UNFAIR COMPETITION—FRENCH AND EUROPEAN APPROACHES

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It is a platitude to state that law, as society, is presently going through a crisis. Still, a platitude should—and hopefully generally does—contain much truth. Unfair competition, like many other areas of the law, is currently undergoing, in France and in other European countries, a deep transformation. Perhaps a word of history of the French approach to unfair competition is in order before a description of the existing law, in France and in other European countries, is attempted.[1]

Traditionally, in France, the law of unfair competition is regarded as a means of protecting merchants and traders against unfair practices by one of them. The French Revolution had proclaimed freedom of trade and industry. No freedom, however, can be absolute. Just as every citizen must exercise his freedom in keeping with the equal and concurrent freedom of others, similarly, members of every trade must pursue their competitive aims within limits which permit a coexistence as harmonious as possible. The

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1 As could be expected, an enormous literature exists on the French law of unfair competition. The matter is covered in the handbooks of "commercial law". See especially R. Roblot, *Traité élémentaire de droit commercial de Georges Ripert* (7th ed., 1972) vol. 1 nos 461-521, vol. II nos 2492-2503, 2522-2533 (1973) (hereinafter cited as Roblot), with references to statutes, cases and doctrinal writing. See also R. Rodiere et R. Houin, *Droit commercial* (6th ed., 1970) nos 159-171 bis; G. Farjat, *Droit economique* (1971) 238-263 (hereinafter cited as Farjat). A very expert and detailed restatement of the law may be found in Krasser, cited infra. Mention must also be made of a thesis, presently only in mimeographed from but which will be published: R. Le Moal, *Contribution à l'étude d'un droit de concurrence* (1972). Of special interest is W. J. Derenberg, "The Influence of the French Code Civil on the Modern Law of Unfair Competition" (1955) 4 A.J.C.L.I.. Compare W. R. Cornish, "Unfair Competition? A Progress Report", 12 J.S.P.T.L. 126. Finally, the present writer is pleased to acknowledge that he has made great use, as regards traditional French Law, of an excellent report of A. Pirovano, *La concurrence dé loyale en droit francais*, made to the Deuxiémes Journées Juridiques Franco-Nordiques in Paris in November 1972; again, this report presently exists only in mimeographed form, but will probably be published together with the other French reports.

The subject of this article is covered by H. C. Eugen Ulmer (ed.), *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der EWG* (1965-1968) 5 vol. Three volumes have been translated into French under the common title *La répression de la concurrence déloyale dans les Etats members de la Comunnauté Economique Européenne*; vol. I; E. Ulmer, *Droit comparé avec propositions pour le rapprochement des législations* (1966) (hereinafter cited as Ulmer); vol. II; G. Schricker, B. Francq, J. Wunderlich; *Belgique-Luxembourg* (1973); vol. III; R. Krasser, *La France* (1972). Penetrating views on the subject may also be found in B. Goldman, "Droit de la concurrence", 4 Encyclopaedia Universalis 839-845 (1969).

legal foundation of the law of unfair competition, therefore, is nothing else than Article 1382 of the Civil Code, itself the basis of the law of tort: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it". On such a broad foundation, it was and is still the task of the courts to declare which practices are fair or unfair and, therefore, legal or illegal.

Without having ever been abandoned, this conception of the law of competition has been amended under a number of influences.

First, in the middle of the nineteenth century, it was felt that specific statutes and special machineries were needed to give to the authors of inventions and merchants using trade-marks a protection much stronger than that resulting from the sketchy provisions enacted during the Revolution. Such were the respective purposes of laws of the 5th July 1844 and 23rd June 1857. The content of such laws came to be called "industrial property". The approach to the law of competition, therefore, was still one of protection of the interests of merchants by harmonising their activities. However, the basis of the protection was changed. It was no longer only the law of tort. In certain circumstances, a merchant could acquire a certain number of "absolute" rights, regarded as intangible and invisible property and actually comparable to the rights given to the owner of a thing.

The shift from a law of competition based on tort law to a law based on rights comparable to ownership continued. A statute, of the 30th June 1926, gave to the lessee of commercial premises a certain right of renewal at the expiration of the lease, and, in common language, spoke in terms of "commercial property". Previously, a number of statutes had laid down rules concerning the sales of goodwill. Considering the number of rules governing commercial enterprises mainly for their protection, some text-writers came to consider that a merchant or trader has in the goodwill of his business a right which is in the nature of a right of ownership. There is certainly much truth in this view, even though it should not be carried too far, and it has in fact influenced the courts.

A more radical departure from the traditional approach occurred under the influence of the American anti-trust legislation—even though with a sixty years delay. Until comparatively recently the law of unfair competition was regarded in France as regulating the relationships of merchants and traders among themselves and in the interests of each of them. The rules laid down by the courts, therefore, could be varied by contract, at least within limits. A contract cannot deprive someone of an essential aspect of his freedom. The buyer of the goodwill of a shop, for instance, cannot require that the seller agrees never again to enter into business in any part of France. On the other hand, the seller may validly undertake not to reopen a similar shop during a number of years and within a certain region. More generally, and subject to some provisions from the Revol-

utionary period which were practically ignored, it was left to merchants to make between themselves such arrangements as they might wish to make provided those arrangements would not unreasonably restrict their own freedom.

