

ALLEN & OVERY

Global antitrust enforcement report

March 2022





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Foreword

This is the second year in which our report has covered not only global cartel conduct but also other forms of antitrust enforcement around the world (including vertical arrangements and abuse of dominance cases). And it has already been interesting to examine the data trends year-on-year for these different types of conduct.

Of course, the continued impact of the Covid-19 pandemic across the globe means a degree of caution is required when drawing long-term conclusions from any shifts between 2020 and 2021, which were by no means ordinary years for antitrust enforcement given the ongoing restrictions on authorities' working practices.

However, it is clear from the data that fines for antitrust enforcement ramped up again significantly during the course of 2021. For the jurisdictions surveyed in 2020 and 2021, there was an appreciable increase in total fines, up to USD11.4 billion in 2021 from USD5bn in 2020.

European Commission (EC) fines made up a considerable proportion of the 2021 total (USD2.1bn), after a notable decline in 2020. Italy also imposed a significant amount – USD1.7bn, largely attributable to a single decision against Amazon for abuse of a dominant position in online marketplace and logistics services. Other jurisdictions (including the UK, Austria, Spain, Turkey, Brazil, India and South Africa) reported marked increases in the level of fines imposed in 2021. As an exception to this general trend, however, the U.S. reported a decline in fine totals (down nearly 75%), from USD540 million in 2020 to only USD150.2m in 2021.

In another sign that regulators are keen to get back to 'business as usual', the second half of 2021 in particular saw a remarkable uptick in dawn raids in numerous jurisdictions. Several authorities (including the EC) announced that further raids were in the pipeline. With the pandemic seemingly prompting many businesses across the globe to adapt to more permanent flexible working arrangements, there were initial doubts as to the extent to which regulators would continue to invest in dawn raids. However, it now seems clear that dawn raids are here to stay. What's more, the exponential rise in the number of 'home offices' means that we may well see an increase in the use of authorities' powers to raid the domestic premises of key employees (a trend already underway in certain countries, including France).

Fining totals and enforcement procedures aside, 2021 heralded a number of fundamental and wide-reaching regulatory reforms and new political antitrust agendas. In the U.S., the entry into power of the Biden administration brought antitrust enforcement into sharp focus, with the appointments of several prominent, staunch Big Tech critics to the Federal Trade Commission (FTC) (Lina Khan), Department of Justice (DOJ) (Jonathan Kanter) and White House competition advisor (Tim Wu) confirming that there will be a progressive bent in antitrust enforcement in the U.S. going forward. And perhaps even more significant were the changes in Mainland China. The establishment of a new Chinese antitrust agency and the announcement of significant amendments to its existing antitrust rules, as well as a number of enforcement decisions including in the digital space, suggest we are set to see a new wave of antitrust enforcement.

The focus on the digital sector is a trend that we have witnessed in the last few years, and remains a continued priority for regulators across the globe. A number of digital reforms entered into force in 2021 and several more are on track to do the same in the coming months. As the number of different regimes increases, so too will the need for interaction between them, a fact seemingly already acknowledged by the regulators themselves. We saw the creation of a number of new international cooperation initiatives in 2021, including the EU-U.S. Joint Technology Competition Policy Dialogue and the first joint meetings of the ASEAN authorities.

Looking ahead to 2022, it will be interesting to see whether the wide-sweeping reforms spur on a new era of heightened antitrust enforcement, building on 2021 fining levels, or whether 2021 will be regarded as a pandemic-related anomaly, with the real impact of the reforms not felt for some years to come.

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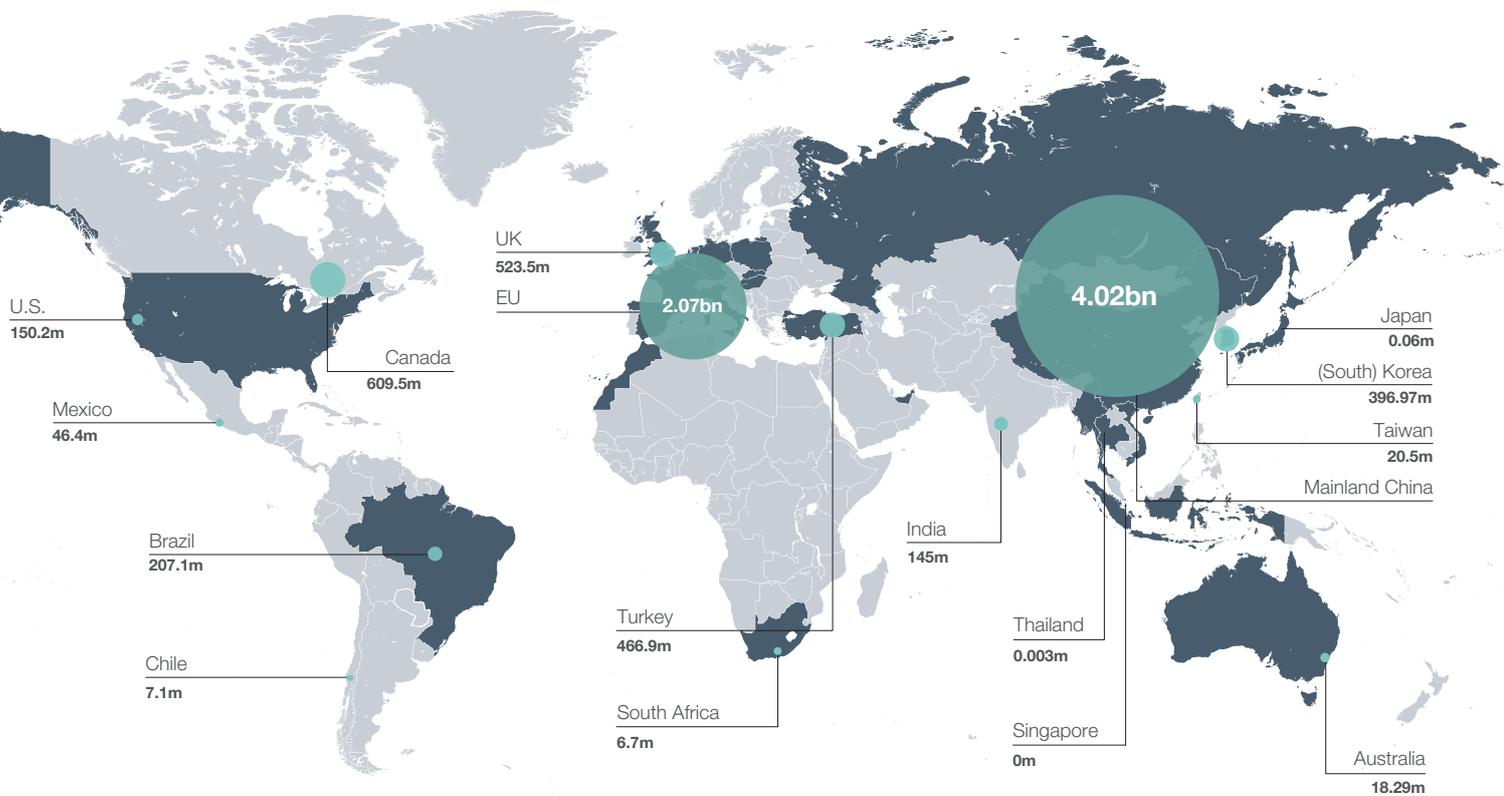
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2021 antitrust enforcement fines

By jurisdiction



● A&O office locations

All figures are in U.S. dollars (USD).

2021 statistics are approximate and may not be exhaustive. They reflect fine levels calculated using an average exchange rate for 2021. The EU fine total relates to decisions taken by the EC.

U.S. figures relate to fines imposed at federal level by the DOJ and are for the U.S. fiscal year, which runs from 1 October to 30 September. All other countries' statistics relate to the calendar year.

China statistics relate to key cases dealt with at a central level.

“Fining totals and enforcement procedures aside, 2021 heralded a number of fundamental and wide-reaching regulatory reforms and new political antitrust agendas.”

Hot topics for 2022



Digital reform starts to bite

'Big Tech' continued to come under intense scrutiny in 2021. Significant enforcement decisions included notable fines against Amazon in Italy, and a landmark ruling by the EU General Court in the Google shopping case seemingly vindicating DG Comp's pursuit of digital enforcement, although Google has already filed an appeal. The EC's consumer Internet of Things sector inquiry also pinpointed various concerns, including relating to tying practices and interoperability. And the flurry of new investigations opened across Europe and APAC indicate that we can expect heightened activity in the digital space to continue throughout 2022.

In April, the UK Competition and Markets Authority (CMA)'s Digital Markets Unit (DMU) began work in 'shadow' form. And EU governments reached agreement on the Digital Markets Act in November, with hopes to reach a final text by the end of March 2022.

Beyond Europe, the U.S., Australia, Japan, Korea and Taiwan are among the jurisdictions that have also launched or progressed initiatives in the digital space. The challenges posed by digital markets dominated discussions at the G7 Competition Enforcers Summit in November, with emphasis on the need for a joined-up approach to reform.



Spotlight on sustainability

2021 saw continued lively debate on the interplay between antitrust law compliance and sustainability initiatives. Europe has been at the centre of much of the discussion, with antitrust authorities in the Netherlands, Greece, Germany and the UK setting out policies or issuing guidance. The Dutch authority in particular has led the way with progressive new guidelines, and a strong stated position that agreements between competitors that benefit society as a whole could be allowed even if the companies' customers are left worse off.

Signalling a slightly different approach, an EC policy brief (published in September) was clear that the green transition must be supported by enforcing the rules "more vigorously than ever", although it also acknowledged that further guidance is needed in this area. Indeed, the draft revised horizontal cooperation guidelines published by the EC in February 2022 now contain a whole chapter on sustainability, which includes conditions for a 'soft safe harbour' for sustainability standardisation agreements as well as several worked examples.

The EC has also indicated that individual guidance will be offered in appropriate cases, as in its letter to manufacturers in the car emissions case (discussed further below) as well as its recently launched consultation on potential exemptions from competition rules for certain sustainability agreements in the agricultural sector. In a similar vein, the German Federal Cartel Office (FCO) has approved two separate business cooperations involving sustainability initiatives (one regarding common wages in the banana supply chain, and the other regarding an animal welfare initiative, the latter subject to guidance from the FCO).

While increased guidance will no doubt be welcomed by businesses, both the policy brief and the EUR875m fines in the car emissions case send a clear message from the EC that sustainability initiatives cannot be an excuse for anti-competitive conduct.



Tough stance on healthcare sector continues

Pharmaceutical companies continued to draw regulatory attention. In Europe, excessive pricing conduct (historically rarely investigated) was the focus of several investigations. In February, the EC accepted commitments in its excessive pricing probe into Aspen. Excessive and unfair pricing by several drug companies attracted record-breaking fines by the UK CMA, while the Dutch authority issued its first ever penalty for excessive pricing on drug maker Leadiant. Leadiant is also under investigation in several other EU Member States (including Italy and Spain) for the same behaviour.

With a general focus on protection of citizens' rights to affordable healthcare, we expect the EC, EU Member States' antitrust authorities and the UK CMA to maintain the enforcement momentum and to target excessive pricing in relation to both generic and patent-protected products.

The EU's interest in pay-for-delay settlements continued, with the European Court of Justice (ECJ) upholding the EC's decision against Lundbeck. The EC also opened a new investigation into Teva, this time under the remit of unilateral conduct potentially amounting to abuse of dominance.

Life sciences also saw antitrust fines in jurisdictions such as Mainland China, Taiwan, Korea, Turkey and Mexico, and pharma companies were the target of dawn raids in Greece, Belgium and Japan.

In 2022 and beyond, the sector can expect even more scrutiny from significant global enforcers, with authorities in both the U.S. and Mainland China signalling that it will be a key target of their antitrust reform efforts.



Renewed focus on labour markets

A number of regulators showed a renewed interest in labour markets in 2021.

EU Competition Commissioner Margrethe Vestager highlighted collusion on wages and the use of no-poach agreements in buyer cartels as particular areas of interest. In the same speech, Vestager indicated that a number of dawn raids were planned, sparking speculation that the human resources sector is a likely future target for investigations. In December, the EC also published draft guidelines on collective bargaining agreements, which seek to improve the working conditions of gig economy workers.

In the U.S., the employment market was one of the key areas of focus of President Biden's executive order, which targeted a number of issues including wage collusion, employee

non-compete clauses and other "agreements that may unfairly limit worker mobility". The DOJ also continued its prioritisation of no-poach agreements, pursuing a number of enforcement actions in 2021. A joint workshop held by the FTC and DOJ in December to explore competition issues in labour markets further emphasised that both agencies are redoubling their efforts in this area.

Other regulators were also active in enforcing and debating antitrust law issues in this area. Brazil's CADE opened an investigation into wage fixing in the healthcare sector, fines were imposed by the Mexican antitrust authority in relation to salary agreements in women's football and amendments to Canada's antitrust legislation on buyer agreements may be on the cards, following a case in the junior hockey sector.

“Pharmaceutical companies continued to draw regulatory attention. In Europe, excessive pricing conduct (historically rarely investigated) was the focus of several investigations.”



Novel forms of collusion, novel forms of enforcement

Antitrust authorities continued to push the envelope in 2021 by considering innovative forms of collusion as potential cartel conduct.

For the first time, in the *car emissions* case, the EC found that cooperation on technical elements, as opposed to more “traditional” anti-competitive conduct such as price fixing or market sharing, amounts to cartel behaviour. In another unusual move, the EC published a letter it had sent to the car manufacturers containing guidance on the aspects of their technical collaboration that did not raise antitrust concerns. The EC has hailed the letter as an example of the guidance it plans to give businesses on whether cooperation to produce greener products is legal. Time will tell how often the authority will take a similar route in future cases. And whether any guidance will focus only on coordination in an environmental or sustainability context, or cover cooperation in a broader sense.

The use of algorithms as a novel means of collusion remained on the regulator watch list. The UK and Japan were among those jurisdictions issuing reports and guidance warning against the use of algorithms for collusion or self-preferencing.

In one of the first decisions considering these issues in practice, the Italian IAA accepted commitments, in an information exchange case in the insurance industry, which specifically addressed the technical aspects of an algorithm and stipulated that it would not feature self-learning characteristics. We expect to see further enforcement action of this nature.



(Parental) liability

2021 saw two significant rulings in the EU regarding the scope of corporate group liability for antitrust enforcement.

In an important judgment for financial investors, the ECJ confirmed in the *Prysmian* case that investors, including private equity businesses, can be held liable for antitrust infringements committed by one of their portfolio companies (for details see our summary below). The case sets a high bar for investors to show that they do not exercise decisive influence over – and therefore should not be held liable for the anti-competitive conduct of – their portfolio companies. It remains to be seen whether the ruling will encourage the EC to bring more financial investors into the scope of its fining decisions. Interestingly, in the UK, in two recent cases in the pharmaceutical sector, the CMA has also found two private equity houses liable for the behaviour of their portfolio companies, suggesting that it is willing to adopt a similar approach.

