



EU Member States' Courts Versus U.S. Punitive Damages Awards for Physical Harm in Football: An Attempt at Defining Best Practice.

Cedric Vanleenhove & Jan De Bruyne***

INTRODUCTION

Shocking or career-threatening tackles have been observed in various football competitions around the world. Every football league has its examples of crushing tackles which have left the victim with long-term suffering.¹ The Major League Soccer in the United States (U.S.) is no exception.² When the victim of such an incident decides to file a law suit to recover damages from

* Dr. Cedric Vanleenhove (Master in Law Ghent University, LL.M Cambridge) is currently Lecturer-In-Charge of an introductory course in the Bachelor of Laws Program as well as Post-Doctoral Researcher in the field of transnational law at Ghent University Law School. He was a Visiting Fellow at the Institute of European and Comparative Law of Oxford University in 2013 and a Visiting Researcher at Harvard Law School in 2014. His Ph.D. thesis dealt with the private international law treatment of U.S. punitive damages in the European Union.

** Jan De Bruyne (Master in Law, Ghent University & Master EU Studies, Ghent University) is Academic Assistant in the field of comparative and private law at the Ghent University Law School. He has been a Visiting Fellow at the Institute of European and Comparative Law of Oxford University in 2014 and at the Center for European Legal Studies of the University of Cambridge in 2015.

¹ For instance, Alf-Inge Håland's career ended due to the deliberate knee-high tackle by Roy Keane during the Manchester Derby in 2001. Another example is Axel Witsel's leg-breaking horror tackle that put Anderlecht player Marcin Wasilewski out for almost an entire year.

² Remember Hristo Stoichkov's leg-shattering tackle in 2003 during a game between D.C. United and American University. The tackle caused severe physical and psychological injuries to his opponent Freddy Llerena-Aspiazu. He filed a lawsuit in the U.S. District Court claiming damages from the former Bulgarian international whose tackle caused the injury.

the wrongdoer, punitive damages might become available.³ The availability of punitive damages for football injuries in the United States raises the question whether awards for such damages can also be enforced in the European Union (EU). The vast majority of EU Member States traditionally adopts a hostile stance towards this controversial remedy. However, more recently a small number of countries have exhibited a more welcoming attitude. The article supports this new-found openness and attempts to solidify it by formulating a number of guiding principles that European judges can fall back on when confronted with American judgments containing punitive damages for liability for football injuries. Such a study might be particularly relevant considering the rising popularity of football in the U.S. and the transfers to major European football leagues going along with it.⁴

PUNITIVE DAMAGES AND SPORT INJURIES IN THE UNITED STATES

Although not the main focus of this contribution, it is interesting to briefly recall the circumstances under which punitive damages become available in the U.S. following a crushing or career-ending tackle in football.⁵

Contrary to compensatory or actual damages, punitive damages are not (primarily) intended to compensate the plaintiff for harm done. Punitive

³ For instance, Llerena-Aspiazu alleged that Stoitchkov's tackle was the direct and the proximate result of the defendant's recklessness. Llerena-Aspiazu further argued that Stoichkov's tackle constituted outrageous conduct that was malicious, wanton, reckless or in willful disregard of rights. Therefore, Llerena-Aspiazu sought \$5 million in punitive damages from Stoichkov (*Llerena-Aspiazu v. Anschutz D.C. Soccer L.L.C., et al.*, Case 1:06-cv-00343-RWR, Complaint (U.D.D. 2006)). Although a financial settlement was eventually reached between Llerena-Aspiazu and Stoichkov (*Llerena-Aspiazu v. Anschutz D.C. Soccer L.L.C., et al.*, Case 1:06-cv-00343-RWR, Notice of Settlement (U.D.D. 2006)), the case illustrates that it is conceivable that punitive damages can be awarded if the court accepts that the tortfeasor deliberately tried to injure the plaintiff or acted willfully or grossly negligent with a conscious disregard for the safety of others.

⁴ There are, for instance, a number of examples of famous players who have made the move from the U.S. football competition to the English Premier League. In 1999 Colorado Rapids sold Marcus Stephen Hahnemann to Fulham. Goalkeeper Tim Howard left Metrostars for Manchester United in 2003. Fulham bought Clint Dempsey from New England Revolution in 2007. Brad Guzan transferred from Chivas USA to Aston Villa in 2008. Finally, DeAndre Yedlin very recently swapped Seattle Sounders FC for Tottenham Hotspur.

⁵ See for an extensive discussion: Cedric Vanleenhove & Jan De Bruyne, 'Liability for Football Injuries and Enforcement in the EU – Will US Punitive Damages be Shown the Red Card in Europe?' (2014) 14 Va. Sports & Ent. L.J. 50.

damages are essentially a sum of money placed on top of the compensatory damages. They seek to punish the defendant for their outrageous misconduct and to deter him and others from similar misbehaviour in the future.⁶ The foundational requirement for punitive damages is the infringement of a legally protected interest.⁷ In order to obtain punitive damages, the plaintiff must have suffered actual damage and must provide sufficient evidence thereof. There is thus no separate cause of action for punitive damages.⁸ However, the fact that the defendant has acted in an unlawful manner does not suffice for punitive damages to be awarded. The conduct in question must involve a degree of aggravation.⁹ In this regard, the Restatement of Torts emphasises that “punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others”.¹⁰

It is thus required that a player’s conduct on the football pitch involves a degree of aggravation. However, such behaviour is not always easy to establish. Violent physical contact is often part of the game in contact sports such as football or rugby and sometimes even encouraged.¹¹ Participants assume to a certain extent the risk of physical injury which is inherent in playing such violent sports.¹² Injuries incurred by professional football players due to an

⁶ See in this regard: Restatement (Second) of Torts § 908 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); Bryan A. Garner, *Black’s Law Dictionary* (9th edn, Thomson/West 2009) 175; Gabrielle Nater-Bass, ‘U.S.-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries’ (2003) 4 DAJV Newsletter 154.

⁷ 22 Am. Jur. 2d Damages § 567.

⁸ 22 Am. Jur. 2d Damages § 567, 569.

⁹ 22 Am. Jur. 2d Damages § 585; Lotte Meurkens, ‘The punitive damages debate in Continental Europe: food for thought’ in Lotte Meurkens & Emily Nordin (eds.), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012) 7.

¹⁰ Restatement of Torts, § 908. Across the different U.S. States, various terminology is employed to express this required high standard of misconduct: “egregious”, “reprehensible”, “bad faith”, “fraud”, “malice”, “oppression”, “outrageous”, “violent”, “wanton”, “wicked” and “reckless”.