It was only be decrees of the 9th August 1953 and 24th June 1958 that legislation was introduced in France to prohibit agreements in restraint of trade, as well as a number of other restrictive practices. A new dimension was thus introduced into the law of illegal competition. An agreement or a unilateral practice could become illegal even though it was not directed against an individual merchant, simply because it was detrimental to the national economy, i.e. to the community of merchants engaged in the trade or related traders, and, more importantly, to the consumers. Consumer protection, of course, was much older than the 1953 Decree, under the form of health and quality control, labels stating price and content, price control in certain periods, etc. By the 1953 Decree, however, the concern for the national economy and consumer interests was integrated in the law of competition. The decree was a broad, even though belated, recognition that commerce should not be left to the forces of the market, and that State intervention was necessary precisely to protect a free and healthy competition.[2] Such a conception gained in importance when it was embodied in the Paris Treaty creating the Coal and Steel Community, then in the Rome Treaty setting up the European Economic Community.

It thus becomes difficult to summarise the field of "unfair competition" in France as it seems practically impossible to distinguish "unfair" from "illegal" competition. Competition may be unfair if it is carried on by means considered unfair by the courts. But competition by infringement of a patent, imitation of a trade-mark, or breach of a carrier's monopoly, for instance, is also unfair competition. The various arrangements or practices prohibited by anti-trust legislation, whether national or European in origin, may also be regarded as constituting unfair competition.

In such circumstances, the present article does not purport to review all aspects of the law of unfair competition in France and, *a fortiori*, in Europe. Rather, it will attempt, in a first part, to offer a short review of the national French law of unfair competition and, in a second part, to present a sketch of the European law of unfair competition under its double aspect of the national laws and of the Community law.

I *THE FRENCH LAW OF UNFAIR COMPETITION*

This review of French law will concern successively the traditional law, directed toward the protection of merchants and traders, and the new rules taken in the general interest of a free and competitive economy, but will disregard the law of 'industrial property'.

[2] Cf. Farjat 258-263, 263-273.

A *The Traditional Law*

As has been explained, the bulk of the traditional French law of unfair competition is based on the sweeping principle that one is liable for damage caused by one's fault. Unfair competition, therefore, requires only two elements: fault and resultant damage. Fault is traditionally defined as behaviour which does not measure up to the standards that would be adhered to by a *bonus paterfamilias* in the circumstances: it is therefore a practice from which the honest merchant in the circumstances considers himself bound to abstain. The criterion is obviously very broad, but imprecise. A merchant is expected to behave according to standards recognized by the community. Such standards vary with time. Comparative research also reveals that they vary from place to place: the various nations which base the law of unfair competition on fault are more or less tolerant of somewhat aggressive or misleading means of competition.

It is not possible to draw a list of the practices which, even in a given country (France), and at a given time (ours), are held to amount to unfair competition. However, some text-writers have attempted to classify those practices into broad categories, which permit us to take an overall view of them, even if borderline cases remain vexing.

Thus, disparagement of a competitor or of a competing product is normally regarded as unfair. What is permissible from third parties, for instance consumer organizations, is not open to a competitor. A chain of hotels has recently tried to show by an opinion poll that its clients were more satisfied than the clients of competitors: it was careful to identify them only as X, Y, Z. On the other hand, any merchant remains free to praise his products as much as he can. A soap producer may chaim that its customers will have a softer skin than they would were they to use any other soap.

It is also unfair to create a confusion which might attract the goodwill of a competitor. The confusion might be one of name: Monsieur Durand (the French equivalent of Mr Smith) may even be under the duty not to use his name on his shop and his commercial papers in such a way as to create a confusion with a Monsieur Durand already using his name in a similar trade. The confusion might also result from the appearance of the shop, from its fantasy-name, from a similar slogan or comparable means of advertising, from the appearance of the products, etc.

To disrupt the business of a competitor is also an unfair practice. Thus, it would be unfair to try and set up a boycott of his products, or obtain some commercial secret of his, or systematically visit his customers, or try and destroy his means of advertising. A particularly difficult problem is to know to what extent a merchant can attract to his service an employee of a competitor. Over a long period the courts have been very conservative in this matter. It is not illegal to offer employment to a former employee

of a competitor, even if he has been of special value to his former employer, unless he cannot exercise his functions without diverting part of the latter's goodwill. Enticement of someone who is still the employee of a competitor, however, even though it is not in itself illegal, may easily become so if special circumstances exist; if, for instance, the prospective employer has been particularly insistent, or has offered an abnormally high salary, or will benefit from special knowledge acquired by the employee in his present position, or if enticement is practised on a large scale.

Finally, it is unfair competition to disrupt the market. A number of practices which would disrupt a market have been specifically prohibited by the decrees of 1953 and 1958 already mentioned, as well as by subsequent legislation of national and European origin. However, other practices which would have the same result could be unfair competition.

