Badmouthing Your Competitor’s Products: When Does Denigration Become an Antitrust Issue?

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Over the past decade, different competition authorities across Europe have begun to identify and pursue a new form of abusive conduct by dominant companies. The authorities are investigating dominant companies that launch strategic campaigns aimed at restricting or excluding competition by portraying competing products or services as unsafe and/or inefficient, or of significantly lower quality. The authorities have generally found this type of abusive behavior in markets where trust in the products is a decisive element and price competition is less important. We broadly refer to such practices as “denigration” in this article.

Interestingly, the European Commission did not bring these denigration cases even though they are primarily based on the prohibition of abuse of a dominant position in Article 102 of the Treaty on the Functioning of the European Union (TFEU). Instead, this development in case law is driven by the Danish, French, and Italian antitrust regulators and was later confirmed by their national courts. The European Court of Justice has also indirectly accepted denigration as an abuse under Article 101 of the TFEU.1 Denigration has become a clear example of how conduct addressed by Article 102 can develop through case law to encompass new types of abuses to ensure that companies with significant market power compete fairly.

It is obviously not unlawful to be good at what you do and become the leading, dominant player in the market. However, European case law has consistently applied the principle that dominant remaining companies are subject to a special obligation not to harm remaining effective competition and are, therefore, limited in their actions to only “compete on the merits.” For example, the European Commission has previously stated:

This implies that conduct which may be permissible in a normal competitive situation may amount to an abuse if carried out by dominant firms. Undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.2

The competition-on-the-merits definition in European competition law is vague. Nonetheless, it is generally understood to mean that dominant companies are only allowed to compete by, for example, having better prices or quality, sharper marketing, providing better before and after sales service, offering a wide range of products, and/or being more innovative.

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1 The Consolidated Version of the Treaty on the Functioning of the European Union (TFEU). The TFEU prohibits agreements between companies that prevent, restrict, or distort competition in the EU and that may affect trade between Member States (anticompetitive agreements). In the United States, the equivalent is Section 1 of the Sherman Act.

Denigration as a Concept Caught by Antitrust Rules

In simple terms, denigration is criticizing a competitor’s products or services in a derogatory manner, ultimately with a view to influencing customers’ purchasing patterns. These practices are normally covered by unfair marketing rules in European or national legislation. They are typically enforced through litigation in courts or by complaints to special regulatory authorities. To oversimplify somewhat, unfair marketing rules are aimed at preventing, for example, untruthful information to consumers or aggressive marketing techniques to influence their choices. These rules are usually adequate in dealing with isolated incidences of unfair marketing. Such legislation is often centered around making sure that companies focus on the qualities of their own products, or comparisons with competing products are based on objective facts.

In more serious cases, denigration has also found its way into the antitrust arena. Certain cases have even caught the attention of the European antitrust regulators when dominant companies have instituted systematic campaigns against competitors and denigrating conduct has formed the central part of their in-market communication strategies. Those campaigns had the underlying intent of disseminating negative information to customers about a competitor’s products in order to either create uncertainty and doubt about the competitor’s ability to carry out certain activities or bring into question the quality, safety, or efficacy of their products and services. The most common form of denigration is the dissemination of information based on false or misleading claims concerning competing products. The aim of such conduct is ultimately to tip customers’ purchasing decisions in the dominant company’s favor.

In this sense, denigration of competitors’ products may have the same effects as other well-known exclusionary abuses, but the effects in the market can be more nefarious as they are likely to be longer lasting than purely monetary-based incentives. This is because the unjustified doubts or fears can be overcome only with significant effort by the target company to re-educate customers and disprove the denigrating statements.

The Legal Standard for Bringing a Denigration Claim is Still Evolving

While the European Commission has not made a decision specifically on the issue of a dominant company denigrating rival products, there is a considerable body of law at the national level under Article 102. The fact that the cases were decided under Article 102 and not only under the national equivalents of Article 102 is important. The European Commission and the national competition authorities in all EU Member States cooperate with each other through the European Competition Network (ECN). To ensure coherent application of the European competition rules, national competition authorities are required by law to inform and consult with the European Commission’s Directorate-General for Competition at an early stage of the investigation.

