

DENIGRATION OF THE COMMERCIAL REPUTATION IN THE ALGERIAN LAW AND FRENCH LAW

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Abstract:

This paper research aims to deal with the problematic of commercial denigration, as it is an unfair practice among the competitors; it is practiced by the unfair traders by abusing the principles of freedom of trade and competition, the cause that led the Algerian legislator to establish a set of legal rules in order to moralize the commercial practices, particularly in the Law No. 04/02; in which the denigration practice is prohibited as it is a dishonest conduct in the articles 27-38; but unlike the Algerian legislator, the French legislator doesn't establish a proper legal rules of the unfair competition, leaving it to the jurisdiction that faced it under the notion of the unfair competition action based on the civil tort liability. Thus, in the Algerian legislation and the French jurisdiction, there are the civil and penal sanctions against who commits it.

Key words: Commercial Denigration, Economic Agent, Civil Penalties, Penal Penalties.

1. INTRODUCTION

The freedom of industry and trade is the fundamental economic and legal rule, on which commercial and industrial activities are based, and it can give rise to subordinate economic rules such as the freedom to compete in the market¹, which was included in the Algerian Constitution after the adoption of the market economic system². But these economic freedoms, as in the liberal countries, can lead to many abuses against the public order, the consumers, and more importantly against the freedoms of other competitor economic agents. In fact, merchants try to use every possible practice to obtain customers, even at the expense of their competitors in the market. This problem has led the legislator to adopt a series of legal texts to regulate this freedom, in particular under Law N° 04/02, including the applicable rules to commercial practices³. And for the morality of the commercial practices he prohibits the Unfair Competition, the theory known in the liberal countries such as in the French judiciary and in USA law⁴, and which has been provided in the Paris Convention for the Protection of Industrial Property of March 20, 1883 (amended).

The Law N° 04/02 prohibits the Unfair Competition under the term unfair commercial practices, as a general rule, which are in contrary to the proper and fair professional customs, by which the economic agent infringes the interest of the other economic agent (Article 26.) and as specific rules the Law in the Article 27 has listed seven commercial practices, considered *ex lege* as unfair practices, they are: (Confusion acts- Denigration- Disloyal exploitation of the knowhow of the others- Employing the employees of the competitor- Abuse of the other professional secrets- Disruption of the competitor- Market disruption-Parasitism on others). In fact, it has been observed that the unfair traders use excessively the denigration practice, because it is easy to commit, especially after the development of propaganda and media, easy access similar to the Internet, social media. Also, the effects of this unfair practice are harmful to the competitor enterprises, to the market, and consumers; the reason that led us to deal with the practice of denigration in the

¹ Y. Auguet, Competition Law (Ellipses: Paris, 2002) 59.

² Article 37 of the Algerian Constitution of 1996 (abrogated), now it is the Article 61 of the Algerian constitution of 2020.

³ Law No 04/02 of June 23, 2004, Relating to the Rules Applicable to the Commercial Practices, Official Gazette, for the year 2004, (Amended and completed)

⁴ L. Mary, Passing Off and Unfair Competition: Conflict and Convergence in Competition Law (2011) 784 Scholarly Works. In <https://scholars.law.unlv.edu/facpub/784>



market, by analyzing its legal elements and the liabilities of the economic agent who commits it. So, the problematic that can be asked is:

When does the denigration become an unfair practice? And what are the punishments for its perpetrators?

We can start from some hypotheses, related to the commercial practices in the market among the economic agents, and the hypotheses of the French judiciary which has instituted the theory of the action of unfair competition, this in the edge of the Algerian law N° 04/02, and in the other legal rules.

In order to treat this problematic, we tend to use the descriptive methodology, by defining the notion of the denigration practice and its elements, its sanctions; in addition to using the analytical methodology of the legal rules about our problematic. Then, it is useful to start with the analysis of the denigration practice (division 2), then the liabilities and punishments (division 3).

2. LEGAL ANALYSIS OF THE DENIGRATION PRACTICE:

In this section, the analysis should be started with the definition of this practice, its subject matter, and its ways to be committed, then its exceptions.

2.1. Definition of the denigration practice:

According to the Algerian law N° 04/02, it is defined as follows:

(Unfair commercial practices are considered...:

-Denigrating the reputation of a competing economic agent by spreading bad information that affects his person, products, or services.)¹

The legislator considers the denigration as a commercial practice that contravenes the clean norms of trade, by which the economic agent tarnishes the reputation of another competing economic agent, by diffusing bad statements that abuse his economic interests. However, the French legislator did not define it, leaving it to the doctrine and the judiciary; The doctrine defined it as (a practice that aims to removing confidence in the competitor or in his products, or it is a practice leading to an attack on the image, the reputation of the enterprise or the product.)²

This practice is also defined by courts, especially the French courts as: (including the spread of bad information that leads to the removal of confidence in the competitor, both in his person and in his products or services.)³; it is an unfair practice that leads the image of the competitor black, and bad in the eyes of the consumers.

