Chapter 6
The Disgorgement of Illicit Profits in French Law

Michel Séjean

Abstract In some sectors, such as intellectual property law, French substantive law explicitly provides that illicit profits may be disgorged, but there is no provision of general scope that enables such disgorgement damages. Many scholars and commentators criticize this sectoral approach, and advocate for a reform of the sanctions regarding profitable tort, as well as for a general provision regarding disgorgement damages. However, the proposals of reform differ from each other in many ways. Meanwhile, trial courts use roundabout means to avoid that profitable tort remain unpunished. For the sake of legal certainty, a provision in the Civil Code, preferably of a general scope, is needed.

Keywords Disgorgement of illicit profits • French law • Lack of general provision • Sectoral approach

How does French law order the disgorgement of illicit profits? The means it uses and intends to use are currently to the fore.

Here is a recent illustration. In September 2013, a number of major Do-It-Yourself stores wanted to open their doors on Sundays, even though this is prohibited by law, and despite the fact that they did not meet the conditions to benefit from a derogation to this. One of their competitors, which complied with this prohibition, filed emergency proceedings to stop what it deemed to be unlawful disturbance.

The court in interlocutory proceedings ordered the respondent companies to close their stores on Sundays and imposed an "*astreinte*", ie a daily monetary penalty. Reiterating the terms of Article 873 paragraph 1 of the Code of Civil Procedure,[1]

[1] Art. 873 paragraph 1 of the French Code of Civil Procedure (hereafter CPC): 'The presiding judge [of the commercial court] may (. . .) provide for by way of a summary procedure such protective measures or rehabilitation measures that the case justifies, either to avoid an imminent damage or to abate a manifestly unlawful disturbance'; while these powers are granted to the presiding judge

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the presiding judge of the commercial court ruled as follows: "The judge ruling in interlocutory proceedings must stop a manifestly unlawful disturbance and (. . .) to do this, *the fine must be set at a level that renders it economically unfeasible to continue with such infractions* (. . .); using our discretion, we hereby set the amount of the provisional fine at EUR 120,000 per store and per day of infringement noted on Sundays".[2]

However, as soon as the penalty was imposed, the major stores announced that they would refuse to abide by this ruling. The following Sunday, over a dozen stores opened for trading, as the turnover made every Sunday was significantly higher than the amount of the fine.[3]

Many lessons may be learned from this example, but two in particular merit specific attention.

Firstly, although the court had a legal basis to prevent illicit profits being made, this did not resolve all the issues. It also needed to be able to correctly assess the extent of the profit to avoid partial disgorgement, which would have no deterrent effect. The example of DIY stores shows clearly that respondent companies were not concerned about a court conviction if it meant that they could make more profits. Undoubtedly, the French courts do not have sufficient experience in assessing the amount of profit or savings made due to engaging in misconduct. The reason they don't is perhaps because until very recently, proceedings for disgorgement of illicit profits were informal. It is only in recent years that French law has acquired legislation allowing for the confiscation or disgorgement of illicit profits, and this only in certain sectors. But we need time for the courts to acquire sufficient economic expertise to effectively combat the tricks used by businesspeople in all sectors. This very variety of sectors in which illicit profits are made leads us to the second lesson.

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of the commercial court, but they also belong to the presiding judge of the Tribunal de Grande Instance: see art 809, paragraph 1 CPC: 'The presiding judge [of the Tribunal de Grande Instance] may always, even where confronted with a serious challenge, order in a summary procedure such protective measures or measures to restore (the parties) to (their) previous state as required, either to avoid an imminent damage or to abate a manifestly unlawful disturbance.'

[2]Commercial court of Bobigny, 26 September 2013, claim no. RG 2013R00400, available online. The italics are ours.

[3]See 'Ouverture le dimanche, Leroy Merlin et Castorama bravent l'interdiction', Le Parisien, 27 September 2013; adde 'Leroy Merlin et Castorama ouvrent leurs portes malgré l'interdiction', Le Figaro, 28 September 2013. On 29 October 2013, the Paris Court of Appeal overturned the interim order from the presiding judge of the commercial court of Bobigny. Finally, decree no. 2013-1306 of 31 December 2013 (Official Journal of the French Republic (JORF, Journal Officiel de la République française), no. 0304 of 31 December 2013, p 22411, text no. 65) granted DIY stores a temporary derogation, from 1st January 2014 to 1st July 2015, enabling them to open on Sundays. See for further information regarding 'astreinte' (daily monetary penalty) Viney and Jourdain (2011), no. 6-5.

