ZEPOS & YANNOPOULOS

# Competition law trends 2022

...staying within the moving sidelines

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# Introduction

**This Competition Brief, prepared by the Antitrust and Competition team of Zepos & Yannopoulos, headed by Stamatis E. Drakakakis, is aimed not only at summarising the most noteworthy antitrust, merger control and State aid developments – be them legislative or judicial – that dominated 2021 both at European and Greek level, but also, and foremost, at providing an outlook on what the competition trends, the focus and priorities of competition authorities – notably the European Commission (EC) and the Hellenic Competition Commission (HCC) – will most likely be in 2022. The ongoing COVID-19 pandemic, the trend towards digital transformation, climate change, the EU sustainability goals, the transformation of various industries and the need for innovation are only a few of the parameters that are anticipated to lead the change in the realm of antitrust and competition law in 2022.**

At the national level, the HCC proved to be particularly active in 2021 – inter alia conducting an unprecedented number of dawn raids and other types of investigations, intervening in various sectors of the economy as an immediate response to the emergencies and challenges created by the pandemic and introducing new or revised tools, such as the sustainability sandbox or the whistle blowing system. However, 2021 was probably dominated, competition law wise, by the commencement of the legislative process that led to substantial modifications to the Greek Competition Act, namely Law 3959/2011. Despite the fact that not all proposed changes were eventually included in the revised Act, as passed by the Hellenic Parliament on the outset of 2022, significant developments occurred both in the field of enforcement and on the merger control side. These significant fermentations and the multilateral activity of the HCC have undoubtedly created a unique momentum for actions and various initiatives to be undertaken by the authority in 2022. Therefore, we expect that 2022 will be a game-changer also in terms of the enforcement of competition law in Greece.

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# A new era for Greek Competition Act

Major legislative developments took place in early 2022 at national level with the modernisation of the domestic Competition Act, including also the transposition of the ECN+ Directive (Directive (EU) 2019/1) into the national legal regime.

In 2022, the HCC, in pursuit of increasingly effective competition law enforcement in the Greek market, is expected to strongly mobilise all new or modernised tools, with some of the most notable ones being briefly set forth below.

First, the modernised Competition Act introduced a new type of infringement. New Article 1A provides for two distinct unlawful practices: the invitation to the conclusion of an unlawful agreement and the announcement of future pricing intentions between competitors ("*price signaling*"), thus, rendering now these two forms of unilateral practice self-standing antitrust infringements under Greek law. This practically suggests that a decision by a single given company will be enough for the HCC to open an investigation, and, in case it finds a violation, to impose the corresponding measures, including fines. To be noted that this specific provision will come into force on 1 July 2022, whereas, in the meantime, the HCC will provide more guidance thereon. One could, therefore, anticipate that towards the end of 2022 and onwards, the HCC may seek to enforce this new provision, in particular by tracking relevant unilateral practices and opening the respective investigations.

Second, it is noteworthy that the Settlement procedure, previously applicable only in horizontal agreements (cartels), has been extended to vertical restraints, abuse of dominance and the new infringement under Article 1A (see above), thus covering the whole scope of Articles 1, 1A and 2 of the Competition Act and of Articles 101 and 102 TFEU. This modification, based on a 2018 OECD recommendation, is deemed innovative given that there is no corresponding formal EU-wide provision. In 2022, the HCC – also in light of the increased number of cases that are anticipated to open following its unprecedented dawn raid activity in 2021 – is expected to use and encourage the recourse to this "modernised" tool, which will reward the cooperation of companies with the HCC (i.e. reduced fines) and will provide for expedited proceedings before the HCC.

On the merger control side, the amended Competition Act introduced the possibility for conditional (i.e. with remedies) clearance of a transaction already in *Phase I*, an option available only in *Phase II* under the previous regime. The parties can now offer remedies in *Phase I* – within twenty days as of the notification- in an attempt to round any "serious doubts" raised by the HCC about the transaction's competitive impact.

Finally, with the recent amendments, the HCC has also embraced novel technological tools, explicitly adding algorithmic methods to the arsenal that the authority can use to scrutinize commercial conduct in the context of its sector enquiries. The revised Competition Act's adoption of modern technological methods follows up on the HCC's broader recent focus on leveraging new technologies to facilitate the implementation of competition law. Notably, the Greek authority has recently established an online anonymous whistleblowing tool, while it has also inaugurated the "HCC Data Analytics and Economic Intelligence" platform. This platform provides an innovative tool, developed by the HCC in collaboration with a team of experts from the Athens University of Economics and Business and the information technology company Warply, which can be used by the HCC for the collection and processing of economic data through the leveraging of Big Data technology. At the same time, the HCC's information collection powers have also been enhanced by an additional amendment to the Competition Act, providing the HCC with the authority to undertake "mapping exercises" with respect to conditions of competition in any market and sector of the economy, which the authority considers necessary to effectively discharge its mandate (this mapping is implemented via requests for information to market participants and other relevant stakeholders).

> "In 2022, the HCC is expected to strongly mobilize all new or modernized tools.

# Dawn raids resurge | The post COVID-19 enforcement

In 2021, after a year-and-a-half hiatus, the investigative activities of the EC and the NCAs picked up again. The authorities were evidently playing catch-up, trying to clear the backlog of pending inspections that built up during the COVID-19-induced lockdowns since March 2020.

The HCC, which proved to be one of the most vigilant authorities in the EU, has raided, since June 2021, fifteen different economic sectors, from supermarket products and agricultural seeds, to power tools, information technology systems, catering services, and lighting systems. Interestingly, the majority of the HCC-investigations seem to be looking into vertical infringements, and specifically RPM.

Meanwhile, the EC/DG COMP launched four probes via dawn raids in the following sectors: defence, animal health in Belgium, wood pulp in several Member States, and manufacturing and distribution of garments in Germany. This trend is only expected to continue. In late October 2021, Executive Vice-President Vestager signaled a new era for cartel enforcement in the EU, announcing a wave of dawn raids in the coming months and a focus on non-classic cartels (*for more details, see below*). At the same time, the HCC's investigations launched via dawn raids in 2021 should be carried on and the raided businesses should expect to be called to participate in additional investigative activities (RFIs, interviews etc.).

**In this new era of dawn raids, authorities will have to face the new workplace practices, as dictated by the COVID-19 reality. Corporate policies (for example obligatory COVID-19 testing before entry), remote working etc. will certainly affect the dawn raid process.** Work-from-home has certainly sped up the authorities' focus shift to all electronic data instead of hard-copied evidence. With this in mind, authorities have been deploying forensic tools, allowing them to narrow down their search to specific materials. Meanwhile, the lines between business and private premises, and professional and personal devices, cell-phones etc. are blurring. In this regard, we cannot exclude that NCAs may no longer be as reluctant to raid private premises, subject to necessary warrants (as has recently been signalled by e.g. the Dutch, French and Swedish authorities).

