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The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?

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The Punishment of Theft and Other Trespasses

If any man steal an ox or a sheep, and kill or sell it: he shall restore five oxen for one ox, and four sheep for one sheep.

If that which he stole be found with him, alive, either ox, or ass, or sheep: he shall restore double.

If a man deliver money, or any vessel unto his friend to keep, and they be stolen away from him that received them: if the thief be found, he shall restore double.

To do any fraud, either in ox, or in ass, or sheep, or raiment, or any thing that may bring damage: the cause of both parties shall come to the gods: and if they give judgment, he shall restore double to his neighbour.[2]

FORMERLY united in the same notion of private vengeance, civil and criminal liability progressively separated into two different subject matters: civil litigation and criminal law. The purpose of civil litigation being the compensation of the damage suffered by the victim while only the State could protect public order by punishing and preventing criminal offenses.

If civil liability still has the role of compensating both in Civil Law and in Common Law countries, Common Law countries have conceived an institution halfway between Civil Law and Criminal Law, putting into question the separation between them. Thus, "punitive damages," also known as "exemplary damages," are "damages awarded in addition to actual damages when the defendant acted with recklessness, malice or deceit, by way of

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[1] With acknowledgment to Marguerite Vallery-Radot for her helpful contributions and assistance.

[2] THE BIBLE, BOOK OF EXODUS, Ch. 22, verses 1,4,7,9.

penalizing the wrongdoer or making an example to others."[3]

The institution of punitive damages appeared in England at the end of the eighteenth century (the first case dates to 1763). It then crossed the Atlantic Ocean and became an established part of the law of the United States, and at the same time, from England, it spread through all the countries of the Commonwealth. Punitive damages exist in Australia, New Zealand, South Africa, Canada. Despite the fact that they are criticized, limited, and controlled, their existence remains. On the contrary, punitive damages play an important role, especially in the United States, where they can be exceptionally high, notably in antitrust cases in the form of multiple damages, or in product liability cases.

Globalization, and in particular the development of business relations between Europe and the United States, has raised the issue of the availability of punitive damages in Europe and especially the existence or the admission of this institution in the different legal systems of the European countries.[4]

Therefore, we will address the question of the availability of punitive damages both in the domestic courts of the European countries and in the Community legislation.

1. Punitive Damages in Contract or Tort Actions in the Domestic Courts of the European Community

Europe is divided into two different legal systems. The system of Common Law, exported by England throughout the Commonwealth, and the system of Civil Law, also called continental law. These two legal systems are so different that it is impossible to answer the question of the availability of punitive damages in Europe as a whole. The availability of punitive damages in Civil Law countries (1.1) will therefore be discussed, before studying the case of England and Wales (1.2).

1.1 Punitive Damages in Civil Law Countries

When answering the question of whether punitive damages are allowed in the legal systems of the European countries, one first has to examine if such a concept already exists in their national laws. If it does not actually exist nor can a similar concept be found, then it is useful to determine whether or not the Private International Law rules of the European countries would accept the introduction of punitive damages.

1.1.1 Domestic Law

The concept of punitive damages does not exist in Civil Law countries and therefore one can say that it is not available as a remedy; however, given the development of international trade and consequently international commercial litigation, the judges in the courts of the European countries have found themselves faced with U.S. statutes and court decisions granting punitive damages. Progressively, these countries could no longer completely ignore such an important concept of Common Law and some even considered introducing punitive damages under certain conditions.

1.1.1.1 Punitive Damages Unavailable

Most Civil Law countries have similar civil liability rules, one of the most important principles of which is the principle of full compensation of damages. It is also the main obstacle to the introduction in Civil Law countries of punitive damages.

(i) Full Compensation of Damages

According to most Civil Law countries, as a rule, damages are solely awarded to

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[3] BLACK'S LAW DICTIONARY 418 (Garner, 8th ed.).

[4] Only a few Member States of the European Union provide for the possibility of punitive or exemplary sanctions in the context of actions for damages: United Kingdom, Ireland, and Cyprus, which are all Common Law countries.

compensate a particular damage, and must be limited to compensate the loss actually suffered (*damnum emergens*) and the lost profit (*lucrum cessans*). This civil litigation rule is called the principle of "restitution in integrum," or full compensation of damages, and is even called "the compensatory dogma" (further emphasizing the importance of this principle). The civil litigation rule can be divided into three propositions:

1) "All the damage"
2) "Nothing but the damage"
3) "The only thing that matters is the position of the victim." (The victim is therefore the only one who can bring an action). The nature or seriousness of the fault and the conduct of the person who committed the act (malice, repetition), are irrelevant.[5]

Therefore, the only purpose of damages from a Civil Law perspective is the compensation of the damage sustained by the victim, and absolutely not to punish the person liable. It is not in the nature of Civil Law to prevent or punish offenses, unlike Criminal Law which ensures the protection of the public interest.

The principle of full compensation implies that the damages awarded must put the victim into a position as close as possible to that in which it would have been in had the damage not occurred. Therefore, the award of damages shall not entail unjust enrichment of the victim, whereas the deterrent nature of "punitive" damages presupposes that the victim will be granted more, and even a lot more, than the compensation of what he/she has actually suffered.

In conclusion, the concept of punitive damages is in total contradiction with the principle of full compensation of damages. The way Continental European courts apply this principle is therefore determinant in answering the question of whether punitive damages can or cannot be made available in Civil Law countries.

(ii) Applying the Principle of Full Compensation of Damages

The principle of full compensation of damages is strictly observed by the courts of the European Civil Law Countries. In an interesting decision dated 21 April 2005 concerning the liability of a local government with regard to a firework's explosion involving a 7-year old boy, the Spanish Supreme Court quashed the judgment of the Court of Appeal which granted excessive damages without sufficient legal and material grounds. In this case, the Court even lowered the amount of damages to be paid by the government despite the Spanish principle under which amounts awarded by the lower courts cannot be reviewed.

In France, the Civil Supreme Court *(Cour de Cassation)* is in charge of controlling the correct application of the principle by the lower courts. On this ground, it has severely criticized decisions which did not limit the granting of damages to a strict compensation of the damage actually suffered[6], or which, "more broadly, confess having taken into consideration, in order to evaluate the damages awarded, other elements than the importance of the damage itself." Similarly, the French Supreme Court systematically condemns the granting by lower courts of fixed damages.[7]

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[5] This is not true in some Civil Law countries, like Italy, where the judges take into consideration the gravity of the fault and the malicious conduct of the defendant to evaluate the damage. The principle of full compensation applies, but the understanding of such full compensation is different.

[6] Cass. Crim., 8 February 1977, Bull. Crim n°52, at 120 (The Supreme Court reminds the judges that the role of civil litigation is not to deter.).

[7] Cass. Com., 29 June 1999, n°97-10.740, unpublished (The Supreme Court quashed a Court of Appeal decision which granted nominal damages ("dommages de principe" i.e. a small amount fixed as damages) in a case of infringement.).

The lower courts therefore strictly observe the full compensation principle and have so far refused to take into consideration "fautes lucratives," a French name for a fault which results in some pecuniary gain for the person who has committed it. In cases of breach of antitrust rules or privacy rights, for example, the author of the fault knows that the compensation of the victim's damage will almost always be insignificant in comparison with the profit resulting from the breach.[8]

The award of punitive damages is *a fortiori* in breach of the principle of full compensation. Hence, a decision of the Court of Appeal of Paris dated 3 July 2006 clearly rejected "sui generis damages," explaining that "under French law, the indemnity necessary to compensate the damage suffered, shall be calculated in function of the value of the damage, without any consideration to the gravity of the fault."[9]

In addition to the French courts, eminent French law professors and scholars, eager to protect the fundamental principles of civil procedure, have severely criticized the concept of punitive damages, calling it "shocking, in its essence as well as in its application."[10] In Belgium, legal authors have criticized court decisions for granting damages that were not merely compensatory.[11] In Spain, legal authors are resolutely opposed to the concept of punitive damages.

