

# **DANIEL ARTHUR LAPRES**

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**Translation by Daniel Arthur Laprès and Anne-Sophie Bacouel**

## **COURT OF JUSTICE OF THE REPUBLIC**

Case N°: 2016/001

**JUDGMENT OF DECEMBER 19, 2016**

**Nature of the offense:** embezzlement of public funds by a third party, resulting from the negligence of Mrs. Lagarde (article 432-16 of the Criminal Code).

**Court seized pursuant to:** the decision of 17 December 2015 rendered by the inquiry commission of the Court of Justice of the Republic

### **PERSON PROSECUTED**

Name: Mrs. Christine X ...

Assisted by:

**Maître Patrick MAISONNEUVE**

Lawyer before the Bar of Paris

232, boulevard Saint Germain

75007 PARIS

**Maître Bernard GRELON**

Lawyer before the Bar of Paris - (LIBRA Avocats)

5, rue Recamier

75007 PARIS

**Maître Grégoire BERTROU**

Lawyer before the Bar of Paris

21-23 rue de la ville the Bishop

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## **1 COURT OF JUSTICE OF THE REPUBLIC**

### **REMINDER OF THE PROCEDURE**

By decision of 17 December 2015, the Inquiry Commission of the Republic deferred Ms. Christine X ... to the aforesaid Court for having, in Paris, in any case on the national

territory, in 2007 and 2008, in any case since a date such that it not would be foreclosed, as Minister of the Economy, Finance and Employment, then Minister of the Economy, Industry and Employment, vested with public authority:

- on the one hand, in September and October 2007, decided to submit to arbitration the disputes between the CDR and the liquidators of the Tapie Group companies as well as the Y spouses ..., when repeated reports of the SIA prepared for her had advised against this procedure, and in particular:

without having beforehand verified that the recourse to arbitration was legal;

by appointing Mr. C, who was unfamiliar with the case and who would in the following weeks reach the age limit as the head of the EPFR;

for not having undertaken an in-depth examination of the element of the case, in particular without having inquired about the attempt, during 2004-2005, to achieve a solution through mediation and about the proposals which were then made, about the conditions set forward on December 22, 2005 by the "Committee of Wise Men", about the

prescriptions of Article 2 of the Law of November 28, 1995 and the Interpretative Letters of March 17, 1999 of the Minister of the Economy concerning the guarantee by the State of the non-quantifiable risks and concerning the fixed financial contribution of Crédit Lyonnais;

without ensuring compliance with the conditions laid down in her written instructions of October 10, 2007 as reaffirmed by the EPFR Board of Directors;

without consulting the legal department of her ministry;

without supervising the arbitration sufficiently, in particular the claims of compensation.

- moreover, in July 2008, waived the right of recourse against the arbitral award of 7 July 2008, though she had been informed of the existence of serious grounds for voiding, in particular:

\*having acted hastily, nineteen days before the expiry of the right of recourse;

\*having neglected to carry out a sufficient study of the legal arguments which might have been invoked to support a petition for voiding of the award; that, before deciding, in effect, she:

did not read all the reports of the SIA prepared for her,

nor, obtain the opinion of Mr. A, whom she never summoned to explain to her his point of view; did not consider it worthwhile, as regards the history of the case, to go beyond a reading the judgment of the plenary assembly, as she has herself admitted, while indicating that the reasoning had been difficult to read; did not seek to meet with M<sup>e</sup> Soltner, counsel for the CDR before the plenary assembly, so that he might explain to her the contents of his memos of July 17 and 23, 2008, which were, in her view, *"not very easy to read"*; did not consult the legal department of her ministry, nor, even unofficially, the Council of State ("Conseil d'Etat").

having put in place a unilateral decision-making process enclosed within itself, tending only to reinforce her in her *"initial position, which was not going towards an appeal"*, whether as regards:

the organization of the unanimous meeting of July 20, 2008 with Mr. E ... and M<sup>e</sup> August, from which were excluded the representatives of the SIA and the lawyers in favour of the recourse, M<sup>e</sup> Soltner and M<sup>e</sup> Martel; the manner of collection of opinions, some of which may have been requested, as the prosecution claims in its indictment, *"to counterbalance the previously issued opinions, and which were in part favourable toward the exercise of a recourse."*

And for having, as a result of the faults enumerated above, which constitute gross negligence, permitted the embezzlement by third parties of the sum of EUR 403 Millions paid by the EPFR to the liquidators of the Tapie Group companies and to the spouses Y ..., in execution of the arbitral awards of July 7 and November 27, 2008. Facts covered and punished by articles 432-16 and 432-17 of the Criminal Code (NATINF n°1435).