> "Businesses should make sure they dust up their internal policies and bring their dawn raid guidelines up to date, ahead of 2022.

# Energy crisis | Soaring energy prices under competition law scrutiny

Wholesale electricity prices reached in 2021 all-time highs in European markets, registering a sharp increase in Q3. At the same time, the disrupted supply chain has had a direct impact on the prices of gas in Europe. The global energy crisis has triggered considerable political and social concerns at an EU and national level. On the assumption that higher levels of competition (both at wholesale and retail level) are an effective way in order to get household retail prices (for electricity and gas alike) reduced, the energy prices – soaring since the summer of 2021 – have certainly attracted the attention DG COMP and NCAs, including the HCC.

In the second half of 2021, the HCC showed renowned interest in energy markets, with enforcement activities commencing in two separate sectors:

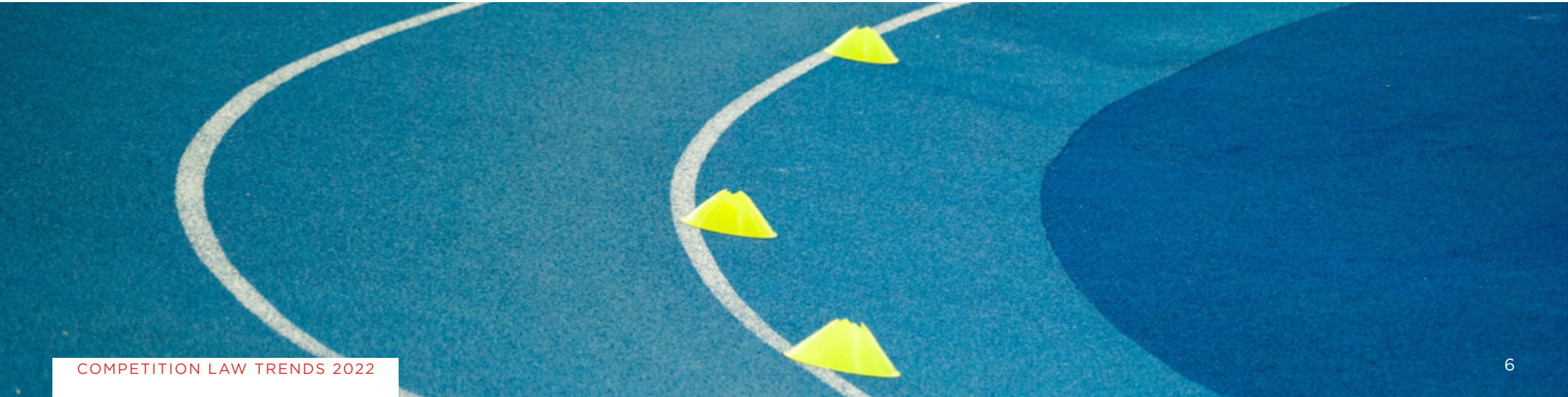
1. On 28 September 2021, the HCC carried out ex officio unannounced inspections at the premises of undertakings active in the refining, wholesale and retail trade of petrol (gasoline) and diesel, regarding potential anti-competitive practices in the context of horizontal and/or vertical agreements and/or abuse of collective dominance.

2. On 16 December 2021, the HCC launched an ex-officio investigation in the market of retail supply of electricity to low voltage customers.

After preparatory research and monitoring of the specific market, the HCC's enforcement activities targeted eighteen (18) companies operating in the market. In its relevant press release, **the HCC noted that, along with the relevant Greek energy regulator (RAE), they are closely monitoring the price increases that are occurring internationally, and therefore they have created a working group consisting of executives in collaboration with experts from foreign and domestic universities to closely monitor the market.**

On the same note, according to an EC spokesperson's statements to the press in early 2022, DG COMP is looking into all allegations of possible anti-competitive conduct by companies producing and supplying natural gas to Europe with a view to verifying whether the current situation on the wholesale gas markets in Europe can be attributed to commercial conduct by market participants, whilst at the same time Executive Vice-President Vestager admitted to be looking into Gazprom's behaviour and its impact on gas prices.

It is apparent that as the energy crisis brews and escalates, competition authorities will be assiduously monitoring the markets, while progressing with their already pending investigative activities in energy markets.



# Electronic Communications & Fintech | Markets in a state of flux

At European level, massive consolidation in the electronic communications market has recently taken place. In particular, there have been a number of proposed deals, such as the merger between *O2* (owned by *Telefonica*) and *Three* (*CK Hutchison*) in the UK and the *Telia-Telenor* deal in Denmark. In these two notable cases, it became apparent that the EC is not convinced that having only three market players in the telecoms market suffices to have strong competition in the market. As a result, the *O2-Three* transaction was blocked in 2016 and the *Telia-Telenor* deal was eventually abandoned after the EC expressed its concerns.

On the other side, very recently, only in December 2021, the EC unconditionally approved the proposed transaction of Dutch-based *United Group* to acquire Greek telecoms operator *Wind Hellas*, which is one of the main operators in Greece. This deal will allow *United Group* to combine *Wind* with its existing Greek pay-tv provider *Nova* and create one operator, that would be the number two player in both fixed and pay-tv services in Greece.

This movement towards consolidation may be halted by the different regulatory regimes in the EU and by the fact that the telecoms market is mostly localised, as consumption figures vary significantly from region to region. However, the most likely scenario is that we will all continue to witness rapid developments in the telecoms market, although it remains to be seen whether the EC will take a more lenient approach on in-country market mergers.

At a national level, the recent amendment to the Greek Competition Act did not interfere with the powers of the Hellenic Telecommunications and Post Commission (EETT), which remains the competent authority for the enforcement of the Greek Competition Act in the electronic communications market.

Given the ongoing digital transformation and the new investments co-funded by the Recovery and Resilience Facility that are on the way in light of the digital transition goal of the EC, a lot of interesting developments in the industry – where competition among operators will continue to grow as new entrants will soon enter the wholesale market- are expected to occur.

Noteworthy is the NCAs' marked interest in a new, emerging and constantly evolving Fintech market. Indicatively, the French regulator issued in July 2021 a public opinion noting the emergence of new services through Fintech, reporting the *market dynamic* and addressing some competition issues that have already come up, such as the existence of increased barriers to entry. The HCC, on the other hand, published in December 2021 the interim report of its Fintech sector inquiry, where it notes that the Fintech market in Greece is currently at *a primary stage of development*. Regardless of this, the HCC, in a forward looking manner, proposed the establishment, in cooperation with the Bank of Greece, of an 'open banking' implementing body which could help prevent situations of exclusion of small businesses.

