Simpson Thacher

2020 Global Cartel Enforcement Report

January 2021

As one administration ends and all eyes turn to the next, the key question on many minds is whether the trends established in the outgoing administration will persist or whether the next administration will mark a significant shift in enforcement policy or focus. We expect the latter.

The new administration is likely to usher in a fundamental shift in antitrust enforcement considerations, with non-economic principles, like inequality and sustainability, playing a role in enforcement decisions and priorities. This shift is expected to result in more aggressive enforcement, particularly around conduct affecting public procurement and other markets key to the new administration's crisis recovery efforts, such as the healthcare, financial services, and labor markets.

Where We've Been: Trends From the Outgoing Administration

The outgoing administration leaves behind an enforcement legacy dominated by a largely domestic focus, which may have contributed to an overall downturn in cartel enforcement actions and total fines, but also ushered in new enforcement tools.

Emphasis on a Domestic Agenda. In a departure from the large international cartels that grabbed headlines in the mid-2010s, the outgoing administration focused on domestic cartel cases. This approach may have contributed to the lower fine totals of recent years, but also led to important new initiatives such as the creation of the Procurement Collusion Strike Force in 2019. It also resulted in the Antitrust Division obtaining the four highest fines ever imposed for domestic-only cartels.

Downward Trend in Enforcement. Although the Antitrust Division continued to bolster their enforcement tools, key statistics reveal a downward trend in enforcement during the outgoing administration. In the period between FY 2013-2016, the Antitrust Division filed an average of 51 criminal cases every year, reaching a high of 60 cases in 2015. However, the outgoing administration saw roughly half this number between FY 2017-2020, with criminal cases filed hovering between 18 and 26. The total number of individuals and companies charged similarly waned: between FY 2013-2016, the Antitrust Division averaged 48 individuals and 19 companies charged per year; in FY 2017-2020, the Antitrust Division charged between 15 and 28 individuals and between 5 and 13 companies per year.

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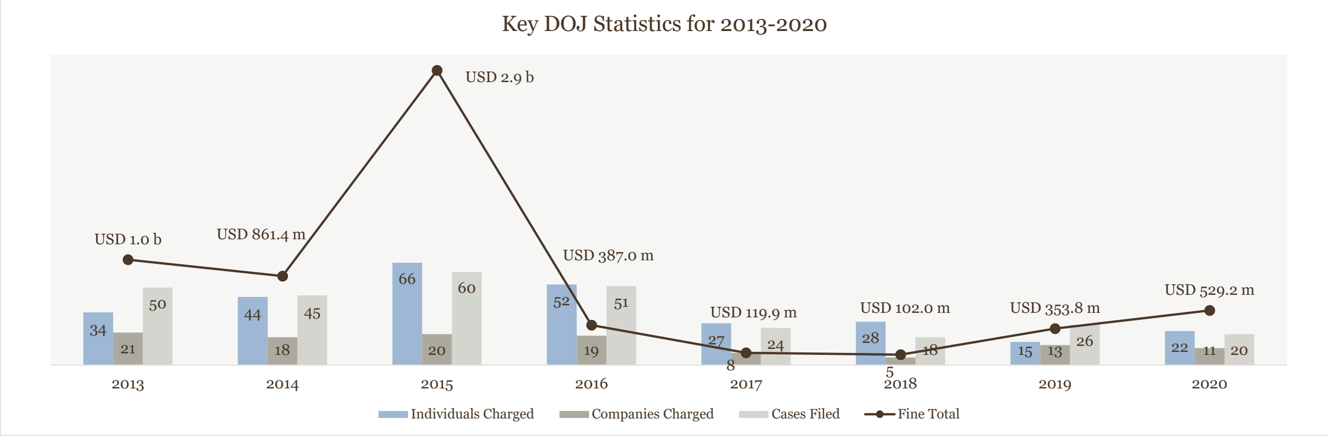
Key DOJ Statistics for 2013-2020[1]



1. The figures below reflect the fines as agreed to and announced at the time imposed by the Antitrust Division. Figures on individuals charged, companies charged, and cases filed were sourced from the Division's Criminal Enforcement Trend Charts, available here.

Slowdown in Cartel Fines. The Antitrust Division saw an increase in fines in 2020 to the highest total obtained since FY 2015, but the outgoing administration overall featured significantly lower fine totals than the prior administration. The downward trend extended outside of the United States as well, as many global enforcers obtained lower fine totals than earlier in the decade. In 2020—an unusual year by any standard—criminal fines took a nosedive in many jurisdictions, with regulators in some countries, such as India and Australia, imposing no fines at all. The COVID-19 pandemic understandably slowed investigations, but we expect fine totals to rebound as regulators adapt with new investigative techniques and as the world recovers from the pandemic.