To our knowledge, the only real exception to the nonexistence of punitive damages in European Civil Law countries is in Italian case law, even though the principle of full compensation also applies in Italy. In 2000, the Court of Torre Annunziata issued two decisions explicitly awarding "punitive damages" in addition to compensatory damages. In both cases, the Court ordered insurance companies to pay punitive damages to the plaintiffs because they had refused to negotiate a settlement of the claim, forcing the injured parties to go to court and "waste time and money."[12]

1.1.1.2 The Progressive Introduction of Punitive Damages in Europe

Most European countries have found ways to get around the principle of full compensation of damages in certain areas of law. The introduction of punitive damages in French Civil Law has been considered.

(i) A More Lenient Approach to the Principle of Full Compensation of Damages

Despite the lack of punitive damages *per se*, the function of deterrence and prevention is not totally absent from continental European Civil Law: it exists through the use of private penalties. Punitive Damages also exist in case law, in certain situations where it would be unfair to apply strictly the principle of full compensation.

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[8] TGI Paris, 5 May 1999. "The profits made by a newspaper shall not be considered for the evaluation of damages," CA Versailles, 4 May 2000. Damages shall "compensate the damage suffered without any consideration for the gravity of the fault or the potential function of deterrence of the amount of damages granted." CA Paris, 31 May 2000 "The granting of damages in order to compensate a breach of privacy shall not result in the condemnation of a certain behavior nor have a deterrent effect on the press, as regards the profit made, but to repair the damage suffered by the victim."

[9] CA Paris, Ch. 17., Sc. A, 3 July 2006.

[10] Juglart: Treaty of Air Law , Tome 1, Du Pontavice, Dutheil de la Rochère & Miller, n°2171.

[11] Such is the case of a decision of 20 April 2004, where the Kortrijk Court of First Instance cleared the practice of the SABAM (Belgian body responsible for collecting and distributing music royalties) which tripled damages in cases of counterfeiting, because it wanted the damages to be deterrent.

[12] Court of Torre Annunziata: decision of 24 February 2000 - Izzo v. and Assitalia and other parties; decision of 14 March 2000 - Guerra and other parties v. SAI.

a. Private Penalty Used in Civil Law Countries

If the award of punitive damages remains the exception rather than the rule, as it is in Italy, for example, the concept of private penalty is not totally nonexistent in Civil Law countries.

Accordingly, in France, the judges of the Civil Supreme Court expressly mentioned the existence in French Law of civil penalties, when they decided that "the sanction of Article L122-14-4, § 2 of the Employment Code," which allows the judge to order an employer to reimburse to the organization concerned the indemnities paid to the employee who has been dismissed without serious and real cause, constitutes a "private penalty" within the statutory ceiling (Cass. soc., 12 June 2001). In addition, several articles of the French Civil Code and the French Commercial Code, inter alia, provide for the payment of a civil penalty ("amende civile") to the Public Treasury in addition to compensatory damages awarded to the victim, in order to prevent the occurrence of similar misconducts.[13]

Some provisions of maritime law provide for the award of multiple damages under certain conditions, and, in the past, Article 43 of a law of 1810 on the regulation applicable to mines, provided that, "the mine owner is to pay an indemnity to the owner of the land where the mine is situated. If the mining undertaken by explorers or mine owners is temporary, and if the land cannot be cultivated after one year, as it used to be before the commencing of the work, the indemnity shall amount *to the double* of what would have produced the damaged land" (emphasis added).

The penalty clause included in a contract is a very good example of a private penalty that exists in most European countries. It provides for the payment of a fixed amount of damages if one party fails to fulfill its obligations. Hence, it clearly has a deterrent purpose in addition to its natural compensatory function. Accordingly, pursuant to the Polish Supreme Court decision of 4 December 2003,[14] the penalty paid by a party on the ground of a penalty clause is independent of the loss suffered by the other party. Therefore, if a party has not suffered any damage following the non-performance of the other party's obligations, the penalty clause will have a punitive rather than a compensatory function. However, most European courts are entitled to reduce the amount of the penalty clause if it is considered disproportionate.

In addition to penalty clauses, forfeitures,[15] periodic penalty payments (as its name so suggests), liability clauses, liability ceilings, and confiscation[16] can all be considered as some sort of substitutes for punitive damages.

Other Civil Law countries outside of Europe, like the Philippines[17] or South Africa, have adopted the practice of punitive damages. One could therefore infer that Civil law countries are not entirely hostile to the introduction of such foreign concept. However, both countries have been considerably influenced by two Common Law countries: the United States and England, where punitive damages are an established concept. If a study of European case law demonstrates that similar concepts have been introduced into Civil Law countries, European Civil Law

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[13] *See e.g.*, Article L442-6 of the French Commercial Law on unfair competition practices.

[14] Polish Supreme Court, 4 December 2003, II CK 271/02.

[15] In securities, succession or guardianship for example, forfeiture is the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.

[16] The Belgian Supreme Court has also declared, in a decision of 21 May 1875, that "confiscation" goes far beyond the mere compensation of the damage. It is rather a civil penalty, quite similar to punitive damages, aimed at undermining civil fraud.

[17] Article 2197, 2229 et 2235 of the Filipino Civil Code of 1949.

countries remain hostile to the concept of punitive damages *per se*.

b. Case Law

To apply the principle of full compensation of damages very strictly is sometimes particularly difficult, as some losses cannot be easily quantified.

Such is the case when collective interests are at stake, especially by the breach of Antitrust Law, Environmental Law, or Anti-counterfeiting Law. At the same time, money-making faults in those areas have increased and some judges have therefore considered that merely awarding compensatory damages to rigidly apply the full compensation principle was unfair, inefficient and did not serve the public interest.

German courts, for instance, have allowed under certain conditions, the recovery of an amount equal to the infringer's profits or to fictitious license fees, as an alternative to the recovery of the damage actually suffered, in case of the infringement of an intellectual property right or of certain similar acts of unfair competition ("dreifache Schadensberechnung" – three-way calculation of damages).

In Italy, Article 18 of the Law No. 349/1986[18] on the award of environmental damages expressly provides that, in cases where the amount of damages cannot be precisely quantified, the judge has to evaluate them on an equitable basis, taking into account the degree of personal fault, the economic costs to repair the environmental damages, and the profit gained by the offender. On 29 June 1989, The Court of Milan, in one of the first Italian cases based on this law, awarded environmental damages of around €250,000 for the discharge of toxic waste in a river. However, it is to be highlighted that the environmental damages were to be paid by the State.

[18] Amended by Legislative Decree No. 152/2006.

The damage cannot be easily quantified either, in the case of "moral damages," a concept which is not understood in the same way in all European countries but which covers, as a general rule, damages awarded in order to compensate the non-pecuniary loss of the direct victim (i.e. pain and suffering, loss of amenity, psychological disorders, loss of reputation) or an indirect victim (i.e. damages awarded for the loss of a loved one)[19] and the breach of privacy rights. In certain European countries, "moral damages" are even awarded to compensate the "immaterial" damage suffered by a company (business reputation, dignity, and honor but also disruption in the company's structure, change in strategic planning, appearance of obstacles for future development…).[20]

German law, for instance, provides for more than a simple compensation in cases of "moral damages."[21] However, if the damages awarded may have a preventive role, they still respect the general principle of full compensation of damages. Therefore, the compensation of the moral damage remains symbolic and cannot allow for additional liability on top of the coverage of the damage actually occurred.[22] It is also the case in the Netherlands, where awards for "other losses" ("ander nadeel," Dutch name for immaterial damage, as opposed to "financial losses," "vermogensschade") are generally not generous.