A list of unfair competitive practices is by nature of a relative character. What is accepted and perhaps even current in a certain community may have appeared unfair in an earlier period or may appear so in another community. Probably, however, the list is more uncertain than it was a few decades ago, due to the new concern for the consumer. Thus, comparative advertising, by which a producer tries to demonstrate that his product is better than the competing ones, has not yet been authorized in France. However, if based on properly conducted comparative tests such advertising may benefit the consumer through quality competition. It is authorized in Switzerland and in Sweden and may be authorized in other European countries, including France, in the near future.[3] Similarly, while recent legislation prohibits dumping by sale at loss, the courts have not considered illegal sales at an extremely low profit margin. However, such sales, usually carried out by large enterprises, while immediately profitable to the consumer, may destroy competition to the consumer's detriment in the long run. The government has limited the discount which may be offered on the price of automobile petrol and, more generally, authorized a producer to refuse to sell to a retailer which would offer the products to the public at an abnormally low profit margin.[4] One could conceive of courts declaring that such sales amount to unfair competition—even though the example of the American courts trying to decide, at the end of the Nineteenth Century and at the beginning of the Twentieth, which rates were a deprivation of property 'without due process of law' should render them cautious.

In principle, unfair competition is governed by all the principles of the law of tort. Thus, the delict need not be intentional. Error of what is

[3] In the United States, comparative advertising is presently encouraged by the Federal Trade Commission (International Herald Tribune, 29-30 December 1973) but must be strictly accurate (International Herald Tribune, 1 January 1974).
[4] Cf. infra p. 41.

permissible or lack of care in the choice of the method of competition entails liability. The method of competition should be judged by itself, independently of the intent of its promoter. However, the action for unfair competition also presents a disciplinary character. The courts often underline the "bad faith" of the unfair competitor and then award larger damages to the plaintiff.

A certain liberty towards the rules governing the law of tort may also be necessary because of the difficulty of proving with some precision the damage suffered by the plaintiff. The damage cannot usually be proved by mere consideration of the turnover of the plaintiff's enterprise. A decrease of turnover may have an infinite number of reasons; a diversion of customers may be hidden by an increase of turnover due to various factors. Thus, the courts may be willing to award damages on the mere finding of a confusion (between the businesses or the products) and perhaps even of the possibility of confusion. Even though the tort basis of the law of unfair competition normally leads the plaintiff to ask damages, his main objective may be the prohibition of continuation of the unfair practice complained of; in such a case, he may be satisfied with only nominal damages (1 Fr. Fr.), prohibition of continuation of the unfair practice, and in the most serious cases publication of the court's decision in a number of newspapers. When the courts grant such claims, their decisions, though based on tort law, again suggest that the action for unfair competition is of a disciplinary nature. Their decisions also bring the action for unfair competition close to an action for the protection of some intangible property. The similarity is striking when there is no real competition between the two parties, the only claim of the plaintiff being that the defendant creates to his benefit a confusion which depreciates the plaintiff's reputation: for example, when a producer of beds takes the name of a fashionable hotel, or when the name of a well-known Paris restaurant is used by a pretentious restaurant 600 miles from Paris.

The action for unfair competition may be brought to court not only by competitors hurt by the fault of the defendant, but by a trade association —a possibility which, again, gives to the action a disciplinary character. On the other hand, no consumer organization seems as yet to have tried to bring someone to court for unfair competition. This may come soon and meet with success before the courts: on the 3rd December 1973, probably for the first time, a court awarded damages to two consumer organizations in a suit brought by the public prosecutor against a butcher for fraud concerning the quality of his goods, deceptive advertising, etc.[5] The same principle as was applied in this case would permit a consumer organization to sue some business for unfair competition whenever it is injured in its legitimate interests.

[5] Le Monde, 5 December 1972, p. 40.

Before turning to the modern approach to the law of competition, reference should be made to the adhesion of France to the 1883 Paris Convention creating a Union for the protection of "industrial property". Two sections of the Convention are devoted to the protection of commercial name and origin indication. In 1900, a new provision was introduced, obliging every Union member to give to nationals of other member-States the same protection against unfair competition as it gives to its own nationals, and defining as unfair competition "any act of competition contrary to honest usages in industrial and commercial matters". The rule was amended in 1925, 1934 and again 1958. Presently, the Union members undertake to give to nationals of all members an "effective protection" against unfair competition. Three means of competition are especially mentioned: confusion, disparagement and misleading advertising.

B *Measures for the Protection of Competition*

Attention will be devoted in the following pages to various statutes enacted in the spirit which inspired European Community law, i.e. in the general interest of a free and competitive economy.

The first significant measure was a Decree of the 9th August 1953.[6] Inserted in the legislation on price control, this provision made illegal, under heavy penalties: (a) any arrangement or agreement under any form, having for its purpose or capable of having an effect of restraining the full exercise of competition by creating an obstacle to the lowering of the cost price or sale price or by artificially increasing prices; (b) on the part of a trader, producer or craftsman, to refuse to sell or to service within the limits of his possibilities when faced with a normal request presented in good faith, or to practice currently discriminatory price increases not justified by the quality of the product; and (c) on the part of any person, to impose or maintain minimal prices or minimal profit margins for goods and services through any kind of tariff, table or agreement.

For technical reasons, this decree was declared in part void by the Council of State, but, a few days after this declaration, on the 24th June 1958, the government made a valid Decree to the same effect, though slightly more comprehensive and more refined in its wording. This legislation has great practical importance, owing to the fights between the traditional retailers and the new giants and among the giants themselves. It was conceived in broad terms and could hardly have been expressed with much greater precision. The administration nevertheless issued rules of construction. Such rules are not binding upon the courts, but have helped them to make the legislation as effective as possible.

[6] 1 Roblot no. 472, 2 Roblot no. 2494.

