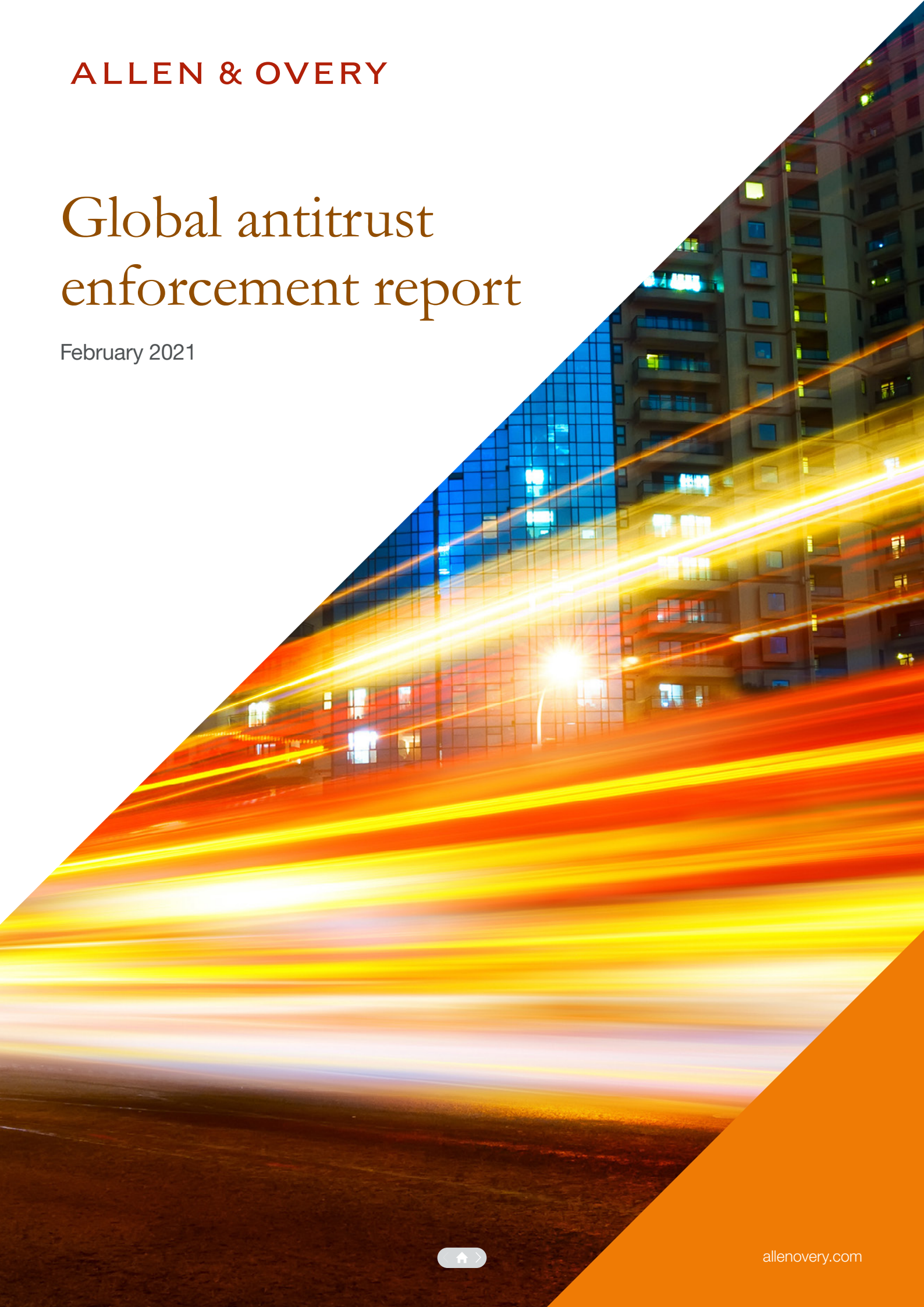
ALLEN & OVERY

Global antitrust enforcement report

February 2021



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Foreword

Our report has a newly expanded scope this year, covering not only global cartel conduct but also other forms of antitrust enforcement around the world, including vertical arrangements and abuse of dominance cases.

Perhaps not unexpectedly given the impact of Covid-19, 2020 saw a mixed picture in terms of fines for antitrust enforcement across the globe. France led the way, imposing total fines of USD2 billion, far ahead of the European Commission (**EC**) and any other EU Member State. This exceptionally high figure is largely attributable to a single decision which sanctioned Apple and others for resale price maintenance (**RPM**) and other vertical restrictions, and imposed a record fine of EUR1.2bn. Also notable was an increase in cartel fines by the U.S., with USD539.8 million of fines issued in 2020, representing a significant uptick on recent years and its highest total since 2015. By contrast, the EC (which usually tops the global leader board) saw a marked decline in fine levels – only USD544.8m, in sharp contrast to the 2019 total of USD1.6bn for cartel conduct alone. Several other jurisdictions with a reputation as aggressive enforcers have also seen lower fine levels compared with 2019: in Brazil, a total of USD53.3m in fines was issued, compared to USD235.9m levied for cartel conduct alone in 2019; in both India and Australia, no fines were issued in relation to cartels in 2020. Indeed, for the jurisdictions surveyed in 2019 and 2020, the total fines across these jurisdictions for all antitrust enforcement (including cartel activity, vertical restrictions, and abuse of dominance conduct) were lower than the total fines in 2019 for cartel conduct alone.

The Covid-19 pandemic undoubtedly had a significant impact on antitrust authorities' investigative efforts in 2020, with extended periods of remote working and restrictions on investigative procedures (such as dawn raids) reducing the pace and intensity with which they were able to operate. It would, however, be over-simplistic to conclude that the overall drop in fine levels in 2020 is solely attributable to the pandemic. As we have seen over the years of this report, the cyclical nature of antitrust enforcement means that fine levels naturally vary significantly year on year, largely due to the ability of one or two significant long-running investigations to materially skew the total. In addition, the impact of the pandemic on authorities' investigative practices in 2020 is unlikely to have tracked through already to enforcement (including fines) in 2020. In that sense, the practical impact of the pandemic on fine levels may be seen more clearly in the months and year to come, although authorities will likely be keen to ramp up their efforts to make up for lost time.

2020 also saw a continuation of the clear trend towards the use of settlement procedures, both in the EU and elsewhere, as well as the increased introduction of more flexible enforcement mechanisms, often involving a more collaborative approach between authorities and companies under investigation. 55% of cartel, 58% of non-cartel and 66% of abuse of dominance decisions in the jurisdictions surveyed, and for which information was available to confirm, involved settlement or cooperation procedures. In addition, especially outside of the cartel space, established authorities have continued to make use of alternative enforcement procedures as a means of reaching a more efficient result (eg accepting commitments in lieu of formal infringement findings), with a number of jurisdictions (such as Turkey, Hong Kong, India, Japan and Singapore) also introducing and beginning to make use of new processes.

Pandemic aside, the digital sector continued to dominate the antitrust agenda, and 2020 arguably saw the most significant updates to date, with a number of key jurisdictions (including the EU and UK) publishing proposals for widespread reform of the regulatory landscape designed to lead to more effective enforcement against digital firms. A key question will be how the patchwork of proposed regulatory regimes will fit together, both across enforcement areas (antitrust, consumer protection and data privacy) and geographies, with the need for a unified approach being acknowledged as a particular priority in the digital space. Naturally, any proposed reforms will take several years to be made law. In the meantime, we anticipate that antitrust authorities will continue to ramp up enforcement of the key digital gatekeepers, with a number of key decisions expected in 2021.

Further down the line, we can expect the implementation of specific digital regimes to have an impact on enforcement under regulators' traditional antitrust armoury. While it is too early to predict with certainty, it is possible that we will see enforcement of notoriously "high threshold" conducts such as abuse of dominance start to give way to more tailored, sector-specific equivalents.

Looking ahead, it will be interesting to see whether the tendency towards a more constructive enforcement approach will contribute to a continued downward trend in overall fining levels, or whether the fallout from the global pandemic, coupled with the digital regime overhaul, will in fact spur on a renewed appetite for more aggressive intervention. Enforcement activity was high after the end of the 2008 financial crisis: this is likely to be replicated in a post-pandemic world, although it remains to be seen how quickly this happens and to what extent.

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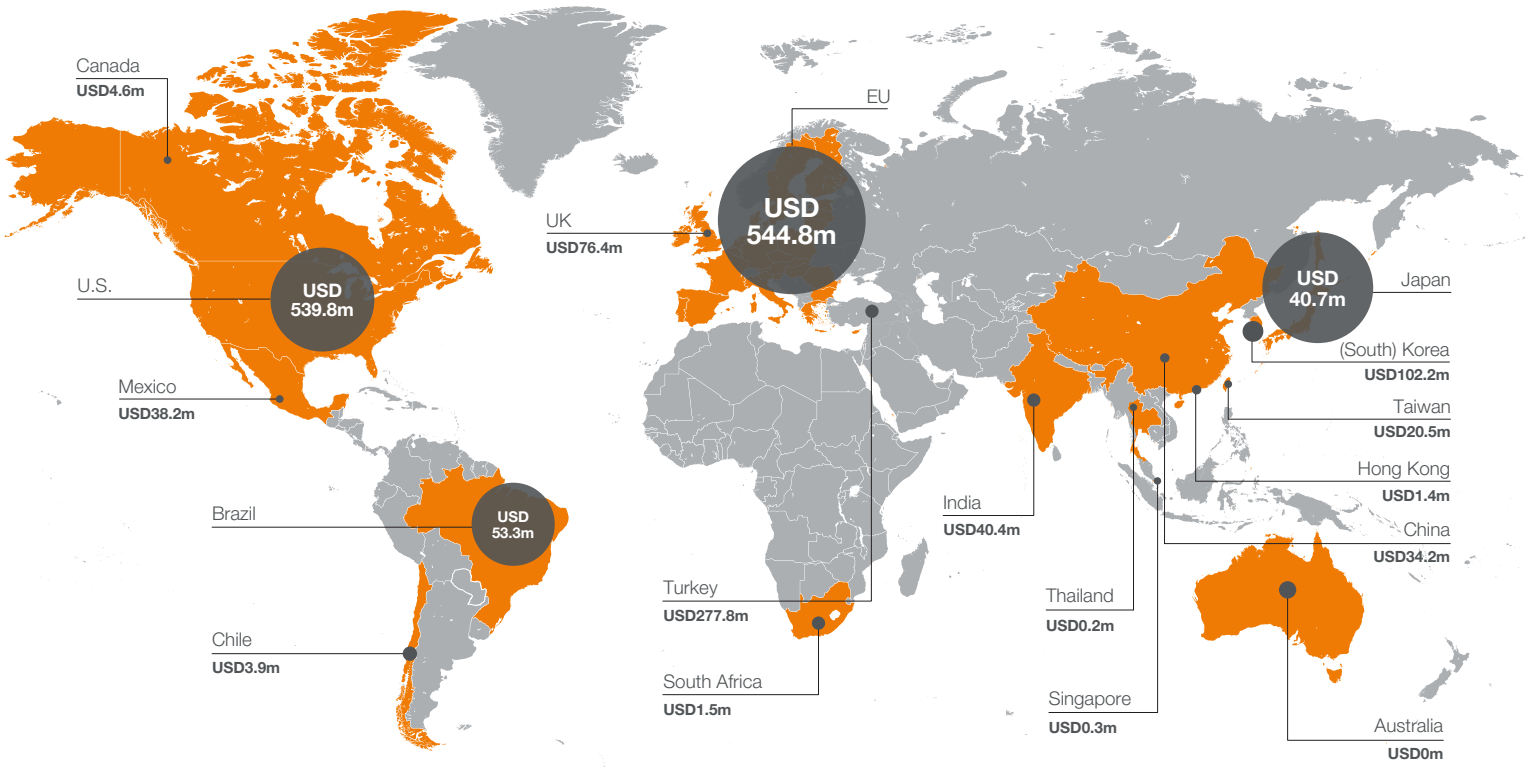
2020 antitrust enforcement fines



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

"Looking further down the line, we can expect the implementation of specific digital regimes to have an impact on enforcement under regulators' traditional antitrust armoury."

Hot topics 2020

Covid-19

Adverse economic or social conditions have not historically tended to affect the general application and enforcement of antitrust rules, but the Covid-19 pandemic challenged this approach. Some authorities applied specific exemptions to the rules in certain industries (eg the dairy sector), with several regulators, including the EC, the U.S. Department of Justice (**DOJ**) and Federal Trade Commission (**FTC**), as well as authorities in Australia and Hong Kong, publishing guidance allowing limited cooperation among businesses in direct response to the pandemic. However, authorities have made clear that any measures put in place are finite, and that they will only tolerate cooperation that aimed to overcome the crisis to the ultimate benefit of consumers. Indeed, swift action was taken against a number of initiatives intended to take advantage of the crisis, particularly where these related to products essential to consumer health (most notably in South Africa, where 38 Covid-related excessive pricing decisions were reached).

Dawn raids were a key investigative procedure impacted by the pandemic, with many authorities unable to conduct raids for a significant part of 2020. While raids have commenced again in some countries (including Japan, Spain and Italy), it is likely that the significantly reduced use of this tool will continue in 2021 for a large number of regulators, which may well impact the number of new investigations going forward.

