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# Punitive Damages and Private International Law: State of the Art and Future Developments

*Edited by*  
STEFANIA BARIATTI  
LUIGI FUMAGALLI  
ZENO CRESPI REGHIZZI



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## CHAPTER XI

# TOWARDS A EUROPEAN CONCEPT OF PUBLIC POLICY REGARDING PUNITIVE DAMAGES?

WOLFGANG WURMNEST \*

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## 1. INTRODUCTION

Different rules govern the recognition and enforcement of foreign judgments awarding punitive damages in Europe. Judgments in civil and commercial matters from any of the other EU Member States are enforced according to the Brussels Ibis Regulation,<sup>1</sup> whereas judgments from third states will be scrutinized

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\* Professor at Augsburg University. The author would like to thank Martin Fischer for the linguistic review of the text and Benedikt Wössner and Merlin Gömann for formatting the footnotes.

<sup>1</sup> Regulation (EU) 1215/2012 on jurisdiction and the recognition and en-



according to the national rules of the state in which enforcement is sought,<sup>2</sup> unless an international treaty applies. But under all rules the courts in the enforcing state can deny recognition and enforcement on grounds of public policy. No state wishes to give foreign judgments any effect if they violate fundamental values of the forum. Traditionally, the concept of public policy was classified as a national concept. National values determined its reach. Over the years, the public policy device, however, has got a 'European coat'.<sup>3</sup> Regarding the recognition and enforcement of EU judgments, the Court of Justice of the European Union (CJEU) held that '[w]hile the Member States remain in principle free [...] to determine, according to their own ideas, what public policy requires', it is up to the Court to watch over the boundaries of the *ordre public*.<sup>4</sup> With regard to judgments of third states, there is at least an indirect European influence on the public policy reservation as European standards forming part of the law of the Member States can influence the interpretation of the reach of the *ordre public* when scrutinizing judgments

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forcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1. This regulation also applies to Denmark via an international treaty concluded between the European Union and Denmark.

<sup>2</sup> For a comparison of the prerequisites under German, French and English law, see Helena Charlotte Laugwitz, *Die Anerkennung und Vollstreckung drittstaatlicher Entscheidungen in Zivil- und Handelssachen* (Mohr Siebeck 2016) 97 ff.

<sup>3</sup> On the European influence on the *ordre public* see Jürgen Basedow, 'Die Verselbständigung des europäischen *ordre public*' in Michael Coester, Dieter Martiny and Karl August Prinz von Sachsen Gessaphe (eds), *Privatrecht in Europa, Vielfalt, Kollision, Kooperation: Festschrift für Hans-Joachim Sonnenberger zum 70. Geburtstag* (CH Beck 2004) 291–319; Dieter Martiny, 'Die Zukunft des europäischen *ordre public* im Internationalen Privat- und Zivilverfahrensrecht' in Michael Coester, Dieter Martiny and Karl August Prinz von Sachsen Gessaphe (eds), *Privatrecht in Europa, Vielfalt, Kollision, Kooperation: Festschrift für Hans-Joachim Sonnenberger zum 70. Geburtstag* (CH Beck 2004) 523–548; Michael Stürner, 'Europäisierung des (Kollisions)Rechts und nationaler *ordre public*' in Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren: Festschrift für Bernd von Hoffmann zum 70. Geburtstag* (Gieseking 2011) 463–482; Ioanna Thoma, *Die Europäisierung und Vergemeinschaftung des nationalen ordre public* (Mohr Siebeck 2007) passim.

<sup>4</sup> Case C-7/98 *Krombach v Bamberski* ECLI:EU:C:2000:164, para 23 (regarding the Brussels Convention); Case C-559/14 *Meroni v Recoletos Limited* ECLI:EU:C:2016:349, paras 39–40 (regarding the Brussels I Regulation).



from third states. In addition, the interpretation may be influenced by court decisions in other EU Member States.

Against this background, this chapter seeks to explore whether and to what extent a common European concept of public policy regarding punitive damages is emerging. After having defined the concept of punitive damages (para 2), the European gloss on the *ordre public* is evaluated by looking at the European Convention on Human Rights and selected rules of European private and private international law (para 3). For reasons of space, the analysis focuses mainly on the law of delict/tort. It will reveal that European standards flowing from EU law or human rights law have some influence on the disputed question whether a foreign judgment awarding punitive damages can be recognised and enforced. Against this background, the following part of the chapter will highlight the general approaches taken by (selected) national courts with regard to the enforcement of punitive damages judgments from third states to evaluate whether the approaches are in line with the European standards and to what extent a form of common concept of public policy emerges (para 4).

## 2. THE CONCEPT OF PUNITIVE DAMAGES

The term 'punitive damages' is not a European term of art. Any analysis, therefore, has to start with a definition of this type of damages. In this chapter, the term punitive damages is understood as in most states of the United States<sup>5</sup> as a form of monetary compensation that is 'awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future'.<sup>6</sup> As far as allowed by law, US courts usually award such damages on top of compensatory or nominal damages as a form of prevention surplus to punish the tortfeasor for his conduct and to redistribute gains from unlawful behaviour to a certain extent.<sup>7</sup> In addition, the

<sup>5</sup> It has to be noted that the law in the different States of the US varies considerably as some restrict the award of punitive damages or even prohibit common law punitive damages, see Anthony J Sebok, 'Punitive Damages in the United States' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 155 ff.

<sup>6</sup> § 908(1) Restatement (Second) of Torts (1979).



award of such damages shall in some areas 'induce private litigation to supplement official enforcement that might fall short if unaided'.<sup>8</sup> The latter is the case, for example, in US antitrust law where plaintiffs can recover treble damages for antitrust law violations,<sup>9</sup> even though from a technical point of view multiple damages are a distinct type of damages.<sup>10</sup> In sum, under US law, the concept of punitive damages is to a certain extent part of a law enforcement scheme in which private plaintiffs aid public prosecutors to ensure a better enforcement of the law.

Not every unlawful behaviour may, however, trigger an award for punitive damages. Usually the law demands that the wrongdoer has caused the damage intentionally or maliciously or by some other form of reckless disregard for the rights and interests of the damaged person; negligence does not suffice for an award of punitive damages.<sup>11</sup> For a breach of contract, punitive damages usually cannot be awarded 'unless the conduct constituting the breach is also a tort for which punitive damages are recoverable'.<sup>12</sup> The latter can be the case, for instance, when a party deliberately breaches the contract in a fraudulent manner.

The amount of the punitive damages award is assessed by looking at the culpability of the defendant's behaviour and the context of the case.<sup>13</sup> Higher punitive awards are justifiable 'when wrongdoing is hard to detect ([as this increases the] chances of getting away with it) [...] or when the value of injury and

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<sup>7</sup> *State Farm Mutual Automobile Insurance Co v Campbell* 538 US 408, 416 (2003) ('[P]unitive damages ... are aimed at deterrence and retribution'); *Exxon Shipping Co v Baker* 128 SCt 2605, 2621 (2008) ('Regardless of the alternative rationales over the years, the consensus today is that [punitive damages] are aimed not at compensation but principally at retribution and deterring harmful conduct').

<sup>8</sup> *Exxon Shipping Co v Baker* (n 7) 2622.

<sup>9</sup> See s 4 of the Clayton Act (which replaced s 7 of the Sherman Act), 15 USC § 15(a). On the goals of private antitrust law enforcement in the US see Clifford A Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP 1999) 80–84.

<sup>10</sup> Geoffrey C Cheshire, Peter North and James Fawcett, *Private International Law* (15th edn, OUP 2017) 868.

<sup>11</sup> Sebok (n 5) 155.

<sup>12</sup> S 355 Restatement (Second) of Contracts (1979); Renée Charlotte Meurkens, *Punitive Damages: The Civil Law Remedy in American Law, Lessons and Caveats for Continental Europe* (Kluwer 2014) 56.

<sup>13</sup> For details see Sebok (n 5) 180 ff.



the corresponding compensatory award are small ([as this provides] low incentives to sue).<sup>14</sup> Over the last years, US courts and also the state legislatures have undertaken various efforts to restrict the award of punitive damages.<sup>15</sup>

### 3. EUROPEAN INFLUENCES ON PUBLIC POLICY

#### 3.1. *The European Convention on Human Rights*

The Europeanisation of the *ordre public* may flow from different sources. Given that constitutional values play an important role when assessing the reach of the *ordre public*, first a look at the case law of the European Court of Human Rights seems warranted.

##### 3.1.1. *Principle of proportionality as yardstick*

The European Court of Human Rights has held that in cases concerning the freedom of expression, an 'award of damages [...] must bear a reasonable relationship of proportionality to the injury to reputation suffered'.<sup>16</sup> Excessive awards are thus not in line with the Convention. The Court, for example, decided that the awards of 35,000 and 40,000 GBP (approximately 51,000 and 58,000 EUR at that time) against two environmental activists who had distributed a defamatory leaflet entitled 'What's wrong with McDonald's?' was disproportionate. The amount awarded violated the right to free expression enshrined in article 10 ECHR given the limited resources of the activists and because it remained unclear to what extent McDonald's

<sup>14</sup> *Exxon Shipping Co v Baker* (n 7) 2622.

