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” (“concurrence 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 Eruopean 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 “unfair compeitition” 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^{bis} Paris Convention which includes a general clause (“honest trade practices”) and three examples (disparagement, likelihood of confusion, misleading statements).
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> 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 compeitition 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 U.S.A. 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 a 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 offerer (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^{bis} 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” “concurrence deloyale” “ongoorloofde mededing” 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’ assotions? 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 preventive claim for cease and desist)?
- Which requirements have to be met in practice for a risk of repeition (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, license 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 claims 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 compeititon? 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?

7. Frequency of actions relating to competition law?
   How frequent are actions on competition? (Any estimate will be helpful.) Are there any statistics? Special magazines (sections) dealing with it?

IV. Cross-border cases (“multistate competition”; “cross-border injunctions”)

- How is cross-border competition judged? Do courts normally apply the national law?
- Is is possible to order a cease and desist aborad (“cross border injunctions”)?
- What is the opinion on the principle of the country of origin? (provided in the E-Comemrce-Directive on Online Advertising)
- Has the Directive 98/27/EC produced any effect on claims for a cease and desist?

V. Evaluation, harmonization

- How efficient is the national system in view of a combat of unfair competition? Which advantages or disadvantages does it have?
- Is there, in particular, sufficient protection from future infringements?
- Is the protection from cross-border unfair competition sufficient? How could it be improved?

- Is there a need for an adjustment of the national provisions?
  - in material law?
  - in procedural law, especially the introduction of special proceedings for unfair compeitition?
- Should legal protection from unfair competition be improved on the international level, especially by regulations in TRIPS?