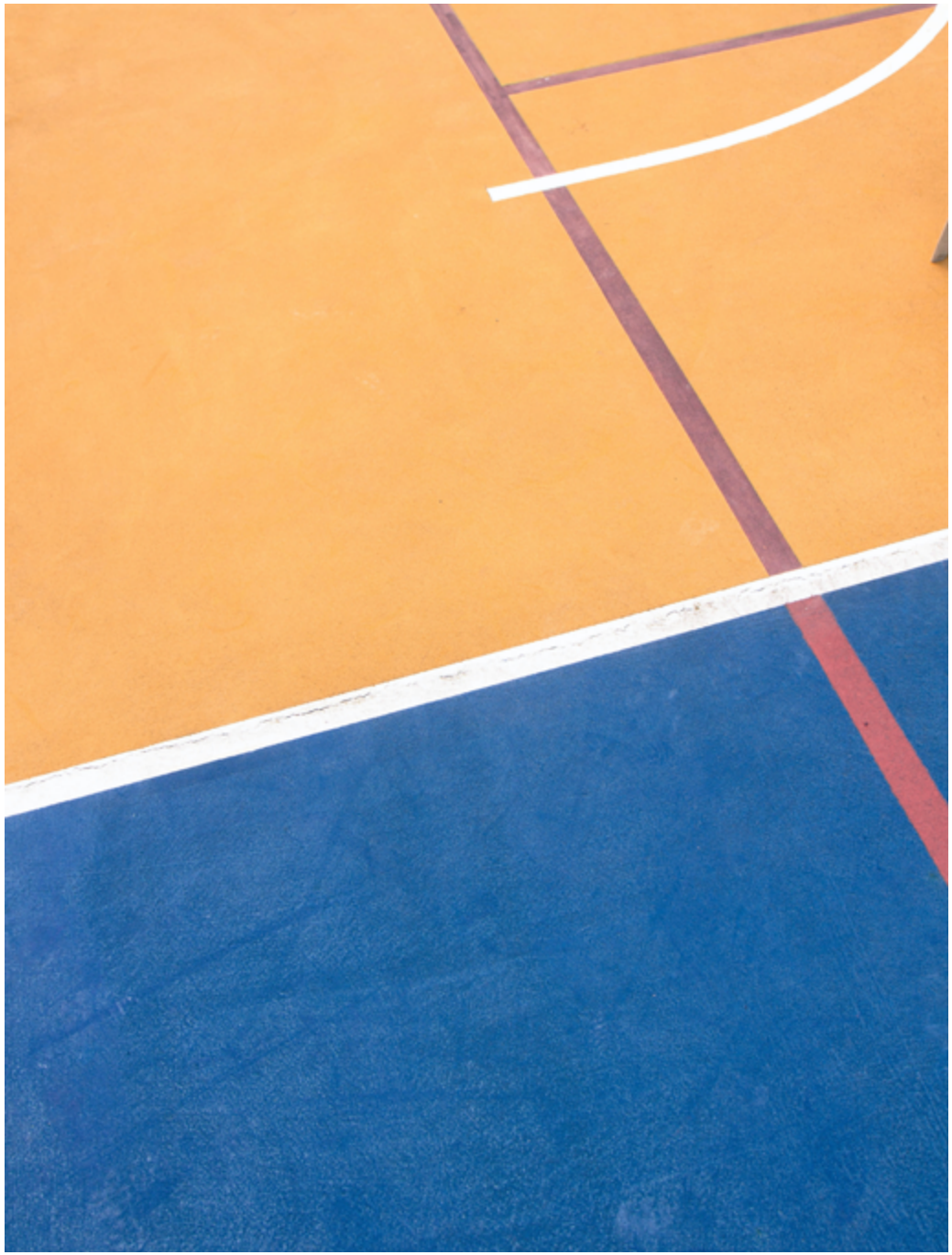
The message from the NCAs is loud and clear; as the Fintech market evolves, we should expect enhanced monitoring and vigilant enforcement action.

# A game-changer for horizontal cooperation agreements & vertical relationships

**The EC is currently conducting a review of rules and guidelines that govern agreements between competitors and supplier/distributor relationships. The review is taking place against a background of accelerated trends toward digital transformation (due primarily to the COVID-19 pandemic) and an international attention on climate change that has led many businesses to adopt ambitious sustainability initiatives for 2022.** The review of the competition policy tools is therefore one of ***"unprecedented scope and ambition"***, in that it must ensure that the rules effectively tackle anticompetitive concerns in the digital space while not hindering sustainability and other worthwhile objectives.

These trends have already prompted significant initiatives and policy reforms at national level, and firms doing business in Greece must keep a close eye on them to ensure continued compliance with the competition rules. The conclusion of the review at the EU level is expected to further affect the competition law landscape in Greece.

A key development is the publication of the EC's much-awaited draft revised horizontal guidelines. The updated rules, when adopted, are expected to provide more guidance on technical cooperation and sustainability, including joint purchasing alliances. Moreover, the public health emergency of COVID-19 has led competition law enforcers to take up a new role of providing informal guidance for businesses in Europe. Competition authorities have been engaging with companies to assist them in assessing the legality of their cooperation plans. The EC has adopted a Temporary Framework to explain when and how firms can obtain comfort on whether their cooperation complies with the competition rules. In addition to oral guidance, the EC is also ready to exceptionally provide companies with a written 'comfort letter'. This would be with respect to specific cooperation initiatives that 'need to be swiftly implemented' to effectively address the COVID-19 crisis. The EC has also shown willingness to consider collaboration in "*other sectors*" or "*other*



*forms of cooperation*". In this vein, with a recent amendment to the Greek Competition Act, the President of the HCC may now issue comfort letters when issues of urgent public interest arises, particularly regarding the achievement of sustainability objectives. Moreover, the HCC has adopted an initiative proposing to adapt the competition rules to promote more sustainable business practices, including a sustainability 'sandbox' in which market players could team up to work on sustainable business projects.

Neither the pandemic nor climate change can be addressed without cooperation between market players. Examples can include open knowledge-sharing platforms, joint procurement of recycled materials, and technical standards on the environmental performance of products or processes. Therefore, informal guidance would be appreciated in the next years.