Another ECJ judgment confirmed the wide remit of potential follow-on damages claims, making it easier for victims of anti-competitive agreements to bring claims against large multinationals. Following a referral from Spain regarding a follow-on damages claim in the ongoing *trucks* case, the ECJ extended the ‘single economic unit’ doctrine by confirming that a plaintiff may sue the subsidiary of a parent company for damages when the parent has been sanctioned by the EC for anti-competitive agreements if they constitute the same economic entity (which is to be proved by the plaintiff). It will be interesting to see the extent to which this impacts international jurisdiction in the private enforcement sphere.





Leniency programmes: improvement and regulator engagement

The role of leniency programmes as a tool to boost cartel detection remained a topic of discussion among regulators across the globe. While some authorities, including Brazil's CADE, reported an increase in leniency deals in 2021 compared to 2020, tied in part to improvement in the Covid-19 situation, others expressed continuing concerns regarding the worldwide decline in cartel leniency applications.

In Europe, both the EC and the German FCO have suggested that whistleblowers may need greater protection from follow-on damages claims in order to encourage leniency applications. In a similar vein, the DOJ acknowledged that

civil litigation may disincentivise and detract from criminal cooperation. It called for a "robust dialogue" between regulators on how to improve leniency programmes, indicating the need for consistent and predictable treatment around the world for companies that self-report cartel activity.

Elsewhere, initiatives taken by regulators to revise their leniency programmes to encourage more applications included new guidelines in South Korea and new platforms/tools in Brazil and Greece.



A 'new era' for international cooperation

Cooperation between antitrust authorities is not a new concept, and there are numerous well-established venues for interaction between antitrust enforcement officials, such as the International Competition Network and the OECD's Competition Committee. These types of collaboration efforts now look set to increase.

Perhaps most significantly, in December 2021, the FTC, DOJ, and the EC (DG Comp) launched the EU-U.S. Joint Technology Competition Policy Dialogue and issued a joint statement that the U.S. and EU will cooperate on competition policy and enforcement in the technology markets. Commissioner Vestager heralded a "new era of transatlantic cooperation", and underlined the need to strengthen common values and address shared concerns, including on the role of platforms. More recently, in February

2022, a new working group was also announced between the 'Five Eyes' antitrust authorities (the UK, Australia, U.S., Canada and New Zealand), which will meet regularly to develop and share intelligence to detect and investigate anti-competitive behaviour.

Elsewhere, the heads of ASEAN authorities held their inaugural meeting, where they committed to closer regional cooperation. Key initiatives planned include a manual on competition policy and law for the digital economy.

For businesses, greater cooperation between authorities may lead to quicker investigations and speedier decision-making, especially in complex areas such as digital markets. It may also facilitate a more transparent and uniform approach to particular business practices, helping multinational companies to better evaluate potential risks.



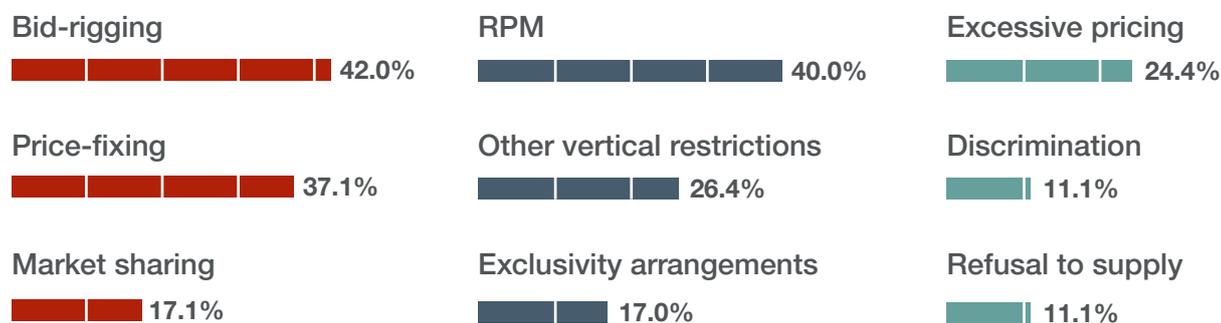
Fines by conduct

2021 global fine levels



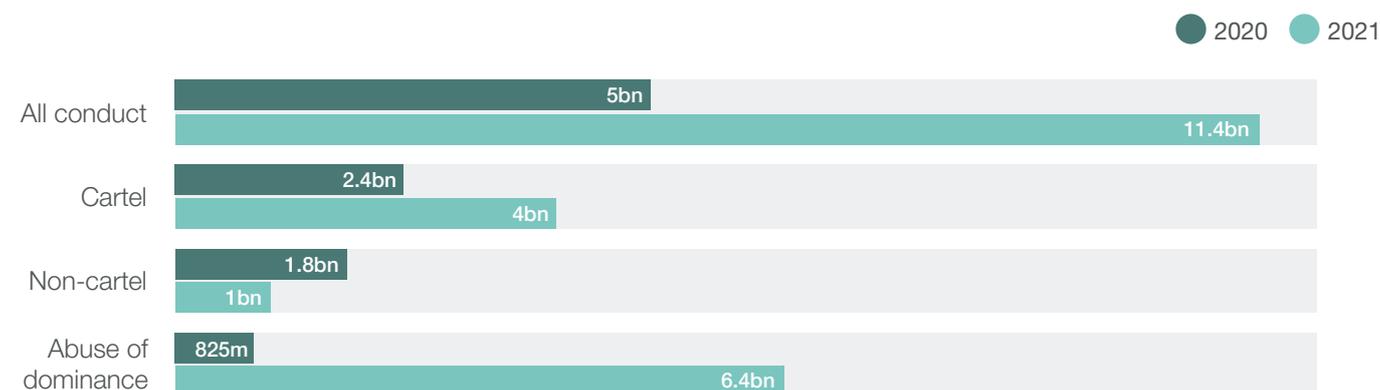
All figures are in U.S. dollars (USD).

Breakdown of conduct



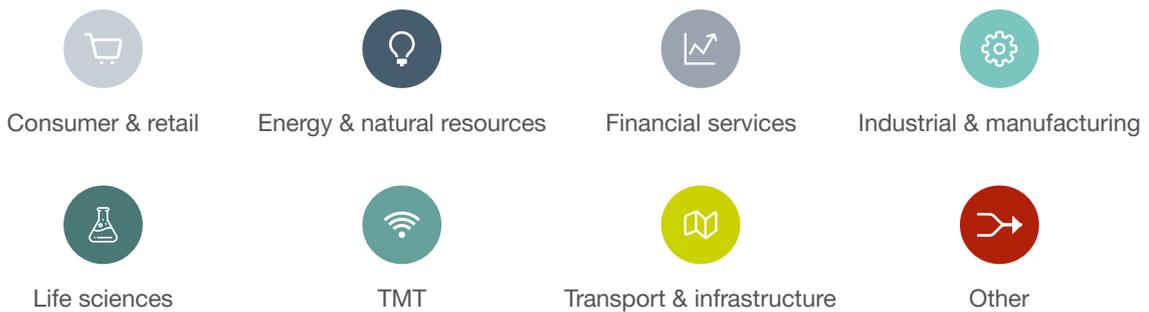
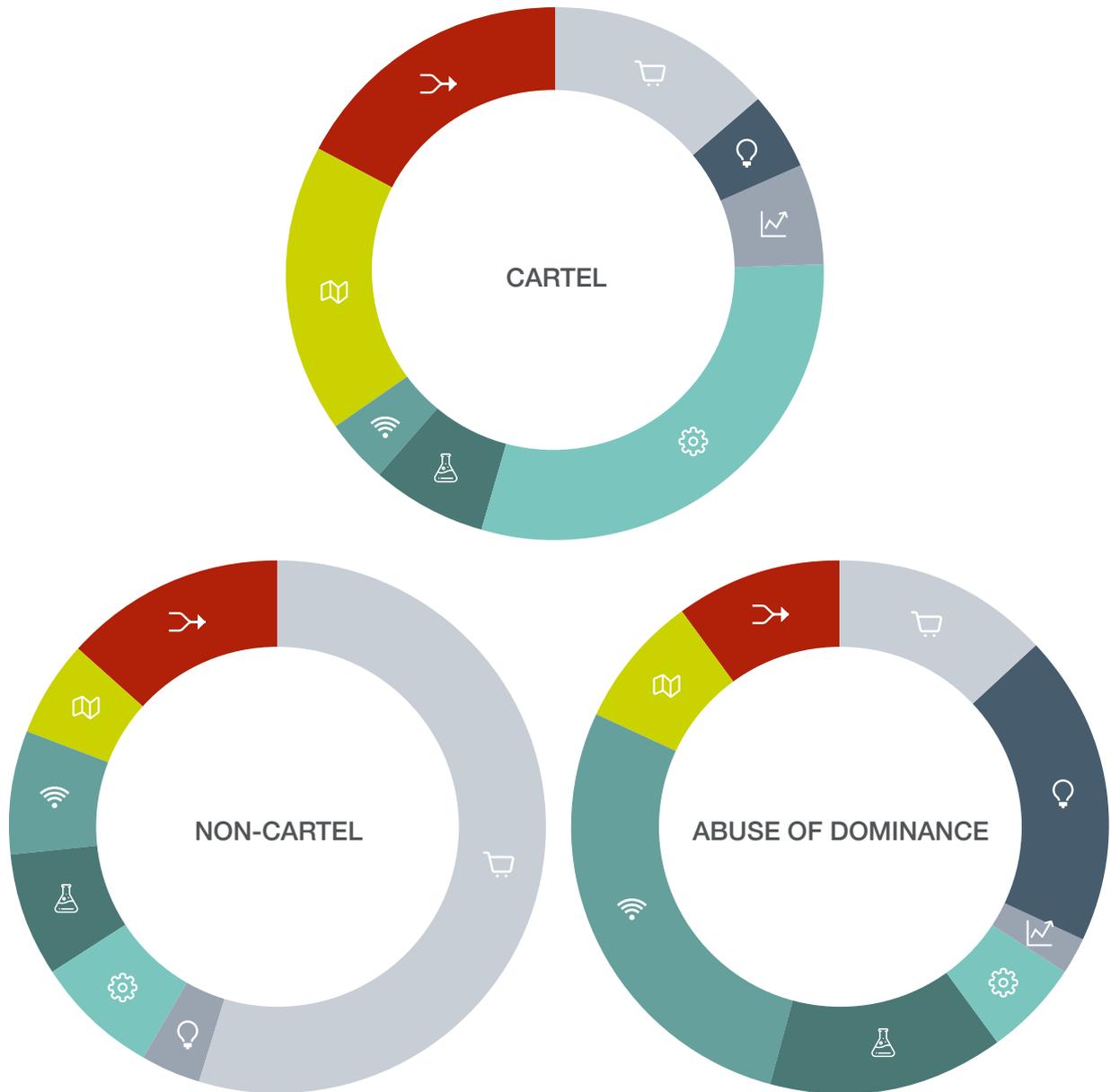
Percentage of cases in which each enforced behaviour was identified, as a proportion of the total number of enforcement decisions involving imposition of a fine or agreement of remedies/commitments.

Comparison of global fines by conduct



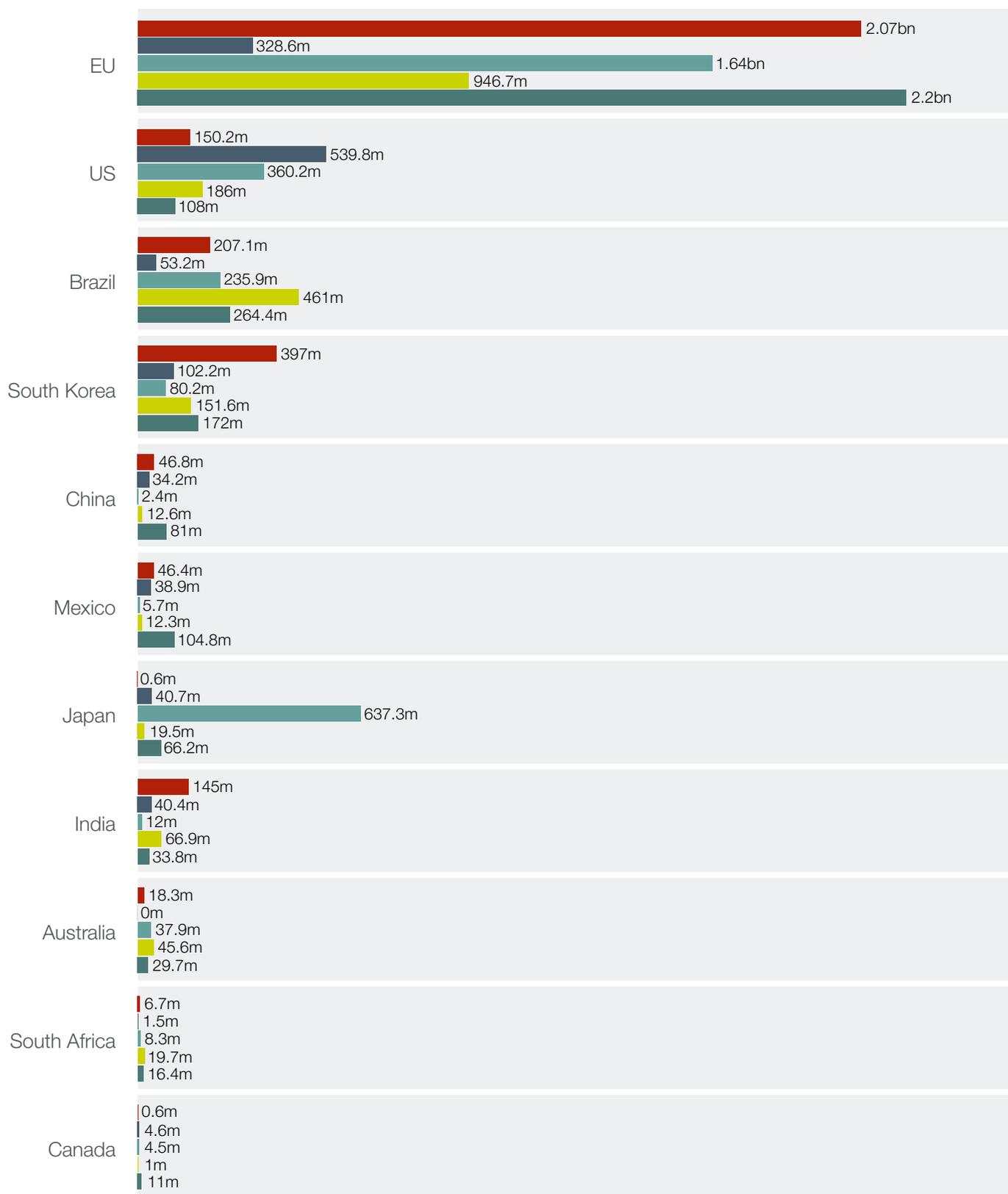
All figures are in U.S. dollars (USD).

Sector comparison



Select cartel fine comparison

● 2021 ● 2020 ● 2019 ● 2018 ● 2017



All figures are in U.S. dollars (USD).

