

## **Disciplining a combat tank manufacturer? A tale of lay judges handling punitive claims for moral damages in business**

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**Commercial Court of Versailles, 6 February 2004, Summary of Plumeitif  
[written judgment] (*Usines Merger vs Giat Industries*)**

Giat Industries, a company whose capital is held entirely by the State, active in the weaponry sector and, in particular, in the sector of combat tank construction, is sued by a competitor, Usines Merger, for 'predatory pricing' (article 420-1, *Code de Commerce*) in the market for speed reducers.

Usines Merger seeks condemnation of Giat Industries for € 10 762 900 in damages and, in addition, the appointment of an expert to calculate its loss.

The Court used its discretion and did not call in an expert to evaluate the loss.

After an examination of the profit rate and the basis for the turnover maintained by the plaintiff, as well as an analysis of the loss in competitiveness, and of moral and material losses incurred by the plaintiff, the Court retained an evaluation of the loss equal to less than 3% of the sum initially sought out.

Concerning the profit rate, the Court stated that in heavy industries, where competition is severe, producers apply a profit margin of 10-20% to the cost of ordered products, and retained a rate of 10%.

Concerning the basis for the turnover, the Tribunal stated that Usines Merger did not provide sufficient proof of its allegations, and considerably minimized the alleged loss.

In the end, the Tribunal does not recognize material damage and moral damage, considering in particular that the risks of conflict are inherent to business and may always arise during the life of a company.

(...) The Court thus dismissed Usines Merger and its assignment based on competition law.

### **With Respect to the Assessment of Damages in Unfair Competition**

*Usines Merger vs Giat Industries* is an interesting case for sociologists of law and business. The Court in which this decision was made offers a unique perspective on how normative orientations and practices of the business world affect judicial decisions on economic regulation. In his work, Fred Bruinsma focuses on legitimacy and authority of high courts.<sup>1</sup> Here we echo his concerns and offer, in the same spirit, an

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<sup>1</sup> Fred Bruinsma, 'The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)', *Ancilla Iuris* 2008, [www.anci.ch/doku.php?id=beitrag:bruinsma](http://www.anci.ch/doku.php?id=beitrag:bruinsma).

exploratory examination of conflicting norms among consular magistrates at the Tribunal de Commerce de Paris (TCP), a first level court.

This decision was indeed reached in a 'consular' court. Commercial courts in France deal with commercial litigation and bankruptcy. They are truly judicial, but consular: in this Court, judges are not career judges but business people, co-opted by an electoral body at the local Chamber of Commerce (composed of sitting judges at the Court and representatives of employers' associations at the Chamber), and acting as unpaid volunteers. 29% of the judges come from the banking and financial industries (38% if insurance companies are counted as included in this sector).

Lay, consular judges (as any other judges) use a great deal of discretion to evaluate damages, notably when the loss is caused by unfair competition. The judges emphasize the specificity of each case and argue that this specificity is only accessible to them. This helps them justify their discretion in the assessment of damages, notably with regard to experts. This approach necessarily leads to differences and inequalities in the awarding of damages. Reparation in corporate law is complex. In effect, in commerce and otherwise, there is a fundamental question concerning the meaning of reparation for the actors of the economy that are often companies, i.e. 'moral' entities (art. 1832 of the French Civil Code). Is rehabilitation the sole objective in awarding damages in all their components (material and moral, for example)? Or does awarding damages also aim to sanction and punish? In effect, the limits to free competition are found in penal texts, which sanction unfair practices such as counterfeiting, dishonest advertising, deception about merchandise and dumping. But they can also be found in the civil domain, for example with the creation of confusion between a company and its competitor (the use of distinctive signs belonging to the company, the imitation of its products and brands), or in the attempt to disorganize the operations of a competitor (in fraudulent use of client lists, for example, or confidential documents).

