

Switzerland

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Introduction

Concept

The Swiss Constitution proclaims the general principle of freedom of trade and industry.¹ However, in reality, this apparently very liberal principle is limited in many ways, among others, by the control of cartels and dominant companies (Cartel Law) and by the law against Unfair Competition (Unfair Competition Law Statute). The Swiss Unfair Competition Law has a tri-dimensional and hybrid nature as it aims at:

- (1) Protecting and regulating the market place;
- (2) Regulating the behavior of competitors; and
- (3) Protecting consumers.²

Preserving the quality of competition is the underlying target of the Statute. Competition must take place in an atmosphere of fairness and should not be distorted. Competitors should adhere to honest market ethics to obtain their results by activities which can be expected from a fair competitor. This is expressly provided for in Article 1 of the Unfair Competition Law of 1986:

"This Statute aims at ensuring, in the interests of all parties concerned, a fair and undistorted competition."

Since the scope of the law has been extended to acts or behavior affecting relations between merchants and consumers, the former requirement (contained in the Unfair Competition Law of 1943) of the existence of a direct competitive relationship between the author of the unfair

¹ Federal Constitution, Article 31.

² ATF 120 IV 282, 293.

behavior and the "victim" has been abandoned. With the present law, all market participants, not only competitors but also consumers, can be found guilty of unfair competition practices. It means, for instance, that an article written by a journalist can now fall within the Unfair Competition Law.³

Sources of Law

Unfair trade practices are regulated by different sources of law. Firstly, the basic acts of unfair competition and the principles eliminating them are the objects of the Federal Unfair Competition Law Statute of 19 December 1986, which has been in force since 1 March 1988. This statute is divided into five chapters. The first chapter defines the aim of the Statute.⁴ The second chapter stipulates the principle of fair competition (general clause)⁵ and introduces a catalogue of various detailed rules concerning examples of unfair trade practices⁶ and also fixes procedural rules.⁷ Chapter three regulates the indication of retail prices,⁸ while the criminal rules are dealt with in chapter four.⁹ The fifth chapter concerns the abrogation of federal law.¹⁰

Unfair trade practices are secondly dealt with by the rules laid down by the Swiss Commission for Fairness in Advertising and by an Ordinance on the Indication of Retail Prices. The Swiss Civil Code contributes also to the protection of fair competition, Articles 28 *et seq.* dealing with the protection of personality and Article 29 with the protection of the names of individuals. The Swiss Code of Obligations protects against another aspect of unfair competition; Articles 951 and 956 deal with the protection of company names. Internationally, Switzerland must comply with the rules of the Paris Convention for the Protection of Industrial Property, particularly with Articles 10*bis* and 10*ter*, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Finally, the doctrine (literature) and the jurisprudence of the Swiss tribunals play an important role in the development and the interpretation

3 ATF 117 IV 193.

4 Unfair Competition Law, Article 1.

5 Unfair Competition Law, Article 2.

6 Unfair Competition Law, Articles 3–8.

7 Unfair Competition Law, Articles 9–15.

8 Unfair Competition Law, Articles 16–20.

9 Unfair Competition Law, Articles 23–27.

10 Unfair Competition Law, Article 28.

of the applicable law. When looking for a solution, one should take into consideration at least the decisions of the Federal Supreme Court which constitute a kind of "case law".

Conflict of Laws

The provisions regulating the conflict of laws are contained in the Swiss International Private Law Statute which has been in force since 1 January 1989. Unfair trade practices, that is, unfair competition, conflict of law rules are included in chapter nine, the third section concerning Unlawful Acts. The applicable law is the one of the State in which the result of the unfair act occurred:

"Claims of unfair competition are governed by the law of the country in whose market the unfair act deploys its effect."¹¹

"If the unlawful act is directed exclusively against operational interests of the damaged party, the applicable law will be that of the country in which the establishment concerned is located."¹²

The internal jurisdiction of the Swiss tribunals lies with the courts at the domicile or the residence of the defendant. If the defendant has neither a domicile nor a residence in Switzerland, the jurisdiction of the Swiss tribunals is determined by the place where the unlawful act took place or where the result occurred:

"Lawsuits based on unlawful acts are subject to the jurisdiction of the Swiss courts at the domicile of the defendant or, if he has none, at the place of his habitual residence or of his business establishment."¹³

"If the defendant has neither his domicile, nor his habitual residence, nor his business establishment in Switzerland, jurisdiction lies with the Swiss court where the act took place or where it had its effect."¹⁴

11 International Private Law Statute, Article 136, alinea 1.

12 International Private Law Statute, Article 136, alinea 2.

13 International Private Law Statute, Article 129, alinea 1.

14 International Private Law Statute, Article 129, alinea 2.

Unfair Acts and Practices

The cornerstone of the Unfair Competition Law is the general clause:¹⁵

"Is unfair and unlawful every behavior or commercial practice which is deceptive or which is infringing in sundry ways the good faith rules and which has an influence on the relations between competitors or between suppliers and customers."

Article 2 must be interpreted in relation to the purposes of the Statute which are defined in Article 1, that is, to guarantee fair and undistorted competition in the interest of all participants. Article 2 allows the delimitation of a zone in which an economic behavior is considered as acceptable. To be able to recognize when a behavior falls under the general clause, it is necessary to define the three key words: "unfair", "unlawful" and "good faith". Firstly, "unfair": the Message of the Federal Council Concerning the Unfair Competition Law¹⁶ explains that fair competition distinguishes itself from unfair competition — without taking into account business ethics — in the perspective of the results that can be expected in a system where competition works well.¹⁷ Because fairness presupposes a relationship between human beings, Article 2 principally aims at ensuring that economic actors behave correctly. Success in the market should be achieved by own efforts and work. This is another cornerstone of the Statute, which is based upon performance in its widest sense.

Secondly, "unlawful": this term has been joined with "unfair" because the adjective unfair is not a legal notion. Unfair acts are unlawful. The adding of this adjective ensures that unfair behavior is considered a tort. Finally, "good faith": when the law refers to good faith, it follows the principle of Article 2 of the Swiss Civil Code.¹⁸ In the field of competition, acting with good faith means that actors in the market have the right to expect "normal behavior" from each other. The Federal Supreme Court has not established clear and straight rules for what is

15 Unfair Competition Law, Article 2.

16 *Message à l'appui d'une loi fédérale contre la concurrence déloyale* (LCD) of 18 May 1983, at p. 33.

17 *La séparation de la concurrence loyale de celle qui est déloyale doit donc s'opérer — indépendamment des critères propres à la morale des affaires — dans la perspective des résultats escomptés dans un système où la concurrence fonctionne bien.*

18 The first ten Articles of the Swiss Civil Code set out some generally valid principles of Swiss law.

to be considered as behavior contrary to good faith. Nevertheless, it can be said that, as long as the consumer is not misled and that his security is not endangered, the behavior of the competitor is, as a general rule, in accordance with good faith.

