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Case Commentary

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The Recognition of Punitive Damages in Italy: A commentary on *Cass Sez Un 5 July 2017, 16601, AXO Sport, SpA v NOSA Inc*

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Abstract: Following the decision of the First Division of the Court of Cassation issued on May 16, 2016, the United Section of the Italian Court of Cassation delivered a very important ruling on 5 July 2017 deciding – for the very first time – in favour of the enforceability of US punitive damages in Italy.

The decision of the Joint Divisions of the Court of Cassation was based on the following arguments: a) more than one provision of the Italian legislative framework already attributes to damage compensation a scope that goes far beyond the mere restoration of the prejudice suffered by the victim; b) recent case law on the matter excludes the incompatibility of the punitive scope of civil liability with the Italian legal system; and c) several doctrinal contributions have promoted the possibility of granting the injured party the right to obtain compensation, beyond the patrimonial loss suffered, assuming that civil liability may also have a deterrent effect.

On these premises, the Plenary Session of the Italian Court of Cassation recognised that civil liability may serve different functions: it primarily grants compensation to the injured party, in line with the previous connotation of civil liability as restoration of patrimonial loss, but it may also ensure deterrence and sanction the wrongdoing of the tortfeasor.

Given this comprehensive nature of civil liability, the decision stated that foreign decisions granting punitive damages are not against public policy in principle and, thus, can be enforced in Italy, but only under certain preconditions.

A foreign ruling providing the payment of punitive damages may be executed in Italy only in the case where foreign legislative provisions, or equivalent sources, grant the competent judge the power to award punitive damages based on typical and predictable circumstances. Moreover, the amount of punitive damages due shall be limited.

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A decision of the Joint Divisions of the Italian Court of Cassation—which is entitled to provide an uniform interpretation of the law— represents a significant precedent, which lower courts and subsequent judgments are likely to follow, in terms of which courts will be required to recognise and enforce foreign decisions implying a compensation of punitive damages.

I Introduction

The United Sections of the Italian Supreme Court (*Corte Suprema di Cassazione*),[1] in its decision of 5 July 2017 no 16601, recognised the possible admissibility of punitive damages in the Italian legal system. The decision has prompted significant interest, not only among private law scholars.[2] The principle set out in the

1 The Italian Supreme Court of Cassation (Corte Suprema di Cassazione, Cass) is the court of last resort in Italy. Cases brought to the Supreme Court are normally heard by a panel of five judges (simple section). In more complex cases, especially those concerning compounded matters of statutory interpretation an extended panel of nine judges (*Sezioni Unite*) hear the case. On the tasks of Italian Court of Cassation, see *M Taruffo*, Civil Procedure and the Path of a Civil Case, in: JS Lena/U Mattei, Introduction to Italian Law (2002) 175ff. For *Sezioni Unite,* I will use the term 'United Sections (= United Secs)' as well as 'Plenary Session' and 'Grand Camber'.

2 *Axo Sport SpA v Nosa Inc*, Cass United Secs 5 July 2017, no 16601, has been published with comments in various law journals; see among others: *A Palmieri*/*R Pardolesi*, I danni punitivi e le molte anime della responsabilità civile; *E D'Alessandro*, Riconoscimento di sentenze di condanna a danni punitivi: tanto tuonò che piovve; *R Simone*, La responsabilità non è solo compensazione; *PG Monateri*, I danni punitivi al vaglio delle Sezioni unite (all published 2017) I, Foro italiano (Foro it) 2630, 2639, 2644 and 2648ff; *A Di Majo*, Principio di legalità e di proporzionalità nel risarcimento con funzione punitiva (2017) Giurisprudenza italiana (Giur it) 1792; *M La Torre*, Un punto fermo sul problema dei 'danni punitivi'; *G Corsi*, Le Sezioni Unite: via libera al riconoscimento di sentenze comminatorie di punitive damages; *G Ponzanelli*, Polifunzionalità tra diritto internazionale privato e diritto privato; *PG Monateri*, Le Sezioni Unite e le funzioni della responsabilità civile (all published 2017) Danno e responsabilità (Danno resp) 421, 429, 435 and 437; *M Grondona*, Le direzioni della responsabilità civile tra ordine pubblico e punitive damages (2017) I, Nuova giurisprudenza civile e commentata (Nuova giur civ comm) 1392; *A Gambaro*, Le funzioni della responsabilità civile tra diritto giurisprudenziale e dialoghi transnazionali; *PG Monateri,* Le Sezioni Unite e le molteplici funzioni della responsabilità civile; *G Ponzanelli*, Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno (all published 2017) II, Nuova giur civ comm 1405, 1410 and 1413ff; *C Consolo*, Riconoscimento di sentenze, specie USA e di giurie popolari, aggiudicanti risarcimenti punitivi o comunque sopracompensativi, se in regola con il nostro principio di legalità (che postula tipicità e financo prevedibilità e non coincide pertanto con il, di norma presente, due process of law) (2017) Corriere giuridico (Corr giur) 1050; *C Scognamiglio*, Le Sezioni unite ed i danni punitivi: tra legge e giudizio*; A Briguglio*, Danni punitivi e delibazione di sentenza straniera: turning point 'nell'interesse della legge' (2017)

judgment constitutes, in effect, a *revirement* of the Court's previous position: prior to this decision, the Supreme Court had declared punitive damages to be incompatible with Italian public policy.

In this article, I will present in detail the Plenary Session decision (*AXO Sport, SpA v NOSA Inc*), the historical and recent developments to the enforcement of punitive damages foreign judgments in Italy, and some comments on what the future hold for punitive damage awards in the Italian legal system following the AXO case.

Let us start with a brief summary of the facts. A biker (Charles Duffy) sustained severe brain injuries as a result of a crash that occurred while he was driving a motorcycle in a motocross practice race. Believing the accident to be attributable to the defective manufacture of the helmet, the rider sued the American retailer (NOSA) and the Italian manufacturer (AXO) of the product. During the proceedings, the retailer reached a settlement agreement with the victim, agreeing to pay around one million dollars in damages. The District Court of Appeal of Florida then stated that AXO was legally obliged to pay NOSA the same amount of money.[3] However, when it did not receive the payment, NOSA brought the case to Italy. The American retailer filed a suit in the *Corte d'appello di Venezia*, very close to where the helmet had been manufactured. The Appellate Court of Venice granted an *exequatur* for the Florida judgment, primarily for the following reasons: 1) the condemnation of AXO was based on its failure to pay NOSA, and not on the obligation to pay damages to the biker and 2) it did not appear that punitive damages had been paid, because the American ruling was limited to recognising the obligation of AXO to pay the transaction amount to NOSA, without specifying to which damages the payment would be ascribed.

