Parallel enforcement of international cartels and its impact on the proportionality of overall punishment

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PARALLEL ENFORCEMENT OF INTERNATIONAL CARTELS AND ITS IMPACT ON THE PROPORTIONALITY OF OVERALL PUNISHMENT

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Parallel Enforcement of International Cartels and Its Impact on the Proportionality of Overall Punishment

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"*If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice* […] *demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.*"

European Court of Justice judgment of 13 February 1969 in case 14/68 *Walt Wilhelm*

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The origins of this dissertation lie in the discussions that I have had with John Terzaken, former Director of Criminal Enforcement for the Antitrust Division of the US Department of Justice. John introduced me to the issues resulting from the parallel enforcement of international cartels. The paper that we produced setting out our thinking on these issues gave me my first experience of publishing a peer reviewed article. The substance and process of this initial publication inspired me to conduct my PhD research.

Prof. Tom Ottervanger was willing to support my PhD ambition right from the start as my supervisor. I am very grateful that throughout the years, Tom has never (expressly) giving up the hope that I could at some point finish my PhD. He has consistently stimulated me to conduct my research in an effective and efficient way. He has also provided me with all the necessary substantive and procedural guidance while at the same time giving me the freedom to explore my own academic path. Dr. Ben van Rompuy later joined as second supervisor, with great enthusiasm and support. I have very much appreciated his valuable comments on this dissertation.

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I am most grateful to the one person who has had the privilege and burden of having to listen to more of my deliberations than anyone else: Sofie Wulp. The progress of my PhD nicely coincides with the development of our relationship, although I do not believe the two are directly related. We were dating when I started planning my PhD, moved into a small houseboat when I was writing my first article, got engaged and married before finishing my second article, enjoyed the birth of our son Duco around the time of finalising my third and fourth publications, bought our first home while I was working on the fifth article, and were happily quarantined when finalising my sixth and last piece of this dissertation. Sofie was always enthusiastic and interested in helping me to explore and sharpen my thoughts. She has given me the inspiration and opportunity to continue to pursue this exercise. Most importantly, she made sure that in the past seven years I have enjoyed not just my academic and professional work but especially my personal life.

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1. CHAPTER 1: INTRODUCTION

1.1 General introduction

An introduction of the subject of this dissertation can best start with an example of modern day enforcement of an international cartel. The example relates to the provision of international ocean shipping services of cars, trucks and other large vehicles, so-called 'roll-on, roll-off' (ro-ro) cargo. This industry is highly specialised, very capital intensive and has been described as 'a virtually closed market' characterised by only a handful of major, globally active shipping companies.[1] Close links between individual deep-sea car carriers and individual car manufacturers have made it all the more difficult for new players to enter the market.[2] To increase the level of competition in the market, customers seeking to transport their cars and trucks to other continents regularly launched tenders forcing the various suppliers to enter into direct (price) competition with one another.

While customers were seeking to benefit from greater competition, suppliers were conspiring to restrict it. Starting in 1997 and ending in 2012[3], maritime car carriers agreed to fix the prices charged for certain routes and certain customers, and agreed to allocate customers by rigging tenders.[4] This collusion followed the 'rule of respect', meaning that carriers would by guiding principle respect the business of the incumbent carrier. The competitors also coordinated the reduction of capacity in the market through the scrapping of vessels. A large part of the contacts implementing and maintaining the cartel arrangements took place in Japan, where three of the large carriers were based (MOL, NYK and K-Line).[5] Sales managers of the carriers would meet at each other's offices, in bars, restaurants or other social gatherings.[6] However, given the global scope of the business, the discussions between the sales managers in Japan and elsewhere had worldwide implications.

The long-lasting cartel was revealed in May 2012 by the leniency applications of one of the participants, MOL.[7] Following an initial investigation, coordinated dawn raids were conducted by the European Commission, the US Department of Justice (DOJ) and the Japan Fair Trade Commission (JFTC).[8] In addition to these three authorities, the maritime car carriers cartel has (thus far) subsequently been investigated and punished by competition authorities in eight other jurisdictions, namely Australia, Brazil, Chile, China, Korea, Mexico Peru and South Africa. Overall fines imposed on the participants of the global cartel exceed USD 1,200 million.[9] Apart from corporate fines, the DOJ has also targeted executives with personal fines and prison sentences of 14-18 months. As for private enforcement, the companies involved in the cartel conduct can expect to be caught up in civil litigation for the years to come.[10]

The example of the maritime car carrier cartel illustrates the widespread and far-reaching legal exposure that participants in international cartels can nowadays be faced with. Such active enforcement of the same international cartel in a large number of different jurisdictions is a very recent phenomenon. It is the result of significant changes that have taken place since the mid-1990s. Before that time, it is doubtful whether one can even speak of effective enforcement of international cartels.

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1 European Commission decision of 29 November 2002 in *Wallenius Lines AB / Wilhelmsen ASA / Hyundai Merchant Marine* (COMP/M.2879), paras 18-19.

2 ibid paras 18, 34.

3 Different authorities have concluded on different durations for the cartel. The US Department of Justice and Australia's ACCC have found the cartel to start in 1997, while the European Commission found it to start in 2006, with most other enforcing authorities sitting in between.

4 European Commission decision of 21 February 2018 in *Maritime Car Carriers* (AT.40009), paras 29-34.

5 ibid. paras 36, 37.

6 European Commission press release, 'Antitrust: Commission fines maritime car carriers and car parts suppliers a total of €546 million in three separate cartel settlements' (21 February 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_962>.

7 A leniency application was filed with European Commission, probably also with the DOJ and JFTC, and possibly with other authorities as well.

8 European Commission press release, 'Antitrust: Commission confirms inspections in the sector of maritime transport services' (7 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_655>.

9 Based on own research in combination with the OECD International Cartels Database (2019) <https://qdd.oecd.org/subject.aspx?Subject=OECD_HIC>.

10 See the 2018 annual reports of K-Line, NYK and Wallenius Wilhemsen. The latter company still had a provision of USD 179 million per year end 2018 to cover expected pay outs related to jurisdictions with ongoing anti-trust proceedings and potential civil claims.

This is true also for the US, most probably the jurisdiction where cartel enforcement had historically received most attention. The DOJ's focus up until the early 1990s was clearly directed at fighting domestic price-fixing and bid-rigging cases, not on international cartels.[11] The aggressiveness of the DOJ's enforcement was also limited by the statutory fine maximum, which until 1990 was set at USD 1 million. The active enforcement of international cartels only became a priority in 1993.[12] In the following years, DOJ resources were reallocated to focus on the pursuit of large or complex international cartels. The efforts paid off relatively quickly with the successful prosecution of several global cartels still before the end of the century, i.e. citric acid (1996), lysine (1996), sodium gluconate (1997), heavy-lift marine services (1997), graphite electrodes (1998), sorbates (1998) and vitamins (1999).[13]

Outside of the US, international cartel enforcement received attention in only few jurisdictions before the 1990s.[14] The International Competition Policy Advisory Committee (ICPAC), a US advisory body to the Attorney General and Assistant Attorney General for Antitrust, even noted in 2000 that:

> *For many decades, the United States stood almost alone in the world in its commitment to antitrust enforcement, especially when the defendants were located in other countries. In fact, until quite recently, U.S. antitrust investigations into international cartels were met with chilly receptions from other governments.*[15]

The Organisation for Economic Co-operation and Development (OECD) stated that before it adopted its *Recommendation on Hard Core Cartels*[16] in 1998, only very few competition authorities around the world had a fully developed anti-cartel program.[17] Many of the industrialised OECD members at that time still lacked the competition laws to effectively halt and deter hard core cartels. For developing countries, effective cartel enforcement was virtually non-existent, with a 2001 World Bank paper finding little activity by government agencies to respond to international cartels even after they had been shown to exist.[18]

What has caused the surge in international cartel enforcement in the last 25 years? One can point to at least seven developments that have had a very significant impact on the extent to which international cartels are being discovered, investigated, prosecuted and punished:

(i) The continuing effect of globalisation on the nature of all economic conduct, including cartel behaviour. Logically, with trade becoming increasingly international and the supply chains being more and more global in nature, the geographic scope of competition continues to widen. So too the collusion aimed at restricting this competition. Cartels hence become increasingly cross-border.[19] The OECD has reported in 2014 that more than 90% of recent cartel fined in the US have been international and that the number of cartel cases investigated in the European

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11 International Competition Policy Advisory Committee (ICPAC), *Final Report* (2000) 166 <https://www.justice.gov/atr/final-report>.

12 ibid.

13 Reference to the years in which the first penalties were imposed.

14 ICPAC (n 11) 186.

15 ibid. 185.

16 OECD, *Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels* (25 March 1998) (C(98)35/FINAL - C/M(98)7/PROV) <http://www.oecd.org/daf/competition/2350130.pdf>.

17 OECD, Working Party No. 3 on Co-operation and Enforcement, *International Co-operation – Stocktaking Exercise of the Competition Committee's Past Work* (29 May 2012) 11, footnote 27 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2012)5&docLanguage=En>.

18 Margaret Levenstein and Valerie Suslow, *Private International Cartels and Their Effect on Developing Countries*, Background Paper for the World Bank's World Development Report 2001 (9 January 2001) 7-8 <http://documents.worldbank.org/curated/en/357531468761437829/pdf/wdr27826.pdf>.

19 Antonio Capobianco, John Davies, and Sean F. Ennis commented in 2016 that "*[a]s international trade has increased, the number of competition law enforcement activities related to cross-border mergers and cartels has risen substantially (up by about 250–466% since the 1990s*". 'Implications of Globalisation for Competition Policy: The Need for International Cooperation in Merger and Cartel Enforcement', *Think Piece for the E15 Expert Group on Competition Policy and the Trade System* (January 2016) <http://e15initiative.org/publications/implications-of-globalisation-for-competition-policy-the-need-for-international-cooperation-in-merger-and-cartel-enforcement/>.

Union (EU) involving a participant from outside the EU has increased by more than 450% since 1990.[20]

(ii) A very substantial growth in the number of antitrust authorities pursuing cartel conduct. The OECD noted in 2014 that "*[t]he speed and breadth of the proliferation of competition laws and competition enforcers around the globe is the single most important development in the competition area over the last 20 years*".[21] In 2001, agencies from 14 jurisdictions founded the International Competition Network (ICN) with the aim to promote sound and effective antitrust enforcement in the wake of economic globalisation. Today, the membership of the ICN has expanded to 137 authorities. The US Federal Trade Commission lists an even higher number of jurisdictions with antitrust laws.[22]

(iii) A significant strengthening of the capabilities of authorities to successfully target international cartel conduct. John Connor has pointed towards greater degrees of skills, maturity, and confidence needed to investigate complex international collusion.[23] Allocation of sufficient investigative resources and legislation expanding investigative powers have also been crucial for the effectiveness of international cartel enforcement. In the period between 1990 and 2016, the number of authorities that have successfully prosecuted at least one international cartel has gradually risen from 3 to 75.[24]

(iv) Increased levels of inter-agency cooperation facilitating cross-border cartel investigations. Part of the challenge of investigating international cartels is that the relevant evidence may be located in other jurisdictions. Successful prosecution in that case requires close cooperation with other authorities, through the sharing of information and the coordination of evidence gathering. To facilitate and formalise this cooperation, a large number of bilateral agreements have been signed since the mid-1990s.[25] Benefitting from the increased inter-agency cooperation, international cartel investigations now often start off with coordinated and simultaneous surprise inspections to collect evidence ('dawn raids') in different locations across the globe (as was the case for the maritime car carriers cartel).[26]

(v) The proliferation of effective leniency policies. The DOJ has called this "*[t]he single most significant development in cartel enforcement*".[27] The term 'leniency' refers to a system of immunity and reduction of sanctions that would otherwise be applicable to a cartel participant in exchange for reporting on cartel activities and supplying information or evidence.[28] As cartel participants are generally aware of the illegality of their activities, cartels are almost by definition secret in nature.[29] This makes the detection and successful prosecution of cartels all the more difficult. Leniency allows authorities to have the benefit of inside information detailing the precise functioning of the cartel. Leniency also helps to destabilise the

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20 OECD, *Challenges of International Co-operation in Competition Law Enforcement* (2014) 5 <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>.

21 ibid. 28.

22 FTC website, *Competition & Consumer Protection Authorities Worldwide*, listing 133 countries and 8 further regional jurisdictions <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide>.

23 OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Paper by John M. Connor* (1-2 December 2016) 5 <https://one.oecd.org/document/DAF/COMP/GF(2016)9/en/pdf>.

24 ibid. 6. International cartels in this context refer to cartels of which the membership composition is international; OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Summary of Discussion* (1-2 December 2016) para 26 <https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf>.

25 See e.g. the long lists of competition cooperation agreements signed by the European Commission and the DOJ <https://ec.europa.eu/competition/international/bilateral/> and <https://www.justice.gov/atr/antitrust-cooperation-agreements>.

26 Simultaneous, coordinated inspections occurred for example in the global cartel cases regarding marine hoses, cathode ray tubes, freight forwarders, high voltage power cables, refrigeration compressors, auto parts and maritime car carriers.

27 DOJ, Scott D Hammond, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades', speech before the 24th Annual National Institute on White Collar Crime (25 February 2010) 1 <https://www.justice.gov/atr/file/518241/download>.

28 ICN, *Good practices for incentivising leniency applications* (30 April 2019) 5, footnote 1 <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf>.

29 The European Commission's *Notice on Immunity from fines and reduction of fines in cartel cases* (2006), for example applies to 'secret cartels'.

functioning of cartels and helps to prevent cartels from forming, given the level of uncertainty and distrust created by the possibility of others reporting on the cartel in exchange for full immunity. The US was the first to adopt a leniency policy in 1978, but it was rarely used before it was significantly revised in 1993.[30] The revisions increased the transparency of the leniency program and raised the incentives for companies to come forward. Since then, the DOJ has received so many leniency applications that it considers its leniency program to be its most effective investigative tool.[31] Witnessing this success, many other authorities have adopted leniency policies to fight cartels. Today, at least 78 jurisdictions have leniency policies in place.[32] The importance of leniency in modern cartel enforcement is demonstrated by the fact that immunity was granted in at least one jurisdiction for all but three of the 41 global cartels discovered between 1990 and 2018.[33] The three exceptions were all discovered in the 1990s.[34]

(vi) Increased extraterritorial application of antitrust laws. The US has historically been known and criticised for its 'aggressive extraterritorial enforcement', i.e. its willingness to extend the application of its antitrust laws to conduct occurring beyond its borders.[35] The extraterritorial reach of US antitrust laws continued to be a contested issue. This is demonstrated by the interventions of several foreign nations, including Japan, Korea, Taiwan and Belgium, in *Motorola Mobility LLC v AU Optronics Corp*, a civil case in which the US Court of Appeals for the Seventh Circuit was wrestling with the question whether Motorola could claim damages under US antitrust laws in respect of sales taking place entirely outside the United States.[36] Despite the on-going debate, extraterritorial cartel enforcement has become a standard practice for mature antitrust regimes. Out of 30 of the world's major antitrust regimes, Colombia and arguably Canada are the only countries for which the location of the conspiracy is a decisive factor in establishing prosecutorial jurisdiction.[37] For all the other jurisdictions, it is sufficient for the conduct to affect the national trade or commerce. The wide adoption of this 'effects doctrine' has substantially removed the jurisdictional limitations to cartel enforcement, meaning that merely by selling the cartelised products to customers in a particular country, cartel defendants render themselves subject to the enforcement of that country's antitrust laws. As a result, international cartel conduct triggers a patchwork of overlapping jurisdiction.

