

U.S. Antitrust Regulation and Practice

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Objectives of U.S. Antitrust Law

- What is antitrust law supposed to do?
 - Protect consumer welfare by preserving competition
- Key questions: Does the practice harm customers?
 - Look at effects on:
 - Market prices
 - Market output
 - Product or service quality in the market
 - Rate of technological innovation/product improvement
- U.S. antitrust laws protect customers, not competitors
 - Unless harm to competitor harms customers
 - Compare with EU

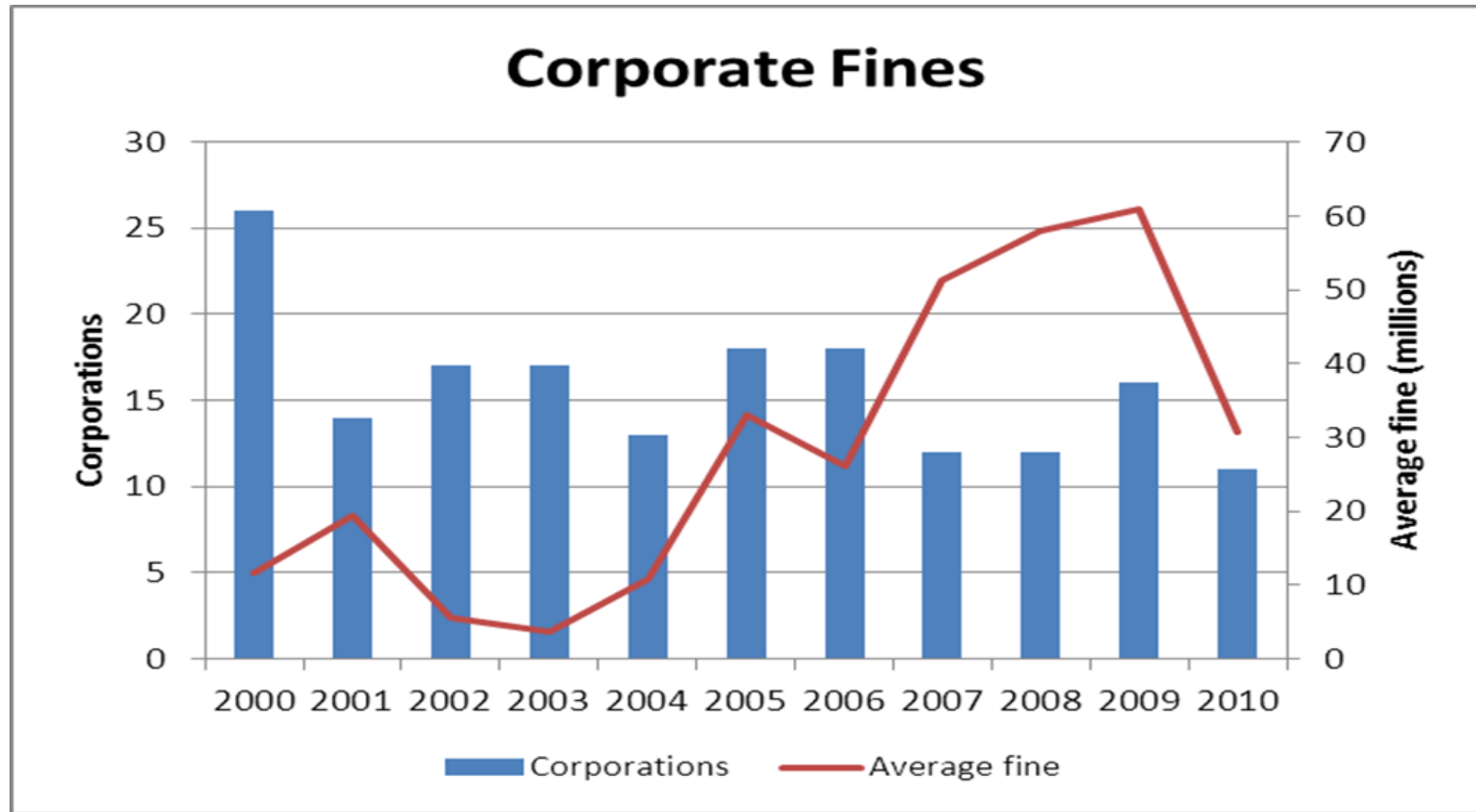
Relevant U.S. Antitrust Statutes

- Sherman Act
 - Section 1 prohibits "contracts, combinations...and conspiracies in restraint of trade" → civil and criminal penalties
 - Section 2 prohibits "monopolization," "attempted monopolization," and conspiracies to monopolize trade or commerce → civil and criminal penalties
- Robinson-Patman Act
 - Prohibits charging different prices to different customers for the same product (in certain circumstances) → civil and criminal penalties
- Federal Trade Commission Act
 - Prohibits "unfair methods of competition"
- State antitrust laws
 - Often—but not always—follow federal antitrust law

