

# 2022 global cartel forecast

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While 2021 ushered in a resurgence of aggressive cartel enforcement, it remained predominantly focused on domestic, as opposed to global, matters.

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Yet, the developments of 2021 offer a view towards growing globalization of enforcement and areas that are likely to come into focus in 2022, including: the rise of the U.K.'s Competition and Markets Authority as a global cartel enforcer; increased scrutiny of labor markets across the globe; a renewed focus on financial institutions as economies seek to recover from the pandemic; elevated enforcement over procurement collusion; and the potential for policy shifts in the U.S. and EU that might enable the pursuit of sustainability goals through antitrust enforcement.

## Looking inward in 2021

Domestic cases were yet again the primary drivers of cartel figures in 2021 and continue to dominate the landscape of active investigations and litigation at the forefront of regulators' dockets. While there are calls, including in the sweeping Executive Order issued last year by U.S. President Biden, for a return to global coordination and enforcement to mirror industry consolidation and trends, the largely domestic agendas that countries will employ to rebound from the impact of the global pandemic may temper those efforts.

Fine totals in 2021 reflected the continued focus on smaller-scale, domestic cartel matters, with notable jurisdictions posting fine totals well below historic highs. For example, U.S. fine totals remained at historically low levels, dipping further below 2020 figures, and enforcers in Japan and Canada posted no fines at all. Certain other notable enforcers, like Australia, Korea and China, saw some rebounding in their figures compared to recent years.

The exception to the rule in 2021 was the European Commission, which imposed its highest total fines since 2016, although those

figures were largely due to a series of long-pending, global enforcement matters — like the Foreign Exchange investigation — that were only recently concluded by the Commission. (Please see Page 2 for graphic.)

The lower fine totals in 2021 are not, however, reflective of a drop in enforcement. Rather, cartel enforcement activity has been on the rise.

Reflecting this trend, the U.S. Antitrust Division noted in its Spring 2021 update that the agency was preparing for thirteen criminal trials, some of which — including the Division's first no-poach prosecution and prosecution of a Florida medical provider for an alleged market allocation scheme — are scheduled to go forward early in the new year.

More importantly, the unprecedented political and media visibility antitrust enforcement is currently enjoying leads us to expect even more aggressive enforcement in 2022.

## Trends to watch for in 2022

### Post Brexit — U.K. CMA steps up to the plate

The U.K.'s Competition and Markets Authority (CMA) announced its intent to develop its own standing as a global cartel enforcer, declaring in its annual plan for 2021 and 2022, that it is "ready to launch complex cartel and antitrust cases and merger investigations with a global dimension that would have previously been reserved to the European Commission."

