

GLOBAL CARTEL ENFORCEMENT REPORT 2023



2023 GLOBAL CARTEL ENFORCEMENT REPORT

AUTHORS



Omar Shah
omar.shah@morganlewis.com
+44.20.3201.5561



J. Clayton "Clay" Everett, Jr.
clay.everett@morganlewis.com
+1.202.739.5860



Jack Ashfield
jack.ashfield@morganlewis.com
+44.20.3201.5090

ADDITIONAL CONTRIBUTOR



Leonard Impagliazzo IV
leonard.impagliazzo@morganlewis.com
+1.215.963.4984

2023 GLOBAL CARTEL ENFORCEMENT REPORT

In 2023, cartel fines in key jurisdictions increased by 7.7%—totaling \$1.4 billion—compared to 2022. While the totals remain significantly below the peaks seen in the mid-2010s, 2023 saw record fines imposed in several jurisdictions (Japan, United States, Australia, and Canada), which demonstrates global competition enforcers’ continuing intent to pursue cartels and impose severe sanctions.

However, fining by traditionally active agencies in Brazil, the European Union, and South Korea was down by more than 50%, and the United Kingdom also saw a 20% contraction.

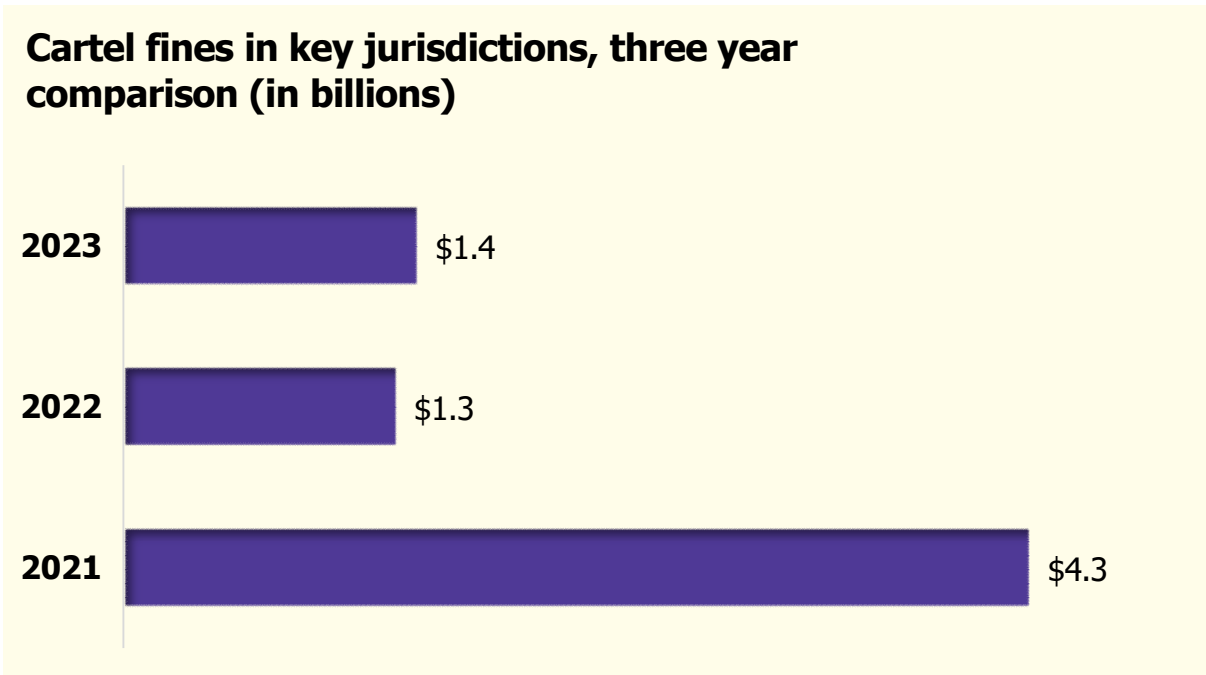
Behind the headline figures—which reflect the conclusion of investigations that often take several years to progress—2023 saw a resurgence of new investigations and dawn raids being launched.

Cartel fines in key jurisdictions in 2023 were \$1.4 billion, an increase of 7.7% from 2022.¹

Jurisdiction	2023	2022	% CHANGE
Australia	\$38.5m	\$3.1m	+1,142
Brazil	\$51.2m	\$102.9m	-50.2
Canada	\$37.9m	\$0	-
European Union	\$95.8m	\$205.4m	-53.3
India	\$0	\$237.9m	-
Japan	\$766.1m	\$19.3m	+3,870
Mexico	\$120.7k	\$0	-
South Africa	\$3.5m	\$1.6m	+116
South Korea	\$95.2m	\$666.6m	-85.7
Taiwan	\$9.5m	\$633.6k	+1,399
United Kingdom	\$74.2m	\$92.8m	-20.0
United States	\$264.2m	\$1.5m	+17,512

¹ Select fine totals reflect enforcement activity from January–December 31, 2023. Figures are based on publicly available information and may not be exhaustive.

Morgan Lewis



AUTHORITIES IMPOSE RECORD FINES

The **Japanese Fair Trade Commission (JFTC)** and the **US Department of Justice (DOJ)** imposed the largest fines in 2023 by some margin. The former set its highest fine to date of 101 billion yen (\$761.4 million) against four electricity utility companies for illegally conspiring to stifle competition following the deregulation of Japan’s electricity market in 2016. The conduct sanctioned included bid rigging for public tenders and the business contracts of large business, no-poach agreements, and price fixing.