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The French Competition Authority (FCA) has, in particular, brought a number of cases in this area. Where appealed, the cases have been upheld in two instances (the cour d’appel de Paris and the cour de cassation).

Importantly, the concept of denigration in those cases seems to have general applicability as they covered diverse industry sectors, such as pharmaceuticals, telecommunications, electricity, and pay-TV. Common to all the cases was that the dominant player attempted to hinder market entry and product switching by conducting systematic in-market campaigns that denigrated competitor products in a number of different ways. Typically, the dominant company conducted a consistent, widespread strategy of misinformation aimed at those who take or influence purchasing decisions. For example, in the pharmaceutical sector, the dominant companies launched campaigns to generate doubt among prescribing doctors as to the safety and/or efficacy of a particular (typically generic) pharmaceutical product. The information systematically provided to doctors by the dominant pharmaceutical company was false (or at least against commonly accepted scientific knowledge) and exploited the well-established relationships that the dominant company’s medical representatives had with doctors across France.

The FCA has 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 a dominant position in certain circumstances. The FCA has interpreted denigration under Article 102 and the French equivalent as follows: “Such conduct consists of publicly discrediting an identified person, product or service. It differs from criticism insofar as it comes from an economic player who seeks to benefit from a competitive advantage by penalizing his competitor.”

According to French courts, for denigration to infringe Article 102, four elements are required:

1. There is denigration of a competitor’s product with a view to obtaining a commercial advantage;
2. Importantly, the concept of denigration in those cases seems to have general applicability as they covered diverse industry sectors, such as pharmaceuticals, telecommunications, electricity, and pay-TV.

Taking the pharmaceutical sector as an example, non-price exclusionary conduct such as denigration has been facilitated by the inherently conservative nature of the industry. Trust is a major issue, as noted in French case law:

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4 See, e.g., the decisions by the French autorité de la concurrence in the following cases: (1) Décision no. 07-D-33 du 15 octobre 2007 relative à des pratiques mises en œuvre par la société France Télécom dans le secteur de l’accès à l’Internet à haut débit (France Télécom); (2) Décision no. 07-MC-06 du 11 décembre 2007 relative à une demande de mesures conservatoires présentée par la société Arrow Génériques (Arrow Génériques), upheld on appeal to the cour d’appel de Paris on February 5, 2008 (Décision en référé à la Cour: no. 07-MC-06 rendue le 11 décembre 2007 par le Conseil de la Concurrence) and the cour de cassation on January 13, 2009 (Pourvoi: no. 08-12.510); (3) Décision no. 09-D-14 du 25 mars 2009 relative à des pratiques mises en œuvre dans le secteur de la fourniture de l’électricité (GEG), upheld on appeal to the cour d’appel de Paris on December 18, 2010 (Décision en référé à la Cour: no. 09-D-14 rendue le 25 mars 2009 par l’autorité de la concurrence); (4) Décision no. 09-D-28 du 31 juillet 2009 relative à des pratiques de Janssen-Cilag France dans le secteur pharmaceutique (Janssen-Cilag France), upheld on appeal to the cour d’appel de Paris on December 18, 2014 (Décision en référé à la Cour: no. 13-D-11 rendue le 16 mai 2016 par l’autorité de la concurrence) and the cour de cassation on October 18, 2016 (Pourvoi: no. X 15-10.384); (7) Décision no. 13-D-21 du 18 décembre 2013 relative à des pratiques mises en œuvre sur le marché français de la buprénorphine haut dosage commercialisée en ville (Schering-Plough), upheld on appeal to the cour d’appel de Paris on March 26, 2015 (Décision en référé à la Cour: no. 13-D-21 rendue le 18 décembre 2013 par l’autorité de la concurrence) and the cour de cassation on January 11, 2017 (Pourvoi: no. 15-17.154).