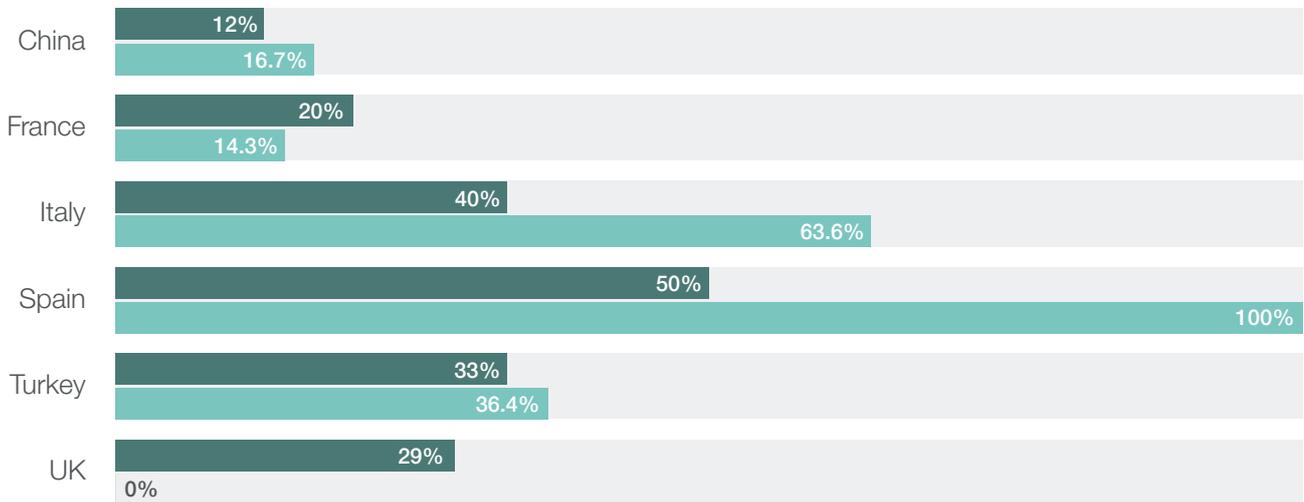
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References to China mean Mainland China. Statistics for China relate to key cases dealt with at a central level.

Other key statistics

Non-cartel and abuse of dominance decisions involving remedies or commitments

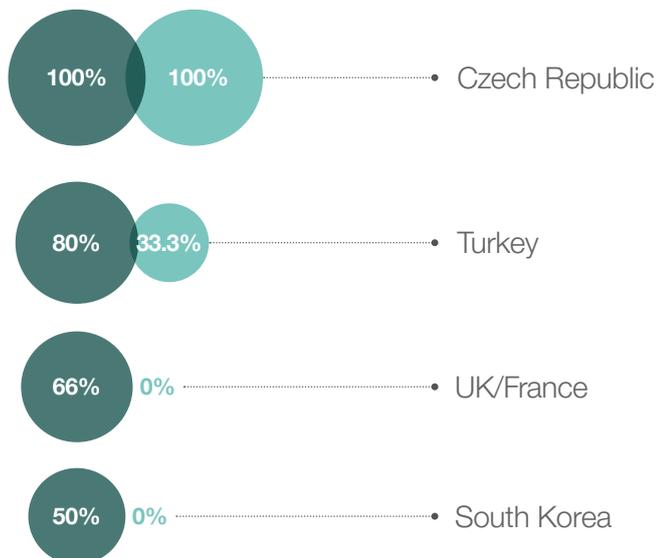
● 2020 ● 2021



Figures relate to select jurisdictions with, in aggregate, three or more non-cartel or abuse of dominance enforcement decisions. References to China mean Mainland China. Statistics for China relate to key cases dealt with at a central level.

Percentage of non-cartel enforcement decisions involving RPM conduct

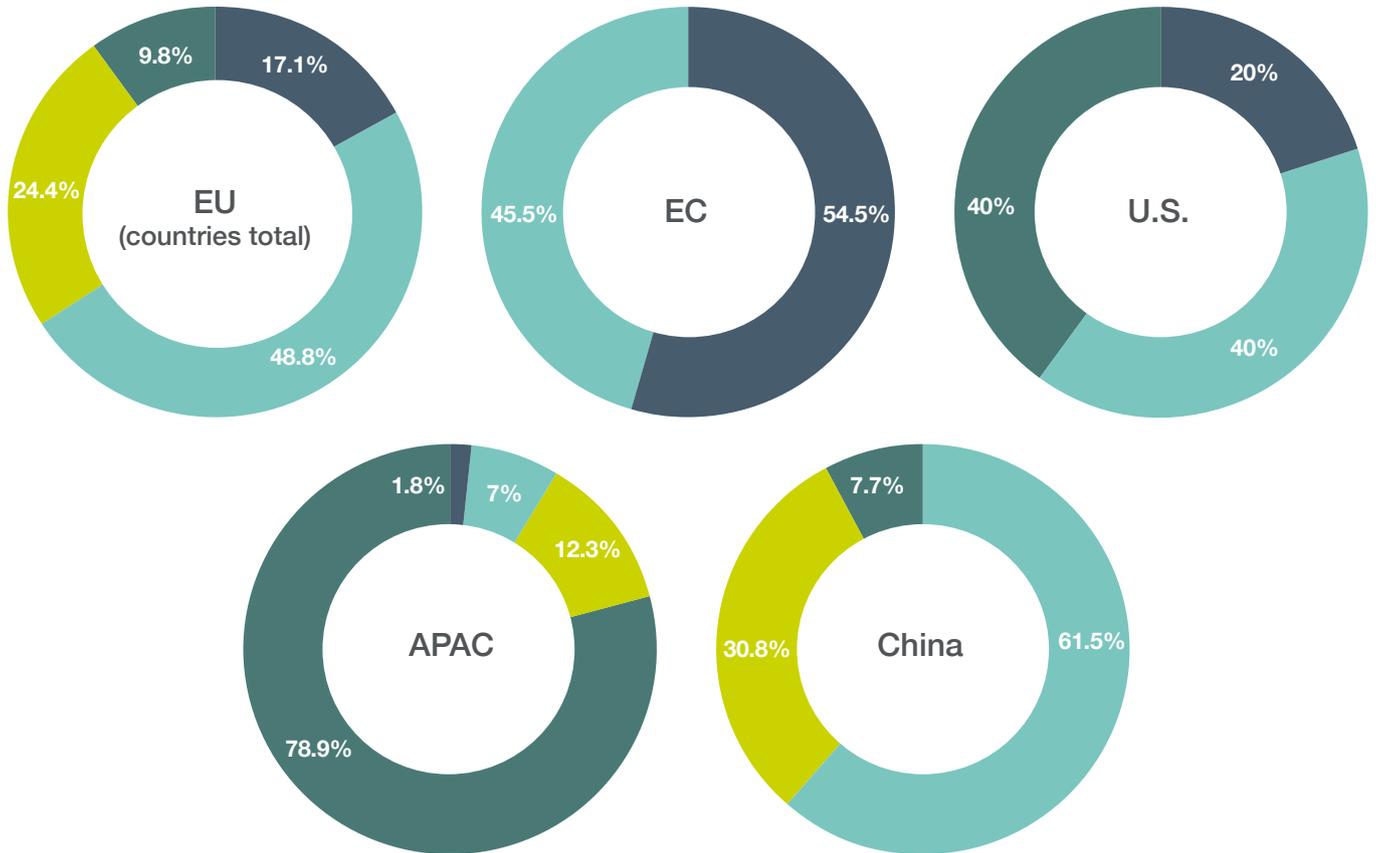
● 2020 ● 2021



Figures relate to select jurisdictions with, in aggregate, three or more non-cartel or abuse of dominance enforcement decisions.

Mode of initiation of cartel cases in 2021

● Immunity/leniency application
 ● Authority's own initiative
 ● Complaint
 ● Not known

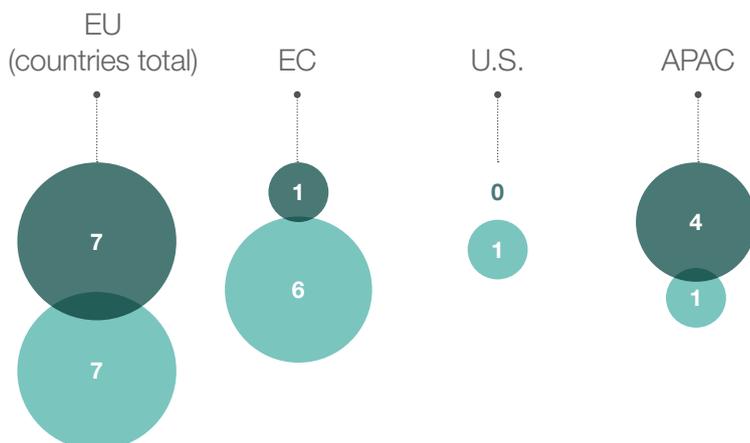


References to China mean Mainland China.

For the purposes of this graphic, APAC excludes China. Statistics for China relate to key cases dealt with at a central level.

Comparison of cases initiated by immunity/leniency by region

● 2020
 ● 2021



Abuse of dominance fines for select jurisdictions in 2020 and 2021



References to China mean Mainland China. Statistics for China relate to key cases dealt with at a central level.

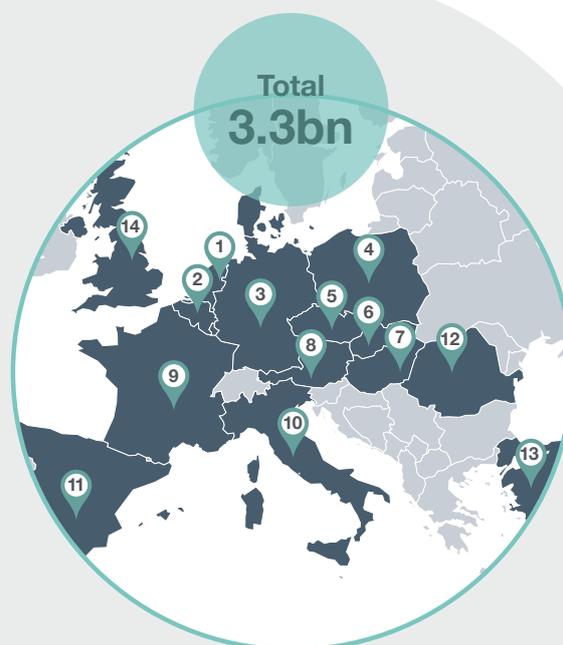
Europe

Antitrust enforcement fines in 2021



● A&O office locations

All figures are in U.S. dollars (USD).



European Union

The EC reclaimed its position as one of the most vigorous antitrust enforcers. It imposed fines of EUR1.75bn, up from a comparatively subdued fine level of EUR369.5m in 2020. All indications are that these higher enforcement levels will continue, with the EC set on the robust pursuit of antitrust violations.

Cartel conduct

Looking at cartel conduct alone, the EC adopted 11 decisions in 2021 in nine separate cases. This compares to 12 in total across the period 2018-2020. The number of decisions does not, however, tell the full story as, in several instances, including the *Euro Interest Rate Derivatives* and *ICAP* cases, these are re-adopted decisions following court challenges from the relevant parties in long-running cases. In both these cases the re-adopted decisions resulted in limited reductions in fines.

Novel approaches to enforcement

The largest fine by some distance (EUR875m) was imposed in the *car emissions* case, against four car manufacturers for collusion over technological developments in the area of nitrogen oxide cleaning for diesel cars. A fifth was the

whistleblower and therefore escaped a fine. As noted earlier, the case was novel as marking the first time the EC has imposed a fine against parties for cooperation on the alleged restriction of technological development. This novelty was reflected in a 20% overall reduction in the fine. Reductions were also made under the leniency regime and for settlement.

While each manufacturer admitted its part and settled the case, several parties maintained that the agreements were never implemented. For companies, this is a reminder that the EC does not need to prove consumer harm or the actual implementation of anti-competitive agreements in order to find an infringement of antitrust laws.

In another unusual step, the EC issued a non-binding comfort letter to the parties on aspects of their conduct considered unlikely to raise antitrust concerns.

The case shows that where anti-competitive conduct restricts competition to the detriment of innovation and threatens the EU's Green Deal objectives, the EC will be particularly determined to take enforcement action. It also clearly demonstrates that the EC is not afraid to pursue novel theories of harm.

In a further example of its willingness to take an innovative approach, in the EC issued a statement of objections to a pharmaceutical company for allegedly regularly misusing patent procedures to delay the entry of generic manufacturers and for so-called “exclusionary disparagement” by creating a “false perception” around the risks associated with generic alternatives to its drugs.

Focus on financial services continues

Returning to more traditional enforcement activity, the financial services sector has been a consistent area of focus in recent years. 2021 was no exception, with the EC issuing fines totalling EUR744m in cases involving the rigging of foreign exchange rates (the EC’s third such fine in recent years) and separate cartels in relation to trading in Supra-Sovereign, Sovereign and Agency bonds and European Government Bonds. Several of these decisions are being appealed. As an interesting aside, a number of the banks found to have been involved in these and other antitrust infringements were reportedly temporarily excluded by the EC from participation in syndicated bonds sales related to the EU’s Covid-19 recovery fund.

Financial markets look set to remain on the EC’s radar: commenting on the forex case, Commissioner Vestager underlined that the EC remains committed to ensuring a “sound and competitive financial sector that is essential for investment and growth”.

The EC’s 2021 cartel enforcement action concluded with a settlement decision against an ethanol producer for coordinating trading behaviour with other firms in relation to the wholesale price formation mechanism in the European ethanol market. A second firm has not settled and the EC’s administrative action continues. This case brought the total number of settlement decisions issued by the EC in 2021 to four (36%). In three of these cases, the EC pursued hybrid proceedings, allowing one or more parties to settle while continuing its enforcement action against the non-settling parties. This approach has been endorsed by the European courts, provided that the EC takes sufficient precautions in the drafting of the settlement decision so as not to breach the non-settling company’s rights of defence.

Non-cartel conduct

Turning to non-cartel conduct, the EC fined an online PC gaming platform and five PC video game publishers a total of EUR7.8m for “geo-blocking” practices. The EC found that the use of geo-blocked activation keys prevented customers from being able to play certain PC video games outside certain Member States in which they were sold. This case confirms that the EC is likely to clamp down on restrictions of cross-border ‘passive’ sales (ie restrictions on responding to unsolicited requests from customers in EU Member States which fall outside a distributor’s exclusive territory), in particular in relation to the EC’s goal to harmonise the Digital Single Market.

Commitments case

One case in 2021 illustrates the increasing willingness of regulators to close a case by obtaining legally binding commitments instead of proceeding to a full fining decision. The case involved commitments by a pharmaceutical manufacturer. In response to the EC’s preliminary concerns of excessive pricing in various Member States, the manufacturer agreed to reduce its prices in Europe for six cancer drugs by an average of 73% (with a ten-year price ceiling and a related commitment to supply the drug or make its marketing authorisation available to other suppliers).