The topic of disgorgement of illicit profits is not the sole preserve of tort and contract law.[4] A number of authors have even argued that it be *set aside* from the area of tort law and some of their arguments are convincing. In particular, some have argued that in accordance with the concept of commutative justice advocated by Aristotle, the purpose of obliging the perpetrator can only be to *indemnify* the victim or unsatisfied creditor, by making good the loss incurred.[5] It is true that this is the exact meaning of the term "indemnity". Consequently, any mechanism that aims to do more than compensate losses should be developed *outside* the sphere of tort law, whether its purpose is to *punish* the perpetrator or to disgorge illicit profits, even where such profits are higher than the losses incurred.[6] At first sight, substantive law confirms this view, the only *official* purpose assumed by tort law being "full reparation" of the damage.[7] Compensating losses, returning the victim or unsatisfied creditor to their position prior to when the loss occurred is the stated aim of the Civil Code[8] and is regularly restated by the Court of Cassation.[9]

However, as long as strict compliance with this equivalence between loss and compensation is not supplemented by another mechanism, perpetrators of harmful activities have an incentive to expand these because what they make in profits or savings outweighs the loss incurred.

The same thing occurs in counterfeit, unfair competition, unfair trade practices, environmental damage, infringement of personality rights through the media, overbooking in transport, non-compliance with safety rules that must be observed by professionals but breaches of which allow them to save considerable sums – the list has no limit other than that of human greed.

In some sectors, where the opportunities to make illicit profits are more often seized than in others, the public authorities have timorously attempted to introduce

[4]Strictly speaking, interlocutory proceedings are not part of tort law, although interim orders aim at putting an end to an unlawful disturbance ("trouble illicite"), ie at preventing the damage suffered by the plaintiff from becoming more serious.

[5]See in particular Chénedé (2008), no. 499 et seq.

[6]See among other publications, Piedelièvre (2001), in particular no. 5 and no. 22; adde Chénedé (2008), no. 502.

[7]See for a recent and insightful study, Coulon (2012), 679 et seq.

[8]See especially for delictual liability, article 1382 of the Civil Code: "*Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it*"; adde, for contractual liability, art 1149 of the Civil Code: "*Damages owed a creditor are, in general, for the loss he sustained and the profit of which he was deprived, subject to the exceptions and the modifications below.*"

[9]See the following two cases, where the ruling was held in view of art 1382 Cciv: 1) Première Chambre civile de la Cour de cassation, 9 November 2004, appeal no. 02-12.506, Bulletin civil I, no. 264, JurisClasseur Périodique 2005, part I, 114, no. 1 et seq, obs. Grosser: "*Whereas, however, the reparation of damage, which must be integral, may not exceed the amount of the damage incurred*"; and 2) Chambre commerciale de la Cour de cassation, 11 mai 1999, appeal no. 98-11.392, Bulletin civil IV, no. 101: "*Whereas the reparation of damage may not exceed the amount of the damage incurred.*" As a result, if trial judges were to explicitly allocate damages in order to disgorge illicit profits instead of repairing the damage incurred, their decision would be inevitably quashed by the Court of cassation: see Fabre-Magnan (2013), 55.

mechanisms for disgorging such profits. However, as each of these instruments of disgorgement was drawn up in reaction to a particular situation, their scope is very limited. What's more, there is not always legislation or a general principle to order the disgorgement of illicit profits outside these sectors. While this does not mean that disgorgement is impossible, when it happens it is covert and has no legal framework, giving rise to issues of legal certainty, which a number of reform proposals are attempting to remedy.

