



Legal high Committee for  
Financial markets of Paris

***APPENDICES TO  
THE REPORT ON INVESTORS'  
COMPENSATION FOR  
FALSE INFORMATION ON  
FINANCIAL MARKETS***

*by the Legal High Committee for  
Financial Markets of Paris*

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## Appendix 1 – Investor compensation for false information in France

### 1. General information about the French system. Liability established by the judge.

In French law, in the absence of specific legal provisions or powers of compensation granted to the regulatory authority<sup>1</sup>, it was naturally up to the judge to establish civil liability for false information, on the basis of the general provisions of non-contractual liability for personal acts. The judge has had complete discretion to do so, since the French legal system is based, in a rather original way, on a general principle of fault-based liability. This has two main consequences. On the one hand, the judge may consider any violation of the law to be wrongful, but also, more broadly, any deviation from a standard of reference, whether the fault is intentional or negligent, commission or omission, and regardless of who committed the fault. On the other hand, as the system is not based on Aquilian relativity, any victim of the fault may in principle bring an action for civil liability, without any particular need to consider the interests protected by the violated provision – this liberalism may, however, be moderated by a more or less strict judicial conception of causation.

**2. Details on the offense.** Under French law, the fault related to the information is widely recognized. It may consist of either an act of commission, through the dissemination of false (or at least misleading) information to the public, or an act of omission, through the failure to disclose significant information. To characterize such fault, the judge may rely in particular on the numerous disclosure obligations imposed on issuers, both in terms of ongoing and periodic information<sup>2</sup>. Furthermore, in civil proceedings, the judge must take into account, as grounds for misconduct, the criminal penalty for market abuse involving the dissemination of false or misleading information<sup>3</sup>, in accordance with the principle of *res judicata* in criminal matters over civil matters<sup>4</sup>. The judge may also, despite the absence of *res judicata* attached to administrative decisions<sup>5</sup>, rely on the administrative sanction imposed by the AMF's Enforcement Committee for the dissemination of false or misleading information or the

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<sup>1</sup> However, the *Autorité des Marchés Financiers* (AMF) is considering the issue. See the AMF report on compensation for losses suffered by savers and investors issued by the working group chaired by Jacques Delmas-Marsalet and Martine Ract-Madoux on 25 Jan. 2011, in line with the AMF's strategic plan of 29 June 2009 (known as the “Delmas-Marsalet and Ract”). For a summary, see the *Rapport du groupe de réflexion de la Commission consultative Épargnants - L'indemnisation des préjudices subis par les épargnants et les investisseurs 10 ans après le rapport du 25 janvier 2011 : quel bilan ?*, June 2022. Following the 2011 report, Law No. 2014-344 of 17 June 2014 on consumers (known as the Hamon Law) introduced a new Article L. 621-12-1 into the French Monetary and Financial Code (CMF), stipulating that “*the Autorité des Marchés Financiers may transmit to the court hearing an action for compensation for losses, at the latter's request, the minutes and investigation or inspection reports in its possession which are useful for the resolution of the dispute*”. However, the 2022 report found that the provision is generally very rarely used.

<sup>2</sup> In particular, given its central role in the production of financial information, the issuer is the only party expressly required to provide the public, in all circumstances, with information that is accurate, precise, and truthful (AMF General Regulations, Art. 223-1).

<sup>3</sup> French CMF, Art. L. 465-3-2, I. In addition, other criminal offenses may be applicable to corporate officers (offense of presenting inaccurate accounts) or auditors (offense of confirming false information).

<sup>4</sup> According to which the civil judge must accept as true what has been judged by the criminal judge, and which has the procedural consequence that “*the criminal holds the civil in the same state*”. However, the scope of this principle has been reduced, in particular due to the new Article 4-1 of the French Criminal Procedure Code, under which acquittal in criminal proceedings no longer prevents a civil judge from finding negligence.

<sup>5</sup> See, in particular, the *Vivendi* civil case, Paris Commercial Court, 7 Jul. 2021, Nos. 2011027112, 2012033467, 2012029636, 2012056220 and 2012028100: DEXANT-DE-BAILLIENCOURT O., Dr. sociétés 2021, p. 21. In these decisions, the commercial court judge stated that he was not bound by the administrative authority's decision to impose sanctions in relation to the characterization of civil wrongdoing. Comp., in the *Montaigne Fashion Group* case, Paris Court of Appeal, 14 Sept., 2023, No. 21/11057: Dr. sociétés, Dec. 2023, No. 12, 141, note GRANOTIER J.; BJB, Jan.-Feb. 2026, p. 20, note BOMPOINT D. and RAMONÉDA V., seems, on the contrary, to confer authority to administrative sanctions. *Adde*, in the same vein, in the *Altran Technologies* case, Paris Court of Appeal, 10 March 2020 (cited by BOMPOINT D. and RAMONÉDA V., note above).

violation of a positive obligation to provide information<sup>6</sup>. In this regard, civil case law takes a variety of positions, sometimes basing itself on the commission of market abuse<sup>7</sup>, even if not sanctioned<sup>8</sup>, but also on other factual elements for the purposes of characterizing civil wrongdoing<sup>9</sup>. The situation is different before the criminal court, which can obviously only rule on civil interests if a criminal offense has been committed. In France, many cases have been heard before the criminal court<sup>10</sup>, particularly because of the evidentiary advantages offered by criminal proceedings due to the investigation conducted by the public prosecutor and the preliminary investigation. Finally, liability is not limited in terms of its author, who may be the issuer, corporate officers, auditors, financial analysts, rating agencies, journalists and, more broadly, anyone disseminating information to the public. However, case law essentially only concerns issuers and corporate officers<sup>11</sup>.

**3. Chronological approach.** Since the fault ultimately posed little difficulty, it was the conditions relating to causation and loss that had to be adjusted by the judge to allow civil liability to be exercised on the secondary market<sup>12</sup>. This was done for two reasons: to make it easier for investors to provide evidence and to meet the needs of mass litigation<sup>13</sup>. Indeed, although in the early 1990s the Court of cassation recognized that an investor who makes an investment decision relating to financial securities when false information about those securities is disseminated on the market suffers loss<sup>14</sup>, the question of the nature of this loss has since

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<sup>6</sup> In particular, in the event of failure to disclose inside information under the issuer's ongoing disclosure obligation.

<sup>7</sup> See, for example, in the civil aspect of the *Marionnaud* case, Créteil Commercial Court, 2nd Chamber., 19 Jan., 2010, No. 2005F00978, *Marionnaud Parfumeries*, where the judges expressly refer to the administrative and criminal penalties imposed on the company and its senior managers to characterise civil liability and thus compensate a large number of shareholders.

<sup>8</sup> See the *Eurodirect Marketing* case, in which the judge expressly refers to the constituent elements of market abuse to characterize civil wrongdoing, even though the market abuse in question was not subject to criminal or administrative sanctions.

<sup>9</sup> Thus, in the *Gaudriot* case, while the judges referred to the administrative sanction imposed on the chief executive officer, they more broadly, for the purposes of characterizing the civil wrongdoing of this executive and other directors, noted their deliberate maneuvers to give a distorted image of the company and reveal their desire to mislead public opinion, which led them to compensate a large number of shareholders.

<sup>10</sup> With the exception of the *Eurodirect Marketing*, *Flammarion*, *Gaudriot* and, in part, *Marionnaud* and *Vivendi* cases (the latter two of which also have a criminal aspect), *GECI Aviation Montaigne Fashion Group*. All other cases, approximately a dozen (*Société Générale de fonderie*, *Landauer*, *Comptoir des Entrepreneurs*, *Sedri*, *Banque Pallas Stern*, *Crédit Lyonnais*, *Sidel*, *Régina Rubens*, *Marionnaud* and *Vivendi* in their criminal aspects, *Gespac Systèmes* and *Natixis*) were heard before a criminal court judge.

<sup>11</sup> With regard to corporate officers, the Commercial Chamber of the Court of cassation stated in the *Gaudriot* case, with regard to proof of separable fault, that “*the liability of directors and the chief executive officer towards shareholders seeking compensation for damage they have personally suffered is not subject to the condition that the misconduct attributed to these executives be intentional, particularly serious, and incompatible with the normal exercise of corporate functions*” (Cass. com. 9 March 2010, No. 08-21.547 and 08-21.793, *Gaudriot*, Bull. civ. IV, No. 48). For a critical review of this solution in relation to financial reporting, see in particular PROROK J., note under Cass. com., 16 May 2018, No. 16-20.684: *Rev. sociétés*, 2018, p. 708. It should also be noted that under French law, insurance does not cover intentional or fraudulent misconduct (French Insurance Code, Art. L. 113-1, para. 2: “(...), *the insurer shall not be liable for losses and damages resulting from the insured's intentional or fraudulent misconduct*”).

<sup>12</sup> French case law mainly concerns the secondary market.

<sup>13</sup> In the absence of specific provisions allowing for collective action in cases of false financial information, the shareholders acted individually, each being a party to the proceedings, but all of these actions were exercised collectively within the same proceedings. This is therefore not a class action, but multiple individual actions brought collectively (see, on this matter, DAIGRE J.-J., note under Paris Criminal Court, 11th Chamber 1st sect., 12 Sept. 2006, *Rev. sociétés*, 2007, p. 102). It should be noted that Law No. 2025-391 of 30 Apr. 2025, known as “*DDADUE*”, which goes beyond the simple transposition of Directive (EU) 2020/1828 of 25 Nov. 2020 on representative actions, recently established a new framework for class actions that is both unified, putting an end to previous sectoral regimes, and expanded in terms of both compensable damages and entities authorized to take action. However, its application to losses suffered by investors as a result of false financial information remains a matter of debate.

<sup>14</sup> The path to compensation by the criminal court was opened by the Criminal Chamber of the Court of cassation when it admitted the admissibility of civil action by shareholders or holders of financial instruments of the issuer who

been the subject of ongoing judicial interpretation based on the *summa divisio* between alteration of the stock market price and alteration of the investor's decision by the information. Indeed, due to the public nature of the information and the specific characteristics of the financial markets, financial information has a dual influence – both on the investor (through the decision) and on the market (through the price) – which French courts have taken into account in gradually adapting civil liability in this area, so that it can now constitute a means of collective redress for the loss.

4. The chronological approach thus reveals that, although the judge initially compensated for a share price distortion or a concrete distortion that was a determining factor in the decision, this choice remained residual (I), with case law subsequently favoring compensation for a non-determinative distortion of the decision, through loss of opportunity<sup>15</sup>(II).

### **I. Residual compensation for a share price distortion or a concrete distortion that was a determining factor in the decision**

5. **Residual choices.** On a residual basis, the judge first compensated for a share price distortion (A), then for a concrete distortion that was a determining factor in the decision (B).

#### **A. Compensation for a share price distortion**

6. **Ex ante or ex post distortion.** More specifically, the loss resulting from the distortion of the market price may be either a loss resulting from an *ex ante* distortion of the market price, i.e., a loss due to overvaluation or undervaluation (consisting, for the investor, either of having purchased a security at an overvalued price and therefore having paid too much, or of having sold a security at an undervalued price and therefore having received too little); or a loss due to a price distortion suffered *ex post*, consisting of the effect on the price of the correction of the information<sup>16</sup>. In French law, the judge began by compensating for an *ex ante* distortion in the share price, then used this method again, separately, to compensate for both *ex ante* and *ex post* distortions. A distinction is thus made between *ex ante* share price distortion (A) and *ex post* share price distortion (B).

#### **1. An ex ante share price distortion**

7. **Société Générale de fonderie case.** In the 1990s, in the *Société Générale de fonderie* case<sup>17</sup>, the criminal court had the opportunity to rule for the first time on the nature of the loss resulting from the offense of disseminating false information, allowing compensation for a change in the share price. In this case, for nearly six months, the company's executives had presented the company as being on the road to recovery in various press releases, even though they were already aware of their insolvency. Shareholders who purchased shares both before and during the period of false information and resold them at a loss after the information was corrected sought compensation for their loss, based on the difference between the purchase price and the resale price. In upholding the judgment, the Paris Court of Appeal held that the

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were victims of the offense of disseminating false information or publishing inaccurate accounts (Cass. crim. 5 Nov. 1991, No. 90-82.605, *Société industrielle et financière Bertin*).

<sup>15</sup> See below on the types of losses.

<sup>16</sup> It is therefore in relation to the correction of information that we are dealing with *ex ante* or *ex post*: *ex ante* price distortion is that exerted on the stock market price by false information prior to its correction – i.e., throughout the period of defective information – while *ex post* price distortion is that exerted on the price by the correction of false information, and therefore after the period of defective information.

<sup>17</sup> Paris Criminal Court, 11th Chamber, 20 Dec. 1990 – Paris Court of Appeal, 9th Criminal Chamber Sect. A, 15 Jan. 1992 – Cass. crim., 15 Mar. 1993, No. 92-82.263 – Orléans Court of Appeal, 20 June 1994 – Cass. crim., 19 Oct. 1995, No. 94-83-884.

loss was certain since the victims had purchased the shares “*at a price higher than their real value as a result of the dissemination of false information*”. The Court of cassation case was dismissed on the grounds that “*the arguments, which merely challenge the judges' sovereign assessment of the facts and circumstances of the case and the determination of the compensation appropriate to repair the loss suffered by the victim, can only be dismissed*”. However, the trial judges refused to compensate shareholders for shares acquired prior to the publication of the disputed information. The shareholders then lodged a petition, which the Court of cassation dismissed outright on the grounds that “*only the loss resulting from the difference in price is certain and directly stems from the offense*”. In other words, since the judge only accepted the loss resulting from the change in the share price, he logically refused to compensate investors who had held their shares – only by taking into account the distortion in the investor's decision can compensation for loss be awarded in the event of retention. In any event, even though it may have been used in other cases, compensation for share price distortion has remained residual<sup>18</sup>. Indeed, assuming that it is possible to determine the impact of false information on the stock market price at any time between its dissemination and its correction, this method requires the use of economic expertise in the context of mass litigation, which has not been the choice of French law<sup>19</sup>.

## 2. An *ex post* share price distortion

**8. Compensation for loss resulting from *ex post* price distortion. The *Marionnaud* civil case.** The revelation that information disseminated was false generally has a significant impact on the share price: in most cases, this involves the correction of overly optimistic information, which leads to a sharp fall in the share price. In France, the commercial court had the opportunity to adopt such a framework for analysis in the *Marionnaud* case, in its civil aspect, which gave rise to an in-depth discussion on the implementation of civil liability for false information and on the various types of loss that could be considered<sup>20</sup>. Here, we will essentially recall the solution adopted by the court.

**9. The apparent loss: abstract distortion of the decision.** The Créteil Commercial Court began by noting that “*the financial communications issued by [Marionnaud] were consistently misleadingly optimistic throughout the period in question between April 2002 and December 17, 2004, and were therefore likely to artificially inflate the share price*” and that “*this misleading communication was likely to cause loss to shareholders by encouraging them to buy or hold MARIONNAUD shares at a price higher than their real value*”. It then reiterates the cause of harm identified in the *Sidel* case law<sup>21</sup>, finding that the misconduct “*was likely to deprive MARIONNAUD shareholders of an opportunity to make a more informed choice between buying, holding or selling securities*”, and that the loss consists of “*a loss of opportunity for shareholders to make informed decisions in their own interests, having been deprived of the opportunity to arbitrate their assets wisely*”. Finally, it added that the loss “*cannot be confused with the amount of losses incurred on the resale of securities, due to the uncertainty inherent in any stock market investment*”.

**10. Rejection of shareholders' claims.** With regard to the assessment of losses, the court dismissed, on the basis of stock market uncertainty, both the argument of small shareholders

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<sup>18</sup> In the *Régina Rubens* case, for acquisitions made at the beginning of the criminal process. See below.

<sup>19</sup> See, in particular, CLERC Ch., *La réparation du préjudice subi par un actionnaire du fait de la diffusion de fausses informations*, RTDF, 2007, No. 1, p. 31, No. 22.