The Italian judges have taken things a step further in awarding damages, with the clear intention of punishing the defendant

[19] All European countries do no allow the compensation of "moral damages" in the case of indirect victims (*e.g.*, Germany).

[20] *See* the case Morgan Stanley v. LVMH below.

[21] For a case of breach of the right of privacy (by the press), see German Federal Court of Justice's decision, case no. VI ZR 56/94, dated 15 November 1994, known as "Caroline von Monaco" case). The main ideas behind these damages, apart from compensation, are both prevention and gratification for the injured party.

[22] The largest award, DM180,000, have been granted to Caroline de Monaco in the case cited above.

and discouraging him/her, and the public at large, from adopting the same unlawful conduct. On 24 November 1992, the Court of Rome decided that the damages awarded to an Italian journalist in compensation for the damage that she suffered after the circulation of false and defamatory information about her career in a famous weekly magazine should not only compensate the plaintiff but also punish the defendant and discourage third parties from adopting the same conduct. Similarly, in an action of "liability for vexatious litigation"[23] and more particularly "abuse of Court,"[24] the Court of Rimini ordered an insurance company to pay one percent of its share capital to the plaintiff. In this case, the Court punished the "cynical disregard" of the insurance company, which had refused to pay the injured party during the nine years which followed the occurrence of the event, but offered to settle immediately after an action was brought against it.[25]

In France, some judges have tempted to get around the principle of full compensation of damages using the sovereign power that lower judges hold from the Supreme Court to calculate damages.[26] The Court of Appeal of Bastia marked a turning point in 2006 by ordering "an active pirate" who provided pirated software on the Internet, to pay fixed damages in the absence of a precisely quantified prejudice.[27] Similarly, the granting of FF200,000 by the Commercial Court of Montpellier to a union of building material traders, in compensation for the damage suffered by the members of the union after the unlawful opening on Sunday of another member, is hard to explain if not by a deterrent purpose.[28] Finally, in the notorious Morgan Stanley v. LVMH case of 12 January 2004, the Commercial Court of Paris ordered Morgan Stanley to pay LVMH the sum of €30 million in respect of the "moral damage" caused to LVMH. This case concerned an accusation that Morgan Stanley had been issuing biased equity research on the luxury goods sector that allegedly "denigrated" LVMH.[29] The Court's award of an amount of damages as high as €30 million to remedy an immaterial damage, by essence difficult to measure (one cannot imagine that LVMH suffered pain), necessarily aims at punishing Morgan Stanley for its allegedly unlawful conduct.

However it remains very unlikely that a French judge would take into consideration, in the calculation of damages to be granted to the victim, the illegitimate benefits ("faute lucrative") made by the wrongdoer or anything which would go beyond the sole compensation of the loss actually suffered. Nevertheless, some French scholars and legal professors have considered that punitive damages should be introduced into French Law. Additionally, a committee of French legal authors has decided to propose punitive damages in the French Civil Code.

(ii) Proposing Punitive Damages in French Domestic Law

A report dated 22 September 2005, written by a committee of thirty-six Civil Law professors led by Professor Jean-Pierre Catala, was handed over to the French Ministry of Justice to propose "a reform of the Law of obligations and the Law of

[23] "Responsabilità aggravata," Article 96 of the Italian Code of Civil Procedure.
[24] When the claimant or the defendant, respectively take action or defend an action with dilatory or vexatious purposes, e.g., "force" the other party to settle the matter under more favorable terms.
[25] Court of Rimini decision No. 3264/1999.
[26] Cass. Soc., 14 June 1988.
[27] CA Bastia, ch. Corr., 15 November 2006.
[28] Trib. Com. Montpellier, 14 October 1988.
[29] Tribunal de commerce de Paris, 12 janvier 2004, SA LVMH Moët Hennessy Louis Vuitton (LVMH) v. Morgan Stanley. In a judgment of 30 June 2006, the Paris Court of Appeal overturned the majority of the Commercial Court's findings against Morgan Stanley, including the Commercial Court's damages award of €30 million, which had to be paid back. Both parties finally decided to settle the case out of court in February 2007.

prescriptions" to be eventually introduced into the French Civil Code.

The paragraph dedicated to "damages"[30] begins with the reaffirmation of the principle of full compensation of damages. Draft article 1370 of the proposed revised Civil Code hence provides that "[s]ubject to special regulation or agreement to the contrary, the aim of an award of damages is to put the victim as far as possible in the position in which he would have been if the harmful circumstances had not taken place. He must make neither gain nor loss from it."

However, the article directly following, draft article 1371, "open[s] the way"[31] for the award of punitive damages in civil litigation:

> A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the court may in its discretion allocate to the Public treasury. A court's decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance.

Thus, if punitive damages were to be introduced in France, it would be subject to the satisfaction of several important requirements. First punitive damages cannot be awarded without the proof of a "deliberate fault, and notably a fault with a view to gain," defined by Geneviève Viney as the "fault whose beneficial consequences for its perpetrator would not be undone by the simple reparation of any harm which it has caused."[32] This is a direct reference to the "faute lucrative" discussed above.[33] Such an award also requires a court to motivate its decision by giving a special reason or reasons for the award and to distinguish between those damages which are punitive and those which are compensatory. Finally, it forbids their being covered by insurance, in order to give to the award the punitive impact which would constitute its very *raison d'être*.

The admission in France of punitive damages, if the proposal is adopted, would be a significant infringement of the principle of full compensation of damages. Many legal commentators however believe that the introduction of an official punitive aspect is not necessary since the case-by-case assessment of loss provides sufficient flexibility as to the amount of award to be granted. Some legal authors also believe that France's civil penalty is a sufficient alternative to punitive damages, especially because it prevents unjust enrichment of the victim and provides for adequate prevention and deterrence.[34] In addition, numerous civil law professors[35] and professional lobbies are fiercely opposed to the

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[30] The paragraph on damages is in the section 1 "principle", of the chapter III "effects of civil liability", of the sub-title III on "civil liability."

[31] Geneviève Viney, in her preamble to the civil liability section of the proposals for reform of the Law of obligations and the Law of prescriptions, English translation by John Cartwright and Simon Whittaker, http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf, at 180.

[32] *Id.*

[33] *See* 1.1.1.1 (ii) Application of the principle of full compensation.

[34] Martine Behar-Touchais, "Is civil penalty a satisfying substitute for the lack of punitive damages," LPA, 20 Novembre 2002 n°232, at 36.

[35] Ch. Lapoyade - Deschamps, "What compensation?" in *Civil Liability at the dawn of the 21st century, retrospective assessment of the situation,* Symposium of Chambery, 7 and 8 December 2000, resp. civ. et assur. 2001, n° espec. 6 bis, at 62 ; S. Piedelièvre, *Punitive damages: a solution for the future,* Symposium of Chambery, prec. p. 68, spec. at 69, n°6 ; Adde doubts expressed by Ph. Brun, Symposium of Chambery, prec. Introductive report, at 4, espec. at 8, n°35, Adde R. Saint-Esteben, For or against punitive damages? in *the judiciary sanctions of anti-competitive practices*, Symposium University Paris I, 24 April 2004, LPA 20 January 2005, at 53.

introduction of punitive damages in France,[36] pointing out the potentially worrying consequences for businesses of such a radical change to the French legal culture. It is therefore rather unlikely that the draft article 1371 damages remains untouched.[37]

In any case, the Catala Report has not evolved since 2005 and remains only an academic proposal at this stage. Punitive damages are therefore still contrary to the French Public Order and *a fortiori* to the domestic Public Policy of the other civil law countries as well, where no such proposition is even considered and where punitive damages are strongly criticized. If the position of the domestic Public Orders of the European Civil Law countries toward punitive damages is now clarified, the conformity of punitive damages with their International Public Policy remains to be studied.