Given the heavy fines that the EC and other authorities continue to impose on companies for antitrust breaches (and the related risks of private damages claims), we expect the trend of companies offering binding commitments to continue.

Other notable developments

– **Final report in consumer Internet of Things (IoT) sector inquiry:** The EC identified a variety of antitrust issues in a sector found to have high barriers to entry with a few vertically integrated players. The final report (published in January 2022) highlighted four main areas of concern: (i) exclusivity and tying concerns in relation to voice assistants, as well as practices limiting use of different voice assistants on the same smart device; (ii) the use of default settings, pre-installation and prominent placement of consumer IoT services on smart devices or on voice assistants; (iii) the access to and accumulation of data (including concerns that this allows voice assistant providers to improve their market position and leverage more easily into adjacent markets); and (iv) the lack of interoperability due to the prevalence of proprietary technology, leading to the creation of ‘de facto’ standards.

The EC’s inquiry into the IoT sector is driven by its ambition to prevent “tipping” (where a large player in one market is able to expand into a new market owing to its access to data and then “tip” the new market in its favour) and its ongoing monitoring of digital gatekeepers. Commissioner Vestager has made clear that the report “justifies a regulatory approach” to how Big Tech operates in the sector, and we can therefore expect its findings to feed into the upcoming legislative digital reform, including the scope of the Digital Markets Act. Commissioner Vestager also expressed hope that the report will stimulate companies to pro-actively address the concerns of their own initiative.

– **Draft Guidelines on collective bargaining agreements:** In early December, the EC published draft guidelines setting out how it will apply EU antitrust law to collective agreements entered into by solo self-employed people in order to improve their working conditions. The guidelines are part of a wider package which also includes a proposal for a Directive on improving working conditions in platform work and a Communication on harnessing the full benefits of digitalisation for the future of work.

The trigger for addressing this issue was the situation of so-called gig-workers, ie self-employed individuals who work through online platforms. However, the scope of the draft is not limited to the online environment.

The draft defines the solo self-employed as those who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labour for the provision of services. Solo self-employed individuals are in principle considered as “undertakings” under EU competition law and, if they negotiate their fees and other trading conditions collectively, there is a risk of infringing the EU prohibition against anti-competitive agreements.

The EC is concerned, however, that solo self-employed people are also often in a weak bargaining position. It believes that the guidelines will bring certainty by, in Commissioner Vestager’s words, “making clear when competition law does not stand in the way of these people’s efforts to negotiate collectively for a better deal”. The final version of the guidelines is expected to be published in the second quarter of 2022.

ECJ confirms that investors can be liable for antitrust infringements of portfolio companies

The EU’s top court has confirmed that financial investors, including private equity businesses, can be held liable for antitrust infringements committed by one of their portfolio companies. In 2014, the EC fined Prysmian EUR104.6m for its role in a high voltage power cable cartel. The EC found that a private equity investor, which for a four-year period during the existence of the cartel held an indirect interest in Prysmian through a fund and other intermediate companies, was jointly and severally liable for EUR37.3m.

The investor appealed, claiming it was a pure financial investor and not a parent company, and therefore should not be held liable for Prysmian’s conduct. The General Court disagreed, confirming the EC’s decision. The ECJ has now dismissed the investor’s appeal and upheld the General Court’s ruling.

There are two key takeaways from the judgment. First, it confirmed that the presumption that a parent exercises decisive influence over its subsidiary (meaning it can hold liability for that subsidiary’s conduct) can be applied not only

where the parent holds all (or nearly all) of the subsidiary’s capital, but also where it holds all of the voting rights associated with a subsidiary’s shares. In this case, it was deemed irrelevant that the investor’s stake fluctuated, since the investor retained 100% of voting rights throughout.

The second key part of the ruling relates to the period following an IPO which saw the investor’s stake fall below 50%. Here, the ECJ again sided with the General Court and confirmed that the investor continued to exercise decisive influence over Prysmian and therefore retained liability for its conduct. In particular, it confirmed that personal links between companies may be relevant when establishing whether a parent can exercise decisive influence over a subsidiary, including where a board member is connected to another firm by means of “previous advisory services” or “consultancy agreements”.

EU and UK changes to Vertical Agreements Block Exemptions – points of commonality and divergence

The EU's existing legislation on vertical agreements, the Vertical Block Exemption Regulation (VBER), which was also retained in UK law following Brexit, is due to expire in May 2022. Ahead of that expiry, the EC has proposed a number of changes to the current VBER as well as revised Vertical Guidelines. And, following the CMA's recommendation, the UK government this month published a draft UK-specific Vertical Agreements Block Exemption Order (VABEO), which will replace the VBER in the UK.

Both jurisdictions plan to retain various aspects of the current regulation, including the main market share thresholds and the treatment of resale price maintenance (RPM) as a 'hardcore' restriction. In addition, for the most part, deviations from the VBER in the UK's draft VABEO are in line with the changes being proposed by the EC for the revised VBER. In particular, both authorities recommend that dual pricing strategies (ie the setting of different wholesale prices for online and offline sales by the same distributor) and the imposition of other non-equivalent criteria for online and offline sales should no longer amount to hardcore restrictions. In addition, under both sets of proposals, online intermediaries are to be considered as suppliers of online intermediation services rather than agents.

However, there are also important areas of divergence. In particular:

– **Wide retail price parity obligations** (or 'most favoured nation' (MFN) clauses) – under the draft VABEO, all wide retail MFNs (ie clauses that prevent a supplier from offering the product/service on any other indirect sales channel, whether online or offline) and equivalent measures are treated as a hardcore restriction, but business-to-business parity obligations and narrow MFNs (which restrict better terms being offered only on the supplier's own website) remain block exempted. By contrast, the EC proposes to exclude from the benefit of the VBER only wide MFNs imposed on buyers of online intermediation services (ie imposed on suppliers by platforms such as price comparison websites). The UK's approach is therefore stricter than that of the EC on two counts – in the UK, all wide retail MFNs will be treated as 'hardcore' and result in the entire agreement falling outside of the exemption, while in the EU, a narrower subset of these clauses will fall to be assessed individually (but will not be automatically prohibited or necessarily cause the remaining agreement to fall outside the exemption).

– **Dual distribution** (ie where a supplier is both a manufacturer and distributor of its products and the buyer does not compete at the upstream level) – both the EC and the UK propose that non-reciprocal dual distribution agreements continue to be block exempted, and both also propose to extend the benefit of the exemption to dual distribution by wholesalers and independent importers who are also active downstream. However, the EC proposes that platforms should not benefit from the exemption where they have a hybrid function, ie they act as both suppliers of online platform/intermediation services and retailers. By contrast, the draft VABEO does not carve out hybrid platforms from the exemption, although the CMA has noted that it will keep the issue under review generally and in individual cases. In addition, it remains to be seen if the EC has abandoned the introduction of a stricter combined (10%) market share threshold at the retail level in order to fully benefit from the exemption. The CMA explicitly rejected proposals for additional market share thresholds, which it considers would likely add "complexity and uncertainty" for businesses. Following consultation feedback and the findings of a subsequent EC-commissioned expert report, the EC is now consulting on potential further guidance on information exchange issues in the context of dual distribution.

– **Non-compete obligations** – the draft VABEO retains the current rules on non-compete obligations as they are – that is, non-compete obligations that are indefinite or exceed five years in duration are excluded from the block exemption. This includes non-compete clauses that are automatically renewable beyond a period of five years (which are deemed to be indefinite). By contrast, the EC proposes to allow some non-compete obligations which are tacitly renewable beyond five years to benefit from exemption going forward.

The CMA also intends to consult on accompanying guidance to the VABEO, which it says will provide clarity in a number of areas (including the categorisation of sales as 'active' and 'passive', agency issues, and information exchange issues in dual distribution scenarios).

While in a post-Brexit world it is of course open to the EU and UK authorities to depart from each other, and indeed while vertical restrictions have long been a source of significant differences between regulators across the globe, these changes at the EU/UK level will no doubt present challenges to multinational companies as they adapt to the new and nuanced differences in approach between the two regulators.

Shadowboxing: DMU prepares to enter the fight in the CMA's crackdown on digital markets

In February, the CMA published a strategy 'refresh' of its Digital Market Strategy setting out a revised list of priorities for tackling perceived antitrust problems in digital markets including, as a main priority, the establishment of the DMU. As reported last year, the CMA's Digital Markets Taskforce published recommendations in December 2020 for a regime to police digital firms designated as having "Strategic Market Status" (SMS), including the creation of the DMU as an independent regulator sitting within the CMA.

The DMU's proposed powers will include the introduction and enforcement of a code of conduct governing the relationship between digital platforms and content providers, such as news publishers (on which it will work with the UK communications regulator Ofcom), as well as powers to introduce "pro-competitive interventions".

In April, the CMA officially launched the DMU in 'shadow form' pending legislation granting it full powers. The DMU has started preparatory work, including evidence gathering, engaging with stakeholders, building teams and preparing draft guidance.

Once the DMU has full powers, it is likely that the CMA, given its keenness for the DMU to 'hit the ground running', will transfer to it a number of the Big Tech cases opened in 2021 and described above.

Other priority areas listed by the CMA in its policy refresh including prioritising the work of its Data Technology and Analytics (DaTA) unit, which in 2021 published a research paper for consultation on the potential impact of the use of algorithms from a competition and consumer perspective, as well as closer cooperation with both other UK and international regulators on digital initiatives.

2021 only saw two formal infringement decisions issued by the CMA, in contrast to 11 in 2020. Notably, however, both decisions involved significant financial penalties, meaning that the total value of fines imposed by the CMA increased significantly from GBP59.6m in 2020 to GBP380.4m in 2021.

Pharmaceuticals cases

The 2021 decisions each represent the culmination of long-running probes by the CMA in the pharmaceutical sector in relation to the supply of generic medicines in the UK. In both cases, the CMA found that relevant suppliers of hydrocortisone tablets and liothyronine tablets used the fact that only branded pharmaceutical products are subject to price regulation in the UK to 'de-brand' and launch generic medicines which were not subject to price control. This allowed the suppliers to charge unfair and excessive prices for a sustained period of time, which the CMA found infringed antitrust law. In *Hydrocortisone tablets*, the CMA also found that the supplier was able to maintain these prices by entering into 'pay-for-delay' market sharing agreements with potential competitors, who agreed to stay out of the market. This was a separate antitrust infringement for which the relevant supplier and the potential competitors were fined as part of the same decision.

The total fines imposed were GBP260m in *Hydrocortisone tablets* (the CMA's largest antitrust fine to date) and GBP101.4m in *Liothyronine tablets*.

These cases mark the second and third large fines in the last few years imposed by the CMA against pharmaceutical companies for charging unfair and excessive prices and exploiting what the CMA has referred to as a 'loophole' in UK drug pricing regulation around the pricing of generic medicines, following its 2016 decision in the *Pfizer/Flynn* case. Both sets of parties have appealed.

While these appeals are likely to consume much of the CMA's attention over the next few years, there are other signs that the CMA's focus on the pharmaceutical sector over recent years may be coming to an end. In October 2021, the CMA dropped another probe in the sector on administrative priority grounds, and in February 2022, it concluded its one remaining probe: the market sharing investigation related to prochlorperazine tablets, issuing fines of over GBP35m to firms including Advanz, Cinven and Lexon, all of which have been subject of previous CMA fines in the sector.

Big Tech focus

As to where the CMA's eye will turn next, unsurprisingly, Big Tech is firmly in the spotlight. At the beginning of the year, the CMA announced that it was opening an investigation into Google's Privacy Sandbox which led to Google offering commitments to address the CMA's provisional antitrust concerns following consultations with the market. Google has indicated that if the CMA accepts the commitments it will implement the changes globally.

The CMA has also opened probes in relation to the Apple AppStore and Meta (formerly Facebook)'s use of advertising data as well as a recently announced investigation into Google and Meta's conduct in the ad tech space (in parallel, but separate, investigations to those of the EC). It is also conducting a market study into Google and Apple's alleged "effective duopoly" over mobile ecosystems (the final report is due in June 2022). The CMA's DMU also launched this year in 'shadow' form ahead of legislation to enshrine its powers – see further details on this below.

Other developments

As predicted in last year's report, the CMA's tough stance against RPM continued, with the issue of a statement of objections to a supplier of domestic lighting products in December, alleging that it restricted retailers' freedom to set their own prices online between 2017 and 2019 by requiring them to sell at or above a minimum price and so preventing them from offering discounts. At least one further RPM probe is ongoing.

Similarly, the CMA has been unyielding in seeking the disqualification of directors found to have been involved in anti-competitive conduct. As with 2020, the CMA accepted five disqualification undertakings from directors (ranging from three to 12 years in length) taking the aggregate number of disqualifications since the powers were first used in 2016 to 26.

In terms of action by sector regulators, who have concurrent powers to enforce antitrust law, the UK's energy regulator Ofgem accepted binding commitments from PayPoint (a provider of energy pre-payment services) and a donation of GBP12.5m to Ofgem's Energy Industry Voluntary Redress Scheme to close an investigation as to whether PayPoint had abused a dominant position by using exclusivity clauses in its contracts with energy suppliers and retailers.

The UK's Payment Systems Regulator (PSR) also issued a statement of objections to five companies for allegedly agreeing not to compete or poach each other's clients in relation to the supply of prepaid card services used for welfare disbursements to public bodies in Great Britain. Three parties agreed to settle with the PSR in February 2021 pending the outcome of the PSR's investigation. The PSR reached its decision in January 2022, imposing fines of GBP33m. This is the first fine issued by the PSR using its concurrent antitrust powers.

EU Member States

Austria

With thanks to Christine Dietz of Binder Grösswang.

2021 was another eventful year for Austrian antitrust law. On the cartels front, the construction cartel, the largest cartel investigation in Austrian history, remains the centre of attention. Following the initiation of proceedings in 2020 and 2021 by the Austrian Federal Competition Authority (AFCA), the first fine was imposed in settlement proceedings before the Cartel Court in October 2021. Due to its willingness to cooperate, the company involved received a reduced fine of EUR45.37m. A reduced fine of EUR62.35m against another important player in the industry is expected to be issued soon. And this is only just the beginning.

A further sector is also in the AFCA's sights: dawn raids were carried out at the premises of various waste management companies throughout Austria in March 2021 on suspicion of infringements involving price fixing, market sharing and bid-rigging.

There was a noticeable increase in abuse of dominance enforcement when compared to previous years, with six cases taken to the Cartel Court, all but one of which were successful. In one case, the Cartel High Court essentially confirmed the Cartel Court's findings of abusive behaviour by an Austrian general importer of new vehicles and original spare parts against an authorised car dealer,

a decision which could have an impact outside Austria due to similar contractual arrangements being in place elsewhere. In another case, predatory pricing by a pharmaceutical company in the area of cancer drugs was ended by a settlement following an application by the AFCA.

The AFCA continued its inquiry into the healthcare sector. Its third interim report (following reports regarding pharmacies and rural healthcare) on the supply of pharmaceuticals shows how competition can assist in minimising the risk of supply shortages, especially in light of the pandemic.

