

LIDC 2002/2003

## **Question II**

### **Report of the UK Competition Law Association**

**Colin Tyler,  
University of Birmingham  
UK National Reporter**

# Index

UK National Report pages 3 to 23

Annex I Questionnaire (translated from German)

Annex II Article 10 Bis of the Paris Convention 1883

## International League of Competition Law

### Question II

**What are the advantages and drawbacks of there being a specific procedure of cessation of unfair competition practices? Is it advisable to introduce/harmonise such a procedure? What should the conditions and consequences be?**

### INTRODUCTION

Annex I to this report sets out the particular questions and matters which the International Reporter has asked all national reporters to consider and cover in their national reports.

Annex II provides a bibliography of references to United Kingdom statutes, subordinate legislation and case law, to European Union legislation and case law and to other materials referred to in this report.

Annex III sets out the terms of the only relevant article of the only International Convention ratified by the United Kingdom relevant to the question to be considered.

In 1995 and 1996 the League considered the question whether “the current relationship between competition law and unfair competition law was satisfactory”. In the international report on that question the following opening words of the United Kingdom national report are quoted:-

“Within the United Kingdom there is no specific law or general regulatory framework aimed at prohibiting or limiting what could be described as ‘unfair competition’. Similarly ..... no established common law principal has evolved ‘prohibiting unfair competition in general terms’”.

This continues to be the case today and makes it difficult to respond in a precise manner to the preliminary questions in the international reporter’s questionnaire notwithstanding the United Kingdom’s adherence to the Paris Convention of 1883 in which Article 10 bis has been present since 1900 and the WIPO model provisions on protection against unfair competition of 1996 which enshrine and emphasize Article 10 bis. In **Mogul Steam Ship Co v McGregor**<sup>1</sup> decided by the Court of Appeal in 1889 Fry L.J. stated:-

“to draw the line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts”.

reflecting the “laissez-faire” attitude prevalent in the latter half of the 19th century. The United Kingdom has ever since remained sceptical of the value of a law against unfair competition despite Article 10 bis. The very word “unfair” has innumerable connotations ranging from the downright illegal to the morally reprehensible. Apart from the law relating to passing off, breach of confidence and restraint of trade this has often lead in the United Kingdom to matters of business practices and ethics being looked at and judged from the viewpoint of the consumer, leaving the market place to determine its own morality in the context of consumer protection law, whether developed by the courts or enacted by Parliament.

In protecting the consumer the common law also prevents unfair competition in three ways, passing off i.e. confusing both suppliers and trade customers and the consumer; inducing breach

---

<sup>1</sup> **Mogul Steam Ship Co v McGregor** [1892] AC 25

of contract and unlawful interference with contractual relations (i.e. inducing the customer to breach his contract with a competitor), defamation, slander of goods and injurious falsehood (i.e. lying to those dealing with him, whether consumers suppliers or trade customers about a competitor or his goods), all of which are actionable torts. Indeed passing off also protects traders against one another and was developed by the common law with that also in view, as well as indirectly protecting consumers. These torts cover sub-paragraphs 1 and 2 of Paragraph 3 of Article 10 bis. Parliament itself has intervened to cover sub paragraph 3 in the Trade Descriptions Act 1968. In addition, the United Kingdom has reconciled its national laws with various European Treaties particularly Articles 81 and 82 (previously Articles 85 and 86) of the current EU Treaty and adapted them to European Union legislation relating to consumer protection, such as the Directive on misleading advertising as amended by the Directive on comparative advertising. Honesty for the purposes of the reference in paragraph 2 of Article 10 bis to “honest practices” is judged by reference to whether the practice in question is honest vis a vis the consumer as well as between traders.

Question II is essentially concerned with procedure and sanctions. In the United Kingdom there is generally no specific procedure for the cessation of unfair competition practices. The procedure developed over centuries by the courts which is most relevant is the injunction both interlocutory and final, but injunctive relief has always been and still is discretionary, notwithstanding that there are now clear principles defining the circumstances in which the court will exercise its discretion to grant injunctive relief. Interlocutory (i.e. interim) injunctive relief is also subject to the equitable doctrine of laches (delay) and must be sought at the earliest possible opportunity. Damages may also be sought and generally a claim is made both for an injunction and damages. If a defendant is in breach of an injunction, proceedings for contempt of court may be initiated and may result in the case of an individual in that individual being fined or sent to prison or in the case of a corporation in that corporation being fined or having its assets sequestered.

This report now turns to the questions posed by the International Reporter’s questionnaire. The law stated is that applying in England and Wales but it is believed that the substantive law is not significantly different in Scotland and Northern Ireland. However, Scots law has its own procedures and sanctions, which will not be dealt with, but which it is believed are likely in practice to produce similar results to those described in the case of English law.

## **I. Preliminary Questions**

1. There is no specific field of law called “unfair competition law”. As stated in the introduction, the English law which in effect regulates competition as between traders is often derived from consumer protection law, which conditions the behaviour of traders towards the consumer and indirectly their behaviour inter se. The extent of this law will be dealt with in detail in the answer to question II below. Notwithstanding that there is no specific field of law, there are piece meal provisions, some developed by the Courts others enacted by Parliament, that cover many of the areas which are covered by the concept of unfair competition in civil law jurisdictions. Although there is only limited regulation of unfair competition as between traders by the common law (e.g. passing off), that regulation and the indirect regulation by reference to consumer protection are not generally considered inadequate or ineffective, notwithstanding its piece meal nature and the fact that it is less extensive than in some civil law jurisdictions. That is not to say that improvements could not be made, a subject which will be touched on in the answer to question II below. The basis of the English law is that people are not to be confused, misled or told untruths, a concept which has its limitations but subject thereto it is for the market place to regulate the behaviour of traders not the law. There

is therefore no movement towards the recognition of a law of unfair competition between traders.

## 2. Which procedures normally fall under “unfair competition law”?

### COMMON LAW

The common law developed by the courts provides remedies for certain business malpractices against which suppliers, trade customers and the consumer are considered to require protection.

#### (a) Passing off

The law relating to passing off has its origins in the 16th and 17th centuries and grew out of the common law action for deceit. It was developed both by the Common Law Courts and the Courts of Equity. The elements of this tort were restated by the House of Lords in the well known JIF Lemon case, **Reckitt & Colman Products v Border Inc**<sup>2</sup>.

They are:-

- (i) the plaintiff's goods or services must have acquired a goodwill or reputation in the market and must have some distinguishing feature;
- (ii) there must be a misrepresentation by the defendant leading or likely to lead the public to believe the goods or services offered by the defendant are those of the plaintiff - this misrepresentation need not be intentional on the part of the defendant;
- (iii) the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief amongst the public brought about by the defendant.

These propositions deal only with the common situation where the goods of one trader are passed off to members of the public as goods of another trader.

The existence of goodwill or reputation is a question of fact which the plaintiff must prove. He must satisfy the Court that the distinguishing feature has acquired public recognition. Normally reputation must be exclusive to the plaintiff but in certain instances a passing off action has succeeded where the reputation has been shared as for example in **J. Bollinger v Costa Brava Wine Co. Ltd.**<sup>3</sup> where the judge decided that passing off was available to enable 150 or so champagne producers to stop the sale off Spanish sparkling wine as “Spanish champagne”. The same principal was applied to sherry in **Vine Products Ltd. v McKenzie & Co. Ltd.**<sup>4</sup> The principle was reinforced by the House of Lords in the **Advocaat case (Warninck v Townsend)**<sup>5</sup> where it confirmed that passing off extended to misrepresentations as to quality as well as origin.

The courts have refused to classify the possible ways in which the representation may be made. It is a question of law for the court whether the representation is likely to cause confusion amongst a substantial number of

---

<sup>2</sup> **Reckitt & Colman Products v Border Inc** [1990] IAIER 873

<sup>3</sup> **J. Bollinger v Costa Brava Wine Co. Ltd.** [1960] RPC 16

<sup>4</sup> **Vine Products Ltd. v McKenzie & Co. Ltd.** [1969] RPC 1

<sup>5</sup> **Warninck v Townsend** (1980) RPC 31

the public. It is no defence that an intelligent person would not be deceived if there is evidence that the less well endowed intellectually would be.

