

Global antitrust enforcement report

March 2024





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Our global antitrust practice

Foreword

2023 saw another muted picture in terms of overall global fines for antitrust enforcement, with total penalties for the jurisdictions surveyed in our report down at USD2.9 billion, a moderate decrease from the 2022 totals (USD3.5bn) and a significant downtick from 2021's bumper year of enforcement (USD11.3bn). Notably, traditional "heavy hitter" regulators in Europe and the U.S. reported marked decreases in fines for the second year in a row. By contrast, moderate increases were observed in a number of APAC jurisdictions (including Australia, China and Japan) as well as in Canada.

While care should be taken to avoid attributing too much significance to year-on-year changes given the cyclical nature of antitrust enforcement, a combination of different factors may be responsible – at least in part – for the mixed enforcement picture we have seen in the last couple of years:

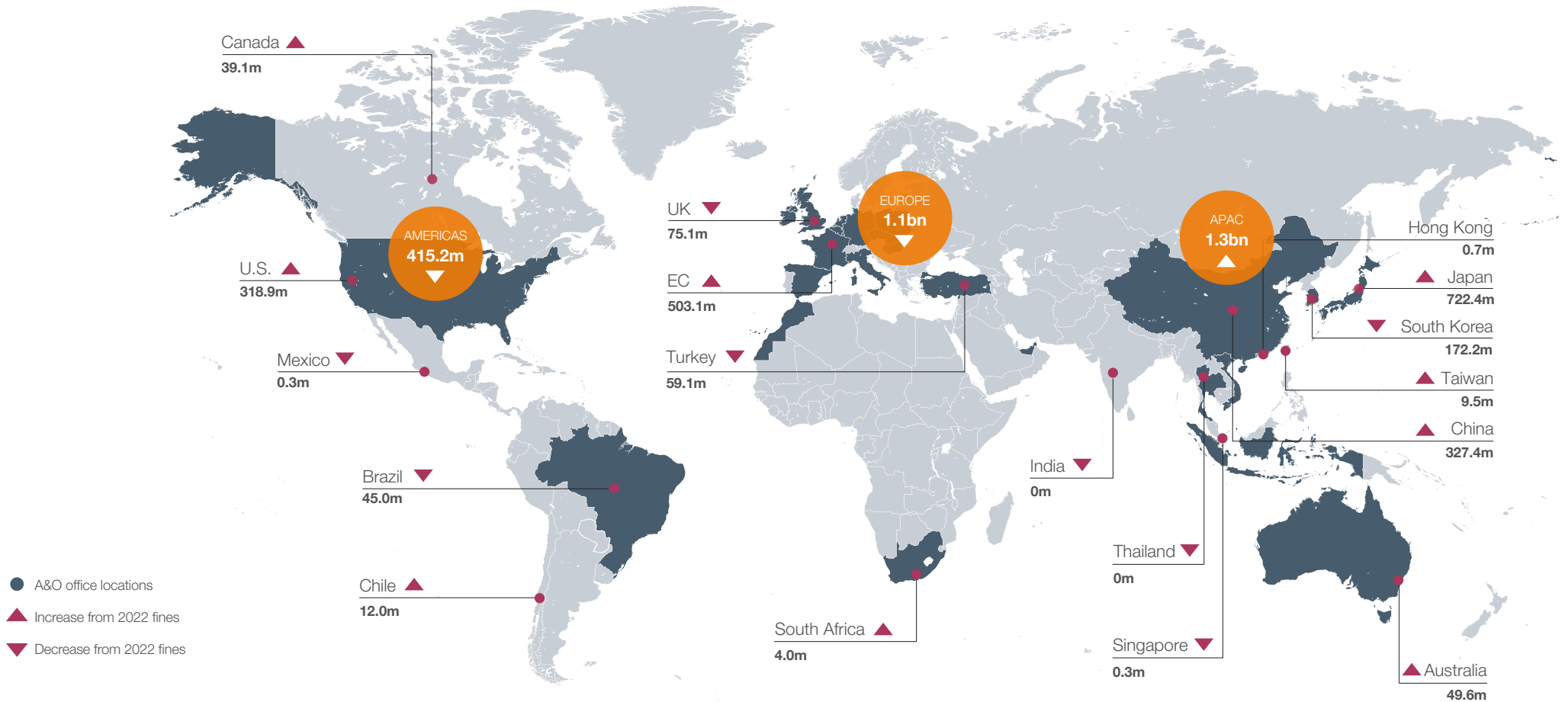
- The impact of the Covid-19 pandemic on regulators' ability to conduct dawn raids and otherwise pursue enforcement in 2020 (and, to an extent, 2021), may only now be trickling through to reduced enforcement statistics, given the tendency of material investigations to run for a number of years.
- The proliferation of private enforcement action across the EU, UK and U.S., and the related prospect of follow-on litigation, appears to be having a continued chilling effect on leniency applications across many jurisdictions, with the number of enforcement decisions in 2023 following from leniency applications remaining low compared to previous years. Seemingly bucking this trend, the European

Commission (EC) reported an increase in immunity applications in 2023 for the third year running. It remains to be seen whether this uptick will be reflected in increased enforcement in 2024 and beyond. What is clear is that private antitrust enforcement is only set to increase, with regulators becoming increasingly mindful of the need to ensure that action in the courts does not skew the balance and focus of public enforcement, which necessarily serves a distinct purpose.

- The ongoing major legislative reforms in the digital sector continue to take up significant regulator time and resource, possibly distracting from enforcement under regulators' traditional antitrust armoury, or at least increasing their incentives to delay enforcement of notoriously high threshold conduct pending the implementation of new ex ante regimes. All eyes will be on the EC's enforcement of digital "gatekeepers" under its Digital Markets Act (DMA), with lively debate already underway as to the extent to which Big Tech will fully comply with the new rules.

Looking ahead, it will be interesting to see whether regulators are successful in their efforts to reverse the downward trend in fines over the last two years. Dawn raids continued to pick up with pace in 2023, with regulators increasingly collaborating to coordinate efforts across jurisdictions, and the continued focus on enforcing conduct in labour markets as well as sustainability initiatives (in particular in the U.S.) may also present opportunities for increased enforcement action. The Australian Competition and Consumer Commission (ACCC) has said we can expect "bang for our buck" in antitrust enforcement in 2024 – it remains to be seen to what extent this will play out in practice, and whether it will ring true for enforcement across the globe.

Global antitrust enforcement fines in 2023 were USD2.9bn, a decrease from 2022



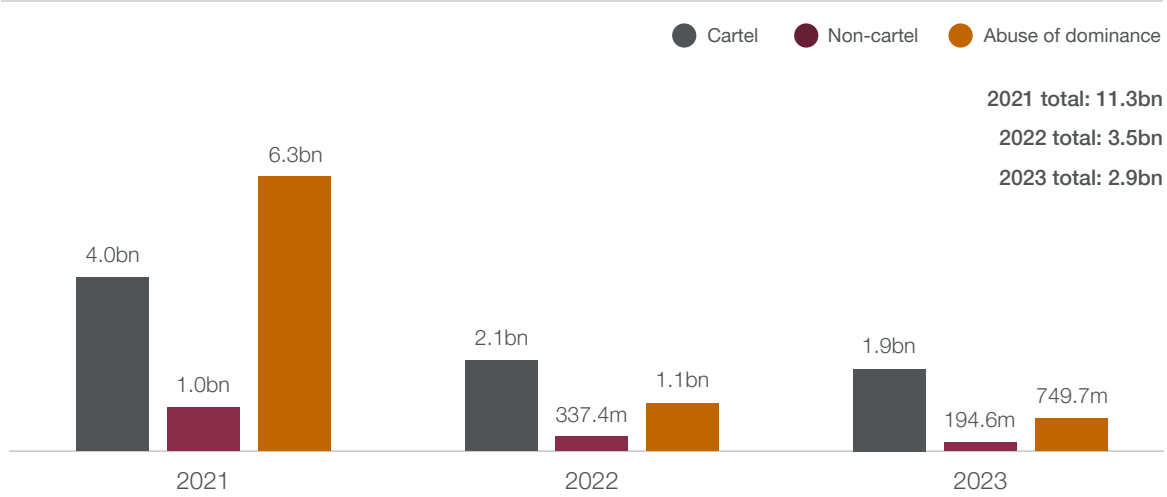
All figures are in U.S. dollars (USD).

Hong Kong is a new jurisdiction for the 2023 report.

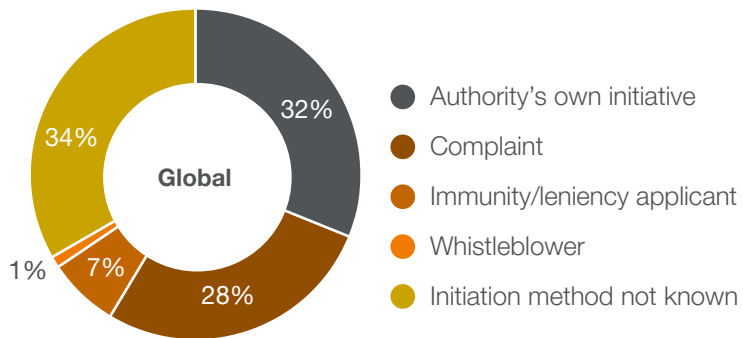
Statistics relate to the 2023 calendar year and reflect levels calculated using an average exchange rate for 2023. Statistics are approximate and may not be exhaustive.



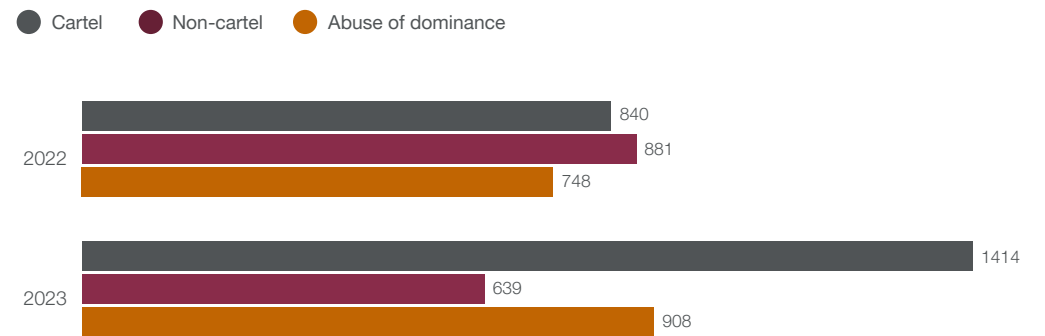
Total global fines by conduct type, 2021-2023



Mode of initiation of enforcement action, 2023



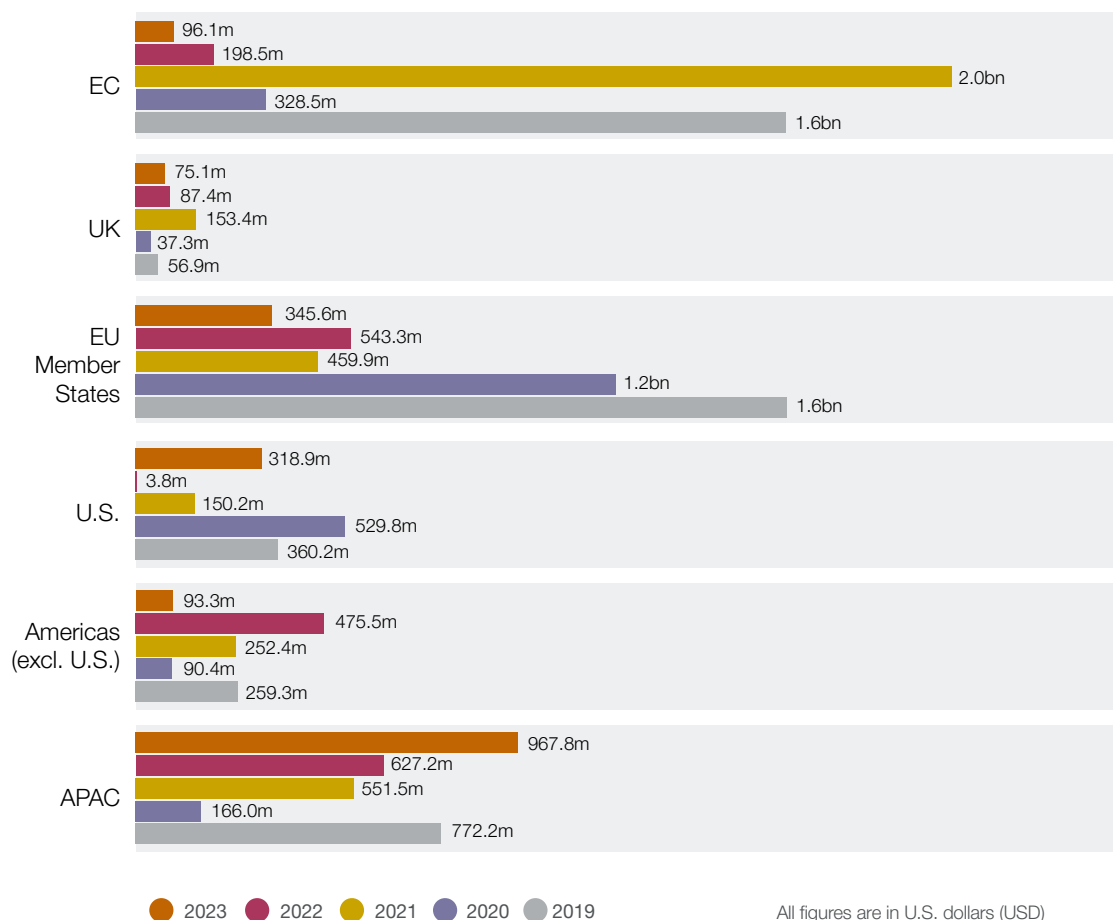
Average length of investigation (calendar days), 2022-2023



Cartel enforcement tops the antitrust agenda

Overall, global fines for cartel activity in 2023 (USD1.9bn) were broadly in line with the 2022 total (USD2.1bn). However, regulators in the EU recorded significant drops in actual fine levels, and 2023 also saw a sharp decrease in the total number of cartel enforcement decisions, from more than 200 in each of the previous two years to just 163 in 2023.

