

US Antitrust Issues Trends In Cartel Enforcement

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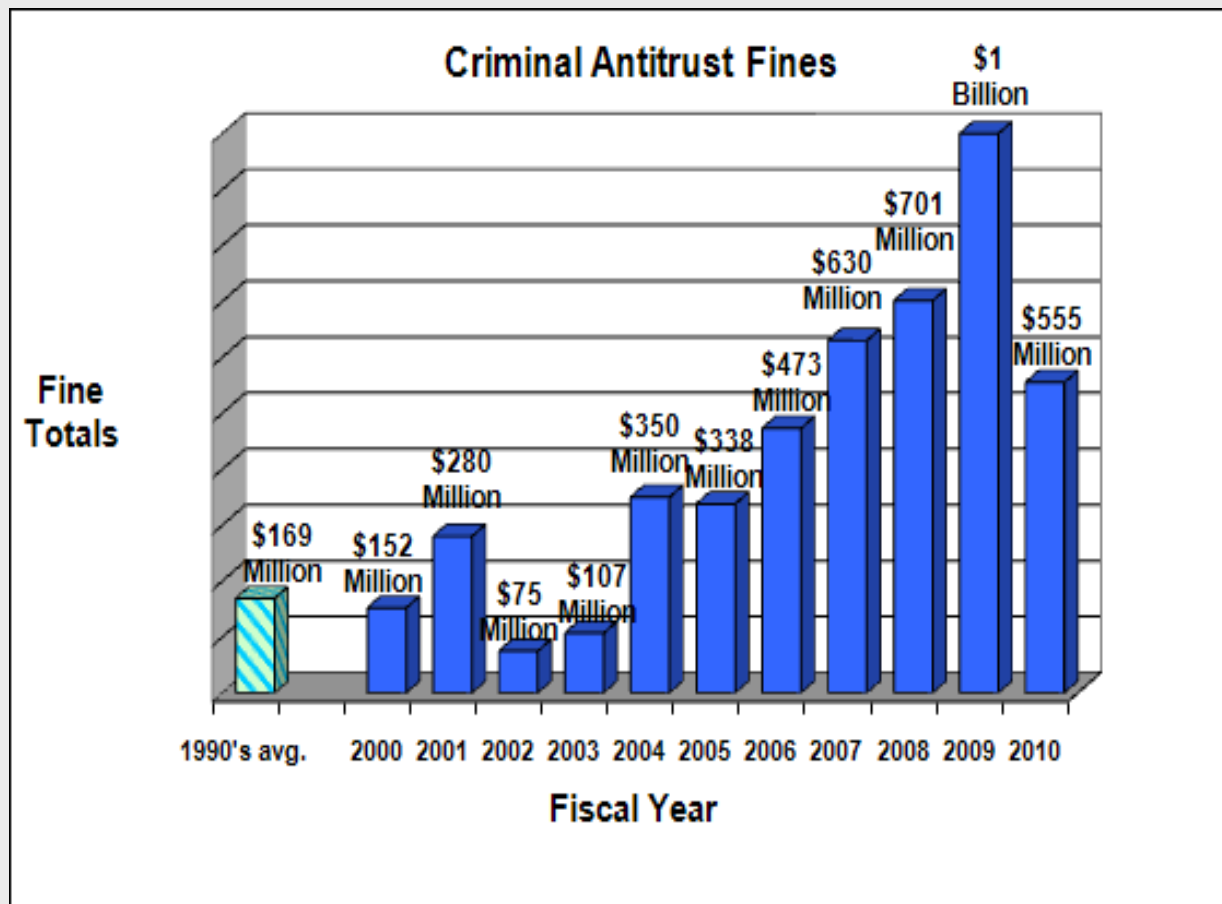
Overview

- Introduction – Recent Trends
- Cartel Enforcement
 - Increased Enforcement: Fines & Jail
 - Leniency/Immunity Considerations
 - Industries Impacted
 - Aggressive Investigative Techniques
 - Global Reach of U.S. Cartel Enforcement
- Growing Importance of Compliance Programs
- Private Damage Claims

