Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism

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Abstract

This multi-author article aims to demonstrate that, despite the traditional understanding that tort law should serve the sole purpose of remedying the harm caused as precisely as possible, there are growing indications in several continental European legal systems that damages awards are not entirely immune from extra-compensatory, punitive features. This is evident particularly with regard to moral damages, to ‘compensation’ for the violation of privacy rights and of intellectual property rights. Moreover, statutory civil sanctions, conceived of as alternatives to criminal and administrative penalties, are increasingly being adopted by national legislatures to deter anti-social behaviour. Based upon scholarly work and case law from different European jurisdictions, the authors argue that extra-compensatory damages are frequently applied by national judges, albeit not always in an overt manner, and that such a phenomenon should not be deemed a priori in conflict with the principles of European law.

I. Introduction

On 11 June 2013, the EU Commission issued a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States.1 Paragraph 31 of the Recommendation reads that “punitive damages leading to overcompensation in favour of the claimant party of the damage suffered should be prohibited”. It seems that, in this non-binding document, the Commission intends to prohibit punitive damages in civil actions.

Such a general prohibition would be problematic from many perspectives, since it is far from being widely recognised in most systems in Europe.\(^2\) Firstly, at EU level, the availability of punitive damages is accepted in a number of legislative provisions.\(^3\) Secondly, the CJEU leaves room to the Member States to choose appropriate measures to remedy violations, including punitive damages.\(^4\) Thirdly, the common law countries of Europe – England and Wales, Northern Ireland and Ireland – as well as the mixed system of Cyprus provide for punitive damages in their respective legal systems. In England, for instance, punitive damages are designed to express the court’s disapproval of the defendant’s exceptionally bad conduct, and may be awarded when it comes to oppressive actions by government servants or torts committed for profit, or where the award of such damages is authorised by statute.\(^5\) Finally, regarding continental European systems, even though the traditional view is that the award of punitive damages is excluded as non-compensatory damages are *prima facie* contrary to the underlying principles of civil liability,\(^6\) there are growing indications that a non-compensatory aspect is indeed included in damages awards.\(^7\) For example, in France, Germany, Italy, the Netherlands and Switzerland, some legislative recognition of punitive damages in civil actions and, more importantly, the practice of the courts in recognising the preventive function of extra-contractual liability in certain circumstances blur the line between compensatory and punitive objectives.\(^8\)


\(^3\) For instance, Regulation 261/2004 concerning air passengers’ rights establishes a system of fixed compensation regardless of actual damages. For another example, see Art. 18(2) of Regulation No. 1768/95 on the agricultural exemption, which provides that “the liability to compensate […] 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 […] without prejudice to the compensation of any higher damage”.


Echoing von Bar’s argument that “punitive damages are by no means unique to the common law”, we will attempt in this article to uncover this hidden phenomenon in continental European systems and reveal the inadequacy of the Commission’s proposed solution regarding the prohibition on punitive damages. We will start by presenting the general rule, according to which the goal of damages is to put the claimant back in the position in which they would have been without the wrong (II). We will then try to draw a picture of the increasing legislative and judicial interest in punitive damages, which goes beyond the general rules (III).

II. The General Rules

Even if it seems, at first sight, that there is a consensus in continental European systems that the amount of damages shall not exceed the amount of the harm, the reasons for such a limitation vary from one jurisdiction to the other. Whereas French, Italian and Dutch courts have a tendency to give more weight to the full compensation of the harm or loss suffered by the victim (A), in Germany and Switzerland courts have a tendency to lean towards the prohibition on unjust enrichment (B).

A. Restitutio in integrum

In European systems, full compensation is considered to be the “main goal” of damages awards. In France, in a decision of the Paris Court of Appeal of 3 July 2006, which rejected the claim for punitive damages made by the estate of the victim of a plane crash, it was held that “under French law, the amount necessary to compensate the damage suffered, shall be calculated on the basis of the value of the damage, without the seriousness of the fault having any impact on that amount”. In another case, the Cour de cassation held that “[t]he assessment of damages must be undertaken solely on the basis of the injury sustained”. On that basis, it would run contrary to the fundamentals of civil law for a punitive element to be included: the function of the civil law is to provide reparation and compensate, not punish. This is also

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10 For the approach in contract law, see Solène Rowan, Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance, 109 (Oxford University Press 2012).
11 For an excellent analysis of the French law position, see Jean-Sébastien Borghetti, Punitive Damages in France, in Helmut Koziol and Vanessa Wilcox (eds.) Punitive Damages: Common Law and Civil Law Perspectives, 55ff. (Springer 2009).
13 Cass Civ 21 July 1982 No. 81–15236 (in this case the Court of Appeal had erroneously taken into account the financial resources of the defendant in setting damages).
14 Philippe Le Tourneau, fn 8, para. 2522. Note that the author takes issue with this rule: ibid., para. 45.
echoed in the leading textbooks.\textsuperscript{15} According to Le Tourneau, “the judge should not take account of the seriousness of the fault in order to set the level of damages”.\textsuperscript{16}

The dominant view of courts and scholars in many other systems in continental Europe supports such a position. In Italy, according to the \textit{Corte di Cassazione}, any award of damages for a tangible or intangible loss should pursue the sole aim of compensating the injured person, whereas no attention should be paid to the tortfeasor’s conduct.\textsuperscript{17} However, as we will examine in detail in Part III, some significant inconsistencies can be found in the practice of non-economic damages, where the incommensurability of human health, feelings or dignity has often led the courts to assess damages in the light of the \textit{gravity} of the offence.\textsuperscript{18}

In the Netherlands, at first sight, the judge seems to have some power – within the framework of Article 6:98 of the Dutch Civil Code (\textit{BW, The Burgerlijk Wetboek}) on causation, Article 6:101 BW on the tortfeasor’s fault and Article 6:106(1)(a) BW on non-pecuniary loss – to take the degree of fault of the tortfeasor into account.\textsuperscript{19} However, leading authors argue that by considering the tortfeasor’s fault, justice is done to the \textit{compensatory} function of tort law and that this does not have a \textit{punitive} purpose.\textsuperscript{20} Also the Dutch Supreme Court clearly emphasizes the principle of \textit{full compensation}.\textsuperscript{21}

