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Время выполнения задания 150 мин.

1) Прочитайте статью* и сделайте ее критический анализ на русском языке.

*Статья из кн.: The Power of punitive damages: Is Europe missing out?/ Ed. L. Meurkens, E. Nordin. – Cambridge, UK; Portland: Intersentia, 2012, p.333-349.

Cedric Vanleenhove. Punitive Damages and European Law: Quo Vademus?

1. The Concept of Punitive Damages

The availability of punitive damages has long been recognized in common law jurisdictions including the United States, New Zealand, Canada and Australia.¹ They are not intended to compensate for harm done but are awarded in excess of any compensatory or nominal damages.² Compensatory damages on the other hand provide reparation both for economic (e.g. medical costs) and for non-economic losses (e.g. pain and suffering). Punitive damages essentially serve four purposes: to punish the offender for uncivilized conduct, to deter the offender and others from similar conduct, to reward the plaintiff for enforcing the law and to supplement inadequate compensatory damages.³ Although punitive damages are not intended to compensate the plaintiff, the plaintiff will in fact receive all or some portion of the punitive damages award.⁴ Punitive damages are typically limited to tort actions where the defendant has engaged in exceptionally objectionable conduct and are consequently rarely awarded for breach of contract.⁵ In the European Union only the common law countries England, Wales, Ireland, Northern Ireland and the mixed system of Cyprus provide for this specific kind of damages in their respective legal systems.⁶ The availability of punitive damages however is by no means without constraints. England for example restricts exemplary damages (as they are called there)

¹ Gray 2009, pp. 111–112

² Nater-Bass 2003, p. 154.

³ This accurate enumeration ironically comes from the German Federal Supreme Court ('Bundesgerichtshof'): BGH, 4 June 1992, BGHZ 118, 312, English translation in 32 ILM 1320 (1993); Brand 2005, p. 185.

⁴ Ryan 2003, p. 76 and 92.

⁵ Gotanda 1998, p. 193. Only Canada and the U.S. award punitive damages as a remedy in contract cases. In England and Australia punitive damages are not available for breach of contract (Gotanda 2003, p. 12, p. 19, pp. 44 and 51).

⁶ As a matter of fact, the concept of punitive damages in the US, Canada, Australia and New Zealand has its roots in 18th-century English law: Wilcox 2009, p. 8, nr. 3.

to three specific circumstances.⁷ In continental Europe and in other civil law countries across the globe the concept of punitive damages is scarcely recognised in law. Generally, punitive damages are considered to be a penal sanction.⁸ The indemnification obligation of civil law systems primarily has a compensatory purpose, i.e. restoring the injured party's former situation. The laws of the Continental European countries do not aim to punish the tortfeasor through damages but rather serve to compensate the victim for the damage sustained.⁹

As Europe consists of both civil and common law orientated countries, it is interesting to examine the position which European law takes on punitive damages. This article will try to establish that punitive damages do not – perhaps yet – play a significant role in European law. The author shares Koziol's view that Community law is inconsistent in reflecting the contrast between common law and continental civil law in Europe.¹⁰

2. Punitive Damages in European Law

2.1. Drafting History of the Rome II Regulation

The EU's attitude towards punitive damages has been described as ambivalent and selfcontradictory.¹¹ The drafting history of the Rome II Regulation, although dealing with private international law situations, clearly demonstrates this. The original proposal from 2003 combined a general rule on public policy (*ordre public*) in its Article 22 with a more specific rule on non-compensatory damages in its Article 24. Article 24 read as follows:

'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'.¹²

The insertion of a separate article was inspired by a predominately German call for a rule corresponding to Article 40 paragraph 3(1) of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche – EGBGB*) which, although not explicitly mentioning punitive damages, rejects the enforcement of any awards that 'substantially go beyond what is necessary for an adequate compensation of the injured party'. During the consultation phase, the German federal bar, along with other contributors, had expressed the concern that the absence of provisions limiting liability would be problematic. It found the mechanism of a general *ordre public* exception (as later set out in Article 22) insufficient to

⁷ Lord Devlin in *Rookes v. Barnard* [1964] AC 1129, [1964] 1 All ER 367. The three categories are: oppressive, arbitrary or unconstitutional actions by government servants, torts committed for profit and exemplary damages expressly authorized by statute.

⁸ Nater-Bass 2003, p. 154.

⁹ Sein 2007, p. 46.

¹⁰ Koziol 2008, p. 748.

¹¹ Wagner 2006, p. 69.

