II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 24 November 1993

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/32031 — Auditel)

(Only the Italian text is authentic)

(93/668/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 2 and 3 (1) and Article 6 thereof,

Having regard to the notification and the application for negative clearance or, alternatively, for exemption, submitted in accordance with Articles 2 and 4 of Regulation No 17, by Mr Giulio Malgara, chairman of Auditel Srl, on 15 September 1986, on behalf of the members of Auditel and for the company Auditel, as decided by Auditel's board of directors on 7 April 1986, of:

— the instrument of incorporation and the articles of associations of the company Auditel,

— the agreement between the shareholders of Auditel Srl,

— the agreement between the Auditel Srl and AGB Italia SpA,

Having regard to the applications made pursuant to Article 3 of Regulation No 17 by A. C. Nielsen Italia SpA (hereinafter 'Nielsen') on 11 June 1987 and by Marketing TV Services Srl ('MTVS') on 7 August 1987,

Having regard to the Commission's decision on 7 October 1991 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

The notification covers three agreements:

— the instrument of incorporation and the articles of association of the company Auditel,

— the agreement between the shareholders of Auditel Srl,

— the agreement between Auditel Srl and AGB Italia SpA.

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No 127, 20. 8. 1963, p. 2268/63.

A. The instrument of incorporation and the articles

(1) The instrument of incorporation and the articles of association relate to the private limited company 'Auditel', Largo Toscanini 1, Milan, whose purpose is to record objectively and impartially and to disseminate systematically information, divided into national, regional and subregional areas, on audiences for television broadcasts.

B. The agreement between shareholders of Auditel Srl

(2) The Agreement between the shareholders of Auditel Srl lays down the requirements incumbent on the members. The members are divided into three groups:

1. the public television channel (RAI Radio Televisione Italiana);
2. the private television channels (Canale 5, Rete 10, Rete Quattro, Gruppo STP-RV, FRT Federazione Radio e Televisioni);
3. the associations of the following operators: advertisers (UPA Utenti Pubblicità Associati), advertising agencies (ASSAP Associazione Italiana Agenzie Pubblicità e Servizio Completo), organizations dealing in advertising techniques (OTEP Associazione Italiana delle Organizzazioni Professionali di Tecnica Pubblicitaria) and agencies specializing in advertising media (AMA Agenzie Media Associate).

The cost of the operation is borne by the first two groups, which account for virtually the whole of the television audience in Italy.

(3) Article 11 of the agreement provided that 'Auditel's partners undertake, as regards all matters which may be of advertising or business importance, to use exclusively the services provided by Auditel and to recognize the validity only of the figures resulting from Auditel's measurements and research'.

This requirement was subsequently amended on two occasions.

(4) The first amendment on 9 April 1987 stipulated that the requirement related only to the figures resulting from the measurement of audience ratings and not to the breakdowns and analyses of the rating figures carried out by Auditel for specific commercials and programmes.

(5) The second amendment, transmitted on 8 July 1992 after the statement of objections had been sent and after the hearing, provides that 'the partners undertake, in their activities, with regard solely to the measurement of audience ratings (audience-share figure for a specific time-period), to use exclusively Auditel's measurements, the sole aim being to avoid disagreements on television audience shares and distortions in the information provided to the public by the press, radio or television'.

As became clear at the hearing, the purpose of Article 11 is in practice to prevent a 'ratings war' between the main Italian television channels.

By letter of 11 June 1993 the lawyer for Auditel gave notice of a modification to Article 11 according to which it would read 'the members of Auditel undertake, as far as the data on television viewing levels (viewing in a defined limited period) is concerned, to use the data, collected by, or on behalf of, Auditel, as a reference point in case of legal or other disputes'.

(6) Conscious of the fact that the Commission could well refuse to exempt this clause, Auditel's lawyers indicated by letter of 23 June 1993 that Article 11 was being withdrawn while stating that it could not have any restrictive effects.

The decision to withdraw Article 11 was adopted by the Administrative Council of Auditel on 24 July 1993 and a copy of that decision was conveyed to the Commission on 10 September 1993

C. The Auditel/AGB agreement

(7) The Auditel/AGB agreement concerns the setting-up and administration by AGB of the entire audience-measurement system and the analysis and processing of the figures.

By letter dated 1 December 1991, Auditel Srl informed the Commission that a new agreement, which had been signed on 25 October 1991, had entered into force on 1 November 1991 and was to run until 31 December 1996, had replaced the notified agreement.

Under the new agreement, AGB is responsible for administering and maintaining the system, the electronic equipment (meters) remaining the property of Auditel.

D. The market for audience-rating measurements

(8) The relevant market is the market for figures showing the audience for television broadcasts i.e. the figures showing the number of persons who were watching a given channel at a given point in time.

These basic figures are then broken down so as to identify viewers as closely as possible in order to allow advertising to be targeted.