5 Arrow Génériques, GEG, Sanofi-Aventis, and Schering-Plough, supra note 4.

6 Sanofi-Aventis, supra note 4, ¶ 365. See also Schering-Plough, supra note 4, ¶ 360.
As has been noted at the outset, health professionals are cautious about drugs and tend to favor those they know. In fact, these products have a relatively high degree of rigidity in terms of prescribing physicians and pharmacists, as well as a certain mistrust of novelty, which can only be overcome by precise and objective information.  

This is why instilling doubts in healthcare professionals’ minds on key factors such as efficacy or safety can be enough to discredit a new product, as explained by the court:

Therefore, the dissemination of negative information, or even instilling a doubt about the intrinsic qualities of a drug can be enough to discredit it immediately with health professionals. Indeed, if they wonder about its therapeutic efficacy or even its safety, because of the presentation made to them or the answers given to their questions in this regard, they will not take the risk to prescribe it or issue it.  

(2) A link between the dominance and the denigration has to be established.

Relevant in this regard has been whether the dominant company has put in place a comprehensive, widespread, and structured communication to denigrate competitors. In one case the denigration was made possible by the dominant company’s reach in the market, namely a corps of 77 medical representatives covering all of France.  

French case law has also put emphasis on how well respected the dominant company is in the market. For example, health care professionals’ trust in a dominant pharmaceutical company may be misused by that company.  

(3) The statements put forward in the market by the dominant company are not based on objective findings or verified assertions.

In the French case law, the communication from the dominant company was centered on instilling doubts in the minds of health care professionals and could not be backed up by, or was even contrary to, medical or scientific studies, or simply omitted relevant information. The communications made it difficult for health care professionals to form an objective opinion “by providing information that is organized and structured, but incomplete, ambiguous or presented in such a way as to suggest that substitution [with a generic product] carries a risk . . . .”

(4) The commercial statements are liable to influence the structure of the market.

Again, as mentioned above, health care professionals are generally risk averse when it comes to patient health and susceptible to negative statements about safety concerns from a trusted source. Such doubts can be enough to potentially influence the structure of the market. Should an actual impact be proven, this will reinforce the finding of abuse.

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7 Sanofi-Aventis, ¶ 375.
8 Id. ¶ 376.
9 Schering-Plough, supra note 4, ¶¶ 396–398.
10 See, e.g., id. ¶ 398.
11 Id. ¶¶ 374–376; Sanofi-Aventis, supra note 4, ¶ 444.
12 Schering-Plough, supra note 4, ¶ 381.
13 See, e.g., Sanofi-Aventis, supra note 4, ¶ 463.
14 Id. ¶ 378.
15 See id. ¶ 490.
16 See id. ¶ 512.
In Italy, a decision adopted by the Italian Competition Authority (ICA) was appealed to the Italian courts that posed questions on the interpretation of EU competition law to the European Court of Justice, Europe’s highest court.

The European Court of Justice found that an agreement between competitors marketing two competing products to communicate certain denigrating information to decision-makers constituted a restriction of competition “by object,” the most severe form of competition law restriction.\(^\text{17}\)

A “by object” restriction can best be compared to a per se violation in the United States. The case dealt with two pharmaceutical products registered for the treatment of different diseases where one of the products could be used “off label” for treatment of the same disease as the first product. The European Court of Justice concluded:

> Article 101(1) TFEU must be interpreted as meaning that an arrangement put in place between two undertakings marketing two competing products, which concerns the dissemination, in a context of scientific uncertainty, to the EMA, healthcare professionals and the general public of misleading information relating to adverse reactions resulting from the use of one of those products for the treatment of diseases not covered by the MA for that product, with a view to reducing the competitive pressure resulting from such use on the use of the other medicinal product, constitutes a restriction of competition “by object” for the purposes of that provision.\(^\text{18}\)