The Federal Supreme Court considered that a competitor who orders samples not only to test the goods but to copy them behaves maliciously and, therefore, contrary to good faith.¹⁹ It is the act of taking advantage in a malicious way of the efforts of a competitor that is contrary to Article 2, not the act of copying. Further, placing a person in front of a competitor's shop to attract purchasers into one's own shop is behavior contrary to good faith.²⁰ However, certainly the most frequent form of behavior which infringes the rules of good faith is passing off. Article 2 may be used to reprimand acts or behavior which do not fit exactly into one of the articles ruling upon special unfair trade practices, particularly Article 3. Article 3 consists of a list of the acts (catalogue) which have been considered by tribunals as being unfair. This catalogue of unfair behavior cannot be exhaustive as technical evolution is growing very rapidly and, with it, new forms of competition. However, as stated previously, if it is needed and if its conditions are fulfilled, the general clause can come to the rescue.²¹

Fishing for Customers

Deceptive Practices

Apart from the general clause, this type of unfair behavior is prohibited by the Unfair Competition Law.²²

Article 3 lit. b provides that:

"... one is acting unfairly when he gives inaccurate or false indications about himself, his undertaking, his trade name, his goods, his business or if by such allegations he favors third persons against their competitors."

In this case, the competitor gives himself or his goods an advantage without any justification in order to induce customers to use his services, to buy his goods or to favor third parties. To know whether an

19 ATF 113 II 319.

20 Martin-Achard, *La loi fédérale contre la concurrence déloyale*, 19 December 1986, at p. 38.

21 Martin-Achard, *La loi fédérale contre la concurrence déloyale*, 19 December 1986, at p. 42.

22 Unfair Competition Law, Articles 3 lit. b, c and d.

indication is inaccurate or false, one must examine how the average consumer would understand it.²³ The understanding of the specialist or the opinion of the author of the indication are not decisive. What matters is how the buying public understands the indication. As soon as the public is at risk of being misled and deceived, the competitor's behavior is unfair.

In order to establish whether an indication is misleading or not, not only the words must be examined, but also the way in which it is presented. For instance, advertising exaggerations which do not obviously appear as such (which are not mere puff) are prohibited. A true advertisement which presents standard characteristics common to all products of that kind as if those characteristics were extraordinary can mislead the buying public if they are led to believe that the praised qualities exist only in the article which is being advertised.²⁴ Of course, one can indicate that his goods or services are unique if the statement is true. However, if there is a doubt as to the uniqueness of them, it is better not to use this form of advertisement in order not to fall within the Statute.

Indications contained in a trade name should correspond to the real business activity.²⁵ A trade name should not contain indications which could induce customers to think that there is a link with another firm.²⁶ It is also prohibited to allege that a trademark or a patent exists when it is not the case or when the rights are void.

Deceptive practices are furthermore prohibited by Article 3 lit. c of the Unfair Competition Law. This provision forbids the use of inaccurate titles or professional names, which lead people to think of a particular or distinctive capacity and, therefore, incite them to enter into relations with the holder of the (false) title.

A title or a professional designation indicates a distinction, a professional ability, specialty or the existence of a diploma. For example, the designation "*fabricant*" (manufacturer) is not considered as being a title according to the definition given above.²⁷ According to a recent decision of the Federal Supreme Court, Article 3 lit. c is applicable only when a person professionally uses a title which is inexact and misleads the public by making them think that this person has peculiar

23 ATF 90 IV 43 — JT 1964, 55, 56.

24 Swiss Commission for Fairness in Advertising Rules 1989, Number 3.7.

25 ATF 94 I 613 — JT 1969, 687.

26 ATF 104 II 59 — JT 1978, 282–283.

27 ATF 106 IV 218, 222.

distinctions or abilities. Inexact means that the title was not obtained through the normal route or has been established by a fictitious institution.²⁸ The purpose of this article is to make sure that people who use a title have followed studies which are equivalent to Swiss standards giving the right to such a title. Eccentric titles such as "doctor of watches" or "clinic for dolls", which clearly cannot be taken seriously, do not fall within Article 3 lit. c. This behavior can also fall within Article 3 lit. b of the Statute. Article 3 lit. d of the Statute is the main provision against deceptive practices. It provides that:

"... one is acting unfairly when he takes measures which cause confusion with the goods, the works and the services of someone else's business."

This article aims at preventing the creation of a risk of confusion (passing off) to "fish" for customers. Confusion can result from the use of similar trade names or trademarks, from the imitation of the form of a product or its presentation or packaging, from audio-visual presentations (telespots) or from any other method of identifying a product or a firm in a way which makes the customer believe that there exists a link between the two competitors: To examine whether a risk of confusion has been created, one must take into account, above all, the recollection left in the memory of the consumer, the auditive effect of the presentation (pronunciation of words) and also the sense of the individual item, that is, the intellectual association which the consumer makes when he perceives it.

There are several types of confusion. Confusion can occur with regard to the origin of the product or the service from a certain enterprise. A consumer can also be confused if he is induced to think that there exists a link between the business of the competitor and the one of another market participant, or that there is a relationship between a certain product and a competitor's enterprise. The risk of confusion concerning packaging must be analyzed taking into account the moderate capacity of attention and perception of the average consumer. Generally, this kind of confusion will occur with the packaging of goods, one of which is already quite well-known among the buying public. Of course, the more original the packaging is, the greater its distinctive capacity, but also greater is the temptation for competitors to imitate it. Deception can also be achieved in relation to the imitation

²⁸ ATF 117 IV 324 — JT 1992 II 383.

of goods (counterfeits), misleading statements and product quality, which are discussed in more detail later.

Duress

This kind of unfair trade practice is covered by Unfair Competition Law.²⁹ Apart from the general clause, duress is strictly prohibited by Article 3 lit. k, as it states:

"... [commits an act of unfair competition the person who] omits in his public advertisements for sales with installments or similar agreements to identify himself clearly or to give clear indications about the sales price or the additional costs resulting from the payment by installments."

This kind of advertisement can be catalogued under duress because the omission of clear information in the advertisement attracts consumers to conclude contracts or payments by installments. There is duress because the consumers are obliged to pay supplements without being made aware that they pay in reality an exaggerated price. The same kind of duress can also occur when the competitor omits in his advertisements for consumer credits to give clear indications regarding the net amount of the credit, the total cost of the credit and the interest to pay per annum.³⁰

Article 3 lit. m also concerns consumer credits or sales by installments, but there, duress results from the use by the competitor of pre-established contract forms which contain inaccurate indications relating to, for instance, the object of the contract, the price, the payment conditions and the duration. Duress is also covered by Article 8 of the Unfair Competition Law, which prohibits the competitor to:

"... use forms with general pre-established clauses that may mislead the other party that are notably departing from the usual rules and that foresee a distribution of rights and obligations contrary to what would normally result from such a contract."

Here, duress occurs because the competitor, by using pre-formulated general clauses, puts all the advantages on his side at the expense of the other (inexperienced) party. As a general rule, the other party does not pay attention to the general contract conditions. It is the purpose of

²⁹ Unfair Competition Law, Articles 3 lit. k to lit. m.

³⁰ Unfair Competition Law, Article 3 lit. l.

Article 8 to protect the weaker party. However, Article 8 does not apply where the other party was given the possibility to discuss and negotiate all of the conditions and general clauses before signing the contract.³¹

Nuisance and Harassment

Both nuisance and harassment are covered by the Unfair Competition Law and especially by Article 3 lit. h. According to this provision, one is acting unfairly:

"... when by using particularly aggressive sales methods, the competitor acts so that his customers are not able to decide freely."

Of course, trying to catch the attention of the customers for one's own goods belongs to the nature of competition, but it becomes illicit when the consumers can no longer decide freely. With this provision, the legislator wanted to eliminate methods of sale which place the consumer in a situation where he feels obliged to buy. Psychological constraints fall within this provision. It is, for example, considered harassment to organize trips at a very tempting price and then to plague the participants during the journey with sales offers, to sell in the street by pursuing the "victims" or to make believe that there is a danger for health if a special product is not bought and used.³² Nuisance and harassment can also take place when unordered goods are sent with a ten-day return right, but with a payment slip to be paid as soon as the goods have been received. It would appear that Article 3 lit. h has been successful in its preventative function as, to date, no judicial decisions concerning aggressive sales methods are known to the authors.

