

REDEFINING THE PUBLIC POLICY EXCEPTION IN THE CONTEXT OF
PUNITIVE DAMAGES ©.

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1. INTRODUCTION

Punitive damages provide civil plaintiffs with additional monetary relief beyond the value of the harm incurred.¹ They are awarded in excess of any compensatory or nominal damages.² The remedy transcends the corrective objective of re-establishing an arithmetical equilibrium of gains and losses between the injurer and the injured.³

Punitive damages exist in various countries around the world. The United States, Canada, Australia, South Africa and New Zealand are the main examples of third state jurisdictions which allow for this type of damages. Within the European Union only England, Wales, Ireland, Northern Ireland and Cyprus provide for this kind of damages in their respective legal systems. In contrast to their acceptance within Common Law jurisdictions, they are said to be relatively non-existent in Civil Law countries.

In the United States the Second Restatement of Torts and Black's Law Dictionary define punitive damages as: "*damages, other than compensatory or nominal damages, 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*".⁴ The United States Supreme Court views punitive damages as: "*private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence*".⁵ These

¹ Garner, A. Bryan, *Black's Law Dictionary*, West Group, St. Paul, 2006, 175.

² Nater-Bass, Gabrielle (2003), U.S.-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries, *Deutsch-Amerikanische Juristen-Vereinigung Newsletter*, 4, 154.

³ Quarta, Francesco, "Foreign Punitive Damages Decisions and Class Actions in Italy" in: Fairgrieve, Duncan & Lein, Eva, *Extraterritoriality and Collective Redress*, Oxford, Oxford University Press, 2012, 280; Posner, Richard A (1998), The Concept of Corrective Justice in Recent Theories of Tort Law, *The Journal of Legal Studies*, 10 (1), 187.

⁴ Second Restatement of Torts § 908 (1979); Garner, Bryan A., *Black's Law Dictionary*, West Group, St. Paul, 2006, 3rd pocket edition, 175.

⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), 350.

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definitions thus focus on the socio-legal significance of the wrongdoing and on the importance of discouraging its repetition.⁶ Both mention the two main objectives of punitive damages: punishment and deterrence.

The functions of punishing and deterring are traditionally attached to criminal law sanctions. It is, therefore, often argued that punitive damages pursue criminal law objectives rather than private law objectives.⁷ As a quasi-criminal institution they are halfway between civil and criminal law and they put the boundaries between both areas of the law into question.⁸ Their hybrid character, *i.e.* neither completely civil nor criminal, causes the controversy that has always surrounded this institution.⁹

2. PRIVATE INTERNATIONAL LAW TREATMENT IN THE EU

When American judgments containing punitive damages have to be enforced in the EU, the conflicting views on the remedy on both sides of the ocean come to the foreground. The decision whether to grant enforcement to American awards of punitive damages or to refuse it boils down to the question whether exequatur of the award would be compatible with the public policy of the requested forum. Contrariety to public policy is a common ground for refusal in the EU Member States. The notion of public policy should, however, be understood as *international* public policy.

International public policy is, despite its name, a purely national concept.¹⁰ It contains those fundamental rules of internal public policy that a legal system wants respected in international cases as well.¹¹ International cases thus trigger the more narrow concept of international public policy. This is the appropriate yardstick when dealing with cases which are not purely domestic. It is under the umbrella of this pivotal international public policy

⁶ Quarta, Francesco, “Foreign Punitive Damages Decisions and Class Actions in Italy” in: Fairgrieve, Duncan & Lein, Eva, *Extraterritoriality and Collective Redress*, Oxford, Oxford University Press, 2012, 280.

⁷ Meurkens, Lotte, “The punitive damages debate in Continental Europe: food for thought” in: Meurkens, Lotte & Nordin, Emily, *The Power of Punitive Damages – Is Europe Missing Out?*, Cambridge, Intersentia, 2012, 4.

⁸ 22 Am. Jur. 2d Damages § 541; Rouhette, Thomas (2007), The availability of punitive damages in Europe: growing trend or nonexistent concept?, *Defense Counsel Journal*, 74 (4), 320; Adar, Yehuda (2012), Touring the Punitive Damages Forest: A Proposed Roadmap, *Osservatorio del diritto civile e commerciale*, 2, 302.

⁹ Schlueter, L. Linda, *Punitive Damages – Volume I*, Newark, New Jersey, LexisNexis, 2005, 82; Owen, G. David, *Products Liability Law*, St. Paul, Minnesota, Thomson/West, 2005, 1122; Zipursky, C. Benjamin (2005), A Theory of Punitive Damages, *Texas Law Review*, 84 (1), 107.

¹⁰ Dollinger, Jacob (1982), World Public Policy: Real International Public Policy in the Conflict of Laws, *Texas International Law Journal*, 17, 170.

¹¹ Sibon, S. Amaury, Enforcing Punitive Damages Awards in France: Facing Proportionality within International Public Policy, April 1, 2013 available at <<http://ssrn.com/abstract=2382817>>.

exception that the enforceability of foreign punitive damages is assessed and objections against punitive damages are formulated.

