An aerial photograph of a long, multi-lane bridge stretching diagonally across a vast expanse of turquoise water. The water's surface is textured with small ripples and some white foam from waves breaking near the bridge's edges. In the upper right corner, a small, rocky island with patches of green vegetation is visible. The overall scene is serene and expansive.

Linklaters

# Next Generation Cartels and Antitrust Enforcement

Spring 2023

[linklaters.com](https://linklaters.com)



# Antitrust enforcement is in growth mode, businesses need to ensure effective compliance

Amid a cost-of-living crisis, antitrust enforcers are seeking to ensure inflationary prices are not masking collusion or market power drivers, while many are taking enforcement action to make sure that employers are not suppressing competition in labour markets and depressing consumers' purchasing power.

## Stamping out unlawful collusion: the top priority for antitrust enforcers

Authorities will be on high alert and enforce aggressively in 2023. We expect the number of dawn raids (including of private homes) to grow significantly. Businesses need to be ready to respond balancing their obligation to co-operate with the need to protect their rights.

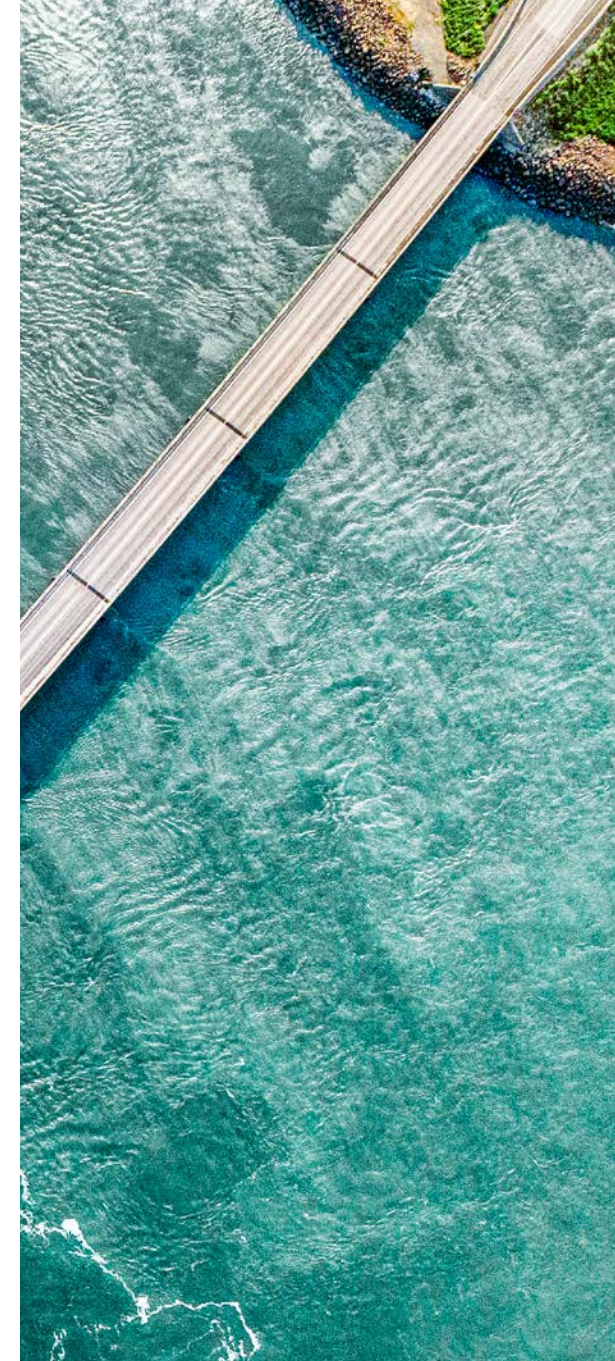
In the EU, the **upgraded e-lenieny tool and lenieny guidance** reflects the Commission's commitment to rebuilding its enforcement pipeline. Detection risks are also increased following a significant uptick in lenieny applications in the EU (twice the amount in 2022 compared to 2021), so businesses banking on lack of detection may need to think again.