Enticement

Apart from the general clause, two provisions in the Unfair Competition Law can be cited as suppressing enticement. Article 4 lit. b states that an activity is unfair when:

"... one seeks to obtain profits for himself or for somebody else by according or offering to workers, representatives or

³¹ François Dessemontet, *Le contrôle judiciaire des conditions générales*, at p. 70.

³² *Message à l'appui d'une loi fédérale contre la concurrence déloyale* (LCD) of 18 May 1983, at p. 65.

auxiliaries of a third person illegitimate advantages which are of a nature to tempt them not to fulfill their duties."

This kind of behavior disturbs the equilibrium of competition because the corrupter is not selected according to his offer, but because he is able to offer advantages to another person who can make decisions in his favor or, at least, can influence them.³³ Article 4 lit. c of the Unfair Competition Law covers another form of enticement, by:

". . . urging workers, representatives or auxiliaries to betray or discover a manufacturing secret or business secrets of their employers or mandators."

In this case, the corrupter contacts persons who, thanks to their contractual relationship with a competitor, know secrets which they can betray or which they can discover because of their position and which they can communicate to the corrupter. If the exploitation of secrets takes place after a work contract or after an agency agreement has come to an end, the general clause is applicable and not Article 4 lit. c.³⁴ Even if a bribe is offered but not accepted, an unfair act has been committed and is covered by Article 4 lit. b or Article 4 lit. c of the Unfair Competition Law. The Unfair Competition Law is not the only legal weapon against bribes. The Swiss Code of Obligations³⁵ and the Criminal Code can also be cited. One who has betrayed a secret (the corrupted) will fall within the Criminal Code³⁶ as well as within the general clause, because he has granted advantages to a third person by acting contrary to the principles of good faith. Acting in this way inevitably has adverse effects upon competition in the sense of the general clause.

Exploitation of Gambling Instincts, Free Gifts and Bonuses

The exploitation of gambling instincts is covered by the Unfair Competition Law³⁷ as well as by the rules laid down by the Swiss

33 Oppetit, B., "*Le paradoxe de la corruption à l'épreuve du droit du commerce international*", J.D.I., I, 1987, 5 s.

34 ATF 114 II 91 — JT 1988, 310–312.

35 Code of Obligations, Article 41.

36 Criminal Code, Article 162.

37 Unfair Competition Law, Articles 3 lit. g and lit. h.

Commission for Fairness in Advertising. According to Article 3 lit. g of the Unfair Competition Law:

"... one acts unfairly when by offering free gifts and bonuses he deceives his customers about the real value of his offer."

The deception consists of the fact that the bonus or free gift attracts the attention of the buyer and thereby falsifies his judgment, or it induces the consumer to believe that the purchase he intends to make is a particularly advantageous deal.³⁸ It is unfair to advertise that the purchase of an article will be accompanied by a valuable free gift if this gift is a practically worthless item or if the price of the main good to which the bonus is attached has been increased before the sale to compensate for the free gift.³⁹ It is not the offer of a free gift or a bonus which is unfair, but the deception in relation to its real value.

The Swiss Commission for Fairness in Advertising has issued some rules for the offering of bonuses and gifts. According to the Commission, sales with free gifts or bonuses are allowed when they are publicly offered in the framework of a retail sale, for a short period only and if the value of the gift or the bonus does not exceed three per cent of the sale price of the main good to which it is attached.⁴⁰ This rule does not concern flowers, animal food or consumable goods. Vouchers are considered as free gifts and bonuses. They are allowed as long as the public is not deceived as to the real value of the goods which are offered with them.⁴¹ Article 3 lit. f of the Unfair Competition Law also applies when one is exploiting the gambling instincts of a consumer. What has been said previously in relation to nuisance and harassment can be applied *eo ipso* here.

Exploitation of Emotions

This type of behavior is covered by the general clause. The exploitation of the emotions of the consumer infringes the principles of good faith and influences the relationships between competitors and other market participants. Article 3 lit. h is also applicable when one is exploiting the emotions of the consumer. Again, what has been said regarding nuisance

38 ATF 83 II 458.

39 ATF 89 IV 218 — JT 1963, 155 and ATF 82 IV 47.

40 Swiss Commission for Fairness in Advertising Rules 1989, Number 3.9.

41 Swiss Commission for Fairness in Advertising Rules 1989, Number 3.10.

and harassment can be applied *eo ipso* here. Article 29 of the Swiss Code of Obligations offers a means for nullifying a contract concluded using emotions. This provision states that if a party has entered into a contractual relationship as a result of fear which has been provoked by the other party or a third person, the contract will not be binding upon that party. Article 29 is one of the general rules of the Swiss Law on Contracts.

Exploitation of Inexperience

This kind of unfair practice is prohibited by the Unfair Competition Law⁴² which has already been discussed in relation to duress. What has also been said regarding the exploitation of gambling instincts more particularly under Article 3 lit. g, can also be repeated here, as inexperienced people may run a higher risk of falling into the trap of tempting offers, free gifts or bonuses.

Use of Non-Professionals

As there is no particular provision covering this kind of unfair practice, the general clause may be applied. Article 2 will apply where non-professionals are participating in competition without being able to offer the service or effort which may, in good faith, be expected from them. The offer of services by a professional who, in reality, does not have the required capacity may also be considered as use of inaccurate or false titles or professional designations, as prohibited under Article 3 lit. b and lit. c. As in most instances, the use of a non-professional leads to deception of the consumer.

Impeding Free Competition

As said before, the general clause can be invoked where there is no specific rule regulating the act concerned. Free competition is, above all, guaranteed by cartel law, the Unfair Competition Law containing only a few clauses which indirectly safeguard free competition. The general clause may be invoked, but shall rarely be applied by the courts.

⁴² Unfair Competition Law, Articles 3 lit. k to 3 lit. m and Article 8.

Impeding of Marketing Efforts and of a Competitor's Business

These two impediments seem to concern, above all, the freedom of competitors or the guarantee of equal chances. Swiss cartel law guarantees competitors against abusive activities of dominant companies or against horizontal or vertical agreements between market participants which would exclude third parties from participating in the market. The Swiss Unfair Competition Law does not contain any special clauses which are expressly aimed at suppressing impeding activities as such. However, if such activities are unfair, then the general clause may be invoked. Furthermore, most of the activities falling within the scope of the Unfair Competition Law are directly or indirectly impeding marketing efforts or the business of competitors. One should keep in mind, however, that, in a free market such as Switzerland, the business of a market participant may be impeded and even annihilated by his competitors as long as it is done in a fair way, that is, without recourse to unfair or otherwise illegal means.

Cut-Throat Competition

One could consider as cut-throat competition (a term unknown to the Unfair Competition Law) the practice of "decoy prices". This kind of behavior is covered by Article 3 lit. f of the Unfair Competition Law which provides that:

"... someone is acting unfairly when he repeatedly offers a choice of goods, works or services below cost price and advertises his offer in a particular manner so that he misleads his customers about his own capacity or the capacities of his competitors."