E. The complaints

(9) (a) *The complaint submitted by Nielsen*

According to the complaint submitted by Nielsen, which specializes in market studies and market research, Auditel's agreements commit the following infringements of Articles 85 and 86:

1. infringements of Article 85:

— the mutual exclusivity granted between Auditel and AGB for a five-year period for setting-up and administering the system,

— the requirement imposed on Auditel's members by Article 11 of the agreement;

2. infringements of Article 86:

— Article 11 gives Auditel a dominant position on the market for audience ratings data and Auditel is abusing it by imposing standard contracts which give it full freedom as regards prices, conditions of use and duration.

(10) (b) *The complaint submitted by MTVS*

MTVS groups together three companies whose activities involve the establishment of audience-rating data and the certification of transmission at a given time and of the number and duration of the commercials.

According to MTVS, the infringements of Articles 85 and 86 are as follows:

1. infringements of Article 85:

— the requirement imposed by Article 11 of the agreement between Auditel's members,

— the exclusivity granted to AGB,

— the sharing of the costs of Auditel's operation between the television channel members, allowing data to be supplied on the market without competition;

2. Infringements of Article 86:

Auditel is abusing its dominant position on the market by having the data available before its competitors and by setting prices at a level that bears no relation to the real costs of production.

II. LEGAL ASSESSMENT

A. Article 85 (1)

1. *Undertakings*

(11) Auditel Srl and the members of Auditel are undertakings within the meaning of Article 85 of the EC Treaty.

2. *Agreements*

(12) The agreements notified and, in particular, the agreement between the shareholders of Auditel Srl, are agreements between undertakings within the meaning of Article 85 (1) of the Treaty.

3. *Restrictions*

(13) Article 11 of the agreement between the members, both in the version of 8 July 1992 and in the previous versions, provides that the partners undertake, in their activities, with regard solely to the measurement of audience ratings, to use exclusively Auditel's measurements, the sole aim being to avoid disagreements on audience shares and distortions in the information provided to the public by the press, radio or television.

(14) This amended version had the advantage over the previous version of indicating clearly, first, that the audience rating referred to is simply the overall audience rating and, secondly, that the purpose of the Article is to avoid a 'ratings war' between the private and public television channels.

(15) As was explained by an Auditel representative at the hearing, this requirement is aimed essentially at two groups amongst Auditel's members, namely the private and public television channels, which were behind the 'ratings war'.

(16) Since the final rates for advertisements are determined on the basis of the number of viewers who were watching the programme during which the advertisement was broadcast, each broadcasting channel is bound by the Auditel audience rating and may not refer to any other figures that are more favourable for it, as they were previously able to do.

(17) At the hearing, an Auditel representative argued that, in the case of the undertakings belonging to the third group which were interested in Auditel's figures and which, through their professional association, formed part of the group only indirectly, the requirement was not valid since they did not sign the agreement individually, the agreement having been signed by their professional association.

(18) However, even in such a situation, the members of the third group, which, before Auditel was set up, were free to dispute the figures used by the broadcasting channels, are necessarily dependent on Auditel's figures just as much as the public and private channels. Even if they have available figures that are more favourable to them and even if any disagreement on their part does not lead to a 'ratings war' between the public and private channels, such figures are unusable.

(19) This is because, in negotiations on advertising rates, the private television channels and the public channel were required by Article 11 to take as their reference the Auditel audience rating and could not have referred to other ratings put forward by members of the third group.

(20) The restriction of competition therefore continued to apply directly to the private channels and the public channel and indirectly to the other members of Auditel.

The requirement constitutes a restriction of competition in that it deprives the members of any freedom to use figures from any other source.

(21) According to Auditel, the members may commission their own audience-rating measurements and subsequent analyses or market research, provided that their results are not made public; in addition, it is possible to instruct Auditel or others to produce and publish breakdowns of the audience figures for individual commercials and programmes.

(22) However, this was not sufficient to reduce the restrictive scope of the requirement; either such figures were unusable, since it was prohibited to make them public and hence to use them as a basis for determining advertising rates, or the analytical breakdowns which could have been made public had necessarily been derived from Auditel's figures, whose use is compulsory.

4. *Effect on trade between Member States*

(23) Auditel's audience ratings may have an appreciable effect on trade between Member States: either directly, as regards advertising in general and the programmes to be broadcast, or indirectly as regards the products to be advertised.

(24) The ratings are the basis on which advertisers and operators decide on the amount of their advertising investment, how to allocate them as between the different media and which media of the same type to opt for.

(25) As far as the television channels are concerned, Auditel's figures on the number of viewers per broadcast and on their composition (age, socio-economic group and cultural level) determine the choice of programmes, their scheduling and their advertising rates.

(26) That being so, there is an appreciable effect on trade between Member States since:

— advertising agencies from other Member States operate in Italy both directly and through branches,

— some of the programmes broadcast originate in other Member States,

— advertising time is bought by advertisers or operators in order to advertise products originating in other Member States (1),

— at least one Italian television channel (RAI) can be received in other Member States.

B. **Article 85 (3)**

(27) In order to qualify for exemption under Article 85 (3), the four conditions laid down therein must be met.