\textbf{B. The Prohibition on Unjust Enrichment}

In Germany and Switzerland, the compensation systems rely on the fundamental principle that plaintiffs may not enrich themselves at the expense of the tortfeasor. In Germany, there has been, for well over a century, a common perception that the law of damages prohibits any enrichment of the injured party as a consequence of the

\begin{thebibliography}{99}
\addcontentsline{toc}{section}{References}
\bibitem{15} François Terré, Philippe Simler and Yves Lequette, \textit{Droit Civil: Les Obligations} 597 (Dalloz 9th edit. 2005).
\bibitem{16} Philippe Le Tourneau, fn 8, para. 2522.
\bibitem{20} PGFA Geerts et al., \textit{Oneerlijke handelspraktijken: praktijkervaringen in België met de sanctie van artikel 41 WMPC}, 62 (Groningen 2011). See also AS Hartkamp and CH Sieburgh, Mr. C Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte, paras 21 and 31 (Deventer 2013).
\end{thebibliography}
damages awarded. Any punishment of the tortfeasor is – and should remain – limited to criminal or administrative sanctions. Even the preventive function of tort law is still viewed with scepticism by many, even though their reluctance in this regard is slowly changing. Therefore, not only are German courts not allowed to (openly) award punitive damages, but even punitive damages awarded in other jurisdictions are frequently seen as unacceptable, as against the German ordre public, and for this reason usually not enforceable in these countries.

In Switzerland, although the prohibition on unjust enrichment is not specifically expressed in any statute like in Germany, it is inherent in the general provisions of the Code of Obligations. These provisions reflect the basic principle applicable throughout Swiss private law, including the laws of torts and contracts. The term “damages” shall designate compensatory damages only; a damages award must not put the plaintiff in a better financial position than he would be in, if the damaging event had not occurred. That is the main reason why some authors consider punitive damages as contrary to public policy. The Swiss Code on Private International Law lends support to this idea, when it comes to product liability lawsuits. Article 135(2) reads that “if claims founded on a product defect or a faulty description of a product are governed by foreign law, no awards may be made in Switzerland in excess of those which would have been awarded for such damage under Swiss law”. Article 137(2) offers a comparable solution for antitrust damages claims governed by foreign law.

III. Going beyond the General Rules: Increased Interest in Punitive Damages

Despite the broad agreement that tort law should serve the sole purpose of compensating damage, there are growing indications that a non-compensatory aspect is indeed included in damages awards in continental European legal systems. We will try to uncover this hidden phenomenon by reference to moral damages (A), to compensa-

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22 For more details on the historic background of this situation see Ina Ebert, Pönale Elemente im deutschen Privatrecht (Tübingen 2004); for short summaries on the present situation also: Nils Jansen and Lukas Rademacher, Punitive Damages in Germany in Helmut Koziol and Vanessa Wilcox (fn 11) p 75ff; Ulrich Magnus, Punitive Damages and German Law in Lotte Meurkens and Emily Nordin (eds.), The Power of Punitive Damages, 245ff. (Cambridge 2012).
23 BGHZ 118, p 312ff.; see also Ina Ebert, fn 22, p 525ff.
24 Franz Werro, La responsabilité civile, para. 42 (Stämpfli 2nd edit. 2012); Peter Gauch, Walter R Schluep, Jörg Schmid and Susan Emmenegger, Schweizerisches Obligationenrecht, AT, V. 2, para. 2848 (Schulthess 10th edn. 2014).
tion for the violation of privacy rights (B) and of intellectual property rights (C) as well as to civil sanctions (D).

A. Moral Damages Carrying a Strong Punitive Component

Unlike economic losses, non-pecuniary losses cannot be exactly quantified but only roughly estimated.\footnote{For examples of how this dilemma is dealt with in Germany and elsewhere in Europe see: Compensation for Pain and Suffering – New Trends in Europe and the USA 5ff. (Munich Re 2012).} Human beings and their feelings simply do not carry price-tags.\footnote{However, Franz Werro rightly pointed out that, in reality, celebrities regularly obtain large sums as a result of unauthorised publicity, whereas the average person cannot do so. This shows that the personality is rather based on economic reality. See Franz Werro, La tentation des dommages-intérêts punitifs en droit des médias, 88 (Medialex 2002).} This is why pain and suffering awards, even though primarily compensatory, have, over the centuries, frequently been used as a backdoor entry-point for non-compensatory functions, including “hidden punitive damages”. In France (1), Germany (2), the Netherlands (3) and Italy (4), whether punitive damages are awarded under the heading of non-pecuniary damages is an evaluation of the merits of the claim, and particularly intentional or grossly negligent behaviour of the defendant is taken into account in such an assessment.

1. Le pouvoir souvérain of French Judges

In France, the [s]overeign power of assessment [of judges] plays a significant role in awarding punitive damages. Indeed, in civil procedure, the lower French courts exercise a [s]overeign power of assessment as to the exact quantum of damages,\footnote{The certainty of loss and ultimate measure of damages are now considered to be questions which fall within the ‘sovereign power of assessment’ of the lower court: see Christopher Pollmann, Contrôlé de Cassation du Conseil d’État, RDP 1653 (1996); Philippe Le Tourneau, fn 8, para. 2507.} and this is characterised as a matter of fact which is unchallengeable before the appeal courts. As Simon Whittaker argues, this [s]overeign power thus provides a veil behind which “the lower courts are able in fact to exercise a discretion as to the amount which should be recovered.”\footnote{John Bell, Sophie Boyron and Simon Whittaker, Principles of French Law, 415 (Oxford University Press 2nd edn. 2007).}