Decoy prices are presumed when the sales price is lower than the cost price for comparable goods, works or services of the same nature. Even if an action is qualified as being a "special offer", it may fall within Article 3 lit. f if it suggests overall favorable prices practiced by the shop or company, and that, in reality, only a few prices are favorable, whereas the majority are standard or even above standard. This behavior is considered to be dishonest because it entices consumers to enter a shop to buy the goods marked with decoy prices, and then, once in the shop, the consumers may buy other goods at a standard or even exaggerated price. Decoy-prices, even if they are not misleading, may also have an indirect but real effect of denigration, as the consumer may be led to believe that

the competitors who are selling the same goods at normal prices are practicing overrated prices and realizing excessive profits.

Practicing decoy prices on branded goods is also a method of cut-throat competition. The "infringer" offers branded goods at below cost prices and thus uses the reputation attached to the branded goods to make the clients enter the shop and buy other goods sold at normal prices. By such an action, the brand reputation may be damaged as the consumers may believe that the marked goods offered at normal prices by authorized distributors are sold at overrated prices.⁴³

Defamation

Defamation or slander is expressly covered by Article 3 lit. a of the Unfair Competition Law:

"Behaves unfairly the one who denigrates another person, his goods, his services, his works, his prices or businesses by inaccurate or fallacious or unnecessary injuring allegations."

Denigration (slander) or defamation can be aimed at any aspects of the activity of a competitor. It can deal with his business connections as well as with his private life. An allegation is inaccurate when it is objectively contrary to the truth. Untrue allusions or insinuations about a competitor which leave the potential customer with a negative impression of the competitor, his activities or his capacity fall within Article 3 lit. a of the Unfair Competition Law. The criterion to determine whether allegations are accurate or inaccurate is the usual attention or capacity of judgment that can be expected from the circle of customers concerned.⁴⁴ A negative comment regarding the services of a competitor is unnecessarily injurious when it is not relevant for the comparison of the services offered by the two competitors, that is, when it does not help or facilitate the comparison. Often, such allegations aim at killing the sympathy that the consumer could have had for the competitor as a human being.

The constitutive elements of slandering are the same as the ones concerning defamation in the Criminal Code.⁴⁵ For instance, to wrongly claim that a competitor is insolvent is injurious to his business.⁴⁶ There

43 Bernard Dutoit, *La nouvelle loi fédérale contre la concurrence déloyale*, at p. 27.

44 ATF 87 II, 116 — JdT 1961, 601.

45 Criminal Code, Article 173, ch. 2.

46 ATF 104 V 115.

are many court decisions dealing with slander or defamation. For instance, the publication of the only expert opinion which is favorable to a product when there are many other less favorable opinions regarding the same product falls within Article 3 lit. a,⁴⁷ as well as expressions which tend to ridicule the product of a competitor.⁴⁸ Of course, in economic matters, it is possible to objectively criticize products but, when the critics serve as comparison their own businesses or activities, the Federal Supreme Court considers that particular care should be taken.⁴⁹

Nowadays, however, the Federal Supreme Court tends to be less severe with publications criticizing works or competitors' activities when the terms used are not injuring or humiliating as such. Only when the terms are not only negative but also inaccurate, will they be considered as denigrating or defaming. For instance, the Federal Supreme Court considered the statement in a newspaper article that "those products are already old-fashioned when they enter the market" as not unnecessarily injurious because the falsehood of the allegation was not established.⁵⁰ It should be noted that, not only a slandering or defaming allegation regarding a third person, his goods, services or works is covered by Article 3 lit. a of the Unfair Competition Law, but also a slandering statement regarding his price policy. In any case, what is decisive is that an inaccurate allegation distorts inadmissibly the commercial position of the victim. For instance, to say that a competitor "does not have a penny" (*il n'avait pas le sou*) is needlessly offending.⁵¹ However, if unnecessarily injurious or inaccurate words are published for economical or political purposes they may also be prohibited by the Unfair Competition Law, even if their purpose is not to influence the situation of a competitor.⁵²

Critical and Comparative Advertising and Product Tests

Two provisions regulate critical comparative advertising and product tests: Article 3 lit. e of the Unfair Competition Law and Rule Number 3.6 of the Rules laid down by Swiss Commission for Fairness in Advertising.

47 ATF 120 II 76 — JT 1994, 365.

48 ATF 59 II 16 — JT 1933, 435.

49 ATF 120 IV 32 — JT 1994, 363.

50 ATF 117 IV 193 — JT 1992, 378.

51 ATF 74 IV 115 — RSPI 1949, 78.

52 ATF 112 II 268.

According to the Federal Supreme Court, comparative advertising is lawful when it does not contain unfair elements.⁵³ Article 3 lit. e of the Unfair Competition Law provides that:

"Behavior is unfair when one is making an inaccurate, fallacious, parasitic or needlessly injurious comparison between himself, his goods, his works, his services or his prices and the ones of a competitor or when one by such comparisons favors third persons against competitors."

As the sole use of false or inaccurate indications is already forbidden by virtue of Article 3 lit. b, it is not surprising that inaccurate indications or false allegations which are used by a competitor in the comparison of his products or services with those of one of his competitors are also considered to be unfair. Like any other advertising, comparative advertising must be objective, true and realistic, as buyers must be put into a position where they can proceed to an objective comparison of the products or services which are offered to them by sundry producers or sellers. For this purpose, quality and price must be presented in a transparent way. As not only those elements are influencing the consumer, but also the sympathy, the conviction, the political, ecological or humanitarian attitude of the competitor, it is, therefore, also very important that the information given about the competitor, his person, his products or services, is true, accurate and not unnecessarily injurious.⁵⁴

Nevertheless, an advertisement which is true and objective can sometimes be unfair when it is done in a parasitic way. For instance, it is prohibited for a competitor to attribute to his products the qualities of a well-known product of another competitor just to incite the consumer to buy his products.⁵⁵ Comparative tests must be used with reserve and objectivity. To be objective, the competitor must mention not only the elements in favor of his products, but also the negative elements (which may be absent in a competitor's products). For comparative advertisements, one must take into account the interpretation that the public concerned is going to make of the given information. The elements which are compared must be of the same character and measurable in the same way.⁵⁶

53 ATF 102 II 294 — JT 1977, 516.

54 Bernard Dutoit, *Réflexions comparatives*.

55 ATF 102 II 292 — JT 1977, 516.

56 ATF 104 II 124 — JT 1978, 282.

Rule Number 3.6 of the Swiss Commission for Fairness in Advertising lays down the same criteria concerning fair comparative advertisement. For the Commission, an allegation is inaccurate if goods or services which are compared are not comparable, or if the facts put forward in the advertisement are of no importance in making the public understand the comparison. According to the Commission, an indication is deceptive when, for example, it is hiding facts which should have been communicated to the public, the information to which it is referred does not take into account the standard capacity of comprehension of the average consumer, elements cannot be compared because they are not of the same kind or the comparison is falsely shown as if it was complete and conclusive. At last, according to the Commission, an allegation is unnecessarily injurious if the advertisement contains a judgment of value (*jugement de valeur*) that is not necessary for informing the customers objectively. It is also needlessly injurious when it goes beyond what is necessary to ensure market transparency (if, for example, it attacks the personality of the competitor instead of his performance).