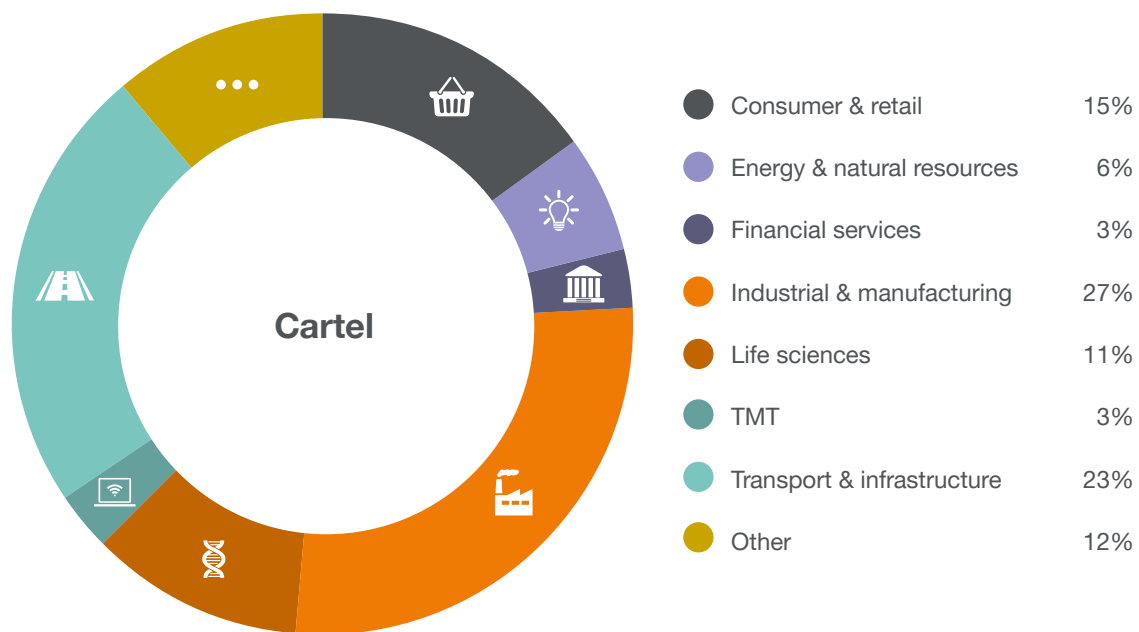
Regional cartel fine comparison (2023 total: 1.9bn)



Key statistics

- The EC recorded its lowest total fine value (EUR88.9 million) since 2005, finalising just four cartel enforcement decisions in 2023 – in the hand grenades, N-butylbromide scopolamine/hyoscine (SNBB), Euro-denominated bonds and ethanol benchmarks cases. The average total fine per decision (EUR22m) was also significantly lower than the figures for 2022 (EUR94m) and 2021 (EUR159m).
- In the UK, the Competition and Markets Authority (CMA) issued GBP60.2m in fines across two decisions – in the construction services and Leicester City FC merchandise cases.
- Enforcement at the national level by EU Member States dropped to its lowest for a number of years. Spain was again the top enforcer (EUR205m, three decisions), while significant activity was also seen in Austria (EUR45.2m, six decisions) and France (EUR37.9m, five decisions).
- U.S. antitrust enforcement remained at historically low levels, with the increase in total fines largely attributable to two settlements (USD305m) in a long-running generic pharmaceuticals price-fixing investigation.
- Elsewhere in the Americas, Canada issued a record fine (USD37m) in respect of a coordinated pricing scheme affecting the price of bread.
- In APAC, fines reached their highest level for several years. However, this was largely attributable to a single decision, as the Japan Fair Trade Commission (JFTC) issued its highest-ever antitrust fine (USD717.3m) on a cartel involving three electricity companies. South Korea continued to be one of the most active authorities, issuing fines of USD113.3m across 28 decisions. Australia's Federal Court issued a record fine (USD38.2m) on a steel manufacturer for attempting to fix prices. The court also imposed a USD0.4m penalty on the company's former general manager and, to ensure deterrence, ordered that this could not be recovered under insurance.

Cartel decisions by sector, 2023



“Financial markets look set to remain on antitrust authorities’ radars, and a key enforcement priority in certain jurisdictions.”

Financial services: an area of continued interest for key regulators

The financial services sector has been a consistent area of focus for cartel enforcement over recent years. In 2023 there were just five enforcement decisions totalling USD32.9m (continuing the downward trend seen in 2022). However, financial markets look set to remain on antitrust authorities’ radars, and a key enforcement priority in certain jurisdictions.

The EC continued its enforcement against cartel activity in the trading of fixed income products, fining a bank EUR26.6m over a Euro-denominated bonds trading cartel, in which traders had exchanged commercially sensitive information and coordinated their trading and pricing strategies over a ten-year period. The other participating bank avoided a fine of almost EUR156m, as it had revealed the cartel to the EC under its leniency programme and received full immunity.

Fixed income has also been the subject of scrutiny in the UK. In May 2023, the UK CMA issued a statement of objections in its ongoing financial services sector cartel investigation, provisionally finding that five banks unlawfully exchanged sensitive information regarding UK government bonds in one-to-one online chats. The UK Financial Conduct Authority (FCA) also fined three money transfer firms GBP150,000 for fixing exchange rates and the transaction fee charged to consumers in Glasgow over a three-month period. This is just the second time the FCA has issued fines using its concurrent antitrust powers. With two further antitrust cases opened in 2023, we may see further enforcement action from the FCA in the coming months.

In South Africa, there were a number of developments in the Competition Commission’s ongoing case against 28 banks accused of manipulating the USD/ZAR foreign exchange rate between 2007 and 2013. In November 2023, one of the banks reached a settlement agreement and agreed to pay an administrative penalty of USD2.3m. In January 2024, the Competition Appeal Court dismissed the charges against most of the remaining banks, leaving just five banks to face trial. The Commission announced in February 2024 that it has approached the Constitutional Court for leave to appeal the decision.

Finally, the 2023 developments in the ongoing FX litigation proceedings in the UK (see our **damages section** below for more details) serve as a reminder that public enforcement decisions in the financial services sector are a prime candidate for follow-on damages claims in the courts.

Key themes in cartel enforcement

Forms of cartel conduct

Bid-rigging: an enforcement target across multiple industries

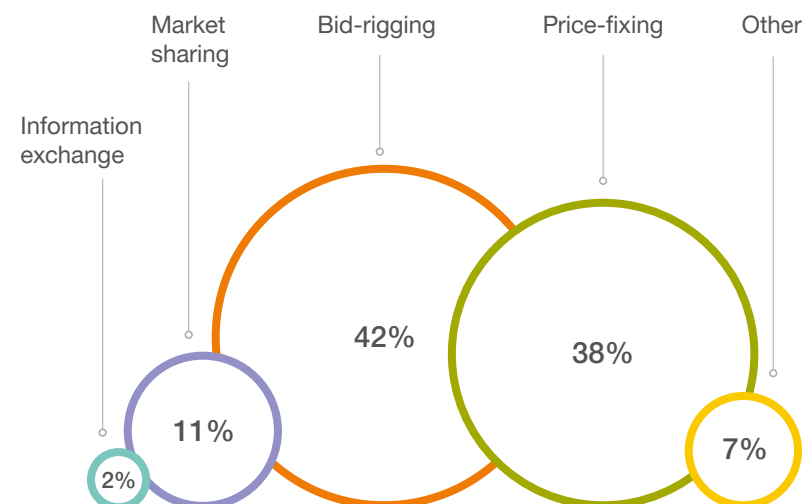
For the third year running, bid-rigging was the most commonly enforced type of cartel conduct in 2023 (42% of decisions), with investigations progressed and concluded in a number of jurisdictions.

The construction industry continued to be the sector of focus. In the UK, the CMA fined ten construction firms a total of GBP59.3m for illegally colluding to rig bids for demolition and asbestos removal contracts involving both public and private sector projects. The CMA also secured the disqualification of four directors of firms involved in the unlawful conduct. Significant fines were issued elsewhere in Europe, with the French competition authority fining six companies EUR31.2m for bid-rigging in public tenders for decommissioning operations at the Marcoule nuclear power plant. In Austria, further fines were imposed in relation to an ongoing cartel probe targeting more than 40 construction companies; over EUR180.7m in fines have now been levied to date. In Germany, the Federal Cartel Office (FCO) fined 14 construction companies and 12 individuals a total of EUR4.8m for bid-rigging in industrial construction contract tenders awarded by three steel companies. The case marks the first time that the FCO has applied powers, introduced in 2017, to impose fines and liability amounts on parent companies to prevent avoidance of fines through restructuring.

Other sectors were the subject of bid-rigging enforcement elsewhere. In South Korea, the Korea Fair Trade Commission (KFTC) fined 32 vaccine companies USD32.5m for colluding to win public contracts for the government's National Immunisation Programme. Penalties were imposed in Brazil in relation to pacemakers, in Chile in relation to fighting forest fires using helicopters and planes, in Spain in relation to military equipment for the Spanish Ministry of Defence, and in Slovakia in relation to electricity transmission.

Individuals also faced significant sanctions for bid-rigging conduct in 2023. In Japan, a district court found an ex-official of the Tokyo Olympics organising committee guilty of rigging bids for "test events" related to the 2021 Games, sentencing him to a two-year suspended prison term. In the U.S., where individuals face a maximum penalty of ten years in prison and a USD1m criminal fine, 13 individuals were convicted of bid-rigging offences.

Extra-territorial enforcement was also pursued in 2023, as a U.S. district court ordered a Korean-based company to pay restitution and a USD8.6m fine for bid-rigging and fraud relating to U.S. military hospitals in South Korea. In March 2022, two officers of the company, both South Korean nationals, had been indicted by a grand jury in connection with the same conduct. An official at the U.S. Department of Justice Antitrust Division (DOJ) warned that the DOJ will continue to aggressively pursue bid-rigging and other collusion that targets the U.S., even where such schemes are executed overseas.



“For the third year running, bid-rigging was the most commonly enforced type of cartel conduct.”

Spotlight on labour markets

Building on developments seen in recent years, 2023 saw enforcement action by a number of regulators against anti-competitive conduct in labour markets, with mixed results on opposite sides of the Atlantic. Investigations in particular targeted wage-fixing agreements (where employers agree to set or fix employee wages) and “no-poach” agreements (where employers agree not to hire each other’s employees). Outside of explicit enforcement action, antitrust authorities are also increasing their focus on labour markets in general, with non-compete clauses being a prime concern as authorities seek to curb practices that could limit labour mobility or reduce salary competition.

A tough approach on no-poach

In Europe, sports leagues were again at the forefront of labour markets enforcement. The Polish competition authority imposed fines of USD1.2m on the Polish Automobile and Motorcycle Federation and the Speedway Extra-League for implementing regulations which provided for maximum remuneration rates that sports clubs participating in speedway racing league contests were allowed to pay their athletes during the 2013 season. In Italy, the competition authority (IAA) concluded its investigation against the Italian Volleyball Federation concerning the alleged anti-competitive nature of restrictions on the transfer of non-professional athletes between affiliated amateur sports clubs. The IAA accepted commitments proposed to remove the restrictions – the new bylaws for 2024 will provide athletes with the ability to switch clubs at the end of every season.

Authorities also targeted labour market violations in more traditional employment settings. In October, the Czech competition authority (UOHS) concluded an investigation into possible anti-competitive provisions in the ethical codes of the Association of Travel Agencies and Association of Used Car Dealers, which required association members to use non-compete clauses in their employment contracts where possible and potentially restricted the transfer of employees between them. Both cases were resolved by the association removing the problematic provisions from its ethical code and informing its members about the changes made. In August, the Turkish Competition Authority (TCA) issued its second no-poach sanction – a landmark USD6.3m cross-sector fine on 16 companies for a series of bilateral no-poach agreements. The companies involved were not all themselves competitors.

Overall data shows an increase in decisions and new cases in labour markets over the last three years with 13 labour market cartel investigations active across Europe as of the end of 2023. Enforcement action in Europe in particular looks set to continue into 2024, as the EC conducted its first-ever dawn raids in relation to alleged no-poach agreements in November, in connection with its online food delivery sector investigation. Meanwhile the French competition authority issued a statement of objections to companies in the engineering, technology consulting and IT services sectors, and the Belgian competition authority issued a statement of objections to private security firms. In the UK, the CMA has ongoing investigations into workers’ rates in sports and non-sports TV production and broadcasting and suspected no-poach arrangements in consumer fragrances, and is reported to have further labour markets investigations in the pipeline.

