COMPETITION FORUM
LAW & ECONOMICS

March, 2nd 2023

Abuse of dominant position: the use by a company of his historical position to create confusion at the benefice of his subsidiary

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To quote this paper: F.-M. BERTOLOZZI, "Abuse of dominant position: The use by a company of his historical position to create confusion at the benefice of his subsidiary", *Competition Forum – French Insight,* 2023, n°0043 https://competition-forum.com.

Resume: *The French Competition Authority condemned the company Audiens Santé Prévoyance (hereafter Audiens SP) for abuse of dominance in the sector of collective supplementary social protection for entertainment workers, by reaffirming that for a company in a dominant position due to a former legal monopoly, to provide material and immaterial resources to its subsidiary leading to confusion between its different activities is of definite seriousness.*

On December 14, 2022, the French Competition Authority made public a decision rendered one month earlier, on November 15, 2022, this delay being explained by the desire to preserve business confidentiality. It is by this decision n°22-D-20 that the French Competition Authority has imposed a fine of EUR 800,000 on Audiens SP, after implementation of the settlement procedure.

The Audiens Group is a professional social protection group created on November 26, 2002. It is dedicated to the cultural sector, in particular the press, communication, audiovisual and entertainment industries, and is organized in the form of a joint social protection group, made up of several organizations managed by the social partners: supplementary pension institutions, mutual provident institutions, insurance companies and employee savings management companies.

Among these organizations is Audiens SP, a provident institution active in the sector of collective supplementary social protection for entertainment workers. In terms of collective supplementary health insurance for entertainment workers, Audiens SP oversees the managing of the collective health fund for the entertainment industry, which enables the financing of guarantees and to which all employers of entertainment workers are obliged to contribute[1]. As for the collective provident fund, which is managed by Audiens SP, which also offers its own range of services, the system is financed by a contribution paid by all employers of entertainment workers, on each salary. In

[1] Endorsement of June 16, 2008, to the national interbranch collective agreement instituting collective provident guarantees for the benefit of intermittent entertainment workers of July 20, 2006.

fact, almost all the companies participating in the collective health fund for the entertainment industry also subscribe to the Audiens SP provident scheme.

In this case, the French Competition Authority took action on its own initiative following the transmission of an investigation report drawn up by the Auvergne-Rhône-Alpes Interregional Competition Investigation Brigade relating to abuse of a dominant position by Audiens SP within the meaning of Articles L.420-2 of the French Commercial Code and 102 of the Treaty on the Functioning of the European Union.

First, to qualify the abuse of a dominant position, it seems appropriate to define the relevant market and its particularities (I) before tackling the disputed practices, namely the provision by the dominant operator of a market of means to use its reputation (II) as well as customer databases (III).

I/ Definition of the relevant market : the existence of a related market

Firstly, the Authority notes the existence of a French market for group provident insurance for entertainment workers, as well as a French market for group supplementary health insurance for entertainment workers, and secondly, the existence of a national market for payroll management services for entertainment workers, considering the specific national regulations in terms of labor law, compensation management and unemployment insurance for entertainment workers.

Audiens SP had a legal monopoly by virtue of the "designation clauses" until the French Constitutional Council declared Article L.912-1 of the Social Security Code [2], which enshrined these clauses, to be unconstitutional. This historical position still gives Audiens SP a significant position, close to a monopoly, on the markets in question.

As a result, the Authority considers that Audiens SP is in a dominant position on the national markets for collective provident insurance for entertainment workers and collective supplementary health insurance for entertainment workers during the period in which the alleged practices[3] were implemented and that its subsidiary Movinmotion operates on the market for payroll management services for entertainment workers, where it holds a significant position at the date of the present decision[4].

In this case, the practices observed concern the marketing strategy of the service offered by Movinmotion on the market for payroll management services for entertainment workers, which were made possible by the use of resources held by Audiens SP, which holds a dominant position on the markets for collective supplementary social protection for

[2] Constitutional Council, June 13, 2013, Decision n° 2013-672 DC.

[3] French Competition Authority, Decision 22-D-20 Point 83.

[4] *Ibid*, Point 84.

entertainment workers and belongs to the Audiens group, which enjoys a strong reputation and brand image in the entertainment and audiovisual sector. In this respect, the Authority notes that these two markets have common characteristics and close links, to the extent that there is a close connection between the French markets for collective supplementary social protection for entertainment workers and the French market for payroll management services for entertainment workers.