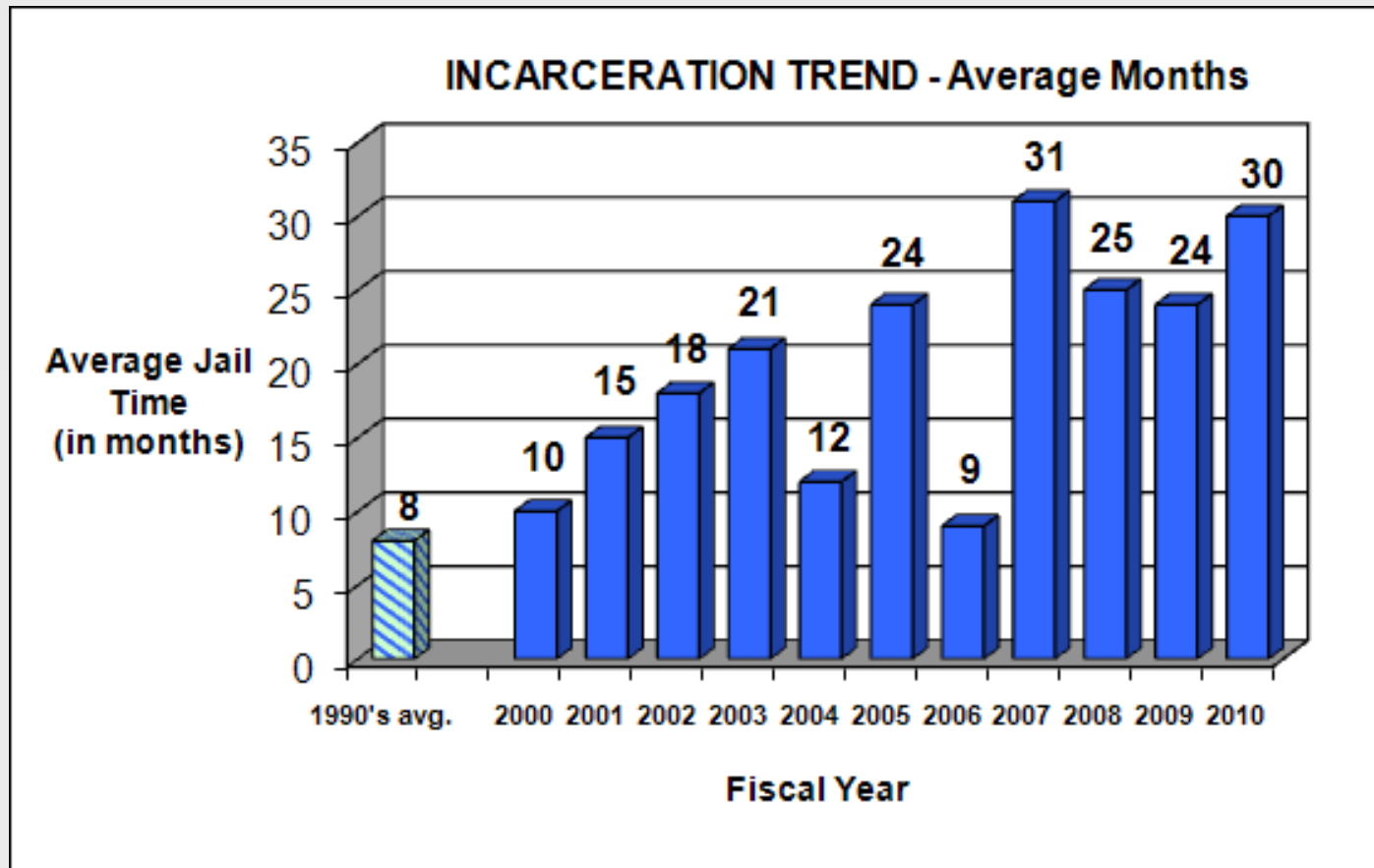
Cartel Enforcement– Recent Trends

- Consistent Pattern of Enforcement
 - Cartel enforcement immune to changes in political leadership
 - Comparisons to EU Cartel Enforcement
- Maturing of Cartel Enforcement
 - Leniency applications may be leveling off after initial rush to file
 - Authorities focusing on stronger cases and more cooperation upfront by immunity/amnesty applicant
- Globalization of Cartel Enforcement
 - Over 50 countries have immunity programs
 - Problems with inconsistent approaches
 - Threat of information leaking from one jurisdiction to the next
- Greater Willingness to Decline Prosecution or Limit Penalties Where Other Jurisdictions Take the Lead
 - Marine Hose, two UK executives charged in U.S. and UK and allowed to served their entire sentence in UK
 - French citizen charged in U.S. and allowed to serve part of his prison term in France.

