

# Global Antitrust Compliance: Assessing Risks and Creating an Effective Antitrust Program

Tim Bridgeford, Global Head of Anti-Corruption and Antitrust Compliance,  
J.P. Morgan, New York [timothy.bridgeford@jpmchase.com](mailto:timothy.bridgeford@jpmchase.com)

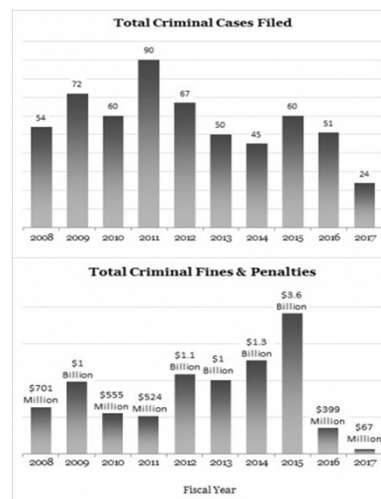
Doug Tween, Partner, Linklaters LLP [douglas.tween@Linklaters.com](mailto:douglas.tween@Linklaters.com)



Linklaters

## Antitrust Enforcement Risks

- > After a decade of robust enforcement, some signs of a slowdown
  - Lowest fines in more than a decade following record highs in 2015
  - Recognition leniency programs have become burdensome
- > Inherent Risk (probability + impact) of enforcement remains
  - Impact should still be the key driver of compliance efforts
  - Probability of detection still should not be understated



Source: US Department of Justice, Antitrust Division

Linklaters

October 2018 | 2

## Risk Assessment is Key to Effective Compliance

---

- > Risk assessment allows you to most effectively allocate resources – focusing preventative and detective measures on your highest risk areas
  - No “off the shelf” or “one size fits all” process; need to assess the specific risks for your company, industry, and jurisdiction(s)
  - Learn the business model / go to market strategies by interviewing business and legal / compliance teams
  - Assessment should consider a range of antitrust risks: Cartel, Info Exchange, Monopolization, Vertical, M&A, Bespoke Risks (e.g. HR)
  - Formal risk assessment recommended at least once a year; always be alert to changing risk factors (new laws, new inquiries, shifting business risks)

## Understanding the Risk Factors: Cartel Conduct

---

- > Market structure in your industry
  - Commodity product? Number of players? Barriers to entry?
  - Bidding markets (particularly government contracts)?
- > Competitor interaction and opportunity for coordination
  - Commercial relationships and joint ventures with competitors
  - Employee rotation within the industry can facilitate collusion
  - Trade associations and conferences should be closely monitored
  - Information exchange mechanisms can be pro-competitive, but pose particular enforcement risks
- > Countries where you operate (and related enforcement activities)

## Understanding the Risk Factors: Human Resources

---

- > HR activities are a new area of bespoke antitrust risk
  - New guidelines from US DOJ / FTC focused on coordination in employment following high profile Silicon Valley enforcement action
  - European Commission and Hong Kong Competition Commission have followed with similar guidance
- > Example of shifting enforcement trends that can create enforcement risks in areas that were not previously a focus of antitrust compliance
  - Wage fixing and “no poach” agreements now potentially subject to criminal cartel enforcement in the United States
  - Information exchange activities related to sensitive HR material can also give rise to exposure

## Measuring the Level of Risk in Your Organization

---

- > Quantification of overall risk should be some representation of your Inherent Risk and Residual Risk
  - ICC guidelines provide some metrics for quantifying probability of detection and potential impact
  - Every organization has a unique risk profile
- > Challenges associated with quantifying antitrust risks
  - Inherent Risk tends to be higher given the potential impact of antitrust enforcement actions (criminal and civil exposure)
  - Residual Risk can still be high given difficulty in applying antitrust controls and shifting enforcement standards

## Implementing Effective Antitrust Controls

---

- > Administering antitrust controls presents a challenge to most companies
  - Safeguards can be put in place ex ante to reduce potential exposure, but they can be difficult to administer
  - Prohibiting or requiring pre-clearance for interactions with competitors can be effective, but this is not feasible in most companies today
- > Potential to focus resources on safeguards for higher risk areas:
  - Controls for trade associations and conferences
  - Safeguards for information exchange activities
  - Communication controls to flag suspicious conduct

## Conducting Effective Antitrust Audits

---

- > Audits are an important and effective tool for antitrust compliance
  - Effective audits can have a strong deterrent effect in the business
  - Detection of potential violations allow for effective remedial action
- > Audits should be tailored to the risk assessment and antitrust controls
  - Monitor antitrust controls for potential compliance breaches
  - Conduct in-depth audits of higher risk business areas