Soulier
AVOCATS

Published on 7 April 2025 by **Paul Tournier**, Member of the Lyon Bar
p.tournier@soulier-avocats.com
Tel.: +33 (0)4 72 82 20 80

Read this post online

Business damage under French Law: What Compensation?

In the business world, companies may suffer various forms of damage due to wrongful actions by competitors, partners, or other economic actors. Understanding the mechanisms of compensation is essential for businesses seeking to defend their interests.

It is, therefore, important to define the scope of compensable damage under French law (1), to identify the characteristics of damage that must be established to claim compensation (2), and to be aware of the types of damage for which companies can seek redress (3).

1. The scope of compensable damage under French law: full compensation, but nothing more

Under French law, the general principle is full compensation for the damage suffered by the injured party. This principle applies to businesses as well. It encompasses both positive and negative aspects, meaning that injured parties must be restored to the position they would have been in had the harmful action not occurred, without incurring a loss or making a profit.

While full compensation for losses is a common feature in many foreign legal systems, the principle that the injured party cannot receive any additional benefit beyond compensation for the actual damage suffered is a distinctive aspect of French law.

This distinction reflects different legal approaches to civil liability.

© 2025 - **SOULIER Avocats** All rights reserved

For instance, unlike common law countries such as the United States, where an injured party may be awarded punitive damages – designed to sanction particularly wrongful actions – this form of compensation, which goes beyond mere reparation, is not recognized in France. As a result, the same damage cannot be compensated twice[1].

2- Characteristics of damage under French Law

a) Common characteristics of contractual and tortious damage

To be compensable, the alleged damage must traditionally meet certain requirements, as consistently reiterated by French courts "*The only proof required is that of personal, direct, and certain damage.*"[2] .

"Personal" damage means that the damage must directly affect the party seeking compensation.

"Direct" damage means that the damage suffered must result directly from the event/ wrongful action giving rise to liability. Only direct damage can be compensated, as it alone is causally linked to the event/ wrongful action.

This causal link must be expressly demonstrated by the plaintiff. Under established case law, "*It is not sufficient for the injured party to establish the defendant's wrongful action and the damage; He/she/it must also prove the direct causal link between the wrongful action and the damage.*"[3]

Any doubt as to the existence of a causal link benefits the defendant. A mere possibility or hypothesis does not establish the existence of a wrongful action and is, therefore, insufficient for the defendant to be held liable[4].

Lastly, to be compensable, the damage must be "**current**" and "**certain**", which means that the damage must be capable of being established with certainty, whether it involves a suffered loss or a missed gain.

From a legal perspective, a damage that is certain is considered current, whether it has already occurred or is expected to occur in the future. However, a future damage can only be compensated if it is certain. The *Cour de Cassation* (French Supreme Court) has ruled that a future damage is that "which inherently carries the conditions of its realization[5]."

As such, a compensable future damage is distinct from a hypothetical or potential damage, i.e., a damage that may or may not occur. The *Cour de Cassation* has consistently held that "while damages cannot be awarded for a purely hypothetical damage, they may be awarded when the future damage appears to the trial judges as the certain and direct extension of an existing situation and as being capable of being immediately assessed[6]."

b) Specificities in contractual matters

Foreseeability of damage

Pursuant to Article 1231-3 of the French Civil Code[7], when parties are bound by a contract, in order to be

© 2025 - **SOULIER Avocats** All rights reserved

compensable, the damage resulting from a contractual breach must have been foreseeable at the time the contract was formed.

Contractual penalty clauses and limitation of liability clauses

The parties may contractually determine the compensation to be received by the injured party in the event of a breach or defective performance of their agreement. These are penalty clauses, as defined in Article 1226 of the French Civil Code[8].

Article 1231-5 of the same Code[9] provides that a judge hearing a contractual dispute may, even without an express request from the parties, reduce or increase the contractual compensation stipulated in a penalty clause if it is deemed manifestly excessive or derisory.

A contract may also include liability limitation clauses, which cap the liability of the defaulting party at a specified amount. These clauses are generally valid under French law, except when they deprive the debtor's essential obligation of its substance[10]. For instance, in an express delivery contract, a clause stipulating that in the event of delay, the express carrier is only liable for reimbursing the shipping costs was deemed unenforceable by the *Cour de Cassation*, as it effectively nullified the carrier's core obligation of ensuring timely delivery[11].

3. Types de compensable damage for businesses

As long as it meets the requirements outlined above, any damage may give rise to compensation.

Businesses may seek compensation for various types of damage, including:

- **Material damage**: This refers to the deterioration or destruction of the company's tangible assets, whether movable or immovable. For example, a fire or an act of vandalism causing physical damage to a factory or equipment may entitle the company to compensation.
- **Non-material damage**: This results from material damage and includes loss of use, loss of clientele, or additional costs incurred to mitigate the damage, such as mobilizing personnel.
- **Moral damage**: Case law recognizes that harm to a company's honor, reputation, name, image, or standing constitutes moral damage for which the company may seek compensation[12].
- **Economic or commercial damage**: This category encompasses all financial losses suffered by the company. It may include lost revenue or profits due to a business disruption or slowdown, operating losses, loss of business, lost earnings, or missed gains corresponding to unrealized profits due to damage[13], etc.

