

## EXAMINING THE ENFORCEMENT MECHANISMS OF UNFAIR COMMERCIAL COMPETITION IN THE LEGAL SYSTEM OF AFGHANISTAN

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**Abstract.** Fair competition in the marketplace benefits consumers, sellers, and society; however, in some cases, certain traders may resort to unfair methods or violate competition laws and harm each other's commercial interests. In such cases, the issues of civil and criminal liability arise from unfair competition. Unfair competition can be defined as any competition that is conducted contrary to the norms of honorable conduct and trade. It is an aggressive behavior that arises from the misuse of a specific freedom related to commercial activities that is not inherently prohibited and is permissible when used normally. The legislator has defined acceptable methods and fair competition to maintain market order and gain profit, and traders must use these legal methods in their transactions to avoid causing disorder in the market and harm to others. This article examines the enforcement mechanisms arising from unfair commercial competition in the legal system of Afghanistan. The findings indicate that the enforcement mechanisms arising from unfair competition in the legal system of Afghanistan include: compensation for damages, restoration of the previous state, monetary fines and in some cases imprisonment.

**Keywords:** Compensation for damages, competition, unfair competition, enforcement mechanisms, legal system of Afghanistan.

## ИЗУЧЕНИЕ МЕХАНИЗМОВ ПРИНУЖДЕНИЯ К НЕДОБРОСОВЕСТНОЙ КОММЕРЧЕСКОЙ КОНКУРЕНЦИИ В ПРАВОВОЙ СИСТЕМЕ АФГАНИСТАНА

**Аннотация.** Честная конкуренция на рынке приносит пользу потребителям, продавцам и обществу; однако в некоторых случаях некоторые торговцы могут прибегать к недобросовестным методам или нарушать законы о конкуренции и наносить ущерб коммерческим интересам друг друга. В таких случаях из-за недобросовестной конкуренции возникают вопросы гражданской и уголовной ответственности. Недобросовестная конкуренция может быть определена как любая конкуренция, которая ведется вопреки нормам честного поведения и торговли. Это агрессивное поведение, которое возникает из-за злоупотребления определенной свободой, связанной с коммерческой деятельностью, которая по своей сути не запрещена и допустима при обычном использовании. Законодатель определил приемлемые методы и честную конкуренцию для поддержания порядка на рынке и получения прибыли, и торговцы должны использовать эти законные методы в своих сделках, чтобы не вызывать беспорядок на рынке и не причинять вред другим. В этой статье рассматриваются механизмы принуждения, возникающие из-за недобросовестной коммерческой конкуренции в правовой системе Афганистана. Результаты показывают, что механизмы принуждения, возникающие из-за недобросовестной конкуренции в правовой системе Афганистана, включают: возмещение ущерба, восстановление прежнего состояния, денежные штрафы и в некоторых случаях тюремное заключение.

**Ключевые слова:** Возмещение ущерба, конкуренция, недобросовестная конкуренция, механизмы принуждения, правовая система Афганистана.

## **Introduction**

Since ancient times, civil and criminal liability has existed among commercial competitors when conditions for compensation for damages are met. According to the legal principle ( لا ضرر (و لا ضرار), it is not permissible for anyone to cause material or moral harm to another. Fair and honest commercial competition in the market secures the interests of society and consumers and is accepted by all legal systems including Afghanistan. Whenever competition occurs against laws, customs of traders and market practices it is deemed unfair which is addressed in both national and international laws. Engaging in unlawful commercial practices will result in civil and criminal enforcement mechanisms. In the legal system of Afghanistan, several laws have been enacted regarding competition protection such as the Competition Protection Law approved in 1388 (2009) consisting of 5 chapters and 35 articles. The procedure titled "Matters Related to Competition Protection" states in Article 1, Clause 2 that this procedure has the following objectives:

1. To establish and prevent anti-competitive activities in the market to ensure fair competition.
2. To prevent market monopolies.
3. To address complaints from real and legal persons who have suffered from unfair activities.

This article will elucidate the enforcement mechanisms of unfair commercial competition within the legal system of Afghanistan, initially defining the linguistic and terminological aspects of competition and then discussing civil and criminal enforcement mechanisms in accordance with applicable laws.

**Research Objective:** In this Article we will explain and clarify the enforcement mechanisms of unfair commercial competition in the legal system of Afghanistan.

**Research Question:** What are the enforcement mechanisms for unfair commercial competition in the legal system of Afghanistan?