(vii) A dramatic and continuous rise of cartel fine levels. Worldwide, annual corporate cartel fines are reported to have increased by a factor 120 in the period between 1990 and 2015.[38] This is not merely a consequence of the increase in the number of active cartel enforcers. It also results from legislative and policy changes in many countries aimed to increase deterrence through higher (maximum) fine levels. The ICN reports of 2008 and 2017 on the setting of cartel fines

30 DOJ, Scott D Hammond (n 27) 2.

31 ibid. 3.

32 See, Morgan Lewis, *Global Cartel Enforcement Report – Year-end 2019* (February 2020) 24 <https://www.morganlewis.com/documents/m/documents/cartel/cartel-report_end-2019_200299.pdf>. The number was already at 50 in 2010, DOJ, Scott D Hammond (n 27) 1.

33 See Chapter 2.

34 These are the global cartels *Industrial diamonds* in 1994, *Citric acid* in 1995 and *Soda ash* in 1999.

35 IBA Legal Practice Division Task Force, *Report of the Task Force on Extraterritorial Jurisdiction* (2008) 66 <https://documents.law.yale.edu/sites/default/files/Task%20Force%20on%20Extraterritorial%20Jurisdiction%20-%20Report%20.pdf>. See also Mark S. Popofsky, 'Extraterritoriality in U.S. Jurisprudence', 3 *Issues in Competition Law & Policy*, ABA Section of Antitrust Law (2008) 2423. The resistance by other states even took the form of 'blocking statutes', such as the U.K. Protection of Trading Interests Act (1980), the Canadian Foreign Extraterritorial Measures Act (1984), and the Australian Foreign Proceedings (Excess of Jurisdiction) Act, No. 3 (1984).

36 See Chapter 3 for a detailed assessment of the discussions on jurisdiction and territoriality in the context of the LCD cartel.

37 Global Competition Review, Getting the Deal Through, *Cartel Regulation* (2020), overview of answers to the question "*Extraterritoriality - Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)?*"). Canadian antitrust law requires the existence of substantive jurisdiction. It is unclear if this condition can be met in the case of conduct affecting Canada but entirely taking place outside of its jurisdiction. See *R v. Libman*, [1985] 21 D.L.R. 174 (Can.): *"[A]ll that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada."* Nevertheless, Canada's Competition Bureau has succeeded in obtaining plea agreements from participants of cartels taking place outside of Canada. Whether or not this is consistent with Canada's antitrust law is yet to be tested in court.

38 OECD, *Sanctions in Antitrust Cases - Paper by John M. Connor* (n 23) 3-4.

> both refer to the level of fines in many jurisdictions having significantly increased over the years.[39]

As a result of these developments, the enforcement community targeting international cartels has become increasingly crowded and increasingly active. Thus far, there have been three cartels for which fines have been imposed in more than ten jurisdictions (maritime car carriers, auto parts, air cargo). In view of the above-mentioned trends, it is not unlikely for this to become the new standard for cartels having a worldwide scope.

The increase in parallel enforcement of international cartels is considered to create both opportunities and challenges for authorities.[40] Opportunities for achieving more effective and more efficient enforcement. Challenges of avoiding inconsistent, duplicative or suboptimal outcomes. Cooperation between authorities is needed both to seize the opportunities and to overcome the challenges. The necessity of closer cross-border cooperation has been recognised by the OECD in its 1998 *Recommendation on Hard Core Cartels* and has been a major focus of the work of the OECD, the ICN and other international bodies since then.[41] These efforts have not been futile. There now exists a very large body of guidance documents on cartel enforcement and antitrust enforcement more generally created with the aim of facilitating inter-agency cooperation and stimulating procedural and substantive convergence. International conferences, roundtables and surveys are also taking place to promote and monitor the cross-border harmonisation of cartel enforcement.

The lion share of all the advocacy calling for closer coordination between authorities has focused on the investigative and prosecution stages of cartel enforcement. The sanctioning of cartels has received relatively little attention. This applies even more to the question whether authorities should pursue coordinated sanctioning. In part this may be explained by the enforcement community having been primarily focused on detecting and ending cartels more effectively. It may also be due to the reluctance of governments and authorities to accept or even discuss potential limitations to their power to set and impose sanctions. This ties into the cultural differences regarding notions of fair punishment and the substantial sensitivities concerning a jurisdiction's sovereignty over its penal framework. Irrespective of the underlying motives, addressing the matter of overlapping punishment of cartel offenders in international cartel cases has clearly not been a priority for the enforcement community.

At the same time, the multitude of penalties and overlapping punishment that can result from the parallel enforcement of international cartels is a very pressing concern for cartel offenders. Such concerns have been raised ever since cartels became the subject of fines in multiple jurisdictions. This is illustrated by the arguments raised by defendants ADM and Ajinomoto against the fine to be imposed by the European Commission's in the lysine cartel in 2000:

> *In the view of ADM, there is no need for deterrence in respect of itself under the European competition rules. It claims that it has already suffered such significant sanctions (including penal sanctions for certain executives) that it has already been sufficiently deterred from further infringement in the USA, Europe or indeed anywhere else in the world.*[42]

> *Ajinomoto requests that the Commission's assessment of the appropriateness of any fine in Europe take account of the fact that it has already been subjected to fines in the USA and Canada, and has therefore already been punished for its acknowledged misdeeds.*[43]

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39 ICN, Report to the 7th ICN Annual Conference, *Setting of Fines for Cartels in ICN Jurisdictions* (April 2008) 44 <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_SettingFines.pdf>; ICN, Report to the 16th ICN Annual Conference, *Setting of Fines for Cartels in ICN Jurisdictions (2017)* (May 2017) 57, no longer available on the ICN website as the relevant is mistakenly leading to the 2008 report.

40 OECD, *Challenges of International Co-operation in Competition Law Enforcement* (n 20) 19.

41 See OECD, 'New Approaches to Economic Challenges: Implications of Globalisation for Competition Policy: the Need for International Co-operation in Merger and Cartel Enforcement', Note by the Secretariat (3 March 2014) 13 and further <https://one.oecd.org/document/DAF/COMP(2014)4/REV1/en/pdf>.

42 European Commission decision of 7 June 2000 in *Amino Acids* (COMP/36.545), para 306.

43 ibid. para 310.

It will be no surprise that cartel defendants are primarily objecting to overlapping punishment out of their own interests of reducing or even avoiding additional cartel fines. Authorities, courts and legislators hence have good reasons to be sceptical of these objections. But the concerns have been raised by businesses more generally, with the Business and Industry Advisory Committee to the OECD for example commenting already in 2003 in the context of cartel sanctions against individuals that "*in cases of multiple prosecutions, coordination among jurisdictions would be advisable to avoid unfair and excessive penalties*".[44] And it cannot be ignored that the concerns are growing in view of the rapid proliferation of active cartel enforcement.

Still, some may ask the question "*why should we care about harsh and potentially duplicative punishment of cartel offenders?*". Indeed, I was asked this question various times while conducting my research. In my view, this is not just related to the private interests of those subject to cartel enforcement. Rather, I see the pursuit of proportionate punishment of international cartel conduct to be justified by the much wider societal interest of maintaining a system of effective but fair law enforcement. In respect of both effectiveness and fairness, I believe that there is an optimal level of enforcement that authorities can and should pursue. In the case of cross-border conduct, this requires a cross-border perspective. Sub-optimal international cartel enforcement is not just jeopardising private interests of cartel defendants, it also leads to sub-optimal outcomes for the society as a whole. Excessive punishment may for instance result in companies becoming overly cautious in their business dealings. It may also unnecessarily reduce the competitive strength of those who were sanctioned, or harm consumers that may ultimately see the fine amounts being passed on through higher prices. I believe that perceived fairness and transparency of sanctions is also crucial for corporations in general to accept the antitrust rules they are expected to abide by. From an enforcement perspective, authorities can have much to gain from enhanced inter-agency coordination of not just the investigation but also the prosecution and punishment of international cartel cases. Better allocation of cases may for example result in a more efficient use of government resources, allowing authorities to expand their enforcement activities and/or reduce enforcement budgets.

The above considerations formed the background of an article that John Terzaken, former Director of Criminal Enforcement for the Antitrust Division of the DOJ, and I wrote in 2013, titled "*How Much Is Too Much? A Call For Global Principles To Guide The Punishment Of International Cartels*".[45] This article was an initial attempt to raise broader awareness and to call upon the enforcement community to start thinking about the coordination of sanctioning. At that time, the question "how much is too much" in the context of parallel enforcement of international cartels was the subject of a growing debate among practitioners. But the debate hardly included scholars, policy makers or antitrust officials, in line with the lack of academic or policy studies on this topic. I was therefore of the opinion that the effect of parallel enforcement on the sanctioning of international cartels warranted a more thorough analysis. Many underlying questions deserved to be explored and hopefully answered. This gave me the motivation for my research and the articles that I have written and published on the subject. This dissertation is the culmination of this work.

The next Section *1.2 Research focus and dissertation structure* will set out in detail what research questions have been analysed in this dissertation. It also sets out the structure of this dissertation and describes how the various questions are addressed in the six articles that make up the substantive body of this dissertation. This section is followed by Section *1.3 Relevance of the research*, which explains why the conducted research is relevant for a variety of professionals involved in the field of cartel enforcement and beyond. Sections *1.4 Explanation of key terms* and *1.5 Methodology and limitations* clarify the theoretical and methodological framework that I have applied in conducting my research, also justifying the choices that I have made in limiting the scope of this research.

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44 OECD, *Cartel Sanctions against Individuals* (2003) 110 <https://www.oecd.org/competition/cartels/34306028.pdf>.

45 John Terzaken and Pieter Huizing, 'How Much Is Too Much? A Call For Global. Principles to Guide The Punishment Of International Cartels' (2013) 27 ABA Antitrust Magazine 2, 53.

1.2 Research focus and dissertation structure

A. Research focus

The principal purpose of this dissertation is to study the parallel public enforcement of the same international cartel by different authorities and the impact that this has on the overall punishment of cartel defendants. As further explained in Section *1.5 Methodology and limitations*, this research has descriptive, analytical, comparative and normative elements.

The main research focus comprises several distinct aspects of the parallel enforcement of international cartels:

a) First, the changing nature of international cartel enforcement, i.e. the growing number of authorities actively pursuing international cartel conduct.

b) Second, the extraterritorial jurisdictional scope of the enforcement actions of individual authorities, i.e. how far does national cartel enforcement reach and what approaches are being applied to prevent or limit overlapping enforcement?

c) Third, the sanctioning of cartel defendants and the way in which parallel cartel enforcement affects this punishment.

d) Fourth, the opportunities and challenges for individual authorities and for the enforcement community as a whole to advance the coordination of cartel sanctioning.

B. Main research question and sub-questions

The main research question addressed in this dissertation can be formulated as follows:

> *How does the parallel public antitrust enforcement of international cartels affect the overall punishment of these cartels and how can and should proportionate punishment be ensured in a world characterised by increasingly widespread and active cartel enforcement?*

Answering this question requires an assessment and understanding of several underlying elements. It comprises the four aspects of parallel enforcement of international cartels mentioned above plus the inclusion of the notion of proportionality. In combination, five categories of sub-questions can be identified that are fundamental to answering the main research question:

> *1. What is the current state of parallel enforcement of international or global cartels? How has this evolved over time?*
>
> *2. What choices can and do individual authorities make in exercising their jurisdictional discretion when prosecuting international cartels? How do jurisdictional limitations affect the extent to which enforcement and punishment of international cartels overlap? How is jurisdiction being shared and allocated within the European Competition Network?*
>
> *3. How are international cartel defendants being punished? How do individual jurisdictions fine international cartels? Do authorities or courts take into account penalties imposed elsewhere for the same overall cartel?*
>
> *4. What is proportionate punishment? How does parallel enforcement of international cartels affect the overall proportionality of punishment?*

5. How can and should the international enforcement community work to develop a framework for the coordination of the sanctioning of international cartels?

C. Article-based dissertation structure

This dissertation consists of a "collection of separate scientific treatises" as referred to in Article 13(2) of the Leiden University Doctorate (PhD) Regulations 2018. In particular, it comprises the following six articles, five of which have been published and one of which was accepted for publication at the time of finishing the manuscript:

i. 'Parallel enforcement of rate rigging: lessons to be learned from LIBOR', 3 *Journal of Antitrust Enforcement* 1, 1 April 2015.

ii. 'Fining Foreign Effects: A New Frontier of Extraterritorial Cartel Enforcement in Europe?', 40 *World Competition* 3, 2017.

iii. 'InnoLux v AU Optronics: comparing territorial limits to EU and US public enforcement of the LCD cartel', 6 *Journal of Antitrust Enforcement* 2, 1 August 2018.

iv. 'The ECJ finally accepts the qualified effects test: now was that so hard?', 38 *European Competition Law Review* 1, 2018.

v. 'Proportionality of fines in the context of global cartel enforcement', 43 *World Competition* 1, 2020.

vi. 'Parallel enforcement of global cartels: facts & figures', 4 *European Competition and Regulatory Law Review* 2, 2020.

Except for the article published in ECLR, all articles have been subject to a peer-review process of the relevant journal before being admitted for publication. The respective journals prescribe different citation styles, which have been maintained in this dissertation.[46]

I have made some minimal changes to the published articles in incorporating them as chapters in this dissertation. First and foremost, I have supplemented the introductions and conclusions to better explain how each article/chapter fits within the broader research and how it responds to one or more research sub-questions. Where relevant, texts have been updated to reflect recent developments.

Writing a dissertation consisting of a collection of published articles has various benefits, as recognised by the Leiden University Graduate School.[47] The first and foremost benefit in my view is that it forces the PhD candidate from the start to focus on the most relevant aspects of its research and to produce output that is sufficiently interesting, high-quality and concise to be eligible for publication in journals. Enjoying the positive experience of seeing your work published also contributes greatly to the overall motivation needed to finish a dissertation. It also makes the overall effort of writing a dissertation more manageable, stimulates a candidate to actually putting pen to paper earlier on in the process, allows the candidate to benefit from peer-review and responses after publication and gives more flexibility in respect of the research focus. I have indeed experienced these benefits myself and I am grateful for the opportunity to work on a PhD dissertation in this manner.

A main challenge of writing an article-based dissertation is finding the right balance between writing articles that have sufficient standalone value to be separately published, while at the same time forming

[46] The Journal of Antitrust Enforcement and the European Competition and Regulatory Law Review use OSCOLA, used in this dissertation in Chapters 2, 3 and 7, as well as in Chapter 4. World Competition uses the Association of Legal Writing Directors citation style, used in Chapters 5 and 6. I have used OSCOLA also in this introductory chapter and the concluding chapter 8.

[47] Leiden University note 'Op Artt. Een notitie over promoveren op artikelen' (30 March 2010).

a natural part of a cohesive dissertation having a single research focus. Indeed, ensuring sufficient cohesion of a manuscript consisting of separate articles is a key element to assess under the Leiden University PhD Regulations.[48] This means not including articles that do not fit in the manuscript and adding chapters without which the manuscript would be incomplete.