A leading French litigator, Thomas Rouhette has identified, in an elegant comparative law paper, a number of cases which are difficult to explain otherwise than by the French courts taking advantage of their sovereign power of assessment of damages to include a deterrent element in the award.\footnote{Thomas Rouhette, The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept? 74 Defense Counsel Journal 320, 326 (2007). Borghetti also recognises that it is “a widely shared belief among French lawyers and academics that French courts sometimes set damages not only on the basis of the harm suffered by the plaintiff, but also by taking into account the behaviour of the tortfeasor”, but expresses some scepticism due to the fact it is difficult to verify the truth of this assertion. (Jean-Sébastien Borghetti, fn 11, p 62).} This has been confirmed in other
studies, including a Parliamentary Report.\textsuperscript{33} The impact of the ‘sovereign power of assessment’ has been particularly noted in the domain of damages for moral harm. Whilst history shows that courts initially exhibited a reluctance towards awarding recovery in damages for certain types of préjudice moral,\textsuperscript{34} (often motivated by policy reasons),\textsuperscript{35} the French courts now take a more liberal stance granting financial reparation for many types of préjudice moral. It has often been said that the lower courts’ sovereign power of assessment in awarding damages provides a veil behind which a punitive element for egregious fault may be included, “off the face of the record” within the sphere of préjudice moral.\textsuperscript{36} A similar phenomenon can be detected before the European Court of Human Rights.\textsuperscript{37} As one author has explicitly noted: “the flexible nature of ‘préjudice moral’ allows […] trial judges to circumvent [the ostensible prohibition on punitive damages] and to enable delict to play a hidden punitive role”\textsuperscript{38} Rouhette gives the example of the case brought by Louis Vuitton Moet Hennessy (LVMH) against Morgan Stanley for erroneous equity research allegedly denigrating the former, in which LVMH was awarded Euros 30 Million in respect of moral damage caused to LVMH. The latter was described by the commentator as “necessarily aim[ing] at punishing Morgan Stanley for its allegedly unlawful conduct.”\textsuperscript{39}

2. German Case-Law

Originally, the German Civil Code (\textit{BGB}, introduced in 1900) allowed pain and suffering awards only under tort law (§ 847 BGB 1900). Therefore, fault of the tortfeasor was a precondition for an award. Nevertheless, sums awarded were usually low and criteria for determining the sum awarded were usually compensatory.\textsuperscript{40} This changed, however, in 1955, when the combined senate of the German Federal Civil Supreme Court (\textit{Großer Senat des BGH}) held, in a decision that became the basis for pain and suffering awards in Germany for many decades, that pain and suffering awards only under tort law (§ 847 BGB 1900). Therefore, fault of the tortfeasor was a precondition for an award. Nevertheless, sums awarded were usually low and criteria for determining the sum awarded were usually compensatory.\textsuperscript{40} This changed, however, in 1955, when the combined senate of the German Federal Civil Supreme Court (\textit{Großer Senat des BGH}) held, in a decision that became the basis for pain and suffering awards in Germany for many decades, that pain and suffering


\textsuperscript{34} Before the administrative courts, until the case of CE 6 June 1958, Commune de Grigny [1958] Rec 323, that claims for physical suffering would only be countenanced if there had been ‘exceptionally severe suffering.’ (CE 24 April 1942, Morell, [1942] Rec 136).

\textsuperscript{35} There were fears of the potential frequency and extent of claims concerning pretium affectionis. It was feared that the nature of pretium affectionis could entail a ‘proliferation of actions’ from a plethora of secondary victims claiming to have suffered grief (A Coudevylle, Le «Pretium Affectionis»: un Piège pour le Juge Administratif, Chronique 173, 177(1979). A Commissaire du Gouvernement indicated that the courts were protecting public funds by rejecting such claims (CG Delevalle’s conclusions in TA Lille 28 February 1958, Jurisprudence 216, 217 (1958)).

\textsuperscript{36} John Bell, Sophie Boyron and Simon Whittaker, fn 31, p 415.

\textsuperscript{37} See further Duncan Fairgrieve, The Human Rights Act 1998, Damages and Tort Law, Public Law, 704 (2001). The Strasbourg Court has often referred to the seriousness of the State’s violation of the Convention when making awards for non-pecuniary loss -frequently when punitive damages have been sought, and ostensibly rejected.

\textsuperscript{38} Philippe Le Tourneau, fn 8, para. 2522.

\textsuperscript{39} Thomas Rouhette, fn 32, p 326.

\textsuperscript{40} Ina Ebert, fn 22, p 448ff.
awards were not normal heads of damage. Instead of being compensatory only, the Court decided that pain and suffering awards served two functions: to compensate damage and to give the injured person “satisfaction” (Genugtuung). Thus, while the severity of the injury suffered by the claimant should be the main criteria for determining the amount of compensation to be awarded, the degree of fault and the economic situation of the tortfeasor could and should also be taken into consideration. This opened the door to hidden punitive damages in case of intentional or grossly negligent behaviour of the tortfeasor.

However, German courts made only very limited use of this option and even went back to a more compensatory interpretation of pain and suffering awards over the last decades. Three milestones accompanied this development:

– The strict segregation between pain and suffering awards on the one hand and the compensation for the violation of personality or privacy rights on the other hand, as developed by the Federal Supreme Court in the 1980s and 1990s,

– abandoning the practice of awarding only symbolic compensation amounts in favour of substantial sums in the most severe bodily injury cases in the 1990s and

– the German tort law reform in 2002 that shifted pain and suffering awards from tort law (§ 847 BGB) to the law of damages (§ 253 II BGB), expanding its scope of application to strict liability.

