Punitive damages in Europe: Concern, threat or non-issue?
Punitive damages have always been of concern for insurers, and the experience in the U.S. has tended to confirm this anxiety. At first glance, such developments seem not to be an issue in Europe. But as this paper shows, elements of punitive damages are present in several European jurisdictions as well.
Capricious, arbitrary awards of punitive damages in the U.S. have long drawn criticism in Europe and are often viewed as an anathema for sound public policy and sustainable commerce. And a number of European courts indeed refuse to enforce U.S. punitive damage awards on the grounds they run counter to *ordre public* or public policy.

This paper discusses European jurisprudence on punitive damages, including the exceptions to the general rule of no recovery where compensatory damages can be increased or some penalty element added. It also looks at punitive damages under Directives of the European Union and their general insurability.
There is no recovery of punitive damages in continental Europe in civil litigation. And in the UK and Ireland, recovery of punitive damages is rare and limited. By contrast, punitive damages in the U.S. are frequently sought and huge awards make headline news. The European perspective is that recovery of punitive damages would have an adverse economic impact, create unpredictable results and be unfair. Neither are such courses of action consistent with European legal culture and practices.

The difference between punitive and compensatory damages

First of all, punitive damages need to be contrasted with compensatory damages. Where one person has suffered harm from a wrongful act of another, compensatory and contract damages are generally the amount of money needed to restore the damaged party to the condition that existed before the wrongful act or contractual breach occurred. Fines and sanctions are generally amounts of money paid to a government body when rules are broken.

By contrast, punitive damages are awards of money to punish a party and to deter others from similar outrageous or reckless conduct by setting an example. Punitive damages are awarded in addition to compensatory damages and are often described as quasi-criminal punishment. Punitive damages can also be described as exemplary damages. For the purposes of this article, we will refer to them as punitive damages.

Most judges and lawyers would deny that punitive damages are available at all in continental Europe. In the UK and Ireland, punitive damages are available even in the context of defamation, slander and libel and in cases involving false imprisonment or improper governmental action. However, as in all continental European countries, UK and Irish punitive damages are determined by judges rather than juries. Moreover the legal culture does not encourage awards of such damages.

While Europe is largely free of punitive damages, caution is still advised

Of the 15 jurisdictions surveyed in this report, 13 make no provision for punitive damages. These include Austria, Denmark, France, Finland, Germany, Hungary, Italy, The Netherlands, Norway, Poland, Spain, Sweden, and Switzerland. The 2 countries permitting punitive damages to a limited extent are the UK and Ireland. In no country are punitive damages designed to influence personal or business conduct.

This survey indicates the status of the law on the availability of punitive damages and related legal issues. While Europe may be largely considered a zone free of punitive damages, there is still some cause for concern. The means that the current legal landscape will continue to require close monitoring.
II. Punitive damages in individual European countries

1. Austria

Austrian law does not provide for punitive damages. Consequently, foreign judgments granting punitive damages are not enforceable in Austria either, in that they are deemed in violation of the ordre public. However, in 2008 there were calls in the University of Salzburg for the introduction of punitive damages into Austrian law in cases of intentional wrong, in connection with realisation of undue profits (Prof. Andreas Kletecka, inaugural lecture, Salzburg University, “Die Presse”, 22.4.2008). Up to now at least, such calls have not led to any change in the law.

2. France

Generally, the concept of punitive damages is not known in French civil law. The law of extra-contractual liability – also known as tort law – is governed by the principle of full compensation (“réparation intégrale”) which aims at compensating for the harm suffered, not for making the plaintiff any richer (“tout le damage, mais rien que le dommage”). This is also the view of France’s highest Court, the Court de Cassation.

A mixed picture

Notwithstanding the above observations, recent consumer protection initiatives pursued by members of the French Government (Messrs. Catala and Béteille) could be construed as moves towards punitive damages. Being in charge of both a Liability Law Clean-up and a Simplification Project, they recommended the introduction of such a concept. However, the concept only would be used to penalize deliberate behaviour and voluntary negligence, with any punitive award going either to the victim, the Treasury or a Compensation Fund, at the discretion of the presiding judge.