The **DOJ** on the other hand secured settlements totaling \$255 million in the context of a deferred prosecution agreement against two manufacturers of generic pharmaceutical, including the **DOJ’s** largest fine for domestic cartel activity to date.

The **Canadian Competition Bureau (CCB)** also secured a record fine for price fixing against a producer and distributor of bread for its role in an agreement to increase prices for various bagged breaded products. The Ontario Supreme Court imposed the statutory maximum fine less a leniency discount for the company’s cooperation, which totaled 50 million Canadian dollars (\$37.9 million).

Australia’s Competition and Consumer Commission (ACCC) also saw a federal court set the highest-ever penalty (57.5 million Australian dollars, \$37.1 million) for cartel conduct in Australia relating to attempts by a flat steel manufacturer to induce distributors and an overseas manufacturer to raise prices.

FINE TOTALS DO NOT TELL THE WHOLE STORY

The headline fine totals do not entirely reflect a busy year of enforcement. **Brazil's Administrative Council for Economic Defense (CADE)** imposed fines in 10 separate investigations and the **Taiwanese Fair Trade Commission (TFTC)** and the **South Korean Fair Trade Commission (KFTC)** resolved six and five cases, respectively.

Even the **European Commission (EC)**, which collected less than 100 million euros (\$109.6 million) in fines from cartelists in 2023 (its lowest total in well over a decade), issued four decisions—more than in 2022 and 2020.

China's **State Administration of Monopoly Regulation (SAMR)**, which is not included in our global figures, also imposed some significant fines, including its first fine for cartel conduct twinned with abuse of a dominant position for conduct in relation to the supply of active pharmaceutical ingredients.

KEY TRENDS AND DEVELOPMENTS

This report examines the headline fines as well as key trends and developments globally in cartel enforcement, including the following:

- A look at key areas of focus for enforcement and the increasing emphasis placed by enforcers on tackling high prices in consumer industries against the backdrop of inflationary conditions and the cost-of-living crisis.
- Enforcers' work in grappling with new and novel forms of collusion (in particular, with regards to artificial intelligence).
- Continued enforcement against bid-rigging conduct, particularly regarding public tenders and how the construction and pharmaceutical sectors continue to see significant attention.
- The increasing focus on collusion in labor markets as well as significant developments from Europe in relation to sports and sporting associations.
- The resurgence of dawn raids and own-initiative investigations and increased international cooperation between enforcers and key trends in relation to information-gathering powers and their interaction with post-pandemic ways of working and privacy rights.
- A look at significant developments in terms of executive and individual liability for cartel conduct.
- How authorities and governments are updating the rulebook to provide guidance to businesses on how they may cooperate without falling foul of antitrust laws and regulations, in particular with regard to sustainability.

AREAS OF FOCUS FOR ENFORCEMENT

High Prices Paid by Consumers in the Spotlight Due to Inflation

Against the backdrop of inflationary trends in all major economies, the prices charged for staple consumer goods and services came into sharp focus over 2023. Enforcers have been monitoring not only increasing prices but also the downward trajectory (i.e., whether prices are falling as quickly as they should) to see if this flushes out any nefarious activity. A number of enforcers decided to prioritize

Morgan Lewis

investigations or shift their enforcement activities toward the markets that are most likely to have a direct impact on consumer spending.

In the fuel sector, for example, **Mexico's Federal Economic Competition Commission (COFECE)** announced in January that it had issued a statement of probable responsibility against several economic agents after finding evidence of probable collusion to fix the retail price of gasoline and diesel at service stations. The **Italian Competition Authority (ICA)** announced in July that it was investigating a number of petroleum companies following a whistleblowing report about potential price signaling through an industry newspaper. In November, the **Morocco Competition Council** announced that it had reached a settlement with nine companies and a trade association in retail fuel markets, with the companies agreeing to pay a fine of 1.8 billion Moroccan dirham (\$181 million), a record amount for the authority, to resolve a probe into price fixing.

The **UK Competition and Markets Authority (CMA)** announced the results of its market study into the retail fuel market, disavowing any suggestion of cartel behavior, but implementing an open-data scheme requiring retailers to provide up-to-date pricing behavior. The authority recently announced a consultation on its annual plan for 2024–2025 in which it confirmed it will continue to “act in areas of essential spending and where people are under particular financial pressure.”

Although the probes were started prior to the current inflationary period, there were also record corporate fines imposed in **Malaysia** in relation to price fixing for the price of poultry feed, along with the fines discussed above imposed by the **JFTC** and **CCB** relating to electricity and bread, respectively. **COFECE** sanctioned multiple suppliers of tortillas and dough, the **South African Competition Commission** settled a probe into the alleged market sharing for margarine and edible oils, and the **TFTC** fined the country's two largest telecommunications firms for conspiring to halt discounting.

We expect enforcers will continue to come under pressure from legislators to find ways to put money back in consumers' pockets and to root out anticompetitive conduct that may be slowing deflationary trends.

Novel Enforcement Grabs Headlines but Enforcement in Traditional Sectors and Against Familiar Conduct Remains Relevant

Enforcers Grapple With Artificial Intelligence

Artificial intelligence (AI) has been a topic that rarely left the headlines in 2023. As businesses, policymakers, and consumers race to understand the true scale of how AI is expected to reshape and disrupt economies, antitrust enforcers have not been far behind in consulting on changes to the rules or their own enforcement priorities in order to ensure they have a fit-for-purpose toolbox.