The six articles that together form the substance of this dissertation all clearly relate to the main research focus. I do not believe that any of the articles is undeserving of its place in this dissertation. Conversely, in my view the findings from the six articles, in combination with the introduction and the overall conclusion, are capable of supporting a comprehensive answer to the main research question. While the list of limitations applied to the conducted research (see section *1.5 Methodology and limitations*) could have certainly been shortened by adding further chapters or articles, I believe that the absence of such additional elements does not render this dissertation incomplete.

Some overlap between the respective articles certainly exists. This overlap primarily relates to the description of the wider context of parallel enforcement of international cartels. Given that each article has been separately published, they all contain a general introduction before delving deeper into the specific topic addressed in the article. Most of these general introductions start by discussing the rapid proliferation of active enforcement of international cartels. A reader of this dissertation will hence notice a repetition in the way some of the chapters – one more extensively than the other – describes this overall development. Another element overlapping across the articles relates to the finding that an increasingly crowded enforcement environment calls for closer coordination of international cartel sanctioning. Several articles describe the few efforts already made by authorities to reach a coordinated outcome and contain my recommendations to advance these efforts. Not surprisingly, these recommendations are quite similar across the different articles. This is again explained by the fact that each article has been published separately, and by my preference for each standalone article to include normative elements.

Despite the overlaps described above, I have carefully considered the specific topic of each of the six articles to ensure their complementary contribution to the overall research. Each article focuses on a particular part of the sub-questions mentioned above and hence helps to answer the main research question from their own perspective. This is set out in the below overview of the substantive chapters of this dissertation:

Chapter 2: A quantitative introduction to parallel cartel enforcement

> The chapter gives a quantitative insight into the evolution of the parallel enforcement of global cartels. It hence provides a good starting point for the research into the changing landscape and its effects of cartel punishment. The chapter identifies 41 global cartels which were subject to corporate fines and which were discovered between 1990 and 2018. Studying the data for these 41 global cartels, an analysis is made of the number of different authorities fining each cartel and the level of combined fines imposed. It also discusses the extent to which authorities have thus far recognised the broader context of global cartel enforcement in setting their fines.
>
> This chapter primarily addresses the first research sub-question and part of the third sub-question (*Do authorities or courts take into account penalties imposed elsewhere for the same overall cartel?*).

Chapter 3: Territorial limits to EU and US public enforcement

> A key element of the research of this dissertation focuses on the jurisdictional limits to cartel enforcement, i.e. the approach that authorities take in respect of extraterritorial enforcement

[48] See the Leiden Law School *Guide to obtaining a doctorate on the basis of articles* (January 2020) <https://www.staff.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/meijers-instituut/guidlines-obtaining-doctorate-on-basis-of-articles-eng-jan-2020.pdf>.

and prosecutorial discretion. This chapter assesses the position on territorial limits to public cartel enforcement in the EU and the US on the basis of the decisions and court rulings concerning the global LCD cartel. This analysis reveals the level of jurisdictional self-restraint exerted by two of the most mature and active antitrust regimes. It considers the basis for asserting jurisdiction, the scope of the cartel conduct that is being sanctioned and the methodology for calculating the cartel fine. Each of these elements directly impacts the extent to which parallel enforcement also amounts to overlapping enforcement.

This chapter addresses the second research sub-question of this dissertation.

Chapter 4: The jurisdictional implications of the ECJ's acceptance of the qualified effects test

The *Intel* judgment European Court of Justice (ECJ) was rendered in 2017, after the *InnoLux* judgment analysed in Chapter 3. In *Intel*, the ECJ explicitly embraced the qualified effects test for asserting jurisdiction over foreign anticompetitive conduct. This followed decades of dodging the sensitive issue of the European Commission's extraterritorial reach. The chapter describes this long journey and discusses the implications of the acknowledgement of the qualified effects test in the context of overlapping enforcement of international cartels. It hence adds to the analysis of Chapter 3 with a more detailed legal analysis on EU extraterritorial enforcement.

Chapter 4 complements the response to the second sub-question.

Chapter 5: Extraterritorial cartel enforcement within the European Competition Network

This chapter assesses the legality of national competition authorities within the EU taking into account foreign effects in sanctioning cross-border cartels. The context of the EU is unique for the close cooperation and shared enforcement responsibilities within the European Competition Network (ECN). The chapter gives recommendations to give national authorities the right to fine foreign effects in a way that ensures effective enforcement and proportionate sanctioning while still allowing for sufficient prosecutorial discretion at the national level.

From yet another perspective, this Chapter 5 addresses the second research sub-question on jurisdictional boundaries and overlapping enforcement.

Chapter 6: Proportionality of fines in the context of parallel global cartel enforcement

The sixth chapter focuses on the proportionality of fines for international cartels, combining an analysis of the legal theory on proportionality with an assessment of modern day cartel fining practices and the development of increasingly overlapping enforcement. This is a fundamental part of the overall research, delving deeper into the notion of proportionality to find firm ground from which the effects of parallel enforcement of international cartels on the proportionality of overall punishment can be studied.

Chapter 6 addresses both the third research sub-question on fining practices and the fourth sub-question on proportionate punishment. The final part of the chapter also responds to the fifth sub-question, exploring the possibilities to achieve better coordination of the sanctioning of international cartels to ensure overall proportionality.

Chapter 7: LIBOR: A case study on parallel enforcement by antitrust and other authorities

This chapter contains a case study of a global cartel characterised by overlapping enforcement not just between different antitrust authorities but also between other types of regulators. The chapter focuses on the various investigations and sanctions targeting the interest rate

benchmark manipulations of LIBOR and EURIBOR. It describes how various types of authorities in various jurisdictions have pursued the same conduct in parallel without significant coordination in respect of the prosecution and punishment. This chapter also explores the elements that may guide authorities in future global investigations towards a more coordinated and proportionate punishment.

Chapter 7 helps to answer each of the five research sub-questions, with a notable focus on the normative part of the fifth sub-question.

Following these substantive chapters, chapter 8 concludes the research. In this final chapter, I will first answer the five research sub-questions on the basis of the specific findings of the previous chapters. This will flow into the general conclusions of this dissertation and the answer to the main research question. Finally, I will set out my recommendations for further research.

1.3 Relevance of the research

My research into the parallel enforcement of international cartels was triggered by the article written in 2013 together with John Terzaken and published in the Antitrust Magazine of the American Bar Association (ABA). We considered this to be an area of rapid development with a very substantial legal and economic impact on corporations. Our article was a starting point for exploring what the boundaries are in respect of the multitude of authorities penalising the same cartel offenders, and – in the absence of a clear current framework – what those boundaries should be.

As mentioned above, not much was written on the subject at the time, not in terms of academic literature nor in respect of advocacy or policy documents produced by the international enforcement community. My motivation to dig deeper into the subject had both a theoretical and practical component. From a theoretical perspective, I wanted to gain a better understanding of the nature and the scope of concerns raised by parallel enforcement. From a practical perspective, I wanted to study how authorities are addressing these concerns, how they could be addressing these concerns and how they should be addressing these concerns.

I believe that the relevance of my research rests on both the theoretical insight as well as the practical observations and recommendations. The research does not only achieve the more academic purposes of deepening and widening the knowledge on the subject, it also serves the objectives of raising awareness for the issues involved, advancing the debate on these issues and trying to propose potential solutions or at least identifying avenues to explore in seeking workable solutions.

The relevance of my research into cartel enforcement is aided by the growing importance of competition law enforcement across the globe more generally. Apart from public cartel enforcement, the past few decades are characterised by the increasing prevalence of abuse of dominance cases, merger control investigations and private antitrust enforcement. Each of these areas is dealing with the positive and negative implications of the cross-border application of competition law. As it is for public cartel enforcement, legitimate concerns have been raised in these fields on the risks of multijurisdictional enforcement resulting in conflicting outcomes.

The concerns relating to parallel public cartel enforcement are hence only one part of the wider debate. However, given the high stakes involved for corporations, it is certainly one of the most important fields to focus on. As was commented by the DOJ already in 2004:

> "*Nowhere is the issue of international coordination more crucial to our enforcement mission than in the area of hard core cartels that is, price fixing, market allocation, and bid rigging. Hard core cartels are the most egregious violations we pursue, and in the US, such conduct*

> *is punishable as a crime, with heavy fines for the companies and significant jail time for corporate officials involved in the conspiracy*".[49]

Since the publication of the 2013 article *How Much Is Too Much? A Call For Global Principles To Guide The Punishment Of International Cartels*, the subject has received wider attention. Various articles have since been written by practitioners, scholars and policy advisers touching on the issue of multijurisdictional cartel enforcement resulting in overlapping punishment.[50] Moreover, in the past few years the topic has entered the arena of public debate within the enforcement community.[51] This highlights the issue's growing importance. At the same time, the discussions on this front are only just beginning, the relevance of the concerns is certainly not fading and the issues are still far from being resolved. I would therefore argue that the finalisation of this dissertation comes at a very appropriate time.

This dissertation is relevant for different audiences. First, it is aimed at professionals who are part of the enforcement community and who are focusing on the punishment of international cartels, either at a policy level or at the level of enforcement in particular cases. This includes officials working at international organisations such as the OECD, ICN or ECN, as well as those working for individual authorities. The research in this dissertation is also very relevant to the legal community involved in international cartel cases, namely competition lawyers (private practitioners and in-house counsel) and the judiciary. Thirdly, this dissertation is meant to be of interest to others active in the academic world, which in this field of law includes a large share of the professionals active in enforcement and legal community.

Lastly, I hope that my research will also draw interest from other fields of law and enforcement. The issues studied in this dissertation are not unique to antitrust law.[52] This is nicely illustrated by the following quote from a 2015 article on cross-border corruption enforcement:

> "*As more and more countries enter the anticorruption enforcement arena, however, it will become increasingly common that one incident of alleged misconduct will trigger years of parallel or successive enforcement actions and, in some cases, duplicative penalties by different authorities. When overlapping jurisdiction exists, and countries proceed in isolation, what can result is an unfair, unpredictable, and overly punitive regime that, in the long run, may prove counterproductive*".[53]

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49 DOJ, Andrew C. Finch, 'Facing the Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies [of] the U.S. and E.U.', speech before the ABA Administrative Law Section Fall Meeting (22 October 2004) <https://www.justice.gov/atr/speech/facing-challenge-globalization-coordination-and-cooperation-between-antitrust-enforcement>.

50 See e.g. Tween, D. and Murray, G., 'Death by 1,000 fines: is there a way to stop the bleeding?', Baker & McKenzie publication (2014), no longer available online; Davies, Capobianco and Ennis (n 19); Casey W. Halladay, 'Assessing the relevant volume of commerce in global cartel cases: where do we go from here?' 1 *Competition Law & Policy Debate* 4 (November 2015) 23-28; Lukas Ritzenhoff, 'Indirect Effect: Fine Calculation, Territorial Jurisdiction, and Double Jeopardy', 6 *Journal of European Competition Law & Practice* 10 (2015) 701; Philip Bentley and David Henry, 'Calculating the Cartel Fine: A Question of Jurisdiction or a Question of Economic Importance?' 39 *World Competition* 3 (2016) 442.

51 See e.g. the OECD Roundtable on Cartels Involving Intermediate Goods in October 2015, *Executive Summary* (27 October 2015) 4 <https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN3/FINAL/en/pdf>; calls made by the Japanese Ministry of Economy, Trade and Industry, English summary of the METI *Report on Research for Case Examples concerning the Implementation of Regulations on International Cartel Cases among Overseas Competition Regulatory Authorities* (3 June 2016) <http://www.meti.go.jp/english/press/2016/0603_02.html>; and the IBA and ABA comments on proposed update to the *Antitrust Guidelines for International Enforcement and Cooperation* (December 2016) <https://www.justice.gov/atr/page/file/915786/download> and <https://www.ibanet.org/Document/Default.aspx?DocumentUid=57AFCE72-2189-4E28-9758-DE17F7B64949>; DOJ, 'Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act' (9 May 2018) <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes>.

52 The OECD has noted that "*The challenges associated with international co-operation are not unique to the area of competition. Enforcement bodies in other policy areas such as tax, anti-corruption and money laundering face similar challenges*". OECD, *Improving International Co-operation in Cartel Investigations* (2012) 14 <http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf>.

53 Jay Holtmeier, 'Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities', 84 *Fordham Law Review* 2 (2015) 495 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5143&context=flr>.

1.4 Explanation of key terms

This section explains what meaning is given to a few of the key terms used throughout this dissertation.

A. Cartels

A cartel is generally understood to be an agreement or concerted practice between competitors with the aim to coordinate their competitive behaviour and/or influence competitive conditions, for example by fixing prices, restricting output or sharing markets.[54] Occasionally the term 'hard core cartel' is used, most notably by the OECD.[55] The addition of the words 'hard core' seems to be meant to exclude agreements and concerted practices that may restrict competition but that are nevertheless considered lawful, on the basis of their efficiencies or otherwise.[56] Being most familiar with the EU competition law framework, I am accustomed to reserving the term cartels – without the addition of the words 'hard core' – for only the most serious types of violations of Article 101 TFEU, by competitors and without justification. Throughout this dissertation, I hence use the term cartels as being synonymous with the term hard core cartels.

Apart from the general meaning of the term (hard core) cartel, there is no question that there can be much debate on whether certain particular conduct should be classified as cartel behaviour. For the purpose of the findings in this dissertation, however, those issues can be left aside. This is because the focus of the research is on the type of behaviour that is subject to public cartel enforcement and that hence has been considered to constitute cartel behaviour at least by the relevant authorities.

A distinction can be made between 'private' cartels and cartels protected by government sovereignty or international treaties (such as the Organisation of Oil Exporting Countries (OPEC)).[57] As this dissertation focuses on the enforcement of (illegal) cartels, it only covers private cartels.

B. International cartels

The term 'international cartel' can have two different meanings:

(i) A cartel of which the membership composition is international. The term is used in this way by Connor.[58] This covers both (i) cartels with one or more participants having its headquarters, residency, or nationality outside the jurisdiction of the investigating

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54 The European Commission refers to "*agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors*" (*Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (2006), para 1. The OECD similarly defines 'hard core cartels' as "*anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of commerce*" (OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (2 July 2019) OECD/LEGAL/0452, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>.

55 These cartels are sometimes also referred to as 'naked' cartels, see Jones and Suffrin, *EU Competition Law: Text, Cases, and Materials* (7th ed.; OUP: 2019), Chapter 9.

56 See OECD, *Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels* (n 16), article I(A)(2)(b). In the OECD context, it can also be interpreted as just comprising the four types of cartels explicitly included in the definition of the 1998 Recommendation: (a) horizontal price fixing; (b) bid rigging; (c) output restrictions or quotas; and (d) market division or sharing by allocating customers, suppliers, territories or lines of commerce. OECD, *Review of the Recommendation of the Council concerning Effective Action against Hard Core Cartels, Report by the Secretariat* (4 July 2019), paras 22-24 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2019)13&docLanguage=En>. For Connor, 'hard core' cartels are those "*agreements (contracts, deals, coordinated bidding, and the like) with the intent to control market prices or restrict industry supply (or both)*". John Connor, 'The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016 (Revised 2nd Edition)' (9 August 2016) <https://ssrn.com/abstract=2821254>. For Evenett, Levenstein and Suslow, 'hard core' cartels seem to exclude cartels aimed to fix prices or engage in market allocation in export markets, but not in their domestic market: 'International Cartel Enforcement: Lessons from the 1990s', *Economics Department Working Paper Series* 89 (2001) 3 <https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1092&context=econ_workingpaper>.

