

2023 global cartel forecast

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Belied by low fine totals, all signs point to a continuation of aggressive antitrust enforcement worldwide. Rather than returning to an international focus, enforcement in the U.S. and abroad remains primarily domestic, but is expanding through the use of new detection tools, novel legal theories and, in some jurisdictions, increased penalties for violations.

The result is a murky path for companies attempting to navigate an intensifying enforcement environment while also combating economic challenges such as labor shortages and record inflation.

Enforcement by the U.S. Department of Justice Antitrust Division, particularly in the courtroom, accelerated in 2022: by the end of FY 2021, the Antitrust Division had set a 30-year record for pending grand jury investigations, and it has since charged 31 individuals and 9 corporations with criminal violations.

The Antitrust Division has accordingly bolstered its litigation bench, appointing a second litigation deputy and hiring additional trial lawyers to allow for increased litigation capacity. While the Antitrust Division has expanded its litigation docket, it has not enjoyed universal success.

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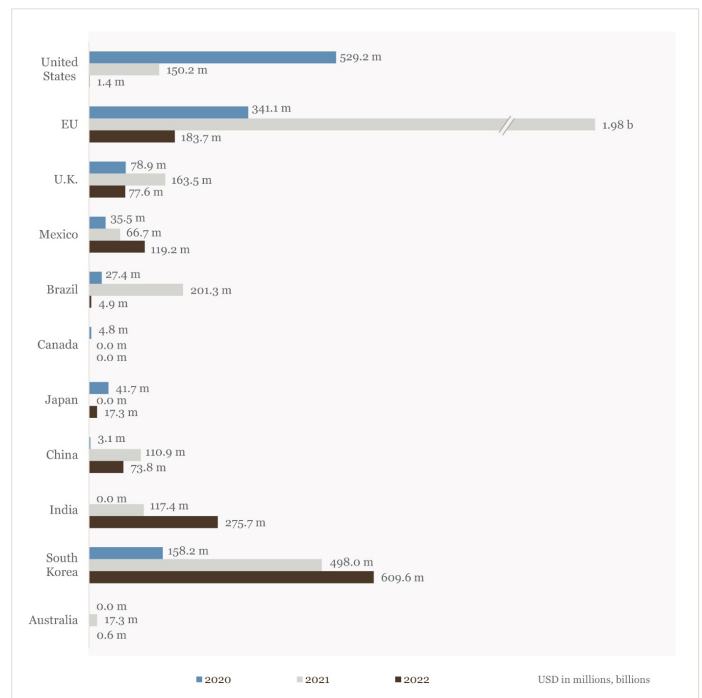
In 2022, the Antitrust Division faced several high-profile losses, including mistrials and acquittals in price-fixing litigation in the poultry industry, and losses in two no-poach litigations. Undeterred, the Antitrust Division secured its first no-poach victory in the form of a guilty plea in its case against a health care staffing company, and, in October 2022, obtained a guilty plea in the first criminal monopolization case in over 40 years.

Elsewhere, regulators are similarly sharpening their enforcement sticks while also wading into new enforcement waters. Enforcers in the U.S., U.K., Australia, Canada and New Zealand developed a working group to share intelligence in order to investigate suspected anticompetitive behavior in global supply chains, while enforcers globally delved into enforcement related to labor markets, digital markets, and environmental, social, and governance (ESG) initiatives.

In the U.K., the Competition and Markets Authority (“CMA”) expects enhanced investigation powers, with the U.K. Government proposing reforms in April 2022 that include expanding the extraterritorial scope of their cartel prohibition to agreements implemented outside of the U.K. and broadening interview and search warrant powers.

In line with their stated aim to continue pursuing large and more complex cases, the CMA has, since Brexit, opened more cases than the European Commission (“EC”). The potential penalties for antitrust violations are also on the rise, with regulators including the Australian Competition and Consumer Commission (“ACCC”) and Brazil’s CADE announcing increases to fines available under the law.

Select Year-to-Year Comparison^{1,2}



1. Statistics from selected jurisdictions are approximate and reflect fine levels and exchange rates at the time of writing and may not be exhaustive. Statistics reflecting penalties for the U.S. include those in the U.S. fiscal year, October 1, 2021 to September 30, 2022. All other statistics include enforcements in the 2021 calendar year. Fine totals include the amounts imposed during the relevant fine period, and exclude fines that were reduced, adjusted, or re-imposed from prior years.

2. Fine amounts were based on the local currency and converted to U.S. dollars using the currency exchange rates reported by the United States Treasury's Reporting Rates of Exchange, available here: bit.ly/3r7KIM (as modified in September 2022).

Trends to watch for in 2023

Leniency in limbo

As reported by the Organization for Economic Cooperation and Development (“OECD”),¹ leniency applications have been plummeting worldwide since 2015, and expectations are that applications may remain low as new changes to leniency programs take shape.

In the EU, the EC experienced a downturn in enforcement during the critical pandemic years; the EC did not launch a single cartel investigation during 2020 or 2021. OECD studies have also shown that leniency applications in Europe were 70% lower in 2020 compared to 2015, while the number of claims for damages increased in the same period by 350%, suggesting that applicants view the increased risks and costs of private enforcement to outweigh the benefits of a leniency application.

In the wake of the downturn in leniency applications, enforcers are shifting their focus to other detection methods such as bid-screening and algorithmic tools to generate case leads.

To reverse this trend, the EC issued guidance in October the form of FAQs, appointed a leniency officer to give informal advice to potential leniency applicants, and is considering allowing ‘no names’ discussions with whistleblowers. The number of EC dawn raids rose again in 2022, and we expect healthy levels of activity in 2023.

In April 2022, the Antitrust Division also issued updates and clarifications to its Leniency Program² in the form of updated FAQs. The new updates include more stringent requirements on applicants seeking conditional leniency, such as demonstrating a restitution plan before a conditional leniency letter is granted.

Given the near term uncertainty around how these new revisions will be interpreted and applied, we expect potential applicants may be more cautious as they consider the implications of seeking leniency.

An expanding detection toolkit

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We expect to see regulators continue to explore new areas of enforcement, scrutinizing a broader range of conduct and testing new legal theories.

For example, the Antitrust Division has continued to expand its Procurement Collusion Strike Force to partner with additional federal agencies, which has paid dividends in procurement-related enforcement actions in recent years.

Algorithm-based detection tools are also gaining popularity, with enforcers in Australia, New Zealand, South Korea, and Singapore, among others, developing and adopting programs to help to detect potential bid rigging in public tenders. This trend is expected to continue for the foreseeable future, particularly as enforcers across jurisdictions turn an eye to collusion in the supply chain and the investigation of pandemic era and post-pandemic recovery efforts.

New areas of enforcement

We expect to see regulators continue to explore new areas of enforcement, scrutinizing a broader range of conduct and testing new legal theories. These include the revived criminal enforcement of monopolization, the continued focus on labor markets, the potential antitrust implications of ESG initiatives and enforcement agendas focused on digital markets, including the development of new tools and capacity to take on these investigations.

Notes

¹ <https://bit.ly/3JtsEa8>

² <https://bit.ly/3kSznOl>

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