For example, on October 30, 2023, US President Joseph Biden issued an [executive order](#) in which he announced he would support the **US Federal Trade Commission (FTC)** taking a leading role in addressing competition issues involving AI, including using its rulemaking authority as it sees fit. Shortly thereafter, on November 21, 2023, the **FTC** approved an omnibus resolution authorizing the use of compulsory processes in nonpublic investigations relating to AI. The **CMA** also published its own initial [Report on AI Foundation Models](#).

At present, however, a significant amount of the conversation has been forward looking and actual enforcement has been relatively limited and focused on more typical forms of business-to-business collusion that has been facilitated, for example, by the use of pricing algorithms or price-monitoring tools. The question of how enforcers will hold companies liable for conduct that is “attributable” to the AI itself—i.e., without the users of the technology knowingly engaging in anti-competitive conduct or reasonably being aware of the risks—remains largely unanswered.

Morgan Lewis

As enforcers grapple with these challenges, we are likely to see more market investigations or studies launched—such as the one launched by the **ICA** in November 2023 into the use of pricing algorithms in air passenger transport on domestic routes.

Public Procurement and Bid Rigging Continue to Attract Significant Attention

Despite the risks of AI generating significant headlines, it remains the case that a large majority of antitrust cases brought to a resolution in 2023 around the world involved conduct that has been on enforcers' radar for decades, in particular the rigging of bids and auctions in a procurement context (with the construction sector being particularly affected):

- **Brazil:** **CADE** imposed fines in no fewer than six separate investigations in sectors ranging from the supply of engineering works to waste-removal contracts.
- **Germany:** The **Federal Cartel Office's** only cartel fine—4.8 million euros (\$5.2 million)—issued in 2023 was imposed on 14 construction companies for the rigging of procurement tenders between 2007 and 2016.
- **Japan:** Of the **JFTC's** three fines issued in 2023, two were issued against companies for bid rigging in relation to contracts for the supply of geological inspection services and pharmaceuticals supplied to the National Hospital Organization.
- **Korea:** The **KFTC** fined 32 companies in the pharmaceutical sector a total of 40.9 million Korean won (\$32 million) in relation to the rigging of 176 tenders for the supply of vaccines to the government's National Immunization Programme over a six-year period.
- **UK:** The **CMA** fined 10 construction firms approximately 60 million British pounds (\$73.1 million) for engaging in cover-bidding practices (i.e., submitting false bids deliberately priced to lose a tender).
- **US:** The **DOJ** secured its first guilty plea and sentence in relation to an ongoing investigation into the rigging of bids for US military installations in South Korea with a Korean subcontractor sentenced to pay almost \$9 million.

In the fight against bid rigging, enforcers are increasingly looking to rely on AI to detect potentially irregular conduct. The **Spanish National Commission of Markets and Competition (CNMC)**, for example, announced in 2023 that it had developed a tool that uses AI to predict whether a tender has been genuinely competitive. Other enforcers such as **CADE**, the **KFTC**, the **DOJ** (with its Procurement Collusion Strike Force), and the **EC** are already known to be using or investing in similar tools.

Pharmaceutical Industry Under the Microscope

Continuing a trend in recent years, the pharmaceutical industry continues to attract scrutiny from enforcers with a number of high-profile investigations being brought to a conclusion (see above in relation to the **JFTC** and **KFTC** actions).

In August, the **DOJ** announced it had secured deferred prosecution agreements (DPAs) against the outstanding two defendant pharmaceutical firms facing allegations of price-fixing, bid-rigging, and market-allocation schemes affecting the supply of various generic medicines. As part of the DPAs, the two firms agreed to a remedy involving the divestiture of a business line that had been key to the alleged misconduct. Further, one of the firms agreed to a donation of \$50 million worth of supply of two of the products that were investigated to humanitarian organizations.

Morgan Lewis

The **EC** imposed fines totaling 13.4 million euros (\$14.2 million) against a cartel in the pharmaceutical sector relating to the supply of an active pharmaceutical ingredient (API) used to produce antispasmodic drugs. The companies involved had agreed to fix minimum sales prices and to allocate quotas between themselves. While the **EC** has previously investigated and fined companies for pay-for-delay agreements, this represents its first fine for pure cartel conduct in the sector. Six companies agreed to settle the case while the investigation against a final non-settling party continues. A parallel investigation is underway in **Brazil**, with one of the companies agreeing to a 23 million reais (\$4.6 million) settlement with **CADE** in September.

CADE also imposed fines of 59 million reais (\$11.7 million) on a medical devices company for rigging tenders to provide high-technology medical suppliers for pacemakers.

In China, **SAMR** concluded two probes in the sector in 2023. In May, it fined two API suppliers a total of 320.7 million renminbi (\$45.4 million) for taking part in conduct where, as the only two domestic suppliers, one agreed to refrain from production in return for a transfer of value to compensate for lost profits. The case was also significant as being the first time that **SAMR** imposed a fine for cartel conduct as well as abuse of a dominant position (against the company supplier that remained on the market that forced customers to agree to unreasonable contract terms). In June, **SAMR** then imposed fines totaling 57.1 million renminbi (\$8.1 million) on two wholesalers found to have fixed prices in relation to injectable medicines used in cancer treatment.

