imovine i lica – Komentar*, Dunav preving, Beograd, 1996, p. 205

⁴⁵ Article 117, item 5 of the ZOOS

⁴⁶ According to the data of the Association of Serbian Insurers contained in the review of the number of registered, resolved and unresolved cases of the guarantee fund for 2015, 2016 and 2017: 686 claims for compensation for damage caused by uninsured motor vehicle were settled out of court in 2015, and on that basis over 2 million euros were paid; In 2016, 815 requests for compensation for damage caused by uninsured motor vehicles were settled out of court, and over 2 million and 400 thousand euros were paid on this basis; In 2017, 739 requests for damages caused by uninsured motor vehicles were settled out of court, and over 2 million and 100 thousand euros were paid on that basis

obtained by domestic citizens, but also citizens of countries with whom Serbia has intensive traffic connections.⁴⁷

The right to compensation for damage caused by an uninsured motor vehicle is relatively reserved for Serbian nationals in Serbian practice. Foreigners can exercise this right, but under one additional condition that does not apply to citizens of the Republic of Serbia. This condition is reciprocity.

Reciprocity in its content can be formal or material. Formal reciprocity has been established when domestic citizens in a foreign country are equal with the citizens of that country, and the citizens of that country are equal with our citizens. Material reciprocity, however, means giving the foreigner the rights that a national citizen enjoys in the country of that foreigner.⁴⁸

The court practice in the Republic of Serbia considers that material reciprocity is necessary in order to compensate the damaged party from abroad for the compensation for damage caused by an uninsured motor vehicle. The judgment of the Commercial Court of Appeals Pž. 2917/17 dated June 28, 2017 has been passed concerning damage caused in Belgrade to a foreign legal entity registered in the State of Delaware (federal unit of the United States of America). The damage was caused by an uninsured motor vehicle in traffic. The damaged legal entity initiated a lawsuit to compensate for the damage from the assets of the guarantee fund of the Association of Serbian Insurers. The Commercial Court of Appeal, when passing the verdict, proceeded from the fact that there was no guarantee fund in the State of Delaware nor a similar institution. For this reason, he assessed that the laws of the said foreign state do not provide the Serbian citizen with the rights that the legal entity in the Serbia is seeking, and that the necessary condition of reciprocity is not met.⁴⁹

Based on the above-mentioned case-law, it can be concluded that foreign citizens in Republic of Serbia have the right to compensation for damage from the guarantee fund, only if they come from the countries where the guarantee fund operates. If the law of the state of the injured person does not know the guarantee fund nor

⁴⁷ E.g. Association of Serbian Insurers from the assets of the guarantee fund paid compensation for damage caused by uninsured motor vehicle: to the damaged party A. B, a citizen of the Federal Republic of Germany, in the case Gf-01101/15; to the damaged party B. B., a citizen of the Republic of Croatia, in the case Gf-01279/14; to the damaged party G. P, a citizen of the Federal Republic of Austria in the case Gf-01244/14

⁴⁸ Varadi, T., Bordaš, B., Knežević, G., Pavić, V., *Međunarodno privatno pravo*, Pravni fakultet Univerzitetu u Beogradu, Javno preduzeće Službeni glasnik, Beograd, 2007, pp. 215 - 216

⁴⁹ Commercial Court of Appeals, Judgment Pž. 2917/17 dated June 28, 2017

a similar legal institute, the damaged person will not be able to receive compensation from the guarantee fund at the Association of Serbian Insurers.

Migrants, who on their way to the central European Union countries pass through the territory of the Republic of Serbia, most often come from Asian and African countries that are affected by war, are unstable or very poor. A guarantee fund or a similar body, in such countries do not exist neither *de iure* nor *de facto*. Serbian citizens in such countries would not be able to receive compensation for damage because there is simply no guarantee fund there. Material reciprocity, as a condition necessary in Serbia for a foreign citizen to receive damages, is not fulfilled.

