



International Cartel Enforcement in the United States and European Union

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U.S. Antitrust Law Overview

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U.S. Antitrust Law Overview

■ Sherman Act Section 1

- Elements
 - An agreement among two or more separate entities
 - Affecting interstate commerce
 - Unreasonably restrains trade
- Analysis
 - Per Se
 - Rule of Reason

■ State Laws

- Most states have antitrust statutes modeled after federal law
- Potential differences include allowing indirect purchaser actions and differences in Per Se or Rule of Reason treatment of conduct

■ Private Litigation

Enforcement in the U.S.

- **DOJ Investigations**
 - FBI assistance for criminal cases
- **State Attorneys General and Prosecutors**
- **Civil Actions – “Private Attorneys General”**

Recent International Cartel Cases

- **Aftermarket Automotive Lighting Products**
- **Cathode Ray Tubes**
- **Marine Hose**
- **SRAM**
- **Air Cargo**
- **Air Transportation**
- **DRAM**
- **Chemical Cartels**
- **International Parcel Tanker Shipping**

Corporate Compliance Programs – Benefits

- **Prevent violations and costs associated with investigations/litigation**
- **Early detection of violations that occur**
 - **Maximize first in line amnesty chances**
 - **Fine reduction “Effective” program reduces culpability score by 3**
- **“Effective” program reduces culpability score by 3**

Corporate Compliance Programs – “Effective” Programs

- **Clearly established standards and procedures**
- **Oversight by high-level personnel and accountability**
- **Exclusion of employees with a history of illegal conduct from substantial authority personnel**
- **Effective communication of standards and procedures**
- **Effective monitoring of compliance with program**
- **Consistent enforcement of standards**
- **Appropriate response to discovered violations**

Guidelines for Engaging In Competitor Communications

- **Avoid agreement or understanding with competitors on pricing or output**
- **Avoid discussing commercially sensitive information**
- **Trade associations, seminars, social events**

Communications with Subsidiaries and Joint Ventures

- **Wholly-owned subsidiaries:** No concerns
- **Jointly controlled, full-function JVs:** No coordination outside the JV; use care with respect to exchange of commercially sensitive information
- **Production JVs:** No coordination with partner regarding sales, marketing and distribution of the JV's product or the parents' businesses outside the JV
- **Minority holdings:** Use confidentiality agreements/firewalls to limit and control commercially sensitive information obtained through board representation

U.S. Criminal Cartel Enforcement

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DOJ Antitrust Division's Jurisdiction

- **Standard**
 - **Conduct and transactions occurring within the boundaries of the U.S.**
 - **Foreign conduct:**
 - **Foreign import commerce that was meant to produce and did produce a substantial effect in the U.S.**
 - **Foreign non-import commerce that has a direct, substantial, and reasonably foreseeable effect in the U.S.**

- **If transact business, even if no physical presence**
 - **Pragmatic interpretation**

- **Possible to avoid U.S. jurisdiction, but lose opportunity to do business in the U.S.**

DOJ Tools for Proactive Investigation

- **Examples:**
 - Covert tapes
 - Informants
 - Search warrants
 - Subpoenas

- **Newer tools for international cartel investigations**
 - INTERPOL Red Notices
 - Border watches
 - Extradition

DOJ Leniency Program

- **First to report illegal conduct to the DOJ is eligible for immunity from criminal prosecution if certain conditions met:**
 - Promptly end participation
 - Provide full cooperation
 - Confess to reported conduct – but no guilty plea
 - Where possible, make restitution
 - Was not the leader or originator and did not coerce others to join

- **Powerful tool for DOJ**
 - Strong incentives to report
 - DOJ gets access to extraterritorial documents
 - DOJ gets access to extraterritorial witnesses

DOJ Leniency Program – How to Apply

- **Contact the Antitrust Division as soon as possible**
- **Get a “marker”**

DOJ Leniency Program – Benefits

- **No prosecution/fines**
- **Cooperating employees may receive amnesty**
- **Eligible under ACPERA**
- **Minimize litigation costs and management distractions**
- **Possible remedial reputational benefits**

DOJ Leniency Program – Drawbacks

- Forego opportunity to demonstrate innocence
- Can give rise to civil antitrust lawsuits
- Could complicate liability issues in civil antitrust lawsuits
- Ongoing cooperation obligations
- Possible reputational damage

DOJ Leniency Program – “Second-In” Status

- **Second to contact DOJ and cooperate can also benefit**
- **But rewards for second-in corporations not as uniform**
- **Must plead guilty to receive leniency**
- **Subsequent cooperators receive fewer benefits**

DOJ Leniency Program – “Amnesty Plus”

- **Reporting a second, unrelated conspiracy**
 - May receive amnesty for the reported offense
 - May receive reduction in the penalties for first offense

- **Recently resulted in new cartel investigations for the DOJ**

DOJ Leniency Program – Revocation of Amnesty

- **DOJ will revoke amnesty if corporation does not meet qualifications or does not cooperate**
 - Applicant bears burden

- **Stolt-Nielsen (2004)**
 - In March 2002, Stolt's general counsel reported cartel behavior to the corporation
 - Stolt sought amnesty after an article was published in the Wall Street Journal in Nov. 2002
 - Revoked because of continuing participation in the cartel

Informality of Investigation Process

- **Informal process throughout**
 - Call to file for amnesty, get an audience to make your case
 - Without strict timelines/deadlines

- **Active negotiation**
 - Immunity or leniency
 - Fines, sentences
 - Documents or information provided
 - Language in plea, duration of violation, or corporate entity named
 - Individuals included vs. carved out