The enforcement picture was less successful for U.S. regulators. In April, the DOJ suffered its fourth consecutive loss in contested criminal labour collusion trials, as a federal judge acquitted six executives for allegedly conspiring to allocate the labour market for aerospace engineers. In November, the DOJ dropped its last remaining criminal no-poach prosecution.

New legislation and guidance on the cards

With new legislation in force or in prospect across several jurisdictions, labour markets look set to remain a focus for antitrust authorities in 2024.

The most high-profile new legislation is the U.S. Federal Trade Commission (FTC)’s proposed rule, announced in January 2023, to prohibit employers from imposing non-compete restrictions on their employees and require any existing non-compete agreements to be rescinded, with limited exception. The FTC is expected to vote in April 2024 on the final version of its proposal. By contrast, in a report published in January 2024 on competition in UK labour markets, the UK CMA indicated that non-compete clauses are typically a matter for employment law and do not generally breach UK antitrust rules (although noting the UK government’s announcement that it will legislate to limit post-term non-compete to three months). The Australian government is also reviewing the use of non-compete clauses and no-poach agreements as part of its review of Australian competition laws.

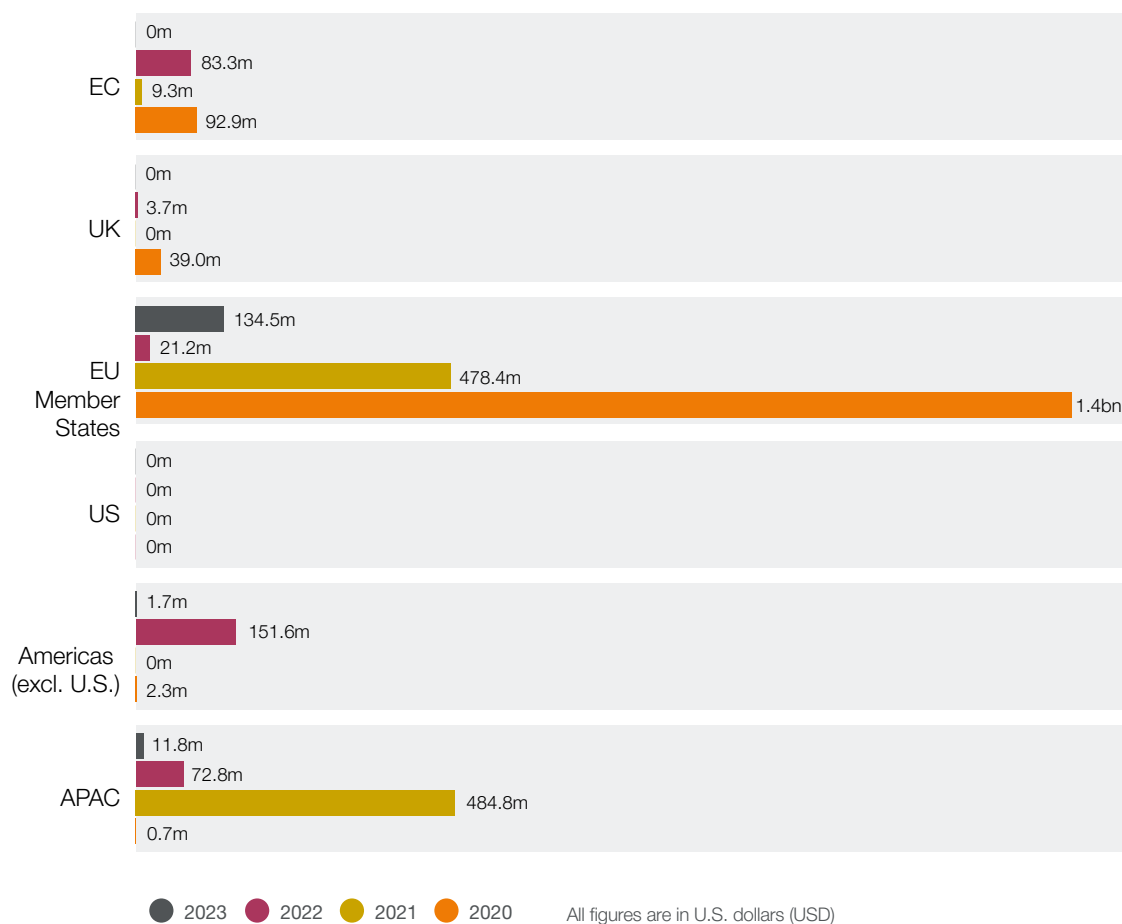
In Canada, a new offence for wage-fixing and no-poach agreements entered into force in June, prohibiting non-affiliated employers from entering into agreements to fix wages, fix terms or conditions of employment, or not hire or solicit each other’s employees. Notably, employers do not need to be competitors for the new provision to apply.

Authorities have also been updating their guidance documents to reflect labour market conduct. The EC added wage-fixing to the non-exhaustive list of “by object” infringements in its revised horizontal guidelines, and the UK CMA published guidance for employers on how to avoid anti-competitive behaviour in labour markets, as well as identifying labour markets as a key area of focus in its Annual Plan 2023/24 and hosting a roundtable on these issues in November 2023.

Authorities take a more conciliatory approach to enforcement against vertical and other non-cartel conduct

The level of fines imposed for infringements relating to vertical and other non-cartel conduct declined steeply once again in 2023, with overall fines around half of the 2022 total, and less than a quarter of the 2021 figure. However, the overall number of decisions recorded in our dataset (72) was the highest in recent years. This indicates that authorities are increasingly willing to take a more conciliatory approach to penalising vertical infringements, with 61% of decisions in 2023 involving settlement or other forms of cooperation (up from 42% in 2022 and 26% in 2021).

Regional non-cartel fine comparison (2023 total: 194.7m)



Key statistics

Neither the EC nor the UK CMA recorded any decisions against vertical or other non-cartel conduct in 2023, a significant downturn in enforcement activity when compared with 2022 (where they each published four decisions). However, vertical agreements clearly remain on the radar of both authorities following the publication of significantly revamped “block exemption” regulations and guidance last year.

National authorities in EU Member States continued to be key enforcers, accounting for 35% of decisions recorded and 71% of overall fines. The Czech Republic’s UOHS and the French competition authority were particularly active in this area – UOHS issued 12 decisions focused on retail price maintenance, while the French competition authority imposed the standout penalty of 2023, a EUR91.6m fine on a Swiss luxury watch maker for prohibiting authorised retailers from selling its watches online.

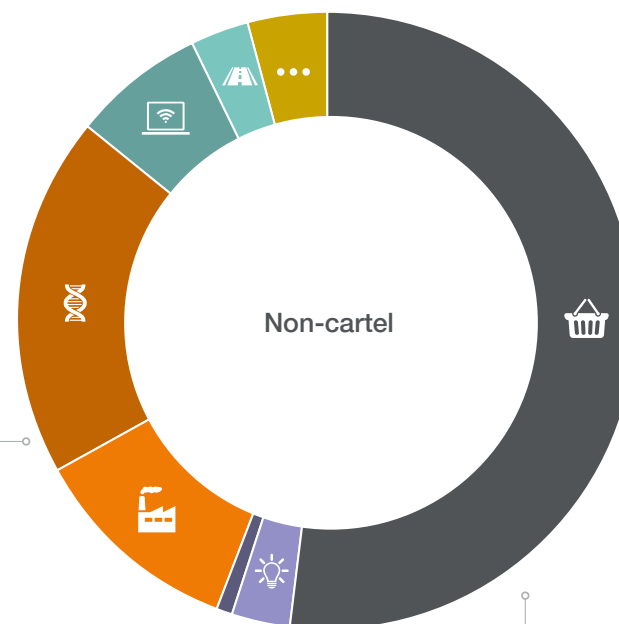
The Chile competition authority (FNE) recorded its first decisions in this area in recent years, reaching settlement agreements in three cases in 2023. This included approving commitments offered by three food delivery platforms to remove or modify various types of “most favoured nation” clauses (MFNs) that prevent restaurants from offering products at lower prices on alternative platforms or directly.

Overall fines across APAC were low, but authorities in the region continued to be active enforcers – accounting for 31% of all decisions recorded. Japan’s JFTC and South Korea’s KFTC in particular opted for agreeing corrective actions rather than imposing penalties, with no fines imposed in any of their 12 decisions in 2023. This included two notable settlements in cases related to COVID-19 – in Japan, a pharmacy chain agreed to repay its suppliers USD5.7m to compensate for products it sent back when its stores closed during the pandemic, while in Korea, a healthcare company that imposed minimum online prices for facemasks during the pandemic escaped without a fine (primarily due to its low market share).

Non-cartel decisions by sector, 2023

Authorities look to cure pricing arrangements in the life sciences sector

Authorities across the world raised concerns with vertical restrictions in the life sciences sector in 2023. Over 85% of decisions in the sector focused on retail price maintenance, and although the associated fines added up to just USD8.3m, remedies were imposed in 9 out of the 14 cases. This is perhaps driven by a sector-specific goal of addressing problematic conduct as quickly as possible – the average length of investigation across these 9 cases was just 138 calendar days, less than one-quarter of the overall average for non-cartel decisions in 2023.

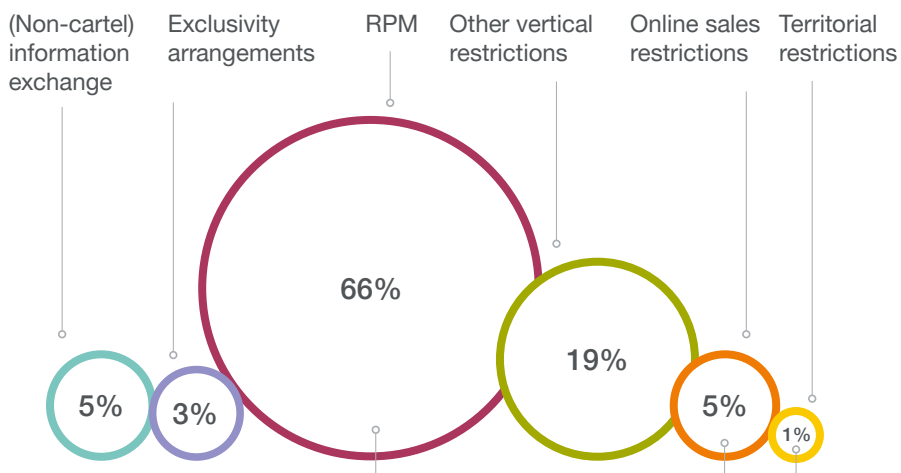


Consumer & retail continues to be the key focus for enforcement against vertical restrictions

There continued to be a high volume of decisions recorded in the consumer and retail sector, rising from 26 in 2022 to 38 in 2023. Fine levels remained generally low, with the median penalty imposed being only USD0.5m, however their potential impact is still significant given the smaller scale of businesses active in the segment.

Key themes in vertical and other non-cartel enforcement

Forms of non-cartel conduct



RPM continues to be the most common form of vertical conduct red flagged across the world

Resale price maintenance (RPM) was a key focus for authorities across the world, with total fines of USD76.3m.

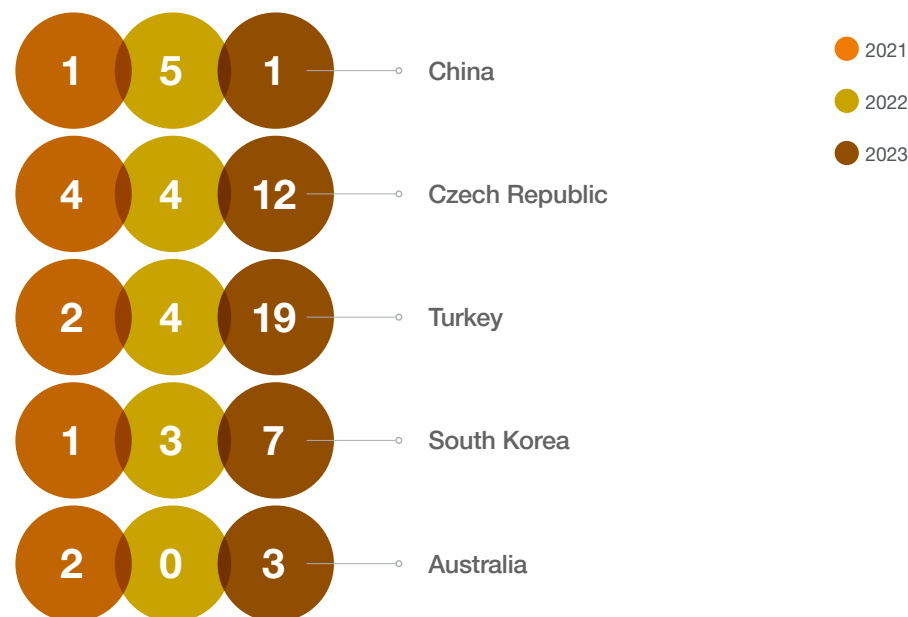
The Czech Republic's UOHS issued 12 infringement decisions for RPM, all targeted at businesses in the consumer and retail sector. However, it agreed settlements in 11 of these cases, and fines were reduced significantly – up to 70% in some instances – where the infringing firms undertook to introduce new compliance programmes (or strengthen existing ones).