Regarding sustainability, the AFCA launched an inquiry into the electric vehicle charging sector, in parallel to a similar investigation opened in Germany. In addition, the Competition Law Amendment Act 2021 introduced sustainability aspects into Austrian antitrust law: certain anti-competitive conduct may be exempt from the prohibition on cartels if it contributes, among other issues, to an ecologically sustainable or climate-neutral economy.

Belgium

2021 saw the conclusion of a number of ongoing investigations by the Belgian Competition Authority (BCA). The BCA closed its investigation into the purchasing alliance between Carrefour Belgium and Provera after the parties offered commitments to address the BCA's concerns.

In another case, the BCA fined French skincare company Caudalie for imposing minimum resale prices on its selective distributors and restricting its online selective distributors from engaging in active and passive sales to end-users located in another country. However, the BCA's decision was annulled on appeal by the Market Court, which found that the BCA had unlawfully used Caudalie's proposed commitments as a mitigating factor when setting the fine, when the commitments had been offered with the aim of avoiding an infringement decision and the imposition of a fine. The existence of the infringement itself was not contested by Caudalie in the context of the appeal proceedings.

In other developments, the BCA amended its fining rules following a decision by the Market Court which ruled that the EUR1m fine imposed by the BCA in 2019 on the Belgian pharmacist's association was unlawful on the basis that it exceeded 10% of the association's annual turnover. The BCA

adopted a new decision in which it recalculated and imposed a lower fine of EUR245,000. It has also since amended its rules to allow the maximum fine to be imposed on a trade association to be equal to 10% of the aggregate turnover of all the members of the association that are active on the relevant market.

The Investigation and Prosecution Service of the BCA decided to prosecute various tobacco product manufacturers for exchanging information on future prices through wholesalers. The Competition College will investigate further.

Finally, in numerous recent cases, the courts have considered the concept of abuse of economic dependence, which is relatively new to the Belgian Code of Economic law. This rule, which entered into force in August 2020, prohibits undertakings from abusing their non-dominant position vis-à-vis undertakings that are economically dependent on them. In at least three cases, which all involved refusal to supply an existing customer, the Belgian courts established an infringement. The BCA has yet to take its first decision applying this new prohibition.

France

In 2021, the French Competition Authority (FCA) issued 12 substantive antitrust decisions, imposing fines totalling EUR872.5m. This figure is significantly lower than the record fine total imposed by the FCA in 2020 (EUR1.9bn), which was largely attributable to the single decision against Apple for RPM and other vertical restrictions.

Five decisions related to cartels, with fines totalling EUR25.5m, significantly lower than both the 2019 (EUR480.5m) and 2020 (EUR97.7m) cartel fine totals.

The most significant case related to bid-rigging in the retail sector. The FCA fined Roland Monterrat, La Toque Angevine and Snacking Services (Daunat), which manufacture own-brand label sandwiches for mass retail distribution, for devising and implementing a plan to share volumes and customers and agree on prices between 2010 and 2016.

The FCA also issued three non-cartel decisions, which imposed total fines of EUR126.3m. Two of these related to RPM and all of them involved alleged online sales restrictions. One decision did not give rise to monetary sanctions as the undertaking concerned (Lego) offered to remedy the FCA's antitrust concerns (see our separate summary below).

Four decisions on abuse of dominance were taken, including two decisions related to Google's practices (fines of EUR220m for favouring its proprietary technologies in the online advertising sector and fines of EUR500m for not complying with several FCA injunctions issued in April

2020, regarding the remuneration of related rights for press publishers and agencies). In the related rights case, as part of the examination on the merits, the FCA's investigation considered that Google likely abused its dominant position in the generalist search services market, by imposing unfair and discriminatory settlement conditions on publishers and news agencies, and by circumventing the law on related rights. In response, Google has offered various commitments that the FCA has subjected to a market test.

The FCA also adopted several decisions in 2021 against companies suspected of obstructing its investigations, including imposing fines on both the Nixon Group and Mayotte Channel Gateway (and its parent), in both cases for failing to respond to requests for information.

As anticipated, following the creation of a Digital Economy Unit within the FCA in January 2020, it adopted more decisions in the digital sector (including on the merits in the abuse of dominance case regarding Google's general search services). The FCA has stated that the digital sector will remain a top priority in 2022.

Other priorities for 2022 include sustainable development, which will continue to play a part in the FCA's decisional practice, with a focus on the most harmful anti-competitive practices, and continued support for businesses requesting guidance on collaborations with a sustainable objective.

The FCA's Lego commitments case – a contrast to the new EC verticals approach?

In January 2021, the FCA accepted binding commitments from Lego to amend its discount policy so as not to discriminate against online retailers. The FCA had launched an investigation following concerns that Lego's pricing policy, which included a significant difference in the functional discounts applied to operators that only sold Lego products online (compared to distributors that sold in 'brick and mortar' stores), had potential anti-competitive effects, by putting online-only sellers at a competitive disadvantage.

This case is somewhat surprising in light of the EC's proposed revisions to the VBER and accompanying vertical guidelines, which recommended that dual pricing strategies (ie the setting of different prices for online and offline sales) and the imposition of other non-equivalent criteria for online and offline

sales should no longer amount to hardcore restrictions, and should instead be considered on a case-by-case basis. Indeed, the EC noted that dual pricing may help address free-riding and create a level playing field between online and offline sales, and also that a more flexible approach would allow for differentiation between sales channels based on actual sales efforts.

As a commitments case, the FCA was not required to reach a final conclusion as to whether Lego's practices infringed antitrust law. It will be interesting to see whether the FCA maintains this more conservative position in its enforcement activity, or whether it adapts to the EC's newly stated approach to dual pricing.

Germany

The digital economy was a particular focus in Germany in 2021. The FCO has already made ample use of its new powers, which were introduced in January 2021 to combat abuses by large digital companies, initiating six proceedings against Amazon, Apple, Google and Meta.

The landmark Facebook case also continues. After the FCO's decision in early 2019, holding that Facebook had abused its dominant position in the social networking market by combining user data from different sources and imposing far-reaching remedies on Facebook, an unprecedented battle between Facebook, the FCO, the higher Regional Court Düsseldorf and the Supreme Court has been taking place. After the Supreme Court ruled in favour of the FCO in the preliminary proceedings, the Higher Regional Court of Düsseldorf referred the case to the ECJ, asking various questions relating to a potential breach of the GDPR. This was in direct opposition to the views of the Supreme Court which did not consider a breach of the GDPR to be a necessary element of an abuse of dominance.

In other developments, in May 2021, the FCO won its appeal at the Supreme Court relating to Booking.com's narrow best price clauses. The Supreme Court reversed a ruling of the Higher Regional Court of Düsseldorf which found Booking.com's narrow best prices (MFN) clauses to not infringe EU antitrust rules. Given that narrow MFN clauses will fall under the revised VBER (which – as described above – will exclude only wide MFNs), the impact of the Supreme Court ruling should in practice be limited.

Fine levels were relatively low in 2021. Fines totalled only EUR105m (compared to EUR443m in 2020). The fines were imposed on special steel producers and steel forging companies and for vertical price-fixing agreements (RPM) for musical instruments, school bags and consumer electronics. Clearly, cartel enforcement was affected by the Covid-19 pandemic, particularly due to restrictions imposed on dawn raids (only two raids were carried out) and the hearing of witnesses. However, the FCO is ready to initiate further proceedings in 2022.

In stark contrast to the low level of fines, it was another very active year for private enforcement. The Supreme Court delivered a much anticipated judgment in the *trucks* case, where it found that economic evidence plays a crucial role in the assessment of whether or not anti-competitive behaviour actually led to higher prices. In another recent judgment, the Supreme Court indicated that lump sum damages clauses in private follow-on damages actions of up to 15% are permissible. Further, the High Court of Berlin issued the first preliminary injunction based on the newly introduced anti-tipping rules, prohibiting certain exclusivity rebates used by the leading real estate platform, Immoscout 24, on the basis that they may facilitate monopolisation of the market.



Italy

2021 was characterised by aggressive enforcement against Big Tech. The Italian Antitrust Authority (IAA) imposed fines totalling EUR1.24bn, mainly attributable to a single significant sanction against Amazon for abuse of dominance in online marketplace and logistics services (totalling EUR1.128bn). The IAA issued a second EUR134m fine against Amazon, alongside Apple, for conduct relating to restrictions placed on third party Apple resellers on the Amazon marketplace. Furthermore, the IAA also fined Google EUR102m for abusing its market position relating to the exclusion of interoperability of an electric car charging app with Android Auto.

In other developments, the IAA has notably pursued cases that have a weak territorial connection with Italy, and/or relate to conduct with a predominantly supranational geographical dimension. By way of example, in April 2021, the IAA opened an investigation into Roxtec for a suspected abuse of dominance. Roxtec is a Swedish company that operates in Italy with only a commercial branch dedicated to assisting its network of distributors and agents. A further example is the EUR1.128bn fining decision against Amazon. The conduct in question was first investigated by the IAA (in respect of Italy only) and subsequently by the EC (in respect of other EU jurisdictions). Amazon appealed the exclusion of Italy from the EC investigation. However, the EU General Court defended the IAA's power to scrutinise the conduct in question. The EC investigation into Amazon (outside Italy) is ongoing.

Giving effect to its stated intention in 2020 to apply the previously long-dormant prohibition of abuse of economic dependence, the IAA now appears to be doing this in abuse of dominance cases in which it is particularly difficult to define the relevant market for the purposes of assessing dominance. In 2021 the IAA sanctioned Poste Italiane for applying unjustifiably onerous contractual clauses to a company carrying out the distribution and collection of mail on its behalf in Naples. In addition, in November 2021, parliament approved the Draft Annual Law for Competition, currently undergoing Senate approval, introducing a presumption of economic dependence on online platforms. This could result in the concept of abuse of economic dependence becoming the main tool for the IAA in its fight against online platforms' anti-competitive behaviour.



The abuse of economic dependence concept may become a key tool in regulating anti-competitive conduct by online platforms.

Netherlands

The Dutch antitrust authority (ACM) issued three enforcement decisions in 2021, relating, respectively, to a cartel, RPM and abuse of dominance.

Perhaps most noteworthy was the RPM fine of almost EUR40m imposed on Samsung, demonstrating that the ACM is putting vertical restrictions back on the map after a long period of low prioritisation. This new focus is particularly notable in light of the ACM's previous statement in 2015 that it would give little priority to monitoring vertical agreements because of the usually limited harmful effects on competition. Before the Samsung decision, the last time the ACM imposed a fine in relation to RPM (against fashion company Secon Group) was in 2003, and this was in fact later annulled by the Trade and Industry Appeals Tribunal.

In 2020, the ACM decided to extend its ongoing investigation into alleged excessive pricing by pharmaceutical company Leadiant with respect to its orphan drug CDCA. In July 2021, the ACM concluded its investigation and imposed a

EUR19.5m fine on Leadiant. The fine was originally due to be paid on 17 December 2021. However, after complaints by Leadiant that the health insurers had jointly refused to negotiate a price reduction, leading to a 'collective boycott', the ACM granted Leadiant a postponement. The decision to suspend the fine is remarkable, since normally the ACM collects a fine within 24 weeks. If a company later successfully objects, the regulator will refund the collected fine. The postponement in the Leadiant case could mean the ACM's allegations are proving less watertight than previously thought.

In October 2021, the ACM announced that it intended to carry out more dawn raids now that the Covid-19 pandemic appears to have decreased in severity. This follows a period of a year and a half during which raids were almost completely suspended due to the pandemic. Given the increased working-from-home trend, the ACM has stated that raids may extend to employees' residential addresses.

Spain

The enforcement activity of the Spanish competition authority (CNMC) picked up in 2021 and returned to pre-pandemic levels, after 2020 was severely impacted by the pandemic and initial lock-down periods. In 2021, the CNMC adopted seven fining decisions dealing with alleged cartels (in contrast to only three decisions in 2020). The total fines levied in 2021 (EUR187m) has also returned to more usual levels compared to those of 2020 (only EUR7.4m). Of the seven investigations, two (Road works, and Railway signalling and communication) accounted for the bulk of the fines. The CNMC continues to be extremely focused on bid-rigging. Six of the seven cases involved alleged bid-rigging in one way or another.

The 'back to normal' approach of the CNMC has had an impact on dawn raid activity. In the second half of the year, the CNMC conducted three dawn raids related to alleged cartel conduct. These raids took place in June (data bases), June and November (military equipment) and December (waste management), respectively. The CNMC has since initiated infringement proceedings relating to the data bases and military equipment sectors.

As regards non-cartel cases, the CNMC has shown flexibility, adopting five decisions in 2021 where the investigations ended without fines, but instead with binding commitments being offered. The most prominent settlement reached related to the information that major studios and their respective distribution arms can exchange in relation to the release of films in theatres in Spain.

On the abuse of dominance front, the CNMC made no infringement findings and dismissed five complaints (including two in relation to Google).

CEE region

2021 was a very busy year for most antitrust authorities in the CEE region, who significantly increased their enforcement activity both in terms of the amount of fines imposed and the number of conduct proceedings brought.

An all-time record individual fine of approximately EUR39m was imposed by the Hungarian Authority (HCA) on fertiliser producer Nitrogénművek Zrt for engaging in horizontal and vertical conduct with other companies operating within its dual distribution system.

A fine of almost EUR9m for bid-rigging was imposed by the Slovak Authority (SCA) on three undertakings for coordinating their bids in a public tender for construction and installation services organized by SEPS, the state-owned operator of the electricity transmission grid.

At the end of 2021, the Czech Authority (CCA) imposed its highest fine to date (approx. EUR3.5m) for a prohibited vertical agreement in the garden/hobby equipment segment. With a new Chair in office, the CCA also recorded the highest number of dawn raids in its 30-year history, despite the Covid-19 pandemic.

For its part, the Polish Authority (PCA) has become increasingly eager to impose fines on managers responsible for infringements.

The Romanian Authority (RCA) ended the year at full pelt and held at least three hearings in December in important investigations (including one concerning the availability of human immunoglobulin on the Romanian market and involving simultaneous dawn raids in Romania, Belgium and Italy).

As in previous years, bid-rigging remained a key area of focus in the region. Most of the 2021 cartel decisions issued by the HCA (four of six decisions), the CCA (six of eight), and the SCA (two of two decisions) concerned collusive practices in procurement tenders. The transport and infrastructure and TMT sectors attracted the most attention. In addition, the PCA's primary focus has been the activities of digital undertakings, whereas the RCA has directed its scrutiny at the energy and pharmaceutical markets.

The authorities remained open to cooperation with parties in cartel cases. As in previous years, the PCA is persuading undertakings to cooperate, enticing them with lower fines. This initiative seems to be successful: in Poland it was reported that in at least two of four cases of horizontal agreements and two of three cases of vertical agreements the parties had used the leniency programme. Settlement procedures appear to prevail in proceedings in the Czech Republic, with the parties opting to reduce fines in exchange for settlements in seven of the eight cases. Similarly, in Romania, at least two cases were closed following a settlement procedure and another two with commitments.

