



Unfair competition and freedom of trade: the requirement for a prohibition strictly proportionate to wrongful conduct alone

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To quote this paper: SEMERDJIAN LUNA “*Unfair competition and freedom of trade: the requirement for a prohibition strictly proportionate to wrongful conduct alone*”, *Competition Forum*, 2026, n° 0089 <https://competition-forum.com>.

Resume: *The Court of Cassation (Commercial Division, 28 January 2026, No. 23-20. 245) has partially quashed a judgment of the Court of Appeal which, having found acts of unfair competition, had imposed a general ban on the marketing of interfaces enabling GPS systems to be connected to competing agricultural equipment, ruling that such a measure infringes upon the freedom of trade and industry and must be limited solely to unfair or parasitic conduct.*

This case concerns the connected agricultural equipment sector and involves Optima Concept and the companies GPS Géomatique Agricole (2GA) and Innov GPS. Optima Concept has developed a spraying system to which GPS guidance devices can be connected. Competitors have created and marketed interfaces enabling their own navigation systems to be connected to the same equipment. Such practices fall within the field of interoperable technologies, where compatibility between products manufactured by competitors is a key economic issue.

Optima Concept considered that these practices constituted unfair competition and brought an action against the companies for tortious liability. This action falls within the traditional framework of non-contractual

civil liability based on Article 1240 of the Civil Code, which forms the legal basis in France for actions relating to unfair competition.

In a judgment of 11 May 2023, the Douai Court of Appeal found that unfair competition had taken place, noting that the marketing of these interfaces did not comply with the regulations set out in the decree of 18 December 2008 on the procedures for inspecting sprayers, and that the use of the trade names created a risk of confusion. The Court of Appeal therefore imposed a general ban on marketing.

The companies against whom the judgment was made lodged an appeal to the Court of Cassation, criticising the Court of Appeal for imposing a ban that went beyond the punishment for the wrongful conduct alone, and arguing that this disproportionate

sanction infringed upon the principle of freedom of trade and industry. For their part, they argue that the measure went beyond what was strictly necessary to put an end to the unfair practices.

The Court of Cassation was therefore asked the following question: is it possible to sanction acts of unfair competition by imposing a general prohibition on marketing, or must the prohibition be limited only to the wrongful conduct?

In a judgment handed down on 28 January 2026, the Court of Cassation partially quashed the decision. It noted, with reference to the Act of 2 and 17 March 1791 and Article 1240 of the Civil Code, that a ban on carrying out an economic activity imposed in relation to unfair competition must be limited solely to unfair or parasitic conduct.

It overturns the Court of Appeal's decision on the grounds that it went beyond mere unfair practices and constituted a disproportionate infringement of the freedom of trade and industry. In this regard, the Court reviews the proportionality of the penalty.

This decision calls for a two-stage analysis: first, the conditions for establishing unfair competition must be examined (I); second, the proportionality test applied by the Court, designed to prevent any excessive infringement of the freedom of trade and industry, must be considered (II). This analysis highlights the fundamental distinction between the characterisation of the competitive.

I. The dual characterisation of unfair competition: combining regulatory non-compliance and consumer confusion as sources of liability

The action for unfair competition falls within liability for personal acts based on Article 1240 of the Civil Code, which provides that any wrongful act engages the liability of its author, and requires the fulfilment of three conditions, namely a fault, damage, and a causal link¹. French case law does not require proof of intent to harm². This framework provides a fairly flexible way of understanding the variety of

¹ Article 1240 of the French Civil Code, Légifrance website.

² Y. Serra, "Unfair Competition", Commercial Law Encyclopedia, p. 6, §22; see also Cass. 1st Civil

Chamber, 18 January 2005; Paris Court of Appeal, 21 January 2005, No. 03/00679, D. 2005, p. 2463, note by Y. Auguet, Dalloz website.

anti-competitive practices, in the absence of specific legislation.

In this case, the Court of Appeal identified two distinct and autonomous faults allowing unfair competition to be established: the regulatory non-compliance of the marketed interfaces (A) and the risk of confusion arising from the use of commercial references associated with the company Optima Concept (B). This dual characterisation shows that unfair competition can have various causes, stemming either from a breach of a standard or from misleading commercial practices.