Outside of Europe, in Australia, the ACCC persuaded courts to levy a record USD10m fine on a power tool supplier for contractually restricting sales below a specific minimum price, and enforcing these agreements by warning – and in some cases refusing to supply to – dealers that offered to sell or sold the products below this price. In Turkey, nine cosmetic companies agreed to pay USD12.5m to settle resale price maintenance allegations put forward by the TCA. The TCA also imposed fines of USD26.3m on four homeware appliance companies for imposing minimum prices on its distributors, ending a long investigation that had initially focused on alleged online sales restrictions.

Luxury goods in the spotlight for online and territorial sales restrictions

Decisions focusing on online sales restrictions accounted for 53% of global fines in 2023 (albeit only 5% by number of cases). This was largely driven by the standout EUR91.6m penalty imposed on a Swiss luxury watch maker for preventing retailers from sending watches to customers in the post, and thereby effectively ruling out online sales. It was the second such restriction penalised by the French authority in 2023 – the agency also fined a luxury tea seller EUR4m for prohibiting online sales of its branded products for a period of 15 years.

Elsewhere in Europe, the EC issued a statement of objections accusing a clothing company and its licensee of restricting cross-border and online sales, and the Polish competition authority fined a bicycle manufacturer USD0.6m for prohibiting its retailers from selling bicycles online.



Number of vertical decisions focused on RPM conduct

Key legal developments relating to restrictions on vertical agreements

Not so “hardcore” after all? ECJ makes clear that authorities must always look at the full picture

The European Court of Justice (ECJ) ruled in June 2023 that authorities cannot automatically conclude that agreements categorised as “hardcore restrictions” for the purposes of the “block exemption regulations” should be treated as “by object” infringements under general competition rules. Instead, before penalising such conduct, authorities need to analyse whether the agreement presents a sufficient degree of harm to competition, taking into account the content of an agreement’s provisions, its objectives, and the economic and legal context of which it forms a part. The ECJ ruling followed a referral from the Lisbon Court of Appeal in its review of the Portuguese competition authority’s (PCA) fine against Super Bock for RPM.

The ECJ’s ruling cuts across the standard working assumptions of most competition authorities across Europe – including, most notably, the recently revised vertical guidelines published by the EC in 2022, which state that hardcore restrictions for the purposes of the block exemption regulation are generally restrictions of competition by object.

Similar discrepancies between guidance and case law have been seen in recent years in the UK – the Competition Appeal Tribunal (CAT)’s 2022 ruling in *Compare the Market* found that wide MFNs do not necessarily have an anti-competitive effect, which was seemingly at odds with the CMA’s decision to characterise such provisions as “hardcore restrictions” in its revamped vertical regulations and guidance.

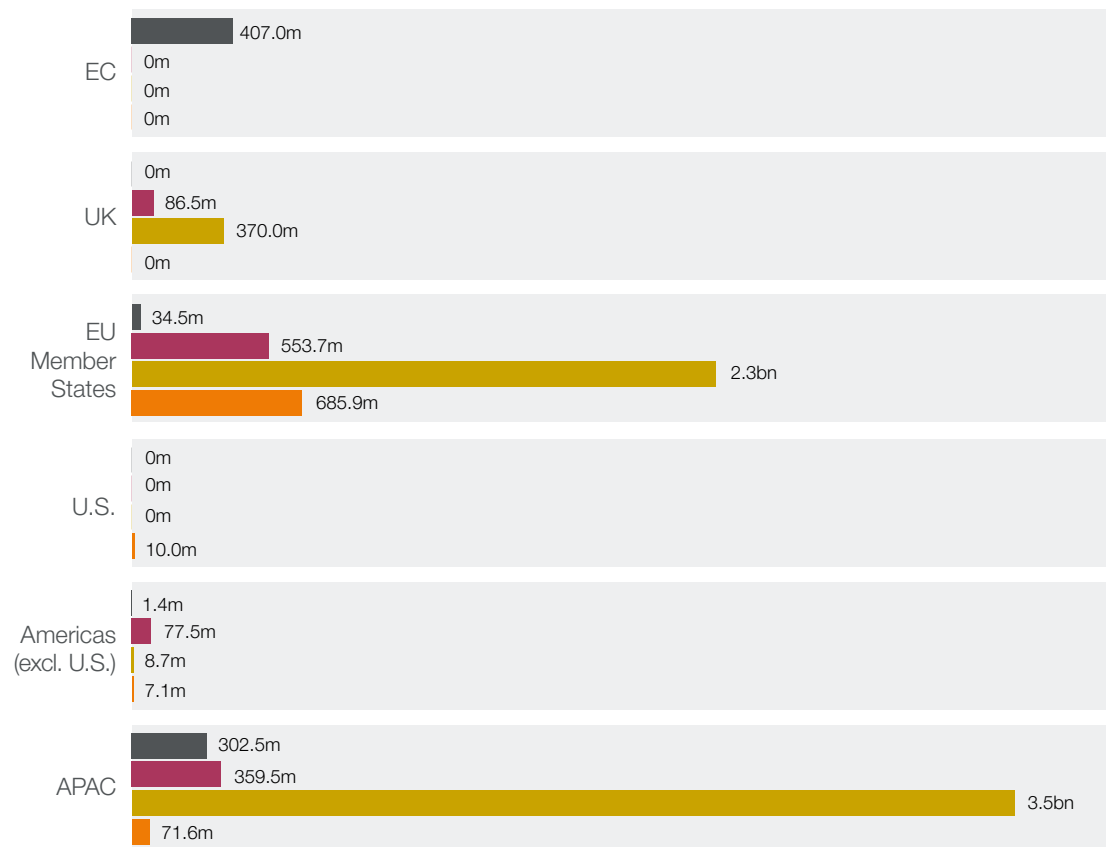
While these developments indicate that firms may be able to raise defences against conduct that was previously thought of as a clear red flag, the argument is unlikely to be an easy one to win. Indeed, despite the ECJ’s ruling, Super Bock was not able to successfully avoid a penalty – with the Lisbon Court of Appeal ultimately deciding to re-impose the record EUR24m fine initially issued by the PCA.



Abuse of dominance enforcement declines as new forums emerge

The level of fines imposed in abuse of dominance cases continued to decrease across the world in 2023. To some extent, this reflects the recent trend towards authorities being willing to close investigations based on commitments that address the conduct at issue, rather than seeking to impose large fines (which often result in years to reach an infringement decision as well as subsequent judicial review in the courts) – parties agreed commitments with authorities in 41% of cases in 2023 (up from just 16% in 2022 and 11% in 2021), and were able to avoid fines altogether in the vast majority of cases. However, the overall number of decisions recorded in our dataset continued to decline (there were 59 in 2023, down from 62 in 2022 and 90 in 2021), suggesting that authorities are beginning to prioritise resources towards enforcement under ex ante regimes designed to regulate dominant firms in digital markets.

Regional abuse of dominance fine comparison (2023 total: 749.8m)



Key statistics

Although the level of fines imposed by the EC were significant, its only abuse of dominance decision in 2023 was the re-imposition of a EUR376m fine on Intel for so-called “naked restrictions”. This was a significant reduction to the original EUR1.1bn fine imposed in 2009, after the EU General Court annulled the aspects of the decision relating to “loyalty rebates”. Intel has appealed against the new decision, so the over 20-year old saga will continue on into 2024.

National competition authorities in EU Member States continued to be key enforcers, issuing 35% of the total decisions. However, there were no standout penalties imposed and over half of decisions involved the acceptance of commitments – making the overall level of fines significantly lower than recent years

Despite the significant decrease in total fines, there was significantly more enforcement activity in the Americas region in 2023 – with a total of 11 decisions recorded, up from four in 2022. Six of these were commitment decisions issued by Brazil’s Administrative Council for Economic Defense (CADE), with only minimal fines imposed as a result (less than USD1m in each instance).

China’s State Administration for Market Regulation (SAMR) was the standout enforcer in the APAC region, levying a total of USD243.6m in fines across eight separate infringement decisions. South Korea’s KFTC was also very active – issuing a total of nine decisions, with aggregate fines of USD58.9m. No fines were issued by India’s Competition Commission (CCI) or Japan’s JFTC

Abuse of dominance decisions by sector, 2023

A break in fines against “Big Tech” firms, but they continue to be the focus of enforcement across Europe and APAC

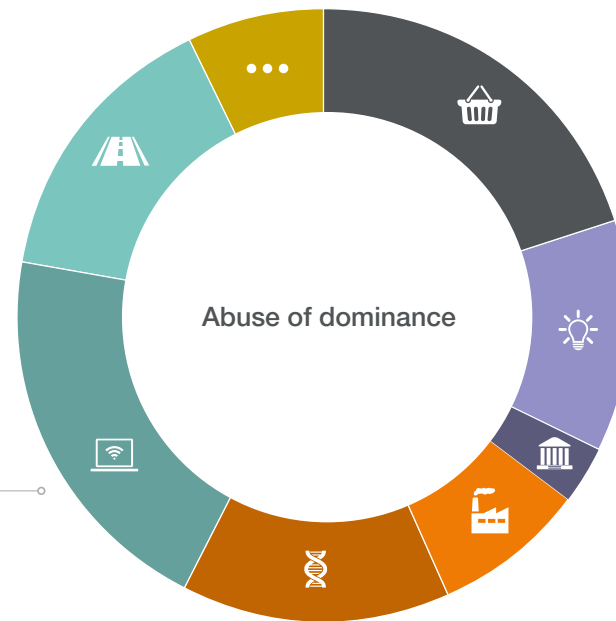
The only fine imposed on “Big Tech” in 2023 was the KFTC’s USD33.7m penalty on Google for blocking developers from releasing mobile video games on a Korean competitor platform. However, other technology companies were subject to significant fines for abuse of dominance in 2023 – accounting for 57% of the total recorded. In addition, despite the low number of decisions, the EC remained an active enforcer of abuse of dominance rules with a particular focus on “Big Tech” – it published statements of objections in ongoing investigations into Google and Meta in 2023, and launched a new investigation into Microsoft. Notably, in 2024, the EC also recently fined Apple over EUR1.8bn for so called ‘anti-steering’ restrictions applied by its App Store to music streaming providers – a clear indication that abuse of dominance rules “will work hand in hand” with the new ex-ante EU DMA regime to regulate digital markets going forwards. “Big Tech” also clearly remains in the crosshairs for regulators across the globe, with a number of new investigations being opened under abuse of dominance rules in 2023.

Notably, there were no significant fines against telecoms operators in 2023, with the only decisions recorded in our dataset reflecting the commitments agreed by two operators in Romania.

Life sciences remain under the microscope across the world

Life sciences remained a key sector for enforcement, with authorities particularly keen to penalise “exploitative abuses”. In China, SAMR published four decisions in the sector, comprising a significant USD172.2m fine on four collectively dominant suppliers of an antibiotic, a USD40.3m fine on the only two domestic suppliers of ingredients for injections used in emergency treatments (for imposing unreasonable trading terms) and two other excessive pricing penalties. Likewise, in South Africa, the Competition Tribunal issued a fine for excessive pricing of hand sanitiser sold to the police service during the pandemic.

In Europe, the EC dawn raided companies producing cardio medical devices in September. This investigation is now the EC’s fifth ongoing abuse of dominance case in the life sciences sector. Interestingly, four of these cases involved dawn raids – a tool usually reserved for detecting hidden cartels, rather than abuse of dominance conduct.



Consumer & retail	20%
Energy & natural resources	12%
Financial services	3%
Industrial & manufacturing	8%
Life sciences	14%
TMT	20%
Transport & infrastructure	15%
Other	7%

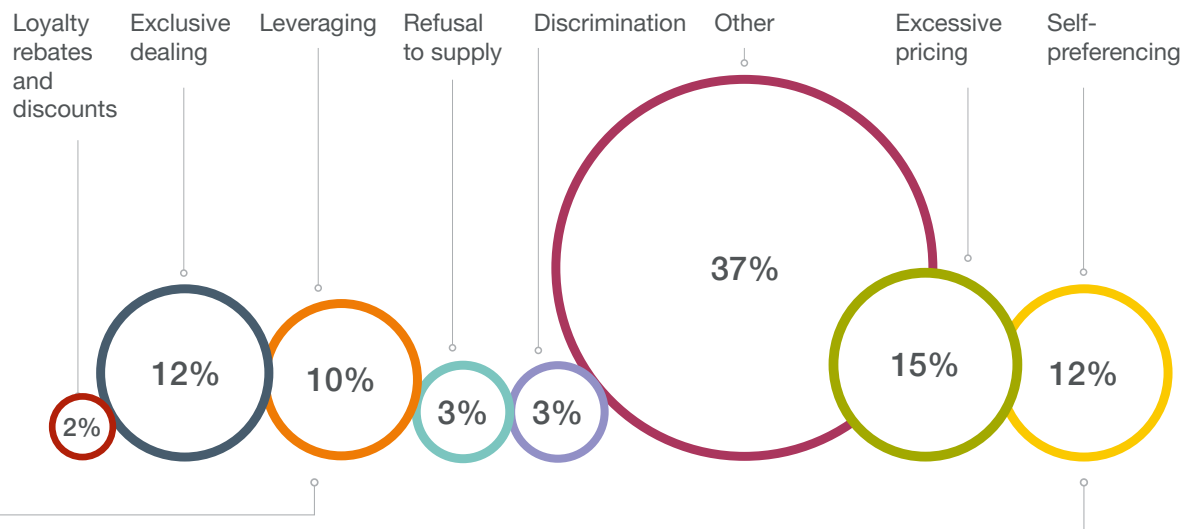
Key themes in abuse of dominance enforcement

Forms of abuse of dominance

The concept of “abuse” continues to be used flexibly by authorities across the world, who are seeking to adapt existing rules to new market realities. This is perhaps shown by the increasing number of decisions that address types of conduct falling outside of the labels traditionally used in this area – now 37% in 2023, up from 33% in 2022 and 29% in 2021. The move towards ex ante regulation of digital markets may cause abuse of dominance enforcement to be focused on more “traditional” markets going forwards, but upcoming changes to the EC’s guidance are expected to mark a clear shift away from the formalistic categories that used to be applied – reflecting years of litigation in the courts regarding the need for case-by-case effects-based analysis to establish an abuse.