The prohibition of agreements or arrangements in restraint of trade was extended in its scope by an Ordinance of the 28th September 1967 and is controlled by a special Commission.[7] Discriminatory practices raised special difficulties.[8] It was a matter on which the 1958 Decree contained a re-draft of the 1953 one. Still, the 1967 Ordinance had to come back to the matter and to authorize the Minister of Economy to issue rules to control the practices. The same Ordinance gave to the Minister a similar power as regards the complex matter of prices imposed or "recommended" by the producer[9] and, in general, rephrased and made more precise the provisions of the Decree of the 24th June 1958.

Another important statute was the Act of the 2nd July 1963.[10] The first section of the act prohibits sales at loss, subject to a certain number of exceptions (perishable merchandises being in danger, goods which are no longer in demand, etc.). The act did not govern sales at 'appeal price', i.e. at a very low profit margin, even though such sales may disrupt a market nearly as much as sales at loss. Such sales have been declared legal by the courts.[11] The administration, however, expressed the view that current use of "appeal prices" by a business could deprive the latter of the quality of a "good faith" buyer and therefore justify a refusal of sale. Another section of the Act amended the 1958 Decree in a way which is now covered by the 1967 Ordinance.[12] It created, on the spur of European Community law, a new crime: the abuse of a dominant position.[13] A third section prohibits under criminal sanctions advertising in bad faith which contains a precise statement which is false or misleading.[14] The prohibition concerns services as well as goods. The false or misleading statement must be "precise" to be illegal: apparently none can be misled when a manufacturer of television sets claims that its sets give "the brightest" image or when a manufacturer of brassieres promises to its clients that they will be "the sexiest". Finally, a section gave to the court in any proceeding for unfair competition the discretionary power before going to the substance of the case, to order the defendant to cease the activity complained of; but this section has been left inoperative, since it is dependent upon decrees which have not yet been made.

After a long political battle, the "*loi Royer*" was passed by Parliament on 27th December 1973. Among many measures, it replaces the law of discriminatory practices and creates new prohibitions in the field of false or misleading advertising. In the latter field, the Act gives additional powers

[7] 2 Roblot no. 2528; Farjat 245-257.
[8] 2 Roblot no. 2501.
[9] 2 Roblot no. 2502.
[10] 2 Roblot no. 2503.
[11] Cf. Supra p. 38.
[12] See supra at fn. 7.
[13] 2 Roblot no. 2529. Cf. infra p. 51.
[14] 2 Roblot no. 2498.

to the courts to order, if necessary on their own motion following an administrative finding of a violation, the cessation of the advertising and the publicity of their judgment. Recognized consumer organizations are granted the right to claim damages.

Mention may be made, finally, of some secondary legislation which relates to the general interests of the economy. Since 1944, a very complex set of rules prohibits, subject to exceptions, sales with premiums or gifts of all kinds, from stamps to a visit to Bangkok.[15] Also prohibited are sales subject to the purchase of other goods or services;[16] sales when the price is lowered or reduced to nought if the buyer himself sells a certain number of similar objects;[17] and clearance sales not authorized by the administration.[18]

II EUROPEAN LAW OF UNFAIR COMPETITION

As explained earlier, this part of the study will be devoted successively to a short review of the laws of the continental European nations members of the Common Market and of the law of the European Community. Perhaps the present writer should underline again how sketchy his presentation must be. Books have been written on matters dealt with in nearly every one of the following pages.

A *National Laws of the European States*[19]

Even though a number of European countries have for decades had a law of unfair competition comparable to the French one, *Germany* will receive priority, since the statute it enacted in 1909 became a model largely followed.

At first, Germany had been reluctant to give a general recognition to the concept of unfair competition.[20] The proclamation of freedom of trade in 1869-1871 and the nearly concomitant enactment of a 1874 statute for the protection of marks led the courts to consider that the latter legislation contained the only limits to freedom of competition.

Parliament had to intervene. In 1896, it enacted civil and criminal provisions against some forms of unfair competition: false advertising, disparagement, violation of secrets, etc. Furthermore, when the BGB came into force at the beginning of 1900, its tort provisions were applied to other forms of unfair competition, for instance boycott and discrimination.

The law was improved again by the 1909 Act against unfair competition. This Act contains two kinds of provision: a general one and a number of

15 2 Roblot no. 2523. See also the Act of 27th Dec. 1973, s. 40.
16 2 Roblot no. 2524.
17 2 Roblot no. 2525.
18 2 Roblot no. 2526.
19 The present writer is pleased to acknowledge that he has made great use of Ulmer for this part of his article.
20 Ulmer 8-10.

others more specific. The general one, section 1 of the Act, provides: "Whoever, in business relations, commits in the process of competition an act *contra bonos mores* (contrary to the requisites of life in society) can be sued for discontinuance and damages". These words give a very broad basis to the law of unfair competition, a basis comparable to the one found in France in the tort provisions of the Civil Code. Since the beginning of the Century, innumerable law suits have been brought before the courts. On the basis of experience, courts and doctrinal writings have developed a vast system of rules and directives.

The specific provisions of the Act also prohibit a number of practices: not only those which were already considered as unlawful, but, for instance, corruption of employees or abuse of patterns. Some practices are at least subject to regulation; thus clearance sales and, since 1932, sales with premiums or gifts and sales at reduced prices.

