



ALLEN & OVERY

# Global antitrust enforcement report

March 2023



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# Foreword

2022 saw a mixed picture in terms of antitrust enforcement across the globe. For the jurisdictions surveyed in our report, global fine totals were down significantly from 2021 (USD3.5bn, compared to USD11.3bn), with the U.S., EU, and a number of other key jurisdictions reporting marked decreases in fines. And although 2021 was in many ways an anomaly year of bumper enforcement, 2022's fining totals were also down on 2020, where global fine totals were USD4.9bn despite the Covid-19 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, which in turn means that it is difficult to draw material conclusions from changes in annual totals.

That said, the number of major legislative reforms ongoing across a number of key jurisdictions suggests that antitrust enforcement is in an important phase of transition, which perhaps at least in part explains the 2022 dip in fines. Indeed, 2023 will see the commencement of the EU's Digital Markets Act, with a number of other jurisdictions set to bring in similar legislation. All eyes will be on how quickly and to what extent the European Commission (EC) and other regulators enforce under this new armoury.

Outside the digital sphere, 2022 saw the introduction of a number of new rules and guidance, including important updates in the EU and UK to the rules on vertical restrictions. Regulators also continued to grapple with the interplay between antitrust and sustainability, with a potential divergence of approach between the EU, U.S. and UK regulators continuing to develop. Building on developments in 2021, a number of regulators on both sides of the Atlantic ramped up campaigns against anti-competitive conduct in labour markets – the publication of new guidance in the UK and prospective legislation in the U.S. suggests that 2023 might well bring significant investigative action in this space.

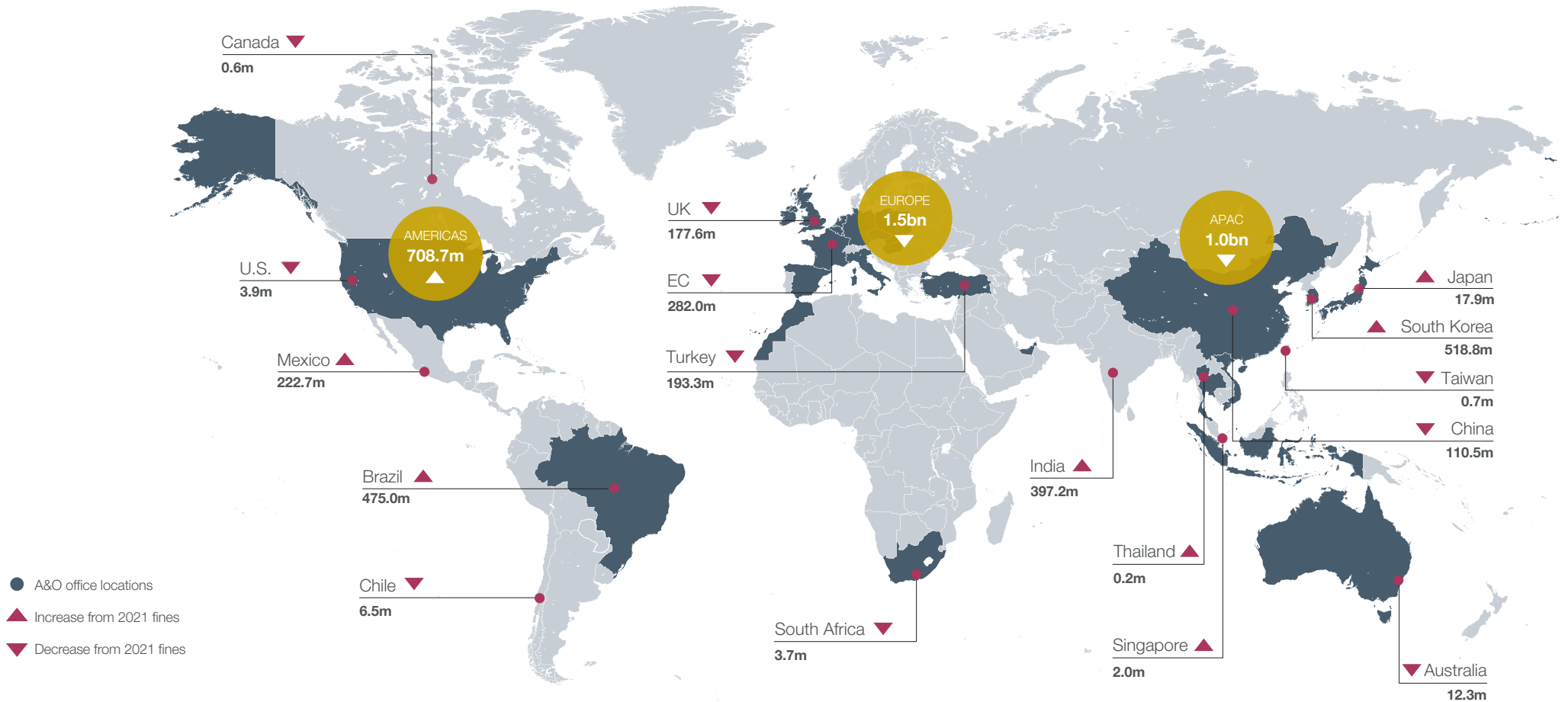
2022's lower fining totals may also be a partial product of the continued downtick of immunity/leniency cases that has been observed over the last few years. The prospect of follow-on litigation and exposure to liability in other jurisdictions has greatly reduced the leniency pipeline in

many jurisdictions. Regulators have responded by revamping leniency programmes in order to increase their attractiveness to whistleblowers, as well as ramping up their dawn raid activities. In an early sign that these efforts might be paying off, the EC indicated that it received a marked increase in leniency applications during the course of 2022.

Finally, it seems clear that private damages enforcement will continue to constitute a high risk area for businesses. The recent trend towards private proceedings being brought as standalone claims, and the allegation of novel types of unilateral conduct, look set to increase, with the UK Competition Appeal Tribunal (CAT) expecting a further 'explosion' of similar cases in the tech sector. Looking ahead to 2023, it will be interesting to see how the ongoing legislative reforms by antitrust regulators interact with private enforcement, and in particular the extent to which the new rules pave the way for increased follow-on action.



# Global antitrust enforcement fines in 2022 were USD3.5bn, a decrease from 2021



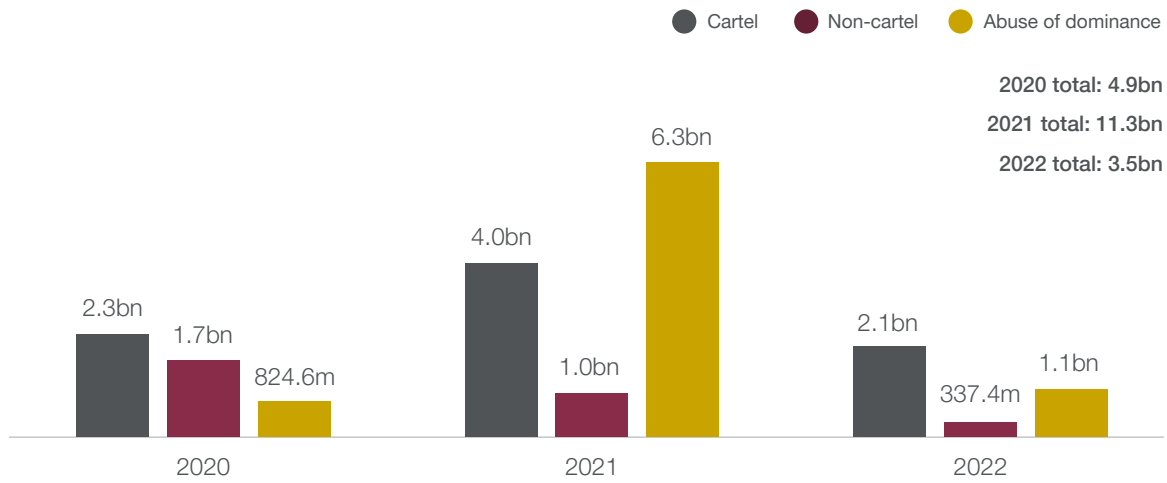
All figures are in U.S. dollars (USD).

Ireland is a new jurisdiction for the 2022 report.

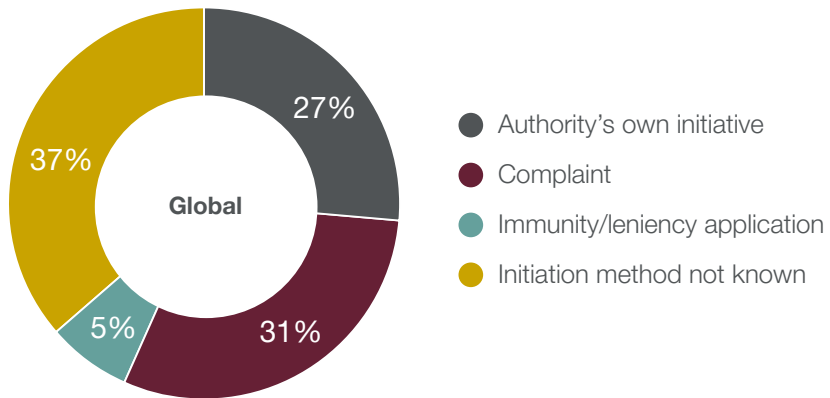
2022 statistics are approximate and may not be exhaustive. They reflect fine levels calculated using an average exchange rate for 2022.

U.S. figures relate to fines imposed at the federal level by the U.S. Department of Justice Antitrust Division (DOJ) and are for the U.S. fiscal year, which runs from 1 October to 30 September. All other jurisdictions' statistics relate to the calendar year.