Businesses will also benefit from guidance in the (now accelerated) transition to digital, especially on issues such as algorithms, e-commerce and chat-room collusion. **Companies should engage with the relevant authorities on these novel issues. The authorities may be keen to offer advice on a case-by-case basis, in order to avoid legal uncertainty that may hold companies back.**

With the aim to provide up-to-date guidance for a business environment reshaped by e-commerce and online platforms, the EC is also revising the EU Vertical Block Exemption Regulation (VBER) and the Vertical Guidelines. The new rules are expected to come into force on 1 June 2022, i.e. when the current legislative package expires, and firms will be allowed a one-year transitional period to adjust their distribution arrangements accordingly. The draft revised VBER and Guidelines provide specific rules and guidance relating to the platform economy taking into account that this part of the economy plays an increasingly important role in the distribution of goods and services. Particularly, it is expected that rules on price parity clauses and dual pricing for online and offline sales will be relaxed. However, agreements preventing the effective use of the internet, such as bans on price comparison tools and search engines, will be treated more strictly in that they will not benefit from a safe harbour. Similarly, the draft revised VBER excludes from the safe harbour scenarios of dual distribution that may give rise to horizontal concerns, which entails that agreements of platforms that compete with their users (e.g. Amazon) will be assessed on a case-by-case basis.

These changes will deeply affect the Greek competition law approach to vertical relationships, especially since the draft revised EU rules provide for specific devices to ensure a more harmonised application of Article 101 TFEU to vertical agreements across the EU. Also, a recently introduced novelty into the Greek competition law framework has extended the settlement procedure to vertical competition restraints, thereby rewarding the cooperation of companies with the HCC and speeding the proceedings.

2022 is expected to be a challenging year for companies, as they will have to navigate the variety of reforms coming into force. Companies pursuing sustainability objectives involving collaborations with competitors or other cooperation initiatives to address the COVID-19 crisis must consider the competition law risks that may arise and engage with the HCC and/or the EC. Businesses should also review their distribution arrangements in view of the new vertical rules. Any business selling online, in particular, must ensure that any restrictions on the use of the internet are removed from agreements, as authorities are expected to take a hard line against such restrictions. At the same time, direct or indirect Resale Price Maintenance continues to be a top enforcement priority of both the HCC and the EC.

Overall, companies should focus on compliance and risk management, with the hope that more legal certainty will be provided in 2022.

# Merger control | Increased discretion & consolidation of sectors

**The EC is currently expanding EU merger control by changing its policy in relation to referral mechanisms and by proposing the introduction of a separate notification obligation on certain digital platform businesses acquiring companies that provide digital services.** This is resetting expectations about the EC's jurisdictional authority to review transactions it considers may harm competition, even in the absence of compulsory notifications. This expansion of the EC's jurisdictional reach is a response to the perceived concerns about overly concentrated markets and under-enforcement regarding, in particular, deals that involve the acquisition of a nascent or future competitor by established players ("*killer acquisitions*"). Moreover, both the HCC and the EC tend to consider wider theories of harm as they investigate whether deals are stifling innovation and creativity, giving greater weight to concerns that traditionally have been of a lower priority.

These dynamics are reshaping national and EU merger review, which is reflected in the increased scope of investigations and the broader set of issues that are being part of the analysis, leading to longer review timelines, more expense, and more uncertainty for businesses. Despite this shift in the regulatory landscape and the ongoing COVID-19 pandemic, businesses continue to pursue ambitious strategic plans. There is a record number of transactions notified to the HCC and the EC, indicating that companies are proactively trying to find ways to successfully navigate the new regulatory realities.

A major development is the EC's new policy of encouraging Member States to refer transactions to it, even if they are not notifiable under the national rules, provided those transactions could be perceived as stifling future competition. This represents a radical shift in the EC's policy, in that previously only transactions which were notifiable in at least one Member

State were accepted by the EC. The Guidance that the EC has issued on the new policy puts focus on transactions where the revenues of at least one of the parties do not reflect its actual or future competitive potential. Although there are no sector limitations, the EC focuses on digital and pharma targets. The EC has started claiming the right to review mergers which would normally not be notifiable, by calling in two deals since its policy change (*Illumina/Grail and Facebook/Kustomer*).

The EC is prepared to offer non-binding guidance and comfort to stakeholders where this is possible. Still, however, the new policy creates legal uncertainty because: the EC review cannot be excluded even where the transaction does not meet the EU's and Member States' filing thresholds; even if a transaction is notifiable in certain Member States, NCAs which lack jurisdiction may also initiate a referral; the referral triggers the standstill obligation under the EUMR. As a result, referral risk should be on radar screen in every transaction, meaning identifying the characteristics and rationale of the deal, considering the level of publicity that the transaction may generate and identifying potential NCAs' interest in the deal.

As to the substantive assessment, both the EC and the HCC clearly have their eyes on practices that may eliminate nascent rivals that could offer disruptive new products and challenge incumbents if given time to succeed. Nascent/potential competition will remain a key focus of the substantive analysis, especially in tech mergers, as well as in the healthcare and life sciences sectors, where there tends to be a high degree of cross-supply, and merging parties can often be both a key supplier and a downstream competitor. This trend of intense scrutiny on innovative industries shows no sign of abating in 2022.

The technological transformation of financial services, manufacturing and energy is similarly in focus. A number of notifiable transactions are currently being reviewed by the HCC, while the authority cleared in the course of 2021 concentrations in the energy sector (e.g. *Gek Terna/Heron I and Heron II*), in the sector of private insurance (e.g. *Generali/Axa*) and in the financial services sector (e.g. *Eft Services/Piraeus Bank* and *Alpha Bank/Nexi S.p.A.*). In line with merger control tradition, according to which transactions are very rarely blocked, there were no outright prohibitions in the EU or in Greece in 2021, which entail that, despite increased scrutiny, large mergers are taking place in many sectors as companies sought to consolidate their place in the market. That said, it is worth mentioning that, in January 2022, the EC prohibited a merger between two South Korean shipbuilders that would have created a dominant position post-merger in the worldwide market for the construction of large liquefied gas carriers (*HHIH/DSME*). This, however, was an exceptional case in that the parties did not offer remedies to address the EC's concerns.

**With the competition authorities pushing jurisdictional and substantive boundaries, a more challenging M&A environment is created, where deals take longer to close and dealmakers are required to think creatively about novel types of harms that the authorities may try to pursue. This means that parties contemplating a merger should plan for longer and more complex processes with demanding Requests for Information. Competition law advisors must be involved at an early stage of the transaction in order to identify merger control requirements and ensure an early planning in faming the transaction's rationale and developing defenses. In addition, if mergers involve new ownership of data, a careful consideration should be given to how such data is maintained and accessed to ensure compliance with the competition rules.**

Finally, the parties must be alert with regard to the risk of running into gun-jumping issues, which have recently come to the fore after the EC's 2018 decision (subsequently confirmed by the General Court) imposing a fine on Altice for failing to notify its acquisition of SP Portugal to the EC, and for implementing said acquisition prior to its clearance by DG COMP. This case signals a strict approach by EU competition authorities with respect to contractual provisions conferring acquiring firms de facto decisive influence over the target before merger control clearance.