Criminal Process Overview

- **Grand Jury convened**
- **DOJ conducts investigation**
- **Recommendations as to indictments**
- **Pre-trial motions, trial, sentencing, appeal**
- **Plea agreements – at any point, occur in most cases**
- **Government may seek larger fine or claim longer conspiracy if forced to trial**

Calculating Fines

- **Corporate fine is the greater of \$100 million or twice defendant's monetary gain.**

- **Multi-step process:**
 - **Base fine (20% Volume of Commerce)**
 - **Minimum and maximum “multipliers” based on “culpability score”**
 - **“Fine range” calculated by multiplying base fine and multipliers**
 - **“Downward departure” and discount for cooperation**
 - **Negotiated plea amount (including DOJ discretion)**

Possible FTAIA Defense

- **Not well developed in criminal context**
- **FTAIA limits subject matter jurisdiction over (non-import) foreign commerce**
- **U.S. courts have rarely applied in criminal context**
- **May have implications for scope of conduct used to calculate fine**

U.S Cooperation With Foreign Jurisdictions

- **Bilateral and Multilateral Agreements**
 - **Antitrust cooperation agreements with: Australia, Brazil, Canada, Germany, Israel, Japan, Mexico, and E.U.**
 - **Agreements typically provide for:**
 - **Notification**
 - **Sharing of information**
 - **Coordination**
 - **Application of comity principles**
 - **Consultation**
 - **No formal agreement with Taiwan**

U.S Cooperation With Foreign Jurisdictions

- **Increasing amount of informal cooperation**
 - “Pick-up-the-phone” attitude increasing
 - Exchanges of status reports, coordination of investigations, discussion of objectives

- **Coordinated, simultaneous raids/searches around the globe**
 - Ex.: Cathode Ray Tube investigation
 - Also used in other major investigations

U.S Cooperation With Foreign Jurisdictions

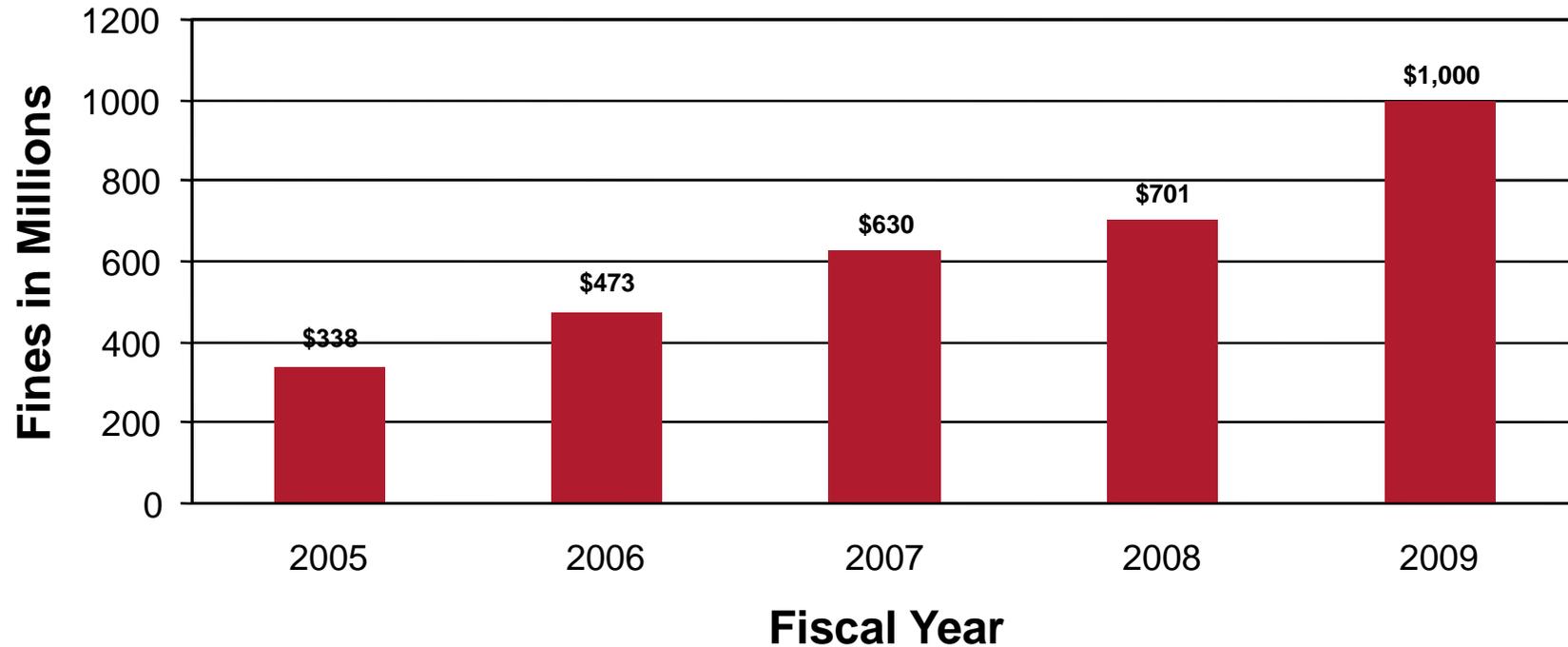
- **Information sharing**
 - Exchange of substantive evidence increasing
 - Cross-waivers

- **International Competition Network's (ICN) Cartel Working Group**
 - Serves as forum for agencies to share expertise
 - Relationships result in real-time coordination
 - Taiwan Fair Trade Commission is a member of ICN

Criminal Consequences - Corporations

- Higher corporate fines

Criminal Antitrust Fines



Criminal Consequences - Corporations

- **Higher corporate fines**
 - **F. Hoffman-La Roche, Ltd (vitamins, 1999) - \$500 million**
 - **LG Display (LCD panels, 2009) - \$400 million**
 - **Air France (air cargo, 2008) - \$350 million**
 - **British Airways (air transportation, 2007) - \$300 million**
 - **Samsung (DRAM, 2006) - \$300 million**