**Importance of Research:** It should be noted that competition in trade and product manufacturing boosts the economy. Without creating an environment for fair and legitimate competition, if capital and production are not done in the light of security and legal protection, only fraudulent profit-seekers benefit from investment markets. The income and profit levels of individuals in trade depend on their number of customers. Traders strive to capture a suitable market share and attract more customers, provided that this is done through permissible means outlined in laws and trader customs. If a trader uses illegal means or violates customs to attract customers from competing traders, or causes harm to a competitor through unlawful means such actions are considered unfair competition. Given the novelty of the topic of unfair competition in our country's legal literature, the concept of unfair commercial competition and compensation for damages resulting from it has not been clearly articulated. This research aims to elaborate on legal literature comprehensively.

**Research Methodology:** This article is fundamental in nature, employing a descriptive-analytical approach. Data collection was conducted through library research by consulting credible sources available in both digital and traditional libraries using note-taking tools, leading to findings through data analysis.

## **Definition of Concepts and Terminology**

### **Linguistic Concept of Competition**

Competition, in its linguistic sense, refers to guarding, waiting, rivalry, expectation, or emulation (Amid, 138: 490).

### **Terminological Concept of Competition**

The UK Competition Commission defines competition as a set of activities and disputes among companies to achieve success in trade and dealings with customers over a specified period (Ghafari, 1390: 9). Some scholars view competition law as a set of criteria aimed at protecting the process of competition in a free market, where the determining factors of profit and loss are solely the supply and demand for products rather than government regulations (Vakili Moghaddam, 1389: 18). The only law that addresses competition in the legal system of Afghanistan is the Competition Protection Law approved in 1388 (2009). In part 8 of Article 3 of this law, competition is defined as: "A state in which a number of producers, buyers, and independent sellers operate in the market for the production, purchase, or sale of similar goods or services in such a way that none of them has the power to individually determine the quantity and price in the market." The legislator in our country has defined the economic model of competition rather than explaining the nature of commercial competition itself. However, it has not addressed the essence of competition, which is the effort to attract more benefits and increase profits in the market.

### **Unlawful Competition**

Unlawful competition refers to actions or practices committed by traders—such as merchants, doctors, craftsmen, or artists—to attract customers or those they collaborate with through dishonest and irrational methods (Langarudi, 1385: 338). The well-known Black's Law Dictionary describes unlawful competition as a term that generally applies to all unlawful or deceptive competitions in trade but specifically refers to attempts to replace one's goods or products in the market with those of others in equity courts (Black's Law Dictionary, 4th edition, p. 1699). International regulations and national laws have not defined unlawful competition; this matter has been left to the judiciary and legal scholars. Particularly since unlawful competition is so broad and extensive that defining its scope is very challenging (Hamidullahy, 139: 40). In Afghanistan's Commercial Law, which dedicates a chapter to illegal competition, unlawful competition is not defined; instead, only its provisions are stated. However, one author in Afghanistan's legal system has defined unlawful competition as the misuse of a legitimate right in performing an act that indicates the use of any wrongful means employed to attract customers from other traders, such as predatory pricing or spreading false rumors about a trader (Janbaz, no date: 25). Alternatively, unfair (unlawful) competition is described as competition that is not consistent with commercial customs and generally stems from unlawful practices such as:

- Advertising against a trader to create suspicion or misunderstanding;
- Disrupting the internal order of competing commercial companies;
- Imitation;
- Creating doubt among customers or consumers (Stanakzi, 138: 70).

In other words, unlawful competition refers to activities that are rejected by collective consciousness and are not tolerated by public interest; rather, those who commit such acts are punished and held accountable for the damages incurred (Zamani Bisheh, 1396: 40).

According to part 2 of Article 10 of Paris Convention, unfair (unlawful) competition is defined as any competition that violates customary fair practices in commercial and industrial matters. Part 3 of the same article specifies actions that should be explicitly prohibited. According to this clause, the following actions must be declared prohibited:

1. Any act that creates confusion in any way with a competitor's company or products or industrial or commercial activities;
2. Specifications or statements that mislead the public regarding the nature, manufacturing method, distinguishing characteristics, usability, or quality of goods;
3. False statements on trade cards that undermine the reputation of a competitor's institution or products or their industrial or commercial activities (Pilwar, 1402: 66);

### **Enforcement Mechanism of Unfair Commercial Competition**

#### **1. Civil Liability for Unfair Competition**

Since individuals in a society possess different individual, social and personal characteristics each has different rights. Legislators soon realized that no one should cause harm to others and that no harm should remain unaddressed, and the field of law does not support actions that cause harm to others (Katouzian, 1393: 25).

