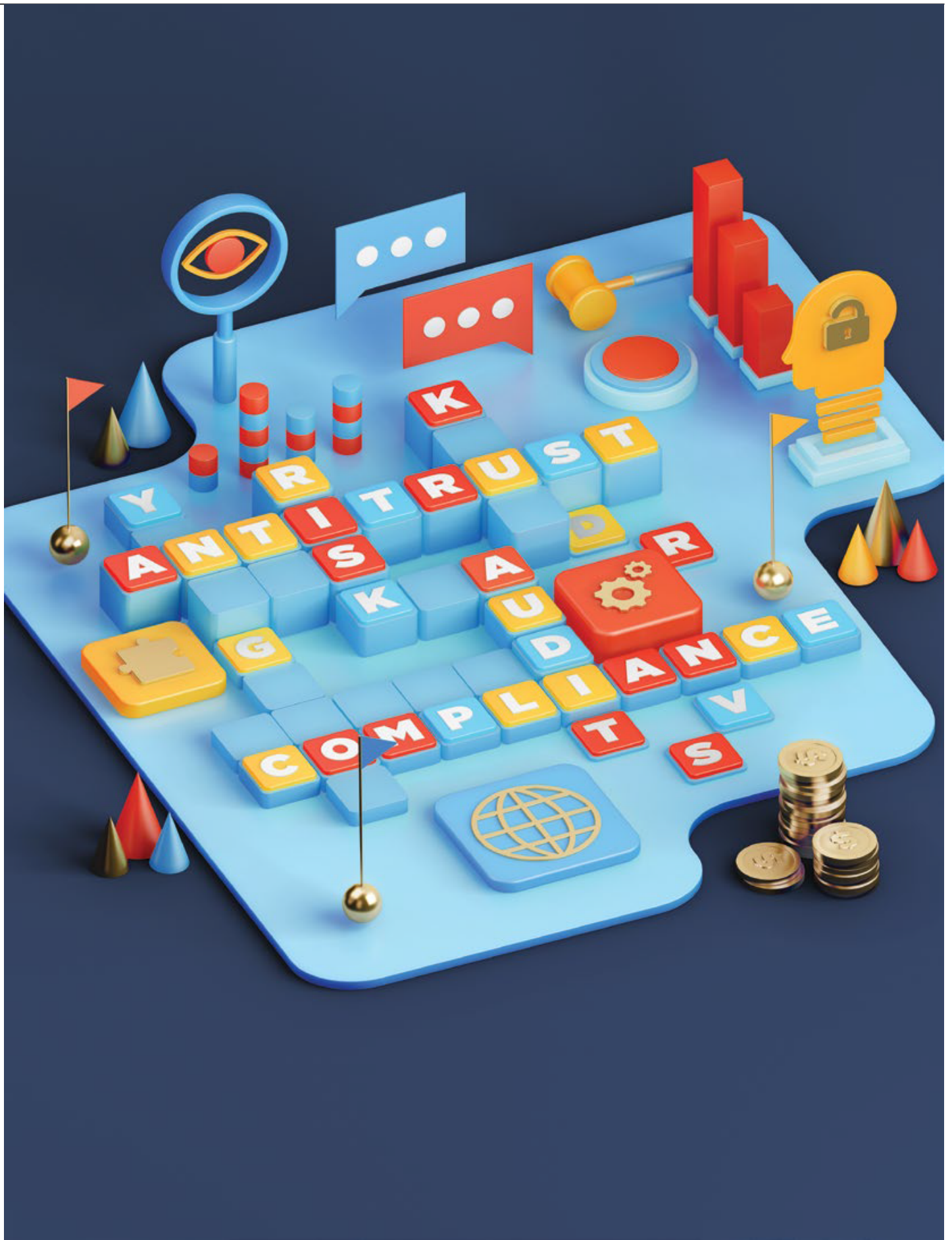




Creating and Implementing an Antitrust Compliance Program

Compliance and Ethics





CHEAT SHEET

- **Unwanted attention.** A breach of antitrust law can result in fines of up to 10 percent of the organization's worldwide turnover. Recently, the European Commission fined Intel €1.06 billion for its abuse of antitrust regulations.
- **Culture is key.** It's imperative that antitrust compliance measures are adapted to fit with company culture. A "one size fits all" approach does not address specific antitrust risks.
- **Train to gain.** Training is a fundamental part of any antitrust program, and should empower employees to spot potential risk areas and implement strategies to overcome them.
- **Revisit and restructure.** When creating an antitrust compliance program, it's important to periodically review provisions and adapt to stay up-to-date with changing standards.