With regard to the definition of the denigration practice, it should be noted that it seems similar to the offense of Defamation known in the criminal law, which is criminalized in the article 296 of the Algerian Penal Code: (it is an allegation or imputation of an act that harms the honor or the reputation of persons.) Both practices are committed by public allegations or imputations that injure the reputation of persons⁴; but there are some differences between them; because each act has its position in the field of the law: abuse of freedom of speech and press about defamation offence, and abuse of the right to trade and competition in the market about the Unfair Denigration. Therefore, it is better to analyze the practice of unfair denigration first, and then deduce the differences between the two conducts in the conclusion.

¹ First Paragraph of Article 27 of the law N° 04/02.

² P. Roubier, *Industrial Property Law*, (Sirey: Paris, 1952) 206.

³ C.A. Lyon, May 21, 1974, in Dalloz collection (D), 2000, *Periodic Juris-Classeur*, General Edition J.C.P. G. ed. Of 1974.

⁴ M. A. Frison Roche and M. S. Payet, *Competition Law*, 1st edn (Dalloz: Paris, 2006)182.



According to the first paragraph of Article 27 and the French commercial doctrine¹, the practice of denigration can be analyzed under two elements: first, examining the subject matter of the practice, the conduct in which it is committed, then the exceptions.

2.2. Subject matter of the denigration practice and its conditions:

Referring to the wording of the first paragraph of Article 27 aforementioned, it seems that the subject matter of the attack is the person of the competitor economic agent or his products or services.

2.2.1. The personality of a competing economic agent:

According to the law N 04/02 in the article 03 the term "Economic Agent" refers to any producer, merchant, artisan, or service provider, regardless of their legal status, who carries out its activity in the normal course of their business, or with the intention of achieving the purpose for which it was established. i.e. the prohibition of the practice applies just to persons who have the status of a merchant known under the commercial law², and also to craftsmen and service providers who do not have the status of a merchant, such as practitioners of liberal professions, as liberal doctors, accountants... all of these persons are economic agents as long as they exercise an economic activity as their usual profession. Like the Algerian law the French judiciary has adopted the same interpretation, according to which unfair competition action is applied to all professional persons in the market, traders or other professional non-traders³, legal or natural persons. However, the prohibition of the commercial denigration isn't applied to the non professional persons, such as the consumers.

As for the meaning of the **person of the competitor**, it is all the characteristics by which the personality of the economic agent is characterized, whether he is a natural or legal person; and whether these characteristics have a direct relationship with the competitor's professional life, or not. With regard to the private life, it is because competitors often resort to influencing the desires or the emotions of the competitors' customers by defaming the character, the honor, the integrity, the history, or the affiliations of the merchant to a sect or a race that would alienate his clients. In the French judiciary, there are some cases as the Tribunal of Common Instances of Paris decided that the competitor who published that his competitor was from a certain race to exclude his clients is considered as unfair competition⁴.

Also, the professional situation of the trader can be subject to the denigration, when the competitor damages his commercial reputation, as his financial confidence, his goodwill's property like his business name, his industrial or commercial activity, his employees' qualities...i.e. all the economic interests of the competitor agent can be considered in this unfair practice, as the article 26 of the law 04/02 stipulates. Here the French judiciary decided that it was a disloyal denigration, when the competitor declared that his competitor didn't have the professional qualities⁵.

2.2.2. The products of the competitor:

The term (... *products*...) in the article 27 means all things that are produced or offered or imported by the merchant or craftsmen; they can be material things as goods (food, furniture,...) and the real states, or the intellectual things as the copyrights (films, artistic drawing, stories...). For example: The competitor who discredits his rival's cars as they are unsafe to drive or the apartments of the definite provider are so cramped; moreover the discredit can relate to the prices of the

¹ P. Roubier, Serra Y., Marie Malaurie-Vignal,...

² Article 1 bis of the Algerian Commercial Code.

³ C.A. Paris, May 09, 1985, D, 1986 I.R 344, Obs. Y. Serra.

⁴ Tribunal of the Common Instances, (TGI) of Paris, May 2, 1968, Periodic Juris-Classeur, General Edition. (JCP G ed.). 1969, 6, p.53.

⁵ Court of Cassation, Commercial Chamber, January 5, 1961, n° 58-12.760, Bulletin of Decisions of the civil chamber of the French Court of Cassation. (bull. civ.).3, n° 10, p.8.

products...). The French judiciary ruled that the competitor who claimed that the other competitor's cars were not high-tech had committed an Unfair Competition¹.

2.2.3. The services of the competitor:

According to the Algerian Consumer Protection Law N° 09/03,² the term "service" includes all what is offered by the trader except the delivery of goods, such as banking operations, transport, media, hotels,... So the denigration can touch the service offered by the company; for example, publishing dissemination that the financial activity of the definite bank is fraudulent..., also publishing an advertisement for an air transportation company as it is the only honest transporter in the market, this allegation is indirectly denigration of the other air companies that they aren't honest³.

