International Handbook on Unfair Competition

edited by

Frauke Henning-Bodewig

C. H. Beck · Hart · Nomos

Preface

International trade and globalization are a reality. Without doubt, they require free competition. Where there is competition, there is, alas, also unfair competition. As experience has shown, it is an illusion to hope that market forces alone can keep this problem in check.

It is therefore generally regarded as necessary to establish some legal safeguards against unfair market behaviour and to monitor market practices not only under the banner of freedom, but also under the banner of commercial decency. How these mechanisms are labeled is of secondary importance. The term "unfair competition law" is used here as it was more than a century ago the first (and until now only) explicit regulation in this area on an international level, the Paris Convention.

As far as we know, all developed market economies have established some legal mechanism, often in combination with judge made law and rules of voluntary restraint, to combat unfair market behavior and have counterbalanced them towards the principle of economic freedom. These mechanism typically aim at guaranteeing enterprises a level playing field in competition (which is endangered by impediment, disparagement, causing confusion, misappropriation) and at guaranteeing consumers the right to make undistorted commercial choices (which is endangered by deceptive or harassing commercial practices). Both aims are considered a necessity when it comes to promoting an efficient market system that serves the interests of all participants.

The way countries have done this, however, differs considerably. The reasons for this are mainly historical. When unfair behaviour emerged at the end of the 19th century as a side effect of free trade and growing industrialization, all countries tried to solve this new problem by applying the legal system already in force. Since this general system of law was quite diverse – the most pronounced difference being between the so-called civil law and common law countries – the approach to unfair competition was divers, too.

And this variety became even more pronounced with the emergence of consumer protection rights in the 1960s. While some countries consider competitor and consumer interests in fair commerce as being two sides of the same coin, others distinguish between the protection of competitors (which is often seen in relation to tort and IP-law) and the protection of consumers (which is often seen as an annex to antitrust law). Consequently, unfair competition law is seldom a clear cut field of law.

While on the one hand these differences should not be overrated, because almost all countries seem to achieve adequate solutions in the suppression of specific phenomena of unfair commercial behavior – in particular in core areas like advertising and marketing where the interests of competitors and consumers are inseparably intertwined – they are also, on the other hand, a hindrance to free trade.

It is generally agreed that international trade and globalization require international, unitarily accepted standards. These standards can, however, not be found

without in-depth knowledge of how the different countries around the world see this problem.

This book aims at giving such an insight into the system of two dozen countries. In addition it discusses the current status of international and regional harmonization. Hopefully this paves the way to a better understanding of a complex problem like "unfair competition" (and maybe even to some harmonization).

Munich, November 2012 *Frauke Henning-Bodewig*

Contents – Summary

Table of Contents VII

General abbreviations and acronyms XXVII

Table of Authors XXXI

A. INTRODUCTION 1
§ 1 Unfair Competition Law – An Introduction to a Complex Topic .. 1

B. INTERNATIONAL PROTECTION AGAINST UNFAIR COMPETITION 9
§ 2 International Protection Against Unfair Competition 9

C. REGIONAL PROTECTION AGAINST UNFAIR COMPETITION 39
§ 3 Overview 39
§ 4 European Union 41
§ 5 Regional Agreements in North America, South America, Africa, Caribbean, Asia 76

D. COUNTRY REPORTS 83
§ 6 Australia 83
§ 7 Austria 106
§ 8 Brazil 136
§ 9 Canada 164
§ 10 China 188
§ 11 France 207
§ 12 Germany 231
§ 13 Hungary 261
§ 14 India 285
§ 15 Italy 313
§ 16 Japan 342
§ 17 Lithuania 377
§ 18 Netherlands 399
§ 19 Poland 423
§ 20 South Africa 456
§ 21 Spain 481
§ 22 Sweden 511
§ 23 Switzerland 547
§ 24 Turkey 583
§ 25 United Kingdom 600
§ 26 United States of America 621

Table of Contents

A. INTRODUCTION 1
§ 1 Unfair Competition Law – An Introduction to a Complex Topic 1
I. The Roots of Unfair Competition Law 1
1. Counterbalance to the principle of *laissez-faire* in trade 1
2. The (initial) common ground: protection of the "honest entrepreneur" 2
3. The additional factor: consumer protection 2
4. The (new) common ground: undistorted competition 3
II. Unfair Competition Law as a Separate Field of Law? 4
III. The Core of Unfair Competition Law 5
1. Between IP law, antitrust law and consumer protection 6
2. (Some) subject matters of unfair competition law 7
IV. Conclusion 8

B. INTERNATIONAL PROTECTION AGAINST UNFAIR COMPETITION 9
§ 2 International Protection Against Unfair Competition 9
A. The Paris Convention 10
I. The Paris Convention and the Repression of Unfair Competition 11
1. Basic features of the Paris Convention 11
2. The repression of unfair competition as part of industrial property law 12
3. The main principles of the Paris Convention 14
a) National treatment and minimum protection 14
b) Direct application of the minimum standard? 16
c) Higher standards of protection/reverse discrimination 16
4. Interpretation of the Paris Convention 17
a) Autonomous interpretation 17
b) The importance of the law where a conflict occurs 18
c) National requirements for protection 19
5. Article 10^{bis} Paris Convention in detail 19
a) Overview 19
b) Purpose of protection 20
c) Scope of application: "acts of competition" 21
d) The benchmark: "honest practices" 22
e) Specific incidences of unfair competition 25
aa) Risk of confusion 25
bb) Discrediting competitors 26
cc) Misleading allegations 26
6. Enforcement/the right of action 27
II. The 1996 WIPO Model Provisions 28
1. Background 28
2. Overview 29
a) Scope of application; purpose of protection 29
b) Extended lists of examples 29
c) Enforcement 30
B. TRIPS 30
I. Basic Features of TRIPS: The "Paris-Plus"-Approach 31
II. TRIPS and the Repression of Unfair Competition 32
1. Regulated incidences: Indications of origin, trade secrets 32
2. Incorporation of Article 10bis PC by general reference? 33
a) Article 2(1) TRIPS 33
b) The "Havana Club" decision 34
c) Consequences of "Havana Club" for Article 10^{bis} PC 35