The damage to the plaintiff is normally in the form of loss of sales or damage to reputation caused by the defendant's inferior goods. Damage to reputation has been extended to include dilution by the case of **Taittinger v Allbev Ltd.**<sup>6</sup>, notwithstanding minimal confusion on the basis that describing a fizzy drink by the name Elderflower champagne would debase the name champagne. However, some doubt was cast on dilution as a head of damage in **Harrods v R Harrod Ltd.**<sup>7</sup>. Anticipating Section 10 (3) of the 1994 Trade Marks Act, which implemented Article 5(a) of the Trade Mark Directive.

Special rules apply to a foreign plaintiff. Such a plaintiff does not have to have an establishment within the jurisdiction, nor does it need to do business within the jurisdiction, any such requirement having been held in **Maxim's v Dye**<sup>8</sup> to be incompatible with directly effective provisions of the Treaty of Rome in so far as it discriminated against entities established in other EU Member States. It was also held to be wrong in principle by a senior judge in **Pete Waterman v CBS**<sup>9</sup> and has been rejected by Commonwealth courts and is likely to be overruled by the House of Lords.

(b) **Deceit**

This is the tort from which passing off was developed. In an action for deceit the plaintiff is required to prove:-

- (i) that the defendant knowingly made a false statement;
- (ii) intending that the plaintiff should act upon it;
- (iii) which the plaintiff did to his detriment.

This action requires proof of actual fraud on the part of the defendant. Prior to the end of the 18th century the action was confined to direct transactions between the parties i.e. it was of a contractual nature but in 1789 in **Palsey v Freeman**<sup>10</sup> it was freed of any contractual link between the parties. It has, however, retained a contractual flavour as the elements of the action largely reflect the ethical and moral standards of the market place as they relate to permissible methods of obtaining contractual or economic benefit by inflicting loss through reliance on false information. Mere silence or passive failure to disclose the truth are not actionable. However, there is a requirement to correct false statements when the maker of the statement made it believing it to be true but later discovered that it was false.

(c) **Negligent Mis-statement**

Until the case of **Hedley Byrne v Heller**<sup>11</sup> in 1964 English law did not recognise liability for negligent mis-statement causing economic loss. In that case the House of Lords reversed the previous law laid down by the Court of

---

<sup>6</sup> **Taittinger v Allbev Ltd.** [1993] FSR 641

<sup>7</sup> **Harrods v R Harrod Ltd.** (1924) 40 TLR 195

<sup>8</sup> **Maxim's v Dye** [1978] 2 AllER 55

<sup>9</sup> **Pete Waterman v CBS** [1993] EMLR 27

<sup>10</sup> **Palsey v Freeman** [1789] 3 TR 51

<sup>11</sup> **Hedley Byrne v Heller** [1964] AC 465

Appeal in the **Candler v Crane Christmas & Co**<sup>12</sup>. The House of Lords realised however that some limit had to be placed upon the new law and that there was a wealth of difference between statements made on informal or social occasions and serious communications made in the business or professional context. It is still not clearly established whether the duty is only confined to professional advisors or whether it extends to anyone who takes it upon himself to make a statement inviting justifiable reliance on it especially in a business context, but the trend in common law jurisdictions is towards the latter view despite some case law supporting the former view.

(d) **Interference with Contractual Relations**

This tort has been significantly expanded by the Courts in recent years as a result of the very much reduced statutory immunity now conferred in relation to labour disputes. Previously labour disputes had enjoyed virtual total immunity. The tort however is not relevant only to labour disputes, it applies today wherever a party with knowledge of the contract either (i) persuades influences or procures one of the parties to it to breach it or (ii) commits an act wrongful in itself, to prevent performance of the contract.

(e) **Unlawful Interference with Trade or Business**

This tort only received its true recognition in 1964 in the House of Lords decision in **Rookes v Barnard**<sup>13</sup>. It is commonly referred to as the tort of intimidation, the coercion of a person by unlawful threats to do or abstain from doing something he was otherwise free to do. The essence of the tort is the use by the defendant of unlawful means which includes not only criminal or tortious acts but also breaches of contract. The defendant's action must be targeted against the plaintiff, although its main purpose may be to further the defendant's own economic interests. Although this tort undoubtedly exists the courts have not yet worked out by their decisions its exact scope.

(f) **Conspiracy**

This tort is closely linked to the one previously discussed. The common law for public policy reasons took the view that an element of combination might make unlawful an act which if done by one person alone would not be actionable. However, the tort was reconsidered by the House of Lords in 1942 in **Crofter Hand Woven Harris Tweed Co v Veitch**<sup>14</sup>. The House decided that if the sole or predominant motive of the combination was to advance its own interest rather than injure the plaintiffs then the defendants conduct was not actionable. This decision has vastly reduced the importance of the tort.

(g) **Injurious Falsehood**

This tort is closely related to the tort of defamation. Defamation protects a person's personal reputation whereas injurious falsehood protects against disparagement of the plaintiff's business, goods or services. The plaintiff has to prove that the statement was false, that it was made with intent to injure without lawful justification and that he suffered actual economic loss. English

---

<sup>12</sup> **Candler v Crane Christmas & Co** [1951] 2 KB 164

<sup>13</sup> **Rookes v Barnard** [1964] AC 1129

<sup>14</sup> **Crofter Hand Woven Harris Tweed Co v Veitch** [1942] AC 435

law flatly condones truthful disparagement of competitors, their goods and services. The untrue statement must relate to the plaintiff's goods and services not the defendant's. Proof of malice i.e. intention to injure without lawful justification is essential. General comparisons by a trader claiming that his goods and services are the best or better than the plaintiff's are not actionable on the basis that no one takes such comparisons seriously but specific disparagement of rival goods and services e.g. by stating that goods contain harmful materials will be actionable if the other elements of the tort are present.

In two other areas the courts have developed rights and remedies which affect traders' potential behaviour. These are the restraint of trade doctrine a child of the Common Law Courts and breach of confidence a child of the Chancery Court.

### **RESTRAINT OF TRADE**

The essence of the restraint of trade doctrine is still to be found in the speech of Lord MacNaghten in **Nordenfelt v The Maxim Nordenfelt Guns & Ammunition Co.**<sup>15</sup> where he said that "the public have an interest in every persons carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade themselves, if there is nothing more, are contrary to public policy".

However, the law does not allow a person to derogate from his grant. If a person has sold the goodwill of his business, some restraint to enable the purchaser to enjoy what he has bought is reasonable. The usual purpose of a restraint of trade clause is to limit competition but public policy leans against the achievement of that purpose. As Lord Atkinson said in **Morris (Herbert) Ltd. v Saxelby**<sup>16</sup> "no person has an abstract right to be protected against competition per se in his trade or business". The restraint must be reasonable and there must be a legitimate interest to be protected by it. This is usually the goodwill of a business following its sale but a restraint placed on an employee in his employment contract may also be upheld where it protects the employer's business against an employee using the intimate knowledge he has acquired as an employee in order to compete against his ex employer.

In restraint of trade cases the court consider four matters:

- (i) does the restraint exist and does the restraint of trade doctrine apply to it,
- (ii) is there an interest meriting protection,
- (iii) is the restraint reasonable between the parties,
- (iv) is it reasonable in the public interest?

The courts have established that the doctrine applies to:

- (a) employment contracts regarding the period after the contract has ended,
- (b) contracts similar to employment contracts such as agency and partnership,
- (c) business sales,
- (d) solus agreements,

---

<sup>15</sup> **Nordenfelt v The Maxim Nordenfelt Guns & Ammunition Co. [1894] AC 535**

<sup>16</sup> **Morris (Herbert) Ltd. v Saxelby [1916] 1 A C 688**



- (e) situations (not necessarily involving a contract) where a party has acted unreasonably or oppressively so as to restrict a person's ability to carry on his trade, profession or employment.

There must be a legitimate interest meriting protection prime examples being goodwill and trade secrets. Once such an interest has been established the court will consider whether the geographical extent and duration of the restraint are reasonable as between the parties. The greater the geographical extent or the duration the more difficult it will be to show that the restraint is reasonable between the parties.