Criminal Consequences - Corporations

- Legal expenses
- Exposure to additional State actions
- Exposure to additional prosecutions by other national regulators
- Stigma
- Possible exclusion from government contracts
- Possible effect on future mergers

Criminal Consequences - Individuals

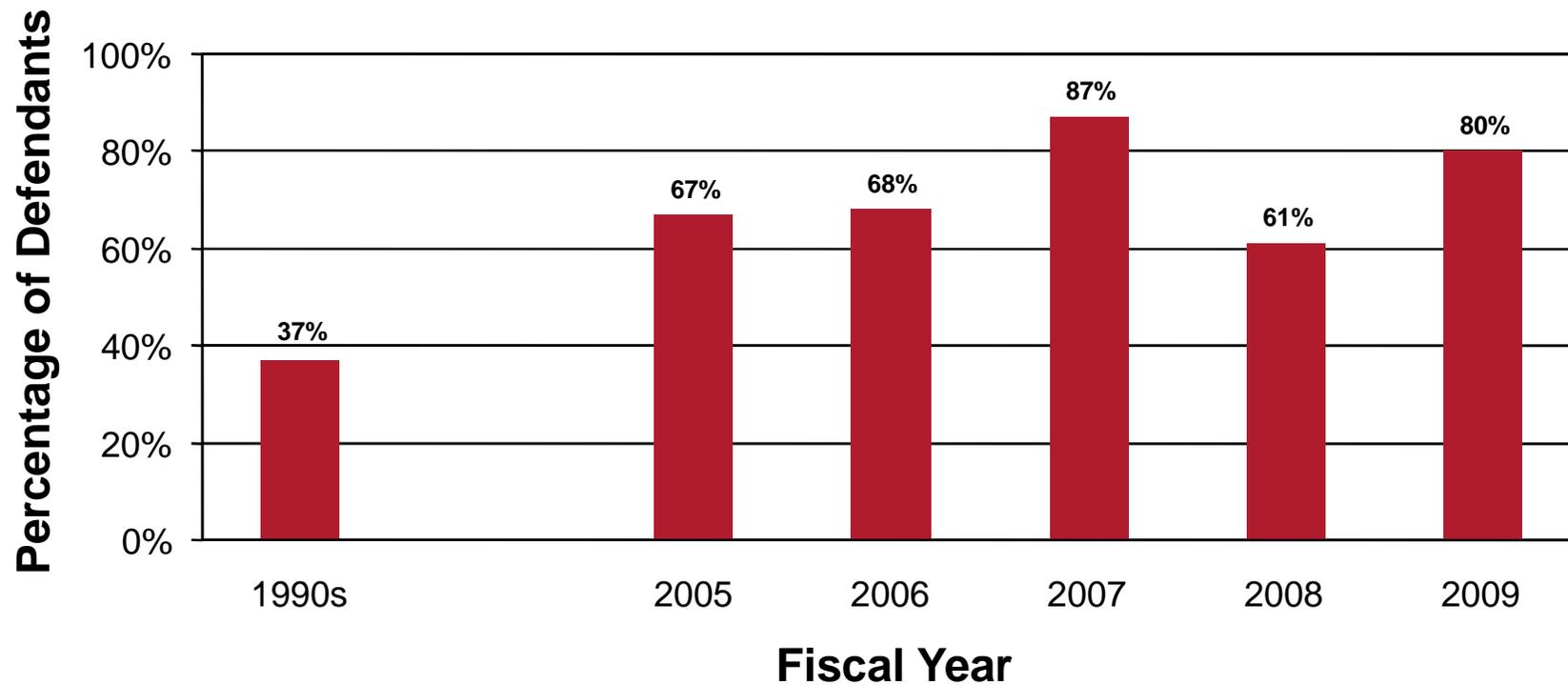
- **Carveouts**

- Increasing number of executives from each investigated corporation are being carved out for potential prosecution