### Total global fines by conduct type, 2020-2022



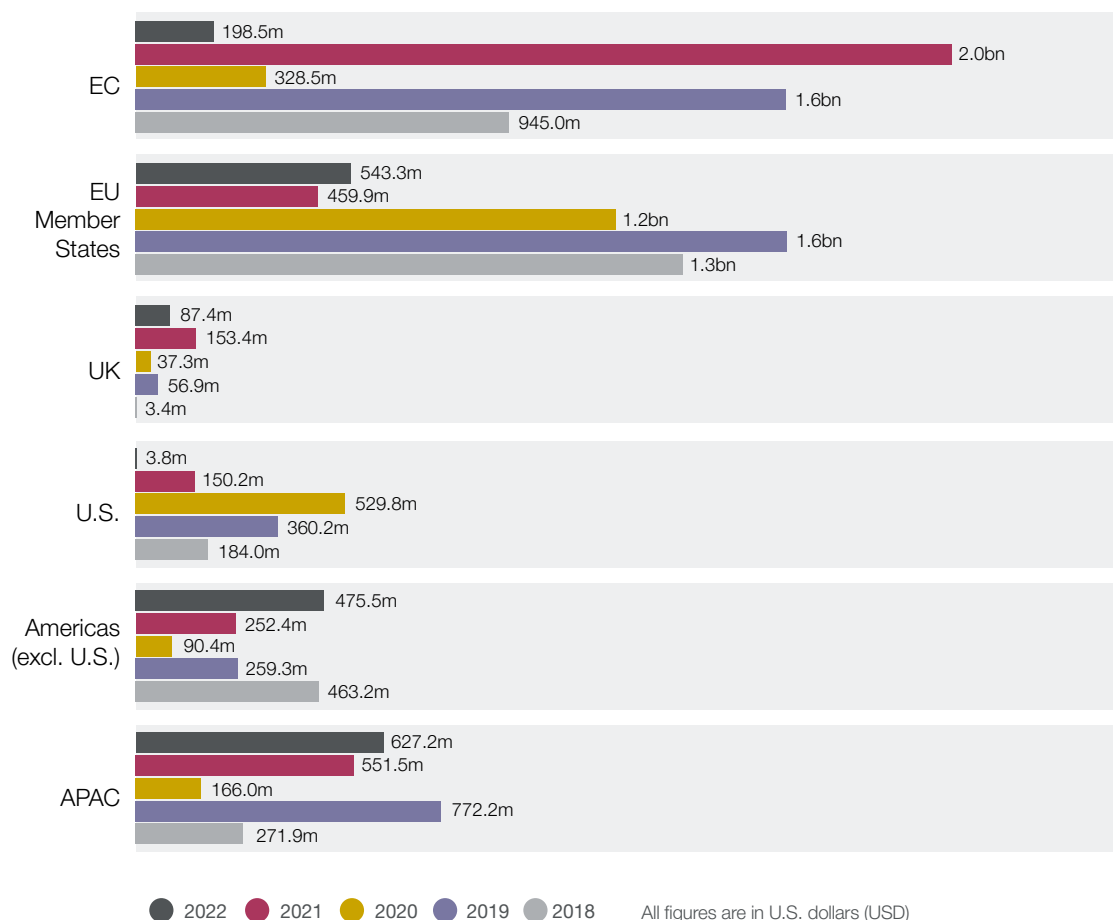
### Mode of initiation of enforcement action, 2022



# Cartel enforcement remains a priority for antitrust authorities

Overall, global fine levels for cartel activity in 2022 (USD2.1bn) were just half the 2021 total (USD4.0bn). However, the high 2021 total was largely attributable to a small number of significant fines imposed by the EC in the car emissions case (EUR875m) and financial services cases (totalling EUR744m). 2022 in fact saw a slight increase in the total number of cartel enforcement decisions, from 205 to 220.

## Regional cartel fine comparison (2022 total: 2.1bn)



## Key statistics

The EC recorded its lowest total fine value (EUR188.6m) for a number of years, finalising just two cartel enforcement decisions in 2022 – in the styrene monomer and metal packaging cases. This is down from the 11 decisions adopted in 2021, although the 2021 total included several re-adopted decisions following court challenges. The average total fine per decision (EUR94m) was also lower than the figures for 2021 (EUR159m) and 2020 (EUR96m).

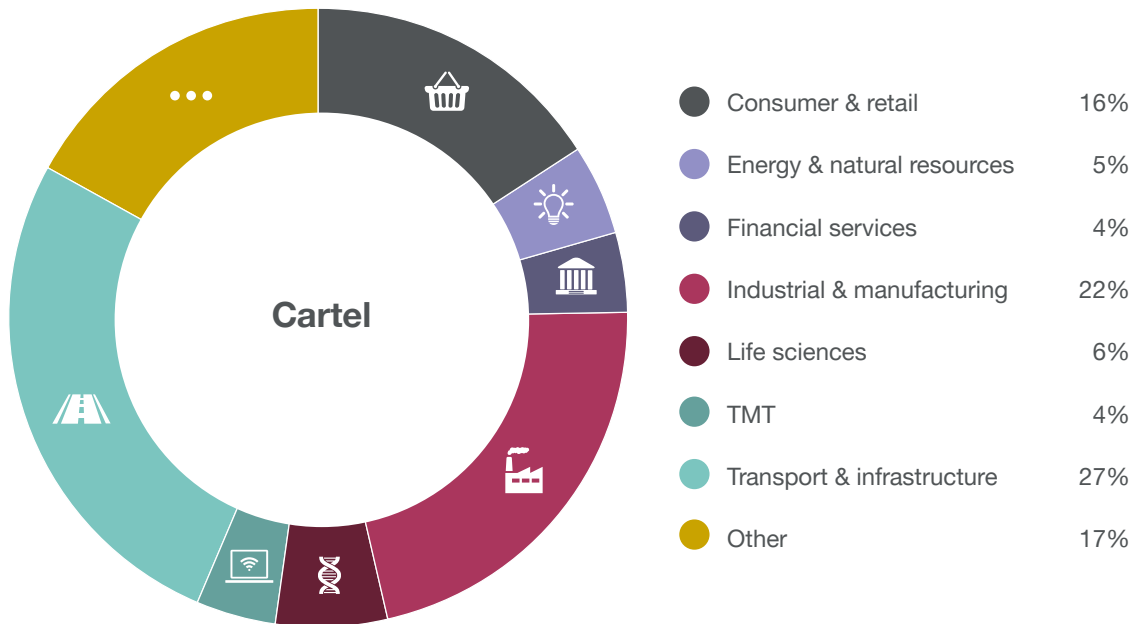
Enforcement at the national level by EU Member States was broadly similar to that seen in 2021. The top three EU Member States by total fine level were Spain (EUR227.6m, two decisions), Romania (EUR102.8m, five decisions) and Belgium (EUR66.0m, three decisions).

In the UK, the Competition and Markets Authority (CMA) issued GBP37.5m in fines across three decisions. The UK Payment Systems Regulator (PSR) also imposed fines of GBP33.3m against five companies for agreeing not to compete or poach each other's customers in relation to the supply of prepaid cards used by local authorities for welfare disbursements. These are the first fines issued by the PSR using its concurrent antitrust powers.

By contrast, cartel enforcement in the U.S. was down in 2022, with fine amounts reaching the lowest levels in a decade (USD3.9m), reflective of a continued trend over the last three years.

In the APAC region, South Korea continued to be one of the most active antitrust authorities for enforcement against cartel conduct, issuing fines of USD518.4m across 54 decisions.

Cartel decisions by sector, 2022



**Financial services: watch this space for further enforcement**

While the financial services sector has been a consistent area of focus for cartel enforcement in recent years, in 2022 there were just nine enforcement decisions totalling USD35.5m.

Despite this, financial markets look set to remain on antitrust authorities' radars, and a key enforcement priority in certain jurisdictions. The UK CMA's financial services sector cartel investigation remains ongoing and, in December 2022, the EC sent a statement of objections to two banks in its euro-denominated bonds cartel investigation.

In Australia, the Federal Court imposed suspended prison sentences on four individuals linked to Vina Money Transfer and fined the company for fixing the exchange rate between the Australian dollar and Vietnamese dong and for fixing the fees they charged customers. It is the first time that individuals have received prison sentences under Australia's criminal cartel offences.

By contrast, the Australian Competition and Consumer Commission's (ACCC) criminal cartel case against three banks and six senior banking executives, in relation to the alleged withholding of shares by the underwriters of a failed share placement, collapsed in February 2022. The ACCC's withdrawal of charges ahead of trial, and before any substantive issues were determined by the court, leaves some uncertainty as to whether this type of conduct may give rise to antitrust issues.

“The UK CMA’s financial services sector cartel investigation remains ongoing and, in December 2022, the EC sent a statement of objections to two banks in its euro-denominated bonds cartel investigation.”

# Key themes in cartel enforcement

## Forms of cartel conduct

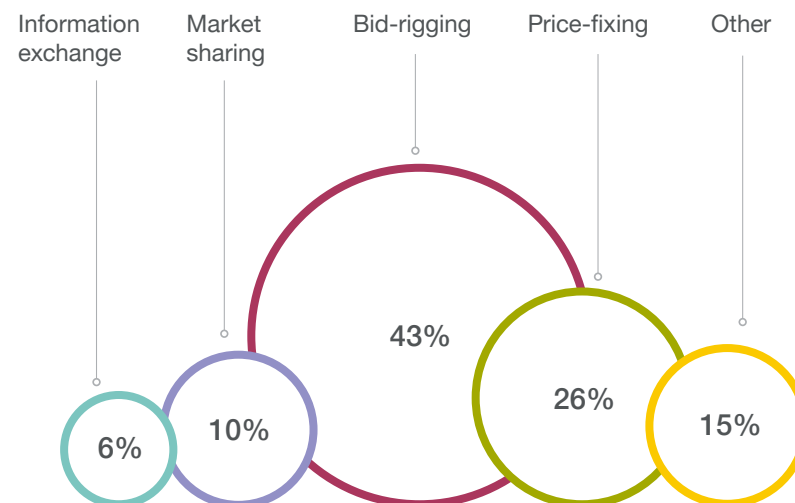
### Bid-rigging: a target across multiple sectors

As in 2021, bid-rigging was the most commonly enforced type of cartel conduct in 2022 (43% of decisions), with investigations progressed and concluded in a number of jurisdictions.

The construction industry continued to be the sector of focus, with active cases and enforcement in Austria (in an ongoing cartel probe targeting more than 40 construction companies), the UK (where the CMA provisionally found that ten construction firms colluded on prices when submitting bids in competitive tenders and had engaged in “cover bidding”) and Spain (where construction companies were fined for coordinating on technical bids rather than economic terms). Significantly, in the Spanish case, the companies may also face a ban from participating in public procurement tenders.

Other sectors were the subject of bid-rigging enforcement elsewhere. In South Korea, the Korea Fair Trade Commission (KFTC) fined rolling stock manufacturers USD45.2m for rigging bids in public tenders for rail vehicles. Fines were levied in Japan in relation to data printing services and pharmaceutical procurement, in Italy in relation to water meters, in Hungary in relation to an anaesthesia and ventilation equipment tender, and in France in relation to waste management services.

Individuals also faced significant sanctions for bid-rigging conduct in 2022. In July, a U.S. Department of Justice Antitrust Division (DOJ) probe resulted in a military contractor pleading guilty to rigging tenders on public military contracts. The individual faces a maximum penalty of ten years in prison and a USD1m criminal fine.



“Significantly, in the Spanish case, the companies may also face a ban from participating in public procurement tenders.”



## Cartel developments to watch

### Labour markets: authorities hard at work

Building on developments seen in 2021, last year a number of regulators on both sides of the Atlantic ramped up campaigns against anti-competitive conduct in labour markets. Investigations in particular targeted wage-fixing agreements (where employers agree to set or fix employee wages) and “no-poach” agreements (where employers agree not to hire each other’s employees).

In the U.S., the DOJ secured its first no-poach/wage-fixing criminal enforcement conviction against a healthcare staffing company for entering into and engaging in a conspiracy with a competitor to allocate employee nurses and to fix the wages of those nurses. In Brazil, the Administrative Council for Economic Defense (CADE) fined six healthcare companies approximately USD6.6m following an unprecedented probe into benchmarking and exchanging information on wages and benefits.

