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Approximation of legislation: a study of approaches to unfair competition in the member countries.

A comparative study of the law on unfair competition in the six Member States has been prepared by the Institute for Foreign and International Patent, Copyright, in Munich for the EEC Commission. ^{x)} The study will help to guide for the Commission's future work on the approximation of legislation by bringing out those disparities between the legal systems of the six countries which are liable to create differing competitive conditions for enterprises engaging in international trade.

It comprises five volumes, one on "The comparative situation"; and the others dealing with the legislation in force in Benelux, Germany, France and Italy respectively. All five volumes will be published in French, and volume I in all Community languages. ^{xx)}

Law against agreements and practices in restraint of competition and against the abuse of dominant positions, makes for freedom of competition; law against unfair competition is aimed at preventing the abuse of that freedom. In all the countries of the EEC the principle applies that freedom of trade and industry must not go beyond the point at which competition based on relative efficiency is distorted through unfair practices by competing firms. Examples of such practices are creation of a risk of confusion, the abuse of distinctive signs, industrial espionage, the denigration of competitors, comparative advertising, misleading advertising and the unjustified utilization of designations or of indications of origin. In the broad sense unfair competition also includes infringements of regulations on rebates and gifts to promote sales, and infringements of provisions concerning special forms of sale. Regulations governing commercial activities and rules of business law, such as that concerning admission to and exercise of occupations in business or trade, food and price legislation, and regulations on shop closing hours, are not included in the concept.

Disparities between France and Germany.

Although the concept of unfair competition exists in all the legal systems in the Member States, there are substantial differences of approach from country to country. The sharpest legal disparities are those between France and Germany.

^{x)} Institut für ausländisches und internationales Patent-, Urheber- und Markenrecht.

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Giuffré (Milan)
Tjeenk-Willink (Zwolle).

In French law the general provisions of the law of torts are used to deal with malpractices of this kind. On the basis of these provisions the courts have developed French law of unfair competition, which is therefore essentially case-law. It is, however, supplemented by a body of statutes and regulations, notably provisions in the Code pénal, specific penal laws on fraudulent sales, laws and regulations on clearance sales and gifts, etc.

In Germany, on the other hand, there are specific statutory rules to combat unfair competition. These consist of a general clause forbidding all competitive acts contrary to fair business practice, and of individual provisions listing specific groups of acts which are deemed to constitute unfair competition. These acts are, however, only examples ; others not mentioned in the provisions may also be caught by the law.

In Italy and the Benelux countries, as in France, the law in this field is based on the law of torts.

The recodification of civil law in Italy has, however, led to a special arrangement for unfair competition, separate from the law of torts. Similarly, in Belgium and Luxembourg the general rules of the law of torts have been supplemented by special regulations on unfair competition. The rules in these countries therefore lie somewhere between the French and German arrangements. In the Netherlands unfair competition continues to be dealt with essentially under the law of torts.

Similarities and disparities between national systems.

The general picture of the law against unfair competition in the Member States given in Volume I is based on the detailed accounts given in the country reports and brings out similarities and disparities in the different national legal systems. For example, in the assessment of risk of confusion there are parallels which extend even to details; on the other hand, the differing legal systems, and the considerable powers of discretion granted to the courts in all the Member States with regard to what offends fair business practice or decent custom in trade and industry, lead to disparities in questions of principle as well as of detail.

Of particular significance are the differing opinions on how far competition law should protect not only the individual interests of fellow competitors but also the interests of fellow competitors as a whole. These lead to practical differences both in the rules on what parties may institute proceedings against unfair competitors and in the assessment of unfair practices, notably in connection with misleading advertising. Differences in the rules concerning distinctive signs, stemming from disparities in the legal concepts on which these rules are based, have a special relevance to the question of how the rules concerning trade-marks are supplemented by those of the law on unfair competition. For trade names, there are disparities of definition which arise from differences in regulations concerning the use of trade names and in commercial law. The disparities in the law concerning indications of origin arise partly from the creation in French law of a specific category of designations of origin.

In addition, legal disparities arise in connection with problems not fitting into broad categories ; these result partly from rules developed from case-law, such as those on the protection of famous trade-marks or on comparative advertising, and partly from statutory provisions, such as rules on ~~the~~ protection of industrial secrets.

Measures proposed.

In the field of law of procedure, there are differing rules on the admissibility of petitions for restraining injunctions, and not all the countries have a proper procedure for taking urgent action. To avoid the inconvenience which could arise from disparities in rules of competition law, the following approximation measures are proposed in the study:

- (i) Conclusion of a multilateral convention on unfair competition with a general clause and a number of specific provisions covering typical acts of unfair competition; the convention would also empower competitors and associations to institute proceedings against offenders and would provide for injunctions prohibiting acts of unfair competition and set out an accelerated procedure to enforce them;
- (ii) Conclusion of a second multilateral convention, on the protection of geographical designations of origin;
- (iii) The adoption of directives on gifts to induce purchases and on national regulations requiring merchandise imports to be labelled or marked with certain details of country or place of origin.

The Commission is at present engaged in a preliminary examination of legal disparities and their impact on the Common Market. The result of this examination will determine what approximation measures are proposed to the Member States.