

§ 23 Switzerland

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I. Background and General Approach to Unfair Competition Law.....	1
1. Historical development	1
a) Article 50 CO	1
b) FAUC 1943	2
c) FAUC 1986	4
2. Influence of international law	8
a) Paris Convention and TRIPS.....	8
b) European law	9
c) German law	12
3. Protective purpose.....	13
4. Enforcement.....	14
5. Actual importance of unfair competition law in Switzerland.....	16
II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law	20
1. Administrative regulations against misleading products	21
2. Relation to antitrust law.....	25
3. Relation to intellectual property rights.....	28
4. Relation to civil law	32
5. Influence of court decisions.....	33
6. Principles of the Swiss Commission for Fairness (SCF)	34
III. Basic Considerations	35
1. Applicability of FAUC.....	35
2. Relation between general clause and specific regulations	38
IV. General Clause (Article 2 FAUC)	44
1. Semantics of “behaviour” and “business conduct”	45
2. Principle of good faith	47
3. Impact on market	50

V. Marketing.....	53
1. Advertising	54
a) Deceptive advertising (Article 3 FAUC).....	55
aa) The notion of advertising.....	56
bb) The notion of deception	60
cc) Relevant perspective	62
b) Comparative advertising (Article 3 lit. e FAUC)	66
aa) The notion of comparison.....	69
bb) The notion of unfair comparison.....	71
2. Concealed advertising (Article 3 lit. i FAUC)	74
3. Loss-leading offers (Article 3 lit. f FAUC)	76
4. Sales promotions	78
a) Customer gifts.....	79
b) Promotional games	81
5. Direct marketing.....	85
VI. Protection of Competitors against Unfair Competition Practices.....	89
1. Imitation.....	90
2. Confusion.....	93
a) Purpose of Article 3 lit. d FAUC	94
b) Protected symbols.....	96
c) Potential confusion	98
3. Parasitic behaviour	99
a) Imitative comparative advertising (Article 3 lit. e FAUC)	100
b) Article 2 FAUC.....	104
4. Impediment	107
5. Denigration.....	109
6. Protection of know how.....	111
a) Article 5 FAUC.....	112
b) Article 6 FAUC.....	116
c) Article 162 Swiss Criminal Code	120
7. Breach of law.....	121
VII. Specific Protection of Consumers against Unfair Competition Practices	123
1. Information disclosure.....	124
a) Article 3 lit. i FAUC	124
b) Article 3 lit. k-n FAUC.....	126
c) Article 3 lit. s FAUC.....	128
2. Aggressive commercial practices	129
3. Privacy	131
VIII. Enforcement.....	132
1. Capacity to bring actions.....	133
a) Customers.....	133
b) Professional and trade organisations.....	135
c) Consumer organisations	137
d) Swiss Confederation	139
e) Swiss Commission for Fairness	141
f) Injunction	142
g) Damages and indemnification	145
h) Declaratory relief.....	148
i) Criminal sanctions.....	149
2. The courts	150
3. Costs.....	152
<i>Specific Abbreviations and Acronyms</i>	

I. Background and General Approach to Unfair Competition Law

1. Historical development

a) Article 50 CO

Until the first statute against unfair competition came into force in Switzerland, acts of unfair competition were prosecuted as tortious acts against competitors under tort law. This punishment was based on the comprehensive clause of former Article 50 of the Code of Obligations (CO) in its version of 1881 and the revised version of Article 48 CO (1911) in the law of torts, following the idea of Josef Kohler's general rights of personality. The provision was interpreted as protecting the subjective rights of tradesmen. The consumers could not make any claims in case of unfair competition and the competitors could only do so if they were threatened in their customer base.¹

b) FAUC 1943

When the first Swiss unfair competition law (Federal Act against Unfair Competition, in the following: FAUC) was enacted on 30 September of 1943, it abandoned the concept of individual rights and was supposed to protect not only the competitors but all market operators, including the consumers and therefore the general public.² Competitors, specified trade organisations, and consumers who were harmed in their economic interests were entitled to claims resulting from acts of unfair competition. Claims according to Article 2 of the former FAUC under civil law for cease and desist as well as for damages were defined in a general clause on giving false or misleading information about the provider, the goods, or business relations (Article 1 lit. b of the former FAUC) or for taking measures intended to achieve, or suitable to cause confusion, about these circumstances.

Such behaviour, if intentional, was also punishable by imprisonment or penalty. Despite these provisions, legal practice seemed not to notice this changed object of protection and followed the former understanding of individual rights. The only relevant criteria to judge competitive acts as fair or unfair were still seen in business ethics based on good faith.³

c) FAUC 1986

About 30 years after the enactment of the first Federal Act against Unfair Competition, forms of unfair competition changed with new distribution structures, new copy techniques, and the enhanced role of consumers required amendments, which is why in 1977 the Federal Department of Economic Affairs established a commission of experts to elaborate a draft for a new law against unfair competition. The commission, together with interested parties and organisations reviewed topics, such as loss leaders, power of demand, promise of gifts, closing down sales, unfair advertising, and ancillary copyrights. The commission provided its first preliminary draft to the parliament on 31 January 1980; this draft became the fundament for the ensuing legislative procedure.⁴

¹ David/Jacobs, *Schweizerisches Wettbewerbsrecht*, 4th ed. 2005, margin no. 1.

² Müller in: v.Büren (eds.), *Schweizerisches Immaterialgüter- und Wettbewerbsrecht*, Band 5 Wettbewerbsrecht, Teilband I Lauterkeitsrecht, 2nd ed. 1998, Band V/1, p. 28.

³ Knaak/Ritscher, *Das Recht der Werbung in der Schweiz*, margin no. 34.

⁴ Baudenbacher, *Länderbericht Schweiz*, in: Schmidt-Kessel/Schubmehl (eds.), *Lauterkeitsrecht in Europa* 2011, p. 586.

- 5 The current Federal Act against Unfair Competition became effective on March 1, 1988 after having been adopted by the Swiss Federal Assembly on 19 December, 1986. This current version of the law has been amended several times since. One reform was prepared when Switzerland was considering an accession to the European Economic Area (EEA) in the 1980s. In case of such accession, Switzerland would have had to adapt its law to the Council Directive 84/450/EEC concerning misleading and comparative advertising. Nevertheless, when the people and the states (“cantons”) of the Confederation decided not to join the EEA, the prepared modifications were incorporated in the Federal Act against Unfair Competition, by way of voluntary alignment with European Community Law (so called SWISSLEX-reform).
- 6 Since this reform, Article 3 lit. k, l, m, and Article 4 lit. b FAUC define acts of unfair competition in relation with consumer credits and instalment-purchases, and were amended again when Switzerland established a special law about consumer credit. Since its voluntary alignment with the European Community Law, Article 13 lit. a of the FAUC allows a judge to shift the burden of proof and to obligate the advertiser to furnish evidence for the accuracy of factual claims.⁵
- 7 Further amendments have granted limited rights to the Swiss Confederation to prosecute misleading sales methods that could harm Swiss prestige abroad;⁶ extended Article 3 lit. b FAUC to cover misleading information about sales-events when the closing sale act of 1947 was repealed⁷ so as to change the rules about the place of jurisdiction for lawsuits alleging unfair competition.⁸

2. Influence of international law

a) Paris Convention and TRIPS

- 8 Article 5 (4) of the Swiss Federal Constitution obliges the Swiss Confederation and the states of the federation to respect international law, and constitutes supremacy of international law. Article 10bis of the Paris Convention, Articles 22 et seqq., and Article 39 of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) are important provisions for unfair competition law in Switzerland, being one of the founding members of both agreements. While Article 10bis of the Paris Convention requires member states to assure effective protection against unfair competition to nationals of such countries in general, Articles 22–24 oblige member states to create regulations against the unfair use of geographical indications referring to Article 10bis of the Paris Convention. Also, Article 39 TRIPS refers to Article 10bis of the Paris Convention and requires regulations for protection of undisclosed (“secret”) information.

b) European law

- 9 Besides these basic regulations, Swiss unfair competition law has also been influenced by European Community law even though Switzerland did not join the European Economic Association (EEA). Since voluntary alignment with European Com-

⁵ Amtliche Sammlung des Bundesrechts (AS) 1994 375; Botschaft über das Folgeprogramm nach der Ablehnung des EWR-Abkommens vom 24. Februar 1993, Bundesblatt der Schweizerischen Eidgenossenschaft (BBl) 1993 I 805, 922 *et seq.*

⁶ AS 1992 1514.

⁷ AS 1995 4086; BBl 1994 III 442.

⁸ AS 2000 2355.

munity law by way of the amendments of SWISSLEX mentioned above, Swiss unfair competition law remains influenced by the statutes of the European Union (EU).

Under this influence, Article 13 of the Data Protection Directive 2002/58/EG 10 served as an example for the newly incorporated Article 3 lit. o FAUC. In contrast to EU member states that are obliged to interpret their provisions in conformity with EU law, Switzerland is under no such obligation. However, Swiss courts accept European law as an interpretation aid in their decisions.⁹ Furthermore, Swiss courts in case of doubt¹⁰ tend to an interpretation in accordance with European law. This tendency can be seen in recent Swiss court decisions on labour law that take into account decisions rendered by the European Court of Justice.¹¹

In the field of unfair competition law this approach is accepted by Swiss Courts 11 as having been autonomously implemented from EU law.¹² It remains to be seen how far completion of European unfair competition law will influence Swiss court practice in the future. Although European law is implemented in Switzerland, there is no guarantee that this is in actual conformity with European law. As Switzerland is not a member state, decisions can be examined neither by the European Court of Justice nor by the EFTA Court.¹³

c) German law

In addition to European Community law, the Swiss doctrine and jurisprudence 12 was, and continues to be influenced not only by EU law but by German law as well. The reason for this German influence is not only the same language for about three-fifth of Switzerland's population but also because of the greater volume, quantity and extent of both academic jurisprudence and court practice. Since the size of the population of Switzerland is less than a tenth of Germany, and Swiss society is less litigious, no corresponding extent of jurisprudence is available in Switzerland. For this reason, *Baudenbacher* summarizes that ignoring German law would, in many areas, mean re-inventing the wheel and be a waste of resources.¹⁴

3. Protective purpose

Article 1 FAUC states that the purpose of the act is to ensure fair and undistorted 13 trade for all participants of the market. This explicit reference to all market participants intends to make visible the "three-dimensionality of competition" with an equivalence of the interests of competitors, consumers, and of the general public.¹⁵ In line with this understanding, Article 2 FAUC also defines a wide range of potential perpetrators of unfair competition when defining as unfair and illegal any behaviour or business practice that is deceptive, or that in any other way infringes the principle of good faith, and which affects the relationship among competitors, or between suppliers and customers.¹⁶ The provision, therefore, encompasses unfair acts com-

⁹ Decisions of the Swiss Federal Supreme Court (*BGE*) 125 II 293, 307.

¹⁰ *BGE* 129 III 335, 350.

¹¹ *Baudenbacher*, (fn. 4), p. 592 with reference to *BGE* 129 III 335, 352.

¹² *BGE* 130 III 182, 190.

¹³ *Baudenbacher*, (fn. 4), p. 592 *et seq.*

¹⁴ *Baudenbacher*, *Lauterkeitsrecht: Kommentar zum Gesetz gegen den unlauteren Wettbewerb*, 2001, Art. 2, margin no. 88.

¹⁵ Botschaft UWG, BBl 1983, Band 2, 1009, 1058.

¹⁶ *Müller* in: v.Büren, (fn. 2), p. 28.