It must be noted that it is not always easy to delineate the topic of disgorging illicit profits. What is certain is that disgorgement requires restitution. The topic is therefore more restricted than simply *penalising* illicit profits. But the distinction itself also gives rise to questions. For example, when an independent professional and an individual client agree on manifestly excessive fees for a service provided by the professional, does the court-ordered reduction of such fees –which courts have felt free to make rulings on since the "*Ancien Régime*"[10] – come within the scope of this study? I believe the answer must be no, for two reasons. The first reason is that the concept of disgorgement is missing: disputes most often arise *before* the client has paid the fees, meaning that there is no illicit profit to be "disgorged" per se. The second reason is that unlawfulness is not clearly characterised: the binding force of agreements would suggest that unless special provision is made, the courts have no power to order any such revision. Moreover, unlawfulness does not occur in the same terms as suggested by the topic. The topic of disgorging illicit profits covers profits made in contravention of a prohibition which, although clearly defined, has not been sufficiently dissuasive. However, with a court-ordered reduction of agreed fees, while the attitude of service providers may smack of knavery, their behaviour does not amount to persistent infringement.[11] Regardless, these hesitations show that the disgorgement of illicit profits has no legal framework as such.[12]

This is what is shown by this study of the means used to achieve the disgorgement of illicit profits. This study will be followed by an investigation, in terms of prospective law, of potential means of disgorgement.

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[10]"Ancien Régime": the political and social system in France before the Revolution of 1789" (Oxford Dictionary of English, 2014). See for further information on court-ordered reduction of fees, among numerous references, van Dievoet (1963), 911 et seq.; as for case-law, see in particular Chambre des Requêtes de la Cour de cassation, 11 March 1824; Sirey 1822-1824, chronologie, 413; Chambre des Requêtes de la Cour de cassation, 12 January 1863, Dalloz périodique 1863, Part I, 302, especially 304: '*Considering all these findings, the trial court had the right and the duty to assess, as it did, the proportion between the agents' actual activity and the agreed fees, and to reduce it in case the fees appeared to be immoderate*'; Chambre civile de la Cour de cassation 29 January 1867, Capitant et al. (2008), no. 280.

[11]Likewise, when the organizers of a prize draw who promise winnings which reveal to be fallacious, the situation does not call for the "disgorgement" of illicit profits. Neither the amount of a fine, nor the money paid by the organizers to the addressee can be considered as "disgorgement" money. They merely represent a sum of money paid, not disgorged.

[12]See also, from a tort law standpoint, Nussenbaum (2005),78 et seq.; from a contractual liability standpoint, and in particular as regards breach of contract, see Fauvarque-Cosson (2005), 479 et seq.

The Means Currently Used

To report on the current state of French substantive law in this regard, two observations come to mind. Illicit profits can be disgorged by both official (A) and roundabout (B) means.

Disgorgement by Official Means

There are three sets of official mechanisms for confiscating profits for restitution. What they have in common is their sectoral character: none of them could be used as a basis for a more general approach.

The first series of provisions derives from the Act of 29 October 2007 to counteract counterfeiting, transposing the European Directive of 29 April 2004 on intellectual property rights.[13]

A number of articles offer the applicant two alternatives, both of which openly mention illicit profits acquired by the counterfeiter, enabling "the applicant to include the full or flat-rate disgorgement of profits in the sum to be paid by the perpetrator".[14] These texts, drafted along the same model, relate mainly to intellectual property,[15] drawings and models,[16] patents,[17] topographies of semiconductor products,[18] plant variety rights[19] and brands.[20]

Other provisions created by the same act clearly mention the confiscation of illicit profits. Article L. 331-1-4(4) of the Intellectual Property Code provides as follows: "The court may also order *the confiscation of all or part of the receipts* obtained by reason of counterfeiting, infringement of a right related to copyright or to the rights of database producers' rights, such confiscated receipts to be handed over to

[13] Act no. 2007-1544 of 29 November 2007, Official Journal of the French Republic no. 252 of 30 October 2007, 17775; Directive 2004/48/CE of 29 April 2004 on the enforcement of intellectual property rights. For further information on the relation between this 2007 act and tort law, see: Gautier (2008), 727; Huillier (2009), 245 et seq.; Maréchal (2012), 245 et seq.

[14] Viney and Jourdain (2011), no. 6-7, p 24.

[15] Art L331-1-3 of the Intellectual Property Code (hereafter CPI): "For assessing damages, the court shall take into account the negative economic consequences – including the loss of profit – sustained by the injured party, the profits made by the infringer of the intellectual property rights and the non-pecuniary damage caused to the owner of the said rights because of the infringement. However, the court may, alternatively and upon request by the injured party, award damages as a lump sum which may not be lower than the amount of the royalties or fees that would have been due if the infringer had requested authorization for the use of the right it has infringed."

[16] Art L521-7 CPI.

[17] Art L615-7 CPI.