¹² Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), 22/07/2003, COM/2003/0427 final.

avoid exorbitant damages such as punitive damages.¹³ The idea of applying the law of a third country providing for damages not calculated to compensate for damage sustained worried many contributors to the written consultation.¹⁴

The inclusion of the express rule of Article 24 suggested that punitive damages violate some kind of Community public policy.¹⁵ The Commission however seemed to have forgotten how the legal systems of England and Ireland actually operate.¹⁶ The original draft would have had illogical consequences for those Member States since an English court for instance would have had to refuse the application of a foreign law granting punitive damages and replace it by its own domestic law (*lex fori*) which awards such damages itself.¹⁷ Article 24 would also have caught other non-compensatory damages such as the account of profits which have an important function and are fundamentally different from punitive damages. This was caused by the lack of specificity as to the types of non-compensatory damages Article 24 aims to exclude. In our view the Commission did not intend to outlaw such remedies.¹⁸

The Report on the proposal (also known as the Wallis report) dropped the reference to the Community public policy. Rapporteur Diana Wallis thought it beyond the scope of the Regulation to introduce this new concept and to remove the possibility of awarding punitive damages as the Commission proposed in Article 24.¹⁹ Even though she felt sympathetic towards the proposed provision, she preferred to have Article 22 amended and made the suggestion to return to the mere possibility for the forum to refuse the application of a foreign law allowing for punitive damages.²⁰

The Commission subsequently amended its proposal by deleting Article 24 and merging it with Article 23. In Article 23 it was stated that:

‘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 may be considered incompatible with the public policy of the forum’.²¹

¹³ Position of the Bundesrechtsanwaltskammer (The German Federal Bar) on the Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (to be found at http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/bundesrechtsanwaltskammer_en.pdf), par. 8.

¹⁴ Council on the law applicable to non-contractual obligations (‘Rome II’), COM/2003/0427 final, p. 29.

¹⁵ Koch 2009, p. 198.

¹⁶ Tebbens 2009, p. 286.

¹⁷ Koch 2009, p. 199.

¹⁸ European Union Committee of the House of Lords, The Rome II Regulation, 8th Report of Session 2003–04, nr. 169–170.

¹⁹ Draft Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (‘Rome II’), COD/2003/0168, p. 31.

²⁰ Draft Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (‘Rome II’), COD/2003/0168, p. 33.

²¹ Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (‘Rome II’), 21/02/2006, COD/2003/0168

Instead of automatically ruling out punitive damages as violating the public policy of the European Community, this new article leaves the national judge free to decide whether punitive damages are acceptable in light of his own country's public policy. Furthermore, only 'excessive' punitive damages are deemed to fall under the umbrella of the public policy exception.²²

However, this softened approach was not followed by the Council which in its Common Position deleted the rule due to difficulties in establishing a definition of public policy.²³ In the final version of the Rome II Regulation only the first sentence of Article 23 of the proposal was retained in current Article 26 which deals with the public policy of the forum. The Commission and Parliament managed to sneak a reminder of the discussion on punitive damages into the Regulation's Preamble.²⁴ The relevant part of Recital 32 reads:

'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'.

The wording of Recital 32 is similar to the second sentence of Article 23 of the proposal. The transfer of the reference to punitive damages from the main text to the Preamble makes little difference as a Member State court can still find punitive damages in violation of the public policy of the forum even though Article 26 does not mention this *expressis verbis*.²⁵ The inclusion of the Recital in the Regulation is meaningful because it enables the European Court of Justice (ECJ) to draw the line as to what amounts to an excessive non-compensatory award, thereby defining the boundaries of public policy.²⁶

2.2. Other Legislative Sources

The European Union's attitude toward punitive damages is also unclear and inconsistent in other legal acts and decisions.²⁷ Wagner has argued that there is no EU legislation specifically authorizing courts to award punitive damages.²⁸ This is too strong an assertion. As Koch has already put forward, supporters of punitive damages could for instance point to Article 18 of Regulation No. 1768/95 as proof of the existence of punitive awards within European law. This Regulation contains rules which implement the agricultural exemption as provided for in Article

²² Licari 2010, nr. 17

²³ Common Position adopted by the Council on 25 September 2006 with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II') No. 22/2006, OJ C 289/3, p. 68

²⁴ Koch 2009, p. 199

²⁵ Koch 2009, p. 199. In the same sense: Plender & Wilderspin 2009, p. 751.

²⁶ Plender & Wilderspin 2009, p. 752.