Exploitation

Imitation

With regard to the exploitation by imitation of goods or services of a competitor, Article 3 lit. d of the Unfair Competition Law applies. Imitation of a good or service is unfair when it confuses the consumer, that is, when the imitator could have copied the article (which is not protected by a special law) without creating a risk of confusion, for example, by changing the get-up of the article. The imitation of current consumer articles is unfair when the customer is led to believe that the different articles originate from the same enterprise or from enterprises which are linked to each other.⁵⁷ If a competitor does not imitate the products or the packaging of the goods as a whole but only parts of them, he creates unfair confusion if the consumer believes that the product has been produced with the consent of the owner of the original packaging.⁵⁸

Imitation is also unfair when the imitator exploits the reputation of a product in a parasitic way.⁵⁹

⁵⁷ ATF 116 II 365 — JT 1991, 613.

⁵⁸ ATF 116 II 305 — JT 1991, 613.

⁵⁹ ATF 116 II 471 — JT 1991, 164.

Imitation of goods or services is not prohibited as long as the goods or services are not protected by a special law and the imitation does not confuse the consumer. According to the current position of the Federal Supreme Court, the risk of confusion must exist at the time when the consumer is buying the goods or when he takes the decision to acquire them.⁶⁰ However, the confusion caused by unfair acts can also occur after the act of buying — so-called "post-sale confusion" — for instance, at home when opening the packaging, that is, when counterfeits are wrapped in neutral packaging, so that the passing off takes place only after the wrapping has been taken away. For instance, to avoid confusion, and particularly post-sale confusion, the creator of an imitation should place on every good a distinctive sign or a designation which allows consumers and potential buyers to distinguish the imitation good from the original product.

Assimilation

If a consumer is led to attribute a good to a competitor whereas this good does not originate from this competitor, then Articles 3 lit. b and lit. d of the Unfair Competition Law apply. What has been said above in relation to deceptive practices and Articles 3 lit. b and d can be repeated here.

Labor Piracy and Customer Raiding

Article 4 lit. a of the Unfair Competition Law states that:

"... acts unfairly the one who is enticing a client or a customer to break a contract to conclude another one with him."

The breaking of a contract, as such, is not unfair, but the fact of trying to substitute oneself for another contracting party and entering into an agreement with the partner of the substituted party is unfair. Consequently, if the one who induces the other party to break the contract does not want to become a new partner to the contract, Article 4 lit. a does not apply. For instance, the Federal Supreme Court refuses to apply Article 4 lit. a to the parallel importer who asks a distributor to deliver goods to him in violation of his contractual obligations towards another manufacturer.⁶¹ The reason is that the parallel importer does not want to

⁶⁰ ATF 116 II 463.

⁶¹ ATF 114 II 91 — JT 1988, 310-313.

become the customer of the distributor but only wants to obtain from him the products that the supplier does not want to deliver or cannot deliver to him. Note that this kind of situation can become unfair when particular circumstances are attached, for example, when the unfair competitor acts with the sole purpose of damaging a competitor.⁶²

Another example of the application of Article 4 lit. a consists of attracting workers away from their employer. There, the behavior is unfair because the competitor wants to substitute himself as the employer and the employee illegally cancels his contract to take up work for the unfair competitor. Article 4 lit. d of the Unfair Competition Law also aims at prohibiting labor piracy and customer raiding. This article states that:

"... one acts unfairly when he urges a purchaser or a person who has concluded a sale by installments to break the contract or to terminate the agreement to conclude on his side the same contract with him."

The authors have no knowledge of any decision regarding this article; its preventative nature has probably sufficed to discourage this sort of behavior. Article 3 lit. h of the Unfair Competition Law (aggressive sales methods) also applies to this sort of behavior. What has been stated in relation to nuisance and harassment can also be repeated here.

Violation of Statutory or Contractual Obligations

Apart from the Swiss Code of Obligations which is applicable to this kind of behavior, the general clause is applicable if its conditions are fulfilled, that is, if the behavior concerned is deceptive or infringes the principles of good faith and influences the relationships between competitors or suppliers and customers.

Misleading Statements

Scope of Application

Several articles of the Unfair Competition Law aim at prohibiting the use of misleading statements, by which a competitor tries to confuse consumers to make them buy his products or services rather than those of his competitor. All of the applicable provisions which are going to be

62 ATF 114 II 91 — JT 1988, 314.

examined hereinafter aim at ensuring that competition occurs in a fair and lawful atmosphere so that the consumer is able to make an objective and free choice of products or services, in the sense of the general clause.

Determination of Misleading Character

What does "misleading" mean? When is behavior "misleading"? Above all, one thinks of deceptive practices. When called upon to judge the allegedly misleading character of an advertisement or other business statement, a tribunal examines how the average reader understands it.⁶³

According to the Federal Supreme Court, the average consumer is to be found within the circle of standard customers using their average intelligence and the diligence which could normally be expected from them in their daily lives.⁶⁴ What must be looked at is how the public or consumers are reacting when they are confronted by the statement. If there is a risk that they are being misled or mistaken, then the statement of the competitor is misleading. For instance, if the advertisement is true but presents a product, an enterprise or an offeror as being extraordinary, whereas it is, in reality, merely average, then the public is misled because there may be an inducement to believe that what is on offer is unique.⁶⁵ Not only the wording of the statement must be considered to say whether it is misleading, but also the way in which it is presented.⁶⁶ For instance, it is misleading to put a trademark on goods which have not been manufactured or produced by the owner of the trademark or have not been distributed with his authorization, because it induces consumers to believe that there exists a link with the owner of the trademark.

Misleading Statements Concerning Products

As a general rule, public statements of any kind must be true and correspond to reality.

Product Quality

A misleading statement concerning the quality of a product falls under Articles 3 lit. a and b of the Unfair Competition Law. It is also covered

63 ATF 90 IV 43 — JT 1964, 55.

64 ATF 87 II 345 — JT 1962, 316–319.

65 Swiss Commission for Fairness in Advertising Rules 1989, Number 3.7.

66 ATF 94 Ia 38 — JT 1968, 84.

by Article 3.7 of the 1988 rules laid down by the Swiss Commission for Fairness in Advertising. With a particular view to the quality of the products, an advertisement which praises as extraordinary properties of goods, works, products or services which are normally found in articles, products or services of this kind is considered as misleading and, consequently, unfair. If one alleges that an item of furniture has been made by a particular craftsman, he is making a misleading statement if, in reality, the item originates from a large factory.⁶⁷

To be misleading, a statement must be made seriously. For instance, if the indication looks like being a mere puff without professing any accurate information, this puff advertisement or statement does not fall within Article 3 lit. b. However, the Federal Supreme Court is very reluctant to admit puffing. In a decision of 1977⁶⁸ it decided that the statement "the biggest correspondence school in Switzerland" was not an exaggerated puff, but was a verifiable allegation which had to be true. Therefore, it was misleading.

Geographical Source of Products

Geographical names and indications of origin are protected by Articles 47 *et seq.* of the Trademark Law. The Unfair Competition Law can be applied concurrently with the Trademark Law. Articles 3 lit. b and d of the Unfair Competition Law prohibit misleading statements concerning the geographic source of products, for example, alleging that a product comes from a given geographical source when it does not come from that area. Therefore, the designation "Swiss Panzer" for a lock manufactured in Germany was considered to infringe Article 3 lit. b because it suggested to the consumer that it had been manufactured in Switzerland.⁶⁹

Not only the direct use of false or inaccurate statements regarding the geographical source of a product is prohibited, but also the use of statements or words which create the impression that the product or good possesses qualities or properties which are typical for a given area. The use of the word "type" or "like" or "method" in connection with geographical designation is prohibited.⁷⁰ The general clause also prohibits this kind of statement, as it aims at raiding the reputation of a competitor.

