



## The Competition Authority's first enforcement of the new leniency procedure to the sale of access to databases on companies

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**Resume:** *In a recent decision, no. 23-D-04 dated April 12, 2023, the French Competition authority uses, for the first time, to fully exonerate a company guilty of price fixing and client allocation, the new leniency procedure stemming from Act no. 2020-1508 of December 3, 2020 (known as the "DDADUE Act") and the Decree no. 2021-568 of May 10, 2021.*

In a recent decision, no. 23-D-04 dated April 12, 2023, the French Competition authority uses, for the first time, the new leniency procedure stemming from Act no. 2020-1508 of December 3, 2020 (known as the "DDADUE Act") and the Decree no. 2021-568 of May 10, 2021, on the procedure for total or partial exemption provided for in IV of article L. 464-2 of the French Commercial Code.

In the present case, Bureau van Dijk (BvD), which is part of Moody's Corporation, and Ellisphere were collaborating as a software solutions developers and information providers and were jointly editing databases on companies since 1989. They had co-editing agreements that included clauses for joint price fixing and client allocation in the marketing of business intelligence products.

In July 2019, Moody's Corporation and its subsidiaries, including BvD France, submitted a request to the Competition Authority regarding the sale of subscriptions to business intelligence products. In January 2021, the European Commission issued a non-intervention letter. Also in January 2021, Moody's supplemented its initial request by seeking the implementation of L. 464-2 of the French commercial Code, accompanied by documents and statements. In May 2021, the General Rapporteur stated that the leniency request was eligible for a complete exemption from sanctions in France. On February 3, 2022, the Competition Authority launched its investigation on the practices reported.

On August 30, 2022, allegations relating to violations of articles Article 101 TFEU and Article L. 420-1 of the French commercial

Code, were notified to Moody's, its subsidiaries (including BvD), Ellisphere, and its parent company Arthemis. Later in October 2022, Ellisphere and Arthemis agreed not to contest the allegations. During the session on January 24, 2023, their representative formally confirmed full agreement with the terms of the transaction, specifically the minimum and maximum amounts of the pecuniary sanction that would result from the anticompetitive practices observed by the Competition authority.

The central question presented to the French competition authority is whether the practices of price fixing and client allocation violate the provisions of Articles 101(1) TFUE and L. 420-1 of the French Commercial Code.

Price-fixing and client allocation practices were deemed contrary to the provisions of Articles 101(1) TFUE and L. 420-1 of the Commercial Code, and the Competition Authority granted a full exemption from pecuniary sanctions to BvD and Moody's Corporation due to their role in disclosing the practices and their cooperation. Ellisphere however was fined 3.5 million euros, jointly with Arthemis as the parent company, in accordance with the amounts set in the transaction memorandum.

The competition authority starts by reporting on the price fixing and the client allocation infringements and on the companies that will

be sanctioned by the French competition authority (I), before applying the new leniency procedure and the settlement procedure to determine the amount of the sanctions (II).

## **I. Price fixing and client allocation, infringements leading to the identification of multiple liable companies by the French competition authority**

The competition authority starts by tackling the recognition of the price fixing and client allocation violations (A), before discussing how the competition authority would determine the companies liable for these violations (B).

### A. The recognition of the price fixing and client allocation infringements

It is well established in European case law that agreements aiming to fix prices, whether directly or indirectly, are deemed to have an anticompetitive nature. Horizontal price fixing by cartels, is so likely to result in negative effects on prices, quantity, and quality of products and services that it is not necessary to demonstrate their concrete effects on the market under Article 101(1) of the Treaty on the Functioning of the

European Union (TFEU)<sup>1</sup>. Consequently, there is no need to demonstrate the actual and concrete effects of such agreements for them to be considered anticompetitive<sup>2</sup>.

Regarding client allocations, the Paris Court of Appeals considers horizontal market or customer allocation agreements as severe competition restrictions, as confirmed in a recent case involving sandwich manufacturers<sup>3</sup>. Other recent examples can be given where the French Competition authority decided to fine Apple and its wholesalers for implementing a customer restriction system regarding Apple products<sup>4</sup>, or several other companies were fined for customer allocation agreements in the economic intelligence products sector<sup>5</sup>.

In the present case, Ellisphere and BvD were found to engage in price fixing and client allocation practices. They jointly set prices for co-edited products through contractual agreements and steering committee meetings, which also served to address conflicts in client allocation. Exchanges between the companies revealed consistent sharing of information on national and international

product prices, with a commitment to following agreed-upon pricing instructions.

Additionally, both parties implemented contractual clauses related to client allocation, exchanging client information monthly and monitoring compliance through an administration site. The investigation uncovered a systematic approach to ensuring adherence to pricing and client allocation rules.

The Authority decided, in light of this evidence, that there was indeed an infringement of competition law due to these practices and the mechanisms put in place by the companies since February 1989.

#### B. Liability allocation by the French competition authority

The French competition authority, following previous European decisions, confirms that price fixing and client sharing go against article 101 (1) TFEU and article 420-1 of the French commercial Code.