Any breach of the Act, whether the general provision or the specific ones, may give rise to actions for discontinuance and damages. Some breaches also entail criminal sanctions. The court which pronounces criminal sanctions or enjoins continuance may also order that a certain publicity be given to its decision.

Damages may be claimed only by aggrieved competitors. On the other hand, in cases of violation of the general provision or of the rules governing clearance sales or sales with premium or at reduced prices, an action for discontinuance may be brought to the courts by any one who produces or offers the same goods or offers the same services, as well as any trade association the object of which is the protection of a certain trade. The courts may also and often do order interlocutory measures that give more effectiveness to the action for discontinuance.

The spirit of the 1909 Act was that laws against unfair competition do not serve only the interests of some merchants, but the common interests of the trade. The Act was construed accordingly by the courts. More recently, the capacity of the Act to aid in the protection of consumers has been recognized. A 1965 amendment to the Act authorized consumer organizations to introduce an action for discontinuance when they have a serious interest in the matter, particularly in cases of false advertising.

An Act against restraint of competition was passed on the 27th July 1957 and amended in 1966 and 1973.

Since the French Civil Code was introduced in *Belgium* and has never been repealed, it is not surprising that the Belgian approach to unfair competition has over a long period been similar to the French.[21] Freedom of commerce and industry had been proclaimed in France when Belgium was a province of the latter. Unfair competition appeared as an abuse of that freedom, subject to liability for fault. Thus, in Belgium as in France,

[21] Ulmer 15-17; Schricker, Francq and Wunderlich, op. cit. supra fn. 1.

the courts, in co-operation with text-writers, had to decide which means of competition were fair and legal, or unfair and illegal.

As in France, a number of statutory provisions were enacted as the need appeared. Thus, the Penal Code prohibited under criminal sanctions deceptive sales, violation of commercial secrets, and the use of false commercial names. The 1873 Act which authorized the free creation of companies limited by shares provided that the name of a new company must be different from any name already given to a company, and be such as to exclude any danger of confusion. Trade marks and guaranteed vintage were protected respectively in 1879 and 1927.

A number of merchants and traders, however, felt that the law was uncertain, and that a suit for unfair competition was a long and sometimes disappointing process. A reform was introduced in 1929 and led to the publication of a Decree of the 23rd December 1934 still in force. This Decree follows the pattern of the German statute of 1909. Section 1 of the Decree is a general provision which defines as unfair competition any act contrary to honest usages in trade or industry,[22] by which a manufacturer, trader or craftsman diverts or tries to divert part of the goodwill of a competitor or of competitors or reduces or tries to reduce their credit or their competitive capacity. Section 2, without in any way reducing the scope of the former, specifically mentions seven practices which constitute unfair competition: thus, a creation of confusion, disparagement of competitors or competing products, false statements on the producer or seller itself or on the product (the provision is very severe as regards truth in advertising).

The main interest of the 1934 Decree is that it gives to the courts a power of injunction to restrain the illegal practice. The injunction may be granted at the request, not only of the aggrieved party, but of any competitor or of a relevant trade association. The purpose of the Decree is not to protect individual traders, but to protect trade in general and the consumers. This protection, however, is entrusted to the merchant community, not to the consumer: the latter organizations are not granted the power to go to court.

The tort provisions of the Civil Code remain the basis of an action for damages. However, the courts, in their judgment of what constitutes a fair or an unfair practice, could not help but be influenced by the provisions of the Decree.

Among the new statutes enacted after 1934, mention may be made of a 1945 Act on price control, a 1960 Act against abuse of economic power and a 1971 Act on commercial practices.

The situation in *Luxemburg* has been and remains comparable to the Belgian one.[23]

[22] Cf. the Paris Convention, supra, p. 40.
[23] Ulmer 17-19; Schricker, Francq and Wunderlich, op. cit. supra fn. 1.

For a long time, the tort provisions of the Civil Code were nearly the only basis of an action for unfair competition. The decisions of the courts were even inspired by Belgian and French precedents. The provisions of the Penal Code regarding defamation, however, were used against disparagement. Trade marks were protected by an 1883 Act.

A statute against unfair competition was enacted in 1929. It contained criminal provisions against false advertising, clearance sales, violation of production or trade secrets or unauthorized use of patterns. The aggrieved party could obtain damages. Sales with premiums were similarly prohibited in 1934.

The law, however, was, so to speak, remodelled by a Decree of the 15th January 1936. The 1929 Act was kept only as regards violation of secrets. All other aspects of unfair competition were subjected to the new Decree. The 1936 Decree is comparable to the Belgium one. Section 1 mentions actions contrary to honest usages in trade or industry, while section 2 gives a non-exhaustive list of unfair practices. Subsequent provisions relate to special forms of sales and order that the goods be shown with price labels. Of special importance are the provisions giving to the courts a power of injunction at the request of any person aggrieved or concerned or at the request of the public prosecutor.