A close look at the work of lay, consular judges, as well as at the manner in which they practically mobilize their experience of business to carry out their work, helps identify some of the conventions upon which they rely to make decisions in 'economic justice', in particular when they can use their discretion. This question is difficult because, in general, judges say little about their work in order to protect their independence. To get around this difficulty, we used a jurisprudential method based on consular judges' comments on judgments of specific cases. *Usines Merger vs Giat Industries* was deliberately chosen in a domain where the law does not provide an immediate solution and where the judge must mobilize his or her personal judgment, a form of discretion that resorts to customs, conventions and representations (called 'sensitivities' by the judges themselves). In other words, we attempted to bring to light the judges' collective sensitivities within the TCP by using a 'jurisprudential' method based on reading and commenting a judgment about a specific case. We asked them to read this judgment, to freely comment on it, and finally to answer specific questions about it. During the course of the interview, our task was to help the magistrates to reach for these conventions and to make them explicit. We essentially comment on variations in the magistrates' responses to our questions. We

interpret these variations as indicators of struggles among lay, consular judges to define and impose criteria of economic justice.<sup>2</sup>

*Usines Merger vs Giat Industries* calls for an evaluation of both material loss and moral damage (*préjudice moral*); it also raises the issue of resorting to an expert. Plaintiffs seek both 'material damages' and 'moral damages'. The latter represent a special kind of punishment for infractors. Judges have to decide whether or not they want to be punitive, i.e. award such moral damages. The judge's decision is based in large part on article 420-1, Code de Commerce), which deals with anti-competitive practices, including predatory prices, i.e. 'a unit sale price of a product that is inferior to the true unit cost of this product'. We are particularly interested in the common positions eventually taken by the magistrates who are both bankers and jurists, and who constitute a good part of the elite of the TCP.<sup>3</sup>

We observed that the judges did not all reason in the same manner in terms of the evaluation of loss.

### The Evaluation of 'Moral Damages' in Consular Legal Culture

Slightly more than a third of the consular magistrates (38%) would have made the same decision as the Court of Versailles in this case. A minority (15%) would have made the opposite decision. A significant portion of the magistrates (38%) claim not to know what they would have done in a similar case, given the absence of the complete dossier.

Among the judges who expressed their views on this question the problem of damages is presented as intrinsically very volatile:

'When you listen to the plaintiffs about damages, they always want their slice of bread with four layers of butter on both sides. To have a million euros, you have to ask for ten. (...) Even when they are justified, the Tribunal estimates damages differently: for the Tribunal it's a slice of bread without butter or jam' (Judge 200).

The majority (62%) declare themselves *generally favorable* to the recognition of moral damage to a moral person insofar as positive law allows moral damage to moral entities and its reparation, provided that the existence of damage is proven (article 1382, Code civil). In their interviews, they invoke mainly two possible senses of moral damage to moral people in order to justify their recognition 'in general' (even if they actually grant very little).

2 Olivier Favereau & Emmanuel Lazega (eds.), *Conventions and Structures in Economic Organization: Markets, Networks, and Hierarchies*, Cheltenham, UK: Edward Elgar Publishing 2002.

3 Emmanuel Lazega & Lise Mounier, 'Polynormativité et contrôle social du monde des affaires: le cas de l'interventionnisme et de la punitivité des juges du Tribunal de Commerce de Paris', *Droit et Société* 2009, 71, p. 103-132.



The first sense comes from *pretium doloris*.<sup>4</sup> Even if a company as a 'moral person' is unaware of it, certain judges consider that the entrepreneur, as an individual representing this organization, can be affected in the sense of *pretium doloris*:

'I support the recognition of moral damages if someone proves them to me. The problem is that it's difficult to prove. We are not in the domain of criminal law. One day someone treated me in an unspeakably depraving way. I didn't sue him because I didn't know how to sue him. I didn't know how to calculate the damage' (Judge 202).

Judges convey the idea that moral damage is part of the bitterness and roughness of business life and they often think that one must accept, in the majority of the cases, to renounce compensation due to a lack of evidence and of evaluation. In principle, however, these judges hold on to the possibility to impose punitive damages such as reparations for pain.