Competition law violations, as dictated by legal precedent, involve economic entities under Articles L. 420-1 and L. 420-2 of the

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<sup>1</sup> CJEU September 11, 2014, « *CB/Commission* », C-67/13 P, and Novembre 26, 2015, « *Maxima Latvija* », C-345/14 and April 2, 2020, « *Budapest Bank* », C-228/18

<sup>2</sup> CJEU, June 4, 2009, « *T-Mobile Netherlands* », Case C-8/08,

<sup>3</sup> Paris Court of Appeals, June 15, 2023, No. 21/08411, confirming Competition Authority, Decision No. 21-D-09, March 24, 2021

<sup>4</sup> Competition Authority, Decision No. 20-D-04, March 16, 2020, confirmed on this point by Paris Court of Appeals, October 6, 2022, No. 20/08582

<sup>5</sup> Competition Authority, Decision No. 23-D-04, June 14, 2023

French Commercial Code and Articles 101 and 102 of the Treaty on the Functioning of the European Union. In cases of company absorption, the acquirer inherits the competition law liabilities of the acquired entity<sup>6</sup>. Within corporate groups, if a subsidiary lacks autonomy and strictly adheres to the parent company's instructions, it is considered a unified enterprise. Notably, when a parent company holds a significant stake in a subsidiary, there is a presumption of influence, potentially leading to joint liability for fines unless the parent company proves the subsidiary's autonomous market behavior<sup>7</sup>.

In the present case, concerning liability allocation, distinct timeframes are defined for BvD Belgium, BvD Switzerland, and BvD France, respectively from February 24, 1989, to November 7, 2000, and from March 19, 2008, until the notification date. The parent companies, BvD Netherlands and Moody's Corporation, are also presumed jointly liable, since BvD Netherlands, the full owner of the French, Belgian and Swiss subsidiaries was later acquired by Moody's Corporation and given their influential roles over the group's subsidiaries,

Shifting focus to Ellisphere, the company is the successor to Coface, as shown by evidence. With Artemis holding a 99.50% ownership stake in Ellisphere since July 27, 2020, the identified practices are attributed to Ellisphere from February 24, 1989. Artemis, as the parent company, assumes responsibility from July 27, 2020, until the notification date.

These specific timeframes and ownership structures are pertinent to determine the assigned liabilities in the context of competition law infringements. In the present case, the parties did not contest the decisive influence they had within one another.

## **II. The new leniency procedure and the settlement procedure applied by the French competition authority.**

Before getting into the French competition authority's decision, it is necessary to analyze the differences between the old and the new leniency procedure (A), to better comprehend the perpetrators' partial or total exemption (B).

### A. The old and the new leniency procedure

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<sup>6</sup> General Court of the EU, December 14, 2006, T-259/02 to T-264/02 and T-271/02, « *Raiffeisen Zentralbank Österreich AG e.a. v. Commission* » and European Court of Justice, July 8, 1999, « *Anic Partecipazioni SpA* », C-49/92

<sup>7</sup> CJEU, September 10, 2009 du 10 septembre 2009, « *Akzo Nobel NV e.a. v. Commission* » C-97/08

The ECN+ directive includes a chapter dedicated to leniency programs. The DDADUE law and the Decree no. 2021-568 of May 10, 2021 is transposition of this directive in French law. The DDADUE law had a direct impact on the French leniency procedure, eliminating the leniency notice. The leniency procedure, as outlined in Article L. 464-2, IV of the Commercial Code, allows companies to disclose the existence of and their involvement in a cartel, whether current or past, and be fully or partially exempted from financial penalties, subject to conditions. The Authority emphasizes that this program aids in uncovering and terminating anti-competitive practices, serving the interests of the French economy and consumers<sup>8</sup>.

Before the reform, access to the leniency procedure relied on a conditional opinion from the Authority, issued after the investigation of requests by the rapporteur. This process involved drafting a report, followed by a response from the company before a session with the Authority's board. The conditional opinion specified a range of sanction reductions or rejected the request. Subsequently, the Authority conducted a comprehensive review, and if the company agreed to obligations, it could benefit from the determined reduction rate.

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<sup>8</sup> Revue Lamy de la concurrence, No 134, « Programme de clémence : L'Autorité de la concurrence publie son nouveau communiqué de procédure », January 1, 2024

<sup>9</sup> *Ibid*

Now, the report and conditional opinion have been eliminated. The rapporteur general communicates in writing to the applicant regarding their eligibility for total or partial exoneration through the leniency procedure, along with the required cooperation conditions<sup>9</sup>.

In the present case, the new leniency procedure is used for the first time by the French competition authority. In January 2021, following a letter of non-intervention issued by the Commission, BvD supplemented the summary application by making a leniency request before the Deputy General Reporter of the Authority in accordance with Article L. 464-2, IV of the French Commercial Code<sup>10</sup>.

BvD was fully exonerated as a result of their cooperation with the French competition authorities and their compliance with the exposed conditions. Ellisphere however was partially exempted with the transaction procedure<sup>11</sup>.

#### B. The partial or total exemption in favor of the perpetrators

Ellisphere and Arthemis had to pay a 3.5 million euros fine for the illegal practice as they benefited from a transaction. The companies

<sup>10</sup> Jérémy Berlemont, « Première application de la nouvelle procédure de clémence par l'Autorité de la concurrence », April 19, 2023

<sup>11</sup> *Ibid*

tried to contest this amount and reduce it to a more affordable amount due to their limited financial capacity. However, since the maximum and the minimum of the fine were included in the transaction agreement, they had already contractually agreed to pay this amount. In order to obtain a price reduction, the companies should have shown that their financial capabilities had deteriorated over time, which they failed to do in this case.

In this case, BvD benefited, as a result of the leniency procedure, from a full exoneration regarding its monetary sanctions despite the severity and the duration of the infringements reported. The company sufficiently cooperated with the French competition authority and allowed her to uncover and put an end to anticompetitive practice. This case is a successful illustration of this system but it also shows that the leniency procedure has its flaws, as it does not take into consideration the importance of the infringements when fully exonerating a company.

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