Nevertheless, two scenarios remain where pain and suffering awards can be seen as containing punitive elements. First of all, in case of intentional or gross negligence on the tortfeasor’s side, courts tend to increase the amounts of damages awarded for pain and suffering. On occasion, this is justified (though not entirely convincingly) by the alleged extra suffering caused to the victim because of the severe fault of the tortfeasor. Secondly, a severe delay in regulating obviously justified claims in bodily injury cases, either by the tortfeasor or his liability insurer, can also lead to an increase of the damages awarded for pain and suffering, up to twice the amount otherwise considered to be appropriate. The official explanation for the increased amount awarded in these cases, however, is usually similar to the explanation provided in regard to intentional or grossly negligent tortfeasors: the higher damages awarded are supposed to compensate the victim for the presumably increased pain he suffered as

41 BGH (GS) 18, p 149ff.
43 BGHZ 120, p 1ff.
44 For more details on the impact of this reform, see Ina Ebert, fn 22, p 462ff.
a consequence of the tortfeasor’s failure to promptly and properly compensate the damage he caused.

3. Dutch Case-Law

Dutch case-law is to some extent similar to German case-law, since the Dutch Supreme Court decided that in estimating the non-pecuniary damages award in case of physical injury, “the nature, duration and intensity of the pain, the grief and deprivation of joy in life” should be taken into account.\(^{47}\) Satisfaction of the victim is especially important in cases involving violence. Non-pecuniary damages might then also have a *punitive* meaning. Some authors indeed relate non-pecuniary damages to punitive damages, as the borderline between satisfaction and punishment is vague.\(^{48}\) Others are more reluctant since the legislator did not intend a real punitive purpose.\(^{49}\) According to Article 6:95 BW not only financial loss but also other loss is compensable as far as this is determined by legislation.\(^{50}\) The term ‘other loss’ is further defined in Article 6:106 BW.\(^{51}\) A claimant has a right to compensation for non-pecuniary loss in three situations:

- the tortfeasor intended to cause the loss,
- the injured person is physically injured, his honour or reputation is infringed, or his person is injured in another way,
- the loss consists of the violation of the memory of a deceased person, provided that the injury would have given the deceased, had he still been alive, the right to damages for injury to his honour or reputation.

There are starting points to attribute a punitive function to Article 6:106 BW.\(^{52}\) In Article 6:106(1)(a) BW, the focus shifts from the victim to the defendant whose *intentional* behaviour is taken into account. An example is the case concerning the man who intended to wound his wife by killing their son. In such a situation of intentionally harming a relative, compensation of non-pecuniary loss is possible on the

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\(^{50}\) AS Hartkamp and CH Sieburgh, fn 20 above, para. 142.

\(^{51}\) Dutch law knows some other bases for compensation of immaterial loss, such as Art. 7:510 BW governing travel agency agreements.

\(^{52}\) CJJC van Nispen, fn 48, p 38.
basis of Article 6:106(1)(a) BW.\textsuperscript{53} This judgment forms an exception to the little practical value of category \textit{a}, as it is difficult to prove that non-pecuniary loss was \textit{intentionally} caused.\textsuperscript{54} But given the use of Article 6:106(1)(a) BW in case there has been an intentional breach of a contractual or non-contractual duty, this provision has been mentioned as a potential basis for punitive damages.\textsuperscript{55}

The most significant proportion of non-pecuniary damages is awarded for physical injury.\textsuperscript{56} According to the Dutch Supreme Court, non-pecuniary damages for injury to the person \textit{other than} physical injury can only be awarded in case of \textit{serious} wrongdoing, such as the grave infringement of someone’s private life.\textsuperscript{57} Awards for infringements of honour or reputation can be rather substantial, especially when compared to awards for physical injury, although the majority of awards are modest in size.\textsuperscript{58} The last category mentioned in paragraph \textit{b}, injury of a person in another way, usually concerns mental injury or the infringement of a personality right other than honour or reputation, most importantly the right to self-determination. The position of the judge with regard to this category is rather reserved in comparison to situations where there is physical injury or injury to someone’s honour or reputation.\textsuperscript{59} The general requirement to award non-pecuniary damages on the basis of this category is that the victim has suffered psychological damage, but the extreme gravity of the infringement and the consequences thereof for the victim may justify exceptions.\textsuperscript{60}

Most Dutch non-pecuniary damages awards are based on physical injury and infringements of honour and reputation and do not exceed €15,000 – awards exceeding €50,000 are rare.\textsuperscript{61} In assessing non-pecuniary damages awards, the judge can use his discretionary power and assess the award in fairness.\textsuperscript{62} He should take notice of awards that have been granted by Dutch courts in comparable situations and may even look at foreign developments, although the latter cannot be decisive.\textsuperscript{63} All circumstances can be considered, such as the nature of the liability, the seriousness of the injury as well as the nature, gravity, length and intensity of the pain and suffering.\textsuperscript{64}
The judge’s discretionary power to take into account the nature and gravity of the wrongdoing might lead to punitive awards. Indeed, although the size of the awards is relatively small in comparison to some other European countries, Dutch lower courts have shown willingness to award a substantial sum of non-pecuniary damages in cases of grave wrongdoing. The highest non-pecuniary damages sum ever awarded by a Dutch court is €150,000, awarded to a man who became severely handicapped due to attempted murder, but awards of this size are only rarely awarded. Furthermore, in 1992 a sum of £300,000 (± €136,000) was awarded, also in a personal injury case, to a patient who was infected with HIV due to medical malpractice.

4. Non-economic Damages in the Italian Civil Code

In Italy, whereas Article 2043 of the Civil Code (It.c.c.) states that full compensation must be provided for any unjust damage, Article 2059 It.c.c. limits non-economic damages (damages for non-pecuniary loss) to cases which are expressly provided for by statute. How does one explain such a restrictive approach to non-pecuniary loss? The easiest way to justify the coexistence of such norms would be to postulate that, while economic wrongs may be redressed in court without restrictions, the attack upon the person’s non-economic interests cannot lead to a compensatory award unless the legislator has so explicitly provided. But this would however be difficult to reconcile with a system that provides in prominent articles of its Constitution to protect and promote fundamental human rights, which as is well-known, are mostly “non-economic”.