We should also expect tougher penalties for antitrust breaches, with new personal liability rules in China and heftier corporate fines expected in Australia, following the first ever prison sentences imposed last year.



Antitrust agencies are sharpening their toolbox and gearing up to deploy their enforcement powers to the fullest so that competition works well across sectors even in challenging economic times.”

**Marcus Pollard**, Counsel, Hong Kong SAR





## Tackling new ways to collude and abuse

Enforcers are increasingly interested in novel competitive harms, especially in the less traditional forms of cartels (such as buyer cartels, cartels on technical development or product characteristics, and information exchange cartels) across a variety of sectors. This includes the HR space – an area of the business traditionally outside of the day-to-day scope of antitrust law. With the US leading the way, we are seeing a significant uptick in enforcement actions against **wage-fixing and non-solicitation (or “no-poach”) agreements** globally, with a number of ongoing investigations, including in France, Hungary, Lithuania, Poland, Romania, US and UK (where **guidance has been published** for employers on avoiding anti-competitive behaviour) and a rumoured probe at EU level. We can expect scrutiny to continue into 2023 and beyond, so businesses should prioritise updating their compliance policies to protect against this new level of risk facing HR and M&A teams. Listen to our **dedicated webinar** for more on this.

Meanwhile, the European Commission has opened its **first formal investigation** into potential standalone abuses of dominance based on disparagement of competing products in the pharmaceutical sector. (Its **ongoing investigation into Teva’s Copaxone** involves disparagement too, but as one of a series of alleged abuses.) This is significant because it shows the Commission’s growing resolve to focus on non-price strategies by dominant companies.

In the US, plans to rev up enforcement against **“right to repair” initiatives** will continue, with implications for manufacturers across sectors. While federal legislation is pending, manufacturers should keep watch, as the FTC’s recent anti-tying enforcement focus and the passage of legislation at a state level may signal further developments ahead. And, as with HR, enforcement trends in the US often turn global.

## The flipside: more support for businesses to stay within the rules

2023 will also be the year when companies get more clarity on how to stay within the competition rules, with updated and expanded EU guidance on agreements between competitors **expected in the first half of 2023** (together with the revised R&D

and specialisation block exemption regulations). This follows refreshed **EU** and **UK** verticals rules last year, with new guidelines expected elsewhere, including Brazil.

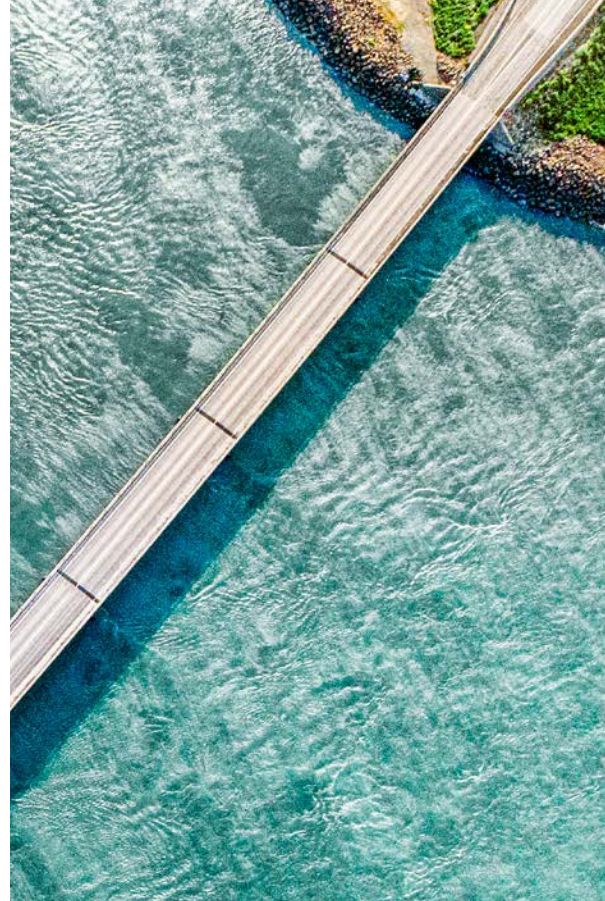
There will be new EU guidance to support the digital and green transition – particularly for mobile infrastructure sharing agreements, data sharing via data pools, and **sustainability agreements**.