It was commonly the case to underestimate the importance of reasonableness in the public interest and it was often said that if the restraint was reasonable between the parties then it was highly unlikely that it would be found to be unreasonable in the public interest. However, in certain cases the court has concentrated more on the public policy aspect than on the position between the parties. Public policy is ever changing. In the past courts were at great pains to uphold the sanctity of contracts. Today the courts are less concerned with the sanctity of contracts and more concerned to strike down what in their view are oppressive or unreasonable contracts, especially where there is a disparity in bargaining power between the parties. The public policy aspect has been particularly important in those cases where there is no contractual relationship between the parties such as **Eastham v Newcastle Football Club Ltd.**<sup>17</sup> where the House of Lords held that the rules of the Football Association and the Football League relating to the transfer and retention of players were in restraint of trade.

### **BREACH OF CONFIDENCE**

There is a degree of overlap between the restraint of trade doctrine and breach of confidence. For the latter three elements are normally required. First the information concerned must have the necessary quality of confidence, secondly it must have been disclosed in circumstances involving an obligation of confidence and thirdly there must be unauthorised use of the information to the detriment of the party disclosing it. In the present context the extent to which the obligation of confidence continues to exist after termination of the contract is the most important factor. The courts have generally considered this matter in the context of ex-employer and ex-employee. Once the employment ends the ex employer has to show a proprietary right unless the situation is governed by a specific provision of the contract which takes effect on termination of the employment. The manner in which termination takes place is critical. If the termination is by the employer and is not justifiable the employee will be discharged from any obligation under a provision of the contract intended to take effect on termination. On the other hand where there has been a wrongful repudiation of the contract by the employee the employer is not obliged to accept the repudiation and terminate the contract and if he does not do so it will continue in force.

Assuming there is no contractual provision intended to operate after termination of the contract the secrets of the employer will still be protected. This area of the law was authoritatively reviewed in **Faccenda Chicken Ltd. v Fowler**<sup>18</sup> where a senior employee, Fowler, and eight other employees set up a new company to compete with their ex employer and wrongfully made use of confidential information acquired during their employment. The information involved related to the ex-employer's customers. The Court of Appeal held that in the absence of any express restriction in the contract of

---

<sup>17</sup> **Eastham v Newcastle Football Club Ltd.** [1964] Ch 413

<sup>18</sup> **Faccenda Chicken Ltd. v Fowler** [1987] Ch 117

employment only business secrets were protected and gave as examples secret processes but business secrets may in appropriate circumstances include information about customers, their identities and requirements. The type of information used by Fowler at his new company was, so the Court of Appeal held, only protected if there was an express contractual provision.

## **LEGISLATION**

Legislation has been used to implement consumer protection and directly to set standards of commercial behaviour for traders. This legislation relies for enforcement purposes both on the criminal law and the civil law and generally enforcement is by government or local authority agencies or in some cases by rendering void certain types of contractual clauses in particular exemption clauses. Except where certain types of contractual clause are rendered void the legislation does not confer rights which either consumers or traders can invoke themselves in either the civil or criminal courts.

### **(A) Trade Descriptions Act 1968**

Section 1 of this Act provides:-

“any person who in the course of trade or business a) applies a false trade description to any goods or b) supplies or offers to supply any goods to which a false trade description is applied shall (subject to the provisions of the Act be guilty of an offence)” Section 2 of the Act defines what a “trade description” is. In particular it provides that a trade description is an indication, direct or indirect, and by whatever means given (inter alia) of any of the following matters:-

- (a) Method of manufacture, production, processing or reconditioning;
- (b) Place or date of manufacture, production, processing or reconditioning;
- (c) Person by whom manufacture, produced, processed or reconditioned;
- (d) Other history.....

Section 3 elaborates upon the word “false” providing that a false trade description is one which is false to a material degree. It also provides that a trade description within Section 2, which is misleading, shall be deemed to be a false trade description. It further provides that “anything which, though not a trade description, is likely to be taken as an indication” of a Section 2 matter and “as such ..... would be false to a material degree shall be deemed to be a false trade description”. Finally a false indication, or anything likely to be taken as an indication which would be false, that any goods comply with a standard specified or recognised by any person or implied by the approval of any person shall be deemed to be a false trade description if there is no such person or no standard so specified recognised or implied. Section 4 defines the meaning of “applying” a trade description to goods and provides that it means:-

- (i) affixing, or annexing it to, or in any manner marking it on, or incorporating it with, goods or anything in, on or with which goods are supplied;
- (ii) placing goods in on or with anything to which the trade description has affixed or annexed or marked on or incorporated with, or placing any such thing with goods;

- (iii) using the trade description in any manner likely to be taken as a referring to goods.

A trade description may be applied orally but this will present serious problems of proof. It may even emanate from a potential purchaser where goods are supplied pursuant to a request in which a trade description is used and in circumstances where it is reasonable to infer that the goods are supplied as goods corresponding to it. In such a situation the supplier of the goods is deemed to have applied the trade description.

Section 5 applies to advertisements containing trade descriptions and states that they are to be taken as referring to all goods of the class in question whether existing or not at the date of the advertisement's publication. Finally, Section 6 states that a person exposing goods for supply or having them in his possession for supply is deemed to offer to supply them. In Section 14 the Act deals with false or misleading statements as to services. It makes it an offence for any person in the course of any trade or business:-

- (a) to make a statement what he knows to be false; or
- (b) recklessly to make a statement which is false about:-
  - (1) the provision of any services, accommodation or facilities;
  - (2) the nature of any services, accommodation or facilities;
  - (3) the time at which, manner in which or person, by whom they are to be provided;
  - (4) the examination, approval or evaluation of them by any person and
  - (5) the location or amenities of any accommodation.

Anything likely to be taken for such a statement which is false is deemed to be a false statement. A statement made regardless of whether it is true or false is deemed to be made recklessly whether or not the person making it had reasons to believe it might be false. Where the service consists of or includes any treatment, process or the carrying out of any repair the matters specified in (1) above are to be taken to include the effect of the treatment, process or repair.

Offences under the Act are offences of absolute liability. There is no requirement of "mens rea" (a guilty mind). It is possible to disclaim responsibility for a trade description but the conditions for so doing laid down by the courts are extremely stringent. Defences are very limited and if mistake, reliance upon information provided by, or act or default of, another or accident are pleaded, the person charged has to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or any person under his control.

A contract for the sale and purchase of goods or services is not rendered void or unenforceable by reason only of a contravention of the Act.

The Act has been in force for over 30 years and has proved extremely effective and well adapted for dealing with changes that have occurred in trading methods over that period. However, it does have the drawback that it cannot be enforced by the individual consumer or trader in either the criminal or civil courts.

## **(B) The Misrepresentation Act 1967**

This Act was passed because of the unsatisfactory state of the common law regarding remedies for innocent (as opposed to fraudulent) misrepresentation. Section 1 removes certain common law bars to rescission for innocent misrepresentation. Rescission is now available for innocent misrepresentation where there is no allegation of fraud notwithstanding that:-

- (i) the misrepresentation has become a term of the contract or
- (ii) the contract has been performed.

Further under Section 2 damages are recoverable for innocent misrepresentation where the party to whom the misrepresentation is made sustains loss that would be recoverable had the misrepresentation been made fraudulently unless the other party can show that there was reasonable ground to believe and he did believe, at the time the contract was made, that the facts represented were true. Finally, Section 13, the present terms of which were introduced by the Unfair Contract Terms Act 1977, provides that any term in a contract excluding liability or remedy for misrepresentation is of no effect unless it satisfies the reasonableness test of Section 11 of the Unfair Contract Terms Act 1977 for which see below.

## **(C) The Unfair Contract Terms Act 1977**

The purpose of this Act is to render certain exemption clauses void and only to permit others to take effect in so far as they satisfy the requirement of reasonableness. Section 2 of the Act prevents the use of any contractual term to exempt from liability in negligence for death or personal injury. Section 3 prevents the use of any contractual term in a trader's written standard terms of business as against a person who deals on those terms or deals as a consumer in order to exclude or limit the trader's liability for breach of contract or to allow the trader to render a contractual performance substantially different from that reasonably expected of him or to render no performance at all in respect of the whole or part of his contractual obligations unless the contractual term satisfies the test of reasonableness contained in Section 11.