[18] Art L622-7 CPI.

[19] Art L623-38 CPI.

[20] Art L716-14 CPI.

the victim or his successors in title". Is this type of confiscation a mechanism of tort law or a criminal measure?[21] It is difficult to answer this, but it suffices to note that there are two other articles drafted in the same manner inside a chapter entitled "Criminal Provisions".[22] These are articles L. 335-6 and L. 335-7 of the same code, which, with similar clarify, that the court may order "*the confiscation of all or part of the receipts* (. . .)" from infringers. Interestingly, confiscation can be ordered in addition to damage,[23] indicating that in this particular case, the confiscation of illicit profits is not considered sufficient indemnity. Finally, the fact that this legislation is quite recent and the number of convictions low makes it difficult to assess the effectiveness of this mechanism: how many offenders have had their profits confiscated and how many have been ordered to disgorge their illicit profits? It is not currently possible to answer these questions.[24]

In any case, some authors have expressed doubts about the effectiveness of all these mechanisms arising out of the 2007 Act.[25] It is true that parliamentary work involves ambiguities, in that it implies that these mechanisms should not violate the principle of full reparation deriving from tort law.[26] In addition, a response issued in 2009 by the Minister for Justice aggravated this ambiguity, by asserting that these provisions existed "*without calling into question the principle of full reparation for loss*".[27] Finally, the information report assessing the 2007 Act submitted in 2011 to the Speaker of the Senate, perpetuates the idea that the disgorgement of illicit profits should not exceed the threshold of full reparation.[28]

However, counterfeiting is not the only area where the disgorgement of illicit profits is officially accepted. On the other hand, the 2007 Act is the only one that creates a mechanism exclusively devoted to disgorgement. This is what makes the difference between the first mechanism and the other two, which I will now go into in detail.

The second mechanism is the *civil fine*,[29] levied for anti-competitive practices. Since the Act of 4 August 2008,[30] the Commercial Code provides that the Minister

[21] See for a series of reflection on this particular topic, Dreyer (2011), 487; adde Borghetti (2009), 55 et seq, in particular no. 12.

[22] Chapter V (Criminal Provisions) of Title III (Prevention, Proceedings and Sanctions) of Book III (General Provisions relative to copyrights, to neighbouring rights and to the rights of database producers).

[23] See Art L335-6 para 3 CPI: "[The court] may also order, at the cost of the convicted party, the destruction or the restitution to the harmed party of the objects and things withdrawn from trade channels or confiscated, *without prejudice to any damages.*" The italics are ours.

[24] See for critical comments on the Act of 2007, Stasiak (2009).

[25] See in particular Maréchal (2012); and Mésa (2012b), especially no. 3.

[26] See Maréchal (2012).

[27] Official Journal of the French Republic, 12 November 2009, 2651.

[28] Béteille and Yung (2011), 28 et seq.

[29] See on the theme of civil fines ("amendes civiles") Behar-Touchais (2002).

[30] Act no. 2008-776 of 4 August 2008, art 93-I, 3°.

for Economic Affairs and the public prosecutor may ask the court to which the case is referred to order the "recovery of the undue sum" and to impose a penalty which, while not exceeding two million Euros, "*may be raised to three times the sums unduly paid*" (Commercial Code, Art. L. 442-6, III). It is noteworthy that this fine *comes on top of* compensatory damages, and the existence of a threshold means that profitable tort can be maintained when the illicit profit exceeds two million Euros. This fine is therefore considered a "penalty". And yet, as Prof. Viney reminds us, "a penalty is not generally determined *according to the profits made* but according to the gravity of the offence".[31] Most importantly, despite its name, a "civil" fine is subject to the basic requirements of criminal law, as confirmed by the Constitutional Council in 2011.[32] These requirements notably include: (i) the principle of legality, which prohibits analogical reasoning by reducing the scope of application of the text to what is strictly laid out; (ii) the right to a fair trial, which has developed considerably around Article 6 of the European Convention on Human Rights; (iii) and the presumption of innocence, set out in Article 6(2) of the European Convention on Human Rights, which prohibits the presumption of liability so favoured by civil law.[33]

The third series of measures comes under criminal law in its entirety. An example of this is the issue of insider trading. The Monetary and Financial Code provides for a fine of 1.5 million Euros "*which amount may be increased to a figure representing up to ten times the amount of any profit realised and shall never be less than the amount of said profit*" (Art L465-1). This mechanism largely exceeds the objective of disgorgement of illicit profits, because it also provides for the *punishment* of the party responsible. This therefore is an official means of disgorging illicit profits but it is not exclusively designed for this purpose. The same observation could be made as regards the penalties provided under the Criminal Code for handling stolen goods ("*recel*", ie receiving) and money laundering,[34] where a fine can amount to up to half of the value of the gains from the offence: disgorgement of illicit profits is not the primary objective of these penalties but increases the punishment for such offences.