Apart from this, in 2007, translating EU Directive 2004/48/EC of 28 April 2004, new provisions have been introduced into the French Intellectual Property Code (Code de la propriété intellectuelle), governing the seizure of illegal profits. However, in the strict definition of punitive damages, this seizure may not be considered “punitive”. Nonetheless, in this case, the law does undoubtedly exercise a punishing function.

Although punitive damages in general are unknown, French law does incorporate the concept of insurance bad faith, under which interest is awarded at twice the legal rate should an insurer fail to react to an offer made in respect of compensation under the policy.

Most recently, the French Court de Cassation handed down a ruling in respect of recognition and execution of a U.S. judgment comprising punitive damages, in France. Noteworthy is that the Court held that punitive damages do not, per se, contravene the local ordre public. However, enforcement of the judgment was ultimately rejected because the Court held that any punitive amount must be in proportion to the damages. In this specific instance, with a ratio of damages to punitive damages of 1:1, this was not found to be the case. This decision may be interpreted as recognition that a French court might indeed enforce proportional punitive damages which had originally been awarded outside France.
II. Punitive damages in individual European countries

3. Germany

In general, the concept of punitive damages is unknown in Germany. However, there are certain areas in the law where damages over and above the actual damage sustained are being awarded, e.g. in Tort Law and in Personal Rights Law. However, although these kinds of damages constitute a penalising element as far as the defendant is concerned they are not considered "punitive damages" in the U.S. definition of the term.

According to established case law of the German Supreme Court, in connection with tort law, general damages consist of two elements: One is the compensatory factor, considering the personal pain and suffering of the victim. The other is the penalization factor, focusing on the wrongdoer’s behavior and serving personal and general prevention. Although the latter element has a punitive intention – as far as the prevention aspect is concerned - the German Supreme Court makes it quite clear that this should not be compared to the U.S. generic term, “punitive damages” (BGH NJW 1992, 3069).

Stirrings in Germany too

Nevertheless, a punitive element in German tort law is discernible. In cases of infringements of personal rights, general damages awarded to the victim can include an uplift, reflecting the tortfeasor’s mischief, plus a penalising factor in order to prevent recurrences (see e.g. case Caroline of Monaco vs. WAZ Media, BGH VI ZR 332/94).

Moreover the German jurisdiction also makes provision for increased damages in cases of insurance bad faith. Instances in this connection are behaviours such as the delaying of proceedings, false accusations or undue influence of the victim, or of the third party. In such cases, punitive awards, on top of general damages, range between 10% and a maximum of 100% (doubling general damages e.g. Court of Appeal/OLG Frankfurt, 12-U 7/98, NJW 1999, 2447).

Indeed over the past 10 years in Germany, too, there have been attempts to introduce punitive damages, e.g. into labour law. Although bills did reach the committee stage, they never progressed as far as the final readings. That said, consumer groups are still lobbying hard for punitive elements to be placed on Germany’s statute books.

Although preventive/punitive elements are present in German law, any fraction of an award falling into this category would not be considered a punitive damage in the strict U.S. sense of the word. Since damages are not an issue in the German market as such, they are not insured under a local standard GTPL-policy.

In connection with the topic, it should be mentioned that a U.S. summons including punitive elements may be served in Germany, since the punitive element as such does not contravene German ordre public. But this is only the case as far as the service is concerned (BVerfG, 2BvR 1133/2004). However, any U.S. judgment including punitive damages is only then enforceable (recognised for execution) provided it complies with the ordre public, which is generally not the case.
4. Hungary

In principle, punitive damages are prohibited under the Hungarian Civil Code. However, as in other European countries, punitive elements are considered when it is deemed Personal Rights have been infringed, and in connection with generally accepted penalty clauses in contract law (§246 Civil Code). Given a historically founded aversion to repressive legal sanctions in Hungary (such as public penalty and private law confiscations), it is unlikely that punitive damage will be introduced into its legal system in the foreseeable future (Prof. Attila Menyárd, University of Budapest, l.c.: Koziol/Wilcox, p. 87 et seq.).

5. Ireland

The Republic of Ireland is a Common Law country. The current common law position does not preclude punitive damages for breach of constitutional rights, or for any torts. The Civil Liability Act 1961 contains the only general legislative provisions dealing with punitive or aggravated damages. A specific provision for awarding punitive damages can be found in private antitrust litigation, Section 14 (5)(b) of the Competition Act 2002.