Leveraging – a bundle of trouble for Big Tech

Authorities are continuing to limit how “Big Tech” firms leverage data, with the UK’s CMA agreeing commitments with Meta to ensure that its advertising customers can “opt out” from data being used to run and improve Facebook Marketplace. However, 2023 also saw cases based on more traditional leveraging theories of harm being initiated against “Big Tech” firms across Europe – with the EC investigating Microsoft for bundling its Teams product into Office software, and Germany’s FCO alleging that Google infringed rules by offering its various vehicle apps as a bundle. In Turkey, the TCA is investigating Meta for tying its new Threads platform with Instagram. Elsewhere, authorities continue to enforce against leveraging in other sectors, especially where natural monopolies exist. For example, in China, a domestic gas utility was fined USD7.1m for unlawfully tying its pipeline projects with other services.



“Self-preferencing” continues to be a dominant allegation against online intermediaries

2023 saw a continuation in the trend of authorities investigating “self-preferencing”, particularly in the context of algorithms used by online marketplaces / intermediary services.

The most significant fine in 2023 was in South Korea, where the KFTC fined the country’s largest taxi-hailing app operator USD21.7m for designing the algorithm on its mobile application to give preferential treatment to its own affiliated drivers. In the UK, the CMA accepted commitments to address potential concerns it had raised with Amazon’s “Buy Box” algorithm – but this has not stopped two very similar standalone class action claims being made against Amazon in the UK CAT. Amazon is also under the spotlight in Turkey, where the TCA has launched an investigation into its algorithmic pricing practices. This follows a USD2.6m fine imposed on Trendyol (Turkey’s largest e-commerce platform, which is majority-owned by China’s largest e-commerce and digital company Alibaba) in July for manipulating algorithms to favour its own brand.

“Self-preferencing” remains firmly on the agenda for 2024, with the EC having sent a statement of objections to Google in June 2023, alleging that the company favours its own online display advertising technology services and indicating that divestments may be required to address the authority’s concerns. If the EC confirms its concerns and remedies, this would be only the third time that it has imposed “structural” remedies in an abuse of dominance case.

Looking forward – emerging trends in abuse of dominance

Consumer protection increasingly at the heart of abuse of dominance enforcement

2023 has seen an increasing trend towards abuse of dominance rules being used to address what would previously have been viewed as consumer protection concerns.

The EC signalled its intentions in this area by issuing a call to evidence, seeking feedback on the adoption of new guidelines on exclusionary abuses of dominance. Governments across the world are also expanding the toolkits available to antitrust authorities to protect consumers, with new digital markets regimes in the UK, the Netherlands and Australia all likely to contain powers that are designed to promote the interests of consumers.

Elsewhere, consumer protection concerns are prevalent features of private class actions brought on abuse of dominance grounds (which are becoming increasingly prevalent – see our **damages section** for details). A prime example of this is the collective proceedings brought against Meta in the UK for alleged damages caused by unfair data requirements, unfair price and unfair trading conditions. In February 2024, the CAT certified the collective proceedings claim, after having ordered a stay in 2023 amid concerns over the validity of the methodology used to calculate damages in this context.

Private equity firms feel the heat as antitrust agencies shine a spotlight on roll-up strategies

In September 2023, the U.S. FTC filed a complaint and sought a permanent injunction against a private equity (PE) fund and its portfolio company, U.S. Anesthesia Partners. Its lawsuit alleges that the defendants' roll-up strategy – which involved a series of 17 small acquisitions over a ten-year period – was designed to consolidate and monopolise the anaesthesiology market in Texas, violating general U.S. antitrust laws.

In future years, roll-ups are likely to be scrutinised to a greater extent through merger control regimes. In 2023 the U.S. updated its merger guidelines and announced proposed changes to the premerger notification form, both of which will facilitate greater scrutiny of serial acquisitions. Meanwhile, the EC may utilise its “Article 22” powers to investigate so-called killer acquisitions. In the UK, the CMA investigated a series of PE-backed roll-up acquisitions of 17 independent veterinary businesses, forcing the acquirer to divest 12 of the businesses after completion. See our latest **Global trends in merger control enforcement report** for more.

However, as foreshadowed in last year's report, abuse of dominance rules may also play a role in this area. The ECJ's ruling in Towercast in March 2023 affirmed the opinion of the Advocate General, clarified that abuse of dominance enforcement can be used to plug gaps in protections in existing merger control regimes.

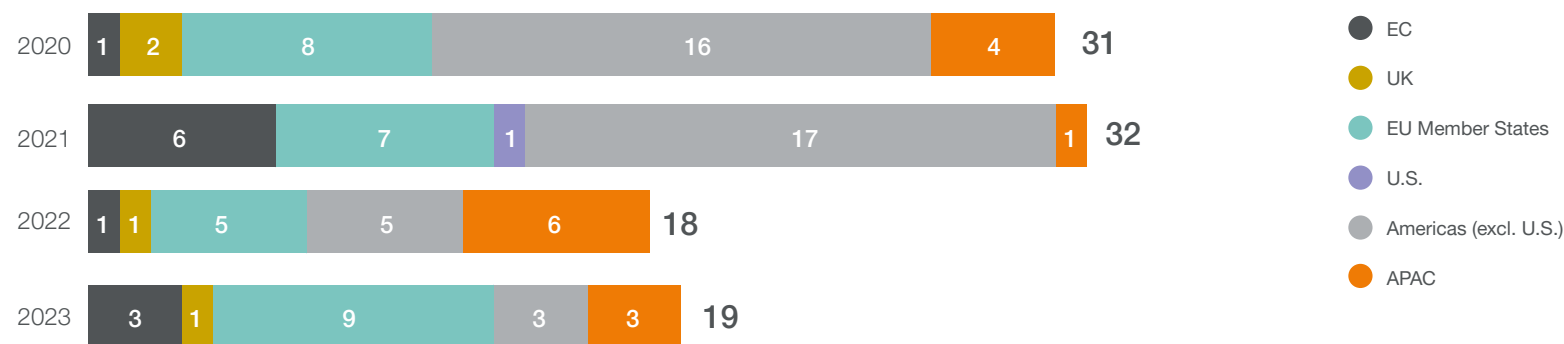
Immunity and leniency pipeline continues general decline

Overall, the number of immunity/leniency cases decided in 2023 (19) was broadly in line with 2022 (18), although lower than both 2021 (32) and 2020 (31). The costs and uncertainty associated with seeking leniency – including increasingly the prospect of follow-on private litigation and exposure to liability in other jurisdictions – has greatly reduced the leniency pipeline across many jurisdictions globally.

Regulators continued their attempts to attract leniency submissions by increasing the attractiveness of their policies. In April, India introduced a new “leniency plus” tool designed to incentivise companies already under investigation to report other cartels. This new tool came into effect in February 2024. In October the U.S. DOJ announced a safe harbour for companies that discover wrongdoing by the acquired business in an M&A transaction. In January 2024, the French competition authority published a new procedural notice providing greater clarity and predictability about application processing.

In contrast to the widely reported worldwide decline in leniency applications over recent years, in January 2024, a senior EC enforcer reported that the number of cartel leniency applications received by the EC increased for the third year in a row in 2023. Whether this reported uptick in leniency applications will translate into an increase in successful enforcement actions is yet to be seen.

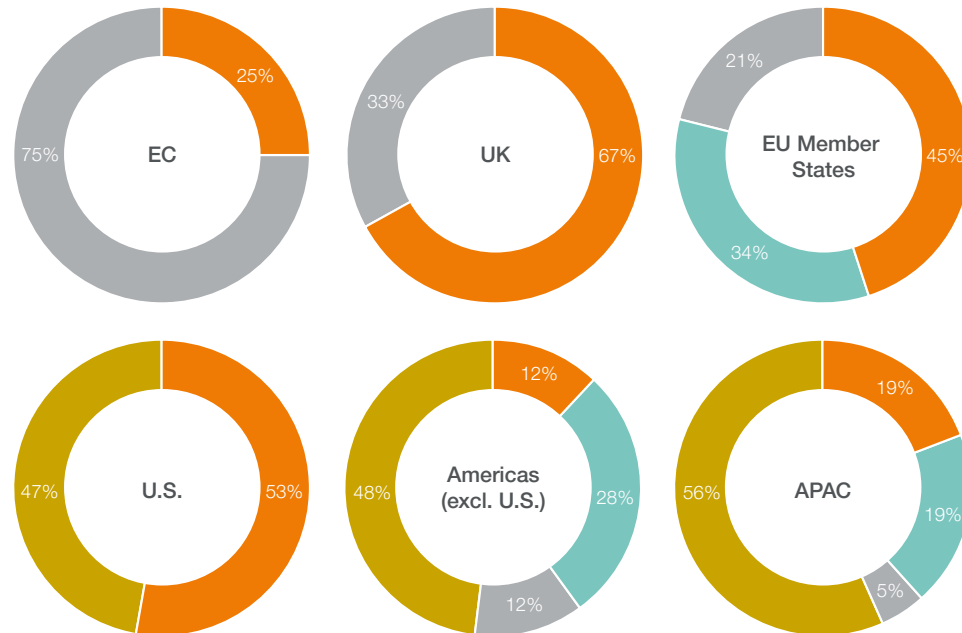
Comparison of cases initiated by immunity/leniency by region (includes cartel, non-cartel and abuse of dominance), 2020-2023



Leniency in Austria: applicants must provide full information

The experience in Austria’s ongoing construction cartel investigation serves as a stark reminder that, while antitrust authorities are open to cooperation with the parties in cartel cases, securing a leniency marker provides no guarantee of avoiding antitrust penalties. In June, the Austrian Supreme Court ordered a review of a sanction imposed on Strabag in 2021, after new information revealed the construction company may have breached the terms of its leniency agreement by failing to disclose key facts and evidence. As a leniency applicant, Strabag had received a reduced fine of just 0.3% of its global turnover (EUR45.4m). If it does not agree to a settlement, it could now face a EUR181.5m fine.

Mode of initiation of cartel cases, 2023



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

Whistleblowers “call time” on cartel activity

The role of whistleblower policies as a tool to boost cartel detection remained a topic of discussion among regulators. These policies encourage individuals (often anonymously if they prefer) to provide information on business practices they suspect are anti-competitive.

A new whistleblowing platform was introduced in Italy in February, receiving over 100 complaints in the first nine months of its operation. This led to the opening of three cartel proceedings in the motor fuel, cast iron and glass wine bottle sectors. Elsewhere, legal protections for whistleblowers were increased in France and Germany, while the UK CMA announced in June that it had increased the reward to whistleblowers from GBP100,000 to GBP250,000.

Merger control: a gateway to antitrust proceedings?

In 2023, the EC and CMA opened cartel investigations into two sectors where a large merger had recently been approved by competition authorities globally.

In March, the authorities conducted coordinated dawn raids against a group of fragrance manufacturers, including Firmenich whose merger with DSM had been reviewed and cleared by a number of authorities, including the EC in February 2023. In October, the authorities raided a group of construction chemicals producers, including Sika and its recent target MBCC – an acquisition that had closed in May 2023 after the authorities approved the merger subject to remedies.

The agencies have not disclosed what prompted these investigations, but carrying out a substantive merger review does give officials the opportunity to review a wide range of documents submitted by the parties, receive complaints from third parties, and investigate how a market functions. A buyer may also discover compliance problems during due diligence that it subsequently reports.

Dawn raids bounce back, international cooperation flourishes

Dawn raid activity continues to heat up

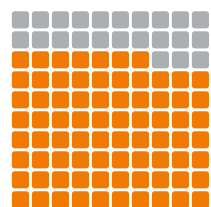
2023 saw a continued surge in the number of dawn raids conducted by antitrust authorities across the globe, continuing the trend reported in 2022. After an unsurprising lack of raids during the height of the Covid-19 pandemic, it now appears that authorities truly are back to “business as usual”.

Of the 31 jurisdictions surveyed, 24 (77%) confirmed that the regulator had carried out dawn raids during the course of 2023, conducting in total more than 165 raids.

Within Europe, the EC carried out unannounced inspections in several Member States at the premises of companies active in a number of different sectors, including energy drinks, fashion, synthetic turf, cardiovascular medical devices and online food delivery. The inspections were conducted in conjunction with national antitrust authorities. In addition, the EC carried out coordinated dawn raids of fragrance manufacturers in March 2023 in cooperation with the UK, U.S. and Swiss competition authorities, and dawn raids of construction chemicals companies in October 2023 in cooperation with the UK, U.S. and Turkish competition authorities; evidence that cross-border enforcement is very much alive.