The test contained in Section 11 is that the contractual term is a fair and reasonable term to include having regard to all the circumstances which were or ought to have been known to or in the contemplation of the parties when the contract was made. Schedule 2 of the Act sets out matters to be considered by the court when applying the test but these matters are not exhaustive. They include:

- (a) the bargaining position of the parties;
- (b) whether there has been any inducement received by the consumer to accept the contractual term;
- (c) whether the consumer knew or ought have to known of the existence and extent of the term;
- (d) where the term restricts any relevant liability unless some condition is complied with, whether it was reasonable when the contract was made to expect that compliance with the condition would be practicable;

- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

Section 4 relates to unreasonable indemnity clauses which are also subject to the Section 11 reasonableness test.

In the case of goods ordinarily supplied for private use or consumption Section 5 prevents the exclusion or restriction of liability by reference to a contract term for loss or damage resulting from the goods proving defective whilst in consumer use or for the negligence of any person concerned in their manufacture or distribution.

Dealing as a consumer is defined in Section 12. A party to a contract deals as a consumer in relation to the other party when he neither makes a contract nor holds himself out as doing so in the course of a business and the other party makes the contract in the course of a business.

Section 6 prevents a trader from contracting out of Section 12 of the Sale of Goods Act 1979 (undertakings as to title to the goods) and also where the other party deals as a consumer from contracting out of Sections 13, 14 and 15 of the Sale of Goods Act 1979 (undertakings regarding conformity with description or sample and as to quality or fitness for a particular purpose). As regards a party who does not deal as a consumer any contracting out of Sections 13, 14 and 15 of the Sale of Goods Act 1979 is subject to the Section 11 reasonableness test.

Similar provisions are enacted by the 1977 Act in the case of hire purchase.

#### **(D) The Fair Trading Act 1973**

The protection of consumers by the use of the criminal law has the drawback that it is not always effective in dealing with the persistent offender. The Fair Trading Act 1973 attempted to provide a solution to this problem. If it appears to the Office of Fair Trading (OFT) that a person who is carrying on business has in the course of it persisted in a course of conduct:-

- (a) which is detrimental to the interests of consumers in the United Kingdom (whether an economic, health and safety or other interest) and
- (b) is (as defined) unfair to consumers;

it is under a duty to use its best endeavours, by contact with that person or otherwise to obtain a satisfactory written assurance that he will refrain from continuing the course of conduct and from carrying on any similar one - Section 34.

A course of conduct is unfair if:

- (i) it consists in breach of an enactment imposing duties, prohibitions or restrictions enforceable by the criminal law or
- (ii) it consists in things done or omitted in the course of a business in breach of contract or in breach of a duty (other than a contractual one) owed by virtue of any enactment or rule of law enforceable by civil proceedings.

If no written assurance is forthcoming or if any assurance given is not complied with the OFT may bring the matter before the High Court - Section 35. The Court if it decides in favour of the OFT may order the trader to desist from the course of conduct and may

accept an undertaking from the trader to the same effect. Such an order or undertaking is enforceable by proceedings for contempt of court. This procedure is less likely to be invoked today because of the procedures referred to in paragraphs (E) and (F) below.

**(E) The Stop Now Orders (EC Directive) Regulations 2001**

These regulations implement the injunctions directive. They apply to any act contrary to any provision in certain EC consumer directives such acts being defined as community infringements. The directives concerned are listed in the regulations. The regulations apply an amended form of the provisions described under (D) above. These amendments first extend the number of potential enforcers so as to include local authorities and their trading standards officers and other UK and community qualified entities. Secondly they remove the requirement of having first to seek assurances before bringing proceedings. However enforcers other than the OFT are required to consult it and the trader concerned to give the latter an opportunity to cease the infringement before court action is taken. The trader then has two weeks to cease infringing. The court is able to make an order under Section 37 of the Fair Trading Act 1973 requiring the trader to stop infringing. The court may also order publication of its decision with a view to eliminating infringements by other traders.

**(F) The Enterprise Act 2002 (Part 8)**

This Act introduces new enforcement procedures for certain consumer legislation and is mentioned here for the sake of completeness. It will be considered in detail when responding to Part 2 of the international reporters questionnaire.

Parliament has either by direct legislation or much more frequently by subordinate legislation under the European Communities Act 1972 in the form of statutory instruments enacted European Union Directives into law and the Directives listed in Schedule 13 of the Enterprise Act 2002, detailed later in this Report are examples of this.

**3. Relation to other branches of law**

So far as there is a right provided by the common law e.g. passing off the relevant law is part of the law of torts. However, the Trade Descriptions Act 1968 is enforced by criminal sanctions and breaches are generally brought before criminal courts by local authorities who employ Trading Standards Officers for these and other purposes.

The action for passing off is very close to an action for infringement of a trade mark and is indeed the only remedy available in the case of an unregistered mark. Passing off apart the other common law torts are not associated with intellectual property rights.

**4. What is the basis on which protection from unfair competition is granted?**

It has already been mentioned that there are no special laws as in Belgium. Common law torts have been developed by the courts on a case by case basis but these decisions are not founded on any general rules or on any general underlying principal or theory governing the whole area of what in civil law jurisdictions is considered to be "unfair competition".

As has been explained above the English law which fulfils, in so far as it is fulfilled at all, the role of civil law unfair competition has largely been developed via consumer protection. Where the relevant law does not consist of a tort or a breach of statutory duty conferring a right of action on the individual enforcement may be via the criminal

law e.g. the Trade Descriptions Act 1968 or the civil law e.g. the Unfair Terms in Consumer Contracts Regulations 1994. This will be dealt with in great detail in part II of this report.

5. By “self-control” it is assumed that reference is being made to codes of conduct and the like. There are in the United Kingdom numerous codes in operation but in this report it is only proposed to deal in detail with those regulating advertising and for the most part the code operated by the Advertising Standards Authority. Its code applies to all advertising except that on television or radio. Whether an advertisement conforms with the code is assessed according to its probable impact when taken as a whole and in context. This in turn will depend upon the audience, the medium, the nature of the product or service and any additional material distributed at the same time to consumers, defined as persons who are likely to see the advertisement in question.

The code enunciates a number of principles, the basic one being that advertising must be legal, decent, honest and truthful. Advertisers must show a sense of responsibility to consumers and society and respect the principles of fair competition. The code is extremely rigorous with regard to the ability of the advertiser to substantiate any claims made in the advertisement. Advertisers are responsible for complying with all legal requirements and must not exploit the credulity, lack of knowledge or inexperience of consumers. Advertisements must not contain anything likely to cause serious or widespread offence and should not mislead by inaccuracy, ambiguity, exaggeration omission or otherwise. Comparative advertising is allowed on the grounds of competition and public information. They must be clear and fair and must not be selected in a manner which gives the advertiser an artificial advantage. Advertisers are not permitted unfairly to attack or discredit other businesses or their products or services and should not make unfair use of the goodwill attached to a trademark, name, brand or the advertising campaign by any other business. No advertisement should so closely resemble any other that it misleads or causes confusion.

To police the code sanctions are necessary. If a complaint is found to be justified the advertiser is required to give an undertaking not to repeat the breach of the code and to amend or withdraw the advertisement. If the advertiser refuses the Authority informs the media organisations which are represented on the Committee of Advertising Practice (in effect the Committee represents all aspects of the advertising industry) of its decision. All members of the organisation represented on the Committee have undertaken that advertising space will not be made available for the offending advertisement.

The codes operated by the Independent Television Commission and the Radio Authority are similar in effect.

6. There is no general clause nor is there any underlying principal or theory developed by the courts. Presumably no general clause exists because neither the courts nor Parliament ever consider that there was a need for one.

7. **Purpose of Protection**

Virtually the whole of the relevant law is consumer orientated and only indirectly regulates traders inter se. Parliament in general terms in promulgating consumer protection legislation basically is solely concerned with consumer protection although the business lobby may in some cases be influential on the level and degree of protection where the proposed legislation has serious cost implications for business.

