A. Introduction

On July 1st 2022 the new provisions of the Greek Competition Act on unilateral price signaling and unilateral invitation to collude will enter into force. These provisions were introduced in January as part of a broader amendment of the Greek Competition Act (Law 3959/2011 as in force), however the law stipulated that these provisions will come into effect on July 1st, 2022.

On January 24, 2022, the Plenary of the Parliament ratified Law 4886/2022 on the modernization of competition law for the digital era, amendment of Law 3959/2011 and transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 ("ECN PLUS Directive") to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.[1] This Law entered into force on January 24, 2022, which is the date of its publication in the Government Gazette, [2]noting that the new provision of Article 1A, which is further analyzed below, will enter into force from July 1, 2022, as the Hellenic Competition Commission ("HCC") intends to adopt relevant Guidelines prior to its implementation. The ultimate goal of the Amendment is the harmonization of the national competition law with the ECN PLUS Directive by strengthening the enforcement powers of the HCC and updating the national competition law regime, taking also into account the challenges accompanying the digital era and economy.

Following the above developments, as well as the recent editorial of the HCC President,[3] we shall analyze two provisions that have caught our attention. First of all, the recent Amendment of Law 3959/2011 has introduced a new article, Article 1A, which refers to tacit collusion (Paragraph 1) and price signaling (Paragraph 2). Although these notions have not been defined explicitly by European legislation, tacit collusion is found under both Articles 101 and 102 TFEU,[4] whereas price signaling is found under Article 101 TFEU. However, contrary to this, the Explanatory Report of Law 4886/2022 states that both of the aforementioned behaviours are considered as unilateral conduct.[5] This raises the question of whether the application of Article 1A should follow the established conditions and principles of Articles 101 or 102 TFEU or

[1] "Εκσυγχρονισμός του δικαίου ανταγωνισμού για την ψηφιακή εποχή – Τροποποίηση του Ν. 3959/2011 και ενσωμάτωση της Οδηγίας (ΕΕ) 2019/1 του Ευρωπαϊκού Κοινοβουλίου και Συμβουλίου της 11ης Δεκεμβρίου 2018 για την παροχή αρμοδιοτήτων στις αρχές ανταγωνισμού των κρατών μελών, ώστε να επιβάλλουν αποτελεσματικότερα τους κανόνες και για τη διασφάλιση της εύρυθμης λειτουργίας της εσωτερικής αγοράς και άλλες διατάξεις". Available at: https://www.epant.gr/nomothesia/nomoi-diatagmata/prostasia-antagonismoy.html.

[2] Government Gazette A΄12/24.01.2022.

[3] I. Lianos and F. Wagner-von Papp, "*Tackling invitations to collude and unilateral disclosure: the moving frontiers of competition law?*", Journal of European Competition Law & Practice, 2022, pp. 1-5.

[4] Reference to Articles 101 and 102 TFEU herein includes reference respectively to Articles 1 and 2 of L. 3959/2011.

[5] Explanatory Report of Law 4886/2022, P. 88, Analysis of Article 4: "*As said conducts are essentially unilateral, they cannot fall under the scope of Article 1 of Law 3959/2011 or of Article 101 TFEU, although under certain conditions they may lead to anti-competitive effects*.».

whether it consists of a novel form of competition law infringement. Secondly, the recent Amendment of Law 3959/2011 did not include the previously proposed provision on abuse of a dominant position on an ecosystem of structural importance for competition, namely Article 2A. Due to its particular nature, it shall be analyzed hereinbelow whether Article 2A would have contributed substantially or not to Greek competition law.

B. Analysis of identified issues

B.I.i. On Article 1A (1) of Law 3959/2011 – tacit collusion

Issue under examination. Article 1A (1) refers explicitly to an undertaking proposing, forcing, providing incentives or inviting other undertakings to collude. These behaviours could fall under the general notion of "invitation to collude", which is not unknown to EU legislation, as it is found in relation to Article 101 TFEU. Specifically, the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements[6] state that: "63. *Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101 (1) TFEU*", although according to Footnote no. 10 "*This would not cover situations where such announcements involve invitations to collude*".

It is important to note that Article 1A (1) focuses on the mere intention of the undertaking to distort competition. The actual distortion of competition has not yet necessarily taken place and might not have yet manifested itself. Thus, the provision seems to condemn a behaviour that is one step before the actual scope of application of Article 101 TFEU. Finally, one of the issues that arises from Article 1A (1) concerns the treatment of the act of invitation to collusion in the context of a single and continuous infringement. In other words, can a mere invitation be considered as an individual infringement, that could possibly help substantiate a finding of single and continuous infringement? And consequently, what would its effect be on the duration of the infringement and the fine imposed? Although the intention of Article 1A (1) is to treat invitation to collude as an individual infringement, the aforementioned analysis has shown that it is debatable whether this would be the case at all times.

