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Case Notes

Recognition of a Danish Monetary Penalty in Employment Matters and Public Policy

Note to: Corte di Cassazione (First Chamber), Solesi Spa v. Landsorganisationen i Danmark and Fagligt Faelles Forbund, 7 March 2023, No. 6723

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Abstract

The contribution is focused on a recent decision of the Italian Supreme Court, in which it was held that a Danish judgment imposing a monetary sanction (*bod*) on an employer for the failure to perform its obligations under a collective employment contract can be recognized in Italy under Regulation (EU) No. 1215/2012 (applicable to Denmark via the 2005 EU-Denmark Agreement). The request to refuse recognition had been raised on the assumption that the Danish measure amounted to a condemnation to punitive damages and was thus incompatible with public policy. The *Corte di Cassazione* came to the opposite conclusion, but the solution reached may cause a mixed reaction. It is regrettable that, notwithstanding the applicability of Regulation (EU) No. 1215/2012, the Italian Supreme Court simply relied on the principles developed in its previous judgment No. 16601/2017 (concerning a judgment of a non-EU court) and did not deem it necessary to request a preliminary ruling from the European Court of Justice ("CJEU") on the interpretation of the relevant provisions of the mentioned Regulation.

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In a different vein, it is to be welcomed that the nature of the foreign measure was assessed in accordance with the so-called *Engel* criteria, developed by the European Court of Human Rights. However, the analysis conducted in the instant case by the Italian Supreme Court, which appeared to overlook some characteristics of the Danish *bod*, is not completely convincing.

Keywords

collective employment contract – regulation (EU) 1215/2012 – recognition of judgments – public policy – criminal penalties – European court of human rights

Abstract of the Decision

The case under comment concerned the request by Solesi Spa ("Solesi"), an Italian company, to refuse recognition in Italy of a judgment issued by Danish Labour Court at the request of Landsorganisationen i Danmark and Fagligt Faelles Forbund ("3F"), two Danish trade unions. The facts of the case can be summarized as follows: Solesi had employed several workers in a construction site in Denmark, on the basis of an agreement with 3F regarding the treatment of posted workers; the Danish Labour Court found that the Italian company had breached that agreement and had failed to pay adequate salaries and social security contributions with regard to those workers and imposed a sanction of 1,900,000 Euros, to be disbursed in favor of the two trade unions.

Solesi initiated proceedings before the *Tribunale di Siracusa*, requesting that recognition of the Danish judgment be refused in Italy under Article 45 of Regulation (EU) No. 1215/2012,[1] which is applicable to Denmark in accordance with a 2005 Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[2] The Italian company assumed

1 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20 November 2012, p. 1 ff, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215>.

2 Official Journal of the European Union (L 299), 16 November 2005, p. 62. The Agreement referred to the implementation of Regulation EU No. 44/2001 by Danish courts, but Art. 3.2 of the Agreement enabled Denmark to notify the Commission of its decision whether or not to implement the content of future amendments to that Regulation. Accordingly, Denmark has by letter of 20 December 2012 notified the Commission of its decision to implement the contents of Regulation (EU) No 1215/2012: see the Notice in Official Journal of the European Union (L 79), 21 March 2013, p. 4.

that the Danish judgment was manifestly contrary to public policy for different reasons: 1) the sanction imposed by the Danish Labour Court was criminal in substance and amounted to a penalty within the meaning of Article 7 of the European Convention on Human Rights; therefore, the judgment had been issued in breach of the principle "no punishment without law"; 2) the sanction, being a criminal penalty, could not be issued by a national court adjudicating at unique instance, as in criminal matters every person has the right to have his/her sentence reviewed by a higher court; 3) the Danish Labour Court, while adjudicating at last instance, had failed to refer a preliminary question to the Court of Justice of the European Union in accordance with Article 267 TFEU.

The *Tribunale di Siracusa* upheld the request. In a thoroughly reasoned order it moved from the assumption that, according to the case-law of the Court of Justice of the European Union, the public-policy clause would apply only when the recognition or enforcement of the judgment in the State in which enforcement is sought would be regarded as a manifest breach of an essential rule of law in the legal order of that Member State. Having clarified that the identification of a rule of law which is essential in the national legal system must especially focus on rules pertaining to the protection of fundamental rights, the court of first instance proceeded to evaluate whether the sanction imposed by the Danish court could qualify as a criminal penalty and it did so by making reference to the case-law of the European Court of Human Rights and to the so-called '*Engel* criteria'.