- **Jail sentences (shift from just probation)**

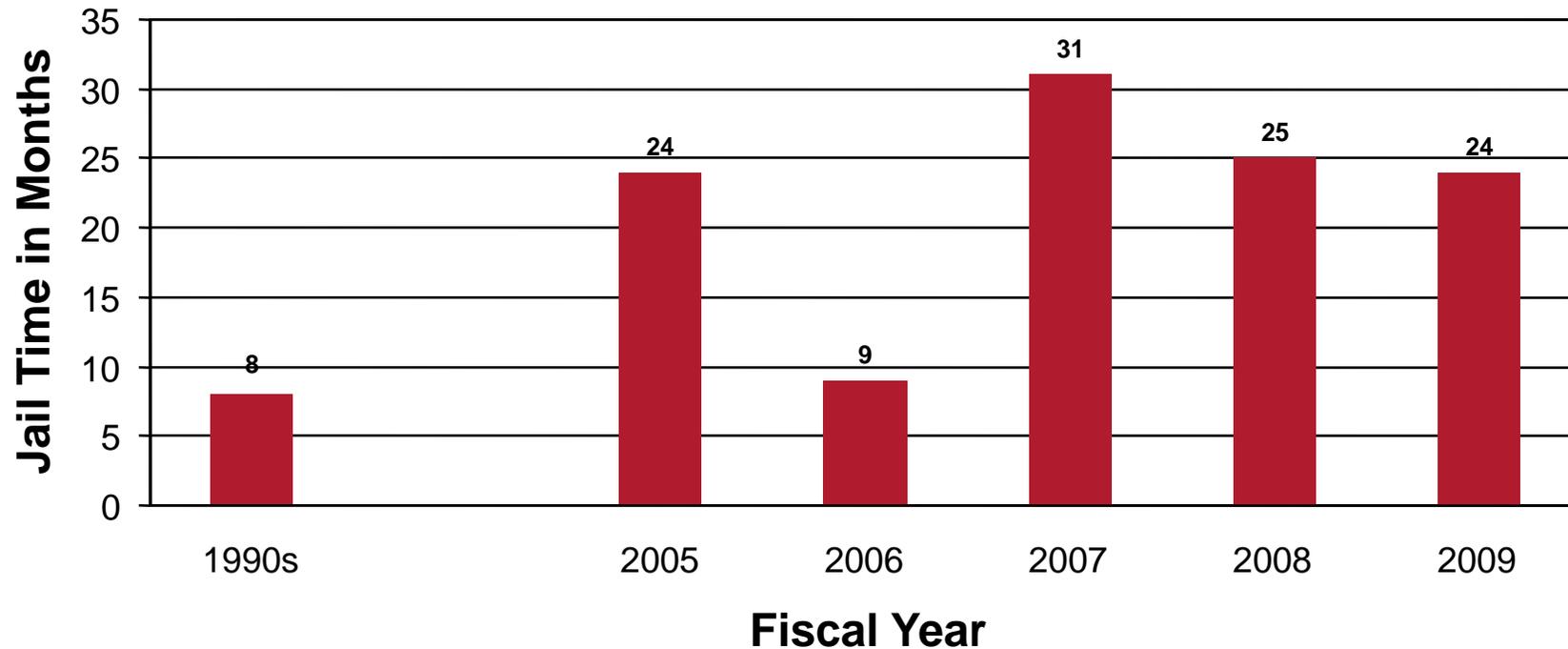
More Frequent Jail Sentences

Percentage of Defendants Sentenced to Jail



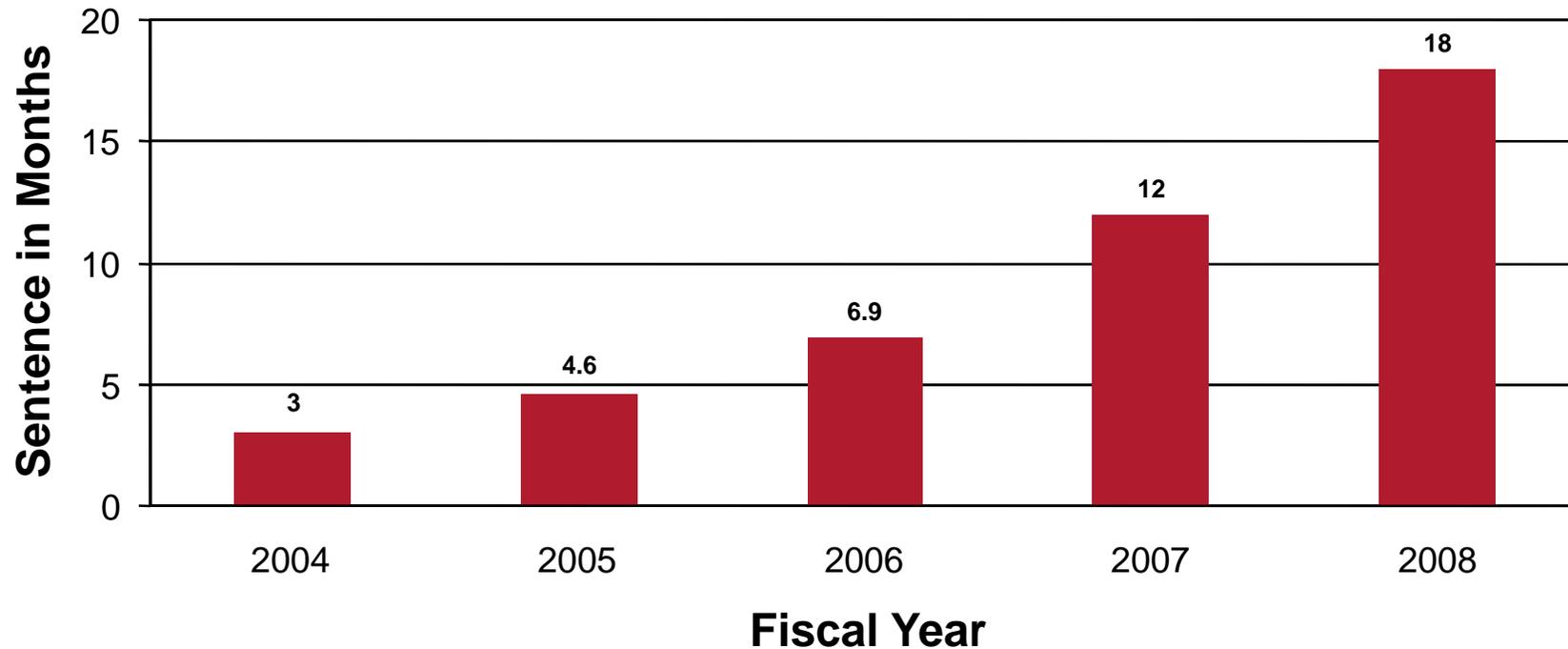
Longer Jail Sentences

Average Jail Time in Months per Defendant



Trend for Foreign Nationals

Average Jail Sentence in Months for Foreign Nationals



Criminal Consequences - Individuals

■ Extradition

- DOJ has not yet secured physical extradition of a defendant
- But DOJ is committed to extraditing culpable individuals
- Increased risk of extradition leading foreign nationals to submit to U.S. jurisdiction