B.I.ii. On Article 1A (2) of Law 3959/2011 – price signaling

Law 4886/2022 has also added a separate provision for price signaling, which could be considered as a particular form of invitation to collude. This infringement is generally considered as falling under Article 101 TFEU by ECJ case law and by Paragraph 63 of the aforementioned Guidelines.

[6] Commission Communication - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, *O.J.,* C 11/01, 14 January 2011.

The seminal ECJ decision is Woodpulp II[7]where the ECJ held that the public price announcements that the undertakings made to users did not reduce the uncertainty of other undertakings regarding the future conduct of its competitors. Moreover, the European Commission ("EC") did not provide adequate proof in order to attribute an anti-competitive character to parallel pricing. Parallel conduct does not constitute proof of concertation, unless this is the only plausible explanation for such conduct.[8] In order to check whether other explanations exist, that could potentially justify such behaviour without leading to a concertation, other elements should be considered, such as the nature of the products, the size and the number of the undertakings and the volume of the market. Information of a similar nature are also required by Article 1A (2), in order to examine whether there is a restriction of competition.

Interestingly, the Wood Pulp decision refers clearly to the distinction between the notions of parallel conduct and concerted practice. Specifically, if the conduct in question can be regarded as an intelligent adaptation to the anticipated conduct of the competitors, thus as independent behaviour, then it will not be considered as an infringement of Article 101 TFEU.[9] On the contrary, parallel conduct that is clearly affected by the announcements would constitute a concerted practice. Consequently, this means that the mere existence of parallel behaviour is not considered prohibited by Article 101(1) TFEU, which could also be taken into consideration by analogy in the case of Article 1A (1) described above. More recent developments in similar cases indicate that this is followed by the EC, although it is not always easy to distinguish the two notions. In the Container Shipping case,[10] the EC relied on the fact that there was a response from the competitors' part in the form of alignment of their prices, as a reaction to the initial price announcement, in order to find an anti-competitive behaviour which eventually led to commitments.

Additionally, the ECJ requires for the particular infringement of price signaling that a causal link between the announcement and the anti-competitive behaviour is proven. Article 1A (2) states that an undertaking is prohibited from announcing information on prices etc., if the announcement restricts effective competition in the Greek territory. It appears, thus, that the ECJ requirement is also found in Article 1A (2), rendering this paragraph much more clear regarding its scope and purpose than in the case of Article 1A (1).

It should be noted that the aforementioned Guidelines are stricter for private announcements, since the receipt of strategic data from a competitor, in a meeting or

[7] C.J., *A. AhlströmOsakeyhtiö and others v Commission of the European Communities,*31 March 1993, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

[8] G.C., *LimburgseVinylMaatschappij NV and Others v. Commission of the European Communities,*20 April 1999, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94.

[9] See also C.J., *CooperatieveVereniging "SuikerUnie" UA and others v. Commission of the European Communities*, 16 December 1975, C-40/73.

[10] Commission Decision - *Case AT.39850 Container Shipping*, C (2016) 4215 final, 7 July 2016.

by mail or electronically, leads to a presumption of acceptance of the information and adaptation of the company's market conduct accordingly, unless it responds with a clear statement that it does not wish to receive such data.[11] Therefore, the undertaking has to rebut the presumption by providing proof that it refused the receipt of sensitive information.

B.I.iii. Article 1A – a possible extension of Article 1

Notwithstanding the analysis of the Explanatory Report maintaining that the newly introduced provisions concern exclusively unilateral conduct, it could still be argued that Article 1A falls under the scope of Article 1Law 3959/2011and Article 101 TFEU, although introducing at the same time a novel form of prohibited unilateral conduct. Specifically, Article 1A seeks to prohibit the parallel conduct of undertakings that leads to anti-competitive effects, explicitly naming tacit collusion as one of them, as has already been recognized by ECJ case law.[12] Such conclusion is also substantiated by economic analysis, as it only produces harmful effects and not any efficiencies. Additionally, the new provision explicitly exempts behaviour within its scope which however fulfills the four exemption criteria of art. 101 (3) TFEU.