It is 9 a.m. on a Monday. The receptionist calls to tell you that there are five visitors from an antitrust authority who want to enter your organization's premises and inspect files. While rushing to the lobby, you call relevant senior leadership to inform them about the imminent antitrust inspection.

This scenario, which is not foreign to many in-house counsel, often prompts questions around creating or updating your antitrust compliance program. In particular, senior leadership in an organization may wonder whether the organization has put sufficient resources into antitrust compliance. It may prompt questions regarding whether a suspected antitrust breach could have been avoided if the organization had an antitrust compliance program. If they already have a compliance program, what should have been done to improve it to minimize the risk of future antitrust laws violations (and inspections)?

In a broader context, managing legal risks, including antitrust law risks, is becoming a priority for more and more organizations as they navigate through international regulations that require they meet ethical expectations and contractual requirements to their customers, vendors, and investors. Compliance programs are viewed as effective tools to achieve business goals without violating antitrust laws.

This article provides guidance on the creation and implementation of an antitrust compliance program.

Defining antitrust compliance

Antitrust compliance is acting in accordance with antitrust laws, whose purpose is to encourage competition and efficiency in the marketplace so that consumers can have more choice and benefit from greater quality products and lower prices. Antitrust compliance has become a more prominent concern for organizations as knowledge about antitrust laws and enforcement increases. Currently, over 115 countries in the world have antitrust agencies that aim to raise awareness and enforce compliance.¹ In addition, many national and regional courts have the powers to hear antitrust cases and enforce relevant antitrust laws. Finally, private plaintiffs are increasingly involved in antitrust enforcement as more and more jurisdictions introduce private enforcement of antitrust laws. In certain jurisdictions, private plaintiffs can file damages claims² against organizations that they believe to

have broken antitrust laws.

1 For the full list of antitrust agencies worldwide, please visit [Federal Trade Commission, Competition & Consumer Protection Authorities Worldwide](#).

2 While in US, private enforcement is a mature practice, Europe is only starting to see cases. It is hoped that after the EU member states transpose the Directive 2014/104/EU on antitrust damages actions, it will become a more frequent practice.

Importance of antitrust compliance

It is important to comply with antitrust laws because any violation can bring adverse consequences to an organization. Increased attention to the value of antitrust compliance has been heightened recently, as antitrust authorities have been given more fining power. A breach of antitrust law can result in fines of up to 10 percent of the organization's worldwide turnover. For example, the European Commission fined Intel €1.06 billion for abuse of a dominant position,³ which served as the highest fine ever imposed by the European Commission. In addition to fines, organizations that violate antitrust laws can face costly damages, claims, and injunctions brought by competing businesses. In an increasing number of jurisdictions, organizations can be found liable for private plaintiffs who suffered harm due to an organization's anticompetitive behavior. Antitrust law violations can leave an indelible stain on an organization's image and reputation. A business that does not act in accordance with the law may be considered unethical and untrustworthy. Violating antitrust laws can further lead to time-consuming, disruptive investigations, which require significant human resources, including significant fees and expenses of external counsel and other experts, such as economists. In some jurisdictions like Canada, the United States, and the United Kingdom, certain antitrust violations, such as agreements with competitors, are criminal offenses. Individuals who participate in them can face jail sentences and/or fines. Finally, antitrust authorities can impose binding and restrictive conditions on organizations that have been determined to have breached antitrust regulations. This, in practice, means that the authorities may interfere with how the organization runs its business.

3 COMP/C-3 /37.990 – Intel. The fine was upheld by the *General Court in Intel Corp. v European Commission* (Case T-286/09). The appeal is currently pending before the European Court of Justice.