¹¹ Michael F. Taxin, ‘The Changing Evolution of Sports: Why Performance Enhancing Drug Use Should Be Considered in Determining Tort Liability of Professional Athletes’ (2004) 14 Fordham Intell. Prop. Media & Ent. L.J. 817, 819 & 825-826; Daniel E. Lazaroff, ‘Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition’ (1990) 7 U. Miami Ent. & Sports L. Rev. 191, 194. See for example: *Jaworski v. Kiernan*, 696 A.2d 332, 337 (Conn. 1997).

¹² See for example: *Nydegger v. Don Bosco Preparatory High School*, 495 A.2d 485, 486 (N.J. Super. Ct. Law Div. 1985). See for a discussion: Richard J. Hunter Jr., ‘An “Insider’s” Guide to the Legal Liability of Sports Contest Officials’ (2005) 15 Marq. Sports L. Rev. 369, 373.

opponent's tackle will, therefore, not often result in civil litigation.¹³ Despite these restrictions, punitive damages have already been claimed and awarded at several occasions in cases of (professional) sport liability.¹⁴ If an injured football player decides to file a law suit against the opponent-tortfeasor in the U.S., he can base his claims on several grounds.¹⁵ One of these grounds in cases of professional sports liability is recklessness.¹⁶ Recklessness is a state of mind in which a person does not care about the consequences of his or her actions.¹⁷ It can occur when the defendant acted with "reckless disregard of [the plaintiff's] safety".¹⁸ Intention is another ground on which claims for recovery can be founded. Intentional wrongdoing involves claims that are based on a deliberate interference with another person either by threats of physical contact or directly through the physical contact itself.¹⁹ An intentional

¹³ Jeffrey Citron & Mark Abelman, 'Civil Liability in the Arena of Professional Sports' (2003) 36 U.B.C. L. Rev. 193, 194-195; Chris J. Carlsen & Matthew Shane Walker, 'Note, The Sports Court: A Private System to Deter Violence in Professional Sports' (1982) 55 S. Cal. L. Rev. 399, 400-402 & 412-413; Erica K. Rosenthal, 'Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play' (2004) 72 Fordham L. Rev. 2631, 2631-2632; Donald T. Meier, 'Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout From the Tragedies on the Training Ground for American Values' (2002) 2 Va. Sports & Ent. L.J. 80, 153.

¹⁴ See for example: *Polonich v. A.P.A. Sports*, No. 74635 (E.D. Mich. filed Nov. 10, 1982); *Tomjanovich v. California Sports*, No. H-78-243, 1979 U.S. Dist. LEXIS 9282 (S.D. Tex. 1979). See for a discussion of the cases: Wyatt M. Hicks, 'Preventing and Punishing Player-to-Player Violence in Professional Sports: The Court System versus League Self-Regulation' (2001) 11 J. Legal Aspects Sport 209, 222; John F. Carroll, 'Torts in Sports – I'll See You in Court!' (1983) 16 Akron L. Rev. 537, 539; Citron & Abelman (n 13) 199; Michael K. Zitelli, 'Unnecessary Roughness: When On-field Conduct Leads to Civil Liability in Professional Sports' (2010) 8 Willamette Sport L.J. 1, 6-7; Gil B. Fried, 'Punitive Damages and Corporate Liability Analysis in Sport Litigation' (1998) 9 Marq. Sports L. J. 45.

¹⁵ See for an extensive overview of case law with further references: Rosenthal (n 13) 2647.

¹⁶ Taxin (n 11) 823; Ray Yasser, 'In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants be Required to be Reasonable' (1995) 5 Seton Hall J. Sport Law 253, 254-255 & 257-262. See for an in-depth discussion on the standard of intention or recklessness with further references to case law: Adam Epstein, *Sports Law* (1st edn, Cengage Learning 2012) 118-119; Lazaroff (n 11) 198-205; Rosenthal (n 13) 2648-2653.

¹⁷ Garner (n 6) 1277. In this regard, Section 500 of the Restatement Second of Torts stipulates that "the actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent".

¹⁸ *Hackbart v. Cincinnati Bengals, Inc. and Charles Clark*, 601 F.2d 516, 524 (1979); *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975); *Bourque v. Duplechin*, 331 So. 2d 40 (La. Ct. App. 1976); *Robert J. Gauvin v. Richard Clark*, 404 Mass. 450, 454 (Mass. 1989).

¹⁹ Citron & Abelman (n 13) 198-199; Yasser (n 16) 255-256.

tort requires the actor to have intended to cause the harm which resulted from the act.²⁰

In sum, a football player who suffers shocking and career-threatening injuries might be able to recover damages when he establishes that the defendant either acted with reckless disregard of the former's safety or with the intention to cause him physical injuries. The crushing tackles discussed in this article often qualify as reckless, intentional or committed with disregard for the safety and interests of the plaintiff. As a consequence, punitive damages could be awarded by a U.S. court.²¹

ENFORCEMENT OF U.S. PUNITIVE DAMAGES IN THE EU: CURRENT SITUATION

Given the many options the football market offers players to develop a career abroad, it is possible that the tortfeasor transfers to a club in the EU leaving no assets behind and rendering enforcement outside of the U.S. indispensable if any money is to be recovered. The question of the enforceability of U.S. punitive damages in the EU, therefore, holds a high level of relevance for sports law practice.

In absence of a treaty for the mutual recognition and enforcement of judgments between the EU (or its Member States) and the U.S., national rules of private international law determine the requirements for enforcement. The compensatory damages awarded will generally not pose many concerns in the European Union. The punitive damages granted by the American court, on the other hand are more complicated. Fortunately, the Supreme Courts of four major EU Member States – Germany, Italy, Spain and France – have ruled on the enforceability of U.S. punitive damages. These nations are significant in

²⁰ Zitelli (n 14) 2-3. See for example: *Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 206 (Ct. App. 2003); *Averill v. Luttrell*, 311, S.W.2d 812 (Tenn. Ap. 1957).

²¹ See for an extensive discussion and further references: Vanleenhove & De Bruyne (n 5) 51-58.

terms of population²² and economy²³ as well as regards to the level and attraction of their highest football league.