Any one of these three official means can be used to disgorge illicit profits but disgorgement is not guaranteed. It is even less certain when roundabout means are used.

[31] Viney (2005), 89 et seq.

[32] See in particular Constitutional Council's ruling no. 2010-85 of 13 January 2011, Question prioritaire de constitutionnalité (QPC), Établissements Darty et Fils; Mainguy (2011); Behar-Touchais (2011).

[33] See on all these aspects Carval (1995), no. 206 to 214; adde Mésa (2009).

[34] For handling stolen goods, see Art 321-3 of the Penal Code: 'The fines provided by articles 321-1 and 321-2 may be raised beyond €375,000 to reach half the value of the goods handled'; for money laundering, see Art 324-3 of the Penal Code: 'The fines referred to under articles 324-1 and 324-2 may be raised to amount to half the value of the property or funds in respect of which the money laundering operations were carried out.'

Disgorgement by Roundabout Means

Many means can be used to disgorge illicit profits, even though they were not designed for that purpose. Despite their diversity, what they have in common is that they have developed behind the screen of the inherent authority of judges to decide on the merits of the case.

Practitioners have noted, for example, that in civil proceedings, the losing party is often ordered to pay discretionary costs (Art. 700 of the Code of Civil Procedure) on the grounds of equity[35] in order to punish the perpetrator,[36] but also to disgorge illicit profits.[37]

Another roundabout means of disgorgement is the coercive progressive fine, which was also not designed to prevent illicit profits being made. Its purpose is rather to ensure the execution of a conviction. In this, it has a dissuasive rather than a corrective role. However, as we have seen with the DIY store case, *if the proceedings against the infringement continue despite the imposition of a coercive progressive fine*, the latter no longer has a preventive role but becomes a means of *disgorging* illicit profits. Of course, we can assume that in this case, there would not be full disgorgement. But there would all the same be partial disgorgement, through roundabout means.

More often, where disgorgement of illicit profits is not expressly provided for by a text, it happens covertly, under the guise of civil liability, which is not designed to achieve any aim other than full compensation for damages.

Illicit profits are thus disgorged by bending the principle of civil liability.

The most obvious assumption is compensation for non-pecuniary damages, which is very difficult to assess in monetary terms. As judges deciding on the merits of a case have inherent discretionary authority to determine the extent of the loss,[38] the assessment of non-pecuniary damages is not subject to review by the Court of Cassation, meaning that damages may be awarded that serve in fact to disgorge illicit profits.[39] This is particularly true in the case of infringement of personality rights through the press, where the Court of Cassation has ruled for almost 20 years, based on Article 9 of the Civil Code that a finding of loss is not even required for compensation to be ordered. Damages are therefore detached from the assessment of loss because the infringement on its own is sufficient to justify their being awarded.[40] In addition, a single infringement may give rise to

[35] Art 70 CPC: "(. . .) the judge will take into consideration the rules of equity and the financial condition of the party ordered to pay".

[36] See in particular Anziani and Béteille (2009), 82.

[37] Martin (1976).

[38] See Chambre Civile de la Cour de cassation, 23 May 1911, Dalloz Périodique 1912, part 1, 421.

[39] See in particular Pierre (2010), especially 1120.

[40] See in particular Première Chambre civile de la Cour de cassation, 5 November 1996, no. 94-14.798, Société Prisma Presse, Bulletin civil I, no. 378; note by Laulom (1997); observations by Jourdain (1997); Hauser (1997); Ravanas (1997); Viney (1997); adde Première Chambre civile de la Cour de cassation, 12 December 2000, appeal no. 98-21.161, Bulletin civil I, no. 321; Note

two series of compensation: one based on upholding the right to privacy and the other based on upholding the right of personal portrayal.[41] This does not make it easy to assess damages, an assessment that is even less transparent by the fact that it is rare that the media instrument infringing the right to privacy is entirely devoted to this infringement, such that "it would appear difficult to establish an accurate causal link between such publication and the gains made on that occasion".[42]

The difficulties of compensating non-pecuniary damages thus provide a pretext for modifying – discreetly and imperfectly – the function of damages, by assigning to them the role of disgorging illicit profits. But non-pecuniary damages are not the only entry point for this development.