Individual liability

Highlighted as a trend in our last report, agencies continue to pursue executives for their part in companies' anti-competitive behaviour. Individual sanctions included:

– fines (the first ever individual fine in Poland, as well as fines in New Zealand and the U.S.);

– director disqualifications (the first ever in Hong Kong; five in the UK as well as the first court ruling in the Competition and Markets Authority (**CMA**)'s favour); and

– prison sentences (with the U.S. ordering 40 months' jail time for one CEO and several other indictments, as well as criminal cartel proceedings ongoing in Australia). The U.S. is also not shy of using extradition procedures to pursue foreign nationals, obtaining two extraditions in 2020 on antitrust charges alone.

Pursuing individuals appears to be a trend set to continue in 2021, with more and more jurisdictions either introducing personal liability (including China and Russia) or ramping up existing sanctions that can be applied to individuals (as we are seeing in Spain).

Healthcare sector under the microscope

Pharma companies suspected of breaching the antitrust rules have continued to attract the attention of regulators. In line with the wider policy objective of making medicines accessible and affordable for patients and health budgets, "pay-for-delay" and other practices that delay generic (lower cost) entry into the market have continued to draw severe sanctions. In the U.S., two of the largest fines of the year came from the DOJ's ongoing investigation into generic drug manufacturers.

Substantial fines for conduct impeding generic entry, deemed to go beyond "competition on the merits", were also issued by regulators in the EU, France and the UK. The sector is also being prioritised in other jurisdictions: there are ongoing investigations in Belgium, Italy, the Netherlands and Spain into suspected excessive pricing (by the same company), and China has produced new guidelines on antitrust compliance for the "active pharmaceutical ingredients" sector.

As the effects of the Covid-19 pandemic continue to be felt, the healthcare industry is likely to remain under sharp focus. Economic and societal pressures will fuel the need to innovate. Increase in regulatory scrutiny will inevitably follow. The use of consortia, involving collaboration between industry peers as a fast route to innovation, may provoke antitrust concerns and require the early building in of suitable policies and provision for ongoing compliance. Where emerging technologies such as medical wearables and apps and other digital health initiatives, together with the collection and use of data to drive more personalised treatments, are involved, businesses can also expect keen attention from regulators.

Alternative enforcement procedures

In 2020, settlement continued to be the preferred course of handling cartel cases, while authorities in several jurisdictions have shown a willingness to accept commitments in lieu of infringement decisions in non-cartel cases, in particular in cases concerning conduct where the threshold for infringement is high (such as excessive pricing), as well as in sectors where speed is a priority for consumer interests (such as the healthcare sector).

Significantly, while the use of settlement and commitment procedures has traditionally been limited to a smaller selection of jurisdictions with more established antitrust regimes, we are seeing an increased adoption of more flexible enforcement procedures across the globe. In Turkey and India, new settlement and commitment procedures are due to come into force in 2021. In Japan, the Japan Fair Trade Commission (**JFTC**) actively used its commitment procedures (first introduced in December 2018) to approve five commitment plans, and authorities in Hong Kong for the first time reached an agreement with respondents to resolve cartel proceedings by consent, and also accepted a commitment from a company to strengthen its antitrust compliance programme (in lieu of being named as a respondent in proceedings). The Competition and Consumer Commission of Singapore (**CCCS**) also made the first use of its fast track procedure (where parties who admit liability are eligible for a reduction in fines).

Digital tops the agenda again

Once again, the digital sector heads the enforcement priority list in jurisdictions around the world, often alongside proposals for reform of the applicable regulatory framework. Among the most significant of these are the specific proposals being made in the EU, with the EC's draft legislation setting out proposed EU rules for companies designated as "*gatekeepers*" of "*core platform services*". The UK too made significant progress in its own plans for a digital-specific rulebook, and specific proposals are also being made in several other jurisdictions, including Germany, Mexico, China and South Korea.

In the meantime, so-called Big Tech companies continue to deal with numerous individual probes under the existing regimes, which are set to continue in 2021 and beyond. In the U.S., landmark antitrust cases have been brought against Facebook and Google (by the FTC and DOJ respectively). And in Europe, various GAFA investigations opened by the EC in 2020 are likely to gather pace in 2021, with significant enforcement action and ongoing investigations also taking place in France and Germany, as well as the UK.

Online surveillance

Closely connected to the ongoing global reform of digital enforcement, the use of algorithms by businesses has been on the watch list of regulators across jurisdictions for several years. Discussion has continued apace on the potential for data, AI and algorithms to act as a vehicle for collusive behaviour, with an increasing number of enforcers establishing new specialised units to analyse digital markets and boost their understanding of the issues involved, and cross-agency collaboration on the topic also anticipated to intensify in the coming months.

With this increased interest in potential concerns around algorithmic activity, regulators have also been considering how they themselves might use software and technology to increase the sophistication of their enforcement activity. The UK CMA has taken inspiration from price monitoring software used by businesses to track their rivals' prices for anti-competitive purposes (encountered during its resale price maintenance investigations in the musical instruments sector) to develop its own price monitoring tool to help detect suspicious online pricing activity. The French Competition Authority (**FCA**) is also reported to be working on a research-based investigative tool to tackle Big Tech abuses, with the German Federal Cartel Office (**FCO**) considering using "market screening" as an additional means of enforcement, and the CCCS in Singapore also announcing plans to use technology and big data to better identify markets that have competition or consumer protection issues (including the development of a bid-rigging detection tool and a text analytics tool).

RPM enforcement evolution

As we have indicated in previous reports, agencies across many jurisdictions have been increasing their efforts on addressing "vertical" infringements. Unsurprisingly, RPM took centre stage in 2020 as the most pursued vertical restriction, with just under 50% of non-cartel decisions (other than abuse of dominance) from the jurisdictions surveyed relating to RPM conduct, including a number of decisions by regulators in the musical instruments sector (UK, Poland and Austria), as well as various decisions in other areas (including in France, Austria and South Korea).

There have also been signs of interesting developments in authorities' approaches to enforcement in RPM cases. At the EU level, while the EC, in the context of its review of the vertical block exemption regulation, seems determined to retain RPM as a "hardcore" restriction, it intends to engage businesses in discussions about the conditions under which efficiencies can be claimed and the evidence needed to qualify for exemption.

In the UK, the CMA imposed its first ever fine on a downstream retailer for RPM conduct, which is a marked departure from its previous practice, as well as from the typical approach of the EC, where conduct has consistently been enforced against the upstream manufacturer or supplier (as the entity imposing the restrictions). And in its landmark decision against Apple, while the French Competition Authority did not impose fines on the resellers in connection with the RPM conduct, it made clear (in the context of its decision to fine wholesalers for customer allocation) that there is no principle that requires the penalties borne by distributors involved in a vertical agreement to be less severe than those issued against suppliers that are part of the agreement.

Sustainability

Sustainability (and in particular environmental and climate issues) is likely to top the corporate boardroom agenda in 2021, fuelled by governments looking for sustainable ways for economies to recover from the effects of the Covid-19 pandemic. As a result, we can expect an increased focus by antitrust authorities on the interplay between antitrust compliance and sustainability initiatives.

A recent EC consultation as to how antitrust policies and sustainability policies (the EU Green Deal) can work more effectively together has received around 200 replies, and the topic appears to be infiltrating other ongoing review processes, including work by the economics unit on techniques that would allow it to take environmental criteria into account, as well as the ongoing review of the horizontal and vertical block exemption regulations, and the horizontal cooperation guidelines. Authorities in the UK, Greece, the Netherlands and France have also been vocal in their desire to progress sustainability discussions. The UK has recently issued business guidance on how to achieve antitrust-compliant cooperation on environmental sustainability initiatives, but the extent to which other jurisdictions will follow suit with concrete guidance (or indeed "relaxation" from the rules) remains to be seen.