C Current Situation ... 36
Specific Abbreviations and Acronyms ... 36

C. REGIONAL PROTECTION AGAINST UNFAIR COMPETITION ... 39
§ 3 Overview ... 39
§ 4 European Union ... 41
I. Introduction ... 44
II. Unfair Competition Law – its Base in the TFEU and the European Internal Market ... 45
1. Relevant provisions ... 45
2. Jurisprudence of the CJEU ... 46
a) *Dassonville* ... 46
b) *Cassis de Dijon* ... 46
c) *Keck* ... 47
III. The Directive on Unfair Commercial Practices (UCPD) ... 48
1. History ... 48
a) Forerunner directives: misleading and comparative advertising ... 48
b) The history of the UCPD ... 49
2. The purpose and scope of the UCPD ... 49
a) The purpose of the UCPD ... 49
b) The scope of application ... 50
aa) Personal scope ... 50
bb) Factual scope ... 51
3. The structure ... 52
a) Annex I ... 53
b) The "small" general clauses ... 53
aa) Misleading commercial practices ... 53
(1) Misleading actions ... 54
(2) Misleading omissions ... 54
bb) Aggressive commercial practices ... 55
c) The "grand" general clause ... 56
4. Enforcement ... 56
a) Enforcement ... 56
b) Enforcement and self-regulation ... 57
5. The UCPD before the CJEU ... 58
a) Preliminary rulings ... 58
b) The UCPD and sales promotions ... 58
c) The UCPD and the "invitation to purchase" ... 59
d) The UCPD and the relation between the general clauses ... 60
e) The UCPD and contract law ... 61
IV. Directive concerning Misleading and Comparative Advertising ... 61
1. Misleading advertising ... 61
a) Scope of application ... 61
b) Prohibition of misleading advertising ... 62
2. Comparative advertising ... 63
a) Scope of application ... 63
b) Requirements of comparative advertising ... 64
aa) Comparative advertising is not misleading (Article 4 lit. a) ... 64
bb) Comparative advertising compares goods or services meeting the same needs or intended for the same purpose (Article 4 lit. b) ... 64
cc) Comparative advertising objectively compares one or more material, relevant, verifiable and representative features of those goods or services, which may include the price (Article 4 lit. c) ... 64
dd) Comparative advertising does not discredit or denigrate the trademarks, trade names or other distinguishing signs of a competitor (Article 4 lit. d) ... 64
ee) For products with designation of origin, comparative advertising relates to products with the same designation (Article 4 lit. e) ... 64

ff) Comparative advertising does not take unfair advantage of the reputation of the trademark or other distinguishing marks of a competitor (Article 4 lit. f) ... 64
gg) Comparative advertising does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name (Article 4 lit. g) ... 65
hh) Comparative advertising does not create confusion in the market place between the advertiser and a competitor (Article 4 lit. h) ... 65
3. Enforcement ... 65
V. Product- and Media-specific Directives and Regulations ... 66
1. Overview ... 66
2. The Regulation on nutrition and health claims made on foods ... 66
a) Purpose of the Regulation ... 66
b) Scope of application ... 67
aa) Nutrition claims ... 67
bb) Health claims ... 68
3. Directive 2000/31/EC on Electronic Commerce ... 69
a) Purpose and scope of the Directive ... 69
b) Structure of the Directive ... 70
c) The country of origin principle ... 70
aa) The principle ... 70
bb) Country of origin principle and applicable law ... 71
VI. Summary ... 72
VI. ANNEXES ... 72
VI. *Specific Abbreviations and Acronyms* ... 75
§ 5 Regional Agreements in North America, South America, Africa, Caribbean, Asia 76
I. North America: NAFTA ... 77
II. South America: MERCOSUR/CAN ... 77
1. History ... 77
2. CAN ... 78
3. MERCOSUR ... 79
III. Caribbean: CARICOM ... 79
IV. Africa: ARIPO/OAPI/COMESA/SADC ... 80
1. ARIPO ... 80
2. OAPI ... 80
3. COMESA ... 80
4. SADC ... 81
V. Asia: ASEAN ... 81
Specific Abbreviations and Acronyms ... 82

D. COUNTRY REPORTS ... 83
§ 6 Australia ... 83
I. Background and General Approach to Unfair Competition Law ... 84
II. The Legal Basis of Unfair Competition Law and its Relation to Neighbouring Areas of Law ... 87
1. Federal acts of the Commonwealth of Australia ... 87
2. Acts of the states and territories ... 92
3. Case law ... 93
III. General Considerations ... 95
IV. General Clause Against Unfair Competition (or lack of it) ... 95
V. Marketing ... 95
1. Advertising ... 96
2. Sales promotion ... 99
3. Direct marketing ... 100
VI. Protection of Competitors Against Unfair Trade Practices ... 100
1. Imitation and parasitic behaviour ... 101
2. Confusion ... 101
3. Impediment ... 101