A significant development in 2022 was the extension of inspections to employees’ domestic premises, prompted by the shift to home and hybrid working arrangements. In October, however, the UK CAT denied a CMA request for a warrant to inspect a domestic premises in connection with its construction chemicals dawn raids. The CAT stressed that private home searches constitute considerable intrusions into private life and the exercise of these powers must, in all cases, be closely justified. It remains to be seen whether this will dampen future CMA home raids efforts.

2023 also saw corporate challenges against authorities’ dawn raid powers. In March, the ECJ annulled in full the EC’s decisions to conduct dawn raids on two French supermarkets in 2017. The EC had failed to comply with its obligations to properly record third-party



77%

of regulators conducted dawn raids in 2023

interviews relied upon as evidence, as the statements had not been provided to the interviewees for approval. This, in turn, led to the annulment of subsequent investigation measures and to the closure of the case. Since the ruling was issued, two further appeals have been lodged at the General Court challenging the existence of sufficient grounds to order ex-officio inspections in the EC’s fragrances and energy drinks investigations.

Experiences in Central and Eastern Europe, however, serve as a reminder to companies of the importance of complying with authorities during inspections. In May, the Romanian competition authority fined three dairy producers USD3.1m for obstructing antitrust dawn raids by refusing to provide full access to its employees’ email accounts. In September, the Polish competition authority fined a coffee machine company and one of its retailers USD2.6m after employees deleted WhatsApp messages from their work phones once they became aware that the dawn raids were happening. In November, the Czech competition authority fined a household appliances manufacturer USD0.6m for preventing investigators from inspecting and making copies of its business records and for refusing to comply with an order to freeze email accounts.

CMA’s extraterritorial investigatory powers confirmed by UK court

In January 2024, the UK Court of Appeal confirmed that the CMA has the power to require overseas companies to produce documents and information when it is investigating suspected anti-competitive conduct.

The CMA can send an information notice to any entity, whether located inside or outside the UK, and the whole undertaking to which that entity belongs must comply with the request. Otherwise, reasoned the Court of Appeal, the CMA’s ability to conduct antitrust investigations would be “badly compromised” and conspirators may be incentivised to move offshore to organise cartels directed at harming the UK market.

Draft legislation – expected to come into force in October 2024 – is set to amend the UK competition rules to explicitly enable the CMA to issue information notices to overseas companies if (i) they are being investigated for breach of the UK antitrust prohibitions or (ii) they have a UK connection.

International cooperation initiatives deepen inter-agency relationships

Cooperation between antitrust authorities is not a new concept, and 2023 saw the establishment of additional initiatives for interaction between antitrust enforcement officials.

In Central and Eastern Europe, the heads of ten antitrust authorities (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and two EU candidate Member States: Moldova and Ukraine) signed an agreement on regional cooperation, with the aim of coordinating efforts on policy and enforcement and sharing experiences and best practices through working groups, training and shadowing. South American authorities have reached similar arrangements, with Brazilian and Paraguayan agencies, and those in Argentina and Chile, entering into two separate cooperation agreements. In APAC, the ACCC and authorities from across the Pacific Islands formed a new international network, PINCCER, which aims to promote competitive markets through sharing information, investigative techniques and best practices.

Initiatives to collaborate on particular issues/sectors also continued. At the end of March 2023, for example, the U.S. antitrust agencies and the EC held their third Joint Technology Competition Policy Dialogue, where the authorities announced that each U.S. agency would send an official to assist the EC with the implementation of the DMA, once in force. In November, antitrust authorities and policymakers from the G7 nations met in Japan to discuss digital competition, following which they released a “communiqué” focusing on possible antitrust issues in the AI sector, and in particular generative AI.

The EC already cooperates and coordinates certain investigative activities with other antitrust authorities, including the Swiss and Australian authorities in its recent SNBB cartel investigation. European competition agencies also regularly share information with other antitrust authorities. For example, a recent investigation by the Spanish National Markets and Competition Commission (CNMC) into Apple and Amazon was initiated after the CNMC became aware of the conduct through the European Competition Network. The CNMC ultimately imposed fines of EUR194.2m for unreasonably restricting the number of resellers of Apple products on Amazon’s website in Spain and agreeing to limit advertising space and targeted marketing campaigns for competing products from other brands. Apple and Amazon have appealed the CNMC’s fining decision in the Spanish courts.



Digital markets remain a focal point for antitrust enforcement

EU DMA – the frontrunner for global digital regulation

2023 marked a significant year in the evolution of digital market regulation, largely influenced by the EU's DMA, which came into force in May 2023. The DMA's designation in September 2023 of six online platforms as digital "gatekeepers" across several "core platform services" is first out the post in setting a precedent for the regulation of "Big Tech". However, with several gatekeepers disputing their designations, and with debates already active on the adequacy of compliance measures taken by gatekeeper firms (whose deadline for compliance is March 2024), it will be interesting to see how enforcement of the Big Tech firms under these new rules is implemented by the EU in practice.

It also remains to be seen how enforcement under the EU DMA will interact with various digital reforms being considered and implemented across other jurisdictions, most notably the UK's Digital Markets, Competition and Consumers (DMCC) Bill, which is expected to come into force in late 2024.

Elsewhere, authorities have been considering what digital reform will look like and how closely it will mirror the EU precedent. South Africa has been drawing up principles that link remedial actions to the standards set by the DMA. India is also currently examining the need for digital sector-specific ex ante legislation similar to the DMA, with a report expected to be published in 2024. South Korea has proposed legislation to regulate the largest digital platform providers, and Australia has also announced its in-principle support for ex ante regulation for designated digital platforms, and other consumer and competition enhancing measures targeted at digital platforms with further consultation to occur in 2024.

Authorities adapting technology for markets new and old

The integration of advanced technologies into antitrust enforcement strategies has been a notable development in 2023. Regulatory authorities, such as the DOJ and CMA, have increasingly leveraged data science and AI to analyse complex market dynamics and identify anti-competitive practices. In addition to the developments in dawn raids noted elsewhere in this report, the EC has hinted at reforms that could allow it to conduct remote inspections in addition to dawn raids, in a world where an increasing number of files are now held in cloud-based storage systems. The increasing use of these technologies in enforcement tools reflects a broader recognition of the need for authorities to keep pace with the technological advancements within the markets they regulate.

Continued scrutiny under existing tools

Pending the adoption of (and enforcement under) new digital regimes, regulators have continued to prioritise investigation of digital markets under their traditional armoury. In addition to pursuing several abuse of dominance investigations against Big Tech (see our **abuse of dominance** section above for more details), 2023 also saw a continued focus on the use of market studies, reports and investigations as a means of keeping conduct in the digital sector under the spotlight.

The UK CMA opened reviews into cloud services and AI foundation models, and the EC and CMA have both expressed interest in Microsoft's partnership with OpenAI, with the CMA seeking views from interested third parties on the potential impact the partnership may have on competition in the UK. In Australia, the ACCC's Digital Platform Services Inquiry is ongoing with the most recent interim report in 2023 covering competition and consumer issues from digital ecosystems through the lens of smart home devices and consumer cloud storage solutions. In September 2023, the French competition authority also published its findings on the cloud computing sector, which was followed by an announcement of a dawn raid in the graphics cards sector. Further in February 2024, the French competition authority opened inquiries and a public consultation regarding generative AI. In Turkey, the TCA announced and published a report in relation to digital markets categorising anti-competitive concerns related to digital markets into seven different headings with possible legislative solutions to handle them within existing competition law. In Japan, the JFTC has also been active in investigating digital markets, releasing market study reports on mobile operating systems, mobile app distribution, and news content distribution, in 2023. Although we have yet to see the impact in enforcement, in order to expand its existing tools, the Taiwanese authority has also formally broadened its guidelines and consideration factors for defining relevant digital product and geographic markets, as well as defining "multi-sided market" and "indirect network effect" to better capture the digital platform economy.

Sustainability and antitrust weave a regulatory patchwork

Sustainability continues to be high on the agenda of various antitrust authorities, who have been considering the best way to ensure that antitrust laws do not prevent collaboration between businesses that is necessary to promote or protect sustainability, albeit with some notable differences in approach across the globe.



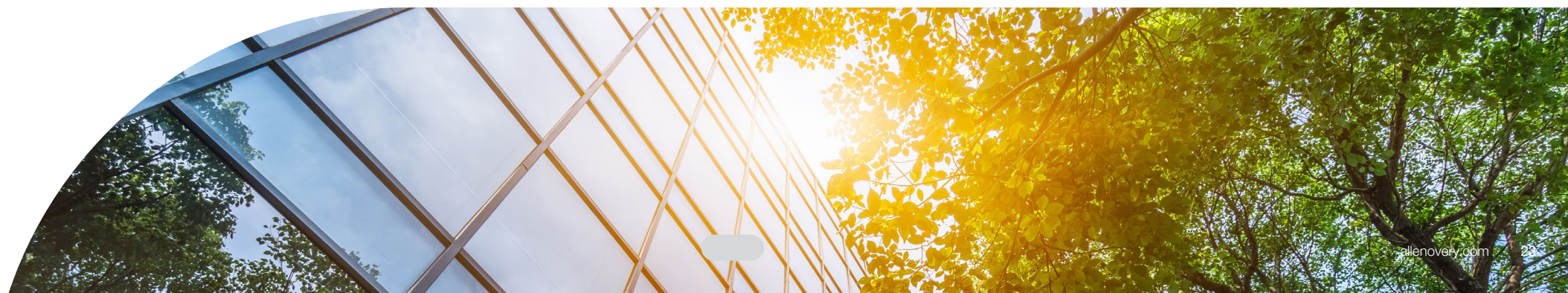
Divergence on sustainability guidance – green light or red tape?

2023 saw the publication of various new guidance on sustainability agreements across the world. Following the EC's publication of its revised horizontal cooperation guidelines in 2022 (which contained a chapter on sustainability), the CMA published its much-anticipated "Green Agreements Guidance", which gives businesses an important steer on when they can legitimately engage in environmental cooperation and puts the UK firmly ahead of the pack of international regulators seeking to promote sustainability initiatives. In many respects the UK guidance is in line with the EC's approach. However, there are some significant differences, with the CMA keen to position itself among the more "cooperation-friendly" regulators given the importance of these topics to consumers and public policy. In particular, the CMA takes a more permissive approach than the EC to climate change agreements, with differences creating complexity for businesses active in both jurisdictions as they seek to apply the rules.

In APAC, antitrust regulators in New Zealand and Japan introduced guidance for cooperation on sustainability goals, while the watchdog in Singapore published draft guidance and is expected to issue final guidance in the near future. Across the Atlantic, the Mexican competition authority recently decided to include "linking competition policy with sustainability" as one of its objectives for the coming years.

By contrast, and as a notable outlier, the approach in the U.S. remains unchanged as the DOJ continues to uphold the position that there is no ESG exemption to U.S. antitrust laws. A change in this position seems unlikely, with FTC Chair Lina Khan noting at the beginning of 2023 that sustainability is not a focus. Authorities in Brazil have adopted a similar conclusion, with CADE generally moving away from granting antitrust exemptions to sustainability agreements on the basis that CADE's role is to protect competition and that sustainability is a policy goal that ought to be maintained through strong governance mechanisms and monitored by other regulatory bodies in the country.

These differences in approach, coupled with the proliferation of parallel initiatives across jurisdictions, brings with it a risk of material divergence and complexity. While faced with growing disclosure requirements and increasing pressure to contribute to climate and environmental goals, businesses should tread carefully – in this area of fast-developing policy, arrangements with industry counterparts that might be permitted by one antitrust authority will not necessarily be treated in the same way by others.





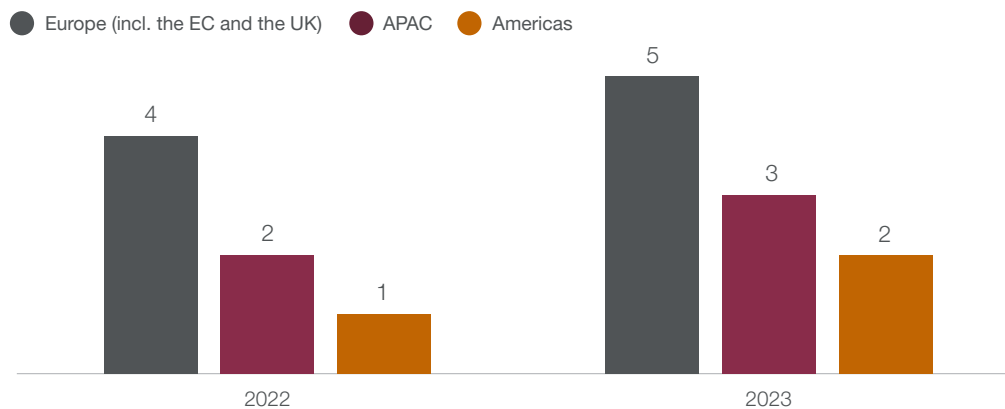
Greenwashing gets cleaned up

In 2023, authorities also intensified their scrutiny of sustainability initiatives from a broader consumer protection perspective, in particular seeking to combat “greenwashing” by corporations, a practice where companies misleadingly exaggerate the environmental benefits of their products or services. This crackdown is evident through various regulatory actions and legislative reforms across jurisdictions:

- In Australia, the ACCC released eight principles on good business practice when making environmental claims after conducting an internet sweep for misleading environmental and sustainability marketing claims and consulting on draft guidance earlier in the year.