57 See e.g. Connor, The Private International Cartels (PIC) Data Set (n 56) 4.

58 ibid.

antitrust authority, and (ii) cartels with at least two participants with different nationalities; and

(ii) A cartel (potentially) affecting markets in two or more nations.

I believe that the second interpretation is the more common use of the term international cartel. It is also the interpretation that I have adopted throughout this dissertation, which focuses on parallel enforcement of the same international cartel by multiple authorities, hence implying that more than one jurisdiction has been (potentially) affected. As explained below, some international cartels may be classified as global cartels.

C. Global cartels

The focus of my research is on the parallel enforcement of international cartels by multiple authorities. Such parallel enforcement can arise whenever a cartel affects markets in at least two jurisdictions. This dissertation therefore generally focuses on international cartels, irrespective of their precise geographic scope.

However, I have at times deliberately used the term 'global cartels', in particular in Chapter 2. Global cartels are a sub-set of international cartels. Following Beyer[59], I consider global cartels to be cartels whose coordinated conduct affects most, if not all, sales of the affected products or services worldwide. A further explanation on the use of this term is provided in Chapter 2.

D. Cartel enforcement

Unless explicitly stated otherwise, I have used the term 'cartel enforcement' to refer to public cartel enforcement by government bodies, in particular antitrust authorities. This hence excludes private enforcement by claimants seeking termination of cartel conduct and/or compensation of damages through civil litigation.

I have used the term cartel enforcement as covering both those regimes where the investigation, prosecution and punishments rests with the same body and those regimes where different bodies (e.g. authorities and courts) are involved. Also, I have generally made no distinction between enforcement that is criminal, administrative or civil in nature, nor between penalties resulting from rulings/decisions and those resulting from plea agreements.

As explained further in the next section, the focus of my research is limited to the final stage of cartel enforcement, i.e. the sanctioning. Moreover, it only focuses on sanctioning through the imposition of corporate fines. Obviously, public cartel enforcement encompasses more than just monetary penalties imposed on the corporations involved. It may also cover non-monetary sanctions on corporations (e.g. cease-and-desist letters, warnings) and sanctions against individuals (e.g. personal fines, imprisonment, director disqualification). The context will reveal whether a reference to cartel enforcement is to be interpreted in the broader or more narrow sense, but given the focus of this dissertation it will generally be used as specifically relating to enforcement through the fining of corporations.

Perhaps needless to say, cartel enforcement as used in this dissertation is synonymous with the term 'anti-cartel enforcement'.

[59] John C. Beyer, 'Are Global Cartels More Effective Than "National" Cartels?' (14 January 2010) 1 <https://ec.europa.eu/competition/antitrust/actionsdamages/beyer.pdf>.

E. Parallel enforcement

By parallel enforcement of cartels I mean that the same overall cartel conduct is subject to enforcement in multiple jurisdictions. I hence use the term as being synonymous to multijurisdictional enforcement. The term 'parallel' as used in this dissertation does not necessarily mean that the enforcement actions of different authorities are overlapping in time. It is meant to capture both concurrent/simultaneous enforcement as well as serial/consecutive enforcement.

As explained above, parallel enforcement can refer to enforcement in the broader sense (investigation, prosecution, sanctioning). However, given the focus of this dissertation its use will generally refer to multiple authorities imposing corporate fines for the same overall cartel conduct.

F. Proportionality

Proportionality of punishment is a key term used in this dissertation and indeed in the main research question. It is also a very complex notion that can have different meanings. The term is thoroughly examined from a legal theory perspective in Chapter 6. To avoid unnecessary duplication, I will not further address the definition of the term in this section but will refer to the elaborate discussion thereof in Chapter 6.

1.5 Methodology and limitations

A. Overall research approach

I have approached the main research question of this dissertation in different ways and from different perspectives. As mentioned above, my dissertation has descriptive, quantitative, comparative, legal analytical and normative elements. I have applied different research methods across the six substantive chapters, as described below:

Chapter 2 mainly contains a quantitative analysis of the evolution of parallel cartel enforcement. As further explained below, it makes use of data from two databases, complemented with data collected by my own research, to provide insight into various aspects of cartel enforcement as developed since 1990.

Chapters 3, 4 and 5 focus on the application of jurisdictional limitations to avoid overlapping enforcement and punishment. The analysis of chapter 3 is mainly comparative in nature, looking at the different ways in which the authorities and courts in the EU and the US have dealt with extraterritorial enforcement and prosecutorial discretion. The comparison is focused on two high-profile cases in the respective jurisdictions relating to the same global cartel. Chapter 4 contains a detailed legal analysis of the developing case law of the ECJ in respect of extraterritorial enforcement of EU competition law. Chapter 5 takes yet another approach, assessing the developing practices of extraterritorial cartel enforcement within the unique context of the close cooperation and shared enforcement responsibilities within the ECN.

Chapter 6 contains the most 'theoretical' part of this dissertation. It focuses on the notion of proportionality by applying legal theory on proportionate punishment. As further explained below, it looks at consequentialist and retributive theories. After setting out the theoretical framework, the chapter goes on to apply the theories to modern cartel fining practices, first in a national context and then in the context of multijurisdictional enforcement. The chapter also includes a normative part on how overall proportionality of international cartel fines can and should be ensured.

Chapter 7 is the final substantive chapter before the concluding chapter. It is essentially a case study revealing the multitude of different (types of) authorities that may target the same overall conduct and assessing the implications that the resulting overlapping enforcement has for the overall punishment

of the conduct. It again contains a strong normative element, by proposing guiding principles to move towards a more coordinated and proportionate punishment in future global investigations.

The chosen overall research approach for this dissertation certainly has its drawbacks. First, I have deliberately chosen to apply a combination of different research methods. One may find that this undermines the consistency and coherence of the dissertation as a whole. I find, however, that the diversity actually strengthens the robustness of the overall analysis. It has also significantly contributed to my research experience and my continued enthusiasm of advancing my research. I certainly hope that it also contributes to the reader's interest in reading this dissertation.

Second, I have made many choices in determining what to focus on and what to leave aside, and which methods to apply and which approaches to ignore. These limitations have obviously affected the conclusions reached in this dissertation. They are set out and explained further below.

Third, a substantial part of the overall dissertation focuses on just two jurisdictions, the EU and – to a more limited extent – the US. This narrow focus has the clear drawback of potentially missing key developments occurring elsewhere. The current state of EU and US cartel enforcement will not be representative for what goes on across the world. But there are logical explanations for why I have nevertheless focused my research extensively on the EU and the US. These jurisdictions can be said to play the most prominent role in cartel enforcement of all antitrust regimes. Out of all fines on global cartels since 1990, those imposed by the DOJ and the European Commission account for more than 90% of the total fine amount.[60] The EU and the US are also two of the most transparent jurisdictions in respect of their policies, case decisions and court rulings (all available in English). Also, they are the jurisdictions I am most familiar with. Importantly, developments outside of the US and the EU have certainly not been ignored in this dissertation and have been discussed where relevant.

The applied research methods for each chapter, as well as their benefits and pitfalls, are set out in greater detail below.

B. Chapter specific methodologies

Chapter 2: A quantitative introduction to parallel cartel enforcement

As this chapter focuses on the evolution and current state of parallel cartel enforcement, I have chosen to use a quantitative research approach, analysing the data on the number of different authorities pursuing the same cartel to study its development over time. The chapter also addresses the developments behind the growing levels of parallel cartel enforcement, but the main purpose of the analysis is to demonstrate the scope of the central issues addressed in this dissertation.

Having a comprehensive and reliable dataset was crucial for the robustness of the research for this chapter. Two databases with cartel enforcement information, both developed by Professor Connor[61], have provided the basis for the dataset that I have used for my calculations. I have verified the relevant data included in the databases against other publicly available information. While I have found the Connor data to be very reliable, I have made some limited adjustments where I found deviating information from reliable sources such as authority websites. Also, to ensure my dataset's comprehensiveness, I have complemented the Connor data with my own research, collecting data from annual reports submitted to the OECD by competition authorities, published cartel decisions and other public sources such as websites of competition authorities, Shearman & Sterling LLP's Cartel Digest, MLex, Global Competition Review and websites of news agencies. Complementing the Connor data was

60 See Chapter 2.

61 John Connor, Private International Cartels Full Data 2012-4-13 2012-1 Edition (2017), Purdue University Research Repository <https://purr.purdue.edu/publications/2732/1>; OECD International Cartels Database (n 9).

necessary because it did not cover my entire research period (1990-2019). I have received the very helpful assistance of Professor Connor in this process.

Despite the above efforts, my dataset may still not be 100% complete and overlook some cartel decisions targeting the identified global cartels. This may in particular be because not all authorities publish their cartel decisions. As I have mainly searched for instances of cartel enforcement in English, reporting in other languages may also have caused certain decisions to be missed. Still, I believe that the data used for the analysis is as complete as could reasonably be achieved for the purposes of my research. Also, the main conclusions on the evolution of parallel cartel enforcement will not be affected by a limited number of cartel decisions not currently included in the dataset.

Four choices made in conducting the analysis warrant an explanation:

(i) *The time period*: I have chosen to begin the analysis in 1990 for two reasons. First, it is the start of serious enforcement of international cartels, as explained in section 1.1 of this dissertation. Second, it is the starting point of the Connor data. I have chosen to limit the research to cartels discovered before 2018 because the most recently discovered cartels may very well still be subject to additional fines, distorting the analysis on the number of different authorities pursuing the cartel and the combined fine levels. This latter effect is still part of the current analysis to some extent. The Brazilian authority for example has a history of imposing fines many years after a cartel's discovery.[62]

(ii) *The focus on global cartels*: as explained above in section 1.4.C, parallel enforcement can arise whenever a cartel affects markets in at least two jurisdictions. This dissertation therefore generally focuses on international cartels, irrespective of their precise geographic scope. Still, I have focused on global cartels for the research in this chapter for the simple reason that it allows for the best comparison over time of the different number of authorities pursing the same cartel. Including cartels only covering a limited number of jurisdictions would distort this analysis.

(iii) *The identification of global cartels*: it is not always clear that a cartel has had a global scope. Authorities sometimes refer to a cartel as being global but often refrain from making statements on the precise geographic scope beyond their own borders. For the identification of global cartels, I have focused on whether they have affected commerce in (i) North America, (ii) Europe and (iii) the rest of the world (ROW), using Connor data. If affected sales were present in the three geographic areas, I have considered the cartel to be global unless there were clear indications (e.g. based on the evidence referred to in cartel decisions) to the contrary. Conversely, where Connor has indicated that no commerce was affected in each of the three areas, I have considered the cartel not to have a worldwide scope unless there are clear indications that it did.

(iv) *The treatment of closely related cartels*: cartels may be composed of multiple, interrelated underlying cartels. The vitamins cartel for example can be said to have covered sixteen separate cartels each covering a different type of vitamin product. The discovery and punishment of such interrelated cartels is often combined (e.g. because a leniency applicant discloses the entirety of its cartel conduct). Counting each underlying cartel separately would weigh heavily in the analysis, while not actually

[62] The Brazilian authority for example imposed fines eleven years after the discovery of the gas-insulated switchgear cartel, ten years after the discovery of the hydrogen peroxide cartel, eight years after the discovery of the optical disk drives cartel, seven years after the discovery of the discovery of the air cargo cartel, six years after the discovery of the cathode ray tubes cartel, six years after the discovery of the TFT-LCD cartel and five years after the discovery of the freight forwarding cartel.

reflecting unique instances of parallel enforcement of global cartels. I have hence counted such closely related cartels as a single global cartel in the analysis. While this approach can be said to also distort the assessment to some extent, I consider this to be the better alternative.

Chapter 3: Territorial limits to EU and US public enforcement

A key part of my research focuses on the extent to which parallel cartel enforcement may amount to overlapping cartel enforcement. This is largely dependent on the jurisdictional boundaries set to limit the authorities' extraterritorial reach and the self-restraint applied within those boundaries. Research in this field will hence concentrate on the complex notions of jurisdiction and extraterritorial enforcement. These notions can be analysed on a more conceptual level, but I have chosen to instead focus on how these concepts have been dealt with in practice using one particular global cartel case. This case study type approach allows me to identify the actual limitations applied in the relevant jurisdictions (the EU and US).

I have chosen the LCD cartel case for this research for three reasons. First, it is a global cartel case involving intermediate goods with supply chains that may span across different continents. This means that authorities will have to make choices in respect of the part of the conduct that they are capturing with their own cartel enforcement and the part of the conduct that they consider to lie outside of their own realm. Second, the case was subject to enforcement in six jurisdictions, including the EU and the US. It hence lends itself to a multijurisdictional comparison. Third, on both sides of the Atlantic Ocean, defendants have strongly challenged the respective authorities in court *inter alia* for taking an expansive approach to their jurisdiction and enforcement powers. The case therefore allows me to not just look at the enforcement practice but also at the state of case law on this point.

Another choice made is to limit the comparative analysis to the EU and the US. In these two jurisdictions, elaborate authority and court documents – in English – are available on the case, revealing the state of jurisdictional (self-)restraint. Moreover, I would argue that the EU and the US are still the two most important regimes in terms of their scale of international cartel enforcement and in terms of their thought leadership in antitrust enforcement. Importantly, this is not to say that the approaches taken by the European Commission and the DOJ are representative of the legal views and enforcement practices elsewhere. But an analysis and comparison of even just these two jurisdictions is in my view illustrative for the issue of overlapping jurisdiction that may arise in case of unrestrained extraterritorial cartel enforcement.

The comparisons made in Chapter 3 between the EU and the US enforcement of the LCD cartel relate to three levels: (i) the basis for asserting jurisdiction, (ii) the scope of the cartel conduct that is being sanctioned and (iii) the methodology for calculating the cartel fine.

Comparative legal research can employ various methods.[63] Most notably, a distinction can be made between functional and structural methods. Functional methods focus on the extent to which different regimes reach similar solutions to the same legal issues, an analysis that can be said to concern the micro level of law comparison. For the functional approach, an analysis and comparison of the respective socio-economic context, legal tradition and legal structures is not required (but may well be relevant and valuable). In contrast, a structural method focuses more on the macro level, exploring differences and similarities in respect of legal systems or parts thereof. Such methods for example entail the classifications of different 'legal families'.[64]

63 Mark Van Hoecke, 'Methodology of Comparative Legal Research', *Law and Method* (December 2015) <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.pdf>.

64 Ibid. 12.

The comparative analysis in Chapter 3 is largely functional. It looks very specifically at the way in which two jurisdictions have dealt with similar legal issues of jurisdictional limits and extraterritorial cartel enforcement. I have largely ignored the very different legal traditions and structures that characterise these jurisdictions.

Chapter 4: The jurisdictional implications of the ECJ's acceptance of the qualified effects test

Chapter 4 contains a deep dive into the developing case law of the ECJ in respect of extraterritorial enforcement of EU competition law by focusing on its struggle with the qualified effects test. This is an important addition to the analysis of the previous chapter given that the ECJ's acceptance of the test in *Intel* came after its ruling in *InnoLux*. The research for Chapter 4 is based on a legal analysis of relevant European Commission decisions, court rulings and opinions by Advocates General. It also considers the wider implications of the ECJ's lenient approach to jurisdictional boundaries. The last part of the chapter is normative in nature, criticising the ECJ for its past approach and calling for it to address fundamental issues head-on to safeguard and strengthen legal certainty.