The sparse case law in the EU on the topic indicates that the outcome of the request for enforcement of the punitive award depends on the requested national court's interpretation of the public policy exception. Contrariety to public policy is a ground for refusal of enforcement in all four selected EU Member States. The notion of public policy should be understood as *international* public policy. In private international law, a condensed form of public policy, namely international public policy, comes to the foreground.²⁴ This derivative from domestic public policy contains only the most fundamental values of the forum and is, therefore, narrower in scope than its internal counterpart. A legal system is required to be more tolerant in cross-border matters than in purely domestic affairs.²⁵ Despite its name, international public policy is a purely national concept.²⁶

All cases regarding the enforcement of U.S. punitive damages in the EU were centred around this ground of refusal but resulted in different outcomes.²⁷ As to the four selected EU countries, two divergent attitudes can be discerned. On the one hand, the Supreme Court judgments in Germany (*John Doe v. Eckhard Schmitz*) and Italy (*Parrott v. Fimez*) have demonstrated a clear distrust towards American punitive damages. The concept of punitive damages is considered contrary to the fundamental separation of criminal and private law. These nations are wary of punitive damages because they are administered in

²² See for an overview of the population in EU Member States: <http://europa.eu/about-eu/countries/member-countries/index_en.htm>.

²³ The figures of the year 2013 are available on the website of the International Monetary Fund: International Monetary Fund, World Economic and Financial Surveys – World Economic Outlook Database, October 2013 <<http://www.imf.org/external/pubs/ft/weo/2013/02/weodata/index.aspx>>.

²⁴ Vincent Heuzé & Pierre Mayer, *Droit international privé* (8th edn, L.G.D.J 2004) 149, no. 205; Alex Mills, *The Confluence of Public and Private International Law – Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (1st edn, CUP 2009) 275-277; Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 J. Private Int. Law 201, 203; Patrick Bernard, 'Further developments for qualification of foreign judgments for recognition and enforcement in France: the test for punitive damage awards' (2011) IBA 16, 18.

²⁵ Benjamin Janke & François-Xavier Licari, 'Enforcing Punitive Damage Awards in France after Fountaine Pajot' (2012) 60 Am. J. Comp. L. 775, 792.

²⁶ Jacob Dollinger, 'World Public Policy: Real International Public Policy in the Conflict of Laws' (1982) 17 Tex. Int'l L. J. 167, 170.

²⁷ See for a more extensive analysis: Vanleenhove & De Bruyne (n 5) 58-80.

civil proceedings but pursue objectives which are traditionally the focus of criminal law. Punitive damages are also held to be anathema to the principle of strict compensation and are seen as resulting in an unjust enrichment of the plaintiff. These findings led both courts to the conclusion that U.S. punitive damages violate their respective international public policy and should, therefore, be turned down for enforcement.²⁸

In contrast, the highest civil courts in Spain (*Miller v. Alabastres*) and France (*Schlenzka & Langhorne v. Fontaine Pajot*) have moved away from this conservative view and have adopted a more embracing stance on the contentious remedy of punitive damages. Instead of declaring the concept itself incompatible with international public policy, they have shifted their attention to an investigation of the amount awarded by the U.S. court.²⁹ The fundamental rejection of the institution *in se* was replaced by a tolerance check in the form of an ‘excessiveness test’ on the basis of the quantum of punitive damages granted by the American court. In Spain, the end result was the acceptance of U.S. treble damages, *i.e.* a form of punitive damages achieved by trebling the compensatory award (one third of treble damages thus stands for compensatory damages while two-thirds of the award represents punitive damages).³⁰ In a French case worth USD 1.391.650,12 in compensatory damages, punitive damages as such were accepted, but USD 1.460.000 was deemed excessive.³¹

The described schism leads to the realisation that the location of the wrongdoer’s new club will play a vital role in the enforcement chances of an American judgment for punitive damages. The likelihood of obtaining the

²⁸ For Germany: German Supreme Court 4 June 1992, *John Doe v. Eckhard Schmitz*, BGHZ 118, 312, NJW 1992, 3096, RIW 1993, 132, ZIP 1992, 1256 (English translation of the relevant parts of the judgment by Gerhard Wegen & James Sherer, ‘Germany: Federal Court of Justice decision concerning the recognition and enforcement of U.S. judgments awarding punitive damages’ (1993) 32 I.L.M. 1320, 1329. For Italy: Italian Supreme Court 19 January 2007, *Parrott v. Fimez*, no. 1183, Rep Foro it 2007 v Delibazione no. 13 and v Danni Civili no. 316; Corr. Giur., 2007, 4, 497; Italian Supreme Court 8 February 2012, *Soc Ruffinatti v Oyola-Rosado*, no. 1781/2012, Danno resp 2012, 609.

²⁹ For Spain: Spanish Supreme Court 13 November 2001, *Miller v. Alabastres*, exequatur no. 2039/1999, Aedipr 2003, 914. For France: French Supreme Court 1 December 2010, *Schlenzka & Langhorne v. Fontaine Pajot S.A.*, no. 09-13303, Dalloz 2011, 423.

³⁰ Spanish Supreme Court 13 November 2001, *Miller v. Alabastres*, exequatur no. 2039/1999, Aedipr 2003, 914.

³¹ French Supreme Court 1 December 2010, *Schlenzka & Langhorne v. Fontaine Pajot S.A.*, no. 09-13303, Dalloz 2011, 423.

amount of U.S. punitive damages in Germany and Italy is very low. The odds of getting punitive damages enforced in Spain and France is undoubtedly much higher but it is extremely difficult to predict the tolerance level of the national judges.³² Instead of revisiting the past cases, this article takes a normative slant by looking at the future. In the following parts it is first argued that European courts should accept the concept of punitive damages and then a framework that can assist the court when reviewing the excessiveness of the punitive damages is formulated.

CHOOSING SIDES: PERSISTENT REFUSAL OR PRINCIPLED ACCEPTANCE?

European courts should not treat U.S. punitive damages as, in themselves, contrary to international public policy.³³ The traditional interpretation of international public policy, as rejecting the concept of punitive damages, does not reflect the legal reality. It cannot be sustained that the outright rejection of the remedy of punitive damages is warranted under international public policy.

In this article it is asserted that Member States' courts should not refuse the enforcement of U.S. punitive damages because their own legal systems contain private law instruments akin to punitive damages or pursuing identical or similar goals. In such a context, it seems problematic to employ the international public policy exception to reject foreign punitive damages in private international law cases. The international public policy test should be restricted to an excessiveness (or proportionality) check of the American punitive damages.³⁴

The legal systems of France, Spain, Italy and Germany contain private law instruments which resemble punitive damages or which pursue the same goals

³² See for an extensive discussion of the enforcement of punitive damages in the different EU Member States: Vanleenhove & De Bruyne (n 5) 58-81.