4. Denigration ... 101
5. Protection of know how ... 102
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 102
1. Information disclosure duties ... 102
2. Aggressive commercial practices ... 102
3. Privacy ... 103
VIII. Enforcement ... 103
Specific Abbreviations and Acronyms ... 104
§ 7 Austria ... 106
I. Background and General Approach to Unfair Competition Law ... 107
1. History ... 107
2. European influence ... 108
3. Concept ... 109
4. Enforcement ... 109
II. Legal Basis of Unfair Competition Law and Relation to Neighbouring Areas of Law ... 110
1. Main statutes ... 110
2. Statute and judicial process ... 111
3. Relation to neighbouring areas of the law ... 111
III. General Considerations ... 113
1. Purposes ... 113
2. Systematic features ... 113
3. Scope of application ... 114
a) Commercial activity ... 114
b) Act of competition ... 115
c) Commercial practice ... 116
IV. The General Clause Against Unfair Competition ... 116
1. Introduction ... 116
2. Relation of the general clause with other provisions ... 118
3. The interpretation of the general clause ... 118
4. The *de-minimis* criterion ... 119
V. Marketing ... 120
1. Introduction ... 120
2. Misleading advertising ... 121
3. Comparative advertising ... 122
4. Prohibition of Promotional Bonuses ... 122
VI. Protection of Competitors Against Unfair Trade Practices ... 123
1. Misappropriation/Imitation ... 123
a) General requirements ... 123
b) Identical imitation ... 124
c) Confusion ... 124
d) Parasitic behaviour ... 125
e) Systematic imitation ... 125
f) Illegal procurance of know-how ... 125
2. Impediment ... 125
3. Breach of law ... 126
4. Denigration ... 127
5. Protection of know-how ... 127
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 128
1. Information disclosure duties ... 128
2. Aggressive commercial practices ... 129
a) Introduction ... 129
b) Coercion ... 129
c) Harassment ... 129
d) Other undue influence ... 130
3. Canvassing for customers ("Kundenfang") ... 130
a) Introduction ... 130
b) Advertising with gifts ... 131

c) Emotional advertising ... 131
VIII. Enforcement ... 132
1. Introduction ... 132
2. Injunctions (cease and desist orders) ... 132
3. Publication of the judgement ... 133
4. Competent courts ... 133
5. Temporary Injunctions ... 133
6. Enforcement of court decisions and settlements in court ... 134
7. Costs of litigation ... 134
Specific Abbreviations and Acronyms ... 135
§ 8 Brazil ... 136
I. Background and General Approach to Unfair Competition Law ... 137
1. Overview ... 137
2. Modern unfair competition law ... 139
3. Unfair competition practice ... 140
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 141
1. International and constitutional legal basis ... 141
2. Legislation and relations to neighbouring areas of law ... 142
a) Ties to industrial property law ... 142
b) Ties to consumer protection law ... 143
c) Ties to antitrust law ... 143
3. Self-regulation ... 144
III. Basic Considerations ... 144
1. Purpose of protection ... 144
2. Systematic features ... 145
IV. General Clause Against Unfair Competition ... 146
V. Marketing ... 148
1. Advertising ... 148
2. Ambush marketing ... 149
3. Sales promotion ... 150
VI. Protection of Competitors Against Unfair Trade Practices ... 151
1. Confusion ... 151
a) Confusion pursuant to Art. 195 LPI ... 151
b) Confusion pursuant to Art. 209 LPI ... 152
2. Parasitic behaviour and impediment ... 153
3. Denigration ... 154
4. Protection of test data and know-how ... 155
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 155
1. The Consumer Protection Act ... 155
2. Information disclosure ... 157
3. Aggressive commercial practices ... 158
4. Privacy and direct marketing ... 158
VIII. Enforcement ... 159
1. Overview ... 159
2. Administrative enforcement ... 159
3. Civil enforcement ... 160
a) Cease-and-desist letters ... 160
b) Preliminary injunctions ... 160
c) Main proceedings ... 161
d) Enforcement of the judgment ... 162
4. Criminal enforcement ... 162
5. Self-regulation ... 162
Specific Abbreviations and Acronyms ... 163
§ 9 Canada ... 164
I. Background and General Approach to Unfair Competition Law ... 165
II. The Legal Basis of Unfair Competition Law and its Relation to Neighbouring Areas of Law ... 168

1. Federal law ... 168
2. Provincial and territorial law ... 173
3. Case law ... 175
III. General Considerations ... 177
IV. General Clause Against Unfair Competition (or lack of it) ... 178
V. Marketing ... 178
1. Advertising ... 178
2. Sales promotion ... 181
3. Direct marketing ... 181
VI. Protection of Competitors with regard to Unfair Trade Practices ... 182
1. Imitation and parasitic behaviour ... 182
2. Confusion ... 182
3. Impediment ... 182
4. Denigration ... 182
5. Protection of know how ... 182
VII. Specific Consumer Protection Against Unfair Trade Practices ... 182
1. Information disclosure duties ... 183
2. Aggressive commercial practices ... 183
3. Privacy ... 183
VIII. Enforcement ... 183
Specific Abbreviations and Acronyms ... 186
§ 10 China ... 188
I. Background and General Approach to Unfair Competition Law ... 189
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 192
III. Basic Considerations ... 193
IV. General Clause Against Unfair Competition ... 195
V. Marketing ... 196
1. Advertising ... 196
a) Deceptive advertising ... 196
b) Comparative advertising ... 197
c) Concealed advertising ... 197
d) Specific products and media ... 198
2. Sales promotion ... 198
a) Rebates ... 198
b) Free gifts and joint offers ... 198
c) Promotional games ... 198
3. Direct marketing (but see VII.) ... 199
VI. Protection of Competitors Against Unfair Trade Practices ... 199
1. Imitation, parasitic behaviour and confusion ... 199
2. Impediment ... 200
3. Denigration ... 201
4. Protection of trade secrets ... 201
5. Commercial bribery ... 202
6. Bid-Rigging ... 203
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 203
VIII. Enforcement ... 204
1. Dual track mechanism ... 204
2. Administrative enforcement ... 204
3. Enforcement before the court ... 205
4. Criminal enforcement ... 205
Specific Abbreviations and Acronyms ... 206
§ 11 France ... 207
I. Background and General Approach to Unfair Competition Law ... 208
1. Terminology and applicable laws ... 208
2. Historical development ... 210
3. The regulation of unfair commercial practices in context ... 210
4. The objectives ... 211