The advantages granted by Audiens SP to Movinmotion have enabled the latter to offer its services and develop its activity under conditions that are not comparable to those of competing companies in the sector, thus distorting competition on the market. By making these advantages available to its subsidiary, which is active in the market for payroll management services for entertainment workers, Audiens SP has created confusion in the minds of employers of entertainment workers between its activities as a manager of collective supplementary social protection for entertainment workers and those of its subsidiary, thereby providing it with an advantage that cannot be replicated.

II/ The provision by a dominant operator of resources enabling its subsidiary to use its brand image and reputation.

The use of the brand image and reputation of an incumbent operator, i.e. the holder of a former legal monopoly, does not in itself constitute an abusive practice. It can only be considered as anti-competitive when certain specific circumstances are met[5].

In fact, the provision of resources enabling the use of the brand image and reputation of an operator in a dominant position may be qualified as an abuse of a dominant position when the use of this brand image (and in particular of the distinctive signs supporting it) and this reputation are such as to distort competition on the merits which must prevail on the market in which the subsidiary of the operator in a dominant position is active.

In practice, Audiens SP has used the brand image that it has historically held due to its virtual monopoly on the markets for collective supplementary social protection for entertainment workers, via the name "Movinmotion by Audiens", to unfairly grant its subsidiary Movinmotion competitive advantages on the market for payroll management services for entertainment workers, advantages that the latter's competitors could not replicate. In addition, the communication implemented by Audiens SP and the Audiens Group around the services offered by Movinmotion, by means of newsletters, training, and professional events, has reached all employers of entertainment workers who are also

[5] Paris, Appeal Court, 21 mars 2015.

Movinmotion's target clients. This gave Movinmotion considerable visibility, especially as these media were not accessible to companies competing in the market for payroll services for entertainment workers.

It follows from the foregoing that the particular circumstances that may lead to a misuse of the brand image and reputation of the operator in a dominant position are, in particular, cases in which this operator confuses its protected historical activities with a competitive activity, particularly in the context of a recently created market or one that has recently been opened to competition, or when it uses the competitive advantage of the historical operator's reputation in market circumstances which, far from making it commonplace, will amplify this advantage in a way that cannot be replicated by competitors[6]

However, the provision of resources allowing the use of the brand image and reputation of an operator in a dominant position may be qualified as an abuse of a dominant position when the use of this brand image (and in particular of the distinctive signs that support it) and this reputation are such as to distort competition on the merits that must prevail on the market where the subsidiary of the operator in a dominant position is active.

III/ The cross-use of customer databases to market Movinmotion's payroll management services for entertainment workers.

As a result of its quasi-monopoly on the markets for collective supplementary social protection for entertainment workers, Audiens SP has access to significant customer databases. This data includes strategic elements for the commercial prospection carried out by Audiens SP and Movinmotion, such as the number of entertainments declared by the structure concerned and the payroll processing system used.

These databases, which are inaccessible to competitors on the market, were nevertheless made available to Movinmotion. This took the form of a proactive commercial approach on the part of Audiens SP, which was able to promote the payroll management services of its subsidiary Movinmotion by sending out newsletters, direct mailings, and telephone canvassing. The use of this privileged information represented an undue competitive advantage by making it possible to reach a large number, much larger than would have been the case in a situation of traditional competition, of employers of entertainment workers and prospects under conditions that could not be replicated by competitors.

Thus, the Authority notes that the practices implemented had a real effect, by their combination and their scope, which allowed Movinmotion to acquire very quickly a

[6] French Competition Authority n° 13-D-20 December 17, 2013, Point 293.

significant position on the market of payroll management for entertainment workers, compared to its competitors. As a result, its revenue more than tripled in 2017, compared to 2016, and then gradually increased until 2019.

Conclusion:

To conclude, it appears that through this decision the Authority wishes to reaffirm once again that the practice consisting, for a company in a dominant position due to a former legal monopoly, to provide material and immaterial resources to its subsidiary leading to confusion between its different activities, is of a definite seriousness[7]and, even more so, that the use of non-replicable advantages resulting from a situation of legal monopoly is of particular seriousness, in particular in that it introduces a major breach of equality in the competition between the different operators.

As a matter of facts, the fine of EUR 800,000 is below the legal ceiling, which normally for each of the two notified complaints amounts to 10% of the highest worldwide turnover excluding tax achieved during one of the financial years closed since the financial year preceding that in which the practices were implemented. This is due to Audiens' acceptance of the settlement procedure. This decision illustrates the considerable increase in popularity of this procedure in recent years, as evidenced by its use in 8 decisions in 2022[8].

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[7] Court of cassation, September 27, 2017, n° 15-20.087 & 15-20.291.

[8] French Competition Authority, Decision n°22-D-01, 22-D-05, 22-D-06, 22-D-08, 22-D-10, 22-D-21 et 22-D-26.