However, 2021 was also the year of rejected leniency applications. In Hungary, of the five applications for immunity from fines, only one was successful and some were rejected even though the HCA had initially issued a conditional immunity or leniency decision against the undertaking concerned.

In addition to enforcement, the CEE authorities have engaged in sector enquiries. Using its new powers under the Covid-19-related emergency regulation to conduct fast-track sectoral investigations, including the power to gather information through dawn raids, the HCA has already issued a final report on ceramic building materials for walls (bricks), a draft report on wooden building materials and has launched an inquiry into Covid-19 rapid tests. In addition, it has issued a final report under its standard sectoral investigation procedures on audiovisual media services and the distribution of television programmes. In the Czech Republic, a two-year sector inquiry into the distribution of prescription medicines, focusing primarily on direct forms of distribution, was launched. The RCA is analysing various markets including the fuel wholesale market, the building materials market, and the e-commerce market.

In 2022, we expect several important events. A new Chair is due to be elected to the Slovak authority; this should have taken place last year but did not for political reasons. In the Czech Republic, the amendment to the Competition Act should introduce leniency for vertical agreements, but tighten some other procedural measures, including the settlement procedure and access to information on the identity of complainants. The CCA will also focus on the Czech EU Presidency in the second half of 2022 with the aim of completing the process of adopting the Digital Markets Act, moving forward with collective bargaining rules for sole traders and small businesses in the digital sector, and discussing a stronger anchoring of personal liability for anti-competitive conduct within the European Competition Network.

Russia

The attention of the Federal Antimonopoly Service (FAS) is increasingly focused on development of digital markets and the related requirements for antitrust regulation, with FAS officials stating their readiness for international cooperation in order to achieve a consistent approach.

In other developments, the FAS announced the investigation of several cartel cases in various sectors that achieved high price increases following the pandemic, largely connected with the domestic supply of materials for construction, oil trading and medicines. The local construction, community

services, and pharmaceutical sectors remain the focus of cartel and abuse of dominance decisions. However, the total fines issued remained low and the average investigation period is approximately 1.5 years.

The largest cases concerning international business activity in Russia in 2021 were two abuse of dominance decisions, against: (i) Apple, in respect of the distribution of its IOS apps (FAS imposed a fine of around EUR11m); and (ii) Booking.com relating to pricing restrictions on hotels outside of the Booking.com platform (FAS imposed a fine of around EUR15m)*.

Turkey

2021 was certainly a remarkable year for antitrust enforcement in Turkey with record-breaking fines and an increased number of cartel investigations.

The consumer goods and digital sectors were at the top of the Turkish Competition Authority (TCA)'s agenda. The TCA imposed a record-breaking fine amounting to around TRY2.7bn in total on five supermarket chains and one supplier. Although the reasoned version of the decision is yet to be published, this investigation is the first case where a hub-and-spoke infringement was examined in depth by the TCA.

On the digital side, the TCA's focus seemed to shift towards e-marketplaces. Not long after the TCA released its preliminary report on e-marketplaces, it enforced an interim measure and initiated an investigation against Trendyol, a subsidiary of Alibaba and the fastest-growing e-marketplace in Turkey.

Overall, price-fixing cases, particularly in the consumer and retail sector, appeared to dominate 2021. Out of 20 cartel investigations, 16 involved price-fixing. There was a dramatic increase in abuse of dominance cases, where the total number of decisions in 2021 was more than double that in 2020.

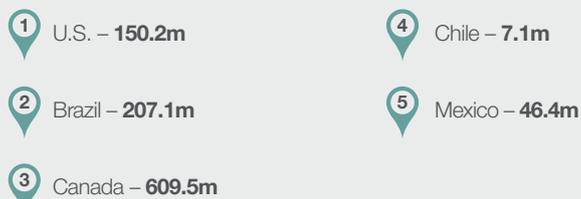
On the legislative front, Turkey's alignment efforts with EU legislation continued and the threshold for the vertical block exemption regime was reduced to 30% from 40%. A *de minimis* principle was also introduced into Turkish antitrust law and the recently introduced settlement procedure was applied for the first time.

Similarly to previous years, administrative courts continued to play an important role in Turkish antitrust practice. Turkish administrative courts have annulled several decisions based on the fact that the Turkish Competition Board did not meet the required standard of proof. Successive decisions of administrative courts on the standard of proof are expected to give rise to more in-depth analysis in future investigations.

*As the decisions in these cases had not yet been published at the point of data collection, these fines were not included in the fining total for Russia.

Americas

Antitrust enforcement fines in 2021



● A&O office locations
All figures are in U.S. dollars (USD).

United States

In 2021, a new Democratic administration under President Joe Biden came to power. President Biden had made antitrust a campaign issue, and he has chosen progressive leaders to lead the two U.S. antitrust agencies. Lina Khan, a staunch Big Tech critic, was appointed Chair of the FTC in June 2021. Jonathan Kanter, a prominent progressive antitrust figure, took up the role of Assistant Attorney General for the DOJ's Antitrust Division in November 2021. In addition, President Biden appointed Tim Wu, another leading critic of Big Tech, as White House competition advisor, which is significant because Mr Wu will be tasked with coordinating antitrust policy across all federal agencies, not only the antitrust agencies.

Reinforcing the emphasis on antitrust enforcement, in July 2021, President Biden issued the Executive Order on Promoting Competition in the American Economy (Order). The Order sought to reform competition policy broadly while also targeting certain industries in the U.S. economy including labour, healthcare, transportation, agriculture, internet service, technology, and banking and consumer finance. The Order

calls for a 'whole-of-government' approach to competition policy, directing actions from more than a dozen federal agencies and encouraging a reevaluation of established antitrust doctrine. It urges the FTC and DOJ, as well as regulators of the individually targeted industries, to use their authority to increase competition and combat harms to consumers caused by the behaviour of dominant companies in highly concentrated industries.

The Biden administration has also continued antitrust enforcement against Big Tech, following enforcement efforts in 2020, including the House Judiciary Committee investigation into Big Tech as well as the FTC and DOJ monopolisation cases against Meta and Google, respectively.

The FTC's suit against Meta suffered a drawback in 2021: in June a district judge in the District of Columbia dismissed the agency's initial complaint for failure to state facts that plausibly support the allegation that Meta had monopoly power in the market for personal social networking (PSN) services. The judge also dismissed a parallel case brought by attorneys general from 46 states, the District of Columbia,

and Guam with prejudice. Subsequently, the FTC filed an amended complaint against Meta in August, alleging that Meta used a ‘buy-or-bury scheme’ to strengthen its monopoly in the PSN market, acquiring competitors who outperformed Meta’s capabilities to maintain its market power. The FTC included in its complaint metrics of daily and monthly active users to support its argument that Meta maintains a dominant share of the personal social networking market. In response, Meta filed a second motion to dismiss in October, alleging that the FTC’s amended complaint still failed to sufficiently allege Meta’s monopoly in the PSN market.

The DOJ’s case against Google, brought in October 2020, continued in 2021. A judge in the U.S. District Court for the District of Columbia has made clear that the case will move quickly: in granting a 45-day extension for discovery in November 2021, the judge warned against further delays and informed the parties that absent extraordinary circumstances, he would hold the case to its planned trial in the fall of 2023. The parties have agreed to bifurcate the case into two trials, the first covering liability and the second handling remedies if the DOJ succeeds in the first trial.

In the area of criminal cartel enforcement, there were three important themes in FY2021:

– **Sharp decline in corporate fines:** criminal cartel fines in FY2021 totalled USD150.2m, in contrast to USD529m in FY2020 and USD365m in FY2019. The largest fine – representing 70% of the sum of the fines in 2021 – was the USD107m penalty imposed on Pilgrim’s Pride Corporation for its participation in a conspiracy to fix prices and rig bids for broiler chicken products. The DOJ, however, suffered a significant setback in December 2021 when a district court judge declared a mistrial in a case charging ten poultry executives with participation in the conspiracy. The new trial began in February 2022.

Another notable enforcement action was the USD15m fine imposed on G4S Secure Solutions NV, a Belgian security firm, for its engagement in a conspiracy to rig bids, allocate customers, and fix prices for defence-related security services, including a multi-million dollar contract issued to provide services to the U.S. Department of Defense for military bases and installations in Belgium. This was the first international resolution obtained by the DOJ’s Procurement Collusion Strike Force (PCSF), which was formed in November 2019 to combat anti-competitive collusion in government procurement, grant, and programme funding. The PCSF was expanded in 2020 to include PCSF: Global, launched to investigate and prosecute collusive schemes targeting government spending outside the U.S.

– **Individual liability:** individual liability continues to be an important part of U.S. criminal cartel enforcement. The DOJ criminally charged 29 individuals in FY2021, including executives and senior management in the healthcare, construction, and agriculture industries, a significant increase on the 22 charged individuals in FY2020 and the 15 in FY2019. These individuals await sentencing, but face, for a criminal violation of Section 1 of the Sherman Act, a maximum term of imprisonment of 10 years and a maximum fine of USD1m.

– **Labour market:** the labour market was subject to particularly rigorous regulatory scrutiny by the U.S. agencies. In December 2020, the DOJ brought its first criminal antitrust wage-fixing case against the former owner of a therapist staffing company in Texas for his participation in a conspiracy to fix prices by lowering the rates paid to physical therapists and physical therapist assistants. A second individual was indicted in April 2021, and the DOJ’s case survived a motion to dismiss in November 2021.

Additionally, in January 2021, the DOJ brought its first criminal antitrust no-poach case against Surgical Care Affiliates LLC, a surgical outpatient services company, charging it with engaging in separate conspiracies with two other health care companies not to hire one another’s senior-level employees. In December 2021, the DOJ obtained an indictment against six individuals for participation in a long-running conspiracy to restrict hiring and recruiting of employees in the aerospace industry.

That same month, the FTC and DOJ held a joint workshop to explore competition issues arising in the labour markets, including labour monopsony and restrictive provisions in labour agreements. Remarks from both DOJ and FTC leadership emphasised that the agencies are ‘redoubling’ their commitment to investigating potentially unlawful mergers and anti-competitive conduct that harm workers, and more recently, in March 2022, the DOJ and U.S. Department of Labor also entered into a Memorandum of Understanding to work together to protect competition in labour markets.

Brazil

With thanks to Marcelo Calliari, Mario Pati and Rodrigo da Silva Alves dos Santos of TozziniFreire Advogados.

In 2021, the total amount of fines imposed by the Administrative Council for Economic Defence (CADE) in cartel and unilateral conduct cases was the highest since 2015, totalling BRL1.103bn (USD207.1m), which is more than four times the fines imposed in 2020 (BRL279.4m or approx. USD50m). The increase is unsurprising given that 2020 was a somewhat atypical year due to the Covid-19 pandemic, which led to fewer cases being concluded (25 in 2021, 17 in 2020, and 28 in 2019).

CADE kept some of its staff working remotely as a result of the pandemic, but this had no apparent impact on the pace of CADE's investigations. The number of cartel decisions increased substantially in comparison to the previous year, with 19 cartel rulings in 2021 (six more than in 2020). CADE also ruled on four non-cartel investigations (in line with 2020).

There were markedly more immunity applications in 2021, with five agreements signed by December, compared to two in 2020. This upward trend demonstrates the pace at which the General-Superintendence adapted its structures for remote negotiations and execution of agreements.

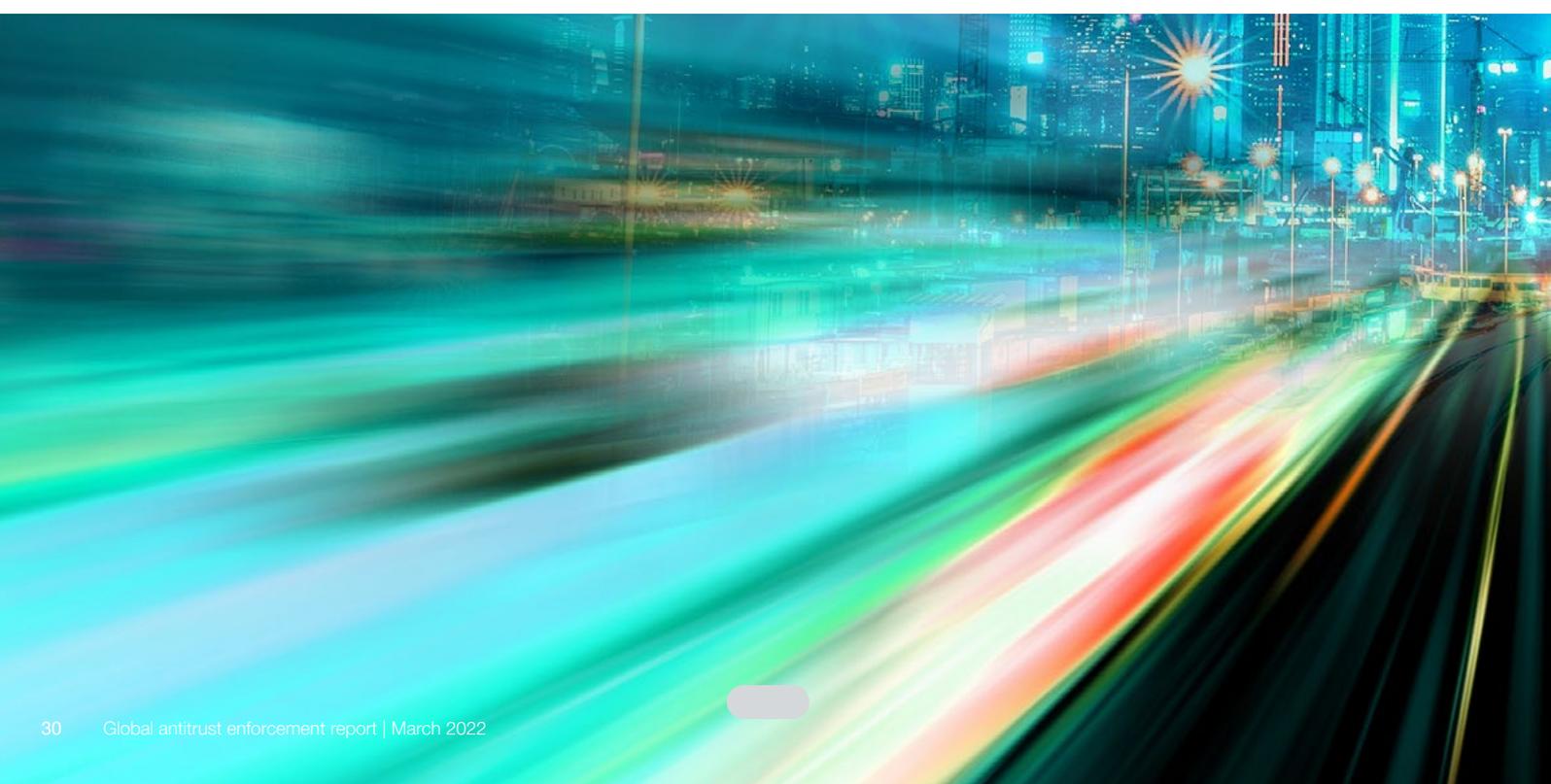
CADE's decision-making body, the Administrative Tribunal, continued to discuss whether to take account of the benefit obtained by defendants from the unlawful conduct when calculating fines – as opposed to using the criteria established by CADE's case law, which is based on defendants' revenues. For the first time, CADE's Tribunal accepted

the 'benefit obtained' criteria when setting a fine for cartel conduct, albeit in a judgment with a reduced quorum. This discussion has extended beyond CADE and is the subject of a legislative bill under analysis by Brazil's Congress.