In a broader sense, Article 1A (1) may thus be deemed problematic with regards to Article 3(2) of Regulation 1/2003. According to this provision, the application of national competition law may not lead to the prohibition of agreements, decisions or concerted practices that do not restrict competition within the meaning of Article 101(1) TFEU, or that fulfil the conditions of Article 101(3) TFEU. Member States are also not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings. However, as it has been supported that the conduct under examination is not an agreement or concerted practice, due to its unilateral nature, it is not captured either by the prohibition of stricter national provisions as depicted in Regulation 1/2003. It has to be noted that, to some extent, similar provisions are found in the respective Austrian and German legislations (Article1 par. 4 of Federal Cartel Act 2005[13] and Article 21 of the Act against Restraints of Competition[14]).

[11] Commission Communication - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, *O.J.,* C 11/01, 14 January 2011, par. 62.

[12] C.J., *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de NederlandseMededingingsautoriteit,* 4 June 2009, C-8/08.

[13] Any recommendations to maintain certain prices, price limits, calculation guidelines, trade margins and discounts which aim at or result in the restriction of competition shall be equivalent to a cartel under para. 1 ("recommendation cartels"). This shall not apply to recommendations which explicitly state to be non-binding and which are not or shall not be enforced by exerting economic or social pressure."

[14] "Prohibition of Boycott and Other Restrictive Practices: (3) Undertakings and associations of undertakings may not compel other undertakings: 1. to accede to an agreement or a decision within the meaning of Sections 2, 3, 28 (1) or Section 30 (2a) or (2b), or 2. to merge with other undertakings within the meaning of Section 37, or 3. to act uniformly in the market with the intention of restricting competition."

B.I.iv. Materiality threshold

Article 1A has also introduced a materiality threshold. Specifically, in accordance with Paragraph 4 of Article 1A, Paragraphs (1) and (2) are not applicable to undertakings having a total turnover of up to 50 million Euro and employing up to 250 employees.

B.I.v. Article 1A Paragraph (1) and Paragraph (2) of Law 3959/2011 and their application on a vertical or horizontal level

One issue that concerns both articles is whether they apply on a vertical or horizontal level. On one hand, the title of Article 1A refers explicitly to competitors, thus to the horizontal level. However, Article 1A (2) on price signaling states that competition is not restricted if the price signaling is exclusively addressed to the end users of a product or service, indicating that there is room for price signaling on a vertical level. This also mirrors the reference in Paragraph 25 (b) of the Guidelines on Vertical Restraints,[15] as currently in effect, where it is specified that "agreements with final consumers do not fall under Article 101(1), as that article applies only to agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings. This is without prejudice to the possible application of Article 102".

Consequently, it could be argued that: (i) in the case of tacit collusion, to the extent that there is reference to competing undertakings in the title, without any reference to end users and considering that Article 1A acts as a more special provision compared to Article 1, then Paragraph (1) applies on a horizontal level; (ii) in the case of price signaling, to the extent that there is an exclusion of end users, but not an exclusion of undertakings on an upstream level, then Paragraph (2) applies on a vertical level.

Nevertheless, considering the fact that this particular provision has not yet been tested before courts, it is safer to assume that both of the infringements described therein extend on both a vertical and horizontal level.

B.I.vi. Conclusion on new Art. 1A

The aforementioned analysis leads to the conclusion that:

(a) Article 1A (2) is more straightforward, as it clearly includes all the elements that constitute price signaling.

(b) Article 1A (1) is more problematic, as it introduces in our opinion a *sui generis* infringement of competition law, that could be perceived as falling under the scope of Article 101 TFEU, or even acting as an extension of it. In this case, we would deal with a novel form of unilateral conduct that leads most likely to the application of Article 101 TFEU at the preparatory stage of the intended concerted practice.

[15] Guidelines on Vertical Restraints, *O.J.,C 130, 19 May 2010, pp. 1–46.*

(c) In any case, it seems that the conditions for the application of Article 1A should be specified in more detail. Specifically, there should be a clear line that would distinguish the application of Article 1A from other provisions, in order to ensure legal certainty for all affected undertakings. The HCC has already noted that it will issue relevant Guidelines clarifying the aforementioned points. As such, the HCC has declared that a transition period is provided to undertakings to ensure compliance till July 1,2022.

C. On previously proposed Article 2A of Law 3959/2011 - abuse of a dominant position on an ecosystem of structural importance for competition

Introduction. The initial draft of Law 4886/2022, which was submitted for consultation in August 2021, included a provision on ecosystems, with the aim of modernizing and updating Greek competition law. This provision essentially adds criteria to Article 102 TFEU that could help substantiate abuse of dominance in cases where the current legislation is not effective.