The **CNMC** also announced that it had carried out raids at the premises of several pharmaceutical companies in October and November in relation to separate probes into the market for digital pharmaceutical logistics tools and medicines distribution.

Labor Market Remains in the Spotlight

No-Poach and Wage-Fixing Agreements Attracting Considerable Enforcement Activity

We discussed in the [2022 report](#) that there had been an increasing focus among enforcers on cartels in labor markets—in particular, agreements between employers not to hire from or solicit employees from one another or agreements to fix remuneration (e.g., salaries, bonuses, terms, and conditions of employment) of employees.

The **CMA** for the first time published [guidance](#) on February 9, 2023 warning employers not to engage in such agreements, highlighting the risks faced by businesses in entering agreements with their competitors (or signing up to industry-wide initiatives) that could restrict the freedom of freelancers and contracted workers or permanent salaried staff. The authority also expanded its probe, first launched in 2022 in relation to the purchase of freelance services by broadcasters, to include employment of fulltime staff and named two new companies under investigation for the conduct.

The **EC** has also taken action, raiding the premises of food delivery companies in November in relation to suspected no-poach agreements. The authority is also reported to be investigating no-poach agreements in relation to radio frequency front end products. In its revised Horizontal Guidelines (discussed further below) published in 2023, the **EC** added wage fixing agreements to its non-exhaustive list of agreements that are considered to restrict competition “by object” (i.e., which by their very nature are likely to be harmful to competition).

National competition authorities in Europe have to date been more active in investigating no-poach and wage-fixing agreements than the EC and 2023 was no exception, with the **French Competition Authority** announcing in November that it had sent Statements of Objections (SOs) to a number of companies in the engineering, technology consulting, and information technology (IT) services sectors.

Morgan Lewis

The **Belgian Competition Authority** also sent SOs in July to three security companies, including allegations that they had entered into “textbook examples” of no-poach agreements.

In May, the **Peruvian National Institute for the Defense of Free Competition and Protection of Intellectual Property (INDECOPI)** imposed fines in excess of 5.7 million Peruvian sol (\$1.5 million) on six companies and four executives in the construction sector in relation to agreements implemented by the human resources staff of the companies.

In August, the **Turkish Competition Authority (TCA)** fined 15 companies approximately 151 million Turkish lira (\$5.6 million) for a no-poach agreement, bringing to an end an investigation it launched in 2020. The **TCA** has since raided the premises of 19 companies active in the pharmaceutical sector, including an employment consultancy, in relation to no-poach agreements.

In China, four of the largest pig-breeding businesses in the country announced publicly that they were withdrawing from a no-poach agreement that they had reached earlier in the year following intervention from **SAMR**, which met with the companies and took the opportunity to emphasize publicly that the agency would monitor labor market competition.

The **DOJ** has also pressed ahead with its endeavors to bring criminal prosecutions against no-poach agreements but continues to struggle to secure convictions. In March 2023, a Maine federal jury found four business managers not guilty of a conspiracy to fix hourly rates for home healthcare workers. In April, a federal judge in Connecticut acquitted six executives, finding that the alleged conspiracy (which involved allegations of a hub-and-spoke conspiracy not to solicit or hire) “had so many exceptions” that it could not be said to have been a meaningful allocation of the labor market. Finally, in November, the US District Court for the Northern District of Texas granted the **DOJ’s** own motion to dismiss with prejudice its only outstanding criminal no-poach case.

Noncompete and Non-Solicitation Covenants

Generally, enforcement by competition authorities has been concentrated upon more egregious examples of collusion in the labor market rather than against common contractual provisions (restrictive covenants) typically found in employment contracts or in merger and acquisition agreements, such as noncompete or non-solicit provisions. These provisions can be permissible subject to rules on enforceability under applicable national law—e.g., whether there is a legitimate business interest, whether the restrictions are proportionate.

The UK government confirmed in May 2023 it intends to legislate in due course to reduce the duration of noncompete clauses in UK contracts to three months. Earlier in the year, the **FTC** went further, [announcing a notice of proposed rulemaking](#) that would ban employers from entering into and maintaining noncompete clauses in employment or other contracts with their workers and would require employers to rescind existing noncompete clauses.

As national employment laws change and companies come to terms with the impact on their human resource (HR) practices, it is to be expected that more businesses may be tempted to enter into agreements or concerted practices that offset any perceived negative effect. Businesses should train HR in-house counsel and executives on the risks involved—particularly if attending trade association or other industry gatherings to discuss developments.

Morgan Lewis

A Shakeup in the World of Sports

2023 was notable for significant developments in relation to rules around freedom of association of sporting players.

In the **United States**, suits were brought concerning Major League Baseball and golf (the latter having subsequently been withdrawn). In December, seven attorneys general filed a suit alleging that the National Collegiate Athletic Association's (NCAA) Transfer Eligibility Rules constitute a no-poach agreement between member schools. This is the latest in a number of challenges filed against NCAA in recent years that have led to rules being amended, including allowing compensation of college athletes. The **DOJ** also entered into a consent decree with a publisher in the esports sector to settle its claim that a levy imposed by the publisher on certain esports teams in online leagues was in effect a salary cap that "penalized teams for paying esports players above a certain threshold."

The **Colombia Superintendence of Industry and Commerce** opened an investigation into the football league, the Colombian Football Federation, and 29 clubs, in relation to an alleged cartel regarding professional women's football. In June 2023, the **Polish Office of Competition and Consumer Protection** imposed fines against the national motorsports association and the top speedway league for agreeing to cap the salaries of motorcycle racers.