5. Enforcement through private party complaints 211
6. Actual importance of unfair competition law 212
II. Relations of Unfair Competition Law to Neighbouring Areas of Law and Systematic Features 212
III. General Considerations 213
1. Purpose of protection 213
2. Scope of application 214
IV. Main Provisions on Unfair Competition 214
1. Wording 214
a) General clause 214
b) Unfair commercial practices 215
2. Main criteria 216
V. Marketing 217
1. Advertising 217
a) Former legal wording – positive law 217
b) Definition of advertising 218
c) Comparative advertising 218
d) Rules for specific products 220
2. Sales promotions; free gifts 220
VI. Protection of Competitors Against Unfair Trade Practices 221
1. Imitation 221
2. Parasitic behaviour 222
3. Confusion 224
4. Denigration 225
5. Protection of know how 225
VII. Specific Protection of Consumers against Unfair Trade Practices 226
1. Information disclosure duties 226
2. Aggressive commercial practices 227
VIII. Enforcement 228
1. Plaintiffs and courts 228
2. Injunctions and damages 228
3. Locus standi 229
Specific Abbreviations and Acronyms 230
§ 12 Germany 231
I. Background and General Approach to Unfair Competition Law 232
1. Historical development 232
a) The tort law roots 232
b) The UWG of 1909 (and its unexpected success) 233
c) The UWG of 2004 (and the reform of 2008) 234
2. Basic features of the Act against Unfair Competition (UWG 2004) 235
III. Relations to Neighbouring Areas of Law 237
1. A separate field of law – but with close relations to neighbouring areas 237
2. Antitrust law 237
3. Intellectual property rights 237
4. General consumer protection law 239
III. Basic Considerations: Purpose of Protection, Scope of Application 240
1. Purpose of protection 240
2. Scope of application 240
IV. General Clause against Unfair Competition 241
V. Marketing 243
1. Misleading commercial practices 244
a) Misleading through positive statements (Sect. 5 UWG) 244
b) Misleading by omission (sect. 5 a UWG) 245
2. Comparative Advertising 246
3. Concealed advertising 247
4. Other forms of advertising 247
5. Direct marketing 247
6. Sales promotion 248

a) Transparency requirements ... 248
b) Undue influence on the decision-making ... 249
VI. Specific Protection of Competitors against Unfair Trade Practices ... 249
1. Discrediting of a competitor (sect. 4 nos. 7 and 8 UWG) ... 249
2. Imitation (sect. 4 no. 9 UWG) ... 250
3. Impediment of a competitor (sect. 4 no. 10 UWG) ... 252
a) General principles ... 252
b) Case groups ... 253
4. Breach of law (sect. 4 no. 11 UWG) ... 254
5. Trade secrets ... 254
VII. Specific Protection of Consumers against Unfair Trade Practices ... 255
1. Aggressive market practices ... 255
2. Undue influence on the decision-making, exploitation of credulity etc. (sect. 4 nos. 1 and 2 UWG) ... 255
3. Harassment, pestering (sect. 7 UWG) ... 255
4. Information duties ... 256
VIII. Enforcement ... 256
1. Sanctions ... 257
a) Injunctive relief; removal ... 257
b) Damages (sect. 9 UWG) ... 257
c) Confiscation of profits (sect. 10 UWG) ... 258
2. Procedure ... 258
a) Competent courts ... 258
b) Warning letter; protective brief ... 258
c) Place of venue ... 259
3. Costs ... 259
Specific Abbreviations and Acronyms ... 259
§ 13 Hungary ... 261
I. Background and General Approach to Unfair Competition Law ... 262
II. Legal Basis of Unfair Competition Law and Relationship with Neighbouring Areas of Law ... 263
1. The Competition Act ... 263
2. Act on the prohibition of unfair commercial practices against consumers ... 264
3. Advertising Act ... 264
4. Relationship between the rules on unfair competition and private law 264
5. Self-regulation ... 265
III. Basic Considerations ... 265
IV. General Clause Against Unfair Competition ... 265
V. Protection of Competitors Against Unfair Trade Practices ... 267
1. Denigration – discrediting competitors ... 267
2. Protection of trade secret ... 268
a) The definition of a trade secret ... 268
b) Acts infringing trade secrets ... 269
c) Protection of know-how ... 270
3. Prohibition of calls to boycott ... 271
4. Risk of confusion ... 272
a) Factors for establishing confusion ... 272
b) Examples from court practice ... 273
c) Connection to IP law ... 274
5. Unfair influencing of a bidding process ... 275
VI. Marketing ... 276
1. B2C relationship ... 276
2. B2B relationship ... 277
3. Comparative advertising ... 278
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 279
1. Information disclosure duties ... 279
2. Sales promotion: rebates, free gifts ... 279

3. Sales promotion: promotional games ... 280
4. Aggressive commercial practices (harassment, coercion etc.) ... 280
VIII. Enforcement ... 281
1. Right of action ... 281
2. Court proceedings ... 281
a) Civil law claims ... 281
b) Preliminary or interim injunctions ... 282
3. HCO proceedings ... 283
a) Competence of the HCO ... 283
b) HCO's decisions ... 283
4. Criminal law ... 284
Specific Abbreviations and Acronyms ... 284
§ 14 India ... 285
I. Background to Unfair Competition Law in India ... 286
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 287
1. Main statutes to combat unfair trade practices and their relation *inter se* ... 287
2. Issues of overlap between different statutes ... 288
3. Court decisions as genuine basis of law ... 289
4. Relation between Paris Convention, TRIPS Agreement and Indian law 289
III. Unfair Competition Law: Purpose, Scope and Criteria ... 290
IV. Unfair Trade Practices in Marketing ... 291
1. Deceptive advertisements ... 291
2. Comparative advertising ... 292
3. Rules for specific products and media ... 295
a) Food ... 296
b) Medicine ... 296
c) Media ... 296
4. False sponsorship ... 297
5. Misleading information about products/services ... 300
6. Sales promotion through gift schemes ... 301
7. Ambush marketing ... 302
V. Protection of Competitors Against Unfair Trade Practices ... 303
1. Confusion and imitation ... 303
2. Dilution and parasitic behaviour of competitor ... 304
3. Disparagement of goods/services of competitor ... 305
4. Protection of trade secrets ... 305
VI. Specific Protection of Consumers Against Unfair Trade Practices ... 308
1. Non-disclosure of information, hidden conditions and half truths ... 308
2. False warranty or guarantee ... 309
3. Unsolicited marketing calls ... 310
VII. Enforcement Issues ... 311
Specific Abbreviations and Acronyms ... 312
§ 15 Italy ... 313
I. Background and General Approach to Unfair Competition Law ... 314
1. Historical development ... 314
2. Present status of unfair competition law in Italy and its relation to general tort law ... 315
3. Objectives ... 315
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 316
1. Art. 2598 Civil Code and other provisions ... 316
2. Relation to anti-trust Law ... 318
3. Relation to contractual obligations ... 319
4. Relation to intellectual property rights ... 319