Aim & impact of provision. Article 2A was eventually not included in the final version of the amended Law, as it was heavily criticized by stakeholders that were not persuaded of the aim and impact that the provision would have. Specifically:

(i) Article 2A was introduced at a moment when European legislation on this matter had not yet been fully formulated. Specifically, the adoption of the DMA[16] was still pending. The DMA introduces *ex ante* prohibitions of a regulatory nature that undertakings in the digital sector holding a particular and significant role in the market ("gatekeepers") should abide by. The DMA is explicitly limited only to the digital sector. On the contrary, Article 2A has been criticized as covering a far broader scope than the intended scope of the DMA, as it could be applied to other sectors apart from the digital one. Consequently, the provision is not seen as complementary to the DMA by a fair amount of stakeholders, which seems to have been initially the rationale behind Article 2A, but as more interventional in the process of competition.[17]

(ii) The DMA indicates that the intention of the EU legislator is to start off with regulatory reforms and not yet competition law interventions. It acts complementarily to EU and national competition law, as "*it minimises the detrimental structural effects of unfair practices ex ante, without limiting the*

[16] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final, 15 December 2020.

[17] See also M.G. Jacobides and I. Lianos, "*Ecosystems and competition law in theory and practice*", Industrial and Corporate Change, 30, 2021, p. 1221: "*In contrast to the ex ante regulation suggested by the DMA, this new provision Article 2A relates to ex post competition law enforcement and aims at addressing anticompetitive issues posed by the widespread prevalence of ecosystems in the sense of covering an increasing scope of economic activities, impacting a growing number of sectors, and becoming more consequential within them. Therefore, the new provision complements the DMA rather than being a substitute for it*".

ability to intervene ex post under EU and national competition rules".[18] Therefore, it appears that the EU legislator considers either that broad interventions on a competition law level are not yet deemed necessary or that more specific tools are needed, such as the much awaited revision of the Market Definition Notice. This is contrary to the approach of Article 2A, which seems to expand further the scope of Article 102 TFEU, by introducing new notions. Moreover, the DMA's explicit intention is to capture anti-competitive behaviour arising from undertakings that may not be necessarily dominant, which is contrary to Article 2A.

(iii) Article 2A is not similar to the provisions adopted in other EU countries (most notably Germany), which have been characterized as more limited in scope. Thus, Greek competition law deviates from EU competition law and errs to the stricter side, which can be particularly limiting for undertakings active in Greece.

(iv) Article 2A can also further highlight the conflict between the competences of the HCC and other regulatory authorities, notably the Hellenic Telecommunications and Post Commission ("EETT"). EETT is still considered as the competent authority for competition law disputes regarding the telecommunications and post sectors, whereas the provision could allow the HCC to set foot in the digital/technology sector, thus possibly in an area falling under EETT's competence.

(v) Even in cases where Article 2A has introduced specifications that could clarify its scope and facilitate its implementation, these have been debated. For example, in Paragraph 4, a presumption had been proposed that an ecosystem is not of structural importance for competition, if at least four other independent ecosystems are present in the market, as a viable alternative. Such number has been criticized as being not justified for the size of the Greek market.

All in all, the market landscape as regards technology-based businesses is changing even in Greece and this may affect the dynamics of competition. However, European legislation seems to approach the matter of regulation of the digital sector in a different way at the time being and, in any case, it has not yet been fully formulated (e.g. DMA). Moreover, we are also still awaiting further developments on various important cases linked to the digital sector from the ECJ (e.g. Google decisions that are on appeal before the Court of Justice or pending decision before the General Court[19]).

As a result, Article 2A would add more legal uncertainty at this point, than assist in the implementation of competition law in the digital sector, considering the ambiguities

[18] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final, 15 December 2020, p.4.

[19] C.J., *Google and Alphabet v. Commission (Google Shopping)*, C-48/22 P, appeal pending against decision T-612/17; G.C., *Google and Alphabet v. Commission (Google Android)*, T-604/18, pending publication of decision.

that have been raised. *Ex post* legislative innovations are a useful tool, but they should be fully substantiated and adjusted to the circumstances of the market, in order to avoid over-regulation, as well as extensive interventions to business freedom, competitiveness and investments.

D. Epilogue

The amendment of Law 3959/2011 has posed some new issues. Although certain provisions were correctly omitted, such as originally proposed Article 2A, others require further clarifications, with the purpose of identifying their proper nature and scope of application. One such example is Article 1A, as shown hereinabove. The upcoming HCC Guidelines are expected to shed more light into this matter. Therefore, there is still a long road till we see how this provision, and the amended law in general, will be applied and enforced in practice.