<sup>20</sup> Créteil Commercial Court, 2nd Chamber, 19 Jan. 2010, No. 2005F00978, *Marionnaud Parfumeries*.

<sup>21</sup> In the *Sidel* case, case law identified a new type of loss, namely the loss of opportunity to arbitrate in full knowledge of the facts, which can be described as an “*abstract loss of opportunity*” or “*abstract distortion of the decision*”. See below.

based on a distortion of the *ex ante* price (permanent overestimation of the purchase price by 50% throughout the period of false information): “*regardless of the communications made by the managers concerning the company's results, the evolution of the net asset value of the shares is likely to vary according to fluctuations in the market on which they are listed*”, and that of a professional investment company, Aquasourca, based on the deprivation of the opportunity to sell earlier at a higher price. It also refuses to consider as certain, and therefore to compensate, the loss of earnings claimed by Aquasourca due to the non-realization of gains it could have obtained through other, more profitable investments: “*in order to be compensated, a loss must be certain in nature, which excludes its realization being subject to possible outcomes (...). Whereas in the present case, these gains are indeed hypothetical and their materiality has not been demonstrated (...)*”.

**11. The actual loss: the new loss caused by the *ex post* share price distortion.** Contrary to all expectations, the court then opted for a type of loss that had not previously been recognized in case law: the loss caused by the *ex post* share price distortion resulting from the correction of the false information. It decided to award compensation for all of the shareholders, the portion of their capital loss<sup>22</sup> related to accounting adjustments, excluding that related to stock market fluctuations: “*this capital loss is linked, on the one hand, to market fluctuations and, on the other hand, to the restoration of the accounts to their true value after the elimination of accounting irregularities committed by MARIONNAUD PARFUMERIES. (...) only the latter constitutes a loss for the plaintiffs and voluntary interveners*”. To assess this influence on the stock market price, the court appropriately used the period during which trading in the stock was suspended, considering that the change in the price between the suspension and the resumption of trading was solely the result of the correction of the erroneous information between those two dates, to the exclusion of any other factor: “*During the period between the suspension and the resumption of trading, i.e. between 10 December and 21 December, the time elapsed is sufficiently short for the change in the share price to be the direct consequence of the correction of the accounts from a falsified situation to a real situation and, consequently, it is possible to assess, independently of any other factor, the overvaluation of the share price as a result of the actions of MARIONNAUD PARFUMERIES. (...) when trading was suspended on 10 December 2004, the MARIONNAUD share price was €21.79 and when trading resumed on 21 December 2004, it was only €14.95, a discount of €6.84 per share*”. However, the court dismissed the financial analysts' assessment of the value of the stock when trading resumed, considering it to be “*mere speculation with no basis in reality*”, as well as the evolution of the stock market price after the resumption of trading and the price offered in the context of the takeover bid and the public withdrawal offer, which must be considered independent of the previous periods and unrelated to the false information. The court therefore set the compensation at a lump sum of €6.84 per share acquired before the suspension of trading on December 10, 2004, and still held on that date.

**12. Assessment.** Following a fairly detailed analysis, the judge therefore identified a new type of loss, namely the loss caused by the *ex post* share price distortion resulting from the correction of the false information. The event giving rise to the loss appears to be assessed at the time of the correction of the information and not at the time of the initial purchase of the securities, since only investors still holding shares on the day of the suspension of trading, i.e., just before the correction of the information, are compensated, and not all investors who acquired securities during the period of false information. In this regard, it should be noted, however, that the judge considers that the impact of the false information had a fixed value throughout the period of false information until the correction. Indeed, the judge considers the

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<sup>22</sup> By “*capital loss*”, the court here means not the positive difference between the purchase price and the sale price, but the loss in value of the securities, since this “*capital loss*” concerns securities that are still held on the date of correction of the false information.

*ex ante* impact of the false information on the stock market price and the *ex post* impact of the correction of the false information on the stock market price to be identical: “(...) *the time elapsed is sufficiently short for the change in the share price to be the direct consequence of the correction of the accounts from a falsified situation to a real situation and for it to be possible, as a result, to assess, independently of any other factor, the overvaluation of the share price due to the actions of MARIONNAUD PARFUMERIES*”. In these circumstances, it was irrelevant whether the impact taken into account was that exerted *ex ante* by the false information or that exerted *ex post* by the correction of the false information. In the first case, the judge would have compensated all investors who acquired shares during the period of false information, with a fixed amount equal to the impact of the false information on the stock market price, excluding those who resold their shares, since the resale would have been made at a price increased by the same fixed amount. In the second case, the judge considers only the correction of the false information to be the event giving rise to the loss and compensates only those investors as for securities still held on the date of correction, i.e., not resold, of the same fixed value. The two solutions thus lead to identical results when a fixed value is used as the impact of the false information, both in terms of the group of shareholders compensated and the amount of compensation.

## **B. Compensation for a concrete distortion that was a determining factor in the decision**

**13. Distortion of the decision. Typology.** Like any information, information disclosed to the public is likely to influence the investment decisions made by those who receive it. This is even its purpose: according to the transparency model, the increasingly numerous public disclosure requirements imposed on market participants are designed to inform investors. French case law has thus generally favored compensation for decision distortion over price distortion. In this context, it began by compensating for “*concrete*” distortion, i.e., taking into account a specific investment decision<sup>23</sup> and “*determinative*” of the decision, in the sense that the information is considered to have determined the investor to make a prejudicial investment decision<sup>24</sup>. However, concrete and determinative distortion is by its nature difficult to characterize, especially for public information. The approach has nevertheless enjoyed some success in French law. In most cases, to overcome evidentiary difficulties in particular, the judge has had no choice but to presume the determinative nature of the information (1). However, in the *Eurodirect Marketing* case, the investor was able to provide proof (2).

### **1. Presumed determinative distortion**

**14. In the event of the acquisition of securities. Landauer case.** In the *Landauer* case<sup>25</sup>, the trial judges agreed to consider, as requested by the shareholders and certainly in view of the seriousness of the fraudulent actions of the manager, that the false statements made by the latter had been determinative in the acquisitions made: “*Considering that it appears from the documents produced by Mr. C. that he had his bank purchase 10 CFTI securities on 1 June 1987 for the sum of 3,638 francs including tax and that the other acquisitions were made prior to the publication of the misleading information for which LANDAUER was found guilty; that*

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<sup>23</sup> As opposed to the “*abstract*” distortion of the decision, i.e., a general infringement of the investor's ability to make informed investment decisions, which is therefore not exercised in relation to a specific decision. See below. V. CLERC Ch., art. *supra.*, spec. Nos. 31 and 32, which refers to the case law relating to the *Sidel* case as the “*abstract concept of loss of opportunity*”.

<sup>24</sup> As opposed to “*non-determinative*” distortion of the decision, where the false information is not considered to have determined the investor's decision, but simply to have caused him to lose an opportunity not to make that investment decision.

<sup>25</sup> Paris Criminal Court, 11th Chamber, 10 June 1994, No. P8820369013 – Paris Court of Appeal, 9th Criminal Chamber, Sect. A, 18 Dec. 1995, No. 1994/04893 – Cass. crim. 15 May, 1997, No. 96-80.399.

*under these circumstances, only Mr. C.'s most recent acquisition, which was determined by the disputed information, will be taken into account for the compensation of his loss; Considering that, under these circumstances, the court estimates the amount to be 5,000 francs for the compensation for losses resulting directly for Mr. C. from the fraudulent actions of Gérard LANDAUER*"<sup>26</sup>. As the judges did not find any evidence of the determinative nature of the information, it appears that they implicitly assumed causation between the information and the investor's decision to purchase, without providing any justification for doing so. Logically drawing the consequences of the presumption of causation, they compensated at least two investors for, it seems, the entirety of their losses<sup>27</sup>. However, the judges expressly excluded any compensation for securities acquired before the period during which the disputed information was disseminated and held during that period. This solution is surprising because opting for an intellectual definition of the loss would have made it possible, as the Criminal Division had suggested in the *Société générale de fonderie* case<sup>28</sup>, to compensate for the loss resulting from the retention of securities on the basis of false information.

**15. In the event of acquisition and retention of securities. *Comptoir des entrepreneurs* case.** In the *Comptoir des entrepreneurs* case<sup>29</sup>, the criminal court judge again relied on a presumption of causation, but this time extended it to the scenario of retention of securities. In this case, several shareholders who had acquired or held securities following the publication by the company of inaccurate accounts or the press conference during which false information had been disseminated, brought civil proceedings against the corporate officers, managers responsible for presenting or publishing inaccurate accounts, and disseminating false or misleading information. The court acceded to their claims, considering that the shareholders would not have acquired their securities if false information about the company's situation had not been disseminated, "*which, given the extent of the deception and the collapse of the share price after the truth was revealed, seems difficult to dispute*"<sup>30</sup> and that shareholders who had held their securities would have immediately sold them before the sharp fall in the share price if they had been properly informed. In addition to the presumption of causation, compensation for shareholders who held their securities was granted for the first time, but in a somewhat curious manner. The court justified this extension on the grounds that investors were deprived of the opportunity to immediately sell their shares before the sharp fall in the share price. However, it is difficult to see how shareholders could have avoided this sharp fall if the entire market had been informed of the reality of the situation.

When it comes to assessing losses, the court makes a distinction between shareholders who bought shares and shareholders who kept their shares based on false information. The court awarded compensation to the former, who believed that they would not have purchased their shares had they been aware of the company's situation. This compensation included the price of the shares purchased and lost profits due to the deprivation of the sums invested in the securities. To the latter, who claimed losses relating to the deprivation of the effective exercise of their voting rights and, above all, the ability to immediately resell their securities before the sharp fall in the share price, it awarded compensation equal to the difference between the value of the shares prior to the dissemination of the false information and the residual value of the shares. In other words, the court awarded the civil parties compensation at least equal to the

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<sup>26</sup> Paris Court of Appeal, 9th corr. sect. A, 18 Dec. 1995, No. 1994/04893, see above.

<sup>27</sup> More specifically, first-instance judges awarded compensation to a first shareholder, to whom they granted the full amount requested, and, on appeal, to a second shareholder, to whom they awarded damages more than the purchase price of the securities.

<sup>28</sup> Cass. crim. 15 March 1993, No. 92-82.263, see above.

<sup>29</sup> Paris Criminal Court, 11th Chamber, 17 Dec. 1997, No. 9304169023 - Paris Court of Appeal, 9th Criminal Chamber, Sect. A, 16 Dec. 1998 - Cass. crim. 29 Nov. 2000, No. 99-80.324.

<sup>30</sup> RONTCHEVSKY N., note under Paris Criminal Court, 11th Chamber, 17 Dec. 1997, Bull. Joly Sociétés, 1998, No. 5, p. 485, § 165.

amount of their losses and, for some of them – those who had purchased the securities while the true situation of the company was concealed – to the amount of the loss of earnings due to the deprivation of the availability of the invested funds. The Court of Appeal upheld the decision of the lower court judges for both shareholders who had held their shares and those who had acquired their shares on the basis of indications. The defendants then formed a petition to the Court of cassation, essentially to challenge, with regard to the compensation awarded to shareholders, the compensation paid to the civil parties who had held their shares following the dissemination of the misleading information. They argued that only purchases of shares made after the dissemination of the misleading information could have been influenced by that information and could therefore constitute a direct loss. Refusing to go into the details of the defendants' arguments, the Court of cassation dismissed the petition on the grounds that the question of loss was a matter for the discretion of the trial judges. Although the issue deserved more thorough examination, the harm suffered by shareholders who held their shares on the basis of false information was thus implicitly acknowledged by the High Court.

**16. The presumption of causation in the *Sedri* case.** A similar approach was undoubtedly taken by the judges of the 11th Chamber of the Paris Criminal Court in the *Sedri* case<sup>31</sup>, even though the determinative nature of the false information is not as clear as in previous decisions. The court, on the other hand, places even greater emphasis on the intellectual dimension of the loss: *“the dissemination of false information to the public about the prospects or situation of SEDRI, which was likely to influence share prices, facilitated in particular by the certification of the auditors, Messrs. Gand B, of the accuracy and sincerity of the figures extracted from the company's financial statements and consolidated accounts and published in the note relating to the latter's capital increase, and which did not allow third parties to know the exact nature and risks inherent in the SEDRI group's activity and to assess the results of its real purpose, had the effect of misleading said third parties by encouraging them either to purchase SEDRI securities or, for those who were already shareholders, not to sell them, all of whom held securities that ultimately proved to be worthless and therefore suffered certain loss”*. It also precisely determines the period during which the misleading information was disseminated and upholds the civil action brought by both shareholders who acquired shares and shareholders who held their shares during that period: *“this dissemination ceased to have any prejudicial effect on third parties when collective proceedings were initiated against company S on 17 August 1990, the date on which the reality of its situation became publicly known; it follows that the civil actions relating, on the one hand, purchases followed by sales before the public became aware of the aforementioned information memorandum, namely on 25 September 1989, and, on the other hand, the purchase of securities after 17 August 1990, will be declared inadmissible, in the absence of any proven causation between the losses for which compensation is sought and the offenses committed”*. A presumption of causation is thus implicitly established between the misleading information and the detrimental investment decision, provided that this decision (to acquire or hold securities) was made during the period in question, i.e., between the dissemination of the misleading information to the public and the commencement of collective proceedings against the company, which revealed its true situation to third parties, all other civil claims being declared inadmissible. The solution is partly new because, this time, the presumption of causation is applied in consideration of a precise determination of the period in dispute, which was undoubtedly intended to facilitate the task of the court, which in this case was faced with a large number (505) of civil claims. This method would also be used in subsequent cases involving mass litigation. Both the president and the auditors were thus ordered to compensate the said shareholders on the grounds, respectively of

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<sup>31</sup> Paris Criminal Court, 11th Chamber, 27 Feb. 1998, No. 98/07599, *Sedri* - Paris Court of Appeal, 9th Criminal Chamber, Section B, 8 Oct. 1999, J.-C. G., JurisData No. 1999-024560 (confirmation), and Cass. crim. 24 Jan. 2001, No. 00-80.247, J.-C. G. (dismissal) - Paris Court of Appeal, 9th Corr. Chamber sect. B, 25 May 2000, B. B. (confirmation) and Cass. crim. 4 Apr. 2001, No. 00-84.322, B. B. (dismissal).

the offense of providing false information and of complicity in the same offense. With regard to the assessment of losses, the court observes “*that, with respect to all the civil parties who will be heard in their capacity as such, the principle and amount of each of the alleged losses are in no way, and specifically, seriously contested by the defendants; that, therefore, the compensation appropriate to repair each of the said losses will be determined, taking into account all of the above and all of the evidence regularly submitted to the proceedings*”. It can therefore be assumed that the judges generally upheld the civil parties' claims and that at least the totality of the losses suffered was compensated. This prompted criticism from legal scholars, who considered that the loss resulting from the retention of the securities should rather be analyzed as a loss of opportunity and therefore be subject to lower compensation<sup>32</sup>.

**17. The consequences of the presumption of causation: effective and greater compensation for victims on the stock market.** By choosing to take into account a decisive concrete alteration of the decision in several cases, the criminal court sought to allow for effective compensation in cases where the extent of the misstatements on the stock market was such that it was likely that investors would not have acquired<sup>33</sup> or even held their securities if they had been properly informed. The solution also enabled the judge to deal with mass litigation, as in the *Sedri* case, by adopting a collective approach to compensation. The compensation awarded is also more substantial. On the one hand, in terms of the broader scope of victims, the solution also allows for the loss resulting from the retention of securities to be taken into account. On the other hand, regarding the more generous assessment of the loss, the latter must compensate at least for all the losses suffered, or even the other consequences of the acquisition or retention of a security, and in particular the loss of profit due to the deprivation of the invested funds. However, the judge only reached this solution at the cost of an implicit presumption of causation between the information and the investment decision and the abandonment of the actual requirement to prove causation, and therefore in possible disregard of the reality of the facts. One investor, however, managed to prove that inaccurate information was decisive in his investment decisions in a case brought before a civil court.