<sup>15</sup> Sebok (n 5) 155 ff. For empirical information on the size of punitive damages awards see Renée Charlotte Meurkens' chapter, at 2.2.

<sup>16</sup> *Tolstoy Miloslavsky v UK* App no 18139/91 (ECtHR, 13 July 1995), para 49; *Rumyana Ivanova v Bulgaria* App no 36207/03 (ECtHR, 14 February 2008), para 69; *Europapress Holding DOO v Croatia* App no 25333/06 (ECtHR, 22 October 2009), para 54; *Bozhkov v Bulgaria* App no 3316/04 (ECtHR, 19 April 2011), para 53; *Tavares de Almeida Fernandes and Almeida Fernandes v Portugal* App no 31566/13 (ECtHR, 17 January 2017), para 77; see also *Independent News and Media and Independent Newspapers Ireland Ltd. v Ireland* App no 55120/00 (ECtHR, 16 June 2005), para 110.



was affected by the campaign.<sup>17</sup> In a similar manner, the Court held that the award of 20,000 PLN (approximately 5,000 EUR at that time) that a Polish applicant had to pay to a politician and to a charitable organisation was excessive and thus a violation of article 10 ECHR. The applicant had distributed a defamatory 'open letter' directed against the politician that portrayed him as being incompetent for the position for which he was running. As the awarded compensation was the highest that a court could grant under Polish election laws in force at that time and as the sum was more than sixteen times the average monthly wage in Poland at that time, the European Court of Human Rights held that it was disproportionate and thus not serving a legitimate aim.<sup>18</sup>

In particular circumstances, however, the Court approved rather high amounts of damages. In *Krone Verlag v Austria*, the Court held that the award of 130,000 EUR against a newspaper publisher who had infringed the personality rights of a child by reporting about his family life and the custody litigation of his parents, did not violate article 10 ECHR. The Court found this award was not disproportionate as the newspaper had published a series of articles 'capable of creating a climate of continual harassment inducing in the person concerned a very strong sense of intrusion into their private life or even of persecution' and that the newspaper had a particular wide circulation across the country.<sup>19</sup>

Even though the Court developed the proportionality threshold in the area of protection of personality rights, it is a general yardstick for measuring damages under this body of law. It should thus apply, in principle, to other losses as well. Awards of an excessive nature, such as excessive amounts of punitive damages, may therefore be in conflict with values protected by the European Convention of Human Rights. The proportionality test does not however ban all forms of high or

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<sup>17</sup> *Steel and Morris v UK* App no 68416/01 (ECtHR, 15 February 2005), para 96.

<sup>18</sup> *Kwiecién v Poland* App no 51744/99 (ECtHR, 9 January 2007), paras 56–57.

<sup>19</sup> *Krone Verlag v Austria* App no 27306/07 (ECtHR, 19 June 2012), paras 59–60. This case is cited as example for the Court to have embraced the idea that damages might also serve punitive purposes, see Meurkens (n 12) 253.



supra-compensatory damages awards but only those that are out of proportion.

### 3.1.2. Awarding punitive damages under the Convention?

The fact that the Court of Human Rights itself has not openly awarded punitive damages under the European Convention of Human Rights so far supports the argument that excessive awards of damages may infringe the Convention. Under article 41 ECHR, the Court is entitled to grant compensation in money ('just satisfaction') to victims that have established a violation of the Convention or its Protocols that national law cannot adequately remedy.<sup>20</sup> Just satisfaction can compensate the victim for pecuniary and non-pecuniary losses as well for costs and expenses incurred in pursuing his or her right.<sup>21</sup> The amount a state has to pay is principally based on the maxim *restitutio in integrum*.<sup>22</sup> Whether or not an award should also punish the infringing Convention state, and therefore grant a victim an additional compensation on top of his or her actual damage, is subject to debate. The majority of scholars argue that so far punitive damages have not played a role when assessing the amount of just satisfaction,<sup>23</sup> even though the European Court

<sup>20</sup> On remedial measures to secure non-financial redress ordered by the Court (which today are no longer based on art 41 ECHR but on art 46 ECHR) see Marten Breuer in Ulrich Karpenstein and Franz C Mayer (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten: Kommentar* (2nd edn, CH Beck 2015), Artikel 46 para 6; Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 Human Rights L Rev 451–478.

<sup>21</sup> Cees van Dam, *European Tort Law* (2nd edn, OUP 2013) 389; Paulo Pinto de Albuquerque and Anne van Aaken, *Punitive Damages in Strasbourg*, University of St. Gallen Law School, Law and Economics Research Paper Series, Working Paper no 2016-05 (May 2016) 3.

<sup>22</sup> Practice Direction (Just satisfaction claims) issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 (Version of 1 August 2018) para 10 (regarding pecuniary loss); given that non-pecuniary losses cannot be calculated precisely, the assessment of the award has to be made on an equitable basis, *ibid* para 14.

<sup>23</sup> Meurkens (n 12) 273 and 275 (although seeing signs that the Court might depart from this standpoint); Jens Meyer-Ladewig and Kathrin Brunozzi in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention: Handkommentar* (4th edn, Nomos 2017), Artikel 41 para 4; Nicola Wenzel in Ulrich Karpenstein and Franz C



of Human Rights has mentioned such damages in some judgments,<sup>24</sup> and awards higher amounts when the conduct of the state has aggravated the suffering of the victim. An example of the latter is a state not fully abiding by a Court's judgment so that the victim has to seek relief 'through time-consuming international litigation before the [European Court of Human Rights]'.<sup>25</sup> There are some voices, however, arguing that the just satisfaction remedy is – at least – impliedly used to punish the Convention State.<sup>26</sup>

The latter view has however not garnered much support in the case law. Referring to the case of *Cyprus v Turkey*,<sup>27</sup> decided by the Grand Chamber of the European Court of Human Rights in 2014, one cannot question the fact that US style punitive damages have not been awarded under article 41 ECHR as yet. This

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Mayer (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten: Kommentar* (2nd edn, CH Beck 2015) Artikel 41 para 10; Vanessa Wilcox, 'Punitive Damages in the Amory of Human Rights Arbiters' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012) 499, 500. From the case law see *Orhan v Turkey* App no 25656/94 (ECtHR, 18 June 2002), para 448: 'The Court notes that it has rejected on a number of occasions, recently and in Grand Chamber, requests by applicants for exemplary and punitive damages'; *B.B. v UK* App no 53760/00 (ECtHR, 10 February 2004), para 36: 'The Court recalls that it does not award aggravated or punitive damages'; *Wainwright v UK* App no 12350/04 (ECtHR, 26 September 2006), para 60: 'The Court does not, as a matter of practice, make aggravated or exemplary damages awards ....'; see also *Mentes and Others v Turkey* App no 23186/94 (ECtHR, 24 July 1998), para 21: '[The Court] rejects the claims for punitive and aggravated damages'.

<sup>24</sup> See, for example, *Hood v UK* App no 27267/95 (ECtHR, 18 February 1999), para 88: 'The Court finds no basis, in the circumstances of the present case, for accepting this claim [for punitive damages]'; *Greens and M.T. v UK* App nos. 60041/08 and 60054/08 ECtHR (23 November 2010), para 97 '[T]he Court does not consider that aggravated or punitive damages are appropriate in the present case.'

<sup>25</sup> *Burdov v Russia* (no 2) App no 33509/04 (ECtHR, 15 January 2009), para 156; for further examples see Wenzel (n 23) Artikel 41 para 10.

<sup>26</sup> Pinto de Albuquerque and van Aaken (n 21) 2 ff; see on this discussion also Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 410–420 (also on the case law of other international tribunals); Wolfgang Peukert in Jochen Abr. Frowein and Wolfgang Peukert (eds), *Europäische MenschenrechtsKonvention: EMRK-Kommentar* (3rd edn, N.P. Engel 2009), Artikel 41 para 6 (arguing that punitive damages could be awarded for severe and intentional violations of the Convention).