1.1.2 Private International Law

The conformity of punitive damages with the International Public Policy of the European Civil Law countries gives rise to two different issues: the conformity of the concept of punitive damages and the conformity of the quantum of punitive damages.

1.1.2.1 The Conformity of Punitive Damages with International Public Policy

In Private International Law, the question of the law applicable to punitive damages and its conformity with International Public Policy traditionally precedes the study of the recognition and enforcement of punitive damages in the different countries of Europe.

(i) Applicable Law

Case law has provided answers as to whether punitive damages are compatible with the International Public Policy of the forum, but before exploring this compatibility, it is necessary to determine in the first place which law is applicable to the concept of punitive damages.

a. The Law Applicable to Punitive Damages

The research of the law applicable to punitive damages can only be based on an assumption as, to our knowledge, no case law has been confronted with the conflict-of-law rules in this matter yet.

In France, according to a qualification *lege fori*, punitive damages would probably be qualified as a private penalty. Private penalties are classified in the Private International Law category of civil liability. Therefore, the law applicable to punitive damages would certainly be the law applicable to civil liability, as such a law governs the conditions of the liability as well as its effects. The law applicable to civil liability is different in contract or in tort matters.

The Rome Convention of 1980 on the law applicable to contractual obligations applies to the Member States of the European Union in any situation involving a choice

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[36] Report of the Chamber of Commerce and Industry of Paris (CCIP), LPA, 16 January 2005, n°12, at 3, "the introduction of punitive damages in French law is disapproved by a majority of legal authors [...] This evolution also encounters the opposition of the CCIP."

[37] In the French comments on the European Green Paper submitted to the European Commission as part of the public consultation, France Telecom as well as the MEDEF (the federation of French businesses), but also consumer associations such as UFC Que Choisir and Consommation, Logement, Cadre de Vie, Emploi (CLCV), reaffirmed their attachment to the French principle of full compensation and opposed against the use of punitive damages in actions for breach of EU Antitrust rules. http://www.ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html.

between the laws of different countries.[38] According to Article 10§1 of the Convention, the law applicable to contractual liability is the *lex contractus*.

As regards tort liability, a certain number of Hague Conventions apply to specific tortious matters.[39] In all other matters, the Private International Law of each country applies its own conflict of law rules, as there is no European convention or regulation yet.[40] Nevertheless, a brief study of comparative law demonstrates that most Civil Law countries have adopted the same solution as regards the law applicable to civil litigation: *lex loci delicti commissi* (law of the place where the tort was committed).

Thus, the law applicable to punitive damages in Europe should be the *lex loci delicti* in case of tortious matters and the *lex contractus* in case of contractual matters. The question is then, whether a Civil Law judge would apply a foreign law which has been designated by the choice-of-law rule, such as a U.S. statute, allowing the award of punitive damages or whether he would consider the result of such an application shocking and contrary to the International Public Policy.

In Germany, this question is answered by a specific provision of German Private International Law, Article 40 (III) of the EGBGB[41] (Introduction to the German Civil Code), which sets out limits, for public policy reason, to the application by German courts of the foreign laws of Tort designated by the choice-of-law rule. In particular, the damages awarded in accordance to the foreign law must not be obviously out of scale with respect to the damage to be compensated. Additionally, the award must not clearly serve other ends than the compensation of the injured party. Hence, according to this provision, foreign provisions allowing for the award of punitive damages shall not be applied by German courts.

Punitive damages have rarely been subjected to the International Public Policy sensor of European countries. Those countries have in fact had little opportunity to encounter this concept. The subsidiaries of European companies which are established in the United States are governed by the local laws, and several International Conventions exclude the award of punitive damages in international matters (*e.g.*, The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, and the Montreal Convention of 28 May 1999, providing for a limitation of liability excluding the award of punitive damages.)[42]

However, the increase of international commercial transactions and the subsequent exposure of the European legal systems to the concept of punitive damages raises the question whether such a concept is compatible with the International Public Policy of the forums of European countries.

The principle of full compensation of damages is clearly a fundamental principle in Civil Law countries and it can certainly be considered as a principle of domestic Public Order. Hence, it is very tempting to consider that such an important principle is also one of International Public Order.

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[38] A controversial proposal for transformation of this Convention into a Council Regulation called " Rome I" is currently under consideration.

[39] *See, e.g.*, The Hague Convention of 1971 on the law applicable to traffic accidents, the Hague Convention of 1973 on the law applicable to products liability.

[40] Rome II is still a proposal at that stage.

[41] Introduced in the EGBGB by a law dated 21 May 1999.

[42] Article 29 of the Montreal Convention of 1999 - Basis of Claims provides that "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. *In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable*" (emphasis added).

Unfortunately, there is not a lot of case law on this subject, and the concept of International Public Policy differs from one European country to another.

b. Case Law

The intervention of International Public Policy rarely applies in matters of civil liability. In most European countries, there is very little, if any, case law on the application of a foreign law admitting punitive damages.

In France, since an important judgment dated 30 May 1967,[43] the French Supreme Court has limited the use of the exception of International Public Policy, especially regarding repairable damage. Consequently, judges have agreed to apply foreign laws that did not offer as much protection for the victim as the French laws. A case dated 16 June 1993 is one of the most relevant examples. The Cour de Cassation held that it "is not contrary to Public Policy, in the sense of Private International Law, the refusal by a foreign law of the full compensation of the damage, and notably of a "moral damage."[44] The French Supreme Court had already ruled several times in the same way, allowing the application of foreign laws restricting the victims' rights to obtain compensation.[45]

Some may infer that if French courts accept the application of foreign laws that offer less protection for the victim, *a fortiori*, they should also allow the granting of punitive damages, which are by nature more favorable to the victim. However, French judges have never gone that far and there is no report of case law where judges have applied a foreign law granting punitive damages. Besides, French judges remain very much attached to the function of compensation of damages, and if in the cited case law, the amount of damages received by the victim is not as important as what he/she would have received under French Law, or if the method of assessment is different, judges might have considered that the compensation granted was sufficient. Therefore, it is the fact that a foreign law allows for the compensation of the victim's loss which is far more important, and consequently more acceptable to the French courts, than the quantum of the damages.

As for other European Civil Law countries, to the best of our knowledge, there is no case law addressing the question of the application by a judge of a foreign provision granting punitive damages. However, it is very unlikely that such foreign provision would be applied by European judges. The question is then, whether this solution is similar in the case of recognition and enforcement of foreign judgments awarding punitive damages.

(ii) Jurisdiction

A brief summary of the rules of jurisdiction is necessary (a) before observing the solutions offered by the case law of the different countries regarding the acceptation by the forums of the institution of punitive damages (b).

a. Introduction to the Rules of Jurisdiction in Europe

In the European Union, the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, applies each time that a defendant has his habitual residence in a contracting State, with the

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[43] Cass. 30 May 1967, Kieger.

[44] Cass. Crim., 16 June 1993. For a similar decision, *see* Cass. Civ. 1, 4 April 1991.