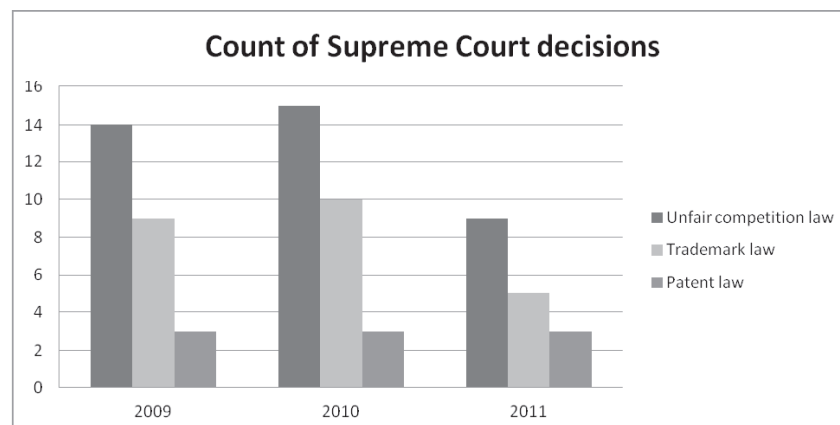
mitted by third parties, customers, or consumers. It is a matter of debate in Swiss jurisprudence if consumers actually do have responsibility for fair competition.¹⁷

4. Enforcement

- 14 The special position of consumers under Swiss unfair competition law is reflected in Article 10 FAUC. This provision empowers consumers to sue under the FAUC if they are affected in their economic interest. In practice, this right is rarely used by consumers.
- 15 The right to sue is not only granted to individuals who suffer under an act of unfair competition, be it an impairment of his clientele, his credit rating, his professional reputation, his business, or another aspect of his economic interests (Article 9 FAUC), but is also granted to specific professional and economic organisations. In accordance with Article 10 (1) lit. c FAUC, the Swiss Confederation may also bring action under Article 9 FAUC if it considers this to be necessary in order to protect the reputation of Switzerland abroad (further infra 8.).

5. Actual importance of unfair competition law in Switzerland

- 16 The definition of a functional approach in the Federal Act against Unfair Competition of 1986 has put an end to former discussions about personality rights. With this understanding, it has become possible to define commercial acts as unfair even if no personality rights of competitors have been infringed, for example, by misleading advertising. This changed understanding of unfair competition has been intended to “waken the slumbering act”.¹⁸ The new importance of Swiss unfair competition law is apparent in most of the many cases under trademark law having an aspect of unfair competition law. Even quite a few patent law cases are connected with unfair competition law too. Further, there are many cases subject exclusively to unfair competition law that have their origin in an advertising campaign.
- 17 Statistics of the Swiss Federal Supreme Court show an increased importance of unfair competition law when compared with (other) intellectual property rights:



¹⁷ Baudenbacher, (fn. 14), Art. 1, margin no. 45.

¹⁸ Baudenbacher, (fn. 14), Art. 1, margin no. 11.

In 2009, there have been 14 Supreme Court decisions under unfair competition 18 law but only 9 under trademark law, and 3 under patent law. In 2010, there have been 15 decisions under unfair competition law, 10 under trademark law, and 3 under patent law. In 2011, there have been 9 decisions under unfair competition law, 5 under trademark law and 3 under patent law.¹⁹

Another important aspect of unfair competition law is the provision concerning 19 general business terms and conditions which are governed by Article 8 FAUC. Swiss law includes no further regulations about general business terms and conditions, in contrast to most EU member countries, which are obliged to provide detailed regulations for protecting consumers against disadvantageous general business terms and conditions by Directive 93/13/EEC.

II. Legal Basis of Unfair Competition Law and Relations to Neighbouring Areas of Law

All main statutes to combat unfair competition are concentrated in the Federal 20 Act against Unfair Competition of 1986.²⁰ In addition there are various administrative regulations that under some aspects also govern misleading offers of specific products.

1. Administrative regulations against misleading products

For example, Articles 19 et seq. of Swiss food ordinance²¹ prohibits deception 21 about characteristics and packaging of foods. The purpose of these provisions is specified in Article 1 of the law of 9 October, 1992, on foods and consumer products²² authorising adoption of the food ordinance²³ for protecting consumer's health and to prevent consumers from being misled. Consumer's protection is also the purpose of an ordinance on the notification of prices²⁴ regulating the transparency of price indications on goods intended for end consumers and having a high degree of practical relevance.

The Swiss Coats of Arms Act²⁵ is dedicated to the protection of emblems of the 22 Swiss Confederation if used in a misleading manner. Detailed provisions for labelling watches as "Swiss made" are contained in the ordinance about use of the Swiss name on watches.²⁶

Furthermore, there is a specific body of law to protect geographical indications 23 against misleading use if they are officially registered as protected geographical indications, or as protected designations of origin.²⁷ The purpose of this defensive

¹⁹ Count of published cases on www.bger.ch.

²⁰ An English translation of this Act with amendments until 1995 is published on www.wipo.int/wipolex/en/text.jsp?file_id=125795.

²¹ Systematische Sammlung des Bundesrechts (SR) 817.02.

²² SR 817.0.

²³ SR 817.02.

²⁴ SR 942.211.

²⁵ SR 232.21.

²⁶ SR 232.119.

²⁷ SR 910.12.

instrument is based mainly on political goals in agriculture but also provides strong protection of registered geographical indications.²⁸

- 24 All regulations mentioned above have an administrative character, and monitoring of compliance with the provisions is done by public institutions. In contrast, competitors of providers that act in breach of unfair competition law have no direct claims arising from these statutes intended to guide the authorities in case of infringement. The relation of these regulations to the provisions of the Federal Act against Unfair Competition has not been clarified yet. However, it seems reasonable to expect that claims granted to market operators under this law are not precluded because they have no other option to start court action against misleading use of registered geographical indications under the administrative ordinance, and would have to rely on administrative procedures.²⁹

2. Relation to antitrust law

- 25 In German terminology, unfair competition law or – literally “competition law” – is not restricted to unfair competition but includes aspects of antitrust law (defined in the Swiss cartel act) since both fields have similar objects, aims, and means. Both acts are intended to protect competition as an institution by trying to suppress harmful behaviour. Historically, both acts are also based on the concept of personality rights.³⁰ For this reason it has been, and by some authors still is, considered desirable to combine both existing acts in just one Competition Act³¹ (the so-called *entity theory*).
- 26 On the other hand, differences are apparent as to objectives and functions as well as to differences about the legal nature of enforcement.³² Those authors that support the division theory see, as the main purpose of antitrust law, to guarantee unfair competition in general, while regulations for accomplishing orderly competition are subject matter of unfair competition law.
- 27 The concept of a functional difference can also be seen in Article 1 of the antitrust law which declares, as its aim, to foster fair competition in the interest of a free and open market economy while fair and undistorted competition is also the goal of unfair competition law (as set forth in Article 1 FAUC). With this understanding, both acts can be applied cumulatively and independently,³³ and this can be relevant, for example, in cases of illegal price fixing below cost within the meaning of Article 3 lit. f FAUC.³⁴

3. Relation to intellectual property rights

- 28 The discussion about relations between unfair competition law and intellectual property rights has focussed on the so called *detour theory* (German: “Umwegthese”) for a long time. The Swiss Federal Supreme Court has used this principle to

²⁸ Schröter, Der Schutz geographischer Herkunftsangaben nach Marken-, Wettbewerbs- und Registerrecht in Deutschland und der Schweiz, 2011, p. 223 *et seq.*

²⁹ Schröter, (fn. 28), p. 232 *et seq.*

³⁰ David/Jacobs, (fn. 1), margin no. 11.

³¹ Baudenbacher, (fn. 14), margin no. 66.

³² Jung in: Jung/Spitz (eds.), Bundesgesetz gegen den unlauteren Wettbewerb (UWG), Einl., margin no. 21.

³³ BGE 107 II 277, 286.

³⁴ Jung in: Jung/Spitz, (fn. 32), Einleitung, margin no. 25.

judge cases in which copied goods were not protected by registered rights or by copyright. It has been a widespread view that unfair competition law could not protect by detour, what was not protected by intellectual property rights.³⁵ The idea behind this maintains that rights of intellectual property should not only define positively what is protected, but also state negatively, what is subject to free common use.³⁶ This thinking expresses fear of a monopoly-type protection for an unlimited period of time, and that this shall not be achieved by patent or design protection.³⁷

Commentaries have critically scrutinised formal application of this theory by the courts. Its implementation has been criticized as tempting and dangerous because it could be used to exclude claims under unfair competition law without reasonable grounds.³⁸ As to the protective purpose of unfair competition law it has been asked if an act of unfair competition could be tolerated solely because protection by intellectual property law is available. Critical commentators do not want to ignore this evaluation and accept the idea of the *detour theory* only when used in a legal analysis of the question what type of work is protected by intellectual property law.³⁹

The continuing criticism seems to have induced the Swiss Federal Supreme Court to reconsider the problem of undifferentiated application of the theory that protection rights may not be granted by detour via unfair competition law. The Court has given greater focus to the different purposes of protection provided by unfair competition law and intellectual property law. In its decision Puls of 2003, the Swiss Federal Supreme Court has stated that trademark law is not a *lex specialis* to unfair competition law, and its purpose of protecting fair and undistorted competition in the interest of all market operators should not be thwarted by trademark law.⁴⁰ The state ("cantonal") jurisprudence follows this understanding of autonomous application of unfair competition law in addition to trademark law.⁴¹

Unfair competition law and the laws on intellectual property are not subject to a different classification: Intellectual property rights are a specific expression of a universal market law, which has become unfair competition law. As a result, intellectual property cannot be excluded from unfair competition law in order to protect fair and undistorted competition.⁴²

4. Relation to civil law

Unfair competition law having its roots in the former law of torts can be applied autonomously alongside the current law of torts (Article 41 CO). Thus, the Unfair Competition Act is also a protection right in the sense of Article 41 (1) CO.⁴³ The conclusion of autonomous application is also valid for the relation between person-

³⁵ BGE 104 II 332; BGE 108 II 69, 75; BGE 116 II, 471, 472.

³⁶ Pahud, Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht (sic!) 2004, 804, 807.

³⁷ BGE 88 IV 79, 83.

³⁸ v.Büren, Schweizerisches Immaterialgüter- und Wettbewerbsrecht, Band 5 Wettbewerbsrecht, Teilband I Lauterkeitsrecht, 2nd ed. 1998, Band V/1, Art. 1, margin no. 87 *et seq.*

³⁹ Pahud, sic! 2004, 804, 807.

⁴⁰ BGE 129 III 353, 358 – Puls.

⁴¹ Kantonsgericht Appenzell Innerrhoden vom 6. März 2007, sic! 2007, 917.

⁴² Thouvenin, Funktionale Systematisierung von Wettbewerbsrecht (UWG) und Immaterialgüterrecht, 2007, p. 508.

⁴³ Baudenbacher, (fn. 14), Art. 1, margin no. 74.

ality rights connected to a corporation, such as business reputation, commercial trade secrets, or distinctive signs (Article 28 of the Swiss Civil Code), and unfair competition law. Furthermore, the statutes protecting names (Article 29 Swiss Civil Code) of natural and legal persons may conflict with or overlap unfair competition law. For this reason, both acts may be applied autonomously.⁴⁴

5. Influence of court decisions

- 33 Article 191 Section C of the Swiss Federal Constitution is about judicial independence to the effect that a Swiss judge is bound only by the statutes and is not obliged to take into account prior court decisions. Yet, lower courts tend not to decide against previous decisions by the Swiss Federal Supreme Court because a contrasting decision might be reversed. Consequently, there is no dependency on a hieratic case-law and any judge may challenge a previous decision by the Swiss Federal Supreme Court, which, of course, has the last word.

6. Principles of the Swiss Commission for Fairness (SCF)

- 34 The Swiss Commission for Fairness (SCF; German: “Lauterkeitskommission”), which is the executive organ of the foundation of Swiss Advertising for Fairness is mainly an organisation to control its members but also acts against non-members (for SCF-proceedings: *infra* 8.1.5). The SCF – board of appeal when deciding takes into account the general code of advertising practice of the International Chamber of Commerce (ICC), the Swiss legislation and its own principles⁴⁵ (Principles of the Swiss Commission for Fairness). These SCF – principles have no legal status beyond SCF – proceedings, but are often inquired in judicial proceedings when arguing that an act of competition is unfair in the meaning of FAUC. The special importance of the SCF is proven by the large number of proceedings. In 2011 the SCF registered 441 proceedings and 275 inquiries that did not result in further proceedings.⁴⁶ Complaints before the SCF are popular not least because these proceedings are free of charge.