In the *Netherlands*, the law of unfair competition remains primarily based on the tort provisions of the Civil Code.[24] Those provisions, however, have a narrower basis than in France, Belgium or Luxemburg. In the latter countries, any deviation from the behaviour which could be expected from a reasonable man under the circumstances is in itself a fault and gives to the aggrieved party a right to damages. In the Netherlands (as in Germany and Switzerland), fault is only one factor of liability, the second one being unlawfulness. For liability to result it must be shown both that there has been fault on the part of the defendant and that he has unlawfully violated the interests of others. Thus, a number of practices prohibited by French and Belgian courts remained in the Netherlands shielded against any court action. It was only in 1915 that Parliament introduced into the Penal Code a provision making it illegal to commit any fraudulent act aimed at deceiving someone or the public in order to promote or maintain sales, if such act may harm competitors. Any such act thus became illegal and opened the door to a claim for compensation.

Dutch law came closer to the French when the highest court, the *Hoge Raad*, in a case in 1919, took a new and much broader view of the concept of unlawfulness. An act is to be considered unlawful, not only when it amounts to a breach of the law or of a subjective right, but when it is contrary to morality or deviates from the behaviour expected in society, toward the other citizens or their goods.

[24] Ulmer 13-15.

According to the Dutch law of tort, similar in this respect to the German and comparable to the English, unlawfulness is a relative concept. Only persons for whose protection the law had been enacted or the duty recognized can complain of its breach. They may obtain damages if they have suffered a loss or are bound to suffer in the future a loss (including a reduction of earnings). They may also ask a court to issue a kind of injunction according to which a certain amount of money will be paid to them if the unfair competition is not discontinued. They may also obtain a declaratory judgment of unfair competition and, if necessary, use a summary procedure. Text-writers admit that the law of unfair competition works for the protection of the consumers as well as for merchants and traders. Consumer organizations, however, are not accorded the right to appear in court.

A certain number of practices are specifically made illegal by the Penal Code: these are false statements regarding the origin of goods, violation of production or trade secrets, fraudulent delivery of goods different from those which had been ordered, adulteration of food products. Special rules govern sales with premiums.

Italian law presents a somewhat complicated picture.[25] At first, the tort provision of the 1865 Civil Code was applied to unfair competition. Then, in 1928, a statute introduced the provision of the Paris Convention prohibiting any violation of honest usages in the fields of industry and trade.[26] The 1942 Civil Code, presently in force, adds to this general rule a number of more specific ones: sections 2563-2568 contain a protection of commercial names and signs; sections 2569-2574 state the protection of marks; sections 2598-2601 govern unfair competition in general. The latter provisions prohibit disparagement, taking for one's own a reputation for quality belonging to another or creation of a risk of confusion, and also "the direct or indirect use of any means of competition which does not conform to correct trade behaviour and which may damage a competing enterprise".

Today, therefore, the law of unfair competition is largely independent of the law of tort. Most actions for unfair competition are brought before the courts in order to obtain remedies unavailable under the law of tort: prohibition of the illegal activity and elimination of the effects of such activity. The remedies may be obtained even when the defendant has not been at fault or caused any damage. On the other hand, when fault and damage exist (fault is presumed whenever unfair competition has been proved), the plaintiff may obtain damages and publication of the decision. Trade associations may bring an action when their interests are encroached upon by the illegal activity; the possibilities of such an encroachment, however, have been recognized only within narrow limits.

[25] Ulmer 10-12.
[26] Supra p. 40.

Denmark has been the last of the continental European countries to join the Common Market.[27] Its law of unfair competition largely followed the French example during the Nineteenth Century, then underwent the influence of the English Merchandise Marks Act 1887, and the German Acts of 1896 and 1909. Thus, in 1912, a statute prohibited false descriptions of goods, disparagement, abuse of manufacturer or trade secrets, and confusion of marks. Later on, provisions were made against false or misleading statements, and false news concerning a competitor or his merchandise. Then, in 1927, a general provision was added against any violation of honest usages in commercial matters. This last provision is rarely a completely independent basis for an action before the courts. Rather, it serves to enlarge the scope of specific provisions against some practices. When the precise statutory conditions are not met, the courts may still intervene on the basis of the general provision if they feel that they should. The general provision has even been used to extend the scope of the protection given to marks, patterns or literary creation. The law, however, is not as flexible as it might appear, as judicial decisions have now marked out the circumstances under which the courts are willing to use the general provision.

Violation of the law entails civil remedies and, if a precise provision is violated, criminal sanctions as well. The main civil remedy is injunction. Damages are often awarded, usually of modest amounts. A small award is possible even if the plaintiff cannot give evidence of the damage suffered.

A kind of "guild justice" has been developed as a number of trade associations have organized internal commissions which may adjudicate upon any dispute between their members. They decide in accordance with national law, and also with the rules of fair advertising issued by the International Chamber of Commerce. Even though they do not have any official authority, their decisions are normally obeyed by the parties.

As has happened in every country, the law of competition, formerly intended for the protection of merchants between themselves, is now conceived as a protection for the consumer and for the economy at large.

This evolution has not yet changed the law to any significant extent. However, the Parliament is presently considering a broad bill concerning consumer protection and comparable to the legislation already passed in some Nordic countries. Such a bill would govern: (a) techniques of sale and advertising; (b) contractual conditions imposed by a party; (c) control of products and consumer information. It seems certain that it will become law in the near future. It may create, as in Sweden under the so-called "Marketing Act" of 1970, special bodies for the implementation of the law,

[27] On Danish law, see M. Koktvedgaard, "Les régles juridiques de la concurrence déloyale dans les pays nordiques", and Ulf Bernitz, "La protection des consommateurs", in S. Strömholm (ed.), *La réglementation du marché. Rapports nordiques présentés aux Deuxiémes Journées Juridiques Franco-Nordiques* (1973).

including a Consumer Ombudsman and a Market Court. Among other progressive features, it may also authorize advertising stressing the comparative characteristics and prices of similar goods, even mentioning them by their brand names, provided this comparative advertising is free from any false or misleading statement.