The criteria, developed by the European Court in order to define the notions of 'criminal offence' and of 'penalty' under Articles 6 and 7 of the Convention, include the nature and purpose of the measures in question; their characterization under national law; the procedures involved in the making and implementation of the measures; and their severity. Within this framework, the European Court has attached a special emphasis to the punitive purpose of the measures concerned.

Then, the *Tribunale di Siracusa* had to examine whether the penalty at issue could be considered as compatible with the principle of legality and concluded that the insufficient statutory definition of the punished offence and the lack of a minimum and a maximum amount of the penalty brought about its incompatibility with Italian public policy on the ground of its unpredictability. In the opinion of the *Tribunale di Siracusa*, those features could not be remedied by the existence of an allegedly consistent case-law of Danish courts, clarifying how the amount of the penalty should be calculated.

The *Corte di Appello di Catania* reversed the decision. In particular, it considered that the so-called *Engel* criteria, concerning administrative sanctions that show similarities with criminal penalties, are not applicable to a decision awarding damages for non-performance of a contract, like the Danish

bod, and that this instrument does not amount to punitive damages, insofar as it is calculated taking into account the amount unpaid by the employer on the basis of a supposedly clear and predictable method constantly followed by Danish courts.

This approach was not entirely shared by the *Corte di Cassazione*, which, in fact, resorted to the *Engel* criteria in order to evaluate the compatibility of the Danish measure with public policy. In the Court's opinion, though, the measure did not qualify as a criminal penalty: its preventive and punitive nature was not relevant, as several rules of domestic law in the field of civil liability may serve a similar purpose, and it did not attain a special degree of severity, on account of the fact that the amount awarded was calculated taking into account the cost savings obtained by the employer. In addition, even assuming that the Danish *bod* could enshrine a condemnation to punitive damages, the measure was not incompatible with Italian public policy, as it was established by an express provision of Danish law, predictable on the basis of the practice of domestic courts and proportionate in its final amount.

Key Passages from the Ruling

(Paragraph 6) "The fifth, sixth and eighth grounds of appeal, by which the impugned decision is challenged insofar as it declared that the Danish judgment is not incompatible with public policy building on the assumption that the sanction against the claimant in that judgment is criminal in substance and breaches the principles established by this court with regard to the recognition of punitive damages, are partly inadmissible and partly ill-founded".

(Paragraph 6.3) "In the instant case, the Danish Labour Court imposed, in accordance with Article 12 of the Danish Employment Unified Act, a sanction calculated on the basis of the unlawful savings obtained by the Italian company as a consequence of non-payment of salaries, vacation pay, salaries for Sunday and holiday working, social security contributions, plus an amount to be calculated taking into account the circumstances of each case. […] Under Danish law the "bod" qualifies as a civil sanction, envisaged under the Employment Unified Act (article 12) as an alternative to ordinary civil liability: it can be imposed only for the breach (non-performance) of collective employment contracts, in order to strengthen the binding effects of those contracts, whose purpose would be weakened should their breach bring about only a compensation calculated in terms of damages actually incurred, and in order to prevent the so-called social dumping. Accordingly, it jointly has a compensatory function, following the breach of the agreement, and a preventive and punitive function, in order to ensure effective protection of

the obligations entered into through collective contracts and to preserve the credibility of those contracts. The fact that a civil sanction may also carry out a punitive and preventive function is not sufficient to characterize its nature as a criminal penalty and to invoke its incompatibility with public policy. In any event, in the domestic framework of the Danish legal system the sanction so imposed, under Article 12 of the Danish Employment Unified Act, is not formally considered as a criminal sanction, but as a financial penalty. The possible punitive nature of the sanction can be thus recognized taking into consideration the two aforementioned substantive criteria: on the one hand, the nature of the offence, according to its scope of application, as it can be criminal only if infringes values belonging to the whole community and not to individuals participating in a given relationship, and, above all, according to the objective pursued, which should be "not merely compensatory, but punitive and preventive"; on the other hand, the nature and gravity of the sanction to which the individual is subject, as it should display a punitive nature, enshrining a significant degree of severity" (Constitutional Court, Judgment no. 43/2017). In the instant case, neither of those criteria is applicable: the sanction was imposed in the context of a case concerning non-performance of a contractual agreement between the Italian company and the Danish trade unions and was calculated according to the criterion of unlawful saving plus an amount serving a punitive and preventive purpose, in order to prevent the phenomenon, incompatible with intra-EU competition, of social dumping, which infringes the fair treatment of workers".