Indeed, new sustainability guidance looks to be a global theme for 2023: following final guidance published recently in Austria, the UK CMA plans to issue **more detailed guidance** on when sustainability agreements won’t restrict competition. It will be applied by a dedicated Sustainability Taskforce. Most recently, Japan’s JFTC also **announced plans** to issue guidance.

### Spotlight on: Digital markets

In 2023, the EU’s landmark Digital Markets Act will **take effect**. Designed to curtail the power of Big Tech, it will doubtless have significant global impact. But will it set the global standard for tech regulation or spark a phase of fragmentation? Meanwhile the fate of new US digital legislation will be in focus following the recent midterms, the UK’s Digital Markets Unit is **set to get legislative powers** by October, and tech remains high on SAMR’s 2023 enforcement agenda.

Several high-profile antitrust investigations are expected to reach key milestones, while private class actions against Big Tech are on the rise with claimant firms and litigation funders actively seeking to bring claims without waiting for infringement findings. This is not only in the US – the traditional home of class actions – but increasingly in the UK, Portugal, the Netherlands and beyond. The potential damages exposure dwarfs anything imposed so far by enforcers. For more insight, read our dedicated tech publications: **Tech Legal Outlook 2023** and **5 Themes in 5 Minutes**.



“2023 will see continued enforcement against practices that are seen to slow down innovation or limit competition with greener solutions”

**Bernd Meyring**, Partner, Brussels

Germany's FCO **plans to include a clearer legal framework** for sustainability agreements in the next stage of the German Competition Law reform this year. Meanwhile the French FCA has underlined its commitment to sustainable development by tackling anti-competitive practices and supporting companies wishing to achieve genuine ESG goals.

But not all authorities are onboard: Brazil's CADE is clear that it is not the place of antitrust law to promote certain policy goals over others, including ESG and in the US senators have issued written warnings to law firms that sustainability collaborations can be viewed as antitrust violations.

While new guidance is bedding in, companies may want to avail themselves of offers by authorities for informal guidance on the lawfulness of their plans. The **Dutch ACM is the trailblazer** here, having already published several decisions to bless sustainability agreements across sectors. But others, including the Commission, have also invited companies to enter into a dialogue.

## Get comfort “at any time” for legitimate crisis coordination

The opportunity to seek informal guidance will also be increasingly important in the context of crisis coordination. We have already seen the first requests for comfort in Germany (**sugar** and **energy**), following a **joint ECN statement** that authorities are ready “at any time” to engage with companies on their necessary, temporary and targeted plans to mitigate supply chain disruptions due to the Ukraine crisis.

In the EU, procedural guidance has **just been updated**, strengthening the evidentiary weight of comfort letters and increasing the collaborative nature of the procedure. However, companies may still be hesitant to engage with the Commission given the lack of (1) procedural guidelines the Commission follows when it contacts third parties (including customers, suppliers or competitors) regarding an application for a comfort letter, and (2) protection against self-incrimination.

## Spotlight on: “Green claims”

Tackling green claims (i.e. false or misleading statements that products or services meet certain environmental standards) is a top priority for many consumer regulators and private litigants, meaning heightened risks for businesses.