Findings of antitrust infringement may lead customers to question the business ethics of the accused infringer. Organizations with a record of complying with laws, including antitrust laws, tend to attract and retain customers, investors, and ethical employees. Furthermore, antitrust compliance avoids the risk of losses associated with the considerable money spent on fines, the potential damages that could be required as a result of a civil action, and the external counsel/expert fees. Finally, in the M&A context, a potential buyer could be more attracted to acquiring an organization with a strong antitrust compliance record. This is because such compliance record demonstrates the organization's values, its commitment to respect legal norms, and its interest in minimizing risks of any future liabilities associated with antitrust infringements.

Creating a compliance program

An antitrust compliance program helps minimize the risk of violating antitrust laws. Employees at organizations with compliance programs are empowered to act within the legal framework and are educated as to what they need to do when they spot a potential antitrust issue.

A robust antitrust compliance program can also come in handy when — despite its best efforts to remain compliant — the organization is suspected of having violated antitrust laws. This is because many jurisdictions consider having a compliance program to be a mitigating factor that will inevitably lead to lower fines. Antitrust agencies that give an organization credit for having a compliance program include agencies in Australia, Brazil, Canada, France, India, Italy, Singapore, South Africa, South Korea, and the United Kingdom. Recently, the US Department of Justice recommended a lower fine for an organization that has a “comprehensive” and “effective” compliance program.⁴

4 *United States v. Kayaba Industry Co., Ltd, d/b/a KYB Corporation.*

There are at least eight elements that you should consider when creating an antitrust compliance program at your organization, namely:

- Antitrust compliance as part of your organization’s culture;
- Customization;
- Management support;
- Resources;
- Training;
- Audits and controls;
- Reporting potential antitrust violations; and,
- Your organization’s response to antitrust violations.

Antitrust compliance as part of your organization’s culture

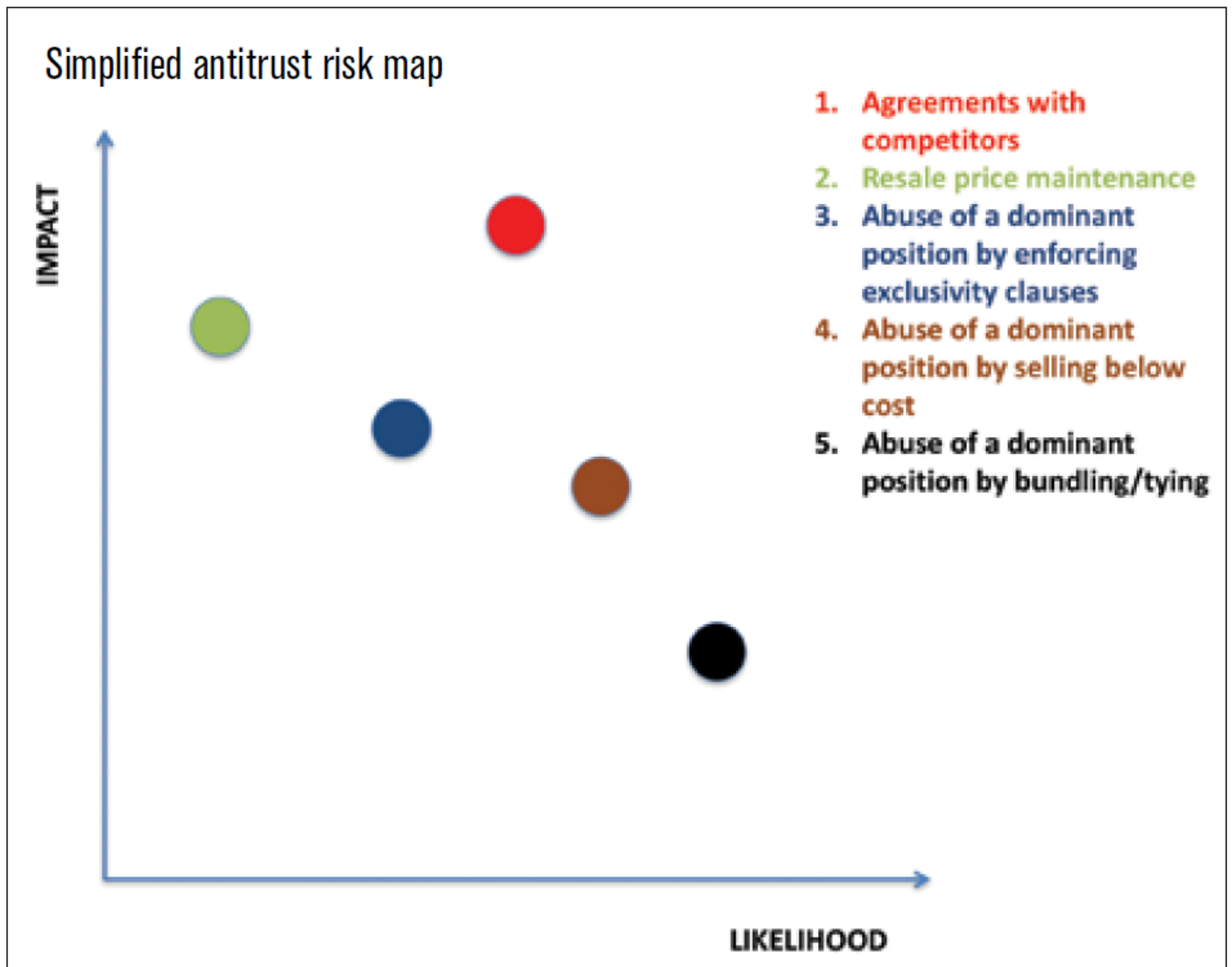
The antitrust compliance program can only be successful if it is embedded in your organization’s culture. However, creating a culture of compliance does not happen overnight. It requires willingness, time, and effort from the senior leadership team to continuously foster an ethical culture and ensure that the right attitude cascades down the corporate ladder. In particular, senior leadership should be encouraged to remind its employees of the importance to act within the legal framework. Where competition issues create a high risk of impact for your organization, the compliance message should also be delivered when the CEO and other senior organization representatives speak at events and with the press. Further, senior leadership should back up its words with definitive actions so that employees can see the value of such protocol. Senior leadership should also endorse the antitrust training program and encourage their teams to contact the legal department for any queries to ensure a consistent approach across the organization. Finally, if your organization has a general business code of conduct, antitrust compliance should be included to further reflect your organization’s commitment to comply with these sets of laws.