(Paragraph 6.5) "Now, in the instant case, even though one may consider that the sanction imposed constitutes a condemnation to punitive damages, it is in line with the criteria set forth by the Joint Chambers in 2017, namely the principle of legality, since it is provided for by a recognizable source of law (Article 12 of the Danish Employment Unified Act, which clarifies some general criteria, while leaving the application of the provision to the discretion of domestic courts in accordance with the circumstances of each case), as it is interpreted, as to the quantification, by the case-law of the Danish Labour Court (and the Danish Court also established clear guidelines for the calculation of the "bod", which ensure the predictability of the calculation); the principle of predictability (as mentioned by the *Corte d'Appello*, with regard to the applicable foreign law and to the practice of the Danish Court in similar judgments) and the principle of proportionality (with reference to the additional penalty imposed, having clear punitive nature, if compared to the sanction imposed with a merely compensatory purpose taking into account the economic saving unlawfully obtained by the Italian company)".[3]

3 Key passages from the ruling are translated by the author.

Comment:

In the case examined by the *Corte di Cassazione* the public policy clause enshrined in Article 45 of the EU Regulation No. 1215/2012 was invoked for several reasons, both procedural (alleged lack of impartiality of the court of the State of origin; failure of that same court to request a preliminary ruling from the CJEU; violation of the right to have the sentence reviewed by a higher tribunal) and substantive (compatibility of punitive damages with public policy). The present case comment will focus on the latter issue, as the judgment provided a new occasion for considering a topic that recently had called the attention of the Italian Supreme Court.

While, even in the recent past, recognition of foreign judgments awarding punitive damages in many European legal systems was considered as outright incompatible with public policy, a clear tendency to allow the circulation of such judgments has emerged in recent years.[4] In Italy, in 2017 the Joint Chambers of the *Corte di Cassazione* paved the way for this development,[5] explicitly departing from previous judgments of the same court refusing recognition of foreign decisions awarding punitive damages.[6] On that occasion, the Italian Supreme Court examined a request for recognition of a US judgment, issued under the law of the State of Florida in a case relating to product liability, and found that it was actually possible to uphold that request, provided that some conditions relating to the principles of legality, predictability and proportionality were fulfilled.[7]

Accordingly, the fact that the above-summarized judgment relied on that precedent in order to ensure recognition of a Danish *bod* might come as no surprise. However, the case under comment deserves careful attention, insofar as it displays several distinctive features: 1) the judgment to be recognized had been issued by the court of a EU Member State and recognition was thus subject to Regulation No. 1215/2012 in accordance with the mentioned 2005 EU-Denmark Agreement; 2) the dispute did not arise in the field of non-contractual obligations, but the claim for damages was the consequence of the non-performance of contractual obligations; 3) in particular, those obligations

4 See MEURKENS, "Punitive Damages: Foundations To Start With", in BARIATTI, FUMAGALLI, CRESPI REGHIZZI (eds.), *Punitive Damages and Private International Law: State of the Art and Future Developments*, Padova, 2019, p. 1 ff, p. 12 ff.

5 *Corte di Cassazione* (*Sezioni Unite Civili*), *Axo Sports S.p.a. v. Nosa Inc.*, 5 July 2017, No. 16601.

6 See *Corte di Cassazione*, *P.J. v. Fimez S.p.a.*, 19 January 2007, No. 1183, and *Ruffinatti S.r.l. v. O.R.L.*, 8 February 2012, No. 1781.

7 For an analysis of the judgment, BIAGIONI, "Recognition of Punitive Damages in Italy", in BARIATTI, FUMAGALLI, CRESPI REGHIZZI, *cit. supra* note 3, p. 201 ff., p. 208 ff.

flowed from a collective employment contract and were owed to two trade unions.

On account of those circumstances, the reasoning on which the conclusion reached in the judgment is based does not seem entirely convincing.