A. The qualification of regulatory non-compliance as unfair competition: the identification of an undue competitive advantage

In this case, the first fault concerns the violation of the regulation of the Order of 18 December 2008 relating to inspection procedures for sprayers. This regulation imposes certain technical requirements with which companies must comply. The interfaces marketed by the companies 2GA and Innov GPS did not comply with these

rules, particularly in terms of product control and safety. Thus, a lack of awareness of these technical requirements is likely to undermine not only the safety of the equipment, but also the level playing field between operators who comply with the regulations and those who do not.

The violation of a regulatory act may constitute a fault of unfair competition where it provides an undue competitive advantage³. However, this infringement must have a direct impact on the conditions of competition. By disregarding the applicable rules, the companies benefited from more favourable market conditions, offering products that were more easily adaptable or sometimes less costly, which is likely to distort normal conditions of competition.

However, the manufacture of a product compatible with that of a competitor remains in principle authorised⁴. The fault is not found in compatibility with competing products but in the non-compliance with the Order of 18 December 2008. The Court thus draws a fundamental distinction between lawful competition based on imitation or technical compatibility and unfair competition

³ Breach of a regulation creating an undue competitive advantage, Dalloz website.

⁴ M. Malaurie-Vignal, Droit de la concurrence interne et européen, 8th ed., 2020: lawful imitation

in the absence of exclusive rights; fault only in case of parasitism or confusion, Dalloz website.

resulting from unlawful conduct that is contrary to fair competition.

This distinction lies at the heart of competition law. As explained by Roubier, unfair competition does not aim to protect an economic operator against all competition, but only to sanction unfair conduct⁵. It would therefore effectively grant a de facto monopoly on a technical solution.

B. The use of a competitor's commercial references: a source of a risk of confusion

The second fault identified by the Court of Appeal concerns the manner in which the products marketed by the companies 2GA and Innov GPS were presented.

These companies used, in their commercial communication, references specific to the equipment developed by the company Optima Concept, allowing them to indicate compatibility with their products. This common market practice must, however, be regulated so as not to mislead consumers.

However, the use of these references in the designation of the interfaces is likely to create, in the mind of consumers, confusion as to the origin of the products or the existence of an economic link between the different companies⁶. Customers may therefore believe that the marketed interfaces are manufactured, approved, or distributed by the company Optima Concept, or that they have been subject to its control. The likelihood of confusion is therefore assessed on the basis of consumer perception, without it being necessary to prove that confusion has actually occurred.

The Court of Appeal thus found the existence of a risk of confusion, constituting on that basis an act of unfair competition. This type of practice is sanctioned where it allows a company to benefit from a competitor's clientele by unduly exploiting its reputation⁷.

This conduct differs from disparagement, which requires behaviour aimed at discrediting a competitor⁸. In this case, the defendant companies did not seek to harm the image of the competing company, but

⁵ P. Roubier, *General Theory of Unfair Competition Actions*, 1948, pp. 541–591, Dalloz website.

⁶ Risk of confusion as to the origin of products, Dalloz website.

⁷ P. Roubier, *Théorie générale de l'action en concurrence déloyale (General Theory of Unfair*

Competition Actions), 1948, pp. 541–591: misappropriation of a competitor's clientele and reputation, Dalloz website.

⁸ Cass. com., 24 Sept. 2013, No. 12-19.790, disparagement defined as discrediting a competitor.

rather to benefit from its commercial references. The classification of « confusion » is more appropriate than that of « denigration », given the absence of any disparaging or denigrating comments about the product.

Unfair competition is therefore characterised here by two distinct mechanisms: the violation of an objective rule and the existence of a risk of confusion. These behaviours thus constitute faults within the meaning of Article 1240 of the Civil Code and justify, in principle, a sanction as they distort normal competition.

II. The proportionality test as a fundamental safeguard on the power to impose sanctions in cases of unfair competition

While the Court of Cassation does not rule on the merits and therefore does not call into question the characterisation of the faults identified by the Court of Appeal, it censures the general scope of the sanction imposed. The Court thus reviews not the fault itself, but whether the penalty is proportionate to it, which shifts the focus of

the debate to the proportionality of the measures imposed. It recalls in this respect that measures must be strictly limited and proportionate to the wrongful conduct identified (A), and that a general prohibition constitutes an infringement of the freedom of trade and industry (B).