By order of September 12, 2016, the President of the Court of Justice of the Republic fixed the opening of the debates on Monday, December 12, 2016 at 2 pm.

The formalities stipulated in articles 28 and 30 of the Organic Law of November 23, 1993 have been carried out properly.

## **THE HEARINGS**

At the hearing on Monday, December 12, 2016, the President

declared the hearing open at 2 pm and verified the identity of the accused Christine X ...

The President read out the act which brought the case before the Court.

The President informed the accused of her right to make statements, to answer the questions directed towards her or to remain silent.

The President read the list of witnesses:

- cited by the general prosecutor

Mr. Bruno A ..., who will be heard on Wednesday, 14 December at 9 am

Mr. Stéphane G ..., who will be heard on Wednesday, 14 December at 10.30 am

Mr. Jean-Louis R ... and Mr. Thierry S ..., who will be heard on Wednesday, 14 December at 2 pm

Mr. Jean-François E ... and Mr. Bernard C ..., who will be heard on Wednesday, 14 December at 4 pm

Mr. François M ... and Mr. Claude K ..., who will be heard on Thursday 15, December at 2 pm;

- cited by the defense:

Mr. Gilles T ..., Mr. Didier U ..., Mr. Christian V ... and Mr. Jacques W ..., who will be heard on Thursday, 15 December at 9 am.

The President recalled the facts and the background.

Maître Patrick Maisonneuve, Maître Bernard Grelon and Maître Grégoire Bertrou, lawyers for the accused, filed submissions, regularly acknowledged by the President and the Clerk of the Court, moving that the Court stay the proceedings until the rendering of a final criminal judgment against Mr. Y ..., Mr. C ..., Mr. G ..., Mr. E ..., Mr. H ... and Mr. I ...

Maître Patrick Maisonneuve, lawyer, presented orally his explanations, observations and pleadings in support of the motion.

The Prosecutor presented orally his observations, concluding that the motion should be joined with the merits.

Maître Patrick Maisonneuve, lawyer, presented orally his observations.

The Court withdrew to deliberate, and the alternate judges retired to a separate room.

When the hearing resumed, on the same day at 3.50 pm, the

Court, in the presence of the accused, assisted by her lawyers, in the presence of the Public Prosecutor and the Clerk of the Court, after deliberation, decided to join the preliminary motion with the merits, a decision that is not subject to appeal.

Ms. X... was presented orally her observations on the charges against her.

The President adjourned the hearing at 6 pm until Tuesday December 13, 2016 at 9 am.

When the hearing resumed on Tuesday, December 13, 2016 at 09:05, in the presence of the Public Prosecutor and the Clerk of the Court, Mrs. X ..., assisted by her lawyers, presented orally her observations regarding the charges against her.

The President adjourned the hearing at 12:15 pm until Tuesday, December 13, 2016 at 2 pm.

When the hearing resumed on Tuesday, December 13, 2016 at 2:05 pm, Mrs. Christine X ..., assisted by her lawyers, in the presence of the Public Prosecutor and the Clerk of the Court, presented orally her observations on the charges against her.

The President adjourned the hearing at 3:15 pm to until Wednesday December 14, 2016 at 9 am.

When the hearing resumed on Wednesday, December 14, 2016 at 9:10 am Mrs. X, assisted by her lawyers, in the presence of the Public Prosecutor and the Clerk of the Court,

Maître Jean-Etienne Giamarchi, counsel for Mr. Stéphane G ..., indicted in the proceedings before the Superior Court of Paris, took the floor to explain the reasons for the absence of his client, summoned to this hearing as a witness. At the end of his explanations, Mr. Giamarchi wished to file a written memorandum.

The Public Prosecutor presented orally his observations. Maître Maisonneuve, counsel for Ms X, presented orally his observations and arguments.

The Court withdrew to deliberate, and the alternate judges retiring to a separate room.

When the hearing resumed, on the same day, at 9.30 am, in the presence of the accused, assisted by her lawyers, in the presence of the Public Prosecutor and the Clerk of the Court, the Court, after deliberation, took note of Mr. G's absence and said that Mr. Giamarchi's motion to file a written statement on behalf of Mr. G. was not accepted.

Mr. Bruno A ... was brought into the courtroom and, after having taken the oath provided for in article 446 of the Code of Criminal Procedure, was heard as a witness, in accordance with the provisions of articles 444, 445, 452, 453 and 454 of the Code.