Impact of Threat of Civil Litigation on DOJ Investigations

- **Factor in considering whether to apply for leniency**
 - Joint and several liability
 - Treble damages
- **Discovery issues**
- **Negotiating concessions to help in civil actions**
 - Language in plea
 - Limit scope of violation
 - Negotiate scope of documents provided to DOJ

Internal Process in Response to Violations

- **Suspect violation**
- **Retain outside legal counsel**
- **Outside counsel performs investigation**
 - Actual and perceived impartiality of outside counsel
 - Create attorney-client privilege over results of investigation
 - Perceived legitimacy and defensibility of investigation
 - Expertise of outside counsel
- **Decide whether to apply for leniency**
- **Respond to DOJ investigation, subpoenas**
- **Negotiate with DOJ**

U.S. Civil Cartel Enforcement

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Criminal Investigations Impact Civil Complaints

- **Criminal investigations often lead to civil complaints**

- **Impact of convictions and guilty pleas on civil litigation**
 - Adverse inferences
 - Guilty pleas establish occurrence of liable conduct
 - Language in plea agreement may limit success of civil litigation
 - Limits on U.S. travel for non-U.S. witnesses

Potential for Multiple, Complex Actions – Class Actions

- **Class actions**
 - **Direct purchaser actions**
 - **Indirect purchaser actions**

Potential for Multiple, Complex Actions – Idiosyncrasies of Class Action

- **Rule 23(a) requirements**
 - Numerosity
 - Common questions of law or fact
 - Typicality
 - Fair and adequate representative

- **Rule 23(b) requirement**
 - Risk of inconsistent judgments;
 - Defendant acted on grounds that apply to class; *or*
 - Common questions of law or fact predominate

- **Notice**
 - For b(3) classes – best notice that is practicable

Potential for Multiple, Complex Actions – Other Civil Actions

- **Separate “opt out” actions**
 - Individuals who “opt-out” may bring an individual suit
 - Multiple opt-out actions may result in greater damages

- **Civil actions by states**
 - Brought by AGs
 - Tolling agreements for Statute of Limitation

Burden, Expense and Distraction of Litigation

- **Discovery obligations**

- **Depositions**
- **Document productions**
 - **Potential forced production of documents not subject to subpoena in criminal investigations**
 - **Criminal standard**
 - **Civil standard**
- **Interrogatories**
- **Requests for admission**
- **Opportunity cost**

Burden, Expense and Distraction of Litigation

- **Intricacies of joint defense litigation (common with conspiracy allegations)**
 - Layers of confidentiality
 - Coordination of arguments, discovery obligations
 - Different interests
- **Motion Practice**
- **Attending hearings**

Jurisdictional Issues

- **FTAIA limits jurisdiction**
 - **Recovery only for products at issue in U.S. commerce**
 - **Import commerce**
 - **Domestic injury**

 - **Application uncertain**

Potential Civil Penalties

- **Treble damages**
- **System of multiple recovery could lead to higher damages**
- **Factors in damages calculations**
- **Joint and several liability with no right of contribution**
- **ACPERA for amnesty recipients**

Example - Joint and Several Liability, No Right of Contribution

- May lead to paying more than your “share” of damages
- Example:
 - 3 corporations allegedly fix prices
 - Collect \$10 million in overcharges in amounts proportional to market shares
 - Civil litigation, trebled damages equal \$30 million

	Corporation A	Corporation B	Corporation C
Market Share	60%	30%	10%
Collection of Overcharges	\$6 million	\$3 million	\$1 million
“Share” of trebled damages	\$18 million	\$9 million	\$3 million

Example - Joint and Several Liability, No Right of Contribution

- **Example continued:**

- Plaintiffs settle with Corporation A for \$2 million, leaving a judgment of \$28 million against Corporations B and C
- Plaintiffs can enforce entire judgment against either remaining defendant or collect a portion from each
- Plaintiffs can enforce entire \$28 million judgment against Corporation C, and Corporation C is unable to sue Corporation B to recover any “over payment”

	Corporation A	Corporation B	Corporation C
“Share” of trebled damages	\$18 million	\$9 million	\$3 million
Actual payment	\$2 million	\$0	\$28 million

Example - Impact of ACPERA

- **Non-amnesty defendants may pay more than their share**
- **Example:**
 - Corporation A is an amnesty recipient and cooperates under ACPERA, paying only “single” damages
 - Corporation B and C pay must cover remaining judgment and both will pay more than their share

	Corporation A	Corporation B	Corporation C
“Share” of trebled damages	\$18 million	\$9 million	\$3 million
Actual payment	\$6 million (single damages)	Remaining \$24 million of judgment	
Remainder split by market share		\$18 million	\$6 million

E.U. Cartel Enforcement

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Overview

- **EU Legal Standard**
- **EU Process and Timing**
- **EU Due Process Rights**
- **Example EU Timeline**
- **EU Fining Guidelines**
- **10 Largest EU Cartel Fines**
- **The Fight Against Cartels – A Political Priority**
- **Increased Enforcement Resources**
- **EU vs. US Fines**
- **Fines vs. Jail Time**
- **EU Leniency and Settlement Reductions**
- **Private Damage Suits**



EU Legal Standard

- Article 81 of the EU Treaty prohibits “agreements” and “concerted practices” which may affect trade between EU Member States and which have as their “*object or effect*” the prevention or distortion of competition
- The EU Commission bears the burden of proving an infringement, but need not prove that the agreement caused a price increase
- Requirement for a finding of “agreement” very low: an expression (even implicit) of joint intention to adhere to a common plan (e.g., *Copper Plumbing Tubes*)
- Standard for a finding of “concerted practice” is even lower: a mere coordination between competitors which, absent an agreement, knowingly substitute cooperation for the risk of competition (e.g., *PVC*)
- At the EU level, antitrust infringements do not result in criminal liability
 - BUT in certain Member States (e.g., the UK) cartelists may be exposed to criminal sanctions, including imprisonment