³³ Nater-Bass (n 6) 160

³⁴ François-Xavier Licari, 'Prendre les punitive damages au sérieux: propos critiques sur un refus d'accorder l'exequatur à une décision californienne ayant alloué des dommages intérêts punitifs' (2010) 137 *Journal du droit international* 1230, 1262.

of punishment and/or prevention.³⁵ An argument of internal legal coherence then leads to the acceptance of U.S. punitive damages at the enforcement stage. When a legal system itself contains punitive-like remedies in private law, it cannot declare punitive damages unenforceable by using the international public policy escape clause.³⁶ Member States would be guilty of legal hypocrisy if they were to reject U.S. punitive damages as violating international public policy while at the same time acknowledging or condoning similar instruments in their substantive law.³⁷

PROPOSAL FOR GUIDING PRINCIPLES

Although this article supports the compatibility of U.S. punitive damages with international public policy, the openness is by no means unbridled. There is still another requirement that acts as a safety valve: the punitive damages award should not be excessive. In the following paragraphs, a set of guidelines as to how this excessiveness check should be applied is formulated. These suggested guidelines are derived from the U.S. Supreme Court's constitutional constraints on punitive damages as well as from the few cases concerning the enforcement of punitive damages in the four selected EU Member States. The

³⁵ In Spain, for instance, Article 123 of the *Ley General de la Seguridad Social* (General Act on Social Security) provides that when an employee has suffered a labour accident or an occupational disease which was caused by faulty equipment in a workplace without obligatory safety devices or where safety and hygiene measures were not observed, the benefits paid out (by the state) to the employee will be increased by 30 to 50% depending on the seriousness of the employer's wrongdoing. A penalty clause is another example. The clause leads to the party failing to perform his obligation or failing to do it properly having to pay an amount of money as penalty to the other party. The clause is intended to encourage performance or, put differently, to deter the party from breaching the contract. The party requesting payment of the penalty does not have to prove the existence of any real damage. The (indirect) penal effect of the clause is thus obvious. See in this regard: Article 339 of the German Civil Code, Article 1226 of the French Civil Code, Article 1154 of the Spanish Civil Code and Article 1382 of the Italian Civil Code.

³⁶ Volker Behr, 'Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts' (2003) 78 Chi.-Kent. L. Rev. 105, 153; Madeleine Tolani, 'U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public' (2011) 17 Ann. Surv. Int'l & Comp. L. 185, 207; Francesco Quarta, 'Foreign Punitive Damages Decisions and Class Actions in Italy' in Duncan Fairgrieve & Eva Lein (eds.), *Extraterritoriality and Collective Redress* (OUP 2012) 275-276.

³⁷ Jessica J. Berch, 'The Need for Enforcement of U.S. Punitive Damages Awards by the European Union' (2010) 19 Minn. J. Int'l L. 55, 77; Csongor István Nagy, 'Recognition and enforcement of US judgments involving punitive damages in continental Europe' (2012) 30 N.I.P.R. 4, 11.

objective of the proposed framework for European judges is to promote a uniform and receptive standpoint regarding the enforcement of this common law remedy by offering concrete tools for European courts to separate acceptable punitive damages from the intolerable ones, thereby contributing to legal certainty. Football players who have suffered from tackles and have recovered punitive damages in the U.S. will have a clearer picture of what to expect at the enforcement stage in the EU. Although the guidelines discussed in the following paragraphs are valid for any type of U.S. punitive damages award, they are applied to the specific situation of a punitive award for physical harm in football where possible. The recommendations set out are thus not only relevant from a conceptual and academic point of view but are also practically significant for the football industry.

First, an obvious yet important overarching reminder: refusal of enforcement should remain exceptional. The violation of (international) public policy forms a justification for a refusal to enforce the foreign judgment.³⁸ However, this safety valve mechanism should only operate in the most compelling circumstances.³⁹ Frequent refusals to grant enforcement on the basis of (international) public policy would add to the development of anarchy in international affairs.⁴⁰ The escape clause should be reserved for extreme cases.⁴¹ When deciding on the enforceability of an American punitive damages award, courts in the European Union should thus lean towards acceptance rather than rejection.

Second, the compensatory damages awarded to the prevailing party do not pose any enforcement concerns and should be enforced.⁴² Compensation of the victim is the foundational objective of civil liability systems in the European

³⁸ John Kuhn Bleimaier, 'The Doctrine of Comity in Private International Law' (1979) 24 *Cath. Law.* 327, 330.

³⁹ Bleimaier (n 38) 330-331.

⁴⁰ Bleimaier (n 38) 331.

⁴¹ See for an application of this principle in Germany: Joachim Zekoll, 'The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice' (1992) 30 *Colum. J. Transnat'l L.* 641, 646; Volker Behr, 'Myth and Reality of Punitive Damages in Germany' (2005) 24 *J.L. & Com.* 197, 204; Tolani (n 36) 201; Hartwin Bungert, 'Enforcing U.S. Excessive and Punitive Damages Awards in Germany' (1993) 27 *Int'l Law.* 1075, 1079.

⁴² Olivier Cachard, 'Le contrôle juridictionnel des jugements étrangers ordonnant des Punitive Damages' (2013) *Revue Lamy Droit des Affaires* 140.

Union.⁴³ The compensatory damages are not in jeopardy by the presence of punitive damages in the judgment. However, it is required that the judgment clearly identifies the compensatory damages because the prohibition of *révision au fond* (prohibition of a review on the merits) prevents a court from reducing the global amount of (unspecified) damages a foreign court has awarded.⁴⁴ Even if the compensatory damages are very high in comparison to the compensation standards of the requested forum, they should be accepted for enforcement. For instance, the German Supreme Court accepted in *John Doe v. Eckhard Schmitz* that the damages for pain and suffering, which are very relevant in the context of football injuries, could be enforced even though their amount was very high to German standards.⁴⁵

Third, it is submitted that courts in the European Union should keep in mind that some punitive awards (partly) pursue a compensatory function. Although it seems counterintuitive, compensation can indeed be one of the possible reasons why an American court grants punitive damages to the plaintiff. In the United States, punitive damages occasionally compensate for losses that are difficult to prove or for losses that are not covered by other types of damages. Punitive damages can also serve as a means to deprive the defendant of the gains he accumulated through his wrongful conduct.⁴⁶ The compensatory objective of punitive damages should not pose any problem under international public policy because making the victim whole is the cornerstone upon which private laws in the European Union are based. Enforcing that compensatory portion of a punitive award should, therefore, be encouraged.