Customization

Your compliance program will need to be tailored-made. A ‘one size fits all’ approach for antitrust compliance programs does not work efficiently, as organizations have different antitrust risks. In particular, if your organization has a high market share, you may want to put more emphasis on abuse of dominance issues in your compliance program and confirm that your employees understand rules around exclusivity clauses, bundling/tying, and below cost pricing. If your organization has smaller market shares, but, for example, your CEO attends trading events where he or she socializes with competitors, you may want to examine whether the market your organization operates in is subject to cartelization risk (agreements between competitors). It’s also important to focus on anticompetitive vertical restraints (e.g., resale price maintenance).

Therefore, it is essential that you first identify what antitrust risks your organization has by immersing yourself into the business. You should engage with and create trusted relationships with stakeholders across different departments (e.g., sales, finance, product development, and products marketing) that can share insights with you on how the business is done.

Once you identify the potential antitrust risks, the next exercise will consist of risk prioritizing. Depending on the resources that your organization has, it may be best to focus on the risks that are the highest in terms of probability of occurrence and the level of impact. A helpful process to visualize your organization's antitrust risk is to create an 'antitrust risk map' indicating the likelihood of a particular behavior and the impact that it may have on your organization. Ensure that legal counsel, including in-house and external, is engaged in the process of creating a heat map. The heat map will be an inherent part of legal advice for an organization regarding prioritization of compliance efforts.



The customization aspect is equally important when creating antitrust training for your organization's employees. A 'one size fits all' approach is not an effective approach to such trainings. This is because each department within an organization has different roles and responsibilities and employees pertaining to different organizations (e.g., legal, sales, finance, and services), and the employees must clearly understand what these roles and responsibilities are. It is key to create customized training that explains each employee's role and responsibilities and, as such, minimize the risk that the aforementioned antitrust incidents occur.

Management support

The support of senior leadership, including the CEO, the executive team, and the board of directors, is important to the success of any antitrust compliance program. Senior leadership should understand the compliance program's value and should be actively engaged in its creation, promotion, and implementation. Unequivocal support from the top management is ultimately linked to the desire to run an ethical business and create a culture of compliance. Further, antitrust authorities often highlight the importance of senior management's support in relation to compliance programs.⁵ Finally, such authorities may take senior management's evident support into consideration when evaluating whether an organization's compliance program should be considered as mitigation factor in an investigation for an antitrust law violation.

