



The French Competition Authority sanctions EDF and its subsidiaries for abuse of a dominant position implying data use they detained from its historical operator position on the electricity market

Clémence SAFA

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***Resume:** In a decision rendered on February 22<sup>nd</sup>, 2022 (Decision No. 22-D-06), the French Competition Authority fined EDF and its subsidiaries €300 million for abuse of a dominant position as they used data files concerning customers thanks to EDF historical operator position on the electricity market. EDF used its position to reach new energy sectors as gas, reducing competition in the whole energy sector. EDF and its subsidiaries didn’t challenge grievances and proposed commitments which contributed to mitigate their sanction.*

The company Electricité de France (EDF) is the first historical supplier of electricity in France. The company was created in 1946, after a law on nationalization and uniformization which appeared necessary in the 30’s as several electricity companies were on the market proposing different prices according to different French regions, which wasn’t fair for the consumers who felt wronged.

The French competition Authority decision rendered on February 22<sup>nd</sup>, 2022, is an illustration of the way the historical French operator abused of its dominant position on the electricity market, and widely, on the energy sector. Indeed, sectors of energy and

electricity were opened to competition after a liberalization wanted by the European Union through a European guideline rendered in December 1996. From July 2004, the energy sector was opened for all European companies, such as EDF.

On June 19<sup>th</sup>, 2017, the company ENGIE has seized the French competition Authority to denounce the behavior of its competitor, EDF, and its subsidiary companies Dalkia Smart Building, Dalkia, Citelium and CHAM (below “EDF group companies”) for anti-competitive practices on the retail market of electricity. ENGIE reproached that, first, EDF used with abuse its historical files on regulated sales prices to conquer customers in

market offers in electricity and gas. Then, EDF would have refused to communicate to alternative suppliers its customers file on regulated sales prices on the “Blue tariff”. At last, EDF would have intentionally degraded the quality of its customers file information on regulated sales prices on “Yellow” and “Green” tariffs which were transmitted to alternative suppliers.

On May 25<sup>th</sup>, 2021, EDF group companies received a notification of grievances about forbidden practices which we can find in the article 102 of the Treaty on the Functioning of the European Union (TFEU) and in the article L. 420-2 of the French commerce code. On September 20<sup>th</sup>, 2021, the EDF group companies committed themselves through minutes to not challenge grievances which were notified to them, and then proposed commitments.

***Is EDF, the historical operator in the electricity sector, and its subsidiaries, abusing of a dominant position on the energy sector to the detriment of alternative suppliers, using data files concerning their customers to reduce the competition on the energy sector? Is the fine enough in front of the practices?***

The French competition Authority decided that EDF group companies infringed the articles 102 of the TFEU and L. 420-2 of the French commerce code related to an abuse of

a dominant position and fined in solidarity with each other EDF group companies to €300 million.

**I. The use of data files concerning customers as a strategy aiming to reduce competition on the electricity market through an abuse of a dominant position**

**A. The necessary characterization of a dominant position on the electricity market**

Before considering if there is an abuse of a dominant position, it was necessary for the French competition Authority to characterize a dominant position on the electricity market. One of the criteria is the company’s market shares. *“Extremely important market shares constitute by themselves, except in exceptional circumstances, the proof of the existence of a dominant position. The possession of a market share extremely high put the company which detain it during a certain time, by the volume, the production, and the offer that it represents [...] in a situation of power which made it an obligatory partner and ensure to it the independence of behavior which characterize the*

*dominant position*<sup>1</sup>. Moreover, it was judged that “*A market shares equivalent or higher than 50% constitute by itself, except if there are some exceptional circumstances, the proof of a dominant position*”<sup>2</sup>.

As it springs from the French Energy Regulation Commission published data concerning the fourth trimester of 2020, EDF’s market shares were about 65 % concerning retail supply of electricity to residential sites. On December 3<sup>rd</sup>, 2018, the French Energy Regulation Commission’s notice reported that, on December 31<sup>st</sup>, 2017, EDF’s market shares were about 82% on this residential segment<sup>3</sup>.

Concerning the retail supply of electricity to small non-residential sites, EDF kept huge market shares which were about 80% at the end of 2017<sup>4</sup>.

Concerning the retail supply of electricity to middle non-residential sites, EDF’s market shares reached 74% at the end of 2017<sup>5</sup>. Thus, as it is acknowledged in French law<sup>6</sup>, EDF group companies always had high market shares, superior to 50%, during the commission of the forbidden practices which permitted to the French competition

Authority to characterize that EDF group companies had a dominant position on the electricity market.

### **B. The acknowledgment of EDF’s abuse of a dominant position on the electricity sector**

The articles 102 TFEU and L. 420-2 of the French commerce code prohibit the abuse of a dominant position on the market. In terms of article 102 TFEU: “*Is not compatible with the common market and forbidden, in the extent where the trade between State members could be affected; the fact for one or several companies to exploit abusively a dominant position on the common market or in a substantial part of this market [...]*”. In terms of article L. 420-2 of the French commerce code: “*Is prohibited, in the planned conditions of article L. 420-1, the abusive exploitation by a company or a group of companies the abuse of a dominant position in the indoor market or on a substantial part of this market*”.