III. Basic Considerations

1. Applicability of FAUC

- 35 There has been a long discussion in Swiss jurisprudence if a competitive relationship between plaintiff and defendant is actually required for claims under unfair competition law. Decisions under the Act of 1943 did require such a relationship, but construed it so extensively that even its appearance was sufficient.⁴⁷ The new general clause of Article 2 FAUC, stipulates that any misleading or deceptive act that affects the relationship between competitors, or between suppliers and customers, is covered. The extensive scope of possible offenders should end any discussion and a competitive relationship between the parties in litigation is not required any longer.⁴⁸

⁴⁴ Baudenbacher, (fn. 4), p. 593 *et seq.*

⁴⁵ Published on: www.lauterkeit.ch/pdf/grundsaeetze.pdf.

⁴⁶ Annual report of activities: www.lauterkeit.ch/pdf/taetigkeit11.pdf.

⁴⁷ Müller in: v.Büren, (fn. 2), p. 8.

⁴⁸ Botschaft UWG, BBl 1983 II 1009, 1060.

The Swiss Federal Supreme Court has clarified in the case *Bernina* that even a 36 journalist could infringe the provisions of the amended Federal Act against Unfair Competition. In that case, the court has assumed a violation of Article 3 lit. a FAUC because the accused journalist had published an article, which described sewing machines of a specific manufacturer as technologically out of date at the time it was placed on the market, without a factual basis.⁴⁹

Applicability of unfair competition law is limited by Article 9 FAUC, which 37 requires at least a damnification of an economic interest as a prerequisite for the legal interest needed to take legal action. Such legal interest can be – but not necessarily is – seen in a competitive relationship. In the opinion of the Swiss Federal Supreme Court any deterioration of the participant's position in commercial competition can be sufficient for bringing legal action.⁵⁰

2. Relation between general clause and specific regulations

Fast changing developments of economics tend to foster new forms of unfair 38 competition, and the legislature has been fully aware of the fact that unfair competition can effectively be stemmed only by means of a sufficiently broad general clause.⁵¹ Accordingly, the main purpose of the general clause of Article 2 FAUC is filling the gap between unfair competition acts that are not codified by specific statutes and, consequently, allows enhancement of Swiss unfair competition law. Since a general clause has less normative content than a specific statute, any concretisation of the normative content of the general clause of the Unfair Competition Act, is a crucial task for the judge to define a competition act as unfair.

This is a consequence of the purpose of the Unfair Competition Act as defined in 39 Article 1 FAUC, which stipulates a functional understanding of which type of behaviour constitutes unfair competition and where the subject is not just a clear case of an act of competition but also includes its concomitants and consequences, or competitive behaviour in total.⁵²

With the latest amendments the Swiss Federal Assembly inter alia did approve 40 extending the concept of what constitutes an act of unfair competition by enumerating new specific instances with six additional provisions (lit. p, q, r, s, t, u)⁵³ in Article 3 FAUC. This amendment is in line with the dynamics of the markets and will need some time to be reflected in specific statutes. Seventeen specific regulations are set forth in Articles 3–8 FAUC and, present a list of typical practices defined as unfair. This list is meant to clarify what is meant by the general clause, and is not exhaustive.⁵⁴ Specific statutes and the general clause compliment each other and can be applied in this manner. Cases not covered by the specific statutes can be adjudicated on the basis of the general clause alone.

Cases most difficult to judge are those that meet some, but not all criteria of a 41 specific statute. This could mean that the legislator had considered such cases as not constituting unfair competition or that such a case represented a new form of an

⁴⁹ BGE 117 IV 193.

⁵⁰ BGE 121 III 168, 174.

⁵¹ Botschaft UWG, BBl 1983 II 1009, 1042.

⁵² Baudenbacher, (fn. 14), Art. 2, margin no. 4.

⁵³ Decree of 17 June 2011, BBl 2011, 4925 will enter into force on 1 April 2012.

⁵⁴ Botschaft UWG, BBl 1983 II 1009, 1042; Bundesgericht (BGer), sic! 2003, 354.

unfair competition practice encompassed by the general clause. Such cases must be resolved by interpreting all pertinent evaluations.⁵⁵

- 42 Easier to judge on the basis of the general clause are those cases that correspond with a specific statute, except where one criterion is replaced by another. Since application of the general clause tends to be a sophisticated task, legal practice prefers trying to define an act of competition as unfair by one of the specific statutes. This has justly been criticised because a statute should be read from its beginning and not from its end.⁵⁶
- 43 Another important difference between an act of unfair competition according to the general clause of Article 2 FAUC, and an act of unfair competition according to one of the specific statutes, is the threat of punishment according to Article 23 (I) FAUC. Whoever intentionally commits an act of unfair competition within the meaning of Articles 3, 4, 4 a, 5 or 6 FAUC, risks imprisonment, or, if they so choose, a fine of up to CHF 100 000. An infringement based merely on the general clause may not be subject to punishment because the clause is too vague and too indeterminate with regard to the principle of legal certainty in criminal matters. An extension of punishment under other provisions contradicts the principle of legality.⁵⁷

IV. General Clause (Article 2 FAUC)

- 44 Article 2 FAUC defines as unfair:

“Any behaviour (German: “Verhalten”) or business conduct (German: “Geschäftsgeschehen”) that is deceptive or that in any other way infringes the principle of good faith, and which affects the relationship between competitors, or between suppliers and customers, shall be deemed unfair (German: “unlauter”) and unlawful (German: “widerrechtlich”).”

1. Semantics of “behaviour” and “business conduct”

- 45 The general clause of the Unfair Competition Act of 1986 used the term “means” instead of the current terms “behaviour or business conduct” because doctrine had interpreted the term “means” in a more neutral sense than the phrase “behaviour or business conduct”.⁵⁸ While “behaviour” already covers all acts, tolerations and omissions, the legislators wanted to clarify this understanding with the addition of “business conduct” because they suspected that “behaviour” could be reduced to positive acting.⁵⁹ Furthermore, the term “business conduct” means that private acting is excluded from review by unfair competition law.⁶⁰
- 46 Further, it should be noted that the German term “unlauter” in the name of the act (German: “Gesetz gegen unlauteren Wettbewerb”) can be translated into English either as “unfair” or as “dishonest”. Since the English term “unfair” is

⁵⁵ Baudenbacher, (fn. 4), p. 600 *et seq.*

⁵⁶ Müller in: v.Büren, (fn. 2), p. 60.

⁵⁷ Besse, La répression pénale de la contrefaçon en droit suisse avec présentation des droits français et allemand et aperçu de droit international, 1990, p. 177.

⁵⁸ Baudenbacher, (fn. 14), Art. 2, margin no. 22.

⁵⁹ Jung in: Jung/Spitz, (fn. 32), Art. 2, margin no. 10.

⁶⁰ Baudenbacher, (fn. 4), p. 595.

used as such in German too, the moral content of the English “unfair” is not the same as that of the German word “unlauter” which – semantically – is located somewhere between “dishonest” and “unfair”.

2. Principle of good faith

The main criterion of unfair competition as a negation of fair competition is an infringement of the “principle of good faith”, which has not been defined in detail by the legislators. This principle is stated specifically in Article 2 of the Swiss Civil Code and constitutes a general obligation of any person to act in good faith when exercising his or her rights, or when performing his or her obligations.

However, there is no direct connection between this general clause of private law and the general clause of unfair competition law. Good faith in the sense of Swiss unfair competition law – which is a law against unfair competition in connection with business – must be defined under specific considerations of business competition and in the light of the protective purpose set forth in Article 1 FAUC. According to the justification of this law, and under the premise of “maintaining fair competition”⁶¹ a violation of the principle of good faith can be specified as an act of competition that in the light of the protective purpose of the law, the interests concerned, and the constitutional framework, goes against honest practices in economy, distorts competition, or is denounced or considered unacceptable by the general public.⁶²

Reference to common practice in a specific business sector is not a suitable argument when establishing whether a particular practice is fair. In fact a new or unusual practice does not necessarily indicate unfair doings. Preferably, the decisive benchmark is to maintain the standards of decency.⁶³

3. Impact on market

The general clause requires that an act of unfair competition affects the relationship between competitors, or between suppliers and customers. Behaviour is only relevant for fair trade and business competition if it has an appreciable direct or indirect impact on the market. Contrary to the wording of the provision, it is not necessary that such market impact can be verified; rather it is sufficient if the act is objectively capable of having such an effect.⁶⁴

A market effect or impact can become apparent from an improved or reduced effect of a corporation’s promotion in terms of reaching the consumers, or from an expansion or decrease of the market share of a corporation. It is not relevant if such consequences do match the intention. Legal culpability is a prerequisite only for claims of compensation or rehabilitation in line with Article 9 (3) FAUC. 3.⁶⁵

The Current Federal Act against Unfair Competition does not require a competitive relationship between the parties (supra 3.1). As a matter of principle, acts of unfair competition can also be committed by monopolies or by third parties, such as professional or commercial organisations or associations. A defendant has no

⁶¹ Botschaft UWG, BBl 1983 II 1009, 1017.

⁶² Jung in: Jung/Spitz, (fn. 32), Art. 2, margin no. 20.

⁶³ Baudenbacher, (fn. 14), Art. 2, margin no. 20.

⁶⁴ Jung in: Jung/Spitz, (fn. 32), Art. 2, margin no. 17.

⁶⁵ Baudenbacher, (fn. 4), p. 599.

recourse to the objection of “unclean hands” if the opponent committed acts of unfair competition, too.⁶⁶ Intervention by the legal system may be required if two or more entities are mutually engaged in acts of unfair competition; this is in line with the principle of a functional understanding of unfair competition.⁶⁷ The courts have developed several categories for acts of unfair competition when applying the general clause as illustrated in the following.

V. Marketing

- 53 In 2010, Swiss corporations have spent about 3.7 billion Swiss Francs for marketing purposes.⁶⁸ In fact, Switzerland has always been among the leading nations concerning advertising expenditures.⁶⁹ According to the practice of the Swiss Federal Supreme Court, freedom of advertising is considered to be part of economic freedom, which in turn is constitutionally guaranteed by Article 27 of the Swiss Federal Constitution.⁷⁰ Yet, the regulations tend to restrict the freedom of commercial advertising, as to prevent unfair competition. As a consequence it is the task of the state to restrict unfair business conduct by setting up rules.⁷¹

1. Advertising

- 54 There is no uniform definition of “advertising” (German: “Werbung”) in Swiss unfair competition law. In a general sense, “advertising” is understood as a synonym for “sales-oriented commercial communication” and in addition to “advertising” semantically includes “promotion”, “propaganda”, and “publicity”. According to Swiss contract law, “advertising” refers to any statement of contractors, which is not a binding contractual offer. Unfair competition law differentiates between “advertising” and other forms of commercial communication, notably in connection with methods of sale. Any business transaction is based on a specific method of sale.⁷² The term “advertising” is used herein below in the sense of a commercial communication between supplier and buyer that is not aimed at a specific business transaction.

a) Deceptive advertising (Article 3 FAUC)

- 55 Article 3 FAUC contains various specific rules about deceptive advertising. The main provision against deceptive advertising is Article 3 lit. b FAUC. It constitutes that he

“shall be deemed to have committed an act of unfair competition, who, in particular, makes incorrect or misleading statements in respect of himself, his corporate name, his trade name, his goods, his works or services, his prices, his stock, the kind of sales events or business relationships, or who, by such statements, favours third parties in competition.”

⁶⁶ BGE 129 III 426.

⁶⁷ Jung in: Jung/Spitz, (fn. 32), Art. 2, margin no. 18.

⁶⁸ Published by the Swiss Foundation for Advertising Statistics under www.werbestatistik.ch

⁶⁹ Knaak/Ritscher, (fn. 3), margin no. 1.

⁷⁰ Arter, Lauterkeitsrechtliche Aspekte von Werbung mittels E-Mail, Aktuelle Juristische Praxis (AJP) 2004, 1067, p. 1077.

⁷¹ Staub/Hilti, Wettbewerbs- und Immaterialgüterrecht, Band 3, 1998, p. 13 *et seq.*

⁷² Jung in: Jung/Spitz, (fn. 32), Einl., margin no. 5.

aa) The notion of advertising. A “statement” in the sense of “advertising” is a pronouncement that includes any verbal, written, or visual expression based on verifiable facts. The manner of how such “advertising” reaches the addressee, i. e. directly or indirectly, is of no concern. Because the provision covers statements about verifiable facts, it must be distinguished from lurid judgements of value. An advertising statement may also be included in a specific communication between advertiser and addressee, or in an implied statement that causes confusion in its context.⁷³

Other forms of deceptive advertising with a less extensively construed concept of an “advertising statement” are covered by Article 3 lit. i FAUC, which defines as acting unfair anyone “who, in particular, deceives the customers by concealing quality, quantity, purpose, benefit or risk of goods, works or services”.