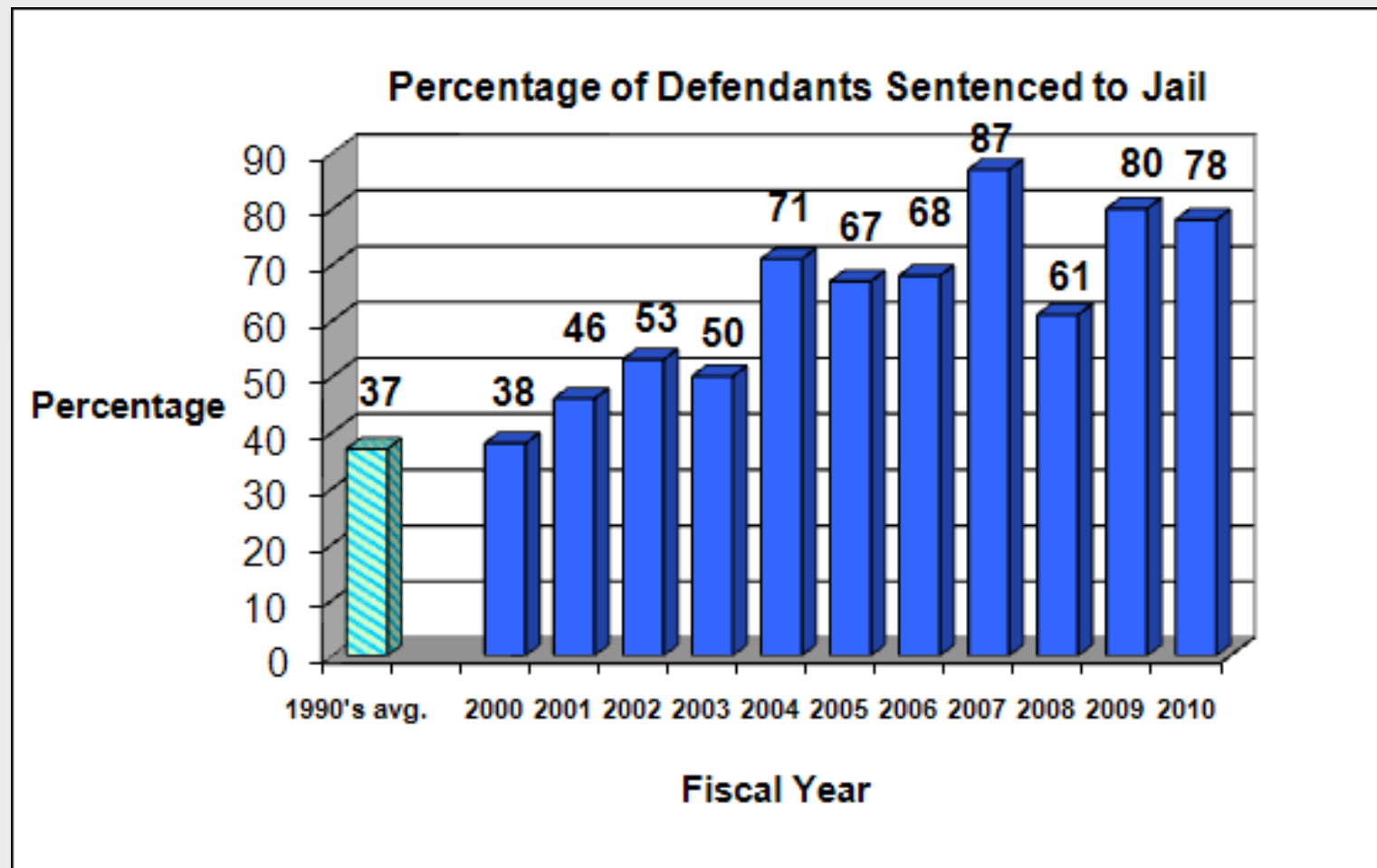
Cartel Enforcement Statistics - Fines



Cartel Enforcement – Longer Prison Sentences



Cartel Enforcement – More Defendants Sent to Prison



Cartel Enforcement – Leniency/Immunity Agreements

- Still The Most Significant Source of New Cartel Cases
- Costs
 - Need to report to more jurisdictions (all or none approach)
 - Reporting is not cost free
 - Legal fees (including follow-on cooperation commitments)
 - Business distraction
 - Civil damage claims
 - Retaliation by Other Members of the Industry
- Benefits
 - No Criminal Penalties in US and Lower or No Fines Elsewhere
 - Companies that report Second can be Penalized Harshly (e.g. Hoffman La Roche \$500 million, LG \$400 million, Samsung \$300 million)
 - No Executives Go to Jail or Restricted from Travel
 - Ability to Resolve problem Sooner and Get Back to Business
 - (e.g. AU Optronics)
 - If You Don't Report Someone Else Will (Do you trust your competitor?)

Industries Already Affected By Cartel Enforcement

- Air & Water Transportation (cargo/passenger)
- Computer Components/ Consumer Electronics
- Banking & Financial Industry
- Food Industry
- Oil & Gas
- Automobile Parts
- Chemical
- Home Appliances
- Government Procurement
- Cement/Ice/Paper

Cartel Enforcement - Aggressive Investigative Techniques

- Use of Other Criminal Statutes
 - Obstruction of Justice
 - Mail/Wire Fraud Statutes
- Extradition
 - Ian Norris
- Covert Surveillance
 - Audio and Video Recording
- Search Warrants
- Border Watch
 - Track travel into the U.S.
- Interpol Red Letter Notices

Increased interest in cartel conduct abroad “affecting” domestic markets

- DOJ
