

Antitrust Committee
Corporate Counsel Forum
Young Lawyers' Committee

Effective Antitrust Compliance Programs

Tuesday, September 20, 2016



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Effective Antitrust Compliance Programs

- Global perspective
 - and mix of in-house and outside counsel
- Focus of session → answering
 - Why?
 - What?
 - Who?
 - How?



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Speakers

- Moderators
 - **Adam S. Goodman**, Dentons (Toronto)
 - **Munesh Mahtani**, Google (London)
- Outside Counsel
 - **Daniel Bitton**, Axinn, Veltrop & Harkrider LLP (New York)
 - **Christian Steinle**, Gleiss Lutz (Stuttgart)
 - **Tsuyoshi (Yoshi) Ikeda**, Mori Hamada & Matsumoto (Tokyo)
- In-house Counsel
 - **Suzanne E. Wachsstock**, American Express (New York)
 - **Magdalena Jakubicz**, Cisco (Madrid)
 - **Christian Wind**, Bratschi Wiederkehr & Buob (Zurich)



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1. Why Care about Antitrust Compliance?



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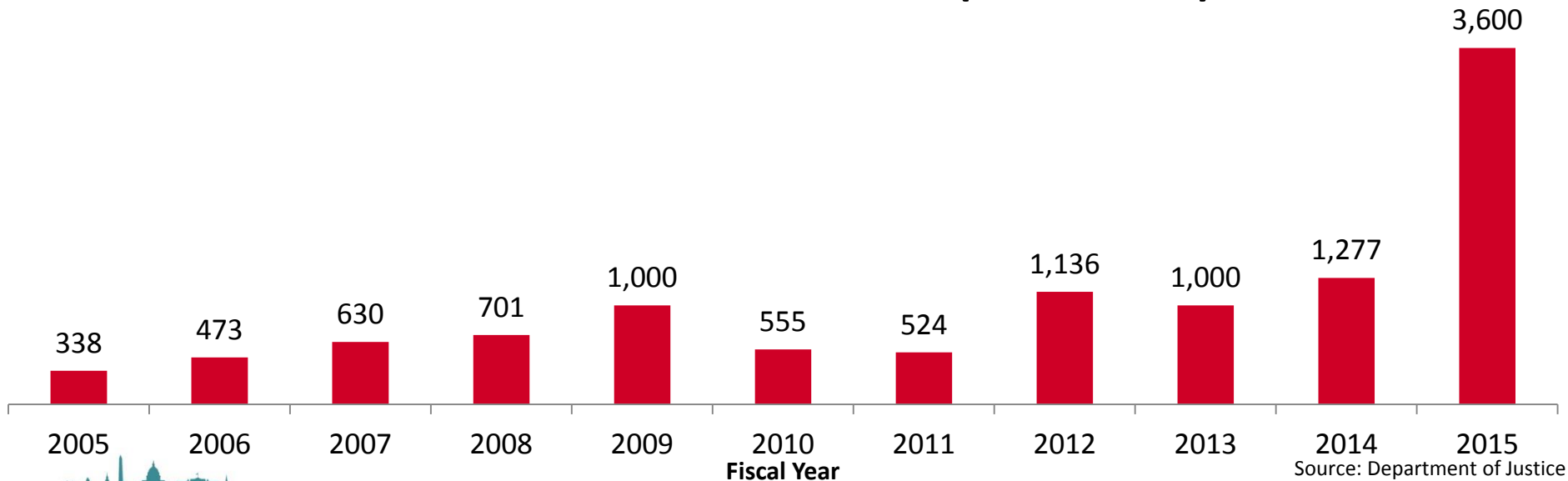


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US Criminal Antitrust Fines (USD \$MM)