Thus, it is noted that, the denigration is committed only by an economic agent against another competing economic agent, unlike the defamation offense, provided in Article 296 of the Algerian penal code, which is committed by any person against any person, whether professional or not; and the subject matter of the denigration is the person of the economic agent as well as his business or his products or services, but in the defamation offence its subject matter is just the honor or the reputation of the persons.

2.2.4. Conditions regarding the subject matter of the denigration:

According to the first paragraph of Article 27 and the French judiciary and doctrine as we are going to deal with, there is no unfair denigration without two conditions, namely, the competitive situation between the parties, and the subject of the unfair practice must be identified or identifiable.

2.2.4. 1. Competitive situation between the two parties:

The Algerian legislator stipulates in the first paragraph of the article 27 of the law N° 04/02 expressly (*...denigrating of the reputation of a competing economic agent....*) i.e., the two parties offender and the victim must be in competitive situation, or their products or their services are offered in the same market. This last term (Competitive situation) means that the two economic agents have the same kind of clients, when they offer the same kind of goods or services⁴, as (car market or clothes market...). Besides, they can be in competitive situation with offering similar goods or services that customers perceive as interchangeable due to their attributes, pricing, common usage, and geographic location⁵.

However, commercial jurisdictions in France, at first they were requiring the competitive situation in the denigration practice, by offering the same products or same services⁶, then they started to step back about the requiring of the competition situation, as in one case the court of appeal decided that it was disloyal practice, when the retailer trader had denigrated the wholesaler, as long as their goods will reach the same consumers⁷. And then because of the danger of the practice the courts have reached to no obliging the competitive situation between the two parties, then the Court of Cassation has accepted the case of Unfair Competition by denigration even if the defendant and the plaintiff weren't in the same situation in the market⁸. This case was between the biscuits sellers and the cigarette manufacturers. The jurisdictions did well when it doesn't require a true competition situation in the market to accept the case of the unfair denigration,

¹ M. A. Frison Roche– M. S. Payet, above, p.385.

² According to Article 2 of the Law No 09/03 of February 25, 2009, relating to consumer protection and the fraud suppression, Official Gazette, No 15, 2009. (amended and completed)

³ C.A. Paris, 1st Chamber, April 26, 1989, Distribution Lettre (lettre. Dist.), 1989.

⁴ M. Malaurie-Vignal, Interne Competition Law (Armand Colin: Paris, 1996) 186.

⁵ Article 03 of the Ordinance No 03/03₂ of July 19, 2003, Relates to Competition, Official Gazette, No 43 for the year 2003. (Amended and completed)

⁶ C. A Paris, April 30, 1936, Directory of the Industrial Property (Ann. prop. ind.). 1936. p. 32.

⁷ C. A Paris, 20 February 20, 1992, Dalloz collection (D) 1993, Somm. 155, Obs. M.L. IZORCHE.

⁸ L. Merlan, above, Commentary of the decision of the Court of Cassation of 15 January 15, 2002, company EC de Witt and company limited v national Syndicate of coffee production and trade, Decision n° 123 FS.P.



because now the business relationships are more complicated, characterized by the speedy, and auto changing in different levels.

2.2.4.2. The subject matter of the denigration must be identified or identifiable:

Even if the legislator didn't stipulate the condition of the subject of the denigration to be mentioned in the allegations, it is clear from the context of the first paragraph of article 27 and from the material act of the conduct; because the unfair trader in this practice determines to leave out the competitor's clients in purpose to acquire them¹. Moreover, the unfair competitors already do this bad practice without designation of each trader, but implicitly he can be known among consumers by the indirect indicators indicated by the unfair trader; these indirect indexes let the consumers presume that the product of the second competitor for example, is significantly lower quality than the first one, or is offered with high price; for instance when the trader uses an advertisement saying that he is the only trader who sells the original product in the domicile market; here the consumers think that the products of other traders offered in the same market are fake²; also when the enterprise of tissue declared that it is the only factory whose employees are dynamic. This form of unfair practice is named in the legal jurisprudence the practice of the magnification of one's own products; which is condemned by the French jurisdictions³, whether in unfair denigration or in fraudulent advertisement.

2.2.3. The conduct committed in denigration practice:

The legislator in the paragraph 1 of article 27 of the law 04/02 provides (... -denigrating.... by spreading bad information that affects his ...) i.e. diffusing bad information, in public, and by using any means of publication; these elements are followed in the French doctrine to analyze the denigration ways.

2.2.3.1. Diffusion of bad information:

Here, the economic agent diffuses pejorative and depreciatory information about his competitor, in which these announced bad characteristics can affect the reputation of the competitor's business or his goods or services⁴. Thus, the aims of the denigrator agent is to reduce the value of the other competitor in the eyes of the consumers, and it leads to their transformation from the victim to the perpetrator, e.g. in the car market car manufacturer spreads declarations that, the definite trade mark car has been already subject to car accidents⁵; here the reputation of the latter trade mark becomes negative among the consumers.