Article 3 lit. i FAUC complements and specifies Article 3 lit. b FAUC by expressly including any manipulations of facts without an implied content of a declaration. If Article 3 lit. b FAUC would include Article 3 lit. I FAUC, the latter would be an unnecessary regulation.⁷⁴ Further, specific deceptive statements are covered by Article 3 lit. c FAUC (use of inappropriate titles), Article 3 lit. e FAUC (comparative deceptive statements), Article 3 lit. f FAUC (statements concerning works or services sold below cost), Article 3 lit. g FAUC (making gifts in order to deceive about the actual value of goods or services), Article 3 lit. i FAUC (concealing product characteristics), Article 3 lit. k-n FAUC (omitting specifics about consumer credit).

If the facts of a case do not exactly meet any of the specific regulations, the more generic rule of Article 3 lit. b FAUC about deceptive advertising is to be applied; this must be decided by interpretation of the aim of provisions under the assumption that specific regulations must not be interpreted extensively.⁷⁵

bb) The notion of deception. Deception can be caused by false or misleading advertising. A commercial statement is considered to be literally false advertising if, at the time of its expression, it did not conform to the facts of current knowledge and, therefore, infringes the requirement of truthfulness. Misleading advertising may consist of a correct statement that is incomplete, or has a secondary meaning and, therefore, may cause an inappropriate impression. These kinds of statements infringe the requirement of clarity.⁷⁶

Because the truth of a commercial statement may be difficult to evaluate, Article 13 a FAUC allows the judge to require that the advertiser produces evidence of the correctness of a factual statement. De facto sole position advertising is banned if it is not based on veritable facts.⁷⁷

cc) Relevant perspective. The understanding of an advertising statement by the target audience is decisive for judging deceptiveness of such statement. Because of the importance of the public’s perception the public, that is the target audience, must first be precisely defined. Accordingly, it must be determined if the advertising statement was aimed at the general public (consumers in specific), a specialised

⁷³ Jung in: Jung/Spitz, (fn. 32), Art. 3 lit. b, margin no. 17 *et seq.*

⁷⁴ Pedrazzini/Pedrazzini, Unlauterer Wettbewerb (UWG), 2002, margin no. 7.80.

⁷⁵ Jung in: Jung/Spitz, (fn. 32), Art. 3 lit. b, margin no. 7.

⁷⁶ Jung in: Jung/Spitz, (fn. 32), Art. 3 lit. b, margin no. 59.

⁷⁷ Spitz in: Jung/Spitz, (fn. 32), Art. 13 a, margin no. 1.

audience, a regional audience, a specific age range (for example, children, adults, elderly persons), or a specific social group (workers, executives, foreigners, tourists). Once the public perception has been determined, it must be applied to an average member of this target group.⁷⁸

- 63 If consumers are targeted, a hypothetical reference person – the average buyer – is assumed as a reference. Because consumers are flooded with advertising, the Swiss Federal Supreme Court does not expect the consumer to critically analyse advertising content.⁷⁹ On the other hand, protecting inexperienced, unintelligent, or credulous consumers is not an object of Swiss unfair competition law; also, the advertiser's expectation of how the public would understand his statement or message is not relevant.⁸⁰
- 64 If the judge is part of the target group he will, although not representative, use his own understanding to determine if an advertising statement is deceptive. If he is not part of the target group he needs to imagine the understanding of the hypothetical addressee. Therefore, the judge may also ask experts or professional organisations to review this understanding. It is not (yet) common in Switzerland to use consumer surveys for determining the addressee's understanding of an advertising statement because of the costs and the time required for such surveys.⁸¹ In trademark cases, however, surveys are used increasingly, and even are requested sometimes by the Swiss trademark office or by the courts to assess, e.g. if a descriptive designation has acquired a secondary meaning as a trademark.
- 65 Swiss jurisprudence does not quantify deceptiveness. Court practice and commentaries stipulate that a significant part of the public that must have been deceived.⁸² The size of the group of deceived customers may also be important to determine if there has been a relevant impact regarding trade competition (*supra* 4.3).⁸³

b) Comparative advertising (Article 3 lit. e FAUC)

- 66 Contrary to German jurisprudence, comparative advertising has always been admissible under Swiss law. Under Article 48 of former CO the personality aspect of unfair competition law comparative advertising was penalised only if it endangered a competitor's customer base. Comparative statements in advertising have been tolerated if true and not derogatory.⁸⁴ Swiss Jurisprudence has followed this understanding in both versions of the Federal Act against Unfair Competition (1943 and 1986), which both include a specific provision on comparative advertising. Because of its informative content comparative advertising is generally allowed and deemed illegal only if not within the statutory limits.⁸⁵
- 67 The specific rule of Article 3 lit. e FAUC was part of the reform of the Unfair Competition Act in 1986 and is directed against misuse of comparative advertising.⁸⁶ According to this provision anyone who compares in an incorrect, mislead-

⁷⁸ *Jung* in: *Jung/Spitz*, (fn. 32), Art. 3 lit. b, margin no. 62.

⁷⁹ *BGE* 94 IV 34, 99 IV 30.

⁸⁰ *Glöckner* in: *Baudenbacher* (fn. 14), Art. 3 lit. b, margin no. 65 *et seq.*

⁸¹ *Jung* in: *Jung/Spitz*, (fn. 32), Art. 3 lit. b, margin no. 66.

⁸² *BGE* 88 II 54, 55; 136 III 23, 45.

⁸³ *Jung* in: *Jung/Spitz*, (fn. 32), Art. 3 lit. b, margin no. 66.

⁸⁴ *Glöckner* in: *Baudenbacher* (fn. 14), Art. 3 lit. e, margin no. 1 with further references.

⁸⁵ *Knaak/Ritscher*, (fn. 3), margin no. 129.

⁸⁶ *Oettiker* in: *Jung/Spitz*, (fn. 32), Art. 3 lit. e, margin no. 5.

ing, unnecessary injurious or imitative manner his person, his goods, his works, his services or his prices with others, or with their goods, their works, their services or prices or who, by such comparison, favours third parties in competition, shall be deemed to have committed an act of unfair competition,

The FAUC does not include a specific definition of what is comparative 68 advertising. Court practice tends to apply Article 3 lit. e FAUC with a broad understanding of the term and does not expressively analyse its requirements.⁸⁷ While not representing an entirely correct approach, misleading or unnecessarily injurious comparative advertising frequently is assumed if it states that the advertiser's product is superior to that of the competitor, while comparative advertising in an imitative manner tends to show that the advertiser's product has the same qualities as the competitors' product so as to benefit from its good will.

aa) The notion of comparison. Judging comparisons in the light of Article 3 lit. e 69 FAUC requires a review of the facts concerning a competitor's performance in an advertisement.⁸⁸ Accordingly, "comparison" has a broad meaning and does not imply a direct reference to a competitor. It means an advertising statement that refers in any way to a competitor or his products. The name of the competitor does not need be mentioned and it is sufficient if the reference is understood by the audience.⁸⁹

Such references are tolerated as long as they are objective and true. However, if a 70 comparison is limited only to superior characteristics while concealing inferior features, this would be held to be abusive since it distorts the comparison.

bb) The notion of unfair comparison. A comparison is unfair if it is incorrect, 71 misleading, unnecessary disparaging or unnecessary imitative. A statement is incorrect if it is not based on true facts when judged by objective criteria. Therefore, it is important to recognise a merely subjective statement, which cannot be correct or incorrect. Also, a comparison is incorrect and unfair if – while based on true facts – it is an unapt comparison because the facts compared pertain to different categories.⁹⁰ Generally, a misleading comparison is judged by the same principles as deceptive advertising according to Article 3 lit. b FAUC and a typical misleading comparison is based on true but imprecise or incomplete statements.⁹¹

Both true as well as untrue statements can result in a disparaging comparison. 72 Pointing out superior characteristics of a specific product in comparative advertising inherently and automatically disparages the other product and this is not considered to violate fair trade standards according to Swiss FAUC. However, unnecessarily disparaging in a specific case is an unfair comparison if it goes beyond what the audience needs in order to be informed about the facts, e.g. by way of a formal lapse or a nasty slander.⁹²

An imitative comparison is illegal under the Federal Act against Unfair Competi- 73 tion if it is used to unnecessarily exploit the reputation of a competitor. In contrast

⁸⁷ Glöckner, Markenschutz durch Art. 3 lit. e UWG, sic! 2011, p. 273, 277 with reference to BGER, sic! 2008, 454 et seq., E. 4.

⁸⁸ Oetiker in: Jung/Spitz, (fn. 32), Art. 3 lit. e, margin no. 11.

⁸⁹ Glöckner in: Baudenbacher (fn. 14), Art. 3 lit. e, margin no. 28.

⁹⁰ Oetiker in: Jung/Spitz, Art. 3 lit. e, margin no. 18 et seq.

⁹¹ Knaak/Ritscher, (fn. 3), margin no. 132.

⁹² Glöckner in: Baudenbacher (fn. 14), Art. 3 lit. e, margin no. 64 et seq.

to a disparaging comparison, an imitative advertisement claims that the subject product has the same quality as a competing product so as to benefit from its goodwill. This can happen in an apparent as well as in a concealed manner, e.g. by a mere comparison of prices.⁹³

2. Concealed advertising (Article 3 lit. i FAUC)

- 74 Article 3 lit. i FAUC bans deceptive advertising and sales methods, which “conceal quality, quantity, purpose, benefit or risk of goods, works or services”. The provision is a special prohibition of deceptive advertising and covers forms of concealing product characteristics. As there is no provision concerning advertising, which is not apparent as advertising, this form of unfair competition can be adjudicated only on the basis of the general clause.⁹⁴ Examples of concealed advertising that can be prosecuted only by means of the general clause of Article 2 FAUC are camouflaged sales trips pretending to be excursion trips; home visits, or phone calls pretending to be a charity or an opinion poll; or advertising mail pretending to be private or official mail.⁹⁵ Further examples are information programs with an obvious advertising character, and various forms of product placements in the media.⁹⁶
- 75 A specific statute for a differentiation between the advertising and the editorial parts of a radio or television program can be found in Article 9 of the Swiss Federal Radio and Television Act.⁹⁷ Article 10 (3) of that act prohibits surreptitious advertising and subliminal advertising.

3. Loss-leading offers (Article 3 lit. f FAUC)

- 76 Article 3 lit. f FAUC holds as illegal anyone who repeatedly offers selected goods, works or services below cost, thus deceiving the customer as to the offering party’s own capabilities or those of their competitors. Hence, this provision specifies a subcategory of deceptive advertising. Selling goods below cost implies that ensuing losses will be compensated by sales of other goods. Consequently, offenders under this statute tend to be retail chains or supermarkets.⁹⁸
- 77 Another aspect of offering brand-name products at prices below those charged regularly is a potentially damaged reputation of the trademark because customers could expect that the lowered price implies a lower quality. Furthermore, such offers can be advantageous to the advertiser who makes such an offer in order to attract customers for buying the advertiser’s goods. While the Federal Supreme Court decided that the mere fact of campaign advertising using the good will of brand names is not per se, a case of unfair competition law,⁹⁹ some authors perceive an unfair exploitation of the achievements of others if the advertiser promotes his own achievements.¹⁰⁰

⁹³ Oetiker in: Jung/Spitz, (fn. 32), Art. 3 lit. e, margin no. 36 *et seq.*

⁹⁴ Knaak/Ritscher, (fn. 3), margin no. 141.

⁹⁵ Jung in: Jung/Spitz, (fn. 32), Art. 2, margin no. 41.

⁹⁶ Knaak/Ritscher, (fn. 3), margin no. 141.

⁹⁷ SR 784.40

⁹⁸ Pedrazzini/Pedrazzini, (fn. 74), margin no. 6.56.

⁹⁹ BGE 107 II 285.

¹⁰⁰ Streuli-Youssef in: v.Büren, (fn. 38), p. 138.