The means of obtaining management support will vary considerably between organizations but to convince them of the value of having a robust antitrust compliance program, you may want to consider providing your CEO and the senior leadership team examples of:

- High fines imposed on organizations and executives for breaching antitrust rules. For example, the European Commission has recently fined five truck producers over €2.93 billion for participating in a cartel, with Daimler being fined over €1 billion.⁶
- Reputational and image damage that organizations may suffer as a result of being investigated by antitrust authorities. For example, the European Commission's investigation into Google's abuse of its dominance position, which has been included on the front pages of multiple principal European newspapers including The Financial Times,⁷ Le Monde,⁸ El Mundo,⁹ and Die Zeit.¹⁰
- The list of the most active antitrust agencies. For example, an organization that does business in the United States and Latin America should be aware that the US Federal Trade Commission and the US Department of Justice, as well as the Administrative Council for Economic Defense in Brazil, are active antitrust agencies. In addition to this list, you may want to highlight specific kinds of conduct that are of interest to such agencies. For example, while the US Department of Justice is an active agency, it rarely focuses on single-organization conduct.

Obtaining your senior leadership support will be an initial step. In the long run, in order to sustain the culture of compliance and maximize the success of the antitrust compliance program, you will need continuous and broad management support across all departments.

5 As example, please review [Competition and Market Authority's chief executive, Alex Chisholm, speech to the Law Society Competition Section Annual Conference in London on 16 May 2014](#).

6 [Antitrust: Commission fines truck producers 2.93 billion for participating in a cartel available](#).

7 Google to be hit by new complaint from Brussels.

8 [Bruxelles accuse Google d'abus de position dominante](#).

9 [Bruselas acusa a Google de abuso de posición dominante en la publicidad online](#).

10 EU-Kommission eröffnet weiteres Verfahren gegen Google.

Resources

Resources that can be dedicated to the creation and implementation of the antitrust compliance program, which will vary depending on your organization's needs. Further, the availability of resources will determine what antitrust risks your organization will target, who will create and own the compliance program, how the compliance program will be structured, and how it will be implemented. Costs differ substantially when you consider whether to have an in-house counsel or an internal compliance officer create and deliver training as opposed to outsourcing this task to outside counsel. The training by internal resources could be more effective (provided the internal resources have the necessary antitrust background) than if it's carried out by third parties, as these individuals are versed in the risks and business activities of the organization.

There are also plenty of resources created by antitrust agencies that are available online and are free of charge. These resources can provide a helpful start for your organization's compliance program.¹¹

11 For example, the [United Kingdom Competition Market Authority's website](#) is a goldmine of relevant information on antitrust compliance. Resources include videos, guides, checklists, etc.

In any discussion concerning the resources needed to implement an antitrust compliance program, your senior leadership should be encouraged to understand what resources can help protect your organization from violating antitrust laws and reduce the risk of adverse consequences, including damage to organization's image and reputation. A compliance program is a long term investment into your organization's people, processes, and, consequently, its success.

Seven quick tips

1. **Timeline:** Creating and delivering an antitrust compliance program is a time-consuming exercise. Avoid setting short deadlines and allow yourself between six to 12 months to complete the task.
2. **Prioritizing antitrust risks:** Be prepared to know how to prioritize the antitrust risks that your organization has identified. Your organization may not have enough resources to tackle all of them at once.
3. **Getting management support:** Ensure you have continuous support from senior leadership. You should call them from time to time to remind them about the importance of complying with the program. Further, when you set up antitrust trainings, ask each senior leader to send an email to their team emphasizing the importance of the training.
4. **Delivering trainings:** Avoid trainings that last more than one hour, particularly if you are going to deliver these via video conferencing system. It may be better to schedule a few, shorter trainings to ensure that you're keeping your audience's attention.
5. **Legal jargon:** Avoid complex legal language when explaining the importance of compliance to your organization's employees.
6. **List of trained employees:** Prepare and maintain a list of employees that have received antitrust training. It may be helpful when assessing whether or not to take disciplinary action against an employee that is suspected of breaching an antitrust compliance program.
7. **Material repository:** Ensure you store all material relating to your compliance program in one place. If you upload some material to your organization's internal website, ensure that you take it down once it is obsolete to avoid any misunderstanding.