The second sense comes more from the harm done to the reputation of a company, to notoriety. This harm is difficult to calculate but evokes more directly the loss of profit or of business. Some judges include this approach to moral damage for a moral entity as a special case of, or a sort of supplement to, material loss. In other words, these judges see the recognition of moral damage as a way of compensating when material loss seems to be under-valued:

'What can happen is that when we don't have sufficient evidence to evaluate the material loss clearly and precisely, we add the moral qualifier in order to, I would say, put a surcharge on the quantification that we made on the damage (...) Because it seems to us that in all fairness the defendant was particularly unspeakable, that he used highly reprehensible means. And at this time, we are convinced that the company's loss is greater, but we're hard-pressed to establish it on a purely mathematical basis' (Judge 132).

Recognizing the existence of moral damage in business in general does not mean that the judges recognize it in this particular case: here, 63% of the judges refuse to recognize moral damage in the specific case of *Usines Merger vs. Giat Industries*, concurring with the judgment. Only 11% of the judges declared themselves favorable to the recognition of moral damage in this case. Consular judges often accept moral damage to moral entities (companies) in law and in theory, but much less so in practice. There is a reticence, deeply anchored in their consular legal culture, to grant moral damage to a business. The general state of mind is pragmatic:

4 *Pretium doloris* refers to reparation in which the victim obtains financial compensation for the suffering that he or she endures, whether or not this suffering was the direct or indirect consequence (for example surgical intervention) of an accidental event or of poor treatment. This reparation cumulates with the compensation of other major forms of damages, such as physical harm or esthetic damage. Cf. Serge Braudo, *Dictionnaire du Droit privé*.

'There is still a pretty general mentality here, which is: the morality of a tradesman is in his cash-drawer. Consequently, in terms of purely moral damage, everyone here is reticent' (Judge 201).

Certain judges are conscious of the paradox and essentially explain it either by the difficulty of showing proof of this moral damage, or by a tendency to stick to the rule of law:

'All the same, we might consider that there are a lot of judges, including career magistrates, who think they were born to reestablish justice on earth. Those judges punish. And then there are those who desperately hold on to the Rule of Law and who say: there has to be loss, a fault, there has to be a link between the two, so calculate the loss for me. And still, without being too mean towards those who were born to reestablish justice, there's a huge tendency at the level of the Court de Cassation [French highest Court] to fill in the gaps of political Law, of legislation. Accordingly, by confirming damages and interests that have a political character, in fact there's still a jurisprudential tendency to grant damages and interests that are in fact political, even if they don't say it (...); this jurisprudential tendency to give punitive powers to the judge is not recent, it dates way back.'

Some claim to award punitive damages precisely to compensate for the well-known impossibility of proving material losses. Unfair competition, for example, is so difficult to prove that certain judges grant a symbolic euro, while others, for the same reasons, grant millions of euros<sup>5</sup>:

'I can't give you percentages, but there are always two schools. One that says: you need serious evidence to evaluate loss, otherwise you get peanuts. The other says: you need to sanction the counterfeiter, and even if there is no evidence, you need to sanction. You need to punish, you can't just let it go, based on the argument that if you fine one euro, it doesn't deter the counterfeiters. In the end you have to make sure it's not profitable enough for them to carry on' (Judge 143).

In summary, the 'restorative' approach to loss and the 'punitive' approach are both present at the TCP. The 'restorative' approach is popular in business because it is in harmony with the ideology of reestablishing the link between the infractor and the victim, especially between parties who instrumentalize the court to renegotiate their contracts. But the punitive approach is also successful. The idea is that individual loss is accompanied by collective loss because it implies the destruction of market circuits. Many judges consider that if fault and measure of its gravity are not present in the premises of their decisions, entrepreneurs will lose their sense of responsibility, threatening the protection of 'free markets' as such.

5 For example *LVMH vs Morgan Stanley* (12.1.2004), [http://lexinter.net/ACTUALITE/lvmh\\_morgan\\_stanley.htm](http://lexinter.net/ACTUALITE/lvmh_morgan_stanley.htm).

### From Collective Sensitivities to Institutional Capture

By looking at the ways in which consular judges carry out their work, we identify sectoral 'sensitivities' that characterize the governance of business in a concrete manner. Sensitivities are indeed collective. They characterize not only isolated individuals but also sets of individuals: judges of the same seniority, judges coming from a specific sector of the economy. For example, no matter what sense the term 'moral damage' holds, the most junior judges are more favorable to the recognition of moral damage to companies than the oldest judges, who are usually retired. The reasons often indicated by these young judges concern the non-respect of creativity and innovation in companies. They also develop the notion that today's entrepreneurs and companies are plunged into an anomic business world.