Nevertheless, AXO filed an appeal to the Italian Court of Cassation alleging, inter alia, the violation of art 64 (g) of the Law of 31 May 1995, no 218. It claimed that the Court of Venice had neglected the fact that the American decision authorised the payment of compensation to the injured party, that is, a payment of punitive damages.

The first section of the Court of Cassation issued a provisional order, requesting a ruling of the Grand Chamber (pursuant to art 374, § 2 Italian Code of Civil Procedure).[4] The question of the recognition of foreign judgments awarding

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Responsabilità civile e previdenza (Resp civ prev) 1109, 1597 ff; *F Benatti*, Benvenuti danni punitivi … o forse no! (2017) Banca borsa titoli di credito (Banca borsa tit cred) 575.

3 *AXO Sport, SpA v NOSA, Inc*, Court of Appeal of Florida, Fourth District, 41 Southern Reporter, Third Series (So 3d) 910; 2010 Fla App Lexis 11878, 11 August 2010.

4 Art 374, § 2 Italian Code of Civil Procedure states: '… the first President may order Court of Cassation in united section to decide the appeals concerning issues of law already decided

punitive damages was thus overwhelmingly considered a '*questione di particolare importanza*' ('issue of utmost importance').

Prior to the AXO case, there had been few decision concerning the enforcement of a US punitive damage award. And both sections of the Supreme Court refused to grant the judgment creditors an *exequatur*.[5]

The formulation of the provisional order prompted expectations of a landmark decision among many private law scholars.[6]

It should be noted, however, that the case could have ended without the decision of the Plenary Section. Before declaring the legal considerations on the eligibility of foreign punitive damages judgments, the United Sections had considered inadmissible the various grounds for appeal. The judges therefore ruled out the possibility in the US judgement of a payment of punitive damages to the tort's victim. The judges simply had to analyse, on the one hand, the claims made by the Court of Appeal of Venice (for which the ruling of the American judges was clear: the agreement did not imply payment of punitive damages), and evaluate, on the other hand, the settlement reached on a transactional basis in relation to the serious injury, involving cranial lesions and

differently by the single sections of the Court and on the appeals of the utmost importance': see *S Grossi*/*MC Pagni*, Commentary on the Italian Code of Civil Procedure (2010) 306ff.

5 The reference is to a Cass civ, sec III, 19 January 2007, no 1183, (2007) I, Foro it 1460, and to Cass civ, sec I, 8 February 2012, no 1781, (2012) I, Foro it 1449.

6 The motivated order of the 1st section of the Italian Supreme Court (Cass civ, sec I, 16 May 2016, no 9978) is published with comments in various Italian law journal: (2016) Giurisprudenza italiana (Giur it) 1854, with comment of *A Di Majo*, Riparazione e punizione nella responsabilità civile; (2016) Corr giur 912, with comment of *C Scognamiglio*, I danni punitivi e le funzioni della responsabilità civile; (2016) I, Foro it 1973, with comment of *E D'Alessandro*, Riconoscimento in Italia di danni punitivi: la parola alle Sezioni Unite; (2016) Danno resp 827, with comments of *PG Monateri* and *G Ponzanelli*; (2016) Resp civ prev 1232, with comments of *C Scognamiglio*, Principio di effettività, tutela civile dei diritti e danni punitivi 1120, and of *F Quarta*, L'anacronistico ordinamento contrario al riconoscimento di condanne straniere a punitive damages 1159. See also *E Lucchini Guastalla*, La compatibilità dei danni punitivi con l'ordine pubblico alla luce della funzione sanzionatoria di alcune disposizioni normative processualcivilistiche (2016) Resp civ prev 1474; *M Grondona*, L'auspicabile 'via libera' ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale (a proposito del dialogo tra ordinamenti e giurisdizioni) Diritto civile contemporaneo (Dir civ cont) 31 July 2016; *L Nivarra*, Brevi considerazioni a margine dell'ordinanza di rimessione alla Sezione Unite sui 'danni puntivi', Dir civ cont 30 January 2017; *S Landini*, La condanna a danni punitivi tra penale e civile: la questione rimane attuale (2017) Diritto penale e processuale (Dir pen proc) 262; *C Scognamiglio*, Quale futuro per i danni punitivi? (Aspettando la decisione delle Sezioni Unite) (2017) 3 Giustizia civile commentata (Giust civ comm) 1; *A Montanari*, La resistibile ascesa del risarcimento punitivo nell'ordinamento italiano (a proposito dell'ordinanza n 9978/2016 della Corte di Cassazione) Dir civ cont 2 February 2017.

disabling postures, suffered by the injured party (the amount corresponding to about $ 1 million could not be considered abnormal even by domestic standards).

The inadmissibility of the grounds of appeal did not undermine the power of the Plenary Section to rule on the 'utmost importance' issue.[7] The Court therefore, following a series of well-founded arguments, stated the following principle of law:[8]

> In the present system, civil liability has not merely the task of compensating the subject who was injured, since the deterrence and the sanctioning functions are part of the system itself. Therefore, punitive damages are not ontologically incompatible with the Italian legal system. The recognition of a foreign judgment containing a ruling of this kind must, however, commit to the following conditions: that the foreign decision was rendered on grounds that guarantee that punitive damages were expressly admitted for the case in question, their foreseeability and their quantitative limits, having regard, in the exequatur, solely to the effects of the foreign decision and to their compatibility with public policy.

II Punitive damages in the Italian law system: a foretold admission

The innovative nature of the United Sections decision is indisputable. Prior to this ruling, the judges of the Supreme Court had clearly expressed their aversion to requests for the exequatur of foreign (US) punitive damages decisions. In two specific cases, the Court had expressly stated its position on this matter.