The Supreme Courts of Germany and Italy have always taken a traditional view and have denied the enforcement of U.S. punitive damages because the concept of punitive damages is considered contrary to the fundamental separation of criminal and private law. The judgments make clear that Civil Law countries in the European Union are wary of punitive damages as they are administered in civil proceedings but pursue objectives which are traditionally the focus of criminal law. Punitive damages are also held to be anathema to the principle of strict compensation and are seen as resulting in an unjust enrichment of the plaintiff.¹² However, judgments from the Supreme Courts of Spain and France indicate a willingness to move away from these traditional defenses.¹³

This article argues that EU Member States can no longer refuse the enforcement of U.S. punitive damages judgments under their international public policy exception because their private law systems contain punitive-like elements. Instead, the international public policy analysis should focus on the question as to whether the punitive damages contained in the foreign judgment are excessive.

3. PRESENCE OF PUNITIVE ELEMENTS

European courts should not treat U.S. punitive damages as, in themselves, contrary to international public policy.¹⁴ The traditional interpretation of international public policy, as rejecting the concept of punitive damages, does not reflect the legal reality. It cannot be sustained that the outright rejection of the remedy of punitive damages is warranted under international public policy.

We assert that Member States' courts should not refuse the enforcement of U.S. punitive damages because their own legal systems contain private law instruments akin to punitive

¹² For Germany: German Supreme Court 4 June 1992, *John Doe v. Eckhard Schmitz*, BGHZ 118, 312, NJW 1992, 3096, RIW 1993, 132, ZIP 1992, 1256 (English translation of the relevant parts of the judgment by Wegen, Gerhard & Sherer, James (1993), Germany: Federal Court of Justice decision concerning the recognition and enforcement of U.S. judgments awarding punitive damages, *International Legal Materials*, 32 (5), 1329. For Italy: Italian Supreme Court 19 January 2007, *Parrott v. Fimez*, no. 1183, Rep Foro it 2007 v Delibazione no. 13 and v Danni Civili no. 316; Corr. Giur., 2007, 4, 497; Italian Supreme Court 8 February 2012, *Soc Ruffinatti v Oyola-Rosado*, no. 1781/2012, Danno resp 2012, 609. A very recent ruling of 5 July 2017 (Cass. 5 July 2017, *Axo Sport S.P.A. v. Nosa Inc.*, no. 16601/2017) seems to represent a Copernican revolution in Italy. Punitive damages are no longer held to be contrary to Italian public policy.

¹³ For Spain: Spanish Supreme Court 13 November 2001, *Miller v. Alabastres*, exequatur no. 2039/1999, Aedipr 2003, 914. For France: French Supreme Court 1 December 2010, *Schlenzka & Langhorne v. Fontaine Pajot S.A.*, no. 09-13303, Dalloz 2011, 423.

¹⁴ Nater-Bass, Gabrielle (2003), U.S.-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries, *Deutsch-Amerikanische Juristen-Vereinigung Newsletter*, 4, 160.

damages or pursuing identical or similar goals. In such a context, it seems problematic to employ the international public policy exception to reject foreign punitive damages in private international law cases. The international public policy test should be restricted to an excessiveness (or proportionality) check of the American punitive damages.¹⁵

The legal systems of France, Spain and Germany, to take these major countries as an example for the purposes of this article, contain private law instruments which resemble punitive damages or which pursue the same goals of punishment and/or prevention. An argument of internal legal coherence then leads to the acceptance of U.S. punitive damages at the enforcement stage. When a legal system itself contains punitive-like remedies in private law, it cannot declare punitive damages unenforceable by using the international public policy escape clause.¹⁶ Member States would be guilty of legal hypocrisy if they were to reject U.S. punitive damages as violating international public policy while at the same time acknowledging or condoning similar instruments in their substantive law.¹⁷ Below we discuss a number of these “punitive elements”.¹⁸

A. SURCHARGE OF BENEFITS IN SPANISH SOCIAL SECURITY LAW

In Spanish law article 123 of the *Ley General de la Seguridad Social*¹⁹ (General Act on Social Security) provides a clear example of a punitive provision within private law.²⁰ The article of the Act deals with the legal consequences of a labour accident or an occupational disease caused by the employer’s fault. When the harm to the worker was caused by faulty

¹⁵ Licari, François-Xavier (2010), Prendre les punitive damages au sérieux: propos critiques sur un refus d’accorder l’exequatur à une décision californienne ayant alloué des dommages intérêts punitifs, *Journal du droit international*, 137, 1262.

¹⁶ Behr, Volker (2003), Punitive Damages in American and German Law – Tendencias Towards Approximation of Apparently Irreconcilable Concepts, *Chicago-Kent Law Review*, 78 (1), 153; Tolani, Madeleine (2011), U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public, *Annual Survey of International and Comparative Law*, 17, 207; Quarta, Francesco, “Foreign Punitive Damages Decisions and Class Actions in Italy” in: Fairgrieve, Duncan & Lein, Eva, *Extraterritoriality and Collective Redress*, Oxford, Oxford University Press, 2012, 275-276.

¹⁷ Berch, J. Jessica (2010), The Need for Enforcement of U.S. Punitive Damages Awards by the European Union, *Minnesota Journal of International Law*, 19 (1), 77; Nagy, Csongor István (2012), Recognition and enforcement of US judgments involving punitive damages in continental Europe, *Tijdschrift Nederlands Internationaal Privaatrecht (N.I.P.R.)*, 30 (1), 11.

¹⁸ For a more extensive list see Vanleenhove, Cedric, *Punitive Damages in Private International Law: Lessons for the European Union*, Cambridge, Intersentia, 2016, 158-204.