The President adjourned the hearing at 10:55 am until Wednesday, December 14, 2016 at 2 pm.

When the hearing resumed on Wednesday, December 14, 2016 at 2:05 pm, in the presence of Mrs. X, assisted by her lawyers, in the presence of the Public Prosecutor and the Clerk of the Court, Mr. Jean-Louis R ... and Mr. Thierry S ... were brought successively into the courtroom and, after having taken the oath provided for in article 446 of the Code of Criminal Procedure, were heard separately as witnesses, in accordance with the provisions of articles 444, 445, 452, 453 and 454 of the said Code.

Mr. Bernard C ..., was brought into the courtroom.

The President informed him that, since he had been indicted on charges of fraud by a criminal organization and complicity in the embezzlement of public funds in the procedure before the Superior Court of Paris, he would not take the oath.

The President notified the witness of the right to not answer his questions, that is, the right to remain silent, as recognized in the European Convention, in the case law of the Criminal Chamber of the Court of Cassation, and most recently by the decision of the Constitutional Council dated November 4, 2016.

Mr. Bernard C ... was heard as a witness in accordance with the provisions of articles 444, 445, 452, 453 and 454 of the said code.

Mr. Jean-François E ..., was brought into the courtroom.

The President informed him that, since he had been indicted on charges of fraud by a criminal organization and complicity in the embezzlement of public funds in the procedure before the Superior Court of Paris, he would not take the oath.

The President notified the witness of the right to not answer his questions, that is, the right to remain silent, as recognized in the European Convention, in the case law of the Criminal Chamber of the Court of Cassation, and most recently by the decision of the Constitutional Council dated November 4, 2016.

Mr. Jean-François E ... was heard as a witness in

accordance with the provisions of articles 444, 445, 452, 453 and 454 of the said Code.

The President adjourned the hearing at 6 pm until Thursday, December 15, 2016 at 9.30 am.

When the hearing resumed on Thursday, December 16, 2016 at 9:40 am, in the presence of Mrs. X, assisted by her lawyers, in the presence of the Public Prosecutor and the Clerk of the Court, Mr. Gilles T. ..., Mr. Didier U. ..., Mr. Christian V. ..., and Mr. Jacques W. ..., were brought successively into the courtroom and, after having taken the oath provided for in article 446 of the Code of Criminal Procedure, were heard separately as witnesses, in accordance with the provisions of articles 444, 445, 452, 453 and 454 of the said Code.

The President adjourned the hearing at 12:30 until Thursday, December 15, 2016 at 2 pm.

When the hearing resumed on Thursday, December 15, 2016 at 2:05 pm, Mrs. X, assisted by her lawyers, in the presence of the Public Prosecutor and the Clerk of the Court, MM. François M ..., and Claude K ... were brought successively into the courtroom and, after having taken the oath provided for in article 446 of the Code of Criminal Procedure, were heard separately as witnesses, in accordance with the provisions of articles 444, 445, 452, 453 and 454 of the said Code..

The Public Prosecutor and assistant Public Prosecutor presented oral submissions.

The President adjourned the hearing at 6:15 pm until Friday, December 16, 2016 at 9:30 am

When the hearing resumed on Friday, December 16, 2016, at 9:40 am, in the presence of Mrs. X, assisted by her lawyers, in the presence of the Public Prosecutor and the Clerk of the Court,

- Maître Bernard Grelon, counsel for the accused, was heard in his pleadings;
- Maître Patrick Maisonneuve, counsel for the accused, presented orally his arguments;
- Mrs. X. had the last word.

The President declared the debates closed.

The President announced that the Court would deliberate and render its judgment on Monday, December 19, 2016 at 3 pm.

The Court withdrew to deliberate, and the alternate judges retired to a separate room.

And on Monday, December 19, 2016, at 3 pm, the Court, in the presence of the Public Prosecutor and the Clerk of the Court, in the absence of the accused, represented by her lawyers, rendered the present judgment, which was read by the President.

**With respect to the motion for a stay of the proceedings**

In a memorandum filed on December 12, 2016, Maître Maisonneuve, Maître Grelon and Maître Bertrou, lawyers of Mrs. X ..., requested a stay of the proceedings on the ground that the Court of Justice of the Republic was not in a position to determine whether there had occurred an embezzlement, which is a constituent element of the alleged offense against the concerned party, as long as no decision will have been taken in the proceedings pending before the Superior Court of Paris, against Mr. Bernard Y ..., Mr. Pierre H ..., Mr. Maurice I ..., Mr. Stéphane G ..., Mr. Bernard C ... and Mr. Jean-François E ..., who are indicted in proceedings of which the object is to determine whether an embezzlement occurred and to determine their criminal liability.