In Europe, Poland’s Office of Competition and Consumer Protection (PCA) issued its first decision concerning a no-poach infringement. The PCA found that after the 2019/2020 season (terminated early due to the Covid-19 pandemic) several basketball clubs, with support from the basketball league, agreed not to pay their players’ wages for the remainder of the season and to terminate their contracts. In Romania and Turkey, the antitrust authorities have opened investigations into companies suspected of entering into no-poach agreements in the automotive and software industries.

With new legislation in prospect across several jurisdictions, labour markets look set to remain a focus for antitrust authorities in 2023. The most high profile of these is the U.S. Federal Trade Commission’s (FTC) proposed rule, announced in January 2023, to prohibit employers from imposing non-compete restrictions on their employees and require any existing non-compete agreements to be rescinded, with limited exception. The proposed ban has met with criticism from outgoing Commissioner Wilson, as well as from business groups and other stakeholders. Outside the U.S., in Canada, the introduction of a new criminal conspiracy offence for wage-fixing and no-poach agreements is due to come into force in June 2023. In February 2023, the UK CMA published guidance for employers on how to avoid anti-competitive behaviour in labour markets.

### Guilty by (trade) association

A number of authorities, particularly in the APAC region, continued to investigate and penalise the activities of trade associations.

In China, the Shaanxi Administration for Market Regulation (AMR) fined 13 concrete firms and an industry body USD64.6m in relation to a monopoly agreement under which the companies negotiated and agreed the timing and range of several price hikes. The trade association organised meetings and online chats between the companies’ decision-makers, facilitated discussions on cement product prices, and coordinated implementation of the price increases.

In South Korea, the KFTC issued fines totalling USD141.4m against 38 container shipping companies and two trade associations for price-fixing. The companies raised minimum freight rates on routes between Korea and Southeast Asia and Japan, agreed not to poach each other’s clients, and monitored compliance through the shipping industry associations.

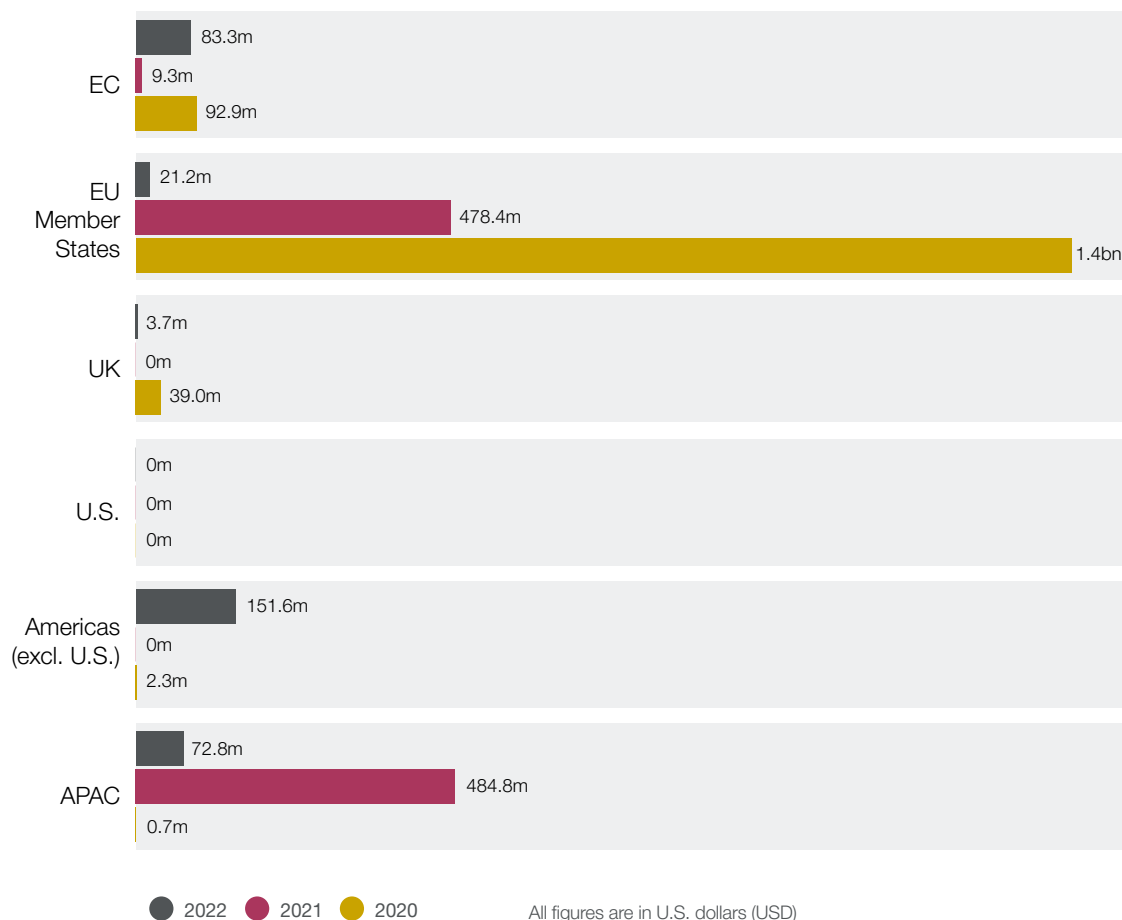
The decisions highlight the importance of having robust safeguards in place to minimise the risk of anti-competitive conduct via trade associations.



# A changing landscape for enforcement against vertical and other non-cartel conduct

Overall, global fines for vertical and other non-cartel conduct in 2022 were significantly down on previous years (less than half the 2021 and 2020 totals). However, the total number of decisions issued increased slightly (from 53 in 2021 to 57 in 2022). Many of these decisions involved some form of commitment or settlement in lieu of imposing a fine. 2022 also saw the introduction of important reforms to the rules on vertical restrictions in several key jurisdictions.

## Regional non-cartel fine comparison (2022 total: 337.4m)



## Key statistics

The EC actively enforced its rules on vertical and other non-cartel conduct, recording four decisions (up from one in 2021). Three of the cases involved commitments, which explains the relatively low level of fines.

Despite a marked decrease in the overall fine level across EU Member States, national authorities issued 19 enforcement decisions, accounting for 33% of decisions globally. Notably, the Czech Republic, Italy and Spain together accounted for 55% of EU national authority fines.

The UK CMA saw a substantial uptick in enforcement activity against non-cartel conduct, issuing four decisions (compared to none in 2021). All four cases involved some form of commitment, leniency or settlement, explaining the relatively low level of fines.

In the U.S., the FTC has rarely enforced laws on vertical restraints in recent times. However, a new policy statement and the recent challenge of a loyalty rebate programme – branded a ‘pay-to-block’ scheme – may signal a shift in approach. 2022 also saw the first significant instances of enforcement against non-cartel conduct in the Americas in our dataset. All three decisions were issued by Brazil’s CADE, including a USD151.6m penalty imposed on the mobile phone operators Claro, Oi and Telefonica, ending a seven-year investigation initiated following a complaint from BT.

The number of decisions issued in APAC in 2022 increased to 21 (accounting for 38% of the global total, up from 28% in 2021), with authorities in China, Japan, South Korea and Thailand all prioritising enforcement against non-cartel agreements. The significant decrease in the level of fines from 2021 to 2022 was largely due to the USD456.7m penalty imposed on Gongniu in China in 2021.

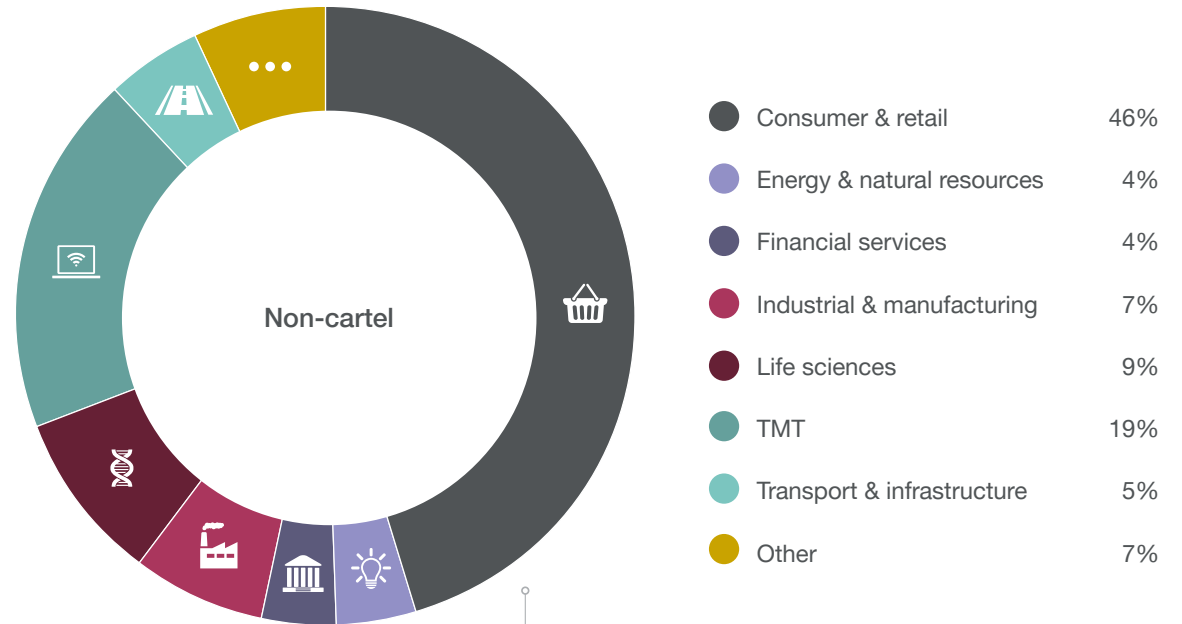
**Non-cartel decisions by sector, 2022**

**Significant fines on telecoms operators**

Although there were just 11 non-cartel decisions in the TMT sector, these accounted for approximately 85% of total fines. This was largely driven by the significant fine imposed on the Brazilian mobile network operators (as noted above) and the EC's re-adopted decision against Telefónica and Pharol for entering into a non-compete agreement (EUR79.2m).

**High volume of decisions in consumer & retail (albeit with low fine levels)**

By contrast, the 24 decisions against operators in the consumer & retail sector only accounted for 8% of global fines, perhaps reflecting the smaller scale of some consumer and retail businesses.