Returning to general civil liability, the Act of 1961 does, however, exclude the award of punitive damages in survivor actions and actions for wrongful death. It also regulates the award of punitive and aggravated damages in cases where there are concurrent tortfeasors. Damages of this nature in Ireland are not known in cases of breach of contract. Recent cases where a claim for punitive damages has been made, and awarded, are mostly linked to Libel and/or Breach of Constitutional Right to Privacy.

**In Ireland, they are the exception**

As a rule, punitive damages are only awarded in exceptional circumstances. This would include circumstances where, for example, there has been a deliberate and conscious violation of rights. In addition, the conduct in question must be seen as outrageous, extremely malicious or socially harmful to the extent that the courts wish to make an example of the defendant for reasons of public policy. If aggravated punitive damages are awarded, they tend to be a fraction of the contributory damages rather than a multiple. Large amounts of punitive damages are generally not awarded by Irish courts. They range between 10–30% of general damages. As an example, in the libel case of *Kinsella v Kenmare Resources*, 2010, the total award amounted to EUR 10 million, including EUR 1 million for aggravated damages.

Concerning the insurance industry, currently there is no legislative prohibition on insurance for punitive damages. However, punitive damages are generally excluded from liability policies. And reinsurance policies are generally silent on the matter as well. However, most reinsurance policies specifically exclude punitive damages arising from court decisions in the United States and Canada. Reinsurers tend to rely on cedents to apply the exclusions. A reinsurance policy is also generally silent on punitive damages.

Punitive damages are unlikely to become an important part of general damage awards in civil liability cases in Ireland in the foreseeable future (and therefore an important consideration for insurers). The Law Reform Commission Report on Aggravated, Punitive and Restitutionary Damages (2000) is quite clear in stating that the intention is for punitive damages to remain an exception rather than become the norm.
II. Punitive damages in individual European countries

6. Italy

The Italian civil law system does not envisage punitive damages in addition to typical compensatory damages awarded by Courts. The compensatory category embraces 1) economic damages, 2) biological damages – affecting a person’s psycho-physical integrity – and 3) non-pecuniary or moral damages, including compensation for pain and suffering; the latter category is mainly in connection with criminal offences (Art. 2059 Civil Code). Compensatory damages are awarded by Courts irrespective of the defendant’s ability to pay or the degree of culpability involved. Specifically in respect to punitive damages, the Italian Supreme Court, in a 2007 judgment, ruled that this head of damage conflicts with fundamental principles of the law and is thus not available (Cass., 17 January 2007, no. 1183, GI 2007, 12, 2724).

Punitive in all but name

Although the principle of punitive damages does not exist in Italy, it is worth mentioning that despite this, regulatory sanctions of a punitive nature can be applied in the insurance sector by the ISVAP (Private Insurance Companies’ Vigilance Institute). This is mostly the case in connection with Motor Third Party Liability claims (MTPL), in circumstances of bad faith, unreasonable resistance to settle (delay in offering an adequate compensatory amount within a fixed period of time, which is 120 days for bodily injury cases) and delayed payment after a claim is finally agreed and settled. Nevertheless, these sanctions would not be classified punitive damages as such.

In respect of foreign judgments ordering the defendant to pay punitive damages, these are not enforceable in Italy, following the above cited Supreme Court decision, which is considered stare decisis in Italy.

7. The Netherlands

Generally speaking, exemplary awards are unavailable since the concept of punitive damages in the strict U.S. definition is unknown in the Netherlands. However, there may be elements in some cases which would fall into the punitive category, as these go further than necessary in compensating the injured party for actual damage sustained.

Dutch flexibility

The assessment of damages is flexible, with the Dutch civil code giving the Court a fair amount of discretion regarding quantum. The judge may, for instance, estimate damages based on the profit made by the defendant through an unlawful act. This could have the effect that the award is higher than the actual damage the plaintiff has sustained. Nevertheless, any difference is not recognized as punitive damage, rather aiming at the prevention of further infringements by either the tortfeasor or others. As punitive damages are unavailable, they are not insured under local Dutch insurance or reinsurance policies. As an alternative to the U.S-generic term “punitive damages”, policies often refer to them as Extra Contractual Obligations (ECO’s). Punitive damages are considered contrary to local public policy. So they may not be imposed by either civil courts or arbitration tribunals. Consequently, foreign judgments granting punitive damages are generally not enforceable in The Netherlands.
8. Poland

Punitive damages are not an issue in Poland either. Considering the fundamental principles underlying Polish private law, it seems unlikely that this situation will change in the foreseeable future. An exception to the general rejection of the idea of punitive damages is art. 79 of the Copyright Act. Under this law, an author may claim from a person infringing his rights double, or – where the infringement was intended – triple the amount of remuneration due for the use of the work.