4. Sales promotions

Popular sales promotions are customer gifts and promotional games. These behaviours can be held to violate Article 3 lit. b FAUC if they are deceptive as set forth above (5.1.1).

a) Customer gifts

Article 3 lit. g FAUC states that an act of unfair competition is committed “if customers are deceived, by means of gifts, as to the effective value of goods offered”. In other words, customer gifts are permitted by law, if they are not deceptive.

Gifts according to this provision are any commercially independent goods or services offered in addition to paid goods or services.¹⁰¹ To determine the effective value of an offer accompanied by a gift, the value of the gift must be considered as well as the value of the main goods, for which the customer can be expected to know the price, as that is what he intends primarily to buy. Thus, the customer is deceived as to the effective value, if there is a difference between his estimation and the effective value, i. e. the actual current market value of the main article and the gift.¹⁰²

b) Promotional games

Lotteries are prohibited by Article 1 of the Swiss Lottery Act.¹⁰³ According to Article 2 of this act, a promotional game is not prohibited if the prize is not paid in money, or if the lottery tickets are given for an entertainment purpose. An entertainment purpose is excluded if a stake is to be paid, for example by means of a pay phone number that must be called to participate, or if the customer has a better chance of winning if he knows the specific characteristics of a product and might be tempted to buy the product outright.

As of July 2006, the Swiss Lottery and Betting Board (Comlot) monitors the lottery and betting market. On behalf of Switzerland’s 26 cantonal governments this board is charged to ensure that any gambling activities are conducted with transparency and honesty.¹⁰⁴

The concept of “prohibited lotteries” stems from the Swiss Lottery Act and is not referred to in unfair competition law; a “promotional game” presents an act of unfair competition if a stake must be paid in order to participate. Promotional games that are not connected with any kind of contract are generally permitted by unfair competition law, if they are not deceptive as judged by the general clause. These principles were created by way of court practice and will be codified in the amended Article 3 lit. t FAUC,¹⁰⁵ which will define as an illegal act of unfair competition any promise of a prize in a contest or sweepstake which has to be redeemed by using a pay phone number, effecting an allowance, purchasing any goods or services, attending a sales presentation, a sales trip, or another lottery.

Another limit regarding promotional games is based on Article 3 lit. h FAUC prohibiting “particularly aggressive sales methods”. For this reason it can be con-

¹⁰¹ Streuli-Youssef in: v.Büren, (fn. 38), p. 98.

¹⁰² Oetiker in: Jung/Spitz, (fn. 32), Art. 3 lit. g, margin no. 18 *et seq.*

¹⁰³ SR 935.51.

¹⁰⁴ www.comlot.ch.

¹⁰⁵ Decree of 17 June 2011, BBl 2011, 4925 will enter into force on 1 April 2012.

sidered to constitute an act of unfair competition if a customer has to enter a shop of the offering seller in order to participate in a promotional game.¹⁰⁶

5. Direct marketing

- 85 Aggressive sales methods as referred to in Article 3 lit. j FAUC are defined as illegal insofar as they limit the customer's autonomy. Such methods have in common that there is a direct contact between supplier and customer, for example by personally addressed offers submitted by telephone, fax, or e-mail. The autonomy of decision is impaired or precluded if sustained intrusive behaviour affects the mental integrity of the customer. Whether a sales method fulfils such requirements cannot be decided in a general manner but must be reviewed in each individual case.¹⁰⁷ The main application of this provision has been envisioned for sales trips and doorstep selling.¹⁰⁸
- 86 While advertising is intended to motivate customers to buy something, it does not impair customers' autonomy; and only a sales method might cause an emotional obligation to buy and impair autonomy in the sense of Article 3 lit. h FAUC. Accordingly, aggressive advertising methods can be adjudicated but via the general clause of Article 2 FAUC. Sales methods do not only cover purchase agreements but any legal transaction of goods or services in a broad understanding of marketing language.¹⁰⁹
- 87 The requirement of a particularly aggressive sales method should make it clear that only such sales methods are deemed unfair, which – because of their intensity – are capable of overcoming critical restraints of the customer. Individual evaluation of each case is to be based on the weakest group of addressees. Impairment of the customer's freedom can be assumed if the addressee – with an average level of resistance – would not primarily be motivated by the promised performance to conclude a contract but, instead, feels pushed into a contract by the specifics of the sales method concerned.¹¹⁰
- 88 Unsolicited phone calls which offer a direct contractual transaction represent a classic example of blinding and surprise, and are deemed to constitute an act of unfair competition according to Article 3 lit. h FAUC or the general clause of Article 2 FAUC.¹¹¹ New Article 3 lit. u FAUC provides further protection against unsolicited phone calls and escalated forms of direct marketing. Disregarding a note in the telephone directory stating that the subscriber does not want to receive advertising messages and is opposed to passing his data for direct marketing purposes, is deemed unfair by this provision.

VI. Protection of Competitors Against Unfair Competition Practices

- 89 The protection of competitors is basically provided by supplementary protection of achievements under competition law and specific forms of similarity-caused confusion as defined in the FAUC.

¹⁰⁶ Baudenbacher, (fn. 14), margin no. 53 *et seq.*

¹⁰⁷ Glöckner in: Baudenbacher, (fn. 14), Art. 3 lit. h, margin no. 33 *et seq.*

¹⁰⁸ Botschaft UWG, BBl 1983 II 1009, 1068.

¹⁰⁹ Streuli-Youssef in: v. Büren, (fn. 38), p. 100 *et seq.*

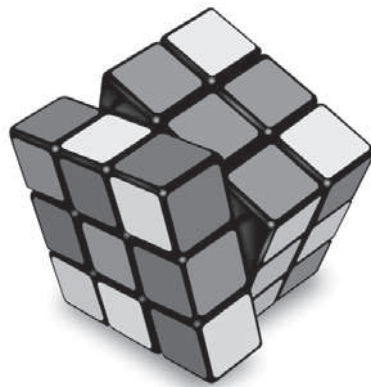
¹¹⁰ Pedrazzini/Pedrazzini, (fn. 74), margin no. 7.08 *et seq.*

¹¹¹ Oetiker in: Jung/Spitz, (fn. 32), Art. 3 lit. h, margin no. 12.

1. Imitation

However, freedom to copy, and to commercially exploit, anything not specifically 90 protected is assumed as a basic principle under Swiss law. Only such competitive advantages that have been acquired under legally specified conditions must not be copied.¹¹² While Article 5 lit a and b FAUC I protects against the exploitation of working results like calculations or plans (infra 6.6.1 – protection of know how) Article 5 lit c FAUC protects marketable results against technically reproduction. Article 5 lit. c FAUC deems as a unfair anyone who, by means of technical reproduction processes without a commensurate effort of his own, takes the marketable results of work executed by a third party, and exploits them as such. Legislative history indicates that the provision of Article 5 FAUC should not be assumed to constitute new rights of exclusion, nor to extend existing rights, and that there was no intention to weaken the *numerus clausus* of intellectual property rights; and only such copying was to be considered illegal that provided a benefit to the imitator by saving development costs.¹¹³ In other words, Article 5 FAUC does not provide supplementary protection to intellectual property as a main object but only to protect fair competition.¹¹⁴ Even so called “slavish imitations” of goods – meaning exact reproduction – are permitted by Swiss law unless Article 5 FAUC applies. This principle applies as far as the original result or work does not have a distinctive character, which may provide protection due to confusion according to Article 3 lit. b FAUC.¹¹⁵

Under the former FAUC the offering for sale of an almost identical reproduction 91 of the famous Rubik’s cube was judged by the Swiss Federal Supreme Court as an unfair imitation, because there was no need to use the same measures and colours of the original. The reproduction constituted also a likelihood of confusion that was required to deem a reproduction as unfair under the former FAUC of 1943. The Swiss Federal Supreme Court saw the intention of the competitor in copying the external design of the original cube was to benefit from its good reputation.



¹¹² *Brauchbar-Birkhäuser* in: Jung/Spitz, (fn. 32), Art. 5 margin no. 1.

¹¹³ *Botschaft UWG*, BBl 1983 II 1009, 1047 *et seq.*

¹¹⁴ *BGE* 131 III 384, 395 *et seq.*; *BGE* 118 II 459, 462.

¹¹⁵ *Spitz/Brauchbar-Birkhäuser* in: Jung/Spitz, (fn. 32), Art. 3 lit. d, margin no. 65.

- 92 A limitation of protection of Article 5 lit. c FAUC to a certain period of time, as for other registered intellectual property rights, was not regulated by the legislator and was controversial for a long time. In its judgement *Arzneimittel-Kompendium II* the Swiss Federal Supreme Court decided that a reproduction does not constitute an act of unfair competition anymore, if the first competitor on the market already could have redeemed his investments.¹¹⁶

2. Confusion

- 93 Article 3 lit. d FAUC states that measures, which may cause confusion about goods, works, services or business of others are considered as acts of unfair competition.

a) Purpose of Article 3 lit. d FAUC

- 94 It is not the main purpose of Article 3 lit. d FAUC to protect the public against confusion about the commercial origin of goods and works but rather to prevent that a potential confusion is used to exploit the achievements of others.¹¹⁷ The provision constitutes the basic rule for protection against imitation under unfair competition law. Although this rule does not grant subjective rights to an affected market participant it may provide supplemental protection under unfair competition law. Protection against potential confusion provides a broad range of protection to competitors including those not directly affected, as well as to consumers and the general public. In contrast to many other national unfair competition laws, Swiss law does not require a subjective intention to imitate but only the objective requirement of an inevitable potential confusion.¹¹⁸
- 95 Article 3 lit. d FAUC protects work elements, goods and achievements, which are indicative of a competitor or his business. Therefore the provision is also referred to as “trademark protection under unfair competition law”.¹¹⁹

b) Protected symbols

- 96 Protected symbols under Article 3 lit. d FAUC are all indications, signs, marks, or tokens that identify a competitor, his business, or his business results. Accordingly, such symbols may indicate a commercial entity or the goods and services of such an entity. A symbol of or for a commercial entity, may be a name, a trade name, or another business description. Symbols for goods and services may be trademarks, trade-dresses,¹²⁰ as well as titles of books, journals or other printed matter. The appearance of such symbols on the market is not important for protection under Article 3 lit. d FAUC if they are distinctive, either inherently or acquired by use. For this reason, even a domain name can become distinctive and protected under this provision.¹²¹

¹¹⁶ BGer, sic! 2008, 462, E 4.2 – *Arzneimittel-Kompendium II*.

¹¹⁷ *Caspers* in: Baudenbacher, (fn. 14), Art. 3 lit. d, margin no. 4.

¹¹⁸ *Spitz/Brauchbar-Birkhäuser* in: Jung/Spitz, (fn. 32), Art. 3 lit. d, margin no. 1.

¹¹⁹ *Spitz/Brauchbar-Birkhäuser* in: Jung/Spitz, (fn. 32), Art. 3 lit. d, margin no. 6.

¹²⁰ The protection of trade-dresses (German: “Ausstattung”) is neither expressly defined by trademark law nor by unfair competition law. Besides the protection against mislead of the public of interest it is recognised as a subjective right in analogy to trademark law. (See further: *Ritscher*, *Markenschutz durch Wettbewerbsrecht – Wettbewerbsschutz durch Markenrecht*, in: Rehinder (ed.), *Marke und Marketing*, 1990, p. 176.

¹²¹ *Caspers* in: Baudenbacher, (fn. 14), Art. 3 lit. d, margin no. 11.

Besides an (indirect) likelihood of confusion under trademark law, the courts saw 97 an obvious case of unfair competition in the meaning of Article 3 lit. d FAUC when the trade dress of the well known Swiss soft drink “rivella” was copied by a supermarket chain to advertise a similar soft drink by the name of “apiella”. The apiella-label not only was almost identical in background and font colour but also showed the identical ending of the trademark “ella”:¹²²



c) Potential confusion

The potential for, or likelihood of, confusion is defined uniformly for both 98 trademark and unfair competition law in Switzerland¹²³ although specifics of unfair competition law must be considered.¹²⁴ Contravention of unfair competition law – as distinguished from infringement of a registered intellectual property right – depends upon the behaviour of the defendant who infringes an objective legal norm rather than an intellectual property right. In contrast to trademark law, ambient conditions or circumstances may cause or prevent the possibility of confusion. Accordingly, a broad perspective including all circumstances must be reviewed when considering potential confusion under unfair competition law.¹²⁵ When potential confusion is a consideration under unfair competition law, perception of and by the target public must be considered because it is not by a direct comparison of symbols that confusion may arise but rather by what is remembered of the symbols and it is this aspect that is decisive when reviewing potential confusion.¹²⁶

¹²² HGer Zürich, sic! 1997, 65 – *Rivella v Apiella*; HGer Zürich, sic! 1999, 581 – *Rivella v Apiella II*, BGE 126 III 315 – *Rivella v Apiella III*.