# Key themes in non-cartel enforcement

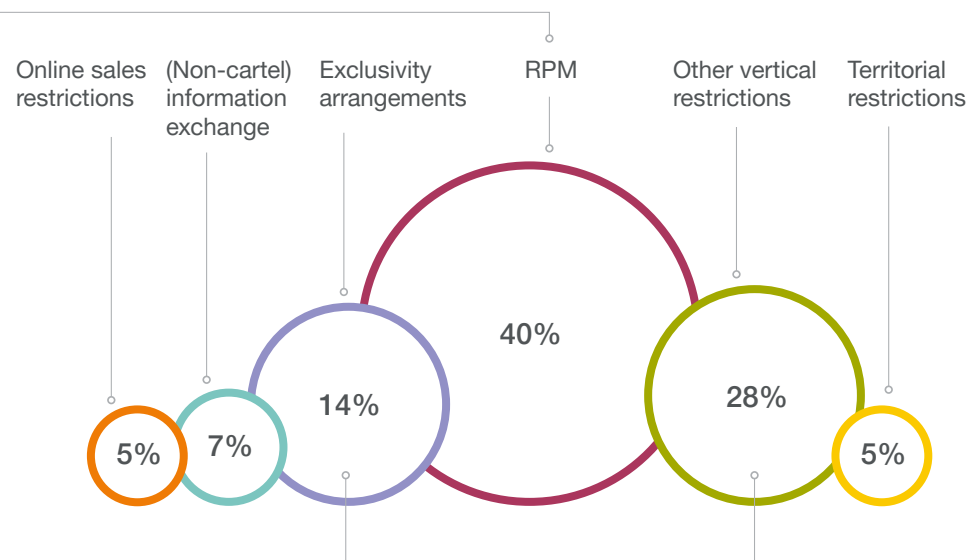
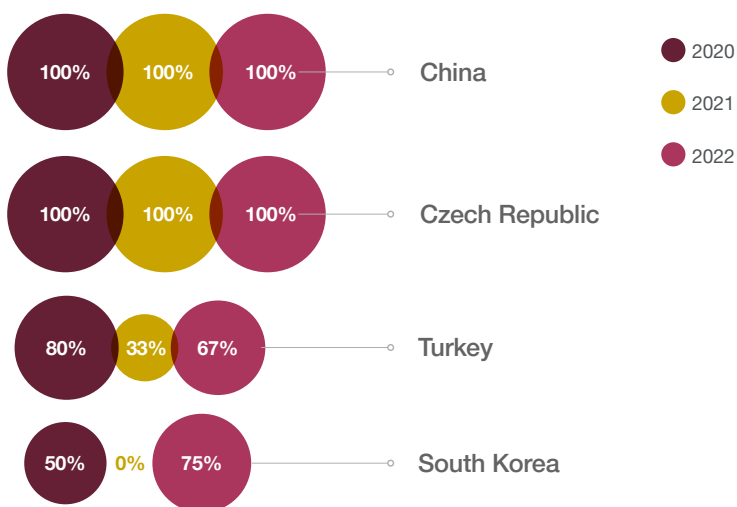
## Forms of non-cartel conduct

### RPM continued to be a key enforcement priority for authorities across the world

China issued five decisions relating to resale price maintenance (RPM) conduct. Notably, a fine on the education technology company Kairui for setting the price of courses offered by its franchisees departed from previous judicial practice that had distinguished franchise agreements from other arrangements subject to RPM rules. It remains to be seen how the new Anti-Monopoly Law (AML), which allows businesses to put forward effects-based arguments, will affect RPM enforcement in practice.

RPM was also a key area of focus for authorities in Central and Eastern Europe, with the Czech Republic, Hungary and Poland issuing six decisions, all in consumer and retail sectors. The Hungarian Competition Authority (GVH) delivered the most recent decision against Yamaha and its distributors. It forms part of a string of cases across Europe that have been initiated by Yamaha's multiple applications for leniency.

### % of vertical decisions involving RPM conduct



### Exclusivity arrangements and MFNs/parity clauses: a mixed picture

Exclusivity clauses and 'most favoured nation' clauses (MFNs) attracted interest in several jurisdictions in 2022, particularly in the context of digital platforms. Japan's Fair Trade Commission (JFTC) approved a commitment plan regarding MFN clauses in the contracts used by online travel booking platforms Booking.com and Expedia.

Elsewhere, Brazil's CADE agreed a settlement with corporate wellness platform Gympass that significantly limited its use of exclusivity and MFN clauses in contracts with gyms, while the Trade Competition Commission of Thailand (TCCT) fined a food delivery platform operator for imposing a clause that incentivised restaurants not to sell on other platforms.

In the UK, by contrast, the CAT overturned the CMA's 2020 decision against price comparison website CompareTheMarket, which had found that wide MFNs infringed antitrust law. The CAT concluded that the wide MFNs in question had no proven anti-competitive effect. This judgment is particularly important in that it potentially undermines the CMA's decision to characterise wide MFNs as 'hardcore' in its new vertical agreements block exemption order, a key point of divergence from the EU approach (see further details below). Going forward, it will be interesting to see how the CMA reconciles the CAT's judgment with the position set out in its new vertical rules.

## Vertical conduct: an evolving, and potentially fragmented, legal framework

2022 saw landmark reforms to the rules and guidelines governing authorities' enforcement against vertical restraints in the EU, the UK and China.

### New EU and UK vertical rules and guidelines

New antitrust regimes for vertical arrangements took effect in both the EU and the UK. Significant and not entirely aligned changes have been made to both rulebooks.

In the EU, a revised Vertical Block Exemption Regulation (VBER) continues to exempt certain categories of vertical arrangements from the prohibition on anti-competitive agreements. In the UK, similar rules are now set out in a Vertical Agreements Block Exemption Order (VABEO).

The updates to the rules in both jurisdictions in large part reflect new market developments and in particular the growth in e-commerce. Other amendments serve to clarify or update existing rules. Helpfully, businesses have 12 month transition periods to make any necessary amendments to ensure that vertical agreements that are block exempted under the old rules continue to benefit from the new block exemptions.

Crucially, however, while the EU and UK take a consistent position in many areas, they diverge in a few key aspects.

#### – Dual distribution

Both jurisdictions extended the scope of the exemption available for so-called 'dual-distribution systems', where suppliers sell goods or services through independent distributors as well as directly to end-customers. Now, agreements where the parties' activities overlap at the wholesaler or importer level can also be exempt.

However, the EU rules provide for one important new exclusion for online platforms that have a hybrid function, ie that supply online intermediation services while at the same time selling goods or services downstream. The UK opted for a less restrictive approach, with no equivalent 'hybrid platforms' exclusion in the VABEO. Both the EU and UK provide similar guidance in relation to information exchange in a dual distribution context.

#### – MFNs / parity obligations

The assessment of parity obligations attracted considerable debate during the consultation process. In the EU, the key substantive change is that the new VBER excludes across-platform retail parity obligations from the benefit of the block exemption. Under an across-platform parity obligation, a buyer of an online intermediation service (such as a seller on an online marketplace) must not offer, sell or resell goods or services to end users under more favourable conditions through another online intermediation service (such as through another online marketplace).

The UK took a more restrictive approach – under the VABEO, all "wide" retail parity clauses fall outside the scope of the block exemption (including those which relate to indirect sales channels other than online platforms). In addition, the VABEO makes wide retail parity obligations a hardcore restriction, meaning that, where such clauses are included, the entire agreement falls outside the block exemption. As described above, it will be interesting to see how the CMA reacts to the CAT's recent CompareTheMarket judgment on this topic.

### A loosening of restrictions on vertical arrangements in China?

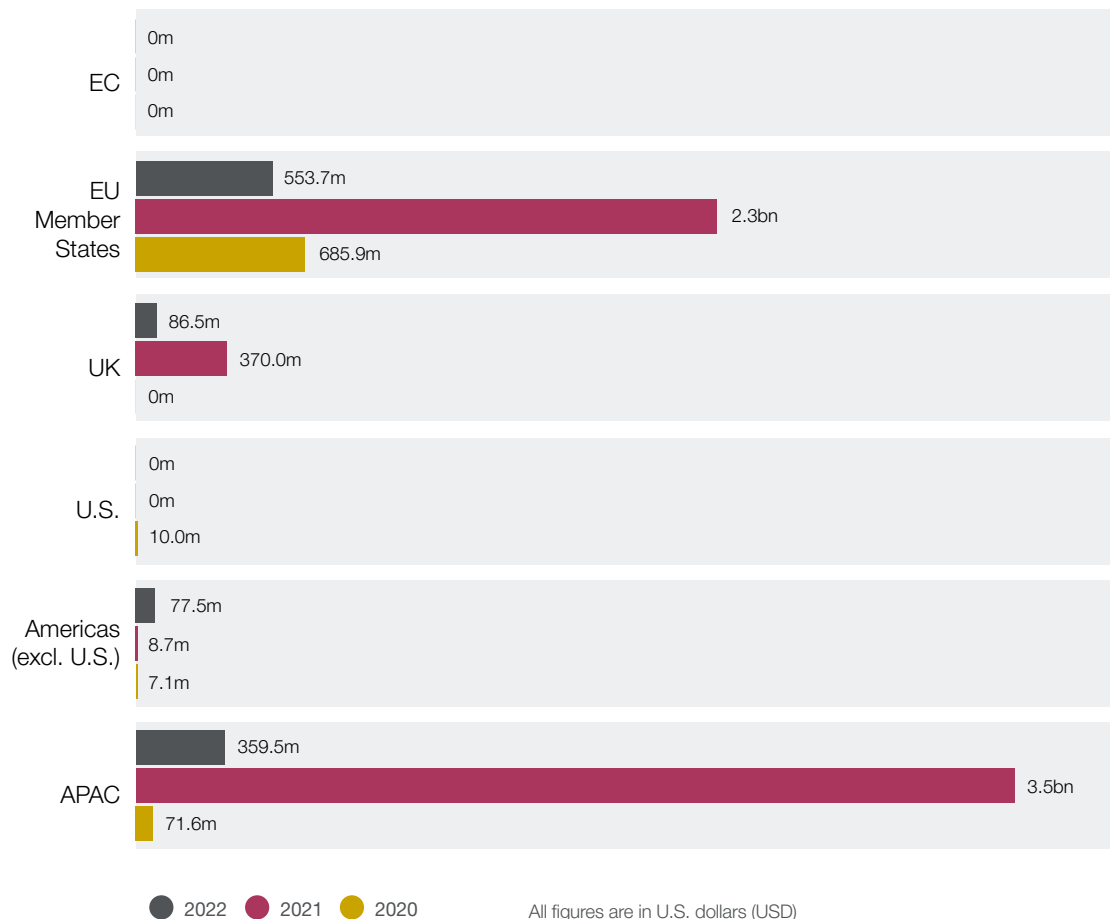
China's new AML entered into force in August 2022, making it possible for vertical agreements to benefit from a safe harbour if, among other things, the parties' market shares fall below the threshold specified by China's State Administration for Market Regulation (SAMR) (likely to be 15%).

The new AML also permits a more relaxed approach towards RPM in China, allowing business operators to put forward effects-based arguments to justify their practices (which would have previously been deemed illegal per se). As mentioned above, it remains to be seen whether this potential relaxation will in fact lead to less stringent enforcement.