²⁷ Wagner 2006, p. 71

²⁸ Wagner 2011, p. 5

14 paragraph 3 of Regulation 2100/94 on Community plant variety rights. Article 18 deals with special civil law claims and reads (emphasis added):

‘1. A person referred to in Article 17 may be sued by the holder to fulfill his obligations pursuant to Article 14(3) of the basic Regulation as specified in this Regulation.

2. If such person has repeatedly and intentionally not complied with his obligation pursuant to Article 14(3) 4th indent of the basic Regulation, in respect of one or more varieties of the same holder, the liability to compensate the holder for any further damage pursuant to Article 94(2) of the basic Regulation shall cover at least a lump sum calculated on the basis of the quadruple average amount charged for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, without prejudice to the compensation of any higher damage’.

Under this provision of the Regulation the right holder is thus awarded a multiple of the actual loss incurred. This overcompensation of the victim therefore seems to be punitive in nature. The scope of this Regulation, however, is quite limited and restricted to the particular field of plant breeders’ rights within intellectual property.²⁹

There are also Community instruments that speak out against non-compensatory damages. Recital 26 of the preamble to the IPR Enforcement Directive of 2004 clearly rejects the establishment of punitive damages when it states (in its last sentence):

‘The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion (...)’.³⁰

Article 340 TFEU (ex Article 288 ECT) equally seems to limit the extent of the liability of EU institutions to strict compensation. Any claims for exemplary damages by EU employees have been identified and treated by the European judiciary as requests for non-material relief, thereby avoiding giving their award a punitive effect.³¹ Its second sentence reads that (emphasis added):

‘(...) the Union will (...) make good any damage caused by its institutions or by its servants in the performance of their duties’.

This phrase emphasises the compensatory nature of the indemnification.³² Similarly, Article 29, second sentence of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, concluded by the European Community in April 2001, states that

²⁹ Koch 2009, p. 208–209

³⁰ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30/04/2004, p. 45. It has been argued that although the Directive does not explicitly provide for the awarding of punitive damages, some provisions come quite close (Borghetti 2009, p. 58). This view seems inconsistent with the wording of Recital 26.

³¹ ECJ 17 March 1993, *Andrew Macrae Moat v. Commission of the European Communities*, ECR 1993, p. 287, par. 6 and 48; CFI 26 October 1993, *Renato Caronna v. Commission of the European Communities*, ECR 1993, p. 1129, par. 102 and 106

³² Oliphant 2008, p. 244

in any action for damages concerning the carriage of passengers, baggage or cargo, punitive, exemplary or any other non-compensatory damages shall not be recoverable.³³

3. Punitive Damages in the Case Law of the ECJ

Not only the body of Community legislative acts but also the jurisprudence of the European Court of Justice is a useful tool in the search for the nature of the EU's stance on punitive damages.³⁴

3.1. Von Colson

The case of Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen ('Von Colson')³⁵ concerned the correct interpretation of the Equal Treatment Directive.³⁶ Both women applied for two positions at the all-male Werl prison in North Rhine Westphalia (Germany). Due to the problems and risks attached to female employees working in a prison populated by men, the recruitment officials decided to engage two less well-qualified men to fill the vacancies. The applicants felt they were unlawfully denied employment on grounds of their sex and sought compensation in the German courts.

The Hamm Labour Court ('Arbeitsgericht') referred several questions to the ECJ for a preliminary ruling. At that time only Article 6 of the Directive provided for sanctions. It imposed on Member States the obligation to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to apply to them the principle of equal treatment to pursue their claims by judicial process. The ECJ found the German transformation of the Directive to be inadequate. The Court held that:

'The principle of the effective transposition of the directive requires that the sanctions must be of such nature as to constitute appropriate compensation for the candidate discriminated against and for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses actually incurred through reliance on an expectation ('Vertrauensschaden')³⁷ is not sufficient to ensure compliance with that principle'.³⁸

³³ Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), OJ L 194, 18/07/2001, p. 34. The European Union approved of this Convention by Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), OJ L 194, 18/07/2001, p. 33.

³⁴ On a side note, the European Court of Human Rights does not award punitive damages. This follows from par. 9 of the Practice Direction on Just Satisfaction Claims from 28 March 2007 as well as from case-law (e.g. Akdivar and Others v. Turkey, 01/04/1998, no. 21893/93; Ludescher v. Austria, 20/12/2001, no. 35019/97; B.B. v. the United Kingdom, 10/02/2004, no. 53760/00, par. 36 and Wainwright v. the United Kingdom, 26/09/2006, no. 12350/04, par. 60). All EU Member States are Members of the Council of Europe and have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms.