Generally it is not open to the trader to invoke statutory provisions protecting the consumer. However, where the trader is aware that such provisions are being breached by another trader he can ask that the appropriate enforcement agency take up the case i.e. he can act as a whistle blower. Traders and consumers are protected differently in so far as they are protected at all. There is no real link between competitor protection and consumer protection; it is just that the common law remedies available to the trader e.g. passing off and injurious falsehood because they indirectly protect the consumer and the statutory remedies available for the protection of the consumer directly condition the behaviour of traders inter se and contribute to producing a playing field which is not necessary level but whose contours are known to everyone.

Some aspects of anti-trust law such as the laws against cartel would not generally be considered part of consumer protection law notwithstanding that the discovery, abolition and punishment of the parties to a cartel benefits the consumer preventing such things as price fixing and market sharing. There is no particular interface with anti-trust law.

## 8. **Scope of Application**

The questions posed under this heading have been answered by the account given above of the position under English law insofar as they are capable of being answered. The media and consumers' associations are subject to the same laws as other entities.

## II. **Sanctions Imposed for Unfair Competition**

The response to this section of the questionnaire is conditioned by the response to the first section in that English law does not have a law of unfair competition in the meaning attributed to that phrase in civil law jurisdictions.

### 1. **Sanctions**

Some degree of protection is granted by the remedies developed by the common law described under I above and these remedies fall under the civil law. The legislative provisions protecting the consumer which indirectly condition traders' behaviour inter se are protected by the criminal law e.g. under the Trade Descriptions Act 1968 and the civil law e.g. under the Fair Trading Act 1973 as extended by the Stop Now Orders (EC Directive) Regulations 2001. English law does not have a separate regime of administrative law. Public authorities use and are subject to the criminal and civil law. Their role as enforcers is dealt with in response to Section III of the international reporters questionnaire.

There is a clear distinction as can be seen from the response to Section I of the questionnaire between remedies exercisable by one trader against another and those exercised by institutions charged with the duty of enforcing consumer protection legislation.

### 2. **Right of Action**

The common law remedies confer rights of action on individual traders and consumers which they can enforce directly in the civil courts. Generally industrial associations will not have rights of action unless there exists special legislation in their favour as is the case for example under the Scotch Whisky Act 1988 for the producers of scotch whisky or the individual trader is able to bring a claim on behalf of himself and other members of a group of traders with a shared interest as in the **Advocaat** case referred to above.



Although the individual in theory can bring prosecutions under the criminal law this seldom occurs in practice and the legislation protecting consumers generally places enforcement and therefore the right of action in the hands of a public body or bodies.

3. **Which claims can be asserted under the civil law?**

In the case of the common law remedies where appropriate the remedy of an injunction is available to stop and prevent the repetition of the defendant's conduct. Similarly where the civil law is used to implement consumer protection law the court is able to make orders equivalent to injunctions.

Where misleading advertising is concerned enforcement is by means of the civil law but enforcement is by a public body or bodies.

Damages are recoverable whenever one of the common law remedies is invoked and a claim for damages is usually coupled with a claim for an injunction whenever the latter is the main relief sought from the court. Damages are not recoverable by public bodies charged with the enforcement of consumer protection law.

There are no special provisions for the publication of judgements except under the Fair Trading Act 1973, the Stop Now Orders (EC Directive) Regulations 2001 and the Enterprise Act 2002 (Part 8). The proceedings in court are open to the public and are reported in the wider press including trade journals and similar publications so that information about decisions readily becomes available to traders.

Claims for unjust enrichment may be brought in the English courts but they do not play any particular role in what may be termed "unfair competition". If information on customers or suppliers or other confidential information has been wrongfully taken the courts may order its delivery up to plaintiff. In appropriate circumstances the courts have power to order an account of profits to be taken. This is dealt with in more detail below.

4. **Injunctive Relief**

This matter will be dealt with in two parts, first injunctive relief in actions commenced by individuals and secondly injunctive relief in the enforcement of consumer protection law by public bodies.

Part 1 - Although county courts have jurisdiction to grant injunctions almost invariably the injunction will sought in the High Court. Although the Court can grant a mandatory injunction compelling the defendant to do some act the most common form of injunction is a prohibitory injunction. This type is the more relevant for the purposes of this report. A prohibitory injunction is negative in character but may produce a positive effect as in **Sky Petroleum Ltd v VSP Petroleum Ltd**<sup>19</sup> where an injunction restraining the defendant from withholding supplies of petrol resulted in what was in effect specific performance of the contract to supply it.

An injunction may be interlocutory or final. A final injunction will only be made after a full hearing on the merits of the case i.e. after a full trial. An interlocutory injunction is issued where irreparable damage may be done to the plaintiff if the defendant is not immediately restrained and will continue only up to the trial of the case.

---

<sup>19</sup> **Sky Petroleum Ltd v VSP Petroleum Ltd [1974] 1WLR 576**

In the most urgent cases interlocutory injunctions may be obtained even without notice to the defendant but will only continue until the defendant has had an opportunity to be heard. What are termed “quia timet” injunctions may be obtained where an infringement of the plaintiff's rights is threatened but has not actually occurred.

The injunction is a discretionary remedy and cannot be demanded as of right as is the case with damages. It is a remedy in personam but it is possible to enjoin a defendant not personally within the court's jurisdiction provided service of proceedings outside the jurisdiction is permitted under the civil procedure rules. An injunction may be granted against the members of a particular class or organisation.

A prohibitory injunction will not be granted if the court considers damages would be a sufficient remedy. They will not be sufficient if they would be difficult to quantify or would not properly compensate the plaintiff as where it is necessary to prevent repeated infringements of the plaintiff's rights. In particular damages will not be an adequate remedy if thereby the defendant would compulsorily acquire a right which the plaintiff cannot be obliged to sell. If it would be difficult for the defendant to comply immediately with the injunction it may be suspended for a reasonable time to enable him to comply but he may be required to undertake to pay damages for any loss caused to the plaintiff during the period of suspension.

Interlocutory injunctions raised different considerations. The jurisdiction to grant them is related not to the plaintiff's rights but to the most convenient method of preserving the status quo whilst the plaintiff's rights are established by trial. However, in many cases the grant of an interlocutory injunction may well dispose of the whole matter.

The principles applicable to the grant of interlocutory injunctions were laid down by the House of Lords in **American Cyanamid Co. v Ethicon Ltd**<sup>20</sup> and are designed to avoid the necessity of deciding disputed facts or questions of law without hearing sufficient argument. More recent case law on the balance of convenience in passing off cases is to the effect that it may be appropriate to weigh the merits of the action. The principles laid down are: 1) the claimant must show that there is a serious issue to be tried and that he has a good arguable case and a real prospect of success at the trial; 2) subject to 1 the governing consideration is the balance of convenience. The court first considers the adequacy of damages to each party i.e. whether they would adequately compensate the plaintiff for any loss from the defendant's actions prior to trial and whether if an injunction was granted damages would adequately compensate the defendant for any loss caused by the grant of the injunction. If an injunction is granted the plaintiff is generally required to give to the court an undertaking as to damages in the event of his failure at the trial. A similar undertaking may be required on rare occasions or he may be required to pay a proportion of the value of his sales into court or into a joint account pending trial (but this is not usual), from the defendant if no injunction is granted. Failure to comply with such an undertaking is a contempt of court. Either party may be required to give security for his performance of an undertaking as to damages or to make a payment into court in support of it.

Because injunctive relief is discretionary a number of bars to the relief exist. The relief was developed by the courts of equity to supplement the remedies available in the common law courts. Thus equity had no reason to supplement a remedy available at common law if that remedy was adequate. This now manifests itself in a determination by the court whether damages would be an adequate remedy. Factors taken into account are whether the injury sustained is assessable in monetary terms, the prospect

---

<sup>20</sup> **American Cyanamid Co. v Ethicon Ltd [1975] AC 396**

of the defendant repeating his conduct and the ability of the defendant to satisfy an award of damages. The court also applies the maxim that he who comes to equity must come with clean hands. If the plaintiff himself is guilty of some impropriety e.g. reprehensible, unfair or tricky conduct he may be disentitled to equitable relief. Although there is no statutory time limit on injunctive relief the court operates what is known as the doctrine of laches (delay). The court expects the plaintiff to act promptly especially where interlocutory relief is sought but where a final injunction is sought the delay has to be fairly extreme, unless the defendant can show detrimental reliance and so have a defence of acquiescence. Delay is interpreted as acquiescence on the plaintiff's part and loss of the remedy for delay is often difficult to distinguish factually from its loss for acquiescence. Equity will not act in vain and this is well illustrated by the famous spy catcher case, **Attorney General - v - Observer and Guardian Newspapers**<sup>21</sup> where the House of Lords refused a final injunction against the Observer Newspaper because the information it wished to publish had already been published abroad. Particularly in cases where the issue of a mandatory injunction is in question the court may refuse the relief on the ground of undue hardship on the defendant where the hardship caused the defendant in complying with a mandatory injunction far outweighs any benefit which would be conferred on the plaintiff or the degree of injury or inconvenience to the plaintiff is such that to grant an injunction would be unjust. The court may also consider the public interest although there are conflicting views about the extent to which the court will allow the public interest to override the notion of private ownership of land. The courts of equity were courts of conscience and this notion still pervades the discretionary equitable remedies.