⁶⁷ ATF 84 IV 39 — JT 1958, 50–51.

⁶⁸ ATF 102 II 286 — JT 1977, 512.

⁶⁹ RSPI 1986, 95.

⁷⁰ ATF 60 II 256 — JT 1934, 527 "*Bel Paese*".

Quantity

Misleading statements concerning the quantity of a product or the quantity of a component of a product are also deceptive and fall under Article 3 lit. b or Article 3 lit. d of the Unfair Competition Law. An advertisement for "Nescafé" diffused with a slogan "extract of pure coffee with a natural aroma" was considered to be misleading because this particular product, as opposed to other companies' products, was manufactured using only fifty per cent coffee, the other fifty per cent consisting of carbohydrates of another origin.⁷¹ If an advertisement puts forward statistical figures which are not pertinent for the advertised product, it may be considered to be misleading if the advertisement is addressed to a circle of consumers who are not professionals and, therefore, not able to appreciate the relevance of the statistical indications.⁷² Article 3 lit. g of the Unfair Competition Law may also be applied. As it has been previously stated in relation to the exploitation of gambling instincts and the exploitation of inexperience, offering free gifts and bonuses may mislead customers regarding the quantitative value of the offer.

Misleading Statements Concerning Price

Prices are mainly ruled by the Ordinance on the Indication of Retail Prices as well as by the Unfair Competition Law.⁷³ If an advertisement invites the consumer to contract for a small credit or installment purchase, it must comply with Articles 3 lit. k to m of the Unfair Competition Law. The infringement of the above articles can occur when publications or advertisements omit to indicate useful and essential information for the consumer.⁷⁴ As it has been discussed in relation to the exploitation of inexperience, as well as duress, Article 3 lit. k-m can be taken into account in this context.

Price Calculation

Article 18 lit. a of the Unfair Competition Law prohibits, in a general way, the use of misleading practices when indicating prices. With regard

⁷¹ ZR 1949 Number 1.

⁷² RSPI 1981 159.

⁷³ Unfair Competition Law, Articles 3 lit. f and lit. k to m and Articles 16–20.

⁷⁴ ATF 117 IV 364.

to price calculation, the consumer should be put into a position where he can recalculate the prices and compare them with a competitor's prices. Article 14 of the Ordinance on the Indication of Retail Prices states that, in advertisements, all specifications regarding the product must be given in addition to details of the composition of the price. In this context, the Federal Supreme Court stated that an advertisement for a package tour indicating a minimum price must give detailed information as to the main services offered for that price as well as the conditions under which it is valid. Just to refer to the catalogue of the travel office for further information does not suffice, as the consumer must obtain the information when reading the advertisement.⁷⁵

Price Reduction and Price Comparisons

Price reductions and price comparisons both imply that, in addition to the price to be actually paid, other prices are relevant. Price reductions are generally indicated together with the former price. Actual sales prices can be compared with the former prices or with prices offered by competitors. According to Article 18 of the Unfair Competition Law, it is prohibited to use misleading practices to:

"b: advertise reductions of prices; and

"c: mention other prices in addition to the price to be paid."

Price reductions or comparisons have also to comply with the rules laid down in the Ordinance on the Indication of Retail Prices. Article 16, Paragraph 1 of the Ordinance states as a general rule that it is not allowed to indicate other prices in addition to the price to be actually paid. This article concerns not only price comparisons, but also price reductions.⁷⁶ In Article 16, Paragraph 2, three exceptions are introduced which allow the practice of reductions of prices and comparative pricing. Firstly, a reduced price may be compared with the price formerly offered during a period which may not exceed one quarter of the time during which the former price was applied, but, in any case, not for more than two months. For fashion goods, the old price can be indicated for the rest of the season (not to exceed four months), for perishable consumer goods, for one day.

⁷⁵ ATF 113 IV 36, RSPI 1988, 246.

⁷⁶ Article 17 of the Ordinance assimilates price reductions to price comparisons.

The second exception concerns the comparison of a price with prices offered by competitors. One competitor may indicate the price offered by other competitors, but only if the other price is offered for at least half of all other analogous goods.⁷⁷ The third exception applies to a case where the offeror puts a new product on the market and wants to offer it at a lower price than the one which he will apply later (subscription price). This action cannot last for more than one month.⁷⁸ When practicing comparative pricing, the offeror must be able to establish that he fulfills the above indicated conditions.

Price reductions can be indicated in figures, in percentages, in fractions or in words. For instance, any indication such as "off price" or "30 per cent discount" or "20 francs reduction" is considered as an indication of a price reduction. However, when the competitor offers the same reduction for all of his goods,⁷⁹ then he does not need to indicate the price on each good. He may indicate, for instance, "reduction of 30 per cent on all goods". However, a reduction of "up to 92 per cent" for the "rest of carpets" does not comply with Article 17 of the Ordinance. According to the Federal Supreme Court, the offeror should have indicated the exact price to be paid for each carpet. The indication "up to 92 per cent" could be misleading.⁸⁰

Price Declaration

According to Article 16 of the Unfair Competition Law, goods must bear the price at which they can be purchased. Only in cases involving technical or security reasons can exceptions be granted (for example, for high price jewels). The same rule applies for services. To ensure transparency, the retail prices must be indicated in Swiss francs, with an exception for goods sold in auctions or other analogous kinds of sale.⁸¹ For measurable goods, that is, ones for which the retail prices are normally fixed according to volume, weight and/or square feet,⁸² it is compulsory to indicate the unit prices. If Value Added Tax or other taxes must be paid, they must also be indicated.⁸³ When the parties are

77 Ordinance on the Indication of Retail Prices, Article 16, para. 2, lit. c.

78 Ordinance on the Indication of Retail Prices, Article 16, chapter 2, lit. b.

79 Ordinance on the Indication of Retail Prices, Article 17, para. 2.

80 ATF 108 IV 129 — JT 1983 IV 110, 111.

81 Ordinance on the Indication of Retail Prices, Article 3.

82 Ordinance on the Indication of Retail Prices, Article 5.

83 Ordinance on the Indication of Retail Prices, Article 4.

concluding a complex transaction, the contract must spell out all of the important information. For instance, in a contract for hire-purchase, the seller must indicate the monthly price, the installment amounts and the total amount to be paid for the first twelve months.

The price tag must be on the good or within very close proximity to it and be displayed so that it is visible, with an exception for goods which are sold at identical prices and are exposed in large numbers.⁸⁴ In the last case, prices can be indicated in another form as long as the consumer is able to easily consult them. Goods with unit prices above SFr5,000, for instance, antiques, art objects, oriental carpets, furs, watches, jewelry and gems, may be exposed in a window without a price tag. Their prices can be indicated in lists or catalogues at the consumers' disposal inside the shop,⁸⁵ in order not to attract thieves or other criminals (hold-ups).⁸⁶ For services, the Ordinance on the Indication of Retail Prices provides an obligation to keep a list or other price indication informing clients about the unit and the kind of service offered.⁸⁷ All of the abovementioned rules aim at insuring that prices are transparent and can be easily compared by the customer.⁸⁸

Misleading Statements Concerning Offeror

Misleading statements concerning the offeror himself or his products are covered by Article 3 lit. b of the Unfair Competition Law. Of course, the general clause is also applicable when its conditions are met.