EU Process and Timing

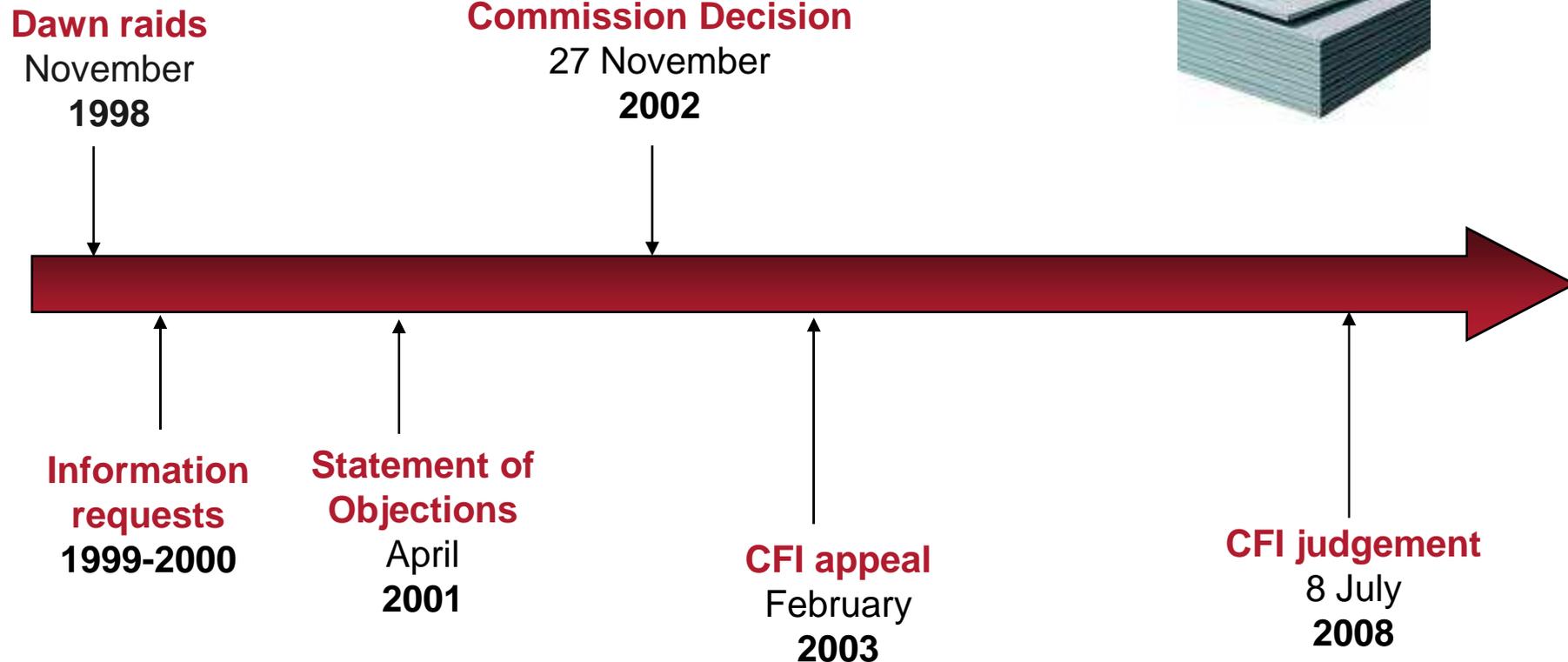
- **Cartel procedures before the EU Commission last approximately 2 years, but duration may be longer**
- **Company must reply to requests for information, produce documents, and data (Article 18 of Council Regulation 1/2003)**
- **An infringement decision can be appealed before the Court of First Instance of the EU (CFI) in Luxembourg**
 - **Appeals normally last about 2 years after Commission decision**
 - **Between 1995-2005, 55% of appellants obtained a reduction of the fine, and 5% full annulment of Commission's decision**