The chapter solely focuses on the EU legal framework and case law, with the exception of a brief introduction referring to the US origins of the qualified effects test.

Chapter 5: Extraterritorial cartel enforcement within the European Competition Network

While also assessing jurisdictional limitations and extraterritorial cartel enforcement, Chapter 5 is specifically focusing on the unique context of the European Competition Network. Within the ECN, the European Commission and the national competition authorities (NCAs) share the power and responsibility to enforce EU competition law. This triggers additional jurisdictional issues and new insights into the need and efforts to avoid overlapping enforcement. The particular focus of this chapter is on the legality of NCAs taking into account foreign effects in sanctioning cartel infringements under EU competition law.

Three research methods are combined in Chapter 5:

(i) A functional comparative method to study current enforcement practices of the NCAs in the Netherlands, the UK, Spain, France, Germany and Belgium. The comparisons focus on fining guidelines, cartel decisions and court rulings in the respective jurisdictions. The choice for the above six Member States has been made on the basis of (i) the importance and maturity of the national enforcement regimes, (ii) my own familiarity with the enforcement regimes, (iii) the availability of relevant materials in languages with which I am sufficiently comfortable. Also, the comparison of just these jurisdictions was already sufficient to show the different practices and legal views on the issue. A further analysis of practices in (all) other Member States would not have added much to this overall finding.

(ii) A literature study into the arguments made by various authors on the subject. In contrast to the topic of parallel enforcement of international cartels on a global scale, much has been written on the sharing of enforcement powers and allocation of cases within the European context, especially following the entry into force of Regulation 1/2003.

(iii) A legal analysis of the robustness of the views expressed in the (academic) debate on the subject. These views are tested by reference not just to the opinions of other authors, but also by reference to legislation and legislative processes, guidance papers, court cases and my own legal arguments.

The findings resulting from this research translates into policy recommendations on how to address the issue from a legislative/legal, political and practical perspective.

Chapter 6: Proportionality of fines in the context of parallel global cartel enforcement

The sixth chapter entails the application of legal theory on proportionate punishment on the practices of international cartel enforcement. This comprises the following elements:

(i) An overview of the relevant legal theory, discussing notions of proportionality under both retributive and consequentialist theories, as well as more recently developed theories on the punishment of multiple crimes.

(ii) An assessment of common features of national cartel fining policies and practices. For this purpose, I have relied on two surveys amongst antitrust enforcement regimes: the 2017 ICN study *Setting of Fines For Cartels in ICN Jurisdictions*[65] and the 2016 study *Sanctions in Antitrust Cases*[66] by the Global Forum on Competition of the OECD. These studies have assessed the enforcement practices of 33 (ICN study) and 43 (OECD study) jurisdictions.

(iii) An application of legal theory on proportionality to the national cartel fining policies and practices. I have done so by looking at the elements determining cartel fines under common fining methodologies and analysing to what extent they meet retributive and/or consequentialist objectives. This approach is based on a similar analysis done by Max Minzer in his book *Why Agencies Punish* (focusing on other types of (American) authorities).

(iv) A critical analysis of the extent to which international cartel fining practices meet retributive and consequentialist notions of proportionate punishment.

(v) A normative part that considers the options for the cartel enforcement community to ensure better adherence to proportionality principles.

Various choices have been made to limit the scope of this chapter. This includes two fundamental limitations that have been described throughout this dissertation and are explained in Section 1.4.D., namely a focus on the enforcement practices of authorities while ignoring (i) the legislative and judicial perspectives, as well as (ii) the impact of private enforcement.

A further limitation is that the assessment of national cartel sanctioning practices solely considers the cartel enforcement regimes included in the analyses of the ICN (33 jurisdictions) and the OECD (43 jurisdictions). Even for these regimes, the assessment mainly relies on the main findings of the ICN and OECD studies, hence ignoring nuances that may exist in individual jurisdictions. The reason for this limitation is that a comprehensive assessment of all cartel enforcement regimes would require much additional research while likely adding little to the overall conclusions reached. This takes into account that both the ICN and the OECD have already attempted to give a representative assessment of the practices of at least the most prominent regimes.

Furthermore, while focusing on the overall proportionality of punishment for international cartels, Chapter 6 is not looking at underlying differences that may exist between jurisdictions on what levels of punishment are considered proportionate in general and for cartel behaviour

65 ICN (2017) (n 39).

66 OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Background Paper by the Secretariat* (1-2 December 2016) <https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf>.

in particular. An analysis of such differences would be crucial in assessing whether multiple authorities could ever arrive at a common view on a proportionate overall punishment. But it is submitted that irrespective of different views on proportionate penalty levels, each jurisdiction can at least for itself consider whether the overall punishment 'fits' the overall conduct, assessed in accordance with its own standards and customs.

Lastly, the research applies legal theory on punishment that was developed in a classical criminal law context, notwithstanding the fact that the sentencing of corporations for cartel conduct by employees may entail additional punishment considerations and objectives. Still, it is submitted that these additional features of corporate cartel punishment do not diminish the relevance of retributive and consequentialist proportionality principles, nor the ability to apply these principles to current international cartel enforcement.

Chapter 7: LIBOR: A case study on parallel enforcement by antitrust and other authorities

Chapter 7 brings together the various elements analysed in the previous chapters in the context of a case study assessment. I have chosen to include a case study in this dissertation for the purposes of making the research more concrete and tangible. An example from practice can best illustrate both the existence and the relevance of the issues studied in this dissertation.

The case study concerns the interest rate manipulations (LIBOR, Euribor and others) that became the subject of very severe enforcement by a wide variety of authorities starting in 2012. The conduct at issue was targeted not just as a cartel infringement but also as fraudulent behaviour and financial misconduct. Apart from antitrust authorities, the manipulation was penalised by financial regulators and anti-fraud agencies. The benchmark manipulation case is an extraordinary example of how widespread enforcement can be.[67] This is also why this case is not representative of how a typical cartel case is pursued. But it is a case in which the authorities involved had every reason to try and coordinate their enforcement efforts and ultimate punishment. It therefore provides an excellent example to assess the extent to which different types of regulators, from different jurisdictions, have managed to avoid overlapping enforcement.

Chapter 7 comprises the following elements:

(i) A factual description of the relevant conduct;

(ii) A legal analysis of:

(A) the qualification of the conduct and an overview of enforcement actions;

(B) the extent to which parallel enforcement has led to overlapping enforcement, looking at the basis for exercising jurisdiction, the delimitation of the part of the conduct that is being pursued, and the resulting individual and overall punishment;

(C) the double jeopardy and proportionality concerns triggered by the overlapping enforcement;

(iii) A normative section on how coordination can and should be achieved, including policy recommendations for future cases characterised by multiple enforcement.

[67] This is illustrated by its coverage in the *OECD Competition Trends* (2020) 66 <http://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf>.

C. Sources

The research of this dissertation is based on an analysis of a variety of sources:

a) *Literature*: Not much (academic) literature has been written on the subject of parallel cartel enforcement. Nevertheless, a wide body of relevant literature exists and has been used in respect of topics relevant for this dissertation, including cartel enforcement in general, jurisdictional limitations, international cooperation between antitrust authorities, cartel fining policies and proportionality of punishment. This literature covers (hand)books and articles. In order to search for and find the literature that was relevant for my research, I have relied on the (digital) library of Leiden University, hardcopy and digital copies of books and journals that I have access to through Allen & Overy, internet searches and references included in other (literature) sources.

b) *Case law*: Part of the analysis in this dissertation (chapters 3, 4 and 5) concerns the limits to extraterritorial application of antitrust law that have been set by courts and applied by authorities. This assessment has in particular focused on European (EU and national level) and to lesser extent US jurisprudence. Case law has also been used as a source throughout this dissertation in referring to fines imposed not by authorities but by courts. EU case law is easily retrievable through the EU courts' website.[68] Case law from other jurisdictions such as the US, Canada, Australia, Brazil and others, has not always been easy to find and access, sometimes requiring extensive search efforts or reliance on secondary sources rather than the actual rulings.

c) *Enforcement decisions*: Given the focus in this dissertation on the coordination (or lack thereof) of international cartel enforcement, fining decisions by authorities are a crucial source of information in my analysis. The European Commission maintains a very useful and transparent online register with cartel decisions (and other types of competition decisions). For the US, relevant plea agreements have been relatively easy to retrieve, mainly from the DOJ's own website. For other authorities, relevant decisions are not always accessible, either because they are not made publicly available or are not easily retrievable, at least not in English. In such cases, basic information (e.g. on fine amounts) was nevertheless often made available in authority press releases or annual reports, news reports or company releases.

d) *Policy documents*: National and international policies documents form a major source used throughout this dissertation. National documents include in particular fining guidelines, enforcement policy reports and annual reports. International policy documents include reports and studies by the OECD, ICN, ECN and other international bodies. Especially the surveys conducted by the ICN and the OECD on fining methodologies have been a very useful source of information.[69]

e) *Legislation*: Existing and past legislation plays a minor role in my research, which is perhaps unusual for a legal dissertation. Instead of studying positive law, I have instead focused extensively on sanctioning practices, enforcement policies, theoretical and conceptual deliberations, and normative considerations. Exceptions are treaties, laws and regulations on antitrust rules, (extraterritorial) enforcement and international cooperation, as well as legislation determining fining methodologies to be adopted by authorities.

f) *Databases*: The quantitative analysis described in Chapter 2 relies heavily on two linked databases containing basic information on international cartel enforcement since 1990, developed by Professor Connor. Another database that I have used is the Shearman & Sterling

[68] Available at <curia.europa.eu>.
[69] ICN (2017) (n 39); OECD, *Sanctions in Antitrust Cases - Background Paper by the Secretariat* (n 66).

LLP's Cartel Digest.[70] This online source contains an overview of international cartels and lists for each international cartel the penalised corporations and individuals, as well as the fine amounts, per enforcing jurisdiction, sometimes including references to US plea agreements.[71]

g) *Other public sources*: Apart from the above, I have relied on a wide range of other public sources that are available online. This includes press releases issued competition authorities, companies or other parties, articles published by specialist news sources such as MLex and Global Competition Review, the websites of news agencies and publications by law firms.

All online sources referred to in this dissertation have last been accessed in March 2020 and confirmed for their availability. Where sources could no longer be found online, this has been explained in the relevant footnotes.

D. Limitations

The scope of research in this dissertation is limited in several ways. In fact, I have applied additional limitations as I progressed with conducting the PhD research. My initial research proposal included aspects of parallel cartel enforcement that I have later chosen to exclude. The various choices that I have made in limiting the scope of my research are explained in the below list of topics not covered in this dissertation:

a) *Other fields of law enforcement*: As explained in Section 1.3, I hope that this dissertation is relevant to scholars, policy makers, government officials and practitioners in other fields of law enforcement, for example anti-bribery enforcement. Any international enforcement of cross-border conduct is likely to attract questions similar to those raised in this dissertation. Nevertheless, I have not studied the extent to which the issues facing different fields of law enforcement are indeed comparable. Neither have I examined the extent to which practices adopted in other fields may or may not work in the field of cartel enforcement. The main reason for this limitation is that the scope of this dissertation would have otherwise been significantly expanded. A thorough comparison across fields of law enforcement would have also demanded a substantial broadening of my knowledge and research efforts.

b) *Non-cartel related competition law enforcement*: All aspects of competition law are experiencing the effects of globalisation and the proliferation of active enforcement. Parallel enforcement resulting in potentially duplicative, partially overlapping, sub-optimal, inconsistent or conflicting outcomes is a concern not just for cartel enforcement. For example, there is much focus on the need for inter-agency coordination of remedies to resolve cross-border abuse cases or to address concerns resulting from international mergers and acquisitions. I would have certainly liked to study these developments as well as part of my PhD, and it was indeed suggested in the peer-review process for one of my articles that I would touch upon these wider issues. But writing a dissertation on the multijurisdictional enforcement of competition law in general would have likely meant a tenfold increase of its size or a significant lessening of the depth of the analysis, and perhaps even both.

c) *Non-sanctioning aspects of public cartel enforcement*: In its broader meaning, multijurisdictional cartel enforcement raises interesting dilemmas in a wide range of aspects. For example, to what extent can and should leniency application procedures be harmonised to ensure an overall satisfactory functioning of this commonly used enforcement tool? To what extent should authorities be free to exchange information on pending cartel investigations? And to what extent should authorities facilitate foreign enforcement in respect of conduct that they themselves would not consider a cartel infringement? Without question very relevant

[70] Available at <https://www.carteldigest.com>.
[71] While the overviews are not complete, they have been helpful in identifying relevant cases and accessing US plea agreements.

topics and certainly worthy of further academic study. I have nevertheless excluded these aspects from the scope of my research, mainly because I believe that a focus on just the sanctioning part of multijurisdictional cartel enforcement already provides for a sufficiently comprehensive subject for a dissertation.

d) *Cartel sanctioning other than through corporate fines*: Some consider that the optimal deterrence of cartel conduct requires a combination of corporate and personal sanctions.[72] This may even result in an interplay between the level of corporate fines and the number of executives subject to imprisonment.[73] In order not to blur the analysis in this dissertation, I have chosen to look only at the impact of parallel cartel enforcement on corporate fines. A study of overlapping criminal enforcement of individuals would encompass a range of other relevant aspects (e.g. regarding extradition) that simply go beyond the intended focus of my research. However, throughout this dissertation I have drawn parallels between the prosecution of individuals and the prosecution of corporations.

e) *Private cartel enforcement*: Similar to sanctions other than corporate fines, private enforcement can significantly add to the overall legal and financial exposure of cartel offenders. The (perceived) severity of cartel punishment can also be said to be affected by the extent to which cartel offenders have been forced to compensate their customers. I have, however, chosen to focus my research on punitive fines imposed in view of deterrence and retributive objectives, excluding decisions, rulings or settlements of a compensatory nature.[74] I believe that this limitation was necessary in order to keep the analysis in this dissertation sufficiently comprehensible and manageable.

f) *Economic perspective*: There is a wide body of economic literature focusing on optimal cartel enforcement, studying whether current fine levels are sufficiently deterrent. This economic perspective is certainly relevant when assessing the overall impact of parallel enforcement on the proportionality of cartel fines. Simply put, if combined fine levels are still considered sub-optimal because they do not outweigh the (perceived) rewards of cartel agreements, does it matter that authorities are not taking into account penalties previously imposed elsewhere? While this is a very legitimate question to ask, I have chosen not to adopt an economic research approach in my dissertation. This would have involved a very different (or complementary) research set-up, beyond the scope of my main research focus.

g) *Conclusions on the extent to which fines have actually been excessive*: Partly because of the lack of an economic analysis as explained above, this dissertation does not reach conclusions as to whether overall fines imposed in particular cartel cases have actually been excessive. I believe that making such an assessment is very difficult without having full visibility over the facts of each case in the light of the wider enforcement context, and perhaps even impossible without having recourse to economic data and analysis. This is why I have focused on the approaches taken by authorities (and courts) to ensure overall proportionality in the case of enforcement of the same cartel in multiple jurisdictions, without stipulating at which point the combination of fines would become disproportionate.

h) *Extensive review of national legislative frameworks*: I have focused my research on cartel fining practices as revealed in actual cases, authority guidelines, policy papers and multijurisdictional studies. Those practices will of course be shaped by the legislative boundaries of individual jurisdictions. I have nevertheless chosen not to focus too much on the legislative restrictions that may exist from country to country, instead looking primarily at the actual enforcement in specific cases and judicial review of such enforcement. In part this is

[72] See e.g. OECD, *Sanctions in Antitrust Cases - Background Paper by the Secretariat* (n 66), paras 80-82.