The Court joined the case to the merits, pursuant to article 459 of the Code of Criminal Procedure.

On the one hand, the procedures underway before the criminal court and before the Court of Justice of the Republic are independent in the relationship between them, no primacy of one over the other results from the Constitution. On the other hand, the offense under article 432-16 of the Criminal Code is a separate infraction from the one referred to in article 433-4 of the same Code and autonomous in relation to the latter. The offense referred to indictment refers to article 432-15 of the said Code only for the definition of property which may be the subject of the destruction, diversion or subtraction that enumerated therein.

Besides, the proper administration of justice requires the Court to rule within a reasonable time, which cannot be achieved by waiting for the outcome of a separate procedure of a random time duration.

It follows, that it is for the Court of Justice of the Republic to determine, on the basis of the elements submitted for its consideration, whether embezzlement of public funds within the meaning of article 432-16 referred to above has been proved.

The application for a stay of proceedings must therefore



be dismissed.

## **With respect to the merits**

### Summary of the facts

It is sufficient, for the purpose of understanding this decision, to recall the following facts:

Mrs. X ... was Minister of the Economy and Finance, Industry and Employment from June 19, 2007 to June 29, 2011, during which time the Ministry had different denominations. She had as chief of staff Mr. Stéphane G, who was already in his position with her predecessor, Jean-Louis R ..., who had been in charge of this Ministry for a month, himself succeeding Mr. Thierry S ... The State Investment Agency (SIA), then headed by Mr. Bruno A ..., had in particular the role of adviser to the Minister in the management of disputes arising in companies in which the State had or had had shareholdings.

Mrs. X ... had, in her ministerial portfolio, the disputes that for several years had been opposing, on the one hand, the spouses Y ... and the companies of which they were shareholders, then their liquidators, and on the other hand, Crédit Lyonnais and its subsidiaries, including notably the Société de Banque Occidentale (SDBO). These disputes included the sale of the company Adidas, of which Bernard Tapie Finances (BTF), a subsidiary of Groupe Bernard Tapie (GBT), owned 78%, that the SDBO had been given a mandate to sell and on which resale it subsequently made a large capital gain of which GBT believed it had been deprived, because of an act of bad faith committed by Crédit Lyonnais and the SDBO, which had been mandated in connection with the initial sale of these shares, pursuant to a memorandum of December 10, 1992 and a subsequent contract of December 16, 1992.

When Mrs. X took up her position at the Ministry of the Economy, there existed a public limited company, Consortium de Réalisation (CDR), of which the State was the sole shareholder, and which had been constituted to carry out the "defeasance" of the assets and bad debts of the Crédit Lyonnais, and Mr. Jean-François E ... was the Chairman of its Board of Directors. The decisions of the CDR could entail the payment of public funds without the prior approval of the Etablissement Public de Financement et de Restructuration (EPFR), in which the State was represented by two officials to whom the Minister gave

instructions. The Chairman of the Boards of Directors of this institution was Mr. Bertrand B ..., who was replaced on September 15, 2007, by Mr. Bernard C ..., who represented EPFR on the Board of Directors of CDR.

A judgment of the Court of Appeal of Paris, dated September 30, 2005, concerning the "Adidas" litigation had found the Credit Lyonnais and the CDR liable to pay the liquidators of Group Tapie companies and the spouses Y ... the sum of € 135 million in compensation for the damage resulting from the sale of Adidas, and found that the alleged moral harm, which claim had been limited by the plaintiffs to one euro, was itself repaired by the award of damages.

When it was seized of a principal recourse only by CDR and Crédit Lyonnais, the plenary assembly of the Court of Cassation ruled, by a judgment of October 9, 2006, first of all, stated that the liquidators, regardless of whether their claims were grounded, were entitled to claim, in respect of GBT, not for damages suffered as a result of the loss suffered as a shareholder of BTF in connection with the resale of Adidas, but for the damage it suffered personally as a result of breaches of concluded agreements: the memorandum of December 10, 1992 and the mandate of December 16, 1992. It follows that *"the action, in so far as it sought compensation for that personal damage, was admissible"*.

Moreover, the Court of Cassation declared ungrounded the argument by which the CDR complained that the Court of Appeal had imputed liability to the financial institutions on the basis of other faults (to have bought the shares which they had been mandated to sell and to have failed to inform their principal loyally) inoperative, whereas the Court of Appeal had held that the only claim for damages which it granted was based on the failure of the Crédit Lyonnais group to propose to the Tapie Group the financing consisting in limited-recourse loans granted to certain transferee companies and whereas the existence of other breaches did not constitute the basis for the decision of the Court of Appeal.