In January 2007, the third section of the Court of Cassation issued the first ruling. In that case too, a biker had lost his protective helmet in an accident. Because of the serious head injuries suffered, the rider died. The victim's mother sued the buckle manufacturer in court. County Jefferson (Alabama) District Court, judging the helmet buckle to be defective, ordered the Italian manufacturer to pay one million dollars in damages. The Court of Appeal of Venice, however, dismissed the application for the exequatur of the US ruling, on the basis of its incompatibility with Italian public policy. The third section of the Supreme Court confirmed this verdict: the Court was in no doubt that, in the present Italian legal

7 The Plenary Session correctly interpreted art 363, § 3 Italian Code of Civil Procedure: 'The principle of law can also be pronounced ex officio when the appeal proposed by the parties is declared inadmissible, if the Court considers that the decided issue is of particular importance' *Briguglio* (2017) Resp civ prev 1109, 1597 ff.

8 *Axo Sport SpA v Nosa Inc*, Cass United Secs 5 July 2017, no 16601, (2017) Danno resp 421.

system, the ideas of punishment and sanction remained external to the system of compensation.[9]

A few years later, the first section of the Court of Cassation issued a similar ruling.[10] The Massachusetts Supreme Court had granted compensation of $ 8 million to a US worker who had been the victim of a serious injury caused by a defective piece of industrial machinery produced by a company from Turin. There was no reference in the decision to punitive damages. However, the judges of the Court of Cassation held that such a large compensation implied a punitive element, given that there was no valid justifying cause. Therefore, the exequatur of the US judgment (although granted by the Court of Appeal of Turin) could not be granted, since the recognition of punitive damages would have resulted in effects contrary to public policy. The appeal was essentially rejected on the grounds set out in the previous judgment. The court again considered punitive damages to be in conflict with the Italian system of compensation, for the following reasons: ' and 'the Italian system of civil liability does not contemplate the idea of punishment and sanction of the tortfeasor and does not evaluate the conduct of that person for that purpose'.[11]

Despite these precedents, it is to be noted that the admission of punitive damages in the Italian legal system (as set forth in the decision of the Italian Grand Chamber of July 2017) was not unforeseeable. In fact, there were several indications that it could happen. Firstly, the case law aspect: despite the above-mentioned precedents, the Supreme Court did reveal the eligibility of the civil liability system to perform (also) a sanctioning function.[12]

9 Cass civ, sec III, 19 January 2007, no 1183 (2007) I, Foro it 1460, with comment of *G Ponzanelli*, Danni punitivi: no grazie; (2007) Danno resp 1225, with comment of *P Pardolesi*, Danni punitivi all'indice; (2007) Europa e diritto privato (Eur dir priv) 1129, with comment of *G Spoto*, I punitive damages al vaglio della giurisprudenza italiana; (2007) Corr giur 497, with comment of *P Fava*, Punitive damages e ordine pubblico: la Cassazione blocca lo sbarco; (2008) Giur it 395, with comment of *A Giussani*, Resistenze al riconoscimento delle condanne al pagamento dei punitive damages: antichi dogmi e nuove realtà; (2008) Responsabilità civile (Resp civ) 188, with comment of *G Miotto*, La funzione del risarcimento dei danni non patrimoniali nel sistema della responsabilità civile; see also: *F Quarta*, Recognition of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto (2008) 31 Hastings International and Comparative Law Review (HICLR) 753.

10 Cass civ, sec I, 8 February 2012, no 1781 (2012) I, Foro it 1449, (2012) Danno resp 609, with comment of *G Ponzanelli*, La Cassazione bloccata dalla paura di un risarcimento non riparatorio; (2011) Corr giur 1068, with comment of *P Pardolesi*, La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no!

11 Cass civ, sec I, 8 February 2012, no 1781 (2012) I, Foro it 1449.

12 See the judgments of the Italian Supreme Court on the damage award for the publication of a photograph without permission: Cass civ, sec III, 11 May 2010, no 11353 (2011) I, Foro it 534, with

With a judgment delivered in April 2015, the first section of the Italian Supreme Court recognised the exequatur of a Belgian decision providing an *astreinte*.[13] In its decision, the Supreme Court pointed out that in the Italian legal system, compensation involves a series of aims beyond the primary purpose of compensating the victim for the harm suffered – such as deterrence or the prevention of torts and the sanctioning of the tortfeasor. In that case, the Supreme Court found, in particular 'the evolution of the civil liability protection technique towards a sanctioning and deterrent function'.[14] Such statements – as has been noted by more than one scholar – pointed to developments also in the interpretation of the exequatur in the Italian legal system of foreign judgments awarding punitive damages.[15]

Other elements also undermine the notion that civil liability has merely a compensatory function.

Consider the progressive development of the doctrinal debate regarding the possibility of using civil liability with sanctioning and deterrent functions. A significant number of Italian law scholars have, moreover, reflected on the opportunity and legitimacy of punitive private sanctions.[16] Therefore, the closing position adopted by the Supreme Court regarding the request of the exequatur of

comment of *P Pardolesi*, Abusivo sfruttamento di immagine e danni punitivi; and for the violation of copyright: Cass civ, sec III, 15 April 2011, no 8730 (2011) I, Foro it 3073, with comment of *P Pardolesi*, Violazione del diritto d'autore e risarcimento punitivo/sanzionatorio. Moreover see Cass United Sec(s) 6 May 2015, no 9100 (2015) Resp civ prev 1991.

13 Cass civ, sec I, 15 April 2015, no 7613: the judgment of the Supreme Court is published in various law journals: Dir civ cont 7 July 2015, with comment of *N Sciarratta*, La Cassazione su astreinte, danni punitivi e (funzione della) responsabilità civile; (2015) I, Foro it, 3966, with comment of *A Mondini*, 'Astreintes' ordine pubblico interno e danno punitivo; (2015) Banca borsa tit cred 679, with comment of *F Benatti*, Dall'astreinte ai danni punitivi: un passo ormai obbligato; (2015) Resp civ prev 1899, with comment of *A Venchiarutti,* Le astreintes sono compatibili con l'ordine pubblico interno. E i punitive damages? (2016) Giur it 562, with comment of *A Mendola*, Astreinte e danni punitivi; and of *A Di Majo*, I confini mobili della responsabilità civile; on the same issue: *G Ponzanelli*, Novità per i danni esemplari? (2015) Contratto e impresa (Contr impr) 1195ff.