[73] US plea agreements often include a specific number of executives excluded from the deference of further prosecution.

[74] Including private litigation that can be said to be partly compensatory and partly punitive, as is the case for the US as a result of the principle of treble damages.

because a study of the nature and background of such currently existing restrictions across jurisdictions could be the subject of a dissertation in itself. Also, I have chosen to approach considerations on possible international coordination in a more conceptual way and in recognition of the fact that changes in the way international cartels are being pursued may require legislative changes. The same is true for normative discussions on how authorities should deal with the parallel enforcement of the same international cartel.

i) *Inside view from the authorities' perspective*: The findings in this dissertation are based on a study of publicly available materials. I have not had access to internal policy documents or insights from government officials not publicly shared in respect of the sanctioning of international cartels. This means that my dissertation presents an 'outside view' of the issues at hand. The obvious downside of this is that my research does not include developments and practices that are occurring but are not (yet) visible to the wider public. I very much doubt however that significant steps are being made in respect of the international coordination of cartel sanctions without this being disclosed.

I believe that the research for this dissertation would not have been manageable – at least within a reasonable timeframe – if it were not for the abovementioned limitations. Inclusion of the aspects mentioned above would have significantly expanded the required research efforts. Also, it would not have been unlikely for myself to get lost in an attempt to capture the full complexity of modern day cartel enforcement in all its facets. It is also doubtful whether this would have contributed to the reader's ability to grasp the key issues being discussed and – just as important – the ability to maintain an interest when reading this dissertation. I hence believe that the limitations to the scope of the research were not only necessary but also beneficial to the ultimate academic product. Importantly, I also believe that the key conclusions drawn in this dissertation stand even despite the various limitations.

2. CHAPTER 2: A QUANTITATIVE INTRODUCTION TO PARALLEL CARTEL ENFORCEMENT

This chapter is based on the article 'Parallel enforcement of global cartels: facts & figures', 4 European Competition and Regulatory Law Review 2, 2020.

2.1 Introduction

Globalisation has expanded the geographic scope of economic activity, turning national or regional markets into global ones. This development has not left cartel conduct unaffected. Where competition is increasingly faced across borders and even continents, incentives and attempts to restrict this competition seem to travel along with it. It is hence not surprising that also worldwide markets are regularly found to be impacted by collusion between competitors. What is unique about global cartels is the widespread harm that they can cause within a great number of different jurisdictions. Preventing and punishing such harm is a concern shared across the globe. But given the absence of any international body targeting worldwide cartel conduct, global cartel enforcement is still characterised by multiple authorities acting in parallel, each safeguarding its own economic interests.

This chapter aims to provide a quantitative insight into the current state of the parallel jurisdictional enforcement of global cartels and how this has evolved over the past few decades. This insight is fundamental for a good understanding of the scope of the central issue researched in this dissertation. It therefore forms a good starting point for the analysis in the following chapters which focuses on the origins of overlapping enforcement and its implications for the proportionality of cartel fines.

A robust and meaningful assessment of this evolution relies on hard numbers, for which I have mainly relied on the comprehensive data set on Private International Cartels (PIC)[1] collected by Professor Connor and the International cartels database[2] published by the Organisation for Economic Cooperation and Development (OECD). This data can provide a quantitative insight into the changing nature of the fight against global cartels, revealing the extent to which more and more authorities are entering the arena, imposing increasingly severe fines.

Before analysing the data on the global cartels identified in this chapter, the next section first describes the methodology underlying this analysis. It sets out my definition of a 'global cartel' and explains how I have arrived at the list of 41 global cartels subject to public enforcement in the past thirty years. The chapter then describes several key features of the identified cartels, before turning to the analysis of the numbers of different authorities imposing fines for the same global cartel and the combined fine levels resulting from this parallel enforcement. The final part of this chapter looks at the level of international coordination of penalties and discusses the relevant developments in this area.

2.2 Defining and Identifying 'Global Cartels'

Collecting data on the enforcement of global cartels starts with a basic question: *what is a global cartel*? A cartel is generally understood to be an agreement or concerted practice between competitors with the aim to coordinate their competitive behaviour and/or influence competitive conditions, for example by fixing prices, restricting output or sharing markets.[3] Connor has applied two distinguishing

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1 John Connor, Private International Cartels Full Data 2012-4-13 2012-1 Edition (2017), Purdue University Research Repository, doi:10.4231/R7GF0RPJ.

2 OECD International Cartels Database (2019) <https://qdd.oecd.org/subject.aspx?Subject=OECD_HIC>.

3 The European Commission refers to 'agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors'. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ 298/11, para 1. The OECD similarly defines 'hard core cartels' as 'anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of

qualifications to this general definition in determining the scope of his cartel database. First, a focus on 'private' cartels as opposed to cartels protected by government sovereignty or international treaties.[4] Second, a focus on 'international' cartels as opposed to cartels consisting of participants each having their headquarters, residency, or nationality within the jurisdiction of the investigating authority.[5]

But when can a private international cartel be considered 'global' in scope? In his database, Connor qualifies cartels as global if they fixed or attempted to fix prices on at least two continents.[6] This hence includes cartels that have affected (parts of) North America and Europe without affecting[7] Asian or other markets.[8] As the focus of this chapter is on assessing the number of different authorities around the world imposing fines for the same cartel, including cartels merely affecting two continents would distort the analysis. I have therefore adopted a more narrow definition of global cartels. Following Beyer[9], I consider global cartels to be cartels whose coordinated conduct affects most, if not all, sales of the affected products or services worldwide. This captures cartels where the scope of the relevant geographic market is worldwide and where cartelists have fixed or have attempted to fix the global prices of their supplies. It also includes cartels where the relevant geographic markets are not worldwide but where cartel agreements span across the different regional markets.

Limited availability of cartel sales data makes it difficult to identify those cartels that have a global coverage. Cases where authorities explicitly refer to the worldwide scope of a conspiracy are rare. Often, authorities are hesitant to make statements on the precise geographic scope of a cartel beyond their own territory.[10] Enforcement of the same cartel in several jurisdictions around the world can be a good indicator of the cartel's worldwide scope. But identifying global cartels purely on this basis would result in false negatives simply because the cartels may not be sanctioned in all the jurisdictions or even continents that they are affecting. Instead, this chapter has relied on Connor's data on affected commerce as a starting point for qualifying a cartel as global.[11] Where Connor has found commerce to have been affected in each of (i) North America, (ii) Europe and (iii) the rest of the world (ROW), I have considered the cartel to have a worldwide scope unless there are clear indications to the contrary.[12] For example references in authority decisions pointing at a cartel's limited geographic scope. Conversely, where Connor has indicated that no commerce was affected in (i) North America, (ii) Europe and/or (iii) ROW, I have considered the cartel not to have a worldwide scope unless there are clear indications that it did.[13]

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commerce'. OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (2 July 2019) OECD/LEGAL/0452.

4 John Connor, 'The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016 (Revised 2nd Edition)' (9 August 2016) 4 <https://ssrn.com/abstract=2821254>.

5 ibid 3-4.

6 ibid 4. For this purpose, Connor has relied on its own estimates of the geographic scope of affected commerce, taking either directly from authority or court documents or estimated on the basis of industry reports or other business and legal resources. ibid 14-15.

7 Where this chapter refers to cartels 'affecting' certain markets and jurisdictions, it is meant to include cartels for which no actual effects were demonstrated (eg as is the practice in the EU for cartels qualified as infringements 'by object'. Also, it does not imply the broad application of a particular jurisdictional test (eg implementation or qualified effects) but relies on the demonstration of the cartel's existence and scope in accordance with the applicable test of the relevant jurisdiction(s).

8 Examples from Connor's PIC database include the *Paraffin wax* cartel, the *Stamp auctions* cartel, the *Shipping TACA (Trans-Atlantic Conference Agreement)* cartel and the *Acrylic glass* cartel. Each of these cartels is indicated in the database as having no ROW affected commerce, ie outside of North America and Europe.

9 John C. Beyer, 'Are Global Cartels More Effective Than "National" Cartels?' (14 January 2010) 1 <https://ec.europa.eu/competition/antitrust/actionsdamages/beyer.pdf>.

10 This results in references to cartels affecting commerce "in the United States and elsewhere" or cartels having a geographic scope "at least" covering the EEA. Cartel defendants may also claim an alleged geographic scope beyond the relevant jurisdiction as being confidential (see eg the European Commission's decision in *Fasteners* (Case COMP/39.168) [2009] OJ C 47/8, para 514).

11 Connor explains his methodology for estimating the affected commerce as follows: 'Data on affected sales for a year or more are sometimes fully revealed in court or commission decisions; the EC decisions are especially important sources of the more precise sales data. Many other estimates were created from the annual sales revealed in an authority's decision or press release; combined with the dates of collusion, a reasonably accurate total affected sales figure can be computed. Without such information, if the industry description was clear, standard business-research sources of industry size were obtained.' John Connor, 'The Private International Cartels (PIC) Data Set' (n 4) 14.

12 Examples of cartels that I have dismissed on this basis include the *Sherry* cartel, *Auction houses* and the *Insurance, commercial, brokerage fees* cartel.

13 This includes the *Aluminium fluoride* cartel, which according to the European Commission had a worldwide geographic scope.

The publicly available version of the Connor PIC database covers the period from 1990 to 2012.[14] To identify global cartels for the period after 2012, I have received the assistance of Professor Connor and relied on the OECD's International cartels database, annual reports submitted to the OECD by competition authorities, published cartel decisions and other public sources.[15] I have chosen to limit the analysis to global cartels discovered[16] before 2018 given the likelihood that global cartels discovered thereafter (eg the *Hard disk drive suspension* cartel[17]) will still be subject to enforcement in additional jurisdictions.

In compiling the list of global cartels fined in the last three decades, I have chosen to count so-called 'supercartels' (*Vitamins*, *Auto Parts*, *Interest rate derivatives & Forex*)[18] and other closely related cartels[19] as a single global cartel in the analysis. This ignores the fact that they may comprise multiple, distinguishable underlying cartels focusing on different products or markets. But membership of these underlying cartels is often overlapping. More importantly, the discovery and punishment of one underlying cartel often results in the enforcement of other related cartels. Counting each underlying cartel separately would weigh heavily in the analysis, while not actually reflecting unique instances of parallel enforcement of global cartels. Qualifying the interrelated cartels as a single global cartel also distorts the assessment to some extent. Still, I consider this to be the better alternative. Throughout this chapter I have made notes on the way in which data regarding super-cartels was included in the assessment.

Based on the methodology described above, I have identified 41 global cartels that were discovered before 2018 and that were subject to public enforcement through monetary penalties in the period from the beginning of 1990 until the end of 2019. These cartels are listed in Table 1 below, sorted by year of discovery.

Table 1: List of fined global cartels

1.	Industrial diamonds	15.	Monochloroacetic acid	29.	TFT-LCD
2.	Citric acid	16.	Magnetic iron oxide powder	30.	Marine hoses
3.	Lysine	17.	Fasteners	31.	Cathode ray tubes
4.	Sodium gluconate	18.	Carbon cathode block	32.	Freight forwarders
5.	Graphite electrodes	19.	DRAMs	33.	Memory chips for smart cards
6.	Heavy-lift marine	20.	Chloroprene synthetic rubber	34.	High voltage power cables
7.	Sorbates	21.	Rubber processing chemicals	35.	Refrigeration compressors
8.	Vitamins	22.	Nitrile synthetic rubber	36.	Optical disk drives
9.	Organic peroxides	23.	Parcel tankers	37.	Auto parts
10.	Soda ash	24.	Plastic additives	38.	Interest rate derivatives & Forex
11.	Methionine	25.	Hydrogen peroxide	39.	Rechargeable batteries
12.	Specialty graphite	26.	Gas-insulated switchgear	40.	Maritime car carriers
13.	Methylglucamine	27.	Aluminium fluoride	41.	Capacitors

[14] Global cartels have existed since long before 1990. Connor refers to the 1862 French-Belgian zinc global export cartel and the 1887 Secrétan copper syndicate export cartel as early examples. John Connor, 'Cartel Overcharges' (March 2014) The Law and Economics of Class Actions, 26 Research in Law and Economics 284.

[15] This includes the websites of competition authorities, Shearman & Sterling LLP's Cartel Digest, MLex, Global Competition Review and websites of news agencies.

[16] Relying on the date of authority press releases confirming the existence of a cartel investigation.

[17] For the Hard disk drive suspension cartel, confirmed by the DOJ to have a global scope, fines have thus far been imposed in the US and Japan, with at least Brazil's CADE still investigating the matter.

[18] Connor has used the term 'supercartel' to define cartels that (1) are global in scope and (2) have a large number of distinct products with partially overlapping corporate membership, and (3) direct their price fixing at customers in one vertical production-distribution channel. John Connor, 'Is Auto Parts Evolving into a Supercartel?' (28 August 2013) AAI Working Paper No. 13-04 <https://www.antitrustinstitute.org/work-product/aai-working-paper-no-13-06-is-auto-parts-evolving-into-a-supercartel/>. In contrast to Connor, I have limited the scope of the Banking and Finance supercartel to only Interest rate derivatives & Forex (including the underlying cartels related to Euribor, USD LIBOR, CHF LIBOR, CHF Spread, JPY LIBOR, Euroyen TIBOR, and the two Forex trading cartels 'Three way banana split' and 'Essex express').

[19] Such as *Freight forwarders* (NES, AMS, CAF, PSS), *Cathode ray tubes* (colour picture tubes, colour display tubes), *Plastic additives* (tin stabilisers, ESBO/esters heat stabilisers), *Specialty graphite* (isostatic, extruded), *Heavy-lift marine* (construction, transport).

14.	MSG and nucleotides	28.	Air cargo		

Sources: Connor's PIC data set, OECD's International cartels database, own research.

2.3 General Overview of the Global Cartels

The databases of Connor and the OECD, complemented with additional data collected by this author, allow for some novel insights into the nature of the 41 identified global cartels. This comparison reveals that, amongst themselves, global cartels vary considerably in respect of their basic features, such as the type of cartel behaviour, the affected industries, the number of companies fined, their nationality and their combined market share, and the cartels' duration.

A. Type of Cartel Behaviour[20]

For eight of the 41 global cartels, the cartel conduct primarily concerned bid rigging. All other global cartels had price fixing as a key feature, including one in the form of benchmark manipulation influencing a price component (*Interest rate derivatives & Forex*). Out of the 33 cartels not primarily concerning bid rigging, information exchange is explicitly mentioned as a separate element of the illegal conduct for eighteen cartels. Quota setting or limitation of production is mentioned as a feature for twelve global cartels. The number of global cartels involving a form of market or customer allocation is also twelve. Seven global cartels combine all the elements of (i) price fixing, (ii) quota setting and (iii) market or customer allocation.