<sup>27</sup> *Cyprus v Turkey* (Just Satisfaction) App no 25781/94 (ECtHR, 12 May 2014). The Court had already decided in 2001 that Turkey had infringed various rights enshrined in the European Convention of Human Rights, see *Cyprus v Turkey* (Merits) App no 25781/94 (ECtHR, 10 May 2001).



case received a lot of attention because it established that Convention states might claim 'just satisfaction' from other Convention states for human rights violations on behalf of their citizens. The background of the dispute was the Turkish invasion of northern Cyprus in 1974. In the course of this operation, various Greek-Cypriot citizens went missing and others were enclaved on a peninsula occupied by Turkish troops. The Court awarded the Cypriot Government 30 million Euro as compensation for non-pecuniary losses arising from approximately 1,500 missing persons, and 60 million Euro to compensate non-pecuniary damages suffered by thousands of enclaved Greek-Cypriots (plus possible taxes owed for these amounts). In addition, the Cypriot Government was ordered to distribute these sums to the individual victims of the violations found. The Court decided to award compensation to Cyprus with a vote by the judges of 15:2. As the issue of applying article 41 ECHR to state applicants raised complex legal questions, there were concurring opinions and even a dissenting one. One of the concurring opinions, written by Judge Pinto de Albuquerque – a proponent of punitive damages as means of enforcing human rights<sup>28</sup> – stressed the fact that the damages awarded by the Court were of a punitive nature:

The punitive nature of this compensation is flagrant. [...] When the Court awards compensation in an amount higher than the alleged damage or even independently of any allegation of damage, the nature of the just satisfaction is no longer compensatory but punitive. [...] The fundamental purpose of that remedy is hence to punish the wrongdoing State and prevent a repetition of the same pattern of wrongful action or omission by the respondent State and other Contracting Parties to the Convention.<sup>29</sup>

<sup>28</sup> See *Krupko and Others v Russia* App no 26587/07, (ECtHR, 26 June 2014), Concurring opinion of Judge Pinto de Albuquerque para 13: 'While the failure to implement *Kuznetsov and Others* for such a long period can hardly be justified, any additional delay would be unforgivable in the light of the present judgment, and would leave the door open for the award of punitive damages in the event of new similar violations' (footnote omitted); Pinto de Albuquerque and van Aaken (n 21) 3–6.

<sup>29</sup> *Cyprus v Turkey* (Just Satisfaction) (n 27) Concurring opinion of Judge Pinto de Albuquerque joined by Judge Vučinić para 13 (footnotes omitted).



The majority opinion, however, did not share these clear words but assessed the amount of damages on an equitable basis instead.<sup>30</sup> This reasoning is also reflected by the Practice direction of the Court on article 41 ECHR, which states:

The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, until now, considered it inappropriate to accept claims for damages with labels such as 'punitive', 'aggravated' or 'exemplary'.<sup>31</sup>

In addition, the examples Judge Pinto de Albuquerque cited in his opinion of other 'punitive damages' cases decided by the European Court of Human Rights (ordering compensation although not being claimed or specified by the applicant, awarding a higher amount than the applicant claimed)<sup>32</sup> demonstrate that his understanding of punitive damages is much broader than the definition followed here. The current discussion on punitive effects is, however, a clear indication that the European Court of Human Rights should put more effort into explaining the basis and the amount of monetary compensation awarded under article 41 ECHR to ensure consistency and legal clarity. The old critique that any 'student of the Court's practice is left wondering whether the process by which the Court arrives at its judgments is anything more sophisticated than sticking a finger in the air or tossing a coin'<sup>33</sup> still holds true in this regard.

### 3.1.3. Conclusion

The case law of the European Court of Human Right gives

<sup>30</sup> *Cyprus v Turkey* (Just Satisfaction) (n 27) para 58.

<sup>31</sup> Practice Direction (n 22) para 9. Some scholars argue that this Direction is no longer up to date, see Pinto de Albuquerque and van Aaken (n 21) 2.

<sup>32</sup> *Cyprus v Turkey* (Just Satisfaction) (n 27) Concurring opinion of Judge Pinto de Albuquerque joined by Judge Vučinić para 13.

<sup>33</sup> Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell 2000) 145.



only a few hints regarding the treatment of punitive damages awards. The rulings on the impact of damages claims on the right to free speech indicate that an award of damages has to comply with the principle of proportionality. In line with this reasoning, the European Court of Human Rights so far has not awarded excessive punitive damages in addition to compensatory damages when assessing claims for just satisfaction according to article 41 ECHR. The proportionality threshold however does not ban all forms of supra-compensatory damages from the law. Rather, only disproportionate damages awards must be avoided.

### 3.2. European private law

Looking at the body of European tort law, there is a broad consensus that its rules serve a compensatory function: to return the injured party to the position where he or she was before the wrongful behaviour, as far as money can remedy the wrong.<sup>34</sup> In addition – at least in some areas, like market regulation – EU law serves the aim of prevention<sup>35</sup> and accepts damages awards that are – from a traditional point of view – supra-compensatory. Against this background, a heated debate has emerged in the last decades as to the extent to which EU law already incorporates punitive damages or at least traces of a punitive function of (tort) law.<sup>36</sup> The discussion is fuelled by the fact that European law is rather ambiguous<sup>37</sup> or – in the eyes of

<sup>34</sup> Cees van Dam (n 21) 360; Wolfgang Wurmnest and Christian Heinze, 'General Principles of Tort Law in the Jurisprudence of the European Court of Justice' in Rainer Schulze (ed), *Compensation of Private Losses: The Evolution of Torts in European Business Law* (seller european law publishers 2011) 39, 53–56.

<sup>35</sup> On the foundations of enforcing market regulation rules through private plaintiffs see Jens-Uwe Franck, *Marktordnung durch Haftung: Legitimation, Reichweite und Steuerung der Haftung auf Schadensersatz zur Durchsetzung marktordnenden Rechts* (Mohr Siebeck 2016) 15 ff.

<sup>36</sup> The view that EU (private) law has embraced punitive damages is advocated by Pinto de Albuquerque and van Aaken (n 21) 11; see also Cedric Vanleenhove, *Punitive Damages in Private International Law: Lessons for the European Union* (Intersentia, 2016) 165, 175 (arguing that there are traces of punitive damages in EU law).

<sup>37</sup> Helmut Koziol, 'Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation?' in Helmut Koziol and Vanessa Wilcox (eds),



some – even ‘self-contradictory’.<sup>38</sup> The following overview will use selected examples to show that EU law does not embrace punitive damages in a similar manner as US law but that this body of law is inclined to broaden the scope of traditional remedies to pave the path for an effective private enforcement of European rules.<sup>39</sup>

### 3.2.1. *Enforcement of EU rights through national law: the principle of effectiveness*

The issue whether EU law embraces ‘punitive damages’ or traces thereof first arose with the (older) case law of the Court of Justice of the European Union on the principle of effectiveness. EU law often confers rights upon individuals but leaves the enforcement of those rights to the law of the Member States. To avoid enforcement gaps caused by national law, the Court obliges the Member States to provide for effective and non-discriminatory remedies for the enforcement of EU rights.<sup>40</sup> In *von Colson and Kamann*, a case concerning damages claims for the violation of the principle of equal treatment in the employment sector (a principle enshrined in an EU Directive), the Court stated that

if a Member State chooses to *penalize* breaches of [an EU] prohibition by the award of compensation, then in order to ensure that [the remedy] is effective and that it has a *deterrent effect*, that compensation must in any event be *adequate in relation to the damage sustained* and must therefore amount to more than purely nominal compensation [...].<sup>41</sup>

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*Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 275, 288 (‘inconsistent’); Meurkens (n 12) 256 (‘uncertain and inconsistent position of the EU legislator’).

<sup>38</sup> Gerhard Wagner, ‘Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden: Gutachten A für den 66. Deutschen Juristentag’ in *Verhandlungen des 66. Deutschen Juristentages: Stuttgart 2006*, Vol I (CH Beck 2006), Part A, 71 (‘Die Haltung der EU zum Strafschadensersatz ist nicht nur ambivalent, sondern evident widersprüchlich’).

<sup>39</sup> On the background for this trend towards more private enforcement see Meurkens (n 12) 209–235.

<sup>40</sup> Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5.



Even though the Court refers to the 'deterrent effect' of the damages action in order to 'penalize breaches' of anti-discrimination law, the emphasis of the judgment lies on the requirement that the compensation awarded 'must in any event be adequate in relation to the damage sustained' – so a symbolic or nominal compensation does not suffice. The German law at that time clearly failed this test as the legislature had limited the damages in case of employment related discrimination to reliance losses, such as costs for sending an application or costs to travel to the job interview. The case law following *von Colson and Kamann* on the effective enforcement of equality rights confirms that the Court puts the emphasis more on the compensatory character of the damages claim even though it did not neglect the preventive effect flowing from such claims.<sup>42</sup> The CJEU for example ruled that certain liability caps would bar plaintiffs from bringing violations of the Community rights to court<sup>43</sup> and that the principle of adequate compensation also demands the payment of interest.<sup>44</sup>

This case law is essentially grounded on the argument that the enforcement of EU law would be impaired if the national legislator restricted claims for compensation to such a minimal level that it is not worth going to court.<sup>45</sup> This reasoning is, in my eyes, different from the reasoning that explains US style punitive damages, even though the 'dissuasive effect' of the damages remedy was later incorporated into the Equal Treatment Directive.<sup>46</sup> That EU law does not call for punitive dam-

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<sup>41</sup> Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1892, para 28 (emphasis added). See also Case 79/83 *Harz v Deutsche Trax* [1984] ECR 1921, para 28.