# EU digital legislative package entering final stretch in 2022

Negotiations on the EC's ambitious legislative agenda on digital markets are set to enter their final stretch in 2022. The digital legislative package includes proposals for a *Digital Markets Act* (DMA) and a *Digital Services Act* (DSA), which were presented by the EC in December 2020. The DMA is envisaged to establish new ex ante rules for digital *"gatekeepers"*, while the DSA would have a wider scope, imposing tailored obligations on online intermediary services, in line with their particular features and role within the digital sphere.

While the DSA is envisaged to function as an across-the-board revision of the digital economy regulatory framework in the EU (with the E-Commerce Directive, which dates from 2000, having missed the explosion of e-commerce of the 2010s), the DMA enters grounds that have traditionally been firmly monopolised (pun intended) by the competition law rules on unilateral abusive conduct. Naturally, this has led to rather heated debates over the rationale and scope of the DMA proposal put forth by the EC (along with the proposed DSA text) in December 2020. The *ex ante* prohibitions and obligations to be imposed on digital gatekeepers would cover a range of conducts, from prohibiting self-preferencing to mandating interoperability with third-party services.

The EU Council and the European Parliament adopted in November and December 2021 their respective negotiating positions with regard to the EC's DMA proposal. Points of (smaller or larger) differentiation between the three institutions are identified in a number of areas, from the content of the *ex ante* obligations to be imposed on large digital platforms, to the criteria used to designate a platform service as an *"important gateway"* connecting businesses and end users, to the exact delineation of the *"gatekeeper"* definition itself.

With respect to the latter point, which is, of course, a fundamental cornerstone of the proposed Regulation, while the EC's proposal for a scope of EUR 6.5 billion in annual EEA turnover in the last three financial years and EUR 65 billion in market capiltasation in the last three financial years has received support from the Council, the Parliament has countered with a proposal to raise these thresholds to EUR 8 billion and EUR 80 billion respectively, seemingly in an effort to ensure that only the group of *"tech giants"* commonly referred to as the *"GAFAM"* (*Google, Amazon, Facebook, Apple and Microsoft*) would be captured by the new regulatory regime. Certain Member States which are home to significant digital platform market players, such as Germany and the Netherlands, have also voiced their support for the narrow approach targeting only the select few *"giant"* tech companies that meet the highest thresholds; the direct implication of the alternative broader scope being that certain companies outside the *GAFAM* circle could also be caught by the lower thresholds, such as e.g. *Zalando* or *Booking.com*.

With the institutions' negotiating positions now crystallised, *"trilogue"* negotiations between the Commission, the Council and the Parliament are set to unfold over the next few months, with the new ex ante obligations likely coming into effect in early 2023 at the earliest, given the politically highly sensitive nature of the debate.

> "The ex ante prohibitions and obligations to be imposed on digital gatekeepers would cover a range of conducts, from prohibiting self-preferencing to mandating interoperability with third-party services.

# Abuse of dominance | Landmark developments from the Court of Justice of the EU

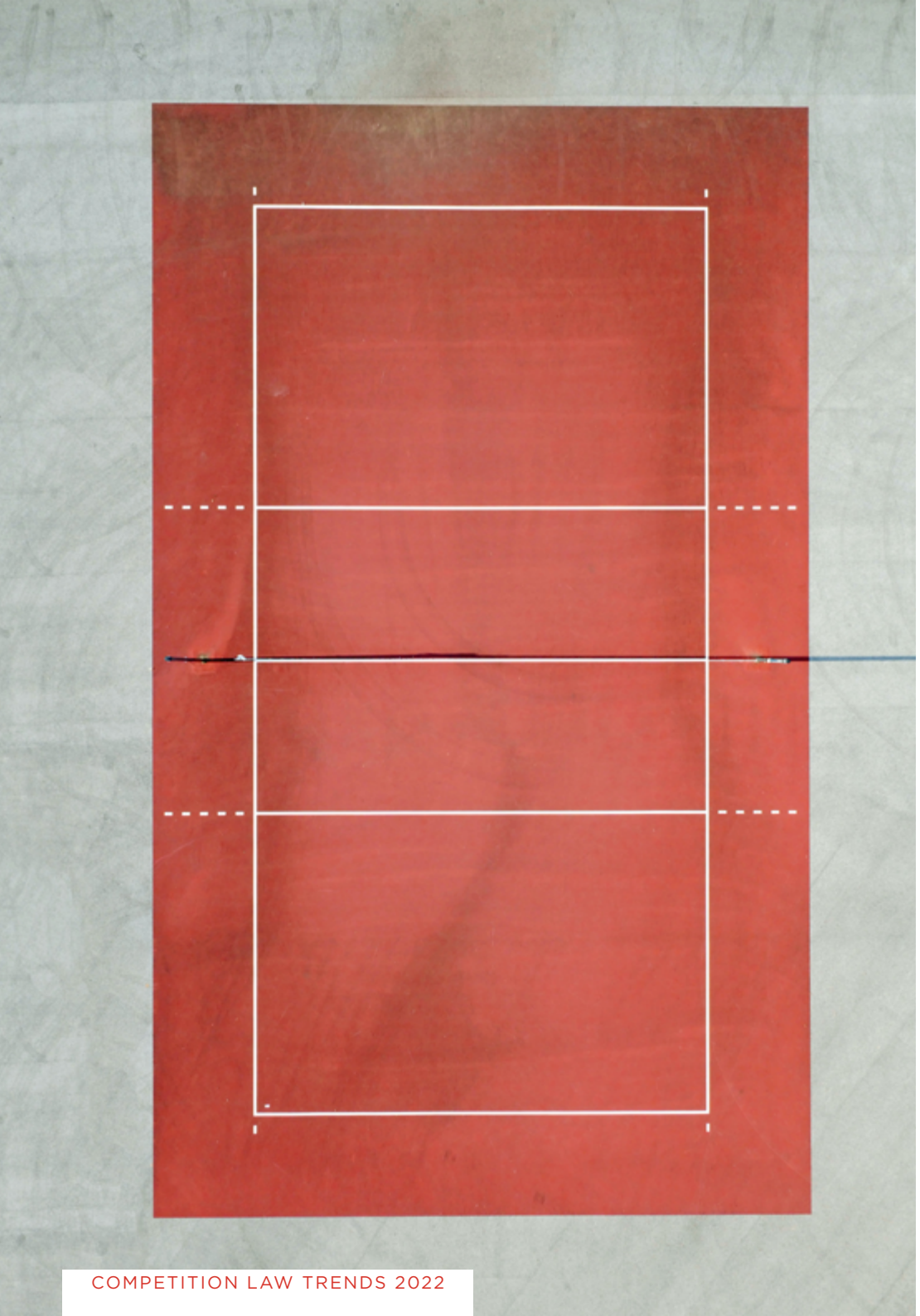
2021 was a year of significant developments in both enforcement and judicial review in the area of EU abuse of dominance law. The EC as well as NCAs launched new abuse of dominance probes or pressed on with pending ones, with a distinct focus on digital markets.

