



# Investigative Techniques in Cartel Prosecutions: The U.S. and EU Experience

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# United States: The Enforcement Framework



**DOJ:**  
Criminal  
Enforcement  
against  
Individuals



**DOJ:**  
Criminal  
Enforcement  
Against  
Corporations -  
Large Fines



**Private  
Enforcement  
by Customers**



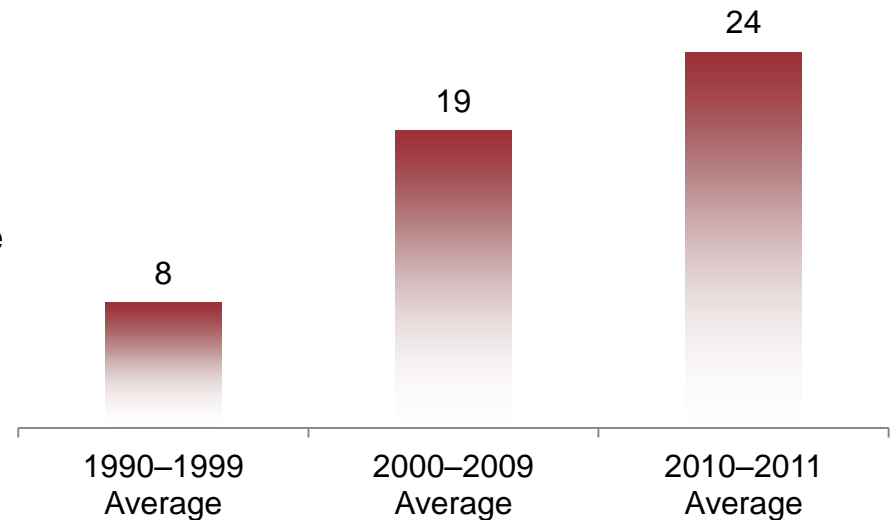
- 3x damages (direct purchasers)  
+ Attorneys' fees
- + Indirect purchaser suits
- Joint & several liability
- No right of contribution

# United States: Criminal Prosecution of Individuals

- Maximum penalties have recently increased from 3 years to up to **10 years imprisonment**
  - Executives from Canada, France, Germany, Japan, Korea, the Netherlands, Norway, Sweden, Switzerland, Taiwan, and the UK have served time in U.S. prisons
  - DOJ seeking to arrest many others who have been indicted by grand juries