Training

Training is a fundamental part of any compliance program. The purpose of the training is to raise awareness in employees, which helps minimize the risk that antitrust violations occur. Employees should be able to understand basic antitrust rules, spot an issue, and know what to do when they are faced with a potential concern. The training should also, ideally, empower the employees to be more confident as to what conduct is acceptable and what conduct should be avoided.

Antitrust training should be customized to different departments within an organization because of differing functions. Each organization is different and will need to decide what split between departments works best. The below provides an example of six different employee groups that should receive tailored antitrust training in the framework of an antitrust compliance program.

1. **Leadership team.** This group includes senior officers, managers, directors, and team leads. Training for these individuals should focus on identifying the main antitrust risks for the organization in general and for its individual departments. For example, if your organization attends a trade show where its competitors are also present, management needs to understand which appropriate conversations can take place. Moreover, management ought to be trained to communicate in a way that ensures that the organization's message reflects the culture of compliance. Leadership teams are also likely to be the first ones with whom antitrust officials will want to speak in case of an antitrust inspection. Therefore, trainings should also outline what an antitrust inspection consists of, what powers the antitrust officials may have, and what level of collaboration is expected from them.
2. **Sales and finance teams.** This group includes account managers and other sales representatives, as well as members of the finance organization who support sales activities. These individuals may be a challenging group to train as they may be a sizable department, spread out geographically, with the greatest exposure to customers and competitors. Their training, similarly to their management's training, should outline the main antitrust risks for your organization in general and for their departments in particular. The trainings should provide practical, tailored examples, and encourage them to ask questions.¹²
3. **M&A teams.** This group includes employees that are responsible for organization's M&A activities. Their training should focus on understanding that some acquisitions, investments, joint ventures, or mergers may require the notification of various antitrust authorities. M&A processes require specific rules that the organization must abide by, including not closing the operation before receiving approval from all antitrust authorities (so-called "gun jumping" rules).
4. **In-house counsel.** The in-house legal staff becomes particularly important if your organization is multinational and has a sizable legal department. Not all attorneys have a familiarity with antitrust principles; however, it is important they are trained. Training will increase the likelihood of these inhouse counsel becoming the "eyes and ears" of antitrust compliance by encouraging them to spot potential violations and mitigating risks before they escalate. Inhouse counsel should be further knowledgeable about antitrust inspections, as they may need to attend to regulatory officials before other more experienced counsel arrives.
5. **Receptionists and security.** These employees may become very involved in the event of an antitrust inspection. The receptionists' training should focus on identifying who the antitrust officials are, why they are visiting the organization's facilities, and what conduct is expected of them. Security staff may be particularly important during the antitrust inspection when there is a need to secure files. In this case, the officials will "seal" the premises and the security staff should be responsible for ensuring that no one interferes with the documents.

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6. **IT staff.** This group includes local IT engineers and their management. The knowledge of an organization's IT system and the role of an IT engineer have become critical during antitrust inspections, as organizations cease retaining paper documents and hard copies of agreements. Thus, IT staff should understand what an antitrust inspection consists of and how they need are required to respond to inspector requests. Potential courses of action may include accessing employees' computers, telephones, or network folders, blocking employees' passwords, or retrieving hard drives.

12 The sales team should not feel that they may be 'interrogated' by the in-house counsel after the training finalizes if, during the training, they ask a question, which can raise antitrust concerns. If they get that feeling, it will be challenging to convince them to participate in the training and ask anything.

There are many ways to deliver antitrust training. The most common is to conduct it in-person, which can be delivered by in-house counsel or by a compliance officer. However, while one person can successfully deliver training for a small organization, he or she will likely struggle to effectively train the employees of an entire multinational organization. One alternative for a multinational organization is for a specialist to train his or her legal colleagues and then allow them to participate in training various departments within the organization. Your organization could also deliver antitrust training using video conferencing systems, or through intranet or an online process, which can be more appealing if you work for an organization with offices across different countries.