The French competition Authority acknowledged EDF group companies an abuse of a dominant position because of an abusive use of means the group companies disposed through their operator on regulated

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<sup>1</sup> European Court of Justice, June 25th, 2010, Imperial Chemical Industries/Commission, T-66/01, EU: T:2010:255 and February, 14th, 1978, United Brands et United Brands Continentaal BV/Commission, 27/76, paragraphes 64 et 65.

<sup>2</sup> European Court of Justice, July 3<sup>rd</sup> 1991, AKZO/Commission, C-62/86, EU:C:1991:286

<sup>3</sup> Detail energy markets Observatory, 4th trimester, 2020 - CRE

<sup>4</sup> Monitoring report of detail markets, 2017, Energy Regulation Commission

<sup>5</sup> Ibid.

<sup>6</sup> Op.cit.

sale prices status (a), and namely because of the effects of those practices (b).

**a) The abusive use of means EDF group companies disposed through their operator on regulated sale prices status to abuse of their dominant position**

The Parisian appeal Court judged, concerning data files related to customers detained by EDF that: *“Client’s names and contact information stored in EDF’s database should be considered as non reproducible information by its competitors in reasonable economic conditions in terms of costs and times limit”, and that “Privileged information use exclusively detained by EDF ENR under its ancient monopoly and its public service missions constituted a significant competitive advantage for EDF ENR which permitted to assure their offers promotion near a lot of prospects in conditions its competitors couldn’t reproduce”<sup>7</sup>.*

Since 2004, EDF group companies adopted a strategy related to their information systems toward a business logic to propose market offers to customers who remained on the regulated sale tariffs. This strategy continued in 2013 with the “Troise Project” which aimed, before the disappearing of Yellow and Green regulated sales tariffs, market offers to replace regulated sale tariffs contracts.

EDF group companies exploited data files related to customers to collect data and propose individualized offers and complementary benefits to customers to whom was still applied the regulated sales tariffs. That information was enriched at every contact with clients.

Moreover, a data qualification permitted to EDF group companies to know their customers submitted to the regulated sales tariffs needs, to propose them market offers more adapted to their needs. This way, EDF group companies sent offers massively to the customers concerned by the end of Yellow and Green regulated sales tariffs. After the Yellow and Green regulated sales tariffs disappeared on January 1<sup>st</sup>, 2016, this strategy was applied to Blue tariffs, namely on multi-sites customers in which EDF was confronted to a strong pricing aggressiveness by competitors.

Besides, this data qualification had to permit the gas sale development, and to assure a following of high value customers, and to develop energetic services offers for the benefit of its subsidiaries.

As we can notice, EDF group companies abuse was possible thanks to EDF’s historical operator status which gave them information on customers the French appeal Court

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<sup>7</sup> Paris Court of appeal,, May 21, 2015, Solaire Direct, RG n° 2014/02694

qualified as “non-reproducible means”<sup>8</sup> by their competitors which created barriers in the entry of the energy sector and failed the opening to this sector to new operators.

**b) The effects of the anti-competitive practices as a consequence of an abuse of a dominant position**

First, EDF group companies defeated authorities’ will to liberalize the energy sector. In 2014, the Parisian appeal Court already judged that: *“Practices implemented by a historical operator detaining a monopoly which effect is to brake the competition development on the market on which it exercised its monopoly are particularly harmful as they could slow, or even defeat the opening of the market to competition through a barrier to entry”*.

Then, thanks to the information EDF had through their historical operator status, it could implement win-back practices to customers who chose their competitors. Those practices were implemented whereas the energy sector was only opening to competition. This facilitated the high market shares maintain by EDF on retail supply electricity market. This practice also delayed the alternative electricity suppliers’ development on this market.

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Certificate, EDF practices permitted to control a significant part of the market, which increased its competitors’ prices and limited the ability of eligible operator to enter the energy sector.

Besides, those practices have been prolonged as some contracts, after the disappearing of Yellow and Green regulated sales tariffs included multiannual commitments and paid exit clause which are an obstacle in front of an operator change.

The abuse of a dominant position of the parent company thrived to their subsidiaries which benefited of consequent business providers thanks to this anti-competitive strategy.

At last, all those practices covered the whole French National territory and concerned a wide majority of electricity consumers in France.

**II. A relatively low sanction in view of the severity of the practices**

**A. The calculation of the amount of the fine**

According to the article L. 464-2 of the French commerce code: *“Financial penalties are*

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<sup>8</sup> Ibid.

<sup>9</sup> Paris Court of appeal, October 31, 2014, GDF Suez, RG n° 2014/19335.