The **European Courts** also handed down important rulings on the legality of "homegrown player" mandates in soccer and on the rules governing participation in ice-skating events around the world, which could have significant consequences for sporting bodies.

- In *Royal Antwerp Football Club*, the **European Court of Justice (ECJ)** concluded that the Union of European Football Associations' (UEFA's) mandate that national associations should require clubs to include a minimum of eight players (in their 25-person squad) who meet the criteria for being "homegrown" talents could have the effect of restricting competition between clubs for the acquisition of players.
- In *International Skating Union*, in a judgment handed down by the **ECJ** on the same day, the question was whether an association of national ice-skating federations (the International Skating Union (ISU)) could require skaters to compete only in events that it preauthorizes. The court held that while sporting organizations may lawfully adopt rules relating to the organization of competition, these rules must be transparent, objective, non-discriminatory, and proportionate and should not make it possible to exclude new or competing competitions or prevent athletes from taking part in such competitions.

Together with other developments from Europe and the rest of world, these rulings could result in a transformative impact on the sporting landscape for athletes, clubs, and broadcasters as well as fans.

DAWN RAIDS AND OWN-INITIATIVE INVESTIGATIONS ARE BACK

Leniency Applications Remain Stinted but There Are Signs of an Uptick

While accurate statistics on leniency/immunity applications are difficult to generate, according to statements from representatives of competition agencies, the trend—which has been observed in recent years of declining numbers of immunity applicants (i.e., parties coming forward with information on cartels in return for immunity or a reduction in overall fine)—may be starting to reverse, although numbers remain low compared to historic levels.

Leniency certainly remains a vital tool in an enforcer's arsenal, however.

Morgan Lewis

Of the four cases resolved by the **EC** in 2023, three were revealed by leniency applicants who received total immunity from fines. Without immunity, the applicants would have faced total fines of approximately 160 million euros (\$177.8 million) or nearly double the total level of fines levied by the **EC** in 2023. The **EC's** deputy director-general for antitrust and head of its Cartel Directorate also noted in statements at a conference in early 2023 that, bucking the trend, the numbers of leniency applications were in fact picking up.

Likewise, the **Philippine Competition Commission** announced in 2023 that it had received its first leniency application since its own regime was launched in 2018.

In its own efforts to buck the trend, the **Competition Commission of India** launched a consultation in October 2023 on proposed changes to its own leniency system, introducing additional incentives for parties who are already cooperating in respect of one investigation (and therefore may benefit from a reduction in their overall fine) to reveal the existence of another cartel in return for a reduction of up to 30% with respect to the first cartel. Likewise, **Peru's** Congress passed a bill to bolster **INDECOPI's** own leniency program following the authority's concerns that the criminalization of anticompetitive conduct was having a deterrent effect on companies and individuals coming forward to cooperate.

Enforcers are acutely aware, however, that there are a number of reasons why businesses may choose not to come forward with information voluntarily even if they could receive significant reductions, including the proliferation of follow-on private damages actions (e.g., class actions in jurisdictions such as the United Kingdom).

As discussed above, this has led authorities to invest in new tools leveraging AI to detect collusion more easily and to bolster their efforts to encourage whistleblowers to come forward. A number of European authorities have now transposed the protections of the EU Whistleblower Directive, which guarantees anonymity and protection from retaliation. The **ICA** has introduced a new online tool, and the **CMA** increased its own reward by 2.5 times to 250,000 British pounds (\$319,000).

Dawn Raids Are Back and More International Than Ever

We detailed in our [2022 report](#) that dawn raids were back following a temporary hiatus during the COVID-19 pandemic. This trend has continued, and indeed accelerated, in 2023, and we have also seen a sea change in the willingness of enforcers to combine their efforts and launch simultaneous, cross-border raids.

In March 2023, the **EC** along with the **CMA** and **Swiss Competition Commission** raided the premises of businesses active in the fragrance sector in relation to suspected anti-competitive agreements. All three agencies confirmed they had also worked together with the **DOJ**.

In October, the **EC**, **CMA**, **TCA**, and the **DOJ** all cooperated in respect of parallel raids in relation to the supply of chemicals for use in the construction sector. The **EC** and **CMA** are already working together on a probe opened in 2022 in relation to the recycling of end-of-life vehicles.

There are a significant number of multilateral fora and treaties already in place—such as the Five Eyes Framework among enforcers in the **United Kingdom, Canada, Australia, New Zealand,** and the **United States** signed in 2020. Alongside the **European Competition Network** involving all member states of the European Union, the EU also has arrangements in place with enforcers in **Brazil, Russia, India, China, South Africa,** and **Mexico**. Chair of the Organization for Economic Cooperation and Development's Competition Committee Frederic Jenny called for agencies to coordinate more closely to avoid the duplication of efforts.

Morgan Lewis

Domestic Raids and Personal Devices and the Right of Privacy

There has generally been an increased expectation that enforcers will start to use their powers to raid not only business premises, but also domestic premises, given the increase in work-from-home practices. The EC conducted a raid for the first time in several years on domestic premises in 2022 and announced that it expected its use of such raids to increase.

The relatively low uptick of domestic raids so far is likely due to the higher legal bar often required for enforcers to obtain a warrant to raid domestic premises. In October 2023, the **UK Competition Appeal Tribunal (CAT)**, which is the appellate body responsible for overseeing the CMA's actions, struck down a warrant application to raid domestic premises in Scotland on the grounds that there is a higher bar for such applications under the European Convention of Human Rights, and that such applications need to be accompanied by evidence that suggests a "propensity to destroy" evidence before applications can be granted.