B *European Community Law*

Fair and free competition was one of the goals pursued when the European Coal and Steel Community was established by the 1951 Treaty of Paris and, to an even greater extent, when the European Economic Community was set up by the 1957 Treaty of Rome, which came into force on the 1st January 1958. A "common market" implies prohibition of some types of discriminatory measures. If this market is to be a sound one, it should also be free of restrictive agreements and abuses of a dominant position. The principles are clear. Their implementation, as could be expected, has raised great difficulties.[28]

The Paris Treaty which created the ECSC expressly prohibits, in Article 4, among measures which could be taken by Member States such as import and export duties, subsidies or aids: "(b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier".[29] Furthermore, Article 60 prohibits pricing practices contrary to the general objectives of the Community, in particular "purely temporary or purely local price reductions tending towards the acquisition of a monopoly position within the Common Market" and "discriminatory practices involving, within the Common Market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the nationality of the buyer".[30] Article 60 also empowers the High Authority (now the Commission) to define the practices covered by this prohibition, which was done by Decisions of the 2nd May 1953 and the 11th December 1963. In order to give a larger scope to the rules thus adopted, Article 63 paragraph 2 permits the High Authority (now the Commission) to compel undertakings to frame their conditions in

[28] Again, the literature on the subject is enormous. A number of valuable books have been published in the English language. The last one is the English translation of a classical handbook, revised to January 1st, 1973: B. Goldman, *European Commercial Law* (1973) (hereinafter cited as Goldman). In the French language, particular references may be made to J. Guyénot, *Le régime juridique des ententes économiques et des concentrations d'enterprises dans le Marché Commun* (1971, with an appendix reproducing the relevant provisions of the EEC Treaty and the main Regulation) (hereinafter cited as Guyénot, *Ententes*), and *Droit antitrust europeen* (1972, with important appendices) (hereinfater cited as Guyénot, *Droit anti-trust*).

[29] Cf. Goldman nos. 648-652.

[30] On the law relating to this prohibition see Goldman nos. 653-680; 2 Roblot no. 2531.

such a way that their customers and commission agents acting on their behalf shall be under an obligation to comply with these rules, and to decide that undertakings shall be held responsible for infringements of this obligation by their direct agents or by commission agents acting on their behalf. To complete the fight against discrimination, Article 60 paragraph 2 provides for publication of price lists and sales conditions. If the rules contained in the Treaty may appear stringent, the High Authority seems to have applied them with a desirable degree of flexibility, without however impairing their effectiveness.

The Rome Treaty does not contain any general prohibition of discriminatory practices.[31] Price reduction appeared, within limits, a normal and healthy means of competition.[32] On the other hand, any discrimination on the grounds of nationality is prohibited under Article 7[33] and, as will be observed, measures are taken against abuses of a dominant position.[34]

The second set of rules for the protection of competition which may be found in the Community treaties concerns restrictive agreements. Article 4 of the ECSC Treaty prohibits "restrictive practices which tends towards the sharing or exploiting of markets". More specifically Article 65 paragraph 1 prohibits "all agreements between undertakings or decisions by associations to which undertakings belong and all concerted practices tending, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the Common Market".[35] Specifically prohibited are agreements tending to fix or determine prices, to restrict or control production, technical development or investments, or to share markets, products, customers or sources of supply. However, Article 65 paragraph 2 gives to the High Authority (now the Commission) the power to authorize specialization agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds such agreements will make for a substantial improvement in the production or distribution of those products, that they are essential to achieve these results and are not more restrictive than is necessary for that purpose, and that they are not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the Common Market, or to shield them against effective competition from other undertakings within the Common Market. In other words, restrictive agreements are dangerous, but may be healthy. Decades of American experience has shown that there are "good" and "bad" agreements and that the judgment can often be made only on the basis of the circumstances of the case within broad standards: hence the general

[31] See however article 85 paragraph 1(d); infra p. 50.
[32] 2 Roblot no. 2531.
[33] Goldman no. 435.
[34] Infra p. 51.
[35] On the law relating to this prohibition, see Goldman nos. 681-721; 1 Roblot no. 491 and 2 Roblot no. 2532.

prohibition and the power of the High Authority (now the Commission) to grant exemptions.

Similar provisions may be found in Article 85 of the EEC Treaty. Paragraph 1 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerned practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market".[36] It also enumerates a number of restrictive practices in a non-exhaustive list similar to the one given in Article 65 of the ECSC Treaty, but which also refers to the discriminatory practice of applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" (Article 85, paragraph 1(d)) and to "linked contracts". However, paragraph 3 permits a "declaration of inapplicability of paragraph 1" to be issued as regards agreements which "contribute to improving the production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit and which neither (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of the above objectives, nor (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question". Needless to say, each expression of these provisions has given rise to great discussion and sometimes to a number of Commission or Court decisions. Furthermore, the Council of the Community has empowered the Commission, by its Regulation No. 19/65 of the 2nd March 1965, to define the types of agreement which should enjoy the benefit of exemption without prior individual examination. The Commission has to a certain extent exercised this power in its Regulation No. 67/67 of the 22nd March 1967.

