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the Procurement Directives and the Directives on Remedies as concerns public contracts meeting the thresholds set out in the Procurement Directives. The relevant framework rules are now set out in the 4th part of the German law against restrictions of competition (GWB) and are complemented by a number of more detailed regulations on public works, services and professional services.

Public contracts below the relevant thresholds continue to be outside the scope of the procurement rules laid down in the GWB and the system of protection of individual rights on which they are based. Here, the traditional view of procurement law as purely internal budgetary law persists. In an order of 13 June 2006 the German Federal Constitutional Court (BVerfG) confirmed the existence of an individual right of each tenderer to have its offer considered on the basis of the criteria relevant for the public contract at issue. But it rejected a constitutional mandate to create a system of private enforcement that would effectively protect this primary right. In view of the procurement authority's countervailing interest in a rapid execution of the contract, as well as the interest in legal certainty of the successful bidder, the legislature may limit the remedies available to the unsuccessful bidder to damages. A duty to inform the unsuccessful bidder about the decision on the award of the contract in advance, ie before the conclusion of the contract, could not be derived from constitutional law.

The → European Commission, on the other hand, tends to favour effective protection of the primary right of any tenderer/applicant to be considered for the contract from the fundamental freedoms (→ fundamental freedoms (general principles)), even for public contracts below the thresholds set out in the Procurement Directives (see EU Commission, Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006] OJ C179/02; for limiting principles see ECJ Case C-91/08 - *Wall AG* [2010] ECR I-0000 (nyr) para 65). Germany has unsuccessfully challenged this Communication before the → General Court of the European Union (GC) (Case T-258/06 - *Germany v Commission*, nyr).

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Heike Schweitzer

Punitive Damages

1. History and terminology

The private → law of torts or delict and criminal law share the same roots. In → Roman law, the law of delict developed as a sort of 'private criminal law' in the form of the *actiones poenales*. These were later combined with the actions *rei persecutoriae*, which aimed at compensation. Even in the 19th century, the eminent German jurist Friedrich Carl von Savigny did not hesitate to acknowledge the penal character of civil liability. In his opinion, the law of delict served not only to compensate the harm caused but also to mete out retribution in order to deter and reform.

Within the common law of torts—which, ironically, is more closely related to classical Roman law than its continental European counterpart—the sanctioning character of liability is explicitly acknowledged even to the present day. Damages are not only awarded in order to compensate a loss, but also as a means to control future behaviour and to effect retribution. The clearest example of this can be seen in the US jurisdictions, where judges (or juries) are authorized to impose 'punitive damages' for purposes of punishment and deterrence if the behaviour in question is thought to be particularly reprehensible.

2. European legal systems

a) Recognition of judgments

Even though Roman law acknowledged the penal character of liability in damages, its modern successors—the continental European civilian legal systems—reject the deterrence and penal functions of civil liability. The American model is thought to lie outside the common core of European private law. The rejection of punitive damages enables European courts to refuse the recognition of judgments issued by courts of the United States (→ recognition and enforcement of foreign judgments) to the extent that they order damages thought to be clearly excessive. The German Federal Supreme Court (BGH 4 June 1992, BGHZ 118, 312, 334 ff) even subscribed to the view that punitive damages are against the German *ordre public* (→ public policy). This view is affirmed in the recitals of the Rome II Regulation.

b) German law

Beyond rejecting the American model, the various national legal systems of Europe do not represent a cohesive view, but offer a multi-faceted picture. Punitive damages are anathema to German legal doctrine. The drafters of the German Civil Code (→ *Bürgerliches Gesetzbuch* (BGB)) explicitly rejected the system of gradation that had dominated the German common law (→ *ius commune*) through to the 19th century. Gradation means that the amount of damages is not only contingent upon the extent of the loss but also on the degree of fault. Under this approach the more reprehensible the conduct of the wrongdoer is, the higher the award of damages has to be. The assessment of damages with an eye to the degree of fault allowed the introduction of moral and pragmatic reasoning into the law of damages. This is exactly what the framers of the BGB wanted to avoid. In contrast, the compensation principle in the technical sense requires that damages must never exceed the loss sustained by the individual victim presently before the court. The concerns of deterrence and retribution are irrelevant for the assessment of damages. These principles are not, however, followed as stringently as it seems: in the context of media torts, when assessing damages for a breach of the right to privacy (→ personality rights), the courts acknowledge that deterrence is a valid concern that must be taken into account. This amounts to an implicit acknowledgement of the goal of deterrence as a normative guideline for the assessment of damages. Furthermore, the degree of culpability has always played an important role when assessing compensation for moral damage, even though it was strictly rejected from the calculation of economic loss. It is unclear why the same criterion that is rejected in the assessment of pecuniary losses, should be legitimate for the purposes of estimating damages for pain and suffering and other non-pecuniary harm.