As a preliminary point, it is worth noting that, notwithstanding the fact that Regulation No. 1215/2012 was here applicable, the Italian Supreme Court followed the same approach it had developed under Article 64 of the Italian Statute on Private International Law for non-EU judgments in the above mentioned decision. That choice is not in itself inconsistent with the general structure of the mentioned Regulation, as Article 45 thereof refers to «public policy in the Member State addressed».[8] Member States are thus free to define the content of their public policy according to their respective domestic conceptions; nonetheless, the Court of Justice consistently held that «the limits of that concept are a matter of interpretation of that regulation».[9]

In the light of this principle, the extent to which intra-EU judgments enshrining punitive elements may fall within the scope of the public policy clause should be a matter of EU law, especially because the question is also linked to the delimitation of the scope of application of Regulation No. 1215/2012. In particular, it must be considered that the Regulation can be applied only in «civil and commercial matters»: even though this notion is to be interpreted in a broad sense,[10] rules concerning the recognition of civil judgments usually do not apply to measures that are criminal in nature or that entail administrative sanctions to be paid to a State authority.[11]

Admittedly, in this case the claim originated from a breach of contract, so that it could be encompassed by the notion of civil matters; however, the interpretation of the CJEU could have been helpful, in order to make it clear whether civil liability measures amounting to sanctions or penalties may be subject to the provisions of the Regulation.

In addition, as the topic of the possible recognition of judgments awarding punitive damages was never thoroughly discussed in the case-law of the CJEU, one cannot take for granted that under EU law the attitude towards foreign judgments awarding punitive damages would be especially liberal. On the contrary, the only express reference to the topic of punitive damages in a legislative act of the European Union concerning judicial cooperation in civil

8 On this topic, see FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012.

9 See, *inter alia*,, Case C-681/13, *Diageo Brands*, 2015, para. 42, and Case C-302/13, *fly-LAL Lithuanian Airlines*, 2014, para. 48.

10 See e.g., Case C-579/17, *BUAK*, 2019, para. 47.

11 See SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento* (*UE*) *n. 1215/2012* (*rifusione*), 4th ed., Padova, 2015, p. 55 ff.

matters[12] seems to allude to a possible incompatibility with public policy, to be evaluated on a case-by-case basis. The fact that on some occasions the Court of Justice has shown a cautious approach towards collective actions in employment matters,[13] especially with regard to the situation of posted workers,[14] seems to point to the same direction.

It is then remarkable that the Italian Supreme Court did not even consider the possibility to request a preliminary ruling from the Court of Justice, but simply proceeded to examine the case in accordance with the same interpretation of the notion and significance of public policy as applicable in the context of recognition of non-EU judgments.

Be that as it may, regarding the issue of punitive damages, the Italian Supreme Court analysed especially two of the points raised by Solesi: first, it considered whether the Danish *bod* could qualify as a measure having criminal nature; secondly, it evaluated the compatibility of that measure with fundamental guarantees to be ensured in matters of criminal sanctions.

As concerns the first point, in its Judgment No. 16601/2017 the Italian Supreme Court clarified that under the public policy clause domestic courts are required to conduct a careful examination of foreign measures having the nature of a penalty or of a deterrent.

In particular, in the Joint Chambers' view, every remedy relating to civil liability implies also a punitive or deterring aim, even mere compensation, but a distinction may be drawn between ordinary mechanisms pertaining to civil liability (e.g. the liquidation of damages as a lump sum) and civil measures that are punitive in nature. This conclusion does not imply blurring the divide between private law measures and criminal law measures, that remains crucial also for the application of European rules concerning recognition and

12 Cf. Recital 32 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II): "In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (order public) of the forum", available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007R0864>. See, among others, WURMNEST, "Towards a European Concept of Public Policy Regarding Punitive Damages?", in BARIATTI, FUMAGALLI, CRESPI REGHIZZI (eds.), *cit. supra* note 3, p. 253 ff., p. 271 ff.

13 On the issue of collective protection of fundamental social rights, see PERARO, *Diritti fondamentali sociali e tutela collettiva nell'Unione europea*, Napoli, 2020.

14 See Case C-341/05, *Laval un Partneri*, Judgment of 18 December 2007, and Case C-438/05, *Viking Line*, Judgment of 12 December 2007.

enforcement of judgments.[15] At the same time, it should not be overlooked that in exceptional cases even ordinary civil liability regimes applicable under foreign law may conflict with public policy.[16]

However, the judgment of the Joint Chambers did not provide any real guidance as to the factors to be taken into account in order to determine the nature of the condemnation issued by a foreign court.[17] Accordingly, the *Tribunale di Siracusa*, referring to the case-law of the European Court of Human Rights, made use of the mentioned *Engel* criteria[18] as a means of interpretation of the foreign judgment.