EU Due Process Rights

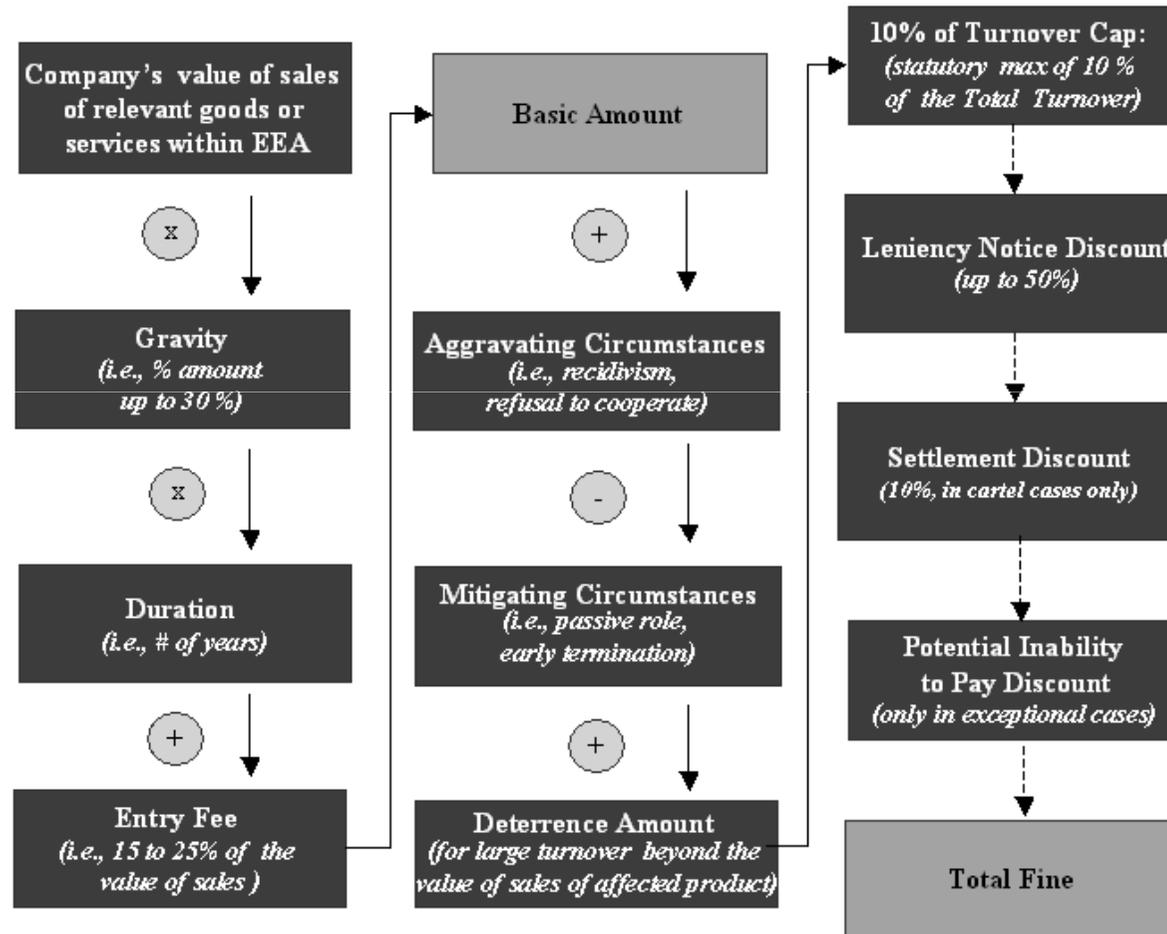
- **Statement of Objections**
 - Written formal document setting out the Commission's objections, the reasons for these objections, and the evidence
- **Right of access to Commission's investigation file after receiving the SO**
- **Right to submit comments on the SO and expert (e.g., economic) advice**
- **Right to a formal oral hearing**
- **Right to receive a fully reasoned decision**
- **Right to appeal final decision before the European Courts**

Example EU Timeline

Plaster board cartel 1998-2008



EU Fining Guidelines (2006)



10 Largest EU Cartel Fines

Year	Company	Relevant Product	Fine (euros)
<u>2008</u>	<u>Saint Gobain</u>	<u>Car glass</u>	<u>896 million</u>
2009	E.ON	Gas	553 million
2009	GDF Suez	Gas	553 million
2007	ThyssenKrupp	Elevators and escalators	480 million
2001	Hoffmann-La Roche	Vitamins	462 million
2007	Siemens	Gas insulated switchgear	397 million
2008	Pilkington	Car glass	370 million
2008	Sasol	Candle waxes	318 million
2006	ENI	Synthetic Rubber	272 million
2002	Lafarge	Plasterboard	250 million

The Fight Against Cartels – A Political Priority

■ **Nelly Kroes (**



), Competition Commissioner (2004 – 2010):

- *“The fight against cartels is one of my top priorities and companies that engage in cartels will be fined heavily. Where companies have repeatedly violated the EU’s antitrust rules, I will keep increasing the fines as a deterrent.”*
- *“Cartel behaviour is illegal, unjustified and unjustifiable, and will be punished severely no matter how large or small the companies involved.”*
- *“Cartels are a scourge. I will ensure that cartels will continue to be tracked down, prosecuted and punished. With this latest decision, I am sending a very strong message to company boards that cartels will not be tolerated, and to shareholders that they should look carefully at how their companies are being run.”*

■ **Joaquín Almunia (**



), Competition Commissioner (2010):