III. Basic Considerations ... 320
1. Impact of repression of misleading advertising on the purpose of unfair competition law ... 320
2. Impact of the regulation of comparative advertising on the purpose of unfair competition law ... 321
3. The Directive 2005/29/EC concerning unfair B2C commercial practices ... 322
4. Implementation of Directive 2005/29/EC ... 323
IV. General Clause Against Unfair Competition ... 325
1. The general clause of art. 2598 no.3 of the Civil Code ... 325
2. The general clause applicable to B2C commercial practices ... 326
V. Marketing ... 327
1. Provisions applicable to marketing activities ... 327
2. Definition of advertising. Hidden advertising ... 327
3. Misleading advertising ... 328
4. Comparative advertising ... 329
5. Advertising of specific types of products ... 329
6. Special sales ... 329
7. Direct marketing ... 330
VI. Protection of competitors against Unfair Trade Practices ... 331
1. Scope of protection ... 331
2. Acts likely to create a risk of confusion ... 332
3. Slavish imitation ... 332
4. Commercial denigration ... 333
5. Unfair appropriation of the "merits of a competitor's product or enterprise" ... 334
6. Other forms of unfair competition prohibited by the General Clause ... 334
VII. Specific Protection of Consumers against Unfair Trade Practices ... 336
VIII. Enforcement ... 337
1. Actions before the ordinary courts ... 337
2. Actions by qualified consumer associations for injunction ... 338
3. Action by individual consumers and class action for compensation of damages ... 339
4. Administrative enforcement ... 339
Specific Abbreviations and Acronyms ... 341
§ 16 Japan ... 342
I. Historical Development ... 343
II. Basic Parameters ... 345
1. Legislative provisions ... 345
2. Beneficiaries ... 347
3. Sanctions ... 349
III. Protection Against the Misappropriation of Another's Achievements ... 349
1. By causing confusion (passing-off action) ... 349
a) Object ... 350
b) Recognition ... 350
c) Similarity ... 351
d) Japanese peculiarities ... 352
e) Similarity and confusion ... 354
f) Confusion in the broad sense ... 356
2. Exploitation of third party efforts by other means ... 358
a) Protection of famous marks against dilution ... 358
b) Protection of famous marks against registration ... 360
c) Registration of a mark by an agent ... 360
d) Domain name grabbing ... 361
e) Protection of trade secrets ... 361
f) Slavish imitation ... 363
g) Publicity rights ... 365

IV. Protection Against Defamatory Statements ... 368
1. Libel and slander ... 368
2. Unjustified threats ... 368
3. Comparative advertising ... 369
V. Other Forms of Interference ... 369
1. Interference with the business operation of a competitor ... 369
2. Supply of circumvention devices ... 370
VI. Protection Against Misleading Indications ... 370
1. Misleading indications as to the origin of goods or services ... 371
2. Other properties of the product ... 371
3. Disguise of price ... 372
VII. Problems Related to Law Enforcement ... 372
1. Civil courts ... 372
a) Taking evidence ... 373
b) In camera proceedings ... 373
c) Claims to injunctive relief ... 374
d) Claims to damages ... 374
e) Claims to an apology ... 375
2. Administrative measures ... 375
3. Penal sanctions ... 375
VIII. Outlook and Reform Efforts ... 375
Specific Abbreviations and Acronyms ... 376
§ 17 Lithuania ... 377
I. Background and General Approach to Unfair Competition Law ... 378
1. Historical development ... 378
2. Influence of international law and European law ... 379
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 380
1. Legal basis of unfair competition law ... 380
2. Relation to antitrust law ... 380
3. Relation to intellectual property rights ... 381
4. Relation to unfair commercial practices ... 382
5. Relation to civil law ... 383
III. Basic Considerations ... 383
1. Purpose of protection ... 383
2. General clause and specific regulation ... 384
IV. General Clause Against Unfair Competition ... 384
1. Definition ... 384
2. Main criteria ... 385
V. Marketing ... 386
1. Advertising ... 386
a) Definition of advertising ... 386
b) Deceptive advertising ... 386
c) Comparative advertising ... 388
d) Concealed advertising ... 388
e) Rules for specific products and media ... 388
aa) Law on Pharmacy ... 388
bb) Law on Alcohol Control ... 389
cc) Law on Tobacco Control ... 389
dd) Law on the Provision of Information to the Public ... 390
2. Sales promotion ... 390
3. Direct marketing ... 391
VI. Protection of Competitors Against Unfair Trade Practices ... 391
1. Imitation ... 391
2. Confusion ... 392
3. Impediment, denigration, protection of know-how ... 392
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 393
1. Information disclosure duties ... 393