The Plenary Assembly of the Court of Cassation then censured the provisions of the Court of Appeal's judgment, which held the liability of Crédit Lyonnais on the contractual ground, whereas the liquidators had for the sale of Adidas dealt only with SDBO, a separate legal

entity which it was not alleged to have been fictitious nor that its assets would have merged with those of the parent company.

The Plenary Assembly also censured the provisions of the Court of Appeal's judgment which held, that the Crédit Lyonnais group had failed to fulfill its obligations as banker agent, in that it failed to propose to the Tapie Group the financing it had granted to some of the buyers of the contested shareholdings, on the ground that it was not part of the agent's mission to finance the operation in which it was involved and that a banker is always free to propose or consent to a credit, or to abstain or refuse to do so.

The Court of Cassation finally judged that there was no need to rule on the complaints criticizing the Court of Appeal's assessment of the harm. The partial annulment of the judgment was pronounced and the case was referred to the Paris Court of Appeal, otherwise composed.

Following upon this judgment, the liquidators had urged the CDR to submit the Adidas dispute to arbitration in exchange for an abandonment of all their proceedings and actions brought against Crédit Lyonnais and the SDBO with respect to a certain number of disputes. Discussions had been undertaken along these lines in parallel with the filing of the pleadings before the court to which the case had been referred. The Cabinet of the then Minister, Mr. S., had been informed of this, as had the SIA, which had advised against this route for the settlement of the disputes in question. The SIA followed, in this sense, the doctrine that the State's interest - the position of which, according to the Agency, seemed to have been strengthened by the Court of Cassation's judgment - was to continue the judicial procedure in process, without excluding a possible transaction. It should be noted that the SIA had maintained that same position when Mrs. X ... took office. The Agency maintained this position until the final stage prior to the decision to enter the arbitration, and thereafter it only had to work on the modalities of its implementation.

It is in these conditions that the Board of Directors of the CDR voted on October 2, 2007 in favor of the entry into arbitration, on the basis of information submitted to it by its Chairman, Mr. E., and by the lawyer of the CDR, Mr. August, chosen by Mr. E. since February 2007 to advise

him on arbitration procedure. This draft arbitration agreement , as presented at the time, provided that the arbitrators, designated in the act itself: Mr. Pierre P ... , Mr. Jean-Denis O ... and Mr. Pierre H ... , would decide in law, with due respect for res judicata resulting from the judgment of the Paris Court of Appeal and the judgment of the Court of Cassation and that, subject to the provisions of article 1484 of the Code of Civil Procedure, the award would be final, and the parties waived all appeals on the merits.

The parties also agreed that the liquidators of the Group Tapie companies would limit the aggregate amount of their claims to € 295 million plus interest at the legal rate from November 30, 1994; the liquidators of the Y spouses ... limited the aggregate amount of their claims to € 50 million.

On October 10, 2007, on the basis of this draft arbitration agreement and an SIA note dated October 1, 2007, analyzing these proposals but still discouraging recourse to arbitration, Mrs. X instructed the representatives of the State within EPFR not to oppose this procedure, subject to obtaining the written agreement of the Credit Lyonnais, in the event of a finding of liability of the CDR, to pay the deductible of € 12 Million due by the bank, either before the expiration of the term of the board set for October 10, 2007, or before the signature of the compromise. On the same day, the EPFR Board of Directors did not oppose the decision to submit to arbitration.

Mr. E ... then accepted, at the request of the other party, that the clauses of the arbitration agreement with respect to the limits on the claims of the liquidators were thus modified:

- the liquidators of the companies of the Tapie Group and of the Y spouses ... limit the total amount of their claims for material damages to € 295 million plus interest at the legal rate from November 30, 1994;
- the liquidators of the Y spouses ... limit the amount of all their demands for compensation "*for moral damages amounting to € 50 million*".

At the same time, in a letter to the President of EPFR dated October 23, 2007, bearing the signature of the Minister, but which was found to not have been written by

herself, but by a "stamp", Mr. C was requested to interpret the instructions given in advance as follows: obtain written confirmation from Crédit Lyonnais to compensate the CDR in an amount of up to € 12 million of the amount of any award of damages, at the latest at the moment the award is rendered.