One of the factors the **CAT** weighed in denying the warrant to raid domestic premises was the fact that permanent deletion of electronic data—even on personal devices—can be difficult in the "modern electronic world." The powers of enforcers in situations where personal devices used for work purposes are seized (or work devices also used for personal purposes) are likely to brush up against domestic privacy laws.

In the **EU**, the **General Court** struck down an application by a drinks manufacturer under investigation for potential cartel and abuse of dominance infringements that challenged the seizure of data from mobile phones and email accounts on the grounds that the **EC** did not take adequate steps to protect private data. The court found that it is inevitable in such investigations that the **EC** will come across personal data and that the mere assessment of that data does not lead to damage—it is up to businesses to identify data that is purely private.

The developments seen in 2023—with the return of dawn raids—emphasize the importance to businesses of ensuring that they have up-to-date and clear policies in place so that staff (e.g., front desk personnel greeting the enforcers, in-house legal counsel, or the IT teams responsible for processing data) are prepared for what to do in the event of a raid and that individuals are aware of the risks to their private data.

Managing Compliance With Investigations

Managing compliance with investigators and regulators has become increasingly complex in today's technological landscape. The widespread adoption of cloud-based platforms raises new hurdles in collecting data in compliance with dawn raids. With cloud-based platforms, businesses faced with a raid or a request for information need to be keenly aware of who custodians are and where they are located. Even though data for a particular custodian might be available through the cloud in the United States, data privacy laws, such as the General Data Protection Regulation (GDPR), may still apply. The appropriate data transfer agreements must be in place prior to removing data of an EU resident from the jurisdiction. The United Kingdom and Switzerland have similar privacy laws with data transfer requirements.

Businesses should also be diligent with understanding their own technology infrastructure. With the rise of "modern attachments" (i.e., hyperlinked documents) comes a whole host of new considerations. Traditional collection tools did not automatically identify embedded links and extract the linked document. However, collection tools are being developed and released with an aim to identify and collect the documents identified in embedded links. Even if these types of tools are available, those responsible for collecting the data should be aware of limitations on versioning and creation of family relationships at the time of collection.

Morgan Lewis

As businesses and practitioners alike navigate the new hurdles and considerations technology has created, it is important to also consider the benefits. With the rise of AI comes advancements in analysis and review capabilities. Modern tools now allow for more advanced identification and suppression of duplicative and redundant information, making even the largest data sets considerably more manageable. Once a much more condensed and unique data set is established, a practitioner can deploy machine-learning technology designed to identify specific behaviors. These machine-learning tools can be trained to identify content and communication patterns, such as off-channel communications and fraud. The practitioner can then take those identified results and overlay additional technologies, such as communications and sentiment analysis, to identify not only communication patterns, but also the underlying emotions with those communications.

EXECUTIVE AND INDIVIDUAL LIABILITY

Executive or individual liability for anticompetitive or cartel conduct remains a highly relevant risk factor with enforcers globally, who are keen to ensure that senior individuals continue to be held accountable.

The **United States** remains the preeminent jurisdiction when it comes to holding individuals accountable for their role in cartel activity, with significant fines and jail time being a real risk. In 2023, developments included the following:

- **Commercial Flooring:** The co-owner of an insulation contracting firm was sentenced to 15 months' imprisonment and ordered to pay restitution of approximately \$1,000,000 for his participation in bid-rigging and fraudulent schemes in Connecticut. This was the seventh sentencing arising out of the same investigation.
- **DVDs and Blu-Ray Discs:** Five individuals and four companies were sentenced for participating in a conspiracy to fix the prices of DVDs and Blu-ray Discs sold on an online marketplace. One individual faced a jail term of 18 months' followed by two years of supervised release. The other individuals received sentences of one to six months' incarceration followed by longer periods of home confinement and/or supervised release. The highest individual fine imposed was \$55,000.
- **Military Tactical Vehicles:** Two military contractors were sentenced in the US District Court for the Eastern District of Texas, Texarkana Division, in respect of a bid-rigging conspiracy connected with the maintenance and repair of heavy military vehicles. One executive was sentenced to 18 months' incarceration and a fine of \$50,000, and the other faces six months in prison and a fine of \$300,000.
- **Forest Firefighting Services:** A federal grand jury in Boise, Idaho returned an indictment charging two executives of a conspiracy to rig bids and allocate territories in relation to forest-firefighting services. The defendants were alleged, among other things, to have coordinated bids to "squeeze" and "drown" competitors. The investigation was conducted by the **DOJ** Antitrust Division's Procurement Collusion Strike Force, which included Federal Bureau of Investigation (FBI) agents intercepting phone calls between the defendants.
- **Caltrans Improvement and Repair Contracts:** The owner of a construction company was sentenced to 78 months in prison and fined \$984,700 for his role in a bid-rigging scheme by which he recruited others to submit sham bids on contracts involving California Department of Transportation (Caltrans) improvement and repair contracts.

In **Australia**, the Federal Court imposed two fines on the managers of a flat steel company and an architecture firm for 575,000 Australian dollars (\$370,000) and 75,000 Australian dollars (\$50,000), respectively, for their role in implementing a plan to induce rivals to participate in cartel activity. In the

Morgan Lewis

former case, the court also ruled that the fine could not be recovered from insurers to ensure that the deterrent impact of individual liability was not undermined by the ability of officers to claim from directors and officers liability insurance policies.