2020 fines by conduct

2020 global fine levels

CARTEL	NON-CARTEL	ABUSE OF DOMINANCE

Breakdown of conduct

Bid-rigging 56%

Price-fixing 41%

Market sharing 26%

RPM 43%

Exclusivity 13%

Territorial restrictions 7%

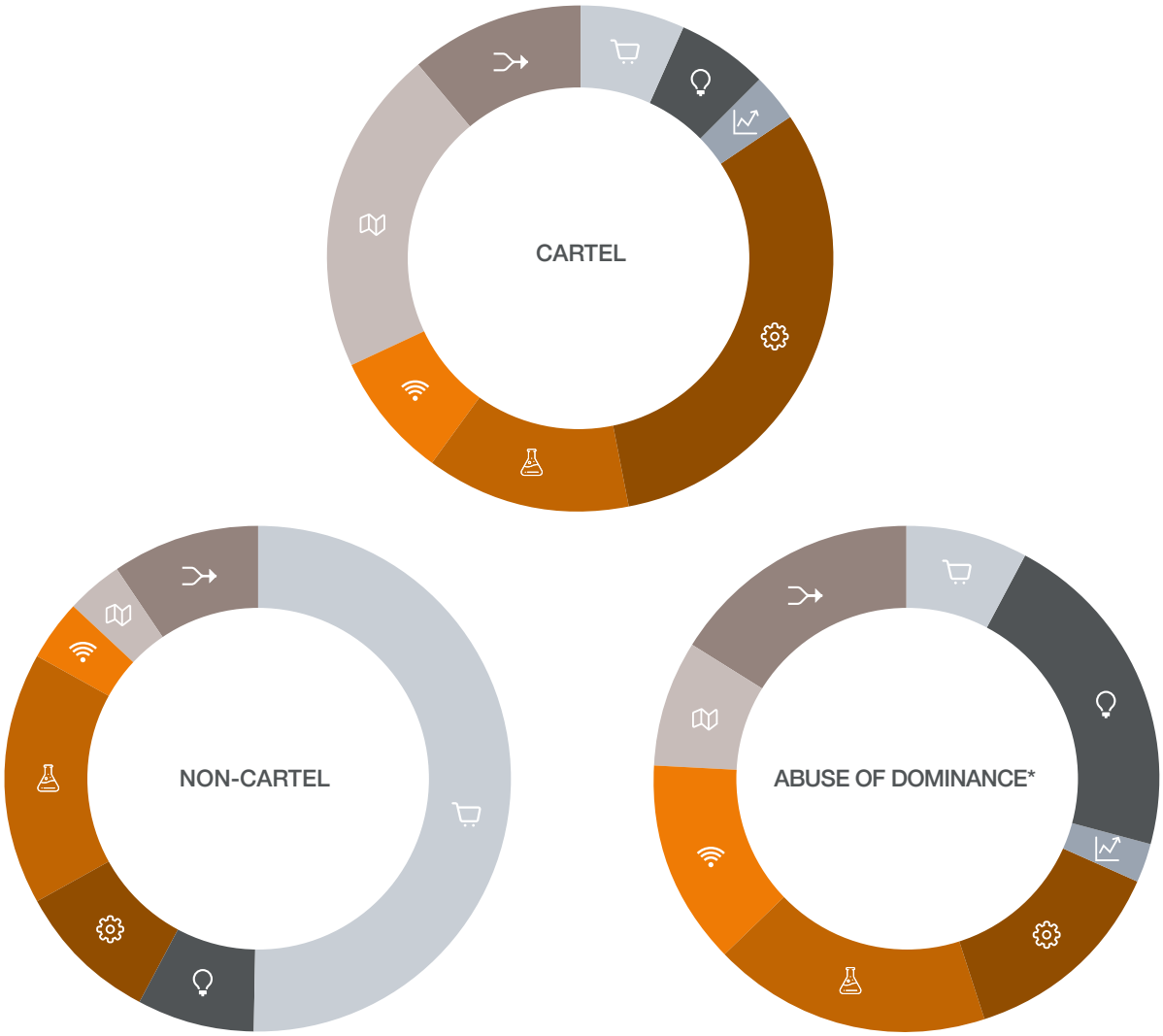
Excessive pricing 59%

Loyalty rebates and discounts 5%

Tying/bundling 7%

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

Sector comparison



Consumer & retail

Energy & natural resources

Financial services

Industrial & manufacturing

Life sciences

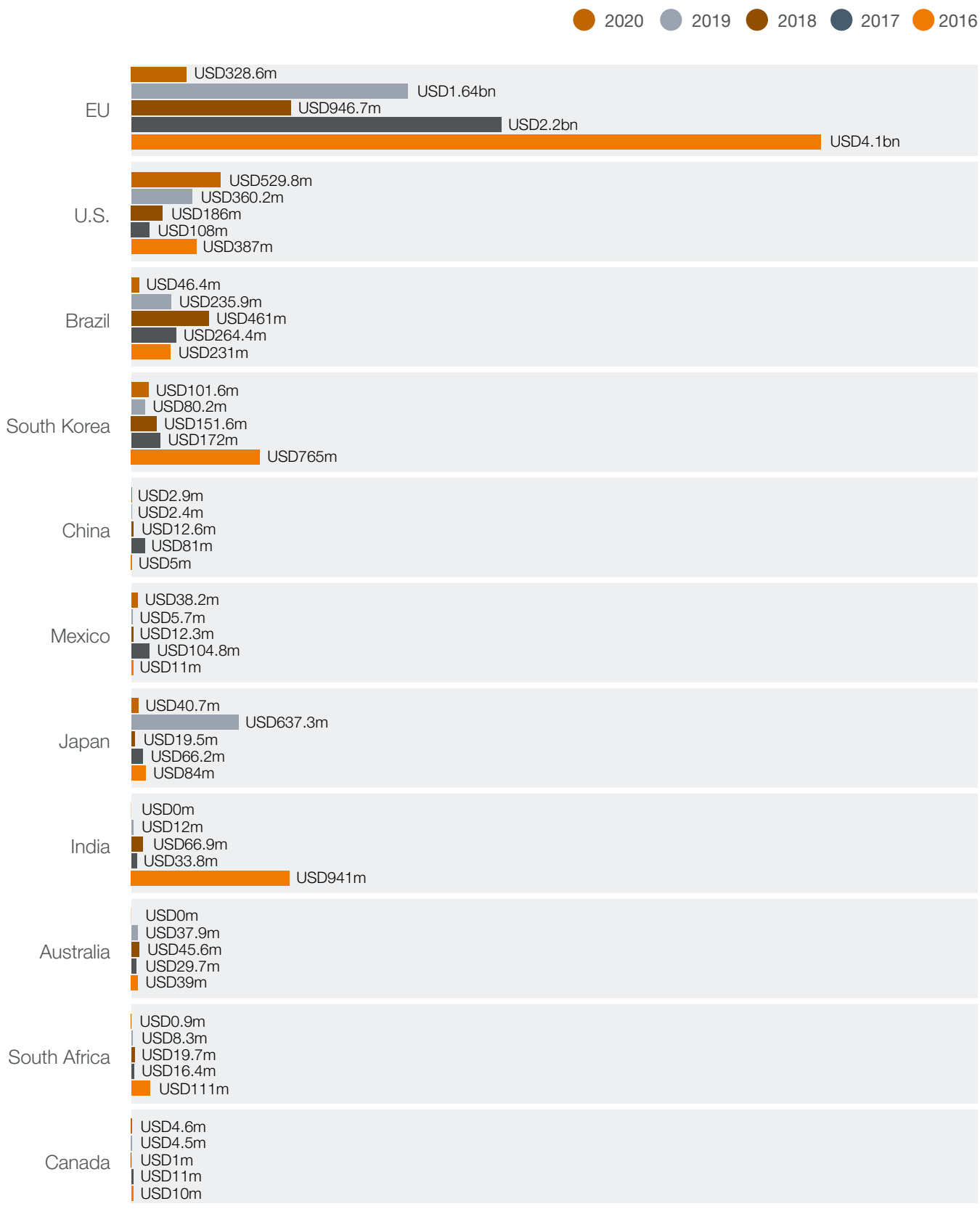
TMT

Transport & infrastructure

Other

*For the purposes of these statistics, 38 excessive pricing cases in the Consumer & retail sector in South Africa have been treated as a single decision.

Select cartel fine comparison



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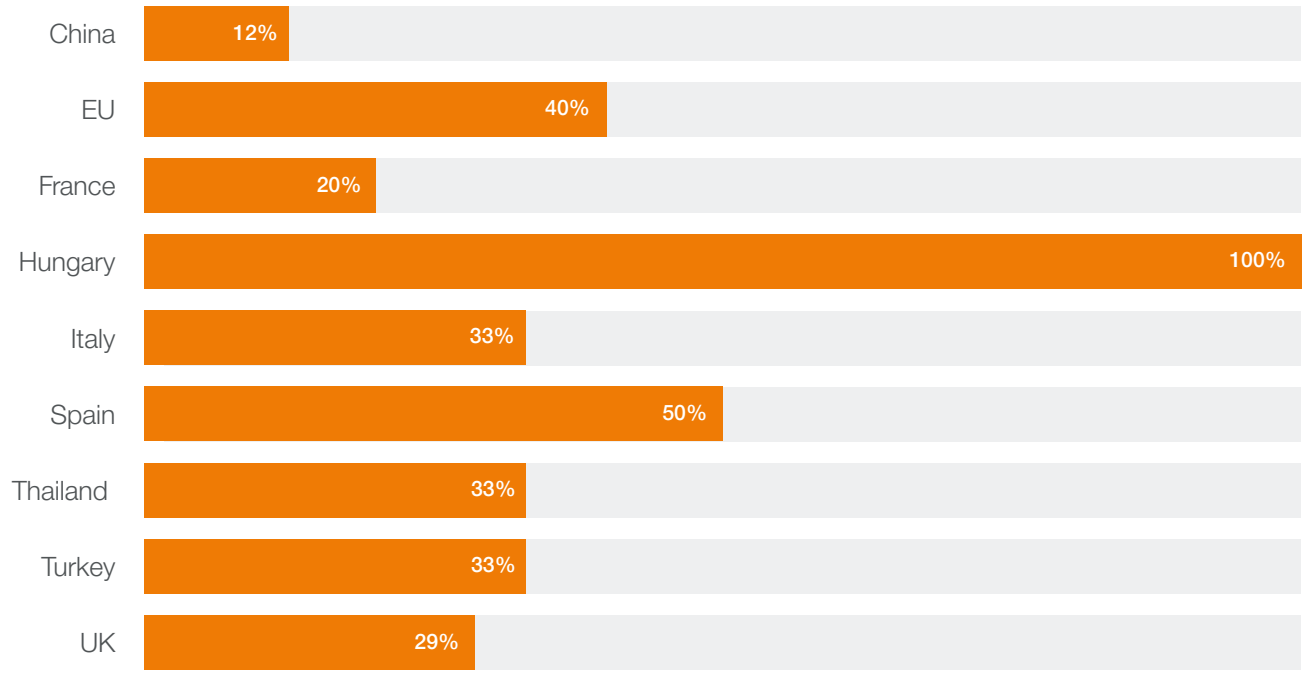
U.S. figures relate to fines imposed at federal level by the DOJ and are for the U.S. fiscal year, which runs from 1 October to 30 September. All other countries' statistics relate to the calendar year. Cartel fines in this context mean fines imposed for a breach of Article 101 TFEU or national equivalent (excluding cases that are purely vertical in nature).

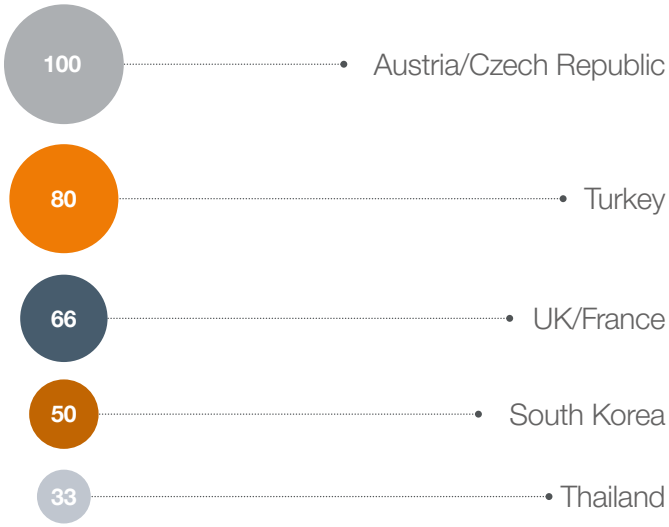
Other key statistics in 2020

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



Figures relate to select jurisdictions with, in aggregate, three or more non-cartel or abuse of dominance enforcement decisions.
The EU percentage relates to decisions taken by the EC.

Percentage of non-cartel enforcement decisions involving RPM conduct



Figures relate to select jurisdictions with three or more non-cartel enforcement decisions.

Europe

Antitrust enforcement fines in 2020

1. Netherlands – **USD94.1m**
2. Belgium – **USD0m**
3. Germany – **USD505.5m**
4. Poland – **USD172.8m**
5. Czech Republic – **USD14.4m**
6. Slovakia – **USD8.2m**
7. Hungary – **USD3.5m**
8. Austria – **USD0.3m**
9. France – **USD2bn**
10. Italy – **USD423.9m**
11. Spain – **USD8.5m**
12. Romania – **USD55.1m**
13. Turkey – **USD277.8m**
14. UK – **USD76.4m**

European Union

2020 saw a notably low level of antitrust fines imposed by the EC: a total of EUR369.5m across all antitrust enforcement cases, considerably less than the 2019 and 2018 totals for cartel conduct alone (EUR1.5bn and EUR801m respectively). This is a marked shift from the previous five years, where the EC has consistently been by far the most aggressive antitrust enforcer of the jurisdictions that we have surveyed (this is the first time since 2015 that the EC has not topped the global leader board for cartel fine totals).

The divergence is at least in part down to the absence of a landmark case in 2020, in contrast to previous years where one or two significant cases accounted for the lion's share of the total (such as the *Forex* cartel in 2019). It will be interesting to see whether 2020 is an anomaly (reflecting at least in part the impact of the pandemic on completing investigations) and EC enforcement picks up during 2021, or whether this is a trend that is set to continue, with the EC perhaps focusing at least in the short to mid-term on the establishment of its new digital enforcement regime.

Of the six infringement decisions issued in total, three related to cartel conduct (one less than in 2019), with aggregate fine values of EUR288m. Two of these three decisions involved settlements, and both cases involved an immunity applicant.

In the cartel space, the vast majority of the EUR288m total related to the EC's decision in the ethylene purchasing cartel, where it fined three firms EUR260m for coordinating their price negotiation strategy for ethylene purchases. The EC found that the aim of the collusion was to push down an industry price reference for ethylene, which is often used as a benchmark in supply agreements, in order to buy the chemical at the lowest possible price. The firms also exchanged price-related information. A fourth company received full immunity for revealing the cartel.

The EC's *ethylene purchasing* decision reflects the continued increasing enforcement focused on the conduct of firms on the purchasing market, in particular in relation to suspicions of purchase price coordination, with a number of EC and Member State probes ongoing, as well as two recent FCA decisions (in relation to which, see below). It is also notable

that the EC granted the ethylene purchasers an additional three months to pay the amounts due to the impact of Covid-19. It would not be surprising to see more of these types of concession in future cases as the economic impact of the pandemic continues.

The three non-cartel decisions resulted in aggregate fines of EUR81.5m. The most significant fine for a non-cartel arrangement was the EC's decision against Teva and Cephalon, whom it fined a total of EUR60.5m for agreeing to delay the entry of a cheaper generic version of Cephalon's sleep disorder drug modafinil. The decision completes the fourth and final ongoing investigation into so-called "pay-for-delay" settlements. It also follows the European Court of Justice (**ECJ**) ruling in January of this year, where (following a reference from the UK Competition Appeal Tribunal) the ECJ clarified criteria governing when entry into this type of agreement can breach EU antitrust rules on the basis either that it amounts to an anti-competitive agreement (in so doing, setting the bar high for pharmaceutical companies to show that it is not anti-competitive by nature) or constitutes an abuse of dominance.

However, this is not the end of the "pay-for-delay" story. Teva has announced that it and Cephalon – now part of the same group – have filed an appeal. In addition, the ECJ is set to rule soon in the *Lundbeck* pay-for-delay appeal, following the Advocate-General opinion earlier this year (although, given that the reviewing judges in the *Lundbeck* case are the same as those that ruled in the GSK judgment, we do not expect any surprises).

Proposed EU competition regime for "gatekeeper" digital platforms

On 15 December 2020, as a key component of its Digital Services Package, the EC published its draft Digital Markets Act (**DMA**), which will introduce broad reforms to the application of EU competition law to so-called "gatekeepers" in the digital sector. The DMA was published alongside a draft Digital Services Act (**DSA**), which has a wider scope (applying to all digital services that connect consumers to goods, services or content) and will, if adopted, introduce new obligations relating to such issues as illegal content, transparency and traceability of business users.

The DMA proposals set out a three-limbed test for companies that offer "core platform services", which, if met, raises the rebuttable presumption that the company is a gatekeeper. A company will have to self-assess as to whether it meets the criteria and, if so, will have to notify the EC, potentially making reasoned rebutting arguments that it is not in fact a gatekeeper. If designated a gatekeeper, it will have to start, within six months and until the gatekeeper designation is removed, complying with specific 'dos and don'ts' covering a wide range of issues such as self-preferencing, interoperability, and collection of and access to data. Significant sanctions would apply for non-compliance, including fines and the possibility of repeat offenders being required to divest parts of their business. Also included in the DMA proposals is a 'market investigation' tool that will enable the EC to keep the gatekeeper criteria and 'dos and don'ts' updated dynamically and to design remedies to tackle systematic non-compliance.

The DMA comes amidst a flurry of reform proposals as jurisdictions around the world grapple with how best to deal with the conduct of digital firms (including the UK a mere week earlier – see page 17 for our overview of the proposed "Strategic Market Status" regime). Given the potential impact of its provisions on large online platforms and their users, significant lobbying from stakeholders and Member States is likely as the proposals move through the legislative process in 2021. The DMA, once enacted, may well contain significant modifications as a result.

Other notable EU developments include:

Commitments decisions for abuse of dominance cases: While there were no infringement decisions for abuse of dominance in 2020, in two cases, the EC chose to go down the route of accepting commitments from the parties in lieu of a formal infringement finding:

– In March, the EC accepted commitments from Transgaz, the sole manager and operator of Romania's natural gas transmission network, following an investigation that identified concerns that the company abused its dominant position through conduct restricting exports of natural gas from Romania.

– In October, after just over a year of investigation, the EC wrapped up an abuse of dominance investigation into Broadcom's behaviour in chipset markets by accepting wide-ranging commitments in order to speedily and conclusively address its concerns over exclusivity or quasi-exclusivity arrangements and/or leveraging provisions (such as rebates).