Any foreign judgment awarding punitive damages in general may be considered in violation of the local Polish ordre public.

9. Scandinavia

In recent study, Prof. Bjarte Askeland of the University of Bergen, reaches the conclusion that generally punitive damages “do not have a tradition” under Scandinavian law. A certain punitive element, however, may be coming into play in connection with non-pecuniary loss in cases of personal injury claims. Here, the sum awarded to the victim should also reflect a) the degree of culpability on the part of the defendant and b) the severity, i.e. the gravity of the tort committed. This is no different than in many other European countries. However, these elements may not be considered of punitive nature in the strict legal definition. Thus, no examples of real punitive damages under Scandinavian tort law can be cited (Bjarte Askeland, l.c.: Koziol/Wilcox, p. 115 et seq.)

Finland

As indicated in the introduction to Section 9, Finnish law does not recognize punitive damages and currently there are no judicial moves that would change this. Also, as a rule, foreign judgments including punitive damage elements are neither recognized or enforced in Finland because of conflict with the ordre public.

Norway

In the case of Norway, please refer to the introduction to this Section. Concerning foreign judgments requested for enforcement in Norway, every case requires individual assessment to verify there is no conflict with the local ordre public. This can be a lengthy process. Generally, provisions, orders and judgments encompassing punitive damages are considered in contravention of the local Norwegian ordre public.

Denmark

Denmark does not have a concept of punitive damages either, with the exception of a few statutory exceptions primarily related to unjustified termination of employment.

Sweden

Punitive damages are neither awarded or enforceable under Swedish law.
10. Spain

Punitive damages are not part of the Spanish legal system. Both judiciary and advocacy share the view that tort law should only have a compensatory function, not a punitive role, which instead should be subject to criminal law. However, as in many other European countries, some provisions in Spanish civil law do bear a resemblance to punitive damages, although locally these would not be categorized as such.

Civil law has punitive elements

One example is the increase in social security benefits, paid following an industrial accident caused by inadequate safety measures taken by an employer. According to Article 123 LGSS, benefits are to be increased by between 30 and 50% in case the injuries result from an employer’s failure to comply with occupational safety and health ordinances. Because of a specific exclusion, any increases of benefits are not insured under a standard Spanish employers’ liability policy. This form of punitive award has thus no impact on the insurance market.

The other example relates to insurance claims handling: In Spain, additional interest on top of the standard interest rate is awarded in cases of unjustified delays in payment of claims (Article 20 Insurance Contract Act - ICA). The extra interest is 50% in the first two years. Bearing in mind the punitive damage definition, however, the additional interest cannot be subsumed under the heading “punitive damage”, although a penalty element clearly can be established.

11. Switzerland

Generally the instrument of punitive awards is not known in Switzerland. However, elements with a similar character can be found in some isolated areas of the law. Specifically this is the case in Labour law (Art. 336a and 337c OR), where a penal surcharge may be awarded in case of an unjustified termination of employment. Specifically, the statute uses the equivalent of the term “punitive damage” (“Strafzahlung”). There is a similar element in Gender law (Art. 5 GIG) where there is a penal surcharge in addition to ordinary damages due in cases of discrimination and sexual harassment in the employment world.

Also, in cases of license fee avoidance, Art. 423 OR of the Intellectual Property Law not only permits the attachment of profits, but also gives the injured party the right to claim a penalty surcharge regardless of proof that any damage was incurred.

With respect to Swiss tort law, compensation in respect of Pain & Suffering can be awarded should the conduct of the tortfeasor be deemed willful, wanton, and reckless.