# Abuse of dominance enforcement paves path for digital reform

2022 saw a significant decrease in fines across the world for abuse of dominance cases. Authorities continued to focus on ‘Big Tech’, but were more willing to accept commitments from firms in place of fines – perhaps with one eye on the various systems of proactive antitrust reforms that are set to be implemented for digital markets over the coming years.

## Regional abuse of dominance fine comparison (2022 total: 1.1bn)



## Key statistics

For a third year running, the EC did not impose any fines for abuse of dominance. However, it accepted commitments offered by Amazon – ending two parallel investigations into the company’s conduct – and remains engaged in several high-profile battles with Google, Meta and Apple. A key question for the coming year will be how (and, if so, how quickly) the Digital Markets Act impacts the landscape of enforcement against these digital platforms – in particular, whether there will be a resulting downtick in enforcement under the traditional abuse of dominance rules.

Overall, total fines for individual EU Member States dropped significantly compared to 2021, where standout penalties were imposed against two ‘Big Tech’ firms in Italy and France. However, the French Competition Authority (FCA) remained highly active, accounting for 73% of the total due, in large part, to a significant fine against EDF (EUR300m). This decision formed part of a string of cases penalising energy companies for improperly using data collected in the context of a legal monopoly position. Elsewhere, the Spanish Competition Authority (CNMC) and the Italian Competition Authority (AGCM) were key enforcers in 2022. The CNMC imposed significant fines on Merck (EUR38.9m) and Correo (EUR32.6m), and while the AGCM issued relatively low total penalties (EUR10.9m), it accepted commitments in three of the six abuse of dominance cases concluded in 2022.

Total fines in the APAC region also decreased, with no standout fines imposed by authorities in China, Japan or South Korea. India’s Competition Commission (CCI) emerged as a key enforcer in 2022, issuing four abuse of dominance decisions with accompanying fines totalling USD338.7m (31% of the global total). This was driven by two landmark decisions against Google, and the CCI looks set to continue this activity, with ongoing investigations against Apple relating to similar conduct.

Abuse of dominance decisions by sector, 2022

**‘Big Tech’ continued to be a key enforcement priority across Europe and APAC**

Google, Amazon and Meta were the addressees of six decisions across Europe, all of which involved commitments being agreed as an alternative to the imposition of fines.

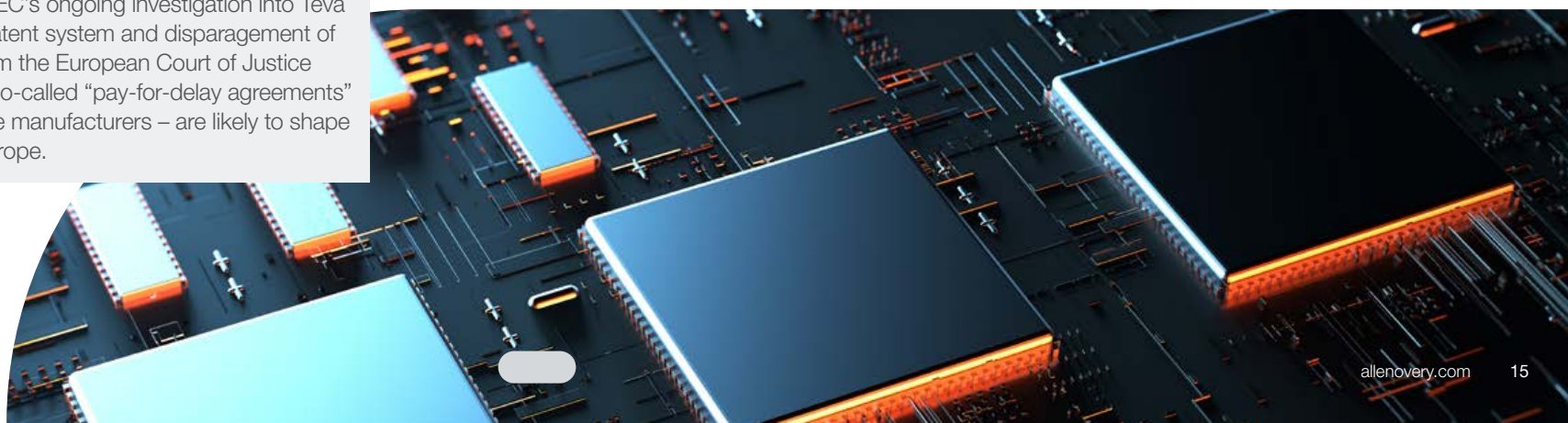
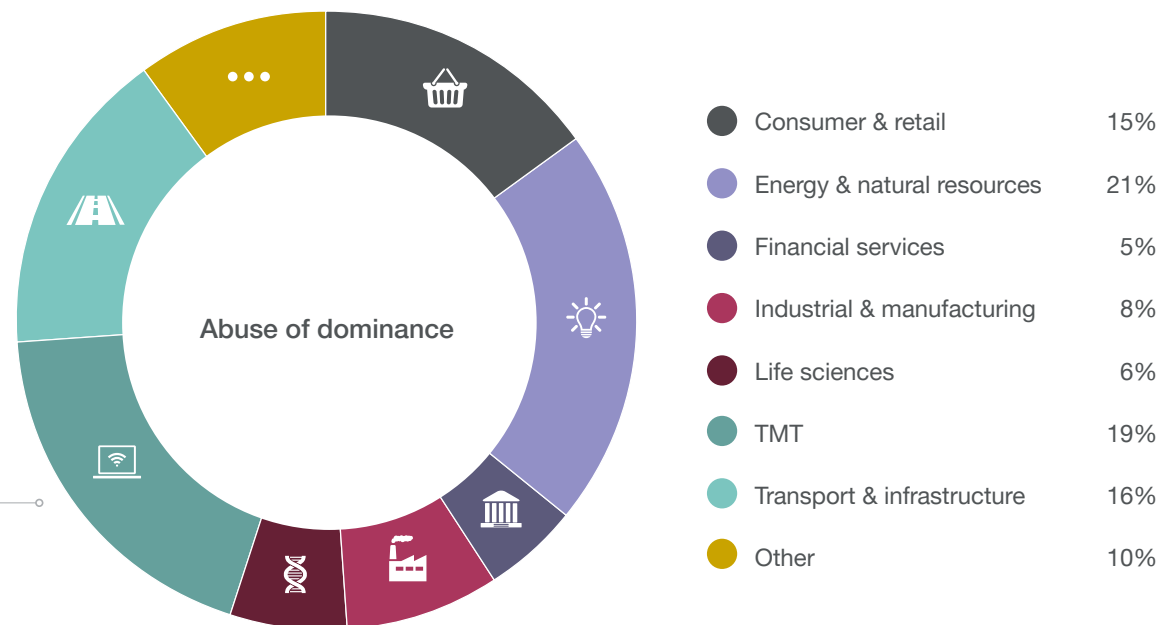
Despite not issuing infringement decisions, authorities in Japan, Korea and China continue to focus on monitoring abuses of dominance by digital platforms. The JFTC has implemented a new “softer” approach, conducting informal investigations through voluntary information requests and site visits with the aim of proactively encouraging commitments. Meanwhile, the new AML in China specifically calls out the risks of abuse via the use of data, algorithms, technology and platform rules.

**Life sciences one to watch in 2023**

Although the life sciences sector has been a consistent area of focus for abuse of dominance enforcement in recent years, there were just four enforcement decisions in 2022, all of which were in Europe. Pharmaceutical companies in particular, however, are likely to remain on the radar of authorities.

The continuing focus on excessive pricing conduct in this sector was demonstrated by decisions against Leadiant in Italy and Spain, as well as a re-adopted decision against Pfizer and Flynn Pharma in the UK.

Looking forward, the outcome of the EC’s ongoing investigation into Teva – concerning alleged misuse of the patent system and disparagement of rivals – and the pending judgment from the European Court of Justice (ECJ) in the Servier case – analysing so-called “pay-for-delay agreements” between Servier and generic medicine manufacturers – are likely to shape the approach of authorities across Europe.



# Key themes in abuse of dominance enforcement

## Forms of abuse of dominance

Authorities worldwide continue to “red flag” a broad range of conduct types. They are also increasingly investigating conduct that does not fit neatly within the traditional categories of behaviour seen in case law and guidance. This includes ‘self-preferencing’ and ‘data leveraging’ conduct, and is also possibly reflected in the increasing number of conduct types falling outside of specific categories in our dataset (33% in 2022, 29% in 2021, 28% in 2020). This trend is perhaps in part consistent with the move towards digital reform, although – as shown below – enforcement against these new types of conduct is not limited to digital markets.

### Data leveraging

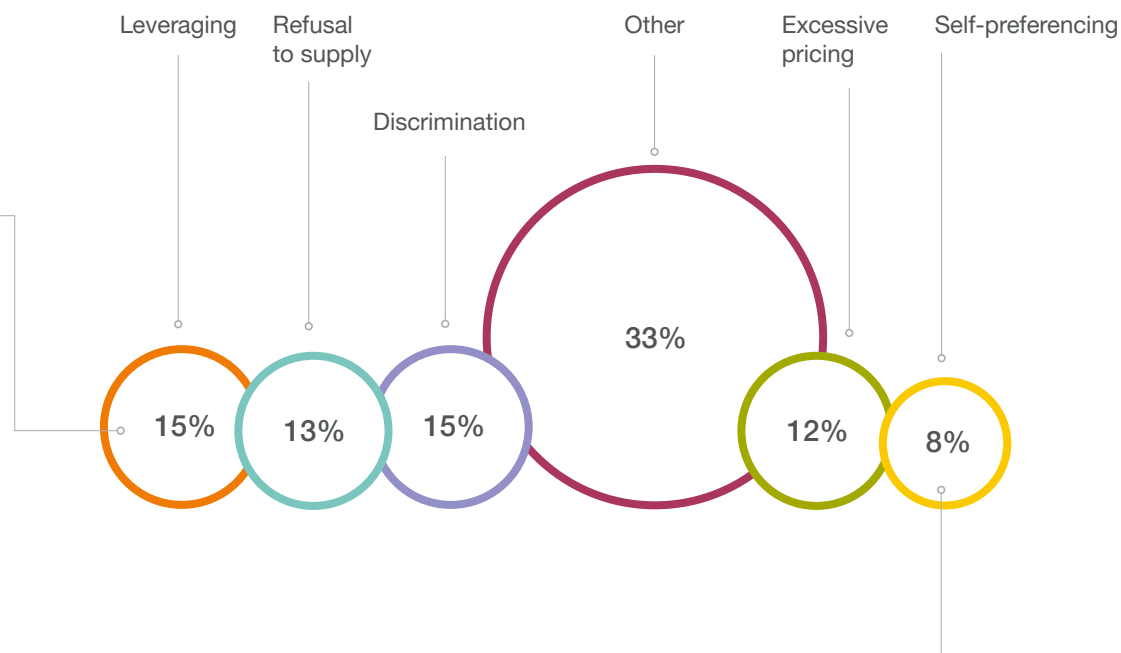
In the energy sector, European authorities are continuing to monitor so-called ‘data leveraging’ by companies who enjoy (or previously enjoyed) a state-granted monopoly, with France’s FCA imposing a fine of EUR300m on EDF for its second offence of this nature.