¹⁹ Real Decreto Legislativo 1/1994, de 20 de junio, por el que se aprueba el Texto Refundido de la Ley General de la Seguridad Social, BOE no. 154, 29 June 1994, 20658-20708, available at <www.boe.es/diario_boe/txt.php?id=BOE-A-1994-14960>.

²⁰ Luque Parra, Manuel, Gómez Ligüerre, Carlos & Ruiz García, Juan Antonio (2001), Workplace Injuries and Tort Liability, *InDret* (02/2002), available at <www.indret.com/pdf/021_en.pdf>; Otero Crespo, Marta, “Punitive Damages Under Spanish Law: A Subtle Recognition?”, in: Meurkens, Lotte & Nordin, Emily, *The Power of Punitive Damages – Is Europe Missing Out?*, Cambridge, Intersentia, 2012, 294-295.

equipment, in a workplace without obligatory safety devices or where safety and hygiene measures were not observed, the benefits paid out (by the state) to the employee will be increased by 30 to 50% depending on the seriousness of the employer's wrongdoing.²¹ The provision further lays down that under these circumstances the employer is liable for the surcharge and cannot insure himself against this liability.²² Lastly, the liability for the additional amount is independent from and compatible with any criminal (or other) liability.²³

The victim of a labour accident or an occupational disease is thus entitled to receive increased financial benefits in case his condition can be attributed to the employer. This financial burden is imposed by the Spanish Department of Employment and has to be borne by the employer. The exact percentage (between 30 and 50) depends on the assessment of the gravity of the employer's wrong. This criterion reflects the tortfeasor-oriented approach of punitive damages and contradicts the idea of (compensatory) damages which are strictly related to the victim's loss. Furthermore, the instrument of the surcharge appears to have a punitive as well as a deterrent objective. It aims at punishing the employer for allowing the damaging event to take place and contributes to the prevention of such accidents by seeking the employer's compliance with his duties in the future.²⁴ The punitive and deterrent nature of the administrative sanction has been explicitly confirmed by the Spanish Supreme Court in a decision of 23 April 2009.²⁵

A number of other characteristics of the employer's surcharge are also reminiscent of punitive damages. First, like punitive damages in the U.S., the amount is payable to the victim and not to the state.²⁶ Second, the liability under article 123 of the *Ley General de la Seguridad Social* does not exclude any criminal (or other) liability the employer might incur. The same goes for U.S. punitive damages. A wrongdoer can face criminal prosecution and still be ordered to pay punitive damages with regard to the same conduct. Following the

²¹ Article 123.1. General Act on Social Security.

²² Article 123.1. General Act on Social Security.

²³ Article 123.1. General Act on Social Security.

²⁴ Otero Crespo, Marta, "Punitive Damages Under Spanish Law: A Subtle Recognition?" in: Meurkens, Lotte & Nordin, Emily, *The Power of Punitive Damages – Is Europe Missing Out?*, Cambridge, Intersentia, 2012, 294.

²⁵ Spanish Supreme Court (Civil Chamber, Plenary Section) 23 April 2009, RJ 2009, 4140.

²⁶ Split recovery schemes, whereby a portion of the punitive award flows to the state, are of course an exception to this general principle. California law, for instance, provides that 75% of the award flows to a Public Benefit Trust Fund: Cal. Civ. Code § 3294.5.

case law of the U.S. Supreme Court the civil court should take the possible criminal sanctions into account in order to avoid excessive punitive awards.²⁷

B. FRENCH CIVIL FINES

French law contains the concept of the *amende civile* (civil fine). A civil fine is essentially a penalty provided for by private law instead of criminal law. The French legislator decided to resort in certain circumstances to penal measures in private law to punish the wrongdoer for his or her unwanted behaviour and to deter the future occurrence of such conduct. Civil fines are administered by civil courts and find their origin in private law statutes.²⁸ They are independent from the normal compensatory damages awarded to the prevailing party.

An example of an *amende civile* can be found in article 50 of the Civil Code. The article provides that a fine of EUR 3 to 30 can be issued against a state official who does not comply with his obligations under articles 34-49 relating to records of civil status. The Civil Code also lays down civil fines in the context of guardianship. The judge of the *tribunal d'instance* in whose territorial jurisdiction the minor has his domicile can sentence those who did not comply with his injunctions to a civil fine (article 388-3 code civil). Pursuant to article 1216 of the *Nouveau Code de Procedure Civile* (Code of Civil Procedure) this fine cannot exceed EUR 3.000. Parties who litigate in a dilatory or abusive fashion can on the basis of article 32-1 of the Code of Civil Procedure be ordered to pay a civil fine not exceeding EUR 3.000.²⁹ A famous example of a civil fine can be found in article L 442-6 of the *Code de commerce* (Commercial Code). This article enumerates a number of prohibited anti-competitive practices and allows competitors to recover damages. On top of these damages the defendant can be sentenced to pay a civil fine of up to EUR 2 million (article 442-6, III, paragraph 2). Finally, reference can be made to article L 651-2 of the *Code de la construction et de l'habitation* (Construction and Housing Code). The article provides that those who change the function of buildings from housing to commercial premises without prior authorisation can be punished with a fine of up to EUR 25.000.

French civil fines bear several similarities to U.S. punitive damages. They are both awarded/issued in addition to the compensatory damages and they both pursue punitive and

²⁷ *BMW of North America, Inc. v. Gore*, 517 U.S. 574-575, (1995).