In **Brazil**, **CADE** entered into a settlement agreement with an individual who agreed to pay a fine of 55,000 Brazilian reais (\$11,000) in relation to a supply chain cartel involving pharmaceutical products used in antispasmodic medications. **CADE** also fined three individuals a total of 732,000 Brazilian reais (\$150,300) for their participation in a global cartel in the underground and marine cable market and a further two individuals a total of 853,000 Brazilian reais (\$169,000) for their role in a cartel in the supply of fuel in Parana state. The **CMA** continued its policy of seeking the disqualification of directors involved in cartel conduct, securing four such disqualifications from directors in the construction sector who were involved in a cover-bidding conspiracy. Three of the directors voluntarily agreed to a disqualification order prior to formal proceedings being commenced, which resulted in a shorter period of disqualification.

Other agencies to bring criminal charges against individuals in 2023 include the **New Zealand Commerce Commission (NZCC)** (in a first) and the **CCB**, both in relation to bid rigging of public construction contracts, and the **JFTC** in relation to bid rigging in the context of the 2020 Tokyo Olympics. **Chile's Tribunal for Defence of Free Competition** approved for the first time the imposition of fines that had been sought by the **National Economic Prosecutor** on two chief executives for their role in a cartel involving helicopters for use in firefighting.

UPDATING THE RULEBOOK

Guidelines for Cooperation Between Competitors Refreshed

The European Union's and the United Kingdom's respective block exemption regulations/orders for horizontal cooperation agreements were replaced in 2023. The block exemptions disapply EU and UK competition law from certain categories of agreements, provided conditions are met—e.g., market shares remain below a set percentage and there are no hardcore restrictions of competition.

Both the **EC** and **CMA** published new guidelines (Horizontal Guidelines) to assist businesses in assessing the compatibility of, for example, research and development, specialization, standardization, commercialization, joint bidding, and joint purchasing agreements with EU/UK competition law. Both authorities also provided welcome further guidance on the treatment of anticompetitive information exchanges.

Cooperation on Sustainability Goals Get a (Mostly) Green Light

Sustainability and climate-change-related objectives continue to be an important topic in boardrooms and legislatures around the world. With governments mandating that companies change the way in which they operate their businesses, there is a recognition that industry-wide solutions or initiatives may provide a more effective and efficient tool in overcoming the free-rider problem and achieving goals such as net zero and the transition away from fossil fuels.

There is, however, a tension and an apprehension among both enforcers and businesses when it comes to competitors determining their commercial behavior on anything but a unilateral business. In Europe, for example, some of the largest corporate fines in the past decade have originated from collusion between companies in the context of changing environmental guidelines or standards (e.g., the *Trucks* and *Car Emissions* cartels). In the United States, investigations are ongoing by multiple state attorneys general into banks' membership of the United Nations' Net-Zero Banking Alliance and insurers' membership of the Net-Zero Insurance Alliance.

Morgan Lewis

Despite an increasing number of enforcers offering businesses the opportunity to seek guidance or, in some cases, exemption from the application of competition laws, take-up remains limited. Multinational companies prefer to self-assess, as there is a certain skepticism driven not least by divergent global attitudes and private litigation risk.

Several different agencies, including the **JFTC**, **EC** (as part of the refresh of the Horizontal Guidelines), **CMA**, **NZCC**, **Netherlands Authority for Consumers & Markets**, and the **Singapore Competition and Consumer Commission** all either published guidance or launched consultations designed to help businesses steer the challenge of working together to achieve sustainability goals without infringing competition law.

A common theme among the various guidelines is that sustainability agreements among competitors must lead to objective and verifiable benefits to consumers even if these benefits are non-price related. The CMA, for example, gives the example of an agreement that will reduce greenhouse gas emissions outside the UK which can be presumed to benefit UK consumers because of the benefits of combatting global climate change. The broader benefits will be expected to outweigh any potential negative effects on competition, although certain restrictions—e.g., price fixing—will remain a firm no-go area.

While the guidance is welcome, there remain significant potential pitfalls. We expect that enforcers will monitor this area closely and come down firmly—as in the past—on cartels that have been disguised as green agreements.

The End of the Strategic Transport Alliance?

The EC and the CMA both launched reviews in 2023 into the future of laws which exempt under certain circumstances agreements between competitors from the application of competition law. One such exemption is the Container Liner Shipping Block Exemption (CBER) which is due to expire in both jurisdictions on April 25, 2024.

The CBER was first adopted in 2009 as a means of promoting competition in the liner shipping sector and allowing cooperation between different liners that would form consortia, allowing, among other things, the more efficient use of capacity and improvements in productivity and quality while at the same time preventing the emergence of an oligopolistic structure and allowing smaller companies to flourish. The CBER permitted consortia to be formed provided that the market share of the liners did not exceed 30%.

Following detailed reviews, the **EC** announced that it will not renew the CBER upon its expiry, and the **CMA** has followed with a recommendation to the UK government along the same lines. The rationale from both authorities is similar—the COVID-19 pandemic and subsequent shocks in global supply chains saw freight rates increase significantly and there has also been an observed consolidation in the market with fewer liners who are part of multiple consortia. As such, neither authority was confident that renewing the block exemption was appropriate as it was unclear whether the efficiencies claimed by the liners were truly being passed on to consumers.