Over the last year, NCAs in the EU either issued abuse of dominance infringement decisions or progressed with investigations against all four of the "*GAFA*" companies (*see above*), while certain investigations are still ongoing. A notable trend is evident in the approach taken by competition authorities in their abuse of dominance probes against the Big Tech companies, with an emphasis on theories of competitive harm focused on *"self-preferencing"* (whereby a vertically integrated dominant company's leveraging of its dominance in an upstream/downstream market to favour and promote its own service on the downstream/upstream market is considered incompatible with competition on the merits), as well as on data-related leveraging practices.

At the same time, 2021 was also marked by significant judicial developments in the area of abuse of dominance. The highly anticipated judgment of the General Court of the EU in *Google Shopping* was issued on 10 November 2021. With the General Court siding with the EC's finding that *Google* had abused its dominant position in the market for online general search services to favour its own comparison shopping services over competing comparison shopping services, the – far from uncontroversial – *"self-preferencing"* theory of harm has now for the first time received the seal of approval of the EU judiciary. Although there are aspects of the judgment that may generate new ambiguities regarding their interpretation (such as the exact scope of the obligation apparently incumbent on a digital platform, such as *Google*'s general search service, to provide equal treatment across the board), this is unlikely to deter NCAs from leaning heavily on the judgment in both reaching their decisions in ongoing antitrust probes into ostensibly *"self-preferencing"* practices, as well as, potentially, in launching new ones.

Beyond the headline-making General Court *Google Shopping* judgment, no summary of the EU judiciary's important 2021 output in the abuse of dominance area would be complete without a mention to the Opinion of AG Rantos in *Servizio Elettrico Nazionale*. Although consistent with previous EU case law, the Opinion's value is in meticulously and methodically laying down a clear analytical framework for the competition law assessment of exclusionary practices. The Opinion brings to the fore a few key principles underlying this assessment, namely that: (i) conduct that can be replicated by equally efficient competitors of the dominant undertaking may not, in principle, lead to anti-competitive foreclosure, but is just a manifestation of *"competition on the merits"*; (ii) proving the use of methods other than those which are part of "*normal competition"* and that these methods generate restrictive effects are part of a single assessment; (iii) an exclusionary practice may be found to be abusive even if it is not included in the indicative list of Article 102 TFEU, depending on the specific factual, legal and economic context within which it unfolds; (iv) when assessing a specific practice under Article 102 TFEU in terms of its potential effects on competition, the absence of any actual effects after the practice has been implemented may indicate that the practice is incapable of having such effects; and (v) the exact threshold for the establishment of anti-competitive effects (plausibility v. likelihood) depends on the specific circumstances of each conduct at issue (i.e. gravity, length and coverage of the practice etc.).

Finally, starting 2022 with a "bang", the General Court also issued its decision in the *Intel* case on 26 January 2022. The General Court was assessing the case for the second time, following a referral back from the Court of Justice, due to the General Court's failure to examine all of Intel's arguments regarding the way in which the Commission had conducted an as-efficient-competitor (AEC) test to ascertain whether, in order to compete with Intel's rebates at issue in the case, an AEC would have to offer non-viable prices, and thus whether the rebate scheme was





capable of having foreclosure effects on such a competitor.

In a landmark finding with significant implications for the interpretation of Article 102 TFEU looking forward, the General Court noted – in line with the Court of Justice decision referring the case back to it – that, although loyalty rebates may be considered by their nature anti-competitive, this does not allow the Commission to dispense with conducting an effects analysis, when the undertaking at issue submits supporting evidence to prove that its conduct was incapable of producing the alleged foreclosure effects. Therefore, the General Court should have properly assessed *Intel*'s criticisms against the EC's AEC test.

In doing so, the General Court indeed found a number of errors which rendered the EC's AEC analysis incomplete. In light of this finding, the General Court annulled the EC's decision and, what is more, annulled the EUR 1.06 billion fine imposed on *Intel* in its entirety, as the Court could not carve out a part of the fine that related solely to the part of the EC's decision that related to rebates (as the decision also covered non-rebate practices).

Beyond the – remarkable in itself – fact that the General Court overturned an EC antitrust decision on substantive grounds for the first time in decades, the judgment is also a watershed moment in the form v. effects debate in EU abuse of dominance law, with effects being declared the clear winner. **At this juncture, there can be little doubt that a competition authority is obligated to assess any and all evidence put forth by an undertaking to demonstrate that the investigated conduct is not capable of producing the alleged foreclosure effects at issue and/or that there are plausible explanations other than anti-competitive behaviour for the conduct at issue.**

# State aid tools to support the economy & boost investments

Due to the unprecedented challenges that the pandemic has brought to the forefront, both governments and businesses are still struggling to cope with the new reality. At European level, Member States have supported and still continue to support the national economies so as to restore liquidity of COVID-19 stricken businesses and, at the same time, provide incentives for the support of private investments.

**In light of the COVID-19 turmoil, the EC issued a Communication, setting out the available options for Member States to respond effectively to the crisis, as well as a Temporary Framework, which allows the adoption of temporary measures so as to support the economy and counter the liquidity shortage faced by undertakings because of the outbreak.** The Temporary Framework has already been amended six times, so as to include additional types of aid, as well as provide incentives for private investments. Aid notified under the Temporary Framework is deemed to be compatible under Article 107(3)(b) and (c), as long as its conditions are met and is approved within a very short timeframe. The latest amendment of November 2021 set the path for a progressive phase-out of crisis measures, while avoiding cliff-edge effects, and accompanied the recovery with new tools to kick-start and crowd-in private investment in the recovery phase. Greece has already made use of this significant tool and continues to benefit from its provisions to support the national economy. We now anticipate the implementation of the latest provisions concerning the support of investments and the solvency support measures and observe how these specific instruments will be used in practice.