²⁸ Behar-Touchais, Martine (2002), L'amende civile est-elle un substitut satisfaisant à l'absence de dommages et intérêts punitifs?, *Les Petites Affiches*, 232, no. 10.

²⁹ For abusive or dilatory appeal article 559 provides the same civil fine.

deterrent objectives within the realm of private law.³⁰ Both institutions are situated halfway between civil and criminal law.³¹ Their penal impact on the ‘condemned’ party without that party benefitting from the criminal law safeguards stirs controversy both in France³² and in the U.S.

The only difference with punitive damages lies in the fact that the penalty is not paid to the other party in the private litigation but to the state.³³ The victim consequently does not receive more than the amount of the damage he suffered. Civil fines thus do not cause a deviation from the strict compensation principle.³⁴ In our view, however, the fact that the sum due is destined for the treasury does not prevent the comparison between *amendes civiles* and punitive damages.

Two observations support this view. First, in the U.S. split-recovery schemes exist under which part of the punitive damages awarded flows to an entity other than the counterparty of the party ordered to pay punitive damages. That part of the punitive damages still bears the label of punitive damages. Second and most importantly, the fact that the damages are attributed to the state does not weaken the finding that criminal law objectives are to be found in French private law. As indicated, the purpose of this article is to dismantle the idea that U.S. punitive damages are *in se* contrary to international public policy by providing evidence that the private law of the continental European law systems of France, Spain and Germany contains legal concepts which pursue criminal aims. The legal mechanisms do not need to be exact copies of U.S. punitive damages. What is crucial is that they pursue similar (penal and deterrent) aims within the context of private law. Civil fines do indeed attempt to achieve such criminal law objectives.

³⁰ Behar-Touchais, Martine (2002), L’amende civile est-elle un substitut satisfaisant à l’absence de dommages et intérêts punitifs?, *Les Petites Affiches*, 232, no. 16.

³¹ Borghetti, Jean-Sébastien, “Punitive Damages in France” in: Koziol, Helmut & Wilcox, Vanessa, *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna, Springer, 2009, 61-62.

³² Behar-Touchais, Martine (2002), L’amende civile est-elle un substitut satisfaisant à l’absence de dommages et intérêts punitifs?, *Les Petites Affiches*, 232, nos. 25-28.

³³ Borghetti, Jean-Sébastien, “Punitive Damages in France” in: Koziol, Helmut & Wilcox, Vanessa, *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna, Springer, 2009, 61; Behar-Touchais, Martine (2002), L’amende civile est-elle un substitut satisfaisant à l’absence de dommages et intérêts punitifs?, *Les Petites Affiches*, 232, no. 22; Nater-Bass, Gabrielle (2003), U.S.-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries, *Deutsch-Amerikanische Juristen-Vereinigung Newsletter*, 4, 156, footnote 29.

³⁴ Behar-Touchais, Martine (2002), L’amende civile est-elle un substitut satisfaisant à l’absence de dommages et intérêts punitifs?, *Les Petites Affiches*, 232, no. 19.

Some scholars assert that civil fines cannot be compared to punitive damages because the amount of a civil fine is in most cases very low.³⁵ Again, it should be underlined that we do not want to argue that civil fines are completely the same as punitive damages. For the sake of argument, however, some thoughts on this issue. In our opinion, the suggested difference between 'high' and 'low' civil fines is arbitrary. The penal nature of a sum payable to the state does not disappear simply because the sum is said to be 'low'. Besides, what is 'high' or 'low' also depends on the financial situation of the party who has to pay the fine. For a wealthy party a 'high' fine might be nothing whereas the same amount might bankrupt another party. We, therefore, reject the idea that a fine would derive its penal nature from the (high level of the) amount levied. Moreover, civil fines can sometimes reach 'high' numbers. In the above-mentioned articles on anti-competitive behaviour (article 442-6 of the Commercial Code) and on the changing of the use of buildings (article L 651-2 of the Construction and Housing Code), for instance, the sums due are of a substantial amount.

C. EXAMPLES IN INSURANCE LAW

The field of insurance forms another area of law where punitive damages can be detected. The legal phenomenon of damages of an extra-compensatory nature in insurance law is found in both France and Spain as well as in Germany.

In France and Spain these punitive-like damages are provided for by statute. The French *Code des assurances* (Insurance Code) deals with claims liquidation in motor liability insurance. The insurers of motor vehicles have the obligation to offer the victim of an accident compensation within certain deadlines. If liability is uncontested and the damage is quantified, the insurance company has three months to make such an offer for compensation to the injured. This time period starts from the date of the victim's claim.³⁶ When the offer has not been made within the time limit, the amount of the compensation offered by the insurer or awarded by the court to the victim shall bear interest *ipso jure* at double the legal interest rate as from the expiry of the time limit and until the date of the offer or the final judgment.³⁷ This clearly constitutes a sanction for non-performance by the insurer. This reasoning finds confirmation in the final sentence of article L 211-13 which states: "*Cette*

³⁵ Borghetti, Jean-Sébastien, "Punitive Damages in France" in: Koziol, Helmut & Wilcox, Vanessa, *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna, Springer, 2009, 61; Behar-Touchais, Martine (2002), L'amende civile est-elle un substitut satisfaisant à l'absence de dommages et intérêts punitifs?, *Les Petites Affiches*, 232, nos. 12 & 34.