In recent times, the Corte di Cassazione (plenary session) has reached the conclusion that, in addition to the numerus clausus of circumstances explicitly provided for in legislation, an award of non-economic compensatory damages may also be sought where a fundamental right laid down in the Constitution has been infringed. However, not any infringement can give rise to an award of damages for non-pecuniary loss. According to the Supreme Court, the individual grievance must have been
sufficiently serious, i.e. it must have exceeded some *threshold of tolerability*, which is said to be imposed by the constitutional duty of solidarity.\(^{73}\)

Whilst this seems to represent the most recent trend of the Italian Supreme Court’s jurisprudence, if one looks at the legislative history of the Civil Code, then a different position could be legitimately defended, according to which Articles 2043 and 2059 It.c.c. do not pursue the same compensatory goals. Article 2059 was originally intended by the Legislature to serve as the legal basis for punishing particularly reprehensible actions. An indication of such an approach can be derived from the ministerial explanatory reports which accompanied the enactment of the *codice civile* in 1942. There, the then Ministry of Justice openly acknowledged the quasi-penal nature of the *non-economic damages* remedy, explaining that Article 2059 served to inflict upon the author of a particular unlawful action a “more vigorous punishment, with a view to deterrence”.\(^{74}\)

It is hard to deny that by subjecting the availability of such a remedy to the principle of strict legality – a guarantee applicable, it is worth recalling it, to criminal or administrative penalties –, the Italian Legislature’s intent was to further extend, by means of private actions, the legitimate interest of the State in deterring particularly reprehensible illicit activities which, in addition to violating sensitive pieces of legislation, had brought harm to the person. Ostensibly, this bears little relationship, if any, to the goal of compensating a victim’s non-economic suffering. Or, if a relationship could be postulated, it would be that of compensation as a secondary, indirect effect of a remedy primarily aimed at “punish[ing] more vigorous[ly] with a view to deterrence”.\(^{75}\)

In conclusion, it could be argued that Article 2059 It.c.c., while displaying the “non-economic damages” tag, truly paves the way for an exemplary sanction: a sanction not only punitive in nature, but also of an extra-compensatory kind. Indeed, if the pre-constitutional rule put forth in Article 2059 It.c.c. were to be read today as a limitation for the courts’ power to impose a compensatory award for intangible losses – subjecting it to previous and express authorization by the Legislator –, this would hardly be reconcilable with the open constitutional mandate (Article 2) to guarantee and promote the inviolable rights of man, as well as the *full expression* of human

\(^{73}\) It is, hence, not exactly in line with precedents the assumption that a “recently established rule” has authorised “compensation of any non-pecuniary loss” (emphasis in original). Thus, Alessandro P Scarso, *Punitive Damages in Italy*, in Helmut Koziol and Vanessa Wilcox (fn 11). If compensation of “any” non-pecuniary loss had really become the rule in Italy, this would have been realised through the “open clause” of Art. 2043 It.c.c. Instead, the Supreme Court has repeatedly affirmed that Art. 2059 It.c.c. and its “riserva di legge” (albeit revisited, broadened, “constitutionalised”) are still key to the recovery of non-economic damages.

\(^{74}\) See Relazione al codice civile, § 803: “With regard to the so-called moral damages, we have decided to restrict their availability to the cases expressly named by the law. These are damages that Art. 185 of the penal code makes available in the occurrence of a criminal offence. When a crime is committed, the attack upon the legal order is more intensely perceived, and therefore more intense is the need for a more vigorous punishment, with a view to deterrence”. For an account in English language, see Francesco Quarta, fn 70.

\(^{75}\) Relazione al codice civile, § 803.
personality. The proposal to bring Article 2059 It.c.c. back to its punitive and deterrent origins allows to valorise or, at least, make sense of a rule otherwise useless and systematically incoherent, notwithstanding the ‘constitutionally oriented’ reading promoted by the Supreme Court: useless because Article 2043 It.c.c. already ensures redress for any unjust damage, whether material or immaterial; incoherent because by subjecting the protection of human wellbeing to statutory pre-authorisation, the hierarchy of legal sources would irremediably be upset, provided that the Italian Constitution does not put forth any exhaustive listing of human rights but purports to safeguard the human person as such.

B. Compensation for the Violation of Personality Rights: A Sanction Sui Generis

Linked to the previous section concerning damages for moral harm is the category of compensation for breach of the right to privacy, which indeed is a sanction sui generis in the jurisdictions we study here with regard to punitive damages. In some of these jurisdictions, even the existence of damage does not seem to be a condition necessary to file a lawsuit.

In French law, it is often cited that a punitive element can be found in claims brought for breach of privacy. Although some authors have expressed scepticism, there are strong indicators of such a practice in the application of Article 9 of the Civil Code on protection of personality rights whose infringement per se results in a form of presumption of injury. There are also a series of cases in which the level of quantum is difficult to explain other than by reference to the behaviour of the defendant, notably the press, in pursuing a profit motive by increasing circulation figures. The classic example, as pointed out by Borghetti, is that of the deliberate publication by the press of information/photos in breach of privacy rights motivated simply by a desire to increase circulation of the newspaper/magazine in question. It should also be mentioned that the Cour de cassation has held that the mere violation of Arti-