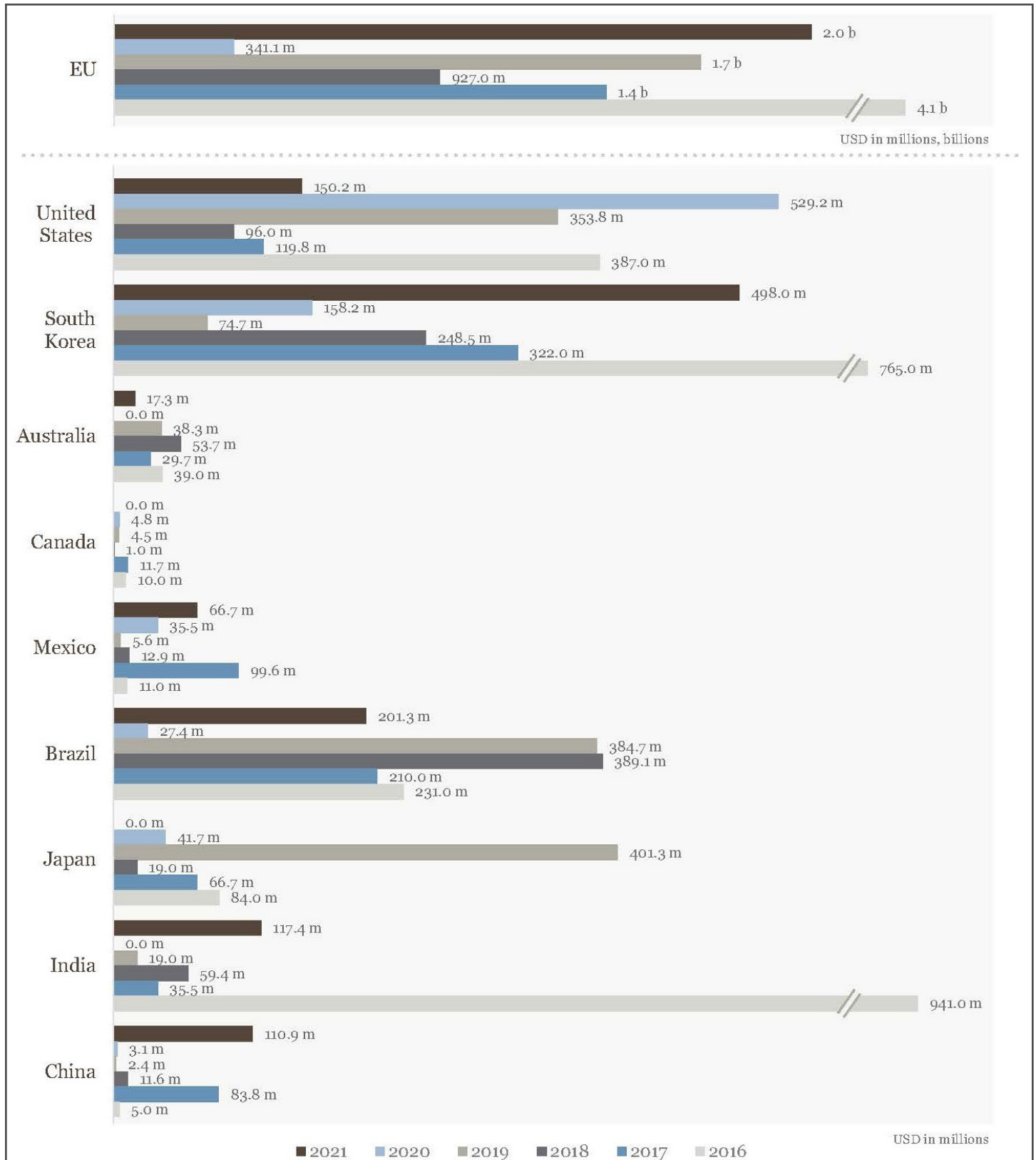
Following the Brexit transition period at the end of 2020, the CMA ceased to enforce Article 101 TFEU in the U.K., and now utilizes the U.K.'s Competition Act 1998 for cartel enforcement, increasing the risk that conduct may face parallel enforcement from both U.K. and EU regulators.

In domestic enforcement, commentators expect active enforcement particularly in the construction sector, which has been under the microscope in recent years resulting in multiple successful investigations by the CMA.

### Global scrutiny of labor markets

The U.S. Antitrust Division continues to prioritize pursuit and prosecution of wage-fixing and no-poach conduct in labor markets. The Antitrust Division scored a critical victory in its case against the former owner of a physical therapist staffing company for alleged wage-fixing conduct when a Texas federal court denied the

### Select Year-to-Year Comparison<sup>1,2</sup>



defendant's motion to dismiss. The court rejected arguments that wage-fixing conduct could not be prosecuted criminally, holding instead that the conduct met the definition of a horizontal price-fixing agreement, and was therefore properly viewed as a per se violation.

Defendants in two cases have similarly challenged the Antitrust Division's authority to pursue no-poach conduct as a criminal violation, and antitrust experts eagerly await the courts' rulings in those cases, as the decisions will impact future no-poach cases by the Division, as well as civil litigation of the same conduct.

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Finally, in December the Antitrust Division announced indictments of six individuals for engaging in a hub-and-spoke no-poach conspiracy in the aerospace engineering market, the Division's first no-poach case outside of the healthcare sector.