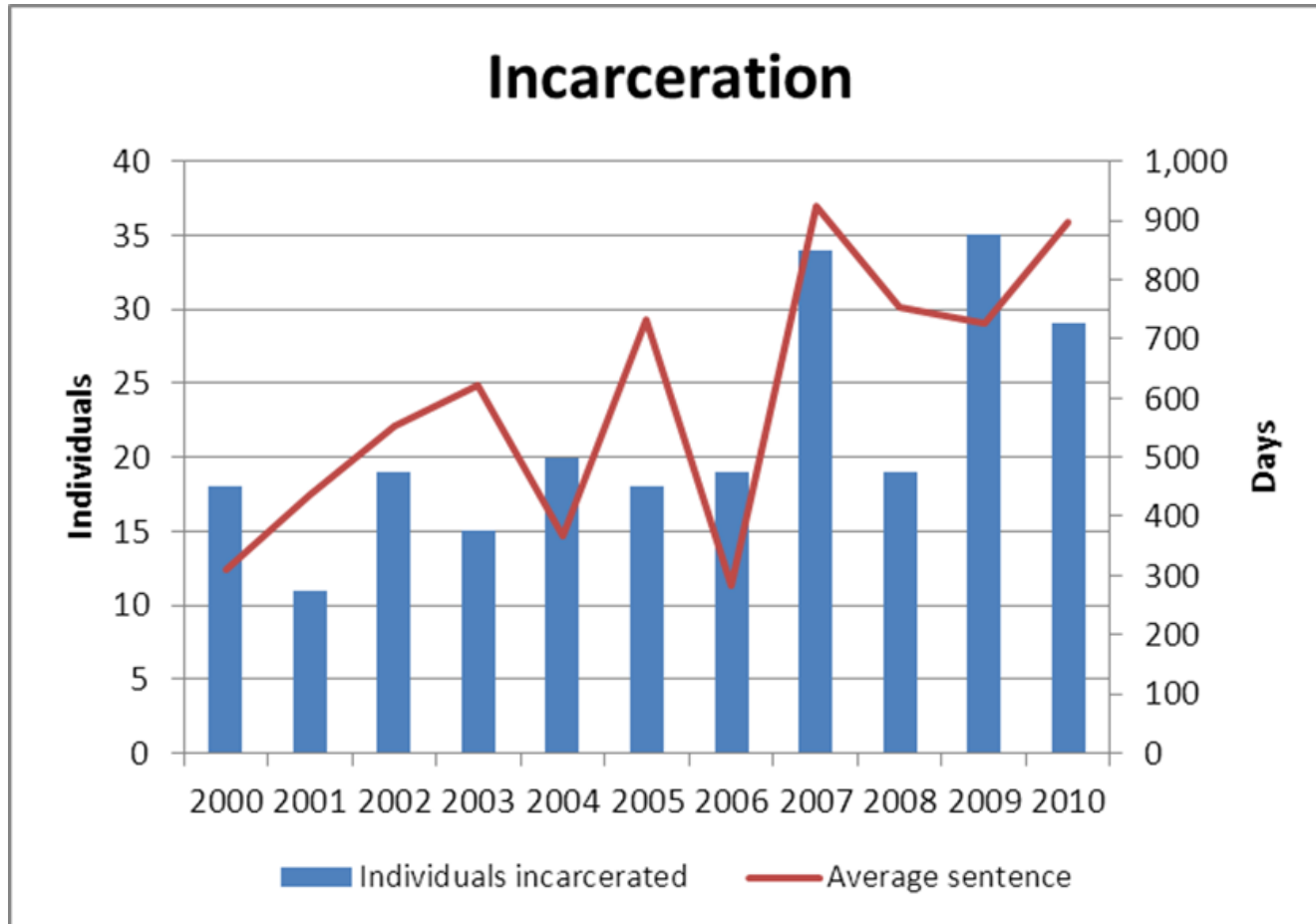
"Hard Core" Violations

- Agreements among competitors to
 - Fix prices
 - Rig bids or agree to refrain from bidding
 - Fix output volumes
 - Allocate customers
 - Allocate sales territories
- Observations
 - Horizontal concerted action → Sounds in Sherman Act § 1
 - *Per se* illegal—presumed anticompetitive; no defense of absence of competitive effect
 - Pose the highest risk
 - Subject to criminal prosecution
 - Clear and convincing evidence of a violation
 - Substantial customer harm

Corporate Fine Trends



Jail Time Trends



Jurisdiction (case law)

- American Banana Co. v. United Fruit Co. (1909)
 - Strict territoriality approach – Sherman Act inapplicable to acts done outside the U.S.
- United States v. Aluminum Co. of America ("Alcoa") (1945)
 - U.S. has subject matter jurisdiction over acts that were intended to affect and did in fact affect trade or commerce in or with the U.S.
- Hartford Fire Insurance v. California (1933)
 - Reiteration of intended effects test
- F. Hoffmann–LaRoche Ltd. v. Empagran S.A. (2004)
 - Foreign purchasers had no Sherman Act claim because the foreign effects were independent of any domestic effect

Jurisdiction (FTAIA)

- Foreign Trade Antitrust Improvements Act ("*FTAIA*") (1982)
- *Legislative intent*: to retrieve U.S. exporters from competitive disadvantage in foreign trade
- *Import* commerce continues to be governed by Alcoa
- *Export* commerce and wholly foreign commerce excluded from antitrust laws unless
 - direct, substantial and reasonably foreseeable effect on either domestic commerce, import commerce or the export activities of one engaged in U.S. domestic or import commerce and
 - this effect gives rise to claim under the antitrust laws

Potential Antitrust Plaintiffs

- U.S. Department of Justice, Antitrust Division
- Federal Trade Commission
- Securities & Exchange Commission
