SHEET 8

How is the role of the injured party considered in relation to economic damage?

The attitude of an injured party who has suffered damage caused by an event giving rise to liability may interfere with the right to compensation claimed from the party liable in several ways:

1 – The impact of the injured party's role in the actual occurrence of the damage

Unless it has the characteristics of force majeure, if the injured party's fault has contributed to the damage it suffers, in principle this entails a partial exemption from liability and a reduction by the same amount from the injured party's claim for damages against the party liable.

However, there are exceptions to this principle. This is the case in particular if the alleged negligence or recklessness of the party against whom the claim for civil liability is brought ranks equally with fault attributable to the injured party, in the absence of which the damage would have been avoided. In terms of causation, this fault by the injured party absorbed the fault found against the defendant in the liability proceedings when that fault could not have been committed in the absence of the injured party's fault (Court of Cassation, Commercial Chamber, 14 Dec. 2004, no. 01-02.511, regarding a breach by an auditor).

2 – The impact of the injured party's role after the damage has occurred

a) Towards a unified obligation for injured parties to limit or avoid aggravating the damage

In principle, current French civil liability law refuses to recognise the existence of an obligation on the part of the injured party to limit damage. This solution is applied in cases both of extra-contractual liability and contractual liability, although in the latter case some decisions pave the way for the injured party's fault which aggravates their damage to be considered in order to limit compensation.

With regard to extra-contractual liability, the Court of Cassation has confirmed, on several occasions, in consideration of the principle of full compensation for damage, that "*the perpetrator of the damage must provide compensation for all the consequences*" and that "*the injured party is not obliged to limit the damage in the interests of the party liable*"

(2nd Civ., 19 June 2003, no. 00-22.302; 2nd Civ., 19 June 2003, no. 01-13.289; 2nd Civ., 2 July 2014, no. 13-17.599; 2nd Civ., 26 March 2015, no. 14-16.011).
of the damage must provide compensation for all the consequences and the injured party is not obliged to limit the damage in the interests of the party liable" (3rd Civ., 10 July 2013, no. 12-13.851; 3rd Civ., 20 May 2021, no. 20-10.905).

However, some decisions have taken into account the injured party's own fault in aggravating the damage in order to limit compensation (2nd Civ., 24 November 2011, no. 10.25.635; 1st Civ., 2 October 2013, no.12-19.887).

The draft reform of civil liability does, however, provide for a change in the current state of the law; it includes a provision (draft Art. 1263 Civ. Code) under which "*Except in the case of physical harm, damages are reduced when the injured party has not taken sound and reasonable measures, particularly in relation to their capacity to contribute, to prevent aggravation of their damage*."

b) Impact of the injured party's behaviour intended to reduce the damage

i. The situation of the diligent injured party and whether the expenses incurred can be recovered

Expenses incurred by the injured party with a view to limiting or preventing further damage can be recovered if they meet the usual criteria (certain and direct damage). Moreover, the draft reform of civil liability under Article 1237 provides that "*Expenses incurred by the claimant to prevent the imminent occurrence of damage or to avoid its aggravation, as well as to reduce its consequences, constitute a recoverable loss if they were reasonably incurred*".

Nevertheless, proving the expenses incurred can be complicated if the injured party did not use external service providers, but instead reallocated internal resources (such as temporary reassignment of employees to sales vs. marketing activities outsourced to an external agency).

ii. The special case of passing on damage to third parties and the burden of proof

The party subject to the liability claim has the possibility of arguing, by way of defence, that the injured party, having passed on the damage suffered to third parties, for example because products have been purchased at a higher price because of an anticompetitive agreement, has ultimately suffered no damage or less damage than the amount claimed. This defence was accepted in the law of anti-competitive practices, first by case-law (Court of Cassation, Commercial Chamber, 15 June 2010, no. 09-15.818) and then by law, following transposition of the EU Antitrust Damages Directive into national law.

In cases when the new rules resulting from the transposition of the Directive are not applicable over time, the Court of Cassation has held, on the basis of general law, that it is up to the injured party to establish that it has not passed on the damage (Court of Cassation, Commercial Chamber, 15 May 2012, no. 11-18.495 and lastly, Court of Cassation, Commercial Chamber, 19 October 2022, no. 21-19.197).

Article L. 481-4 of the Commercial Code, which transposes Article 13 of the Antitrust Damages Directive, sets out an opposing solution in relation to anti-competitive

practices: the burden of proof lies with the defendant, who may reasonably demand the provision of information by the claimant or third parties. (**sheet 10B**).

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