In an unusually aggressive move, the Division arrested one individual, purported to be the hub of the conspiracy, who was later released on bail. Commentators identified the case as one to watch, as the vertical relationships of the hub-and-spoke structure may implicate novel questions and arguments.

Global enforcers have similarly zeroed in on conduct that limits employee compensation and choices. Executive Vice President Margrethe Vestager of the European Commission signaled in a speech in late 2021 that the Commission would pursue wage-fixing and no-poach conduct, noting the "very direct effect" that such agreements have on individual victims.

In Portugal, the Autoridade da Concorrência completed a consultation regarding collusion in the labor market and released best practice guidance for companies advising the elimination of no-poach and wage-fixing practices.

Enforcers in France, Italy, and Indonesia brought charges for wage-fixing or no-poach conduct in recent years, and regulators in additional multiple countries — including Mexico, Portugal, Colombia, Turkey, and Poland — are actively pursuing or investigating collusion in labor markets.

Scrutiny of collusion in labor markets is expected to continue in 2022 and beyond, as multiple regulators consistently place this new effort at the top of their priorities.

### **Financial institutions under the microscope**

Enforcement actions against financial institutions may no longer dominate the headlines as they did in the mid-2010s, but financial markets are never far from regulators' eyes and are again garnering attention as economies look to rebound from the pandemic.

In addition to the European Commission's actions against banks for collusion related to government bonds and forex spot-trading,

regulators in Mexico and Brazil also fined financial institutions for cartel conduct in 2021.

In 2022, antitrust experts will be closely monitoring the Australian Competition and Consumer Commission's case against alleged collusion among joint underwriters involved in a stock sale for Australia and New Zealand Banking Group (ANZ).

The outcome of the case, which seeks to criminalize alleged agreements among joint underwriters in the disposition of shares in the stock sale, could have significant implications for how capital raisings and other joint underwriting activities are performed in the future.

### **Continued focus on procurement collusion**

Procurement fraud investigations and prosecutions will remain a primary diet of antitrust enforcers in 2022 as investigations and allegations arise into the proper use of the substantial public funds spent in response to the COVID-19 pandemic and those governments will be investing in rebuilding.

In the U.S., the Antitrust Division's Procurement Collusion Strike Force (PCSF) was active this year as it seeks to establish itself as both a national and international presence. The PCSF secured several guilty pleas in 2021, including its first against a foreign company, and is promising to double its efforts in 2022.

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The Department of Defense (DOD) also commissioned a study this year on how to enhance its department-wide approaches to preventing contracting-related fraud schemes. One suggested solution was strengthening the DOD Fraud Reduction Task Forces to better prevent procurement fraud during contract bids.

Internationally, global regulators have similarly focused their attention on public procurement fraud, such as the Japan Fair Trade Commission's and Korean Fair Trade Commission's review of bids related to the recent and upcoming Olympics.

### **Policy shifts to promote sustainability**

We expect to see multiple regulators give further consideration as to how to pursue sustainability goals through antitrust enforcement policy. In the U.S., the Biden administration has pledged to combat climate change using every available policy tool and, with that goal in mind, some are calling for permissive corporate collaborations for the purpose of promoting environmental sustainability.

The EU has similarly focused on combating climate change, particularly with the European Commission's 2019 Green Deal. While the EU works to become climate neutral as outlined in the Green Deal, it has signaled that competition policy must also evolve in order to make that plan a reality.

The EU is currently assessing cooperation agreements around research and development, purchasing, and standardization to determine whether eco-friendly collaboration standards can achieve these goals. Should sustainability-focused agreements come to fruition, it would enable companies to collaborate on environmental standards in ways that may otherwise implicate antitrust laws but would be exempt in the name of combating climate change.

We would expect global regulators to pay close attention to the EU's developments and follow its lead should these collaboration agreements prove successful.

## Notes

<sup>1</sup> 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, 2019, to September 30, 2020. All other statistics include enforcements in the 2020 calendar year. Final totals include the amounts imposed during the relevant time period, and exclude fines that were reduced, adjusted, or re-imposed from prior years.

<sup>2</sup> 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 at <https://bit.ly/3L5mnjf> (as modified in December 2021).

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