Manufacturer or Other Commercial Origin

According to the Federal Supreme Court,⁸⁹ a competitor or an offeror who is qualifying himself in an advertisement as the manufacturer of his goods and claims that he is selling them at the manufacturer's price is misleading the consumer if those assertions are not correct, because the consumer may be induced to believe that the offeror can sell at a particularly advantageous ex-factory price. It is also misleading to state that the goods are sold at the manufacturer's price when the price

84 Ordinance on the Indication of Retail Prices, Article 7.

85 Ordinance on the Indication of Retail Prices, Article 7, para. 3.

86 ATF 108 IV 120 — JT 1983, 112, 115.

87 Ordinance on Price Indication of Retail Prices, Article 10.

88 ATF 105 IV 1 — JT 1984, 98.

89 ATF 106 IV 218 — JT 1984, 96.

includes the rent for the shops and the salaries for sales clerks; in this event, the offer refers to a retail price and not a manufacturer's price.

It also considered to be a misleading statement to register oneself in a telephone book under *Machines à coudre Singer/Griner Heinrich ret*, if Mr. Griner does not have any commercial relationship with the manufacturer or the firm "Singer" or does not repair "Singer" products with the specific authorization of Singer. It follows that the use of the brand or of the trade name of another firm by an offeror which could induce the consumer to think that the activities of the offeror are carried out under the supervision or, at least, with the approval of the owner of the brand or of the trade name, is unfair and abusive.⁹⁰

Importance, Size and Age

With regard to the importance or the size of the offeror, only a few cases exist. For instance, an architect has been held to have misled the jury of a competition about the size of his firm and its importance by claiming that he had conceived a project alone whereas he was actually assisted by another architect.⁹¹ A statement made in an advertisement as "the biggest correspondence school in Switzerland" was considered by the Federal Supreme Court as being unfair and misleading because, with respect to the number of students (the determining criterion), this statement did not correspond with reality. The school did not have the importance or the size which it claimed.⁹²

Type of Business

Many examples can be given to illustrate when a misleading statement concerning a type of business occurs. For instance, the one who is designating himself as the owner of machines or as the manufacturer of them when he is only exploiting a workshop on his father's farm, misleads customers about his business.⁹³ When a former member of the board of directors of a firm sends a circular letter inviting the customers of the firm to continue their business relations with him personally by giving them inaccurate indications as to his activities, he misleads them

⁹⁰ ATF 104 II 58 — JT 1978 I 282.

⁹¹ RSPI 1952, 112.

⁹² ATF 102 II 286 — JT 1977 512.

⁹³ BJM 1957, 103.

because he makes them think that he has completely taken over the business of the firm and suggests that the firm has surrendered its activities to him.⁹⁴ However, when a competitor is using the word "dry cleaning" in his trade name whereas, in reality, he does not carry out all of the works related to dry cleaning himself — some of them being given to another firm — Article 3 lit. b of the Unfair Competition Law does not apply.⁹⁵ Misleading statements concerning the type of business can also fall under Article 3 lit. c of the Unfair Competition Law in the same way as the use of misleading titles can incite consumers to think that the offeror is having a certain type of business when this is not so.

Special Sales

Bankruptcy sales are regulated by a special law, the Law on the Prosecution of Debts and Bankruptcy (*Loi de Poursuite pour Dettes et Fail-lites*). Since November 1995, extraordinary, end of season, anniversary and clearance sales are no longer regulated by a special law, as the Law on Liquidation and Analogous Operations has been abolished. Therefore, for this kind of sale, only the Unfair Competition Law and the Ordinance on the Indication of Retail Prices are applicable.

Bankruptcy Sales

Bankruptcy sales are regulated by the Swiss Code of Obligations⁹⁶ as well as the Law on the Prosecution of Debts and Bankruptcy.⁹⁷ None of these rules, however, cover expressly behavior which could mislead or deceive purchasers of goods sold in bankruptcy sales. However, these sales must also respect the rules of the Ordinance on the Indication of Retail Prices. If bankruptcy sales violate any of the abovementioned provisions, then they are illicit and, therefore, may fall within the general clause.

94 RSPI 1987, 125.

95 Extr. FR 1957, 46.

96 Code of Obligations, Articles 229–236.

97 Prosecution of Debts and Bankruptcy Law, Articles 125–130.

Extraordinary, End of Season, Anniversary and Clearance Sales

Sales of this kind can be carried out freely as long as they comply with the rules laid down by the Ordinance on the Indication of Retail Prices and Articles 16–18 of the Unfair Competition Law. These rules have been thoroughly examined above in relation to misleading statements concerning prices.

Kick-Backs

Kick-backs as such are not forbidden. They may, however, fall under Article 4 lit. b of the Unfair Competition Law, which condemns the action of the person who, to secure for himself or for others a profit, offers to workers or auxiliaries of a third party illicit advantages which could entice these persons to fail in the fulfillment of their duties. Commissions given by banks to their employees for having introduced investors to the bank are not prohibited by Article 4 lit. b, as the granting of this commission does not induce the employees not to fulfill their duties. It is not only the unfair competition rules that aim at prohibiting this kind of behavior, but also, in certain circumstances, the Criminal Code.⁹⁸

Reference should also be made to the previous discussion on enticement.

Industrial Espionage and Betrayal of Trade Secrets

Disclosure by Employees During Their Employment

The Unfair Competition Law embodies two articles which cover the disclosure of trade secrets by employees during their employment. Firstly, Article 6 covers the behavior of a person who exploits or discloses trade secrets or business secrets which he has unduly discovered. "Unduly" means that a secret is discovered by technical or commercial spying, by taking advantage of a position of confidence as employee or by violating the rules of general good behavior, for example, by exploiting the contents of a conversation between two persons which has been

⁹⁸ Criminal Code, Article 288, which punishes one who gives a bribe to a member of an authority — active corruption; Article 315, which punishes the member of an authority who has accepted a bribe — passive corruption.

accidentally overheard. On the other hand, if a secret has not been unduly discovered, then its exploitation is not covered by Article 6, but may fall within Article 2 of the Unfair Competition Law, as betraying a secret is, in any case, contrary to the general rules of good faith.

Besides the Unfair Competition Law, an infringer may incur liability for infringing his contractual obligations.⁹⁹ He may, furthermore, be punished according to Article 162 of the Criminal Code (betrayal of a trade secret). Concerning the meaning of "secrets", the Federal Supreme Court has stated that a trade secret consists of commercial information which is not generally known and whose possessor has a justified interest in keeping it secret.¹⁰⁰ The word "exploitation" means that the infringer is using the knowledge picked up unduly for the purpose of making a profit.

Unwarranted Exploitation of Trade Secrets

As Article 6 of the Unfair Competition Law does not only concern employees but everyone who is exploiting or disclosing trade secrets, it also applies when one is exploiting trade secrets in an unwarranted manner. It is assumed that the word "unwarranted" means unduly. Therefore, what has been said above in relation to employees also applies to all persons who obtain undue access to a trade secret (or technical secret).

Model Piracy

Model piracy is both covered by the Law on Designs and Industrial Models and the Unfair Competition Law. According to Article 24 of the Law on Designs and Industrial Models, one who has counterfeited a registered design or imitated it without authorization commits a civil and a criminal offense. However, model piracy may also be covered by Article 5 lit. c of the Unfair Competition Law. According to this provision:

"... acts unfairly the one who imitates by technical reproduction means and without any adequate proper efforts the result of a third person's work ready to be put on the market and exploits it as such."

⁹⁹ For example, Code of Obligations, Article 321 a. al. 4.