## 2. Proven determinative distortion

**18. Proof of material misrepresentation by comparing factual circumstances. Eurodirect Marketing case.** In the *Eurodirect Marketing* case, in April 1998, the company published erroneous information about its earnings prospects, stating forecasts that it knew it could not reasonably achieve. The information was only corrected belatedly, in a press release issued in October of the same year. A shareholder who had suffered losses as a result of purchases and resales of the company's shares and warrants during the period when the false information was disseminated sought compensation from the civil court for the losses incurred and for a loss of opportunity to make a profit, arguing that he could have invested his money in a more profitable investment on the basis of Article 1382 of the Civil Code. However, he did not seek compensation for securities purchased during the same period but not resold, nor for securities purchased before the publication of the false information<sup>34</sup>. The Court of Appeal considered several factual circumstances in order to recognize that the information had indeed been the determining factor in the investment decisions taken by the investor, as claimed by the

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<sup>32</sup> RONTCHEVSKY N., note under Paris Criminal Court, 11th Chamber, 27 Feb. 1998, Bull. Joly Sociétés, 1998, No. 9, p. 925, § 291.

<sup>33</sup> Although the solution is not as explicit, it was undoubtedly similar reasoning that led the trial judges in the *Régina Rubens* case to compensate shareholders who had acquired their securities “*at the height of the fraud*” for the entirety of their losses, “*given the stock market crash that followed the revelations*” (see below).

<sup>34</sup> Strasbourg Lower Court, 2nd Commercial Division, 8 June 2001, No. 99/00963, Michel Pfeiffer v. Eurodirect Marketing, unpublished - Colmar Court of Appeal, 1st Civil Division, 14 Oct. 2003, No. 01/03432, Michel Pfeiffer v. Société Eurodirect Marketing - Cass. com. 22 Nov. 2005, No. 03-20.600, Société Eurodirect Marketing v. Michel Pfeiffer.

latter. It noted, on the one hand, that although the purchases had begun several months before the publication of the misleading press release, they had increased significantly after its publication, and, on the other hand, that the shareholder had “*taken care to request the management of Eurodirect Marketing to provide the 1997 reference document in order to verify, the day after the shareholders' meeting, the information published in April 1998, which attests to the interest it held for him*”. Finally, it dismissed the company's argument that the shareholder had begun to sell his shares before learning of the correction of the false information, considering that this in no way called into question the fact that he may have been misled by the overly optimistic information published in April 1998, given the continuous decline in the share price, which had begun before the correction. However, it is clear how difficult this exercise is and how much the recognition of the determinative nature of information for an investor depends on the sovereign assessment of the trial judges.

**19. Definition and assessment of losses.** While in the first instance, the court awarded lump sum damages for “*all causes of loss combined*” without distinguishing between losses incurred and loss of opportunity for gain and without defining the nature of the loss, the Colmar Court of Appeal overturned the decision on this point and conducted a more detailed analysis. It defined the loss as “*the difference between the purchase price and the sale price of the shares and share subscription warrants acquired after the publication of the press release containing the misleading information*”. However, it dismissed the loss of opportunity for gain claimed by the investor, considering that there was no reason “*to take into account an alleged loss of opportunity for gain, which was entirely random and linked to circumstances that were entirely unrelated*”. The Court of cassation upheld the decision, ruling that due to the late nature of the correction made, the Court of Appeal had been able to decide “*that there was causation between the breaches committed by the company and the loss suffered by Mr. X in selling at a loss the shares that he would not have bought had he not been the victim of misleading information*”. The damages awarded were therefore equal to the difference between the purchase price and the sale price of the securities, i.e., logically, the total losses incurred, since the false information was decisive in the purchase, as in cases where a presumption of causation had been established. It should be noted, however, that the compensation was limited to the amount of these losses, excluding any loss of earnings, contrary to what had been decided by case law in the *Comptoir des entrepreneurs* case, in the case of shareholders who had acquired their shares during the period when the false information was disseminated.

**20. Summary.** In most cases, French judges began by awarding compensation to investors on the basis of presumed causation. However, given the difficulty of determining and demonstrating the effect of the information, if the judge wished to continue to consider the loss in its intellectual dimension, he was quite naturally led to conclude that, had the investor been properly informed, he would have, possibly, probably or certainly – with varying degrees of probability – made a different investment decision. This amounted to considering that the false information had simply caused him to lose an opportunity to make a different investment decision, and to now understand the “*non-determinative*” distortion of the decision.

## **II. The established remedy for a non-determinative distortion of the decision (loss of opportunity)**

**21. Preliminary: the use of loss of opportunity in a specific case (*Flammarion* case).** Judging that the misleading information had exerted an intellectual, but not decisive, influence on an investor's decision naturally led the judge to consider that the information had simply caused the investor to lose an opportunity to make another investment decision. In the

*Flammarion* case<sup>35</sup>, case law thus resorted for the first time to the concept of loss of opportunity in the case of the dissemination of misleading information to the public, a concept that was to become very popular. It did so in a specific case in which the information disseminated by the company had caused certain investors – minority shareholders – to lose a very specific opportunity, namely that of not selling their shares as soon as the bad news was announced, in order to sell them later under a price guarantee. This therefore constituted the loss of an opportunity to make a precisely defined decision, i.e., a loss of a concrete opportunity or a concrete loss that did not determine the decision. In this case, the company had published its half-yearly results and an activity report in the French BALO (*Bulletin des Annonces Légales Obligatoires*), followed by a press release in *Les Échos*, which showed a decline in results and negative prospects. Minority shareholders immediately sold their shares. However, a few days later, the majority shareholders announced the sale of their block of shares at a price almost twice as high, with a guarantee that the price of the remaining shares would be maintained. Some minority shareholders then sought compensation for their loss in court, alleging that the company had been at fault by publishing an incomplete press release. At first instance, the court dismissed the claim, finding that the issuer had not committed any fault. However, the claim was upheld on appeal, as the court considered that the issuer's conduct had deprived minority shareholders of an opportunity to sell their shares under the price guarantee. Given the “*very low risk*” of the transaction not going ahead at the time of publication of the disputed press release, the Court of Appeal calculated the loss suffered by investors on the basis of a high probability that the transaction would go ahead<sup>36</sup>. In this case, the use of the concept of loss of opportunity seems appropriate: if the minority shareholders had been informed, at the same time as the public, of the proposed sale and price guarantee, there is no doubt that they would have preferred to wait before selling their shares; however, there was a risk, albeit a small one, affecting the realization of the price guarantee, so that calculating the loss on the basis of a loss of opportunity with a high probability of realization<sup>37</sup>, valid for all minority shareholders<sup>37</sup>, seemed appropriate<sup>38</sup>. However, this case law arose in a specific situation in which recourse to loss of opportunity was necessary, as the missed investment decision was clearly specified, since it involved holding the shares in order to tender them into the price guarantee – the alteration of the decision was therefore necessarily concrete –, and was also highly probable. However, in general, in the case of public information, the missed investment decision is not as clearly compelled in its nature and probability. Indeed, while the theory of loss of opportunity seems appropriate in cases of lack of information or intelligence, it is most often in the context of information delivered in a personal and individualized manner. However, it is much more difficult to determine the behavior that an individual would have adopted as a result of defective information delivered to the general public.

**22. Adjustments to loss of opportunity.** Thus, when case law subsequently had to rule on more traditional cases in which securities had been bought, sold, or held while false information was being provided to the public on the secondary market, it certainly confirmed the use of loss of opportunity, but modified it significantly in order to meet the needs of mass litigation, in two ways. First, case law has moved towards compensation for a particular loss of opportunity, which can be described as “*abstract*” in that it consists of a general distortion of the investor's ability to make an informed decision (A). Second, it has favored “*concrete*” loss of opportunity, i.e., consideration of a specific but “*non-individualized*” investment decision (B).

<sup>35</sup> Paris Lower Court, 5th Chamber, Section 2, 15 Nov. 2001, No. 2000/18125, *Flammarion*, *inédit* - Paris Court of Appeal, 25th Chamber, Section B, 26 Sept. 2003, No. 2001/21885, *Flammarion*, JurisData No. 2003-224156.

<sup>36</sup> Estimated at 88%. The calculation is based on the amounts awarded by the Court of Appeal. See CLERC Ch., art. above, spec. Nos. 18 and 19.

<sup>37</sup> See below, on the loss of a “*concrete, non-individualized*” opportunity.

<sup>38</sup> In this sense, CLERC Ch., see above.

## A. Abstract loss of opportunity

**23. Case law construction.** The solution of compensating for an abstract distortion of the decision by information, i.e., a general impairment of an investor's ability to make an informed decision, or “*abstract loss of opportunity*”, was first affirmed by the trial judges (1), then confirmed by the Court of cassation (2), and finally further developed by the trial judges (3).

### 1. The assertion by the trial judges

**24. Decisions of trial judges.** Abstract distortion was revealed in the *Sidel* case (a). Other decisions by trial judges subsequently referred to this type of loss, but applied it inconsistently (b).

#### a. The revelation in the *Sidel* case

**25. The revelation of the abstract distortion of the decision in the *Sidel* case.** The *Sidel* case is fundamental in securities litigation, as it provided an opportunity for the trial judges to identify a new type of loss, the consequences of which need to be clarified. For communicating false information to the market regarding the company's order book and prospects and publishing inaccurate accounts, the executives of Sidel were ordered to compensate some 700 shareholders, most of whom were represented by associations of minority shareholders or small shareholders, who had brought civil proceedings<sup>39</sup> in order to seek compensation for the loss in value of their securities following the disclosure of deceit. In response, the court began by pointing out that risk is an inherent feature of financial markets and that, since all stock market investments are speculative in nature, the realization of a capital loss does not in itself establish the existence of a loss, thereby *de facto* ruling out the possibility of automatic full compensation for losses: “*in stock market matters, the fact that the civil parties, contrary to what some of them claim, sold their securities at a price lower than their purchase price, even in the presence of offenses, does not in itself establish their harm. Indeed, the price of shares listed on the stock exchange is, in itself, speculative in nature. The concept of risk is a factor that must be taken into account by the investor*”.

The court then conducted a detailed analysis of the loss. It first noted that the publication of inaccurate financial information, which took place over a long period of time between 1995 and the sale of Sidel as part of Tetra Laval's takeover bid in 2001, “*effectively led the shareholders acting as civil parties to believe that the company's situation and prospects were better than they actually were*”, which may have led investors “*on the basis of this information to purchase or hold securities whose real value was lower than the share price*”. The court then defined the exact nature of the loss: “*in reality, the shareholders suffered, in this case, loss resulting from the loss of an opportunity by purchasing or holding a share whose promising prospects were clearly overvalued. Their freedom of choice was holding and they thus suffered direct loss*”.

This analysis is confirmed, particularly clearly, on appeal: “*the misleading information (...) influenced investors' decisions, with financial analysts being particularly attentive to any difference between expected and actual results (...); that it all contributed to distorting investors' perception of the company's real situation and prospects; that investors were therefore (...) prevented from making decisions based on accurate information, that they were unable to make informed investment decisions and were deprived of the opportunity to make informed choices and invest their money more wisely*”.

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<sup>39</sup> Paris Criminal Court, 11th Chamber 1st sect, 12 Sept. 2006, No. 0018992026 - Paris Court of Appeal, 9th Criminal Chamber, Section B, 31 Oct. 2008, No. 06/09036 – Cass. crim. 18 Nov. 2009, No. 08-88.078.

**26. An abstract and intellectual definition of the loss: an infringement of the ability to make informed decisions.** For the trial judges, the loss thus resulted from the fact that the shareholders, believing the value of Sidel's securities to be higher than it actually was, were unable to make the decisions they would have made in the absence of misleading information. It is therefore an infringement of the investor's ability to make informed decisions on the market, an infringement that caused them to lose an opportunity to make more profitable investments.

The solution thus emphasizes the abstract and intellectual dimension of the loss. Indeed, because of its very abstract nature, the loss consists solely of the influence exerted by the false information on the investor's purely intellectual ability to make informed decisions on the market, i.e., a general infringement of their freedom of choice, without reference to any factual element or specific investment decision. It should also be noted that the judges, both at first instance and on appeal, deliberately opted for an intellectual definition of the loss, whereas previously the specific facts of certain cases (*Eurodirect Marketing, Flammarion*) had naturally led them to consider a distortion of the decision. In the *Sidel* case, the investors did not prove that they had been determined to buy or hold the securities by the false information, and no investment decision other than to sell or not to buy was required. The judges deliberately decided to give priority to compensation for a decision being influenced, and even more so for an abstract influence<sup>40</sup>. It seems likely that in doing so, the judges sought to take into account the specific purpose of the financial market, which, according to efficiency theory, must make all existing information available to investors at all times so that they can arbitrate between the many investment or divestment decisions available to them<sup>41</sup>, with a view to ensuring the accuracy of stock market prices and, in so doing, the optimal match between supply and demand for capital and the efficient allocation of resources. This specific purpose leads the market to place investors in a constant state of arbitration between buying, holding, or selling: if false information is delivered to the market, investors are no longer intellectually capable of making the most profitable investment decisions. The loss identified by the trial judges thus appears to be quite appropriate to the specific nature of the financial market, which constantly places investors in a situation of intellectual arbitration; moreover, it can hardly be envisaged in a company other than a listed company.

**27. The use of the theory of loss of opportunity. Debate.** Much of the legal literature has welcomed the effort made by case law to establish, with inventiveness, a new definition of the loss allowing for effective civil liability<sup>42</sup>. Other authors, however, have regretted that case law has not given priority to economic analysis for the purposes of compensating for a share price distortion<sup>43</sup>, or pointed out that the solution departs significantly from the traditional conception of the praetorian theory of loss of opportunity<sup>44</sup>. Indeed, the theory was designed to allow civil

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<sup>40</sup> In the *Landauer*, *Comptoir des entrepreneurs*, and *Sedri* cases, the judges deliberately ruled that there had been a distortion of the decision, but one that was concrete and decisive by means of a presumption of causation, rather than an abstract distortion.

<sup>41</sup> See, on this point, DAIGRE J.-J., note under Paris Criminal Court, 11th Chamber 1st sect., 12 Sept. 2006, *Rev. sociétés*, 2007, p. 102.

<sup>42</sup> See, *inter alia*, BARBIÈRI J.-F., note under Paris Criminal Court, 11th Chamber 1st sect., 12 Sept. 2006, *Bull. Joly Sociétés*, 2007, No. 1, p. 119; DAIGRE J.-J., note under Paris Criminal Court, 11th Chamber 1st sect., 12 Sept. 2006, *Rev. sociétés*, 2007, p. 102; SCHMIDT D., note under Paris Criminal Court, 11th Chamber 1st sect., 12 Sept. 2006, *D.*, 2006, p. 2522, and, *De quelques règles procédurales régissant l'action en responsabilité civile contre les dirigeants de sociétés « cotées » in bonis*, in *Études de droit privé : mélanges offerts à Paul Didier, avant-propos* by GERMAIN M., pref. FOYER J., *Economica*, 2008, p. 383, esp. p. 388 ff.; DETHOMAS A., note under Paris Court of Appeal, 9th Chamber. corr. sect. B, 31 Oct. 2008, *Rev. Lamy dr. aff.*, Feb. 2009, No. 35.

<sup>43</sup> DEZEUZE É., *Bull. Joly Bourse*, 2007, No. 1, p. 37.