In addition, in February 2021, the EC accepted a set of commitments from Aspen in relation to the EC's abuse of dominance investigation into potential excessive pricing (the first ever in the pharmaceutical space) for six off-patent cancer medicines. The commitments will involve Aspen reducing its prices in Europe for the medicines by around 73% on average, and ensuring their continued supply for a significant period.

Taken together, the three cases suggest a willingness by the EC to forgo infringement decisions concerning abuse of dominance in favour of accepting commitments, in particular for conduct where it is notoriously more difficult to establish an infringement (such as excessive pricing).

Damages Directive review: In December, the EC published a report on the implementation of the EU Damages Directive, which was adopted in 2014 with the aim of facilitating effective compensation for businesses and individuals that have suffered harm as a result of antitrust infringements. In short, it laid down various principles (such as the right to full compensation and the possibilities for obtaining disclosure of evidence) that Member States were required to implement into their own legal systems.

Overall, the EC has observed an increase in the total number of damages actions since the adoption of the Directive, as well as a wider spread of actions across Member States. It notes that Member States have implemented the key rules of the Directive in a consistent manner. However, it intends to continue to monitor developments in Member States with a view to reviewing the Directive once sufficient experience on the application of its rules is available.

The EC's evaluation of the antitrust rules on vertical agreements: where are we heading?

As part of its initiative to 'keep the rulebook up-to-date', the EC has been carrying out an evaluation of the Vertical Block Exemption Regulation (**VBER**) (due to expire in May 2022) and its associated guidelines, to check whether they remain relevant and whether any amendments are required. In a summary of its findings so far, the EC has concluded that the answer to both of these questions is yes – that, while these tools continue to serve a useful purpose, there is room for improvement and modernisation.

An "*inception impact assessment*" published by the EC in October 2020 gives helpful further insight on the likely areas of change:

– In some areas, a softening of the rules is possible, including: (i) possible relaxation of certain online sales restrictions (such as restrictions on "dual pricing"); (ii) enabling greater flexibility over the design of distribution systems (for example, expanding the exceptions for restrictions on so-called 'active sales'); and (iii) exploring the treatment of efficiencies for RPM, including the conditions under which efficiencies can be claimed.

– In other areas, a tightening of the provisions of the VBER may be on the cards, including potential restrictions on dual distribution (where suppliers sell their goods/services directly to end customers in competition with their retail distributors), for example, by introducing a threshold based on retail market shares.

Feedback from the public consultation on this impact assessment is due in March 2021, with a draft revised VBER and guidelines to be published by the EC later in the year.

ECJ tightens the conditions for finding "by object" antitrust infringements

On 2 April 2020, the ECJ issued its judgment in *Budapest Bank*. In this much-anticipated ruling, the ECJ tightened and clarified the conditions for finding "*by object*" antitrust law infringements, ie finding intrinsically anti-competitive infringements without an examination of their actual market effects, in relation to conduct that is atypical, novel or complex. The implications of this decision are particularly relevant to many agreements related to multi-sided markets and platforms.

The ECJ's ruling follows the Advocate-General opinion of last year, and continues the trend of other recent ECJ judgments that tightened the conditions under which authorities can find infringements "*by object*", eg *Cartes Bancaires* and *Generics UK*. In *Budapest Bank*, just as in *Cartes Bancaires* and later in *Dole* and *Generics UK*, the ECJ held that prior experience of the adverse effects of a conduct is relevant when determining whether it qualifies as a restriction "*by object*". However, in *Budapest Bank*, the ECJ expanded the criteria on what can amount to such prior experience – it held that an infringement by object can only be found if prior experience of the conduct is "*sufficiently solid and reliable*" and "*sufficiently general and permanent*". *Budapest Bank* also illustrates how authorities should take into account pro-competitive effects when determining if a conduct qualifies as an infringement "*by object*". Recently, in *Generics UK*, the ECJ considered the same question. However, it remained unclear what level of certainty was needed to rule out a finding of a "*by object*" infringement. This is now clarified by *Budapest Bank*: the ECJ held that "*serious indications*" of or "*contradictory or ambivalent references*" to such pro-competitive effects are sufficient to exclude an infringement "*by object*".

UK

The CMA issued 11 antitrust infringement decisions in 2020, with a total value of fines of GBP59.7m. Of these, five related to cartel conduct, with total fines amounting to GBP29.2m (slightly less than the 2019 total for cartel conduct of GBP44.6m). The remaining five decisions covered non-cartel anti-competitive arrangements, with total fines for these decisions amounting to GBP30.5m. At least nine of the 11 decisions involved settlements, and five were initiated by an immunity applicant.

The CMA's recent focus on the pharmaceutical sector continued in 2020, with two of its five cartel decisions relating to the supply of drugs in the UK, as well as reaching an infringement decision regarding the delay of generic drugs into the market. In addition to imposing fines of GBP3.4m, in two of these cases, the CMA secured significant voluntary payments to the NHS from infringing parties totalling GBP9m. Further, while there were no abuse of dominance infringement decisions in 2020, in December, the CMA accepted commitments from one pharma company in lieu of a formal decision, following concerns about a suspected abuse of dominance, in a notably swift process lasting just two months from the opening of the investigation. There are also a number of ongoing cartel and abuse of dominance probes, including a remittal probe into Pfizer/Flynn drug pricing following a partial annulment on appeal of the CMA's abuse of dominance decision in 2016.

The construction industry also continued to be a target sector for the CMA in 2020. It issued two cartel decisions in relation to roofing materials and groundworks that accounted for GBP24m in fines, the majority of the total cartel fines.

In the non-cartel space, it is clear that tackling RPM remains a key enforcement priority for the CMA. In 2020, it wrapped up four separate RPM probes in the musical instruments sector (accounting for two-thirds of its non-cartel infringement decisions), hot on the heels of a similar earlier RPM decision in the sector in 2019. One of the cases marks the first time that the CMA has brought enforcement action against a retailer for RPM – all other action has focused solely on the supplier(s). It will be interesting to see whether we see retailers being similarly targeted in future RPM probes.

Given the prevalence of RPM in this area, the CMA has launched a targeted compliance campaign, publishing an open letter and guidance to suppliers and retailers, as well as sending warning letters to nearly 70 individual suppliers/retailers. The cases have also inspired the CMA to invest in its own price monitoring tool (see below). It is also interesting that, following the decisions (three of which involved a leniency applicant), in September, the CMA amended its leniency guidance to reduce the maximum leniency discount for RPM from 100% to 50%, noting that 100% might be too generous in RPM cases and could therefore limit deterrence.

As predicted, the CMA once again increased the use of its director disqualification powers in 2020, accepting five disqualification undertakings from directors, as well as securing the first competition director disqualification order issued by the High Court, taking the total number of director disqualifications arising from CMA investigations to 20.

The pandemic has also given rise to some more unusual enforcement action in the UK. In light of the impact of the pandemic on the airlines industry, the CMA paused its investigation regarding UK-U.S. airlines, instead imposing interim measures as a means of extending the existing commitments that were due to expire in 2021. In addition, exceptionally, a pharmaceutical company director who had given an undertaking not to hold a director position was allowed to continue in the role given (among other factors) the importance of the company as a pharmaceutical supplier.

Algorithms and online price monitoring: a target and a tool for the CMA

In the UK, following recommendations in the Furman Report, the CMA's Data Technology and Analytics (**DaTA**) unit – now fully operational, and recently expanded to include behavioural scientists and 'data and technology insight' specialists – has been developing its competence in analysing how digital businesses use algorithms, with a focus on potential harms arising from algorithms. Indeed, in January 2021, the CMA published a paper detailing the work of this unit alongside a call for information, and also announced the launch of a new CMA programme of work on analysing algorithms, which is aimed at developing its knowledge and helping it better identify and address harms.

In addition to scrutinising potential harms arising from algorithms, the CMA has been inspired by the activities of infringing parties to develop its own online pricing monitoring tool. In a number of its investigations into RPM in the musical instruments sector, the suppliers used price monitoring software to ensure that retailers were not selling below the agreed price. Retailers also used this software to track their rivals' prices, and reported them to the supplier if they broke the minimum price arrangement. This gave the CMA the idea that it, too, could monitor online prices. It has developed its own price monitoring tool to help detect suspicious online pricing activity. The tool will be used in the musical instruments sector in the first instance, with the aim being to roll it out to other sectors in the future.

Brexit: after the transition period

Following the end of the Brexit transition period on 31 December 2020, the CMA is no longer prohibited from taking enforcement action against suspected anti-competitive agreements or abuse of dominance in the UK where the EC is investigating the same conduct. The exception is formal EC investigations that are ongoing as at 31 December 2020 – the Withdrawal Agreement provides, broadly, that the EC retains competence over these cases until their conclusion.

In practice, this means that suspected infringement with effects in the UK and EU can be investigated by the CMA (or the UK sector regulators) in parallel with the EC. Clearly this could lead to the CMA bringing more enforcement actions, allowing the CMA to investigate large cross-border cartels with some UK nexus or, for example, the unilateral conduct of businesses suspected of being 'dominant' in their markets. The CMA notes that it is "*ready to launch complex cartel and antitrust cases…with a global dimension that would have previously been reserved to the European Commission*". This also fits with its desire, for example, to increase its scrutiny of conduct in digital markets. But it will all depend on resource. This type of enforcement action is discretionary, unlike the CMA's review of mergers, which it has a statutory duty to undertake. And while the CMA states that it is "*ready to take on new post-EU Exit responsibilities from January 2021*", it will be interesting to see whether there is any immediate shift in enforcement activity, or whether any uptick takes a little more time to materialise.

New UK regulatory regime for digital firms with "Strategic Market Status"

A radical new regime for digital firms with substantial market power has been proposed in the UK. Recommendations published in December 2020 by the Digital Markets Taskforce (**Taskforce**) – a unit led by the CMA, working with Ofcom, the Information Commissioner's Office and the Financial Conduct Authority, commissioned to advise the UK Government on a new pro-competition approach for digital markets – outline a three-pillar regime for digital firms designated as having "Strategic Market Status" (**SMS**).

Under the recommendations, a new Digital Markets Unit (**DMU**), an independent regulator to sit within the CMA and due to start operations in April 2021, would have power to designate SMS firms and would oversee the regime. It would have significant enforcement powers but, consistent with the regime's purpose of proactive prevention of harm, a focus on consensual remedial action. In an update to its digital markets strategy, published in February 2021, the CMA described the establishment of the DMU as its "overarching ambition" and reiterated its desire for the DMU to also perform a monitoring role in relation to competition in digital markets more widely.

A firm designated as having SMS would be subject to a legally binding code of conduct expressly tailored to its activities, as well as ex ante "*pro-competitive interventions*" (such as requiring access to data or imposing data separation/silos and even operational or functional separation of businesses) to drive greater competition and innovation.

More broadly, the Taskforce recommends that the Government should strengthen competition and consumer regimes to ensure they are "*better adapted to the digital age*".

Next steps are for the Government to determine which of the Taskforce's recommendations it takes on board in its formulation of legislation setting out the new regime. While many recommendations are expected to be followed, certain issues are likely to be more controversial, for example, the scope of the pro-competitive interventions the DMU is able to take. Public consultation is due to take place in early 2021, with the DMU keen to assist the Government in progressing the initiative as quickly as possible. The DMU will begin preparatory work before the relevant legislative framework is in place and the CMA has committed to equipping it with the necessary operational resources to enable it to hit the ground running.

The CMA has made no secret of its intention to be an "increasingly active enforcer" in digital markets, demonstrated most recently by the launch of its investigation into Google's 'Privacy Sandbox' browser changes in January 2021.

EU Member States

Despite the pandemic, European Member States continued to be active in their antitrust enforcement activities in 2020, with several jurisdictions conducting dawn raids (including two conducted in Spain after the outbreak), and others reporting an uptick in fines (such as, notably, France). Several Member States anticipate a significant pipeline of enforcement in 2021 and beyond.

Transposition of the Directive (EU) 2019/1 (**ECN+**) into national law will continue to be a priority for Member States into 2021 (the period for doing so ran until 4 February 2021). The ECN+ is aimed at harmonising the outcomes of antitrust proceedings by ensuring Member States have the appropriate enforcement tools. During 2020, *inter alia*, the ECN issued a joint statement acknowledging the need for flexibility in the antitrust treatment of temporary cooperation between companies in certain specific situations.

It will also be interesting to observe how the development of the EC's proposed digital reform under the DMA sits alongside Member State initiatives. Keen to implement a harmonised EU system avoiding regulatory fragmentation, the EC intends that Member States will be prevented from adopting gatekeeper regulations at local level. This begs the question as to how proposed Member State regimes (some of which are already progressing, at a quicker rate than the EC, for example in Germany) will fit with the DMA. Although Member States will have a role to play within the DMA framework, for example, they could request the EC to open a market investigation into whether a particular platform should be designated as a gatekeeper, their involvement looks set to be significantly more limited than proposed under the DSA, which provides for direct enforcement at national level.

Austria

With thanks to Christine Dietz and Miriam Imarhiagbe of Binder Grösswang.

Notwithstanding the Covid-19 crisis, the Austrian Federal Competition Authority (**AFCA**)'s antitrust enforcement activity level remained high throughout 2020, although actual fines remained low.