³⁵ ECJ 10 April 1984, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, ECR 1984, p. 1891. There is also a corresponding case of the same day: ECJ 10 April 1984, Dorit Harz v. Deutsche Trax GmbH, ECR 1984, p. 1921.

³⁶ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, L 039, 14/02/1976, p. 40.

³⁷ 'Fidelity guarantee claim' – the term 'Vertrauensschaden' refers to damages restricted to the losses incurred when one believes that a valid contract is concluded (Behr 2005, p. 214, footnote 91).

³⁸ ECJ 10 April 1984, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, ECR 1984, p. 1891, par. 14

The ECJ acknowledged that Member States are left free to choose appropriate measures to remedy violations of Article 6 of the Directive but called for higher damages than the costs of postage and other application expenses to be awarded in addition to requiring liability to go beyond mere symbolic payment³⁹:

‘If a Member State chooses to penalize breaches (...) by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application’.⁴⁰

With this paragraph the ECJ muddied the waters even further and offered as Koch has astutely put it: ‘(...) a rollercoaster ride between compensatory and non-compensatory damages’. Koch takes the position that the Court in *Von Colson* decided to remain within the realm of classic tort law remedies, despite the use of confusing and contradicting language such as ‘deterrent effect’ and ‘penalize’. He correctly believes the core message to be that ‘(...) compensation must (...) be adequate in relation to damage (...)’. The case should therefore have been (and should in the future be) classified as upholding the principle of compensation in relation to damage (i.e. damages should not exceed the full indemnification of the injured party) and thus as unfavourable toward punitive damages.⁴¹

This view is not shared by authors such as Behr and Jansen & Rademacher who argue that these damages for discrimination cannot be explained within the traditional compensatory framework but conversely fit into the concept of punitive damages.⁴²

In 2002 an amendment to the original Equal Treatment Directive came into effect.⁴³ Under paragraph 2 of new Article 6 Member States have to ‘introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination, in a way which is dissuasive and proportionate to the damage suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit (...)’. Article 8d further requires Member States to (emphasis added) ‘lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive, and [to] take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive’.

³⁹ Jansen & Rademacher 2009, p. 85.

⁴⁰ ECJ 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, ECR 1984, p. 1891, par. 28.

⁴¹ Koch 2009, p. 204

⁴² Behr 2005, pp. 215–216 and Jansen & Rademacher 2009, pp. 84–85.

⁴³ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 05/10/2002, p. 15.

This last phrase is nothing novel; it finds its origin in the *Commission v. Hellenic Republic* ('Greek Maize') judgment of the ECJ.⁴⁴ In that case the Court pointed out that, according to Article 5 of the EEC Treaty, Member States have to take all measures necessary to guarantee the application and effectiveness of Community law.⁴⁵ As was already said in *Von Colson*, the Member States are free to choose the penalties necessary to achieve this. They do, however, have to ensure that infringements of Community law are penalized under conditions, both procedural and substantial, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.⁴⁶

Despite its 'boiler-plate'⁴⁷ character, this formula has ever since been pervasive throughout the various pieces of European legislation and EU case law.⁴⁸ Some of these sources also use the word 'penalties' which seems to imply that they do not wish to touch upon private law remedies, whereas others speak of 'sanctions' with some specifying that this is 'without prejudice to Member States' civil liability regimes'.⁴⁹ This would mean they wish to draw a distinction between private law remedies and administrative or other 'sanctions'.⁵⁰ In our view, however, it seems unlikely that any of these EU rules aim to encourage the granting of awards exceeding the amount of full compensation. Although admittedly a few pieces of legislation such as Article 28 of Directive 2004/109/EC⁵¹ address civil law remedies as penalties, thereby suggesting the punitive nature of the sanction. Our view seems to find implicit support in the drafting of the Consumer Credit Directive which originally suggested 'the loss of interest and charges by the creditor and continuation of the right of repayment in instalments of the total amount of credit by the consumer' as an example of how Member States could lay down penalties for the infringements of the Directive.⁵² The creditor's loss of interest and charges has nothing to do with actual damage incurred by the consumer but is a form of punishment for the creditor's misbehaviour and therefore arguably boils down to punitive damages.⁵³ However, this explicit reference was dropped in favour of the vague and well-known mantra of 'effective, proportionate and dissuasive [penalties]'.⁵⁴

3.2. The Post Von Colson Case Law

⁴⁴ ECJ 21 September 1989, *Commission of the European Communities v. Hellenic Republic*, ECR 1989, 2965.

⁴⁵ *Ibid.*, par. 23.

⁴⁶ *Ibid.*, par. 24.

⁴⁷ Koch 2009, p. 200.