While this does not mean an end to shipping consortia—from 2024, it will be necessary for companies with combined shares below 30% to self-assess whether the consortia are competition law compliant rather than rely on the exemption—it signals a tightening of the rules around strategic alliances and cooperation between competitors.

This has also been seen in the airline sector, with the **DOJ** having succeeded in its suit to unravel an alliance between two airlines operating in the northeast in May 2023. The **CMA** continues its own investigation into an alliance covering certain transatlantic routes and the **ACCC** denied two airlines permission to renew an agreement in relation to corporate customers.

Morgan Lewis

We expect enforcers to monitor developments in these areas closely, including whether the withdrawal of the exemptions and clamp down on alliances may lead to greater consolidation (as has been seen in the United States and Europe in the airline industry). Companies that had previously been able to rely on automatic exemptions or generally more favorable assessments of the benefits to competition from alliances with their competitors will need to do a stock-take to ensure that existing and future arrangements remain compliant.

WHAT'S NEXT

Looking ahead to 2024, we expect to see an uptake in cases involving labor market collusion in particular, given proposed changes in national laws on both sides of the Atlantic, which may make it more difficult for companies to restrict the freedom of employees to switch jobs, resulting in businesses seeking alternative, unlawful ways of achieving the same end. We predict that the ECJ's landmark sporting decisions could lead to a proliferation of different challenges to established rules of association in that sector.

We also expect to see competition agencies continuing to seek ways to provide helpful guidance to businesses seeking to navigate changing national frameworks around topics such as sustainability or climate-change-related initiatives. The **CMA**, for example, in December issued its first response to a request for informal guidance under its "open-door policy" in relation to a sustainability agreement focused on resilience in food supply chains. On the other side of the coin, however, we expect enforcers to be closely monitoring business cooperations and alliances in this field and to take a dim view of companies that are bending the rules.

We would not be surprised to see one or more enforcers taking on a test case of sorts in relation to the role of AI in leading to cartel or collusive outcomes. How such a case progresses—including the difficulties in gathering evidence and the likely long roadmap for judicial challenge—will likely shape international enforcement for years to come. It may be that governments determine a form of ex ante regulation is preferable.

Finally, we predict that the resurgence of international cooperation among agencies will continue. While 2024 may not be a landmark year for headline cartel fines given the current investigative pipeline of global enforcers, it is likely to nonetheless be characterized by heightened activity, and it would not be a surprise if historic fine levels reach those last seen a decade ago by 2025–2026.

ABOUT US

Morgan Lewis is recognized for exceptional client service, legal innovation, and commitment to its communities. Our global depth reaches across North America, Asia, Europe, and the Middle East with the collaboration of more than 2,200 lawyers and specialists who provide elite legal services across industry sectors for multinational corporations to startups around the world. For more information about us, please visit www.morganlewis.com.

Morgan Lewis

CONTACTS

If you have any questions or would like more information on the issues discussed in this report, please contact any of the following:

Boston

Daniel S. Savrin	+1.617.951.8674	daniel.savrin@morganlewis.com
Noah J. Kaufman	+1.617.341.7590	noah.kaufman@morganlewis.com

Brussels

Christina Renner	+32.2.507.7524	christina.renner@morganlewis.com
Izzet Sinan	+32.2.507.7522	izzet.sinan@morganlewis.com

Frankfurt

Michael Masling	+49.69.714.00.753	michael.masling@morganlewis.com
-----------------	-------------------	--

Hong Kong

Charles Mo	+852.3551.8558	charles.mo@morganlewis.com
------------	----------------	--

London

Frances Murphy	+44.20.3201.5631	frances.murphy@morganlewis.com
Omar Shah	+44.20.3201.5561	omar.shah@morganlewis.com
Leonidas Theodosiou	+44.20.3201.5445	leonidas.theodosiou@morganlewis.com
Chris Warren-Smith	+44.20.3201.5450	chris.warren-smith@morganlewis.com

New York

Stacey Anne Mahoney	+1.212.309.6930	stacey.mahoney@morganlewis.com
---------------------	-----------------	--

Paris

Alexandre Bailly	+33.1.53.30.44.59	alexandre.bailly@morganlewis.com
Xavier Haranger	+33.1.53.30.44.28	xavier.haranger@morganlewis.com

Philadelphia

R. Brendan Fee	+1.215.963.5136	brendan.fee@morganlewis.com
Zachary M. Johns	+1.215.963.5340	zachary.johns@morganlewis.com
William T. McEnroe	+1.215.963.5265	william.mcenroe@morganlewis.com
Zane David Memeger	+1.215.963.5750	zane.memeger@morganlewis.com
Steven A. Reed	+1.215.963.5603	steven.reed@morganlewis.com

San Francisco

Michelle Park Chiu	+1.415.442.1184	michelle.chiu@morganlewis.com
Colin C. West	+1.415.442.1121	colin.west@morganlewis.com

Tokyo

Motonori Araki	+81.3.4578.2504	moto.araki@morganlewis.com
Jitsuro Morishita	+81.3.4578.2530	jitsuro.morishita@morganlewis.com

Shanghai

Todd Liao	+86.21.8022.8799	todd.liao@morganlewis.com
-----------	------------------	--

Washington, DC

J. Clayton "Clay" Everett, Jr.	+1.202.739.5860	clay.everett@morganlewis.com
--------------------------------	-----------------	--