14 Cass civ, sec I, 15 April 2015, no 7613 (2015) Resp civ prev 1899.

15 Among others, see, *Benatti* (2015) Banca borsa tit cred 679, 682; *Venchiarutti* (2015) Resp civ prev 1899, 1901.

16 See the various papers in the edited book *FD Busnelli*/*G Scalfi*, Le pene private (1985), as well as those in the volume edited by *P Sirena*, La funzione deterrente della responsabilità civile, alla luce delle riforme straniere e dei Principles of European Tort Law (2011). See also *F Quarta*, Risarcimento e sanzione nell'illecito civile (2013). For studies that have taken into account the conduct of the tortfeasor see *P Cendon*, Il dolo nella responsabilità extracontrattuale (1974), and more recently *PG Monateri*/*GMD Arnone*/*N Calcagno*, Il dolo, la colpa e i risarcimenti aggravati dalla condotta (2014).

US punitive damages decisions provoked disappointment and criticism among broad sectors of private law scholars.[17]

Furthermore, looking beyond national borders, it becomes evident that the position of the Italian Supreme Court on the recognition of punitive damages was, at least in some respects, outdated.[18] Until this decision in comment, the Italian Supreme Court had essentially reproduced the arguments put forward by the German Federal Court of Justice (*Bundesgerichtshof*, BGH) in a 1992 decision made for the same purpose.[19]

Over the course of time, however, not all European courts have sided with the German position, and some have actually embraced punitive damages. The Supreme Courts of legal systems which belong to the same legal tradition as the Italian system, had demonstrated more than one opening-up in favour of the admissibility of the exequatur of foreign judgments awarding punitive damages.[20]

17 For critical opinions of the decisions of the Supreme Court, although with different points of view, see among others *G Ponzanelli* (2007) I, Foro it 1460; *P Pardolesi* (2007) Danno resp 1225; *G Ponzanelli* (2012) Danno resp 609; *P Pardolesi* (2011) Corr giur 1068; *P Fava* (2007) Corr giur 448, 497; *A Giussani* (2008) Giur it 395, 396; *A Riccio*, I danni punitivi non sono, dunque, in contrasto con l'ordine pubblico interno (2009) Contr impr 859. Among the scholars who share the view that the Supreme Court judgments are correct see: *C Castronovo*, Del non risarcibile aquiliano: danno meramente patrimoniale, c.c. perdita di chance, danni puntivi, danno c.d. esistenziale (2008) Europa e diritto privato (Eur dir priv) 315; *M Barcellona*, Funzione compensativa della responsabilità e private enforcement della disciplina antitrust (2008) Contr impr 120; *A De Pauli*, L'irriconoscibilità in Italia per contrasto con l'ordine pubblico di sentenze statunitensi di condanna al pagamento dei danni 'punitivi' (2007) Resp civ e prev 2100. For decades, commentators have lamented the reluctance of European courts to recognise and enforce American judgments awarding non-compensatory damages: *RA Brand*, Punitive Damages and the Recognition of Judgments (1996) 43 Netherlands International Law Review (NILR) 143.

18 *FD Busnelli*, Deterrenza, responsabilità civile, fatto illecito, danni punitivi (2009) Eur dir priv 909ff.

19 BGH 4.6.1992 (1992) Neue Juristische Wochenschrift (NJW) 3096; for some comment on the German case law: *N Jansen*/*L Rademacher*, Punitive Damages in Germany, in: H Koziol/V Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) 75; *P Hay*, The Recognition and Enforcement of American Money Judgments in Germany. The 1992 Decision of the German Supreme Court (1992) 40 American Journal of Comparative Law (Am J Comp L) 729; *E D'Alessandro*, Pronunce americane di condanna di punitive damages e problemi di riconoscimento in Italia (2007) I, Rivista di diritto civile (Riv dir civ) 383.

20 For the French legal system, see Cour de Cassation, chambre civile (Cass civ) 1, 10 December 2010, no 09–13303, (2010) Bulletin civil (Bull civ) no 248; for some comments: *V Wester-Ouisse*, La Cour de Cassation ouvre la porte aux dommages punitifs! (2011) Responsabilitè civile et assurance (RCA) Etude no 5; *J Juvénal*, Dommages-intérêts punitifs: comment apprécier la conformité à l'ordre public international? (2011) 6 La Semaine Juridique: Juris-classeur périodique – Ed Générale (JCP G) 256; *I Gallmeister* (2011) Recueil Dalloz (D) 24; *F-X Licari*, La compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'œil de

Moreover, the provisional order discussed above in the first section eloquently discusses the multifunctionality of the compensation mechanism.

Some of the most significant features of that decision are as follows: a) 'It is doubtful whether the compensatory-remedial function, although prevalent in the Italian legal system, is really the only function attributable to the compensatory remedy and whether the argument that essentially neglects any punitive-deterring nuances is legitimate'; b) 'it is also doubtful whether the recognition of foreign judicial decisions, with a sanctioning function, could be opposed by the principle of public policy that could be inferred from categories and concepts of domestic law, thus treating the foreign judgment as if it were a judgment issued by an Italian court of first instance'; c) 'and above all, it should be demonstrated that the function of damages, now configured in exclusively compensatory terms, is becoming an essential and indispensable constitutional value of our legal system'.[21] More than one factor, then, indicated a change of course by the Italian Supreme Court.

III Aims of damages law

Let us now examine the reasons that led the Plenary Section to change its position on the recognition of foreign decisions awarding punitive damages.

Before proceeding, however, it is appropriate to imagine some of the solutions that the Italian Grand Chamber could have adopted (after the request of the

la Cour de cassation? (2011) D 423; *P Stoffel-Munck* (2011) JCP G 140; *V Wester-Ouisse/T Thiede*, Punitive Damages in France: A New Deal? (2012) 3 Journal of European Tort Law (JETL) 115; *B W Janke/F-X Licari*, Enforcing Punitive Damage Award in France after Fontaine Pajot (2012) 60 Am J Comp L 775. For Spain, see the Supreme Court (Tribunal Supremo, Sala de lo Civil, 13 November 2001, ATS 1803/2001, <http://www.poderjudicial.es/search/index.jsp>: on this issue, *J Carrascosa González*, Daños punitivos: Aspectos de derecho internacional privado europeo y español, in: MJ Herrador Guardia (ed), Derecho de daños (2013) 383ff; *LF Reglero Campos*, updated by *F Peña Lopez*, Conceptos generales y elementos de delimitación, in: LF Reglero Campos/JM Busto Lago (eds), Tratado de Responsabilidad Civil I (5th 2014) 89ff; *P del Olmo*, Punitive Damages in Spain, in: H Koziol/V Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) 137 ff; *SR Jablonsky*, Translation and Comment, Enforcing U.S. Punitive Damages Awards in Foreign Court. A Recent Case in the Supreme Court of Spain (2005) 24 Journal of Law and Commerce (JL & Com) 225.