⁴⁸ *Ibid.*

⁴⁹ See Koch 2009, footnotes 15–17 for an extensive list of each category.

⁵⁰ Koch 2009, p. 200–201.

⁵¹ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31/12/2004, p. 38, art. 28.

⁵² Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM(2002) 443 final, OJ C 331, 31/12/2002, p. 200, Article 31.

⁵³ Kelliher 2008, p. 11, footnote 43.

⁵⁴ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22/05/2008, p. 66, art. 23.

The above-mentioned amendment to the Equal Treatment Directive was influenced by the Von Colson judgment and subsequent rulings of the ECJ. In these latter cases the Court elaborated on the measures Member States need to take to implement the Directive. *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority* ('Marshall II') concerned a discriminatory dismissal.⁵⁵ The applicant Miss Marshall felt she had been the victim of unlawful discrimination on grounds of sex as she had been dismissed because she had attained the qualifying age for a State pension, that age being different under national legislation for women than for men. Her claim was upheld by the Court of Appeal which remitted the question of compensation to the Industrial Tribunal. The English Sex Discrimination Act, however, provided for an *ex ante* cap on the damages an Industrial Tribunal could award.⁵⁶

In his Opinion, Advocate-General Van Gerven took the view that compensation must be adequate in relation to the damage sustained but does not have to be equal thereto.⁵⁷ He did not find the imposition of an upper limit on the compensation payable an automatic failure to implement the Directive.⁵⁸ The ECJ however declined to follow the AG's reasoning and reaffirmed the principle of full compensation.⁵⁹ England's system use of an upper limit was therefore found to be in violation of the Directive.⁶⁰

In the case of *Nils Draehmpaehl v. Urania Immobilienservice OHG* ('Draehmpaehl ') the ECJ had to deal with a case of discriminatory selection for employment. Mr. Draehmpaehl responded to a job advertisement in a Hamburg newspaper stating that defendant Urania was looking for 'an experienced female assistant'. He did not get a reply and sued Urania in the Hamburg Labour Court ('Arbeitsgericht') claiming that he was the best qualified applicant and that he had suffered from sex discrimination. He asked for compensation for three and a half months' wages based on §611a of the German Civil Code (the transformation of the Equal Treatment Directive into German law) which restricts financial compensation to three months' earnings.⁶¹ The Court ruled that Member States are not precluded from imposing a ceiling on the compensation payable where the applicant would not have obtained the position due to another candidate's superior profile.⁶² Such upper ceiling is not allowed where the applicant would have gotten the job if the discrimination had not occurred.⁶³ However, as opposed to its *Marshall II*

⁵⁵ ECJ 2 August 1993, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*, ECR 1993, p. 4367.

⁵⁶ Sex Discrimination Act 1975, section 65(2).

⁵⁷ Opinion of Mr. Advocate General Van Gerven delivered on 26 January 1993, ECR 1993, p. 4367, par. 17.

⁵⁸ Opinion of Mr. Advocate General Van Gerven delivered on 26 January 1993, ECR 1993, p. 4367, par. 29; *Oliphant* 2008, p. 251.

⁵⁹ ECJ 2 August 1993, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*, ECR 1993, p. 4367, par. 26; *Oliphant* 2008, p. 252.

⁶⁰ ECJ 2 August 1993, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*, ECR 1993, p. 4367, par. 32.

⁶¹ The ECJ's judgment does not mention the facts of the case. A summary of the facts in German can be found in *Neue Juristische Wochenschrift* 1997, p. 1839. The English translation of these facts: *Behr* 2004, p. 213.

⁶² ECJ 22 April 1997, *Nils Draehmpaehl v. Urania Immobilienservice OHG*, ECR 1997, p. 2195, par. 37.

⁶³ *Kelliher* 2008, p. 15.

decision, the ECJ in *Draehmpaehl* nowhere mentions the need for ‘full’ compensation but accepts ‘adequate’ compensation as effective judicial protection.⁶⁴

As Koch rightly concludes, the lesson to be drawn from both *Marshall II* and *Draehmpaehl* is that limits on damages are not acceptable in light of the Directive since they may discourage injured parties from bringing their case to court and therefore have no dissuasive effect on the employer. More importantly, the caps are criticized because they prevent victims from receiving compensation adequate to the losses sustained which in our opinion seems to be, at the very least, a statement unsupportive of punitive damages.⁶⁵ The core message seems to be that the European Court of Justice does not seek to impose punitive damages on the Member States but rather that they will sanction any deviations from the boundaries set out by community law.⁶⁶