Furthermore, the unfair practice is committed when the allegations diffused about the trader are false or based on true information⁶, this is unlike what is stipulated by the Convention of Paris relating to Industrial Property 1883, in the 10th article bis, paragraph 3/2. That; (...3-The following in particular shall be prohibited:

... 2. False allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor...).

In fact, generally, unscrupulous businessmen take advantage of true information occasion about their successful competitors, and spread it. In this case, the unfair practice exists even if the allegations disseminated are true or proven; for this reason the legislator did not require that the allegations be false. Thus, this wording in the paragraph is right, because when the professional trader criticizes other competitors, the aim of his messages is not innocent, and he wants to lead the consumers to prefer his goods to others, or he wants to ruin the business of his competitor.

The French jurisdictions has applied the same view, and they have justified their decisions that the false information is not essential in the unfair denigration, but even if the allegations about the competitor are real and well-founded and if they are linked to some circumstances, the practice

¹ Y. Auguet, above, p. 75.

² Court of Cassation, Commercial Chamber, March 3, 1965, Dalloz Sirey. (D. S.) 1965, p. 491.

³ Court of Cassation, Commercial Chamber, March 6, 1978, n° 76-13.306. No published.

⁴ M. Malaurie-Vignal, above, p. 182.

⁵ M. A. Frison Roche– M. S. Payet, above, p.385.

⁶ M. Malaurie-Vignal, above, p. 183.

becomes disloyal and in contrary to honest commercial costumes¹; like the exaggeration in describing the news, and the abused comparative advertising. For example the Court of Appeal of Paris decided that it must be analyzed the fault committed, without focusing on the examination of the validity of the published information².

Thus, what is essential for the existence of an unfair practice is the use of the right of competition by violation of the proper commercial customs and the good faith. Here, this practice (denigration) differs from the defamation offense, provided in article 296 of the Algerian penal code that requires the false diffused allegations about the victim.

2.2.3.2. In practice, publicity is required:

According to the article 27 paragraph 1, the legislator doesn't explicitly stipulate that the denigration must be public; but implicitly this condition is understood logically and linguistically from the context of the words (... *by spreading bad information that affects...*). The terms spreading information mean broadcasting the news to the public, i.e. anyone can access bad information³. The unfair practice is also committed even if no one knows about the allegation, as long as anyone can get it. However, if the bad information is spread within the factory by the boss to hidden employees, there is no denigration⁴.

It must be added that there are no specific material means used by the denigrator, they are different, and vary from one practice to another; so the important item is that the news reaches the public or they can access them; the diffusion can be done through newspapers, advertisements, and comparative advertising, in the television, in Internet, ..., also, by using verbal expressions⁵.

2.2.4. Purpose of the denigration:

In fact, there is no doubt that the purpose of this practice is commercial. It is clear that the competitor -directly or indirectly- uses the denigration for the purpose of attracting the clients of others, or to drive away their clients, and to destroy his competitor commercially, in order to eventually acquire all consumers⁶. This element is presumed through the commission of denigration practice. Because it is impossible, that the merchant does this practice for non-commercial purpose. However, in the case of defamation offense (Article 296) the intention of the perpetrator is to defame the victim in any social environment.

2.2.5. Exceptions to denigration practice:

In fact, in the commercial life, there are some exceptions which lead to make bad information about merchants as permissible act; they are also approved by the French judiciary. The first one is the right of reply, it is a permissible practice among the traders, according to which the enterprise whose reputation has been tarnished in the market, has the right to use the measures of replay⁷, and corrects that, such-and-such merchant has tarnished its reputation, or also if the trade mark of a definite merchant has been imitated, then he has the right to issue a statement announcing that the other competitor's products imitate his trade mark. Here he can identify the counterfeit products. Secondly, is the right of defense in civil associations, as the consumer associations' protection, in condition to be neutral and has nothing to deal with any merchant. According to article 21 of the law n 09/03 they can publish news warning consumers about any dangerous or fake product on the market; and they can conduct comparative experiments between two competing products. Here, the impartiality and objectivity are always required in conducting experiments⁸. Thirdly, in the law related to copyrights, according to the freedom of expression, and the Article 42 paragraph 1 of the Ordinance No 03/05, of July 19, 2003, relating to Copyrights and neighboring rights, any actor can use the parodies on definite oeuvre, (movie, song, sitcom ...) and same

¹ M.- A.Frison-Roche, M.- S. Payet, above, p.390.

² C.A. Paris, Sep. 26, 1991, Dalloz collection (D) 1992, Som.342, obs. M.- L. Izorche.

³ Y. Serra, Encyclopedia Dalloz, Com. Law, Unf. Compe. (Armand Colin: Paris, 2004) 44.

⁴ M. Malaurie-Vignal, above, p. 185.

⁵ C.A Versailles 1st Chamber, January 13, 1981, Gazette of Palais (Gaz. Pal.) 1982,1, Somm., 82.

⁶ Court of Cassation, Civil Chamber, December 5, 2006, CCC 2007, In M. Malaurie-Vignal, above, p. 183.