Another area where civil liability is used to make up for a lack of legislation is that of "micro damage"[43] caused to a large number of victims.[44] At the time of writing, the draft Consumer Act appears to have been approved by the French parliament,[45] thus finally allowing class action suits to be brought.[46] But case-law has long been thinking about the ways of getting around the absence of legislation to avoid perpetrators of such micro disabilities continuing to make money through the proliferation of cases where the damage caused to victims is so minimal that it is not viable for the latter to pay significant legal fees to seek compensation. Recently, faced with an internet access provider that continued to require full payment for subscriptions while subjecting subscribers to repeated malfunctions, the Court of Cassation conceded that a consumer protection association could seek redress for infringement of "a collective interest".[47] This extension of the concept of infringement of collective interests for which a consumer association may seek redress opens up the possibility that the gains or savings made by the perpetrator of micro damage can be returned to the applicant.

The above developments show that the absence of a legal framework leads to legal confusion and uncertainty. This prompts an investigation of prospective law.

Saint-Pau (2001); Caron (2001); Hauser (2001); Première Chambre civile de la Cour de cassation, 17 September 2003, appeal no. 00-16.849; observations Bakouche (2003).

[41] See especially Première Chambre civile de la Cour de cassation, 12 December 2000, references in the previous footnote.

[42] Dreyer (2008).

[43] Fabre-Magnan (2013), 437.

[44] See in particular Bouthinon-Dumas (2011); adde Viney (2009), in particular the third part of her publication.

[45] The Parliament gave its approval on 13 February 2014 ("Projet de loi relatif à la consommation", serial no. EFIX1307316L).

[46] Article 1 of this draft bill elaborates on how this French version of class actions could be filed. Commentators often emphasize the relationship between class actions and disgorgement of illicit profits: see, for a recent publication on this subject, Nussenbaum (2011).

[47] Première Chambre civile de la Cour de cassation, 13 November 2008, appeal no. 07-15.000; observations Stoffel-Munck (2009).

The Potential Means

De lege ferenda, the disgorgement of illicit profits is the subject of in-depth scholarly debate, surfacing in many proposals to reform contract and tort law.

The Means Envisaged in the Scholarly Debate

The disgorgement of illicit profits is the subject of much scholarly debate. Whatever their views, sometimes widely diverging, authors have some points in common.

Firstly, they all argue for a legal framework to end the legal uncertainty resulting from the lack of transparency in disgorging illicit profits. Secondly, they all pin their hopes on tort law as an instrument for disgorging illicit profits. A trend is therefore developing, moving away from the monopoly of full compensation and towards other purposes assigned to tort law and assumed in broad daylight. The third point authors have in common is the idea that to effectively combat illicit profit-making, legislation with general scope rather than a sectoral approach is required that leads to a proliferation of texts with limited scope.[48] Finally, the fourth point on which authors agree is the term chosen to refer to the offence warranting disgorgement of illicit profits: "profitable tort".

This is where agreement ends. Because as soon as the issue of how tort law should frame the disgorgement of illicit profits, differences abound.

These differences go right back to the question of how to define "profitable tort". Two very different definitions have been proposed.

One school of thought sees it as an offence "generating a gain or saving for its perpetrator, in addition to or independently of the loss it causes".[49] According to this school of thought, profitable tort is assessed according *solely to the illicit profits* made, whether these are gains or savings. Therefore, the gravity of the offence and its moral dimension are what are important: there is no reference to the *intention* of the perpetrator. Consequently, damages corresponding to profitable tort thus defined have no punitive value, they are merely "restorative".[50] Mr Rodolphe Mesa in particular proposes establishing the principle of "full disgorgement" to "return the offending party to the position it would be in if the offence had not been committed, in the same way that the principle of full compensation returns the victim to the position it would have been in if the act causing the loss had not taken place".[51]

[48] See, however, the "Rapport d'information du Sénat" (Anziani and Béteille (2009)), in which a sectoral approach is preferred to a text with a general scope.

