

## **How to fight abuses of dominant position done by way of IP claims & denigration?**

**When a competitor which used to reign as a warlord in a particular market becomes challenged by a new player, this competitor may use tactics such as systematic and heavy-handed enforcement of alleged intellectual property rights, as well as aggressive smearing and denigration campaigns, to deter this new entrant. The situation may soon become untenable for the new kid on the block, as potential customers are scared away and dissuaded by the blows forcefully and repeatedly inflicted upon by the dominant player. What to do if you and your business are targeted**

# by such hyper-aggressive competitor? How can you defend yourself against these abuses of dominant position?



The right balance between intellectual property rights (“IPRs”) and free competition is very difficult to strike, especially in markets and jurisdictions which are hyper protective of IPRs of right owners, like in Europe. When the right owner is manipulative, hyper-aggressive and unprepared to share his or her turf, they may use the so-called enforcement of IPRs to drive any new entrants in their specific market away; thus creating many abuses of dominant position.

## 1. What’s going on?

Nowhere as seriously have I witnessed such anti-competitive behaviour from a competitor occur, than in the automotive sector.

I was instructed to attend a trade show in the South of France, last year in September 2019, in order to assist a Chinese automotive company and its Spanish distributor on their stand, as they were systematically and repetitively subjected to court-ordered police raids and interim seizures, on any European trade fair that they had attended, and were attending, since the launch of their new automotive business two years’ prior.

As you might have guessed, it is their competitor, a German company in a monopolistic situation on that particular segment of the automotive sector, which was behind this constant

derailing of each one of my clients' trade exhibitions in Europe.

None of my clients' trade shows in the USA were perturbed by these court-ordered seizures and police raids and court orders to immediately close down their stand on the tradeshow, based on the allegations of IPR counterfeiting made by such German competitor: no US court was accepting to grant the German competitor such overarching measures to stop free competition on a pretence of infringement of IPRs.

However, each one of the European courts to which such over-the-top interim and immediate measures were requested by such German competitor, in the context of European trade fairs held in Germany, Spain, France and Monaco, happily obliged and granted such court orders. As a result, these interim measures had forced my clients to close down their stand on each of these European trade shows prematurely, because my clients were deprived of their products and prototypes taken away during those police-led raids and seizures on their stands, as well as forced sales and seizures of their prototypes and products, ordered by some of these European courts.

Not only was the German competitor using its monopolistic status to manipulate European courts into driving its Spanish and Chinese competitors (my clients) away, alleging some IPRs infringements right and left, but it also conducted a vast, well-oiled and well-orchestrated denigration and smearing campaign against my clients, through the use of private eyes in various European locations, as well as through listening and taping the phone calls and text messages exchanged by my clients on their mobile phones. As a result, the German monopolist was able to always contact, before my clients, all the trade fair organisers, potential distributors and other third parties and business partners interested in my clients' products, in order to denigrate my clients as "Chinese counterfeiters" who manufactured "dangerous and unfit automotive sea products" (sic). Consequently, European trade

show organisers, potential European distributors and potential European end-consumers of my Chinese and Spanish clients were spooked, and took an enormous amount of convincing and cajoling, in order to establish, or re-establish, a rapport with my two clients.

Thanks to my intervention, during two of my clients' trade fairs in Cannes, France, and Monaco, in September 2019, the humiliating option of having to close down their stand before the end of these trade shows was spared, since I efficiently liaised with the bailiff instructed by the French lawyers of the German competitor, in order to salvage some of my clients' prototypes from a forced sale imposed by the Paris "tribunal de grande instance" on some quaint and unfounded allegations of patent and design infringement made by this German competitor.

I had seen some prior abuses of dominant position, in particular in the fashion sector and the fashion textile trade shows' segment, perpetrated by luxury conglomerates and the largest fashion textile trade fair in the world, in the past. However, this first-hand experience of abuse of IPRs, abuse of dominant position and smearing and denigration campaigns against my automotive clients was on another level.