<sup>44</sup> See in particular CLERC Ch., see above, No. 32.

liability to be applied to situations in which a contingency affects the occurrence of a loss<sup>45</sup>, whether it be the loss of opportunity for a favorable event to occur, as in the *Flammarion* case, or the avoidance of an unfavorable event, a risk<sup>46</sup>, as is most often the case in stock market matters (where an investor who has suffered losses claims that he would have had a chance to avoid them if he had been well informed). What all these situations have in common is that there is no certainty as to the occurrence of the “*final*” loss, i.e., the loss that the victim could have avoided if the fault had not been committed, whether it be a loss suffered or a lost gain. The only certain loss that can be taken into account is the loss of a chance of not having suffered the final loss, which is calculated by applying the probability coefficient to the loss suffered or the lost gain. In any event, the “*loss of opportunity*” compensated in the *Sidel* case is clearly distinct from this approach. It is not, in fact, the loss of a concrete opportunity to have taken another precisely determined decision – in this case, for example, the decision not to purchase or hold Sidel securities, as the assessment of the loss of opportunity requires estimating the probability that, had they been properly informed, investors would not have purchased or held the securities in question – but rather the abstract and general loss of opportunity of not having been able to make more profitable decisions in an environment of reliable information, of not having been able to better arbitrate their investments, for which it is difficult to see how it could be assessed using a probability coefficient. The situation can be analyzed as follows: the mere violation of the investor's “*right to information*” must give rise to compensation, regardless of the actual consequences for the investor. The classification as “*loss of opportunity*” is therefore debatable.

**28. Consequences of the abstract definition: presumptions of causation and loss.** The use of the theory of loss of opportunity does not, however, eliminate all causal requirements: it is no longer necessary to prove the relationship between the triggering event and the final loss, but rather the link between the triggering event and the loss of opportunity, a kind of intermediate loss, which reduces the burden of proof. Thus, it is no longer necessary to establish that the information determined the investor to make the decision (i.e., that without this information, he would not have made it), but only that he would then have had a chance not to make it. While proving causation is much simpler, calculating the probability associated with the loss of opportunity is generally complex.

There is nothing of the sort in the *Sidel* case. Since the loss of opportunity is an abstract loss of opportunity, namely that of an investor to make an informed decision, no causation should in fact be required, as any investor can be considered to have been affected in their freedom to make a decision (including investors with no connection to the security)<sup>47</sup>. In this case, however, in order to keep the litigation within reasonable proportions, the court limits the potential number of victims, considering that only those who have suffered “*loss resulting from the loss of an opportunity by purchasing or holding a share whose promising prospects were clearly overvalued*” qualify as victims. A connection with the company is therefore still required, consisting of maintaining or acquiring shareholder status during the period of defective information. A presumption of causation is thus established: all those who acquired or held shares in the company during the period of defective information are presumed to have been affected in their freedom to arbitrate by the false information. In addition to the presumption of causation, the loss of abstract opportunity also leads to a presumption of loss, insofar as the

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<sup>45</sup> V. VINEY G., JOURDAIN P. and CARVAL S., *Traité de droit civil, Les conditions de la responsabilité*, ed. GHESTIN J., LGDJ-Lextenso, 2013, 4th ed., No. 278 et seq.; BACACHE-GIBEILI M., *Traité de droit civil, t. 5, Les obligations, La responsabilité civile extracontractuelle*, Economica, Corpus Droit privé collection, 2021, 4th ed., No. 382 et seq.; *La réparation de la perte de chance : quelles limites ?*, D. 2013. 619.

<sup>46</sup> However, some legal scholars consider that the loss of opportunity, as its name suggests, can only concern the occurrence of a favorable event.

<sup>47</sup> CLERC Ch., art. see above., No. 32.

mere fault in the information provided to the public is sufficient to infer the existence of loss to the investor consisting of an infringement of their freedom of choice, without regard to the actual consequences of the defective information for the investor concerned.

**29. Consequence of the abstract definition: lump sum compensation.** After establishing that the loss “cannot be confused with the amount of losses suffered by the civil parties when reselling the securities, due to the risk and uncertainty inherent in any stock market investment”<sup>48</sup>, the trial judges assessed, in a terse statement<sup>49</sup>, the loss of opportunity suffered by each shareholder at €10 per share held, in contravention of the principles of civil liability, which require full compensation for losses and prohibit lump sum compensation. Indeed, the use of the theory of loss of opportunity in principle does not allow the judge to disregard the principle of full compensation, as the judge must calculate the final loss and apply the probability coefficient corresponding to the loss of opportunity.

In practice, however, courts rarely engage in such an exercise, and recourse to loss of opportunity often gives rise to a lump sum assessment, without further justification, especially since the assessment of losses, which is subject to the sovereign discretion of the trial judges, is not reviewed by the Court of cassation, which, in matters of loss of opportunity, merely verifies that the damages awarded are significantly lower than the final losses. However, the *Sidel* decision is unique in this respect as well. It is not so much the difficulty of the exercise that prevents an assessment of the defined loss of opportunity as its impossibility. Since it is not a question of assessing the probability that another specific decision would have been taken, but rather an abstract infringement of the freedom to arbitrate, it is difficult to see what probability coefficient could be used for the calculation and how the assessment of the loss could be anything other than a lump sum. Furthermore, this solution does not allow for individualized compensation based on the very diverse situations of the civil parties: some acquire their shares before the false information is disseminated and either hold them or sell them after the information is corrected; others acquire their shares only after the false information is disseminated and also either keep them or sell them once the correction has been made.

## **b. The inconsistent application of abstract loss of opportunity**

**30. Circumvention of abstract loss of opportunity. The *Régina Rubens* case and the *Marionnaud* case (civil and criminal).** The first decisions adopted by trial judges after the *Sidel* case, but before the Court of cassation enshrined it in the *Gaudriot* case law, show inconsistency: they take up the new type of loss, but do not draw the consequences in terms of compensation. Abstract distortion thus appears to have been circumvented by the criminal or civil judge, whether in the *Régina Rubens* case (i) or in the *Marionnaud* case (ii).

### **i. The *Régina Rubens* case**

**31. The type of loss accepted.** The *Régina Rubens* case<sup>50</sup>, which closely follows the *Sidel*

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<sup>48</sup> Paris Court of Appeal, 9th Chamber. corr. sect. B, 31 Oct. 2008, No. 06/09036, *Sidel*, see above.

<sup>49</sup> In assessing the loss, the court merely takes into account the amounts by which the results were overstated for the two financial years in question and states that they “must, however, be compared with the group's figures”. The fact that a transaction may have been concluded between *Sidel* and a major shareholder, Eurazeo, a subsidiary of the Lazard financial group, on the one hand, and *Deminor*, acting on behalf of certain shareholders, on the other, at a higher price per share, is also dismissed from the proceedings. The Court of Appeal confirms this amount without further clarification.

<sup>50</sup> Paris Criminal Court, 11th Chamber 1st sect., 22 Jan. 2007, No. 0106896039, *Regina Rubens*: RTDF, 2007, No. 2, p. 123, obs GARRIGUES B. – Paris Court of Appeal, 9th corr. Chamber. sect. B, 14 Sept. 2007, No. 2007/01477, *Régina Rubens*: Lexbase hebdo, private ed., 11 Oct. 2007, No. 276, No. N6240BC4, note LENHOF J.-B. (full text [www.hcjp.fr](http://www.hcjp.fr))

case, provided an opportunity for the judges of the 11th Chamber of the Paris Criminal Court, which was hearing cases involving offenses of presenting or publishing inaccurate accounts and disseminating false or misleading information committed by company executives, to confirm the new definition of the loss suffered by investors. The court began by referring to its previous case law, stating that the loss must be analyzed as an infringement of the shareholder's freedom of choice, who acquired shares while false information about the company was being disseminated on the market, so that the shareholder who was deprived of the opportunity to invest or divest in full knowledge of the company's real situation must receive compensation<sup>51</sup>. However, the court did not draw any conclusions from this with regard to compensation, whether they are professional investors or small shareholders.

**32. Compensation for a professional investor.** First, with regard to the investment company LV Capital, owned by the LVMH group, which had acquired a minority interest by subscribing to a capital increase in the controlling holding company, Régina Rubens Holding, whose main asset was the listed company Régina Rubens SA (taken over by Montaigne Fashion Group), the court began by ruling out compensation for the totality of the losses on the grounds that “*the criminal manipulations accelerated considerably after the financial year ending June 30, 1999, (...) the reference date for LV Capital's subscription*”. In other words, for the court, it was not only the falsified results that had been decisive in the decision to invest, as claimed by the aggrieved investor, but the sincerity of the accounts taken as a whole, in which the accounting manipulations were still limited in scope, so that the losses could not be compensated in full.

The court thus quantifies the impact of the fraud at the date of acquisition<sup>52</sup> to conclude that, even if the decision to invest in Régina Rubens was part of a strategy to acquire a stake in the ready-to-wear clothing sector, “*the influence of these criminal acts on the plaintiff's decision appears (...) to be very significant*”. It thus set the amount of the loss suffered by LV Capital at a lump sum of €1,500,000, without further justification. It therefore appears that, without saying so, the court reasoned in terms of loss of a concrete opportunity, considering that the falsity of the financial statements presented, having had a “*very significant*” influence on LV Capital's decision, had caused it to lose a significant opportunity not to subscribe to the capital increase – more precisely, a 50% chance, since the investor's claims amounted to €3 million<sup>53</sup>.

Unsurprisingly, the Court of Appeal overturned the lower court's decision with regard to the nature of the loss, considering that it should be analyzed “*as a loss of opportunity [for LV Capital] to invest the disputed sums in a more judicious investment and to abandon the investment more quickly*”. It also limited the assessment of this loss of opportunity to 10% of the sums invested, i.e., €300,000, taking into account in particular “*the fact that the impact of the accounting manipulations was relatively low at the time of the acquisition*”, as these accelerated in the second half of 1999 and during 2000, and that “*even if it had been aware of the true situation of Regina Rubens SA at the time, LV Capital would not have been able to easily sell its stake in Regina Rubens Holding, as the factors that led it to invest were not exclusively accounting-related*”. Finally, the court also applied the theory of loss of opportunity

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at No. A6174DYC); RTDF, 2007, No. 4, p. 145, obs. RONTCHEVSKY N.

<sup>51</sup> The solution is clear for civil party shareholders who acquired their shares during the period when misleading information was disseminated on the market, regardless of whether those shares were subsequently resold or held. The question of whether a shareholder who acquired shares should hold them before the dissemination of false information is not addressed, as no civil party appears to be in this situation.

<sup>52</sup> The court took into account the amount of fraud in the half-yearly accounts as of 30 June 1999, used by LV Capital to calculate the subscription price, i.e., 4.2 million francs, and compared it to the total turnover for 1998, which was 46 million francs.

<sup>53</sup> *Contra* CLERC Ch., art. *supra.*, No. 34, considering that it was undoubtedly the same reasoning as that followed in the *Eurodirect Marketing* case that guided the court with regard to the compensation awarded to LV Capital.

in the traditional sense – it is not a question of the abstract loss of opportunity of not having been able to make informed decisions, but of a concrete loss of opportunity, that of not having purchased the Régina Rubens securities and not having sold those that had been acquired earlier – and engages in a probabilistic calculation, estimating that LV Capital would have had approximately a one in ten chance of not buying the securities or selling them earlier if it had been aware of the actual situation.

**33. Compensation for small shareholders.** Regarding small shareholders, the trial judges made a distinction based on the date of acquisition of the shares to apply two different compensation methods. Those who had acquired their shares “*at the beginning of the criminal process*”, i.e., before March 31, 2000, based on accounts showing limited irregularities (i.e., balance sheets closed on December 31, 1998, and June 30, 1999), were compensated for half of the purchase price of the shares, with the court specifying that “*without these fraudulent elements, the shareholders would not have acquired the securities at the same price at the beginning of the criminal process*”. The trial judges thus took into account, for this category of shareholders, the *ex ante* share price distortion, following the reasoning developed in the *Société Générale de fonderie* case: they roughly estimated this impact at half the purchase price, without further justification. Those who had purchased their shares “*at the height of the fraud*”, i.e., after 31 March 2000, were awarded higher compensation, equal to the total losses incurred, i.e., the difference between the purchase price and the value of the share on the date of the judgment, “*taking into account the stock market crash following the revelations*”. The Parisian judges therefore seem to have implicitly established a presumption of causation between information and investment decisions, and considered the false information, given the extent of the accounting manipulations carried out at the time, to be necessarily decisive in the acquisitions made.

## *ii. The Marionnaud case*

**34. The Marionnaud case in criminal and civil courts.** In the *Marionnaud* case, in which shareholders were compensated in both criminal and civil courts, both the criminal and civil judges once again demonstrated inconsistency – or at least ambiguity – between the type of loss and the compensation awarded.

**35. The Marionnaud criminal case. Ambiguity of the solution.** In the *Marionnaud* criminal case<sup>54</sup>, the criminal court ordered the company's Chairman and CEO and deputy CEO to compensate 32 investors for, among other things, disseminating false or misleading information to the public. The court first stated that “*it is clear that the preparation of annual accounts that do not give a true and fair view of a company's financial position is likely to distort an investor's analysis of the real value of that company*”. The type of loss for which the court intends to award compensation is therefore similar, although formulated without express reference to the concept of loss of opportunity, to that retained in the *Sidel* case, since it generally concerns an infringement of the ability to make informed investment decisions. The court then adds, as in the *Sidel* case, that it “*will take into consideration the fact that investing in the stock market is inherently speculative and therefore involves a risk for shareholders, who must assume responsibility for the choices they make, provided that these choices are not distorted*”, in order to limit the compensation to be paid to €2 per share, or 10% of the last price of Marionnaud shares before trading was suspended. The solution adopted therefore appears ambiguous. It is difficult to know whether the judges took into account the abstract distortion

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<sup>54</sup> Paris Criminal Court, 11th Chamber 1st sect., 9 Jul. 2008, No. 0502492024, Marionnaud Parfumeries, *inédit* – Paris Court of Appeal, Division 5 12th Chamber, 27 May 2009, No. 2008/08267, Marionnaud Parfumeries, *inédit*.  
[Hautcomite@hcjp.fr](mailto:hautcomite@hcjp.fr) - [www.hcjp.fr](http://www.hcjp.fr)

of the decision by the false information and, in a manner consistent with the type of loss claimed, awarded a lump sum compensation (based simply on a percentage of the last stock market price), or whether they actually applied, contrary to the alleged loss, an analysis based on the alteration of the stock market price caused *ex ante* by the false information, assigning a proportional value of 10% of the price to the false information. The rather terse reasoning does not allow a decision to be made on this point. More generally, it remains particularly sketchy: no explanation is given as to why the court chose the percentage of 10% of the last stock market price; no distinction is made between buying, selling, and holding (these different investment decisions are not even mentioned); nor is there any explicit reference to the period during which the disputed information was disseminated and during which the investment decisions should have been made in order to be eligible for compensation<sup>55</sup>.

**36. The *Marionnaud* civil case. Contradiction between the type of loss accepted and the compensation awarded.** As we have seen<sup>56</sup>, the Créteil Commercial Court, in its decision of 19 January 2010, in the *Marionnaud* case<sup>57</sup>, reiterated and clarified the type of losses established by the *Sidel* case law, finding that the fault committed by the company “*was such as to deprive the holders of MARIONNAUD securities of an opportunity to make a more informed choice between buying, holding or selling securities*”, and that the loss consisted of “*a loss of opportunity for shareholders to make informed decisions in their best interests, having been deprived of the opportunity to make informed decisions about their assets*”. The court further analyzed this loss of opportunity, defining it “*as the difference between an environment of reliable information and an environment of misleading information*”. Finally, it added, in what has become a standard approach, that the loss could not “*be confused with the amount of losses incurred on the resale of securities, due to the uncertainty inherent in any stock market investment*”. However, the court did not then draw any conclusions in terms of assessment from the definition of loss it had established: it did not make a lump sum assessment of an abstract loss of opportunity to arbitrage in full knowledge of the facts, but instead carried out an *ex post* assessment of the share price distortion due to the false information.