2. Aggressive commercial practices ... 394
3. Privacy ... 394
VIII. Enforcement ... 394
1. Capacity to bring actions ... 394
2. Remedies ... 395
3. Courts ... 396
4. Costs ... 397
§ 18 Netherlands ... 399
I. Background and General Approach to Unfair Competition Law ... 400
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 402
1. Law of unfair competition embodied in regulations and case law ... 402
2. Relations to other areas of law ... 403
a) Anti-trust ... 403
b) Consumer protection ... 403
c) Contract law ... 403
3. Relation to IP laws – pre-emptive effect ... 403
III. Basic Considerations ... 404
IV. General Clause Against Unfair Competition (or lack of it) ... 405
V. Marketing ... 405
1. Advertising ... 405
a) Legal background ... 405
b) Definition ... 406
c) Misleading advertising (6:194 and 193 c et seq. Civil Code) ... 407
d) Comparative advertising ... 408
2. Special forms of marketing ... 409
a) Prospectus liability ... 409
b) Medicines ... 410
c) Media Act ... 410
d) Tobacco ... 410
e) Commodities ... 410
f) Games of chance and promotional games ... 410
3. Self-regulation ... 411
a) Dutch Advertising Code ... 411
b) Advertising for medicines ... 411
VI. Protection of Competitors Against Unfair Trade Practices ... 412
1. Introduction ... 412
2. Slavish imitation ... 412
a) The plaintiff's product must be distinctive ... 413
b) The defendant's product must be likely to confuse the public ... 413
c) The defendant's product must be similar to the plaintiff's product regarding features that are not important for the reliability and usefulness of the product ... 414
d) The defendant must have failed in doing what is reasonably possible to prevent confusion ("needless confusion") ... 414
3. The imitation of badges of trade ... 415
4. Denigration ... 415
5. Protection of know how ... 416
6. Inducing breach of contract ... 417
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 418
1. Aggressive trading practices ... 418
2. Information disclosure duties ... 418
3. Some specific rules ... 418
a) Inertia selling ... 418
b) Door-to-door selling and timeshare ... 419
c) Direct marketing ... 419
VIII. Enforcement ... 419
1. Private enforcement ... 419

2. Public enforcement ... 420
3. Self-regulation ... 421
Specific Abbreviations and Acronyms ... 421
§ 19 Poland ... 423
I. Background and General Approach to Unfair Competition Law ... 424
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 427
III. General Considerations ... 430
IV. General Clause Against Unfair Competition ... 432
V. Marketing ... 435
1. Provisions regarding advertising ... 435
2. Unlawful advertising ... 435
3. Unfair advertising ... 437
a) General clause ... 437
b) Human dignity ... 437
c) Harassing advertising ... 438
d) Misleading advertising ... 438
4. Specific torts of unfair competition ... 438
a) Comparative advertising ... 439
b) Sales promotion ... 439
c) Restrictions on freedom of pricing ... 439
d) Sales with premiums ... 440
e) Games of chance ... 440
f) Loyalty programmes ... 440
g) Direct marketing ... 441
VI. Protection of Competitors Against Unfair Trade Practices ... 441
1. Imitation of products ... 441
2. Parasitic competition ... 442
3. Misleading indications ... 442
a) Symbols of an enterprise ... 443
b) Business name ... 443
c) Geographical indication of origin ... 444
d) Indications of origin and descriptive indications of goods and services ... 444
e) Benchmark for confusion ... 445
5. Specific communication practices ... 445
6. Disclosure of business secrets ... 446
7. Unfair interference with an entrepreneur's contractual relationship ... 447
8. Impeding access to the market ... 448
9. Sale of own-brand products ... 449
10. Corruption of public officials ... 449
11. Performing services supplied electronically or based on conditional access ... 449
12. Obviously groundless complaints ... 450
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 450
VIII. Enforcement ... 452
Specific Abbreviations and Acronyms ... 455
§ 20 South Africa ... 456
I. Background and General Approach ... 457
II. Legal Basis and Relations to Neighbouring Areas ... 461
1. Unlawful competition in South African common law ... 461
2. Unlawful competition in South African statutory law ... 462
a) Trade Marks Act ... 462
b) Companies Act ... 463
c) Consumer Protection Act ... 463
d) Copyright Act ... 464
e) Competition in conflict with a statutory provision ... 464

3. Relations to neighbouring areas ... 465
a) Intellectual property law ... 465
b) Anti-trust law ... 466
c) Tort law ... 467
d) Contract law ... 467
e) Consumer law ... 468
III. Basic Considerations ... 468
IV. Lack of General Clause – Common Law Applicable ... 469
V. Marketing ... 470
1. Deceptive advertising ... 471
2. Comparative advertising ... 471
3. Concealed advertising ... 472
4. Sales promotion ... 472
5. Direct marketing ... 472
VI. Protection of Competitors Against Unfair Trade Practices ... 473
1. Imitation ... 473
2. Parasitic behaviour ... 474
3. Confusion ... 475
4. Impediment ... 476
5. Denigration ... 476
6. Protection of know-how ... 477
7. Breach of law ... 478
VII. Specific protection of Consumers Against Unfair Trade Practices ... 478
1. Information disclosure duties ... 478
2. Aggressive commercial practices ... 479
3. Privacy ... 479
VIII. Enforcement ... 479
Specific Abbreviations and Acronyms ... 480
§ 21 Spain ... 481
I. General Approach to Spanish Unfair Competition Law ... 483
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 484
1. Legal basis of unfair competition law ... 484
a) General Advertising Act ... 484
b) Consumer Protection Act ... 486
c) Retail Trade Act ... 486
d) Consumer protection and commerce acts of the autonomous regions ... 486
2. Relations to neighbouring areas of law ... 487
a) Intellectual property law ... 487
b) Antitrust law ... 487
c) Tort and contract law ... 488
III. Basic Considerations ... 488
1. Purpose ... 488
2. Scope of application ... 488
3. Systematic features ... 490
4. Relations between the general clause and the specific provisions of the Act ... 490
IV. The General Clause ... 491
1. Wording ... 491
2. Function ... 492
3. Criteria ... 493
4. One specific case of application of the general clause ... 493
V. Marketing ... 494
1. Advertising ... 494
a) Overview ... 494
b) Comparative advertising ... 495