3.3. Punitive Damages through the Backdoor via the Principle of Equivalence

Even though the ECJ does not promote the granting of punitive damages, national courts are in certain instances required to award such damages for breaches of EU law. According to the EU principle of equivalence remedies made available for the protection of EU rights by national law must not be less favorable than those available for similar domestic rights. In *Brasserie du Pecheur SA v. Federal Republic of Germany and Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (no. 4)* (‘*Brasserie du Pecheur and Factortame*’) it was therefore established that:

‘(...) it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law’.⁶⁷

Similarly, in *Manfredi v. Lloyd Adriatico Assicurazioni SpA* (‘*Manfredi*’) the Court held that national courts can award punitive damages for violations of Community law (in this case: an infringement of Article 81 ECT) if their national legal system awards such damages for domestic claims.⁶⁸ Following its ruling in *Brasserie du Pecheur and Factortame* the ECJ affirmed that: ‘(...) 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’.⁶⁹ It is important to note that in both cases the non-compensatory

⁶⁴ Oliphant 2008, p. 253.

⁶⁵ Koch 2009, p. 204. See also ECJ 8 November 1990, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, ECR 1990, p. 3941.

⁶⁶ Koch 2009, p. 205.

⁶⁷ Joined cases ECJ 5 March 1996, *Brasserie du Pecheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECR 1996, p. 1029, par. 90.

⁶⁸ Joined cases ECJ 13 July 2006, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA and Nicolo Tricarico and Pasqualina Murgolo v. Assitalia SpA*, ECR 2006, p. 6619;

⁶⁹ Joined cases ECJ 13 July 2006, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA and Nicolo Tricarico and Pasqualina Murgolo v. Assitalia SpA*, ECR 2006, p. 6619, par. 99.

part of the award is not founded in EU law but is treated as a purely national peculiarity respected at European level.⁷⁰

The equivalence principle raises issues of a private international law nature. Under Section 14 (5) of the Irish Competition Act for instance, exemplary damages are available in actions for breach of national competition law. An Irish judge is thus bound to award punitive damages for violations of EU antitrust rules. When the enforcement of this decision is sought in another Member State, Community law becomes contradictory as it on the one hand obliges the granting of punitive damages and on the other does not prevent the requested court from invoking public policy to decline enforcement.⁷¹ This a problem that the EU will need to address.

4. EU Proposals in the Pipeline

As already noted by Koch, the Manfredi judgment has been interpreted by the EU Commission in such a way as to give the impression that punitive damages are part of the *acquis communautaire*.⁷² In an attempt to make private antitrust lawsuits more prominent within the EU, in 2005 the Commission published a Green Paper on Damages Actions for Breach of the EU antitrust rules.⁷³ This proposal called for the awarding of double damages for horizontal cartel cases and was seen as a means to provide for an incentive for private enforcement of competition law, inspired by the treble damages of U.S. antitrust law.⁷⁴ In 2008 the Commission continued its effort through the adoption of a White Paper. In this proposal, the mechanism of punitive damages in the form of double damages has disappeared. The Paper's primary objective is the improvement of the legal conditions for victims to exercise their right to reparation of all damage suffered as a result of a breach of the EC antitrust rules. It therefore takes the idea of full compensation as its first and foremost guiding principle.⁷⁵ In the Working Paper accompanying the White Paper the Commission however changes its tone and includes punitive damages into the *acquis communautaire*. It correctly states that the ECJ did not consider punitive damages to be a violation of European public order but derives from this the idea that the opposite is true.⁷⁶ Moreover, although openly admitting elsewhere⁷⁷ in the Working Paper that the Green Paper's introduction of double damages has triggered a lot of opposition, the Commission claims that unjust enrichment of the injured party is not legally forbidden under Community law. The ECJ in Manfredi had ruled that:

⁷⁰ Koch 2009, p. 206

⁷¹ Cavalier & Queguiner 2007, p. 9

⁷² Koch 2009, p. 207

⁷³ Green Paper on Damages Actions for Breach of the EC antitrust rules, COM(2005) 672 final, 19.12.20 05.

⁷⁴ Gotanda 2007, p. 520; Sein 2007, p. 49.

⁷⁵ White Paper on damages actions for breach of the EC antitrust rules, COM/2008/0165 final, p. 3.

⁷⁶ Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC/2008/0404 final, p. 57, nr. 190; Koch 2009, p. 207.

⁷⁷ Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC/2008/0404 final, p. 55, nr. 182.