Antitrust training can be outsourced to external counsel or compliance specialists, but you should ensure your organization gets a customized training protocol based on your its particular antitrust risks.

Antitrust training delivered using previously prepared videos, brochures, pamphlets, and other written documents on your organization's antitrust policies may not fulfill the desired purpose if they are not followed by live training. This is because employees may not read or comprehend the material and/or view the videos. Passive training may also be inadequate, at least for some groups (e.g., sales and finance), who may have expect on-the-spot answers for specific questions. Therefore, videos and guidelines should be in addition to the live training but act as a substitute.

Creating a compliance program

There are eight elements that are worth considering when creating a compliance program:

1. The compliance program must become part of the organization's DNA and culture.
2. The compliance program should be personalized to be able to effectively tackle the organization's potential antitrust risks.
3. The management should fully and unequivocally support the creation and implementation of the compliance program.
4. The organization needs to devote resources to create and implement a compliance program.
5. The program requires delivery of customized training on a regular basis to different organizations within the organization.
6. The compliance program has to be controlled and audited to ensure it is up-to-date and employees act in accordance with it.
7. The compliance program should provide for means of reporting antitrust violations.
8. The organization may want to think what its response should be towards identified breaches of the compliance program.

Audits and controls

To ensure ongoing relevance of the compliance program for your organization, and to make sure employees have the desired knowledge on antitrust laws, compliance programs should be periodically reviewed. When creating a compliance program, you should decide who will be in charge of directing the program and performing regular audits. This responsibility can rest with the employee who created the compliance program, the employee from a different department, or with an outsourced attorney.

While control methods and audits vary considerably, they will share the following four elements:

1. Regular review of the antitrust risk map to ensure it continues to accurately reflect risks the organization faces in light of changes in: business, markets where the business operates, competitive landscape business faces, and changes in substantive law;
2. Regular review of the training materials to ensure these are current to recent legal developments;
3. Regular review of employees' feedback after training to check whether they found the training educational and interesting;
4. Regular review of employee completion lists to verify that relevant employees complied with the duty to be trained.

Reporting potential violations

The antitrust compliance program should make very clear that it is every employee's obligation to report a compliance concern by ensuring that your organization thoroughly investigates all issues brought in good faith. However, in practice, employees may not be comfortable speaking out. Therefore, an additional tool to help discover potential antitrust violations is to create an anonymous whistleblower telephone line or email inbox for employees to report potential breaches of antitrust laws.

Employees should be encouraged to use such resources and guaranteed that their report will remain confidential, and no retaliation will be brought against them for providing information. However, your organization should make sure that it retains its right to pursue remedies against reporting an individual to the government (e.g., in situation of leniency application), if it is determined that the employee who reported a potential antitrust violation was involved in it as well.

Your organization's responses to antitrust violations

If your organization does not take any steps, or responds slowly to antitrust compliance program violations, the effectiveness of the program will be undermined, and employees may question the need to comply. Therefore, your organization should clarify in its antitrust program that if that an employee did not act in accordance with compliance protocol, the organization may take all appropriate actions for those who fail to comply.

Each violation response will vary depending on the circumstances and extent of each case, whether there is evidence that the violation occurred, or if there are any mitigating or aggravating factors to be