c) French law

The French law of damages follows the maxim *tout le dommage, mais rien que le dommage*, which suggests that deterrence and retribution are irrelevant for the assessment of damages. But similar to Germany, the latter concerns find loopholes through which they sneak back into the legal analysis. It is no secret that French courts, like their German counterparts, have an eye on deterrence when estimating damages in cases involving media torts or the breach of general personality rights (→ personality rights). Wrongful but lucrative behaviour is to be discouraged. The Draft Reform Act of the Law of Obligations (*Avant-Projet de reforme du droit des obligations*) embraces this jurisprudence and even suggests entrenching it in the *Code civil*. Under the proposed Art 1371 *Code civil*, the court will be entitled to award punitive damages in cases of clearly deliberate fault, specifically for 'lucrative fault' (*dommages-interets punitifs en cas de faute manifestemente delibérée, et notamment d'une faute lucrative*). Aside from breaches of privacy rights through the media, aspects of prevention and retribution are considered, not only in cases of non-pecuniary loss, but also with regard to pecuniary loss. The broad discretion that the French courts enjoy in assessing the amount of damages offers the possibility of taking concerns of deterrence and retribution into account without much ado.

d) Austria and Switzerland

Among continental European jurisdictions the Austrian and Swiss legal systems approach the deterrence and penal functions of the law of delict with relative ease. For Switzerland, Art 43(1) OR explicitly states that the circumstances of the case, but also the degree of fault, have to be considered when assessing the amount of damages. This practice relates to punitive damages in that the assessment of damages is used as a means of furthering the ends of the law of delict. The Austrian → *Allgemeines Bürgerliches Gesetzbuch* (ABGB) has followed the system of gradation up to this day since damages may be reduced where the fault on the part of the wrongdoer was only slight. In the current reform dis-

cussions it has been suggested to abandon this principle. At the same time, the reform draft, however, explicitly acknowledges that one function of the law of damages is to create an incentive to avoid harm in the first place (§ 292(1) Draft Proposal).

e) English law

English law does not need any detours in order to embrace the deterrence function of damages. Punitive damages are an accepted feature not only of the American common law but also of its English parent, albeit under the term 'exemplary damages'. In contrast to US law, however, the scope of exemplary damages had been limited to a few distinct categories of cases as a result of the (former) House of Lords' 1964 decision in *Rookes v Barnard* [1964] AC 1129. One of these categories was where a statute explicitly authorized the court to award exemplary damages, the second was government liability for wrongful acts of civil servants and the third was lucrative torts. As to the latter, where the tortfeasor anticipated his liability in damages and nonetheless committed the wrongful act for his own benefit, the deterrence function took priority and justified an award of supra-compensatory damages. The practical relevance of the maxim 'tort must not pay' has been predominant in the area of media torts. However, the House of Lords has overturned the limitation of exemplary damages to specific categories of cases in 2002 (*Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122). An extension of exemplary damages beyond the area of media torts and the other two categories acknowledged by *Rookes v Barnard* is now within reach.

3. European Union law

There is no → European Union legislation specifically authorizing courts to award punitive damages. However, where a particular national legal system acknowledges the deterrence function of damages and allows for supra-compensatory remedies, it must not discriminate between breaches of national law and European Union law. Therefore, the → European Court of Justice (ECJ) has held that it is the duty of the English courts to award exemplary damages in cases involving the liability of the state for a breach of EU law, as long as they would also order the same damages if national law had been breached (ECJ Joined Cases C-46/93 and C-48/93 – *Brasserie du pêcheuer and Factortame III* [1996] ECR I-1029 para 90 f).

Numerous EC → directives and → regulations grant the Member States discretion as to how they sanction breaches of EU law. However, this discretion is not without its limits. According to ECJ case law the Member States are required to sanction breaches of EC law in a manner that guarantees 'real and effective judicial protection' and to see to it that the sanction has a 'real deterrent effect' on potential wrongdoers (ECJ Case C-14/83 – *von Colson* [1984] ECR 1891, para 23). The formula that sanctions must be 'effective, proportionate and dissuasive' is now firmly established not only within the jurisprudence of the ECJ but also in the acts of the European legislature, found, for example, in the anti-discrimination directives (eg Art 15 Dir 2000/43).