Unlike the court of second instance, the *Corte di Cassazione* endorsed this solution: interestingly, the Italian Supreme Court did not mention expressly Articles 6 and 7 of the European Convention on Human Rights, but quoted the case-law of the Italian Constitutional Court, which, in recent years, accepted that the *Engel* criteria can be applied in order to ensure that the fundamental rights enshrined in the European Convention be implemented within the domestic legal system.[19]

The use of those criteria for the purpose of the application of the public policy clause in a private-law context may appear as an unusual choice, since the European Court of Human Rights always used them with regard to measures adopted in connection to criminal proceedings or administrative measures imposed by public authorities. In the same context, the *Engel* criteria found their way also into the case-law of the Court of Justice of the European Union.[20]

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15 See REQUEJO ISIDRO, "Punitive Damages From a Private International Respective", in KOZIOL, WILCOX (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, Berlin, 2009, p. 253 ff.; BROGGINI, "Compatibilità di sentenze statunitensi di condanna al risarcimento di 'punitive damages' con il diritto europeo della responsabilità civile", *Europa e diritto privato*, p. 479 ff., p. 492.

16 See e.g. *Corte di Cassazione* (*Third Chamber*), *Frikus Transportsgesellschaft GmbH and Others v. Liguria S.p.a. and Others*, 22 August 2013, No. 19405. In that case the public policy clause was activated on the ground that Austrian law did not provide for compensation of moral damages, thus preventing the claimant from obtaining a full reparation.

17 Punitive damages are usually seen as non-criminal in nature both in the State of origin and from the viewpoint of the Italian legal system: SARAVALLE, *Responsabilità del produttore e diritto internazionale privato*, Padova, 1993, p. 109 ff.

18 European Court of Human Rights, *Engel and Others v Netherlands,* Applications No. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Judgment of 8 June 1976. On the so-called *Engel* criteria, see BARKHUYSEN et al. "Right to a Fair Trial (Article 6)", in VAN DIJK et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, Cambridge, 2018, p. 497 ff.

19 See *Corte Costituzionale*, *Criminal proceedings against S.C.*, Judgment No. 43/2018; *M.G. v. Direzione Territoriale di Como*, Judgment No. 43/2017.

20 Case C-489/10, *Bonda*, 2012, para. 37; Case C-537/16, *Garlsson Real Estate*, 2018, para. 28; Case C-439/19, *B.*, 2021, para. 87; Case C-481/19, *Consob*, 2021, para. 42.

However, one should not forget that some civil liability mechanisms may have characteristics that are usually found in measures belonging to the domain public law. For instance, when punitive damages are awarded in favor of a private party, the latter is considered as a "private attorney general", who pursues indirectly public interests and brings lawsuits that are beneficial to the public.[21] This feature marks a clear difference with more traditional private-law mechanisms that may show also a punitive or deterrent function (e.g. destruction of goods manufactured in breach of intellectual property rights or *astreintes*), but serve almost exclusively the interests of the claimant. As a consequence, even if one shares the view of the *Corte di Cassazione* that every remedy in the field of civil liability may disclose a punitive or deterring function, some of them can clearly resemble measures that are subject to Article 7 of the European Convention on Human Rights.[22]

If the choice to use the *Engel* criteria[23] as a frame of reference appears to be consistent with the general approach of the Italian Supreme Court, the conclusion reached in the instant case is less persuasive. First, the *Corte di Cassazione* found that the Danish *bod* is adopted outside the framework of criminal proceedings and without any necessary connection to a criminal offence. Afterwards, it moved to consider whether the measure could be considered as having a general punitive or deterring function rather than pursue a merely compensatory purpose and whether it could attain a significant degree of severity.

To this regard, the judgment strongly emphasizes the fact that the penalty was imposed as a result of the failure by Solesi to perform the obligations assumed in the collective employment contract with the Danish trade unions.