- State Attorney Generals
- Injured private parties (class actions)

DOJ/FTC Antitrust Enforcement

- Remedies in government actions
 - Criminal fines for corporations (DOJ)
 - Maximum corporate fine: \$100 million
 - Alternative: Up to twice the defendant's gain or victim's loss, whichever is greater
 - Criminal fines and imprisonment for individuals (DOJ)
 - Maximum imprisonment term: 10 years (average: 31 months)
 - Maximum individual fine: \$10 million
 - Injunctions (DOJ/FTC)
 - Prohibitory
 - Remedial

DOJ/FTC Antitrust Enforcement

- Forum
 - DOJ actions are tried in federal district court
 - With appeal to court of appeals
 - FTC actions are tried in administrative trials
 - With appeal to full Commission and then to federal court of appeals
 - Preliminary injunctions must be obtained from federal district court
 - Proposals to give FTC independent litigating authority
- Statutory offensive collateral estoppel when DOJ obtains a litigated judgment
 - In follow-on private actions, plaintiffs can use court judgment in case brought by DOJ to establish defendant's liability
 - Need only show that sustained antitrust injury and then quantify damages
 - No statutory estoppel in FTC actions

State Antitrust Enforcement

- Can sue under the federal antitrust laws for:
 - Antitrust injury to states themselves
 - Antitrust injury to their citizens (*parens patriae* actions)
- Can sue under state antitrust laws as well
 - Mostly track federal provisions, but some differences (e.g., RPM)
- Remedies
 - Damages
 - Injunctions

Private Antitrust Enforcement

- Remedies in private actions
 - Treble damages
 - Three times actual damages
 - Joint and several liability
 - No right of contribution
 - The *Flintkote* rule in antitrust damages class actions
 - Injunctions
 - Attorneys' fees for prevailing plaintiffs
 - No reverse fee-shifting for prevailing defendants
- Pre-trial Discovery