A claim for compensation of damage to the Association of Serbian Insurers was submitted by some of the persons injured in a traffic accident that occurred on February 24, 2015 in Serbia, near the town of Leskovac, when the Fiat Ducato van with 41 passengers skidded from the road. B.B. and M. O. from the Federal Republic of Nigeria and O. S., a citizen of the People's Republic of Bangladesh, sought compensation for damages from the guarantee fund. Association of Serbian Insurers rejected the claims of those injured parties. The reason why the damages were rejected was the lack of reciprocity between the Republic of Serbia and the countries which the specific injured persons come from.⁵⁰ The Association of Serbian Insurers in Serbian laws and practices of the courts of the Republic of Serbia had a reliable basis to reject claims for damages in these specific cases.

5. REGULATIONS OF OTHER COUNTRIES OF THE BALKAN ROUTE

The first European country on the Balkan migrants' route is Greece. Obligatory traffic insurance in the Republic of Greece is governed by Law 489/76, "Compulsory Insurance of Civil Liability arising from Motor Accidents", Government Gazette, No. A '331/1976, A' 253/1981, A' 118/1985, A' 227/1989, A' 98/1991, A' 150/1993, A' 186/1996, A' 87/97, A' 199/1999, A' 249/1999, A' 178/2000, A' 128/2001, A' 7/2003, A' 297/2005, A' 100/2007, A' 174/2008, A' 27/2009, A' 128/2010, A' 220/2012, A' 81/2013, A'107/2014, A' 194/2014, A' 13/2016. The provision of Article 16 of this Law establishes the Auxiliary Fund for the insurance of Liability arising from Motor Accidents (hereinafter: Auxiliary Fund) as a separate legal entity. Auxiliary Fund, among other things, is obliged to pay damages to the damaged person if a traffic accident is caused by a motor vehicle for which the

⁵⁰ Association of Serbian Insurers, Decision No. Gf-00734/16 dated November 1, 2016, Decision No. Gf-00027/18 dated 15 January 2016, and Decision No. Gf-00027/15 dated 7 February, 2018

obligation to conclude the insurance contract has not been met.⁵¹ Greek law does not exclude the possibility that foreigners receive compensation from the Auxiliary Fund, nor does it make reciprocity as a precondition. Therefore, refugees and economic migrants from Asian and African countries could be compensated in case of injuries in Greece caused by an uninsured motor vehicle.

Mandatory insurance of motor vehicles in the Republic of Macedonia is governed by the Law on Compulsory Traffic Insurance, Official Gazette of the Republic of Macedonia. 88/2005, 70/2006, 81/2008, 47/2011, 135/2011. Article 58 of this Law obliges the Macedonian National Insurance Bureau to establish a guarantee fund. The primary purpose of this fund is compensation for damage caused by uninsured motor vehicles in the territory of the Republic of Macedonia. The conditions under which the right to compensation for damage from the guarantee fund can be exercised by the Macedonian National Insurance Bureau are stipulated in Article 60 of the Law on Compulsory Traffic Insurance of the Republic of Macedonia. The provision of paragraph 5 of this Article stipulates that a person who is not a citizen of the Republic of Macedonia may be compensated from the assets of the Macedonian guarantee fund only if in the country of his citizenship a citizen of Macedonia can exercise the same right. The right to compensation from the guarantee fund in Macedonia is conditioned by material reciprocity. Therefore, migrants from countries where the guarantee fund does not function, cannot receive compensation in the event of a traffic accident caused by an uninsured motor vehicle in Macedonia.