Even though Brazil continues to prioritise cartel and bid-rigging enforcement, CADE has also been focusing on unilateral conduct. In the most high-profile case of 2021, CADE imposed a fine of BRL247.1m (USD44.2m) on Rumo-ALL, after acknowledging that the company had created barriers to a rival company in the logistics market for the exportation of sugar via rail transportation.

CADE's composition changed significantly in 2021. The former General-Superintendent assumed the seat of President of the Tribunal. Meanwhile, the former President of the Tribunal was appointed to take over the General-Superintendence (he and another appointee for a seat as Commissioner at the Tribunal still await their hearings before the Senate to take office).

In addition, the mandate of CADE's Attorney-General came to an end in October 2021 and the position remains vacant to date, while in February 2022 Paula Farani, one of CADE's Commissioners, stepped down, making way for a new appointment to CADE's Tribunal and marking the substitution of almost half of the Tribunal's members in a six-month period. Although the precise impact of these new appointments on the regulator remains unclear, it is likely that the Tribunal will face challenging discussions concerning interim measures in digital markets in 2022, as the sector is the target of multiple ongoing investigations and there is increasing pressure for faster decisions in these cases.



Canada

With thanks to Casey Halladay of McCarthy Tétrault LLP.

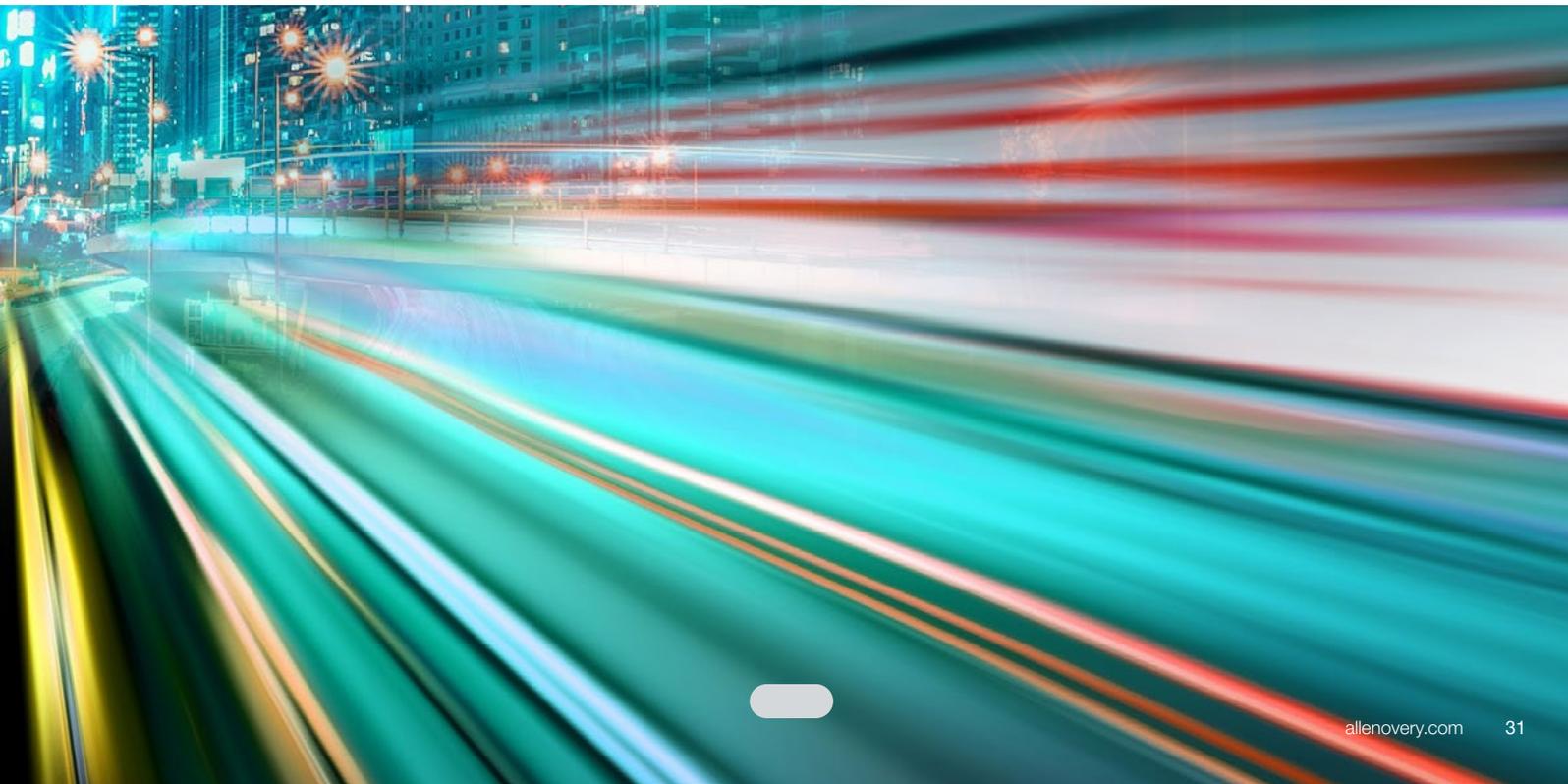
Canada continued its programme of active antitrust enforcement in 2021. We understand that the prosecution service had in excess of 30 open cartel enforcement matters on its docket. While the number of cartel-related fines and convictions noticeably decreased, in March 2021 the Competition Bureau (Bureau) brought charges against four companies and three individuals in a condominium refurbishment bid-rigging inquiry in the Greater Toronto Area, leading to a guilty plea and a fine of approximately CAD762,000 against one accused corporation in January 2022. The litigation continues against the others. In June 2021, in a long-running ongoing investigation, the Bureau laid criminal charges against a fifth person in connection with a conspiracy to rig bids for City of Gatineau infrastructure contracts.

In May 2021, Chief Justice Crampton of the Federal Court of Canada struck out a putative class action alleging a buy-side conspiracy in respect of junior hockey players' services and violations of the professional sport conspiracy offence. Notably, Justice Crampton confirmed that so-called 'buy-side agreements' are not captured by section 45 of the Competition Act, Canada's primary cartel offence. The Bureau had issued a policy statement in November 2020 indicating that, in its interpretation and that of the Federal Department of Justice, such agreements are outside the scope of section 45. Justice Crampton's decision was appealed to the Federal Court of Appeal, and that matter was heard in January 2022, with a decision still pending. Relatedly, there has been some discussion in the Canadian media about whether the section 45 offence will be amended by Parliament to capture buyer agreements.

The Bureau continued several pending abuse of dominance inquiries, including an inquiry into potential anti-competitive conduct in the supply of seed and crop protection products in Western Canada, and an inquiry into allegedly exclusionary practices by Amazon against third party vendors on the Amazon marketplace. In February 2021, the Bureau completed a public consultation into competition issues in the digital healthcare sector and, in April 2021, announced a follow-on market study in this sector.



The digital healthcare sector is the focus of an ongoing Canadian market study.



Chile

With thanks to Luis Eduardo Toro Bossay, Francisco Bórquez Electorat and Javiera Riquelme of Barros & Errázuriz.

The Chilean Competition Tribunal (TDLC) issued one abuse of dominance decision in 2021 regarding loyalty rebates, discounts, and unfair competition in the national mail distribution market. Additionally, the Chilean Supreme Court adopted one abuse of dominance decision, regarding the Chilean professional football market, on the case decided by the TDLC in 2020 and appealed by the defendant.

In November 2021, the TDLC updated its case law regarding loyalty rebates and discounts with the *Envía vs. Correos* case. In this decision, the TDLC established that the defendant charged discriminatory prices to its customers, through tailored target rebates, in order to produce an exclusionary effect against its competitor. The TDLC had not ruled on this type of conduct since the *Fósforos* case, decided in 2005. In addition to determining the dominant position of the defendant, the TDLC established that these discounts were not justified by cost savings or other objective justifications. Finally, it was also proven that the defendant engaged in unfair competition practices, having illegitimately interfered in the negotiations that Envía was carrying out with one of its clients.

In June 2021, the Chilean Supreme Court upheld the decision of the TDLC in the *FNE* (National Economic Prosecutor's Office) vs. the *ANFP* case, confirming the fine imposed of USD2.5m. In its decision, the Chilean Supreme Court maintained the TDLC's criteria, indicating that the imposition and regulation of an incorporation fee for soccer clubs constitutes a barrier to entry, designed with an anti-competitive purpose.

In a separate development, a new follow-on damages action was filed by the SERNAC (National Consumer Service) seeking compensation for customers affected by the *FNE vs. Supermarkets* cartel. This case is currently under review by the TDLC.

Due to the Covid-19 pandemic and the subsequent suspension of trials (which began to resume in October 2021) there were not many new decisions by the TDLC or the Supreme Court. However, in October the FNE filed a complaint against three cash and valuables transportation companies and six of their main executives, for price fixing during 2017 and 2018. The investigation was initiated in October 2018, after an individual made a leniency application. In the investigation, the FNE also conducted a dawn raid at the premises of the companies involved and at the private residences of their general managers. This case is currently under review by the TDLC.



The TDLC updated its approach to loyalty rebates and discounts in the *Envía vs. Correos* case.

Mexico

With thanks to Fernando Carreño, Mónica Cabeza de Vaca and Michel Llorens of Von Wobeser y Sierra, S.C.

Mexico has two antitrust authorities, the Federal Telecommunications Institute (IFT) which is the authority in the telecommunications and broadcasting sectors, and the Federal Economic Competition Commission (COFECE) which is the antitrust authority in all other markets. During 2021, COFECE sanctioned four cartels in the following markets: (i) medicine distribution (with fines of around MXN903m issued to five companies and 21 individuals); (ii) the secondary market for the intermediation of government debt securities (with fines of around MXN35m issued to seven banks and 11 individuals); (iii) signing of soccer players (with fines of around MXN177m issued to 17 soccer clubs, the Mexican Football Federation and eight individuals); and (iv) baby diapers, feminine sanitary protection products and incontinence products (with fines of around MXN313m issued to three companies and nine individuals).

COFECE was very active in energy markets in 2021. COFECE's watchdog notified several companies and individuals of potential responsibility for participating in different cartels regarding the liquefied petroleum gas (LPG) market, and preliminarily determined the absence of effective competition in the distribution of LPG for final users.

Finally, the Board of Commissioners of COFECE is currently operating with only four out of seven commissioners, since the Executive Branch has not appointed the remaining three commissioners. COFECE has brought a constitutional challenge before the Mexican Supreme Court of Justice against the Executive Branch for the failure to appoint new commissioners, on the basis that this jeopardises COFECE's proper operation.

The IFT did not carry out any cartel enforcement during 2021, but has been very active in investigations related to abuse of dominance and vertical restraints. For instance, the IFT's Investigative Authority initiated investigations into the possible existence of undertakings with substantial market power in the telecommunications network markets that provide voice, data, or video services. It also started a probe into the fixing, imposition or establishment of exclusive marketing or distribution of SIM cards in convenience store chains. Finally, the IFT recently issued new guidelines for determining relevant markets in the telecommunications and broadcasting sectors.



Energy markets were a key focus of COFECE's 2021 activities.



Asia Pacific and South Africa

Antitrust enforcement fines in 2021 (by jurisdiction)



● A&O office locations
All figures are in U.S. dollars (USD).

Australia

Notwithstanding the ongoing Covid-19 pandemic, the Australian Competition and Consumer Commission (ACCC) continued to be proactive in its antitrust enforcement and compliance activities throughout 2021.

Criminal and civil cartel proceedings remained an enduring priority for the ACCC, including working together with Commonwealth Director of Public Prosecutions (CDPP). In 2021, the CDPP obtained an AUD24m fine against an international shipping company involved in price fixing and market sharing, as well as guilty pleas from a pharmaceutical company and its former export manager in relation to a range of cartel conduct. The ACCC also commenced civil cartel proceedings against a construction company for alleged bid-rigging in relation to the refurbishment of the National Gallery of Australia.

However, the ACCC and CDPP have been less successful in the long-running criminal cartel prosecution of several investment banks and senior executives. Following an initial decision by the CDPP in November to drop its case against one of the banks, in February 2022, the CDPP subsequently withdrew the remaining charges against the other banks

and their executives. The proceedings had been criticised, including by a Federal Court of Australia judge presiding over them, as being long and drawn out. The judge noted, back in November, that it was “an entirely unsatisfactory state of affairs” that the indictment was not still insufficiently particularised over three years after the first charges were made and only six months before the trial was due to commence. These issues may well have contributed to the withdrawal of the charges. However, the CDPP has not specified the ultimate reasons behind its decision.

Elsewhere, the CDPP also failed to obtain a conviction in an alleged bid-rigging case against a rehabilitation aids company and its former CEO.

Two cases under the new misuse of market power provision were resolved in 2021 against port corporations in Tasmania and New South Wales. The ACCC achieved costs and a court enforceable undertaking in the Tasmanian case. However, in the NSW Ports case, the ACCC was unsuccessful in proving that a compensation agreement between the NSW government and a port operator was anti-competitive. The Federal Court found that the agreement,

which compensated the port operator if container traffic was diverted to different ports, was directed at maintaining the resale value of the operator's port, not to the lessening of competition. The ACCC has appealed.

Otherwise, the ACCC continued its strong track record in RPM cases, obtaining an AUD350,000 fine against a sporting goods wholesaler and court enforceable undertakings in lieu of other remedies from a bathroom products supplier. The ACCC also commenced proceedings against a power tools wholesaler alleged to have engaged in RPM on at least 97 occasions.

Digital platforms continue to be a major focus of the ACCC, which announced that consultation will begin in 2022 on potential new regulation to govern the conduct of large tech firms. Looking ahead, the ACCC is expected to maintain its focus on antitrust enforcement but also to push its extensive reform agenda in 2022. The ACCC will also welcome a new Chair in March 2022.

Mainland China

2021 was a significant year for the antitrust sector in China both in terms of enforcement and the broader development of the regulatory regime.

Anti-monopoly enforcement in 2021 was unprecedented. Compared to the previous year, the total number of cases increased by around 50% and the total amount of fines rocketed by more than 60 times. Overall, there were 13 cartel cases published with a total value of fines of RMB302m (approx. USD46.8m), four of which involved successful leniency applications, one RPM case against Gongniu Group with a fine of RMB2.95bn (approx. USD457m), and 11 abuse of dominance cases with a total value of fines of RMB22.8bn (approx. USD3.53bn).