[49] Mésa (2012a); see also Viney and Jourdain (2011), no. 6-7; adde Stark et al. (1996), no. 1335. From a general standpoint, see Mésa (2006); Fasquelle (2002).

[50] Mésa (2012a).

[51] Mésa (2012a); with a diverging view, see Vignolle (2010).

This view has a number of advantages.

By clearly separating the area of *punishment* from that of *disgorgement*, this view allows the law of disgorgement of illicit profits to develop fully within civil law, with no recourse to criminal law. Thus, the presumption of liability can be restored, because the principle of presumed innocence is side-lined.

It would be then easier to calculate compensatory restitution because this would be exactly equal to the amount of the illicit profits, without including aggravating factors relating to tortious intent or the gravity of the offence. Compensatory restitution could only be capped in the case of a penalty clause duly agreed in advance. Instead of extending the court's remit, which would raise the spectre of arbitrariness, the court's margin of manoeuvre would be extremely limited: it would not be able to order disgorgement *that was lower* than that of the illicit profits.

On the other hand, even among supporters of this purely restorative view, two differences appear.

The first relates to the possibility for the beneficiary of the illicit profits to have the conviction covered by an insurance policy. Some authors believe that this guarantee is "quite acceptable where the conviction tends to disgorge illicit profits",[52] while others are opposed, arguing the dissuasive role of liability and the difficulty of designing an insurance policy which is, most often, intentional.[53] The future will perhaps bring a compromise, already observed in liability insurance, which "reconciles both insurance cover and a tightening of its introduction".[54]

The second difference concerns the disgorgement of damages. Some authors have no serious objection to the disgorgement of profits in favour of the victim or unsatisfied creditor, even suggesting that the Treasury should be the beneficiary.[55] Others, however, dismiss this possibility. They argue that the victim should not be allowed to benefit from the committing of an offence, because this would mean that the illicit profits would simply change sides. Furthermore, if the money were returned to the Treasury, could one continue to say that the penalty was purely "private" and thus does not require the application of criminal law? These authors suggest that the money be repaid into guarantee funds designed to compensate the interests affected.[56]

According to a second and contrary school of thought, the definition of profitable tort is too restrictive if it is limited to simple self-enrichment allowed by the committing of an offence. For example, Ms Laureen Sichel holds that the decisive factor is the "strategy implemented in order to make a profit or saving".[57] Profitable tort

[52] Viney and Jourdain (2011), 28.

[53] Mésa (2012a).

[54] Pierre (2010), 1126.

[55] Viney and Jourdain (2011), 28.

[56] See in particular Mésa (2009).

[57] Sichel (2012), no. 551.

would therefore be classified under intentional, fraudulent[58] and even inexcusable offences.[59]

The result of this would be that private penalty is the only appropriate response to the committing of profitable tort. The punitive dimension is thus significant in this second school of thought. Simply disgorging illicit profits is not sufficiently daunting: the amount of the damages must be "higher than the gain – or saving – made from the harmful activity, which amounts to depriving it of all interest".[60] The solution in this case would be to make an award for damages that are not simply restorative but "exemplary". These would comprise "the equivalent profit that the unlawful behaviour procured to the offender and a percentage aimed at dissuading any repeat of the offence".[61] While the intentional nature of profitable tort excludes any insurance cover under this scenario, it should be noted that the inexcusable nature of the offence does not. Ms Sichel thus suggests, rightly in our view, that insurers could be ordered to pay exemplary damages to the victim or unsatisfied creditor *and that they could then pursue the offender*.[62]

These areas of convergence and divergence also appear in various texts aimed at reforming tort law.

The Means Envisaged in the Proposals for Reform

As far back as 2005, Article 1371 of a preliminary bill to reform contract law and the statute of limitations ('the Avant-Projet *Catala*') stated that profitable tort should be penalised through the awarding of punitive damages.[63] This text, however, was

[58] See also Méadel (2007), in particular no. 10 and 11.

[59] Sichel (2012), no. 551.

[60] Sichel (2012), no. 555.

[61] Sichel (2012), no. 560.

[62] Sichel (2012), no. 560.