76 For a few authors, inviolable human rights are only those (in fact, not many) expressly spelled out in the Constitution: e.g., see S Fois, Questioni sul fondamento costituzionale del diritto alla «identità personale», in G Alpa, M Bessone, L Boneschi and G Ciauzza (eds.), L’informazione e i Diritti della Persona, 155 (Jovene, Naples 1983) (not recognizing the constitutional rank of the right to personal identity). On the opposite side, see TA Auletta, Riservatezza e Tutela della Personalità, 42 f (Milano, Giuffrè, 1978). On the all-encompassing nature of Art. 2 of the Constitution and its direct application to non-economic damages redress, see P Perlingieri, L’art. 2059 c.c. uno e bino: una interpretazione che non convince, Rass. dir. civ. 776 (2003), Le funzioni della responsabilità civile, Rass. dir. civ. 115 (2011). Generally, see B Markesinis, M Coester, G Alpa and A Ullstein, Compensation for Personal Injury in English, German and Italian Law, 91 (Cambridge, 2005).
77 J Bell, S Boyron and S Whittaker, fn 31, p 379.
78 Rightly so, in the absence of any explicit recognition of practice or empirical data supporting such a claim: J-S Borghetti, fn 31, p 379.
79 J Bell, S Boyron and S Whittaker, fn 31, p 379.
80 J-S Borghetti, fn 11, p 64.
Article 9 of the Civil Code *per se* entitles the victim to compensation,\(^\text{82}\) without the need to show loss, thereby formalising the possibility of a punitive award, unconnected to harm suffered.\(^\text{83}\)

Like French law, German law does not provide explicitly for compensation for the infringement of personality or privacy rights. However, the German Supreme Court started as early as the late 1950s to award damages in these cases nevertheless, stressing from the very beginning that here – in contrast to pain and suffering awards – satisfaction is a much more important criteria for calculating the appropriate damages amounts than any compensatory approach. In the 1990s the German Supreme Court went even further:\(^\text{84}\) It made clear that damages paid for such infringements are something completely different than the compensatory pain and suffering awards in bodily injury cases, a sanction *sui generis*, based directly on provisions in the German Constitution (*Grundgesetz*). As a result, to determine the damages to be paid by the tortfeasor, the severity of any loss on the victim’s side is not a criterion. The existence of harm is not even required at all. Instead, the amounts of damages to be paid depend primarily (or exclusively) on the degree of fault of the tortfeasor, previous infringements committed by him, his economic situation and his reasons for violating the victim’s rights. So instead of compensating damage caused to the claimant, the emphasis is on preventing future infringements and sanctioning the infringements already committed.

A similar approach to that of the German Supreme Court is used by the Italian Supreme Court. In one Italian case,\(^\text{85}\) a famous football player was awarded 1 million Euros under Article 15 of Decree n 196/2003 (Data Protection Code). Article 15 states that an award of *non-economic damages* may be entered in favour of a person whose personal data have been illegitimately handled.\(^\text{86}\) The Milan Court found that the football club’s senior managers, wilfully aided by employees of a telecom company, had unlawfully and surreptitiously accessed the player’s mobile phone for a long period. The victim found out about such a privacy violation from the news only five years later. Although the decision was filled with references to the footballer’s state of anxiety upon discovery of the infringement, the Court also took into account the blameworthiness of the defendants’ conduct (the wilful nature of the offence as well as its long lasting concealment).

In the Netherlands, if someone commits a tort, for instance by infringing a personality right, or breaching a contract with a profit motive, then the victim may ask the judge to estimate the damage to the amount of (a part of) the profit. According to some authors, the obligation to compensate harm resulting from wrongful conduct has shortcomings if the profit gained by the wrongful conduct exceeds the injury to

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\(^{82}\) Cass 1er civ, 5 November 1996, Bull civ I, No. 378.

\(^{83}\) See discussion of J-S Borghetti, fn 11, p 64f.

\(^{84}\) So, ultimately, since the Caroline I-decision of 1994: BGHZ 128, p 1ff.; further clarified in BGHZ 160, p 298ff.; see also comment to this decision by Ina Ebert, VersR (2005), p 127ff. For more on this development see Ina Ebert, fn 22, p 478ff.

\(^{85}\) Trib. Milano, Sez. X, 3 September 2012, n 9749, Danno resp., 2013, pp 51 and 309.

\(^{86}\) See section III.A.4 above.
PUNITIVE DAMAGES IN EUROPE AND LEGAL PLURALISM

The victim. Article 6:104 BW on disgorgement of profit therefore also serves the function of law enforcement. In respect of a possible punitive function, an important question is whether disgorgement of profit is also possible if the victim himself has not suffered harm at all. The Dutch Supreme Court has answered this question in the negative: Article 6:104 BW is not applicable in case there is no damage. Although it is often difficult for the victim to estimate the exact loss, he must at least have suffered some damage. Thus, this provision cannot form an independent or separate basis for a disgorgement of profit claim.

In the evaluation of the compensation on the basis of the illicit profits, unlike the Dutch Supreme Court, the Swiss Federal Supreme Court is not reluctant to award a large sum of money as damages to the person who himself has not suffered pecuniary damage, but whose personality rights are unlawfully infringed. In a decision handed down on 7 December 2006, the High Court stated that the victim of a defamatory statement is not only allowed to claim damages for pain and suffering (tort moral, Genugtuung) but also the profits made by the defendant newspaper SonntagsBlick.

In order to achieve this result, the Court used Article 423(1) of the Swiss Code of Obligations (SCO), which sets out the conditions for the principal to be entitled to appropriate any benefits resulting from a business conducted by the agent without authority. This pragmatic solution allowed the Court to deal with the ostensible prohibition on punitive damages. However, it is highly questionable whether there really was a business conducted by the newspaper as the agent of its victim.

Since the newspaper had refused to deliver the account records, pursuant to Article 42(2) SCO, the Court had to estimate the profit at its discretion in accordance with the principles of justice and equity. Hence, the Court departed from the traditional definitions and principles based upon the so-called difference method (Differenzmethode) going back to Mommsen, and stressed the preventive function of tort law.

C. The Punitive Character of the Awards for the Violation of Intellectual Property Rights

Another example of hidden punitive awards can be found in the case of the breach of intellectual property rights. When certain conditions are met, the civil courts in Europe...
can order confiscation of revenue obtained through counterfeiting. As the amount in question is paid to the victim of the counterfeiting, and thereby will in many cases go beyond the actual loss which the latter actually sustained, this constitutes an exception to the restituo in integrum principle referred to above. In this regard French, Italian, German and Swiss law (1) seems different from the position of the Dutch Supreme Court (2).