In China, SAMR relied on more conventional leveraging theories of harm in four decisions concerning tying/bundling in the water supply and natural gas markets.

### Self-preferencing

‘Self-preferencing’ has been the focus of several investigations in digital markets in Europe this year, including decisions against the e-commerce platform Allegro in Poland and Meta in Turkey, as well as Amazon at the EU level.

This builds on the EU General Court’s late-2021 Google Shopping decision, which confirmed that such conduct can amount to an abuse of dominance under EU law.





## Looking forward – emerging trends in abuse of dominance

### Standalone private enforcement: a rise in claims featuring unilateral conduct

2022 saw an increasing number of private proceedings being brought as standalone claims alleging abusive practices. In the U.S., consumers have continued to bring monopolisation claims against ‘Big Tech’ firms, including an ongoing USD4.7bn suit against Google based on novel theories of harm such as limited interoperability. Another recent standalone action relates to allegations against Ticketmaster. U.S. plaintiffs are also increasingly bringing claims based on decisions issued by foreign antitrust authorities.

Similarly, the UK has seen a sharp rise in collective proceedings, many of which relate to alleged abuses of dominance, albeit with a distinct consumer protection backdrop. Marcus Smith – the head of the UK CAT – expects to see a further “explosion” in such cases, driven by cases centred on the tech sector.

It remains to be seen the extent to which this trend will filter out to other jurisdictions with established private antitrust enforcement environments. What is clear is that the UK will continue to lead the pack in private damages actions in Europe for the foreseeable future – more on this below.

“Expect an ‘explosion’ in collective proceedings relating to abuses of dominance”

### Using abuse of dominance rules to target killer acquisitions

This last year has seen abuse of dominance rules being used in increasingly innovative and novel ways to plug potential gaps in existing regimes – consumers, businesses and authorities have all asserted novel theories of harm (especially in relation to digital markets and public services). Perhaps the most high-profile development is the suggestion to use the abuse of dominance regime to evaluate “killer acquisitions”.

While the EC has continued to identify “killer acquisitions” as an enforcement priority for merger control regimes, an Advocate General opinion late last year recommended the use of the abuse of dominance rules to assess transactions that fall under EU or national merger control thresholds to fill a “gap in protection”.

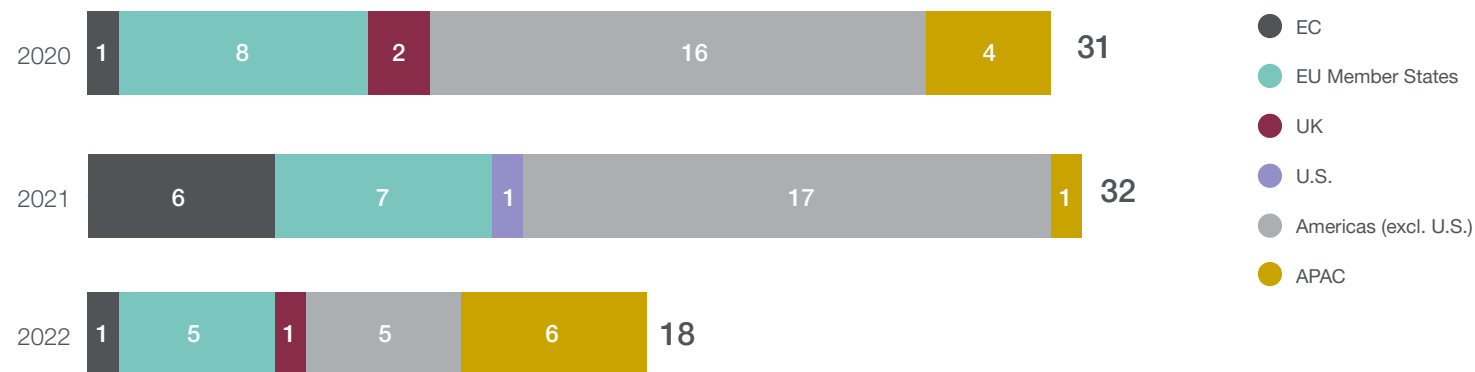
This opinion was followed by the ECJ in a preliminary ruling in March 2023, which held that regulators can open abuse of dominance into below-threshold mergers after they have closed. The ruling is a significant clarification, and it will be interesting to see how companies factor abuse of dominance into merger considerations going forward.



# Immunity/leniency activity

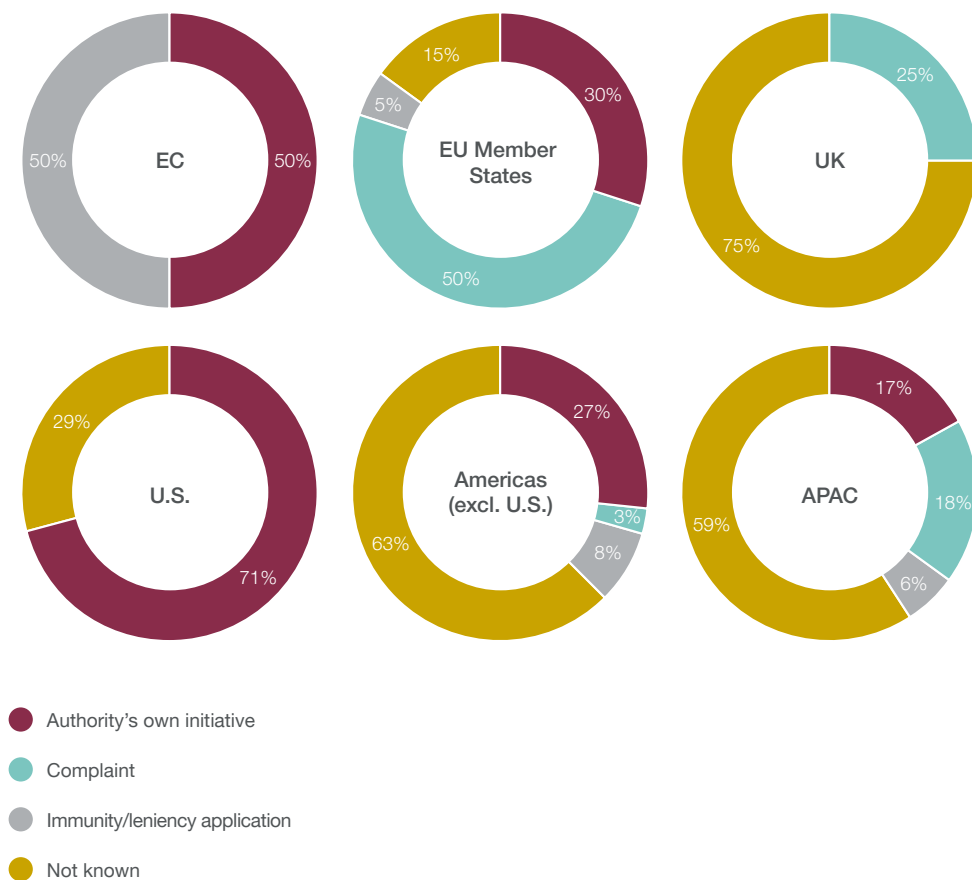
Overall, the number of immunity/leniency cases decided in 2022 (18) was lower than both 2021 (32) and 2020 (31), driven largely by a downtick in the Americas. The costs and uncertainty associated with seeking leniency – including increasingly the prospect of follow-on private litigation and exposure to liability in other jurisdictions – has greatly reduced the leniency pipeline across many jurisdictions globally. In contrast to the widely reported worldwide decline in leniency applications over recent years, however, in January 2023, a senior EC enforcer reported that the number of cartel leniency applications received by the EC in 2022 was in fact twice the number in 2021 and three times as many as 2020.

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



“The costs and uncertainty associated with seeking leniency – including increasingly the prospect of follow-on private litigation and exposure to liability in other jurisdictions – has greatly reduced the leniency pipeline across many jurisdictions globally.”

Mode of initiation of cartel cases, 2022



Regulators focus on attracting leniency submissions

The role of leniency programmes as a tool to boost cartel detection remained a topic of discussion among regulators across the globe, and antitrust authorities have sought to increase the attractiveness of their whistleblower policies. The debate (primarily in the EU) as to whether first-in leniency applicants should be granted full immunity from follow-on damages claims rumbled on in 2022 – but the jury is still out...

In October 2022, the EC published revised guidance on its leniency policy that aims to facilitate leniency applications. The document signals the EC’s intention to discuss potential leniency applications on a “no-names” basis, without the need to disclose the sector, the parties involved or any other details identifying the potential cartel, which the EC predicts will assist parties involved in novel conduct. In addition, the EC has identified “Leniency Officers” that can be contacted for informal advice.

The EC has also reportedly seen an increase in activity under its whistleblower programme. This tool encourages individuals (anonymously if they prefer) to approach the EC with information on business practices they suspect are anti-competitive. In January 2023, the EC announced that its whistleblower tool would be expanded to include merger infringements and state aid violations.

In the U.S., the DOJ Antitrust Division has sought to revitalise its leniency programme by revising its policy and, in April 2022, issuing updated guidance in the form of FAQs. Key changes include adjustments to the application process, the introduction of an obligation to “promptly report” illegal activity, and clarification on the DOJ’s approach to restitution, remediation and compliance.

While antitrust authorities are open to cooperation with the parties in cartel cases, the experience in Hungary serves as a stark reminder that its leniency policy does not guarantee certainty of avoiding antitrust penalties. Of the five applications for immunity from fines in 2022, only one was successful, and some were rejected even though the GVH had initially issued a conditional immunity or leniency decision in favour of the undertaking concerned. The reasons for refusal were varied, including alleged lack of cooperation in the discovery of evidence or reluctance to accept the GVH’s wider qualification of the infringement.

# Dawn raids and cooperation on an upward trajectory

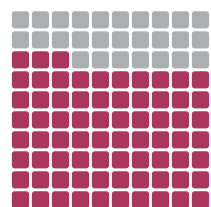
## A 'new dawn' for dawn raids

2022 saw a surge in the number of dawn raids conducted by antitrust authorities across the globe, continuing a trend that commenced in the second half of 2021. After an unsurprising lack of raids during the height of the Covid-19 pandemic, it now appears that authorities are keen to get back to 'business as usual'. Notably in the UK, the CMA Director for Enforcement has warned cartelists "the days of the CMA having to refrain from dawn raids are over".

Of the 30 jurisdictions surveyed, 22 (73%) confirmed that the regulator had carried out dawn raids during the course of 2022, conducting in total more than 155 raids.