[45] CA Paris, 26 April 1977, Spanish Law fixing a limit on the compensation of road accidents; CA Paris 15 December 1981, Cass. Civ. 1, 6 June 1990, about the fixed damages provided for by Portuguese Law; Cass. Civ.1, 15 December 1969 – Articles 1323 and 1325 of the Austrian Civil Code limiting the compensation of damages according to the gravity of the fault committed by the victim of a road accident, are not contrary to Public Policy.

exception of certain provisions.[46] The Treaty of Lugano on jurisdiction and the enforcement of judgments in civil and commercial matters dated 16 September 1988, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters dated 27 September 1968 replaced by the Council Regulation 44/2001,[47] cover the entire European Economic Area (EEA). When these international instruments do not apply, the rules of jurisdiction of the Private International Law of each country therefore apply. Regarding arbitration, all European countries are signatories to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

All these laws and international instruments subject the enforcement of foreign awards or judgments to two real conditions, a fair trial and the conformity with the International Public Policy of the forum. Therefore, the question is whether the different European countries would refuse the enforcement of an award or a foreign judgment granting punitive damages, on the ground that such punitive damages are contrary to the Public Policy. Although not much case law exists in the matter, most European countries can answer with the fundamental principles of their own Private International Law.

b. Case Law

Most European countries attach great importance to the different principles of civil liability, especially the principle of full compensation, and therefore consider that the concept of punitive damages cannot be introduced in their respective legal systems. Punitive damages are viewed, almost everywhere in Europe, as contrary to International Public Policy. Hence, an arbitral award or foreign judgment awarding punitive damages will not be recognized and enforced in most European countries.

In Germany, the Federal Court of Justice held – in a decision dated 1992 – that the enforcement of a foreign judgment awarding punitive damages can be refused, on grounds of Public Policy.[48] Since this decision, there has not been any more recent case law clarifying the position of the German courts. However, the legal authors take the view that a foreign judgment which awarded punitive damages would not be enforced where the injured party had already been sufficiently compensated for their loss.

In Italy, in a case dated 19 January 2007, the Italian Supreme Court upheld the decision of the Court of Appeal of Venice dated 15 October 2001, which refused the enforcement of a judgment of the County Court of Jefferson (Alabama) for the very reason that the damages granted by the Court of Jefferson County were to be considered as "punitive damages." The Supreme Court decided that, since Italian law does not provide for any "extra damages" (i.e. other than compensatory damages) with a punitive or deterring purpose, the decision was to be considered contrary to the Italian Public Policy.[49]

In Poland and Russia, for the same reasons, it is very unlikely that arbitral award or foreign decisions granting punitive or multiple damages would be enforced.

According to French case law, the principle of full compensation of damages does not seem to be considered as a fundamental value of French International Public Policy. Hence, some authors may have inferred from the case law as well as from the proposal for an introduction in France of punitive damages, that the

[46] Articles 23 and 24 of the Council Regulation, *inter alia*, have their own scope of application.

[47] Apart from Denmark, where the Council Regulation does not apply.

[48] Federal Court of Justice, 4 June 1992, case no. IX ZR 149/91.

[49] Italian Supreme Court Decision, 19 January 2007, No. 1183/2007. It is therefore to be noted that Italian courts granted punitive damages in domestic cases (cf. footnote 10) and refused the enforcement of a foreign decision awarding punitive damages.

enforcement of a judgment or an award should not be considered as a breach of International Public Policy. On the contrary, other authors believe that French judges remain attached to the function of compensation of damages and that our legal system is not ready to accept such a foreign institution. In addition, to our knowledge, there have been no French decisions, conferring the exequatur to a decision or an arbitral award granting punitive damages.

Research indicates that Spain is the only country where a U.S. award granting punitive damages has been enforced. In a Supreme Court decision dated 13 November 2001, the Court stated that "it cannot be said that punitive damages is something against [Spanish] public order."[50] No decisions have been rendered on this issue since that date, but it is very likely that a decision or an award granting punitive damages would be enforced in Spain, if it is not excessive.

1.1.2.2 Conformity of Punitive Damages with International Public Policy

If the concept of punitive damages is debatable in certain European countries based on International Public Policy, it does not seem to be the case of excessive damages. We will therefore draw a distinction between punitive damages and excessive damages and answer the question of the availability of those excessive damages in Europe.

(i) Distinguishing Punitive and Excessive damages

The question is whether the quantum of damages could affect its acceptance in the courts of the European countries. In other words, would the excessive nature of this remedy be considered as contrary to the International Public Policy?

France has a fundamental principle of proportionality between the offense and the sentence, which is definitely a principle of International Public Policy. This principle comes from Article 8 of the Declaration of Rights of Man and of the Citizen, "The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense." Based on this article, the Constitutional Council decided that the penalty and the fines must be proportionate to the fault committed.[51] This principle is not limited to Criminal Law; it can also apply to private award of damages. For example, if the parties are free to decide the amount of the penalty clause, the judge can always reduce this amount if he deems it to be manifestly excessive.[52] Similarly, if the judge can limit the amount of a periodic penalty payment, he also has to take into consideration the behaviour of the person against whom the injunction has been issued, and the difficulties encountered by this person to execute the injunction at the time of the liquidation.[53] These provisions demonstrate the importance the French legal system places on this principle of proportionality between the offence and the sentence. On this basis, there is no doubt that French International Public Policy would refuse an excessive order for damages, excluding the compensatory aspect of damages in favor of its deterrent nature. The real question is what would be considered as excessive by French courts. To our knowledge this question has not yet been raised before any French courts.

The only decision available is, again, an Italian one. The Italian Supreme Court, in a judgment dated 19 January 2007, refused the enforcement of a U.S. judgment granting punitive damages because they were excessive. In addition, the American judge had not specified how such amount

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[50] Spanish Civil Supreme Court, 13 November 2001, Exequatur n°2039/1999.

[51] Cons. const., decision N° 89-260 D.C. 28 July 1989, 39°.

[52] Article 1152 of the French Civil Code.

[53] Article 36 of the law n°91-650 dated 9 July 1991.

had been calculated, and the "kind" of damage granted to the plaintiff.[54]

(ii) The Opinion of Legal Authors

In France, a great number of legal authors are totally opposed to the concept of punitive damages *per se* and therefore believe that they should not be introduced into the French legal order. In contrast, other Civil and International Law professors[55] support the opinion that punitive damages *per se* are not contrary to the French Public Policy and that the principle of full compensation "is not today among the few essential principles of French law that remain protected in international situations by the Public Policy exception."[56] However, most legal authors agree that excessive sanctions (i.e. disproportionate to the fault committed) should be considered contrary to Public Policy.[57]

The conclusion that can be drawn after studying the availability of punitive damages in Civil Law countries is that almost all domestic laws do not allow granting punitive damages, and most of them would not even accept the introduction in their legal systems of such a concept through the application of a foreign law or the enforcement or recognition of foreign judgments/awards.

Despite the close relation between the U.S. legal system and the English law, the latter applies a similar principle to the compensation of loss as its European cousins, which is that damages are to be compensatory and not punitive. Even though the English courts will apply additional damages in cases of aggravated loss and even will order exemplary damages, it does not go as far as the American courts.

1.2 Availability of Punitive Damages in Common Law Countries: England and Wales

Punitive damages are interchangeably referred to as "exemplary damages" in England and Wales. However, for simplification purpose, we will refer to this remedy as punitive damages.

1.2.1 Domestic Law

English and Welsh Courts award damages in order to compensate a claimant for its loss. Case law has, however, permitted the award of punitive damages under certain conditions.

1.2.1.1 A More Flexible Principle of Compensation

There is no principle of full compensation of damages in English law. A claimant will only receive full compensation if the damages satisfy a remoteness test, and he/she is found to have mitigated his/her loss. However, just as in Civil Law countries, the main function of damages in England and Wales is the compensation of the claimant, and not the punishment of the wrongdoer. Therefore, punitive damages are not available for breach of contract, and the damages in these cases are only awarded to compensate a claimant for its loss.