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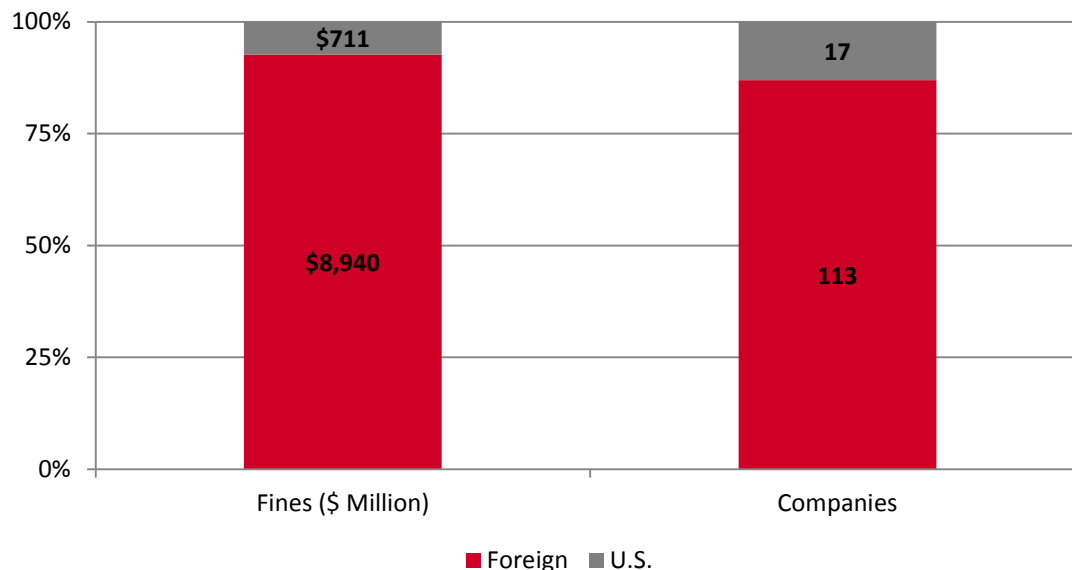
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Bulk of U.S. Criminal Antitrust Fines Imposed on Foreign Firms



Source: Department of Justice; 1995 through May 2016;
Excludes companies with fines <\$10 million



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Recent Cases: Massive Impact on Japanese Companies

Huge Fines and Many Carve-outs

- Yazaki (470M)
- Furukawa (200M)

Repetitive Violations (Penalty Plus)

- Bridgestone
- Hitachi Automotive

Imprisonment of former CEO

- Diamond Electric



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Compliance Programs Have Three Purposes

Prevention

Tailored risk assessment
Compliance culture
Education
Controls / protocols

Detection

Regular monitoring
Audits
Hotline

Mitigation

End violation
Apply for leniency /
cooperation credits
Reinvigorate
compliance culture



"Congratulations Edwards. Your little price fixing scheme has made us millions. I'm having your bonus check delivered right to your cell."



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The Americas



Americas: Compliance Program Credits

- US: unlikely get credit for pre-existing compliance program → ineffective if there was a criminal violation.
- Brazil, Canada: fine reductions for pre-existing compliance programs
- Canada considers the existence of a program when it decides to pursue civil or criminal charges
 - false/misleading advertising; difficult to apply to cartel conduct
 - can also inform a potential due diligence defence



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US: *Kayaba* - Should You Roll the Dice?

- Did not have a Compliance Program
- But Received Substantial Discount for Implementing Compliance Program