In Summary;

The plaintiff identifies the defendant;

The risk of repetition is relevant in considering whether damages are an adequate remedy;

The burden of proof is with the plaintiff - proof required is to satisfy the balance of probabilities;

It is possible for the defendant to give an undertaking to the court in lieu of an injunction and such an undertaking has the same effect as an injunction - it is unlikely that the plaintiff would accept anything less by way of undertaking than an undertaking to the court;

There are two methods of enforcement of injunctions, committal to prison or fine in the case of individuals and sequestration of assets or fine in the case of bodies corporate

Part 2 - As has already been stated there is a large area of enforcement of consumer protection legislation which has significant impact upon traders. This therefore is an appropriate point to give a brief account of the enforcement of this legislation.

**The Trade Descriptions Act 1968** - is enforced in the criminal courts and the vast majority of prosecutions are initiated by Trading Standards Officers employed by local authorities. A person found guilty of an offence is liable on conviction in the magistrates court (the lowest level of criminal court) to a fine of up to £5000 and on conviction in the Crown Court (the next tier of criminal court) to up to 2 years

---

<sup>21</sup> **Attorney General - v - Observer and Guardian Newspapers [1992] 1 AC 191**

imprisonment or an unlimited fine or both. The majority of prosecutions occur in the magistrates courts.

**The Fair Trading Act 1973 and the Stop Now Orders (EC Directive) Regulations 2001.** This Act and these regulations are taken together because the regulations improve the effectiveness of the Act. Orders made by the court are similar in effect to injunctions and the court has available to it the same sanctions to enforce such orders as it has to enforce an injunction. Failure to obey an order constitutes a contempt of court. As the sanctions are criminal in nature so proceedings for contempt of court are akin to criminal proceedings particularly in that the burden of proof is not on the balance of probabilities but beyond reasonable doubt.

**The Enterprise Act 2002 (Part 8)** - Part 8 of this Act is designed to improve the enforcement of consumer protection legislation. The Act deals with what are termed “domestic infringements” and “community infringements”. In both cases the infringement is a act or omission which harms the collective interests of consumers.

In the case of domestic infringements there has to be an act or omission which, inter alia, contravenes an enactment imposing a duty, prohibition or restriction enforceable by criminal proceedings, or one which breaches a non-contractual duty owed by virtue of any enactment or rule of law enforceable by civil proceedings or one for which an enactment provided for a remedy or sanction enforceable by civil proceedings. In the case of community infringements the act or omission has to contravene one of the directives listed in Schedule 13 to the Act or any law which provides protection additional to that required by one of the listed directives where such additional protection is permitted.

Enforcers other than the OFT have to consult with the person against whom enforcement is sought and with the OFT before an application for enforcement can be made. Jurisdiction is conferred on the High Court and the County Courts in England and Wales. The enforcer may accept an undertaking from the infringer instead of making an application to the court. If an undertaking has been given the court must have regard to whether it has been breached in any proceedings brought for an enforcement order. Such an order must identify the conduct complained of and direct compliance i.e. there must be no repetition of the conduct by the infringer or by any body corporate with which he is associated. There are provisions for enforcers to seek and compel the provision of information necessary to make decisions whether to take action and also to ascertain whether any undertaking or enforcement order is being complied with.

The directives listed in Schedule 13 are as follows:

84/450/EEC	10/9/84	Misleading Advertising.
85/557/EEC	20/12/85	Contracts negotiated away from business premises.
87/102/EEC	22/12/96	(as amended) Approximation of consumer credit legislation of Member States.
90/314/EEC	13/6/90	Package holidays.
93/13/EEC	5/4/93	Unfair Terms in consumer contracts.

94/47/EC	26/10/94	Time share.
97/7/EC	20/5/97	Distance Contracts.
1999/44/EC	25/5/99	Sale of consumer goods and guarantees.
2000/31/EC	8/6/2000	Electronic commerce.
Articles 10 to 21 of 89/552/EEC	3/10/89 (as amended)	Broadcasting activities.
Articles 86 to 99 of 2001/83 EC	6/11/2001	Medical products for human use.

## 5 **Damages**

In English law the fault principle plays its greatest role in the tort of negligence which is only marginally relevant to this report. Except in the case of negligent misstatement as mentioned above it has no application to the question of whether damages should be awarded or to their quantification. Generally their amount will not be increased or reduced by the extent to which the defendant was at fault. When the issue of liability has been decided in the plaintiff's favour and the remedy or one of the remedies sought is damages the court's aim is to put the plaintiff in as good position as he would have been had the contract not been breached or the tort not committed.

Exemplary or punitive damages cannot be awarded for a breach of contract but may be awarded in respect of a claim in tort. Their ambit however is restricted and they can be awarded in only three circumstances only one of which is relevant to this report, namely, when the defendant's conduct has been calculated to make him a profit which may well exceed the compensation payable to the plaintiff.

A claim for damages can be coupled with a claim for an injunction - this has no specific significance - and can be asserted at the stage of interlocutory relief (i.e. interim injunction) but the claim will not be dealt with by the court at the interlocutory stage.

The plaintiff is invariably seeking to recover damages for pure economic loss. Whatever type of damages are being sought the court will apply the normal rules relating to remoteness of damage. In essence in contract the loss is too remote if the defendant could not reasonably have contemplated that loss as a serious possibility if he had thought or did think about the matter at the time the contract was made. In essence in tort the rule is the same except that it has been suggested on doubtful authority that the degree of possibility of loss may be lower than in contract.

Damages have to be proved by evidence in the same way as any other facts relied on by either party have to be proved. Frequently once liability is established the parties will negotiate a figure for damages.

In the tortious misrepresentation the aim of the court is to put the plaintiff in the position in which he would have been if the misrepresentation had not been made - it is not to put him in the position in which he would have been if the statement constituting the misrepresentation was true. The plaintiff can therefore recover all the expenses incurred and all the gains forgone because of the misrepresentation.

In the case of wrongful infringement of intellectual property including in particular passing-off and breach of confidence the plaintiff can recover damages for all expenses incurred because of and all profits lost because of the infringement. There are many examples of the recovery of loss of profit, the most common case being reduction in sales of goods and materials. Actual assessment of such lost profits has often proved difficult and the court will often resort to a rough estimation on the basis of the facts proved and its evaluation of them. Equivalence between the plaintiff's lost sales and the defendant's sales of the infringing goods will not be assumed.

In the case of wrongful interference with the plaintiff's business such as inducing a breach of contract, intimidation, interference by unlawful means, conspiracy and injurious falsehood the aim of the court is to put the plaintiff in the position in which he would have been had there been no such interference i.e. he can recover expenses incurred and profits lost.

The plaintiff is entitled to ask the court for an account and award of profits in lieu of damages. This is an equitable remedy and although not available as of right is frequently linked to claims for injunctions in the area that may be loosely termed "Unfair Competition". The effect of the account is to strip the defendant of his ill gotten gains. There is a clear distinction between an account of profits and compensatory damages. The two will not necessarily equate as the plaintiff's loss is not necessarily to be measured by the defendant's gain. Either may be greater or less than the other. This remedy places the onus on the defendant to produce details of what profit he has made from his unlawful acts and he will be subject to the control of the court in producing his account. This is an additional useful weapon in the plaintiff's armoury although it may be refused where the defendant was an entirely innocent wrong doer or only allowed from the time at which he ceased to be an innocent wrong doer and became fully aware of the true facts.