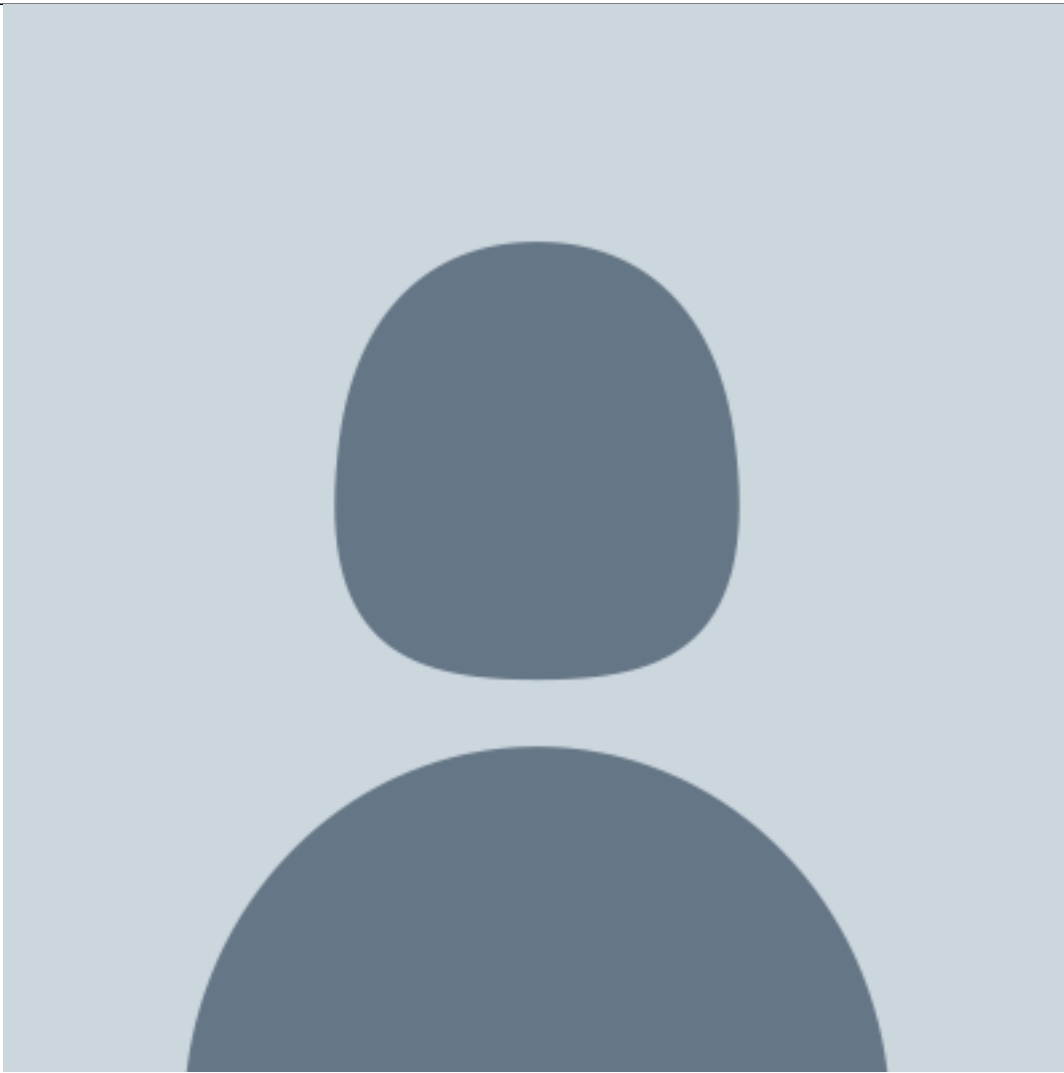
considered. The organization's response can include a formal warning, initialization of a disciplinary action including a temporary salary suspension, or dismissal.¹³ In certain circumstances, after discussion with an antitrust counsel, a company may choose to self-report in order to take advantage of potential mitigation of penalties offered by leniency programs — provided the suspected antitrust law violation qualifies for leniency.

13 Employee's dismissal can be a challenging decision in particular if the company wishes to apply for leniency. This is because the company may need the employee to cooperate during leniency application process and, sometimes, during the whole period of the investigation.

Conclusion

Organizations face a number of complex legal risks as they operate under an increasing number of rules and regulations. Compliance with antitrust laws is increasingly important as the proliferation of antitrust laws across the globe means that compliance is becoming more jurisdiction-specific. Further, penalties associated with antitrust law violations are increasing and can include high fines, reputational damage, and disruptive investigations. In addition, compliance with antitrust laws brings benefits because organizations with a strong compliance record tend to attract and retains customers and investors. Compliance efforts save money and protect the organization from damage to image and reputation. An effective method to ensure antitrust compliance is to introduce a robust antitrust compliance program. Creating and implementing an effective program is a challenging task that requires dedicated time and effort. While each organization is different, there are common elements that all organizations can take into account when creating and implementing an antitrust compliance program.

[Magdalena Jakubicz](#)



Corporate Counsel

Cisco

She specializes in EU competition and IP law. Jakubicz, among others, develops and delivers antitrust trainings, and also provides everyday legal advice to clients across EMEAR and LATAM.