Action against RPM remained a key enforcement priority. The only fine (EUR294,000) imposed in 2020 by the Cartel Court for any type of antitrust infringement (excluding fines for gun jumping) related to an RPM case. A further RPM case concerned musical instruments manufacturers (no fine was applied for, following a leniency application). On the cartels front, in November 2020, the AFCA made its first application against four companies for a fine for alleged price-fixing, market allocation and other horizontal infringements in the construction sector. The sector has been on its radar for some time, with dawn raids taking place in 2017, and these are the largest cartel investigations in Austrian history. More fine applications in respect of other participants are in the pipeline.

In abuse of dominance cases, the only two published complaints by private parties were rejected by the Cartel Court – demonstrating the high bar to making a successful abuse case – and the AFCA brought an application for alleged predatory pricing by a pharmaceutical company. The healthcare sector continues to be a focus area for the AFCA, following market investigations of pharmacies and rural healthcare in 2018 and 2019. It has also looked again at the funeral market, and reported slow improvements in online price transparency.

Digitalisation challenges and data protection issues in the context of competition law have been – and will remain – in the spotlight. In 2020, the AFCA issued its own report on the subject and the Austrian Regulatory Authority for Broadcasting and Telecommunications – a close cooperation partner of the AFCA on these topics – published papers on methods of monitoring digital platforms and instant messaging in May and December. The instant messaging paper concluded that, while WhatsApp had substantial market power in Austria, there were currently no indications that WhatsApp would abuse its power. Areas of concern continue to include issues such as the transfer of market power to other related markets and the limitation of consumers' choices due to network effects.

Belgium

Major developments in 2020 included various decisions taken by the Belgian Competition Authority (**BCA**) on interim measures. The BCA has long used interim measures in both joint conduct and dominance cases, and, with a particularly low bar for their imposition, the tool has been frequently requested by complainants arguing for the need for immediate relief to avoid irreparable damage. In January 2020, the BCA ordered interim measures suspending the cooperation between Proximus and Orange relating to mobile access network sharing so that the federal telecom and postal regulator could investigate the parties' arrangements and proposed commitments. Interim measures were also imposed in January on the Belgian Bumper Pool Association (the association was sanctioned with a penalty payment for non-compliance seven months later).

Complainants' requests for interim measures were not uniformly successful. Lack of sufficient information to identify relevant product and geographic markets and to demonstrate dominance led to the BCA rejecting, in March 2020, a request by DPI in connection with alleged abuse of dominance by HP. Two other requests for interim measures in 2020 related to the professional football sector. Of these, one was only successful on appeal (following a judgment by the Brussels Court of Appeal), and the other was only successful in relation to part of the request made.

In other developments, in July 2020, the BCA drew a line under its nearly three-year long investigation of an agreement between Brussels Airlines and Thomas Cook Belgium. Although it found that certain clauses had anti-competitive foreclosure effects and provided for the exchange of commercially sensitive information, no fine was imposed as Brussels Airlines had never applied the problematic clauses and terminated the agreement following Thomas Cook Belgium's bankruptcy. In November 2020, the Investigation and Prosecution Service of the BCA submitted to the BCA's Competition College a reasoned proposal for a decision concerning anti-competitive practices (including imposing minimum resale prices through maximum discount levels and restricting online sales to customers in another EU Member State) by Caudalie. The Competition College will decide the outcome of the case after hearing Caudalie.

In a regulatory development, the new provision in the Belgian Code on Economic Law, which prohibits undertakings from abusing their non-dominant position vis-à-vis undertakings that are economically dependent on them, entered into force in August 2020. Jurisdictions such as France and Germany also prohibit similar behaviour.

France

In 2020, the FCA issued 11 substantive antitrust decisions (plus 12 decisions where no competition law infringements were found), imposing fines totalling EUR1.8bn. This **exceptionally high figure** is largely attributable to a single decision that sanctioned Apple and others for RPM and other vertical restrictions and imposed a record fine of EUR1.2bn (see our separate summary below).

The majority of decisions (six) related to cartels, with fines totalling EUR97.9m. This amount is significantly lower than the corresponding 2019 figure (EUR480.5m). The most significant fine (EUR93m) was imposed in relation to price-fixing and bid-rigging conduct. Two decisions related to joint purchasing agreements – the first since the so-called Egalim Law, which strengthens the FCA's powers to intervene to ensure joint purchasing agreements are not anti-competitive and are better adapted to the market situation, came into effect. Both cases were settled, with no fines imposed.

The FCA also issued three non-cartel decisions, which imposed total fines of EUR1.2bn. Two of these related to RPM (with the Apple decision also covering other vertical restrictions), and one to vertical territorial restrictions (EUR642,800). Two decisions on abuse of dominance were taken: one related to unfair discounts and rebates and was settled with no fine being imposed, and the other concerned disparaging of competitors' products and misleading public authorities (fine of EUR444.9m). As in 2019, there was continuing use of settlement proceedings – three cases were settled in 2020, all without any fine being imposed.

Despite the creation of a Digital Economy Unit within the FCA in January 2020, the FCA adopted only one decision on the merits relating to the digital sector in 2020. More decisions are anticipated as cases come through the pipeline (including a decision on the merits in the abuse of dominance case regarding Google's general search services), with the FCA stating that the digital sector will remain a top priority in 2021.

Other top priorities for 2021 include sustainable development, which will continue to play a part in the FCA's decisional practice, with scrutiny focused on the most harmful anti-competitive practices, and continued support for businesses requesting guidance on collaborations with a sustainable objective.

Apple heavily fined in France for conduct including RPM and rare abuse of economic dependency

Manufacturers frequently operate dual distribution systems under which they use both independent resellers and their own distribution channels to sell their products. A decision by the FCA serves as a wake-up call for such networks to be antitrust-compliant. It imposed a record EUR1.2bn fine on Apple, alongside substantial fines on two of its wholesalers, for antitrust infringements relating to the distribution of Apple products (excluding the iPhone). Provisions and conduct penalised by the FCA involved the restriction of intra-brand competition, RPM and the rarely used French law concept of abuse of economic dependency.

Under French law, abuse of economic dependence is established if three conditions are met: (i) the existence of a state of economic dependence of one company on another; (ii) abuse of this state; and (iii) a real or potential effect on the functioning or structure of competition. The concept of abuse of economic dependence is a tool open to other antitrust authorities, including in Italy and Belgium (where it came into force on 1 June 2020). It is possible that we may see it being employed more by these authorities.

Germany

2020 was marked by a relatively low overall fine level, with the FCO imposing total fines of EUR443.16m, compared to EUR925m for cartel fines alone in 2019. This figure includes fines imposed in four cartel proceedings in the pesticides, building services, aluminum forging and vehicle registration plate sectors as well as a symbolic fine for anti-competitive practices in relation to basalt stone quarries. In an interesting turn of events, one of the addressees of the pesticides decision brought a civil damages action for EUR73m against the FCO for the alleged breach of its procedural rights. The action was dismissed and is now under appeal.

Although only one investigation was closed by a formal commitments decision in 2020, four proceedings (in the press wholesalers, Spanish guitar, hospital services software and XXXLutz cases) were discontinued following changes to allegedly anti-competitive conduct agreed outside the formal commitments procedure. This informal tool is commonly used in German antitrust proceedings, other than in hardcore cartel investigations.

As in numerous other jurisdictions, online platforms remained very much in the regulator's sights. The landmark Facebook case continues, with the three major authorities dealing with antitrust cases in Germany remaining unusually divided over it. In early 2019, the FCO found that Facebook had abused its dominant position in the social networking market by combining user data from different sources (Facebook, Instagram, WhatsApp, third party websites) in breach of GDPR rules, and imposed far-reaching remedies. Later that year, however, the Düsseldorf Court of Appeal suspended in interim proceedings the execution of the FCO decision, on the basis that, among other grounds, it lacked a convincing theory of harm.

In June 2020, the Federal Supreme Court sided with the FCO by overturning the Düsseldorf Court's interim decision, but suggested a new theory of harm, relying heavily on constitutional law instead of GDPR arguments. The Federal Supreme Court found that Facebook had engaged in an abuse of conditions (*Konditionenmissbrauch*) by leaving users with no choice between the existing version of the social network and a hypothetical less personal data-driven version, making it more difficult for competitors to compete and harming consumers by depriving them of their right to self-determination regarding their personal data. The hearing before the Düsseldorf Court of Appeal in the main proceedings is scheduled for March 2021, and will be watched with interest worldwide. Experience from the landmark rail cartel damages case has shown that the Düsseldorf Court is sufficiently self-confident to dissent even from the Federal Supreme Court.

Italy

The growing need to take account of sustainability issues in antitrust enforcement is apparent from some of the investigations recently opened by the Italian Antitrust Agency (**IAA**). For example, it has begun an investigation into potential anti-competitive practices by two of the most important spent battery recycling consortia and some of their members. This was followed by a second investigation to verify whether a consortium representing the main players in the market for the recycling of plastic packaging is abusing its dominant position.

Throughout 2020, the IAA maintained its focus on public tenders and potential bid-rigging, with a view to protect the national budget. In another development, while there is no official data available on the subject, leniency applications appear to have fallen significantly in number. Each closed cased is now systematically followed by private damages actions brought before the Italian civil courts and with the new strengthened class action model due to enter into force soon it is expected that leniency applications will become a rarity in Italy.

To boost its enforcement arsenal, the IAA has declared its intention to make use of the prohibition of abuse of economic dependency concept, a power that has remained substantially dormant for 20 years. In so doing, it is joining the recent trend set by other national EU competition authorities. The IAA is currently assessing whether the terms and conditions of Benetton's franchising agreements are compliant with the rules regarding abuse of this type.

IAA set to join other EU authorities in making use of the abuse of economic dependency concept.

Netherlands

The Dutch antitrust authority (**ACM**) issued three enforcement decisions, two of which concerned bid-rigging by a group of roofers and a group of contractors respectively. Most noteworthy is a fine of EUR82m imposed on four cigarette manufacturers for indirectly exchanging sensitive commercial information on future pricing of cigarettes through wholesalers and other channels. This is the first case where the ACM has imposed a fine for hub-and-spoke information exchange and the fines are amongst the highest it has ever issued. In another cartel case that was subject to appellate proceedings before the Administrative High Court for Trade and Industry, the ACM proposed to mitigate the fine on account of special circumstances, which included the appellant's looming bankruptcy due to the financial consequences of Covid-19. The fine was reduced from EUR2.8m to a mere EUR10,000.

No enforcement decisions relating to abuse of dominance were taken in 2020. However, a number of developments are noteworthy: first, the ACM decided to extend its ongoing investigation into alleged excessive pricing by pharmaceutical company Leadiant with respect to its orphan drug CDCA. The investigation is expected to be concluded in the summer of 2021; second, another life sciences-related probe concerning rebates was closed by the ACM after the company concerned offered commitments. The ACM anticipates that the commitments will make it easier for biosimilars to enter the market once the relevant patents expire; and third, a further case involved the ACM deciding to abort its investigation into a major Dutch mail corporation because the latter's subsequent takeover of the complainant has significantly altered the structure of the postal market. As a result of these developments the investigation had lost its purpose and necessity, according to the ACM. Lastly, in the field of TMT, the ACM decided to reject an enforcement request made by one telecom provider against another, because it did not share the complainant's concern that the accused undertaking engaged in anti-competitive margin squeeze or predatory pricing.

Spain

The Covid-19 outbreak and the declaration of a state of emergency in Spain in March impacted both the number of cartel decisions adopted and the total amount of fines levied by the Spanish Competition Authority (**CNMC**) in 2020. Three cartel fining decisions were adopted during 2020 (compared to five in 2019 and six in 2018), in part due to the fact that administrative proceedings were brought to a standstill in Spain for two and a half months as a consequence of the pandemic. The total amount of fines levied (EUR7.4m) is substantially lower than in 2019 (EUR282m) since the decisions related to minor cases. The fact that the most significant investigation on the CNMC's books (into the civil construction sector) was time-barred, and that an investigation regarding the aquaculture sector ended without the imposition of fines, has also had an impact on the total.

However, by and large, the pandemic has not caused a dramatic slowdown of the CNMC's cartel enforcement activity. In fact, in 2020, the CNMC conducted four cartel dawn raids, two of which took place after the Covid-19 outbreak. 2021 is likely to see the CNMC catching up with those investigations that were halted because of Covid-19.

In relation to non-cartel cases, the CNMC adopted three decisions in 2020. Probably the most significant relates to the binding commitments by Adidas Spain, accepted by the CNMC to close an investigation into the company's vertical practices (including alleged restrictions of online sales, post-contractual non-compete covenants to distributors/ retailers and a prohibition of cross-supply among distributors). The CNMC also imposed a symbolic fine in relation to the adoption of a framework agreement between unions and stevedoring companies' associations. In addition, the CNMC closed an investigation into Uber and Spanish ridesharing company Cabify (prompted by a complaint).

On the abuse of dominance front, as the CNMC does not have the tools to reject complaints, it falls to the Council of the CNMC to take decisions on complaints. Five complaints of alleged abuse of dominance (including in relation to Sage, Interflora and Nortegas) were dismissed during 2020 and the corresponding proceedings were closed. The CNMC also carried out a dawn raid (after the Covid-19 outbreak) in relation to a potential abuse in the natural gas sector.

CEE region

The Covid-19 pandemic left its mark on the enforcement activity of national competition authorities (**NCAs**) in the CEE region, particularly as dawn raids were either not carried out at all or only to a limited extent, and the opening of investigations slowed down as a result. Decisions issued by the NCAs also decreased in number, particularly in Slovakia (two cartel decisions) and in Hungary (a single cartel decision).