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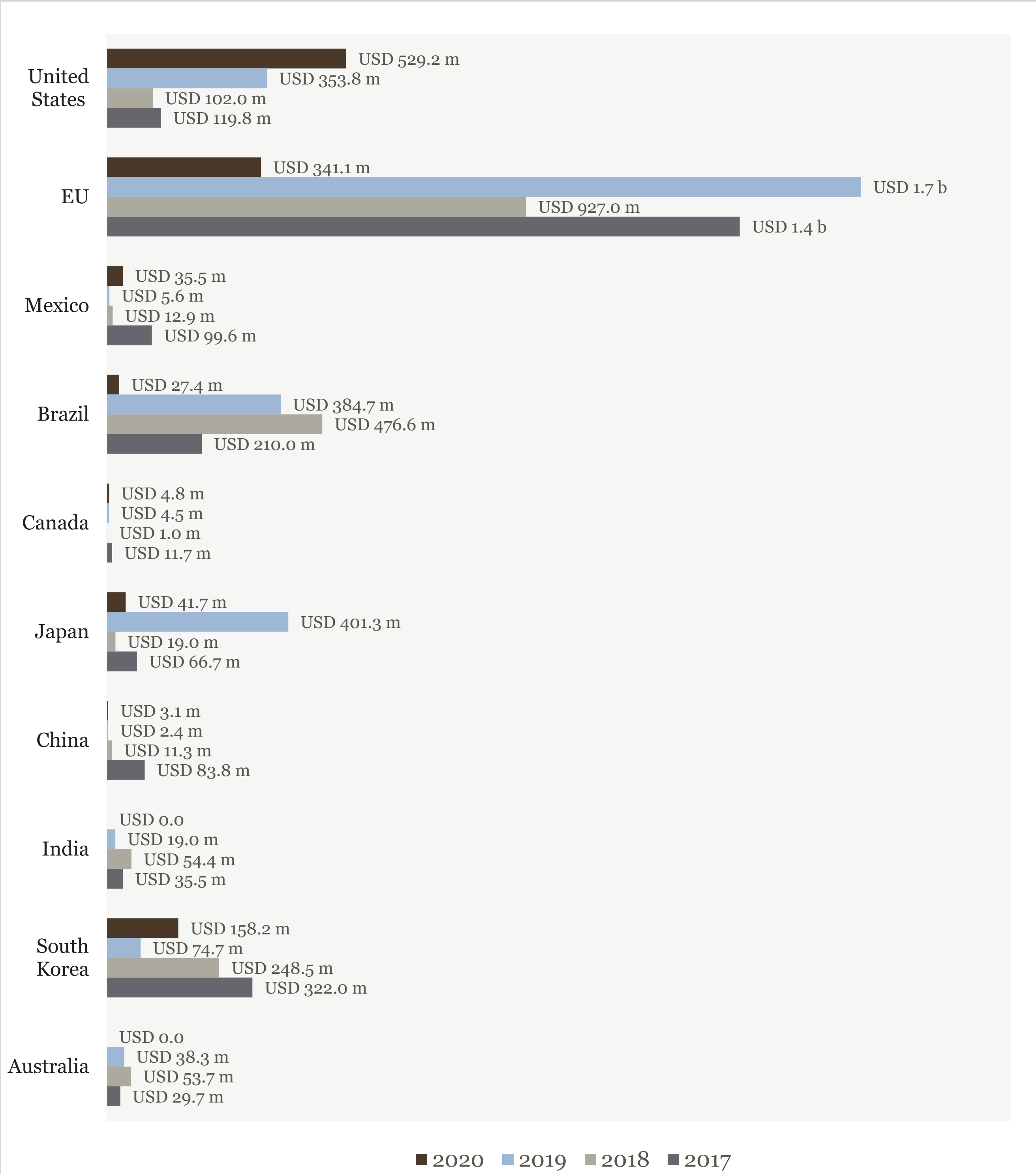
Select Year-to-Year Comparison[2, 3]



2. Statistics from selected jurisdictions are approximate and reflect fine levels and exchange rates at the time of writing and may not be exhaustive. Statistics reflecting penalties for the U.S. include those in the U.S. fiscal year, October 1, 2019 to September 30, 2020. All other statistics include enforcements in the 2020 calendar year.

3. Fine amounts were based on the local currency and converted to U.S. dollars using the currency exchange rates reported by the United States Treasury's Bureau of the Fiscal Service, available here (as modified in December 2020).

Where We're Headed: What to Watch For in the Next Administration

The Antitrust Division was subject to criticism under the prior administration due to concerns of the potential politicization of certain enforcement efforts. Conscious of these criticisms, the new administration is likely to place a greater emphasis on effectuating practices demonstrating transparency and consistency throughout the life-cycle of the enforcement process. In addition, the new administration is likely to place a higher premium on closer coordination with foreign antitrust authorities and State AGs in cross-border matters.

Revival of International Cooperation. Whereas the outgoing administration turned inward to focus on domestic cases, the incoming administration will likely seek to return to the international stage with an increase in cooperation with foreign counterparts in cross-border investigations. Such a transition could prompt further guidance and clarification about how the Antitrust Division coordinates resolutions where foreign regulators institute parallel proceedings arising from the same conduct.