³⁶ Article L211-9, paragraph 1.

³⁷ Article L211-13.

pénalité peut être réduite par le juge en raison de circonstances non imputables à l'assureur (“This penalty can be reduced by the court for circumstances not attributable to the insurer”). The legislature itself thus views the doubling of the interest due as a penal instrument (“*pénalité*”).

With regard to compulsory construction insurance, the French Insurance Code provides for the same sanction. When the insurer fails to communicate a compensation offer within the statutory time limits or proposes a compensation offer that is clearly inadequate, the insured may, after he has notified the insurer, incur the expenses necessary to repair the damage. In such event, an interest double the legal interest rate shall be applied *ipso jure* to the compensation to be paid by the insurer.³⁸

In the Spanish *Ley de Contrato de Seguro* (Insurance Contract Act) we find a similar rule.³⁹ Article 18 of the Act provides that the insurer is obliged to pay the compensation at the end of the necessary investigations. He is also under the obligation to pay the minimum amount that he may owe within forty days after the declaration of the accident. If the insurer does not pay the compensation or the minimum amount within the applicable time limits, he has to pay additional interest. The first two years half the legal interest rate is added. After two years the rate of interest cannot be lower than 20%.⁴⁰ Again, the amounts due go beyond what is necessary to compensate for loss suffered by the insured.

We believe it is irrelevant that the amounts to be paid on top of the normal compensation are minimal compared to the amounts awarded as punitive damages in the United States.⁴¹ What matters in the context of international public policy is that the French and Spanish legislator decided to deviate from the principle of compensation in private law in order to prevent the occurrence of non-compliance by the insurer.

In Germany one can find courts that award increased damages in cases of insurance bad faith. The egregious behaviour of the insurance company could, for instance, be the delay of the proceedings or the undue influence of the victim. A case before the *Oberlandesgericht* (Court of Appeal) Frankfurt offers an example of extra-compensatory damages being awarded for the deliberate withholding of payment by an insurer. A doctor had overlooked that his patient had two fractured vertebrae. The woman had to endure severe pain for

³⁸ Article L242-1, paragraph 5.

³⁹ Ley 50/1980, de 8 de octubre 1980, de Contrato de Seguro, BOE 17 October 1980, 23126.

⁴⁰ Article 20, paragraph 4.

⁴¹ *Contra* Borghetti, Jean-Sébastien, “Punitive Damages in France” in: Koziol, Helmut & Wilcox, Vanessa, *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna, Springer, 2009, 60.

several months, until a second doctor found the cause of her discomfort. Despite the manifest error of the first doctor, the insurance company declined to pay compensation to the victim.

At first instance the woman received EUR 5.000 for pain and suffering. On appeal, however, the *Oberlandesgericht* heavily criticised the behaviour of the insurer. It found that the insurance company had abused its dominant position. It noted that such arrogant behaviour could frequently be observed. Some insurers tend to treat people who are clearly entitled to payment as annoying claimants. The insurance companies then attempt to drag settlement proceedings for as long as possible for their own economic advantage. The *Oberlandesgericht* could not accept such conduct and subsequently ordered double the amount of damages for pain and suffering solely on the basis of that conduct.⁴²

In another German judgment we also find this reasoning. In this case before the *Oberlandesgericht* Karlsruhe the victim of a car accident suffered serious injuries and also developed psychological problems.⁴³ The insurance company of the defendant delayed the payments to the victim. The *Oberlandesgericht* Karlsruhe raised the amount of damages for pain and suffering due to this delay. The court emphasised that the insurer had a public task. When it is clear that the victim is entitled to compensation, the insurance company should pay the claimant who is in an inferior position. The court held that judges should aim to deter the insurance companies from acting in such an abusive manner.⁴⁴ The increase in the award for pain and suffering had a clear function of prevention in this case⁴⁵.⁴⁶ The common thread in both cases is clear: the principle of compensation in private law is set aside to pursue objectives that normally belong to the realm of criminal law.

In the United States punitive damages are available in insurance bad faith cases. In most American states an insurer owes a duty of good faith and fair dealing to their insured. If the insurer violates this “implied covenant of good faith and fair dealing”, this contractual breach may constitute a tort for which punitive damages may be awarded. We thus see a similar reaction to the societal problem of bad faith handling of insurance claims on both continents. The only difference between the European Union countries of Germany, France and Spain,

⁴² *Oberlandesgericht* Frankfurt 7 January 1999, *Neue Juristische Wochenschrift* 1999, 2447.

⁴³ *Oberlandesgericht* Karlsruhe 2 November 1972, *Neue Juristische Wochenschrift* 1973, 851.

⁴⁴ *Oberlandesgericht* Karlsruhe 2 November 1972, *Neue Juristische Wochenschrift* 1973, 853.

⁴⁵ Rosengarten, Joachim (1996), Der Präventionsgedanke im deutschen Zivilrecht – Höheres Schmerzensgeld, aber keine Anerkennung und Vollstreckung US-amerikanischer punitive damages?, *Neue Juristische Wochenschrift*, 1935.

⁴⁶ Tolani, Madeleine (2011), U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public, *Annual Survey of International and Comparative Law*, 17, 197.

on the one hand, and the United States, on the other hand, is the terminology used to describe the legal armoury deployed to combat this type of unwanted behaviour. Whereas the United States call the measure punitive damages, the Member States examined do not use this term. The legal reality, however, shows that both approaches to the issue are closely related, if not identical.