In tort, the main function of damages is also to compensate the claimant; however, from the eighteenth century forward, punitive damages have been occasionally granted to mark the court's disapproval of the defendant's conduct. Thus, punitive damages have been awarded in the torts of assault and battery, defamation, false imprisonment, malicious prosecution, private nuisance, tortious interference with business, trespass to goods, and trespass to land, but any such award still has to be

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[54] Italian Supreme Court Decision No. 1183/2007.

[55] Among which Geneviève Viney and Patrice Jourdain.

[56] Treaty of Civil Law, 2nd ed., LGDJ Paris, at 125.

[57] Jérôme Ortscheidt "Punitive damages and international arbitration law," Petites Affiches, 20 November, 2002, at 17 and "Punitive damages in international contracts," Guy Robin, International Business Law Journal, n° 3, 2004, at 247).

viewed as exceptional, even when it is theoretically open to the court. Today, punitive damages can only be awarded when normal compensatory damages are inadequate. Moreover they must be granted in accordance with the guidelines held by Lord Devlin, in the judgment he gave in *Rookes v. Barnard.*[58]

1.2.1.2 The Availability of Punitive Damages Subject to Certain Conditions

The circumstances where punitive damages may be awarded are dealt with in a body of case law developed over the Twentieth Century. In the leading authority of *Rookes v. Barnard,*[59] the House of Lords subjects the award of punitive damages to several principles:

- A claimant cannot recover punitive damages unless he/she is the victim of punishable behaviour by the defendant;
- The power to award punitive damages is a weapon to be used with restraint;
- The means of the parties, though irrelevant for deciding compensatory damages, are material for the calculation of punitive damages. Any circumstance which mitigates or aggravates a defendant's conduct is relevant.

Moreover, the House of Lords held that punitive damages can only be awarded in three categories of cases:

(i) Oppressive, Arbitrary or Unconstitutional Action by the Servants of the Government

This category has been widely construed. In *Thompson v. Metropolitan Police Commissioner*[60] the Court of Appeal held that punitive damages should only be awarded where there has been conduct including oppressive or arbitrary behaviour by police officers or other agents of the state.

Lord Devlin stressed that this category should not be extended to oppressive or arbitrary actions by corporations of individuals.

(ii) Defendant's Conduct Was Calculated to Make a Profit To Exceed Compensation to Plaintiff

This is what we referred to above as "*faute lucrative.*" In England and Wales, the classic example of such conduct is when a newspaper decides to run a potentially libellous story, on account that the extra revenue from running the story will more than offset any damages paid if a successful libel claim is brought. This category is not confined to making profit only of a pecuniary nature, but can extend to any case where the defendant is seeking to gain an object at the claimant's expense. However, the mere fact that a tort committed in the course of business carried on for profit is not sufficient to bring a case within this category.

In *Design Progression Limited v. Thurloe Properties Limited,*[61] the court held that the calculation of punitive damages was not to be done by "nice legal principles," but was rather to be assessed by an appropriate amount, having regard to the defendant's conduct. The factors to consider when assessing the defendant's conduct include whether the misbehaviour had the effect intended by the perpetrator, the means of

[58] [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367; [1964] 1 Lloyd's Rep. 28; 108 S.J. 93.
[59] *Id.*

[60] [1998] Q.B. 498; [1997] 3 W.L.R. 403; [1997] 2 All E.R. 762; (1998) 10 Admin. L.R. 363; (1997) 147 N.L.J. 341.
[61] [2004] EWHC 324; [2005] 1 W.L.R. 1; [2004] 2 P. & C.R. 31; [2004] L. & T.R. 25; [2004] 1 E.G.L.R. 121; [2004] 10 E.G.C.S. 184; (2004) 101(12) L.S.G. 36.

the parties, the conduct itself, if any regret on the perpetrator's part has been expressed, and the amount of compensation awarded.

(iii) Exemplary damages expressly authorized by statute

Although Lord Devlin expressly referenced this category, in the subsequent House of Lords case *Cassell & Co. Ltd. v. Broome,*[62] Lord Kilbrandon doubted whether any statutory recognition of the doctrine of exemplary damages could be found.

In *AB v. South West Water Services Ltd.*[63] the court held that punitive damages may not be awarded for any cause of action for which they were not awarded prior to *Rookes v. Barnard.*[64] The award of punitive damages by the English and Welsh Courts is therefore possible but restricted. The question has now to be asked whether the enforcement of foreign judgments or arbitral awards granting punitive damages is possible in the same courts.

1.2.2 Private International Law

1.2.2.1 The Conformity of Punitive Damages with International Public Policy

The Protection of Trading Interests Act of 1980 provides for the restriction of the enforcement of foreign judgments awarding multiple damages, while the case law is not well fixed on the question of the enforceability of punitive damages in general.

[62] [1972] A.C. 1136; [1972] 2 W.L.R. 1214; [1972] 2 All E.R. 849.

[63] [1993] Q.B. 507; [1993] 2 W.L.R. 507; [1993] 1 All E.R. 609; [1993] Env. L.R. 266; [1993] P.I.Q.R. P167; (1993) 143 N.L.J. 235; [1992] N.P.C. 146.

[64] [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367; [1964] 1 Lloyd's Rep. 28; 108 S.J. 93.

(i) The Protection of Trading Interests Act of 1980

According to section 5(1) and section 2(a) of the Protection of Trading Interests Act 1980, a foreign judgment awarding multiple damages shall not be registered for enforcement in the United Kingdom, and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.

The current interpretation of section 5 of the Protection of Trading Interests Act 1980 has been given by the Court of Appeal in the case *Lewis v. Eliades.*[65] The defendant appealed that as the claimant was attempting to enforce a judgment containing an element of multiple damages awarded under the Racketeer Influence and Corrupt Organisations Act ("RICO"), the whole judgment was unenforceable. The Court concluded that section 5 of the Protection of Trading Interests Act 1980 applied only to multiple damages judgments. It considered the Parliamentary debates preceding the Protection of Trading Interests Bill and noted that they did not contain any statement to suggest that the principle of unenforceability be extended to cover any judgments wider than multiple damage judgments. The fact that the RICO element was easily severable from the compensatory award was an important factor in this case, and it remains to be seen whether a similar decision would result if the compensatory and multiple element could not be separated.

(ii) Case Law

There is no key authority on the subject; however, it is likely that an award of punitive or multiple damages, without a compensatory element, will not be enforceable in England and Wales. If,

[65] [2003] EWCA Civ 1758; [2004] 1 W.L.R. 692; [2004] 1 All E.R. 1196; [2004] 1 All E.R. (Comm) 545; [2004] 1 C.L.C. 556; (2004) 101(3) L.S.G. 32.

however, a judgment contains an award for punitive damages in addition to a compensatory element of damages, there is authority to suggest that the compensatory element will be enforceable.

In the Court of Appeal case of *Lewis v. Eliades,*[66] it was held that the whole of a foreign judgment will not be unenforceable in England and Wales merely because part of the judgment is. If an unenforceable element of punitive damages in a judgment can be severed from an enforceable compensatory element, it appears that the compensatory element will be enforced. If, however, the punitive element is derived from a multiplication of a compensatory award, there are conflicting persuasive judgments in *Lewis v. Eliades*[67] addressing whether the compensatory award itself may or may not be enforceable. Considering the judgment of Potter LJ, it would seem that the compensatory element would not be enforceable. However, Jacob LJ in his judgment states that the decision in *Lewis v. Eliades*[68] does not rest on the enforceability of the compensatory element of a punitive award, and that this issue can be decided as and when it arises.