On the one hand, it is worth remembering that, according to the case-law of the European Court of Human Rights, the notion of «penalty» is an autonomous one and the existence of a measure that is criminal in nature does not necessarily follow a conviction for a criminal offence.[24] For this reason, the analysis of the measure enshrined in the foreign judgment should not only

21 RABKIN, "The Secret Life of the Private Attorney General", Law and Contemporary Problems, 1998, p. 179 ff., p. 196 f.

22 This feature of punitive damages is seen by some scholars as incompatible in itself with public policy: see GAMBARO, "Le funzioni della responsabilità civile tra diritto giurisprudenziale e dialoghi transnazionali", *Nuova giurisprudenza civile commentata*, 2017, p. 1409 ff.

23 For a list of those criteria, see e.g. *Del Río Prada v Spain*, Application No. 42750/09, Judgment of 21 October 2013, para. 82 ff.

24 See *G.I.E.M. Srl and Others v Italy*, Applications No. 1828/06, 34163/07 and 19029/11, Judgment of 28 June 2018, para. 215 ff.

take into account the nature of the wrongdoing, but revolve especially around the characteristics of the penalty imposed.

On the other hand, the adoption of a measure in response to a breach of contract does not imply that such a measure will neither seek to achieve public interests nor to fulfil a punitive aim against the wrongdoer. It is true that even in common law systems punitive damages are not usually awarded when contractual responsibility is at stake, because the legal system does not want to discourage voluntary transactions by imposing punitive measures in case of non-performance.[25] Nonetheless, it is well possible that some situations may exist, in which the violation of contractual obligations may necessitate the implementation of remedies which are connected to the protection of general interests.

This was clearly the case, as ensuring through the adoption of a *bod* that the obligations arising out from collective employment contracts be performed is, under Danish law, part of the broader framework of a policy aimed at labour protection, as acknowledged by the *Corte di Cassazione* itself. In accordance with this general idea, it is common ground in the Nordic literature that the *bod*, like similar remedies in other Scandinavian legal systems, constitutes an instrument for awarding punitive damages.[26] In this context, the use of such a measure does not only provide a fair contractual balance between the parties, but is also expressly intended to achieve an objective for the national community as a whole, that is to prevent so-called social dumping in the employment of posted workers.

Consequently, the contractual nature of the responsibility invoked by the claimants did not in itself rule out the conclusion that the Danish *bod* could be a punitive measure. However, the *Corte di Cassazione*, focusing on the method of calculation of the penalty, held that the condemnation fulfilled mainly a compensatory function and that only a small fraction of the amount awarded could be considered as a penalty.

But this finding does not seem to rely on a correct description of the characteristics of the measure provided by Danish law. As earlier mentioned, the claim had been brought before the Danish Labour Court by two trade unions, which could not be said to have suffered any personal loss from the non-performance of the contractual obligations and from the failure of Solesi to pay some elements of remuneration to posted workers.

25 See on this topic BEDI, "Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis", *Georgia State University Law Review*, 2012, p. 559 ff., p. 575 ff.

26 MALMBERG, "The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions", *Scandinavian Studies in Law*, 2002, p. 190 ff., p. 201.

So, the Italian Supreme Court extensively dealt with the fact that the penalty was supposed to remove all the advantages obtained by the defendant and did not assess the question of the existence of an actual loss for the claimant party. Such an approach does not correspond to the ordinary functioning of civil liability remedies, which are expected mainly to redress the claimant for the incurred loss, while the necessity to strip the author from the proceeds of his/her wrongdoings is a principle inherent to criminal law.[27]

Now, the calculation method used by Danish courts clearly points to the latter principle. As underlined especially by the *Corte di Appello di Catania*, the amount of the penalty was determined taking into account the economic savings obtained by Solesi, in order to reinstate the company in the situation in which it would have been if it had abided by the contract. This led to wipe out all the profits gained by Solesi but, as far as one can understand from the text of the judgment, the money was not returned to the individual workers who had been deprived of the fair salary treatment or to social security institutions to which the sums were due. Even considering trade unions as representatives of workers' interests, it is very difficult to see how the breach of contract attributable to Solesi had created an actual damage for them.

Accordingly, in our opinion, the Italian Supreme Court should have come to the conclusion that the Danish *bod* in fact constituted a penalty according to the interpretation of Articles 6 and 7 of the European Convention on Human Rights and thus required a closer scrutiny of its compatibility with Italian public policy.

Obviously, this does not mean that, as a punitive measure, the Danish *bod* should be in any case considered as repugnant to domestic public policy. In 2017 the Joint Chambers pointed out that such measures can still be recognized in Italy, provided that they meet some conditions relating to the principles of legality, predictability and proportionality, which must be complied with, under Article 23 of the Italian Constitution, in order to impose obligations of personal or financial nature.