4. European-style 'preventive damages'

Effective sanctions for breaches of EU law for purposes of deterrence are not tantamount to punitive damages. The deterrence function of liability in damages must be distinguished from the penal function in the technical sense of retribution for wrongs. While US-style punitive damages combine both functions of punishment and deterrence, the case law of the ECJ, as well as the legislative enactments of the EU, do not go as far, but embrace the deterrence function only. As the criticism launched against punitive damages has to a great extent been premised on an unwillingness to accept retribution as a function of the law of damages, sanctions which are merely 'dissuasive' pose no deserving target for this kind of criticism. The rejection of retribution as a function of the law of damages makes much of the criticism launched against punitive damages obsolete. For the sake of conceptual clarity, it may be helpful to supply a new term for this European concept, eg 'preventive damages'.

Nevertheless, the recognition of deterrence as a function of the law of damages by the → European Court of Justice (ECJ) and subsequent EU legislation marks a departure from the traditional compensation principle. How far this development will evolve remains to be seen. In the context of European competition law (→ competition law (sanctions)), the deterrence function of damages seemed to dominate the ECJ decision in *Courage* (ECJ Case C-453/99 [2001] ECR I-6297). The decision in *Manfredi* (ECJ Joined Cases C-295/04 to C-298/04 [2006] ECR I-6619), however, shifted the focus back and seemed to place the compensation function into the front seat. The crucial question that the Court has until now declined to answer is whether damages in excess of the loss suffered by the claimant may be awarded in the interest of law enforcement. If supra-compensatory remedies were available, the deterrence function would take priority;

where the loss suffered by the individual claimant operates like a ceiling on the potential liability of the respondent, the compensation function dominates. It will be interesting to see the ECJ coming down on one or the other side of the equation.

5. Perspectives for harmonization

The projects aimed at harmonizing the European systems of tort or delict implicitly reject the concept of punitive damages, at least if understood in the US style, ie including the penal (retributive) function. With regard to the more limited concept of preventive damages, a more positive attitude prevails. The → Principles of European Tort Law (PETL) explicitly define the nature and purpose of damages. Article 10:101 PETL provides that damages serve the purpose of compensating the victim but also of preventing harm. Again, as within the jurisprudence of the ECJ, which function dominates remains ambiguous, particularly whether the deterrence function is strong enough to justify the award of supra-compensatory remedies. The Draft → Common Frame of Reference (DCFR) does not explicitly mention the deterrence function of damages at all. Article VI.-6:101(1) DCFR defines 'reparation' as the effort 'to reinstate the person suffering the legally relevant damage in the position that person would have been in had the legally relevant damage not occurred'. This suggests that the victim must not walk away better off than if the legally relevant damage had not occurred. The special rules on 'prevention' supplied by Art VI.-6:301 DCFR do not concern the assessment of damages at all, but deal with the different topics of injunctive relief and abatement.

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Gerhard Wagner

Railway Transportation

1. Development and significance

After the first rail connections in several European countries started to operate in the first half of the 19th century, carriage by rail quickly gained momentum and soon developed into the primary means of transport on land. As the transport of goods as well as persons was of such eminent significance for the commercial and industrial development of every single country and was also of major importance in military conflicts, rail development enjoyed strong governmental support consistent with the needs of the sponsoring country. This resulted in national rail markets, operated by integrated national rail companies, that offered transport services and also built and maintained the track network. As the technical framework differed from country to country, cross-border traffic was subsequently confronted with a lack of uniformity in areas such as track gauge, voltage and the training standards of railway staff. Instead of a standardized European rail system, the result was an unsatisfactory series of national rail systems which impeded transport speed and generated extra costs, putting rail at a disadvantage in the competition with other modes of transport, particularly road transport. Consequently, goods and passenger rail transport lost significance over the course of time. While the total output of rail transport services has remained roughly the same, it has seen a substantial drop in market share, mainly in favour of road transport, as the overall volume of transport of goods has increased. In regard to the transport of persons, the growing number of private cars and the expansion of air traffic have also had a negative impact. Nonetheless, environmental and safety concerns—areas where rail excels—give hope for a renaissance.

In the future, rail freight will represent an environmentally sounder alternative to increasingly overstrained roads. Today, it has already assumed a growing significance due to the use of standardized loading units, eg containers, which are functional across different means of transport (→ multimodal transport). In the transport of persons, a shift away from the airplane, particu-