Regarding this last point, compensable loss of opportunity refers to the actual and certain loss of a favorable prospect, which results in either a reduction or elimination of profits or an inability to avoid a loss.

© 2025 - **SOULIER Avocats** All rights reserved

According to established case law, missed gains for which a plaintiff can seek compensation correspond to the loss of gross margin that would have been earned until the contract end date[14]. The gross margin is defined as the difference between net sales and net costs, excluding taxes[15]. Reliance on this concept is justified because the aggrieved party in a premature termination continues to incur certain fixed costs.

**

Regardless of the type of damage for which the injured company seeks compensation, the damage must be personal, direct, and certain and must be established using concrete and verifiable data that can be assessed by the court. Therefore, gathering all necessary evidence to substantiate the alleged damage is crucial and engaging financial experts (such as accountants or economic analysts) is often essential to quantify the damage.

As such, evidence is not only important to prove a wrongful action, but also to substantiate the existence and extent of the damage suffered.

---

[1] Commercial Chamber of the *Cour de Cassation*, May 11, 1999, 98-11.392, Bull. civ. II, n° 101

[2] Second Civil Chamber of the *Cour de Cassation*, April 16, 1996, No. 94-13.613

[3] Civil Chamber of the *Cour de Cassation*, March 14, 1892, DP 1892. 1. 523

[4] First Civil Chamber of the *Cour de Cassation*, December 9, 1986, No. 84-15.753; Second Civil Chamber of the *Cour de Cassation*, November 15, 1989, No. 88-18.310; First Civil Chamber of the *Cour de Cassation*, March 14, 1995, No. 93-12.028

[5] Second Civil Chamber of *the Cour de Cassation*, May 15, 2008, No. 07-13.483

[6] *Cour de Cassation*, June 1, 1932. Mixed Chamber of the *Cour de Cassation*, May 29, 1970, No. 90-57.869; Second Civil Chamber of the *Cour de Cassation*, December 15, 1971, No. 70-12.603; Criminal Chamber of the *Cour de Cassation*, November. 7, 1979, No. 78-93.620

[7] Article 1231-3 of the French Civil Code *"The debtor is liable only for damage that were foreseen or could have been foreseen at the time the contract was formed, unless non-performance is due to gross negligence* ["*faute lourde*" in French] *or willful deceitful conduct* ["*faute dolosive*" in French]."

[8] Article 1226 of the French Civil Code: "*A penalty clause is a clause by which a person, in order to ensure performance of an agreement, binds himself/herself/itself to something in the event of non-performance."*

[9] Article 1231-5 of the French Civil Code "*Where the contract stipulates that the party who fails to perform it shall pay a certain sum by way of damages, no greater or lesser sum may be awarded to the other party.*

© 2025 - **SOULIER Avocats** All rights reserved

Soulier
AVOCATS

However, the judge may, even on his/her own motion, moderate or increase the penalty so agreed if it is manifestly excessive or derisory.

When the commitment has been partially performed, the agreed penalty may be reduced by the judge, even on his/her own motion, in proportion to the benefit which the partial performance has procured for the creditor, without prejudice to the application of the preceding paragraph.

Any provision contrary to the preceding two paragraphs is deemed unwritten [i.e. ineffective].

Unless non-performance is final and definitive, the penalty is incurred only when the debtor is put on notice."

[10] Article 1170 of the French Civil Code: "*Any clause that deprives the debtor's essential obligation of its substance shall be deemed unwritten* [i.e. ineffective]."

[11] Chronopost Decision: Commercial Chamber of the *Cour de Cassation*, October 22, 1996, No. 93-18.632

[12] Second Civil Chamber of the *Cour de Cassation,* April 2, 1997: RJDA 5/97 No. 736; Paris Court of Appeals, June 30, 2006, No. 04/06308; Commercial Chamber of the *Cour de Cassation*, May 15, 2012, No. 11-10.278.

[13] Article 1231-2 of the French Civil Code: "*Damages due to the creditor are, in general, for the loss sustained and the profit of which the creditor has been deprived, with the following exceptions and qualifications*."

[14] Commercial Chamber of the *Cour de Cassation*, February 18, 2014, No. 12-29.752

[15] Commercial Chamber of the *Cour de Cassation*, January 23, 2019, No. 17-26.870

Soulier Avocats is an independent full-service law firm that offers key players in the economic, industrial and financial world comprehensive legal services.

We advise and defend our French and foreign clients on any and all legal and tax issues that may arise in connection with their day-to-day operations, specific transactions and strategic decisions.

Our clients, whatever their size, nationality and business sector, benefit from customized services that are tailored to their specific needs.

For more information, please visit us at www.soulier-avocats.com.

This material has been prepared for informational purposes only and is not intended to be, and should not be construed as, legal advice. The addressee is solely liable for any use of the information contained herein.

© 2025 - **SOULIER Avocats** All rights reserved