As earlier mentioned, the *Tribunale di Siracusa* held at first instance that the Danish measure violated the principle of legality for two different reasons. First, it found that Article 12 of the Danish Labour Court and Industrial Arbitration Act did not provide a clear definition of the offence, as it merely referred to any possible violation of collective employment agreements. Secondly, it considered that the determination of the amount of the penalty was not in accordance with the said principle, it being left to the discretion

27 For a discussion of this topic, see NAYLOR, "Wash-out: A critique of follow-the-money methods in crime control policy", *Crime, Law & Social Change*, 1999, p. 1 ff.

of the Labour Court to define the amount to be awarded having due regard to all the circumstances of the case; in addition, in the opinion of the *Tribunale* the Danish trade unions did not produce evidence that the case-law of the Labour Court on this topic was consistent and ensured the predictability of the penalty.

It is worth noting that the first issue raised by the *Tribunale di Siracusa* was not even dealt with in the judgments of the higher courts, which contented themselves with the argument that the measure had a legal basis in the mentioned Article 12 and did not examine whether the wording of that provision was in accordance with the principle of "no punishment without law".

However, the scrutiny as to the observance of the principle of legality cannot be confined to ascertaining the existence of a legal provision in the foreign legal system, given that, according to Article 7 of the European Convention on Human Rights, the offence must be defined by law clearly enough as to ensure that an individual may know what acts or omissions will make him or her liable.[28] For this reason, when the public policy clause is invoked, the courts of the addressed State are called upon to verify the wording of the relevant provision in order to satisfy themselves that, possibly taking into account the domestic case-law, the existence of an offence is foreseeable.

While the silence of the *Corte di Cassazione* on this point appears to be unfortunate, it must also be noted that the conclusion reached by the *Tribunale di Siracusa* that the offence was not well defined in the Danish legal system is not persuasive. Even if the reference to a violation of every possible obligation arising out from a collective employment contract is very general, such a provision does not seem to amount to a blatant violation of the principles of legality and predictability of the offence, as Solesi, being a party to the agreement, should have been well aware of its obligations.

As anticipated, the *Corte di Cassazione* devoted much greater attention to the compatibility of the penalty with the principles of legality, predictability and proportionality, but chose not to exercise a thorough control on the measure adopted, in line with the standard required by the case-law of the CJEU about the use of the public policy clause. In doing so, the Italian Supreme Court noted that a provision enabling the Danish Labour Court to impose the penalty existed and allowed to determine the amount to be awarded taking into consideration all the circumstances of the case; that the consistent practice of the Labour Court, also established in specific guidelines, ensured

28 European Court of Human Rights, *Kafkaris v. Cyprus*, Application No. 21906/04, Judgment of 12 February 2008, para. 140.

the predictability of the penalty and that the amount was in substance proportionate to the offence committed.

The conclusion is not surprising, as the absence of an express provision concerning the minimum and the maximum for the penalty cannot be seen as really crucial,[29] insofar as the application of the Danish law, as interpreted by domestic courts, did not impair the foreseeability of the penalty itself. The fact that the discussion between the parties apparently converged on the existence of a consistent practice about the determination of the penalty is in itself compatible with the function of public policy, since it does not imply any review on the merits of the decision. However, this will usually require a very precise knowledge about the legal system of the State of origin, which may not be available to the courts of the addressed State.

In conclusion, those additional difficulties seem to convert the public policy scrutiny in a very complex mechanism involving a deep examination of the characteristics of the foreign legal system. Especially for this reason, it would have been advisable, as already underlined, to request the interpretation of the Court of Justice as to the possible limits of the public policy control to be exercised under Article 45 of the EU Regulation No. 1215/2012. Accordingly, even though the final outcome of the case does not give way to real criticism, the judgment of the Italian Supreme Court gives rise to possible doubts as to the methodology employed and it may be seen as a lost opportunity for obtaining more solid guidance about the scope of application of the public policy clause under the mentioned Regulation with regard to punitive damages.

29 Such a situation can disclose a violation of Art. 7 only if other factors concur, such as an excessive discretion of the public prosecutor: European Court of Human Rights, *Camilleri v. Malta*, Application No. 42931/10, Judgment of 22 January 2013.