¹²³ BGE 127 III 160, 165 – *Securtias*; 119 II 473, 475; 116 II 365, 370.

¹²⁴ BGE 4C.439/2006, E. 6.2; BGer, sic! 2002, 428, E. 3 – *Orfina (fig.) v Orfina*.

¹²⁵ *Spitz/Brauchbar-Birkhäuser* in: Jung/Spitz, (fn. 32), Art. 3 lit. d, margin no. 26.

¹²⁶ *Caspers* in: Baudenbacher, (fn. 14), Art. 3 lit. d, margin no. 51.

3. Parasitic behaviour

- 99 Protection against misleading advertising is provided by Article 3 lit. b FAUC while Article 3 lit. d FAUC covers potential confusion, which may be part of an exploitation of achievements or the reputation of another party; Article 3 lit. e FAUC covers specific forms of exploitation by comparative advertising.

a) Imitative comparative advertising (Article 3 lit. e FAUC)

- 100 One form of misuse is comparative advertising in an unnecessarily imitative manner by exploiting the reputation of a competitor. Under the Unfair Competition Act of 1943 this form of advertising was held to be an act of unfair competition in the sense of the general clause but most cases of this type were reduced to the aspect of potential confusion between compared products.¹²⁷
- 101 Concealed forms of imitative advertising may be held to constitute unfair competition in the meaning of Article 3 lit. e FAUC even in the absence of potential confusion, if in the mind of customers any reputation of another competitor's achievement is transferred by the advertisement. According to jurisprudence an obvious imitative comparison is assumed because of use of the expressions "as good as" or "better than". The Swiss Federal Supreme Court saw such an imitative comparison with the following IWC trademarks (a traditional Swiss watch brand) because of the labelling of cheap watches with "WMC" or "WMC Schaffhausen" although there no likelihood of confusion was seen under trademark law.¹²⁸



- 102 Yet, even a hidden reference to a well known product or its trade graphics may be considered to constitute comparative advertising in an imitative manner.¹²⁹ Such advertising is deemed to be unnecessary and to constitute an act of unfair competition, if the comparison exceeds what is essential for an objective comparison. References to competitors are assumed to be unnecessary if they are not needed to inform the customer adequately. Products should be reviewed by the customers and this requires objective information rather than subjective opinion.¹³⁰
- 103 In the decision *Maltesers v KitKat PopChoc II*¹³¹ the Swiss Federal Supreme Court decided that the original lettering with the brand name "Maltesers" gave the packaging a distinctive character. Because of the lettering with different trademarks on the compared packages there was seen to be no likelihood of confusion although

¹²⁷ Glöckner in: Baudenbacher, (fn. 14), Art. 3 lit. e, margin no. 76.

¹²⁸ BGer, sic! 2008, 454 et seq., E. 4.3 – IWC v WMC.

¹²⁹ BGer vom 26.5.2009, 4_A 86/2009.

¹³⁰ Glöckner in: Baudenbacher, (fn. 14), Art. 3 lit. e, margin no. 98 et seq.

¹³¹ BGE 135 III 446 – *Maltesers v KitKat PopChoc II*.

the packaging had various similarities. The red background colour was seen as a common appearance to call customers attention and the flying chocolate balls were seen as a description of the packaging's content of light malt chocolate balls. To constitute an unfair act of comparative advertising a sign must be used in a way that an imitation is unambiguous. Because of the comprehensible elements of product presentation such imitation was not assumed by the court and the competitor's product design judged as accordant to unfair competition law.



b) Article 2 FAUC

The general clause of Article 2 FAUC may also serve to adjudicate unfair 104 exploitation of another's reputation. This can be relevant if the achievement of a competitor is mentioned in advertising. Also, it can be assumed by the customers even if it does not constitute a comparison in the sense of Article 3 lit. e FAUC. With a broad interpretation of "comparison" recourse to the general clause may be indicated, such as, for example in so-called "ambush marketing" when an advertiser exploits a close local vicinity to a well-known event without being an official sponsor.¹³²

When deciding the case *Lattoflex v Bicoflex*,¹³³ the Swiss Federal Supreme Court 105 considered an advertising statement that referred to a well known competitor's product as unfair in the sense of the general clause even though the statement that exploited the customer's associative connotation with the well-known products (mattresses) was neither incorrect, nor misleading, nor unnecessarily injurious. In an invitation letter the defendant said:

"Dear Sir or Madam

We have developed a new, sensational undermattress as counter-product to "Lattoflex", our new bico-flex-mattress (Patent No. 513 623). This mattress is more than 20 % more economic than the "Lattoflex" and nevertheless in any circumstance

¹³² Jung in: Jung/Spitz, (fn. 32), Art. 2, margin no. 106.

¹³³ BGE 102 II 292 – *Lattoflex v Bicoflex*.

(flexibility of the laths etc.) equal, in our opinion even essentially better and more stable [...]”.

- 106 An obvious case of unfair exploitation of a competitor’s good will was seen in the almost identical adoption (colours and design) of the packaging of a cookie box (consisting of original graphical elements), although there was no likelihood of confusion under trademark law because of the different trademarks of the competitors.¹³⁴



4. Impediment

- 107 Impediment of competitors tends to be a general feature of business competition. An impediment that is relevant in the context of unfair competition law arises when a competitor is prevented from offering his goods or services on the market and so the public cannot compare his offer with other offers on the market. This results in an obviously tampered business competition and, for this reason, is a classic topic of unfair competition law.¹³⁵ Significant impediment can also be subject under antitrust law which may be applied autonomously in addition to unfair competition law.¹³⁶
- 108 An unfair form of impediment that is deemed illegal under Article 2 FAUC is an impediment of purchase of supply disturbing the relationship between competitor and his suppliers when it must be considered whether or not the goods could also be obtained from other sources. Affecting an impediment of competitors’ sales by intercepting his customers is considered illegal because it is not the quality of the offer but the impediment of the competitor that limits the customers’ choice. Trademark piracy and domain-grabbing are instances of an illegal impediment, as well as disturbance of advertising by destructing promotional posters or removing brands or quality marks of goods prior to selling them. Boycotts are permitted only if they are obviously pursuing legitimate interests that could not be protected by other means.¹³⁷

5. Denigration

- 109 Deemed as acting unfair in competition is “anyone who disparages others, their goods, works, services, prices, or business relations by incorrect, misleading or unnecessary injurious statements” as specified in Article 3 lit. a FAUC.

¹³⁴ BGE 103 II 211, 217 – *Choco-Drageés*.

¹³⁵ Müller in: v.Büren, (fn. 2), p. 66.

¹³⁶ Baudenbacher, (fn. 4), p. 605.

¹³⁷ Baudenbacher, (fn. 14), p. 151 et seq.; Baudenbacher, (fn. 4), p. 604 et seq.

Some kind of disparagement is inherent to business competition when fighting 110 for market shares. Accordingly, only such disparagement is illegal that is incorrect, misleading or unnecessary injurious. Within a functional understanding of unfair competition, the provision of Article 3 lit. a FAUC has particular significance in the field of media activities, notably because a competitive relationship between plaintiff and defendant is not required under Swiss unfair competition law.¹³⁸

6. Protection of know how

Know how is protected under Articles 5 and 6 FAUC. Article 5 lit. a and b FAUC 111 provide protection against exploitation of entrusted information (lit. a) or results of work that have become available without authorisation (lit. b), while Article 6 FAUC protects trade secrets against espionage. Besides Unfair Competition Law, manufacturing and trade secrets are also protected under criminal law.

a) Article 5 FAUC

Article 5 FAUC defines in lit. a and b as committing an act of unfair competition 112 anyone who:

- (a) without due authorization exploits results of work entrusted to him, for example, tenders, calculations or plans;
- (b) exploits the results of work of a third party, for example, tenders, calculations or plans, although he must know that they have been handed over to him or made available without authorization;

The exploitation of working results requires an entrusted work result that does 113 not need to be secret or inventive.¹³⁹ The requirement of an entrusted work result applies to Article 5 lit. a and b FAUC although not mentioned in Article 5 lit. b. The difference between these rules is the process of exploitation. While Article 5 lit. a FAUC applies to cases of direct exploitation by an entrusted person, Article 5 lit. b FAUC covers cases of indirect exploitation.

For an entrusted work result in the sense of Article 5 lit. a the information must 114 be specialised, and this does not apply to knowledge of public domain. Because an authorised person shall not be treated worse than a competitor, product information is protected only as long as the product is not yet on the market. Otherwise an authorised person would remain bound even though a competitor would not be bound any longer once the product is on the market and visible for anybody.¹⁴⁰

In case of an indirect exploitation work results are not provided directly to the 115 exploiter but via a third person that is not authorised to hand over such results. It is necessary that the exploiter is able to understand that he had obtained these results without permission. In case of doubt there is a duty to verify. Accordingly, it is advisable to mark such information in written form as secret even though such explicit marking of secrecy is not required by Article 5 FAUC.¹⁴¹

¹³⁸ Jung in: Jung/Spitz, (fn. 32), Art. 3 lit. a, margin no. 1.

¹³⁹ BGer, sic! 1999, 300 – *Siena II*.

¹⁴⁰ *Brauchbar-Birchhäuser* in: Jung/Spitz, (fn. 32), Art. 5, margin no. 15 *et seq.*

¹⁴¹ *Brauchbar-Birchhäuser* in: Jung/Spitz, (fn. 32), Art. 5, margin no. 19 *et seq.*

b) Article 6 FAUC

- 116 Exploitation or disclosure of manufacturing or trading secrets obtained by spotting or other undue means is illegal according to Article 6 FAUC.
- 117 However, unauthorised disclosure of a trade secret is deemed in breach of unfair competition law only if it is obtained through unfair behaviour, while legality of a subsequent use of this knowledge must not be considered.¹⁴² Obtaining a trade secret by way of an illegal act could be an offence under criminal law, or a breach of a contractual or legal obligation, or an incitement to the betrayal of a trade secret.¹⁴³
- 118 Sell-out of a trade secret is subject to the specific regulation of Article 4 lit. c FAUC, which sets forth that inducement of employees, agents or other auxiliary personal to selling out or spotting secrets of manufacture or trading secrets of their employer or principal constitutes an act of unfair competition.
- 119 Exploitation of trading secrets requires a commercial use aimed at a commercial advantage. This interpretation excludes the use by a natural person for a private purpose¹⁴⁴ or any use for a scientific or an academic purpose.¹⁴⁵ Illegal acquisition of a secret of manufacture or trading does not assume that a third party will exploit the trade secret. It is only in the context of unfair competition law that subsequent exploitation of a trade secret illegally obtained is a requirement for action under unfair competition law.¹⁴⁶

c) Article 162 Swiss Criminal Code

- 120 The betrayal of a manufacturing or trade secret by someone who has a statutory or contractual duty to remain silent, may be penalised with a custodial sentence of up to three years or with a monetary penalty. Such manufacturing or trade secrets can be any technical information or business data, which is not generally accessible. The intention to keep the knowledge secret must be noticeable and an infringement of the provision can be prosecuted only if criminal charges are filed.¹⁴⁷

7. Breach of law

- 121 A breach of law constitutes an act of unfair competition in the sense of the general clause of Article 2 FAUC only if the infringed law has relevance in the sense of Swiss unfair competition law. The quality of the legal norm and its protective purpose is of relevance in this context. With a functional understanding of unfair competition law it is necessary to review each individual case to determine if breach of law, other than unfair competition law, may have an impact on business competition.¹⁴⁸
- 122 The Swiss Federal Supreme Court had considered in one of their decisions that violation of an aviation regulation could also be an act of unfair competition. In that case, an aviation company had infringed a norm stating that, in general, only an aircraft registered in Switzerland can be used commercially on Swiss territory. Since compliance with this rule might disadvantage some competitors while the company

¹⁴² Pedrazzini/Pedrazzini, (fn. 74), margin no. 10.03.