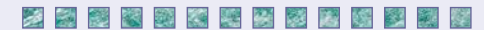
Beyond performing extensive sweeps of company websites, regulators are beginning to act against alleged greenwashers. For example, the UK CMA has **opened investigations into various fashion brands** under its Green Claims Code, and **recently expanded its investigation further into Fast Moving Consumer Goods**. Most recently, Canada's Competition Bureau is **investigating RBC** for greenwashing in their advertising.

What can companies do to mitigate the growing risks? Scrutinise green claims (including those by omission!) and only issue credible statements. Keep a record of statements in case the company is brought to account. Listen to **our webinar** for more practical tips.



How the Commission, would-be gatekeepers and other stakeholders implement and participate in the roll out of the DMA next year will shape the evolution of digital markets, with potential implications far beyond the EU.”

**Jonathan Ford**, Partner, London/Dublin



## YOUR CALLS TO ACTION

1. Ensure your business is dawn raid ready
2. Refresh compliance programmes to protect against new risks including HR
3. Get ready for the DMA and plan for continued focus on digital markets
4. Get familiar with new guidance on sustainability agreements and consider seeking informal guidance in grey areas



# Our cartels practice

With our global footprint and on-the-ground experience in multiple jurisdictions our Antitrust & Foreign Investment team support clients through the broad spectrum of challenges that arise before, during and after a cartel investigation.

We collaborate across practices, including Dispute Resolution, TMT/IP and Financial Regulatory to provide a holistic approach to supporting clients, from designing and implementing effective compliance policies, swiftly reacting to dawn raids, helping you respond to the investigation and advising you on related litigation (appeals and private enforcement). Linklaters can guide your strategy of engagement with competition authorities and private litigants across the lifecycle of an investigation.

Our senior lawyers have excellent access to decision-makers where it matters. Our strong links with regulators are reinforced through the recruitment of former officials and longstanding relationships with the many Linklaters alumni who joined agencies. Many of our lawyers regularly advise agencies within the International Competition Network and other non-governmental bodies on policies and legislation.

**Natura Gràcia**

Antitrust & Foreign Investment Partner,  
London

Tel: +44 20 7456 4941

[natura.gracia@linklaters.com](mailto:natura.gracia@linklaters.com)

**Bernd Meyring**

Antitrust & Foreign Investment Partner,  
Brussels

Tel: +32 2 505 03 32

[bernd.meyring@linklaters.com](mailto:bernd.meyring@linklaters.com)

**Doug Tween**

Antitrust & Foreign Investment Partner,  
United States

Tel: +1 212 903 9072

[douglas.tween@linklaters.com](mailto:douglas.tween@linklaters.com)

**Fay Zhou**

Antitrust & Foreign Investment Partner,  
Beijing

Tel: +86 10 6535 0686

[fay.zhou@linklaters.com](mailto:fay.zhou@linklaters.com)



## Linklaters Dawn Raid Response

2022 saw a sharp increase in the number of dawn raids after a period of almost zero activity during the Covid-19 pandemic. Authorities in the EU, UK and elsewhere made use of their powers to raid private homes adding a layer of risk to be managed. 2023 will see further raids in many jurisdictions as authorities ramp up enforcement and may even see the return of globally co-ordinated raids.

Businesses need to be prepared to respond. Covering 11 jurisdictions in 10 languages Linklaters' fully customisable Dawn Raid App provides practical step-by-step guidance for each team member ensuring the right people know about the raid and your Linklaters team can get to you as quickly as possible.

Take a look at our publicly available [Dawn Raid App](#) or get in touch to discuss customisation to your needs.

To prepare your team you could also take a look at our Dawn Raid [e-learning module](#) or ask us about our training options including delivering a dawn raid drill at your premises.

[linklaters.com](https://www.linklaters.com)

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on [www.linklaters.com](https://www.linklaters.com) and such persons are either solicitors, registered foreign lawyers or European lawyers. Please refer to [www.linklaters.com/regulation](https://www.linklaters.com/regulation) for important information on our regulatory position. LIN.GBR.358