1. French, German, Italian and Swiss Law
In France, Article L 331–1–4 of the Code de la propriété intellectuelle introduces a sanction which looks very much like punitive damages, as it is allows for the civil courts to order the confiscation of revenue obtained through counterfeiting, which goes beyond the actual loss actually sustained. Over and above this provision, it is interesting to note that another article of the IP Code provides that, in setting damages for the breach of intellectual property rights, the courts should take into account inter alia “any unfair profits made by the infringer and the moral harm caused to the rights-holder by the infringement.”

A similar provision has been introduced in Italy under the heading of “Indemnification of damages and restitution of profits.” “Taking into account the profits made by the infringer does seem to definitely move away from the restituo in integrum principle, and thus illustrate a shift from established principle which has not gone un-noticed in the academic literature.

In Germany, similar issues arise in case of the infringement of intellectual property rights. If, for instance, a shop-keeper or restaurant-owner plays music on his premises without paying the usual fee to GEMA, the German copyright collecting agency, it is impossible to know whether the tortfeasor gained anything by doing so or whether his infringement caused a loss on the side of the copyright holder. Therefore, the German Supreme Court has decided that in such a scenario, the tortfeasor has to pay 100% on top of the normal fee to GEMA as damages, because otherwise the highly vulnerable intellectual property rights of the copyright holder would be left without any protection against infringement. Thus, while the double-damages, of course, also serve as some kind of lump-sum compensation for the surveillance expenses of GEMA, their main justification is the violation of the copyright as such, not any damage done.

In Switzerland, recent developments in the field of infringement of intellectual property rights show, as well, that penal elements in civil law are no longer so unfa-
miliar. For cases of infringement of copyright, tariffs of the Cooperative Society of Music Authors and Publishers (SUISA), for instance, provide for damages of twice the ordinary license fee. While in 1996 the Swiss Federal Supreme Court left unanswered the question of whether such tariff provisions are contrary to public policy, it explicitly approved, only one year later, the admissibility of the double tariffs (in accordance with Section 18 of SUISA’s Tariff S).

2. The Position of the Dutch Supreme Court

The possibility to disgorge profit also exists in Dutch intellectual property law. Provisions that are comparable to Article 6:104 BW on disgorgement of profit can be found in the Copyright Act (Article 27a Auteurswet) and the State Patent Act (Article 70 lid 5 Rijksoctrooiewet).

Recently, the Dutch Supreme Court decided in two decisions concerning the character of Article 6:104 BW that this provision does not, not even partly, have a punitive character. Instead, courts should exercise restraint in applying this provision and take a reserved position in establishing the amount of damages: if the profit made by the defendant considerably exceeds the probable loss of the claimant, the court should in principle estimate the damages as a portion of the profit. The Supreme Court refused to see a punitive element in this provision despite an earlier decision made by the Benelux Court of Justice, in which the punitive character of a comparable provision concerning disgorgement of profit in case of intellectual property law infringements, i.e. (current) Article 2.21 Benelux Convention on Intellectual Property, was – albeit carefully – recognised. The punitive character of Article 2.21 should be seen in relation to its recognised law enforcement function; the possibility to disgorge profit on the basis of this Article should prevent malicious infringements of intellectual property rights. The disgorgement of profit takes away the economic incentive of wrongdoers to infringe intellectual property law.

Although the Supreme Court refuses to see a punitive element in Article 6:104 BW it does however, as mentioned above, allow courts to take into account the conduct

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100 BGE 122 III 467.
102 See section IVB above.
103 T Hartlief, fn 8, p 262; J Kortmann and C Sieburgh, fn 49, p 270. Art. 70 lid 5 partly implements Directive 2004/48/EC on the enforcement of intellectual property rights. This Directive is also implemented by other statutory instruments, most importantly the Code of Civil Procedure (Arts 1019 to 1019i Rv).
104 HR 18 June 2010, RvdW 2010/771 (Doerga/Ymere), r.o. 3.6; HR 18 June 2010, RvdW 2010/772 (Setel/AVR), r.o. 3.3.2. In both decisions the Court refers to HR 24 December 1993, NJ 1995/421 m. nt. CJH Brunner; HR 16 June 2006, NJ 2006/585 m. nt. JH Spoor. On these decisions, see WH Van Boom, Twee arresten over ‘winstafstoming’ ex artikel 6:104 BW (Ars Aequi 2011).
107 J Kortmann and C Sieburgh, fn 49, p 271.
of the defendant and the degree of blameworthiness. It is for that reason arguable that compensation of the claimant is not the sole starting point in estimating a damages award on the basis of Article 6:104 BW.

D. Civil Sanctions

Another sphere where a practice of the award of extra-compensatory damages occurs in a number of European jurisdictions is the case of civil sanctions. Depending on the jurisdiction, courts are allowed to award civil penalties either for abusive proceedings (1) or for discrimination (2).

1. Awards for Abusive Proceedings

Civil penalties are present in French law, and awarded by the civil (rather than criminal) courts when explicitly provided for by legislation. It is to be noted however that the amount of any fine imposed accurses to the public purse, and not to the claimant. In such cases, a judge thus can award civil penalties, over and above compensatory damages, within a civil case; so as to denote the displeasure of the court in case of vexatious or abusive proceedings. Earlier cases seemed to require proof of bad faith or malice on the part of the defendant, but that requirement has now been abandoned (though in practice many cases so illustrate serious fault on part of the defendants). Other provisions provide for similar such civil penalties. In France, civil fines are generally of a modest level (varying from 15 – 3,000 Euros), with the main exception being the controversial fine for restrictive practices / unlawful competition with a maximum fine of 2 Million Euros, which has frequently been applied in the retail sector and often for quite substantial amounts.