*appreciated in view of the severity and the duration of the offense, the companies' association or the sanctioned company or the group to which the company belongs and the potential reiteration of prohibited practices [...]. The competition Authority can decide to reduce the amount of the financial penalty inflicted to a company or an organism when they, during the procedure in front of the Authority, gave to the victim of the sanctioned anti-competitive practices an indemnity due in execution of a transaction within the meaning of the article 2044 of the civil code”.*

In this decision, the French competition Authority was aware of the fact that the amount of €300 million corresponding to the sanction inflicted to EDF group companies is lower than the legal ceiling mentioned in the article L. 464-2 of the French commerce code which sets a maximum of: *“10% of the amount of the higher global turnover exclusive of taxes realized during one of the financial year ended since the preceding exercise the one during which practices have been implemented”*. Indeed, the French competition Authority recognized that the amount of the fine should be equivalent to €7.559 billion as the higher global turnover exclusive of taxes realized by EDF group companies during the anti-competitive practices period was about €71,317 billion in 2019<sup>10</sup>.

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<sup>10</sup> Point 559 of the decision

<sup>11</sup> Marie Cartapanis, Transaction : L'Autorité de la concurrence sanctionne l'opérateur historique pour abus de position dominante dans le secteur de l'énergie, mais réduit considérablement l'amende à la

This is a surprising decision<sup>11</sup> when we consider the duration of the abuse of a dominant position, from 2004 to 2021, the many damages done to the economy, the consumers, and the alternative electricity suppliers, the barriers at the entry of the energy sector that were a consequence of those practices, despite of the authorities' will to open this market to competition and to liberalize it.

Moreover, this fine seem to be derisory compared to the abuse of a dominant position maintain of the companies' group and the advantage they got thanks to the historical operator position of EDF, which information they kept were considered by the Parisian appeal Court as non-reproducible means by competitors.

## **B. The non-contestation procedure and the commitments proposal in the framework of the transaction procedure**

The non-contestation procedure and the commitments proposal made in the framework of the transaction procedure were also part of this decision to lower the sanction.

suite d'une procédure de non-contestation des griefs assortie d'engagements (EDF), 22 février 2022, Concurrences N° 2-2022, Art. N° 106497, pp. 112-114

The article L.464-2 of the French commerce code enunciates that: *“When an organism or a company doesn’t contest the reality of the grievances which are notified to them, the General Reporter can submit to them a transaction proposal setting the minimal and the maximal amount of the financial penalty considered. When the company or the organism commit themselves to change their behavior, the General Reporter can take it into account in this transaction proposal”*. Indeed, EDF companies group decided not to contest grievances they were notified through minutes on September 20<sup>th</sup>, 2021, even if EDF’s subsidiaries didn’t admit guilty.

Moreover, in addition to the non-contestation procedure, EDF proposed two kinds of commitments. The first one is to put at the disposition of alternative electricity suppliers who would demand it, their customers file on Blue regulated sales tariffs. Their second commitment is to separate the customers phone subscriptions processes and prospects on Blue regulated sales tariffs in market offers.

The French competition Authority made those commitments obligatory for three years from the notification of the decision.

If EDF group companies didn’t propose those commitments, the fine would have been higher, as this shows that the group

companies want to change their behavior, which would favor the competitiveness of the electricity market.

### **C. The great customers negative deeds and the customers attachment to regulated sales tariffs considered in the mitigation of the fine**

One of the elements which were considered to determine the amount of the fine is alternative suppliers’ customers negative deeds. Indeed, as it is underlined in grievances notification and in the final decision that EDF’s great customers could have communicated *“for example, during tenders, data which could have permitted to their potential suppliers to ameliorate their offers competitiveness, so that the practices effects are necessarily of a reduced magnitude concerning those customers”*<sup>12</sup>.

Another element which was part of the fine’s mitigation is the fact that EDF’s customers were attached to the regulated sales tariffs, and ignorant and defiant toward market offers.

### **Conclusion:**

To conclude, the decision rendered on February 22<sup>nd</sup>, 2022, by the French competition Authority could be disputed

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<sup>12</sup> Point 539. Decision 22-D-06, February 22nd, 2022

when we consider the importance, the duration, and the effects on the economy of EDF group companies' practices. Indeed, an abuse of a dominant position was characterized from 2004 to 2021, and none of the companies disputed grievances they were notified on this fact. As it is said in the article L. 464-2 of the French commerce code, the amount of the fine can be reduced during the procedure in front of the French competition Authority, when the company gives an indemnity to the victim of their practices as the execution of a transaction, but in this case, EDF group companies only didn't contest grievances and proposed

commitments, which seems contradictory with the French commerce code article.

Thus, the fine seems derisory in front of the severity of the practices and the higher global turnover of the companies, but this is the aim of the non-contestation procedure and commitments proposal as the transaction procedure lower the costs of the sanction<sup>13</sup>.

**Clémence SAFA**

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<sup>13</sup> Muriel Chagny, Nicolas Guérin, Irène Luc, Stanislas Martin, Anne Wachsmann, La procédure de transaction : Quelle application en France ? (Rendez-

Vous de l'Autorité - Paris, 2 octobre 2018), mai 2019, Concurrences N° 2-2019, Art. N° 90114, [www.concurrences.com](http://www.concurrences.com)