D. DEFAULT RATE OF INTEREST

As discussed, the increase of interest rates in insurance law indicates the existence of punitive considerations in insurance bad faith cases. Also outside insurance law we can observe interest rates going beyond what is needed to compensate the creditor. The European Union issued Directive 2011/7 which deals with late payment in commercial transactions.⁴⁷ The Directive seeks to combat delays in payment between commercial parties, thereby fostering the functioning of the internal market.⁴⁸ It lays down the obligation for Member States to ensure that a creditor is entitled to interest for late payment without the necessity of a reminder. “Interest for late payment” is defined as interest at a rate which is equal to the sum of the reference rate and at least eight percentage points.⁴⁹ The “reference rate” is the interest rate applied by the European Central Bank to its most recent refinancing operations.⁵⁰ The idea behind the rule is clear: it should not be more favourable for a debtor to owe money to the creditor than to obtain credit from a bank.

We should assess the interest rate from the point of view of the creditor who cannot dispose of the sum owed to him. The loss suffered in such a case can be calculated by looking at the cost for the creditor to acquire a bank loan for the amount owed. The compensatory nature of private law is adhered to as long as the rate stays under the average rate banks charge when issuing a loan. However, to the extent that the interest rate exceeds this bank average it amounts to punitive damages.⁵¹ In the period of January to September 2012, for example, the average interest rate for loans up to EUR 1 million granted to businesses in Germany was 3.4%.⁵² The reference rate of the European Central Bank during that period was first 1%

⁴⁷ Directive 2011/7 of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, *OJ L* 48 of 23 February 2011, 1-10. This Directive replaced Directive 2000/35.

⁴⁸ Article 1.1. Directive 2011/7.

⁴⁹ Article 2(5) & 2(6) Directive 2011/7.

⁵⁰ Article 2(7),(a), (i) Directive 2011/7.

⁵¹ Jansen, Nils & Rademacher, Lukas, “Punitive Damages in Germany” in: Koziol, Helmut & Wilcox, Vanessa, *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna, Springer, 2009, 84.

⁵² See for more information: <ec.europa.eu/enterprise/policies/finance/data/enterprise-finance-index/access-to-finance-indicators/loans/index_en.htm>.

and then 0.75%.⁵³ Germany implemented the Directive by adding the minimum of eight percentage points to the reference rate.⁵⁴ Commercial parties were, therefore, on the basis of the German legislation entitled to 9% and 8.75% interest respectively. The biggest gap between the actual interest rate employed and the average market rate for loans was, therefore, at one point 5.6% (*i.e.* 9 % minus 3.4%). Equally, it seems that 9% is presumably a much higher return than the creditor could have expected had the money owed been available to him. The sanction provided for by Directive 2011/7 can at times thus be severe and could be viewed as punishment. To put it more broadly, any legal interest higher than the average market interest for loans (and, *a fortiori*, higher than the lowest interest rate available) is extra-compensatory to the extent of the difference. The amount of the excess could be understood as pursuing a punitive aim.

E. DAMAGES FOR PERSONALITY RIGHTS VIOLATIONS

The field of personality rights offers an example of deterrence objectives going beyond the normal preventive side-effect of damages. In Germany personality rights received increased attention after World War II. The *Bundesgerichtshof* recognised a general right of personality for the first time in 1954. The *Reichsgericht* (Imperial Court of Justice), the supreme criminal and civil court of the German empire from 1879 to 1945, had always declined to do so. In the so-called *Schachtbrief* case a lawyer wrote a letter to a newspaper on behalf of his client, minister Hjalmar Schacht. In it he requested the correction of certain false political statements. The newspaper published the letter under its “Letters from Readers” section. The reproduction did not make it clear that the lawyer was acting on behalf of his client. The publication thus shed a negative light on the lawyer as it gave the impression he was voicing his own political views instead of performing his professional duty. The *Bundesgerichtshof* referred to article 1 (Human Dignity) and article 2 (Personal Freedoms) of the 1949 Constitution and established a general personality right. On the basis of that right it ordered a corrective statement to be issued by the defendant.⁵⁵

Four years later in the *Herrenreiter* judgment the *Bundesgerichtshof* awarded damages for infringement of personality rights to a brewery owner whose image was used in

⁵³ See in this regard the website of the European Central Bank: www.ecb.europa.eu/stats/monetary/rates/html/index.en.html.

⁵⁴ § 288, (2) Bürgerliches Gesetzbuch (German Civil Code).

⁵⁵ BGH 25 May 1954, *BGHZ* 13, 334.

advertisement for potency pills. On the picture he was seen riding a horse at a show-jumping competition. The brewery owner sued for damages for injury to his feelings and reputation. The Supreme Court upheld the DM 10.000 granted to the plaintiff by the *Oberlandesgericht Köln*. It noted that article 847 BGB only allows for damages for pain and suffering in case of violations of body, health or freedom. The Court, however, adopted a *contra legem* interpretation of the provision and drew an analogy between infringements of freedom and serious violations of personality rights. Without such an approach no remedy would have been available.⁵⁶ It should be noted that only *serious* violations of personality rights could fall under article 847 BGB. This restriction resembles the tortfeasor-oriented approach of punitive damages. The latter can only be awarded for conduct meeting a certain level of reprehensibility. Compensatory damages on the other hand are exclusively linked to the damage suffered.⁵⁷