21 The constitutional irrelevance of the principle of full compensation of damage was confirmed by the Italian Constitutional Court, 6 October 2014, no 235, <www.cortecostituzionale.it>. On the topic see *G Ponzanelli*, La irrilevanza costituzionale del principio di integrale riparazione del danno, in: M Bussani (ed), La responsabilità civile nella giurisprudenza costituzionale (2006) 67ff.

first President to reconsider the matter of the recognition of foreign punitive damages judgments).

First of all, the judges could have been consistent with their own precedents (which were briefly considered in this article) by confirming a configuration of the Italian damages system with solely a compensatory function. If they had done so, the request for the 'admission' in the Italian legal system of the common law punitive damages would be rejected again because of their incompatibility with public policy.[22]

On the other hand, the Italian Grand Chamber had the opportunity to follow the doctrinal guidelines aimed at addressing punitive damages questions outside of the civil liability system and the principles governing it. According to some private law scholars, the payment of 'punitive damages' is not compensation and 'punitive damages' are not injury. Without undermining traditional views regarding the merely restorative function of tort liability law, the Court could have simply pointed to the existence in the Italian legal system of a wide and varied series of sanctioning provisions entirely outside the domain of damages law.[23] Leveraging this argument, the Court could well have recognised the compatibility of the foreign judgment regarding punitive damages with Italian public policy.

Instead, the United Sections believe that the time has come to leave behind a very rigid approach to the aims of civil liability. The Supreme Court states that, even if compensation remains the primary goal, damages law has taken on a multifunctional nature, developing other functions, including preventive and punitive ones.[24]

The first section of the Supreme Court (in its order) had already highlighted that the persistent exclusion of the concept of *sanction* from the range of tort liability aims would come into stark contrast with a number of factors: the opinions of a significant number of private law scholars, the opening up, especially in recent years, of the Italian courts, and above all the progressive introduction, in the Italian law system, of 'remedies with a non-restorative but substantially punitive function'.[25]

22 On this issue, in particular, *Castronovo* (2008) Eur dir priv 315; *Barcellona* (2008) Contr impr 120ff; as well as a comment of the United Sections decision: *C Castronovo*, Diritto privato e realtà sociale. Sui rapporti tra legge e giurisdizione (2017) Eur dir priv 764ff.

23 *C Granelli*, In tema di 'danni punitivi' (2014) Resp civ prev 1760, as well as *E Lucchini Guastalla* (2016) Resp civ prev 1474, 1488.

24 On the various functions of tort law, among many authors, see *C Salvi*, La responsabilità civile, in: G Iudica/P Zatti (eds), Trattato di diritto privato (1998) 19ff; *G Alpa*, Gli incerti confini della responsabilità civile (2006) Resp civ prev 1805ff.

25 Cass civ, sec I, 16 May 2016, no 9978 (2016) Giur it 1854.

The Court refers, in particular, to a number of legal provisions which, despite their diversity, have some homogeneous structural aspects:[26] they are characterised by a legal situation which involves an unlawful act, and by a legal effect resulting in the wrongdoer's obligation to pay, (usually) to the victim of the damage, a sum of money of an ultra-compensatory nature.

The number of these rules is indeed very broad. Here, for the purpose of this article, we will just highlight some of the remarks made by the United Sections.

To compile this partial inventory, one must first mention art 12, Law 8 February 1948 no 47 (Press Law). The regulation allows a victim of defamation by the press, in addition to compensation for the damage and irrespective of the punishment of the offender in the criminal proceedings, to receive 'a compensatory sum'. The amount is defined in relation to the gravity of the offence and the distribution of the printed material. Therefore, at least in extreme cases of defamation, the judge may rule that perpetrator must also transfer to the victim all the profits resulting from the defamation.[27]

Also in other circumstances, the recognition of damages which are awarded over and above what is necessary to compensate the claimant appear to be associated with providing the means to react, with a particular intensity, to a tort characterised by misconduct of the wrongdoer.

Consider, among other situations, the legislation in the field of discrimination law, which confers to the court the right to take account, to quantify the damages, of the fact that 'the act or the discriminatory conduct constitute a retaliation to a previous judicial action, or unjust reaction to a previous activity of the injured party in order to comply with the principle of equal treatment'.[28]

In other cases, however, the ultra-compensatory protection has led to the threat of disgorgement of the profits gained with the commission of the wrongdoing. Because they are generally supposed to exceed the harmful consequences,

26 A systematic analysis by scholars of the various hypotheses is conducted, among others, by *C Scognamiglio*, Danno morale e funzione deterrente della responsabilità civile (2007) Resp civ prev 2485; *Riccio* (2009) Contr impr 859 ff.

27 For further details see *M Grondona*, Danno morale da diffamazione a mezzo stampa e ambito di rilevanza dei danni punitivi (2010) Resp civ 836; as well as *P Cendon*, Pena privata e diffamazione (1979) Politica del diritto (Pol dir) 149. For case-law, see Cass civ, sec III, 29 October 1965, (1966) I, Giur it 726.

28 Now art 28 § 6 *decreto legislativo* (d lgs) 1° September 2011, no 150. On this issue *G Carapezza Figlia*, Divieto di discriminazione e autonomia contrattuale (2013) 49 ff; *C Troisi*, Divieto di discriminazione e forme di tutela. Profili comparatistici (2012) 172; for case-law, Cass civ, sec III, 22 January 2015, no 1126 (2015) Resp civ prev 827, with comment of *G Citarella*; Trib Ascoli Piceno, 25 March 2016, DeJure, Trib Pistoia, 8 September 2012 (2013) II, Rivista italiana di diritto del lavoro (Riv it dir lav) 25; Trib Varese, 2 July 2008, DeJure.

a compensation parameterised only to the losses suffered by the victim would not be a sufficient reason to dissuade potential wrongdoers from engaging in the harmful action.[29]

Examples of this can be found in two provisions on the protection of intellectual property rights in the versions resulting from the changes introduced in the Italian law system with the implementation of the Enforcement Directive. They are: art 125, § 2 d lgs 10 February 2005, no 30 (Industrial Property Code) – for which the determination of the damages can be quantified, inter alia, 'on the grounds of the benefits gained from the infringement of the law'[30] – and art 158, § 2 Law 22 April 1941, no 633 (Copyright Law), where it is foreseen, inter alia, that the court may quantify the damages on a flat-rate basis 'on the grounds of at least the sum total of the fees that should have been paid' if the author of the breach had asked the holder for consent to use the rights.[31]

Sometimes the purpose of law provisions is more uncertain. Consider, for example, the compensatory mechanism put in place by art 709 ter of the Italian Code of Civil Procedure,[32] regarding cases of litigation between parents on the exercise of parental responsibility or the custody arrangements for their children. The article, added by Law 8 February 2006, no 54, gives the judge the power to issue compensatory sentences to the parent who has committed breaches or acts that in any way cause prejudice to the minor or impede the proper conduct of

29 *Scognamiglio* (2017) 3 Giust civ comm 1, 16.

