

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

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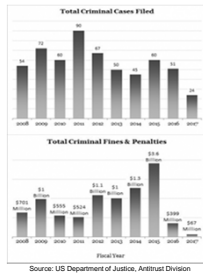
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Antitrust Enforcement Risks

- 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



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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)

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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)

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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

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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

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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

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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

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