## 2. The endorsement by the Court of cassation

**37. The recognition of abstract distortion of the decision by the High Court.** The analysis based on abstract distortion of the decision was first recognized by the High Court in the *Gaudriot* case (a), then in the *Marionnaud* case (b).

### a. The *Gaudriot* case

**38. Before the trial judges.** In the *Gaudriot* case, the management had, through deliberate maneuvers, given a distorted image of the company and misled public opinion by disclosing accounts that did not give a true and fair view of the company's results due to a failure to implement the reliable management tools required by a change in accounting method and by issuing highly optimistic press releases (omitting to mention the qualifications expressed by the statutory auditors regarding the absence of said management tools, qualifications that had only been made public in less widely distributed media). The company was placed in judicial reorganisation, and 160 investors

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<sup>55</sup> The court simply states: “*for these reasons, the Court has awarded compensation of €2 per share for the amount of the loss suffered by the civil parties. This figure corresponds, taking into account the circumstances and applying the principle of compensation for damage caused by the offense, to 10% of the last trading price of MARIONNAUD SA. The admissibility of the civil parties is assessed on the basis of the evidence they have produced, in particular proof of ownership of Marionnaud shares at the time of the events*”.

<sup>56</sup> See above.

<sup>57</sup> Créteil Commercial Court, 2nd Chamber, 19 Jan. 2010, No. 2005F00978, *Marionnaud Parfumeries*, see above.

who had acquired their shares during the period of misinformation sought compensation, arguing that they had been induced to acquire or hold their shares on the basis of false information.

In the first instance<sup>58</sup>, the Guéret Court, while appearing to retain a prejudice of abstract alteration of the decision (“*the shareholders, misled by press releases announcing substantial profits, then carefully concealing the company's real situation, lost an opportunity to invest their savings elsewhere*”), granted all the claims and compensated the investors for all their losses<sup>59</sup>. This assessment of the loss seemed to contradict not only the abstract loss of opportunity that was apparently retained, which seems to require lump sum compensation, but also, more generally, the theory of loss of opportunity, which requires that the compensation awarded be less than the amount of the final loss.

In order to uphold the compensation awarded at first instance, the Limoges Court of Appeal<sup>60</sup> thus modified the nature of the loss: “*whereas, moreover, with regard to the loss, although the first judge incorrectly considered that the loss consisted of a loss of opportunity to invest their savings elsewhere, when in fact, as previously stated, at least the investment made subsequently based on incomplete information brought to the attention of the shareholders, his decision nevertheless deserves to be upheld with regard to the amount of damages awarded; the first judge did in fact uphold the claims submitted to him, which correspond, for each of the shareholders, to the investment made by them*”. In other words, the Court of Appeal upheld a claim for actual decisive loss, implicitly establishing a presumption of causation between the information and the decision to acquire or hold shares, which justified compensation equal to at least the investment made on the basis of the false information, as the first judges had already decided, but on erroneous grounds.

**39. The Court of cassation's ruling.** The Commercial Chamber of the Court of cassation ruled against the Court of Appeal's analysis of the nature of the loss: “*whereas anyone who acquires or holds securities issued by way of a public offering on the basis of inaccurate, imprecise, or misleading information about the situation of an issuing company only loses an opportunity to invest their capital in another investment or to renounce the investment already made; whereas the judgment holds that the loss suffered by shareholders cannot be analyzed as a loss of opportunity to invest their savings elsewhere, since it is, in reality, at least equal to the investment made on the basis of the incomplete information brought to their attention; whereas, in so ruling, the Court of Appeal violated the above-mentioned provisions*”<sup>61</sup>.

The Court of cassation thus solemnly affirms, in a landmark ruling, its desire to standardize the analysis, carried out by the lower courts, of the loss suffered by investors who acquire or hold publicly traded securities when false information is disseminated about the issuing company: this can only be a loss of opportunity to invest capital in another investment or to abandon the investment already made. It therefore seems to enshrine the abstract distortion of the decision by false information, since the first branch of the alternative – consisting of “*investing one's capital in another investment*” – does not refer to a precisely defined investment decision and, more generally, the determination of such a loss of opportunity in mass litigation would be illusory<sup>62</sup>. The only concession made to the classic theory of loss of opportunity is that the Court

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<sup>58</sup> Guéret Lower Court, ruling on commercial matters, 20 Feb. 2007, No. 06/00052, Gaudriot, *inédit*.

<sup>59</sup> The court awarded the 160 plaintiff shareholders damages of approximately €1,400,000.

<sup>60</sup> Limoges Court of Appeal, Civil Division 1, 6 Oct. 2008, No. 07/00286, Gaudriot.

<sup>61</sup> Cass. com. 9 March 2010, No. 08-21.547 and 08-21.793, Gaudriot, Bull. civ. IV, No. 48.

<sup>62</sup> One might think that, in establishing this rule, the Court of cassation considers that determining the other investments in which the victim could have invested is a matter for the trial judges. However, such a determination, which is already very difficult for an individual investor, is impossible in a mass litigation case, which the High Court cannot ignore. It seems rather that it validates the practice of abstract loss of opportunity. See below for a renewed analysis

of cassation states that the damages awarded must be less than the final losses. However, this is undoubtedly more a desire to limit the losses, which are by nature lump sum and therefore potentially indefinite, to the losses incurred, than to require strict application of the theory of loss of opportunity.

While it has been generally approved by legal scholars<sup>63</sup>, this decision has also been criticized for appearing restrictive, simplistic, and arbitrary<sup>64</sup>. Indeed, due to the generality of the solution adopted, it rules out the possibility of compensating for other types of loss, and because of its abstract nature, leads to arbitrary compensation, contrary to the principle of full compensation. By validating the method already adopted by the trial judges, the High Court thus sought to ensure effective civil liability on the stock market in terms of its compensatory function, but also, undoubtedly, as a deterrent, since compensation for this presumed loss, assessed on a lump sum basis, could also be seen as a private penalty.

#### **b. The *Marionnaud* case**

**40. The investor's ambiguous claims.** The *Marionnaud* case has had a new episode in its civil aspect (other than the one mentioned above). In this case, an institutional investor, an insurance company called AFI ESCA, had acquired 8,592 Marionnaud shares between 2003 and 2004, i.e., during the defective information period. It therefore sought compensation from Marionnaud for its loss, consisting of having made trading decisions without knowledge of the company's real financial and economic situation and thus having lost an opportunity to make an informed decision between buying, selling, or holding the securities in question. Having sold all of its shares following the correction of information by the company, it assessed its loss more precisely at 30% of the average purchase price of the shares, i.e., approximately €70,363, taking into account the fall in the share price by this amount following the public announcement of the company's real situation. It also claimed the discount caused by this announcement, equal to the difference between the price of €21.97 on the day trading was suspended and the price of €14.95 when trading resumed, i.e., €7.02, resulting in total loss estimated at approximately €58,769. The claims put forward by the insurance company did, in fact, raise some questions. On the one hand, it was careful to describe the alleged loss as an abstract loss resulting from the distortion of its decision, which had deprived it of the opportunity to make informed decisions about its investments (purchase, sale, or retention). On the other hand, it was in fact seeking compensation for a kind of *ex post* loss caused by the share price distortion of the, based either on the proportional value method or, alternatively, on the fixed value method<sup>65</sup>, since it considered that the overvaluation of the share price had been, throughout the period of false information, either 30% or a fixed value of approximately €7.

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of this case law.

<sup>63</sup> V. approving this decision LE CANNU P. and DONDERO B., note under Cass. com. 9 March 2010, RTD com., 2010, p. 374; ROMANI A.-M., note under Cass. com., 9 March 2010, LPA, 19 Nov. 2010, No. 231, p. 9; SCHILLERS., *L'indemnisation du préjudice de l'actionnaire en cas de diffusion d'une information erronée*, Dr. sociétés, 2009, study No. 12, p. 6; RONTCHEVSKY N., note under Cass. com. 9 March 2010, Bull. Joly Bourse, 2010, No. 4, p. 316, § 41.

<sup>64</sup> SPITZ N., note under Cass. com. 9 March 2010, RTDF, 2010, No. 2, p. 60, spec. No. 27 et seq. See also the report by the Club des juristes, *L'évaluation du préjudice financier de l'investisseur dans les sociétés cotées*, Nov. 2014, prec., pp. 18-52, which severely criticizes the case law of the Court of cassation for using the concept of loss of opportunity in a theoretically erroneous manner in order to arrive at collective, lump sum, and arbitrary compensation contrary to the principle of full compensation and unrelated to the actual losses suffered, and in order to exercise, under the guise of compensation, a punitive function on issuers, when this should be the sole preserve of administrative and criminal law. The report adds that the theory of loss of opportunity can only be used appropriately in the case of a specific opportunity for a more lucrative alternative investment. See, on this report, KLEIN J., *L'évaluation du préjudice financier de l'investisseur dans les sociétés cotées. Pour une meilleure appréhension du préjudice subi par les victimes*, JCP G, 13 Apr. 2015, No. 15, p. 738.

<sup>65</sup> See above.

**41. The decision of the trial judges: strict application of the abstract distortion of the decision.** While the Paris Commercial Court had, in a decision dated 1 April 2011, declared the action inadmissible on the grounds of lack of interest in bringing proceedings, the Paris Court of Appeal accepted the principle of compensation, but in line with the *Gaudriot* case law<sup>66</sup>. On the one hand, it sharply dismissed the argument raised, not without a certain subtlety, by Marionnaud, which focused on the absence of direct and certain causation between the alleged fault and the alleged loss, as the plaintiff had not demonstrated how the inaccurate information had influenced his decision to purchase or hold the securities, especially since the purchases had taken place at a time when the share price was falling. The Court of Appeal replied succinctly that “*AFI ESCA was certainly deprived of the opportunity to make informed investment decisions and informed arbitrage decisions, in particular by giving up investments already made*”, regardless of whether the acquisitions were made when the share price was falling. In other words, the requirement of causation no longer applies when abstract distortion loss to the decision is considered. On the other hand, the Court of Appeal refused to grant the investor's claim for compensation for all of his losses and, in what has now become standard practice, limited the compensation to a lump sum of €30,000 to take into account the uncertainty inherent in stock market investments<sup>67</sup>.

**42. The reiteration of the solution of abstract distortion of the decision by the Court of cassation.** In its petition, Marionnaud argued in particular that, in the absence of a presumption of causation, the dissemination of false information could not justify the conviction of the issuing company only if the decisive nature of said information on the disputed investment decisions is demonstrated. But the argument does not work. In a decision of 6 May 2014, the Commercial Chamber of the Court of cassation upheld the loss of abstract distortion of the decision: “*but considering that, having noted that between April 2002 and December 2004, the company had issued misleading press releases likely to artificially inflate the share price and encourage shareholders to buy shares at a price higher than their real value, or to hold on to them, and considering that Esca had clearly been deprived of the opportunity to make informed investment decisions and to proceed with informed arbitrage, in particular by renouncing investments already made, the Court of Appeal (...) characterized causation between the faults committed by the company and the loss, which can be analyzed as a loss of opportunity, suffered by Esca*”<sup>68</sup>. The Court of cassation thus reaffirmed the principle of abstract alteration of the decision, which had already solemnly stated in the *Gaudriot* ruling four years earlier.

### 3. Further development by trial judges (*Vivendi* criminal case)

**43. The 2011 *Vivendi* criminal case decision. Findings made.** In the *Vivendi* case<sup>69</sup>, in

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<sup>66</sup> Paris Court of Appeal, Division 5, 7th Chamber, 19 March 2013, No. 2011/06831, Société AFI ESCA v. Société Marionnaud parfumeries et autres, JurisData No. 2013-004744: JCP E, No. 22, 30 May 2013, 1315, note MARTIN D.

<sup>67</sup> The reference to stock market uncertainty confirms the abstract nature of the loss of opportunity. Indeed, if the Court of Appeal had upheld a genuine loss of opportunity, the compensation would naturally have been lower than the losses incurred under the classic theory of loss of opportunity, without the need to invoke stock market uncertainty. In truth, the reference to stock market uncertainty serves to limit the damage, which is compensated on a lump sum basis. See, on this point, the detailed explanations of MARTIN D., note above.

<sup>68</sup> Cass. com., 6 May 2014, No. 13-17632 and 13-18473, Société Marionnaud parfumeries et autres v. Société AFI ESCA, JurisData No. 2014-009959: Bull. Joly Bourse, July 2014, No. 7-8, p. 340, note GAUDEMET A.; RDBF, 2014, comm. 156, note PAILLER P.; RTD com., 2014, p. 829, obs. RONTCHEVSKY N.; Rev. sociétés, 2014, p. 579, note DEZEUZE É. and TRÈVES J.; Bull. Joly Sociétés, 2014, p. 449, note TORCK S. It should be noted, however, that the decision was overturned on other grounds

<sup>69</sup> Paris Criminal Court, 11th Chamber, 21 Jan. 2011, Vivendi Universal, *inédit*: Bull. Joly Sociétés, No. 3, p. 210, note by BARBIÈRI J.-F.; Bull. Joly Bourse, No. 4, p. 123, note by LASSERRE CAPDEVILLE J.

2011, the 11<sup>th</sup> Chamber of the Paris Criminal Court reiterated the type of loss it had identified in the *Sidel* case: “with regard to the false or misleading information, the dissemination of such information, which gave a misleading picture of the group's debt and its ability to reduce it, resulted in the civil parties losing the opportunity to make more judicious decisions than purchasing or holding Vivendi Universal shares”. In terms of assessing the loss, the Court set the compensation, exactly as in the *Sidel* case, at a lump sum of €10 per share, “taking into account the evolution of the share price during the period covered by the indictment, which fell from €74 on December 11, 2000, to around €21 at the end of June 2002, (...) the inherent risk in any stock market transaction and the limited number of communications in question”.

However, the decision clarifies the abstract distortion of the decision<sup>70</sup>. First, from the point of view of the generality of the investment decisions considered. The judges refer to all possible investment decisions, not only buying and holding, as is traditionally the case with false positive information, but also selling, even though this was not included in the definition of loss, and treat it in the same way as buying and holding. Each of these three investment decisions gives rise to the lump sum compensation provided for, provided that they were made during the period of false information: “the court considers that the communication of 24 April 2002, could have continued to have an effect until 1 July 2002, with regard to the decisions to be made by shareholders; (...) the court (...) will declare inadmissible, on the grounds of failure to demonstrate a direct link between the offense and the loss, any civil action brought by a shareholder who cannot prove that they acquired, held, or sold Vivendi Universal shares during the period between 11 December 2000, and 1 July 2002”.

This solution seems surprising since shareholders who sold their securities when overly optimistic information was communicated to the market apparently made a good deal by selling the securities at an inflated price. It can only be understood in light of the abstract nature of the decision distortion. Next, there is refinement with regard to the presumption of causation in relation to the period of false information, as the judges make a remarkable effort to precisely define this period<sup>71</sup>. Any investment decision must have been made during this period in order for sufficient causation between the offense and the loss to be recognized: “the court considers that the communication of 24 April 2002, may have continued to have an effect until 1 July 2002, with regard to the decisions to be made by shareholders; (...) the court (...) will declare inadmissible, on the grounds of failure to demonstrate a direct link between the offense and the loss, any civil action brought by a shareholder who cannot prove that they acquired, held or sold Vivendi Universal shares during the period between 11 December 2000 and 1 July 2002”.