In *Ginseng*⁵⁸ the plaintiff was a law professor who had brought a ginseng root with him from a stay in Korea. He placed the root at the disposal of his friend, a professor in pharmacology, for research. The latter mentioned in a scientific article on ginseng roots that he had come into possession of genuine Korean ginseng roots “through the kind assistance” of the plaintiff. This led to the plaintiff being described in a popular scientific article as one of the best-known ginseng researchers of Europe. In an advertisement for its tonic containing ginseng the defendant company described the plaintiff as an important scientist who expressed an opinion on its value. Furthermore, in an editorial note, printed in immediate connection with an advertisement in another journal, allusion was made to the use of the product as an aphrodisiac. Both the advertisement and the journal were very widely distributed. The plaintiff asserted that he had suffered an unauthorised attack on his personality right. In his opinion the advertisement gave rise to the impression that he had been paid to issue an opinion on a controversial topic outside his field of knowledge. Moreover, it seemed he had unprofessionally lent his name to the advertising of a doubtful product. He had suffered damage to his reputation as a learned man and been made an object of ridicule to the public and above all to his students. In relying on *Herrenreiter* he claimed damages for the harm done to him.

⁵⁶ BGH 14 February 1958, *BHGZ* 26, 349; Magnus, Ulrich, “Punitive Damages and German Law” in: Meurkens, Lotte & Nordin, Emily, *The Power of Punitive Damages – Is Europe Missing Out?*, Cambridge, Intersentia, 2012, 253; Beverley-Smith, Huw, Ohly, Ansgar & Lucas-Schloetter, Agnes, *Privacy, Property and Personality – Civil Law Perspectives on Commercial Appropriation*, New York, Cambridge University Press, 2005, 101.

⁵⁷ Auf'mkolk, Hendrik (2007), U.S. punitive damages awards before German courts – Time for a new approach, *Freiburg Law Students Journal*, 7.

⁵⁸ BGH 19 September 1961, *BGHZ* 35, 363.

The *Bundesgerichtshof* confirmed the first instance decision by the *Landgericht* Düsseldorf which had awarded DM 8000. It emphasised the blameworthiness of the defendant's conduct. The Court again ruled that compensation for immaterial damage can only be awarded when the wrongdoer committed a serious fault. For the first time Germany's Supreme Court also alluded to a preventive consideration in cases of infringement of personality rights.^{59,60}

Over a decade later, in *Soraya*, the German Constitutional Court (*Bundesverfassungsgericht*) determined the steps taken by the *Bundesgerichtshof* to be in accordance with the Constitution. The ex-wife of the shah of Iran, Princess Soraya, had brought an action against a German illustrated weekly paper. The latter had brought a front-page story purporting to be the transcript of an interview with the plaintiff. The interview appeared to reveal much of the plaintiff's private and very private life but was wholly fictitious as it was invented by a freelance journalist. The defendant published the story without investigating whether the interview had actually taken place. A couple of months later the defendant's paper carried another story dealing with Princess Soraya. That time the defendant published a brief statement by the Princess to the effect that the alleged April interview had not taken place.

At first instance, on appeal as well as before the *Bundesgerichtshof* the plaintiff prevailed, receiving DM 15.000 in damages. The defendant then brought the case before the Constitutional Court. In its reasoning the *Bundesverfassungsgericht* made clear that the judiciary has the power to give concrete effect to the existence of legal rules found outside the written law created by the legislature. The Supreme Court had noticed a lacuna in the law and had decided to give expression to certain legal values which were implicitly accepted by the constitutional order (in particular articles 1 and 2 of the Constitution). Given the failure of legislative attempts to protect the right of personality, the courts were entitled to ensure this protection through case law.⁶¹

An important further development took place in *Caroline von Monaco I*. The *Bundesgerichtshof* emphasised the preventive purpose of damages for breach of personality rights.⁶² The facts

⁵⁹ Tolani, Madeleine (2011), U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public, *Annual Survey of International and Comparative Law*, 17, 194.

⁶⁰ BGH 19 September 1961, *BGHZ* 35, 363.

⁶¹ Bundesverfassungsgericht 14 February 1973, *Neue Juristische Wochenschrift* 1973, 1221.

⁶² Magnus, Ulrich, "Punitive Damages and German Law" in: Meurkens, Lotte & Nordin, Emily, *The Power of Punitive Damages – Is Europe Missing Out?*, Cambridge, Intersentia, 2012, 253; Tolani, Madeleine (2011), U.S.

of the case were quite similar to those in the *Soraya* judgment. Two widely distributed German magazines contained a fictitious interview with Princess Caroline. In addition, an article mentioned a number of untrue statements about her. Pictures of her taken by paparazzi also appeared on the cover. The Princess brought a claim for retraction and clarification as well as for monetary compensation for infringement of her personality right. Both at first instance as well as before the Court of Appeal of Hamburg the Princess was granted the right of correction as well as DM 30.000 in damages.⁶³

The *Bundesgerichtshof* repeated that victims of a breach of the general right of personality are entitled to compensation if the violation is grave. The gravity of the violation depends *inter alia* on the defendant's motive and degree of culpability. The Court found such a grave intrusion on the facts of the case. The defendant knew that Princess Caroline did not want to be interviewed and instead created a fake interview about the problems in her private life. In order to boost its sales figures it deliberately exposed the plaintiff's private sphere to hundred thousands of readers.