 - Expanding view of extraterritorial reach of U.S. antitrust laws
 - With manufacturing moving overseas, DOJ is pushing to capture indirect effects of cartels
 - e.g., *LCD* (products bought and sold overseas but placed in computers and TVs shipped to U.S.); Chunghwa; and Hannstar
 - FTAIA – Courts are interpreting scope of antitrust law narrowly
 - What will be the effect for criminal cases
- UK and EU
 - EU following the same line as the US (*LCD*)
 - EU focused on “stay at home” arrangements reducing competition in the European markets (non-entry)
 - How will the UK OFT (European criminal enforcement) look at conduct outside the UK?

Common Gaps In Compliance Programs that Lead to Increased Risk of Cartel Conduct

- Mergers (inadequate due diligence)
- Foreign Subsidiaries (in countries without strong compliance cultures)
- Revolving Door Among Competitors (employees switch from one competitor to the next)
- Inadequate Training
 - E.g. Engineers moved to sales position without training
- Cost Cutting Measures Reduce Compliance Training
 - Economic downturn is period of highest risk for cartel conduct
- Other Improper Conduct
 - E.g. Foreign Corrupt Practices Act (FCPA) -- Bribery

Civil Damage Claims – New Challenges

- Courts Have Made it More Difficult to Bring Cases
- Motion to Dismiss
 - *Twombly/Iqbal* (Plausibility test)
- Class Certification
 - Higher Evidentiary Standard
 - Greater Reliance on Economists and Econometric Evidence
- Costs to get to trial are much greater
 - Fewer private antitrust cases filed
 - Plaintiffs will look to government action before filing civil claims (plea agreements, consent decrees)
- Most cases are dismissed before trial