A. Reaffirmation of the principle: a sanction of strict limitation: the proven unfair conduct

The Court of Cassation recalls in its decision that the sanction of unfair competition must be directly linked to the wrongful conduct identified. It therefore insists on a strict requirement for a mandatory link between the offence and the penalty imposed.

This principle is based on the freedom of trade and industry resulting from the Law of 2 and 17 March 1791 and on Article 1240 of the Civil Code⁹. The Court expresses its intention to uphold this principle, whilst ensuring that the penalty does not become an excessive obstacle to economic activity.

The Court's reasoning follows consistent previous case law, in particular the judgment of 10 November 2021¹⁰. Thus,

proportionate to the legitimate interests to be protected.

⁹ Law of 2–17 March 1791; Article 1240 Civil Code.

¹⁰ Cass. com., 10 November 2021, No. 21-11.975, *Linagora v. Blue Mind*: requirement that restrictions on the freedom to conduct business be

the decision in question clearly demonstrates that proportionality has now become a fully integrated standard of review in cases of unfair competition. In this case, the faults identified by the Court of Appeal were precisely determined and characterised. These are the practices that may be subject to sanctions. On the other hand, the ban on all marketing activities imposed by the Court of Appeal was entirely unjustified, even where such activities could have been carried out lawfully.

Legal doctrine shares this analysis: the sanction must aim to eliminate the undue competitive advantage without excluding the competitor from the market ¹¹. Likewise, restrictions on competition are legitimate only if they are strictly necessary for its proper functioning ¹². Thus, the approach adopted by the Court of Cassation appears entirely consistent, but it nevertheless raises the question of the discretion afforded to trial judges in determining and assessing the proportionality of such measures in practice.

¹¹ M. Malaurie-Vignal, *Droit de la concurrence interne et européen* (Internal and European Competition Law), 8th ed., Sirey/Dalloz, 2020: unfair competition is grounded in Article 1240 of the French Civil Code and requires strictly proportionate compensation, Dalloz legal doctrine database.

B. The censure of the general prohibition: a disproportionate infringement of the freedom of trade and industry

It is precisely this disproportionate infringement that the Court censures in this case. The Court states, based on the Law of 2–17 March 1791 and Article 1240 of the Civil Code, that « *the prohibition on carrying out an activity imposed by a judge must be limited strictly to unfair or parasitic conduct* » ¹³. By making this principle a direct basis for the quashing of the judgment, the Court gives the requirement of proportionality a central role in the regulatory framework governing measures relating to unfair competition.

The scope of the censure goes beyond the facts of the case. By ruling without remand, the Court does not merely annul an excessive decision: it substitutes a targeted prohibition for a general prohibition. It thus closely regulates the power of trial judges to issue injunctions, by requiring a strict interpretation of the sanctions that may be imposed for wrongful conduct. This approach can be understood as an effort to

¹² *Ibid*, sanctions must put an end to the undue competitive advantage without excluding the competitor from the market.

¹³ Article L. 411-3 par. 2 of the Code of Judicial Organisation and Article 627 of the Code of Civil Procedure, Légifrance website.

standardize case-law practice regarding acts of unfair competition and to prevent the court from issuing overly broad rulings, as it had previously done in its judgment of 10 November 2021.

Even when fully established, the faults cannot justify a sanction that does not distinguish between unlawful and lawful activity¹⁴. A general prohibition produces a structural exclusion effect, removing the competitor from the market even for lawful activities.

Such a measure exceeds the compensatory and preventive purpose of unfair competition law and becomes an elimination sanction, which cannot be justified either by Article 1240 of the Civil Code or by principle of freedom of trade and industry¹⁵. The Court's ruling is therefore legally consistent, but a requirement of this standard regarding proportionality, even if it serves to protect economic freedom, may raise questions as to the effectiveness of the measures taken, by limiting the discretion of judges when dealing with behaviour that is potentially repetitive or difficult to define precisely.

¹⁴ Marie Malaurie-Vignal, *Internal and European Competition Law*, 8th ed., Sirey/Dalloz, 2020.

¹⁵ Principle of freedom of trade and industry, French Senate website / Légifrance website