**Incarceration Trend**  
*Average Prison Sentence in Months*



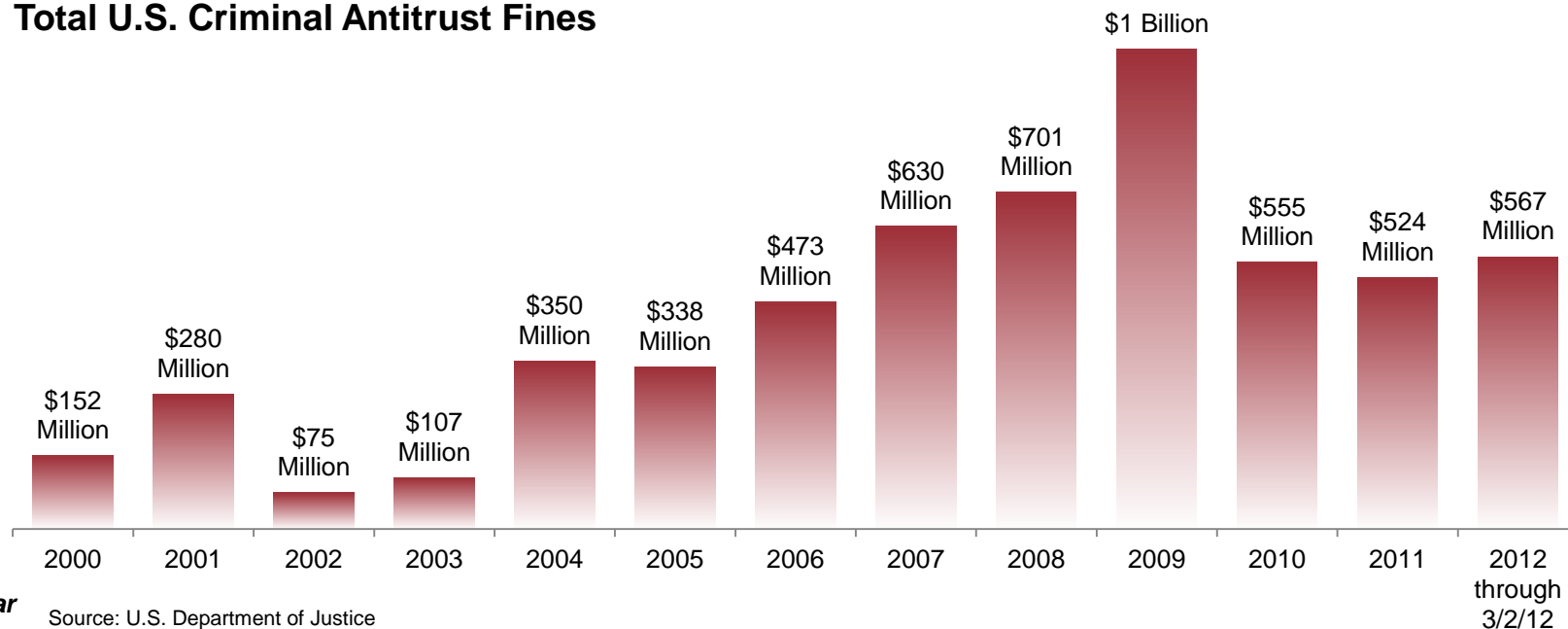
Source: U.S. Department of Justice  
Note: US DOJ fiscal year is October 1 – September 30

“In our experience, individual accountability through the imposition of jail sentences is the single greatest deterrent.”

— Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement, DOJ (2005)

# United States: Criminal Fines

## Total U.S. Criminal Antitrust Fines



Companies from at least the following foreign countries have been fined \$10 million or more: Australia, Belgium, Brazil, Chile, China, Denmark, France, Germany, Hong Kong, Israel, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Norway, Singapore, Switzerland, Taiwan, and the UK.

“Sherman Act violations have yielded 91 criminal fines of \$10 million or more, including 19 fines of \$100 million or more.”— Department of Justice, Spring 2012 Update

# United States: Criminal Investigative Tools

- Grand jury investigations
  - **Subpoenas** (used in virtually all major investigations)
  - **Immunity** (for cooperating witnesses, and to compel testimony)
- DOJ has access to full FBI investigatory powers and resources:
  - **Drop-in visits** (used in virtually all major investigations)
  - **Search warrants** (court authorization required)
  - **Wiretaps** (court authorization required)
  - **Informants / consensual monitoring** (court authorization not required)



# The Lysine Cartel Investigation (1992-1995)

- Mark Whitacre of ADM became the highest-level corporate executive in U.S. history to become an FBI informant in an antitrust case
- For 3 years, Whitacre acted as an FBI informant during investigation of ADM and other companies and individuals for price-fixing in lysine



July 13, 1993

**Telephone Call From  
ADM Headquarters**

**FOREIGN CO-CONSPIRATOR  
EXPRESSES RELUCTANCE TO  
MEET IN THE UNITED STATES**

# United States: Criminal Investigative Tools

- **Border watch:** used to detect entry into the U.S. of a witness or subject of investigation
- **Interpol’s “red notice” list:** international “wanted notice” that many Interpol member countries recognize as basis for provisional arrest with a view toward extradition
  - DOJ will seek to extradite any fugitive defendant apprehended through the Interpol “red notice” watch
- **Extradition** (only from countries that extradite for antitrust offenses)
  - In 2004, the DOJ sought the extradition from the U.K. of Ian Norris, a former CEO of Morgan Crucible, on charges of price fixing in carbon products and obstruction of justice
  - In 2010, Norris was extradited on the obstruction charges and sentenced to 18 months in U.S. prison

Red Notice  
International Warrant of Arrest (Fugitive)  
With a View of Extradition