30 See: *L Nivarra*, L'enforcement dei diritti di proprietà intellettuale dopo della direttiva 2008/48/CE (2005) Diritto industriale (Dir ind) 45; *P Pardolesi*, Un'innovazione in cerca d'identità: il nuovo art. 125 codice proprietà industriale (2006) Corr giur 1605; *V Di Cataldo*, Compensazione e deterrenza nel risarcimento del danno da lesione di diritti di proprietà intellettuale (2008) Giurisprudenza commerciale (Giur comm) 20; *MS Spolidoro*, Il risarcimento del danno nel Codice della Proprietà Industriale. Appunti sull'art. 125 C.P.I., (2009) Rivista di diritto industriale (Riv dir ind) 153; *G Floridia*, Risarcimento del danno e reversione degli utili nella disciplina del diritto industriale (2012) Dir ind 10.

31 For case law: Cass civ, sec I, 1ºMarch 2016, no 4048, De Jure; Cass civ, sec I, 3 June 2015, no 11464 (2015) Dir ind 554; on this topic see: *G Floridia*, Proprietà intellettuale, illecito concorrenziale e risarcimento, in: Il risarcimento del danno da illecito concorrenziale e la lesione della proprietà intellettuale, Castel Gandolfo Congress, 20-22 March 2003 (2004); *A Plaia*, Proprietà intellettuale e risarcimento del danno (2003).

32 Among private law scholars, see *M Paladini*, Misure sanzionatorie e preventive per l'attuazione dei provvedimenti riguardo ai figli, tra responsabilità civile, punitive damages e astreintes (2012) Famiglia e diritto (Fam dir) 853; *N De Salvo*, Il risarcimento del danno ex art. 709 ter, comma, 2, n. 2, c.p.c. come pena private (2012) Fam dir 613; *G Facci*, L'art. 709 ter c.p.c., l'illecito endofamiliare ed i danni punitivi (2008) Fam dir 1026; *E La Rosa*, Il nuovo apparato rimediale introdotto dall'art. 709 ter c.p.c.. I danni punitivi approdano in famiglia? (2008) Fam dir 64; *M Paladini*, Responsabilità civile nella famiglia: verso i danni punitivi? (2007) Resp civ prev 2005.

custody of the child. Due to the formulation of the provision, there are still some uncertainties (among both judges and private law scholars) about the purpose of the compensation. That is to say, it is not clear whether it is directed at the reparation of the injury suffered by the child or by the partner, or whether it has a punitive nature to discourage the potential wrongdoer from behaving unfairly and (potentially) to sanction his/her behaviour.[33]

Special mention must then be given to art 96, § 3 of the Italian Code of Civil Procedure (introduced by a civil process reform in 2009). The article provides for a pecuniary penalty, equitably determined by the judge, in addition to the refund of the trial costs according to the 'losing party principle'. The requirement for this compensation is the same as for art 96, § 1 of the Italian Code of Civil Procedure, that is, the losing party must have commenced proceedings, or defended themselves, with bad faith or gross negligence.[34] Following the opinion of many law scholars,[35] the Italian Supreme Courts did not hesitate to qualify it as a punitive provision[36] the purpose of which is to discourage abuse of the process and to preserve the functionality of the justice system, by repressing unfair or merely dilatory judicial proceedings.

An examination of the Italian legal system might reveal many other examples of provisions with punitive effect, albeit differently articulated. For the purpose of this study, however, the list may be interrupted at this point.[37] The samples enumerated above seem enough to conclude – as the Italian Supreme Court has done – that tort law in Italy is characterised by a 'multiplicity of functions'.

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33 See Cass civ, sec II, 2 April 2013, no 8016 (2013) Diritto di famiglia (Dir fam) 886; Trib Roma, 23 January 2015 (2016) Danno resp 409; Trib Messina 8 October 2012 (2013) Danno resp 409; Trib Messina, 8 October 2012 (2013) Dir fam 409, with comment of *P Pardolesi*, Vocazione sanzionatoria dell'art. 709 ter c.p.c. e natura polifunzionale della responsabilità civile.

34 The third and final paragraph of art 96 Italian Code of Civil Procedure (introduced by Law no 69, art 45, § 12) states: 'In any event, when deciding on the expenses pursuant to article 91, the judge, also sua sponte, may also order the losing party to pay, in favor of the other party, a sum of money equitably determined'.

35 *C Molrini*, Il punto sulle spese di lite e la responsabilità per lite temeraria (2012) Resp civ prev 2081; *Quarta* (fn 16) 395; *M Franzoni*, La lite temeraria e il danno punitivo (2015) Resp civ prev 1077.

36 Corte Cost, 23 June 2016, no 152 (2016) I, Foro it 2639; Cass civ, sec III, 29 September 2016, no 19285 (2016) Diritto e giustizia (Dir giust) 30 September; Cass civ, sec I, 30 July 2010, no 17902 (2011) I, Foro it, 3134.

37 An articulated analysis should be devoted to the theme of compensation for non-pecuniary damage. For the purpose of this discussion, it is briefly noted that a number of scholars have hypothesised a return of the interpretation of art 2059 Italian Civil Code to the ambit of the sanction envisaged by the legislator of the Italian Civil Code of 1942: see, among others *R Scognamiglio*, Danni alla persona e danno morale, (now) in: R Scognamiglio, Responsabilità civile e danno (2010) 37; *G Bonilini*, Il danno non patrimoniale (1983) 299, as well as *Quarta* (fn 16) 374 ff.