If the court precisely determines the period of false information in order to define the circle of investors eligible to bring civil action, this also results in practice in a presumption that is very difficult for the issuer to rebut, whereby any shareholder who acquired, held, or sold shares during that period will be presumed to have suffered loss directly resulting from the offense - on the other hand, outside this presumption of causation, no evidence of causation between the offense and another investment decision can be provided. Finally, clarification regarding the nature of the loss. The court responds to the plaintiffs who are seeking, in addition to

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<sup>70</sup> It should be noted, however, that this decision was overturned by the Paris Court of Appeal in 2014 with regard to the convictions for disseminating false and misleading information (due to lack of material and/or intentional elements) (Paris Court of Appeal, Division 5, 12th Chamber, 19 May 2014, No. 11/03728, Vivendi Universal: RSC, 2015, p. 345, note STASIAK F). The Court of Appeal also censured the civil interests, mainly on the grounds of the absence of civil fault but also of causation: “in this regard, the court notes that the parties (...) sought the joint and several conviction of all the defendants to pay the principal amount of compensation for their financial loss without providing the slightest evidence of the existence of causation between the fault committed by each of them in relation to the acts of which they are personally accused in the indictment and the alleged overall loss” (p. 157). The appeal judgment was also upheld by the Court of cassation (Cass. crim. 20 Apr. 2017, No. 14-84.562, FS-P+B, a judgment in which the Criminal Division also rejected any *res judicata* effect in administrative proceedings).

<sup>71</sup> This was not as clear from previous decisions, with the exception of the *Sedri* case (see *supra*).

compensation for financial losses, compensation for moral losses, that these two types of losses are indistinguishable: “the civil parties (...) ask the Court to order the defendants to pay them, in addition to financial losses (...), the sum of €3,750 each for moral losses, compensating in particular for the betrayal of their trust; since this betrayal of trust is indistinguishable from the misleading nature of the information in question, the civil parties' claim on this count must be dismissed”; “moral losses (...) are indistinguishable from financial losses in this case”; “the court considers that the suffering endured as a result of the loss in value (...) is indistinguishable from financial losses”. Ultimately, the abstract loss of opportunity appears to be nothing more than moral losses.

**44. Assessment of abstract loss of opportunity.** Upon examination, abstract loss of opportunity has been applied only rarely or often imperfectly by trial judges, who are often required to make a more case-by-case assessment. Moreover, in recent years, trial judges have turned to another type of loss of opportunity.

## **B. Concrete loss of opportunity that is not individualized**

**45. New type of “loss of opportunity”:** “concrete, non-individualized loss of opportunity”. Despite the rather casuistic nature of compensation, trial judges have generally respected, at least formally, the principle of loss of opportunity established by the Court of cassation. It should be noted, however, that in the *Vivendi* case, again concerning financial communications in the early 2000s during the bursting of the internet bubble, the Paris Commercial Court rejected, in several judgments handed down on 7 July 2021, claims totaling €1.5 billion brought by around 100 foreign institutional investors excluded from class actions in the United States, who were seeking compensation either for a lump sum loss of opportunity or for a difference in share price. The court considered that no proof of fault had been provided, nor even, on a subsidiary basis, of causation and loss<sup>72</sup>. In doing so, the commercial court implicitly rejected the principle of loss of opportunity established by the Court of cassation, insofar as this principle essentially exempts the investor from proving causation and loss. However, this position remained isolated<sup>73</sup>. More generally, the trial judges, anxious to comply with the principle imposed by the Court of cassation, adopted a new type of loss of opportunity: a loss of opportunity that can be considered concrete because it relates to a specific investment decision (in general, the loss of opportunity to hold or not to sell, or sometimes the loss of opportunity not to buy or even not to invest elsewhere), but assessed collectively, and therefore not on an individual basis.

**46. A new perspective on the *Gaudriot* and *Marionnaud* case law.** This new jurisprudential orientation undoubtedly leads to a somewhat different perspective on the *Gaudriot* and *Marionnaud* case law of the Court of cassation. Indeed, these decisions were generally analyzed at the time, particularly in light of the *Sidel* case, as establishing the principle of abstract loss of opportunity, and this undoubtedly for two main reasons<sup>74</sup>: firstly, from a literal point of view, in view of the very general wording of the infringement of the investor's decision; and secondly, from a practical point of view, because it was considered that in mass litigation, the loss of opportunity established could ultimately only be abstract. However, recent

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<sup>72</sup> Paris Commercial Court, 7 Jul. 2021, Nos. 2011027112, 2012033467, 2012029636, 2012056220, and 2012028100: DEXANT-DE-BAILLIENCOURT O., Dr. sociétés 2021, p. 21. *Adde* CONAC P.-H., *Plaidoyer pour une évolution du régime de la réparation du préjudice boursier*, Rev. sociétés 2022. 270.

<sup>73</sup> The case will not proceed, as on 1 July 2024, Vivendi announced that it had reached a settlement agreement with all institutional investors, whereby the company, “without admitting any fault or liability”, “puts an end to a dispute that began in 2011 and concerned events dating back more than 20 years” (see, in particular, PROROK J., *La transaction Vivendi, le besoin de jurisprudence et la place de l'analyse économique*, BJB, Nov.-Dec. 2024, p. 48).

<sup>74</sup> See above.

case law has shown that a “concrete” loss of opportunity (i.e., relating to a specific investment decision) could be used in mass litigation, provided that it was not individualized. And on closer inspection, the *Gaudriot* and *Marionnaud* case law may also refer to this type of loss of opportunity<sup>75</sup>, so that it is now possible to consider that the principle established by the High Court is ultimately only that of loss of opportunity, whether abstract or concrete, provided that in practice it can be applied to a large number of victim investors. This raises the question of how to distinguish between abstract loss of opportunity and concrete loss of opportunity: since the wording used by the judges is far from always being revealing and may in any case not correspond to the compensation actually paid, it is undoubtedly necessary to focus on the method of compensation. More specifically, if the compensation is purely lump sum (whether per security or overall), it can probably be considered that the loss of opportunity is compensated for in the abstract. On the other hand, when judges retain a specific investment decision and assign a probability to it, the loss of opportunity can be considered concrete – even if, like abstract loss of opportunity, it is not individualized for the purposes of mass litigation.

**47. Distinction.** In most decisions, the non-individualized concrete loss of opportunity has been assessed collectively for all investors (1). But in one decision, this loss of opportunity was assessed more finely by category of investors (2).

### 1. A collective assessment for all investors

**48. A more or less certain solution.** Three fairly recent cases illustrate this method: first, the *Gespac Systèmes* case, in which the choice of losses is not really justified (a), then the *GECI Aviation* case, even though the compensation awarded does not actually appear to relate to loss of opportunity (b); and finally, the *Natixis* case, in which the choice of losses compensated is this time accepted (c).

#### a. The *Gespac Systèmes* case

**49. Facts.** *Gespac Systèmes*, which was listed on the Paris Stock Exchange's second market in November 2000, declared itself insolvent and had its shares delisted in 2004. The same year, on the basis of an investigation by the AMF (which resulted in a report submitted to the public prosecutor's office in 2006 and sanctions imposed by the Enforcement Committee in 2008), proceedings were initiated by eight shareholders of the company through a civil action against the corporate officers for disseminating false information and other offenses. Following an investigation, in 2014 the court found the Chairman and CEO of *Gespac Systèmes* guilty of disseminating false or misleading information (for including in the published accounts invoices that were either unfounded or unjustified) and the deputy CEO guilty of complicity in this offense. It also ordered them jointly and severally to compensate the shareholders: “*in respect of the dissemination of false or misleading information, the loss of opportunity directly linked to the offenses may be subject to compensation. In this case, the dissemination of false or misleading information led shareholders to believe that there were promising prospects for gains, and financial analysts were praising the stock and recommending it for purchase rather than sale until very shortly before judicial liquidation. The surprise associated with the sudden suspension of trading in the stock was therefore brutal. It is clear that the false information disseminated was the direct cause of the loss of opportunity that shareholders would have had to sell their shares earlier and invest elsewhere if they had been able to suspect the imminence of such a collapse. The assessment of this loss of opportunity equal to 90% of lost earnings*”

<sup>75</sup> It is also noteworthy that in the *Gaudriot* case itself, the Court of Appeal opted to apply a loss of opportunity with a 50% probability of losses for all victim investors, “*due to the context*”, on the grounds of the loss of opportunity “*to invest their capital in another investment or to abandon the one already made*” (Poitiers Court of Appeal, 9 Apr. 2013, No. 10/03729). It was therefore a “*concrete, non-individualized loss of opportunity*”.

*seems appropriate given the error made by the shareholders on the basis of the false information disseminated and the fact that the stock suddenly became unsellable, thus eliminating any possibility for them to sell, even at a loss*<sup>76</sup>.

**50. Analysis.** The court therefore upheld a loss of opportunity (to sell and invest elsewhere) and awarded a very high percentage of 90% of lost profits in view of the sudden nature of the delisting and the impossibility of selling (even at a loss). The loss of opportunity no longer appears to be an abstract loss of opportunity, since it is not considered in general terms, but more specifically in relation to the decision to sell and make another investment, and, above all, is assigned a probability of 90 % to be applied to the loss, and not a lump sum.

However, while this loss of opportunity may be considered “concrete”, it is not “individualized” since it does not give rise to any individual analysis of the loss suffered by each shareholder: the court considers that all 31 civil parties suffered the same intellectual influence (according to a 90% probability, each of them would have sold their shares and invested elsewhere), which is necessarily unrealistic. Furthermore, the court does not provide any details on the nature of the lost profits: it is in fact granting the shareholders' claims. Not to mention that it is doubtful that, had they been properly informed of the imminent collapse, the shareholders would have been able to sell their shares to invest elsewhere, since the entire market would also have been affected<sup>77</sup>.

#### **b. The *GECI Aviation* case**

**51. First instance. Abstract loss of opportunity.** A subsidiary of GECI International, GECI Aviation was a company listed on the Alternext market in New York and Euronext Paris and responsible for implementing aircraft construction programs through its two wholly owned subsidiaries (Reims Aviation, responsible for the F 406 aircraft program, and Sky Aircraft, responsible for the Skylander aircraft program). Following the suspension of GECI Aviation's listing at the request of its parent company in 2012 and the judicial liquidation of its subsidiaries, GECI Aviation itself was placed in judicial liquidation in 2014. Believing that the information disclosed by GECI Aviation about its financial situation was inaccurate, imprecise, and misleading, and that it had caused them harm resulting from the loss of opportunity to invest more effectively, certain shareholders brought a civil liability action in 2016 against Mr. F., Chairman and Chief Executive Officer (CEO) of GECI Aviation. On March 2, 2020<sup>78</sup>, the Paris Lower Court (*tribunal judiciaire de Paris*) ordered the CEO to compensate eight shareholders for the loss of opportunity resulting from the dissemination between 2009 and 2012 of inaccurate, imprecise, or misleading information regarding the order book and the delivery date of the first aircraft – in essence, several firm orders for aircraft had been announced in press releases, suggesting prospects for interesting developments, even though the manager knew that these orders did not correspond to any reality. On the issue of losses, the court gave the following reasoning: “*The Plaintiffs, as a result of the faults found, may claim not the difference between the sale price and the price they would have obtained in the absence of misleading information, but compensation for the loss resulting from the loss of an opportunity to make a*

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<sup>76</sup> Paris Lower Court, 11th Criminal Division, 16 Sept. 2014, No. 04323096015, *Gespac Systèmes, inédit*.

<sup>77</sup> It should be noted that, on appeal, the civil parties also sought compensation for losses resulting from the offense of bankruptcy or complicity in that offense, which allowed them to also target the president of Oddo et Cie and that company itself as civilly liable (carry agreements had been entered into between the two companies). However, the Court of Appeal rejected the claim on the grounds that such damage was only indirect for the shareholders (Paris Court of Appeal, 5-13 Chamber, 11 May 2016, No. 14/07648, *Gespac Systèmes, inédit*). The Criminal Division upheld the decision (Cass. crim. 21 March 2018, No. 16-83.705, *Gespac Systèmes, inédit*).

<sup>78</sup> Paris Lower Court, 2 March 2020, No. 16/15250.

*decision based on accurate information. Thus, the loss suffered by the shareholders consists of holding the share with overvalued promising prospects. It follows from established case law that compensation for loss of opportunity must be measured in terms of the opportunity lost and cannot be equal to the benefit that would have been obtained if that opportunity had been realized (Cass. 2nd civ., 9 April 2009). In cases involving the dissemination of inaccurate, imprecise, or misleading information, lump sum compensation is the rule (CA Paris, 9th ch. sect. B, 31 October 2008). In this case, it appears that when the Plaintiffs acquired their shares, the latter had an acquisition value ranging from €0.82 to €1.15 per share. The documents debated in court indicate that when trading resumed on March 11, 2016, the share was worth €0.42, and that at the beginning of 2018, it was worth €0.25. These factors and the nature of the breaches found will lead to a value of €0.25 per share being set (...)*”.

In other words, the court expressly rejects the argument of loss caused by share price distortion and adopts the method of abstract loss of opportunity. It finds that shareholders lost the opportunity to make a decision based on accurate information (with regard, moreover, to the sole assumption of retention of the shares<sup>79</sup>), noting that “*lump sum compensation is the rule*” (referring to the *Sidel* case law). Regarding the amount of damages, the court retained, without really giving any explanation (apart from referring to the share price and “*the nature of the breaches found*”), the share price at the beginning of 2018, i.e., €0.25 per share.

**52. Appeal.** The CEO appealed, arguing that the respondents did not establish fault, loss, or causation, nor did they establish that they would have acquired or held their shares in light of the disputed communications, or that they were deprived of the opportunity to invest their money more wisely. He argues in the alternative that the amounts awarded are excessive as compensation for a loss of opportunity and requests a reduction to more appropriate amounts. The shareholders, on the other hand, are seeking compensation for their entire losses, arguing that they were unable to resell their shares because trading was not resumed.

After finding that negligence had occurred, the court<sup>80</sup> began by specifying that the loss consisted of a loss of opportunity: “*The dissemination of false information about the F-406 order book directly affected the company's share price by leading the stock market to believe that the company was experiencing strong commercial growth and expanding its production facilities. This false information distorted the respondents' perception of the situation of GECI Aviation and led them to hold securities that they would have disposed of had they been aware of the company's real situation in terms of orders placed. The resulting loss is a loss of opportunity for shareholders to have been able to sell their shares while the company was still listed. Contrary to the respondents' claims, this compensation cannot equal 100% of their loss, since if accurate information had been disclosed, the share price would have fallen in light of the less promising development that GECI Aviation would have presented*”. It then corrects the calculation method used by the court (which appears to have confused GECI Aviation with its parent company): “*The court used the share price at the beginning of 2018 to assess the loss suffered by the respondents, but in doing so made an error since GECI Aviation, unlike GECI International, was never re-listed as it was placed in judicial liquidation*”. The court then outlined its method of assessment, which, contrary to expectations, led it to exactly the same conclusion as the first-instance court : “*In order to assess the loss suffered by the shareholders, it should be noted that, according to the press release dated September 27, 2013 (...), the results for 2011/2012 were as follows: “The aviation division generated revenue of €6.2 million, compared with €7.3 million in the same period of the previous financial year. This was generated entirely by the subsidiary Reims Aviation Industries, with 57% coming from service activities and 43% from sales of new*

<sup>79</sup> Apparently, only shareholders who had held their shares had sought compensation (even though the possibility of acquisition is also sometimes mentioned in abstract terms).

<sup>80</sup> Paris Court of Appeal, Division 5, 9th Chamber, 20 Jan. 2022, No. 20/04801: BJS, May 2022, p. 31, note by GRANIER Th.

*aircraft”. Given the extremely limited number of aircraft sold (two instead of nine between 2009 and 2011), REIMS AVIATION INDUSTRIES' revenue was bound to decline, which was likely to have an impact on GECI AVIATION's share price. According to Mr. D's PEA statement as of December 31, 2012, the last price quoted for GECI AVIATION shares was €0.61. In view of the information concerning the activities of GECI AVIATION as described below, the court's assessment of losses at €0.25 per share, or 40% of the last quoted price appears proportionate and will be retained”.*

The Court of Appeal thus upheld the judgment insofar as it had assessed the loss of opportunity for shareholders at €0.25 per share but retained approximately 40% of the last stock market price of GECI Aviation.