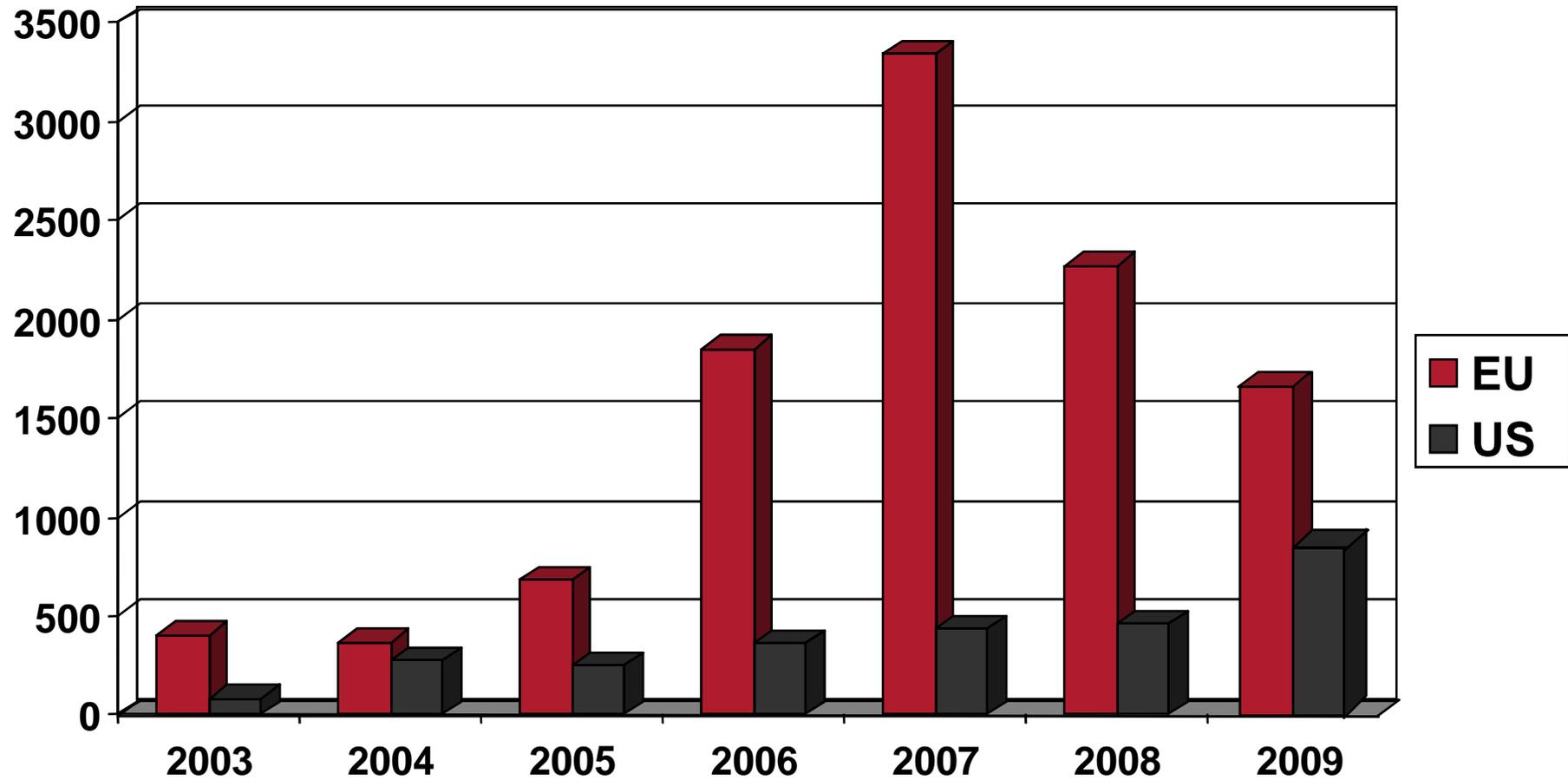
- *“A cartel is the worst violation of competition rules since its object is to collude against the interests of other companies and of consumers.”*
- Recent fining set at *“appropriate level”* and based on *“model that works”*

Increased Enforcement Resources

- **Increased Commission resources**
 - 1998: 1st cartel unit; staff doubled
 - 2002: 2nd cartel unit
 - 2010: Specialized cartel directorate (6 units); 80 staff (40 case handlers)
 - +/- 8 cartel decisions per year
- **Increased EU investigative powers**
- **National cartel enforcement**
 - 1990: 1 EU Member State (Germany) with serious cartel enforcement
 - 2010: 27 EU Member States
- **Information exchange within European Competition Network**
- **Global enforcement cooperation**

EU vs. US Fines

Cumulative fines in cartel cases: EU vs. US (millions Euro)



Fines vs. Jail Time

- **Jail time in US long viewed as most effective deterrent**
 - Enforcement success measured in days jail time
 - Maximum statutory sentence now 10 years
- **EU considers large corporate fines necessary to foster “culture of compliance”**
 - Calculation of cartel fines now includes “deterrence multiplier”
 - Kroes: *“Personally I have sympathy for the view that jail terms are a good deterrent. But that does not imply that an administrative system is somehow soft.”*
- **EU Member States moving towards US-like system where cartels are viewed and sanctioned as (quasi-) criminal offences**
 - At least 14 EU Member States now provide for criminal sanctions for companies and/or individuals, including prison terms in 11 EU Member States
 - **Marine hose cartel (UK)**
 - Three UK businessmen sentenced to prison terms between two and a half and three years. Close cooperation between OFT and DOJ
 - **Airlines fuel surcharge cartel (UK)**
 - OFT pressed criminal charges against four former and current BA executives who may be sentenced to up-to-five-year prison terms

EU Leniency and Settlement Reductions

- **Leniency Notice (2006):**
 - Single most effective tool in detecting cartels
 - Immunity for “first-in”
 - 30-50% for second applicant
 - 20-30% for third applicant
 - Up to 20% for subsequent applicants
 - System of oral leniency applications to protect against US discovery

- **First Cartel Settlement Notice (2008):**
 - Desire to speed up process and free up Commission resources through settlement
 - **Conditions:**
 - Acknowledgment of liability and waiver of rights
 - 10% settlement reduction cumulative with leniency reductions
 - Appeal to CFI possible but unlikely
 - **DRAM Cartel (May 2010):**
 - First settlement decision
 - Encouraging
 - Questions and uncertainties remain (*i.e.*, duration or proceedings, “hybrid“ cases)

Private Damage Suits

- Kroes: *“I am personally convinced that there is a lot of potential in advancing private enforcement”* – but: *“foster a competition culture, not a litigation culture”*
- Commission seeks to encourage private damage claims and ECJ has accepted cause of action, BUT
 - Less litigious society
 - No treble damages
 - No discovery rules
 - No class action
 - No contingency fees
 - No jury
 - No ban on passing on defense
- Nonetheless, plaintiffs bar has caught on (defense bar too!)
- 2008 White Paper proposals to facilitate claims
 - No opt-out class actions
 - No contingency fee
 - Limited discovery
 - No treble damages
- However, private actions are still at a nascent stage in Europe compared to the US

Initial Key Steps

- As soon as you anticipate a criminal investigation and/or civil litigation:
 - Retain outside counsel with appropriate expertise
 - Put in place a system to ensure that all relevant documents are preserved
 - Make sure no one discusses the matter outside the company, including with the press, enforcement agencies, customers, or other potential defendants without the approval or presence of an attorney

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