<sup>42</sup> Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, paras 24–26; Case C-460/06 *Paquay v Société d'architectes Hoet + Minne* ECLI:EU:C:2007:601, paras 45–46.

<sup>43</sup> Case C-180/95 *Draehmpaehl v Urania Immobilienservice* [1997] ECR I-2195, para 40.

<sup>44</sup> *Marshall v Southampton and South-West Hampshire Area Health Authority* (n 42) para 32.

<sup>45</sup> *Wurmnest and Heinze* (n 34) 63 (regarding *von Colson and Kamann*).

<sup>46</sup> The dissuasive effect of sanctions was first enshrined in European Parliament and Council Directive 2002/73/EC of 23 September 2002 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working condi-



ages in discrimination cases was recently confirmed by the CJEU. The Court clarified in *Arjona* that the genuine deterrent effect sought by [the EU Directives] did not involve awarding, to the person injured as a result of discrimination on grounds of sex, punitive damages which go beyond full compensation for the loss and damage actually sustained [...].<sup>47</sup>

In other words, EU law 'allows, but does not require' Member States to grant to the person who has suffered from gender discrimination a claim for punitive damages.<sup>48</sup>

Another example showing that the CJEU is not willing to force EU Member States to introduce punitive damages is the *Manfredi* case decided in 2006. This case concerned an action for damages brought by Italian consumers against insurance companies for damages resulting from an unlawful cartel violating article 101 TFEU. The CJEU held that it is not necessary to award punitive or exemplary damages in competition cases to comply with the principle of effectiveness, as it is settled law that national courts are entitled to take steps to avoid an unjust enrichment of persons benefitting from EU rights.<sup>49</sup> The Court regarded punitive damages thus as a form of unjust over-compensation. To comply with the principle of effectiveness it is sufficient that victims of anti-competitive conduct can claim the actual loss, loss of future profits and a proper amount of interest.<sup>50</sup> That the *Manfredi* case is a powerful example of the Court's reluctance to impose punitive damages on the Member States becomes apparent, when one recalls that the same Court had un-

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tions [2002] OJ L269/15. Under the current legal framework the relevant provisions calling for 'dissuasive and proportionate' measures to remedy discrimination and to oblige the Member States to provide for 'penalties, which may comprise the payment of compensation to the victim, [that are] effective, proportionate and dissuasive' are found in European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23, arts 18 and 25.

<sup>47</sup> Case C-407/14 *Arjona Camacho v Seguridad Española* ECLI:EU:C:2015:831, para 34.

<sup>48</sup> *ibid* para 40.

<sup>49</sup> Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni* ECLI:EU:C:2006:461, paras 92-94.

<sup>50</sup> *ibid* para 100.



derscored some years before in *Courage v Crehan* that 'actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community'.<sup>51</sup> Supra-compensatory damages would certainly enhance the incentives for the enforcement of EU competition law as a comparison with US law shows. In the US, private enforcement of antitrust law has been very effective for many years, inter alia because victims of anti-competitive behaviour can claim treble damages for violation of the US antitrust rules.<sup>52</sup> At the time the judgment in *Manfredi* was handed down, there were voices calling for the introduction of 'double damages' to give plaintiffs a windfall-profit as an incentive to bring complex antitrust cases to court.<sup>53</sup> The Court, however, practiced judicial restraint and did not call for over-compensatory damages to deter undertakings from infringements of competition law. This approach was finally enshrined in the so-called Antitrust Damages Directive, which rules out the possibility that Member States may introduce over-compensatory damages.<sup>54</sup>

Summing up, despite some ambiguous language used by the CJEU, the principle of effectiveness does not demand the award of US style punitive damages. EU law does, however, not preclude Member States from introducing such type of damages. If such damages were introduced at the national level for infringements of national rules, the European twin to the principle of effectiveness, the principle of equivalence demands that national courts also award those damages to safeguard similar European rights.<sup>55</sup>

<sup>51</sup> Case C-453/99 [2001] ECR I-6297, para 27.

<sup>52</sup> See text accompanying supra n 9.

<sup>53</sup> Monopolkommission, *Sondergutachten 41: Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle* (Nomos 2004) para 83.

<sup>54</sup> European Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, art 3(3) states: 'Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages'.

<sup>55</sup> *Manfredi* (n 49) para 99; *Arjona* (n 47) para 44.



### 3.2.2. Remedies of European secondary law

In newer Directives and Regulations, the European legislature often defines remedies for violations of EU rights more precisely in order to achieve a higher level of harmonisation. However, even in this body of law, one cannot find punitive damages as awarded in the US. But at the same time it is undeniable that the preventive function enshrined in some rules leads to the adjudication of an amount of damages that – from the view of traditional tort law – goes beyond mere compensation. As this effect has been scrutinised in detail in a recent *Habilitationsschrift*<sup>56</sup> and other contributions<sup>57</sup>, I want to limit myself to few examples.<sup>58</sup>

My first example concerns the enforcement of Intellectual Property Rights. Article 13(1) of the IP Enforcement Directive 2004/48<sup>59</sup> allows national courts to award ‘damages appropriate to the actual prejudice suffered’ in the case that an IP right was knowingly infringed (or with reasonable grounds for knowing). The law further states that the calculation shall take into account ‘all appropriate aspects’, including ‘any unfair profits made by the infringer’. Recovery of the tortfeasor’s profits is not a remedy classically seen as a tort claim.<sup>60</sup> European law thus broadens the scope of claims to strengthen the preventive effect and to provide incentives to avoid IP rights infringements. Victims will be more likely to enforce the EU

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<sup>56</sup> Christian Heinze, *Schadensersatz im Unionsprivatrecht: Eine Studie zu Effektivität und Durchsetzung des Europäischen Privatrechts am Beispiel des Haftungsrechts* (Mohr Siebeck 2017). This study analysed various directives and regulations in the areas of product liability, travel and transportation law as well as competition law enforcement.

<sup>57</sup> See Bernhard A Koch, ‘Punitive Damages in European Law’ in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 197 ff (with further references therein).

<sup>58</sup> The following analysis draws from Wurmnest and Heinze (n 34) 57–58.

<sup>59</sup> European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45, corrigendum in [2004] OJ L195/16.

<sup>60</sup> Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek 2012), para 2/45: A claim for disgorgement of profits is a claim ‘in the interim area between the law of tort and of unjust enrichment’.



rules when higher awards are at stake. At the same time, the Enforcement Directive states in its recital 26 that the EU Member States are under no obligation to introduce punitive damages. The law, thus, goes beyond mere compensation but not as far as to call for true punitive damages.<sup>61</sup>

The same holds true for my second example. It relates to the introduction of 'standardized damages' which are on the rise in EU law. A prominent example is Regulation 261/2004 on compensation to airline passengers denied boarding and in the event of cancellation or long delay of flights. Depending on the flight distance, passengers can claim different amounts of compensation from the operating air carrier without having to prove any actual losses. This type of compensation should not only remedy non-material losses such as waste of time or stress. It should also create an incentive for flight operators to provide better service.<sup>62</sup> Given that in many jurisdictions a loss of time at an airport is not recoverable under traditional tort remedies, EU law widens the scope of tort/damages law and the standardisation may lead to the result that in some cases a victim will receive more than he or she would have received if a judge had to precisely assess the loss suffered. This broader connotation of compensation serves as a means to prevent further wrongdoings.

My third example is taken from the area of general contract law. In order to deter late payment in commercial transactions the EU has enacted the Late Payment Directive.<sup>63</sup> It obliges Member States to set a default rate of interest for late payments which equals the sum of the 'reference rate' (a given rate of the European Central Bank or the equivalent of a national central bank)<sup>64</sup> and at least eight percentage points.<sup>65</sup> In addition, Member States must ensure that the creditor entitled to interest

<sup>61</sup> As the Directive follows a minimum harmonisation approach, it does, however, not preclude Member States from introducing 'double royalties' to remedy breaches of rights protected by the Directive, see Case C-367/15 *Stowarzyszenie 'Oławska Telewizja Kablowa' v Stowarzyszenie Filmowców Polskich* ECLI:EU:C:2017:36, paras 23–33.

<sup>62</sup> Wurmnest and Heinze (n 34) 57.

<sup>63</sup> European Parliament and Council Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions (Late Payment Directive) [2011] OJ L48/1.

<sup>64</sup> Cf art 2(7) Late Payment Directive.