Number: ECOMAS Criminal Chamber of Independent Prosecutor  
P/O Box 754 Country, Republic of Guinea ECOMAS

Reference No.: ECOMAS/PA/0011  
Date: 1 August 2011

Type of Red Notice  
 Fugitive Wanted for Prosecution

Fugitive Photograph

WANTED:  
This Person May Be:  
 Wanted  
 Additional to Drugs  
 Armed  
 Violent  
 X) Dangerous  
 Fugitive  
 Substantial

IDENTITY PARTICULARS

1. First Name: \_\_\_\_\_ Sex: \_\_\_\_\_  
2. Family Name at Present: \_\_\_\_\_ Miss  
3. Family Name at Birth: \_\_\_\_\_ Miss

A. Father's Name: \_\_\_\_\_  
B. Father's Family Name: \_\_\_\_\_ Miss

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# United States: The Leniency Program

Despite all of these powers and tools, the Leniency Program is by far the DOJ's most important tool

- **Amnesty and “cooperation discounts”**
  - **Amnesty** – 1<sup>st</sup> to report illegal conduct is eligible for full immunity from DOJ criminal prosecution
    - No corporate fine
    - No jail time for executives,
    - Only single damages and no joint & several liability in civil cases
  - **Cooperation discounts** – 2<sup>nd</sup> and later companies to cooperate with DOJ's investigation receive “discounts” on fines, depending on timing and value of cooperation
  
- **Amnesty Plus**
  - Cooperating companies reporting a second, unrelated conspiracy may receive:
    - Amnesty for the 2<sup>nd</sup> offense, plus
    - An additional discount on the fine for the 1<sup>st</sup> offense





# United States: The Leniency Program

## Why is the Leniency Program so effective?

- Compelling incentives to self-report and provide DOJ full access to evidence
  - The 1993 updates to the Leniency Program have made it easier and more attractive for companies to cooperate, leading to a *nearly twenty-fold increase in the leniency application rate*
  - Corporate fines reached a new order of magnitude in 1996, when ADM paid a \$100 million fine for participating in two global cartels in the food and feed additives industry
- DOJ benefits from enormous effort of massive internal investigations by companies:
  - Dozens (or hundreds!) of lawyers working to develop evidence
  - Reviewing millions of e-mails and other documents with “state of the art” private sector technology
  - Direct access to, interviews of, and employment/severance leverage over the relevant executives



“In the United States, companies have been fined more than \$5 billion for antitrust crimes since . . . 1996, *with over 90 percent of this total tied to investigations assisted by leniency applicants.*”

“[The Leniency program] “is, *unquestionably, the single greatest investigative tool available to anti-cartel enforcers.*”

— Scott Hammond, DOJ Deputy AAG for Criminal Enforcement (emphases added)



# EU: The Enforcement Framework



## **Public Enforcement by the European Commission (“EC”):**

- Cartel enforcement remains top priority
- Broad investigatory and enforcement powers to fight suspected cartels
- No criminal prosecutions of individuals (except in a few Member States)
- Member State enforcement against cartels that the EC chooses not to target

## **Private Litigation**

by individual customers in national courts:

- Encouraged by EC, but
- So far nowhere near as relevant as in the U.S.
- Focus is compensation, not 3x or punitive damages