Within Europe, the EC carried out unannounced inspections in several Member States at the premises of companies active in a number of different sectors, including natural gas, online food delivery, water infrastructure and fashion. The inspections were conducted in conjunction with the national antitrust authorities. In addition, the EC and CMA conducted same-day dawn raids of associations active in the automotive sector in the EU and UK. These were the first parallel dawn raids since the completion of the UK's withdrawal from the EU. Several individual European jurisdictions saw record numbers of dawn raids in 2022, while activity in APAC increased towards the end of the year.

A further significant development in 2022 was the extension of inspections to domestic premises, prompted by the shift to home and hybrid working arrangements. For the first time in many years, the EC raided the home of an employee at the same time as it searched the offices of their employer. Announcing the development, an EC official warned that the EC is likely to use this power more frequently in the future, although it will not issue press statements in order to protect individual privacy. Other antitrust authorities (including in France) have also been carrying out domestic raids. In the UK, the government announced plans to give the CMA "seize and sift" powers when carrying out raids at domestic premises on the basis that relevant documents are more likely to be located in private homes.



**73%**  
of regulators conducted  
dawn raids in 2022

## International cooperation proves fruitful for authorities

Cooperation between antitrust authorities is not a new concept, and there are numerous well-established venues for interaction between antitrust enforcement officials, such as the International Competition Network and the OECD's Competition Committee. Building on developments from 2021 and the launch of the EU-U.S. Joint Technology Competition Policy Dialogue, these types of collaboration efforts look set to deepen.

In February 2022, a new working group was announced between the 'Five Eyes' antitrust authorities (the UK, U.S., Australia, New Zealand and Canada) in response to concerns about higher prices resulting from supply chain disruption across the global economy. The working group will meet regularly to develop and share intelligence to detect and investigate anti-competitive behaviour.

The EC already regularly shares information it receives with other antitrust authorities. For example, a recent Spanish CNMC investigation into steel producers over suspected information exchange was initiated after the EC passed on an anonymous complaint received through its whistleblower tool. The CNMC ultimately imposed fines of EUR24.0m in 2022.

# Damages

## UK leads the way in private damages actions in Europe

The continued resilience of the UK as a leading jurisdiction for both standalone and follow-on antitrust damages claims was reinforced in 2022.

The combination of a well-regulated jurisdiction for commercial litigation, specialist competition judges and tribunals, and wide-ranging disclosure regimes has attracted numerous antitrust claims before the English courts. There is, however, a growing incentive for defendants to settle claims out of court due to significant cost liabilities, especially where the action is based on a prior competition infringement decision.

The so-called 'continued competence' provisions under UK law mean that it is not possible to bring a follow-on claim in respect of an EC investigation commenced after 31 December 2020. However, that potentially still leaves a considerable tail of EC investigations capable of giving rise to claims in UK courts. The CMA has also indicated in its latest draft Annual Plan that it plans to step-up its investigation of the UK part of cases that were previously within the remit of the EC. It may be that we see an increasing number of claimants issuing claims in

the CAT that are follow-on, by virtue of a CMA decision, as well as standalone claims with respect to conduct that has been the subject of an EC decision. That said, it remains to be seen whether this will be possible in the long term, or whether the CMA will eventually change its focus such that in future there is less overlap between CMA and EC decisions.

Looking ahead to 2023, a major area of recently completed and ongoing CMA investigation and enforcement which could be fertile ground for follow-on claims is excessive and unfair pricing abuses by pharmaceutical firms. Consistent with the trend towards private claims in relation to unilateral conduct outlined above, this could lead to an increased volume of follow-on damages cases in this sector.

The CMA and the EC have also launched twin investigations into Meta's and Google's online advertising, indicating that the information technology space will also be a priority for the CMA (with follow-on claims possible in the years to come).



# Spotlight on sustainability

Antitrust authorities have continued to grapple with the interplay between ensuring antitrust compliance and avoiding the stifling of sustainability initiatives.



### Legislative updates

In 2022, the EC published draft updated guidelines on horizontal cooperation agreements (the EU Horizontal Guidelines) setting out conditions for a “soft safe harbour” for sustainability standardisation agreements, along with examples.

In terms of EU Member States, the Netherlands continues to be at the forefront of driving change – the Dutch Authority for Consumers and Markets (ACM) applied its draft guidelines on sustainability agreements this year to give the antitrust green light to a sustainability standardisation initiative between soft drink suppliers, including Coca-Cola, to reduce their plastic usage.

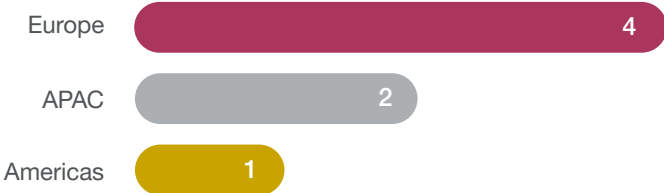
In addition, several other European antitrust authorities, including those in Greece, Austria and the UK, have identified sustainability as a priority, with Austria enshrining environmental considerations within its national antitrust legislation. In 2022, the CMA published advice to the UK government on environmental sustainability and competition law. The CMA has also established a cross-organisational “sustainability taskforce” and published draft guidance on the application of competition law to environmental sustainability agreements in February 2023.

Similar developments are taking place in APAC, with Japan’s JFTC publishing extensive sustainability guidelines in January 2023, illustrated by 75 real and imagined scenarios and covering topics including joint engagement in R&D, data sharing and standardisation.

In contrast, the chairperson of the U.S. FTC confirmed last year that “there is no such thing” as an “ESG exemption” under U.S. antitrust law. Market participants in the financial services sector have accordingly adopted a cautious approach to ESG initiatives, with the Net Zero Insurance Alliance dropping their plans to exit certain coal insurance policies this year, following receipt of U.S. antitrust advice that this may be construed as market allocation. BlackRock has similarly been warned by 19 state attorneys of the potential antitrust risk of their ESG efforts alongside other large investors to achieve net zero emissions across all assets under management, but have defended their efforts as being motivated by “achieving the best long-term value” for companies and shareholders.

### Sustainability updates by region

Number of jurisdictions that published guidance (or other initiative) on sustainability in 2022





### Consumer benefit: a fair share for whom?

In determining whether the restrictive effects of an anti-competitive agreement are outweighed by objective economic benefits, and thereby whether the agreement can be exempted, antitrust authorities must decide whether consumers have received a “fair share” of these benefits. The UK CMA has summarised the two positions adopted by antitrust authorities on the “fair share” assessment as the “broad” and “narrow” interpretations:

1. **The “narrow” interpretation.** The same group of consumers who are harmed by the allegedly anti-competitive agreement must be fully compensated by the proposed sustainability benefits.
2. **The “broad” interpretation.** In some circumstances, wider societal benefits can fulfil the “fair share” criterion, even if the group of consumers harmed by the allegedly anti-competitive agreement are not fully compensated, where the harmed consumers are also part of the broader group of consumers that receive the societal benefits.

The EC appears to favour the “narrow” approach in their EU Horizontal Guidelines; which state that “collective benefits” can be taken into account provided that: (a) the benefit accrues to “substantially the same” group of customers as are harmed by the restriction on competition; and (b) the benefits are “significant enough” to compensate those consumers. In contrast, the UK CMA’s draft guidance indicates that it intends to follow the “broad” approach, considering the “full benefit to UK society” of climate change-related agreements, provided that those benefits are “substantial and demonstrable” and the consumers in the relevant market form part of the benefitting wider group of consumers. In a bolder statement, the Netherlands ACM has opined that not only should “out of market” benefits be considered, but that full compensation of directly harmed consumers should not be required, only “appreciable objective advantages”.



### Confidence through consultation

Several antitrust authorities have encouraged an open dialogue with businesses on the antitrust compatibility of their sustainability initiatives, through existing communication channels or by establishing new sustainability-specific platforms.

For example, the UK CMA established a “Sustainability Taskforce” in 2022, which has been assigned with, amongst other matters, reviewing requests from businesses for informal guidance on specific initiatives. Similarly, the Greek Competition Commission’s (HCC) “sustainability sandbox” allows for early review of business proposals with a view to providing legal certainty for companies seeking to make “green investments”.

Other regulators, including the EC and the Netherlands ACM, have used existing forums to provide an informal early review of proposed green initiatives, with the ACM giving the antitrust green light this year to a proposal for Shell and TotalEnergies to collaborate in the sustainable storage of carbon dioxide.

An aerial, high-angle photograph of a bustling city intersection at night. The scene is dominated by light trails from cars and taxis, creating a dynamic, swirling pattern of white, red, and yellow streaks. The surrounding buildings are illuminated with various colors, including blue, green, and white, adding to the vibrant urban atmosphere. The overall perspective is from a high vantage point, looking down on the city's infrastructure.

# Regional snapshots



# Europe

At the country level, antitrust enforcement fines in Europe were USD1.2bn, a decrease from 2021.