⁷ P. Roubier, above, p. 582

⁸ M. Malaurie-Vignal, above, p. 138.

judgment on the use of parodies on trademarks, this permission was subject to divergence of doctrine, because it can denigrate the intellectual products or trademarks in the eyes of the public¹. Fourthly, the comparative advertising used by the merchants; in Algerian law there is no legal rule that allows the merchants to use the comparative advertising, unlike in French law in the articles L.121-8 and L.121-9 of consumption code, it is allowed only if (...- *it is not misleading in comparison with products or services of the competitor.*

- *It does not cause confusion about competing products or services.*

- *It does not discredit the competitor or his product or services...*)

The French legislator authorized this practice in the law of January 18, 1992 (Modification of the Code of Consumption) after it had been confirmed by the courts and the doctrine². But, the comparative advertising is still a dangerous practice, especially, when it is done by the trader himself.

3. LIABILITIES AND PUNISHMENTS OF DENIGRATION PRACTICE:

The implementation of legal rule is obligatory, especially when it contains punishment against anyone who violates it; and as long as the legislator prohibits the practice of denigration, he provides its punishments, which differ from the proceedings in the civil matters and in the criminal matters.

3.1. Liability and penalty of denigration in the civil proceedings:

The victim of the unfair denigration practice, if he suffers damages, can sue before the commercial jurisdiction³, to recover damages through the Unfair Competition Action.

3.1.1 Conditions for an action for unfair competition:

The action for unfair competition is originally a judicial theory. It was invented and developed by the French judiciary⁴, and it was based on the action of tort liability on the occasion of the lawsuits of merchants against their competitors who had acted in contrary to the trade practices or to the laws and regulations in force. Also, it had been subject to doctrinal divergence concerning its legal basis⁵, and then the French judiciary was basing it on the articles 1882- 1883 of the civil code, that have become articles 1240-1241 about the tort liability.

In Algerian law, this case is based on the article 124 of the Algerian Civil Code and the articles 26-27 of the law n 04/02 (aforementioned). Thus, the victim of the denigration practice must prove before the commercial jurisdiction: the fault, the damage and a causal link between the fault and the resulting damage.

3.1.1.1 The fault:

In the Algerian civil law as the French law the fault to be existent, it needs two elements: the moral element, which is the legal liability of the person and the material element which, is the infringement of the right of others. In the French law the fault in the unfair competition action must be proved by the plaintiff, who must prove that the defendant commits a wrongful act, which is contrary to the law or to the usual business practice⁶; but in the Algerian law, the legislator like the World Intellectual Property Organization, in the Paris Convention 1883 (aforementioned), has

¹ Court of Appeal of Paris, October 26, 1994, PIBD, 1995, n. 579, 3, in C. Etrillard, Parody in Trade Mark Law, (2003) 4 Legal Journal of the West 437-459.

² Court of Cassation, Commercial Chamber, July 22, 1986., Dalloz collection (D), 1986, p. 436.

³ It should be noted that the commercial disputes are under the subject-matter jurisdiction of the commercial section in the Tribunal (article 531bis of the C APC, but if the case is between trader and non-trader, the dispute is under the jurisdiction of the civil section of the Tribunal, according to article 32.

⁴ At first it had existed four types of unfair practices then the Dean P. Roubier added the parasitic behavior as the fifth practice.

⁵ It is real action to protect the goodwill - it is action of tort liability for commercial damages - it is disciplinary action applied to traders who violate the fair commercial practices.

⁶ Y. Auguet, above, p. 56.



listed the unfair commercial practices in the articles 26-27 of the law 04/02; and the article 27 enumerates eight commercial practices that are considered as unfair practices by force of law.

Here the victim only has to prove the denigrating practice, because according to this article it is in itself an unlawful act by force of law, and it forms the fault of the trader, unlike in the French law the legislator did not limit the unfair practices in one legislation rule to the unfair competition, even if he enumerates the list of the unfair commercial practices, under the title the False Commercial Practices article L. 221-1, in the consumption code, that is not related to our issue; but, there is a legislation rule containing the comparative advertising in the articles from L 121-8 to L.121-15-3, especially in the paragraph 2, which stipulates: (the comparative advertising cannot : ...2- lead to the discredit or the denigration on the trade marks, business names, other distinctive signs, goods, services, activity or competitor situation...) thus, this paragraph can be applied if the denigration practice is committed by using the comparative commercial advertisement.

The fault of denigration could be intentional when the unfair trader acts with determination to discredit the reputation of his competing; as statements in the social media aimed at smearing the image of the merchant that he is deceitful. Besides, the fault can be committed by negligence when the competitor unintentionally get harm to other competitor¹, for example, by using a comparative advertisement, while he was comparing his product with other product, he explained subjectively and deeply the negative points of the second product, the act that tarnished its reputation in the eyes of consumers, even if without determination to denigrate

Here in the civil case as we aforementioned in the first part, the fault of denigration must be committed publicly, with false or true allegations. Besides, the competitive situation must be proved between the two parties (plaintiff and defendant); it is better to prove that the two parties or the two products have the common consumers; but the fault can also exist when the activities or the products are assimilated in close proximity. but, the recent French judiciary doesn't require this strict situation.