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Europe



Europe Between Progress and Hardliners

Traditional Hardliners	More Progressive Approach
<p>EU Commission, EU Courts</p> <p><i>“But the mere existence of a compliance programme will not be considered as an attenuating circumstance. Nor will the setting-up of a compliance programme be considered as a valid argument justifying a reduction of the fine in the wake of investigation of an infringement.”</i></p> <p>(EU Commission, Compliance Matters, 2012, p. 21)</p>	<p>UK Competition and Markets Authority</p> <p><i>“2.15 Mitigating factors include [...] adequate steps having been taken with a view to ensuring compliance with Articles 101 and 102 and the Chapter I and Chapter II prohibitions”</i></p> <p>(CMA, Guidance as to the appropriate amount of a penalty, September 2012, para. 2.15)</p> <p>Possible fine reduction of up to 10 %.</p>
<p>German Federal Cartel Office</p> <p><i>“We would provide wrong incentives and reward potentially ineffective compliance programs, if we consider them as a mitigating factor.”</i></p> <p>(Andreas Mundt, President of the Bundeskartellamt, in: Compliance Praxis Service Guide, 2014, p. 13)</p>	<p>French Competition Authority</p> <p><i>“Companies committing to set up or to upgrade an existing compliance programme according to the aforementioned best practices, in the context of a settlement with the Autorité, may expect a reduction of their fine of up to 10%, [...].”</i></p> <p>(Autorité de la Concurrence, Framework-Document of 10 February 2012 on Antitrust Compliance Programmes, p. 1)</p>
This list is non-exhaustive!	Further example: Italy

Position of Hardliners: Only Compliance Counts

- EU Commission: Failure of a compliance program does not deserve any mitigation

“Although all compliance efforts are welcomed, the mere existence of a compliance programme is not enough to counter the finding of an infringement of competition rules — companies and their employees must, in fact, comply.”

(EU Commission, Compliance Matters, 2012, p. 21)

- Sufficient incentives for having a compliance program:
 - Avoiding fines by preventing cartel behavior
 - Early detection and cooperation with competition authorities under their leniency policy
- Parent company remains liable for infringement of its subsidiary, even if parent company gave specific antitrust compliance instructions (ECJ, judgment of June 16, 2016, C-155/14 P, Evonik Degussa, para. 41)
- Additional argument by German Federal Cartel Office: Having a compliance program is an obligation by law (Sec. 130 Administrative Offences Act: violation of supervisory duty)
 - Compliance with law is not a mitigating factor



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The More Progressive Approach: Credit for Adequate Compliance Programs

- Mere existence of a compliance program not considered as a mitigating factor!
- Competition authorities in Europe (e.g. UK, France, Italy) require “adequate” compliance measures
- There is no “one size fits all” program
- Must be tailored to suit each company’s particular situation in terms of risks and individual characteristics, depending on its size, its activities and markets, its organization, governance and culture
- Guidance available e.g. from French Competition Authority and UK Competition and Markets Authority



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Japan



Treatment of Compliance Programs in Japan

- Compliance programs not currently taken into account → may change in near future
- Current surcharge amount in Japan is fixed: 10% of turnover for up to last 3 years
 - Degree of compliance as well as cooperation not taken into account
- Ongoing discussion on discretionary surcharge
 - JFTC sought public comment in July-August 2016
 - Uncertain what factors will be taken into account
 - Cooperation discount is likely; unclear what JFTC will do regarding Compliance Programs



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Costs of Foregoing Compliance Program

- Violations more likely
- Harder to leverage immunity/leniency programs
- Loss of regulatory credits
- Other considerations beyond US criminal liability
 - Disqualification for gov't programs
 - Follow-on civil litigation
 - Corporate reputation, customer backlash
 - Effect on ability to do mergers



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2. What Makes an “Effective” Compliance Program?