On July 7, 2008 the arbitrators rendered their award, in which they found two faults of the CDR: a breach of the duty of loyalty and a breach of the prohibition against becoming a counterparty. They ordered the CDR to pay the liquidators of the Tapie Group an amount of € 240 million plus interest from November 30, 1994 and the liquidators of the Y spouses ..., an amount of € 45 million in compensation for moral damages suffered by them.

This award fixed the reparations at levels very close to the demanded ceilings (80%), on grounds very severe toward CDR. Thereupon, since the State had to pay such amounts, the question of the exercise of an action for voiding, the only open legal remedy against that decision, had been raised and divergent opinions had been expressed as to its chances of success.

Following a meeting held on July 20, 2008 in her office, in the presence of her chief of staff, Mr. E., and M<sup>e</sup> August, Mrs. X ..., by an instruction dated July 28, 2008 asked the representatives of the State within EPFR to speak against the recourse. On the same day, CDR's Board of Directors met and adopted the decision not to file an application for voiding of the award. The Board of EPFR subsequently met and did not oppose the decision.

The arbitral award thus became final and the Minister, as required by this binding decision, issued the orders necessary to make the requested payments, that is € 152 million on September 2, 2008 and € 117 million in March 2009, which were financed by a loan of EPFR drawn on Crédit Lyonnais.

Taking into account the setting-off of the receivables held by CDR on the Tapie Group companies and on the Y spouses ... and the debts of CDR, GBT received an amount of € 233 million and the Y spouses Y ..., that of € 45 million.

Subsequently, it was established that the award had been fraudulently rendered, as a consequence of the decisive role played by an arbitrator, who appeared to have had been in cahoots with Mr. Y... and his lawyer, in order to

favour the claims from the former. The Paris Court of Appeal, by a final judgment of February 17, 2015, ordered the revocation of the arbitral award and of the award that followed upon it and were consequent upon it.

Following letters, issued in 2011, by several Parliamentarians and the Public Prosecutor attached to the General Accounting Office, the Public Prosecutor of the Court of Cassation applied to the Petitions Committee of the Court of Justice of the Republic, and after the opinion rendered on August 4, 2011 by that formation which was favorable to the opening of an investigation, the Prosecutor has seized the Inquiry Commission of charges against Ms. X..., of complicity in forgery and complicity in the embezzlement of public funds.

Having been heard by the Inquiry Commission as a witness assisted by counsel on those charges, Mrs. X ... was indicted on the charge of negligence by a custodian of public authority resulting in the embezzlement of public funds by a third party. At the end of its investigations, the Inquiries Commission deferred Mrs. X ... before the trial bench of this Court.

#### **REASONING OF THE COURT**

With respect to the constituent elements of the infraction As a preliminary point, it should be recalled that the principle of the separation of powers enshrined in article 16 of the Declaration of Human Rights and the Rights of Citizens and article 24 of the Constitution, according to which the Parliament controls the Government, do not prevent a criminal prosecution of a member of the Government for acts which, which may be characterized as a failure in the performance of his/her duties in the context of the making of a decision, might involuntarily facilitated embezzlements by third parties which harm the financial interests of the State of which he/she is the custodian in his/her attributions.

Indeed, the political responsibility which he/she might incur for the same decision is of a different nature that is distinct from that of a criminal action and should not exclude it, without violating the principle of equality of citizens before the law.

It thus enters into the duty of the Court of Justice of the Republic, in accordance with article 68-1 of the Constitution, on the criminal responsibility of the

members of the Government, to distinguish, in the analysis of the facts submitted for examination, those which may be qualified as criminal under the afore-cited article 432-16.

With regards to the imputability to Mrs. X of the two incriminated decisions, it follows from her hearings and statements during the proceedings that she claims not to have acted on instructions given to her by the highest authorities of the State (President of the Republic and Prime Minister) but made her decisions in her field of competence, in her capacity as Minister of Finance, and for which she assumes full responsibility.

It is established that Mrs. X, as Minister, was a custodian of public authority and that she was the decision-maker regarding the payment of funds, which had indeed the character of public funds, since no payment could in the end be made without her authorization.

**With regards to the decision to enter into arbitration**, it does not arise either from the elements of the file nor the debates, proof that Mrs. X, as Minister, in view of the failure of previous attempts at mediation and of the numerous disputes which, according to her, it was appropriate to terminate on account of their length and of their cost, and based on the information available to her, that she was guilty of negligence amounting to criminal faults within the meaning of article 432-16 of the Criminal Code, when she instructed the representatives of the State within EPFR not to oppose the decision taken by CDR to resort to this procedure to settle all disputes between the latter and the liquidators of the Tapie Group companies and the Y spouses ...