In Bulgaria Code on Insurance, State Gazette, No. 102/2015 is in force. This code contains about 650 articles. Among other things, it contains provisions on compulsory insurance in traffic and the guarantee fund. The Guarantee fund under Bulgarian law is a special legal entity.⁵² It consists of two separate property units, the Compensation Fund and the Fund for Uninsured Motor Vehicles.⁵³ The Fund for Uninsured Motor Vehicles of the Guarantee Fund is in the scope of this paper, since it compensates the damage caused by uninsured motor vehicles in the territory of Bulgaria.⁵⁴ The Bulgarian legislator did not prescribe special conditions for the compensation of foreign nationals. Foreigners who suffer damage in the territory of Bulgaria due to the use of an uninsured motor vehicle, can receive

⁵¹ Article 19, paragraph 1 item b of the Greek Law 489/76, “Compulsory Insurance of Civil Liability arising from Motor Accidents”

⁵² Article 518, paragraph 1 of the Code on Insurance of the Republic of Bulgaria

⁵³ Article 521, paragraph 1 of the Code on Insurance of the Republic of Bulgaria

⁵⁴ Article 557, paragraph 1 item 2 of the Code on Insurance of the Republic of Bulgaria

compensation from the Fund for Uninsured Motor Vehicles of the Guarantee Fund under the same conditions as Bulgarian citizens.

Compulsory insurance of motor vehicles in Hungary is governed by Law LXII of 2009 on Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, Hungarian Gazette, No. 89/2009, 191/2009, 165/2011, 159/2013. The Association of Hungarian Insurance Companies under this Law has the authority to administer the Compensation Fund.⁵⁵ The Hungarian Compensation Fund is used to compensate the injured parties in cases where a traffic accident is caused by an uninsured motor vehicle.⁵⁶ A person who has been harmed in the territory of Hungary by a vehicle for which legal liability for liability insurance has not been fulfilled, shall be entitled to compensation for damage from the Compensation Fund.⁵⁷ This right governed by the Hungarian law is relatively reserved for the citizens of Hungary. The provision of Article 36, paragraph 7 of the Law LXII of 2009 on Insurance Against Civil Liability and Respect of the Use of Motor Vehicles of Hungary stipulates that the injured person, who is a resident of another country, is entitled to compensation from the Compensation Fund only if in the country of origin of the injured person Hungarian citizen may exercise the same right. Hungary allows foreigners to claim compensation from the Compensation Fund only on condition of material reciprocity. Refugees and economic migrants from Africa and Asia could not be compensated in this case if they were injured in a traffic accident caused by an uninsured motor vehicle in Hungary.

Law on Compulsory Traffic Insurance of the Republic of Croatia, Official Gazette, No. 151/2005, 36/2009, 75/2009, 76/2013, defines guarantee fund as the property of the Croatian Insurance Bureau intended, inter alia, to compensate for damages that are caused by uninsured means of transport in the territory of the Republic of Croatia.⁵⁸ Croatian law does not condition the right to compensation from the guarantee fund by reciprocity. Foreigners in Croatia who suffer damage due to the use of an uninsured motor vehicle, can receive compensation from the guarantee fund, even if they come from countries where this institute does not exist.

⁵⁵ Article 56, paragraph 1 of the Law LXII of 2009 on Insurance Against Civil Liability in Respect of the Use of Motor Vehicles of the Hungary

⁵⁶ Article 3, item 22 of the Law LXII of 2009 on Insurance Against Civil Liability in Respect of the Use of Motor Vehicles of the Hungary

⁵⁷ Article 35, paragraph 1 of the Law LXII of 2009 on Insurance Against Civil Liability in Respect of the Use of Motor Vehicles of the Hungary

⁵⁸ Article 44, paragraph 1 item 4 of the Law on Compulsory Traffic Insurance of the Republic of Croatia

The Republic of Slovenia has governed the mandatory motor vehicle insurance by the Law on Compulsory Insurance in Transport, Official Gazette of the Republic of Slovenia, No. 93/07 (official consolidated text), 40/2012, 33/2016, 43/2017. The Slovenian Insurance Association is liable to pay compensation to the damaged person from the guarantee fund in the event of a traffic accident caused by a vehicle for which the compulsory insurance contract has not been concluded.⁵⁹ Under the Slovenian law, the right to compensation for damages from the guarantee fund is not limited by reciprocity. Compensation in case of a traffic accident caused by an uninsured motor vehicle in the Republic of Slovenia, under the same conditions can be obtained by Slovenian and foreign citizens.