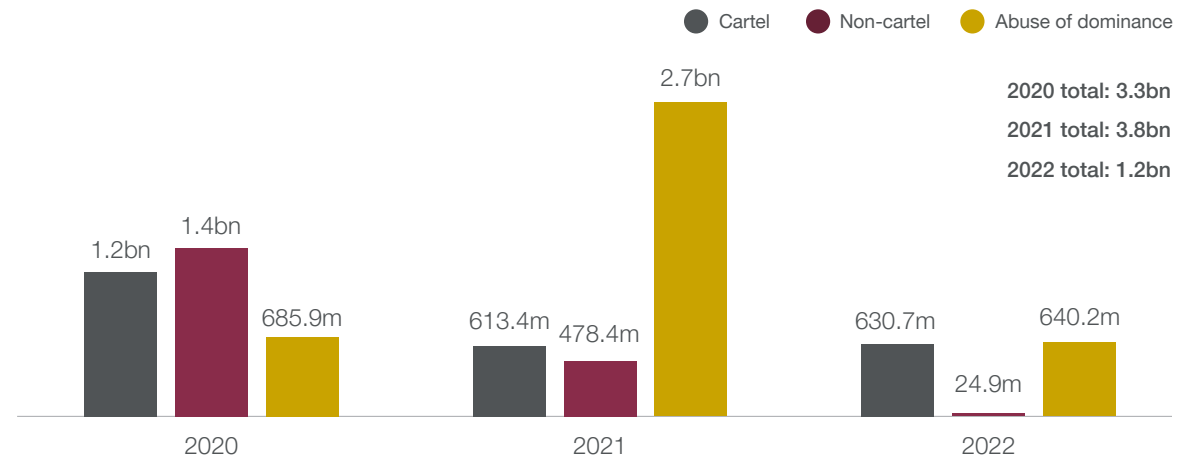
## Antitrust enforcement fines in 2022



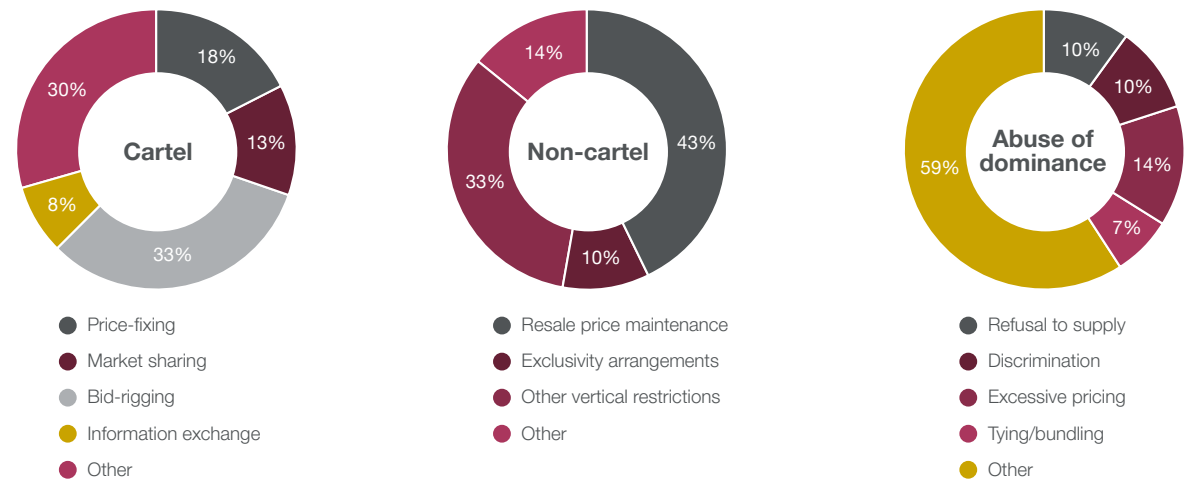
- |                             |                        |
|-----------------------------|------------------------|
| 1. Austria – 68.2m ▲        | 8. Italy – 22.6m ▼     |
| 2. Belgium – 69.5m ▲        | 9. Netherlands – 0m ▼  |
| 3. Czech Republic – 17.4m ▲ | 10. Poland – 52.4m ▲   |
| 4. France – 406.3m ▼        | 11. Romania – 111.0m ▲ |
| 5. Germany – 20.8m ▼        | 12. Slovakia – 1.2m ▼  |
| 6. Hungary – 7.9m ▼         | 13. Spain – 340.8m ▲   |
| 7. Ireland – 0m             | 14. UK – 177.6m ▼      |

● A&O office locations  
 ▲ Increase from 2021 fines  
 ▼ Decrease from 2021 fines  
 All figures are in U.S. dollars (USD)

## Total fines by conduct type, 2020-2022



## Breakdown by conduct, 2022



# APAC

Antitrust enforcement fines in APAC were USD1.0bn, a decrease from 2021.

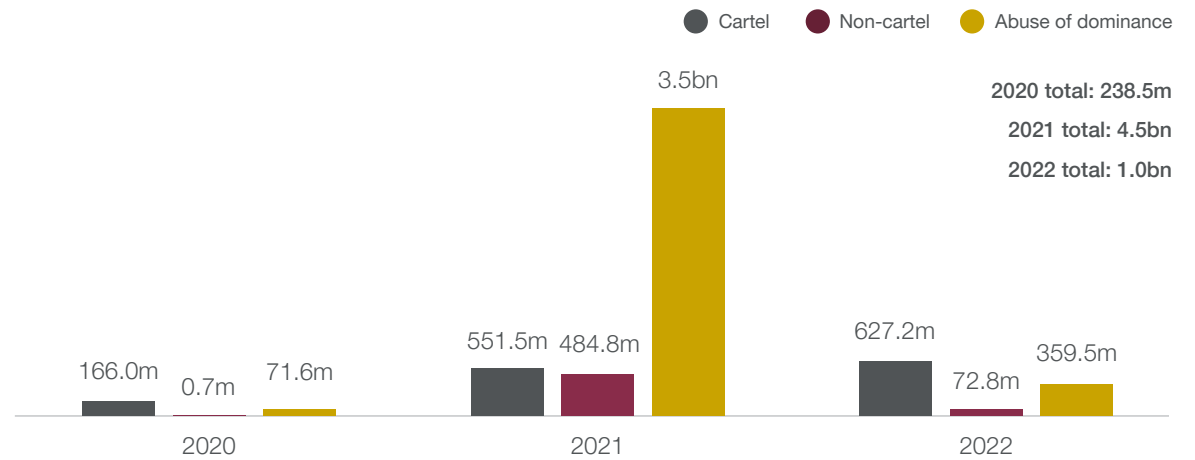
## Antitrust enforcement fines in 2022



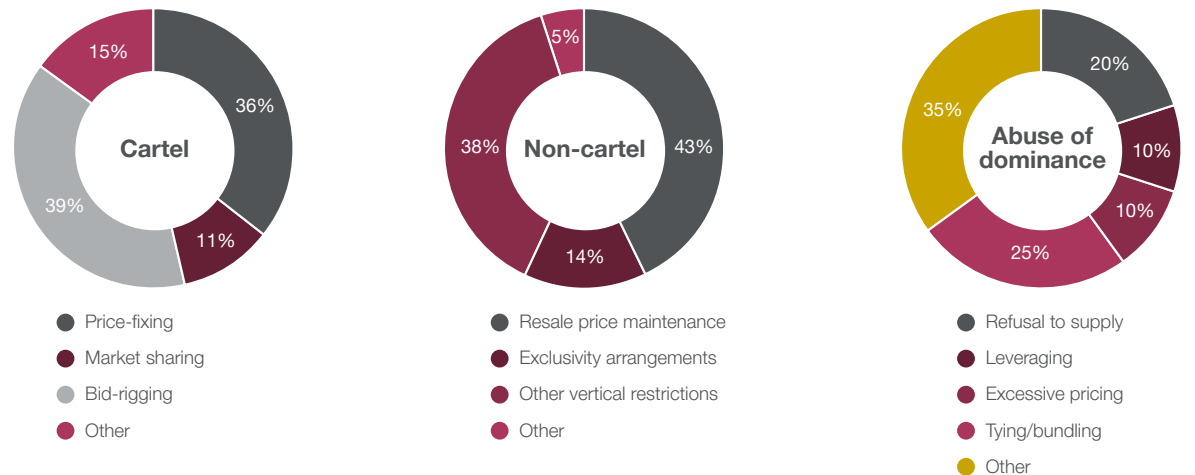
- 1. Australia – 12.3m ▼
- 2. China – 110.5m ▼
- 3. India – 397.2m ▲
- 4. Japan – 17.9m ▲
- 5. Singapore – 2.0m ▲
- 6. South Korea – 518.8m ▲
- 7. Taiwan – 0.7m ▼
- 8. Thailand – 0.2m ▲

● A&O office locations  
 ▲ Increase from 2021 fines  
 ▼ Decrease from 2021 fines  
 All figures are in U.S. dollars (USD)

## Total fines by conduct type, 2020-2022



## Breakdown by conduct, 2022



# Americas

Antitrust enforcement fines in the Americas were USD708m, an increase from 2021.

## Antitrust enforcement fines in 2022

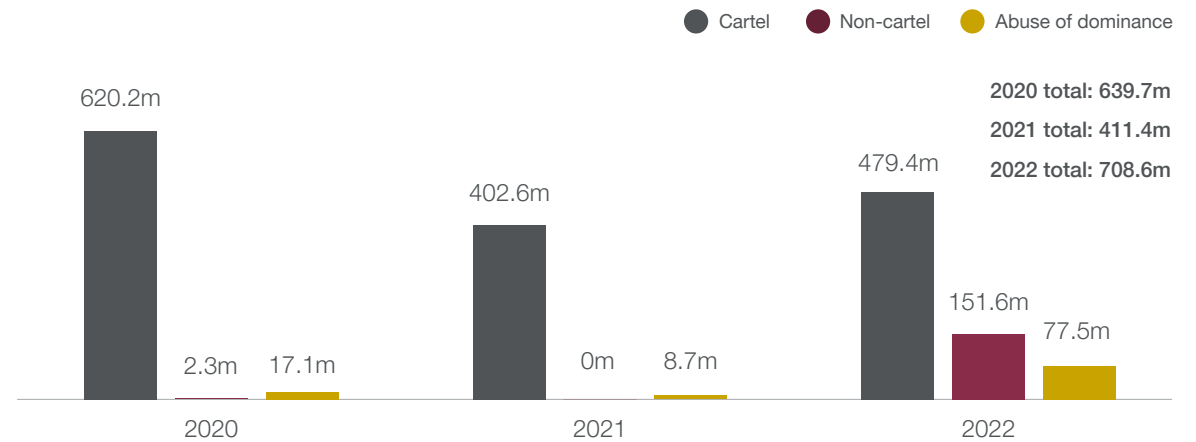


- 1. Brazil – 475.0m ▲
- 2. Canada – 0.6m ▼
- 3. Chile – 6.5m ▼
- 4. Mexico – 222.7m ▲
- 5. U.S. – 3.9m ▼

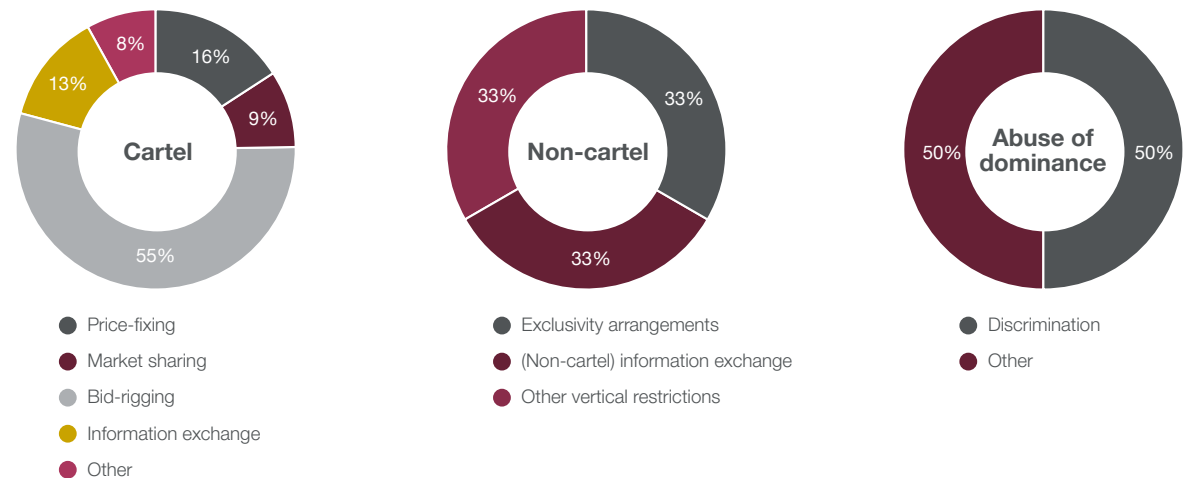
- A&O office locations
- ▲ Increase from 2021 fines
- ▼ Decrease from 2021 fines

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

## Total fines by conduct type, 2020-2022



## Breakdown by conduct, 2022



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



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