<sup>65</sup> Cf art 2(5), (6), art 3(1), art 4(1) Late Payment Directive.



can also claim as minimum damages, a fixed sum of 40 EUR from the debtor, as a lump sum for damages regularly occurring in the context of recovery late payments.<sup>66</sup> Both rules (interest of eight percent over the reference rate and the lump sum of 40 EUR) can lead to an overcompensation of the creditor, a threat that should spur a debtor to fulfill his or her contractual obligations in a timely manner.<sup>67</sup>

### 3.2.3. Conclusion

Summing up, EU law does not impose a requirement for the implementation of US style punitive damages upon the Member States. In some areas of EU law, namely in the field of market regulation and anti-discrimination law, the goal of prevention leads however to a widening of traditional concepts of law, thus allowing for compensation that from a traditional viewpoint of tort law could not be awarded. In other words, European law allows for damages that are not purely compensatory. This development brings European law closer to US law without however embracing punitive damages as a general concept. In my view, it is not correct to characterize the references on the dissuasive or preventive function of EU law as equivalent to US style punitive damages.<sup>68</sup>

<sup>66</sup> Cf art 6(1) Late Payment Directive. In case higher compensation is claimed, the lump sum of 40 EUR can be off-set, cf art 6(3) Late Payment Directive.

<sup>67</sup> On the interest rate see Vanleenhove (n 36) 174–175. On the claim for 40 EUR which Germany has transposed in § 288(5) BGB see Wolfgang Ernst in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol II (7th edn, CH Beck 2016), § 288 BGB para 29 ('Anspruch [ist] am ehesten als Strafschadensersatz einzuordnen.'). Marc-Philippe Weller and Charlotte Sophie Harms, 'Die Kultur der Zahlungstreue im BGB: Zur Umsetzung der neuen EU-Zahlungsverzugsrichtlinie ins deutsche Recht' [2012] WM 2305, 2312 ('[Anspruch hat] pönalen Anstrich').

<sup>68</sup> Similarly Jan von Hein, 'Punitive Damages in European and Domestic Private International Law' in Alexander Bruns and Masabumi Suzuki (eds), *Preventive Instruments of Social Governance* (Mohr Siebeck 2017) 143, 146 (regarding German law).



### 3.3. *European private international law*

#### 3.3.1. *The rules on public policy in the Rome II Regulation*

The issue of whether there are European standards to assess the *ordre public* with regard to punitive damages is also relevant in private international law. Non-compensatory damages received special attention in the legislative process leading to the Rome II Regulation.<sup>69</sup> Like all other regulations on private international law, the Rome II Regulation contains a general public policy clause, which allows a court to refuse the application of foreign law 'if such application is manifestly incompatible with the public policy (*ordre public*) of the forum' (article 26 Rome II Regulation). In addition, recital 32 of the Rome II Regulation states that a court may, 'depending on the circumstances of the case and the legal order of the Member State of the court seised', deny the application of a foreign law for violating the *ordre public* whenever the application of that law would lead to the award of 'non-compensatory exemplary or punitive damages of an excessive nature'.

#### 3.3.2. *Punitive damages disputes as 'civil and commercial matters'*

Recital 32 is a clear indication that claims for punitive or exemplary damages are 'civil and commercial matters' according to article 1(1) Rome II Regulation. Otherwise, clarifying that such damages may be contrary to the forum's public policy in a recital would not make sense given that the public policy reservation only applies to claims that qualify as 'civil and commercial matters'.<sup>70</sup> The view excluding punitive damages from the scope of the Rome II Regulation<sup>71</sup> cannot be maintained any

<sup>69</sup> European Parliament and Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

<sup>70</sup> Von Hein (n 68) 155; Helena Isabel Maier, *Markortanknüpfung im Internationalen Kartelldeliktsrecht: Eine internationalzuständigkeits- und kollisionsrechtliche Untersuchung unter Einbeziehung rechtsvergleichender Überlegungen zum englischen Recht* (Peter Lang 2011) 361.



longer. As the concept of 'civil and commercial matter' is a general concept in EU private international law, this finding holds true for other regulations in this area of law. Hence, punitive damages awards are 'civil and commercial matters' and cannot be classified as a form of a penal judgment, which cannot be enforced abroad under the rules of civil procedure.

### 3.3.3. *The dispute around the qualifier 'punitive damages of an excessive nature'*

A more difficult question to answer is whether recital 32 Rome II Regulation – a compromise that was found in the conciliation committee at the very last stage of the drafting process<sup>72</sup> – establishes some form of European standard for public policy or whether it does not alter the general principle of the forum law defining the content of the *ordre public*.

One can trace back the reference to 'excessive' punitive damages in the recital to the position of the EU Commission and the European Parliament. Originally, the Commission had proposed to introduce a specific rule that regarded all non-compensatory damages incompatible with the Community public policy.<sup>73</sup> This clause would have sat alongside the general public policy reservation.<sup>74</sup>

After severe criticism,<sup>75</sup> the Commission changed its position in the 2006 Amended Proposal.<sup>76</sup> The rule for non-compen-

<sup>71</sup> Juliana Moersdorf-Schulte, 'Spezielle Vorbehaltsklausel im Europäischen Internationalen Deliktsrecht?' (2005) 104 ZVglRWiss 192, 248.

<sup>72</sup> Rolf Wagner, 'Das Vermittlungsverfahren zur Rom II-Verordnung' in Dietmar Baetge, Jan von Hein and Michael von Hinden (eds), *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70. Geburtstag* (Mohr Siebeck 2008) 715, 727.

<sup>73</sup> Art 24 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II') (hereafter: '2003 Proposal'), COM(2003) 427 final: 'The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy'.

<sup>74</sup> The proposal even contained a third reservation (art 23(1) 3rd indent 2003 Proposal) which dealt with the issue of the public policy of the Community. This reservation was dropped in its entirety during the legislative process. Given that the forum's public policy must protect Community values, the specific reservation was regarded as superfluous, see von Hein (n 68) 152–155.

<sup>75</sup> For details see Richard Plender and Michael Wilderspin, *The European*



satory damages was significantly altered and annexed to the general public policy clause. Article 23, 2nd sentence of the 2006 Amended Proposal stated:

In particular, the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum.

Thus, the Commission did not only drop the clear-cut prohibition on applying foreign punitive damages rules *in toto* but also abandoned the reference to the Community public policy. In its explanatory memorandum, however, the commission stressed that 'punitive damages are not *ipso facto* excessive'.<sup>77</sup> Article 23, 2nd sentence of the 2006 Amended Proposal mirrored this by referring to 'excessive' non-compensatory damages. The Council did however not accept the special reservation for non-compensatory damages.<sup>78</sup> In the final stage of the legislative proceedings, the decision was taken to retain the general public policy clause in the Regulation (article 26 Rome II Regulation) and to shift the rule on non-compensatory damages, with minor linguistic changes, to the recitals.

The legislative history shows that punitive damages do not violate the *ordre public per se* and that it is up to the law of the forum to define the content of public policy. The latter is also bolstered by the fact that even recital 32 Rome II Regulation refers to the 'circumstances of the case and the legal order of the Member State of the court seised' as the yardstick for dealing with the issue of public policy. Against this background, many scholars take the view that the Regulation does not constrain na-

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*Private International Law of Obligations* (4th edn, Sweet & Maxwell 2015) paras 27-032-27-033.

<sup>76</sup> Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ('Rome II'), COM(2006) 83 final.

<sup>77</sup> *ibid* 5.

<sup>78</sup> The special rule on punitive damages was deleted in art 26 of the Common Position no 22/2006 adopted by the Council on 25 September 2006 with a view to the adoption of a Regulation of the European Parliament and Council Regulation on the law applicable to non-contractual obligations ('Rome II') [2006] OJ C289E/68.



tional court's powers to reject non-compensatory damages (unless warranted by EU private law) based on domestic public policy considerations.<sup>79</sup> But the qualifier 'excessive' can also be interpreted as a hint that European private international law is more open to supra-compensatory damages than the rules of certain national conflict-of-law rules, as not all forms of supra-compensatory damages should be regarded as contrary to the *ordre public*. However, defining which damages are excessive cannot be done entirely from a European perspective. Against this background, scholars are divided on the matter. Some argue that essentially all damages awarded on top of compensatory damages are excessive (unless they serve as a vehicle to recover profits gained unlawfully at the expense of the victim).<sup>80</sup> Others take a more liberal stance and call for the application of foreign punitive damages rules within certain limits.<sup>81</sup> In detail, practice varies from jurisdiction to jurisdiction. Nevertheless, given that the CJEU has claimed the right to watch over the boundaries of the *ordre public*,<sup>82</sup> it is likely that some European guidance regarding the application of punitive damages will emerge over time.<sup>83</sup> For the sake of legal certainty, national courts con-

<sup>79</sup> Von Hein (n 68) 156; Koch (n 57) 199; Gerhard Wagner, 'Die neue Rom II-Verordnung' IPRax 2008 1, 16–17; see also Paul Beaumont and Zheng Tang, 'Classification of Delictual Damages – *Harding v. Wealands* and the Rome II Regulation' (2008) 12 Edinburgh L Rev 131, 136 (pointing out that the aim of recital 32 is to bar the CJEU from giving a uniform interpretation under which circumstances damages are excessive and therefore contrary to public policy).