**53. Analysis. Loss of a concrete opportunity, but compensation for a concrete and determinative change.** The reasoning given in the appeal is surprising in several respects and proves to be quite complex. At first glance, departing from the decision of the first-instance court, the Court of Appeal finds a “concrete” loss of opportunity in relation to a specific investment decision, rather than an abstract loss of opportunity – however, it only takes into account the hypothesis of retention, whereas the shareholders argued that they had “*acquired or held their shares*” on the basis of false information. Furthermore, since it upheld a loss per share, it appears that the court upheld a concrete, non-individualized loss of opportunity, as in the *Gespac Systèmes* case<sup>81</sup>.

But on closer inspection, the Court of Appeal is in fact compensating for actual loss that had a decisive impact on the decision. It acknowledges this itself since, while recognizing a loss of opportunity, it contradictorily asserts that the false information led shareholders “*to hold securities that they would have disposed of had they been aware of the company's real situation in terms of orders placed*”. Why resort to loss of opportunity if it is certain that, had they been properly informed, the shareholders would have sold their shares? Similarly, the court's assertion that “*compensation cannot equal 100% of their loss because if truthful information had been disclosed, the share price would have fallen in view of the less promising development that GECI Aviation would have presented*” seems superfluous since the use of loss of opportunity effectively prevents full compensation for losses. What the Court means here actually concerns more specifically the assumption of conservation: when shareholders were led by false information to hold their securities, the concrete distortion that was determinative of the decision necessarily consists of the difference between the actual value of the shares at the time of the decision to hold them and the actual value of the shares on the date of the court decision; however, as the information is public, in order to calculate the first value, it is important to take into account the fall in the share price that would have occurred if the information had been disclosed – which was precisely what was omitted in the *Gespac Systèmes* case<sup>82</sup>.

In this case, it is therefore important to determine the impact that the truthful information would have had on the share price in order to determine this actual value, it being specified that the current value is 0, since the company has been liquidated. In reality, the calculation shows that the Court of Appeal did not use the loss of opportunity method (neither concrete nor abstract), but rather a concrete loss that decisively influenced the decision to hold the shares (assuming causation based on the circumstantial evidence). Estimating that the share price would have fallen by 40% if the truth had been disclosed, it considers that the shareholders' loss is: 40% x the last share price (€0.61) - 0 (current value of the shares), i.e. approximately €0.25 per share.

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<sup>81</sup> It is for this reason and for chronological reasons that we include the *GECI Aviation* case here, even though the compensation ultimately awarded does not correspond to that for loss of opportunity.

<sup>82</sup> As in the *Natixis* case (see below).

The 40% figure therefore does not correspond to a percentage loss of opportunity, but to a percentage drop in the share price if the truth had been disclosed: shareholders would have sold at €0.25 if they had known the order situation due to the fall in the share price resulting from the market information. If it was a concrete but not decisive distortion (loss of opportunity) of the decision to hold the shares that had been held, it would still have been necessary to multiply 0.25 by the percentage relating to the loss of opportunity. It should be noted that the Court of Appeal appropriately held a 40% decline percentage to “save” the compensation of €0.25 per share awarded in the first instance (by a completely different means), which leaves the impression of a “*judicial tinkering*”. Ultimately, in the *GECI Aviation* case, the Paris Court of Appeal, in keeping with the case law of the Court of cassation, formally upheld a loss of opportunity, but in reality compensated for a loss resulting from a concrete and decisive distortion of the decision to hold<sup>83</sup>, by means of an implicit presumption of causation.

### c. The *Natixis* case

**54. Facts and procedure.** On 24 June 2021<sup>84</sup>, the Paris Criminal Court, in its 32nd Chamber, fined Natixis €7.5 million for the offense of disseminating false or misleading information with a view to influencing the price of securities traded on a regulated market<sup>85</sup> for deliberately misleading the market about its exposure to subprime mortgages in 2007, and awarded compensation to a large number of investors who had brought civil proceedings. The judgment is very interesting in terms of civil action, in that, in an unprecedented move, it sets out the framework for analysis quite clearly and explains the reasons for its legal policy choice. Keen to respect the decision of the High Court, the court begins by stating that “*in matters of misleading information, the compensable loss consists, first and foremost, of a loss of opportunity to make another investment, which is, by definition, a loss that is less than both the fall in the share price and the amount of the investment*”. It concluded that “*analyzing losses from the perspective of loss of opportunity inherently precludes any individual examination of the investment decision, which is by nature extremely risky: (...) there are many factors that determine investment decisions. This is also why the court will not follow NATIXIS's invitation to abandon this case law or to interpret it so strictly, by requiring proof of the decisive nature of the information for each investor, it would be rendered meaningless*”. “*Indeed*”, explains the court, “*the only two options in this matter are either: - to fully compensate for the loss, using particularly sophisticated and questionable calculations, which is the approach taken by US federal courts. This option is accompanied by battles between private experts representing the plaintiffs and defendants, battles that cannot have a clear winner since these analyses, however sophisticated they may be, are always based on assumptions that are inherently contestable (...)*<sup>86</sup> ; - to compensate only for a loss of opportunity, a method that is certainly imperfect but which, in view of the above, is not really any less reliable. Adopted by the Court of cassation, it complies both with the constitutional requirement of full compensation for loss and with the equally important requirement of the proper administration of justice, which requires that the resources of the parties and the courts not be wasted in order to achieve a result that is hardly more reliable than that which the court could achieve by a less complex method”. The court adds, with regard to the requirement that the information be decisive: “*The requirement that the information be 'decisive' for the investor is also inappropriate for an offense of deception*

<sup>83</sup> Comp. GRANIER Th., note above, seeing this rather as an application of the *Gaudriot* case law.

<sup>84</sup> Paris Lower Court, 32nd corr. Chamber., 24 June 2021, Natixis.

<sup>85</sup> That is, the maximum fine applicable at the time.

<sup>86</sup> And, rather unusually, the court cites American doctrine: CHENG, Christine C CRUMBLY, D. Larry, *Measuring Damages in Federal Securities Fraud Class Actions – A Herculean Task*, Journal of Forensic and Investigative Accounting, Vol. 8; Issue 1, Jan. 2016, having described the task “*Herculean*”. The court adds that “*the authors highlight the irreconcilable differences of opinion among experts, particularly because calculating losses requires using data other than historical data and attempting to assess what the situation would have been like if misleading information had not been disseminated*”.

(rather than fraud) committed in a market where prices reflect fluctuations in information, almost instantaneously”. The court concluded that: “The only relevant question for assessing this loss of opportunity is therefore whether or not NATIXIS securities were held during the period in which the price was distorted by inaccurate information. (...). The court will therefore calculate a fixed loss of opportunity for each of the civil parties per share held during the period in which the price was distorted. **However, the loss also consists of moral loss, namely the betrayal of trust in the issuer. This loss is not excluded by any text, and the court, bound by the principle of full compensation, must assess it, taking into account, where appropriate, the specificities of individual situations**”.

The court then sets out its method for assessing losses and compensation: “The large number of civil parties requires the court to establish the principles of compensation, with the situation of each civil party being dealt with in a simplified manner, within the framework of the attached table<sup>87</sup>, which will indicate, in particular, whether the evidence produced in support of the claim is sufficient. To have suffered a loss, it is necessary, but sufficient, to have held shares between 26 November 2007, and 6 March 2008, the date on which the publication of the 2007 results finally corrected the distortion caused by the dissemination of misleading information on 25 November 2007. With regard to the assessment of the loss, the court considers that the basis for the loss of opportunity is the difference between the share price at the end of the day on 26 November 2007, i.e., €12.97 (AMF appendices, p. 548), and the price at the end of the day on 6 March 2008, i.e., €9.37 (AMF appendices, p. 549). The amount of the loss suffered by the security is therefore €3.6. To determine the compensation for loss of opportunity, which cannot be equal to the amount of the loss incurred, it is necessary to take into account, first of all, the seriousness of the distortion caused by the false information disseminated. In this case, the amount of exposure was underestimated by at least €850 million, and the reality of the risk greatly minimized, particularly in comparison with other French banking institutions, as evidenced not only by the press release itself but also by the communication from NATIXIS Securities (AMF appendices pp. 1123s). In addition, the court takes into account the average profile of investors, many of whom, as NATIXIS points out (p. 9 of its conclusions), were small shareholders, to whom NATIXIS shares were presented, as evidenced by the letters from the civil parties, as a particularly safe investment. **In these circumstances, the court found that there was a high probability that shareholders would have sold their shares quickly if they had been aware of the reality of the exposure, and therefore set the amount of compensation for loss of opportunity at €3 per share. NATIXIS will therefore be ordered to pay each of the civil parties the sums shown in the tables below for loss of opportunity. The tables also indicate the civil parties whose claims were dismissed, in whole or in part, due to insufficient supporting documentation. Regarding the moral losses linked to the fact of having been misled, the court again takes into account the fact that the security was marketed to small investors and presented as "safe." (...) Here again, NATIXIS will be ordered to pay each of the civil parties the sums shown in the tables below for moral losses.**

On appeal, the court upheld the bank's guilt but reduced the fine to €2 million, taking into account the difficulties in communicating during the subprime crisis. However, regarding the civil action, it upheld the principles of compensation established at first instance, although it no longer gave reasons for its choice of legal policy<sup>88</sup>.

**55. Framework for analysis.** Although not entirely convincing, the reasoning developed by the Paris court deserves to be commended. According to the court, there are three main options available under French law. Firstly, a restrictive approach consisting of compensating

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<sup>87</sup> A table is attached to the decision, summarizing the compensation elements for each of the civil parties.

<sup>88</sup> Paris Court of Appeal, Division 2, 14th Chamber, 7 May 2024, No. 23/01536, Natixis: PROROK J., Rev. sociétés 2025. 503, for a combined commentary on the two decisions.

only those investors who have demonstrated the decisive nature of the information<sup>89</sup>: in fact, the court rejects this position, defended here by Natixis, on the grounds that it would undermine the choice of loss of opportunity made by the Court of cassation and would also be “*inappropriate for an offense of deception (rather than fraud) committed on a market where prices reflect fluctuations in information, down to the second*” – the court does not elaborate on this statement, which would lead to compensation for a change in price, something that the court specifically rejects. Secondly, a choice inspired by the American method, which favors economic analysis (event studies that make it possible to reconstruct a *posteriori* the price that would have prevailed without the false information) and allows for “*full compensation for the loss*” (in fact, a change in the price): the court refuses to do so because the method, however sophisticated it may be, leads *de facto* to irreconcilable battles between experts, and therefore to a waste of judicial resources without ensuring a more reliable result than loss of opportunity<sup>90</sup>. Thirdly, compensation for a single loss of opportunity: while acknowledging the imperfection of this method, the court favors it because it produces results that are just as reliable as economic analysis, while being much less expensive. For the court, this method, adopted by the Court of cassation, complies with the requirements of full compensation and the proper administration of justice.

However well-developed it may be, the reasoning does not tell the whole story. Firstly, other options are available under French law, and in particular to French judges, notably that of establishing a presumption of causation in favor of certain investors (for whom the information would be considered decisive)<sup>91</sup>, but it is true that in practice, this presumption is generally only accepted in the primary market. Secondly, the court refrains from going into detail about loss of opportunity, whereas the abstract loss of opportunity, endorsed by the Court of cassation, or the concrete, non-individualized loss of opportunity, which it is preparing to uphold, are very clearly distinct from the classic theory of loss of opportunity. Thirdly, the court says nothing about the functions it intends to confer on liability, whereas the rather generous compensation seems to compensate for the low maximum fine applicable at the time.

**56. Assessment.** The court begins by noting that “*in cases involving the dissemination of misleading information, the compensable loss consists, first and foremost, of a loss of opportunity to make another investment, which is, by definition, a loss that is less than both the decline in the share price and the amount of the investment*”, while specifying that “*the analysis of the loss from the perspective of loss of opportunity excludes, by its very nature, any individual examination of the investment decision, which is inherently extremely risky*”. The court notes that the present dispute constitutes a mass litigation case, which requires it to “*establish the principles of compensation*” in order to deal with the large number of civil parties. It thus begins by specifying the period of false information: from the day after the misleading press release to the correction of the information, i.e., from 26 November 2007, to 6 March 2008. Regarding the *quantum*, the court specifies that the “*basis*” for the loss of opportunity, i.e., the amount of

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<sup>89</sup> For a defense of this position in French law, particularly on the basis of an economic analysis, see PROROK J., Civil Liability in Financial Markets, pref. SYNVEH H., LGDJ-Lextenso, Bibl. dr. priv., Vol. 581, 2019.

<sup>90</sup> However, the American method has convinced a significant number of authors in France. See, *inter alia*, SPITZ N., *La réparation des préjudices boursiers*, pref. PIETRANCOSTA A., RB ed., coll. Droit fiscalité, 2010; CAN KORAY Z., *Le préjudice de l'actionnaire*, pref. COHEN D., Larcier, 2022; MARTIN D., *La réparation du préjudice des investisseurs en cas de fausse information*, JCP E, 9 Sept., 2010, No. 36, 1777; *Réparation (intégrale) des préjudices boursiers : sortons du brouillard*, in Mélanges AEDBF-France VI, ed. GOURIO A. and DAIGRE J.-J., RB ed., 2013, p. 399. Adde CONAC P.-H., *Plaidoyer pour une évolution du régime de la réparation du préjudice boursier*, Rev. sociétés 2022. 270.

<sup>91</sup> As the court notes, such a presumption was adopted in the United States in the 1988 Supreme Court decision in *Basic v. Levinson*. However, this presumption of reliance (at the heart of the theory known as market fraud) serves only to formally satisfy the proof of reliance required under the tort of fraud: *de facto*, US law essentially remedies a price distortion.

loss suffered per security, is the difference between the price on 26 November 2007, and that on 6 March 2008, i.e., approximately €3.6. On that basis, taking into account the facts (Natixis had greatly and seriously underestimated its exposure to subprime mortgages, particularly in comparison with other French banks, and the majority of investors were small shareholders to whom the investment had been presented as safe), “*the court finds that there was a high probability that shareholders would have sold their shares quickly if they had been aware of the reality of the exposure, and therefore sets the amount of compensation for loss of opportunity at €3 per share*”. In other words, the court finds a final loss of €3.6 per share (loss per share), to which it applies a high probability (of resale by shareholders, if they had been duly informed), i.e.,  $3/3.6 =$  approximately 83.33%.

**57. Analysis.** In the *Natixis* case, the court again applied a “*concrete*” loss of opportunity (applied in relation to a precisely defined investment decision: not to hold Natixis securities), but “*collective*” or even “*non-individualized*” (all investors had the same probability of approximately 83% of losing an opportunity to sell). The court tries to provide a more precise assessment: the loss of opportunity is measured against a specific decision, and thus to a final loss of €3.6, corresponding to the loss incurred due to holding the securities. This concrete non-individualized loss of opportunity differs from abstract loss of opportunity, as demonstrated by the award of moral losses for breach of trust<sup>92</sup>. However, this “*concrete*” loss of opportunity is assessed collectively (every investor lost a little more than 8 out of 10 chances of disposing of Natixis securities), which, contrary to the court's statements, still cannot satisfy the principle of full compensation.

The court makes an individualization effort but certainly does not compensate for the actual loss suffered – it acknowledges this itself when it states that the massive nature of the litigation prevents an individual examination of the loss of opportunity. Beyond that, even admitting the collective nature of the loss of opportunity, the court's calculation appears crude. First, as it states itself, the court only considers the holding of Natixis shares during the period of false information: however, is it realistic to treat shareholders who acquired and held shares in the same way as shareholders who only held shares (i.e., who purchased them before) during the period of false information? There are two distinct investment decisions here (the decision to buy and hold, or the decision to hold), the difference between which should be taken into account if the loss of opportunity is to be truly concrete – especially since the probability of holding is greater than that of buying.