Ordre public is key

Although punitive elements clearly can be found in Swiss law, this does not mean that foreign judgments containing punitive damage elements are automatically enforceable for execution. And they are still subject to the ordre public rule. Even though the attachment of profits – which does contain a punitive element – passes this test, a U.S. judgment ordering treble punitive damages on top of general damages did not. The judgment in question, concerning contract law, did not qualify and was found to be unenforceable because it violated the local ordre public.
12. United Kingdom

The United Kingdom consists of England, Wales, Scotland and Northern Ireland. Scotland and Northern Ireland have their own legal systems and generally it can be said that punitive damages have no place in either Scots or Northern Ireland law.

Punitive damages a familiar feature of English tort law

In English law, the primary object of an award of damages is to compensate the claimant for the harm done to him. In certain limited circumstances, in tort law, the defendant can be punished for his conduct in inflicting the harm by the award of punitive damages, in addition to the normal compensatory damages. Aggravated damages, as these are also called, are intended to compensate the claimant for mental distress caused or increased by the defendant’s conduct, either in the way he committed the wrong or as a result of his behaviour subsequent to the wrong. That said, in the case *Rookes v Barnard* [1964] the House of Lords held that, except in a few exceptional cases, punitive damages against a defendant were not permissible however outrageous his conduct. Notwithstanding this case, punitive damages may be considered a familiar feature of English tort law.

Following *Rookes*, punitive damages are available in only three categories: The first two are common law categories and the third is statutory law:

1. Oppressive, arbitrary or unconstitutional conduct by government servants: Government servants include Crown servants, police and local and other officials.
2. Conduct calculated to result in profit, where such profit may exceed the compensation payable to the claimant.
3. Express authorization by statute. There were very few statutory provisions of this nature before *Rookes*, and none has clearly appeared since. If one of these conditions is satisfied, exemplary damages are available in any claim in tort. To the extent that punitive damages are awarded, the monetary element is only moderate.

The question of insurability of exemplary damages was considered by the Court of Appeal in *Lancashire County Council v MMI* (1997). The Court held that such insurance was not contrary to public policy in English law.

In contrast to tort law, neither punitive nor aggravated damages are awarded in breach of contract claims, including insurance contracts. This is unlikely to change in future, an assessment underpinned by a statement of the Law Commission (Paper 6, March 2010). The Commission clearly states that it does not propose that a breach of the duty of good faith should form a separate tort. Hence, exemplary damages are not awarded in connection with insurer bad faith. However, in a Consultation paper published at the end of 2011, the English and Scottish Law Commissions (ESLC), reviewing insurance contract law, suggested the implementation of post-contractual duties. Regarding such duties, there is a proposal on the table for insurers to be subject to damages claims in cases of delay or failure to pay a valid insurance claim. Currently, any economic damage sustained as a result of an insurer’s non-performance, other than interest, is not recoverable.

Although the implementation of Lord Justice Jackson’s litigation cost reforms includes, inter alia, the provision of an additional cost sanction against the defendant on failure to beat a Part 36 offer at trial (sanction may be an amount equal to 10% of the value of the claim as awarded by the court), this sanction aims to encourage a settlement rather than punishing the defendant. So again it is doubtful that the sanction may be considered punitive in nature.
The discussions on punitive damages and their acceptance under European law, at EU level, are rather ambivalent. Looking at the body of law, the Treaty establishing the European Community (ECT), in art. 288, dealing with claims against EU institutions arising out of non-contractual liabilities, only speaks of compensation for any damage caused; it does not mention punitive damages. This points to a pure compensatory regime. But it is doubtful whether art. 288 has any implication for private law.

**Ambivalence on punitive damages but no U.S.-style abuses**

Closer to the subject is the so called Rome II Regulation (Regulation EC No. 864/2007 of 11 July 2007), dealing with non-contractual obligations, which is the legal generic term for tort law. Although the Commission in the original draft of the Regulation, in connection with an article on *ordre public*, had planned to include a separate article dealing with “non-compensatory damages” (meaning punitive damages) which would have been binding for the national courts, it was not thought to be appropriate to lay down common criteria for the purpose of defining what public policy (*ordre public*) is in individual European countries. Therefore, in its final version, the planned article on non-compensatory/punitive damages was left out which may be seen as a clear political vote against punitive damages as such. In consequence, each member State is free to hold punitive damages – in part or in all – in violation of its local *ordre public*. This is the situation as it is now.