<sup>80</sup> Helmut Koziol, 'Punitive Damages – A European Perspective' (2008) 68 Louisiana L Rev 741, 750; a similar view seems to be taken by Mihail Danov, 'Awarding Exemplary (or Punitive) Antitrust Damages in EC Competition Cases with an International Element – The Rome II Regulation and the Commission's White Paper on Damages' (2008) 29 ECLR 430, 436.

<sup>81</sup> Vanleenhove (n 36) 241–242 (advocating a 1:1 ratio as general yardstick, so that a court – subject to certain qualifications – could award the same amount as punitive damages that was awarded as compensatory damages).

<sup>82</sup> Case C–38/98 *Renault v Maxicar* [2000] ECR I–2973, para 28 (regarding the Brussels Convention); *Meroni v Recoletos* (n 4), para 39 (regarding the Brussels I Regulation).

<sup>83</sup> That recital 32 might serve as a sort of anchor for the CJEU to set forth some general European standards on the assessment of punitive damages (although views are divided on the extent the CJEU can and will interfere and what damages should be considered to be 'excessive') is advocated by Thomas Ackermann, 'Antitrust Damages Actions under the Rome II Regulation' in Mielle Bulterman and others (eds), *Views of European Law from the Mountain*:



fronted with the application of foreign punitive damages rules should initiate a preliminary reference proceeding to give the CJEU the chance to clarify the scope of recital 32.

Case law on the application of punitive damages rules under the Rome II Regulation is scarce. In an often cited case, the *Rechtbank Amsterdam* took a rather liberal approach towards punitive damages. In a *kort geding* proceeding about a form of online stalking, the court applied Californian law and awarded each plaintiff 5,000 EUR as '*voorschot wegens punitieve schade*' on top of compensatory pecuniary and non-pecuniary damage to remedy the wrongdoing.<sup>84</sup> The court did not consider awarding punitive damages to be a violation of Dutch public policy – without however referring to or discussing recital 32.<sup>85</sup> But this approach does not seem to be common ground in the Netherlands. The *Rechtbank Utrecht* refused to award punitive damages under Israeli law for violation of the Dutch *ordre public* in a case in which the Rome II Regulation was not applicable *ratione temporis*.<sup>86</sup>

### 3.3.4. Conclusion

Recital 32 of the Rome II Regulation clarifies that European private international law does not consider supra-compensatory damages contrary to the *ordre public* but rather damages that are of an excessive nature. This restriction was necessary as some European jurisdictions award exemplary damages and the EU has also enacted rules under which damages can be claimed that go beyond mere compensation. The standards to test for 'excessive damages' are not yet settled and even within a single jurisdiction views can diverge on how courts

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*Liber Amicorum for Piet Jan Slot* (Wolters Kluwer 2009) 109, 118; Marta Requejo Isidro, 'Punitive Damages: How do They Look Like When Seen From Abroad?' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012) 311, 319–322; Plender and Wilderspin (n 75) para 27–034; Vanleenhove (n 36) 81; see also Cheshire, North and Fawcett (n 10) 868 (indicating that only excessive damages will violate the *ordre public*).

<sup>84</sup> Rb Amsterdam ECLI:NL:RBAMS:2012:BW9838, paras 5.5–5.6.

<sup>85</sup> *ibid* para 4.14.

<sup>86</sup> Rb Utrecht ECLI:NL:RBUTR:2012:BW1631, para 4.21.



should deal with certain damages with punitive elements under the Rome II Regulation.

### 3.4. Drawing the strings together

To draw the strings of the foregoing analysis together, three findings must be highlighted:

First, it is important to note that awards must comply with the principle of proportionality to be in line with the European Convention of Human Rights. US style punitive damages cannot be found in the case law of the European Court of Human Rights but, at the same time, the Court has not banned supra-compensatory forms of damages as such.

Second, EU private law does not embrace US style punitive damages but is receptive towards forms of compensation that employ preventive effects, including forms of supra-compensatory damages. These rules cannot be qualified as single exceptions. Damages beyond mere compensation are frequent in the area of market regulation, especially when private enforcement is seen as important tool to safeguard Community rights. Yet not all areas of European law embrace this widened concept of tort law. For example the Products Liability Directive strictly follows the principle of compensation.

Third, under the Rome II Regulation, supra-compensatory damages are not qualified as *per se* repugnant to the *ordre public*.

Taking these general findings into account it is submitted that European values require a nuanced approach towards the recognition and enforcement of punitive damages awards. As a starting point, it is safe to say that European values do not allow a complete ban of non-compensatory damages. If EU law for example recognises such damages in certain areas of law, the recognition and enforcement of judgments from other EU countries awarding such damages based on these rules could not be rejected by relying on the public policy reservation as national courts have to safeguard rights arising out of EU law.<sup>87</sup>



Much more difficult to answer is the question as to the extent to which other forms of over-compensatory awards must be accepted by national courts, especially when it comes to US style punitive damages. The case law of the ECtHR as well as recital 32 Rome II Regulation points towards a form of proportionality test as only excessive non-compensatory damages shall be set aside on the ground of public policy. Given that so far the CJEU has exercised much constraint in mapping the contours of the forum's public policy and Member States have introduced supra-compensatory damages in their national laws to very different degrees, the answer to the question of what damages ought to be regarded as excessive will certainly vary in the different Member States.

It has however to be noted that neither the European Court of Human Rights nor the Court of Justice of the European Union has embraced the concept of non-compensatory damages in a manner comparable to US courts. Further, the forms of non-compensatory damages that are accepted in EU law are in general rather modest as compared to the US, a finding that might be different when one looks into national law.

The fact that European law has not embraced the concept of punitive damages but merely broadened traditional tort law doctrines in a rather modest way speaks in favour of a relatively narrow proportionality standard. The more the concept of non-compensatory damages spreads in EU law, however, the more difficult it will be to reject recognition and enforcement of similar awards in other areas of the law, including non-harmonised areas of law – at least if one regards the area of the law of tort/damages as a coherent system of law. The spread of such damages in EU law would also make it difficult to argue that punitive damages judgments from third states must be denied recognition and enforcement in Europe based on national reservation clauses.

#### 4. THE COMPARATIVE PERSPECTIVE

The following section will turn to the national perspective. It will highlight the basic approaches developed by selected national courts to see whether and to what extent common Euro-

<sup>87</sup> Von Hein (n 68) 156 (with regard to the Rome II Regulation).



pean standards have emerged.<sup>88</sup> For reasons of space, I will focus on the recognition and enforcement of US style punitive damages judgments, ie judgments from non-EU countries, although parts of the analysis also applies to EU judgments awarding supra-compensatory damages.

#### 4.1. *Partial recognition and enforcement (severability)*

A first common European standard concerns the possibility of limiting the recognition and enforcement to the non-punitive (and non-excessive) part of the judgment at the plaintiff's request. Thus, awarding compensation for different heads of damages, some of them having a punitive and others having a compensatory character, does not necessarily render the entire judgment unenforceable. At least, this is so when the foreign court has clearly distinguished the amount of damages awarded for the different heads of damages in the judgment and the plaintiff has demanded that only a part of the total damages amount should be recognised and enforced.<sup>89</sup>

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<sup>88</sup> For a more comprehensive analysis see the (comparative) annotations to the Italian *Axo v Nosa* case by Barbara Pozzo, 'The Enforcement of Foreign Decisions Concerning Punitive Damages' [2018] ERPL 661–667; Cedric Vanleenhove, 'Punitive Damages in the Belgian Perspective' [2018] ERPL 674–680; Lotte Meurkens, 'Axo v. Nosa from a Dutch Law Perspective' [2018] ERPL 681–689; André Janssen, 'Die Anerkennung und Vollstreckbarkeit von US-amerikanischen Strafschadensurteilen in Deutschland und in Italien: Auf ewig entzweit?' [2018] ERPL 690–696; Natalia Alvarez Lata, 'Are Punitive Damages Incompatible with the Spanish Legal System?' [2018] ERPL 697–702; see also Vanleenhove (n 36) 87–146 (on the law prior to *Axo v Nosa*).