The Advocate General elaborated further in his very concise opinion: “To my mind, the concerted communication of misleading allegations of the lesser safety of one medical product compared to another is, by its very nature, harmful to the proper functioning of normal competition, so much so that an examination of its effects on competition is not necessary.”\(^\text{19}\) The Advocate General continued, pinpointing the very essence of denigrating behavior:

> [C]oncerted communication of those allegations impairs the quality of the information available on the market, and consequently, adversely affects the decision-making process of those who create the demand for the two products concerned. Such concerted communication is, in itself, likely to reduce, if not suppress, demand for the first product to the advantage of the second.\(^\text{20}\)

Europe’s highest court stressed that by providing misleading information on the safety of pharmaceutical products “given the characteristics of the medicinal products market, it is likely that the dissemination of such information will encourage doctors to refrain from prescribing that product, thus resulting in the expected reduction in demand for that type of use.”\(^\text{21}\) Interestingly, the Advocate General defined misleading information to include not only incorrect (i.e., erroneous) information, but also “information which is in itself correct but is presented selectively or incompletely where, because of that manner of presentation, the information disseminated is likely to mislead those who receive it.”\(^\text{22}\)

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\(^{18}\) Id. ¶ 95.

\(^{19}\) Case C-179/16 F, Hoffmann-La Roche Ltd v. Autorità Garante della Concorrenza e del Mercato, 2017 ECLI:EU:C:2017:714 (AG, Sept. 21, 2017), ¶ 156.

\(^{20}\) Id. ¶ 157.

\(^{21}\) Hoffmann-La Roche, supra note 17, ¶ 93.

\(^{22}\) Hoffmann-La Roche, supra note 19, ¶ 158.
objectivity with regard to the available evidence, may render the concerted communication of those risks misleading.”

Thus, while not a case on abuse of dominance, the European Court of Justice nonetheless confirmed that putting forward misleading information to stakeholders in a given market can—in certain circumstances where such information has an impact on customers’ purchasing decisions—constitute an infringement of competition law.

Most recently, in January 2019, the Danish Competition Authority (DCA) found that the Danish business unit of the ambulance service company, Falck, had abused its dominant position on the market for ambulance services by excluding a Dutch competitor, BIOS, from the market by disparaging BIOS. The DCA concluded that Falck had implemented a general strategy to exclude BIOS from the market by creating uncertainty and concern about BIOS as a supplier of ambulance services and, in particular, as an employer. Prior to the implementation of the strategy, Falck had lost a public tender for the supply of ambulance services in the region of Southern Denmark.

Among other things, Falck’s strategy consisted of secretly sending negative stories about BIOS to the press and to their own employees, thus purposefully aiming to influence paramedics from applying for a job at BIOS. It is important to understand that the Danish market for ambulance services is characterized by a limited workforce as all educated paramedics are already employed and the education of new paramedics is time-consuming and expensive. Therefore, it was a well-known fact that BIOS had to take paramedics from Falck in order to be able to deliver its services in the region, which made denigration an effective non-price exclusionary strategy.

Falck’s conduct was effective in making it difficult for BIOS to recruit paramedics. Ultimately BIOS left the market as it could not deliver its services under its contract with the regional contracting authority. The DCA found it especially relevant to the finding of an abuse that Falck had channelled its negative communication through third parties to hide Falck’s involvement, which made the misleading information seem more trustworthy and objective.

Falck argued for the case to be assessed under the Danish Marketing Practices Act and not competition law. The DCA rejected this argument and stated that even though the practices had many similarities to conduct governed by the marketing rules it did not preclude antitrust enforcement.

As illustrated above, the case law relating to denigration in France and at the EU level requires the communication to be overtly false, misleading, or based on unverified assertions. However, the DCA was not particularly concerned whether Falck’s communication strategy was wrong or misleading. Instead, the DCA found that some of the information might even have been factually correct, but the mere fact that the communication strategy was carried out covertly through third parties was itself misleading and manipulative. Accordingly, the conduct did not constitute competition on the merits. The DCA held that it is sufficient in order to establish abusive behavior that the dissemination of information takes place in a covert manner in order to make the information seem more credible and objective, regardless of whether the information is factually accurate or not. The DCA attached substantial weight to the fact that Falck’s covert behavior—in the DCA’s opinion—departed significantly from behavior considered to be within the scope of competition on the merits.

