

April 2023

# French Competition Law Newsletter

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## Highlights

- The French Competition Authority imposes cartel fine on market intelligence company Ellisphere
- The French Competition Authority sanctions a French bakery-pastry equipment manufacturer and its distribution network for implementing vertical agreements

## The French Competition Authority imposes cartel fine on market intelligence company Ellisphere

On April 12, 2023, the French Competition Authority (“**FCA**”) imposed a €3.5M fine on market intelligence company Ellisphere for price-fixing and market-sharing practices, marking the first successful application of the watchdog’s leniency regime since it was reformed under the ECN+ Directive.<sup>1</sup>

### Background

Ellisphere and its competitor Bureau van Dijk are both data collection and analytics companies that specialize in providing economic intelligence services. Bureau van Dijk offers a tool called Orbis, which provides information on over 220 million private companies worldwide, including financial data, shareholdings, and news updates. Ellisphere

specializes in collecting information on French companies.

Since 1989, the two companies had entered into several cooperation agreements to commonly develop data bases and commercialize market intelligence products. The FCA found that these agreements fixed prices of the companies and divided customers in the sector of the sale of subscriptions to economic intelligence and business information products.

### Leniency procedure

The FCA was made aware of the disputed practices through an application to its leniency procedure. Moody’s, Bureau van Dijk’s parent

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<sup>1</sup> FCA Decision 23-D-04 of April 12, 2023 on practices implemented in the sector of the sale of subscriptions to business intelligence and corporate information products.

company since 2017, notified the French regulator of the anticompetitive agreement in 2019 and was granted full immunity from penalties.<sup>2</sup>

Ellisphere did not apply for leniency but its fine was reduced under the FCA's settlement procedure.

This is the first time that the FCA has successfully applied its new leniency regime, revised in 2020 under the so-called "DDADUE Act"<sup>3</sup> implementing the ECN+ Directive, which streamlined antitrust enforcement procedures throughout the EU.<sup>4</sup> The "DDADUE Act" enshrined new leniency procedures in French law, replacing the previous system, which was only codified under soft law guidance.

The review of a company's application for leniency is a complex and time-consuming process, including because each document submitted by the applicant must be carefully assessed to determine if and to what extent the application adds value to the investigation and meets the required threshold for cooperation.

Under the new regime, the FCA investigation unit, led by the General Rapporteur Stanislas Martin, informs applicant companies of the criteria they

need to meet to be eligible for leniency. Once the leniency application is received, the FCA's Board (the "Collège") takes a final decision on the approval of the application and granting of an immunity or fine reduction. The benefit of this new procedure is that companies receive guidance on applicable leniency criteria earlier. Previously, the procedure was more burdensome as companies had to wait for a case handler to issue a report to the Board, which had to adopt a formal leniency notice. With the General Rapporteur directly providing guidance, the process has become more efficient.

The hope is that that the acceleration of the guidance obtained during the leniency procedure will boost the number of leniency applications to the FCA. In a survey conducted by the FCA in 2014, lawyers and businesses had identified the procedural burden of leniency applications as the main disincentive to apply for leniency.<sup>5</sup>

In addition, further revisions of the leniency regime may occur: Irène Luc, vice-president of the FCA, stated last year that a working group involving the European Commission and national enforcers are discussing how to make leniency programs more attractive for companies despite the risks of follow-on damages actions.<sup>6</sup>

<sup>2</sup> Bureau van Dijk and its parent company Moody's revealed similar collusive practices with other competitors to the Portuguese and Spanish Competition Authorities. The Portuguese Competition Authority sanctioned the cartel behaviors, while the Spanish investigation appears to be still ongoing. See Portuguese Competition Authority Press Release, "AdC sanctions Moody's and Informa D&B for cartel", May 30, 2022, available at: <https://www.concorrencia.pt/en/articles/adc-sanctions-moodys-and-informa-db-cartel>; and Spanish Competition Authority Press Release, "The CNMC opens disciplinary proceedings against several database marketing companies", December 22, 2021, available at: [https://www.cnmc.es/sites/default/files/editor\\_contenidos/Notas%20de%20prensa/2021/20211222\\_NP\\_Incoacion-BBDD\\_eng\\_1.pdf](https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20211222_NP_Incoacion-BBDD_eng_1.pdf).

<sup>3</sup> Article L. 462-2, IV, of the French Commercial Code, as amended by Law No. 2020-1508 of 3 December 2020 on various provisions for adapting to European Union law on economic and financial matters, JORF, December 4, 2020, No. 293, p. 2.

<sup>4</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, PE/42/2018/REV/1. OJ L 11, January 14, 2019, p. 3-33.