## **2. What can you do to protect yourself against some abuses of IPRs and of dominant position perpetrated by a competitor?**

The enforcement of IPRs across the European Union ("EU") has been harmonised, to some extent, by the Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (the "**Enforcement directive**"). However, nothing is set out, in the 21 articles of the Enforcement directive about any restrictions on the enforcement of IPRs due to a breach of competition law by the IPRs owner.

Consequently, and since France is extremely protective of IPRs owners, there are no restrictions on how IPRs may be enforced by right owners against third parties, in the French Intellectual property code; provided that any mandatory prior depositing and registration procedures (which are applicable to industrial IPRs such as design rights, trademarks and patents) have been complied with.

Under English law, there are some key restrictions on the ability to enforce IPRs, which include:

- the risk of incurring liability for groundless threats of IPRs infringements, the law of which has been significantly reformed in the United Kingdom (UK) by the Intellectual Property (Unjustified Threats) Act 2017, and
- specific defences to infringement and restrictions on available remedies for each IPR.

Therefore, if your dominant competitor raises some alleged IPRs infringement claims against you and your business in the UK, then you may make the most of these legal tools offered to you, from the “actionable threats” defense, to the “unjustified threats” defense, via UK civil court proceedings.

When an IPRs owner abuses its dominant position, it starts with obtaining some interim IPRs measures, such as the seizures and force sales on my clients’ stands in their trade show, against its competitors. Then, the dominant abuser lodges some IPRs infringement proceedings in front of the competent civil – and sometimes criminal – courts, against its smaller competitors, to obtain some damages for the alleged acts of IPRs infringements.

In France, the “*Tribunaux judiciaires*” (district courts) have exclusive jurisdiction in hearing cases concerning copyright, national trademarks and national design rights; while the

Paris Tribunal judiciaire has exclusive jurisdiction in hearing cases concerning patents and EU rights (i.e. EU trademark and design rights). For example, after the Cannes yachting trade show in September 2019, the German monopolist lodged a fully-fledged patent infringement lawsuit against the Spanish distributor of the Chinese manufacturer, with the Paris Tribunal judiciaire, within 30 days from the day of the seizure and forced sale which took place during the Cannes trade fair. Copyright holders can also take action in the French criminal courts for counterfeiting.

In the UK, IPRs are primarily enforced via civil court proceedings, and the English High Court is the most common venue. IPRs proceedings in the English High Court are heard in the Chancery division, and different specialist lists are available:

- the Intellectual Property Enterprise Court (“IPEC”) can hear any IPRs claim of relatively low complexity and value: the IPEC is suitable for claims which can be tried in two days or less, damages are capped at GBP500,000 and recoverable legal costs are subject to a cap of GBP50,000;
- the Patent Court can hear claims relating to patents, registered designs, semiconductor rights and plant varieties. There is no cap on damages or recoverable legal costs; and
- all other IPRs claims can be heard in the Intellectual Property List of the Chancery Division, of which the Patent Court and IPEC are sub-lists.

The problem, though, is that aside from the above-mentioned “actionable threats” and “unjustified threats” defenses, which can only be invoked in front of UK courts, neither the French Tribunaux judiciaires, nor the English High Court and its specialist lists, can review and decide on any anti-

competitive behaviour and abuse of dominant position claims raised, as a counter-offensive, by the new entrant in a particular industrial sector, which is being subjected to IPRs infringement claims in front of these IP courts by the dominant player in that particular industry.

So, to continue with the example of my Spanish and Chinese clients, the Spanish distributor which is now the defendant in the patent infringement lawsuit lodged by the German monopolist in the automotive sector (the claimant), with the Paris Tribunal judiciaire, cannot make some counterclaims of abuse of dominant position and anti-competitive behaviour, as a counter-offensive, within the scope of that lawsuit with the Paris Tribunal judiciaire. Why? Because the Paris Tribunal judiciaire is not competent to review such claims relating to breaches of competition law: like the other French tribunaux judiciaires, it is only competent to review claims in relation to breaches of IPRs and laws on intellectual property.

So what is a quashed new entrant in this industrial sector to do then, under these circumstances? Well, the first priority is to find and retain expert and very aggressive legal counsel who will defend it against the wrongful allegations of IPRs infringement made by the monopolistic competitor. Such lawyer specialised in intellectual property matters shall also file some counterclaims against such abusive competitor, on behalf of its client, for like-for-like breaches of its client's IPRs, invoking free riding and unfair competition (if in front of French courts) or passing off (if in front of UK courts).