Bid-rigging remained a key focus area. The majority of the 2020 cartel decisions by the Polish authority (**PCA**) (four of six decisions), the Czech authority (**CCA**) (five of seven decisions), the Romanian authority (**RCA**) (two of two decisions) and the Slovak authority (**SCA**) (one of two decisions) related to collusive practices in procurement tenders. Sectors attracting the most attention were transport and infrastructure in Poland, and technology in the Czech Republic. Interestingly, in Romania, the national natural gas transmission system operator Transgaz was recently sanctioned as a facilitator of a cartel relating to eight contracts awarding procedures in 2011.

The NCAs remained open to cooperation with the parties in cartel cases – in the Czech Republic it was reported that in at least three cases parties benefited from the leniency programme and in at least four cases (all bid-rigging infringements) parties agreed to settle with the CCA.

Settlement appears to be a long-lasting trend, with resulting effects on the future development of cartel case law by administrative courts. In Romania, insurance and financial services were top of the agenda and investigated companies continued to collaborate with the RCA: two cases are about to end with commitments, while in others companies admitted the infringement. In Hungary and Slovakia, the NCAs detected potential cartel behaviour based on leniency applications in one case in each country.

As with other regulators across the world, CEE authorities have been using a range of tools to strengthen their enforcement capabilities. In Hungary, the NCA imposed fines of almost 1% of a party's turnover for destroying electronic documents during a dawn raid. In Poland, 2020 brought the first ever fine imposed on a manager of the business responsible for anti-competitive conduct.

In Poland and the Czech Republic, new NCA leaders were appointed in 2020, while the SCA will welcome a new Chairman in 2021. These changes – together with the expected entry into force of a new Competition Act in Slovakia – are likely to result in heightened NCA antitrust enforcement activity in 2021.

Russia

According to the Federal Antimonopoly Service (**FAS**), there was a drop in the overall number of antitrust enforcement cases in Russia in 2020, largely attributable to the general slowdown of the economy as a result of the Covid-19 pandemic.

The head of FAS's anti-cartel department has pointed to a clear tendency in 2020 for "self-replication" of cartels, where cartels that have been previously investigated/prosecuted by FAS re-appear, as cartel participants take the view that the resulting economic gains outweigh the potential risks and liabilities. In FAS's view, this trend is best combatted by increasing criminal liability for cartel participants and stepping up criminal prosecutions of cartel cases.

Although most cartel cases in Russia continue to relate to infringements of public procurement rules, FAS has stated that in 2020 it was more active in monitoring and prosecuting non-procurement cartels, in part because the total number of public procurement procedures has decreased due to the pandemic.

In terms of the impact of the pandemic on the activities of FAS, its anti-cartel department head has said that its 2020 enforcement efforts were largely reoriented towards preventative control, including the issue of warnings against potential infringements. FAS made frequent use of this tool against officials who made public statements that, in the opinion of FAS, could have led to illegal concerted actions or illegal price coordination.

In September 2020, FAS proposed various amendments (updating amendments first proposed in 2018) to a number of Russian laws designed principally for the regulation of competition in the IT sector (**5th Antimonopoly Package**), after cases of potential abuses of dominance by various online platforms investigated earlier in the year revealed an "enforcement gap" in the legal framework applicable to digital markets. The amendments aim to prohibit various forms of abuse by "digital giants", establish new criteria for a dominant position in digital markets (including ownership of software applications for transactions on online platforms, network effects and market share), and broaden the range of sanctions for violation of competition laws. Public consultation on the updated version of the 5th Antimonopoly Package is ongoing.

Turkey

Cartel investigations in 2020 were largely directed at price-fixing and market sharing activities. Of 13 cartel investigation cases, five concerned price-fixing and four market sharing. On the abuse of dominance front, the Turkish Competition Authority (**TCA**) imposed, in its Google Shopping and Google Adwords decisions, a total fine of around TL300m (around USD42m), together with several remedies. 2020 also saw the administrative courts playing an important role in dominance cases: of seven investigations, three were initiated following the administrative courts' decision to overturn the relevant initial decision by the TCA finding that a full-fledged investigation was not necessary. The year also brought an increase in the average duration of investigations, attributable to significant changes in the TCA's organisational structure coupled with the effects of the pandemic.

Overall, 2020 was a remarkable year for Turkish antitrust enforcement, with new amendments to the competition law and with several other communiqués in the pipeline. The new amendments, including the introduction of settlement and commitment procedures and the SIEC test, constitute an important step towards aligning Turkish antitrust legislation with that of the EU.

Both 2020 decisional practice and the newly launched sector inquiries on digital markets and e-marketplaces indicate that, in line with its global counterparts, the TCA's key focus will continue to be on digital markets. Predictions for 2021 include seminal cases applying the new amendments to the competition law and the conclusion of several large-scale investigations.

Alignment of Turkish antitrust law with that of the EU includes introduction of new settlement and commitment procedures.

Americas

Antitrust enforcement fines in 2020

1. U.S. – **USD539.8m**
2. Brazil – **USD53.3m**
3. Canada – **USD4.6m**
4. Chile – **USD3.9m**
5. Mexico – **USD38.2m**

United States

The most notable theme in U.S. enforcement in 2020 was a focus on Big Tech firms, highlighted by the first major monopolisation cases brought by the agencies in some time. These actions came on the heels of a House Judiciary Committee investigation into antitrust issues around the largest technology companies in the world. CEOs of Google, Amazon, Facebook and Apple were brought before the Committee for one of several hearings and Congressional subpoenas were also issued to these companies. The investigation resulted in a 449-page report, which concluded that these companies have become "dominant platforms" in the digital markets and outlined a series of anti-competitive tactics used to maintain their market power.

Parallel to the House investigation, the DOJ's Antitrust Division (**Division**) was conducting its own investigation into Google. A few weeks following the release of the House Report, the Division and 11 state attorneys general filed a civil antitrust complaint against Google in the U.S. District Court for the District of Columbia. This case was the first major action brought under Section 2 of the Sherman Antitrust Act, which prohibits unilateral conduct to achieve or maintain monopoly power, since the 1998 case against Microsoft. The DOJ and attorneys general allege that Google has engaged in illegal tactics to maintain its monopolies in search and search advertising, primarily through entering into exclusivity agreements, tying arrangements and using monopoly profits to buy preferential treatment that ensures Google will be the default or preinstalled search engine on other devices and technologies. In December, three additional state attorneys general filed for permission to join the suit. The progress of *U.S. v. Google* will likely be a major focus of observers of antitrust law in the coming years and is likely to result in landmark decisions regarding Section 2 enforcement.

Following the filing of the *Google* complaint, the FTC filed suit against Facebook under Section 2. The FTC complaint alleges that Facebook illegally maintained its monopoly in personal social networks through its acquisitions of Instagram and WhatsApp. The suit also alleges that Facebook engaged in anti-competitive conduct by imposing restrictive conditions on third party software developers, only allowing them to

use Facebook's application programming interfaces (**APIs**) on the condition that they refrain from developing their own competing technologies. The FTC suit seeks a permanent injunction that would require divesture of Instagram and WhatsApp, prohibit Facebook from continuing to impose anti-competitive conditions on software developers, and require prior notice and approval for any future mergers and acquisitions by Facebook. The FTC investigated Facebook in cooperation with 46 state attorneys general as well as the attorneys general of the District of Columbia and Guam, who have filed their own suit.

Turning to criminal cartel enforcement, three important trends marked FY2020. Firstly, the substantial increase in corporate fines: criminal cartel fines in FY2020 totalled around USD528m, in contrast to USD360.2m in FY2019. Although this was the highest total since FY2016, it remained significantly lower than the billions reached in many years in the first half of the previous decade.

Fines in FY2020 were largely driven by the Division's ongoing investigation into generic drug manufacturers, including the two largest fines of the year reached through deferred prosecution agreements (**DPAs**) – around USD206m from Taro Pharmaceuticals and around USD195m from Sandoz Inc. for their participation in a conspiracy to allocate customers, rig bids, and fix prices for various generic drugs. Additionally, Florida Cancer Specialists & Research Institute LLC, an oncology group based in Florida, agreed to a USD100m criminal penalty for its participation in a conspiracy to allocate radiation oncology treatments for cancer patients.

The second trend is the continued rise in the use of DPAs by the Division. This was a new development in 2019 and continued to be a popular method for resolving cases in 2020. The DOJ resolved four cases in the generic pharmaceutical investigation through DPAs as well as the case against Florida Cancer Specialists & Research Institute LLC.

In a Q&A accompanying the announcement of the Florida Cancer Specialists DPA, the Division explained the reasoning behind its use of the tool. Specifically, it cited the "significant collateral consequences that likely would result from criminal conviction", noting that the Department of Health and Human Services excludes healthcare providers that have been convicted of certain crimes from participation in federal healthcare programmes. This would likely have a significant negative impact on cancer patients and researchers.

Finally, individual liability continues to be an important part of U.S. cartel enforcement. Twenty-two individuals were charged by the Division in FY2020, including executives in the pharmaceutical, poultry and construction industries. Major sentences in 2020 occurred in the packaged seafood case, where the former CEO of Bumble Bee Foods LLC was sentenced to 40 months in jail and a USD100,000 criminal fine, and in the foreign exchange case where a former JPMorgan Chase & Co. trader received a sentence of eight months in jail and a USD150,000 fine and two other traders at multinational financial institutions received sentences involving probation and criminal fines.

U.S. agencies bring major monopolisation cases against Big Tech firms.

Brazil

With thanks to Marcelo Calliari and Raquel Souza Jorge of TozziniFreire Advogados.

In 2020, the total amount of fines imposed by the Administrative Council for Economic Defense (**CADE**) in cases involving anti-competitive practices (both cartel and unilateral conduct) decreased by around 71%, with a total of BRL279.4m (USD53.3m) compared to BRL959m (USD188m) in 2019. The reduction is unsurprising given that the 2019 total was heavily inflated by the fines in the subway cartel case (BRL 535m (USD 105m)) and seven cease and desist agreements reached in the context of auto parts probes that resulted in BRL110m (USD21.5m) in fines.

Even though the Covid-19 pandemic led the agency to suspend all deadlines imposed on defendants between March and July, thereby delaying the closing of investigations before the General-Superintendence and consequently their referral to the Tribunal for ruling, the number of cartel decisions decreased only slightly in comparison to the previous year, with 13 cartel rulings in 2020 (two fewer than 2019). There has been a more significant drop in the number of non-cartel rulings (four, as opposed to 13 in 2019).

In addition, there were markedly fewer immunity applications in 2020, with only two agreements signed as at November, compared to 12 in 2019 and eight in 2018. The CADE General-Superintendent attributed the drop to the practical difficulties caused by the pandemic in finalising negotiations between the agency and the parties involved.

Potential reforms to the cartel enforcement regime may be on the cards. These could involve a change to the standard of proof required (highlighted as a possibility in 2019) and a review of CADE's criteria for initiating investigations. The Deputy General-Superintendent has pointed to the large number of acquittals in Brazilian cartel cases against individuals and indicated that the authority needs to increase its enforcement effectiveness. Since 2012, CADE has issued convictions in 328 probes of individuals and closed 225 due to lack of evidence.

Even though Brazil continues to prioritise cartel and bid-rigging enforcement, CADE has also been focusing on unilateral conduct. In the most high-profile case of 2020, large commercial bank Banco Bradesco agreed to pay BRL23.8m (USD4.5m) to settle charges of anti-competitive behaviour that made it difficult for personal finance app Guia Bolso to access the bank's client data. Incentivising fintechs to grow in the face of incumbent banks is one of the main concerns of the agency in the technology field.

The second half of 2021 will bring changes to CADE with new appointments for two key positions within the agency: the General-Superintendent, who has the power to launch and carry out investigations, and the president of the decision-making Tribunal. Although the precise impact on CADE of these new appointments remains unclear, one certain development in 2021 is the launch of new cases regarding digital markets. The sector is the target of multiple ongoing investigations and of a new market-wide monitoring initiative by the agency. A further topic of interest will be the interplay between antitrust, data and privacy, spurred by the recent entry into force of the new Brazilian Data Protection Law.

Canada

With thanks to Casey Halladay of McCarthy Tétrault LLP.

Canada continued its programme of robust antitrust enforcement in 2020. As of October 2020, the prosecution service had in excess of 30 open enforcement matters on its docket. While the number of fines and convictions went down in 2020, particularly in respect of global cartels prosecuted in Canada, the Competition Bureau (**Bureau**) nevertheless secured convictions in several domestic bid-rigging matters, with more than CAD6m in criminal fines imposed.

The Bureau issued a notable policy statement in November 2020, in which it clarified a view — long held by the cartel defence Bar — that section 45 of the Competition Act, the primary cartel offence, does not apply to buy-side agreements. This view, which is based on the clear language of the Canadian statute, diverges from the enforcement approach in other jurisdictions, most notably the U.S. where "no-poach" and "wage-fixing" agreements among employers have come under recent antitrust scrutiny. In Canada, such agreements will be reviewed under the civil competitor agreements provision in the Competition Act, which carries no risk of criminal fines or imprisonment (unlike the cartel offence).