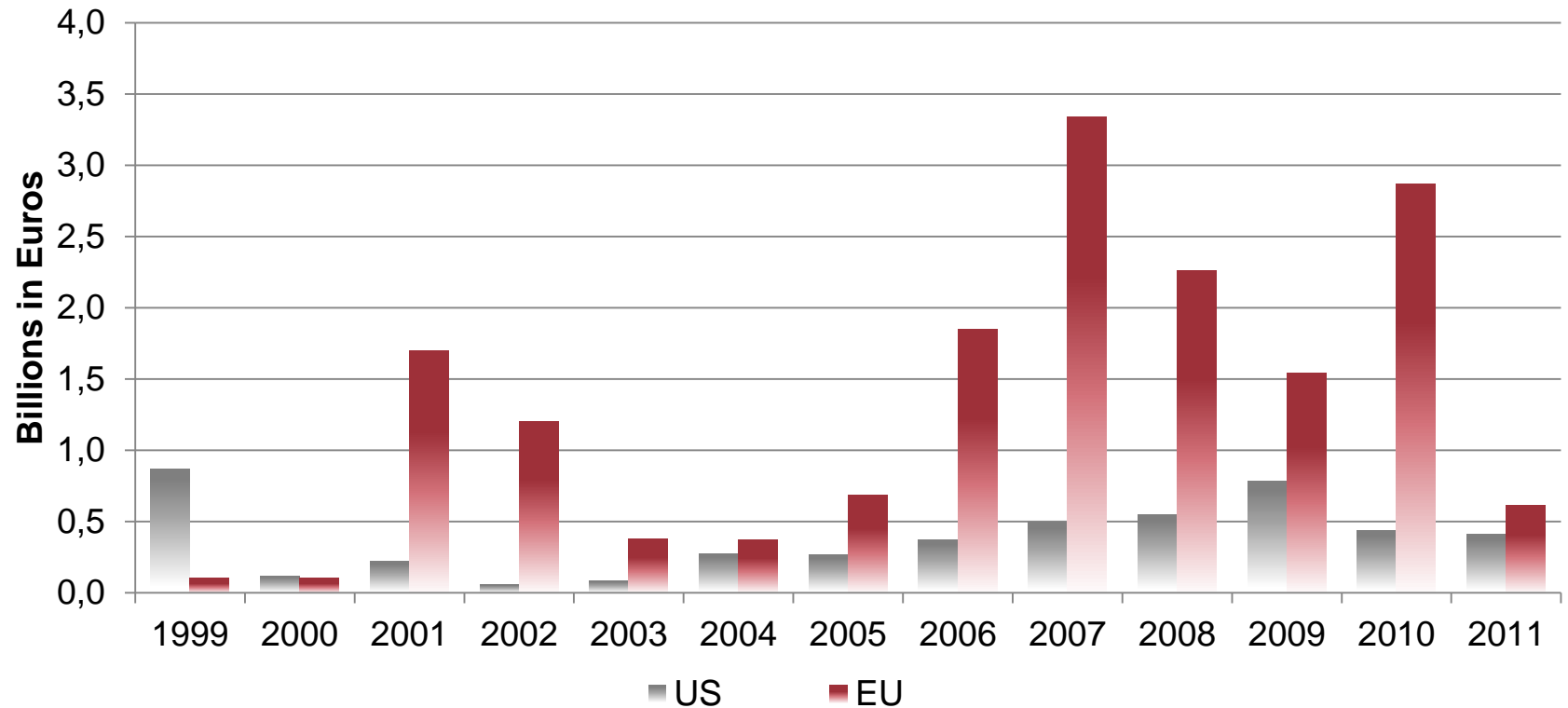
# EU: Huge Corporate Fines

- The EC may fine businesses involved in cartels **up to 10% of global turnover** in prior year
- From 2008 to March 28, 2012, the EC imposed cartel fines totaling approximately **€ 7.5 billion** (total fines imposed since 1990 exceed **€ 16.4 billion**)



# EU vs. U.S. Cartel Fines

U.S. / EU Cartel Fines Imposed: 1999–2011



Source: The Criminal Enforcement Program 1999 Annual Report at <http://www.justice.gov/atr/public/4523e.htm>; Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Nat'l Institute on White Collar Crime, Feb. 25, 2010, at <http://www.justice.gov/atr/public/speeches/255515.htm>; Scott D. Hammond, *Fighting Cartels – Why and How?*, The 3<sup>rd</sup> Nordic Competition Policy Conference, September 12, 2000; DG Competition Statistics, at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>; See also DG Comp, Cartels, Cases, at <http://ec.europa.eu/competition/cartels/cases/cases.html>.