6. CONCLUSION

The migrant crisis has posed a series of questions to European countries and the Balkan countries through which the migrant route passes. Among other issues, the issue of compensation for damages to migrants in the event of a traffic accident caused by a motor vehicle for which the compulsory insurance contract had not been concluded, was also raised.

The Association of Serbian Insurers considers that persons who come from countries in which there is no guarantee fund or similar institute, do not have the right to indemnification from the guarantee fund at the Association of Serbian Insurers. Such an understanding cannot be criticized from the point of view of the positive law of the Republic of Serbia. The understanding of the Association of Serbian Insurers is based on the Serbian law and practice of the courts of the Republic of Serbia.

However, the law of the Republic of Serbia can be criticized. The purpose of the guarantee fund as a legal institute is to provide compensation for damage caused by a vehicle for which a compulsory insurance contract has not been concluded under the same conditions as if the vehicle was insured. The prescription of reciprocity as an additional requirement for compensation of a foreign person, which condition is not required for the compensation of damage caused by the insured vehicle, is not in accordance with the purpose of the guarantee fund.

A migrant is not responsible for the situation in the country he is leaving. The migrant himself cannot be charged for the fact that there is no guarantee fund or it does not function in the country of origin of the migrant. Therefore, it does not seem fair to say that due to the fact that there is no guarantee fund in the country

⁵⁹ Article 38, of the Law on Compulsory Traffic Insurance of the Republic of Slovenia

of origin of the injured person, the injured party will not be able to receive compensation.

The Serbian legislator clearly stated that the right to compensation for damages from the guarantee fund would be recognized to foreigners regardless of the existence of reciprocity. ZOOS prescribes that reciprocity will not be required when Serbia becomes a full member of the World Trade Organization. A refugee or an economic migrant, who is seriously injured in a car accident, is really not responsible for the fact that Serbia has not been admitted to membership of the World Trade Organization. For this reason, compensation for damage should not be denied to him.

European Union regulations do not provide for reciprocity as a condition for compensation of damages from the guarantee fund. Recognition of the right to compensation of damages from the guarantee fund, regardless of the citizenship of the injured party, is a standard that is desirable from the standpoint of European law. Recognition of rights to compensation to all foreigners, in the event when the damage has been caused on the Serbian territory by uninsured vehicles, would be in the interest of the European integration of the Republic of Serbia. The change made in this direction would contribute to the alignment of Serbian law with the *acquis communautaire*, but also to the duly fulfillment of the obligation that Serbia took over under Article 72 of the SAA. Announced amendments and supplements to the ZOOS are an opportunity to allow migrants from African and Asian countries to receive compensation from the assets of the guarantee fund in Serbia, and thus to further harmonize Serbian law with the law of the European Union. The desire for membership in the European Union, as the foreign policy priority of the Republic of Serbia, is an additional argument for allowing migrants, including economic migrants and refugees from Africa and Asia, to receive compensation for the damage caused by an uninsured motor vehicles in Serbia.

Countries in the neighborhood of the Republic of Serbia, or the country on the Balkan migrants' route, generally consider that the right to compensation from the assets of the guarantee fund should be available under equal conditions to foreigners and domestic citizens. Besides Serbia, only Macedonia and Hungary require reciprocity.

The valid Serbian legal solutions do not classify Serbia among the countries that take care of refugees and economic migrants. The announced changes to the Serbian law may be an opportunity to make Serbian law more equitable, to harmonize with the European Union law and to allow compensation for damage to migrants who have been injured in Serbia due to the use of an uninsured motor vehicle.

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