On the other hand, **as regards the decision not to initiate an action for voiding**, taken nineteen days before the expiration of the period prescribed by law, it should be noted that Mrs. X., a lawyer by profession, who said that she had been particularly concerned about the protection of the financial interests of the State, to have been personally involved in the management of the case and to have been "*appalled*" when discovering the arbitrary award and in particular the amount of moral damages awarded to the liquidators of the Y spouses ..., i.e. a sum € 45 million then not subjected to tax, was negligent in deciding not to have initiated an action for voiding such an award.

Indeed, since the claims of the liquidators of the Y spouses had not been brought to her attention ... to obtain "moral damage" presented as such and as a distinct claim for € 50 million, and she had never agreed to that principle, requests for explanations from her staff, from SIA and from the representatives of the State within EPFR were necessary to understand such a shocking award. Such requests would undoubtedly have revealed, as later became apparent to the General Accounting Office, that the wording of the arbitration agreement had been changed after its presentation at CDR's Board meeting on October 2, 2007 and that of EPFR on October 10, 2007 and could therefore have led to the initiation of an action for voiding based on one of the situations stipulated in article 1484 of the Code of Civil Procedure, then in force.

At the very least, the exercise of such a recourse would have enabled CDR to negotiate from a much more favorable position with the opposing party on the disproportionate amount of moral damage, even though the liquidators proposed on July 24, 2008 to reduce their claims if the arbitral award were not challenged in court.

Moreover, Ms. X ... confirmed during the hearing that she did not read SIA's memorandum of July 16, 2008, which pointed out that there were very serious consequences for the State's finances, contrary to what was indicated in the Ministry of Finance press releases - although the minister did not reread them - but also in her own statements during her press interview on July 28, 2008 and when she testified on September 23, 2008 before the Finance Committee of the National Assembly.

Similarly, she did not study the arbitral award, the violent and constantly one-sided terms of which were pointed out by the counsel for CDR, M<sup>e</sup> Soltner, a lawyer at the Council of State and the Supreme Court of Cassation, who described the award as *"an abridgment and an approximation without any legal basis"*, and which could not but have led the Minister to explore and try all legal recourses to obtain the voiding of a result so harmful for the public finances.

Finally, at the meeting of Sunday July 20, 2008, which was held in the office of the Minister, only Mr. G... her chief of staff, Mr. E..., President of CDR, and M<sup>e</sup> August were



present, all in favour of renouncing any recourse, while people with a contrary opinion were not invited: M<sup>e</sup> Soltner, M<sup>e</sup> Martel, lawyer at the Court of Appeal in charge of CDR's interests for many years, and representatives of SIA, who would have been able to present their analysis and arguments orally, which would have given Ms. X. the benefit of conflicting views such that she might have come to a perfectly informed decision. Though she took care to obtain an additional opinion from M<sup>e</sup> Spinosi, lawyer before the Council of State and the Court of Cassation, who was proposed by M<sup>e</sup> August, it should be noted that the opinion rendered in a very short period of time by that counsel who was not familiar with the case was not of such a nature as to remedy the imbalance of her information.

All of these elements reveal negligence in the search for information that Mrs. X ... should have carried out before making her decision.

**With regards to the embezzlement of public funds,** it is clear from the elements of the file and the debates that the insistence of different actors to remove any obstacle to the initiation of an arbitration procedure, the occult manner in which the draft of the compromise arbitration agreement was modified to allow the inclusion of an express mention with respect to a claim for compensation for "moral damages" by the liquidators of the Y spouses ..., the connivance revealed by the inquiry procedure and the judgment voiding the arbitral award and, finally, the exorbitant nature of the amount awarded by that decision on account of moral damages characterize the existence of fraudulent embezzlements, even if their imputability has not been definitively judged.

Such criminal conduct cannot be reduced to the breach by one of the arbitrators of his duty of impartiality. The Minister's decision not to bring an action for voiding, the chances of success of which are not negligible, rendered, *in fine*, inevitable the fraudulent appropriation by the Y spouses ... of the sum of € 45 million, which was the culmination of a long-term criminal process.

This decision therefore proceeds not from a single unfortunate political choice beyond review by the Court of Justice of the Republic, but from negligence within the

meaning of article 432-16 of the Criminal Code. It is immaterial in this respect that this fault was not the only cause of the embezzlement, as long as it was one of the determining causes.

The constituent elements of the offense under article 432-16 of the Criminal Code are therefore present and it is appropriate to declare Mrs. X ... guilty of the crime of negligence by a person custodian of public authority resulting in an embezzlement of funds by a third party, amounting to € 45 million.