B. Affected industries[21]

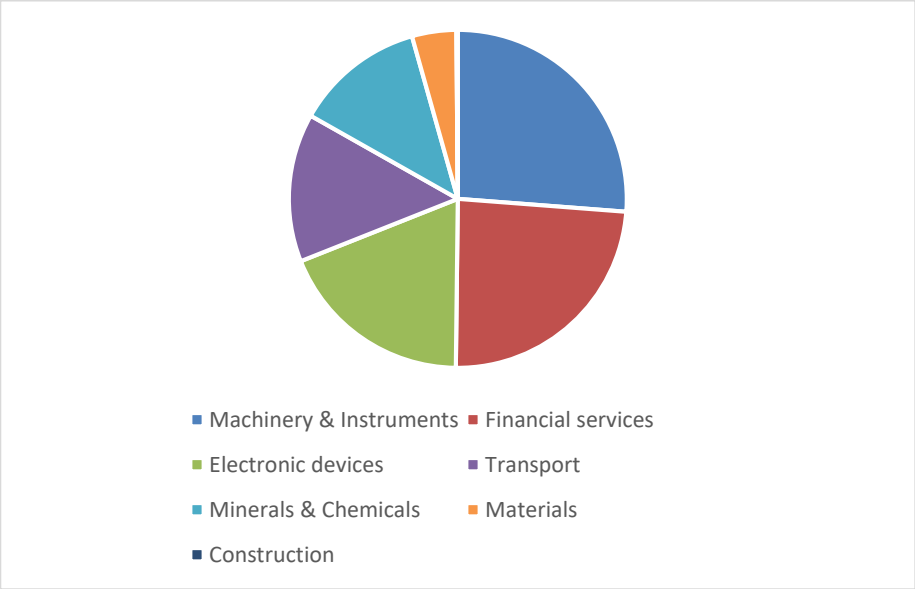
Based on number of global cartels, the Minerals & Chemicals industry by far delivers the highest number (seventeen). This is followed by the manufacturing of Electronic Devices (seven), Materials (six), Machinery & Industry (five) and Transport (five).[22] The remaining industries are Financial Services (one) and Construction (one). A more balanced distribution across industries appears if one takes into account the cartels' fine levels, as shown in Graph 1 below. This is largely due to the very large fines imposed in the Transport (*Air cargo*, *Maritime car carriers*) and Financial Services industries (*Interest rate derivatives & Forex*).

[20] Connor's and the OECD's data sets indicate whether a cartel primarily concerned bid rigging, which indications I have followed. For the other elements of cartel behaviour I have relied on the description of the cartel activities given by the relevant authorities.

[21] The categorisation by industry is mostly based on the economic sector indication used by the European Commission (NACE), grouped into broader categories.

[22] For the purpose of the industry categorisation, the *Auto parts* cartel is counted as one global cartel in the industry for the manufacturing of Electronic Devices.

Graph 1: Industries affected by the 41 global cartels, weighted by fine levels



Sources: Connor's PIC data set, OECD's International cartels database, own research.

C. Number and nationality of cartel members fined[23]

The average number of independent undertakings[24] fined per global cartel and per authority is 4.0. There are five cartels where only one undertaking was fined, and eleven cartels with on average more than five fined participants. The *Air cargo* cartel has the highest average number of fined cartel members across all prosecuting authorities, with on average ten cartel members being fined by ten authorities. One of these authorities, the US Department of Justice (DOJ), imposed fines on nineteen different airlines for their involvement in the cartel. Still, this number is dwarfed by the record number of undertakings targeted by the DOJ as part of the *Auto parts* investigations: 46.[25]

A key feature of modern cartel enforcement is leniency, i.e. the ability to obtain immunity or a fine reduction in exchange for revealing a cartel's existence. Leniency programmes have greatly enhanced the success rates of authorities in disrupting, detecting and punishing cartel behaviour. This is confirmed by the data on global cartels. Immunity was granted in at least one jurisdiction for all but three of the 41 global cartels.[26] The three exceptions were all discovered in the 1990s.[27]

For the 41 global cartels combined, authorities have penalised undertakings of at least 37 different nationalities. Of the more than one thousand individual penalties imposed by the various authorities, Japanese companies account for circa 39%.[28] At a distant second and third place are US and German companies, each representing circa 10% of the number of individual fines received. Other prominent

23 The number of cartel members is based only on the number of independent undertakings, i.e. not separately counting subsidiaries. Only fined undertakings are included, hence excluding companies that have been granted immunity. Cartel facilitators are also excluded. For each cartel, the number of undertakings fined is based on the average number of companies fined by the individual authorities. *Auto parts* is excluded in the calculations of the average number of companies fined per cartel given the very large number of underlying cartels and the correspondingly large number of different cartel participants fined. The nationality is that of the ultimate group parent, or in the case of joint ventures the nationality of that entity. The main source for the number and nationality of fined companies is Connor's PIC data set, complemented with my own assessment of the relevant decisions.

24 In line with the EU concept of an undertaking, the analysis has focused on corporate groups as single economic units, i.e. not separately counting subsidiaries.

25 DOJ, 'Japanese Auto Parts Company Pleads Guilty to Antitrust Conspiracy Involving Steel Tubes' (31 May 2018) <https://www.justice.gov/opa/pr/japanese-auto-parts-company-pleads-guilty-antitrust-conspiracy-involving-steel-tubes>.

26 Based on Connor's PIC data set and the decisions of relevant authorities, mainly those of the European Commission which is transparent in respect of the company that has been granted immunity.

27 These are *Industrial diamonds* in 1994, *Citric acid* in 1995 and *Soda ash* in 1999.

28 For *Auto parts*, I have relied on the data from Connor's article 'Twilight of Prosecutions of the Global Auto-Parts Cartels' (9 July 2019) 22 <https://ssrn.com/abstract=3456279>.

nationalities are France (9%), Korea (5%), Switzerland (3%), the UK (3%), Taiwan (3%) and the Netherlands (3%).

D. Combined market shares[29]

Estimates on the combined share of the global market represented by the members of the cartel is available for 34 of the 41 global cartels. This data shows that on average, the combined global market share is circa 78%. For two cartels (*Lysine*, *Methylglucamine*) all global market players were involved. For ten other cartels, over 90% of the market was represented. In only four global cartels was the combined market share less than 50%: *Soda ash* (25%), *Air cargo* (34%), *Freight forwarders* (41%) and *Memory chips for smart cards* (48%).

E. Duration[30]

The duration of the 41 global cartels widely varies, from just six months (*Aluminum fluoride*) to almost thirty years (*Organic peroxides*). Looking at the longest duration found by one of the enforcing authorities, eleven other global cartels have lasted for ten years or longer: *Marine hoses* (253 months), *Sorbates* (214 months), *Gas-insulated switchgear* (204 months), *Capacitors* (204 months), *Maritime car carriers* (188 months), *Monochloroacetic acid* (187 months), *Methionine* (156 months), *Refrigeration compressors* (144 months), *Plastic additives* (134 months), *Cathode ray tubes* (120 months) and *High voltage power cables* (120 months[31]). The average duration for all 41 global cartels is circa 89 months, i.e. over seven years.[32]

2.4 Parallel Enforcement of Global Cartels

The data on global cartels shows a remarkable growth in the number of different enforcing authorities. For the 25 cartels discovered between 1994 and 2004, the average number of different authorities imposing fines for the same cartel is 2.6. No jurisdiction other than the US, Canada and the EU has sanctioned more than three of these 25 cartels. The average for the sixteen global cartels discovered in 2004 or thereafter is 5.9, with a much wider group of authorities imposing penalties. Thus far, seventeen jurisdictions have imposed fines for one or more of the 41 global cartels.[33]

The *Auto parts* cartel holds the record in parallel enforcement with twelve different authorities imposing fines, followed by *Maritime car carriers* (eleven) and *Air Cargo* (ten). As shown in Table 2 below, eight other global cartels were the subject of fines in five or more jurisdictions.

Table 2: List of global cartels fined in five or more different jurisdictions

Cartel	Number of jurisdictions
Auto parts	12
Maritime car carriers	11
Air cargo	10
Freight forwarders	8
Interest rate derivatives & Forex	7
Capacitors	7

29 The data on the combined global markets shares is mostly taken from Connor's PIC data set.

30 The data on the duration is mostly based on Connor's PIC data set, which relies on the longest proven period. For cartels not covered by Connor's PIC data set, I have also relied on the longest period found by individual authorities. In the case of multiple underlying cartels as in *Auto parts*, *Vitamins* or *Interest rate derivatives & Forex*, the average duration of the underlying cartels was used.

31 Brazil's CADE has alleged that the *High voltage power cables* cartel started in the early 1990s, but I have instead relied on the duration found by the European Commission.

32 As the calculations on duration are based on the cartels' longest proven period, the duration for a cartel found by individual authorities may well be shorter. Taking not the longest proven period for these cartels but the average duration found by all prosecuting authorities, the average duration for the 41 global cartels will hence also be shorter.

33 The numbers in this section exclude the Czech Republic, Hungary and Slovakia, which later joined the EU.

Refrigeration compressors	7
TFT-LCD	6
Marine hoses	6
Vitamins	6
Cathode ray tubes	5

Sources: Connor's PIC data set, OECD's International cartels database, own research.

The data presented above only covers authorities imposing fines on the members of a cartel, hence excluding investigations not resulting in a corporate fine.[34] This means that the actual number of different authorities that participants of the global cartel were faced with may be substantially higher. For example, while 'only' seven different competition authorities have imposed fines for the *Interest rate derivatives & Forex* cartel, UBS is reported to have filed for leniency in respect of the Forex cartel in twice as many jurisdictions.[35]

The US, Canada and the EU have long dominated the enforcement of global cartels. Only seven of the 25 global cartels discovered between 1994 and 2003 were penalised by one or more authorities other than the DOJ, the Canadian Competition Bureau or the European Commission. The DOJ and the European Commission are still the most active enforcers when looking at the period after 2004. But this period also shows the rise of other authorities, each pursuing more global cartels than the Competition Bureau has: Brazil's CADE, Japan's JFTC, Korea's KFTC, Australia's ACCC, New Zealand's Commerce Commission and South Africa's Competition Commission. As Connor has noted, 'the last geographic piece of the cartel-enforcement puzzle is now in place'.[36] Table 3 below shows the number of global cartels pursued by each individual jurisdiction, as well as the year in which the first of the 41 global cartels was fined.

Table 3: List of jurisdictions in which fines were imposed for the 41 global cartels

Jurisdiction	**Number of global cartels fined**	**Year of first global cartel fine**
European Union	35	2000
United States	33	1996
Canada	18	1998
Brazil	16	2007
Korea	10	2002
Japan	8	2008
Australia	7	2003
South Africa	6	2008
Mexico	5	1998
New Zealand	4	2008
Switzerland	3	2012
China	3	2013
Singapore	3	2013
Taiwan	2	2012
India	2	2015
Chile	2	2012
Peru	1	2018

34 For example where authorities have issued warning or signed cease-and-desist agreement without imposing monetary penalties.

35 John Connor, 'Big Bad Banks: Bid Rigging and Multilateral Market Manipulation" (5 May 2014) American Antitrust Institute Working Paper No. 14-04, 18 <https://ssrn.com/abstract=2547682>.

36 See Connor's article on the rise of cartel enforcement by authorities outside of Europe and North America: John Connor, 'The Rise of Anti-Cartel Enforcement in Africa, Asia, and Latin America' (September 2015) 1 Competition Policy International: Antitrust Chronicle, 9 <http://ssrn.com/abstract=2711972>.

Sources: Connor's PIC data set, OECD's International cartels database, own research.

During the last decade, the list of enforcers of global cartels has grown from ten to seventeen. The appearance of jurisdictions such as Peru and Chile on the world stage confirms the trend of increasing parallel enforcement of global cartels. Still, the numbers of different authorities pursuing the same global cartel appear relatively low considering that global cartels will generally affect a large share of the world's economies. Several of the top-20 economies are still missing in Table 3 (Russia, Indonesia, Saudi Arabia and Turkey), with China and India playing a minor role compared to the size of their economies. This is not to say that the competition authorities in these countries are not actively pursuing cartels, but merely that they have not played a significant role in the enforcement of global cartels.

The limited number of authorities having fined one or more global cartels will in part be due to the fact that robust competition laws and enforcement frameworks are still in their infancy in many countries in the world. But there can be a variety of other reasons for why certain global cartels were not fined in a particular jurisdiction:

- It may be that the commerce affected by a global cartel is of insignificant importance in a jurisdiction that would otherwise be inclined to pursue the conduct. A good example is the decision of Singapore's Competition Commission not to pick up a particular *Auto Parts* investigation even after receiving a leniency application. The authority did not consider the cartel's impact to be sufficiently direct to warrant prosecution, referring to the lack of a car manufacturing industry in Singapore.[37]
- There are certain cartels that have explicitly limited the geographic scope of the cartel arrangements. In *Gas-insulated switchgear* for example, Japanese and European companies agreed on a worldwide allocation of projects, with the exception of projects in the US, Canada and for some time also Russia and China.[38]
- There are examples where authorities have investigated a global cartel previously penalised by other authorities but where they have found insufficient evidence of collusion in respect of their own jurisdiction. The *Lysine* cartel was investigated in Brazil for twelve years before the case was dismissed without imposing a penalty.[39] In *Parcel tankers*, investigations had been launched by the European Commission, Korea's KFTC and Australia's ACCC, but all were dismissed for lack of evidence.[40]
- Despite increased levels of cross-border information sharing about suspected cartels, authorities at times may still lack sufficiently reliable information to even start an investigation, or to do so in time. In *Gas-insulated switchgear*, the European Commission reportedly forgot to notify its Japanese counterpart that it was investigating the cartel.[41] The JFTC only found out about the cartel's existence with the public announcement of the fines imposed by the European Commission, by which time it was too late to complete its own investigation before the expiry of the statute of limitations.
- Various other factors may also play a role, such as insufficient resources, a lack of investigative powers or alternative enforcement priorities.

2.5 Global Cartel Fine Levels

Apart from the increasing number of different authorities penalising the same cartel, the last three decades have also seen a clear rise in the level of fines imposed for global cartel conduct. For the 25 global cartels discovered between 1994 and 2003, the average combined fine level was USD 280

37 Yonnex Li, 'Singapore Antitrust Regulator Gauges Local Impact in Leniency Cases, Chief Says' (April 6, 2017) *MLex*. The Competition Commission of Singapore did pursue and impose fines on one of the underlying Auto parts cartels, namely ball bearings.

38 European Commission decision in *Gas-insulated switchgear* (Case COMP/38.899) [2008] OJ C 5/7, para 113, footnote 13.

39 Rachel Hall, 'CADE Dismisses Lysine Cartel Case' (25 March 2012) <https://www.machadomeyer.com.br/en/press-ij/cade-dismisses-lysine-cartel-case>.