23 Id. ¶ 160.
In its decision, the DCA did not refer to the prior case law from France but put forward its own criteria. The DCA based its decision on the following five elements: (1) Falck enjoyed a very strong position on the market and several pieces of evidence suggested that BIOS was excluded from the market due to Falck’s general exclusionary strategy; (2) the Danish market for ambulance services was characterized by a limited workforce since all educated paramedics were already employed and the education of new paramedics was time-consuming and expensive; (3) Falck’s overall exclusionary strategy was implemented in a covert manner, which consequently meant that the real mastermind behind the denigration was unknown to the paramedics in the region of Southern Denmark; (4) Falck, as a dominant undertaking, had a special obligation to compete only on the merits in the market for ambulance services, for example, by having better prices or quality and/or being more innovative; and (5) Falck’s activities on a long-term basis were likely to foreclose other players from entering the market for ambulance services. 24

When assessing the second element (the limited workforce in the Danish market for ambulance services), the DCA considered that Falck’s exclusionary strategy made it more difficult to both enter and establish a position in the market. 25

For example, the introduction of disincentives in the form of doubts or fears were explicitly laid out in the agenda for strategic meetings between Falck and the communication agency that was hired to perform the denigration. 26 The DCA inferred that Falck’s ultimate purpose in its marketing campaign was to harm its competitor BIOS, based on instructions such as: “We need to create alarm”; “the other supplier should be presented as unsafe and unprofessional”; and “we need to create uncertainty about the BIOS business model and financial standing.”

Moreover, a specific headline in an agenda for a meeting between Falck and the communication agency identified the major risks and threats associated with the strategy. Among other examples, the agenda included a bullet identifying a risk that “Falck may be disclosed as the instigator of the negative campaign activities.” 27 This indicated that Falck was very aware that its strategy could be criticized.

As mentioned above, and contrary to the French and European case law, the DCA explicitly stated that the veracity of the denigrating information was of less importance, probably due to the covert nature of the dissemination. Unfortunately, the DCA’s reasoning was never tested in court as Falck chose not to appeal the case, so it is difficult to be certain whether the mere fact that information was disseminated in a covert manner is enough to trigger Article 102.

In December 2019, Falck was fined DKK 30 million (approximately USD 4.5 million) for “a very serious infringement” of the competition rules. The fine is the highest ever in Denmark for a competition law infringement. In its press release, the DCA explicitly stated that Falck had neglected, as a dominant undertaking, its special obligation not to harm effective competition by executing a strategy intended to damage the image of the competitor, BIOS. 28

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25 Id., ¶¶ 1019–1021.
26 The DCA decision is available only in Danish. The following quotations from the decision have been translated by the authors’ firm and are not official.
27 Falck, supra note 24, ¶ 161.
Denigration Is in the Same Category as Financial Disincentives

As clarified by the Advocate General in the Roche/Novartis case, denigrating behavior impairs the quality of information available on the market and consequently adversely affects the decision-making process of buyers.

At its core, therefore, denigration is aimed at changing the mind-set of customers, not by providing financial incentives, but by introducing disincentives in the form of doubts or fears about the competing products in the minds of the decision-makers. Where applied in a systematic and continuous manner, denigrating conduct may be exclusionary. The effects of denigrating measures are not very different from conduct by a dominant company aimed at providing incentives to change market behavior that falls well outside the scope of competition on the merits. For example, providing financial incentives to customers for them to delay, cancel, or otherwise restrict the commercialization of the planned launches of competing products, are all classified as so-called naked restrictions in EU case law.

Accordingly, in terms of effects on the structure of the market, there is no material difference between disincentivizing customer switching through payment of incentives (for example, naked restrictions) and through denigrating the competing products. This is described in the case law as positive incentives that “tend to remove the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition.”