Secondly, and even more seriously, the court is thinking counterfactually, as if only Natixis shareholders had been informed of the truth; however, as the information was public, the entire market would have been aware of it, which would have led to a fall in the share price. It is therefore unlikely that, had they been duly informed, shareholders would have been able to sell at €12.97 at the beginning of the period of false information. The final loss, to which probability must be applied, is therefore undoubtedly much lower and would in any case have required a retrospective economic analysis to be calculated accurately, which is precisely what the court wants to avoid. Finally, while the court takes into account “*the loss of opportunity to make another investment*”, it calculates the final loss only on the basis of the amount of the loss per share, without reference to any lost gains, which seems illogical. *In fine*, one wonders whether the assessment is much more accurate than the purely lump sum assessment used in the context of abstract loss of opportunity<sup>93</sup>.

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<sup>92</sup> In the *Vivendi* criminal case, this moral loss was considered to be indistinguishable from financial damage (see above).

<sup>93</sup> For a recent defense of “*abstract*” loss of opportunity, see BERG O., *Le préjudice résultant d'une fausse information boursière : une perte de chance subie par la masse des actionnaires*, in *Mélanges Fabrice Leduc*, LexisNexis 2025, p. 33.

## 2. A collective assessment by investor category

**58. *Montaigne Fashion Group case. Facts.*** Montaigne Fashion Group (MFG) had been experiencing difficulties for a number of years, since following a recovery plan adopted in 2010, SARL Jekiti Mar Capital, managed by Mr. Hubsch and whose sole partner was the Hubsch family holding company (the civil company Jekiti Mar or SCI JM), had become the main shareholder of MFG. Mr. Hubsch was then appointed CEO, and his wife and the family holding company SCI JM were appointed directors. Due to the continuing difficulties, MFG was unable to honor the fourth annuity of the recovery plan, which led to the suspension of trading on 26 February 2015, and its judicial liquidation on 1 July 2015. Several shareholders then held the CEO and the two directors liable. In essence, the Paris Commercial Court found against the CEO and his wife, an administrator, for fault consisting of appointing the CEO when he was prohibited from managing the company and for making false statements in this regard, and against the CEO alone for making misleading statements concerning support promised by SCI JM and for concealing the default in payment<sup>94</sup>.

In a second ruling on 21 May 2021, the court ruled on compensation. While it refused to compensate for the totality of the losses (equal to the cost of acquiring the securities), it nevertheless acknowledged that the fault of the corporate officers prevented the shareholders from assessing the company's financial situation with full knowledge of the facts and was therefore the cause of their loss of opportunity not to have purchased the securities or to have been able to sell them. It then selected three dates for the calculation of compensation, distinguishing between different situations and assigning them a separate probability of loss of opportunity<sup>95</sup>.

**59. *Appeal.*** The former corporate officers appeal both judgments. Arguing that investing in MFG carried a significant risk due to its financial difficulties beyond the risk inherent in listed securities, they dispute that any loss was caused to shareholders, some of whom were long-standing shareholders or former corporate officers and therefore fully aware of the situation. They argue, in the alternative, that the losses awarded are excessive. The shareholders, for their part, have filed cross-appeals seeking, in particular, the conviction of the two directors for financial disclosure and compensation for all of their losses, with some also emphasizing their status as non-professional investors.

In its ruling of 14 September 2023, the Court of Appeal, based in particular on the administrative sanctions imposed by the AMF<sup>96</sup>, essentially upheld the initial ruling on the fault, except insofar as the latter had dismissed the liability of SCI JM in the appointment of the CEO, who was at the time prohibited from managing the company. However, it differed much more significantly from the second judgment with regard to the loss. Regarding the nature of the loss, the Paris Court of Appeal<sup>97</sup> began by stating that “*the dissemination of misleading information prevented shareholders from making decisions to buy or not to buy, or to keep or sell their shares in full knowledge of the company's situation. The fact that the investment was risky in view of the uncertainty of the stock market and the company's past difficulties is irrelevant and cannot be taken into account in assessing the loss suffered by the shareholders, since that loss consists of the loss of opportunity to make the right decision in view of the misleading information*”

<sup>94</sup> Paris Commercial Court, 2 Oct. 2020, No. J2019000061.

<sup>95</sup> Paris Commercial Court, 21 May 2021, No. J2019000061. See below.

<sup>96</sup> AMF, CDS, 27 April 2019, SAN 2019-4, confirmed by Paris Court of Appeal, Division 5, 7th Chamber, 17 Sept. 2020 and Cass. com., 21 Apr. 2022, No. 20-21.753.

<sup>97</sup> Paris Court of Appeal, 14 Sept. 2023, No. 21/11057: Dr. sociétés, Dec. 2023, No. 12, 141, note by GRANOTIER J.; BJB, Jan.-Feb. 2026, p. 20, note by BOMPOINT D. and RAMONÉDA V.

*disseminated*”.

Regarding compensation, however, the Court of Appeal adopted the same method as the commercial court, which consisted of selecting certain dates to distinguish the losses suffered by different categories of investors during the period of false information. However, it only selected two dates: the date of appointment of the CEO on 21 October 2010, in violation of the prohibition on management; and the date of failure to execute the continuation plan on 14 October 2014<sup>98</sup>. The Court of Appeal thus decided to compensate three categories of investors. First, shareholders who held their shares after the disputed appointment (holding shares as of 21 October 2010), for loss of opportunity to sell their shares, with a probability of 75%<sup>99</sup> and calculated on the value of the securities on the date of appointment (estimated at €0.27<sup>100</sup>, based on an independent expert's valuation made a few weeks before the appointment). Next, investors who acquired securities after the appointment (between 21 October 2010, and 14 October 2014), for loss of opportunity to acquire the securities, also with a probability of 75%<sup>101</sup> and calculated on the basis of the amount of the acquisitions. Finally, investors who acquired securities after the default (as of 15 October 2014), for loss of opportunity not to have acquired them, with a probability of 100% calculated on the amount of the acquisitions<sup>102</sup>, considering that it was certain that investors, aware of the true situation, would not have acquired the securities<sup>103</sup>. The total compensation is approximately €1 million.

**60. Analysis.** With regard to the nature of the loss, although both the Court of Appeal and the lower court apply the principle of loss of opportunity, they do not analyze it in exactly the same way: while the lower court seems to favor a concrete loss of opportunity (based solely on the decisions to sell or not to buy, given the overly optimistic nature of the information), the Court of Appeal tends to focus on abstract loss of opportunity, targeting all investment decisions regardless of the nature of the information (“*decisions to buy or not to buy, or to keep or sell their shares in full knowledge of the company's situation*”).

Furthermore, the court correctly analyzes that the risk is unrelated to the assessment of the loss, since it concerns a “*loss of opportunity to make the right decision given the misleading information disseminated*”. However, with regard to the compensation itself, the Court of Appeal adopted the same method as the lower court, distinguishing between categories of investors and applying a probability of loss of opportunity per category of investor depending on whether they held or acquired shares and on the period in question (75% or 100%). Consequently, even though it held an abstract distortion of the decision, the Court of Appeal, like the court, compensated for a concrete loss of opportunity. Compared to previous cases, the judges certainly made an individualization effort, since categories of investors were distinguished – in particular, investors who had held and investors who had acquired. However, despite this effort, the assessment remains collective and “*non-individualized*”. The same probability of 75% is assigned to both acquisition and retention: not only is the choice of this probability completely unjustified, but it also seems unrealistic, since well-informed investors

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<sup>98</sup> The court had also accepted the date of 14 June 2014, which was the date of publication of an MFG press release announcing Jekiti Mar Capital's support. The court rejected this date due to a lack of evidence that the press release was misleading.

<sup>99</sup> The court had accepted a 50% loss of opportunity.

<sup>100</sup> Or €0.2025 per share. The choice of this value of €0.27 is questionable, since it is the market value that should have been used, which would have fallen if the concealed information had been made public.

<sup>101</sup> The court also accepted a 50% loss of opportunity.

<sup>102</sup> Taking a more cautious approach, the commercial court had deemed this loss of opportunity to be “*very close to 100%*”.

<sup>103</sup> Like the lower court, the Court of Appeal does not compensate shareholders who held their shares on the date of default, since “*if the shareholders had been aware of the default on the fourth annual payment, they would have overwhelmingly decided to sell*”, but “*as the company was about to be liquidated, the shares would have lost all value*”.

would have been more inclined to hold their shares than to acquire<sup>104</sup>. Not to mention that a 100% loss of opportunity (for investors who acquired after the default) does not make sense: if it is certain that investors would not have acquired, there is no reason to resort to the theory of loss of opportunity, due to the lack of causal uncertainty.

The trial judges maintain the terminology of “*loss of opportunity*” in order to appear to comply with the principle of loss of opportunity imposed by the *Gaudriot* case law, but in doing so they violate another principle established by the Court of cassation, according to which loss of opportunity cannot equal the final loss<sup>105</sup>. Furthermore, even when assessed at the level of a group of investors, loss of opportunity obviously remains “*non-individualized*”, since it is highly unlikely that within the same group, all investors (regardless of their expertise, investment habits, portfolio, and more broadly their financial and personal situation, etc.) would have suffered a loss of opportunity with the same probability<sup>106</sup>. In particular, the judges did not take into account the status of certain investors as long-standing shareholders or former executives, which the managers claimed, even though this fact could obviously influence the decision and therefore the percentage of loss of opportunity. Ultimately, the assessment remains collective but is simply refined by distinguishing between categories of investors based on the investment decision made and the period considered.

**61. Final conclusion.** In the end, civil liability litigation for false financial information in France, while not particularly developed, has been the subject of a fairly steady stream of decisions over the past 30 years. In the absence of specific legal provisions, liability has been established by the courts on the basis of the general principle of fault-based liability, whose flexibility has enabled them to address the main difficulties associated with this type of litigation: the often massive scale of the litigation, which makes individual assessment difficult; and the difficulty for investors to prove causation and loss.

While trial judges have been able to explore various avenues to achieve this, for the past fifteen years or so the Court of cassation has imposed the solution based on loss of opportunity, cutting short any attempts to introduce assessment methods based, as in the United States, on economic analysis, which has been the subject of heated debate. In any event, to make it viable in mass litigation, judges have applied this solution in two ways: first, in the form of an “*abstract loss of opportunity*”, a kind of abstract distortion of the decision compensated on a lump sum basis; more recently, in the form of a “*concrete*” loss of opportunity, in that it is assessed in relation to a specific investment decision, but “*non-individualized*” in that it is assessed identically for all investors or by category of investors. In both cases, this greatly facilitates the investors' burden of proving causation and loss.

Beyond that, an examination of the decisions of the trial judges shows a certain pragmatism: while generally aiming at the principle of loss of opportunity, they in fact adopt various solutions depending on the case. The intervention of the High Court has therefore only imperfectly unified case law. What might the future look like? If the Court of cassation were to uphold the principle of loss of opportunity, we could see the courts continuing to refine the solution. However, in order for case law to become truly consistent, the question of entrusting all such litigation to a specialized court could no longer be avoided.

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<sup>104</sup> See, in this regard, BOMPOINT D. and RAMONÉDA V., note above.

<sup>105</sup> This principle had also led to the Court of Appeal's ruling that the loss amounted to at least the amount of the investment made, in the same *Gaudriot* case law. See above.

<sup>106</sup> See, in this regard, BOMPOINT D. and RAMONÉDA V., note above.



## **Appendix 2: Elements of insurance law** (liability insurance for issuers and corporate officers)<sup>107</sup>

Originally from Anglo-Saxon countries, corporate officers' liability insurance is now common practice in France. As a general rule, it is the company itself that takes out the insurance policy and pays the premiums, with the policy covering risks relating to both the natural person, whether a *de jure* or *de facto* officer, and the issuer<sup>108</sup>. With the increase in transparency obligations imposed on companies and to be implemented by officers, there has also been a rise in the number of cases in which companies and their officers are held liable (whether in disputes concerning quarterly reports, universal documents, IPOs, or secondary offerings).

In practice, the insurance covers both defense costs, which often constitute the core of the coverage, and any damages awarded. Defense costs also cover all administrative investigations conducted by the AMF against issuers, as well as hearings of officers and key individuals (e.g., the general counsel) during such investigations<sup>109</sup>. Defense costs are also covered in the event of criminal prosecution. In the event of a final conviction, some insurers provide for reimbursement (this is then a simple advance on defense costs), but in practice insurers do not request reimbursement.

In principle, the insurer allows free choice of lawyer. Officers may have the same lawyer or different lawyers. Similarly, the company and the officer may have the same lawyer (except in the case of a former officers) or different lawyers. A coverage limit of €25 million generally applies in this area.

With regard to officers' insurance<sup>110</sup>, some policies only cover the "*status*" of officer, while others cover the "*role*" of officer, which allows for broader coverage (for example, benefiting *de facto* officers or general counsels)<sup>111</sup>. Furthermore, the practice of "*full coverage*", which applies to all officers, consists of giving priority in coverage to officers who are first in line in the order of claims made. Coverage is thus provided on a first-come, first-served basis, and those who arrive last will no longer benefit from coverage in practice.

Debates exist or may have existed.

The question of whether the payment of insurance premiums by the issuer constitutes misuse of corporate assets is no longer debated in legal doctrine or in the insurance industry.

On the other hand, the insurability of civil and administrative penalties remains a matter of debate. Some insurers consider that if the penalty does not concern a breach that fulfills both conditions of intentional fault within the meaning of insurance law<sup>112</sup> (which, according to case law, presupposes the intention to commit both the fault and the loss), it may then be covered in policies that make coverage conditional on the "legally insurable" nature of the penalty. Other insurers, on the contrary, argue that these penalties are simply "*uninsurable*", particularly in

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<sup>107</sup> The factual elements were provided by Ms. Françoise Mari, Director of Financial Risks, Liberty Specialty Markets France, during her hearing before the working group.

<sup>108</sup> The mechanism used is that of insurance on behalf of another, expressly provided for by the French Insurance Code (French Insurance Code, Art. L. 112-1).

<sup>109</sup> The contracts then provide for an allocation of defense costs, for example 50% for the natural person and 50% for the legal entity.

<sup>110</sup> Within the meaning of insurance law, which differs from company law.

<sup>111</sup> If the manager is dismissed by the new management team, the former manager remains covered.

<sup>112</sup> French Insurance Code, Art. L. 113-1, para. 2: "(...) *the insurer shall not be liable for losses and damages resulting from intentional misconduct or fraud on the part of the insured*".

view of their punitive nature<sup>113</sup>. In practice, some insurers have covered administrative penalties when they are imposed on natural persons, but this practice has not been observed in the case of penalties imposed on legal entities.

Finally, the role of corporate officers' liability insurance must be clarified with regard to civil liability functions. From the point of view of compensation, the effect is twofold: insurance both increases compensation and reinforces its circular nature (the issuer – i.e., economically speaking, its shareholders – pays the premiums, which will *in fine* be used to compensate the shareholders). From the point of view of deterrence, corporate officers' liability insurance is likely to reduce the deterrent effect of liability.

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<sup>113</sup> In a recent press release dated 18 March 2025, the ACPR reiterated that penalties imposed by an administrative authority are not insurable: “*Like any contract, an insurance contract cannot be contrary to public policy. As such, it cannot undermine the effectiveness of penalties that must be personally enforced by the perpetrator of a breach that justified a sanction. The Council of State reiterated in a 2007 opinion that this constitutional principle of the personal nature of penalties in criminal matters is applicable to administrative sanctions.*

*The ACPR therefore points out that the assumption by an insurer of a financial penalty imposed by an administrative authority, in the same way as tax, criminal, and customs fines, would be contrary to public policy and that any contractual clause providing for this would be null and void, subject to the assessment of the courts”.* See on this press release, TOUZAIN A., *L'ACPR affirme l'inassurabilité des sanctions pécuniaires administratives*, bjda.fr 2025, No. 98