Non-criminal antitrust enforcement continued apace in 2020. The Bureau is currently carrying out an inquiry into potential anti-competitive conduct in the supply of seed and crop protection products in Western Canada, obtaining subpoenas (Section 11 orders) against seven companies in February 2020. It is also conducting a high-profile inquiry into the conduct of Amazon, and whether it engaged in abuse of dominance through certain allegedly exclusionary practices against third party vendors on the Amazon marketplace. The agency took the unusual step of publicising this inquiry and soliciting feedback from third parties in August 2020.

While it did not impose any administrative fines under the abuse of dominance provisions in 2020, the Bureau did obtain significant fines against Facebook (CAD9m) and Stubhub (CAD1.3m) under the civil misleading advertising provisions of the Competition Act in May and February 2020, respectively.

Regulator confirms primary cartel offence does not apply to "buy-side" agreements.

Chile

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

The Chilean Competition Tribunal (**TDLC**) adopted one cartel decision in 2020 regarding ten bus lines and taxi-buses. Additionally, the Supreme Court adopted four cartel decisions, on cases decided by the TDLC between 2018 and 2020 and appealed by the parties involved.

The Supreme Court also gave an important judgment on the weight to be given to compliance programmes in cartel decisions. In the *FNE* (National Economic Prosecutor's Office) *vs. Supermarkets* case, the court established that a compliance programme cannot be viewed as a mitigating factor in fines relating to cartel decisions, as the very existence of the cartel proved the ineffectiveness of the programme. For a fine reduction, compliance has to be serious, credible and effective. If a cartel could ensue – for four years in this case – the compliance programme was clearly not effective for the purposes for which it was created, and consequently could not be a mitigating factor in the level of fine imposed. The court increased the original fines of USD6.5m to around USD24.6m. In a separate development, the second follow-on damages action relating to this case was filed by a consumer association seeking compensation for customers affected by the cartel. This case is currently under review by the TDLC.

In another key judgment, in August 2020, the Supreme Court partially granted the FNE's appeal in the *FNE vs. Shipping Companies* case, fining three shipping companies for a market-sharing cartel. Overruling the TDLC, the Supreme Court dismissed the three companies' arguments that their collusion was time-barred. It considered that, even though the parties' illegal agreement was reached in 2009 (and was therefore outside the statute of limitations), as it allowed one of the parties to maintain a key account until 2013, it fell within the statute of limitations. The judgment also raised questions as to the effectiveness of leniency programmes, suggesting that during the judicial process the TDLC or the Supreme Court could revoke a leniency applicant's immunity. This could obviously have significant repercussions for the operation of Chile's leniency programme.

Mexico

With thanks to Fernando Carreño of Von Wobeser y Sierra, S.C.

Mexico's antitrust legal framework was fundamentally restructured eight years ago, with a significant impact on the Mexican markets and the Mexican economy in general. Most recently, Mexican authorities have been focusing their efforts on developing regulatory strategies that can support the Mexican market effectively and facilitate its successful recovery from the Covid-19 crisis. The Mexican Federal Economic Competition Commission (**COFECE**) has emphasised its commitment to investigate public bid-rigging as a top priority due to the direct impact on the public treasury and, as a result, on the Mexican population. In particular, it has directed considerable resources to the investigation of bid-rigging in the health sector, a key target sector for the authority. The first and only instance (in 2017) of COFECE bringing a criminal action against individuals related to bid-rigging.

Bid-rigging is also the subject of the first private litigation case related to an antitrust infringement, brought by IMSS, the Mexican Social Security and Health Institute. The specialist Mexican courts are hearing the case, which remains pending. As the first private antitrust litigation, the outcome of this case is critical.

Digital markets are also attracting the scrutiny of the authorities. In March 2020, COFECE issued its "Digital Strategy", a report highlighting the need for antitrust authorities to develop an effective strategy to face the challenges posed by digital markets. The Digital Strategy sets out five key objectives. These include the drafting of policy proposals to ensure that digital markets are able to deliver greater consumer benefit, holding forums with international experts on digital markets and a general increase in international cooperation. COFECE also intends to develop its own technological infrastructure and to establish its own "Competition Unit in Digital Markets".

Key enforcement sectors for COFECE over the next few years remain finance, agriculture, energy, transport, health and public procurement. However, and particularly in light of the formation of a dedicated digital markets division, everything points to digital platform markets, a subject that has not to date been fully explored in Mexico, as being a top priority for the antitrust authorities in 2021.

New COFECE dedicated digital markets division aims to ensure the sector is prioritised.

Asia Pacific and South Africa

Antitrust enforcement fines in 2020

1. Australia – **USD0m**
2. China – **USD34.2m**
3. Hong Kong – **USD1.4m**
4. India – **USD40.4m**
5. Japan – **USD40.7m**
6. Singapore – **USD0.3m**
7. S Korea – **USD102.2m**
8. Taiwan – **USD20.5m**
9. Thailand – **USD0.2m**
10. S Africa – **USD1.5m**

Australia

Following the initial onset of the Covid-19 crisis in late March 2020, the Australian Competition and Consumer Commission (**ACCC**) quickly shifted its enforcement focus to managing the impact of the pandemic on businesses and consumers, including issuing a number of interim authorisations for conduct that would otherwise be in breach of competition laws.

Notwithstanding this, the ACCC continued to build on its criminal and civil cartel work, which remains an enduring priority. This year, the Commonwealth Director of Public Prosecutions laid criminal charges against a pharma company and its former export manager for 33 counts of cartel conduct. The charges relate to arrangements with overseas suppliers to fix prices, restrict supply, allocate customers and/or geographic markets, and/or rig bids for the supply of an antispasmodic drug to international generic manufacturers, over a period of almost ten years. The ACCC also commenced civil cartel proceedings against an overhead crane company for alleged market sharing.

A number of cartel cases remain before the courts, including the long-running criminal cartel prosecution against three banks, and several senior executives for alleged cartel arrangements relating to trading in ANZ shares. The matter is now slated to go to trial in 2022, following the entry of formal not guilty pleas in December 2020. Another interesting development was the first conviction of an individual for inciting the obstruction of a Commonwealth official (the individual in question was sentenced to eight months imprisonment and fined AUD10,000).

The ACCC commenced several other cases in relation to anti-competitive conduct this year, including alleged boycott conduct, resale price maintenance, and exclusive dealing. Earlier in the year, the Federal Court dismissed the ACCC's exclusive dealing and misuse of market power case against a private healthcare company due to insufficient evidence. More recently, the ACCC announced it has "some fascinating investigations underway" in relation to the new misuse of market power provision, which was amended in late 2017. The ACCC brought its first case under the new misuse of market power laws in late 2019. The trial is due to commence in April 2021.

China

The State Administration for Market Regulation (**SAMR**) succeeded in maintaining its enforcement activity at a steady level in 2020, comparable to the 2019 level. It concluded 2020 with nine cartel cases with a total amount of fines of RMB20.4m (approx. USD2.9m), seven abuse of dominance cases with a total amount of fines of RMB216.3m (approx. USD31.2m) and one case related to RPM (closed without fine following a settlement with SAMR).

Industries affecting daily life (in particular pharmaceuticals, automotive and energy) have again received the bulk of SAMR's attention. Four abuse of dominance cases related to the energy sector while two concerned the pharmaceutical industry. Particularly noteworthy is the decision issued in April by which three suppliers of an active pharmaceutical ingredient (**API**) were found guilty of collective abuse of dominance, resulting in sanctions of RMB325.5m (approx. EUR41.2m) in fines and confiscation of illegal gains. In addition, two of the suppliers as well as their legal representatives and employees received administrative penalties for obstructing the investigation. It is also reported that these two suppliers have filed administrative lawsuits against SAMR – a rather unusual move in China.

Further evidence of the importance of the pharmaceutical industry is a statement by the National Healthcare Security Administration in October 2020 that it summoned and warned more than 20 companies over price-related issues, noting that cases may be referred to the relevant regulators (including SAMR) for further investigation. SAMR's intention to continue to strictly monitor the pharmaceutical industry – and sanction inappropriate behaviour – was confirmed by the issue in October of draft antitrust guidelines targeted at the API sector.

The most significant and long-lasting development of 2020 has been SAMR's increasing focus on Big Tech companies. In July, the State Council issued a set of measures to improve the business environment in China. This includes provisions barring platform companies from charging unreasonably excessive service fees and "encouraging" them to reduce charges related to platform commissions, and bars on code payment fees and internet payment fees, when charged to small businesses. Another very significant step was the publication in October of SAMR's draft antitrust guidelines for China's platform economy. This marks SAMR's first attempt at taking a reasoned approach to antitrust enforcement in the sector and is of relevance to all internet platform operators as well as other companies operating on platforms. There is no doubt that the digital economy will remain very high on SAMR's agenda in 2021.

Hong Kong

In 2020, the Competition Commission brought two new cartel cases before the Competition Tribunal, involving price-fixing, market sharing, bid-rigging and information exchange. With the progression of some of these cases, there have been a number of enforcement firsts.

Significantly, the Competition Commission has brought its first ever director disqualification order against an individual. Further, in its latest text book cartel case, the Competition Commission has started to bring action against a parent company for a contravention committed by a subsidiary over which it exercises decisive influence. This sends a strong signal about the importance of ensuring compliance with the Competition Ordinance by the whole group, including parent companies and their subsidiaries.

In 2020, the Competition Commission also broke new ground in the recent IT sector cartel. For the first time, it reached an agreement with the respondents to resolve both the liability and relief portions of the proceedings before the tribunal by consent. The case also represents the first set of proceedings resulting from a successful leniency application. In a joint application to the Competition Tribunal, the respondents admitted their participation in the anti-competitive exchange of future pricing information. The Competition Tribunal ordered payment of a penalty and suspended a director disqualification order on condition that the respondents conduct an antitrust compliance programme for all of its staff. Finally, another participant in the cartel accepted the Competition Commission's unprecedented use of an infringement notice as a remedy – the company committed to strengthen its antitrust compliance programme to avoid being named as a respondent in the proceedings.

We expect the Competition Commission to make greater use of these processes, penalties and remedies as it continues to strengthen its enforcement strategies. Although almost every case so far has involved cartel conduct, the Competition Commission on 21 December 2020 brought its first case to the Competition Tribunal against Linde for abusing its substantial market power in the medical gases supply market in Hong Kong.

India

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

In 2020, India witnessed a significant decline in the number of cases involving penalties imposed by the Competition Commission of India (**CCI**). The CCI imposed a penalty (INR301.6/USD 40.4m) in only one instance, and adopted a business-friendly approach by issuing cease and desist orders in other cases. The reluctance to impose penalties may be attributed to the circumstances around Covid-19, with one case explicitly citing the pandemic as a consideration during the penalty imposition process. Interestingly, penalties were not imposed despite the fact that the anti-competitive conduct at issue predated the onset of the Covid-19 crisis. One consequence of the non-imposition of penalties may be an effect on the leniency regime, with potentially reduced incentives for cartel members to approach the CCI.
On the Covid-19 front more generally, the CCI issued an advisory clarifying that Indian antitrust legislation is well equipped to assess Covid-19-induced synergies, and that collaborations leading to increased efficiencies are not, of themselves, prohibited.

As concerns the digital economy, in the wake of the e-commerce study published in January 2020, developments in the technology sector gained traction. The CCI initiated investigations against major domestic and global players.

Trends suggest that the focus of these investigations will be issues such as platform neutrality, exclusive arrangements, and interoperability. It remains to be seen whether the CCI's approach will be influenced by other global antitrust authorities' decisions in the digital sector.

An important legislative development is the Competition (Amendment) Bill, 2020 (**Bill**) which has proposed several amendments, such as the introduction of a settlement and commitment mechanism, an authority to supervise the CCI's functioning and extension of the cartel provisions to catch hub-and-spoke arrangements and buyers' cartels. Enactment of the Bill will result in substantial changes in the competition regime and the CCI's practices in 2021.

Introduction of a settlement and commitment mechanism is among the substantial changes proposed by amendments to India's competition legislation.

Japan

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

Due to the spread of Covid-19, the JFTC's enforcement activity levels were temporarily reduced in 2020, especially in April and May. Partly because of this, the number of cases where fines were imposed was lower than usual, as were the amounts of the fines imposed. The JFTC restarted conducting dawn raids in September.

A notable development in 2020 was that the JFTC made active use of the commitment procedure introduced in December 2018, approving five commitment plans. A commitment procedure is a cooperative corrective process where a business suspected of an infringement of the Antimonopoly Act submits a commitment plan to the JFTC for approval. Under the procedure, the JFTC does not determine if the business breached the Antimonopoly Act, and no cease and desist order or fine payment order is issued. It is expected that the JFTC will continue to make heavy use of the commitment procedure for non-cartel cases.

In another development, the amended Antimonopoly Act, which includes a new fine reduction and exemption system and which will improve the JFTC's enforcement powers, came into effect on 25 December 2020. A further significant piece of legislation, the Digital Platform Transparency Law, was promulgated in June 2020 and is due to come into effect in 2021. It is expected that more detailed enforcement rules and guidelines will follow, and that the regulations will be implemented through a "joint regulation" approach between the Ministry of Economy, Trade and Industry, the JFTC, and other government agencies.

Five commitment plans approved by the JFTC in 2020: continued active use of commitment procedure anticipated in 2021.

Singapore

With thanks to Daren Shiau of Allen & Gledhill.