⁴³ Walter Van Gerven, Jeremy Lever, Pierre Larouche, *Tort Law* (Hart Publishing 2000) 770. See for a general discussion of the principles of tort law in Europe: Cees Van Dam, *European Tort Law* (2nd edn, OUP 2013).

⁴⁴ Nathalie Meyer Fabre, 'Recognition and Enforcement of U.S. Judgments in France – Recent Developments' (2012) *The International Dispute Resolution News* 6, 9; Nathalie Meyer Fabre N, 'Enforcement Of U.S. Punitive Damages Award in France: First Ruling Of The French Court Of Cassation In X. v. Fontaine Pajot, December 1, 2010' (2011) 26 *Mealey's International Arbitration Report* 1, 4.

⁴⁵ BGH 4 June 1992, NJW 1992, 3100-3102.

⁴⁶ Wolfgang Wurmnest, 'Recognition and Enforcement of U.S. Money Judgments in Germany' (2005) 23 *Berkeley J. Int'l L.* 175, 196-197; Nater-Bass (n 6) 156; Gerhard Wegen & James Sherer, 'Recognition and Enforcement of US Punitive Damages Judgments in Germany – A Recent Decision of the German Federal Court of Justice' (1993) *Int'l Bus. Law* 485, 486; Andre R. Fiebig, 'The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments' (1992) 22 *Ga. J. Int'l & Comp. L.* 635, 649.

In *John Doe v. Eckhard Schmitz*, the German Supreme Court mentioned the possibility of enforcing the compensatory portion of a punitive award.⁴⁷ The California Superior Court had awarded the plaintiff USD 350.260 in compensation and USD 400.000 in punitive damages. It had allocated 40% of the entire award to compensate the plaintiff's attorney. Germany's highest civil court decided that it would allow the enforcement of punitive damages if and to the extent that the punitive award serves a compensatory function.⁴⁸ The *Bundesgerichtshof* referred to the lawyer's fees which are in principle not recoverable given the American rule on costs (to be contrasted with the English rule on costs). Awarding legal fees through punitive damages enables the plaintiff to achieve full compensation.⁴⁹ The fact that the American court had indicated its desire to transfer these legal fees to the losing party could have made it possible to enforce these fees. However, the German Supreme Court required that the foreign court clearly states its intention to charge this cost against the punitive damages. It held that the California Superior Court had not fulfilled this requirement because it had granted 40% of the *entire* award to the plaintiff's counsel. The *Bundesgerichtshof* could not find sufficient evidence in the California judgment or in the transcript to substantiate the claim that the punitive damages were awarded to cover the legal costs incurred by the plaintiff. It could not exclude the possibility that the compensatory damages included an element addressing those costs.^{50,51}

The approach taken by the German Supreme Court is commendable. A requested court should accept punitive damages to the extent they fulfil a compensatory function. The foreign judgment should, however, explicitly identify the court's intention to attach a compensatory function to the punitive award. It should also indicate which numerical part of the punitive damages is to be used for this compensatory purpose. This reasoning does not only apply to legal fees but to any form of loss. In essence, any disadvantage that the foreign court clearly deems recoverable via (a part of) the punitive damages

⁴⁷ BGH 4 June 1992, NJW 1992, 3103.

⁴⁸ BGH 4 June 1992, NJW 1992, 3103.

⁴⁹ Behr (n 36) 123.

⁵⁰ Nagy (n 37) 8.

⁵¹ BGH 4 June 1992, NJW 1992, 3103.

award should be enforced in the European Union. In light of the American rule on costs, legal fees will be the most common and important form of compensation to be recovered via punitive damages awards.

The facts of the Italian Supreme Court *Parrott v. Fimez* case also demonstrate the necessity of a clear distinction (within the punitive damages awarded) between the amount pursuing compensatory aims and the portion seeking real punitive ends. The District Court of Jefferson County in Alabama awarded the American plaintiff USD 1.000.000 without specifying the nature of the award. The Venice Court of Appeal classified the award as punitive⁵² (the Italian Supreme Court later indicated that this factual finding cannot be reversed⁵³). The Alabama wrongful death statute applied to the traffic accident in which the plaintiff's son lost his life. Under that legislation, compensatory damages cannot be recovered and only punitive damages can be obtained. The Supreme Court of Alabama clarified, however, that the punitive damages in such wrongful death cases pursue punitive as well as compensatory objectives.⁵⁴ Even if the Venice Court of Appeal would have been aware of the dual intentions of the Alabama wrongful death statute and would have been willing to enforce the compensatory portion of the award, it would have been unable to do so due to the prohibition of *révision au fond*. The enforcing court cannot ascertain the motives behind the award if the foreign court has not provided clear and comprehensible information itself. Although a compensatory element might be hidden in a punitive award, the rendering court's lack of identification ties the hands of the requested court. If the requested court were to examine the punitive award and were to differentiate the individual grounds that make up the overall amount of punitive damages, the prohibition of review of the merits would be violated.⁵⁵

⁵² Court of Appeal Venice 15 October 2001, *Rep Foro it* 2003, *Delibazione* no. 29; *Giur. It.* II 2002, p. 1021.

⁵³ Italian Supreme Court 19 January 2007, no. 1183, *Rep Foro it* 2007 *v Delibazione* no. 13 and *v Danni Civili* no. 316.

⁵⁴ *Savannah & Memphis Railroad v. Shearer*, 58 Ala. 672, 680 (1877); *South & North Alabama Railroad v. Sullivan*, 59 Ala. 272, 278 (1877), *Estes Health Care Ctrs Inc v. Bannerman*, 411 So2d 109,113 (1982); Francesco Quarta, 'Class Actions, Extra-Compensatory Damages, and Judicial Recognition in Europe' Conference paper – Extraterritoriality and Collective Redress, London 15 November 2010 6-7; Quarta (n 36) 276.

⁵⁵ Nater-Bass (n 6) 160.

Fourth, European judges should be wary of American punitive damages exceeding the compensatory damages by a factor 10 or more.⁵⁶ When discussing tolerable levels of punitive damages for enforcement purposes, it is useful to refer back to the constitutional limits the U.S. system itself has placed on punitive damages awards. The United States Supreme Court in *BMW of North America, Inc. v. Gore* created three guideposts to help determine whether a punitive award is constitutionally excessive: (1) the reprehensibility of the defendant's conduct, (2) the ratio between the punitive and compensatory damages awarded and (3) a comparison of the punitive damages to the criminal penalties that could be imposed for similar misconduct.⁵⁷ The second guidepost brings some form of mathematical certainty into the assessment of excessiveness.

