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Unfair competition: Classification of prohibited practices

In the era of economic liberalism, opening markets to competition is widely encouraged in modern societies.

In France, freedom of trade and industry is a long-standing principle, first proclaimed after the French Revolution by the so-called Allarde Decree of March 2 and 17, 1791.

This fundamental principle, that was given constitutional value by the French Constitutional Council in a decision dated January 16, 1982, has one key exception: Unfair competition.

Whenever free competition is distorted through the use of unfair methods, penalties may be imposed on the offending business. Companies (in the broadest sense of the word) that engage in unfair competition practices are liable in tort law, as provided for under Article 1240 of the French Civil Code.

Indeed, there is no specific set of legal provisions governing acts of unfair competition in France. Such acts are punishable under ordinary law provisions.

Consequently, as with any tortious act, the plaintiff must demonstrate to the competent court that a wrongful act (i.e. unfair competition practice) was committed, that he/she/it suffered a loss/harm as the result of such act, and that there is a causal link between the wrongful act and the loss/harm suffered.

Since there is no statutory list of unfair competition practices, French courts have established that these acts include any use of unfair and wrongful methods that distort free competition. Unfair competition can, therefore, take many various forms.

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However, based on case-law, it is possible to identify four main categories of unfair competition practices, namely: Disparagement, free riding, disruption, and imitation.

Disparagement

Disparagement involves publicly discrediting the products or services of a competitor to gain a competitive advantage.

For example, a company specializing in the manufacture of electronic components that had sent letters to its competitor's customers, claiming that its competitor's products were based on stolen information from former employees, that a lawsuit was pending, and that the investigations would confirm these suspicions, was ultimately found liable for disparagement. The *Cour de Cassation* (French Supreme Court) ruled that these statements constituted disparagement, insofar as the letters referred to criminal offenses presented as proven and established facts whereas the judgment issued in the meantime by the trial court had not yet become final[1].

It should be underlined that disparagement must not be confused with defamation which is governed exclusively by the Law of July 29, 1881 on the Freedom of the Press. Defamation is defined as any allegation or imputation of a fact that harms the reputation or honor of a natural person or legal entity, whereas disparagement targets the products or services of such natural person or legal entity.

Free riding

Free riding occurs when one business benefits from the efforts of a competitor (such as know-how, reputation, or financial investment) by riding on its coat-tails, thereby gaining an economic advantage, without making equivalent efforts.

For instance, the Paris Court of Appeals sanctioned a company specializing in the sale of tooling equipment for copying the layout of the website of its competitor which had spent a considerable amount of money for its creation. The Court held that the company's commercial strategy of mimicking its competitor's online business, thereby saving time and resources in research and development, while depriving the competitor of the full profit it could have legitimately expected, constituted free riding[2].

Disruption

Disruption refers to any method aimed at disrupting a competitor's business, including wrongful poaching (massive, selective, or strategic poaching intended to disrupt the targeted competitor), undermining a competitor by disclosing its trade secrets, or diverting its clientele through systematic targeted solicitation of its customers or misappropriation of its customer database.

Regarding actions aimed at capturing customers, simply proving that confidential information from a competitor was transmitted to a company by a former employee of said competitor is sufficient to establish

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unfair competition, without the need to demonstrate repeated use of the information or the existence of a post-termination non-compete covenant[3].

Imitation

Imitation involves creating confusion in the minds of customers about the identity of the natural person or legal entity they are dealing with. Examples include pretending to be an employee or supplier of a company without actually being one, or using commercial documents that closely resemble those of a competitor, thereby misleading customers about the company they are contracting with.

The *Cour de Cassation* has ruled that falsely claiming to be the authorized distributor of a supplier constitutes unfair competition against the genuine authorized distributor of that supplier[4].

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Regardless of the type of unfair competition practices involved, one of the main challenges is proving the reality of the alleged unfair practices in order to obtain compensation for the loss/harm suffered. Under French law, the burden of proof lies with the plaintiff.

One can easily imagine the difficulties that may be encountered in obtaining evidence of unfair competition practices by a third-party company. For instance, if a plaintiff suspects that a competitor has misappropriated its customer database, it will be very difficult for it to access the competitor's IT systems to prove that the latter is indeed in possession of the database and that such database has been transmitted to it.

In such situations, the plaintiff can apply to the competent court, in summary proceedings and under certain conditions, for preparatory inquiries *in futurum*[5] (literally for the future) to gather evidence before bringing an unfair competition lawsuit.

If such a measure is granted by the judge, a court-enforcement officer will be appointed to make an unannounced visit to the company suspected of having engaged in unfair competition practices, and to extract all relevant documentary evidence.

Once evidence of unfair practices has been gathered, the next step is to assess the damage suffered (and again, to gather evidence to substantiate this assessment before the court). It is advisable to quantify the damage before initiating any legal action to determine the appropriateness of actually filing a lawsuit.

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Soulier Avocats is fully available to assist you with all any pre-litigation or litigation unfair competition matters.

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[1] Commercial Chamber of the *Cour de Cassation*, January 27, 2021, No. 18-21.697

[2] Paris Court of Appeals, 5th Division, 8th Chamber, April 15, 2016, No. 14/05590

[3] Commercial Chamber of the *Cour de Cassation*, May 17, 2023, No. 22-16.031

[4] Commercial Chamber of the *Cour de Cassation*, November 10, 2021, No. 20-13.607

[5] Article 145 of the French Code of Civil Procedure

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