Within the same objective of tackling the severe repercussions of the pandemic, the Recovery and Resilience Facility was introduced (with the Greek Recovery and Resilience Plan encompassing EUR 30.5 billion in grants and loans), to deal with the crisis and make societies more sustainable and better equipped for the green and digital transition goal. The Facility, as a temporary recovery instrument, revolves around the six pillars of: (i) green transition, (ii) digital transformation, (iii) smart, sustainable and inclusive growth, (iv) social & territorial cohesion, (v) health, economic, social & institutional resilience and (vi) policies for the next generation, and finances European reforms and investments from February 2020 until December 2026. Greece has already gained approval on its plan of reforms and investments to foster sustainable growth and create jobs, as well as accelerate the transition towards a greener and digital economy.

In addition, important projects of common European interest (IPCEIs) seek to encourage the creation of large-scale cross-border projects, which enhance the EU economy and promote the EU strategic objectives. The EC has recently published the updated "Communication from the Commission - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest" and has introduced targeted amendments to address existing issues and achieve better alignment with the EU priorities, as well as facilitate the participation of small and medium-sized enterprises.

At a national level, Law 4864/2021 for the support of strategic investments in Greece, provides incentives and benefits (such as tax incentives, quick licensing and aid to support research, employment and technology costs) to make the regime more attractive to investors. Apart from the different incentives available to investors, a new faster and more transparent process is introduced while previous obstacles, such as long approval processes, were addressed effectively.

On a forward looking note, it now remains to be seen how all these innovative tools will continue to be utilised so as to first, address the challenges that the pandemic has raised and then, focus on the viability of the economy, through investments in strategic fields of the economy.

> "The Recovery and Resilience Facility was introduced to deal with the crisis and make societies more sustainable and better equipped for the green and digital transition goal.

# EU signals focus on no-poach agreements

Although competition law enforcement has traditionally focused on product and services markets, with labour markets being relatively overlooked by enforcers, this seems to be changing. **There is a growing consensus among policy circles that competition law can play an important role in labour markets, and competition authorities are taking their cue by enhancing their scrutiny of potentially anti-competitive labour market practices.**

Even though the EC has not pursued or prohibited no-poach agreements or wage fixing arrangements as standalone violations of competition law, Executive Vice-President Vestager recognised, during a speech in 2021 at the Italian Antitrust Association Annual Conference, that some buyer cartels have a direct effect on individuals, as well as on competition, when undertakings collude in order to fix the wages they pay or when they engage in no-poach agreements as an indirect way to keep down wages; the EU Commissioner also recently announced that the EC will be investigating anti-competitive agreements in labour markets, such as wage fixing and no-poach agreements.

NCAs have also acted to address issues in this context (Hungary, Lithuania, Poland, Portugal) where proceedings have been initiated and fines have been imposed with regards to wage fixing agreements and no-poach agreements. **Companies should be vigilant to ensure that their HR practices are in compliance with competition law rules to avoid exposing their business to potential claims.**

# Addressing collective bargaining agreements

Competition enforcers have acknowledged that there is a need for an update to competition law rules in relation to collective agreements of solo self-employed persons taking into account new and developing working practices. The key underlying concern stems from the fact that EU competition law precludes self-employed persons from collective bargaining. Genuine self-employed persons are seen as undertakings under Article 101 TFEU and, according to current EU case law, the negotiation and conclusion of collective bargaining agreements risk infringing competition law, which in turn creates legal uncertainty. This risk has been reinforced by the divergent approaches on this issue at the national level. The combination of legal uncertainty and lack of harmonisation across Member States has discouraged self-employed persons and companies from negotiating collective agreements.

In response to this concern, the EC published in December 2021 draft Guidelines on the application of EU competition law to collective agreements with solo self-employed persons, along with a proposal for a Directive on improving working conditions in platform work. The Guidelines are aimed at clarifying when certain collective agreements on working conditions of solo self-employed persons will be viewed as falling outside the scope of Article 101 TFEU altogether or will not be prioritised for intervention by the EC.

The public consultation on the draft Guidelines (which ended on 24 February 2022) proved to be of interest to individuals and companies operating in the platform economy, but also those operating in the off-line environment, given that their scope covers the offline sector as well. Their implications will also influence the future application of EU competition law rules and potentially also national tax and labour laws, in terms of the classification of self-employed persons under those regimes.

> “The key underlying concern stems from the fact that EU competition law precludes self-employed persons from collective bargaining.

# Competition law and Sustainability | Hoping that 2022 brings more clarity

For many years, the relationship between sustainability and competition law has become increasingly important and a subject of extensive discussions, both at national and EU level. The discussion is mainly about the potential benefits from an agreement with sustainability objectives flowing to consumers and, as a result, its exemption from Article 101 TFEU where the arrangement between the parties has elements restricting competition.

The HCC has been very active in this regard and has taken steps to stimulate a public discussion on the interplay of the two and in particular the issues of whether competition law is capable of impeding innovative synergies between companies promoting sustainability, the possibility of integrating environmental and other social sustainability concepts into the application of competition law, as well as the potential adjustments of competition law rules against sustainability objectives. In particular, the HCC has published a Staff Discussion Paper analysing the areas of convergence and conflict between sustainable developments and competition law, organised a relevant digital conference, which was attended by high level officials of the EC and the OECD, as well as several presidents of other NCAs, published a respective Technical Report on Sustainability and Competition in view of the initiative undertaken by the EC in the framework of the Green Deal, and proposed the creation of a sandbox for sustainability and competition in the Greek market.

Other initiatives at national level have also been noted. For instance, the Dutch NCA, which has been pushing towards that discussion and has published relevant guidelines, has developed an innovative approach in relation to the exemption of "environmental damage agreements" and Austria amended its national law to provide that, if the necessary conditions are met, agreements which "make an essential contribution to an economically sustainable and climate neutral economy" can be excluded from the prohibition of anti-competitive agreements.

At EU level, the EC has recognised that guidance and clarity is needed in applying competition law rules to sustainability initiatives and has published a policy brief on Competition Policy in Support of Europe's Green Ambition which explores how EU competition rules can complement environmental and climate policies more effectively. Based on this policy brief, the revision of the Horizontal Guidelines, in an effort to provide guidance and legal certainty to enable collaboration on sustainability without infringing competition law provisions was expected, and the revision of other existing guidelines is also expected. Moreover, the EC has signaled that it will be more open to respond to companies' requests for guidance on a case-by-case basis for cases related to collaborations with sustainability objectives.