In *SA Consortium General Textiles v. Sun & Sand Agencies Ltd.*[69] Lord Denning said *obiter dicta* that there is nothing contrary to English Public Policy in enforcing a claim for punitive damages, considering that punitive damages accord with Public Policy in the U.S. and other commonwealth nations. It seems that it is an excessive amount itself which could be considered as contrary to the Public Policy.

[66] [2003] EWCA Civ 1758; [2004] 1 W.L.R. 692; [2004] 1 All E.R. 1196; [2004] 1 All E.R. (Comm) 545; [2004] 1 C.L.C. 556; (2004) 101(3) L.S.G. 32.
[67] *Id.*
[68] [2003] EWCA Civ 1758; [2004] 1 W.L.R. 692; [2004] 1 All E.R. 1196; [2004] 1 All E.R. (Comm) 545; [2004] 1 C.L.C. 556; (2004) 101(3) L.S.G. 32.
[69] [1978] Q.B. 279; [1978] 2 W.L.R. 1; [1978] 2 All E.R. 339; [1978] 1 Lloyd's Rep. 134; 121 S.J. 662.

1.2.2.2 The Conformity of the Quantum of Punitive Damages with International Public Policy

In *Raji v. Bank Sepah Iran,*[70] Hirst J held in his judgment that the amount of an award for punitive or multiple damages may at a point be so grossly exorbitant by English standards that it affronts the English sense of substantial justice and will not be enforced. He said that if an award of damages is essentially penal and not remedial in nature, then it must be at least reasonably arguable that an award which benefits a claimant over and above any compensatory measure does indeed offend against English notions of substantial justice. He added that this does not mean that every award outside the scope of *Rookes v. Barnard*[71] and *Cassell & Co Ltd. v. Broome*[72] would offend these notions.

This judgment was made with reference to an interim application, and so a final ruling on the enforceability of an award containing a punitive element was not necessary. In the absence of other authorities, however, this case is persuasive.

Punitive damages are therefore not available in the domestic courts of European Civil Law countries, and their award is very restricted in England and Wales. However, there is a recent trend in EU law to influence the domestic courts of the Member states towards accepting the introduction of punitive damages in their respective legal systems.

2. Availability of Punitive Damages in European Community Law

The Civil Law "compensatory dogma" also governs Community law, as the victims of the faults committed by a European

[70] Unreported, 23 May 1988.
[71] [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367; [1964] 1 Lloyd's Rep. 28; 108 S.J. 93.
[72] [1972] A.C. 1136; [1972] 2 W.L.R. 1214; [1972] 2 All E.R. 849.

Institution cannot ask for more than the compensation of the damage suffered.

In fact, the only areas where the admission of punitive damages are discussed are those where money making faults can be committed, such as in competition law and in Private International Law. In the latter, the question of the introduction of punitive damages in the different legal systems of the European Community has been answered by the proposal for Council Regulation on the Law Applicable to Non-Contractual Obligations, generally known as "Rome II".

2.1 Community Competition Rules

The question of the admission of punitive damages in community competition law has been raised in the case law and more recently, in a Green Paper issued by the Commission in order to ensure the useful effect of Articles 81 and 82 EC.

2.1.1 Case Law

A recent decision of the European Court of Justice dated 13 July 2006 confirms that where punitive damages are generally available in the domestic courts of EU Member States, they may award punitive damages under Article 81 EC, subject to principles of "equivalence and effectiveness."[73]

> In the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.
>
> Therefore, first, in accordance with the principle of equivalence, if *it is possible to award specific damages, such as exemplary or punitive damages,* in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (emphasis added).

The European judges followed the opinion given by advocate general L.A. Geelhoed, delivered on 26 January 2006.

> Seen from the perspective of Community law, compensation for harm suffered as a result of the infringement of Community law should be appropriate to the harm suffered. As this aspect is not governed by provisions of Community law, it is for the domestic law of each Member State to set the criteria for determining the scale of the damages, provided that those criteria are no less favourable than those relating to similar claims based on national law and compensating for the harm suffered is not rendered impossible or excessively difficult.
>
> Ensuring the useful effect of Article 81(1) EC does not, to my mind, necessitate the award of compensation greater than the harm suffered. *On the other hand, where special forms of damages can be awarded under national competition law, they must also be*

[73] Judgment of the Court (Third Chamber) of 13 July 2006 (references for a preliminary ruling from the Giudice di Pace di Bitonto - Italy) - Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v. Fondiaria Sai SpA (C-296/04), Nicolò Tricarico v. Assitalia SpA (C-297/04) and Pasqualina Murgolo v. Assitalia SpA (C-298/04).

> *available if the claims concerned are based on an infringement of Community competition law* (emphasis added).

This decision goes further than the former decision "Courage Ltd," issued on 20 September 2001[74] which only held that if "the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition" hinders the full effectiveness of Article 81 and 82 EC, "[c]ommunity law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them."

Hence, punitive damages are available in actions under EU Law, and particularly in action based on an infringement of Community Competition Law, but only where damages can be awarded under national Competition Law. A "Green Paper" from the Commission on damages actions for breach of the EC antitrust rules suggests to the contrary that punitive damages may be awarded in all Member States, under certain conditions.

2.1.2 "Green Paper" from the European Commission on Damages Actions for Breach of the EC Antitrust Rules

The European Commission published on 19 December 2005 a "Green Paper" examining ways in which damages actions (in particular, private damages actions) for breach of Articles 81 and 82 of the EC Treaty before national courts may be better facilitated.[75] The Green Paper and its accompanying *staff working paper* identify the main obstacles to the development of a more efficient system for bringing damages claims in EU national courts and seek views on a range of options for addressing these problems.

Among others, the Commission recommends the use of punitive damages as an incentive for private parties (citizens and firms) to bring damage claims. Hence, according to section 2.3 "damages" of the Green Paper, the pure compensation of the loss caused by a breach of anti-trust rules does not always seem to provide a sufficient reward to the claimant for bringing an action. The Green paper therefore recommends the use of double damages "at the discretion of the court, automatic or conditional [...] for horizontal cartel infringements."

Thus, to the Question E "*How should damages be defined?*" the Commission proposes four options:

- Compensatory damages
- Recovery of illegal gain (i.e. punitive damages)
- Double damages (only for horizontal cartels)
- Prejudgment interest.

A public consultation on the Green Paper took place during the spring of 2006 where over 140 industries, lawyers, academics, governments, consumer organisations, and competition authorities from different countries of the EU and from the U.S., submitted their views to the Commission.[76] To the Question E, most answered that they were very attached to the principle of compensation of damages and rejected the options involving punitive or double damages. According to the ICC, for instance, "the role of private remedy should not include deterrence." In France, France Telecom as well as the MEDEF, *inter alia*, declared their opposition to the use of

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[74] Judgment of the Court of 20 September 2001 – Courage Ltd (C-453-99).

[75] Green Paper on Damages actions for breach of the EC antitrust rules, presented by the European Commission on December 19, 2005 (COM(2005) 672 final).

[76] *See* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html.

punitive damages. In the UK, the Competition Law Forum affirmed that double damages should be available under very limited circumstances only.

The analysis of these responses by the Commission has only just started and at this stage, the Commission has not yet decided if actions – legislative or otherwise – are necessary. Also, no conclusions have been drawn whether any possible action is best taken at the Community level or at the level of the Member States. However, it seems that the position of the Member States, along with what we have demonstrated above, is not in favour of the introduction, even in specific actions for the breach of Antitrust rules, of punitive, or double damages.