<sup>89</sup> *England*: See Alex Mills' chapter, at 3.1. (a probable exception might apply to judgments falling under the Protection of Trading Interests Act 1980); *France*: Benjamin West Janke and François-Xavier Licari, 'Enforcing Punitive Damage Awards in France after Fountaine Pajot' (2012) 60 AJCL 775, 803 (in the *Fountaine Pajot* case, the plaintiffs did not demand an *exequatur partiel* so the *Cour de cassation* had to refuse recognition and enforcement of the entire judgment based on public policy considerations); *Germany*: BGH NJW 1992, 3096, 3100–3102 (partial *exequatur* regarding compensatory damages granted); *Greece*: Aeropag no 17/1999, Elliniki Dikaioisini 1999, 1288 (in this judgment the recognition and enforcement of the non-punitive damages was not called into question; I thank Dimitrios Tzakas for explaining this judgment to me); *Italy*: Zeno Crespi Reghizzi, 'Sulla contrarietà all'ordine pubblico di una sentenza straniera di condanna a punitive damages' (2008) 38 RDIPP 977, 990; *Spain*: Francisco Ramos Romeu, 'Litigation Under the Shadow of



To distinguish the compensatory from the punitive part, the foreign court's classification serves as starting point, but it is not necessarily binding. This approach, which at least German courts have endorsed, might help the foreign plaintiff enforcing certain types of damages that the foreign court classified as 'punitive' in those European States that are hostile towards this type of damages if the court of the enforcing state attributes a compensatory aim to those damages. Against this background, the German *Bundesgerichtshof* has accepted that damages labelled punitive can be enforced when they were awarded 'as a lump sum to compensate for economic losses that were not remedied otherwise or that are difficult to prove' or to 'recover profits made by the tortfeasor from the tortious act'.<sup>90</sup> In practice, however, this exception is difficult to apply. A re-classification is possible according to the German *Bundesgerichtshof* when the foreign court or jury provides sufficient information that the damages awarded under the punitive label actually serve a compensatory aim, which presupposes the disclosure of the reasons why a certain amount of damages was awarded.<sup>91</sup> Such reliable indications are often difficult to trace. Foreign plaintiffs would be better off if courts operated with certain general assumptions, for example, that in jurisdictions in which the winning party cannot recover attorney's fees, courts grant punitive damages to a certain extent to ensure compensation for expenses occurred.<sup>92</sup> This line of argument was rejected by the *Bundesgerichtshof* in its 1992 decision, but given that since then in the US the consideration to compensate the plaintiff by means of punitive damages for legal cost incurred has gained more importance, a more nuanced approach seems warranted.<sup>93</sup>

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an Exequatur: The Spanish Recognition of US Judgments' (2004) 38 Intl Law-  
yer 945, 968.

<sup>90</sup> BGH NJW 1992, 3096, 3103: 'Anders kann es sich möglicherweise verhalten, soweit mit der Verhängung von Strafschadensersatz restliche, nicht besonders abgegoltene oder schlecht nachweisbare wirtschaftliche Nachteile pauschal ausgeglichen oder vom Schädiger durch die unerlaubte Handlung erzielte Gewinne abgeschöpft werden sollen'. See also the Swiss judgment to which the *Bundesgerichtshof* referred: Zivilgericht Basel, Basler Juristische Mitteilungen 1991, 31, 36–37 (regarding the disgorgement of profits).

<sup>91</sup> For details see Astrid Stadler's chapter, at 3.3.

<sup>92</sup> Ernst C Stiefel and Rolf Stürner, 'Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile exzessiver Höhe' [1987] VersR 829, 842.

<sup>93</sup> See Astrid Stadler's chapter, at 3.3.



#### 4.2. Enforcement of the punitive part of the judgment

With regard to the enforcement of punitive damages (ie damages that cannot be in some way regarded as serving compensatory purposes), there are still considerable differences in Europe although more and more jurisdictions have opened the door to the recognition and enforcement of such damages.

French<sup>94</sup> and Italian<sup>95</sup> courts have held that punitive damages are not *per se* repugnant to the *ordre public*. The Greek Aeropag<sup>96</sup> seems to follow a similar approach, as does the Spanish Supreme Court, the latter at least in cases of intentional IP law infringements.<sup>97</sup> In addition, one lower Swiss court has ruled that punitive damages are not *per se* a violation of the *ordre public*<sup>98</sup> and there is no complete enforcement ban in England either.<sup>99</sup> Recognition and enforcement is only denied if certain prerequisites are met, in particular when the amount of damages awarded is excessive. This openness is in line with the European development in the area of tort law, which led to a widening of traditional damages remedies. One should note, however, that this openness towards the recognition and enforcement of punitive damages awards is a rather new development. Early forerunners were judgements in Switzerland (1989), Greece (1999) and Spain (2001).<sup>100</sup> The *Fontaine Pajot* case

<sup>94</sup> Cass civ (1) 1 December 2010 no 1090 (09-13.303) *X & Y v Fontaine Pajot* [2010] Bull civ 248.

<sup>95</sup> Cassazione civile, Sezioni unite, 5 July 2017, no 16601, *Axo v Nosa* [2017] Italian LJ 278 (English translation by Francesco Quarta).

<sup>96</sup> Aeropag no 17/1999, *Elliniki Dikaioisini* 1999, 1288 (I thank Dimitrios Tzakas for explaining this complex judgment to me). On this judgement see Christos D. Triadafilidis, 'Anerkennung und Vollstreckung von 'punitive damages'-Urteilen nach kontinentalem und insbesondere nach griechischem Recht' [2002] IPRax 236–238.

<sup>97</sup> Tribunal Supremo 13 November 2001, JUR 2002/608 – *Miller Import Corp. v Alabastres Alfredo, S.L.*, Aedipr 2003, 914 = (2004) 24 J L Comm 225, 231–243 (English translation by Scott R. Jablonski).

<sup>98</sup> Zivilgericht Basel (n 90) 36–37; a different approach (*per se* violation of public policy) was taken by the Bezirksgericht Sargans in 1982. Excerpts of the latter judgment are cited by Jens Drolshammer and Heinz Schärer, 'Die Verletzung des materiellen *ordre public* als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen « punitive damages-Urteils » (Urteilsanmerkung)' [1986] SJZ 309, 310–311.

<sup>99</sup> See Alex Mills' chapter, at 3.2. and 5.

<sup>100</sup> Zivilgericht Basel (n 90) 31; Aeropag (n 96) 1288; Tribunal Supremo (n 97) 914.



opening the door to enforce such judgments in France was decided by the *Cour de cassation* in 2010<sup>101</sup> and the Italian *Corte di cassazione* reversed its hostile approach towards punitive damages only in 2017 (*Axo v Nosa*).<sup>102</sup>

In sharp contrast, Germany still takes a very hostile stance towards punitive damages. In its 1992 decision, the German *Bundesgerichtshof* ruled that punitive damages (unless these damages were actually awarded for compensatory purposes) are contrary to German public policy provided that there is a strong link with the German forum (*Inlandsbezug*). This is so according to the Court because the German law of damages is based on the principle of compensation, not enrichment of the plaintiff. From a German perspective, damages awarded to punish the defendant pursue an aim that is limited to sanctions in criminal law.<sup>103</sup> In addition, the *Bundesgerichtshof* held that the enforceability of punitive damages awards would lead to an unequal treatment of domestic and foreign creditors as the foreign creditors would have better access to the debtor's assets located in Germany even though they might have sustained smaller actual losses than the domestic creditors.<sup>104</sup> It has to be noted that the decision of the *Bundesgerichtshof* is rather old and, in light of the European developments, it is doubtful whether the rejection of punitive damages awards would be as outright today as it was expressed nearly three decades ago.<sup>105</sup>

<sup>101</sup> *X & Y v Fountaine Pajot* (n 94).

<sup>102</sup> *Axo v Nosa* (n 95).

<sup>103</sup> BGH NJW 1992, 3096, 3103–3104 = (1993) 32 Intl L Materials 1320 (excerpted English translation by Gerhard Wegen and James Sherer).

<sup>104</sup> *ibid* 3104.

<sup>105</sup> Doubts are raised by Astrid Stadler in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (15th edn, Vahlen 2018), § 328 ZPO para 25; Wolfgang Wurmnest and Maximilian Kübler-Wachendorff, 'The Constitutionalization of Public Policy in Private International Law' in Charles Hugo and Thomas M J Möllers (eds), *Legality and Limitation of Powers: Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law* (Nomos forthcoming). There are also scholars arguing for a more liberal approach towards the recognition and enforcement of punitive damages judgements in Germany, see Volker Behr, 'Punitive Damages in America and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts', (2003) 78 Chicago-Kent L Rev 105, 159–160; Dirk Brockmeier, *Punitive damages, multiple damages und deutscher ordre public* (Mohr Siebeck 1999) 206; Janssen (n 88) 695–696. But it has to be noted that there are also voices defending the status quo, for details see Astrid Stadler's chapter, at 3.2.



#### 4.3. *The black box: testing for 'excessive' damages*

The tests developed by those courts which do not reject punitive damages *per se* in order to filter out judgments that are contrary to the *ordre public* vary in detail. At their core lies, however, a form of proportionality test. Apart from the general rule that testing for excessiveness has to be done on a case-by-case basis, so far no general yardstick has emerged on how to distinguish between punitive damages that are proportional and those that are excessive. The case law gives very little guidance regarding this important matter.

The first question concerns the applicable law according to which the analysis must be conducted. Do foreign standards matter so that a judge would have to analyse whether the award is proportional according to foreign law, or is a domestic standard the relevant benchmark so that the *lex fori* determines what amounts are proportional? In my view, a judge in Europe must take note of the context in which the foreign judgment was rendered, but must control the issue of excessiveness at the end of the day according to a 'domestic' standard.<sup>106</sup> That, however, does not mean that the enforcing judge should apply domestic law to the case to evaluate the (maximum) reasonable amount. Rather, a more abstract view is necessary that, for example, takes into account the protected interests and the ratio between the compensatory and the punitive damages.