As sustainability parameters are becoming competition parameters, the expectation is that **further discussion will take place this year and the hope is that 2022 will bring more clarity on the extent to which competition law rules impede collaborations which aim to achieve sustainability goals or contribute in achieving a green economy. A key development is the publication of the EC's much-awaited draft revised Horizontal Guidelines. The updated rules, when adopted, are expected to provide more guidance on technical cooperation and sustainability.**

Furthermore, competition authorities are expected to adopt a tough stance against agreements which are disguised as sustainability collaborations or involve a negative environmental impact. Therefore, efficiencies related to sustainability objectives, as well as their impact to consumers and the risk of complaints by competitors, should be considered and be part of early transaction planning on behalf of players willing to engage in green transactions.

# Bid rigging | Towards more legal certainty and a proactive approach

Collusion in public procurement has been high on the agenda of the HCC over the recent years, from the landmark 2017 case in the tendering of public infrastructure projects (entailing both Settlement and standard adversarial procedure decisions and also the very first leniency application to be submitted with the HCC) to other cases of a shorter reach in terms of the significance of the awarded public works, the number of the involved parties per case or the value of the imposed fines. Given how important economic-wise public procurement is, bid rigging has been also in the radars of OECD and OLAF, which both have issued extensive guidelines on the matter.

The Court of Justice of the EU by virtue of its light shedding decision in *Kilpailu- ja kuluttajavirasto* of January 2021, clarified that **the participation in a bid-rigging cartel ends at the latest once the basic characteristics of the contract between the "successful" tenderer and the contracting authority are determined**; this is founded on the fact that an undertaking cannot harm competition *after* the bid submission for the simple reason that there is no longer any competition on the market. This ruling can, in turn, have a major impact on the limitation period, given that the latter in general starts to run on the day following the day on which the infringement was committed. This decision by the Court of Justice, besides creating legal clarity, also puts further pressure on the EC and the NCAs to investigate quickly bid-rigging cases and to adopt carefully formulated decisions, so harmed stakeholders can exercise their rights to seek damages.

Having said the above, the EC as well as the NCAs have tended to penalise collusive behaviour only years after a contract ends. However, it is understood that the EC would prefer to have the collusive behaviour detected and prevented already during the award procedure. A major role towards this direction, therefore, would play the exclusion of *bidders* under public procurement law, if there are sufficiently plausible indications of collusive behaviour. In this context, in March 2021, the EC issued its Notice on "*tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground*" (C (2021) 1631). There, the EC interprets the ground for exclusion on bid-rigging grounds strictly, in the sense that any plausible indications can suffice for exclusion. As soon as these indications appear, then the involved undertakings should immediately initiate appropriate "*self-cleansing*" measures.

It stems, therefore, that the Notice and the overall guidance provided for therewith is addressed mostly to contracting authorities – in this respect it should be noted, though, that to a certain extent it does not recognise that Member States retain significant discretion in their administrative self-organisation and that some of the issues raised will be conditioned by pre-existing administrative law regulations and procedures. Mindful of the content of the Notice, one could safely predict that the contracting authorities may play in the near future a more active role in detecting and preventing collusive bid-rigging practices already during the award procedure. This, in turn, could suggest that a declining number of bid-rigging cases will eventually be *ex post* enforced by the competition authorities, since the collusive behaviour will have already been deterred in the first place by the contracting authorities. Of relevance in this regard is the creation by the HCC of a special platform for anonymous complaints relating to the manipulation of public tenders.

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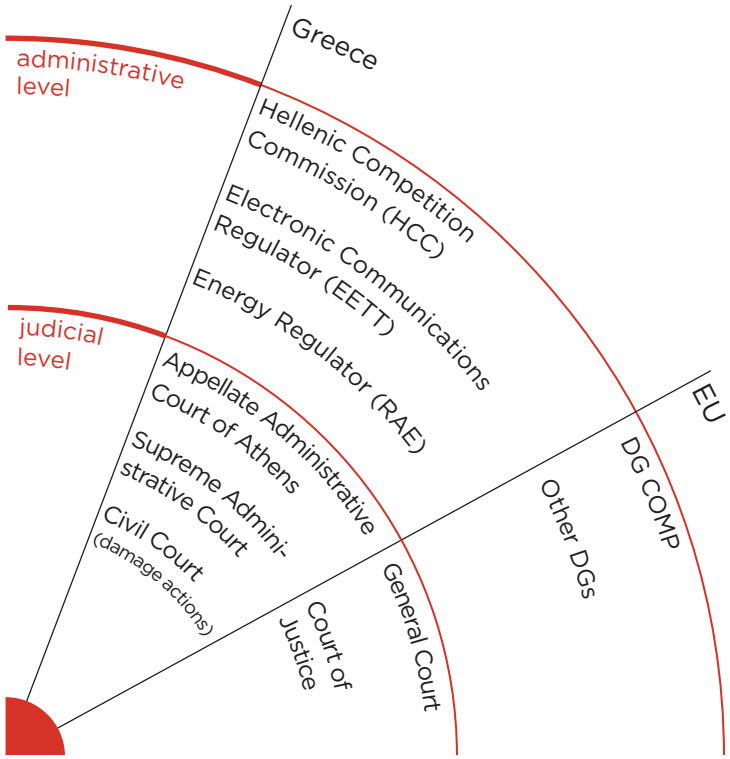

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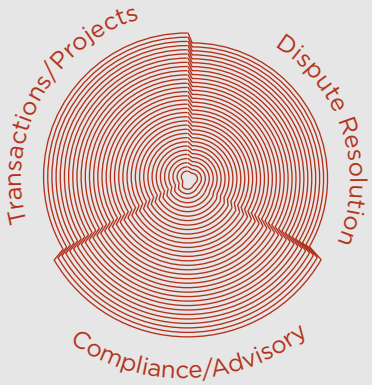


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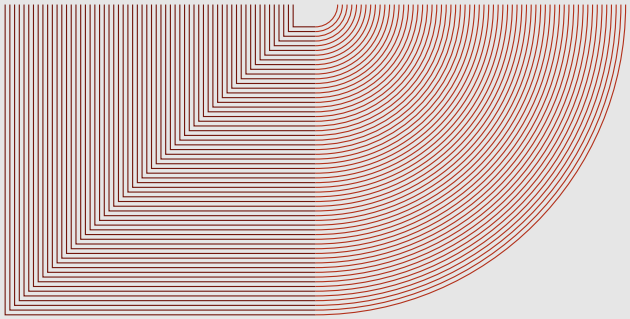

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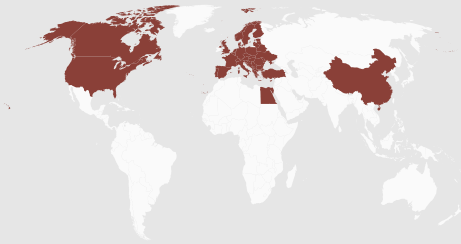

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