The second priority, for the new entrant being wrongfully sued for alleged IPRs infringement by its dominant competitor, is to simultaneously file a claim against that abusive competitor with the national authorities responsible for reviewing and investigating the competitive effects of conduct related to the exercise of IPRs.

In France, the French Competition Authority ("FCA") is the

independent administrative body that specialises in analysing and regulating the operation of competition on markets to protect the economic public order. Its goal is to supervise the free play of competition in France. It can issue an opinion on the investigations it carries out, which can be subject to appeal only to the Paris Court of appeal. The rulings of the Court of appeal can also be the subject of recourse to the French Supreme court ("*cour de cassation*"). However, any judicial action relating to an infringement concerning the application of competition law can be taken before the Marseilles, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes Commercial tribunals on the first instance jurisdictions.

Therefore, our Spanish and Chinese clients should not only fight the patent infringement allegations lodged by their German dominant competitor in front of the Paris Tribunal judiciaire, but also file some claims against that German competitor with either the FCA, or the Paris Commercial tribunal, for abuse of dominant position and anti-competitive behaviour. The claimants will try to obtain a judgment against these anti-competitive practices, as well as some paid damages for the prejudice suffered.

In the UK, the competition authority is the Competition and Markets Authority ("**CMA**"), which reviews and investigates compliance with competition law. The CMA's remit includes the review and control of the exercise of IPRs insofar as they affect competition. The Competition Appeal Tribunal ("**CAT**") is a specialist competition tribunal and hears appeals against the decisions of the CMA. An appeal from the CAT can be made to the Court of Appeal. Follow-on and standalone claims for competition law damages can be raised in the High court and in the CAT.

As you might have inferred from the above, the new entrant who is subjected to these various IPRs infringement claims by the abusive and dominant competitor, better have very deep pockets



and unlimited wells of patience and resilience, in order to not only fight off an IPRs infringement lawsuit against its monopolistic competitor, but also drive through to completion some well-evidenced abuse of dominant position and anti-competitive behaviour claims in front of the competent competition authorities or courts, in either France or the UK.

It may all be worth it in the long term, though, as the recent high-profile cases dealing with the intersection of competition law and IPRs detailed below attest.

In 2014, the FCA ruled against Nespresso, the market leader for machines and capsules. Nespresso linked the purchase of its capsules with that of its coffee machines, thereby excluding manufacturers of competing capsules. Such exclusionary practices were reported by its competitors DEMB and Ethical Coffee to the FCA, as abuse of dominant position. In the decision issued by the FCA dated 4 September 2014, Nespresso was required to make several commitments intended to remove the obstacles to the entry and development of other manufacturers of capsules that would work with the brands' coffee machines.

In 2016, the CMA fined GSK and two other pharmaceutical companies (the generic companies) in relation to anticompetitive patent settlement agreements. The CMA also found that GSK abused its dominant position in the UK market, by seeking to delay the generic companies' entry into the market.

### **3. What can you do to protect yourself against some the acts of denigration and smearing perpetrated by a competitor?**

A new form of abusive conduct has been identified, namely the practice of dominant companies excluding or reducing competition from competitors, by identifying exactly what non-

price parameters are important for competition, and setting up some strategic campaigns to influence the purchasing behaviour of customers, typically by portraying competing products or services as unsafe and/or inefficient or of significantly lower quality.

These practices are usually referred to as "denigration" and "smearing campaigns". Denigration means to criticize a competitor's products or services in a derogatory manner, ultimately with a view to influencing customers purchasing patterns.

While such practices are usually dealt with under the unfair marketing rules in national legislations, some very serious cases found their way into the competition law arena.

Indeed, in several cases, the denigrating conduct has been part of dominant companies' communication strategies with the clear object of disseminating information to customers about a competitor in order to create an air of uncertainty and/or doubt regarding either the competitor's ability to carry out certain activities or putting a question mark on the quality, safety or efficacy of their products and services.