As we can see from the Country Reports, although punitive elements may be discovered in one or the other tort law system of a EU member State, U.S. punitive damage awards are generally rejected for execution on grounds of violation of the *ordre public*. This is another clear vote in respect of punitive damages coming from the European judiciary.

Should any discussion on punitive damages be taken up again on EU level, the view is that even if they are introduced at some time in the future, legislators will undertake every effort to avoid the kind of abuses seen in the United States. This view is supported by the way in which the EU deals with the topic of class actions. Although the European Union does understand the sense of implementing U.S.-style collective redress schemes, the Commission has made it quite clear that it intends to avoid any U.S.-style abuses. It is expected to adopt this stance, too, with respect to punitive damages. The judgment of the French Court de Cassation (see above, Country Report France), holding that any punitive amount must be in proportion to damages awarded, adds credence to this view.

Monitoring European legal developments, there is nothing on the radar which might suggest that punitive damages are becoming an area of concern. And the view is that this is unlikely to change in the foreseeable future.
IV. Punitive damages and insurance

Any consideration must be guided by the thought that punitive damages in respect of the wrongdoer are intended to have a penal function, aiming at both personal punishment and future prevention. These purposes are jeopardized if insurance covers this portion of an award. This is also the reason why in many jurisdictions where punitive damages are explicitly allowed, it is deemed illegal to insure against them, for reasons of public policy. On the other hand, one must also consider the interests of the insured; the latter will wish to avoid any gap in coverage that will possibly expose him to financial distress or even the risk of insolvency, if the punitive award is high enough.

Since insurance is a customer-driven and risk-oriented business, cover for punitive damages is usually granted in insurance policies, especially in lines of business heavily exposed to such awards, as is the case, for instance, in product liability. This is achieved by either explicitly including punitive damages, or on a so called “silent basis”, meaning that the contract does not mention coverage for punitive elements.

Noteworthy in this context from a reinsurer’s perspective are situations of insurance bad faith, in which the insurer, because of his behaviour towards either the insured or a third party, is confronted with a penal order by the court (e.g. by awarding additional interest) or with regulatory sanctions. Especially in Motor Third Party Liability Insurance, there is a growing tendency in Europe to impose a surcharge on insurers who do not meet certain deadlines or other criteria in the settlement of claims towards injured persons. This is either achieved by an increase in interest or in general damages. Although these measures may not be deemed punitive damages in the narrow sense, they are nevertheless of a punitive nature and thus excluded from cover under a reinsurance contract. Many reinsurance contracts have ECO, XPL or combined clause; this element would provide reinsurance indemnity for extra-contractual obligation or payments should courts find that failure to settle within policy limit means that an insurer is obliged to pay a judgment in excess of policy limit.
V. Outlook and conclusion

The concept of punitive damages is not new in Europe and has its roots partly in ancient Roman law. It has been absorbed into modern law over time and it is fair to say that punitive damages nowadays are more or less not recoverable in Continental Europe. That said, punitive damages are recoverable in limited circumstances in Great Britain and Ireland.

Punitive damages, if awarded, have a fourfold function: Primarily they serve the purpose of punishing the wrongdoer for a specific misconduct. Depending on the facts of the case, earnings from unlawful behaviour may be confiscated. Further, punitive damages are to deter both the wrongdoer and other persons from similar misbehaviour. Finally, the punitive portion is to give some additional relief to the injured party whose rights have been violated.

In terms of numbers, judgments encompassing punitive elements do not play a significant role in Europe. Also in monetary terms, punitive awards clearly stay within reasonable limits and thus are not comparable to the equivalent in the United States, where the penal element can be several times over the award. This excessive element is the reason why U.S. judgments including punitive elements are generally not enforceable in Europe because they conflict with the ordre public. This is unlikely to change, even though penal elements can clearly be seen in European law as well. That said, this acknowledgement does not affect the sustainability of the ordre public argument.

Returning to the initial question, it can be stated that although punitive elements in European tort law do exist, they are not of great significance. Other than in the United States, the instrument is well balanced and used only in certain circumstances, without leaving the defendant financially devastated. Currently, the European environment surrounding the concept is unlikely to change; at the moment, therefore, there is neither a threat nor a concern. However, as with all legal concepts, the issue of punitive damages might change in the future and close monitoring is still advised.
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