3.1.1.2 Damages:

In the civil law as disposed in the articles 131 - 183 of the civil code, the damage is a loss that happens to a person, in his body, honor, personality, his property ...and what a person missed to earn. So, according to the legislator in article 26 of the law 04/02, in the unfair competition action the damage touches the economic interests of the economic agent², it can hit his commercial reputation; such as cancellation of purchase orders, or collective resignations of his employees, and overstock ..., here the judge can design a financial expert to assess all the commercial damages; also in the denigration harms the victim can suffer non-pecuniary damages; for example the false accusation on his personality which touches him in his honor, such as dissemination of news about definite trader as he was drug trader.

Furthermore, what characterizes this action in the commercial jurisdictions is the probable damage that is enough to accept it³; i.e., even if without real damages the judge can condemn the defendant, when he examines the existence of the denigration fault and the commercial and moral harms that may happen in future. And that what it is applied in the French judiciary, which justifies it as the unfair competition action that is a judicial means to protect the goodwill, or it is a disciplinary action against traders who violate the fair and the honest business rules.

3.1.1.3 Causal links:

In the article 182 of civil code the damage must be the direct result of the fault, and not the cause of another act. The same judgment in the unfair competition action, the commercial damages or the moral damage must result, for example, to the allegations that had tarnished the reputation of

¹ M. A. Frison Roche and M. S. Payet, above, p.388.

² Y. Auguet, above, p. 57.

³ Court of Cassation, Commercial Chamber, April 16, 1971, Bulletin of Decisions of the Civil Chamber of the French Court of Cassation (bull. civ.) 6, n° 48, p.45; C. A. Paris May 24, 1995, Dalloz collection (D.), 1996, Somm., p. 252, Obs. Izorch.



the victim trader; or the clients canceled their purchase orders immediately after they had heard the bad news about the seller; here the damage can be remarked by comparing the turnover of the victim trader before denigrating him/her and after the practice. In this action the damage is called the competitive damage¹. But this condition, unlike in the material losses, is not more required in the non-material damages, such as in the honor damages².

3.1.2 Consequences of Unfair Competition Action:

The penalty in the civil rules is characterized by the compensation, and the court can also order to the other measures.

3.1.2.1 Compensation:

According to the tort liability law, if the person has caused damage to others, he is obliged to pay compensation as a remedy of his wrong to the victim³, and in French law the case is based on the articles 1240 -1241 of the Civil Code. Then, in the Unfair Competition Action by denigration practice the compensation differs according to the type of damage; in the pecuniary-damages for example the commercial loss, that happens because of the false statement in the social media, that leads the clients to decide to cancel the purchase demands, here the judge can design an expert to assess the compensation according to the volume of the material losses⁴. But as for the non-pecuniary damages, if the victim had been touched in his honor by the hurtful words, the judge will award the victim a lump sum compensation for the moral damages, since it is difficult to evaluate them.

Sometimes, in the French commercial jurisdictions, the courts have condemned the wrong competitors for the unfair competition to pay the compensation even if the victim hadn't suffered from any damage, as the probable damage; here the doctrine justifies these decisions, since the unfair competition action is characterized by its disciplinary nature⁵. It is the judicial means against unfair traders to refrain from repeating the unfair practice.

3.1.2.2 Cessation of the unfair practices:

The action of unfair competition in the civil rules authorizes the victim, to demand before the commercial jurisdiction the issuance of a judgment or measures to stop the unfair practices⁶. This is applied in the French jurisdiction and is confirmed by the commercial doctrine basing their opinion, that the unfair competition is a real action to protect the goodwill. To addition to having a disciplinary side against who violates the normal rules of the competition; this action is a legal means for the victim to obtain compensation, as well as a preventive means against other new practices⁷. For example, the victim of the pejorative allegation in the advertising panels can demand the court to oblige the wrongful trader, who does it to stop publishing this advertisement. In the civil procedures, if the case is urgent, and the damage is imminent, the victim of the denigration can file an urgent lawsuit through the summary proceeding matters, before the judge of the summery proceedings⁸, in order to obtain an immediate injunction obliging the defendant to immediately stop publishing the comparative publicity; furthermore, at the plaintiff's request the judge can order with a threatening fine for each day of delay.

3.1.2.3 Publication of the judgment:

¹ Y. Serra, above, n 228.

² Court of Cassation, Commercial Chamber, 09/02/1993, n. 91.12.258, Bulletin of Decisions of the Civil Chamber of the French Court of Cassation (Bull. civ.), n° 53.

³ Article 124 of Algerian Civil Code.

⁴ Y. Serra, above, n 228.

⁵ J. Blaise, *Business Law*, 2nd ed (LGDJ: Paris, 2000) 348.

⁶ Conference in France may, 5 2002 « Customer Acquisition and Competition Law » Unfair Competition: Civil Fines or Punitive Damages, CREDA, in <http://www.creda.fr>

⁷ Y. Serra, above, n. 115.