In Italy, there is a general consensus among authors and courts that Article 96(3) of the Civil Procedure Code contains a punitive civil sanction. While
Article 96(1) of the Civil Procedure Code authorises the courts, in a maliciously initiated or maintained lawsuit, to award damages in addition to the cost of proceedings. Article 96(3) of the Code introduces the concept of an *equitable amount* which the judge may award in favour of the successful litigant. In Italy, the amount of any fine imposed accrues thus to the claimant, and not to the public purse (unlike in France). One court has sanctioned the conduct of a corporate defendant which repeatedly refused to consider even the possibility of settling a legitimate compensation request by a customer. The latter brought proceedings in a civil court, but the company chose not to show up. The proceedings continued in the absence of the accused and led to a money judgment in favour of the claimant. Although that was not a typical malicious prosecution scenario, the court found that the plaintiff was entitled to Article 96(3) *aggravated* damages, because of the inexcusable conduct of the defendant. The norm’s aim, the court reasoned, is to discourage the waste of public resources related to a useless lawsuit; and a lawsuit is useless also where it could have been easily avoided by a reasonable out-of-court settlement. In such a context, it has been argued that the degree of a defendant’s fault in harming the plaintiff may be taken into account, among other things, with the aim of increasing the *quantum* of the extra-compensatory penalty.

2. **Awards for Discrimination**

Legislation by the European Commission has broadened the scope of awards for discrimination. Indeed, European anti-discrimination Directives usually contain a clause whereby the sanctions for any infringement of the national provisions inspired by EU law must be “*effective, proportionate and dissuasive*.” The CJEU’s case-law lends support to this policy argument while highlighting that liability for discrimination should be truly deterrent, and the sum awarded in respect of such liability must be more than a mere symbolic sum.

Since, unlike in France, Germany has not opted for criminal sanctions to ensure compliance with EU anti-discrimination law, then under German law, the pursuit of a truly deterrent effect relies on the amounts of damages to be paid. While in some Member States, such as Italy, the call for *effective, proportionate and dissuasive* remedies has generally brought about a statutory provision on *non-economic* damages.
(in addition to injunctive relief), the German legislator, with the Equal Treatment Act (AGG), has gone a little further. Indeed, the AGG provides a basis for damages awards in case of discrimination in labour law (§ 15 AGG), even if the employer can prove that the claimant was not the best candidate and would not have been hired had the employment proceedings been free of any discrimination—simply as a sanction for the discrimination as such.

Similarly, in Switzerland, Article 5 of the Federal Act on Gender Equality (GIG) gives the judge the discretion to award compensation to the victim of discrimination or sexual harassment, with the only limitation being that the payment may not exceed three monthly salaries for discrimination and six monthly salaries for sexual harassment. It is arguable that the legislature deliberately opted against the need to show occurrence of actual damage as a pre-requisite for compensation. A similar situation exists in EU countries. Lacking any clear provision in the EU regulations, the case law of the European Court of Justice is quite unambiguous in stating that, in cases of employment discrimination, it ought to be possible to award damages with a decidedly deterrent function. Consequently, according to the Court, national law should not provide for a fixed upper limit of the amount that can be awarded in damages.

In Switzerland, there is one more instrument that allows for the award of damages of a clearly penal character. In the domain of employment law, damages are awarded in cases of abusive termination or immediate termination of an employment relationship without valid reason. In both cases, the court has the discretion (Article 336a or Article 337c(3) SCO) to award up to six monthly salaries of the employee, irrespective of the actual damage occurred. Claims for damages on other counts are unaffected. It is to be particularly noted that according to Article 5(5) GIG, damages for financial loss and pain and suffering (tort moral, Genugtuung) may also be ordered in cases involving discrimination.

121 See Art. 3 of the Law n 67/2006 (discrimination against disabled persons) or Art. 44, decree n 286/1998 (on “racial” discrimination). For a conspicuous “non-economic” damages award in a racial discrimination case, see Trib. Varese, sez. Luino, 23 April 2012, in IlCaso.it. Moreover, it is worth noting that the Corte di Cassazione has recently held that an award of 20,000 Euros was not barely enough if compared to the “gravity of the offence” given the facts at stake (before the Supreme Court was the case of a homosexual who had been classified by the military as mentally ill and discarded on such basis from service; consequently, because of his very homosexuality, the petitioner was administratively deprived of his driving licence). see Cass., Sez. III, 22 January 2015, n 1126, in Danno e Responsabilità, n 5/2015, with notes by Francesco Quarta and Giulio Ponzanelli.


123 Reto Heizmann, fn 25, pp 125ff. and 152ff.

124 BGE 119 II 157.

Conclusion

It is generally believed that, in continental European systems, tort law should serve the sole purpose of compensating damage. Nevertheless, our analysis demonstrates that in several European jurisdictions – including France, Germany, Italy, the Netherlands and Switzerland – courts consider a non-compensatory aspect in deciding moral damages, compensating for the violation of privacy rights and of intellectual property rights as well as civil sanctions. Moreover, in the current scholarly debate, there is no consensus as to whether punitive damages are a priori in conflict with the principles of European law.

In the absence of a clear stance at either EU or national level, the too general statement in Paragraph 31 of the Commission Recommendation 2013/396/EU of 11 June 2013 – “punitive damages leading to overcompensation in favour of the claimant party of the damage suffered should be prohibited” – is therefore unfortunate. It is advisable for the Commission to reconsider its position in the course of its 2017 review of the Recommendation’s implementation to ascertain whether or not it remains consistent with the law in Europe. Indeed, the organic legal development of the European national laws should not be stifled by the unjustified policy changes imposed or recommended by Brussels. Until a possible revision of the Recommendation, national courts should retain the freedom to choose whether, and under what conditions, they recognise punitive damages.

126 Perhaps this would be more meaningful if it was set forth by the new EU Directive on Antitrust Damages Actions (2014/104/EU), and thus limited to such actions.