¹⁴³ Mabillard in: Jung/Spitz, (fn. 32), Art. 6, margin no. 24.

¹⁴⁴ Pedrazzini/Pedrazzini, (fn. 74), margin no. 9.11.

¹⁴⁵ Baudenbacher/Glöckner in: Baudenbacher (fn. 14), Art. 6, margin no. 64.

¹⁴⁶ Baudenbacher/Glöckner in: Baudenbacher (fn. 14), Art. 6, margin no. 72.

¹⁴⁷ Amstutz/Reinert in Niggli/Wiprächtiger (eds.), *Strafrecht II*, Art. 162, margin no. 11 *et seq.*

¹⁴⁸ Baudenbacher, (fn. 14), Art. 2, margin no. 307.

in question gained more business by breaching the law, such behaviour was held to constitute an act of unfair competition.¹⁴⁹

VII. Specific Protection of Consumers Against Unfair Competition Practices

Consumer protection is not an object of Swiss unfair competition law. Protection 123 of the interests of individual consumers, in essence, is a consequence of preventing market distortion by deceptive and misleading advertising. The importance of consumers for competition has been enhanced by the current Unfair Competition Act in so far as consumers are part of competition in the sense of Article 1 FAUC.¹⁵⁰ Furthermore, several changes have been incorporated into Article 3 k-n FAUC, which are intended to directly protect consumers. As a consequence, these amendments have been and continue to be criticised as a transformation of the Unfair Competition Act into a consumer protection act.¹⁵¹

1. Information disclosure

a) Article 3 lit. i FAUC

Deception of customers by concealing quality, quantity, purpose, benefit, or risk 124 of goods, works or services constitutes an illegal act under Article 3 lit. i FAUC. The intention of this provision is to improve transparency of market offers. This objective is not a traditional aspect of Swiss unfair competition law and has been introduced with the reform of the Unfair Competition Act in 1986, but, so far, has been of little practical relevance.¹⁵² Article 3 lit. i FAUC imposes an obligation to inform, and complements the duty of notification¹⁵³ under Article 20 (2) and 21 of the Swiss Foods Act¹⁵⁴ in conjunction with Article 20 et. seq. of the Rules on Foods.¹⁵⁵

In so far as this provision assumes a deception of customers, it overlaps with the 125 general provision against deceptive advertising of Article 3 lit. b FAUC, and it has been argued that Article 3 lit. b FAUC was not needed. However, it is common practice, notably in the cosmetics industry, to conceal product quantity. Not covered by the provision are practices to conceal the price of goods, for instance by means of gifts combined with commercial goods.¹⁵⁶ Such trade practices are covered by Article 3 lit. g FAUC.

b) Article 3 lit. k-n FAUC

The provisions of Article 3 lit. k-n FAUC contain detailed specifications in the 126 context of offers of consumer credits. Accordingly, an omission of specific information in public offers of consumer credits is illegal under the Unfair Competition Act. It is required to clearly state the company name, the net amount of the loan, and to give clear information on the total cost of the loan, the effective annual

¹⁴⁹ BGer, sic! 1999, 156 et. Seqq – Kamov.

¹⁵⁰ Abbt, Konsumentenschutz und Wettbewerb – Ein Spannungsverhältnis, 1994, p. 34.

¹⁵¹ Jung in: Jung/Spitz, (fn. 32), Einleitung, margin no. 95.

¹⁵² Oetiker in: Jung/Spitz, (fn. 32), Art. 3 lit. i, margin no. 1.

¹⁵³ Baudenbacher/Glöckner in: Baudenbacher (fn. 14), Art. 3 lit. i, margin no. 8.

¹⁵⁴ SR 817.0.

¹⁵⁵ SR 817.02.

¹⁵⁶ Pedrazzini/Pedrazzini, (fn. 74), margin no. 6.80 et seq.

interest (Article 3 lit. k, l FAUC), and a reference to the fact that the grant of a loan is prohibited if it leads to overly burdens the consumer (Article 3 lit. n FAUC). Further, it is illegal under Article 3 lit. m FAUC if – within the frame of commercial activity – a consumer loan contract or a prepayment contract includes contract forms containing incomplete or incorrect statements about the object of the contract, the price, the conditions of payment, the term of the contract, the customer's right to revoke or terminate the contract, or his right to a premature back payment of the balance due.

- 127 In addition to the purpose of informing consumers, these provisions are intended to maintain market transparency and to strengthen trade competition.¹⁵⁷ Since the provisions of Article 3 lit. k-n FAUC represent but a concretisation of the secondary general clause against unfair advertising and sales methods, they are not exhaustive and allow recourse to Article 3 lit. b FAUC.¹⁵⁸

c) Article 3 lit. s FAUC

- 128 The new provision of Article 3 lit. s FAUC will come into force on 1 April, 2012¹⁵⁹ and define obligatory information requirements for electronic commercial business. Contrary to fair competition is omission of clear and full indications about identity and contact information about the seller (No. 1), omission of information about the steps required for conclusion of contract (No. 2), omission of identification of means to identify and correct errors prior to placement of the order (No. 3), and omission of immediate confirmation of the order (No. 4).

2. Aggressive commercial practices

- 129 In addition to Article 3 lit. h FAUC, exerting pressure on consumers may constitute unfair competition under the general clause of Article 2 FAUC. In specific cases, aggressive advertising methods can be held illegal even though the impairment must be substantial because of the time-lag between advertising and conclusion of contract.¹⁶⁰
- 130 Coercion by physical or mental means is always an illegal act under Swiss unfair competition law in the sense of the general clause if the customer's freedom of decision is eliminated or impaired. Freedom of decision can also be affected by mere harassment. The limit is reached if the addressee cannot objectively examine an offer. Specifically covered is advertising that is intrusive or intended to blindside the customer. If a customer is addressed directly by such manner, Article 3 lit. h FAUC could be applicable. Otherwise, there is resort to the general clause of Article 2 FAUC.¹⁶¹

3. Privacy

- 131 The specific forms of advertising covered by Article 3 lit. h FAUC are ones that interferes with customer's privacy, e.g. by unsolicited phone calls. Yet, the protective purpose of this provision is not privacy protection of consumers. Rather, Article 3

¹⁵⁷ Spitz/Maranta in: Jung/Spitz, (fn. 32), Art. 3 lit. k-n, margin no. 1.

¹⁵⁸ Spitz/Maranta in: Jung/Spitz, (fn. 32), Art. 3 lit. k-n, margin no. 11.

¹⁵⁹ Decree of 17 June 2011, BBl 2011, 4925 will enter into force on 1 April 2012.

¹⁶⁰ Baudenbacher, (fn. 14), Art. 2, margin no. 46.

¹⁶¹ Baudenbacher, (fn. 14), Art. 2, margin no. 47 *et seq.*

lit. h FAUC aims at protecting the customer's unrestricted freedom of choice. The protection of individual consumer interest that is a consequence of this regulation has not been the primary purpose of this provision.

VIII. Enforcement

The enforcement of claims provided by Swiss unfair competition law is governed 132 by Articles 9 and 10 FAUC. The claimant could be a competitor (Article 9 (I) FAUC), a customer (Article 10 (I) FAUC), a professional or trade organisation devoted to consumer protection (Article 10 (II) lit. a FAUC), an organisation of national or regional significance (Article 10 (II) lit. b FAUC), or the Swiss Confederation (Article 10 (II) lit. c FAUC). All of these claimants can take recourse to the Unfair Competition Act under its Article 9.

1. Capacity to bring actions

a) Customers

An individual's right to sue had already been given to customers under the 133 Unfair Competition Act of 1943 although it was limited to claim damages and indemnification. In order to clarify that customers may request an injunction, the wording of Article 10 (I) FAUC has been changed from "injured consumers" to "consumers, whose economic interests are threatened or infringed".¹⁶²

A customer according to the meaning of this provision is not necessarily a 134 consumer but may be any party interested in the market, including corporations that purchase goods or services, as well as potential customers if threatened in their economic interest.¹⁶³ Accordingly, a claimant must show or – if required – prove a connection between the act under complaint and the customer's economic interests. Specific proof of damage must be provided by claimant only for indemnification claims.¹⁶⁴

b) Professional and trade organisations

Professional organisations and trade organisations are entities with a member- 135 ship organisation, notably associations, corporate enterprises, or cooperatives. In contrast foundations have no right to sue because of the lack of membership while working groups also are not allowed to sue according to the meaning of Article 10 (II) lit. a FAUC.

Professional and trade organisations must be authorised by the articles of 136 association to defend economic interests of their members, while an individual employee in general has no right to bring action.¹⁶⁵ These economic interests must be threatened by the act of unfair competition in question while it is not necessary that all members of the organisation are affected by this interest.¹⁶⁶

¹⁶² Jung/Spitz, (fn. 32), Art. 10, margin no. 4.

¹⁶³ Baudenbacher/Banke in: Baudenbacher (fn. 14), Art. 10, margin no. 9 *et seq.*

¹⁶⁴ Jung/Spitz, (fn. 32), Art. 10, margin no. 18.

¹⁶⁵ An unusual case of a barmaid suing under FAUC can be found in: *Bezirksgericht Arbon*, Schweizerische Juristen-Zeitung (SJZ) 2002, 51.

¹⁶⁶ Jung/Spitz, (fn. 32), Art. 10, margin no. 20 *et seq.*

c) Consumer organisations

- 137 The provision of Article 10 (II) lit. a FAUC follows the obligation of former Article 31sexies (II) of the Swiss Federal Constitution, which obliges the Swiss Confederation to provide legal remedies for consumer organisations. This requirement is contained in Article 97 (II) of the current Federal Constitution. The restriction to organisations of national or regional importance has been introduced to avoid commercialised activities of consumer organisations of the type occasionally observed abroad. As there is no definition of the term “regional importance” it is difficult to delimit legitimised organisations. Organisations with a merely local character are excluded.¹⁶⁷
- 138 “Organisation” is intended to mean any entity that is recognised in Switzerland. In addition to associations, corporate enterprises or cooperatives as well as foundations may bring legal action under Article 9 FAUC. The articles of any such organisation must show a dedication to protect all consumers, or – at least – specific consumer groups. The organisation’s purpose in protecting consumers must not be the only but a main goal of the organisation. For this reason, animal welfare organisations and political parties cannot claim the rights of a consumer organisation. Of particular importance are the Foundation for Consumer Protection (SKS, Bern), the consumer forum (kf, Zürich), the Fédération romande des consommateurs (FRC, Genève), and the Associazione consumatrici della Svizzera Italiana (ACSI Breganzona).¹⁶⁸

d) Swiss Confederation

- 139 In accordance with Article 10 (1) lit. c. FAUC the Swiss Confederation can bring an action under Article 9 FAUC too if it considers this to be necessary in order to protect Switzerland’s reputation abroad, and on behalf of those Swiss who live abroad and have the right to bring action. The necessity to apply Swiss law stems from Article 2 (1) and Article 5 No. 3 of the Lugano Agreement, or – if the Lugano Agreement is not applicable – from Article 3, 129, or 136 of the Swiss International Private Law (IPRG). If Swiss law is applicable under the relevant provisions, the Swiss Confederation is represented by the State Secretariat for Economic Affairs (SECO).
- 140 The latest amendments of the Swiss Unfair Competition Act¹⁶⁹ will relocate the Federation’s right to bring action under Article 10 (III) lit. a FAUC. Furthermore, the discretion of the Confederation to bring action will be reduced once there is any threat to Switzerland’s reputation or an infringement of its reputation abroad. The new regulation of Article 10 (III) lit. b FAUC will give the Confederation the additional right to bring action if the interest of several persons, or of a group of members, of a government branch, or if other collective interests are threatened or infringed.

e) Swiss Commission for Fairness

- 141 The Swiss Commission for Fairness (SCF) (German: “Lauterkeitskommission”) is the executive organ of the foundation of Swiss Advertising for Fairness. All major organisations of the Swiss communications industry are members of this founda-

¹⁶⁷ Pedrazzini/Pedrazzini, (fn. 74), margin no. 16.32.