In the *dicta* of the *State Farm Mutual Automobile Insurance Co. v. Campbell* judgment, the United States Supreme Court expanded upon this second guidepost. It effectively laid down a 9:1 maximum ratio⁵⁸ between punitive and compensatory damages by stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due-process”.⁵⁹ The establishment of this upper limit indirectly affects European courts faced with a request for enforcement of an American punitive damages judgment. If the American legal system itself has identified double-digit ratios between punitive and compensatory awards as constitutionally suspect, it seems only logical that European judges should also treat this 9:1 ratio as an outer limit to be conformed with in order to make the judgment enforceable. It would be illogical to allow the enforcement of judgments that violate the federal Constitution in their country of origin.

However, the U.S. Supreme Court did not construe this bright line limit as a rigid one. It had already held previously that an egregious case with small

⁵⁶ For instance: USD 100.000 in compensatory damages and USD 1.500.000 in punitive damages would be suspect because the punitive damages are 15 times higher than the compensatory damages.

⁵⁷ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-575 (1995).

⁵⁸ The ratio reflects the proportion between punitive and compensatory damages. If the punitive damages amount to USD 1.500.000 and the compensatory damages are 100.000 the ratio is 15:1.

⁵⁹ *State Farm Mutual Automobile Insurance Co. v. Campbell et al.*, 538 U.S. 408, 425 (2003).

economic damages could necessitate an upward deviation from the maximum ratio.⁶⁰ In the case of *State Farm Mutual Automobile Insurance Co. v. Campbell*, the U.S. Supreme Court added that ‘*when compensatory damages are substantial, then a lesser ratio perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee*’.⁶¹ In that case, it considered an award of USD 1.000.000 in compensatory damages to be substantial.⁶² The double-digit rule’s flexibility simultaneously acts as its Achilles’ heel. European courts can use the 9:1 ceiling as an important indication but should remain cautious as the U.S Supreme Court itself creates an opening for (both upwards and downwards) exceptions to the rule depending on the circumstances of the case.

Fifth, a 1:1 ratio between punitive damages and compensatory damages could be a workable starting point for the European excessiveness test. Member States’ courts are not obligated to transpose the relatively high American 9:1 threshold as the maximum level of their tolerance. They are entitled to set a lower ratio as the boundary of excessiveness. The use of a ratio is prompted by the search for some form of (numerical) guidance for European judges. Linking the punitive damages to the compensatory damages contributes to foreseeability based on economically calculable factors.⁶³ By attaching the acceptable amount of punitive damages to the compensatory damages, their effect becomes somehow more compensation-related, thereby narrowing the gap with the American legal system.⁶⁴

In *Schlenzka & Langhorne v. Fountaine Pajot*, the French Supreme Court indeed seems to have laid down a maximum ratio between punitive and compensatory damages of 1:1. It rejected the punitive damages awarded by the California court because the punitive damages exceeded the compensatory

⁶⁰ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1995).

⁶¹ *State Farm Mutual Automobile Insurance Co. v. Campbell et al.*, 538 U.S. 408, 425 (2003).

⁶² *State Farm Mutual Automobile Insurance Co. v. Campbell et al.*, 538 U.S. 408, 426 (2003).

⁶³ See in this regard: Behr (n 36) 150.

⁶⁴ See in this regard: Behr (n 36) 117.

damages.⁶⁵ Later French case law also seems to make use of this ratio.⁶⁶ In *John Doe v. Eckhard Schmitz*, the German Supreme Court rejected the punitive damages for contrariety of the concept itself with international public policy. It, nevertheless, hypothetically took its reasoning a step further and subjected the punitive award to an excessiveness analysis. It held that the punitive damages granted would fail the proportionality test because they were higher in amount than the sum of all the compensatory damages.⁶⁷ It thus suggested that a 1:1 ratio might be the outer limit of acceptable punitive damages under international public policy. In the case law of the U.S. Supreme Court, one can equally find references to this ratio. The U.S. Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* pointed to ‘a lesser ratio perhaps only equal to compensatory damages’ as the ‘the outermost limit of the due process guarantee’ when the compensatory damages are substantial.⁶⁸ In *Exxon Shipping Co. v. Baker*, the U.S. Supreme Court established a strict 1:1 ratio for federal maritime tort cases.⁶⁹

The suggested 1:1 ratio reflects a measure of reasonableness, striking the balance between not allowing enough of the foreign remedy and opening the European borders too liberally. Under this proposed ratio, the treble part of an American treble damages judgment, for instance, would be deemed unacceptable in light of international public policy. This would change the outcome of the Spanish *Miller v. Alabastres* case in which treble damages in their entirety were accepted. Interestingly, research in the United States has shown that in the vast majority of cases the ratio between punitive and compensatory damages lies between 0.88 and 0.98 to 1.⁷⁰ A European standard of 1:1 thus seems to cover most of the American punitive damages judgments.

⁶⁵ Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fountaine Pajot S.A.*, no. 09-13303, D. 2011, 423

⁶⁶ Court of Appeal Poitiers 4 March 2011, case no. 09/02077; Court of Appeal Paris 30 June 2011, case no. 10/00293.

⁶⁷ BGH 4 June 1992, NJW 1992, 3104.

⁶⁸ *State Farm Mutual Automobile Insurance Co. v. Campbell et al.*, 538 U.S. 408, 425 (2003).

⁶⁹ *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

⁷⁰ Theodore Eisenberg, John Goerdts, Brian Ostrom, David Rottman & Martin T. Wells, ‘The Predictability of Punitive Damages’ (1997) 26 J. Legal Stud. 623, 652; Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, ‘Juries, Judges and Punitive Damages: An Empirical Study’ (2002) 87 Cornell L. Rev. 743, 754; Theodore Eisenberg, Paula Hannaford-Agor, Michael Heise, Neil LaFountain, Thomas G. Munsterman,

Sixth, two intervening factors capable of distorting the starting 1:1 ratio should be taken into consideration. The two factors which support an adaption of the ratio are the cases degree of connection to the requested forum (*Inlandsbeziehung*) and the interests protected by the award of punitive damages.