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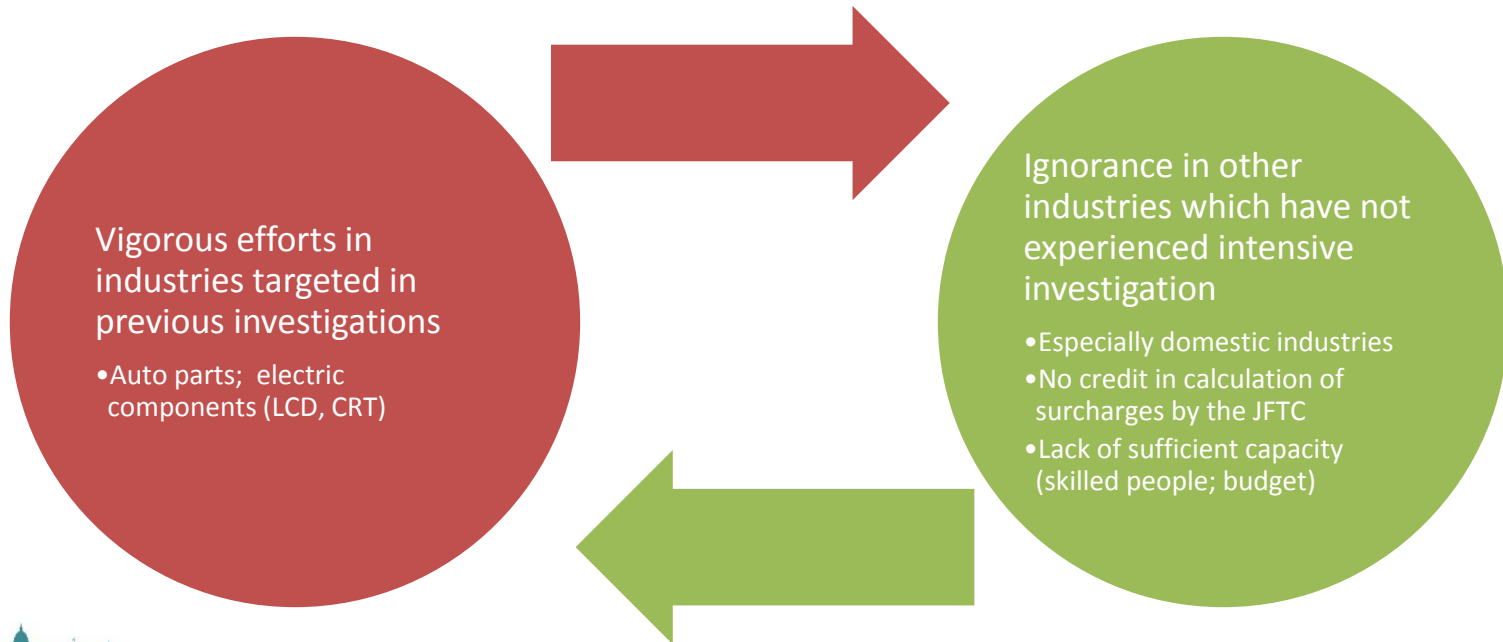
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Current Problem in Japan: Gap between industries



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Compliance Program

- Compliance program is NOT computer program
 - Program has to be tailored for each company
- “Installation Process” may take a long time
 - Especially, in the case of foreign subsidiaries
- Compliance program is not upgraded automatically unlike Windows 10
 - Periodical review is essential
- Efficient and effective compliance programs generally
 - Take advantage of modern technology (e.g., predictive coding for email reviews)
 - Make good use of training opportunities
 - Employees should be encouraged to ask questions related to their experiences



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Incentivise Compliance

Internally

- Training by an outside attorney
- What is going on in foreign subsidiaries?

Externally

- Vigorous enforcement
- Penalty clause in contracts



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Inexpensive Compliance Measures

Audit on activities on industrial groups

Improve whistle blowing system

Due diligence during M&A



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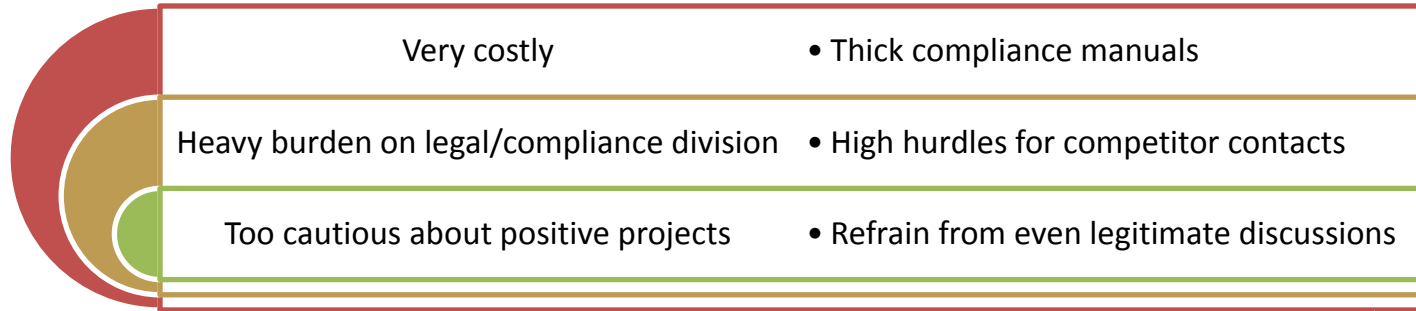
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“Over-Compliance”? Ensure Legitimacy