### III The Enforcement of Rights in Court

1. There are no special proceedings for and no special court having jurisdiction in actions for unfair competition as such.
2. The plaintiff will almost certainly bring his action in the High Court. If the plaintiff's principal aim is an injunction he is likely to commence his action in the Chancery Division of the High Court as it is an equitable remedy. The Court of Appeal in the **McCain v Country Fair Foods**<sup>22</sup> directed that claims for injunctions in passing off actions should be brought in that division. The action may be assigned to a particular judge or judges experienced in the particular type of claim being made. Breach of confidence claims may be and are in practice brought in the Chancery or Queens Bench Division. As has already been stated there is no specific limitation period relating to claims for injunctions. The court operates the doctrine of laches (delay) described above.

The general limitation period for a claim in tort is 6 years from the accrual of the cause of action. This limitation period may be interrupted or may not commence to run if the potential plaintiff is under a disability e.g. he is an infant, of unsound mind or if the cause of action is concealed by the defendant.

---

<sup>22</sup> **McCain v Country Fair Foods [1981] RPC 69**

### 3. Summary Proceedings

Summary proceedings in the High Court are possible but unlikely. Part 24 of the Civil Procedure Rules 1998 applies and the court may give summary judgement if (a) it considers that: (i) the claimant has no real prospect of success or (ii) the defendant has no real prospect of a successful defence and (b) there is no compelling reason why the case should be disposed of at a trial. It is much more likely that the plaintiff will seek an interlocutory injunction in the Chancery Division of the High Court. The urgency of the matter will be apparent from the witness statements filed in support of a claim for the interlocutory injunction. The court will not assume or presume any degree of urgency. The plaintiff must address the issue of urgency in his statement. Initially the judge may only have before him statements from the plaintiff but very rapidly he will also have before him statements from the defendant. The parties' counsel will be heard but generally oral evidence will not be given and the makers of the statements will not be examined upon them at the interlocutory stage. An interim injunction may be granted in appropriate cases pending the effective hearing of the main injunction application and thus an interim injunction may be obtained immediately or on a few days notice to the defendant.

As mentioned above it is possible to obtain a "quia timet" injunction where a breach of the plaintiff's rights is threatened but has not actually occurred. The Court itself may also arrange for counsel to appear before it to argue a particular point or case at "amicus curiae", but this occurs very seldom and is unlikely to occur in the context of "unfair competition". The above is the only meaning in the English law context that the reporter can give to the term "protective brief".

4. Proceedings in relation to an interlocutory injunction will normally be concluded within a matter of 3 or 4 months and at the end of that period the plaintiff will have obtained an interlocutory injunction up to trial or his claim for one will have been rejected. Obtaining a final (i.e. perpetual) injunction may well take a number of years as it will only be granted after a full trial. Most claims will be disposed at the stage of the interlocutory injunction. If the plaintiff obtains one the defendant will normally settle the case. If the plaintiff fails to obtain one he will probably not pursue the matter further.
5. Generally what is termed "a letter before action" will be written faxed or emailed to the defendant but this is not a pre-requisite for commencing proceedings. Failure to send a letter before action may have some effect on the question of costs. The potential plaintiff may consider that an undertaking from the potential defendant not to repeat the infringing acts is sufficient and obviously if the defendant gives one and can then be shown to have broken it the potential plaintiff should be able to obtain an interlocutory injunction without difficulty. If the plaintiff considers that the defendant's undertaking is worthless he will resort to legal proceedings and require the defendant to submit to judgment using the summary procedure outlined above.
6. An action in which one plaintiff sues on his own behalf and on behalf of other potential plaintiffs is possible - see for example **J Bollinger - v - Costa Brava Wine Co Ltd**<sup>3</sup> in relation to "Spanish Champagne".

The plaintiff will pay such court fees as are required of him particularly the fee on commencement of the proceedings. Each party will fund its own case employing such legal advisers as he chooses and being responsible for their fees.

---

<sup>3</sup> **J Bollinger - v - Costa Brava Wine Co Ltd [1960] RPC 16**

Costs are not claimed as damages but as costs and will include lawyers fees, court fees and fees payable to expert witnesses etc. Costs generally follow the event i.e. a successful plaintiff would expect to be awarded his costs but costs are in the discretion of the court and a plaintiff may be deprived of some part of his costs on account of his behaviour or because although he has succeeded on some issues he has failed on others.

The reporter is not aware of any statistics especially as there is no particular body of law which is classified as unfair competition.

#### **IV Cross Border Cases**

In these cases the Court is likely to apply its own national law unless under private international law it is established that a foreign law should be applied. If it is possible for proceedings to be served on a defendant outside the jurisdiction under the applicable Civil Procedure Rules then injunctive relief will be available. The two directives referred to have not been in force sufficiently long for any useful comment to be made.

#### **V Evaluation and Harmonisation**

The English system is so different from the systems of civil law jurisdictions that it is difficult to respond to this section of the International Reporter's Questionnaire. Neither the UK courts nor the UK legislature have sought to regulate competition between traders except insofar as their conduct impacts adversely on the consumer or other third parties. Control of traders' conduct is exercised indirectly through legislation or the common law provisions protecting the consumer.

The reporter does not suggest that the English system is in anyway perfect but it appears to function reasonably satisfactorily whilst avoiding some of the rigidities and indeed absurdities which appear in civil law jurisdictions and which to English eyes seem both unjustifiable and unnecessary, whether to protect traders against one another or to protect consumers.

In July 2003 the Department of Trade and Industry launched a Consultation Document on the Directive on Unfair Commercial Practices proposed by the European Commission on 18th June 2003. This directive is intended to be a radical reform of the current EU legislative framework for the protection of consumers' economic interests. It is clearly going to make a major impact on business to consumer transactions and will indirectly also impact significantly on the behaviour of traders in the market place and towards one another. It is far too early even to begin to predict what will be the effects of the proposed directive, the consultation stage having only just begun.

**August 2003**



## Annex I

### A. Some Preliminary Remarks

1. Discussions of issues relating to “unfair competition law” imply the risk to talk round the subject. The reason is that most of the European countries recognize a specific field of law, usually called “unfair competition law” (“concurrency déloyale”, “competencia desleal”, etc.) while others do not. In any event, there are big differences when it comes to regulations, to substantive law and to sanctions (cf. the study “Protection against Unfair Competition”, WIPO 1994).

Question 2 deals with the sanctions, which means with the issue as to how to enforce claims set forth due to unfair competition. Of course, this issue requires that claims for unfair competition can be set forth, at all. Thus, we cannot avoid to discuss some preliminary questions. They are not only necessary for a better understanding of the special question 2 but also because the law on competition is about to change, at least on the European level.

2. Because of the great difference in the understanding I would like to make some brief preliminary remarks on the development and the current status of the “unfair competition law” in Europe.

While it is generally impossible to bring an action because of the “unfair competition” in Great Britain and Ireland, most of the continental European countries grant legal protection based on the law of torts. In some countries (France/Italy/Netherlands) the tort of unfair competition was developed in case law without any changes of the general tort clause. In some other countries (Germany, Austria) specific statutes on unfair competition were passed, following closely the tort law approach. In all countries the original idea was exclusively to protect trade and business from unfair competition practices of direct competitors. This is also the basis of the only international regulation at this point, Art. 10<sup>bis</sup> Paris Convention which includes a general clause (“honest trade practices”) and three examples (disparagement, likelihood of confusion, misleading statements).

A break in the relatively uniform conception of the European continental countries was caused by consumer protection coming into play. Some countries extended their laws on competition (directly or indirectly) so that they now include an integrated protection of competitors and consumers. Some other countries still grant competitor protection (“B2B”) on the basis of the general clause of the law on torts and passed special laws on the protection of consumers (B2C”). Besides, the law on competition became in some countries a general “law on commercial practices” (Belgium) or “market laws” (Sweden).

The differences existing between the European countries do also exist on an international level. In the USA and Canada e.g. the approach adopted for a protection from unfair competition is different from the European approach (see WIPO study).