According to the German theory of *Inlandsbeziehung*, the intensity of the international public policy exception depends on the case's proximity to the forum.^{71,72} The notion of *Inlandsbeziehung* has been translated as "forum contacts".⁷³ It reflects the forum state's interest in a close policing of its international public policy.⁷⁴ There must be an interest in preventing the foreign judgment from being enforced.⁷⁵ The closer the case's connection to the requested court's forum, the stronger the international public policy exception will be. The more connected the case (in terms of the facts and the parties) is to the territory of the requested state, the more interest the requested forum has to let the values of its own legal system influence the enforcement decision, and the less deference is given to the foreign court's judgment. On the contrary, if the link to the forum is weaker, the forum's interest in a thorough scrutiny is less and the level of tolerance toward the foreign judgment is higher. If the level of contacts to the forum being requested to enforce the judgment is low or non-existent, the application of the (international) public policy clause is softened and more tolerance should, therefore, be granted.⁷⁶ In the case of punitive damages, this would mean that the amount deemed acceptable for enforcement should, all other factors being equal, be higher. The

Brian Ostrom & Martin T. Wells, 'Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data' (2006) 3 J. Empirical Legal Stud. 263, 278.

⁷¹ Marta Requejo Isidro, 'Punitive Damages From a Private International Law Perspective' in Helmut Koziol & Vanessa Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 247.

⁷² For a study of the concept from a German and French perspective: Natalie Joubert, *La notion de liens suffisants avec l'ordre juridique (Inlandsbeziehung) en droit international privé* (Litec 2007) 612.

⁷³ Peter Hay, 'The Recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court' (1992) 40 Am. J. Comp. L. 729, 740; Zekoll (n 41) 652.

⁷⁴ Samuel P. Baumgartner, 'How well do U.S. judgments fare in Europe?' (2009) 40 Geo. Wash. Int'l L. Rev. 173, 205, footnote 189.

⁷⁵ Behr (n 36) 153.

⁷⁶ Requejo Isidro (n 71) 246.

European courts' attitude with regard to U.S. punitive damages awards will thus also depend on the case's factual connection to their territory. In terms of the scenario envisaged in this article, the connection to the enforcing forum will be limited. Even in the unlikely event that either the perpetrator or the victim of the horrendous football tackle on an American pitch have the nationality of the EU country where enforcement is sought, the level of *Inlandsbeziehung* will be on the low side of the spectrum, paving the way for higher levels of tolerance for punitive damages for physical harm in football.

Both the German Supreme Court in *John Doe v. Eckhard Schmitz* and the Spanish Supreme Court in *Miller v. Alabastres* referred to the concept of *Inlandsbeziehung* in their reasoning. The German Supreme Court explained that the proportionality test must take the remoteness of the underlying fact pattern into consideration and that the absence of sufficient contacts to Germany mandates that a greater tolerance be shown toward the foreign decision.⁷⁷ In the case before the *Bundesgerichtshof*, the sexual abuse of the young victim for which punitive damages were awarded happened in the United States and both the victim and the perpetrator held American citizenship. Both resided in California at the moment when the crime occurred.⁷⁸ The defendant only took up residence in Germany after his criminal conviction. The defendant's German nationality was the only other factor connecting the case to Germany.⁷⁹ The connection to the German forum was, therefore, very low. The public policy exception was, nevertheless, employed to block the enforcement of the California judgment. Despite the slight connection to the forum, the German Supreme Court did not tolerate the punitive award. This reveals the *Bundesgerichtshof's* profound dislike for punitive damages at the time.⁸⁰

The Spanish Supreme Court in *Miller v. Alabastres* also attached importance to the case's proximity to the forum. It stated that the court cannot lose sight

⁷⁷ BGH 4 June 1992, ZIP 1992, 1270; Zekoll (n 41) 653.

⁷⁸ Nagy (n 37) 8.

⁷⁹ BGH 4 June 1992, BGHZ 118, 348-349. In this regard, HAY even asserts that it is not a relevant forum contact in the context of the international public policy exception in enforcement cases: Hay (n 73) 741, footnote 42.

⁸⁰ Nagy (n 37) 8.

of the relation the matter presents to the Spanish forum when deciding whether there is a violation of public policy. This can be seen as a clear reference to the *Inlandsbeziehung*.⁸¹ The Spanish Supreme Court, however, did not apply the concept to the facts of the case (at least not explicitly in the judgment). It could be argued that there was at least a certain degree of *Inlandsbeziehung* in the factual pattern because the manufacture of the trademark infringing labels took place in Spain.

Next to the connection to the forum, the interest at stake is the second consideration to be evaluated before international public policy can be activated. *Inlandsbeziehung* modulates the strength of the international public policy exception according to the closeness of the case to the forum. The stronger the interest protected by international public policy is, the less relevant the link to the forum must be to activate public policy.⁸² The opposite is also true. The degree of connection to the forum and the importance of the interest thus act as communicating vessels.

It is perhaps in this regard that the second criterion of the proportionality analysis in *Miller v. Alabastres* can be given meaning. In that case, the Spanish Supreme Court attached particular importance to the nature of the interests protected. It found that not only the Spanish legal system but nations all over the world highly value the protection of intellectual property rights. Market economies globally set great store by the upholding of these rights.⁸³ A common desire to protect the interest at stake might thus lead to more tolerance on the side of the enforcing court. Human rights in particular form an important interest to consider but also the safeguarding of the environment, freedom, dignity and legal certainty could be put forward as such strong interests.⁸⁴

⁸¹ Spanish Supreme Court 13 November 2001, Exequatur no. 2039/1999, Aedipr 2003, 914; Marta Requejo Isidro, 'Punitive Damages: How Do They Look Like When Seen From Abroad?' in Lotte Meurkens & Emily Nordin (eds.), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012) 326-327; Requejo Isidro (n 71) 247.

⁸² Elena Rodríguez Pineau, 'European Union International Ordre Public' in Asociacin Es Paola de Profesores de Dere (ed.), *Spanish Yearbook of International Law* (Martinus Nijhoff Publishers 1994) 65.

⁸³ Spanish Supreme Court 13 November 2001, Exequatur no. 2039/1999, Aedipr 2003, 914.

⁸⁴ Marta Requejo Isidro, 'Punitive Damages – Europe Strikes Back?', presentation delivered at the British Institute of International and Comparative Law, 2 November 2011, London, text on file with the author.

Arguably, the protection of the physical integrity of a sports player also fits the bill. Therefore, punitive damages for football injuries should be treated more amicably than most other categories of cases.

Seventh, once the requested court has determined, with the help of the guidelines formulated, that the punitive award is not excessive, the judgment can be granted enforcement. More difficult is the situation in which the punitive damages award does not clear the excessiveness hurdle. The court is essentially faced with two options. The first: the court declares the whole punitive damages heading of the judgment unenforceable and enforces only the compensatory damages (if requested). The second: the court enforces the punitive damages up to the amount it deems to be tolerable in light of international public policy.