Joint Research & Development; joint procurement; OEM; sales of components to competitors

Educate business people on non-cartel conduct

- Many collaborations are allowed under antitrust laws

Evaluate antitrust risks in cooperation

- Possibility of obtaining pre-approval from antitrust authorities

Prevent potential antitrust violation

- Attorneys' presence at key meetings



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Requirements for Adequate Antitrust Compliance Programs: UK as an Example

*“The core of an effective compliance culture is **a clear and unambiguous commitment to competition law compliance, throughout the organisation.**”*

(OFT, How your business can achieve compliance with competition law, 2011, para 2.1.)

- Management needs to demonstrate the commitment through their actions clearly and unambiguously. This should be demonstrated at all levels of the management chain.
- Four-step process
 - **Step 1: Risk identification** – identify the potential competition law risks
 - **Step 2: Risk assessment** – identify high-risk staff, medium-risk staff and low-risk staff
 - **Step 3: Risk mitigation** – implementing training activities, policies and procedures: Measures (inter alia): face-to-face and/or online training; testing of employees’ knowledge and understanding of competition law; integrate a reporting system; benefits for staff
 - **Step 4: Review** – frequent review of all stages of the process (Step 1 to 3) to ensure that there is a clear and unambiguous commitment to compliance from the top down



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Burden of Proof: UK as an Example

- The company needs to show
 - that the steps taken were appropriate to the size of the business concerned and its overall level of competition risk
 - the steps it took to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation at hand
(OFT, Guidance as to the appropriate amount of a penalty, 2012, footnote 26)
- UK competition authority (OFT at that time) reduced the fine against the Hamsard Group (pharmaceutical) by 5% due to compliance efforts:

“Having considered evidence of Hamsard Group’s compliance activities, at the time of issue of the Statement the OFT considered that a reduction of 5 per cent would be appropriate to reflect these activities.”

(OFT, Decision of March 20, 2014, Case CE/9627/12, para. 7.30)

The French Best Practice Guideline

- Framework-Document of 10 February 2012 on Antitrust Compliance Programs
- Quite specific guidance by a list of “best practices”
- Similar standards to the UK
- **Five key elements:**
 - “**clear, firm and public [compliance] position** adopted by the company’s management bodies and, more broadly, by all managers and corporate officers
 - “commitment to appoint one or more **persons empowered**, within the company or organisation, to develop and monitor all aspects of the compliance programme”
 - “commitment to put in place **effective information, training and awareness measures**, in ways compatible with labour legislation”
 - “commitment to set up **effective control, audit and whistle-blowing systems**”
 - “commitment to set up an **effective oversight system**” including **disciplinary sanctions**
- Implementation and reporting to the FCA in recent cases



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Intersection of Antitrust/Anti-Corruption

- Conduct can violate both sets of rules
 - Marine Hose
 - Petrobas
- Public procurement business: program should cover both
 - Lower incremental cost of program
 - Greater compliance
 - Less exposure



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3. How to Implement and Manage an Effective Antitrust Compliance Program? Who Must be Involved?