With respect to the punishment

The harmful effects on public finances resulting from the absence of an action to have voided the fraudulent arbitral award were terminated when the withdrawal of the latter was pronounced by final judgment of the Paris Court of Appeal of February 17, 2015.

In assessing the award, account must be taken of the context of the worldwide financial crisis in which Ms. X ... served as Minister of Finances.

Her personality and her national and international reputation must also be taken into account in her favour. The conditions laid down in article 132-59 of the Criminal Code are accordingly met and there should be a dispensation of prison for Ms. X ... without mention of the decision on her criminal record.

## **NOW THEREFORE**

### **The Court,**

Rendering the following public and final judgment that is binding on all parties as they were present and participated in the case,

Having deliberated and voted in accordance with article 32 of the Organic Law of November 23, 1993.

Holds that there is no reason to stay the proceedings,  
Declares Mrs. Christine X ... guilty of the crime of negligence by a person custodian of public authority resulting in an embezzlement of public funds by a third party, amounting to € 45 million.

Dispenses Ms. Christine X ... of punishment.

Holds that the decision will not be mentioned on her criminal record.

Due to the absence of the accused, the notification of the conditions and appeal period provided for in article 33 of the Organic Law of 23 November 1993 could not be communicated

to her.

## **COMPOSITION OF THE COURT OF JUSTICE OF THE REPUBLIC**

### **During the hearings**

President: Mrs. Martine Ract-Madoux

Mr. Gilles Straehli, Mrs. Nicole Burkel, Mrs. Josette Durrieu, Mr. Philippe Houillon, Mr. Jean-Luc Warsmann, Mr. Bernard Saugey, Mr. François-Noël Buffet, Mrs. Bariza Khiari, Mr. Yves Détraigne, Mr. Dominique Raimbourg, Mr. Jean-Yves Caullet, Mrs. Marie-Françoise Bechtel, Mr. François Pillet, Mrs. Nathalie Nieson, all regularly appointed sitting members.

In the presence of:

Mrs. Danièle Caron, Mr. Didier Beauvais, Mrs. Jeannine Depommier, Mrs. Françoise Descamps-Crosnier, Mr. Philippe Bies, Mr. Alain Rodet, Ms. Colette Capdevielle, Mr. Pierre Morel-A-L'Huissier, Mr. Francis Hillmeyer, Mrs. Catherine Troendlé, Mrs. Jacqueline Gougault, Mr. Alain Anziani, Mr. Jean-Pierre Sueur, Mrs. Catherine Di Folco, Mr. Alain Fouché, all regularly appointed alternate members.

### **During the deliberations**

President: Mrs. Martine Ract-Madoux

Mr. Gilles Straehli, Mrs. Nicole Burkel, Mrs. Josette Durrieu, Mr. Philippe Houillon, Mr. Jean-Luc Warsmann, Mr. Bernard Saugey, Mr. François-Noël Buffet, Mrs. Bariza Khiari, Mr. Yves Détraigne, Mr. Dominique Raimbourg, Mr. Jean-Yves Caullet, Mrs. Marie-Françoise Bechtel, Mr. François Pillet, Mrs. Nathalie Nieson, all regularly appointed sitting members.

### **During the reading of the judgment**

President: Mrs. Martine Ract Madoux

Mr. Gilles Straehli, Mrs. Nicole Burkel, Mrs. Josette Durrieu, Mr. Philippe Houillon, Mr. Jean-Luc Warsmann, Mr. Bernard Saugey, Mr. François-Noël Buffet, Mrs. Bariza Khiari, Mr. Yves Détraigne, Mr. Dominique Raimbourg, Mr. Jean-Yves Caullet, Mrs. Marie-Françoise Bechtel, Mr. François Pillet, Mrs. Nathalie Nieson, all regularly appointed sitting members.

In the presence of:

Mr. Alain Rodet, Mrs. Catherine Troendlé, Mrs. Françoise

Descamps Crosnier, Mr. Alain Fouché, Mrs. Catherine Di Folco, Mr. Pierre Morel-A-L'huissier, Mr. Jean-Pierre Sueur, all regularly appointed alternate members.

Clerk:

During the trial and reading of the judgment, Mrs. Christine Lambert, Chief Clerk.

Public Prosecutor's office:

Represented at the hearing and at the reading of the judgment by Mr. Jean-Claude Marin, Public Prosecutor before the Court of Cassation, and Mr. Philippe Lagache, assistant Public Prosecutor before the Court of Cassation.