Denigrating conduct is most often seen in the form of dissemination of negative information based on false or misleading assertions in regard to competing products with the intention of having an impact on customers' purchasing decisions.

Denigration of competitors' products have long-lasting effects in the market because the unjustified doubts or fears can only be overcome with a significant effort by the target company to (re)educate and (dis)prove the denigrating statements in front of end-customers, distributors, etc.

Whilst at the European level, the European Commission has not yet had the opportunity to take a decision on a dominant company denigrating competitor products, there is considerable

body of law at national level under article 102 TFEU, in particular in France.

The French cases have covered not only the pharmaceutical sector, but also the telecoms, electricity and pay-TV industries. Common to all these cases is that the dominant player has attempted to hinder market entry and product switch through denigrating competitor products in a number of different ways. Typically, the dominant company conducted a consistent, widespread strategy of misinformation to people who took or influenced purchasing decisions.

For example, in the matter with my Chinese and Spanish clients, their German dominant competitor would spread the word, before each trade show, that they had been sentenced to paying some counterfeiting damages to such German competitor, by a German court, and that their China-made sea scooters were of inferior quality and breaking all the time. This false information was diffused to the trade fair organisers, by the German competitor, in order to push the trade fairs to refuse access to their show to my clients, who were branded "counterfeiters" by their German competitor. But this denigration was also done with each one of the European potential distributors my clients, with threats made by the German competitor that it would stop trading with the distributor if the latter started any business with the Chinese manufacturer and its Spanish representative.

In France, the FCA has thus in its more than 10 denigration cases consistently held that denigration of competitors or their products, does not constitute competition on the merits and as a result, denigration can constitute an abuse of dominant position in certain circumstances. In French case law, for denigration to infringe article 102 TFEU, four clear elements have to be proven:

- there is denigration of a competitor's product with a

view to obtaining a commercial advantage;

- a link between the dominance and the practice of denigration has to be established;
- it has to be verified whether the statements put forward in the market by the dominant company are based on objective findings or assertions that are not verified, and
- whether the commercial statements are liable to influence the structure of the market.

The denigration cases assessed by the FCA and other European competition authorities have so far turned on the dominant company identifying the most important non-price parameters to be able to compete in a market and concluding that the relevant customer decision process could be influenced by instilling fears or concerns that are then conveyed to decision makers and stakeholders in a systematic and consistent smearing campaign.

Therefore, it seems that abuse of a dominant position as a consequence of denigrating conduct is more likely to be sanctioned in sectors where non-price competition parameters are more relevant than price. The more important a given parameter is, the more critical it is when a dominant company tries to exclude competitors through either false or misleading information, or tries to make information credible in a covert manner.

To conclude, a new entrant in a market, which is subjected to an abuse of IPRs and/or a smearing campaign to systematically denigrate its products, by the dominant player in that particular industry, has more than one string to its bow in order to fight back. However, such new kid on the block must brace himself or herself for lengthy, draining and expensive legal battles, both as a defendant against the wrongful alleged claims of counterfeiting of its IPRs, raised by the

dominant and abusive competitor, and as a claimant in front of the competent European competition authority, through which it will have raised some claims against such competitor for abuse of dominant position, in particular by way of denigration and smearing campaign.

These various legal battles will eventually neutralise the dominant competitor, while having a rigorous and well-organised IPR registration and maintenance strategy in place, for the new entrant in the market, is essential. All new models, products, brands, services should have their respective IPR registered, and then listed in a catalogue of IPRs maintained by the legal counsel of the new entrant. All evidence, and certificates, of registration should be kept and archived meticulously, to anticipate any IPRs infringement claim that the dominant competitor may bring. Non-disclosure and confidentiality clauses should be set out in all the contracts entered into with new employees, distributors, service providers who will assist the new entrant before and during the trade shows (PR agencies, hostesses' agencies, logistics companies, etc).

Our law firm Crefovi specialises in dealing with these types of IPRs claims and IP antitrust claims, so don't hesitate to give us a buzz.

Crefovi regularly updates its social media channels, such as LinkedIn, Twitter, Instagram, YouTube and Facebook. Check our latest news there!

Your name (required)

Your email (required)

Subject

Your message

C E N X