As a key industry, internet platforms experienced strict scrutiny in 2021. Two abuse of dominance cases by tech giants attracted the most attention. In April, Alibaba was found to have abused its dominant position in the Chinese market for internet retail platform services and to have since 2015 engaged in a practice described as 'choosing one from two'. As a result, Alibaba received the largest anti-monopoly fine ever imposed (RMB18.3bn, approx. USD2.83bn, 4% of its entire group sales in China in 2019). Then, in October, Meituan was also found to have implemented 'choose one from two' practices since 2018, receiving a fine of RMB3.4bn, amounting to 3% of its 2020 sales in China.

Meanwhile, the pharmaceutical industry, energy industry, and manufacturing industry remain a focus of the State Administration for Market Regulation (SAMR)'s enforcement efforts. Among the 13 cartel cases, four cases related to concrete/cement companies with total fines of RMB237m. There were also five pharmaceutical cases (two cartel cases and three abuse of dominance cases) with total fines of RMB1.07bn (approx. USD166m).

Significantly and fundamentally, various actions were taken to build a more comprehensive and in-depth regulatory regime in China, including the second Draft Amendment to the Anti-Monopoly Law released for public comments, the name change of the anti-monopoly bureau within the SAMR to 'State' Anti-monopoly Bureau and numerous anti-monopoly compliance guidelines published.

We expect that antitrust enforcement will continue to be assertive in 2022. It will be interesting to see whether there will be convergence with other antitrust agencies around the world targeting Big Tech companies.

India

With thanks to Arshad (Paku) Khan and Pranjal Pateek of Khaitan & Co.

In 2021, India witnessed a significant increase in the number of final decisions by the Competition Commission of India (CCI). Nearly 50% of the CCI's penalty orders since the onset of the Covid-19 pandemic were issued between August and November 2021. While the CCI imposed cumulative penalties of over INR10bn (approx. USD132m), a common thread in the recent penalty orders was the weight afforded to the pandemic's impact on the contravening parties, particularly in cases involving smaller firms. In fact, much like 2020, several cases explicitly cited Covid-19 as a consideration during penalty imposition. Interestingly, despite the anti-competitive conduct itself predating the pandemic, penalties have not been imposed citing hardships caused by Covid-19.

Notably, the CCI fined Maruti Suzuki, a leading automobile manufacturer, INR2bn (approx.USD26m), for the implementation of a 'discount control policy' across its dealerships. The CCI found that the policy took the form of minimum RPM and adversely affected competition in Indian markets. The case is of significance since it is the second time an automobile company has been found to be in contravention of minimum RPM in India.

As anticipated, developments in the digital economy also continued apace. Motivated by antitrust concerns associated with surveillance capitalism, the CCI launched an investigation into the privacy policies of WhatsApp. The CCI also took its cue from its overseas peers and zeroed in on the practices of Google in the consumer Internet of Things segment. Apple is facing a reported investigation for an alleged abuse of its dominant position relating to requiring app developers to use Apple's own in-app purchase system, for which Apple charges a considerable transaction commission.

The Competition (Amendment) Bill 2020, which was anticipated to be passed in 2021, was relegated to the legislator's back burner. However, stakeholders remain hopeful that it will be deliberated upon in the 2022 budget session.



Automobile sector targeted for minimum RPM practices for the second time.

Japan

With thanks to Kenji Ito, Saori Takekoshi, Yusuke Ueda, and Kohei Shiozaki of Mori Hamada & Matsumoto.

As the amended Antimonopoly Act entered into force on 25 December 2020, 2021 was the first year in which it became fully operational. However, the continued influence of the pandemic has meant that the Japanese antitrust authority (JFTC)'s activity levels remained relatively subdued and the number of enforcement cases was low. It will therefore take more time before cases based on the amended rules are accumulated and a clear practice under the new system is established.

On the other hand, various developments indicated that the authorities continue to have a strong interest in the digital sector. The Digital Platform Transparency Law came into effect on 1 February 2021, and, as a result, five large platform operators designated as 'specified digital platform providers' by the Ministry of Economy, Trade and Industry are required to disclose information on trade terms, to

establish voluntary procedures and systems to ensure the fairness of transactions, and to submit a self-assessment report every fiscal year on the measures taken. In addition, a number of study groups were held and various reports were published on the digital market (specifically, covering (i) digital advertising, (ii) algorithms/AI and competition policy and (iii) competition policy for data markets). The JFTC also announced in October 2021 that it would launch a new fact-finding survey of mobile operating systems. These developments indicate that the JFTC and the other relevant authorities will be closely monitoring the activities of businesses in the digital sector.



Mobile operating systems to be the subject of a JFTC fact-finding survey.

Singapore

With thanks to Daren Shiau, Lai Ming Kang and Flora Kwon of Allen & Gledhill.

The Competition and Consumer Commission of Singapore (CCCS) did not issue any antitrust infringement decisions on anti-competitive conduct in 2021. On the consumer protection front, the CCCS continued to conduct investigations into unfair trade practices which concluded with the relevant suppliers ceasing false claims and pressure sales tactics to comply with Singapore's consumer protection laws.

The CCCS also conducted a review of its Guidelines on the Appropriate Amount of Penalty in Competition Cases. Following this review, the CCCS proposed to add a further example of when 'substantially limited involvement' by an undertaking in an infringement would amount to a mitigating factor, as well as clarifying the CCCS's policy position on the treatment of undertakings that did not play a leader, instigator or pro-active participant role in an infringement.

Following the expiration on 31 July 2021 of the CCCS guidance on collaborations between competitors in response to the Covid-19 pandemic, the CCCS has issued guidance on business collaborations. The aim is to enable businesses to work together with greater confidence by providing greater clarity on ways to collaborate without harming competition. The guidance provides details of the conditions under which common types of collaborations will not give rise to antitrust concerns and elaborates on factors that CCCS will use in its assessment, such as the nature and extent of the collaboration, the identity of the collaborating parties, and their market shares.

On the policy front, the CCCS made a recommendation to the Minister for Trade and Industry in November that the Block Exemption for Liner Shipping Agreements be extended for three years from 1 January 2022 in respect of vessel sharing agreements for liner shipping services and price discussion agreements for feeder services. At the same time, the CCCS released a guidance note that explains the key features of the Block Exemption, including the conditions and obligations for exemption, as well as filing and notification procedures.

Looking ahead, the CCCS has announced that its proposed revisions to the penalty guidelines set out above, further proposed amendments to six of the CCCS's guidelines on the Singapore Competition Act that the CCCS had published in 2020, and consequential amendments to two other guidelines came into effect from 1 February 2022.

In the long run, given the increasing relevance of the digital and data economy, we expect that the CCCS will regularly review and monitor related sectors such as the e-commerce and digital platforms industries to ensure that its assessment framework and toolkits remain relevant in these fast-moving sectors where new business models and forms of conduct abound.

In addition, we expect that the CCCS will continue to encourage research on antitrust and consumer protection issues in Singapore relating to sustainability and consider collaborations with various organisations in response to the increased interest in climate change and Singapore's active role in leading sustainability discussions in the global community.



CCCS guidance outlines how businesses can organise antitrust-compliant collaborations.

South Korea

With thanks to **Yong Woo Lee and Sangdon Lee of Shin & Kim.**

In 2021, the Korea Fair Trade Commission (KFTC) continued active enforcement against cartels, issuing no fewer than 45 decisions. The KFTC imposed total fines of KRW411.4bn (USD368.9m), marking a 224% increase from 2020 (KRW 127.0bn, USD 101.6m). The highest fine imposed – in a domestic price-fixing and information exchange case for steel scraps – was KRW300.1bn (USD262.8m), and accounted for 73% of the 2021 total.

As in previous years, the KFTC's sanctions in cartel cases were mostly for bid-rigging conduct, which accounted for 36 out of 46 decisions and over a quarter (KRW108.3bn, USD94.9m) of the total cartel fines imposed. Broken down by sector, the highest fine of KRW 404.6bn (USD354.4m) was imposed in the industrial and manufacturing sector.

There were two published decisions involving non-cartel anti-competitive arrangements. Both involved exclusive arrangements, with the KFTC imposing total fines of KRW 1.1bn (USD1.0m).

In addition, there were seven decisions involving abuse of dominance. Of these, the highest fine was imposed on an online platform company for favouring its own algorithms and discriminatory treatment of other companies. The fine totalled KRW26.6bn (USD23.3m), and accounted for over 86% of the total fines imposed by the KFTC in abuse of dominance/monopoly cases in 2021 (KRW30.8bn or USD27.0m). This decision, together with a new bill proposed by the KFTC in January 2021, which aims to regulate online platforms' abuse of dominance conduct, indicate that the KFTC is set to continue active enforcement against platform companies in the digital sector.

Significant legislative changes came into effect on 30 December 2021. An amendment to the Monopoly Regulation and Fair Trade Act strengthened the KFTC's enforcement powers. Notably, the upper limit of fines for cartels was increased from 10% to 20%, and information exchange has been included as a type of cartel for the first time.



High cartel enforcement levels in 2021: 46 decisions and over 220% increase in fine levels from 2020 figures.

Taiwan

With thanks to **Stephen Wu and Yvonne Hsieh of Lee and Li.**

The Taiwan antitrust authority (TFTC) reached an infringement finding in three cartel cases in 2021, imposing fines of NTD288.4m (approx. USD10.3m). This is a significant decrease from the 2020 total of NTD603.7m (approx. USD21.56m). With respect to abuse of dominance and non-cartel infringement (ie RPM and anti-competitive arrangements), the TFTC imposed only one fine of NTD2m (approx. USD71,430).

The TFTC announced that it was setting up a Special Task Force to conduct a wide-ranging industry survey on digital platforms. The main objective of the survey is to learn whether there are grounds for the TFTC to open a formal investigation regarding the bargaining power imbalances between news media businesses and digital platforms.



2021 cartel fine total decreased by over 50% from that of 2020.

Thailand

Despite the ongoing pandemic, Thai antitrust law continued in 2021 to develop at pace in line with the fast-evolving global and local business landscape. Developments included new guidelines on unfair trade practices for small and medium-sized businesses, and a record number (over 36) of antitrust law complaints as reported by the Office of Trade Competition Commission (OTCC) – confirming the growing awareness of antitrust law, and readiness to make use of it, on the part of both Thai business and consumers. The OTCC also held two public hearings on draft implementing rules and, like its counterparts abroad, retained a close watch on developments in the digital economy.

As anticipated in our report last year, the OTCC continued its vigorous enforcement activity in 2021. It released over 21 rulings, 19 of which related to unfair trade practices, and four of which concerned the e-commerce/online platform sector. The OTCC also imposed its first penalty for an unfair

pricing practice. The fine was imposed on a fruit wholesaler and amounted to 5% of its annual revenue – lower than the 10% maximum because the damage suffered was limited to only certain areas and the parties suffering loss were compensated.

The OTCC's focus in 2022, as indicated at a November 2021 seminar, is likely to be on the online sector.



Record number of antitrust complaints confirms growing consumer and business readiness to report anti-competitive behaviour.



South Africa

With thanks to Anton Roets and Nicola Ilgner of Nortons Inc.

Continuing the competition authorities' focus on excessive pricing cases related to Covid-19 essential goods, in 2021, the South African Competition Tribunal (Tribunal) conducted hearings in respect of seven Covid-related consent agreements relating to excessive pricing conduct alone.

One of these agreements related to excessive prices being charged for raw ginger by a Fruit Stop branch in Pretoria between April 2020 and June 2020, which was said to result in excessive profits being made by Fruit Stop.

Raw ginger is a basic food item which is protected in terms of the Consumer Protection Regulations. Despite Fruit Stop disputing the allegations of excessive pricing, in order to seek to resolve the matter, it agreed to the following: (i) the donation of essential goods to a community-based organisation; (ii) the reduction in the gross profit margin charged in respect of raw ginger to an agreed maximum percentage for the duration of South Africa's National State of Disaster; (iii) immediate cessation of the pricing conduct; and (iv) the development and implementation of a competition law compliance programme.

The Tribunal also confirmed separate consent agreements with three of South Africa's private pathology laboratories following a complaint received by the Competition Commission (Commission) from a Health Department official. The private pathology laboratories agreed to immediately reduce their prices for Covid-19 rapid antigen tests to a maximum cap – the laboratories may charge or negotiate a lower price. In addition, for as long as they provide Covid-19 rapid antigen tests, the laboratories have undertaken to disclose the name of the test kit to all consumers of these tests in order to enable the consumers to identify the type of antigen test provided, and this information should also be reflected on any test results. Although usually a consent agreement includes an admission of liability, the three laboratories did not admit to having charged excessive or exorbitant prices in contravention of the relevant regulations.

In 2022, it is anticipated that the Commission's focus will shift to digital markets given that it expects to conclude its ongoing market inquiry into online intermediation platforms markets. In addition, in October 2021, the Commission signed a memorandum of understanding with South Africa's Information Regulator to strengthen co-operation between the two agencies, and to enable the Commission and the Information Regulator to strategically collaborate on measures necessary to promote the protection of personal information and access to information.

The intersection between antitrust, consumer protection, and data protection has become an increasingly important topic. The Consumer and Customer Protection and National Disaster Management Regulations and Directions of 2020 will no longer be in force when South Africa's National State of Disaster comes to an end. It is assumed that the finalisation of excessive pricing complaints which the Commission received based on these regulations will remain a priority for the Commission. It is also anticipated that the Commission will focus on Government tender collusion cases.



Increasing focus on issues at the intersection between antitrust, consumer protection and data protection.

COMESA

As in recent years, enforcement activity by the COMESA Competition Commission (CCC) remained relatively limited in 2021. However, there are indications that the CCC is looking to ramp up its enforcement activity. In June, the CCC announced several proposed changes to strengthen its competition rules, including the removal of the 180-day limitation currently in place on completing an investigation into anti-competitive behaviour, as well as the creation of a new policy research advocacy unit to support the authority's increasing enforcement activity. In the same month, the CCC also stated that it had launched investigations into potential antitrust violations by a number of beer manufacturing companies, in respect of concerns regarding market allocation arrangements among themselves and/or territorial restrictions in their distribution agreements with third party independent distributors.

The CCC also announced in October that it was consulting on three sets of draft guidelines concerning penalties, procedures for conducting hearings and settlement agreements.

In other developments, in April, the CCC signed a Memorandum of Understanding with the Democratic Republic of Congo's Commission de la Concurrence for closer cooperation on competition matters, covering exchanges of information and coordination among other topics.



CCC enforcement activities look set to ramp up in 2022.



A&O global antitrust practice

Global Competition Review 2022 ranks us in the world's top 10 firms for both antitrust work in general and cartel work in particular. We are also noted for our non-cartel behavioural work. Our global team – over 120 antitrust specialists operating from 22 offices in Asia Pacific, the U.S., Europe and Africa – represents clients in the most high-profile international and national cartel and other behavioural investigations and in the equally important litigation that often follows.

Investigations are frequently carried out simultaneously across different jurisdictions and regulators increasingly coordinate approaches. Sanctions – both for individuals and corporates – are a serious threat. More than ever, any multinational needs to have a cross-border and consistent approach and response strategy in place to meet the potential risks of public and private enforcement actions.

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