In 2020, the CCCS continued to take action against cartels and also concluded a number of investigations into alleged anti-competitive conduct in the property valuation industry and the online food delivery and virtual kitchen industries. On the antitrust enforcement front, the CCCS issued two infringement decisions in the building, construction and maintenance services industry and imposed penalties totalling SGD451,112 (approximately USD326,244). In both cases, the CCCS found that contractors had participated in anti-competitive agreements to rig bids relating to tenders for the provision of building, construction and maintenance services; and maintenance services for swimming pools and other water features respectively. Investigations into both cases were commenced following the submission of complaints to the CCCS.

The two decisions bring the total number of cartel cases concluded by the CCCS to 17 since the relevant provisions of the Singapore Competition Act came into force in 2006. In the swimming pools case, the CCCS applied its fast track procedure for the first time since it came into effect in December 2016. The procedure enables parties who admit liability for their infringement of the Singapore Competition Act to become eligible for a fixed percentage reduction in the amount of financial penalty.

Aside from enforcement activities, the CCCS has also conducted a review of its guidelines on the Singapore Competition Act and proposed changes to six guidelines.

The key proposed changes include updates to provide greater clarity on issues such as the interface between intellectual property law and competition law; market definition, and the assessment of market power and types of potentially abusive conduct in the digital era. Updates to reflect the CCCS's current practices in assessing commitments and remedies have also been proposed.

In the long run, given the increasing relevance of the digital and data economy, the CCCS is predicted to focus particular attention on issues connected to e-commerce and digital platforms to ensure that its assessment framework and toolkits remain relevant and effective. The agency's Policy and Markets Division is believed to have pinpointed digital platforms as a potential area of concern. The CCCS also intends to use technology and big data to better identify markets that have competition or consumer protection issues. Examples include a bid-rigging detection tool to spot potentially problematic tenders, developed in-house, and a collaboration with Singapore's Government Technology Agency on a text analytics tool to identify suspicious tender documents.

Proposals in the CCCS's review of its guidelines on the Singapore Competition Act include changes to assessment of market power and types of potentially abusive conduct in the digital era.

South Korea

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

In 2020, the Korea Fair Trade Commission (**KFTC**) continued active enforcement against cartels despite the Covid-19 outbreak, with the issue of no fewer than 50 decisions (with potentially additional decisions which have not yet been published). The KFTC imposed total fines of around KRW127.0bn (USD101.6m) on cartels, marking a 40% increase from 2019 (USD80.2m). The highest fine was imposed in a domestic bid-rigging case and totalled KRW47.2bn (USD37.8m), accounting for 37% of the total fines imposed on cartels by the KFTC in 2020. As in previous years, the KFTC's sanctions were mostly for bid-rigging conduct, with approximately 63% of the total value of fines imposed in such cases (KRW81.0bn, USD64.8m). Broken down by sector, the highest fine of KRW82.5bn (USD66m) was imposed on the industrial and manufacturing sector. Three international cartel cases involving bid-rigging during banks' bidding for foreign exchange swap deals attracted a fine of KRW1.3bn (USD1m).

There were a total of six decisions (with potentially additional decisions which have not yet been published) involving non-cartel anti-competitive arrangements. Of the six decisions, the KFTC imposed sanctions, but not fines, in three RPM cases, and for two of the remaining three vertical restrictions only imposed a fine of KRW738m (USD0.6m). The KFTC has not imposed significant fines for infringements of the abuse of dominant position prohibition since it imposed more than KRW1,000bn (USD843m) on Qualcomm in 2017. However, a public statement issued by the KFTC indicates that it will be actively investigating cases of this type, with a particular focus on abuse of dominance in the ICT sector.

In December 2020, a bill for an amendment to the Monopoly Regulation and Fair Trade Act (**MRFTA**) was passed at the National Assembly (**Amendment**). The Amendment doubled the upper limit of fines for breaches of the MRFTA, for example by adjusting the upper limit of fines for cartels from 10% to 20%, and also includes information exchange as a type of cartel for the first time. The Amendment is expected to come into effect from December 2021. Strengthened enforcement by the KFTC and an increase in the amount of fines imposed are predicted to follow.

63% of the total value of fines imposed related to bid-rigging conduct.

Taiwan

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

The fines imposed by the Taiwan Fair Trade Commission (**TFTC**) in 2020 for cartel infringement generated NTD603.7m (around USD20.5m). This is a significant increase from NTD60.4m (around USD2m) in 2019. Nevertheless, in terms of the number of closed investigations in 2020, the TFTC issued a decision in only one cartel case. The TFTC imposed no fines relating to abuse of dominance or non-cartel infringements in 2020. Official enforcement statistics are available only in the TFTC's annual report, which is usually released in April of each year and which covers the previous year. As a result, it is possible that this data may change.

In terms of areas of particular focus for the TFTC, it will certainly be continuing to keep a close watch on issues raised by the digital economy. While it did not, in 2020, make any specific announcement as to its approach towards the role played by antitrust rules, continuing to take the view that the current laws are sufficient to tackle the issues involved, it has, nevertheless, promoted several research projects on the subject, looking at issues such as big data, digital marketing and technology innovation.

Thailand

2020 was one of the most eventful years for antitrust law in Thailand since its updated regime took effect in 2017. The Thai Office of the Trade Competition Commission (**OTCC**) ramped up activity, both in terms of enforcement – including holding four public hearings and issuing three industry-specific regulations on unfair practices – and advocacy, working to raise levels of awareness of antitrust law across the country, and to demonstrate its ability to regulate a fast-changing business landscape.

As in many global economies, the digital/e-commerce sector grew significantly in Thailand in 2020, partly in response to changes in consumer behaviour as a result of the Covid-19 pandemic. In the food sector, lockdown led the Thai population to shift rapidly from using dine-in restaurants to online food delivery services. Multiple complaints from restaurants alleging that online delivery platforms were taking advantage of the pandemic to overcharge them led the OTCC in May to order investigations into online food delivery operators for potential anti-competitive conduct. Recognising the business need for guidance on what would constitute compliant trade practices, the OTCC issued sectoral guidelines which came into force in December 2020. The guidelines provide detailed examples of unfair practices, including the collection of unfair benefits and fees (such as advertising fees and promotions) and the imposition of unfair conditions (such as exclusive dealing and rate parity clauses). Similar sector-specific guidelines are expected to be issued in the course of 2021 in other digital sectors, including logistics.

Overall, we expect to see continuing vigorous enforcement activity/decisions from the OTCC in 2021, with a reported 30+ cases, for the most part relating to market abuse, currently on its roster. The digital economy, and the role played by digital platforms, will remain an area of focus for the regulator, as will the interplay between consumer law and antitrust law. Following the amendments made to the dominance thresholds in 2020 (unilateral dominance with a market share of at least 50% and revenues of at least THB1bn; collective dominance by top three business operators with a market share of at least 75% in aggregate (but no lower than 10% each) and revenues of at least THB1bn each), review of the existing wider antitrust framework to ensure that it is still fit for purpose is also on the cards. To meet these demands, the OTCC is anticipating a doubling of its size by the end of 2021.

OTCC anticipates doubling in size by end of 2020 to meet the demands of its expanding enforcement regime.

South Africa

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

The majority of antitrust enforcement cases in 2020 involved the industrial and manufacturing sector, which remains one of the South African Competition Commission (**Commission**)'s priority sectors. The 2020 data, which relates specifically to conduct in relation to the Covid-19 pandemic, indicates that the Commission has prioritised resolving matters over insisting on admissions of liability.

Excessive pricing cases have dominated the Commission's 2020 enforcement activity, particularly following the entry into force of specific Covid-related regulations in March 2020. At the Commission's annual conference in November, the Competition Tribunal (**Tribunal**)'s chair noted that the Commission had received around 1,800 complaints of excessive pricing or price gouging of PPE and essential foods, the majority of which were handled by means of cooperation between the Commission and the National Consumer Commission. Of these, 37 were brought to the Tribunal as consent orders and two were contested.

Major penalties imposed in 2020 relate to three excessive pricing cases, all concerned with the sale of face masks. In two of these, involving alleged price increases as high as 987% and 261% respectively, the conduct concerned predated the coming into force of the emergency Covid-related regulations and was reviewed under the general abuse of dominance rules. They were both prosecuted by the Commission before the Tribunal. The matters were heard virtually and were determined based on affidavits and economic reports, together with oral and written submissions made by the parties' legal representatives and economic experts.

Other than requiring contributions to the Solidarity Fund (a government fund to use public donations to assist with the funding of Covid relief initiatives), commitments or remedies imposed in Covid-related excessive pricing consent agreements have included pricing remedies, and/or donations of essential goods such as hand sanitisers to local charities. In some instances, the settlement/consent agreement makes provision only for charity donations and/or contributions to the Solidarity Fund, with no administrative penalty.

Looking ahead to 2021, it is anticipated that scrutiny and enforcement of conduct infringing the Covid-related excessive pricing regulations will remain a key priority for the Commission.

Excessive pricing cases (around 1,800 complaints made) dominated 2020 enforcement activity – most were resolved by cooperation mechanisms.

COMESA

2020 did not show much by way of development on the levels of enforcement by the COMESA Competition Commission (**CCC**) in 2019, which remained relatively limited. However, for those investigations that were reported, potential abuses of dominance appear to be high on the CCC's agenda. One probe, opened in November 2019, into a possible abuse of dominance by a pan-African groceries retailer, was closed in June with no infringement found. However, in May, action was taken by the authority to ban 11 distribution agreements covering products including alcoholic beverages and soft drinks, and fast moving consumer goods. The agreements were considered to pose a potential threat to competition in the Common Market, by safeguarding the dominance held by certain undertakings in a position of monopoly.

A&O global antitrust practice

Our global antitrust practice represents clients in the most high-profile international and national cartel and other behavioural investigations and in the equally important litigation that often follows. Investigations are often carried out simultaneously across different jurisdictions and regulators increasingly coordinate approaches. Sanctions – both for individuals and corporates – are a serious threat. More than ever, any multinational needs to have a cross-border and consistent approach and response strategy in place to meet the potential risks of public and private enforcement actions.

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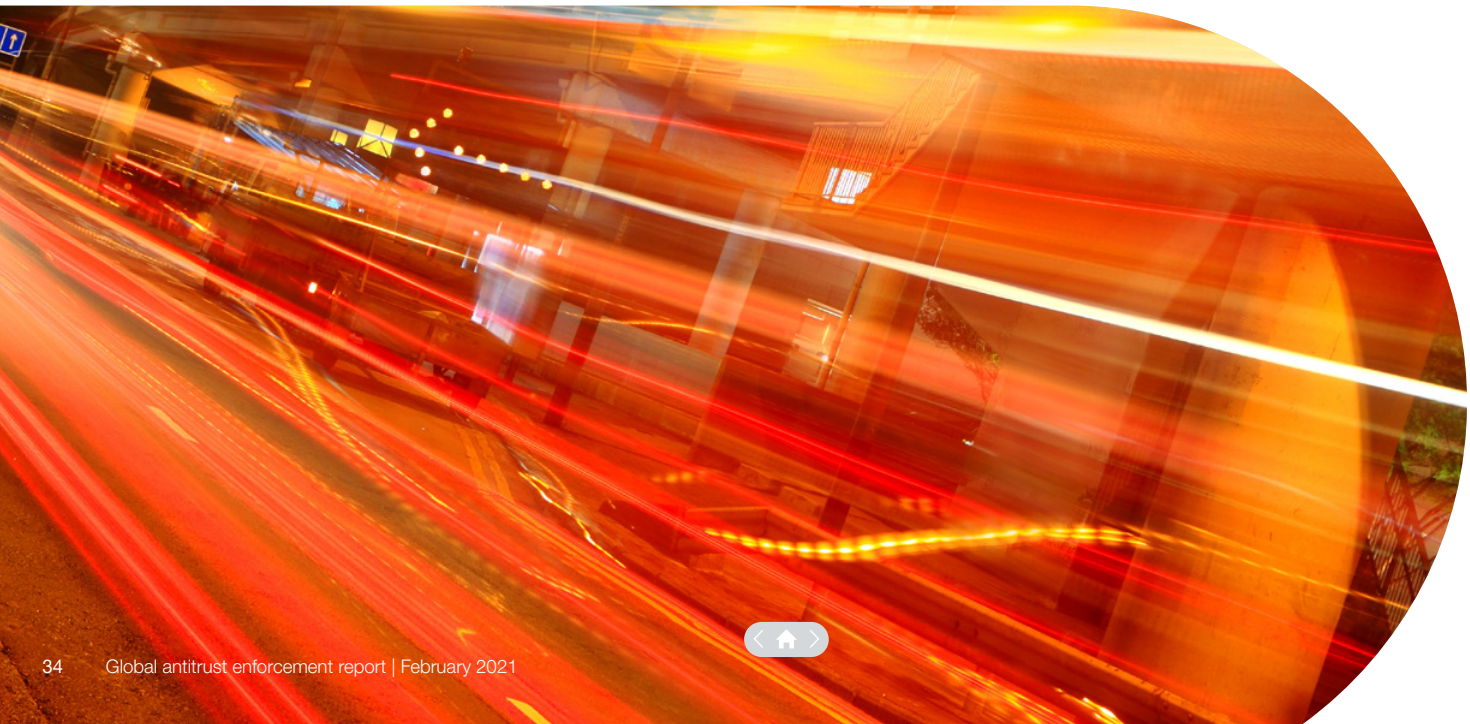

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