# EU: Cartel Investigative Tools

- **“Dawn raids”** – unannounced on-site inspection visits to corporate headquarters
  - EC conducts with member states and local police
  - A key information gathering tool early in investigations
  - In multi-jurisdiction investigations, the EC increasingly aims to coordinate “dawn raids” with other regulators
  - EC can enter premises, examine and take copies of documents, seal premises and records, and ask for oral explanations on the spot
  - Searches of emails, computers on-site
  - EC can inspect other premises (e.g., employee homes) with court warrant
  
- **Formal “Requests for Information” (RFIs)**
  - Extensive written requests to companies being investigated and/or third parties
    - Example: questions about whether company’s executives attended specific alleged meetings
  - Fines for failure to respond truthfully (up to 1% of total annual turnover)



# EU: Leniency and Settlement Policies

- Leniency Notice (2006):
  - Full immunity from fines for “1<sup>st</sup>-in”
  - Fine reductions for subsequent leniency applicants
    - 30-50% for 2<sup>nd</sup>; 20-30% for 3<sup>rd</sup>; up to 20% for all others
    - Exact percentage discount (place in relevant “band”) determined by value of evidence provided
  - System of oral leniency applications to alleviate concerns about creating incriminating written corporate statements, which could be discoverable by private U.S. plaintiffs
  
- New EU Settlement Process is significantly strengthening enforcement
  - Acknowledgement of liability and waiver of rights
  - 10% settlement discount added to leniency reductions
  - Dramatically expedites and reduces EC’s cost and effort of investigations by avoiding lengthy appeals, limiting burdensome access to file exercise, and dramatically reducing the length and detail of the Statement of Objections and Commission Decision
  - Note – virtually all DOJ investigations of corporations are “settled” through criminal plea agreement



“The settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence.”

— EU Settlement Process, Introduction

# EU: The Leniency Policy

- As in the U.S., the Leniency Program is the key enforcement tool
  - Significant increase in cartel enforcement activity (and in fines!) after the introduction of the Leniency Program in 1996
- Like the DOJ, the EC benefits from massive internal investigations by companies (at a very low cost to the EC):

## EC “dawn raid”

*Rudimentary technology*

*Limited resources  
(relatively small team of lawyers)*

*Review/searches often last 1-2 days*

*Limited, if any, access to executives*

## Company internal investigation

- *“State of the art” private sector technology*
- *Significant resources (technology experts and up to hundreds of lawyers!)*
- *Investigations often last for months*
- *Direct access to participating executives*

# EU: The Leniency Policy

The leniency policy is “absolutely crucial for the detection and the investigation of secret cartels.”

— Alexander Italianer, Director General for Competition, EC

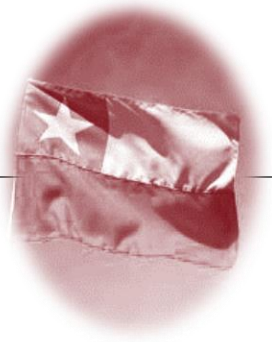
The leniency policy “allow[s the EC] not only to pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement. The leniency policy also has a very deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members.”

— EC Leniency Policy web page





# Chile: A Few Words of Unsolicited Advice



- For the FNE:
  - Allocating limited resources on domestic cartels will have the greatest deterrent effect:
    - **Global cartels:** Adding one more enforcer to the long list of public and private enforcers already pursuing such cases will have negligible incremental deterrent effect
      - Possible criteria for case selection: if Chilean companies are key actors in the conduct, or if Chile is a particularly large export market for the products
    - **Local cartels:** By contrast, targeting domestic cartels with an effective leniency policy and an effective mechanism to settle cases can create significant enforcement and deterrence where it would otherwise be entirely absent
  
- For companies and their counsel:
  - Perhaps Chile is different, but our experience indicates that many countries (in Europe, Asia and Latin America) without a long history of antitrust enforcement have many lurking issues
  - Cartel problems can destroy companies and executives' lives – don't play with fire
  - Adopt an antitrust policy and build an effective compliance program before you have a problem
    - For training, excellent software tools and other materials are available at reasonable costs
      - If a problem is avoided, few other expenditures could possibly have the same return on investment
    - Persuade top business and sales management to lead by setting the “tone at the top”
      - Also consider full “internal amnesty” for past transgressions reported within company on a timely basis



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