‘(...) 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’.⁷⁸

As the Commission officials who wrote the Working Paper construed things, this means that punitive awards can only be reduced if they are deemed to be excessive and thus that such awards are a legitimate form of (unjust) enrichment.⁷⁹ This does not seem to be what the ECJ intended.⁸⁰ The Court sought to prevent the (unjust) enrichment of victims, a principle that the Commission itself in the White Paper attaches great importance to.⁸¹

In other legislative documents the Commission seems to take the opposite position. In the first proposal for a Regulation on the Community Patent punitive damages were explicitly excluded.⁸² While disagreement over the language requirements surrounding such a unitary patent has blocked the establishment of the EU patent for over a decade, the outward rejection of punitive awards has never been under discussion. The latest draft leaves no doubt that punitive damages are not available, whether it be in an action for reasonable compensation for a breach of the rights conferred after publication⁸³ or in a normal action for damages.⁸⁴

5. Soft Law Instruments

Finally, it can be useful to draw one’s attention to the several harmonization projects at European level. It is clear that none of these instruments envisage punitive damages as part of the substantive body of law they aim to create.⁸⁵ The Principles of European Tort Law (PETL) emphasize in Article 10:101 that damages are intended to restore the injured party to the position he would have been in if the wrong had not been committed. Under the Principles punitive damages are therefore not available as they are always out of proportion to the victim’s actual loss.⁸⁶ The commentary to the PETL also explicitly confirms that they are not a basis for punitive damages or for other payments that do not correspond to the actual harm suffered.⁸⁷ The Principles of the Study Group on a European Civil Code, the Swiss and the Austrian draft, equally does not accept punitive damages.⁸⁸ Article 2:101 of Book VI of the Draft Common Frame of Reference does not list punitive damages under the heads of legally relevant damages. Article 6:101 of the same Book addresses reparation as the key element of remedies. In our view

⁷⁸ Joined cases ECJ 13 July 2006, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA and Nicolo Tricarico and Pasqualina Murgolo v. Assitalia SpA*, ECR 2006, p. 6619, par. 99.

⁷⁹ Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC/2008/0404 final, p. 58, nr. 192.

⁸⁰ Wagner 2011, p. 6.

⁸¹ Koch 2009, pp. 207–208.

⁸² Proposal for a Council Regulation on the Community patent, COM(2000) 412 final, OJ C 337E, 28/11/2000, p. 278, Article 44, par. 2.

⁸³ Proposal for a Council Regulation on the Community patent, 8/03/2004, Article 11.2.

⁸⁴ *Ibid.*, Article 44.2.

⁸⁵ Wagner 2011, p. 6.

⁸⁶ Magnus 2005, Article 10.101 nr. 4.

⁸⁷ Koziol 2009, p. 298.

⁸⁸ *Ibid.*, p. 287.

it leaves no room for the granting of punitive awards. The Principles of European Contract Law (PECL) – unsurprisingly because the awarding of punitive damages as a contractual remedy is also less extensive in the U.S. and in Canada⁸⁹ – do not mention punitive damages in explicit terms. Article 9:509 (1) does however, thereby acknowledging their existence in European civil law systems, accept the concept of penalty clauses which can be seen as a form of contractually agreed upon punitive damages for non-performance.

Article 160 of the proposed Common European Sales Law also emphasises the compensatory nature of the remedy of damages.⁹⁰

6. Conclusion and Recommendations

The availability of punitive damages is very rare under European law as it stands today. Although some phrases in EU documents refer to non-compensatory awards, the concept of punitive damages generally is absent from European law.

The core message to be understood from the ECJ's rulings in *Von Colson*, *Marshall II* and *Draehmpaehl* appears to be that neither the EU legislature nor the European Court of Justice want to impose punitive damages on the Member States but rather that they will sanction any deviations from the boundaries set out by community law.⁹¹ Member States have the freedom to determine how to sanction breaches of EU law as long as the measures imposed are effective, proportionate and dissuasive. This formula found its way into several acts of the EU legislature.⁹²

This however does not lead us to the conclusion that punitive damages cannot be awarded at all in a European context. The principle of equivalence may require punitive damages to be made available by the national court to the extent that they are available in domestic law for analogous actions.⁹³ In those circumstances the awarding of punitive damages is not granted on the basis of Community law but is nothing more than a national curiosity tolerated by the EU.

At EU level, there presently is no consensus about whether punitive damages are a priori in conflict with the principles of European law.⁹⁴ The absence of a clear stand is hardly surprising in light of the difference in approach between Europe's legal systems, as it would be analogous to asking a father to pick his favorite child.⁹⁵

⁸⁹ See also footnote 6.

