PUNITIVE DAMAGES IN EUROPEAN LAW

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I. Introduction

“The position of the European Union regarding punitive damages is not only ambivalent, but also clearly self-contradictory.”¹ This statement by one commentator perfectly describes the status quo of European law regarding penal elements in the field of tort law remedies.

When looking at EU tort law within the narrow meaning of the body of law dealing with compensation claims against EU institutions, punitive damages “are probably not available at all” in light of art. 288 par. 2 ECT, which only employs language aiming at compensation.²

In a broader perspective, the image gets less clear as indicated, and the blurriness is due to the ambiguous use of terminology, coupled with political efforts in individual legislative projects to at least stimulate the discussion (if seen in an optimistic light) or to introduce non-compensatory awards as tools of private law enforcement despite clear and unanimous opposition by most Member States (which is probably a less euphemistic way of seeing the developments particularly in the more recent past).

II. Conflicts of Concepts in Legislative Drafts

A microcosm exemplifying the rather ambivalent attitude of the EU towards punitive damages was the drafting process of the Rome II Regulation.³

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In the original draft, the Commission had planned to include a separate article dealing with “non-compensatory damages”, following a more general rule on ordre public. The proposed art. 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.”

In the Explanatory Memorandum thereto, this was justified by alleged widespread concern raised by “many contributors” during the consultation phase who were said to have argued that an open public policy exception without the express exclusion of non-compensatory damages would be too weak a tool against the risk of having to apply such a concept in a forum to which it was alien. Arguably, by including such an express rule in the draft, the Commission suggested that punitive damages and the like violated some Community ordre public thereby defined.

The Wallis report, however, recommended that the proposal be softened by rephrasing it to a mere option of the forum (and thereby reducing it to the status quo), even though the rapporteur expressed “sympathy” with the original proposal. The Commission succumbed to this plea by Parliament and adjusted the wording accordingly, merging it with the article on public policy:

“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.”

Instead of imposing a uniform strict standard, the new wording was meant to leave it purely optional for the courts whether or not they deem non-

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5 This seems to have been a German demand primarily; cf., e.g., the contributions to the consultation by the German Ministry of Justice (http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/minist_just_allem_de.pdf), the German Federal Bar (http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/bundesrechtsanwaltskammer_en.pdf), or the German Insurance Association (http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/gesamtverband_deutschen_v_de.pdf), all demanding a rule equivalent to art. 40 par. 3(1) EGBGB (which does not refer to punitive damages specifically itself, however, but rather excludes the enforcement of awards which “significantly exceed the adequate compensation of the victim”).
7 Draft Report (fn. 6) 33.