The group of magistrates having studied law and coming from the banking and finance sectors are less in favor of recognizing moral damage to a business, as the Court in *Usines Merger vs Giat Industries*, than respondents on average. Banker-jurists are less 'punitive' than the non banker-jurists. We see the opposite trend in the case of judges coming from the Building and Public Works sector (see note 3) – an industry that is much closer to real-life and litigious production markets.

These results are interesting to sociologists of law and business because the TCP represents, in our view, an institution of 'joint regulation of market.' We define 'joint' as combining the coordinated efforts of both the State and the business world, bringing together both an exogenous regulation and an endogenous self-regulation. These findings show that joint regulation of markets is characterized by struggles for influence in the construction of a common frame of reference that is indispensable to the qualification and to the stabilized interpretation of events. In this 'cognitive' competition between sectors, that of banking/finance is in a position to promote its sensitivities, criteria for justice and well-identifiable conventions – a new kind of neo-corporatism.

Delegation of judicial powers by the State to intermediary, meso-level organizations and institutions, and the loss of monitoring capacity that comes attached to modern forms of joint regulation, raise strong issues of conflicts of interests.<sup>6</sup> We live in an

6 See for example Bruinsma (Fred Bruinsma, *Dutch law in action*, Nijmegen: Ars Aequi Libri 2003, chapter 4, p. 53) on 'Alternative dispute resolution Dutch style', with the example of the Arbitration Council for Construction Disputes (Raad van Arbitrage voor de Bouw). Seen from the perspective of article 6 ECHR, French commercial courts are biased and vulnerable to criticism, both on paper and based on our results. Recognizing this, attempts to carry out judicial reforms in France were indeed planning to request a declaration of interests (and a regular update of this declaration) from consular judges to deal with issues of conflicts of interests or at least appearance of conflicts of interests (Clotilde Deffigier, Jean-Marie Plazy, Didier Marshall, Simon Gaboriau & H el ene Pauliat, 'Qualit e et justice en France', in: Marco Fabri, Philip Langbroek & H el ene Pauliat, 'The Administration of justice in Europe: towards the development of quality standards', Research papers of the Insitute di Ricerca sui Sistemi Giudiziari, Bologna; Philip M. Langbroek & Marco Fabri (eds.), *The right judge for each case: a study of case assignment and impartiality in six European judiciaries* (Ius commune Europaeum (57)), Antwerp/Oxford: Intersentia). To this date, such reforms have not been implemented.

organizational society in which organizations that are not meant to protect the public interest nevertheless increasingly pretend to do so. This involvement, even admirable at the individual level, can be part of their efforts to improve their opportunity structure at the collective level, and to weaken the regulatory mechanisms that constrain them. When these efforts are built into the operations of economic institutions, public interest and public service are at stake.

For many sociologists of governance, contemporary States are no longer the main source of regulation, for example because large multinational companies can escape country-level regulation. I would like to argue that the more the State 'loses direct control' of the economy, the more different forms of regulation of these economies are multiplied, the more this State needs to impose at least more transparency in market activities and in institutions of social control of markets so as to help protect the public interest.<sup>7</sup> The situation described by the case examined here is not a situation in which the State has spread its tentacles over civil society in a totalitarian manner. It is a situation where so much power over the public interest (the rule of law, for example) and so many privileges are transferred to business and civil society via professionalization or consular institutions, that increasing the transparency of economic actions and their regulation becomes, in my view, a public service. Sociologists of law and judicial institutions, as Fred Bruinsma does, can contribute to this public service.

7 Emmanuel Lazega, *Networks in legal organizations: On the protection of public interest in joint regulation of markets* (Oratie for Wiarda Chair, Faculty of Law, Utrecht University), 2003.

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# **Rechtspraak van buiten**

**Negenendertig door de rechtssociologie geïnspireerde annotaties**

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