3. Therefore it is not astonishing that full harmonization has not yet been reached on the European level. Instead, particular areas were adjusted:
  - Directive 84/450/EEC: Misleading Advertising
  - Directive 97/55/EC: Comparative Advertising

- Directive 89/455/EEC: TV activities
- Directive 31/2000/EC: Electronic Commerce

The current work of the EU Commission is not consistent. While the General Direction for the Internal Market wants to continue the “piece meal” approach, e.g. in the field of sales promotion, the GD SANCO (in charge of consumer protection) prefers a framework directive on “fair trading”, however, limited to consumer protection (“B2C”). Both projects seem currently to block each other.

4. Another problem is the treatment of cross-border competition (multistate competition). Up to now the principle of territoriality applied. But this principle is frequently not satisfactory. A new try of the Commission (materialized in the E-Commerce Directive) is the so-called principle of the country of origin. According to this principle the applicable law is in the end the law of the country in which the offender (advertiser) is established. But there might be other alternatives, e.g. “cross border injunctions”.
5. On the international level we have to date only Art. 10<sup>bis</sup> Paris Convention. In the TRIPS Convention only rules on geographic indications of origin and the protection of know-how are laid down.
6. As regards question 2, we are particularly interested in the procedural law. In which proceedings including which particularities etc. can claims for unfair competition be asserted (if at all)? There are differences in this respect, too. While some countries provided for special proceedings (e.g. Belgium), it is the normal procedural law which principally applies in most countries. However, there are special procedural rules for competition actions, either prescribed by law or developed by practice.
7. The subsequent questionnaire is to give some ideas for answering the questions. The “explanations” not written in bold letters are to be understood as check list. The answers to the preliminary questions (complex I) should be kept short; we are focused on II (sanctions) and III (enforcement). Instructive case law is of major importance, e.g. to explain by giving examples based on case law.

## **B. Questionnaire**

### **I. Preliminary questions relating to unfair competition law**

#### **1. Is there at all a specific field of law called “unfair competition law”?**

The answer to this question should be given irrespective of whether there exist particular statutory regulations or not. A look into specific groups of cases dealt with in the literature and/or in case law and relating to the topic “unfair competition” “concurrency deloyale” “ongoorloofde mededinging” etc. would be an indication.

In the event that there is no pertinent branch of law: Why not? Where is the problem? What comes next, e.g. self-control? Is there a tendency to acknowledge a law on unfair competition?

## 2. **Which practices do normally fall under “unfair competition law”?**

This question, too, is independent from special legal provisions. Some clues for a check:

- misleading and comparative advertising;
- nuisance advertising, exploitation of feelings like fear, disguised advertising, shocking advertising, etc.;
- slavish imitation;
- protection of know-how;
- sales promotion (e.g. discounts, competitions; gifts, package deals, customer binding systems);
- sales at a price below the cost price.

Does a violation of other statutory rules - e.g. laws on health protection, the environment, etc. - constitute an act of unfair competition permitting competitive advantages? Which are the requirements that must be met? (purpose of protection, etc.).

Are cases pertaining to the law of contract - General Terms & Conditions, teleshopping etc. - also included?

## 3. **Relation to other branches of law**

Is unfair competition law part of the law on torts? Or part of the law of obligations? What relation is there between unfair competition and IP rights or the antitrust law?

## 4. **What is the basis on which protection from unfair competition is granted?**

- special laws (e.g. commercial practices law in Belgium);
- case law on basis of the general clause of the law on torts and special regulations for particular issues, especially on consumer protection;
- public authorities (the Ombudsman System included);
- “soft law”;
- If unfair competition is no tort, how is legal protection obtained in cases as those described in 2.

## 5. **Self-control**

What is understood by self-control? How important is self-control in relation to an enforcement in court? Which sanctions are available (especially, do sanctions lead to a definite cease of the impugned act?)

## 6. **General Clause**

Is there a general clause particularly for unfair competition? (please quote). Or is it that the general clause of the law on torts is used? If there is no general clause: Why not?

## 7. **Purpose of protection**

(Whether a regulation on “fair trading” is only to protect consumers (“B2C”) or concurrently competitors (“B2B”) is currently a particularly contentious issue in the European Union. What do national laws say?

- Are competitors, consumers (possibly the general public) equally protected (imposed by law or acknowledged in case law and in the literature)?
- Are competitors and consumers protected by different regulations? (e.g. France: competitor protection according to Art. 1382 Cc, consumer protection according to the provisions of the Code de la consommation.)
- Which connections are there between competitor protection and consumer protection?
- Which other reasons do there exist for a protection) (middle class protection, etc.)
- What is the relation to antitrust law (reason of protection: “Functioning of the law on competition”)?

## 8. **Scope of application**

- Is the scope of protection limited to acts of competition?
- How is a limitation obtained otherwise (e.g. “seller” in the Belgian commercial practices law)?
- Under which conditions are media, consumers’ associations etc. subject to the regulations on unfair competition?

## **II. Sanctions imposed for unfair competition**

### 1. **Sanctions**

If legal protection from unfair competition is granted, at all: Is this legal protection primarily granted under civil law, criminal law or administrative law (public authority)? Is there a distinction made between competitor protection (“B2B”) and consumer protection (“B2C”)? Are there public authorities, an Ombudsman System or similar institutions?

### 2. **Right of action**

Who can take legal action because of unfair competition? Industrial associations? Consumers’ associations? Individual consumers? Public authorities etc.? Ombudsman?

### 3. **Which claims can be asserted under civil law?**

- cease and desist (also in view of a prevention)

- removal, correction, corrective advertising
- damages
- publication of judgement
- unjustified enrichment
- information (on customers and/or suppliers)
- siphoning-off of profits

**4. In particular, claims for a cease and desist**

- Who can answer as the proper defendant? The disturber? How is the disturber defined?
- Is the risk of repetition required for a claim for cease and desist (e.g. the risk of commission in case of a preventative claim for cease and desist)?
- Which requirements have to be met in practice for a risk of repetition (risk of commission)? Is e.g. the risk of commission assumed? With whom lies the burden of proof?

Is the risk of repetition dispelled by the infringer's declaration and undertaking of cease and desist (subject to penalty)?

- Are there any particular difficulties when formulating the prohibited conduct?
- Are claims secured by a coercive penalty payment ("dwangsom")?
- Should the claim for a cease and desist be simplified, e.g. should a risk of repetition be dropped?

**5. In particular, claim for damages**

- How is the fault principle handled in practice?
- How is damage proved? Presumed or estimated? Do punitive damage, licence analogy or the recovery of profits (e.g. in case of a slavish imitation) exist?
- What is the significance of a claim for damages in relation to a claim for a cease and desist?
- Can damages be asserted in interim injunction proceedings?
- Should claims for damages be made more efficient? How?

**III. The enforcement of rights in court**

**1. Are there special proceedings for actions against unfair competition? Does a special court have jurisdiction?**

**2. Assertion of rights in actions before the courts of law?**

- legal process, competence of courts, general requirements for an action

- Are there any particularities as regards actions on the law on competition? Which one?
- period of limitation (interruption of the period of limitation)
- grant of selling-off/cooling-off periods, etc.

### 3. **Summary proceedings**

- Is there a possibility for summary proceedings in matters relating to competition?
- Are the proceedings final or preliminary?
- Which courts are competent?
- If urgency is required, is it presumed, really examined or for the most part assumed?
- How free is a judge in the appreciation of evidence, etc.?
- Are the parties normally heard?
- Are “protective brief” possible or common (which significance do they have?)
- How long do the proceedings normally take?
- What is the ratio of summary proceedings in relation to normal court proceedings?
- Which other particularities are there?

### 4. **Warning notice**

- Is a prior “warning” of the infringer prescribed by law?
- Are infringers warned off in practice?
- What are the consequences if the infringer was not warned off (e.g. resulting costs)?
- Which consequences has the warned person’s promise to cease the impugned acts? Is the risk of a repetition eliminated? Under which conditions?

### 5. **Class action**

Are class actions possible? Which are the requirements?

### 6. **Costs**

- Who pays the court fees?
- Who pays the legal fees?
- Can the costs be claimed as damages? Is it customary in practice?

## Annex II

### ARTICLE 10 bis OF THE PARIS CONVENTION

1. The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
2. Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
3. The following in particular shall be prohibited:
  - (1) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
  - (2) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
  - (3) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.