Doubling Down on Core Sectors. Certain sectors—like agriculture, financial services, healthcare and labor—that have been a focus of the outgoing administration are likely to remain in the limelight. Five out of the six corporate fines imposed by the Antitrust Division in FY 2020 were in the healthcare sector, with four in the generic pharmaceuticals space. Though the long-running generic pharmaceuticals investigation may be reaching the tail-end of its cycle, the COVID-19 pandemic is likely to sharpen the Antitrust Division's focus in the healthcare sector. Like many regulators, the Antitrust Division worked quickly to provide assurances in the form of Business Review letters to market participants who sought to coordinate on COVID-19 pandemic responses that benefitted the public. However, the Antitrust Division will continue to pursue actors that seek to take advantage of the global crisis or otherwise limit competition in the healthcare market.

The Antitrust Division's focus on labor markets is also likely to carry over into the next administration. In the closing weeks of the outgoing administration, the Antitrust Division brought its long-awaited first criminal wage-fixing and no-poach cases; interestingly, both cases are in the healthcare sector. The labor markets are a shared focus of the outgoing and incoming administrations and thus we expect the new administration to continue aggressive pursuit of the right cases to drive change and precedent in this area.

A New Emphasis on Sustainability. In a sharp departure from the outgoing administration, the incoming administration has signaled that environmental and sustainability initiatives will be a priority in the coming years. Part of this effort could include consideration of the intersection between antitrust and sustainability, including collaboration among competitors to serve environmental and other social goals such as emissions reduction. Similar initiatives are playing out in Europe: in July 2020, the Dutch competition authorities released draft guidance specifically for competitors who wish to collaborate on sustainability initiatives; the U.K. Competition and Markets Authority identified climate change as a key priority for 2020-2021; and a February 2021 conference hosted by the European Commission plans to focus on how antitrust enforcement can be updated in light of the climate crisis.

Reinvigoration of the Corporate Leniency Policy. Leniency programs are and will remain a critical component of enforcement regimes worldwide, but recent changes to the Antitrust Division's policy and its implementation may undermine its appeal to potential applicants. Over the last four years, the Antitrust Division has placed limitations on the scope of those individuals who will be covered by a grant of corporate leniency by presumptively excluding former employees; added new cooperation obligations for covered individuals in the form of mandatory participation in covert activity; and increased the expected timeline for and scrutiny applied to evaluating leniency markers. Amidst speculation that leniency applications are already declining, the incoming administration will likely look to reevaluate and potentially amend these policy changes. At a minimum, we expect further substantive guidance around these policy changes to improve overall transparency in the process.

Reassessment of the Use of Deferred Prosecution Agreements (DPAs). In the waning days of the outgoing administration's tenure, the DOJ entered into a DPA with a cement company to resolve criminal charges for price-fixing and bid-rigging where there was no obvious regulatory debarment or compliance rationale for doing so. This marks the longest reach by the outgoing administration to expand the use of DPAs in antitrust prosecutions following its issuance of new guidance on corporate compliance policies in 2019. Previously, DPAs and non-prosecution agreements (NPAs) were rarely used, and were disfavored due to a perception that they could be applied arbitrarily across cases and undermine the Leniency Program, which has historically been positioned as the sole means for a cartel participant to avoid prosecution. The next administration will likely reconsider the merits and appropriateness of broad use of DPAs in antitrust prosecutions.

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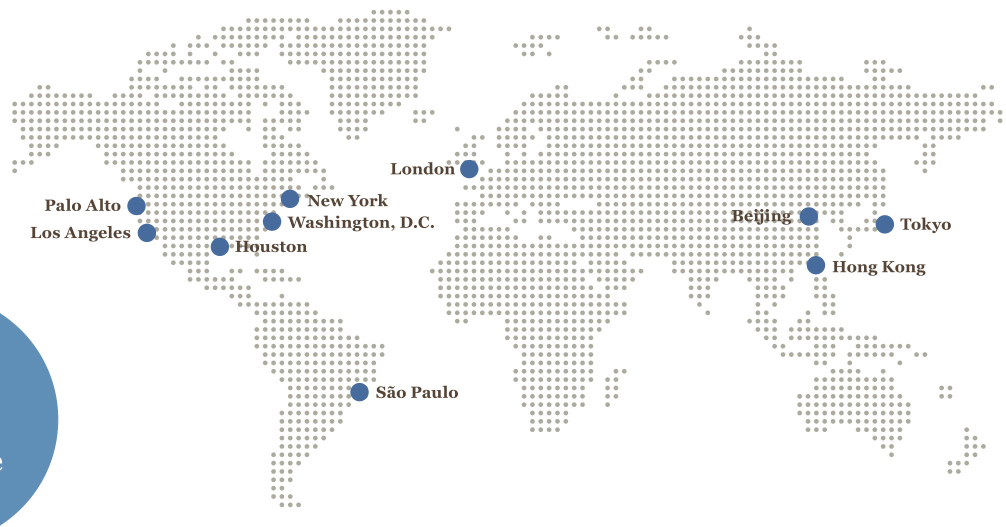

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