- Similarly, in South Korea the KFTC has proposed amendments to its guidelines to effectively regulate greenwashing, emphasising the need for authenticity, clarity, proportionality, objective evidence and precise and complete language when it comes to environmental or sustainability related claims in labelling and advertising.
- In the EU, the proposed Green Claims Directive aims to set clear criteria for substantiating environmental claims and stricter rules for their approval, indicating a commitment to preventing misleading practices. Concurrently, the UK CMA has targeted high-profile cases, such as investigating allegedly overstated green claims and misleading branding from a major public company, highlighting the growing legal risks associated with environmental marketing.

Number of surveyed jurisdictions that have a sustainability initiative (2022 to 2023)



Surge in EU and UK private antitrust damages actions continues

Key themes across the EU and the UK in 2023-24

The EU Private Damages Directive (PDD) has made it easier for claimants to obtain damages for antitrust violations, often exceeding the regulatory fines imposed on the infringers. This has led to a surge in private damages actions in a number of EU Member States – raising unprecedented legal questions (eg regarding jurisdiction, the scope of disclosure obligations and the courts' powers to judicially estimate harm). This trend persisted in 2023 and is likely to continue with the introduction of collective redress mechanisms in more EU Member States.

The UK has also continued to see growth in both standalone and follow-on antitrust damages claims in 2023. In particular, the number of collective actions has increased, with the CAT (the arbiter of those claims at first instance) and appeal courts applying a low threshold test for certification. Claims are being pursued across a range of sectors (including technology, financial services, telecommunications, transport, and utilities) and increasingly rely on allegations of abuse of dominance.

Increasing scope for forum shopping

Despite the aim of the PDD to discourage forum shopping, claimants still enjoy ample latitude to choose their preferred courts for antitrust damages claims in the EU.

The ECJ has taken a rather claimant-friendly approach to establishing jurisdiction in recent years. Interpreting the Brussels I bis Regulation on jurisdiction broadly, the *Tibor Trans* ruling opens the door to suing in any EU Member State where the infringement had effects. In another recent ruling (*Volvo and Others*), the ECJ went beyond *Shevill*, which applies to general tort claims, in allowing for the bringing of one claim at the registered office of the claimant in respect of harm suffered in several EU Member States. Judgments in other areas of law have further broadened the opportunities for forum shopping. In *Sumal*, the ECJ allowed claimants to sue local subsidiaries that were not directly involved in the conduct for which their parent company was held liable. This means claimants are given the option to sue the local subsidiary for damages in their home jurisdiction, avoiding service out of jurisdiction. In two pending cases, the ECJ has been asked by national courts to provide guidance on how the *Sumal* criteria apply when assessing jurisdiction in different scenarios: claims brought against a local subsidiary of a cartel participant serving as the anchor defendant (*Power cable and Cardboard*) and claims brought at the domicile of the parent company of the entities that suffered harm (*MOL*). In the latter, Advocate General Emiliou recently suggested interpreting the rules on jurisdiction narrowly; if the ECJ follows this opinion, it would be the first instance in which the ECJ has averted a further broadening of the scope for forum shopping in the EU.

While the PDD contributed to harmonizing national rules on private enforcement, significant differences persist between national laws and practices, making some EU Member States more attractive than others for private enforcement. Factors such as court expertise, procedural efficiency, collective actions and litigation costs continue to influence claimants' decisions and to lead to claimants favouring Germany and the Netherlands over other EU Member States. The PDD may not have levelled the playing field, but it has boosted antitrust actions across the EU. Spain is one of the EU Member States that has seen a surge in cases.

In the UK, the undertaking liability principles in *Sumal* have been applied recently, for example, by the High Court in *JJH Enterprises v Microsoft*. However, post-Brexit, the ability of claimants to sue in the UK is constrained by the need to also satisfy the forum non conveniens (or appropriate forum) test. In *JJH Enterprises v Microsoft*, that test was met since ties to the UK were clear (for example, it was the key market allegedly affected). However, in other recent cases, such as *Mercedes v Continental*, relevant ties (for example, the location of the infringing conduct and where the majority of damage was suffered) pointed outside the UK, leading the High Court to stay the UK proceedings.

Rules on evidence and disclosure: opportunities and challenges for parties and courts

The UK has always required extensive disclosure of evidence in competition cases, but historically most EU Member States did not. This made it hard for claimants to prove and recover the harm caused by antitrust breaches. Against this background, the PDD introduced new rules on disclosure, intended to remedy the information asymmetry between claimants and defendants. In several cases (*RegioJet*, *PACCAR* and *Others*), the ECJ was asked to clarify the scope of these disclosure obligations and notably ruled that a party is required to disclose not only “relevant evidence” that it already possesses, but also documents that it has to create ex novo by compiling information or data that it holds. With the broader scope for disclosure, it remains to be seen whether the ability of claimants to access easily relevant documents and data will translate into a more robust burden of proof on claimants than we have seen being applied in some jurisdictions.

However, disclosure also raises confidentiality concerns for business secrets and other sensitive information. To balance these interests, the European Commission issued a communication in July 2020 suggesting various measures, such as confidentiality rings and in camera hearings, to limit the access and use of confidential information. These rules have facilitated private enforcement, but also increased the workload and responsibility of national courts, which have to oversee the disclosure process and protect the confidentiality of information.

In the UK, confidentiality rings are widespread in competition litigation. However, recently they have started to face increasing scrutiny, with concerns raised about their impact on open justice and the disruption they can cause in public hearings. The CAT adopted a new practice direction which imposes safeguards against unwarranted confidentiality claims, including potential cost consequences for non-compliance. In *Aurora Cavallari*, the High Court rejected a party’s wide claims for confidentiality, de-designating as confidential over 1,000 documents.

Quantification of damages: a (broad) axe to grind

In the EU, courts have adopted diverging approaches to assessing expert evidence and quantum. For example, in Germany and Italy, courts often rely on experts appointed by the court to help them quantify the harm caused, while in Spain, courts cannot appoint experts and often resort to a judicial estimation of harm, taking into account the approach of courts in other countries, including the UK.

In the UK in the last year, the CAT and High Court, respectively, were required to quantify the impact of cartel conduct in circumstances where, the courts found, the parties’ experts’ economic modelling failed to sufficiently and reliably measure the claimants’ loss. Rather than allowing these difficulties to defeat the claim, the courts used the expert evidence to narrow as far as possible the range of possible outcomes and then adopted the so-called “broad axe” approach to arrive at a judicial best estimate of the likely loss. In *Royal Mail v DAF* (now under appeal), the CAT rejected the econometric models proposed by both sides’ experts but found an overcharge of 5%, which was the mid-point between the competing models. In *Granville v Chungghwa & LG*, the High Court broadly accepted the defendant’s expert’s model, but increased the overcharge finding by almost 50% to account for a risk that the model underestimated the cartel’s effects. Both cases also raised difficult issues concerning the requirements for proving pass-on, an issue that the Court of Appeal is now expected to provide guidance on.



The evolving landscape of collective proceedings

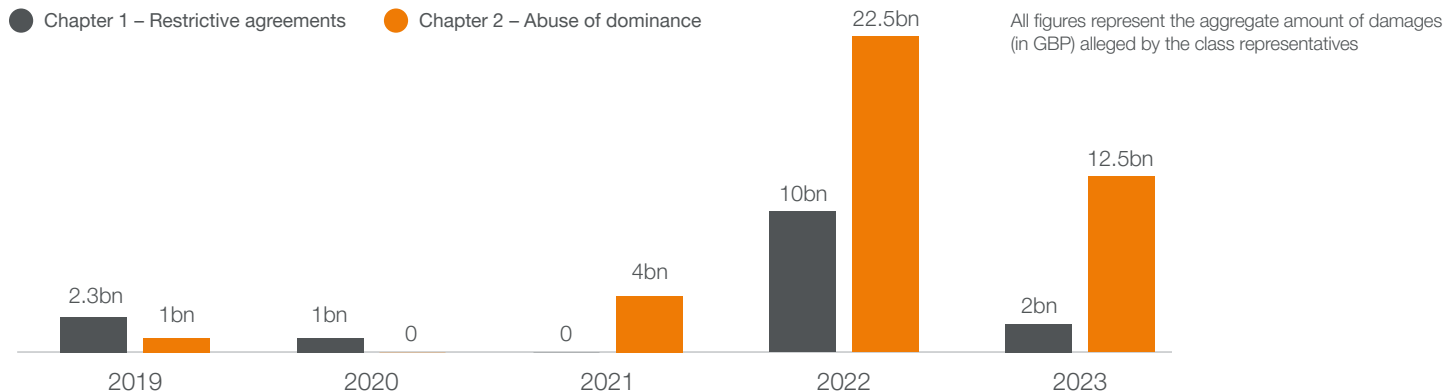
The Representative Actions Directive (RAD) will change the dynamics of antitrust damages litigation in the EU, with several EU Member States now introducing a collective redress mechanism for the first time. This will be a major shift in practice for EU Member States, like Spain, that currently do not allow claims with similar features to be bundled or mass proceedings to be initiated. However, to succeed, collective redress actions need suitable funding regimes. These regimes would allow qualified entities to deal with the costs and risks of litigation. They would also ensure adequate incentives and access to justice for consumers. The RAD, however, gives Member States considerable leeway to design and implement their funding mechanisms, which could lead to divergent and ineffective approaches across the EU.

The UK has a collective proceedings regime which was stimulated by a claimant-friendly decision of the UK Supreme Court in late 2020 (*Mastercard v Merricks*) and has since produced large numbers of high-value claims (albeit none of these have yet reached a final judgment or settlement). Eight distinct sets of collective proceedings were issued in 2023, together claiming aggregate damages in excess of GBP14bn, with abuse of dominance cases making up the bulk of claims by value (see chart). Several points of principle have been established or affirmed in 2023:

- Several applications for certification were heard (including in some cases on appeal) and none were refused permission, with the CAT and Court of Appeal confirming the low threshold test for certification (established in *Mastercard v Merricks*).

- In *FX*, the Court of Appeal found that the CAT was wrong to refuse to certify on an opt-out (rather than an opt-in) basis. In so doing, it held that the strength of a claim will generally be a neutral factor when choosing between opt-out and opt-in, meaning that a test of practicability is likely to be decisive.
- Unsuccessful appeals in the Trucks and *FX* litigation relating to “carriage” (ie which of two competing class representatives should have conduct of the claim) indicate that the Court of Appeal will generally treat carriage as a matter for the CAT, exercising its broad case management discretion.
- Litigation funding was shaken by the Supreme Court’s decision in *R (PACCAR) v CAT*, which rendered a common type of litigation funding agreement, whereby the funder’s return is calculated by reference to the amount of damages awarded, unenforceable in many instances (and in all opt-out collective proceedings). However, funders have put in place commercially acceptable alternatives which have so far withstood legal challenge. In addition, the UK government has also committed to introducing legislation to address *PACCAR*.
- In *McLaren v MOL*, the CAT considered (and approved) the first settlement in collective proceedings (albeit in relation to the claims against just one of several defendants). In so doing, the CAT recognised that a rough-and-ready assessment of the proposed settlement might be necessary, since a detailed and precise review of the merits would discourage settlement.

Applications for collective proceedings in the UK



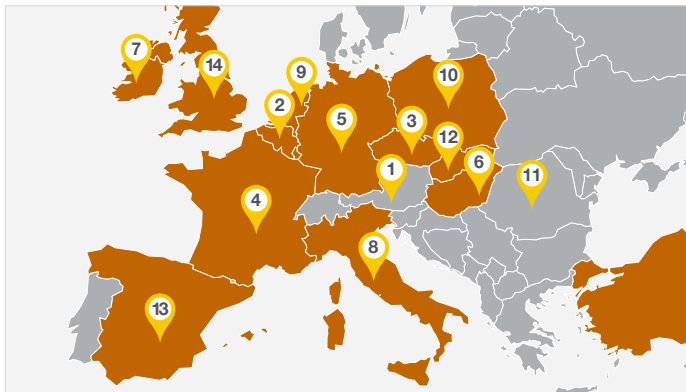


Regional snapshots for antitrust enforcement fines in 2023

Europe

At the country level, antitrust enforcement fines in Europe were USD590m, less than half the 2022 figure.