In *Intel*, the Court of First Instance found that the naked restriction constituted an abuse of dominance because “[a] marketing restriction which targets a competitor’s products undermines the competition structure, since it impedes in a targeted manner the placing on the market of that competitor’s products.” In addition, the Court of First Instance stated in *Intel* that “it should be recalled that a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that access is made more difficult,” and went on to state that “[t]he only interest that an undertaking in a dominant position may have in preventing in a targeted manner the marketing of products equipped with a product of a specific competitor is to harm that competitor.”

Thus, in the special market circumstances which makes denigration a viable strategy to hinder competitor access, non-financial disincentives have been found to have the same effect as financial incentives.

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29 *Hoffmann-La Roche*, supra note 19, ¶ 157.
30 See Case COMP/C-3/37.990—Intel, Comm’n Decision § 4.3 (May 13, 2009) (summary at 2009 O.J. (C 227/13), https://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_18.pdf), § 4.3, upheld on appeal to the General Court, see Case T?286/09—Intel, Intel Corp v. Commission, 2014 ECLI:EU:T:2014:547 (GC June 12, 2014), ¶¶ 198–220, but overturned on appeal to the European Court of Justice. In its review of the General Court’s judgment, the European Court of Justice did not focus on the issue of naked restrictions but on the right for a dominant firm, in situations where this had been an issue during the administrative procedure, to rebut a presumption that a rebate scheme is capable of restricting competition. It should be mentioned that Intel had not raised any objective justifications or efficiency claims with respect to naked restrictions in the administrative proceedings. *Intel*, supra note 30, ¶ 1676. It can therefore be argued that the General Court’s reasoning on naked restrictions still stands.
31 *Intel*, supra note 30, ¶ 176.
32 Id. ¶ 207.
33 Id. ¶ 201.
34 Id. ¶ 204.
No Limits in Case Law on Type of Products Affected by Denigration

It could be questioned whether the French case law on denigration is limited to originator-to-generics competition. However, the case law has not restricted the applicability of the theory of denigration to only one type of product. In the Roche/Novartis Opinion dealing with denigration of pharmaceutical products, it was specifically highlighted that the relevant products were competing originator products “based on different active substances” where the scientific debate concerning the therapeutic equivalence of the two medicines was “still ongoing” and “where the comparative safety of the two medicinal products is the subject of scientific uncertainty.”

Indeed, a full review of the French case law reveals that the case law is also relevant in situations of head-to-head competition between competitors that have differing product offerings aimed at the same market (e.g., energy or telecommunications services). This could be highly relevant for competition cases in the pharmaceutical sector involving denigration of, for example, biosimilars.

The Concept of Denigration as an Abuse of Dominance Is Confirmed but Subject to Differing Legal Tests Across Europe

The different European denigration cases have so far turned on the dominant company targeting the most important non-price parameters to be able to compete in a market. They also generally conclude that the customer decision-making process can be influenced by instilling fears or concerns in decision-makers and stakeholders by a systematic and consistent denigration campaign. Just as safety and effect are essential parameters in the pharmaceutical sector, paramedics comprise an essential non-price competition parameter in the sector of ambulance services.

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 non-price competition parameter is, the more effective 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.

The development of the denigration cases demonstrates that the scope of competition law is ever expanding. The fact that national competition authorities, and not the European Commission, have led a novel application of competition law is also worth noticing. This seems to have resulted in slightly different national interpretations of the law, in spite of the ECN being involved in coordinating the cases. It will be very interesting to see if the European Commission will take on the issue in future abuse of dominance cases to provide guidance to the national competition authorities, and promote uniformity.

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35 Hoffmann-La Roche, supra note 19, ¶ 2.
36 Id. ¶ 138.
37 Id. ¶ 144.
This development would not be surprising since denigration to change the mind-set of customers is not an unknown concept in European case law. Similarly, the inclusion of denigration as a specific example of conduct constituting an abuse of dominance covered by Article 102 could be justified by the European Commission based on the same basis as so-called naked restrictions.