<sup>5</sup> FCA, "Étude relative au programme de clémence français", April 15, 2014, p. 7, available at: [https://www.autoritedelaconurrence.fr/sites/default/files/etude\\_clemence\\_avril2014.pdf](https://www.autoritedelaconurrence.fr/sites/default/files/etude_clemence_avril2014.pdf)

<sup>6</sup> See MLex, "European enforcers working on ways to attract cartel whistleblowers", French antitrust official says, available at <https://content.mlex.com/#/content/1368592> (March 30, 2022).

# The French Competition Authority sanctions a French bakery-pastry equipment manufacturer and its distribution network for implementing vertical agreements

On April 25, 2023, the French Competition Authority (“**FCA**”) imposed a total fine of €2.95 million on Bongard and the members of its distribution network following a settlement procedure for their participation in two anticompetitive vertical agreements in the bakery and pastry equipment sector.<sup>7</sup>

## Background

Bongard is one of the four main French manufacturers of bakery-pastry equipment. It distributes its products either directly to bakeries or through an exclusive distribution network of about 30 distributors throughout the French territory.

Almost all distributors of Bongard’s network are members of the *Association des Concessionnaires Bongard* (“**ACB**”), which acts as a liaison between Bongard and its distribution network. Although Bongard is not a member of the ACB, it has the right to attend its meetings and is involved in the definition and application of certain rules applicable within the ACB.

The FCA decision also concerns the Euomat purchasing office, which supplies Bongard’s distributors with products that are complementary to Bongard’s products.

## Vertical price-fixing agreement

In its decision, the FCA found that between 2006 and 2019, the ACB and Bongard agreed to set a resale price for the “Paneotrad”, a machine for bakers that combines the functions of divider,

shaper, and dough rest. Bongard and the ACB discussed and agreed upon the price of the “Paneotrad” over 22 meetings within the ACB.

To conclude to the existence of an “agreement” under Article 101 of the Treaty on the Functioning of the European Union (“**TFEU**”) and Article L.420-1 of the French Commercial Code, the FCA assessed the discussions within the ACB regarding the “Paneotrad” price and the rates subsequently communicated to all ACB members. It found that these were an expression of how the ACB members intended to behave on the market. Most importantly, the FCA noted that pursuant to the ACB’s bylaws, the ACB’s decisions were binding upon Bongard and all ACB members.

The FCA then found that almost all distributors respected price recommendations from the ACB, which were sometimes accompanied by bans on discounts. Consequently, the practices prevented Bongard distributors from setting the price of the “Paneotrad” independently, thereby constituting a by-object infraction (“resale price maintenance”)<sup>8</sup>.

## Restriction of passive sales

From 2008 to 2016, the ACB’s rules of procedure prohibited the sale or delivery of Bongard equipment and spare parts outside the exclusive territory granted to each distributor, including in response to spontaneous requests from potential customers located outside this territory. Accordingly, if a distributor made a prohibited sale outside its territory, it had to pay the amount of the corresponding profit to the exclusive distributor of the concerned territory.

<sup>7</sup> FCA Decision No. 23-D-05 of April 25, 2023 regarding practices implemented in the bakery equipment distribution sector.

<sup>8</sup> A violation by object occurs when the undertakings’ behavior is by its very nature harmful to the functioning of competition, meaning that the competition authority is not required to show the actual or potential anticompetitive effects of the practices.

The ACB's rules also provided that Bongard and Euromat would oversee compliance with these provisions, which were unanimously adopted by all ACB members and reflected into Bongard's exclusive distribution agreements.

Additionally, during its meetings, the ACB discouraged distributors from disclosing their prices on the Internet and even more so from setting up websites where customers could buy Bongard products.

Therefore, the FCA held that the ACB, Bongard, and Euromat implemented a ban on passive sales outside the exclusive territory of Bongard's distributors, which constitutes an infringement by-object of Article 101 TFEU and Article L.420-1 of the French Commercial Code.

## Settlement procedure and fines

Bongard, the ACB, and Euromat did not contest the practices at stake and engaged in a settlement procedure with the FCA.

Based on the Settlement Notice<sup>9</sup> and the 2021 Fining Guidelines,<sup>10</sup> the FCA imposed fines of €1.5 million on the ACB, €1.2 million on Bongard, and €250 000 on Euromat, in accordance with the settlement terms. To set the fines, the FCA took into consideration the fact that the parties had spontaneously ended the ban on passive sales and that the ACB had played a leading role in the price-fixing practices.

<sup>9</sup> FCA Procedural notice on the conditions for implementing the settlement procedure of December 27, 2018.

<sup>10</sup> FCA Procedural notice on the method for determining fines of July 30, 2021.

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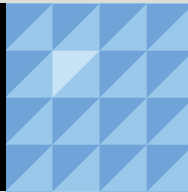


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