¹⁶⁸ Jung/Spitz, (fn. 32), Art. 10, margin no. 28 *et seq.*

¹⁶⁹ Decree of 17 June 2011, BBl 2011, 4925 will enter into force on 1 April 2012.

tion. The SCF bases its activities of self-controlling the communication industry under FAUC and takes into account the guidelines of the International Chambers of Commerce to contribute to the protection of consumers.¹⁷⁰ The SCF acts as legislative¹⁷¹ and judicial power including a board of conciliation within its organisation.¹⁷² Although conciliatory decisions by the SCF board are not binding for state courts, they provide at least an indication of the merits of a complaint if one of the parties brings a civil proceeding before the board of conciliation. Furthermore, the SCF can bring civil actions under Article 10 (II) lit. b FAUC or file a complaint under criminal law.¹⁷³

f) Injunction

Injunctive relief can be claimed under Article 9 (I) lit. a FAUC by anyone who 142 suffers, or is likely to suffer, from an impairment through an act of unfair competition against his clientele, his credit rating, or his professional reputation, his business, or otherwise to the detriment of his economic interests. A claim for an injunction can be asserted following an infringement that has been committed, or is about to be committed.

A legal interest to claim an injunction is assumed to exist if an infringement is 143 imminent meaning that the defendant's conduct gives serious cause to fear an infringement.¹⁷⁴ A prior infringement is not necessary but gives clear evidence of the likelihood of a repetitive infringement,¹⁷⁵ as does a prior warning that has had no effect.¹⁷⁶

Preliminary injunctions (or "precautionary measures" in Swiss terminology) can 144 be claimed according to Article 261 et seq. of the Swiss Code of Civil Procedure if the applicant would otherwise suffer a disadvantage that could not be undone easily. A precautionary measure can be any ordinance by the court. In the practise of unfair competition law regular rather than preliminary injunctions are requested. In cases of particular urgency the court can order precautionary measures without the other party being heard (Article 265 of the Swiss Code of Civil Procedure). The competent court for precautionary measures is the court which is competent for the main proceedings (Article 5 (II) Swiss Code of Civil Procedure).

g) Damages and indemnification

Article 9 (III) FAUC states that actions for damages and indemnification as well 145 as recovery of profits may be brought in accordance with the Swiss CO. In practice, claims for indemnification have but little relevance because of the evidential difficulties and litigation risk. Regarding damage claims, Article 9 (III) FAUC refers to the legal basis of Article 41 et seqq. of the Swiss CO.¹⁷⁷ If the extent of damages cannot be quantified in an exact manner, it may be estimated by the court in line with Article 42 (II) of the Swiss CO.

¹⁷⁰ SCF's intended purpose on www.lauterkeit.ch/komm.htm.

¹⁷¹ Cf. the SCF principles, published on www.lauterkeit.ch/pdf/grundsaeetze.pdf.

¹⁷² Cf. published cases on www.lauterkeit.ch/taetig.htm.

¹⁷³ Pedrazzini/Pedrazzini, (fn. 74), UWG, margin no. 2.08.

¹⁷⁴ BGE 124 III 72, E. 2 a; 116 II 357, E. 2 a.

¹⁷⁵ Troller, Immaterialgüterrecht, Bd. II, 3rd ed., p. 970 et seq.

¹⁷⁶ BGE 124 III 72, E. 2 a.

¹⁷⁷ Baudenbacher/Glückner in: Baudenbacher (fn. 14), Art. 9, margin no. 177 et seq.

- 146 Damages can be claimed only if the infringer has acted culpably. According to the general rules of Articles 41 et seq. CO, even a slight negligence may be sufficient to establish culpability. The requirements for diligence must be defined considering the specific circumstances.¹⁷⁸
- 147 Article 9 (I) lit. b FAUC provides an additional claim to terminate an ongoing infringement while a risk of re-offending is not required. As this claim is intended to eliminate effects of past and current infringements, it borders on a request for restitution in kind.¹⁷⁹

h) Declaratory relief

- 148 According to Article 9 (I) lit. c FAUC, the plaintiff may establish the unlawful nature of an infringement by declaratory relief if consequences of infringement subsist. A justified interest in such declaratory judgement can be shown if the infringement has harmful effects on plaintiff's legal position because of the uncertainty or endangerment of his legal position.¹⁸⁰ In addition to this option of establishing the unlawful nature of an infringement, it is possible to claim a negative declaratory relief to the effect that a specific behaviour does not constitute an act of unfair competition, although this option is not mentioned in Article 9 (I) FAUC.¹⁸¹

i) Criminal sanctions

- 149 Frequently used in the practice of litigation under unfair competition law is an attempt to initiate criminal proceedings against an illegally acting competitor based on Article 23 (I) FAUC within the meaning of Articles 3, 4, 4 a, 5 or 6 FAUC. If the law enforcement agencies decide to intervene, the infringed party does not need to worry about evidential difficulties and costs of ensuing civil litigation. However, official intervention is not easily induced. Law enforcement agencies tend to use their capacity for conventional criminal prosecution and, frequently, may not be experienced sufficiently in litigation under unfair competition law and intellectual property law. With regard to staff shortages, prosecutors tend to feel misused when requested to pursue claims that have their origin in civil law. To improve this situation, it is recommended to limit criminal prosecution under unfair competition law to commercial activities and improve the personnel's awareness of unfair competition law.¹⁸²

2. The courts

- 150 Territorial jurisdiction for claims under unfair competition law for international matters is governed by Article 129 of the Swiss Act on Private International Law, or – for states that have ratified the Lugano Convention – Article 2 and Article 5 No. 3 of the Lugano Agreement. For Swiss domestic issues, Article 3 and Article 25 of the Swiss Act on Jurisdiction establishes the venue as the court of the defendant's

¹⁷⁸ Anton K. Schnyder, in: Honsell/Vogt/Wiegand (eds.), Basler Kommentar: Obligationenrecht I, 4th ed., 2007, Art. 41, margin no. 48 et seqq.

¹⁷⁹ Spitz in: Jung/Spitz, (fn. 32), Art. 9, margin no. 71 et seq.

¹⁸⁰ Pedrazzini/Pedrazzini, (fn. 74), margin no. 14.31.

¹⁸¹ Pedrazzini/Pedrazzini, (fn. 74), margin no. 14.38.

¹⁸² Ritscher, Der strafrechtliche Schutz des geistigen Eigentums und des lautereren Wettbewerbs, Schweizerische Zeitschrift für Strafrecht (ZStrR) 1998, 26, p. 70 et seq.

domicile, or the court at the domicile of the victim, or the court at the place of effect or performance, respectively.

Regarding jurisdiction in matters of Swiss unfair competition law, the states 151 (“cantons”) of the Swiss Confederation are obliged by Article 5 (I) lit. d FAUC and the Swiss Code of Civil Procedure to indicate a single court which is competent for unfair competition law within the state’s territory if the amount in dispute exceeds CHF 30 000. The Courts of Commerce are competent for these proceedings in those states where such courts exist (In the cantons of Zürich, Bern, St. Gallen and Aargau). In the other states these proceedings are conferred to the general courts of ordinary jurisdiction.

3. Costs

Legal costs include court costs and parties’ expenses (Article 95 of the Swiss Code 152 of Civil Procedure), which both are subject to the state’s legislation (Article 96 of the Swiss Code of Civil Procedure). Generally, costs depend on the amount under litigation (“value of dispute”) and must be defined at the start of litigation. Typical amounts in litigation under unfair competition law are in the range of from CHF 50,000 to CHF 100,000, which will typically cause court costs in the range of from CHF 5,500 to CHF 8,750 (taking the canton Zürich here as an example as each canton has its own fee regulations).¹⁸³ Expenses for the opposite party incurred through litigation have to be paid by the losing party and are typically in the range of CHF 7,000 to CHF 11,000.¹⁸⁴ Advance payment of court fees is not obligatory and will only be required by most states of the Swiss Confederation in exceptional circumstances.

Specific Abbreviations and Acronyms

ACSI	<i>Associazione consumatrici della Svizzera Italiana</i> (Consumer Association of the Italian-speaking part of Switzerland)
AJP	<i>Aktuelle Juristische Praxis</i> (law journal)
AS	<i>Amtliche Sammlung des Bundesrechts</i> (official compilation of federal law)
BBl	<i>Bundesblatt</i> (federal law gazette)
BGE	<i>Bundesgerichtsentscheid</i> (Decisions of the Swiss Federal Supreme Court)
BGer	<i>Bundesgericht</i> (Federal Court)
CHF	Swiss Francs
CO	Code of Obligations
Comlot	Lotterie- und Wettkommission (Swiss Lottery and Betting Board)
FAUC	Federal Act against Unfair Competition
FRC	<i>Fédération romande des consommateurs</i> (Consumer Association of French speaking Switzerland)
Hger	<i>Handelsgericht</i> (Commercial Court)

¹⁸³ Cf. § 4 of the regulation on fees of the Zurich High Court, no 211.11.

¹⁸⁴ Cf. § 4 of the fee schedule of the Zurich High Court, no 215.3.

CH

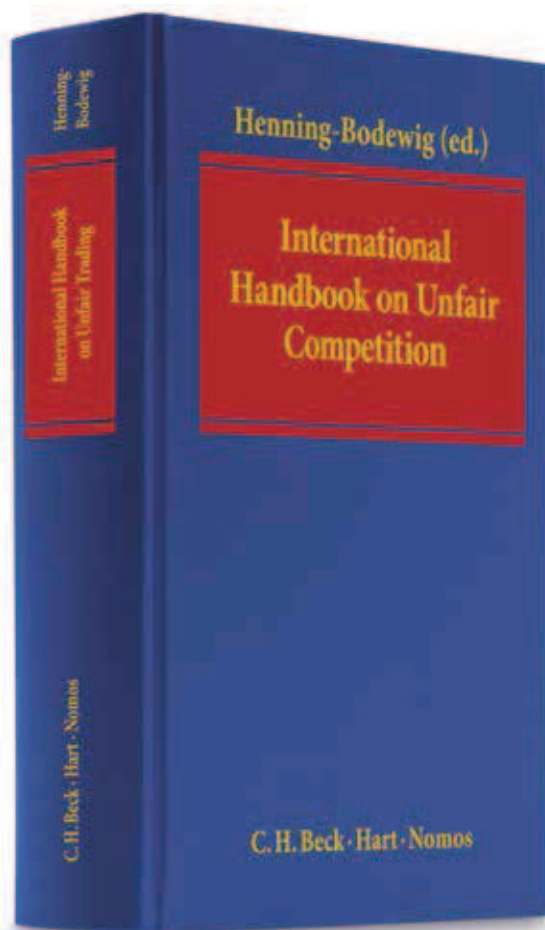
D. Country Reports

ICC	International Chamber of Commerce
kf	<i>Konsumentenforum</i> (Consumer forum)
SCF	Swiss Commission for Fairness
SJZ	<i>Schweizerische Juristen-Zeitung</i> (law journal)
SKS	<i>Stiftung für Konsumentenschutz</i> (Foundation for consumer protection)
SR	<i>Systematische Sammlung des Bundesrechts</i> (Systematic collection of federal laws)
UWG	<i>Bundesgesetz gegen den unlauteren Wettbewerb</i> (Federal Law Against Unfair Competition)
ZStR	<i>Schweizerische Zeitschrift für Strafrecht</i> (criminal law journal)

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Table of Contents

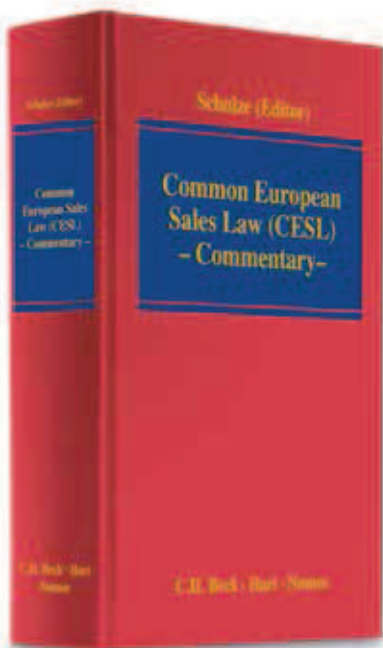
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