The first scenario establishes an all-or-nothing approach: either all the punitive damages are enforced or all of them are rejected. Enforcement or rejection always relates to the whole punitive award. The second scenario allows the judge to reduce the amount of the punitive damages by determining the point at which the punitive damages become disproportionate, throwing out the excessive amount and enforcing the remaining non-excessive portion of the punitive award.

The French *Cour de cassation* opted for the first approach in *Fontaine Pajot*. The French Supreme Court determined that the 1:1 ratio between punitive and compensatory damages had been exceeded by the American judgment. This finding of excessiveness led to the rejection of the whole punitive damages award.⁸⁵ Similarly, the German *Bundesgerichtshof* in *John Doe v. Eckhard Schmitz* spoke out against partitioning the punitive award by stating that the requested court should not be allowed to cut up the punitive damages awarded based on its own free judgment.⁸⁶

⁸⁵ Cass. Civ. 1st, 1 December 2010, *Schlenzka & Langhorne v. Fontaine Pajot S.A.*, no. 09-13303, *Dalloz* 2011, 423.

⁸⁶ BGH 4 June 1992, *NJW* 1992, 3104; Patrick Nettesheim & Henning Stahl, 'Recent Development – Bundesgerichtshof Rejects Enforcement of United States Punitive Damages Award' (1993) 28 *Tex. Int'l L. J.* 415, 423.

The choice between both options stems from different interpretations of the prohibition of *révision au fond*. The first approach incorporates the idea that the arbitrary splitting of the punitive award would amount to forbidden *révision au fond*. Under this view, the judge is not allowed to chop the punitive award according to its own discretion in order to find the right balance but can only accept or reject the punitive award as a whole.⁸⁷ Under the second approach the judge is allowed to cut the punitive award to a level which is acceptable to the forum. The prohibition to review the merits of an incoming judgment does not prevent the requested court to sever the acceptable amount of punitive damages from the excessive, non-tolerable part of the punitive award. Instead of having to rule on the head of punitive damages as a whole, the court is allowed to modify the amount to a numerical level compatible with the international public policy of the forum.⁸⁸

This article argues that a European court should be allowed to reduce the amount of the punitive damages to the level it finds admissible in light of international public policy. The all-or-nothing approach requiring the court to either take or leave the punitive award should not be followed. Cutting down the punitive award (to, for instance, our tentatively suggested 1:1 ratio) does not amount to *révision au fond* because the European court is not giving its opinion about the merits of the foreign case. The requested court is not reforming the foreign court's examination of the facts of the case or second-guessing the foreign court's determination of the matter. It is not questioning whether the foreign decision was correct in fact and/or in law. By curtailing the amount of punitive damages, the requested court is merely stating that, for private international law purposes, the forum's tolerance of this particular remedy goes up to a certain mathematical level but not beyond.

The approval of the second approach brings a degree of fairness into the excessiveness analysis. Under the all-or-nothing approach, one excess dollar

⁸⁷ Nagy (n 37) 8.

⁸⁸ Georges A.L. Droz, 'Variations Pordea' (2000) 89 R.C.D.I.P. 181, 194; Janke & Licari (n 25) 803; Licari (n 34) 1261; Nagy (n 37) 11; Felix D. Strebel, 'The enforcement of foreign judgments and foreign public law' (1999) 21 Loy. L.A. Int'l & Comp. L. Rev. 55, 104; Daniele Favalli & Joseph M. Matthews, 'Recognition and Enforcement of U.S. class action judgments and settlements in Switzerland' (2007) 17 Schweizerisches Jahrbuch für Internationales Recht 611, 635.

could theoretically be the difference between being able to enforce all of the punitive damages or none of them. Withholding a large punitive award based on the presence of a small excessive amount of punitive damages would be a denial of justice and an unjust penalty for the plaintiff.⁸⁹ The possibility of a partial enforcement of the punitive damages leads to fairer results for plaintiffs and defendants who are no longer subjected to a random spin of the wheel. Plaintiffs in American litigation can claim the amount they feel appropriate before the American courts without concern that they will be unable to enforce any of the punitive damages in Europe because the amount of punitive damages received is too high.

⁸⁹ Droz (n 88) 194; Janke & Licari (n 25) 803; Licari (n 34) 1261.

CONCLUSION

The article examined the liability for football injuries in the U.S. and especially focused on the enforcement of a judgment containing punitive damages in a number of EU Member States. A football player who dangerously tackles an opponent and thereby causes shocking and career-threatening injuries risks to be sued on two major grounds, namely recklessness and intention. A claimant will be able to recover damages when he establishes that the defendant either acted with reckless disregard of the former's safety or with the intention to cause him physical injuries. So-called crushing or horrifying tackles in football can meet the requirements of reckless or intentional conduct which in turn might result in awarding punitive damages.

The availability of punitive damages for football injuries in the United States raises the question whether awards for such damages will be enforced in the European Union. In Europe, U.S. punitive awards are subjected to a patchwork of national laws governing the recognition and enforcement of judgments. On the basis of their (international) public policy exception, EU Member States have adopted divergent attitudes towards American punitive damages awards. The Supreme Courts of Germany and Italy have outright rejected punitive damages in enforcement proceedings because they argued that the concept itself violates international public policy. France and Spain, on the other hand, have accepted the compatibility of punitive damages with international public policy. Both the Spanish and the French Supreme Court subsequently investigated the amount awarded by the foreign court. Although punitive damages as such no longer trigger alarm bells during the enforcement process, punitive damages of an *excessive* nature are still problematic in light of the international public policy exception.

The latter progressive approach is to be preferred. A dismissal of punitive damages on principle fails to recognise the legal reality in the Member States. The private law systems of the Member States contain remedies and institutions which deviate from the strictly compensatory agenda of tort law. Their pursuit of deterrence and/or punishment puts pressure on the exclusively compensatory function of the civil liability system. The traditional refusal to

enforce U.S. punitive damages should, therefore, be replaced by an examination of the amount of the punitive damages awarded.

In that regard, this article advanced a number of concrete guiding principles that European judges can work with when confronted with American punitive damages judgments. These rules are not all-encompassing or exhaustive but can help requested courts to make well-informed decisions when tackling requests for enforcement of American punitive damages for football injuries. It is hoped these guidelines will contribute to the perceived paradigm shift regarding the enforcement of U.S. punitive damages in the European Union.