Civil liability refers to the responsibility that has the potential to be evaluated in monetary terms. For instance, if someone damages another's property or causes harm to it, they are considered responsible for their actions and must provide compensation (Bashliyah, 1389: 62).

Compensation for damages is a common aspect that courts often address in their rulings, issuing decisions in favor of the party harmed by unfair competition. It is clear that the trader harmed has a right to compensation from the time the harmful act occurs, although the amount and method of payment are determined by the court. As stipulated in Article 781 of the Civil Code: "The method of compensation for damages shall be determined by the court, taking into account the circumstances." The harm that results from unfair competition for a trader can be both material and moral. Material harm may include spreading rumors that a competitor's products contain harmful substances, while moral harm may involve the misuse of trademarks and business names. According to Article 778 of the Civil Code in addition to material damage, moral damage is also compensable. Moral damage includes aspects such as being knowledgeable, being an inventor, being a poet and having a business title, which hold value and moral character; an individual possesses these attributes during their lifetime and enjoys the privileges associated with them (Samangani, 1390: 135-134).

The damage that must be compensated has to be actual rather than potential. Actual damage is damage that has occurred or will certainly occur in the future, and compensation for damage caused by unfair competition can be of two types:

**A. Restitution:** This is considered the best form of compensation because it fully restores and pays the damage. It returns the situation to its previous state, and the court can rule at the request of the injured party from unlawful competition that the situation be restored. For example, a judge may order the removal of a trademark or business name that the competitor has unlawfully used or direct that a trademark illegally affixed to a product be removed, and any advertisements that harm the reputation and goodwill of the trader be eliminated (Hamidullahy, 1394: 250). As stipulated in Article 55 of Afghanistan's Commercial Law: "If there is confusion between the signs

and names used by one trader and those lawfully used by another trader, such use of names and signs by the first trader is prohibited. A person who acts contrary to this ruling, even if without fault, may still be ordered by the court, at the request of an interested party to rectify the confusion (restore the previous state)."

**B. Compensation for Damages:** Compensation can be made in cash or non-cash forms. If a competitor suffers moral damage affecting their reputation, status, and credibility, then non-cash compensation becomes relevant. In practice, judicial precedent typically awards moral damages when a trader's reputation, status, and credibility have been harmed. This compensation occurs through the publication of a judgment condemning the perpetrator of unlawful competition at their expense in social media platforms so that individuals are made aware of the falsehood of rumors against them concerning their reputation, status, and credibility. However, cash compensation is determined based on the extent of the incurred damage and lost benefits (Hamidullahy, *ibid*: 252).

Article 62 of Afghanistan's Commercial Law states: "A commercial information representative who intentionally or through gross negligence provides false information about a trader's ethics or financial standing shall be liable for compensating both material and moral damages incurred by that trader. The representative's statement correcting that information cannot absolve them. The court may simultaneously order that the issue be published at the representative's expense in one or more newspapers." This article considers both types of compensation—material and moral—and also places the determination of compensation amounts on the court.

Furthermore, the Competition Protection Law stipulates in Article 24: "1. Individuals who suffer as a result of anti-competitive practices outlined in this law may seek compensation by referring to the competent court. 2. If the amount of compensation cannot be established based on documented evidence, it shall be determined based on the balance sheet of the previous year. 3. If the incurred loss results from intentional agreements between parties, the violator is obliged to pay double the compensation for the incurred damages."

**2. Monetary Penalties:** According to Article 26 of the Competition Protection Law, if entrepreneurs, traders, institutions or companies engage in acts listed in Article 8 of this law, they shall be punished as follows, depending on the circumstances:

1. In the case of committing acts listed in parts (1 and 4) of Article 8 of this law, a monetary penalty of no less than five million Afghani and no more than five million five hundred thousand Afghani shall be imposed.

2. In the case of committing acts listed in parts (2, 3, 5, and 10) of Article 8 of this law, a monetary penalty of no less than one million Afghani and no more than one million five hundred thousand Afghani shall be imposed.