However, Article 11 of the agreement does not meet the following two conditions in particular:

1. *Indispensability of the restrictions imposed*

(28) The undertaking provided for in Article 11 of the agreement was not indispensable.

(29) The participation of virtually all of the sector's commercial operators in the notified agreements is intended to ensure that the audience ratings are objective, reliable and homogeneous.

(1) 52 % of Italian imports come from within the Community; of these 52 %, over 24 % are consumer goods (30 % foodstuffs and 70 % other products) which require television advertising in order to promote their sale.

(30) Consequently, the requirement that members use Auditel's figures for their business purposes and for their analyses is superfluous. For the public television channel and the private channels, which bear the costs of the operation, it is a logical consequence of their investment that they should recognize the reliability of the figures and use them.

The justification of Article 11 as a necessary means of preventing a ratings war between the main television channels cannot be accepted; the clause in question does not serve to derive possible favourable effects from the agreement, namely by improving the production or distribution of a service while allowing consumers a fair share of the resulting benefit.

In the case of the third group of members, the reliability of the figures and their use are a consequence of their participation in Auditel and the fact that the figures are used by the other groups of shareholders as well, namely the television channels which are the business partners of the advertising agencies and advertisers.

2. *Elimination of competition*

(31) Furthermore, the fact that each member can, in addition to further breakdowns of Auditel's figures, have other audience ratings measurements and breakdowns carried out shows that other sources of audience rating measurements exist. The fact that the results of such research were not made public once they had been used shows that such figures are valid and that they are capable of competing with Auditel's figures, obtained using the AGB method.

(32) However, such potential competition could not actually take place. Such figures are unusable, firstly because they could not be made public and, secondly, because the members were obliged, for the purposes of their analytical breakdowns, to use only Auditel's figures.

(33) This situation also has repercussions on other companies that compile or analyse figures, since they are confronted by the fact that the only figures recognized as valid on the market were Auditel's.

(34) The agreement thus afforded the opportunity for eliminating competition. Even if there are other systems [1] for measuring audience ratings, the fact that such figures cannot be used placed Auditel in a *de facto* monopoly position, eliminating all competition.

C. **Article 86**

(35) Since Article 11 of the agreement will be annulled by this decision. Auditel will in future no longer have a monopoly position which could constitue an abuse within the meaning of Article 86.

In any case, the complaints made in this regard concern the exclusivity afforded by Article 11 of the agreement, the deletion of which will follow from termination of the infringement of Article 85.

(36) As regards the alleged infringement of Article 86, the information brought to the Commission's attention does not point to the conclusion that Auditel was guilty of such an infringement.

D. **Article 15 (5) of Regulation No 17**

(37) Pursuant to Article 15 (5) (a) of Regulation No 17, the fines provided for in the event of infringement of Article 85 of the Treaty may not be imposed in respect of acts taking place after notification to the Commission and before its decision pursuant to Article 85 (3), provided that they fall within the limits of the activity described in the notification.

Since Auditel's activity does fall within the limits of the activity described in the notification, fines should not be imposed.

E. **Article 3 of Regulation No 17**

(38) Pursuant to Article 3 of Regulation No 17, the Commission may by decision find that there is infringement of Article 85 of the EC Treaty and require the undertakings concerned to bring such an infringement to an end.

In this particular case the withdrawal of Article 11 on 24 July 1993 can be regarded as terminating the anti-competitive effects of the infringement.

[1] In 1986, in choosing the system, Auditel contacted 36 companies or research institutes; 15 submitted projects in response to the invitation to tender.

Given that the parties have denied that Article 11 constituted an infringement of Community law (see point 6 above) the Commission considers that there is a risk of the parties returning to the same, or similar conduct in the future.

In these circumstances the Commission therefore has a legitimate interest in adopting a decision declaring that Article 11 of the agreement between the members of Auditel, in both its 8 July 1992 version and its earlier versions, constituted an infringement of Article 85 (1) and did not fulfil the conditions for an exemption under Article 85 (3),

HAS ADOPTED THIS DECISION:

Article 1

Until its formal deletion on 24 July 1993, Article 11 of the agreement between the members of Auditel, as last amended on 8 July 1992, and in its previous forms constituted an infringement of Article 85 (1) of the EC Treaty.

Article 2

The request for the exemption of Article 11 of the agreement pursuant to Article 85 (3) of the EC Treaty is hereby rejected.

Article 3

On the basis of the information available to it, the Commission need not take action pursuant to Articles 85 (1) and 86 of the EC Treaty in respect of:

— the instrument of incorporation and the articles of association of Auditel Srl,

— the agreements between Auditel Srl and AGB Italia SpA,

— the provisions still in force in the agreement between the shareholders of Auditel Srl,

— the conduct of Auditel Srl on the audience-ratings market.

Article 4

This Decision is addressed to:

Auditel Srl,
Largo Toscanini 1,
I-20122 Milan.

Done at Brussels, 24 November 1993.

For the Commission

Karel VAN MIERT

Member of the Commission