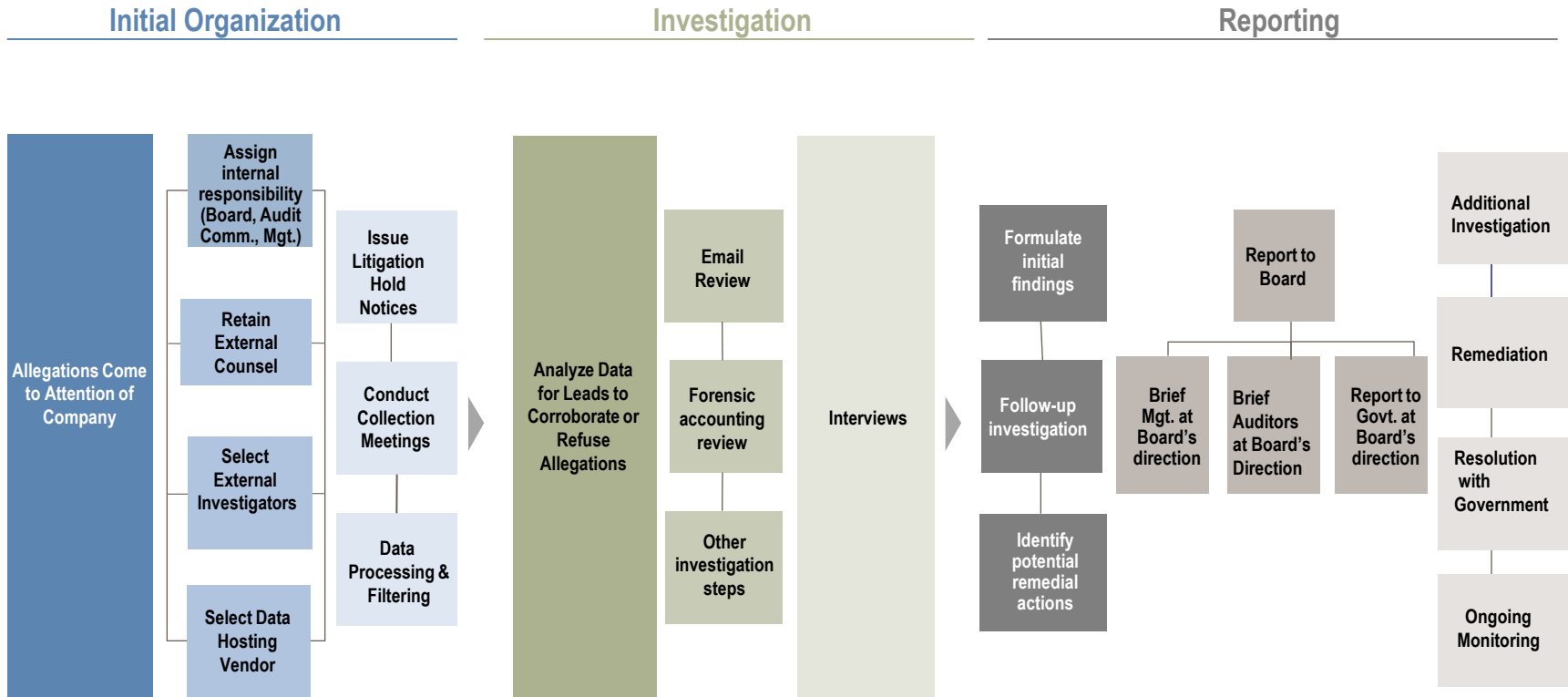
Amnesty Program of DOJ Antitrust Division

- DOJ grants amnesty/immunity to only one corporation/individual – whoever applies first
- DOJ has discretion to allow the applicant to set a placeholder ("marker")
- Elimination of treble damages for the successful amnesty applicant in follow of the civil actions
- Protection from joint and several liability so long as there is cooperation with plaintiffs in making case against remaining cartel members
- "Amnesty Plus": in the course of the investigation of a cartel information about another cartel
- "Penalty Plus": target of investigation has knowledge of its involvement in a separate cartel, but does not divulge that second cartel to the DOJ

Investigation Triggers

- External
 - Government
 - Media reports
 - Competitors
- Internal
 - Whistleblower
 - Auditors

Anatomy of an Internal Investigation



Anatomy of a Government Investigation

