The Autorité de la concurrence declines jurisdiction in favour of the administrative judge for the examination of the practices of which the French Medical Council (Conseil de l'Ordre des médecins) and the French Dental Surgeons Council (Conseil de l'Ordre des chirurgiens-dentistes) have accused Groupon

Published on January 16, 2019

It nevertheless takes this opportunity to stress the necessity of amending the provisions of the French Public Health Code (Code de la santé publique) – which impose a general and absolute prohibition of any advertising by doctors and dental surgeons– in order to bring them into compliance with European law.

Background

Following two complaints by Groupon in March 2017 concerning certain practices implemented by the French Medical Council (Conseil national de l'Ordre des médecins, hereafter CNOM), and the French Dental Surgeons Council (Conseil de l'Ordre des chirurgiens-dentistes, hereafter CNOCD) the Autorité deems that it is not competent to examine the Councils' actions, which are performed in the accomplishment of their public service mission vested in them by law.

The Autorité nevertheless takes this opportunity, firstly, to point out that the provisions imposing a general and absolute prohibition on any advertising by doctors and dental surgeons are not in compliance with European law, and, secondly, to stress the necessity of ensuring that the ethical principles

incumbent on doctors and dental surgeons are applied in full, in particular the prohibition on exercising the profession as a trade, and the principles of independence, dignity and collegiality.

Groupon marketed care services over the Internet

The website www.groupon.com was originally designed to market group purchases. On this basis, the advertised prices applied only if a minimum number of online shoppers expressed an interest in the product or service. Today, however, the Groupon website has evolved into a traditional online marketplace.

Up until September 2017, Groupon marketed various goods and services, at reduced prices, performed by doctors (cosmetic medical treatment such as injections of Botox, or hyaluronic acid to treat face wrinkles or non-medical treatment such as cellulite treatment or corrective laser eye surgery) and by dental-surgeons (whitening of teeth and placing of dental implants).

Groupon's complaint

Groupon's complaints follow various actions filed by the CNOM and the CNOCD to denounce the manner in which services are marketed and presented on the Groupon website.

Groupon considered that these measures constituted a boycott by the two councils. It denounced "a communication campaign and a strategy of multidirectional harassment" from doctors and dental-surgeons using this service, that included numerous legal and disciplinary actions , accompanied by a public communication campaign aimed at denouncing the actions of Groupon and healthcare professionals using its services, deemed contrary to the professions' code of professional conduct.

The complainant deemed that these practices had reduced competition in the market for online advertising of medical and dental acts - and had also dissuaded healthcare professionals from using its services for fear of disciplinary

sanctions.

Legal incapacity of the Autorité to rule on the contested practices implemented by the two French Councils

The Autorité deems that the CNOM's and CNOCD's actions lie within the accomplishment of the two councils' public service mission vested in them by law, in particular the duty to ensure that doctors and dental-surgeons comply with the codes of ethics, and to defend the professions' honour and independence.

Consequently the practices for which the CNOM and the CNOCD have been reproached do not lie within the competence of the Autorité but of the administrative court and the referrals are therefore deemed inadmissible.

Overhauling the texts governing advertising by the liberal professions: a necessity for compliance with EU law

The Autorité has noted that, in view of two recent rulings by the Court of Justice of the European Union (CJEU) , it appears that Article R. 4127-19 of the French Public Health Code (Code de la santé publique) for the doctors and Articles R. 4127-215 and R. 4127-225 of the French Public Health Code for dental-surgeons, insofar as they provide for a general and absolute prohibition of any advertising, either direct or indirect, for these professionals, are not compatible with Article 56 of the Treaty on the Functioning of the European Union (TFEU) or Directive 2000/31/CE on electronic commerce. The French Administrative Supreme Court (Conseil d'Etat) made the same observation in an opinion forwarded to the government. However, it is the responsibility of any administrative authority to discard an internal law provision that is incompatible with European law, and draw the consequences of this action in its duty of repressing anticompetitive actions .

The Autorité wishes to stress the necessity of amending these provisions, in the short term, to take into account the change in CJEU jurisprudence. This amendment will make it possible, on the one hand, to bring the regulatory

provisions concerned into compliance with European law and, on the other hand, ensure that the ethical principles incumbent on doctors and dental surgeons are applied in full, including in particular the prohibition on exercising the profession as a trade, and the principles of independence, dignity and collegiality.

The Autorité also points out that European law allows Member States complete latitude to define regulations on advertising for the liberal professions, providing the regulations do not contain any general and absolute prohibitions. During the hearing, the representative of the Ministry of Solidarity and Health said that the government and a number of professional orders, including the orders responsible for doctors and dental surgeons, were working on a complete overhaul of the regulatory provisions on advertising, with a view to adopting new provisions within 6 to 12 months.

> Decision 19-D-01 of 15 January 2019 on practices implemented in the sector of online advertising for medical procedures.

> Decision 19-D-02 of 15 January 2019 on practices implemented in the sector of online advertising for dental care.

> Press contact: Chloé Duretête +33 1 55 04 01 20 / Email