IV The notion of public policy and the criteria for evaluating foreign judgments

Once the theoretical and systematic assumptions of the previous position on the recognition of foreign judgments on punitive damages – that is, that 'the idea of punishment' is radically extraneous to the Italian system of tort law – have been dismantled, the judges of the Supreme Court outline the criteria for evaluating the compatibility of a foreign judgment awarding punitive damages with the Italian legal system.

Before exploring Italian attitudes to punitive damages, one must understand how Italian courts recognise foreign judgments. On this point Law 218/1995 of the Italian system of Private International Law has adopted the approach taken by the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. According to art 64 § 1 g) of the 1995 Law, now in force, foreign judgments are automatically enforced in Italy when the effects of the judgment are not contrary to public policy.[38]

In the AXO case the judges of the Supreme Court therefore considered the notion of 'public policy'. This is an issue that was dealt with in depth by the decision of the first section of the Supreme Court: the Court highlighted the significant evolution of the notion in case law over the last few years. The notion now takes into account the international environment, of which the Italian law system is also a part. Here are the main steps leading to the decision.

The plenary session agreed with this opinion and observed how 'public policy' can no longer be reduced to just national law. As a result of the integration of Italian law into the European supranational system, to understand the content of the notion of public policy it is now necessary to consider a plurality of legal sources of various origins. These include, in addition to the Italian Constitution, the founding Treaties of the European Union, the Charter of Fundamental Rights of European Union and the European Convention on Human Rights.[39]

The Supreme Court stated that the main effect of the transposition of supranational law is the promotion of European protected values, not the progressive loosening of the traditional control by national law limiting the entry of foreign

38 See: *LG Radicati di Brozzolo*, Private International Law, in: JS Lena/U Mattei (eds), Introduction to Italian Law (2002) 447ff.

39 See, among the others, Cass civ, sec III, 22 August 2013, no 19405 (2014) I, Foro it 2898; Cass civ, sec I, 28 December 2006, no 2759 (2007) Rivista di diritto internazionale (Riv dir int) 886.

rules and judgments.[40] Article 67 of the Treaty on the Functioning of the European Union expressly states that: '[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'. Therefore, the relationship between national and Union public policy is not one of substitution but of autonomy and coexistence.

Consequently, the harmonising impact of supranational law can facilitate innovative outcomes. However, national Constitutions and legal traditions, with their diversity, continue to represent a limitation to the recognition of a foreign judgment applying a measure not governed by national law.

Once the notion of public policy has been clarified, the Court sets out the guidelines to be followed when considering a foreign decision. In summary: a total exact correspondence between foreign and national legal provisions cannot be assumed. Instead, the foreign judgment that knocks on the door of the Italian law system must be considered in light of its compatibility with the values and principles that are relevant for the purpose of the exequatur.

V Criteria for the recognition of punitive damages judgments in Italy

These considerations guide the Court's conclusions. We have now reached the part of the judgment devoted to the construction of the principle of the law. It is somewhat general and abstract, given that the present case did not impose punitive damages.

The Plenary Section indicated some substantive criteria for scrutinising the ways in which the foreign court has come to condemn punitive damages to the defendant.

It should be noted in this regard that the *pars construens* of the decision presents some critical issues. Given the fact that this case did not involve the awarding of punitive damages, this part of the sentence appears to be rather general and abstract and not always easy to read.

The Court first highlighted the limitations to which legislative provisions of a sanctioning or deterrent nature are subject in the Italian law system. It recalled

40 ECtHR *Krombach v France*, 13.2.2001, no 29731/96, ECHR-Report 2001-II; on this topic, *O Feraci*, L'ordine pubblico nel diritto dell'Unione Europea (2012) 155 ff.

that they require 'legislative intermediation' in accordance with the principles set out in arts 23 and 25 of the Italian Constitution.

Both articles mentioned above express the principle of legality: the first regarding administrative penalties, the second regarding criminal punishment.[41]

In the dictum on the recognition of foreign punitive damages judgments, the Court relied on the principles governing the Italian law system. In a sort of parallelism, the judges state that, as is required in Italy, the foreign court must have awarded punitive damages on 'adequate normative' grounds; the Court states that there must be 'a law, or similar source, that has regulated the matter according to the principles and solutions of the foreign country, with effects that do not conflict with the Italian law system'.[42] The constitutional limits suggested by the principle of legality will operate, therefore, also for the examination of foreign judgments.

The Court's formulation requires some clarification. First, the reference to 'a law or similar source' (which allowed the judge to issue a ruling on the basis of appropriate regulatory grounds) must be understood not only in terms of legislative sources of law. As is well known, case law has at least the same standing as a source of law in the legal systems where punitive damages originated.[43] The Plenary Section shows to be aware of the evolution of punitive damages in the US.[44] The Supreme Court conducted in fact a brief review of data US Supreme

41 See the Italian Constitution art 23: 'No one may be required to perform a personal or financial prestation except on the basis of law', and art 25: 'No one may be removed from an ordinary judge preordained by law. No one may be punished except on the basis of a law already in force before the offence was committed. No one may be subjected to security measures except in those cases provided for by law': see *C Casonato/J Woelk* (eds), The Constitution of the Italian Republic, University of Trento, <http://www.jus.unitn.it/dsg/pubblicazioni/costituzione/costituzione%20genn2008eng.pdf>.

42 *Axo Sport SpA v Nosa Inc*, Cass United Secs 5 July 2017, no 16601 (2017) Danno resp 421.

43 On this point, see *Gambaro* (2017) II, Nuova giur civ comm 1405, 1408.

44 Among the Italian law scholars, for studies on punitive damages see *G Ponzanelli*, I punitive damages nell'esperienza nordamericana (1983) I, Riv dir civ 435; *V Zeno-Zencovich,* Il problema della pena privata nell'ordinamento italiano: un approccio comparatistico ai 'punitive damages' di 'common law' (1985) IV, Giur it 12; *G Ponzanelli*, I punitive damages, il caso texano e il diritto italiano (1987) II, Riv dir civ 405; *G Ponzanelli*, Punitive damages e due process clause: l'intervento della corte suprema Usa (Nota a U.S. Supreme Court, 4 marzo 1991, Pacific Mutual Life Insurance co. c. Haslip) (1991) IV, Foro it 235; *G Ponzanelli*, L'incostituzionalità dei danni punitivi grossly excessive (1996) IV, Foro it 421; *A Musy*, Punitive damages e resistenza temeraria in giudizio: regole, definizioni e modelli istituzionali a confronto (2000) Danno resp 1121; *G Ponzanelli*, La 'costituzionalizzazione' dei danni punitivi: tempi duri per gli avvocati nordamericani (2003) IV, Foro it 356; *P Sirena*, Il risarcimento dei danni c.d. punitivi e la restituzione dell'arricchimento senza causa (2006) I, Riv dir civ 531; *G Ponzanelli*, I danni punitivi sempre più controllati: la

Court case law, aimed at limiting damages that were considered 'grossly excessive'.[45] The Italian judges further examined Florida's statute, which has introduced limitations on the multiple liability phenomenon.[46]

Once the concept of legal basis is also extended to the rules created by jurisprudence, a series of questions remain open on the path to recognising foreign sentences of punitive damages.