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The In-House Perspective

1. Setting up a compliance program: some key considerations
2. Managing compliance with limited funding and human resources
3. Heatmap of competition compliance risks
4. Managing compliance fatigue and keeping up momentum once started
5. Getting management buy-in for antitrust compliance
6. Difficulties of implementing one program across a global company
7. Managing suspected breaches
8. Auditing the compliance program



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1. Setting up a compliance program: some key considerations (i)

Scope and content:

- Balance between standard and bespoke (online and live) training
- Identifying higher risk business units; right level of depth for each team
- Ensuring an active, attentive and engaged audience, at all levels and regions (e.g., real-life scenarios, role-plays)
- Policing and managing compliance (ongoing guidance, compliance hotline, audits)
- Tone at the top: including senior executives and board members in the program
- Managing a global program (content, execution, enforcement)

1. Setting up a compliance program: some key considerations (ii)

Structure and Process:

- Length and frequency of training and timing (e.g. compulsory for all new joiners; compulsory before engaging in a new trade association or as a new representative)
- Who conducts the training (in-house lawyers, outside counsel, compliance team, train-the-trainer models) and has ultimate responsibility for the program?
- Ensuring ongoing engagement on antitrust issues – visibility and strong relationships
- How to ensure and record compliance (e.g. automated training assignments, acknowledgement statement, signing/filing, spot-checks and audit program)
- Should the antitrust compliance program be combined with anti-corruption or other programs?

2. Managing compliance with limited funding and human resources

- Online/e-learning tools
- Ideal mix of online and face to face training
- Principle of train the trainer
- Get allies in the organization (e.g. Internal Audit, Controlling, Legal, HR,...)
- Get a slot in the introduction/induction program for new employees
- Make the code of conduct part of the employment contract
- Engage line management



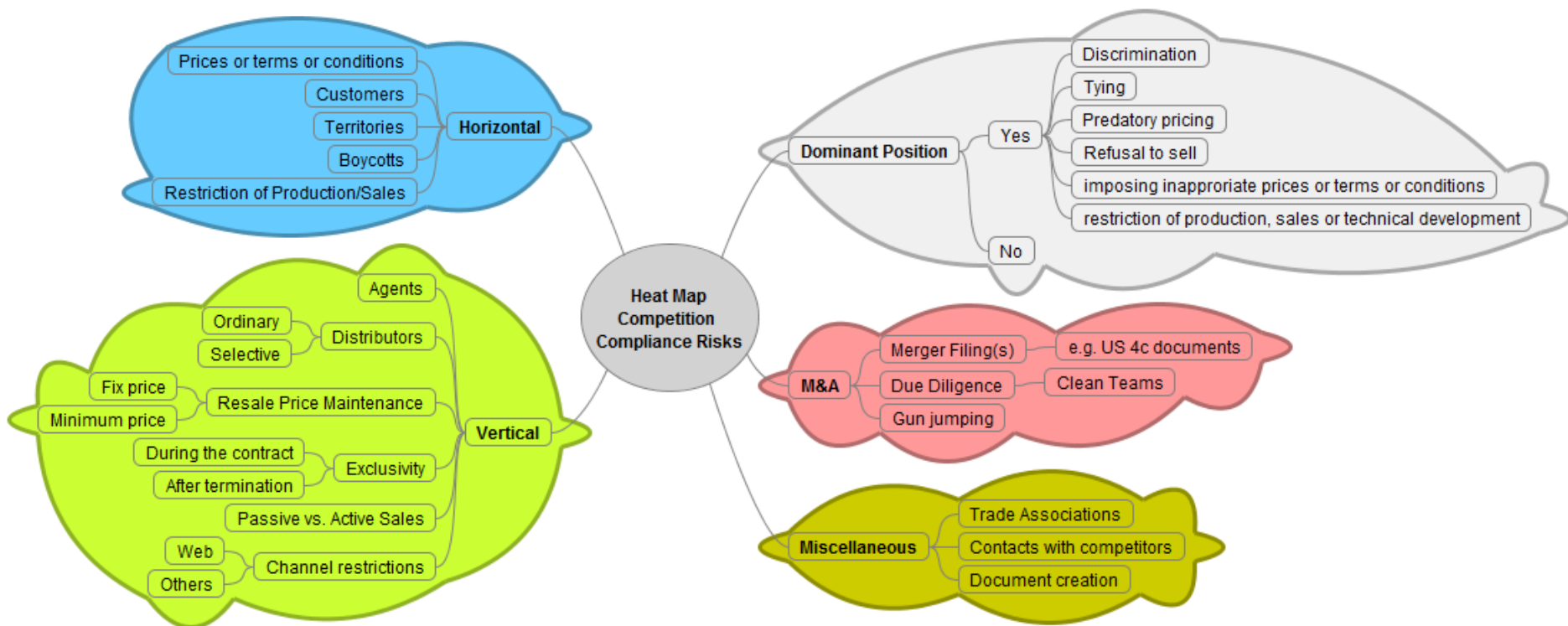
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3. Heatmap of competition compliance risks