To give effectiveness to the prohibition of restrictive agreements, the Council of the Community, in accordance with Article 87 of the Treaty, has also issued an important set of rules: Regulation No. 17/62 of the 6th February 1962.[37] This Regulation creates a procedure of declaration to the Commission (even though such declaration is not imposed), and grants to the Commission important powers of investigation and control to be used "in close and constant co-operation with the relevant authorities of Member States". After a hearing of an adversary kind and consultation with a Consultative Committee, the Commission renders a reasoned decision. Should it find that there has been an infringement of Article 85, it may, by way of decision, "compel the enterprises or associations of

[36] On the law relating to this prohibition, see Goldman nos. 360-469; 1 Roblot nos. 491.1 and 2 Roblot nos. 2532; Guyénot, *Ententes* nos. 43-74; Guyénot, *Droit anti-trust* nos. 5-115.

[37] On the enforcement of the prohibition of restrictive agreements, see Goldman nos. 503-629; 1 Roblot nos. 491.2-492; Guyénot, *Ententes*, nos. 97-189, 231-284; Guyénot, *Droit anti-trust* nos. 200-314.

enterprises to bring the infringement to an end". Moreover, as national courts of Member States must enforce Article 85 of the Treaty under the supervision of the Court of Justice,[38] Article 9 of the Regulation sets out in detail the co-ordination of the jurisdiction of these courts and that of the Commission.[39]

One should remark that concentrations of enterprises, the effects of which may appear stronger and in certain cases more dangerous to competitors than any restrictive agreements, are in principle subject to authorization under the ECSC Treaty,[40] but they are not considered by the Commission to be governed by Article 85 of the EEC Treaty.[41] It is only in special circumstances that they may constitute an abuse of a dominant position.[42] The Commission, however, is presently reconsidering its position.

Abuse of a dominant position in the Common Market is precisely the last practice in the field of competition between enterprises, which is prohibited by Community law. Article 66(7) of the ECSC Treaty empowers the Commission to take measures if it finds "that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the Common Market are using that position for purposes contrary to the objective of this Treaty".[43] In such a situation, the Commission makes such recommendations as are necessary to bring the abuse to an end. If these recommendations are not complied with, the Commission decides on prices and sales conditions to be applied by the enterprise or lays down production and delivery programmes to be met by the enterprise. Heavy fines are incurred by an enterprise which disregards such a decision.

The EEC Treaty also contains a provision against abuse of a dominant position. Article 86 states: "Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States".[44] Article 86 also sets out

[38] On the relationship between Community law and the national laws of the Member States, see Goldman nos. 930-942; 1 Roblot no. 63; Guyénot, *Droit anti-trust* nos. 177-199.

[39] See Goldman nos. 509-536; Guyénot, *Ententes* nos. 192-210; Guyénot, *Droit anti-trust*, nos. 152-176.

[40] Goldman nos. 722-749; 1 Roblot no. 686.

[41] Goldman nos. 495-499.

[42] Goldman nos. 500-502; infra fn. 44.

[43] On the law pertaining to this provision, see Goldman nos. 750-760; 2 Roblot no. 2533.

[44] On the law pertaining to this provision, see Goldman no. 470-494; 2 Roblot no. 2533; Guyénot, *Ententes* nos. 75-96; Guyénot, *Droit anti-trust* nos. 116-149; F.-C. Jeantet, "Lumiére sur la notion d'exploitation abusive de position dominante", 47 Semaine Juridique (Juris-classeur Periodique) 1973.I.2576. On the famous *Continental Can* case discussed in this article, see inter alia: V. Korah, "The control of mergers under article 86 of the Rome Treaty: Continental Can" (1973) 26 Curr. Leg. Problems 82.

a non-exhaustive list of practices which amount to abuse of a dominant position. The list is very similar to the one contained in Article 85.[45] As may easily be seen, the rules governing abuse of a dominant position differ in the Paris Treaty and in the Rome Treaty. In the former, measures against an abuse are taken only upon a finding of the Commission that such an abuse is practised. In the Rome Treaty, any abuse is *per se* illegal and prohibited. The sanctions and the machinery to make sanctions effective are very close to those provided against restrictive agreements and they are contained in the same Regulation.[46]

This has been a bold outline of an impressive evolution: from a law of *unfair competition* purporting to protect a merchant against the dishonesty of another one, to a law of *competition* whose main object is the protection of competition in itself. At the starting point, the interests of an individual merchant are alone taken into consideration. At the present stage of evolution, the traditional law remains in force. However, the "new law" of competition, based on the Community treaties and on national legislation to the extent to which it does not conflict with the Community law, has gained much greater significance. This new law does not disregard the interests of individual merchants. The practices that it prohibits would hurt many of them. It gives them some protections not previously enjoyed. Still, individual interests are not at the root of the new law. The new law aims at maintaining free and healthy competition in the national and European interests. Its concern is not for an individual merchant, but for the citizens at large. As such, it tends to become a piece of a rapidly expanding domain of law: the law of consumer protection.

[45] See supra p. 50.
[46] See supra pp. 50-51.