c) Misleading actions and misleading omissions ... 496
aa) Overview ... 496
bb) Misleading actions: peculiarities ... 497
cc) Misleading omissions ... 498
dd) The black list ... 498
ee) Criminal law ... 499
2. Sales promotion ... 499
3. Direct marketing ... 499
VI. Protection of Competitors Against Unfair Trade Practices ... 500
1. Imitation ... 500
2. Parasitic behaviour (exploitation of another's achievements, reputation) ... 501
3. Confusion ... 501
4. Impediment ... 501
5. Denigration ... 502
6. Trade secrets ... 502
7. Breach of law ... 502
8. Incitement to the breach of contracts ... 503
9. Sale at a loss ... 503
10. Discrimination and economic dependency ... 503
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 504
1. Information disclosure duties ... 504
2. Aggressive commercial practices ... 505
3. Privacy (esp. telephone marketing) ... 505
VIII. Enforcement ... 506
1. Actions ... 506
2. Locus standi ... 507
3. Preliminary injunctions and preliminary proceedings ... 508
4. Burden of proof: speciality ... 509
5. Courts ... 509
6. Self-regulation ... 509
7. Costs ... 510
Specific Abbreviations and Acronyms ... 510
§ 22 Sweden ... 511
I. Background and General Approach to Unfair Competition Law ... 513
1. Historical development ... 513
2. General approach ... 515
3. Systematic place of the discipline ... 516
4. Enforcement ... 517
5. Influence of EU law ... 517
6. Importance ... 517
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 518
1. The main statutes to combat unfair trade practices, relations, overlaps 518
2. Relation to adjacent areas of law and regulation (IP, antitrust, general consumer protection law) ... 519
III. General Considerations ... 521
1. Purpose of protection ... 521
2. Scope of application ... 521
3. Systemic features ... 523
IV. General Clause Against Unfair Competition ... 524
1. Wording ... 524
2. Main criteria ... 524
a) Good marketing practice ... 524
b) Material distortion of consumers' economic behaviour ... 525
c) The average consumer ... 526
V. Marketing ... 527
1. Advertising ... 527

a) Misleading advertising ... 527
aa) Misleading actions ... 527
bb) Misleading omissions ... 529
cc) Invitation to purchase ... 530
b) Comparative advertising ... 531
c) Product-specific advertising ... 532
aa) Alcohol ... 532
bb) Tobacco ... 533
cc) Medicinal products ... 533
dd) Advertising in the liberal professions ... 533
d) Media-specific advertising ... 533
aa) Radio and TV advertising ... 533
bb) E-commerce ... 534
cc) Outdoor advertisements ... 534
2. Sales promotion (rebates, free gifts, joint offers, promotional games) ... 535
3. Direct marketing (but see VII) ... 535
VI. Protection of Competitors Against Unfair Trade Practices ... 535
1. Imitation ... 535
2. Parasitic behaviour (exploitation of another's achievements and reputation) ... 535
3. Confusing imitations ... 537
4. Impediment of competitors ... 539
5. Denigrating and discrediting marketing ... 539
6. Protection of know how and trade secrets ... 540
7. Breach of law ... 540
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 541
1. Information disclosure duties ... 541
2. Aggressive commercial practices ... 541
3. Privacy (telephone marketing) ... 542
4. Socially responsible marketing ... 542
VIII. Enforcement ... 543
1. Avenues for enforcement ... 543
2. Remedies ... 544
3. *Locus standi* ... 544
4. Competent courts ... 545
5. Litigation costs ... 545
Specific Abbreviations and Acronyms ... 546
§ 23 Switzerland ... 547
I. Background and General Approach to Unfair Competition Law ... 549
1. Historical development ... 549
a) Article 50 CO ... 549
b) FAUC 1943 ... 549
c) FAUC 1986 ... 549
2. Influence of international law ... 550
a) Paris Convention and TRIPS ... 550
b) European law ... 550
c) German law ... 551
3. Protective purpose ... 551
4. Enforcement ... 552
5. Actual importance of unfair competition law in Switzerland ... 552
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law ... 553
1. Administrative regulations against misleading products ... 553
2. Relation to antitrust law ... 554
3. Relation to intellectual property rights ... 554
4. Relation to civil law ... 555
5. Influence of court decisions ... 556
6. Principles of the Swiss Commission for Fairness (SCF) ... 556

III. Basic Considerations ... 556
1. Applicability of FAUC ... 556
2. Relation between general clause and specific regulations ... 557
IV. General Clause (Article 2 FAUC) ... 558
1. Semantics of "behaviour" and "business conduct" ... 558
2. Principle of good faith ... 559
3. Impact on market ... 559
V. Marketing ... 560
1. Advertising ... 560
a) Deceptive advertising (Article 3 FAUC) ... 560
aa) The notion of advertising ... 561
bb) The notion of deception ... 561
cc) Relevant perspective ... 561
b) Comparative advertising (Article 3 lit. e FAUC) ... 562
aa) The notion of comparison ... 563
bb) The notion of unfair comparison ... 563
2. Concealed advertising (Article 3 lit. i FAUC) ... 564
3. Loss-leading offers (Article 3 lit. f FAUC) ... 564
4. Sales promotions ... 565
a) Customer gifts ... 565
b) Promotional games ... 565
5. Direct marketing ... 566
VI. Protection of Competitors Against Unfair Competition Practices ... 566
1. Imitation ... 567
2. Confusion ... 568
a) Purpose of Article 3 lit. d FAUC ... 568
b) Protected symbols ... 568
c) Potential confusion ... 569
3. Parasitic behaviour ... 570
a) Imitative comparative advertising (Article 3 lit. e FAUC) ... 570
b) Article 2 FAUC ... 571
4. Impediment ... 572
5. Denigration ... 572
6. Protection of know how ... 573
a) Article 5 FAUC ... 573
b) Article 6 FAUC ... 574
c) Article 162 Swiss Criminal Code ... 574
7. Breach of law ... 574
VII. Specific Protection of Consumers Against Unfair Competition Practices ... 575
1. Information disclosure ... 575
a) Article 3 lit. i FAUC ... 575
b) Article 3 lit. k-n FAUC ... 575
c) Article 3 lit. s FAUC ... 576
2. Aggressive commercial practices ... 576
3. Privacy ... 576
VIII. Enforcement ... 577
1. Capacity to bring actions ... 577
a) Customers ... 577
b) Professional and trade organisations ... 577
c) Consumer organisations ... 578
d) Swiss Confederation ... 578
e) Swiss Commission for Fairness ... 578
f) Injunction ... 579
g) Damages and indemnification ... 579
h) Declaratory relief ... 580
i) Criminal sanctions ... 580
2. The courts ... 580