[63] Catala et al. (2005), 182, draft article 1371: '*L'auteur d'une faute manifestement délibérée, et notamment d'une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du juge d'octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêts accordés à la victime. Les dommages-intérêts punitifs ne sont pas assurables.*'; see the English translation in Levassuer and Gruning (2011), 460: '*One whose fault is manifestly premeditated, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages besides compensatory damages. The judge may direct a part of such damages to the public treasury. The judge must provide specific reasons for ordering such punitive damages and must clearly distinguish their amount from that of other damages awarded to the victim. Punitive damages may not be the subject of a contract of insurance.*'; compare with the translation by Cartwright and Whittaker (2010), 697: "*A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the court may in its discretion allocate to the Public Treasury. A court's decision to order payment of*

severely criticised for mixing civil and criminal law, distorting the restorative nature of tort law by inserting a repressive mechanism.

Senators Anziani and Beteille then recommended, in a report delivered in 2009, that these same *punitive* damages addressed profitable tort[64] and this later appeared in a bill to reform tort law.[65] But again, the draft article 1386-25 did not fulfil the objective of disgorging *all* illicit profits, because the text provided that the total amount of the damages could never exceed double what was provided for compensation. Therefore, there is no deterrence for illicit profits that amount to over twice the damage caused.

In parallel, Article 120 of a preliminary draft bill to reform contract law, led by Prof. Terré under the auspices of the Academy of Moral Sciences, was aimed at combating "lucrative fraud", "i.e. where a party wilfully fails to comply with the law, preferring to risk a conviction and damages so as to be able, for example, to conclude contracts elsewhere, at more advantageous conditions".[66] However, this article also provided for the partial disgorgement of illicit profits,[67] which was also criticised.

Finally, in 2011, another group led by Prof. Terré proposed a preliminary bill to reform tort law, Article 54 of which aimed to include profitable tort.[68] This time, illicit profits were no longer penalised with "punitive damages" as the article provided merely for the disgorgement "*of the profit made by the defendant*". In other words, the "full disgorgement" that Rodolphe Mesa is calling for. However, it is not

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damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance."; adde Carval (2006).

[64] Anziani and Béteille (2009), Recommendation no. 24, p. 100.

[65] Draft Bill from the Parliament ('Proposition de loi'), no. 657, introduced by Senator Laurent Béteille, 9 July 2010; see especially, draft article 1386-25.

[66] Rémy (2008).

[67] Art 120 of the 'avant-projet de réforme Terré du droit des contrats': 'Toutefois, en cas de dol, le créancier de l'obligation inexécutée peut préférer demander au juge que le débiteur soit condamné à lui verser *tout ou partie* du profit retiré de l'inexécution' (the italics are ours). 'However, in the case of fraud, the creditor of the unperformed obligation may prefer to ask the judge that the debtor be ordered to pay him *all or part of* the profit made from the non-performance.' (the translation and the italics are ours).

[68] Article 54 of the 'avant-projet de réforme Terré du droit de la responsabilité civile': '*Lorsque l'auteur du dommage aura commis intentionnellement une faute lucrative, le juge aura la faculté d'accorder, par une décision spécialement motivée, le montant du profit retiré par le défendeur plutôt que la réparation du préjudice subi par le demandeur. La part excédant la somme qu'aurait reçue le demandeur au titre des dommages-intérêts compensatoires ne peut être couverte par une assurance de responsabilité*'; '*When the perpetrator of a damage has intentionally committed a profitable tort, the judge has the ability, provided he states the specific reasons of his decision, to order a payment of the same amount as the profit made by the defendant instead of ordering the reparation of the damage suffered by the plaintiff. The part exceeding the amount that the plaintiff would have been awarded as compensatory damages may not be covered by a liability insurance.*' (translation is ours).

certain that the wording of this text would enable the penalisation of *savings made* as well as the gains.[69] But the argument is not unassailable, because the word "profit" could be interpreted in a wider sense, as there is no longer any repressive dimension imposing a strict interpretation. It is also regrettable that this text requires the courts to choose between compensating the damage and disgorging the illicit profits.[70]

None of these reform proposals has to date given rise to any true change. The simplicity of the *Digest* is far behind us. To quote Pomponius, cited therein: "nobody should enrich himself at the expense of others".[71] Who would have believed that it would be so difficult to disgorge the fruit of illicit profits?

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[69] See Mésa (2012b).

[70] See also Mésa (2012b).

[71] Digest, Pomponius, 50-17.

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