⁹⁰ Annex I to the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11/10/2011, COM(2011) 635 final.

⁹¹ Koch 2009, p. 205; Oliphant 2008, no. 11/8, 11/26 and 11/64.

⁹² Wagner 2011, p. 5.

⁹³ Kellner 2008, p. 581

⁹⁴ Sein 2007, p. 49.

⁹⁵ Koch 2009, p. 208

2) **Выберите среди предложенных ответов один правильный ответ и заштрихуйте соответствующий ему овал в бланке ответов на пересечении номера вопроса и номера ответа.**

1. Нефть, находящаяся в резервуаре, принадлежащем нефтяной компании, является:

- 1) Недвижимым имуществом
- 2) **Движимым имуществом**
- 3) Правильного ответа нет

2. Корпоративными отношениями являются:

- 1) Отношения с участием корпоративных организаций
- 2) Отношения, связанные с управлением корпоративными организациями
- 3) **Отношения, связанные с участием в корпоративных организациях или**

с управлением ими

3. Срок исковой давности по требованию о признании оспоримой сделки недействительной составляет:

- 1) Шесть месяцев
- 2) **Один год**
- 3) Три года
- 4) Десять лет

3.Решите задачу.

ЗАО «Пересвет» заключило с ООО «Челубей» договор поставки на период с 1 января по 31 декабря 2011 года. По условиям договора ЗАО «Пересвет» обязалось ежемесячно поставлять ООО «Челубей» товары, а ООО «Челубей» должно было оплачивать их через месяц после поставки.

Поставив очередную партию товара в марте 2011г., ЗАО «Пересвет» 2 апреля 2011г. уступило право на получение от ООО «Челубей» оплаты за эту (мартовскую) поставку третьему лицу - ОАО «Витовт».

Новый кредитор - ОАО «Витовт» предъявило требование к ООО «Челубей», однако ООО «Челубей» отказалось оплачивать мартовский товар.

ООО «Челубей» мотивировало свой отказ тем, что оно не получало никакого уведомления об уступке, а ГК РФ предполагает полную замену кредитора в обязательстве, а также тем, что ООО «Челубей» не давало своего согласия на такую замену (и не даст,

т.к. заинтересовано в том, чтобы продолжать получать поставки товаров от ЗАО «Пересвет», отношения с которым являются длящимися). Кроме того оно считает, что их отношения носят личный характер. В связи с этим соглашение об уступке права (требования) противоречит нормам ГК РФ и, соответственно, является ничтожным.

Оцените ситуацию и доводы сторон (включая не указанные в задаче доводы нового кредитора). Выскажите мнение о том, как должен решить данное дело арбитражный суд.

Методические рекомендации:

1. Оценивание выполненных заданий осуществляется по 100-бальной шкале. Анализ статьи – 40 баллов (критерии оценивания – ниже); максимальное число баллов за тестовое задание – 30: тестовых заданий – 30, критерий оценки - 1 балл – за один правильный ответ; правильное решение задачи - 30 баллов.

2. Для выполнения первого задания необходимо руководствоваться следующим:

1) При выполнении задания разрешается пользоваться словарем (только печатным изданием).

2) Объем выполненного задания должен быть небольшим – 3-5 страниц. Текст должен быть написан грамотно и приемлемым почерком.

3) Прочитав статью, сформулируйте и опишите главную проблему, которой она посвящена.

4) Обязательно должны быть затронуты следующие вопросы:

а) Можно ли на основе статьи дать понятие штрафных убытков и определить сферу их применения? Если это возможно, сделайте это. Если нет, объясните, почему.

б) Какова правовая природа штрафных убытков?

5) Критериями оценивания первого задания:

а) степень аргументированности и обоснованности;

б) ясность формулировки личной позиции;

в) способность к критическому анализу затронутой в статье проблемы;

г) корректность использования понятийного аппарата, адекватное применение терминов и понятий.

3. Для успешного выполнения тестового задания, необходимо подготовиться в соответствии с Программой, размещенной на страничке магистерской программы «Корпоративный юрист». См. ссылку: http://pravo.hse.ru/korp_lawyer/vstupi

4. При решении задачи, необходимо отразить следующие позиции в ответе:

- 1) Уступается требование, обязанности по длящемуся правоотношению «остаются» у ЗАО «Пересвет»
- 2) Допускается частичная уступка (денежного требования за мартовскую поставку)
- 3) Согласие должника не требуется
- 4) Личность кредитора не имеет значения в данном случае
- 5) Уведомление об уступке может быть направлено как «старым», так и «новым» кредитором.

Удачи!