3. Costs ... 581
Specific Abbreviations and Acronyms ... 581
§ 24 Turkey ... 583
I. Background, and General Approach to Unfair Competition ... 584
1. Introduction ... 584
2. General characteristics of the Turkish unfair competition regulation ... 585
II. Legal Basis of Turkish Unfair Competition ... 586
1. Turkish Code of Obligations (TCO) ... 586
2. Turkish Commercial Code (TCC) ... 587
3. Swiss Federal Unfair Competition Code ... 587
III. Examples of Unfair Competition ... 588
IV. Enforcement ... 592
1. Legal consequences of an act of unfair competition ... 593
a) Protection of evidence ... 593
b) Other temporary remedies ... 593
c) Interim injunctions ... 593
2. Lawsuits ... 595
a) Competent court ... 595
b) Types of lawsuits ... 595
3. Claimants and respondents ... 596
a) Claimants ... 596
b) Respondents ... 597
4. The Execution of court decisions ... 598
5. Statute of limitation ... 598
6. Criminal Liability ... 598
Specific Abbreviations and Acronyms ... 599
§ 25 United Kingdom ... 600
I. Introduction ... 601
1. The general approach of the United Kingdom to unfair competition law ... 601
2. The lack of a general law of unfair competition in the United Kingdom 603
II. Unfair Competition Law and Neighbouring Areas of Law ... 604
1. Competition law ... 604
a) The legislation ... 604
b) Enforcement ... 604
2. Intellectual property law ... 605
3. Contract law ... 605
4. Tort law ... 606
III. The Protection of Competitors Against Unfair Competition: the Common Law Torts ... 607
1. Injurious falsehood ... 607
a) The elements: a falsehood ... 607
b) The elements: malice and damage ... 607
c) Use of malicious falsehood ... 608
2. Passing off ... 609
a) Introduction ... 609
b) The elements: goodwill ... 609
c) The elements: misrepresentation ... 609
d) The elements: damage ... 610
e) Passing off and misappropriation ... 611
f) Defences to passing off ... 611
g) Passing off and unfair competition ... 612
IV. Anti-Competitive Practices and Consumer Protection: the Statute Law ... 612
1. Introduction ... 612
2. The Consumer Protection from Unfair Marketing Regulations (CPRs) 612
a) The CPRs and other legislation ... 612
b) Elements of unfair marketing ... 613
c) Definitions ... 613

3. The Business Protection from Misleading Marketing Regulations 2008 (BPRs) ... 614
a) Introduction ... 614
b) The elements of misleading marketing ... 614
c) Applying the comparative advertising provisions ... 615
V. Enforcement ... 615
1. Introduction ... 615
2. Enforcing the common law torts: passing off and injurious falsehood . 616
a) Which court? ... 616
b) Remedies ... 616
3. Enforcing the CPRs and the BPRs ... 617
a) Introduction ... 617
b) Civil proceedings ... 617
c) Criminal proceedings ... 618
4. The Advertising Standards Authority ... 618
VI. Conclusion ... 619
Specific Abbreviations and Acronyms ... 619
§ 26 United States of America ... 621
I. Background and General Approach to Unfair Competition Law ... 622
1. The structure of unfair competition law in the United States ... 622
2. Historical development and modern enforcement ... 624
II. Legal Basis of Unfair Competition Law and Relations to Neighboring Areas of Law ... 625
1. Areas of law that relate to unfair competition ... 625
2. Areas of law that relate to consumer protection ... 626
3. Antitrust law ... 627
III. Basic Considerations ... 628
1. The goals of unfair competition ... 628
2. The goals of consumer protection ... 629
IV. Lack of a General Clause Against Unfair Competition ... 631
1. Section 43(a) of the Lanham Act ... 631
2. Section 5 of the Federal Trade Commission Act ... 633
3. The trend to uniformity of state laws ... 635
a) Uniform state statutes ... 635
b) Restatements of common law ... 637
4. Article 10bis of the Paris Convention ... 637
V. Marketing ... 640
1. Unfair competition and deceptive marketing ... 640
a) Passing off ... 640
aa) Express passing off ... 641
bb) Implied passing off ... 641
cc) Reverse express passing off ... 641
dd) Reverse implied passing off ... 641
b) False advertising and product disparagement ... 642
2. Consumer protection and the bargaining process ... 642
a) Statutory protections ... 642
b) False advertising and product disparagement ... 643
VI. Protection of Competitors Against Unfair Trade Practices ... 644
1. Misappropriation of trade values ... 644
2. Trade secrets ... 646
3. Rights of publicity ... 648
VII. Specific Protection of Consumers Against Unfair Trade Practices ... 650
VIII. Enforcement ... 651
Specific Abbreviations and Acronyms ... 652