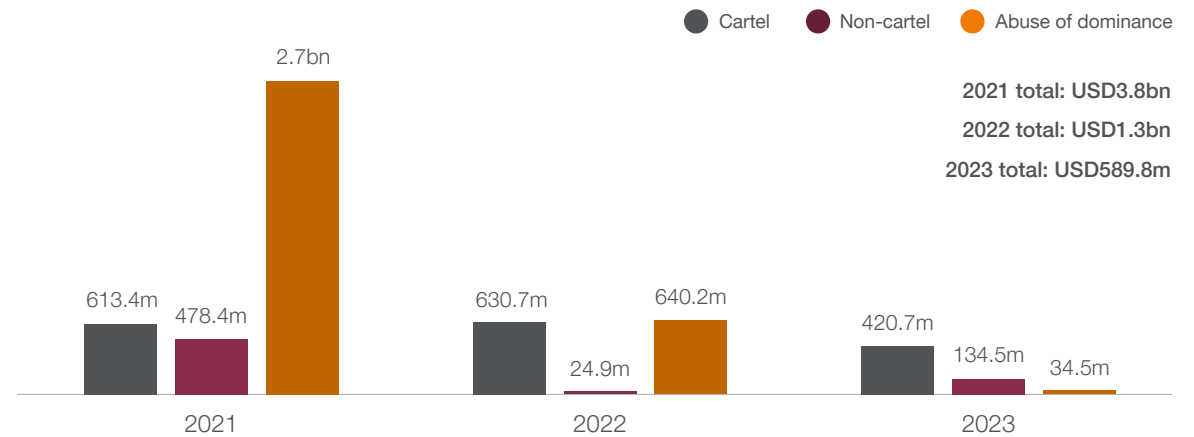
Antitrust enforcement fines in 2023



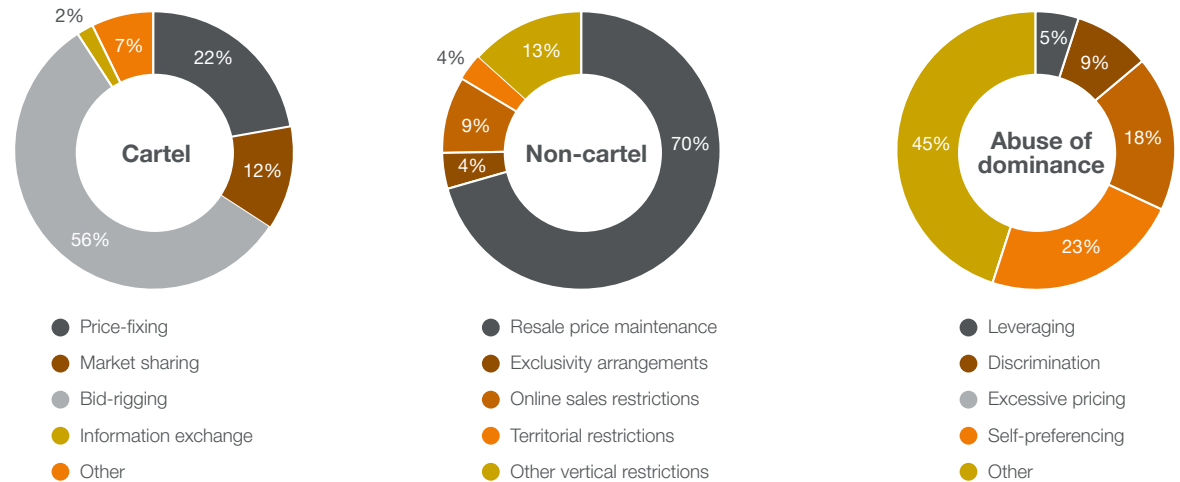
- | | |
|-----------------------------|--------------------------|
| 1. Austria – 48.8m ▼ | 8. Italy – 30.2m ▲ |
| 2. Belgium – 5.3m ▼ | 9. Netherlands – 11.5m ▲ |
| 3. Czech Republic – 11.6m ▼ | 10. Poland – 1.8m ▼ |
| 4. France – 160.1m ▼ | 11. Romania – 7.3m ▼ |
| 5. Germany – 6.3m ▼ | 12. Slovakia – 8.8m ▲ |
| 6. Hungary – 0.9m ▼ | 13. Spain – 222.1m ▼ |
| 7. Ireland – 0m = | 14. UK – 75.1m ▼ |

● A&O office locations
 ▲ Increase from 2022 fines
 ▼ Decrease from 2022 fines
 All figures are in U.S. dollars (USD)

Total fines by conduct type, 2021-2023



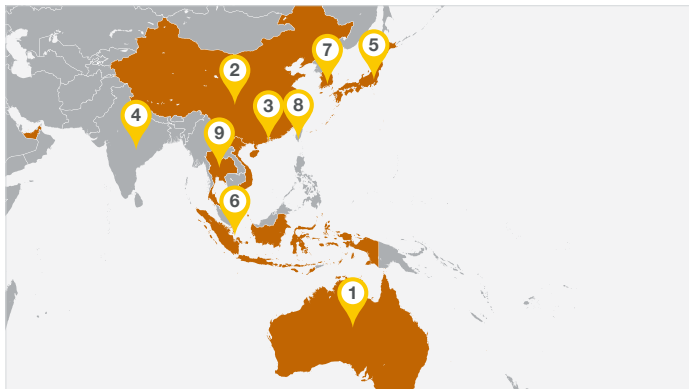
Breakdown by conduct, 2023



APAC

Antitrust enforcement fines in APAC were USD1.3bn, an increase from 2022.

Antitrust enforcement fines in 2023

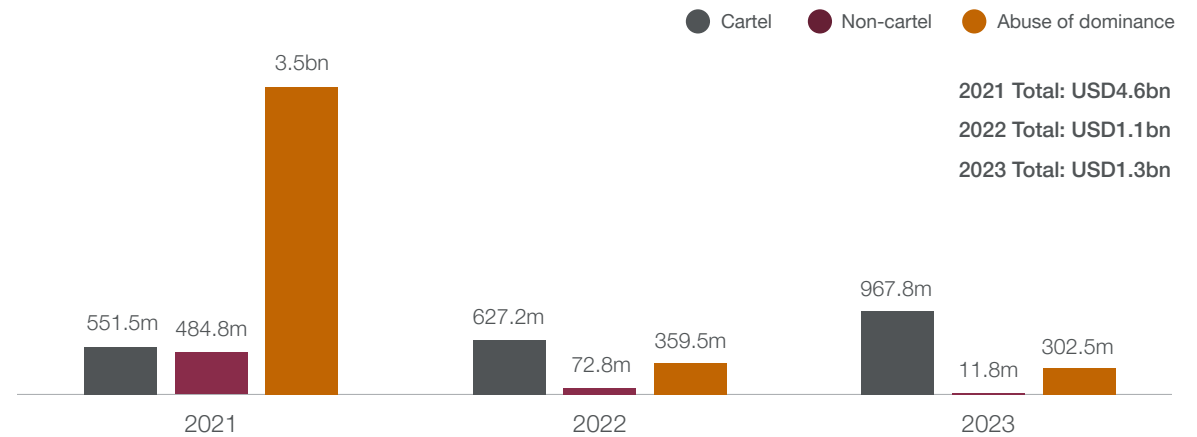


- 1. Australia – 49.6m ▲
- 2. China – 327.4m ▲
- 3. Hong Kong – 0.7m
- 4. India – 0m ▼
- 5. Japan – 722.4m ▲
- 6. Singapore – 0.3m ▼
- 7. South Korea – 172.2m ▼
- 8. Taiwan – 9.5m ▲
- 9. Thailand – 0m ▼

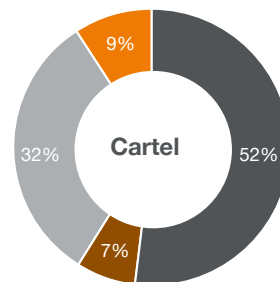
- A&O office locations
- ▲ Increase from 2022 fines
- ▼ Decrease from 2022 fines

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

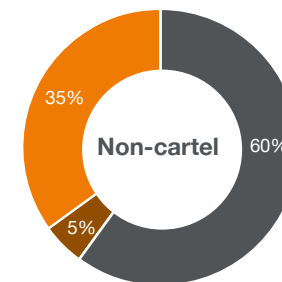
Total fines by conduct type, 2021-2023



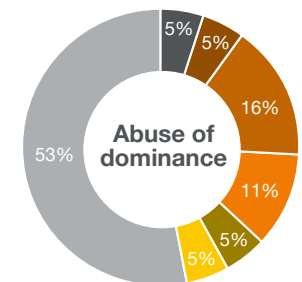
Breakdown by conduct, 2023



- Price-fixing
- Market sharing
- Bid-rigging
- Other



- Resale price maintenance
- Exclusivity arrangements
- Other

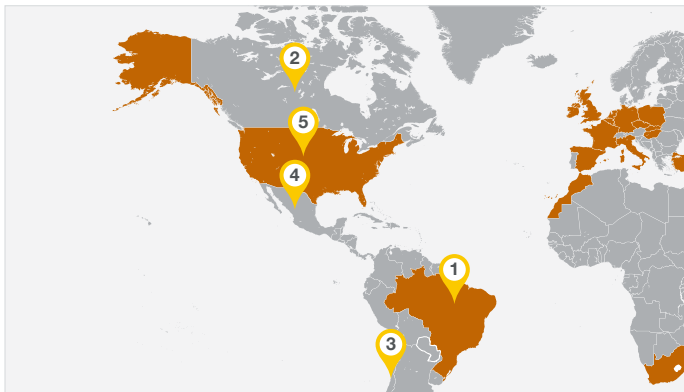


- Refusal to supply
- Discrimination
- Excessive pricing
- Leveraging
- Abuse of buyer power
- Exclusive dealing
- Other

Americas

Antitrust enforcement fines in the Americas were USD415m, a decrease from 2022.

Antitrust enforcement fines in 2023

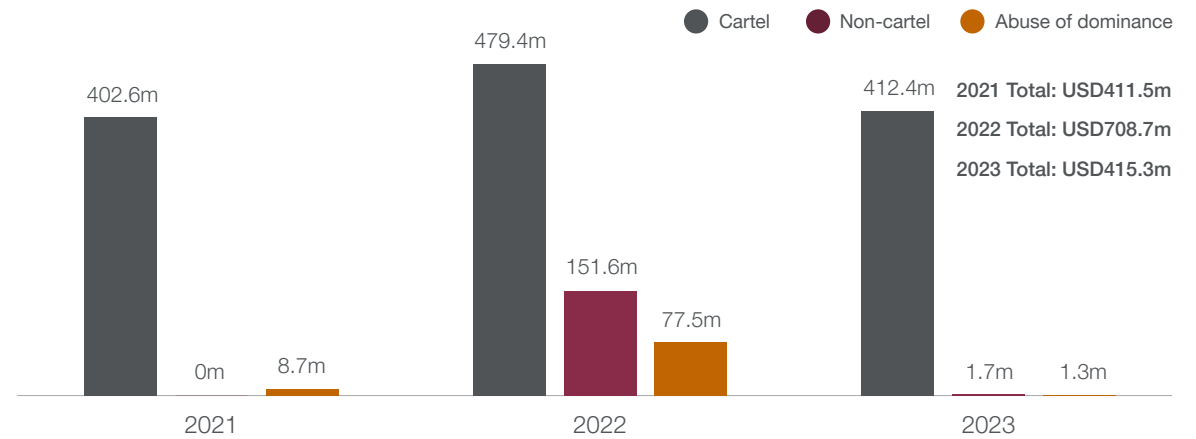


- 1. Brazil – 45.0m ▼
- 2. Canada – 39.1m ▲
- 3. Chile – 12.0m ▲
- 4. Mexico – 0.3m ▼
- 5. U.S. – 318.9m ▲

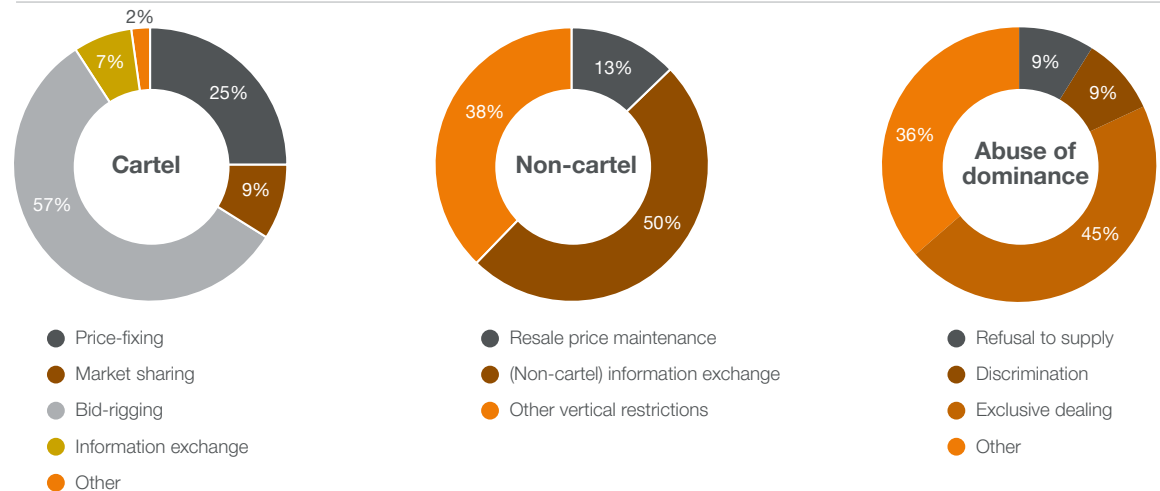
- A&O office locations
- ▲ Increase from 2022 fines
- ▼ Decrease from 2022 fines

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

Total fines by conduct type, 2021-2023



Breakdown by conduct, 2023



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Our global team comprises over 120 specialist antitrust lawyers, located in 22 offices in Europe, the U.S., APAC and Africa. We are one of the leading firms in the world for antitrust, advising on the full spectrum of issues including cartel and behavioural investigations, merger control, sector-specific regulatory issues, abuse of dominance, competition compliance and counselling, vertical and horizontal agreements, market investigations, state aid and general EU law issues.

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 response strategy in place to meet the potential risks of public and private enforcement actions.

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