2.2 Rome II and Punitive Damages: Analysis of Article 26 and its Legislative History

The draft European Regulation on the Law Applicable to Non-Contractual Obligations (i.e. Tort), generally known as "Rome II", the latest version of which is dated 14 March 2007, contained an Article 26 which established a Public Policy exception and evoked non-compensatory damages as being likely to be considered incompatible with the Public Policy of the forum. The reference to non-compensatory damages was finally removed from this article in the final text approved by the European Parliament and the Council and was replaced by a new recital. The question is then whether the domestic courts of the European Union would refuse to apply a U.S. statute leading to the award of punitive damages, using this Public Policy exception.

Rome II has quite a long legislative history, as the first preliminary draft was published on 3 May 2002 and has endured many changes since. On 22 July 2003, the European Commission published a second draft which was the first step of the drafting process of the European Regulation. On 27 June 2005, the European Parliament proposed amendments, many of which were integrated fully or partially into the new draft. The Council then adopted a Common Position on these amendments on 25 September 2006, which was accepted by the Commission, and served as the basis of the second reading of the European Parliament. On 18 January 2007, the Parliament adopted a legislative resolution, proposing new amendments that were partially accepted by the Commission in the last version of the draft Regulation dated 14 March 2007. The final Regulation was enacted on 11 July 2007.

More precisely concerning the issue of the Public Policy exception and punitive damages, the evolution is quite interesting.

2.2.1 The Preliminary Draft of 3 May 2002

In the preliminary draft of 3 May 2002, Article 20 provided:

> The application of a rule of the law of any country specified by this Regulation may be refused only if such application is *manifestly incompatible* with the Public Policy ("ordre public") of the forum. (emphasis added)

The threshold is set high for the Public Policy exception to apply as the contradiction with the Public Policy of the forum must be manifest and not just minor.

2.2.2 The Second Draft of 22 July 2003

In the draft of 22 July 2003, the wording of the article on the Public Policy of the forum remained unchanged with the exception that Article 20 became Article 22. However, an article on non-compensatory damages was added. This article (Article 24) stated:

> 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.

Therefore, at that stage, it was to be considered, as a matter of principle, that a law awarding punitive damages was manifestly incompatible with the European Public Policy, (i.e. with the Public Policy of all Member States).

In the introduction of the draft, the European Commission defined compensatory damages as being only awarded to compensate the damage suffered (or likely to be suffered in the future) by the victim, as opposed to punitive damages, that are characterized by a deterring and sanctioning function. The addition of an article on non-compensatory damages by the European Commission was inspired not only from the concerns expressed by legal authors, invited to send comments on the preliminary draft, but also from the specific provision of the German EGBGB (Article 40-III) regarding the limits to the application by the German judge of a foreign Tort law. The purpose was also to reduce the potential negative effects of the "universal" application of Rome II.[77]

2.2.3 The Report of the European Parliament of 27 June 2005

In its Report of 27 June 2005, the European Parliament proposed several amendments concerning Articles 22 to 24 of the draft Regulation. Articles 23 and 24 were to be deleted, but their content was more or less transferred to other articles, respectively to Article 1 § 2 bis (defining the scope of application *ratione materiae* of the Regulation) and Article 22 (establishing the Public Policy exception). The proposed new Article 22 was drafted as follows:

> Furthermore, 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 *may be regarded as being contrary* to the Public Policy ("ordre public") of the forum (emphasis added).

The difference in wording with the previous Article 24 is not insignificant. Under this amended text, a court is no longer under the obligation to consider whether punitive damages are contrary to the Public Policy of the forum. Thus, national courts regain room to interpret what belongs to the Public Policy of the forum. The Report explains this amendment by considering that the creation of a notion of European Public Policy and the interdiction of the award of punitive damages is out of the scope of a regulation such as Rome II.

2.2.4 The Amended Draft of 21 February 2006

The European Commission partially adopted the European Parliament's amendments. The resulting wording of the new Article 23, including both the definition of the Public Policy exception and the issue of non-compensatory damages, insisted on the distinction between excessive damages and punitive damages:

> The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the Public Policy ("ordre public") of the forum. *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*

[77] The choice-of-law rule provided for in Rome II may result in the application of the laws of a non-Member State.

> *may be considered incompatible with the Public Policy of the forum* (emphasis added).

This provision is more in accordance with the solutions of the Private International Law rules of the European countries, discussed above. The main difference with the amendments proposed by the European Parliament is that the courts of the Member States are allowed to refuse the award of excessive damages. But the principle of letting national courts decide whether the applicable law is compatible or not with the Public Policy of the forum is maintained, as well as the gathering of the provisions into one single article.

2.2.5 The Common Position of the Council of the European Union dated 25 September 2006

The Council of the European Union reached an agreement on Rome II in a Common Position of 25 September 2006. In the new draft Regulation, the Council rejected completely all references to non-compensatory damages that existed in the former Article 23 on Public Policy.

At first, the idea reflected in the former article had been moved into a recital but was ultimately dropped completely when no agreement could be achieved over its content. According to the Council, it "would be difficult for the time-being to lay down common criteria and reference instruments for the purposes of defining public policy." Also, all Member States agreed that the public policy clause offered sufficient guarantee and protection against potential negative effects of awards of excessive damages. The European Council therefore adopted almost identically the former wording of Article 20 of the draft Regulation of 3 May 2002 in a new draft Article 26:

> The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

2.2.6 The Legislative Resolution of the European Parliament on the Council Common Position, dated 18 January 2007

Despite the declaration by the European Commission that it accepted the common position of the Council,[78] the European Parliament proposed, once more, the addition of a second paragraph to the draft Article 26, restoring the reference to non-compensatory damages in the exact same wording as the amendment proposed in its Report of 27 June 2005. The European Parliament explained this addition by pointing out the necessity for the European Union to avoid the forum shopping favoured by the existence of punitive damages.[79]

The Commission accepted this amendment in its entirety in the last version of the draft Regulation dated 14 March 2007.[80]

2.2.7 The Final Rome II Regulation, dated 11 July 2007

The final joint text adopted by the European Parliament and the Council, enacted on 11 July 2007,[81] did not contain the above-mentioned amendment.

Article 26 of the final regulation therefore remained in the form referred to under section 2.2.5 above. The need for the

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[78] Communication from the European Commission to the European Parliament on the Council common position, dated 27 September 2006.

[79] See "*justification*" in the Recommendation for second reading dated 22 December 2006 on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("ROME II").

[80] European Commission Opinion of 14 March 2007.

[81] Regulation n° 864/2007, dated 11 July 2007, on the law applicable to non-contractual obligations.

agreement of the three European Institutions through co-decision proceedings as well as the political impact of such a provision on the Private International Law rules of the different European Countries indeed led to the suppression of any reference to non-compensatory damages in Rome II in the body of the text. Nonetheless, it was decided that a new recital would be added (recital # 32 in the final Joint text) the wording of which is very close to that of the former Article 23 of the Amended Draft of 21 February 2006 (see section 2.2.4) and provides that:

> Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum.

Conclusion

European countries, whether of Common Law or Civil Law tradition, are generally inclined towards maintaining a balance of interests between the parties so that plaintiffs (including individuals) and defendants (including corporations) can litigate on an equal footing. However, a recent converging trend toward the U.S. legal system (proposal for an introduction of punitive damages and class actions in France, incentives for the use of punitive damages in EU law) tend to question this balance, with potentially risking consequences for businesses.

However, it is fair to say that, at this stage, European countries remain impervious to this encouraged Americanization of their legal system, especially with respect to punitive damages. Hence, the quantum of damages awarded by European judges remains "under control" and the concept of punitive damages itself is still nonexistent in Civil Law countries and the granting of such remedy is strictly limited in England and Wales. In addition, the introduction of this foreign concept would be contrary to the International Public Policy of most European countries.

Therefore, it is far too early to tell whether the development described above will lead to actual changes in the European legal systems or if they are the result of some current fashion which will, hopefully, fade over time.