⁸ Articles 299 and 303 of C.A.P.C.

With regard to the French commercial doctrine and the judicial courts, the victim may request the judge to order the publication of the judgment condemning the erroneous, as it is a measure of remedy of the non material damage¹, whether in newspaper or in the other means of media. In the Algerian media law N° 23/14, the victim of denigrating statements has the right to replay and correction according to the articles 37 to 43, as a reaction measure to avoid any tarnishing of his reputation, especially in the media means.

3.2. Liability and punishment of denigration in the penal matters:

In the area of criminal law, we must deal with the crime of denigration, its punishment, and its pursuit proceedings.

3.2.1 Denigration crime:

The Algerian law has criminalized the unfair commercial practices in the same law N° 04/02 in the article 38 that provides penal punishments; unlike the French legislation that didn't criminalize it, except the unfair comparative advertising in articles L.121-9 -L 121-11 -L.121-14 which provide for the application of the criminal penalties of the articles L. 121-1 to L. 121- 7 of the consumption code. And as it is clear, the Algerian legislator like the French penal law divides the criminal offenses into three categories, classified according to the seriousness of the criminal act and the sentence period, (contravention, medium offense, serious crime)², in which, on the article 38 of the law 04/02 the denigration offense is the medium seriousness offense like the French comparative advertising offense.

Thus, the denigration crime must be fulfilled three elements: The first element is the legal status of the offense, it's the legislative rule that criminalizes the practice associated by the penal sanction in the article 38 of the law 04/02; and the second element is the material act (act of conduct) that is mentioned in the article 38 as unfair denigration, it must fulfill its conditions that are: the offender must have the quality of Economic Agent as aforementioned, and the act of all behaviors that tarnish the reputation of other economic agent, or of his products or services, whether with true or false information, as we aforementioned. And then the wrong act must be public; by way of the material element of the denigration in the French comparative advertising is almost the same behavior in the Algerian law³. In addition, the third element is the criminal intent, it is the criminal responsibility of the person and his intention to commit the offense, here the denigration crime is voluntary offense; i.e. the perpetrator must know that he is going to abuse the reputation of another economic agent, and determines to commit the unfair practice.

3.2.2 Prosecution of the crime:

Regarding to the denigration offense as it is provided in the law n 04/02 with just the fine punishment from 50000 A.D. to 5000000 A.D., it is qualified as medium offense. Then, this crime in the law N° 04/02 can be proved by the official reports of the judicial police officer, and after drawing them up⁴, he transmits the penal file to the competent prosecutor of the Republic in the penal court, and this one can exercise the public prosecution by referring the file and the perpetrator directly to the penal section of the Tribunal with the direct citation procedures⁵, or on the other hand the prosecution can be also initiated by the injured party, who can file a claim directly to the competent judicial police officer or to the prosecutor of the Republic, who will refer the file to the penal section of the Tribunal.

And in the session of the trial, which must be public and contradictory (article 342 of P.P.C.), the presiding judge shall hear the accused and bring to him the proofs of the crime, then he shall let the victim speak, and as a civil party, he can demand the compensation for all damages, and then

¹ Y. Serra, above, n° 233.

² (Felony- Misdemeanor - Petty Offense) in UK, is as French penal law divides it in three categories: (summary offence -either way offence- Indictable only offences)

³ Article L 121-9 of the French consumption code.

(...2° Lead to the discredit or denigration of the trademarks, trade names, other distinctive signs, goods, services, activity or situation of a competitor;...)

⁴ Article 55 of the law 04/02 (aforementioned)

⁵ Article 337 of the APPC.



the judge shall let the prosecutor of the Republic to present his requests of the penal punishment against the accused; and then the accused shall have the right to defend himself, whether by himself or assisted by a lawyer¹. And finally the judge after a legal deliberation he pronounces publicly the penal punishment by judgment and can oblige the accused to pay the damages to the victim (civil party). This sentence can be reviewed by ordinary or extraordinary means of review.

3.2.3 Penal punishments of denigration offense:

In regard to the denigration crime that depends on the business criminal law, it is characterized by the high penalty fine, which is the fine of 50000 AD to 5000000 A. D., as basic penal punishment², in addition the legislator provides other complementary penal punishments which are the publication of the condemnation judgment in the national news papers or in the places determined by the court (article 48 of the law 04/02). Also, the judge can apply the other complementary punishment in the general rules in the Penal Code.

In the case of recidivism, the judge can double the basic punishment and the penal sanction can reach to the imprisonment from 3 months to one year. And he can pronounce the complementary sanctions which are the radiation from practicing the profession, and the radiation from the Official Trade Register³.

It is necessary to add that in the denigration offence, the legislator doesn't provide the penal liability for the legal person about the commitment of the unfair commercial practices, there is no legal article or paragraph that provides it. This is unlike the defamation offence in the penal code.