4. Managing compliance fatigue and keeping up momentum once started

- Don't overdo it
- Keep training stimulating by varying content and style (e.g. theory, cases, storytelling, sequences)
- Introduce “nudges” (e.g. antitrust dilemma of the month or an antitrust newsletter with a prize-winning competition)
- Build in compliance as a standard agenda item for your team meetings
- Take real life examples of your competitors or in other industries and discuss them in your team
- Get support and every now and then an official statement from top management to underpin the importance
- Address it in the annual performance appraisal and discussion



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5. Getting management buy-in for antitrust compliance (Tone at the Top)

- Make them aware of their role model function
- Get them involved
- Make them aware of consequences (e.g. criminal sanctions in the USA and UK, blacklisted as director in UK)
- Clear support and demand for compliance by the CEO and the Chairman in the foreword of an antitrust directive
- Line management participates in training sessions by opening and closing them, ideally occasionally supported by a member of the Board of Directors or the Executive Committee
- Show management current antitrust cases and make them reflect whether this could also happen in the own organization or whether all appropriate and adequate preventive steps have been taken



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6. Difficulties of implementing one program across a global company

- Aim for one global standard (e.g. no price fixing, no customer allocation, no territory split)
- Involve and engage people (e.g. sounding board, questionnaires, training feedback)
- Make directives, trainings and Q/A available in local languages
- Central reporting and monitoring (e.g. “hall of fame and shame”)
- Share success stories or achievements in the organization



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7. Managing suspected breaches (i)

- Origin
 - Internal whistleblower
 - Internal/external audit
 - Antitrust investigation (dawn raid)
 - Self turn in
- Internal investigations
- Core principles
 - Confidentiality
 - Impartiality & Objectivity
 - Integrity
- Who?
 - External auditor/counsel
 - In-house counsel/compliance officer
 - Special committee
- How?
 - Interviews (management & employees)
 - Interviews of former employees
 - Legal privilege
 - Document review & preservation



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7. Managing suspected breaches (ii)

- Confidentiality & no-retaliation against whistleblowers
- Disciplinary actions for wrongdoers
 - Taking advantage of Leniency Program for self reporting?
- ...What if a breach remains only a suspicion?
 - Document the internal investigation
 - Consider updating/modifying the compliance program
- ...What if a breach is no longer a suspected breach?
 - Formulate defense
 - if internal discovery: decide whether, how & where disclose the anticompetitive conduct



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8. Auditing the compliance program

Important / ideal feature of any compliance program

- Who?
 - Internal counsel/compliance officer
 - External auditor/counsel
- How?
 - Review of company's antitrust risks
 - Review of program's materials
 - Review list of employees trained
 - Review of employees' feedback & interviews with employees



If you didn't
document it
it
didn't
happen



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Takeaways

- Best practices fairly consistent across jurisdictions
- Regulators generally credit pre-existing programs, with some notable exceptions (DOJ, EU)
- Foregoing a compliance program is not an option
- Tailor program to firm's risks with relevant regulators in mind



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Questions?

Thank you for your attention.



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