The Court further ruled that the compensation of DM 30.000 was not sufficient. It no longer relied on article 847 BGB (damages for pain and suffering) as the basis for the monetary claim. Instead, the redress was held to flow from articles 1 and 2 of the German Constitution. Importantly, this form of redress is meant to serve a preventive purpose as well. Monetary compensation can only properly serve this aim of prevention if the amount due correlates to the fact that the infringement took place for commercial gain. This does not mean that the forced commercialisation of the Princess' personality right should lead to a complete absorption of profits (*i.e.* a restitutionary remedy⁶⁴) but the profits made should be included as a factor in the calculation of the compensation. Where a famous personality is commercially exploited, the amount awarded must act as a real deterrent.⁶⁵

When the Court of Appeal of Hamburg reconsidered the case, it followed the *Bundesgerichtshof's* findings and awarded DM 180.000 in damages. This amount was the

Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public, *Annual Survey of International and Comparative Law*, 17, 195.

⁶³ BGH 15 November 1994, *BGHZ* 128, 1.

⁶⁴ Amelung Tilman, Ulrich (1999), Damages Awards for Infringement of Privacy – The German Approach, *Tulane European and Civil Law Forum*, 14, 21.

⁶⁵ BGH 15 November 1994, *BGHZ* 128, 1.

highest sum ever awarded in Germany for violation of personality rights as damages in similar cases were up to that point always limited to DM 10.000.⁶⁶

Two points of the judgment require further elaboration. First, the Court took the publisher's motive and his degree of culpability in account when determining whether the violation of Caroline of Monaco's right was grave. This seems inconsistent with the victim-focused method of private law. Second, when setting the level of compensation for the breach of privacy, the German Supreme Court held that courts should consider the profits made by the tortfeasor in order to *deter* the defendant and other tabloids. By introducing the purpose of deterrence in violation of privacy cases the *Bundesgerichtshof* arguably crossed the line between compensation and punishment. Indeed, prevention is traditionally associated with objectives of criminal law. By explicitly making deterrence a factor in a private law dispute, the Court blurred the distinction between civil law and criminal law.⁶⁷ If the words of presiding judge Erich STEFFEN are anything to go by, this dogmatic landslide was intentionally caused. He pointed out in an interview after the case that the damages should be painful for the publisher.⁶⁸

It could, therefore, be argued that the approach taken by the *Bundesgerichtshof* in *Caroline I* does not fit within the traditional framework of compensation but rather corresponds to the ideas behind punitive damages. By focusing on the wrongdoer('s act) and the need to prevent repetition by him or commission by others for the first time, the case breaks away from the orthodox position of loss-restoring and victim-orientated compensation.⁶⁹ The use of clear punitive⁷⁰ elements in *Caroline I* can thus be seen as breaking down the theoretical walls between private law and public law and demonstrates the existence of mechanisms close to – or at the very least pursuing the same aims as – punitive damages in German private law.

⁶⁶ Amelung Tilman, Ulrich (1999), Damages Awards for Infringement of Privacy – The German Approach, *Tulane European and Civil Law Forum*, 14, 22; Behr, Volker (2005), Myth and Reality of Punitive Damages in Germany, *Journal of Law and Commerce*, 24, 210.

⁶⁷ Amelung Tilman, Ulrich (1999), Damages Awards for Infringement of Privacy – The German Approach, *Tulane European and Civil Law Forum*, 14, 23.

⁶⁸ X (1996), ZRP-Rechtsgespräch mit Vorsitzendem Richter am BGH a. D. Dr. Erich Steffen, *Zeitschrift für Rechtspolitik*, 366.

⁶⁹ Behr, Volker (2005), Myth and Reality of Punitive Damages in Germany, *Journal of Law and Commerce*, 24, 211.

⁷⁰ Behr, Volker (2003), Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts, *Chicago-Kent Law Review*, 78 (1), 136; Behr, Volker (2005), Myth and Reality of Punitive Damages in Germany, *Journal of Law and Commerce*, 24, 210. *Contra*: Jansen, Nils & Rademacher, Lukas, "Punitive Damages in Germany" in: Koziol, Helmut & Wilcox, Vanessa, *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna, Springer, 2009, 80 and 81; Magnus, Ulrich, "Punitive Damages and German Law" in: Meurkens, Lotte & Nordin, Emily, *The Power of Punitive Damages – Is Europe Missing Out?*, Cambridge, Intersentia, 2012, 253.

4. CONCLUSION

The presence of these mechanisms in the private law of a number of prominent Member States leads to the conclusion that the concept of punitive damages, in itself, can no longer be held to be contrary to international public policy. The French and the Spanish Supreme Court already reached this conclusion in their respective decisions on the enforcement of punitive damages. The existence of mechanisms belonging to private law which, nevertheless, pursue punitive and deterrent aims indeed changes the contours of the international public policy exception. This conclusion does not mean that acceptance of U.S. punitive damages should be unbridled. The *amount* of the punitive damages can still offend the values underlying the international public policy mechanism, justifying a rejection of the excessive award.⁷¹

⁷¹ For a detailed discussion of how to approach the (possible) excessiveness of American punitive damages at the enforcement stage: Vanleenhove, Cedric (2017), A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional ‘¡No pasarán!’, *Vermont Law Review*, 41, 377-403..