3. In the case of committing acts listed in part (6) of Article 8 of this law, a monetary penalty of no less than four hundred thousand Afghani and no more than five hundred thousand Afghani shall be imposed.

4. In the case of committing acts listed in part (7) of Article 8 of this law, a monetary penalty of no less than three hundred thousand Afghani and no more than five hundred thousand Afghani shall be imposed.

5. In the case of committing acts listed in part (8) of Article 8 of this law, a monetary penalty of no less than two hundred fifty thousand Afghani and no more than three hundred fifty thousand Afghani shall be imposed.

6. In the case of committing acts listed in part (9) of Article 8 of this law, a monetary penalty of no less than two million five hundred thousand Afghani and no more than three million Afghani shall be imposed.

7. In the case of committing acts listed in part (11) of Article 8 of this law, a monetary penalty of no less than one million Afghani and no more than three million five hundred thousand Afghani shall be imposed.

8. In the case of committing acts listed in part (12) of Article 8 of this law, each shall be subject to a monetary penalty of no less than five hundred thousand Afghani and no more than two million Afghani.

9. In the case of committing acts listed in part (13) of Article 8 of this law, a monetary penalty of no less than two million Afghani and no more than two million five hundred thousand Afghani shall be imposed.

10. In the case of committing acts listed in part (14) of Article 8 of this law, a monetary penalty of no less than five hundred thousand Afghani and no more than six hundred thousand Afghani shall be imposed.

Additionally, the Penal Code in Chapter Ten, Section One, under the title "Unlawful Competition in Commercial Matters," states in Article 753: If a trader maliciously commits any of the following acts, they shall be punished with a monetary fine ranging from fifty thousand to one million Afghani:

1. Deception or scheming in commercial matters.
2. Publishing false information that harms another trader's interests or business.
3. Spreading false rumors regarding the origin or characteristics of goods or the significance of their own business to attract customers from other traders selling similar goods, as well as announcing certificates and rewards that have not been legitimately obtained through deception.
4. Inducing employees of another trader or factory to inform about customers and attract them.
5. Providing false certificates or testimonials for services to deceive another trader.
6. Presenting false information regarding the financial integrity or ethics of another trader.

Although this article does not define unfair competition, it merely lists examples thereof. The primary purpose of this article is to prevent illegal methods aimed at gaining unjust profit or causing harm to another person in commercial matters (Explanation of the Penal Code, 1398: 170).

**3. Imprisonment:** Article 761 of the Penal Code states: A person who colludes with others to monopolize a market outside the situations mentioned in the section on hoarding, resulting in artificially inflated prices in the market or causing financial harm to other traders, shall be sentenced to short-term imprisonment (from three months to one year). Article 766 under the title "Fraud in Commercial Transactions" states: A person who intentionally causes an increase or decrease in the prices of goods through the dissemination of various events or false news or propaganda, or through other acts involving fraud or deception, or conceals a product ready for

consumption shall be sentenced to short-term imprisonment or a monetary fine ranging from thirty thousand to one hundred thousand Afghani.

### **Conclusion**

Based on the title of this article and the research conducted regarding the enforcement mechanisms for unfair commercial competition under Afghan commercial laws, we reached the following conclusions:

- Competition in trade and production boosts the economy; without creating an environment for legitimate competition, if capital and production are not secured and legally protected, only fraudulent individuals benefit from investment markets. Any activity that harms a competitor's interests or attracts profit at their expense or threatens their welfare is considered unfair competition when carried out through illegal means.

- The civil enforcement of unfair commercial competition based on Afghan laws includes compensation for damages and the removal of confusion or restoration to the previous state, while criminal enforcement includes monetary fines, short-term imprisonment from three months to one year and doubling the penalty in case of repeated offenses.

- Damages must be compensated if they are actual, not merely potential. Actual damages are those that have occurred or will certainly occur in the future. Compensation for damages resulting from unfair competition can be of two types: the first type is restitution, which is the best form of compensation; it requires the offender to restore the situation to its original state. This means that the affected party requests the court to issue a ruling for restoring the situation to its original state, which is also accepted in Article 55 of the Afghanistan's Commercial Law. The second type of compensation is usually in cash or non-cash form; in cases of moral damage (harm to reputation, prestige, or credibility of a trader), non-cash compensation is considered.

- The determination of the amount of compensation and the method of payment is the responsibility of the court. As stated in Article 781 of the Civil Law: "The method of compensation for damages shall be determined by the court, taking into account the circumstances."

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