The second question concerns whether there are some European rules of thumb guiding the lower courts. So far one would look in vain for clear guidance. To give two examples: The *Corte di cassazione* demands very generally that there be 'proportionality between restorative-compensatory damages and punitive damages and between the latter and the wrongful conduct' given that the '[p]roportionality of damages [... is a cornerstone] of civil liability law.'<sup>107</sup> And the *Cour de cassation* stated in *Fontaine Pajot* that the excessiveness has to be judged with an eye to the actual damages sustained and – at least in contrac-

<sup>106</sup> In a similar direction Mauro Tescaro, 'Das "moderate" Revirement des italienischen Kassationshofs bezüglich der US-amerikanischen punitive damages-Urteile' [2018] ZEuP 459, 476 (assessment should be primarily done from the perspective of foreign law, but domestic standards should determine which amounts are grossly excessive).

<sup>107</sup> *Axo v Nosa* (n 95) (cited translation by Francesco Quarta).



tual matters – the obligation breached by the debtor.<sup>108</sup> Some scholars understand the French Supreme Court as advocating, in principle, a 1:1 standard so that (unless certain exceptions apply) a judgement can be enforced if the amount of punitive damages is below or about the same amount as compensatory damages.<sup>109</sup> Whether the *Cour de cassation* has actually embraced such a standard is however not clear.

An assessment that takes a certain ratio as general benchmark into account is helpful to attain a greater degree of legal certainty. From the EU law perspective, this ratio must be set rather low given that, under the European approach, damages that can be labelled (from the traditional perspective) as over-compensatory are usually of a very modest size. Therefore, a strong deviation from the compensatory level cannot be sustained. Hence, accepting awards in which the punitive part is double or triple the compensatory part would not be in line with EU standards unless special areas of business law are concerned, such as the infringement of IP rights. Even the 1:1 ratio advocated by certain scholars might be too recognition-friendly from a purely European perspective. But given that the reach of the *ordre public* is driven largely by national values, courts in jurisdictions with strong punitive damages elements set forth in the autonomous (ie non-European) law can embrace such a ratio or even higher ones more easily as general yardstick (like 1:2, 1:3 etc.). It goes without saying that such benchmarks serve only as a starting point and must be adjusted to the facts of the case at hand.

#### 4.4. 'Downscaling' excessive punitive damages?

An important issue for a plaintiff, wanting to enforce a punitive damages judgment abroad, is whether the part of the judgment that does not pass the respective 'enforcement test' – because the amount awarded is excessive and thus contrary to

<sup>108</sup> *X & Y v Fontaine Pajot* (n 94), 'Mais attendu que si le principe d'une condamnation à des dommages-intérêts punitifs, n'est pas, en soi, contraire à l'ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur'.

<sup>109</sup> Vanleenhove (n 36), 220.



the public policy of the forum – cannot be enforced at all, or whether the judge in the enforcing state has the power to enforce the punitive part of the judgment up to the amount that would be reasonable according to the applicable public policy standard. The latter approach would be very convenient for the plaintiff as it avoids an ‘all-or-nothing’ approach. In *Fontaine Pajot*, the *Cour de cassation* did not reduce the amounts to a reasonable level but rejected the recognition and enforcement of the judgment in its entirety (even in regard to the compensatory part, as the plaintiff had not demanded a partial exequatur).<sup>110</sup> But even if the plaintiffs had asked the *Cour de cassation* to issue an exequatur up to a ‘reasonable’ amount of the punitive damages awarded, the Court would presumably have rejected this claim. Also the *Bundesgerichtshof* has held that a partial recognition and enforcement of the amount awarded as punitive damages at the discretion of the German judge is not feasible.<sup>111</sup>

Any call for reducing the amount of awarded damages to a reasonable level at the discretion of the enforcing judge has to deal with the objection that a *révision au fond* is not warranted. Contrary to arguments raised in France,<sup>112</sup> in those jurisdictions assessing the enforceability of foreign punitive damages judgments based on a proportionality test it is very difficult to argue against a partial recognition and enforcement in the form of a ‘reductive partial exequatur’.<sup>113</sup> Put simply, the *ordre public* control comes close to a *révision au fond*, as the enforcing judge assesses the outcome of the foreign litigation from the perspective of domestic law,<sup>114</sup> even though he or she does not control the merits or the facts of the case, so that it is technically possi-

<sup>110</sup> *X & Y v Fontaine Pajot* (n 94).

<sup>111</sup> BGH (n 103) 3104; concurring Herbert Roth in Friedrich Stein and Martin Jonas (founders), *Kommentar zur Zivilprozessordnung* (23th edn 2015, Mohr Siebeck) § 328 ZPO para 108: ‘[Keine] Möglichkeit einer geltungserhaltenden Reduktion auf einen angemessenen Teil’. Things are different if the foreign judgment itself indicates how the amount awarded as punitive damages can be split into different parts. In such a case, the German judge can assess whether certain of these parts can be recognised and enforced in Germany.

<sup>112</sup> On this discussion see Olivera Boskovic’s chapter, at 3.2., who rejects this argument.

<sup>113</sup> This term was coined by Janke and Licari (n 89) 803.

<sup>114</sup> Stiefel and Stürner (n 92) 842 (arguing that the *ordre public* control is a type of accepted *révision au fond*).



ble to distinguish the *ordre public* from the traditional *révision au fond*.<sup>115</sup> If the *ordre public* control demands assessing whether the amount of punitive damages awarded is reasonable or not (which presupposes that the judge looks at the facts of the case, the interest protected and the law of the forum to generate proper standards for the control), it is a small step to oblige him or her (at the request of the plaintiff) to set forth a precise sum up to which the judgment can be partially recognised and enforced.<sup>116</sup>

## 5. CONCLUSION

Two decades ago, the view prevailed 'that the chances of getting a foreign court to recognize a substantial punitive judgment rendered by a US court are virtually nil.'<sup>117</sup> Since then, the chances of plaintiffs of enforcing such awards in Europe have increased. Many European jurisdictions have taken a more receptive stance towards the recognition and enforcement of punitive damages awards. This development was driven by the fact that European law as well as many national jurisdictions have become more and more receptive towards forms of compensation that employ preventive effects, including forms of supra-compensatory damages. In line with European principles, these jurisdictions do not reject punitive damages judgments *per se* for violation of the *ordre public* but only in cases in which excessive amounts are awarded. By contrast, German courts still cling to the traditional view that punitive damages are repugnant to the *ordre public*.

Even though the pendulum has swung towards a more liberal approach regarding the enforcement of punitive damages, it is too early to evaluate how much the door has been opened

<sup>115</sup> This is so at least from the German perspective, see Haimo Schack, *Internationales Zivilverfahrensrecht* (7th edn, CH Beck 2017) para 958.

<sup>116</sup> That the enforcing judge may issue a reductive partial exequatur is advocated by Georges AL Droz, 'Variations Pordea' [2000] RCDIP 181, 194–196; Janke and Licari (n 89) 803; Vanleenhove (n 36) 230–233. See also Stiefel and Stürmer (n 92) 842 (arguing that a court must *ex officio* issue a partial exequatur to allow an enforcement of those parts of the awarded punitive damages that are not repugnant to the German concept of public policy).

<sup>117</sup> Patrick J. Borchers, 'Punitive Damages, Forum Shopping, and the Conflict of Laws' (2010) 70 Louisiana L Rev 529, 540.



in Europe. So far, no clear standards have emerged on how to analyse whether the awarded damages are excessive. In light of the developments in EU law, however, it seems very likely that only rather low amounts of punitive damages will be recognised and enforced in Europe. Further, enforcement chances will be better in areas in which European or national law also provides for remedies that shall pursue a strong deterrent effect. The figures of recognised punitive damages judgments would significantly rise if courts would grant 'reductive partial exequatur' up to amounts of punitive damages that are deemed non-excessive – but so far, courts have declined to do so. Against this background, it seems the recent shift towards a more liberal enforcement approach will not turn things entirely upside down.

#### ABSTRACT

*This chapter seeks to explore whether and to what extent a common European concept of public policy regarding the recognition and enforcement of punitive damages judgments is emerging. After having highlighted the basic contours of punitive damages, the impact of European standards on the interpretation of the ordre public is analysed. A closer look at the case law of the European Court of Human Rights reveals that awards must comply with the principle of proportionality to be in line with the European Convention of Human Rights. The analysis of EU private law makes clear that EU law does not embrace US style punitive damages but is receptive towards forms of compensation that employ preventive effects, including forms of supra-compensatory damages, so that a per se ban of judgments awarding non-compensatory damages cannot be maintained any longer. This finding is also supported by the interpretation of the ordre public under the Rome II Regulation. The final part of the chapter compares the general approaches taken by selected national courts with regard to the enforcement of judgments from third states and evaluates whether these approaches are in line with the European standards.*