¹⁰⁰ ATF 80 IV 22 — JT 1954 IV 82.

civil tribunals are competent in relation to actions provided for under Article 9 of the Unfair Competition Law. If criminal proceedings are instituted against an unfair infringer according to Articles 23–27 of the Unfair Competition Law, then the criminal tribunals are competent.

Asserting Claims to Cease and Desist from Unfair Acts

According to Article 9 of the Unfair Competition Law, the one who, because of the unfair behavior of a competitor, suffers or is threatened to suffer an attack upon his clientele, his credit, his professional reputation, his business or economic interests in general, can request the judge to:

- (1) Forbid the attack if it is imminent;
- (2) Stop it if it still subsists; or
- (3) Confirm its illicit character if the problems it has created are persisting.

The victim can ask the judge to order a rectification (for instance, in a newspaper), have the judgment communicated to third parties or published.¹⁰⁵ It is not only the victim, however, who can bring claims to cease or desist from unfair acts, but also customers whose economic interests are threatened by or who suffer otherwise from unfair behavior.¹⁰⁶

According to Article 10, Paragraph 2 lit. a of the Unfair Competition Law, the claims provided in Article 9 can also be instituted by professional or economic associations authorized by their statutes to defend the economic interests of their members or by national or regional organizations which aim at protecting consumers.¹⁰⁷ Under special circumstances, the Swiss Confederation may also start proceedings to protect the reputation of Switzerland abroad.¹⁰⁸ Finally, the actions provided in Article 9, Paragraph 1 can be brought against an employer whose employees have infringed the Unfair Competition Law in the course of their work.¹⁰⁹

105 Unfair Competition Law, Article 9, lit. 2.

106 Unfair Competition Law, Article 10, para. 1.

107 Unfair Competition Law, Article 10, para. 2 lit. b.

108 Unfair Competition Law, Article 10, para. 2 lit. c.

109 Unfair Competition Law, Article 11.

Injunctions and Temporary Injunctions

Very often the unfair attack must be stopped quickly to reduce, as much as possible, the damage resulting from it. Therefore, injunctions and temporary injunctions are of great importance. Swiss courts may grant temporary injunctions with immediate effect and normally for a duration of thirty days. To maintain the injunction, an ordinary procedure on the merits must be lodged with the competent jurisdictions before the end of the thirty-day period. The Unfair Competition Law does not provide a special regulation for temporary injunctions. Its Article 14 refers to Articles 28c–28f of the Swiss Civil Code. According to those articles, and especially Article 28c, the following conditions must be fulfilled in order to be able to obtain a temporary injunction. The claimant must establish that:

- (1) He is the object of an imminent or actual unfair attack; and
- (2) The attack creates the danger of a significant prejudice to him.

Note that "likely" means probably. It is not necessary to prove the seriousness of the attack, but only to show that it is likely to happen. The claimant must be threatened by a prejudice which would be very difficult to remedy (a prejudice which is only of pecuniary nature is not considered to be difficult to remedy). The granting of a temporary injunction implies urgency.¹¹⁰ If the above conditions are fulfilled, the judge may:

- (1) Forbid the attack or make it cease provisionally; and
- (2) Take the necessary steps to safeguard means of evidence.¹¹¹

When the attack is committed through the mass media, the judge can pronounce provisional orders only if the attack is of particular gravity, when it is not justified for some other reason and the measure decided by the judge (against the media) is not disproportionate.¹¹² The conditions required to order a temporary injunction against the media are more restrictive than for other "infringers" in order to avoid indirect censorship of the media through the means of temporary injunction.¹¹³ If there exists a special risk which presupposes a quick and sudden intervention of the

¹¹⁰ RSPI 1979, 161.

¹¹¹ Swiss Civil Code, Article 28 c, para. 2.

¹¹² Swiss Civil Code, Article 28c, para. 3.

¹¹³ *Message à l'appui d'une loi fédérale contre la concurrence déloyale* (LCD) of 18 May 1983, at p. 82.

judge, the defendant need not appear at the first hearing; he can be heard after the temporary injunction has been pronounced.¹¹⁴

Enforcement of Injunctions and Agreements

To ensure the enforcement of an injunction or of a judgment, it is usual for the tribunals to accompany the verdict with the threat of Article 292 of the Criminal Code, that is, fines or imprisonment against one who does not respect the injunction or the judgment. If a judgment condemns a party to the payment of certain sums, the winning party can prosecute the other by virtue of the law on prosecution and bankruptcy. Internationally, decisions concerning unfair competition can be enforced in other member countries by recourse to the Lugano Convention, of which Switzerland has been a member since 1 January 1992.

Damage Claims

According to Article 9, Paragraph 3 of the Unfair Competition Law, a victim can claim damages, compensation for "moral tort" or reimbursement of illicit profits, in conformity with the Swiss Code of Obligations. To claim damages, the conditions of Article 41 of the Swiss Code of Obligations must be fulfilled:

- (1) An illicit act must have been committed, for example, behavior contrary to the Unfair Competition Law;
- (2) The victim must have suffered damage, that is, a reduction of his assets;
- (3) The illicit act must have caused the damage; and
- (4) The infringer must have acted intentionally or negligently.

If these conditions are met, the defendant must reimburse the damage suffered by the "victim".¹¹⁵ The damage caused by acts contrary to customs must also be remedied.¹¹⁶ The claimant must prove the damage suffered.¹¹⁷ If the exact amount cannot be established, the judge may fix it equitably.

114 RSPI 1977, 173.

115 Swiss Code of Obligations, Article 41, para. 1.

116 Swiss Code of Obligations, Article 41, para. 2.

117 Swiss Code of Obligations, Article 42.

The conditions for claiming damages for "moral tort" are set out in Article 49 of the Swiss Code of Obligations.¹¹⁸ There must be an illicit attack upon the personality of the victim, the attack must be grave and the victim must not have obtained a satisfactory remedy through some other means. If these conditions are met, the defendant must pay an amount of money to the claimant as moral compensation. The victim of unfair attacks can claim reimbursement of illicit profits which the defendant obtained through his unfair acts.¹¹⁹ The victim can claim reimbursement of the whole profit,¹²⁰ even if this exceeds the damage suffered.

Costs of Litigation

The costs of litigation depend upon the procedural rules of the canton where the action is brought. As a general rule, the procedural costs must be borne by the losing party. These costs include court fees as well as a proportion of the fees of the winning party's lawyer. The costs also depend upon the importance of the claim and the amount in dispute.

Provisions for Dispute Settlement

According to Article 13 of the Unfair Competition Law, the cantons must provide, in unfair competition matters, a conciliation procedure and a quick and simple settlement procedure. However, a dispute relating to unfair competition law can also be settled outside the courts. In Switzerland, the most current alternative is arbitration. The parties can decide to refer their dispute to arbitration after the dispute has arisen or at the beginning of their relationship, for example, by inserting an arbitration clause into their contract.

Current Trends and Developments

Switzerland has a modern law on unfair competition, which safeguards in a satisfactory way the interests of all participants in the economic market. By abolishing restrictions upon special sales and liquidation,

¹¹⁸ *Message à l'appui d'une loi fédérale contre la concurrence déloyale* (LCD) of 18 May 1983, at p. 74.

¹¹⁹ Swiss Code of Obligations, Article 423.

¹²⁰ *Message à l'appui d'une loi fédérale contre la concurrence déloyale* (LCD) of 18 May 1983, at p. 74.

the retail market has lately been somewhat liberalized. The new Carte Law will place limitations upon vertical and horizontal understandings consumer protection becoming more important everyday.

Unfair Trading Practices

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