In the French law the offense of the unfair comparative advertising is codified in the articles L. 121-9 -L.121-11 -L.121-14 which refer to the application of the penal sanctions of the articles L. 121-1 to L. 121- 7 of consumption code; the article L. 121- 6 provides the penal sanction, which is two years of imprisonment and a fine of 300 000 €, as basic sanction; and it also provides complementary sanctions as the publication of the judgment (L. 121- 4) and the cessation of the practice (L. 121- 3). Moreover, the judge can apply the complementary sanctions of the common rules in the penal code. And, if the legal person is responsible for this offense, it will be subject to the penal sanction (the last paragraph of the article L. 121- 7)

4. CONCLUSION:

In conclusion, it can be confirmed that the Algerian legislation did well, by codifying the unfair commercial practices, especially the commercial denigration. And it is right, because it deals with all the issues of the denigration's practice. Whether about the persons who are subject to the law n 04/02, merchants and civil professionals, or about the subject matter of the denigration which is extended, or then the diffused information which is true and false...; so the legislator treats the whole of practice's issues, unlike for example the criminal offense of defamation, which requires the false allegations.

He also provides punishments against the trader who commits this unfair practice, whether in civil matters through the unfair competition action, which must be brought to the commercial section in the tribunal or civil section or in the criminal matter when he has criminalized the unfair competition practice in the article 38 of the law 04/02. Thus, in general, those legal rules help to protect the economic agents in practicing the trade and the industry, in which they facilitate the task to the courts to find regularly and quickly the litigations' resolves.

However, the French legislation didn't codify the unfair competition, neither in the civil rules nor in the penal rules, except the interdiction of the comparative advertisement in the consumption code, but it stiles far to our issue; perhaps because the French legal system has kept the same tradition about the unfair competition action which was the invention and amelioration of the commercial judiciary and doctrine.

¹ Article 353 of the APPC.

² Article 38 of the law 04/02.

³ Article 47 of the law 04/02.

Also we can conclude that unlike the defamation, which is committed by any person against any person, the denigration is committed only by the economic agent against another competing economic agent; and the subject matter of the defamation is the honor or the reputation of the persons, but in the denigration its subject matter is the person of the economic agent or his/her business or his/her products or services; then, in the defamation the law requires the false allegations. In contrast; the denigration exists even if with true allegations; also the aim in the denigration is commercial, but in the defamation is committed to decry the victim. Therefore, in some cases it can be one practice that can be qualified as defamation and at the same time as denigration.

5. BIBLIOGRAPHY:

5.1. Books:

- [1] M. A. FRISON ROCHE and M. S. PAYET, *Competition Law*, 1st edn (Daloz: Paris, 2006)
- [2] M. MALAURIE-VIGNAL, *Interne Competition Law* (Armand Colin: Paris, 1996)
- [3] J. BLAISE, *Business Law*, 2nd edn (LGDJ: Paris, 2000)
- [4] P. ROUBIER, *Industrial Property Law*, (Sirey : Paris, 1952)
- [5] Y. AUGUET, *Competition Law* (Ellipses: Paris, 2002)
- [6] Y. SERRA, *Encyclopedia Daloz, Commercial Law, Unfair Competition* (Armand Colin: Paris, 2004)

5.2 Articles :

- [1] -C. ETRILLARD, *Parody in Trade Mark Law*, (2003) 4 *Legal Journal of the West* 437-459.
- [2] -L. Mary, *Passing Off and Unfair Competition: Conflict and Convergence in Competition Law* (2011) 784 *Scholarly Works*. In <https://scholars.law.unlv.edu/facpub/784>
- [3] -L. MERLAN, *Advertising: the Reference to the Defects of a Non-Competitive Product is Lawful?* (2002) *Law 21, Chr., AJ* 179.

5.3. Conference:

- [1] Conference in France May, 5 2002 « Customer Acquisition and Competition Law » Unfair Competition: Civil Fines or Punitive Damages, CREDA, in <http://www.creda.fr>.

5.4. Laws:

- [1] -Ordinance No 03/03₂ of July 19, 2003, Relates to Competition, Official Gazette, No 43 for the year 2003. (Amended and completed)
- [2] -Law No 04/02 of June 23, 2004, Relating to the Rules Applicable to the Commercial Practices, Official Gazette, for the year 2004, (Amended and completed)
- [3] -Law No 09/03 of February 25, 2009, Relating to Consumer protection and the Fraud Suppression, Official Gazette, No 15, 2009. (Amended and completed)
- [4] -Algerian Civil Code.
- [5] -Civil and Administrative Procedures Code
- [6] -Algerian penal procedures code.
- [7] -French consumption code.

5.5. French collections:

- [1] *Directory of the Industrial Property*, (Ann. prop. ind.).
- [2] *Bulletin of Decisions of the civil chamber of the French Court of Cassation*. (bull. civ.)
- [3] *Gazette of Palais*. (Gaz., Pal.)
- [4] *Periodic Juris-Classeur, General Edition*. (JCP, éd. G.)
- [5] *Distribution Lettre* (lettre. Dist.)
- [6] Daloz collection (D)
- [7] Daloz Sirey. (D. S.)
- [8] *International Journal of the Industrial Property*. (R.D.P.I.A.)