The Plenary Section stated that the foreign court should rule on appropriate regulatory grounds that meet the principles of *tipicità* (typicality) and *prevedibilità* (foreseeability). The former – as stated in the reasoning of the judgment – is to be understood as a 'precise perimeter of the case' and the latter as a 'specification of the quantitative limits of convictions' in the specific case.

We cannot fail to highlight how the US courts, in applying the jurisprudential rules on the subject of punitive damages, continue to have a measure of discretion that is not entirely compatible with such principles.[47]

In future cases, therefore, the party requesting the recognition of the foreign judgment will be required to first demonstrate the compliance of the punitive judgment with the legal system in the country of origin and, second, demonstrate that the imposition of punitive damages is in line with rules of precise typicality and punctual quantitative predictability.

From these considerations, though concise, it can be deduced that, even after the Italian Grand Chamber decision, there is still the possibility of refusal to recognise punitive damages judgments. Consider (not so much the hypothetical, in which even the conformity of the punitive sentence to the legal system of the country of origin is uncertain, but rather) the cases in which there is doubt or total uncertainty about precisely the two requirements of *tipicità* (typicality) and *prevedibilità* (foreseeability) of the punitive damages judgment.

At this point a further step in the reasoning of the sentence should be considered: the reference to art 49 of the Charter of Fundamental Rights of the European Union, and above all to the additional application that the United

decisione Philip Morris della Corte Suprema Americana (2008) IV, Foro it 179; *P Pardolesi*, Danni punitivi, in: Digesto Discipline Privatistiche, Sezione Civile, Aggiornamento (2007) I, 452; *Fa Benatti*, Correggere e punire. Dalla law of torts all'inadempimento del contratto (2008) 106 ff.

45 *Exxon Shipping Co v Baker*, 554 United States Supreme Court Reports (US) 471 (2008).

46 On the origin and development of such kind of damages see, among others: *LL Schlueter*, Punitive Damages (5th edn 2005) 7; *DG Owen*, A Punitive Damages Overview: Functions, Problems and Reform (1994) 39 Villanova L Rev (Vill L Rev) 368ff; *JB Sales/KB Cole jr*, Punitive damages: A relic that has outlived its origins (1984) 37 Vanderbilt L Rev (Vand L Rev) 1119ff.

47 See *Gambaro* (2017) II, Nuova giur civ comm 1405, 1408.

Sections take from it, with specific reference to the issue in question:[48] the Courts of Appeals will be required to 'verify the proportionality between compensatory damages and punitive damages and among the latter and the censored conduct to make the nature of the sanction recognizable'.[49] In short, even if it is not explicitly stated in the formal principle of law set out at the end of the decision, the text of the judgment shows a further limitation to the recognition of foreign judgments in the matter of punitive damages. It is therefore necessary to ascertain whether this can constitute the premise for a refusal of recognition, where the amounts settled on as punitive punishment are manifestly disproportionate in light of the criteria mentioned above.

Therefore – considering moreover that punitive damages are not limited to the US[50] – we will have to wait for a new case to test the indications formulated by the United Sections.

VI Conclusions: a landmark decision

There is a further consideration to be made to clarify the scope of the decision of the United Sections. In order to clear up any misunderstanding, it would seem appropriate to highlight how the judgment of the Plenary Section relates to a matter of private international law.

The request of the first section concerned, in fact, the issue of the recognition of foreign punitive damages judgments. The same United Sections scrupulously restricted the elaboration of their teaching at the private international level.

In the reasoning behind the decision, there is clearly reference to the Italian 'punitive damages' in order to justify the statement on the multipurpose nature of damages law. This declaration constitutes the linchpin of the overruling referred

48 It is recalled that art 49, § 3 of the Charter of Fundamental Rights of the European Union, 'Principles of legality and proportionality of criminal offences and penalties', states: 'The severity of penalties must not be disproportionate to the criminal offence'.

49 *Axo Sport SpA v Nosa Inc*, Cass United Secs 5 July 2017, no 16601 (2017) Danno resp 421.

50 In the cases in which the punitive damages judgement originates in a legal system of one of the Member States of the European Union, the criteria of the Supreme Court United Sections will also apply: in such circumstances the exequatur of the foreign judgment will be governed by art 45 (1) (a) of Regulation (EU) no 1215/2012, for which a civil judgment coming from a court of another EU country must be recognised unless it is manifestly contrary to public policy. On the situation of punitive or exemplary damages damages in Europe, see various contents in *H Koziol*/V *Wilcox* (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) and *L Meurkens*/*E Nordin* (eds), The Power of Punitive Damages (2012).

to. And there is no doubt that it constitutes a novelty for the Supreme College, at least in terms of the way in which it has been formulated.

However, the same Supreme Court points out that a sanctioning function of Italian tort law is not admissible except in cases where regulations expressly permit it. The judges refer to the principles inferable in arts 23 and 25, § 2 of the Italian Constitution and art 7 of the European Convention on Human Rights.[51]

Therefore, given the explicit references to its own precedents, the position of the Supreme Court cannot be said to have changed in so far as it rules out the potential for Italian judges to use as sanctioning measures the powers which are nevertheless granted to them by a combination of provisions in the Italian civil code.

In conclusion, the United Sections demonstrated measure and balance in formulating a decision that is set to become a landmark decision in the analysis of the functions covered by tort law.

Endnote: I would like to thank the anonymous reviewers for their helpful comments on the draft of my paper and Elisabeth White for her revision of the English version of the paper.

51 On this topic, see *F Bricola*, La riscoperta delle 'pene private' nell'ottica del penalista in: FD Busnelli/G Scalfi (eds), Le pene private (1985) 50; as well as, more recently, *Busnelli* (2009) Eur dir priv 909, 915.