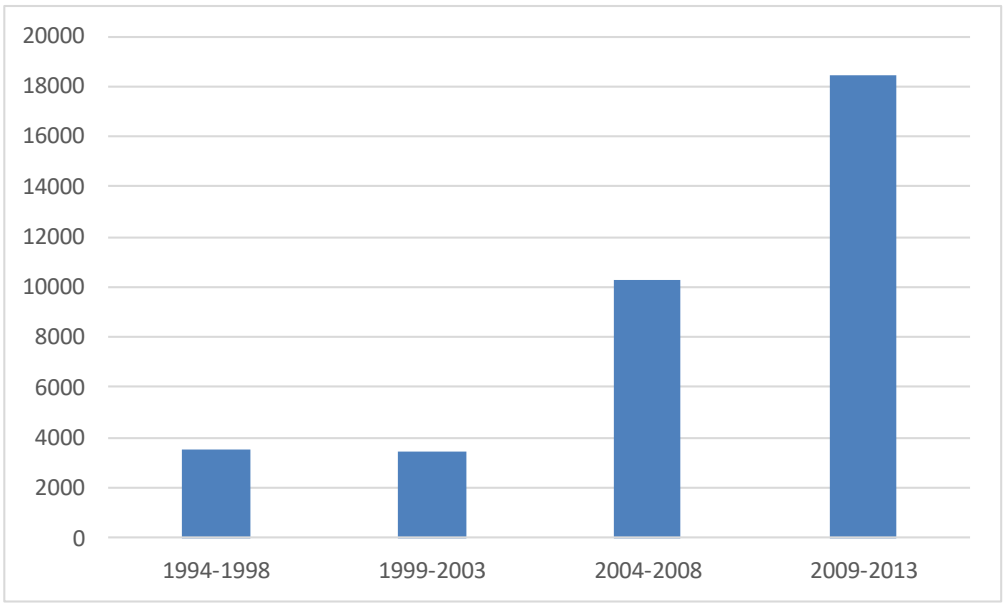
40 Based on annual reports and other SEC filings made by parcel tanker company Stolt-Nielsen.

41 Elaine Chow, 'EU Says It Left JFTC Out of Switchgear Cartel Loop'(14 April 2008) *Law360* <https://www.law360.com/articles/53017/eu-says-it-left-jftc-out-of-switchgear-cartel-loop>.

million per cartel. For the sixteen global cartels discovered between 2004 and 2018, the average combined fine amount is more than six times that amount, at almost USD 1,800 million.[42] In total, the 41 global cartels were subject to a fine amount of over USD 35 billion.

Graph 2 below illustrates the increase in total fine amounts per five-year period, with fines being allocated to the year in which the global cartel was first discovered. More cartels were discovered in the first two periods (25) than in the latter two periods (sixteen), showing that the increase in fine levels is not caused by a higher rate of discovery of global cartels.

Graph 2: Combined fine levels for global cartels, allocated to the first year of discovery



Sources: Connor's PIC data set, OECD's International cartels database, own research.

Fine levels for individual global cartels range from USD 1 million (*Soda ash*) to USD 8,543 million (*Interest rate derivatives & Forex*). The average fine level per global cartel is USD 873 million, with the average fine level per global cartel per individual authority being USD 226 million. Table 4 below lists the nine global cartels with a combined fine amount exceeding USD 1 billion, also showing the number of authorities having fined the cartel.

[42] Excluding the two supercartels *Auto parts* and *Interest rate derivatives & Forex*, the average fine per global cartel discovered since 2004 is USD 937 million, still more than three times the average for the global cartels discovered between 1994 and 2003.

Table 4: Global cartels listed by combined fine amount[43]

Cartel	Combined fine amount (USDm)	Number of authorities fining the cartel[44]
Interest rate derivatives & Forex	8,543	7
Auto parts	7,105	12
Air cargo	3,307	10
TFT-LCD	2,521	6
Cathode ray tubes	2,053	5
Vitamins	1,871	6
Maritime car carriers	1,206	11
DRAMs	1,146	3
Gas-insulated switchgear	1,105	3

Sources: Connor's PIC data set, OECD's International cartels database, own research.

This list includes seven of the eleven global cartels that were subject to penalties in five or more jurisdictions. There is hence a significant overlap between the most widely and the most heavily targeted global cartels. But there are some heavily fined global cartels that were penalised by only three authorities (*DRAMs*, *Gas-insulated switchgear*). There are also some relatively less heavily fined cartels subject to fines in more than three jurisdictions, namely *Optical disk drives* (USD 160 million, four authorities) and *Marine hoses* (USD 237 million, six authorities).

The overall increase in fine levels imposed on global cartels can be linked to individual cartel regimes adopting more aggressive fining policies and practices. Studies by the International Competition Network (ICN) in 2008 and 2017 on the setting of cartel fines confirm that in many jurisdictions, fine levels have significantly increased over the years.[45]

Penalties for global cartels are also pushed to higher levels as a result of the proliferation of different authorities pursing these cartels. At the same time, the impact of the additional enforcers is limited by the relatively small fines often imposed by the more recently established regimes. The fines imposed by the DOJ and the European Commission account for more than 90% of the total fine amount imposed on global cartels.[46] Their average fine amount per global cartel is USD 344 million and USD 448 million, respectively. This is much higher than the average amount in other jurisdictions such as Japan (USD 62 million), Korea (USD 43 million), Brazil (USD 33 million), Australia (USD 29 million) and Canada (USD 11 million). These disparities in average fine amounts are largely explained by the large sizes of the US and EU markets relative to ROW economies. This is because a key element determining cartel fine levels is the prosecuting jurisdiction's value of commerce affected by the cartel (i.e. the relevant sales). Under most fining methodologies, cartel fines are closely related to the value of commerce.[47] It is hence not surprising for fine levels to be proportionately higher in those jurisdictions that constitute a larger share of the relevant global market. However, ROW fines relative to affected domestic sales have still been found to be substantially lower than those imposed in the US or EU.[48] Other considerations such as the maturity of competition law statutes and fining policies hence also appear to play a role.

43 Only fines imposed, in whole or in part, by competition authorities are included, hence excluding fines individually imposed by financial regulators in the *Interest rate derivatives* cartel.

44 The numbers exclude the Czech Republic, Hungary and Slovakia, which later joined the EU.

45 ICN, Report to the 7th ICN Annual Conference, Setting of Fines for Cartels in ICN Jurisdictions (April 2008) 44; ICN, Report to the 16th ICN Annual Conference, Setting of Fines for Cartels in ICN Jurisdictions (2017) (May 2017) 57.

46 Given the lack of data on the precise distribution of fines imposed for the underlying cartels in *Auto parts*, this cartel was not taken into account in the calculation of the distribution of total fines across different authorities and of the average fines per cartel per individual authority.

47 ICN, Setting of Fines for Cartels in ICN Jurisdictions (2017) (n 45) 19-20.

48 Connor, 'The Rise of Anti-Cartel Enforcement in Africa, Asia, and Latin America' (n 33) 8. Connor also mentioned that for ROW authorities, there is a wide gap between fines imposed and fines actually collected.

2.6 International Coordination of Fines

Over the past few decades, global cartel enforcement – and competition law enforcement in general – is characterised by increasingly closer inter-agency cooperation. This is illustrated by the long lists of competition cooperation agreements signed by the European Commission and the DOJ since the mid-1990s.[49] More practically, it is demonstrated by the coordinated and simultaneous inspections that have been carried out by multiple authorities in several global cartel cases, including *Marine Hoses*, *Cathode ray tubes*, *Freight forwarders*, *High voltage power cables*, *Refrigeration compressors*, *Auto parts* and *Maritime car carriers.* Such international coordination of cartel enforcement is strongly supported by the advocacy of the International Competition Network (ICN) and the OECD.

While significant steps have been made to assist one another in the investigation of global cartels, the sanctioning of cartels is still very much a matter that authorities leave to themselves. Cartel fines are determined by individual authorities or courts in accordance with national fining methodologies. These methodologies generally do not consider enforcement of the same conduct elsewhere to be a relevant factor for determining the level of the fine.[50] The main reason for this has often been repeated by the European Commission: fines imposed by other authorities only concern the anti-competitive effects produced in the territory of their own jurisdictions.[51]

In the absence of international coordination of cartel fines, global cartel sanctioning simply entails the piling on of multiple independent cartel penalties, each merely taking into account national punishment considerations. Some may argue that this should not be an issue, because authorities do not need to be bothered with foreign enforcement as long as they are not overstepping their own jurisdictional boundaries. But this approach can be challenged from the perspective of overall proportionality of punishment.[52] For cartel offenders, each individual fine will add to the overall deterrence and retribution targeting the same cross-border conduct. It is therefore difficult to maintain that overall proportionate punishment can be achieved by simply piling on national fines, without assessing the extent to which sanctioning objectives have already been met by foreign penalties.

There are more and more signs indicating that the international cartel enforcement community is willing to move away from a purely national and isolated approach to fining international cartel conduct:

- First, there are cases where authorities have made unilateral adjustments to the fine calculation to avoid overlapping punishment on an international level through double counting of relevant sales.[53] In *Air cargo* for example, the European Commission applied a 50 per cent reduction on sales between the European Economic Area (EEA) and third countries to take into account the fact that on these routes part of the harm of the cartel fell outside the EEA.[54] While one can argue that this merely ensures that only effects felt in the EEA are sanctioned, it does reveal self-restraint in identifying the value of sales to which the infringement directly or indirectly relates.[55]
- Second, there are a few examples of authorities and courts actually taking into account penalties already imposed elsewhere in setting their own fines. In *TFT-LCD*, the US District Court in San Francisco set the fine for AU Optronics at USD 500 million – half the figure requested by the DOJ – *inter alia* because of the fines that the company had already paid and

49 Available at <https://ec.europa.eu/competition/international/bilateral/> and <https://www.justice.gov/atr/antitrust-cooperation-agreements>.
50 ICN, Setting of Fines for Cartels in ICN Jurisdictions (April 2008) (n 45) 32.
51 See eg European Commission decision 2001/418/EC in *Lysine* (Case COMP/36.545/F3) [2001] OJ L 152/24, para 311.
52 See Chapter 6 of this dissertation.
53 John Terzaken and Pieter Huizing, 'How Much Is Too Much? A Call For Global. Principles to Guide The Punishment Of International Cartels' (2013) 27 ABA Antitrust Magazine 2, 55.
54 European Commission decision of 9 November 2010 in *Air cargo* (Case COMP/39258), para 1217.
55 Especially in comparison with the DOJ, which had tackled the issue by calculating the volume of commerce on the basis of (i) outbound shipments and (ii) an upward adjustment for the harm to inbound shipments. The DOJ did not acknowledge that fully including outbound and inbound sales would have been disproportionate. Instead, the approach was justified in reference to the desire to avoid the complexities of litigating the issues. Terzaken and Huizing (n 53) 55.

would still be paying.[56] In *Maritime car carriers*, the Federal Court of Australia considered the penalties previously imposed abroad to be a mitigating circumstance, while noting that these penalties generally only concerned the cartel conduct insofar as it impacted those foreign jurisdictions.[57] The same court had previously followed the ACCC in taking into account foreign penalties in *Air cargo*.[58]

- Third, authorities may defer prosecution altogether in view of penalties already imposed in other jurisdictions. Brazil's CADE may for example close or choose not to open a case if the domestic effects were already targeted by penalties imposed in other jurisdictions.[59]
- Fourth, there are some exceptional examples of actual fine coordination between different authorities rather than mere unilateral deference. In *Auto parts*, the Canadian Competition Bureau agreed to abandon further enforcement against a producer of automotive body sealing products because the US fine took into account both the US and the Canadian affected commerce. Therefore, the Competition Bureau considered the single fine imposed in the US to be an effective remedy also for its own jurisdiction. This outcome was reached following close coordination between the DOJ and the Competition Bureau.[60]

These ad hoc attempts to recognise the broader context of global cartel enforcement are in line with increasingly louder voices calling for greater international coordination of cartel fines. In the past few years, such calls have been made by the International Bar Association[61], the American Bar Association[62], the Japanese Ministry of Economy, Trade and Industry[63], and several delegates to the OECD Roundtable on Cartels Involving Intermediate Goods[64]. This advocacy appears to start to find its way into the fining policies of cartel enforcement regimes. In March 2018, the DOJ announced a new policy to address the concern of the 'piling on' of multiple fines imposed by different authorities for the same conduct.[65] The policy encourages DOJ officials to coordinate with other authorities seeking to resolve a case with a company for the same misconduct, and to evaluate whether multiple penalties serve the interests of justice in a particular case.

It is clear that inter-agency coordination aimed at reaching adequate and overall proportionate penalties for global cartel conduct is still in its infancy. This may still be the case for the foreseeable future, as authorities will not easily give up full prosecutorial discretion for the benefit of multilateral coordination. Willingness to do so may even diminish as a result of stronger political voices emphasizing strict interpretations of national sovereignty. Still, with greater numbers of authorities seeking to impose increasingly severe fines on the same overall cartel conduct, I expect the international enforcement community to face increasing pressure to enhance the international coordination of fines.

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56 Transcript of Proceedings, *United States v AU Optronics*, No 3:09-cr-00110-SI (N.D. Cal. 20 September 2012) 16.

57 Summaries of the judgements of the Federal Court of Australia in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 and *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170.

58 See eg Federal Court of Australia, *Australian Competition and Consumer Commission v Qantas Airways Limited* [2008] FCA 1976, para 42.

59 ICN, Setting of Fines for Cartels in ICN Jurisdictions (April 2008) (n 45) 32.

60 DOJ, 'Nishikawa Agrees to Plead Guilty and Pay $130 Million Criminal Fine for Fixing Prices of Automotive Parts' (20 July 2016) <https://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive>.

61 IBA, comments on proposed update to the Antitrust Guidelines for International Enforcement and Cooperation (December 2016) 6 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=57AFCE72-2189-4E28-9758-DE17F7B64949>.

62 ABA, comments on proposed update to the Antitrust Guidelines for International Enforcement and Cooperation (1 December 2016) 18-21 <https://www.justice.gov/atr/page/file/915786/download>.

63 The Japanese Ministry conducted a study in the context of the 'growing concern about overlapping application of competition laws or imposition of multiple surcharges by several countries'. English summary of the METI Report on Research for Case Examples concerning the Implementation of Regulations on International Cartel Cases among Overseas Competition Regulatory Authorities (3 June 2016) <http://www.meti.go.jp/english/press/2016/0603_02.html>.

64 The delegates highlighted 'the importance of taking into account fines or sanctioning decisions already imposed by other competition agencies to minimise concerns about the fairness and proportionality of fines levied in multi-jurisdictional cases'. OECD, Working Party No. 3 on Co-operation and Enforcement, Roundtable on Cartels Involving Intermediate Goods - Executive Summary (27 October 2015) 4 <https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN3/FINAL/en/pdf>.

65 DOJ, 'Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act' (9 May 2018) <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes>.

2.7 Conclusion

This chapter has addressed the first research sub-question formulated in Section 1.2 of this dissertation: *What is the current state of parallel enforcement of international or global cartels? How has this evolved over time?* It has applied a quantitative approach, relying on two linked data sets of contemporary international cartels, along with other sources, to identify 41 cartels with global characteristics that have been subject to fines in the last thirty years.

The data shows that these cartels have widely diverging features. Some purely focus on price fixing while others include market sharing and output limitation. Some include only two or three participants, while others have more than ten. Some have lasted for less than two years while others have lasted for more than a decade. Some relate to distinct industrial or chemical products while others relate to global transport services or widely used components for consumer products.

What all global cartels have in common is that they have affected markets across the world. One may therefore expect most jurisdictions with established competition law regimes to jump on these cartels. But parallel enforcement of global cartels by more than a few authorities is a fairly recent phenomenon. For cartels discovered before 2004, it was quite unlikely for any authority outside of North America and Europe to impose fines. Since then, it is common that the conduct is targeted in parallel in more than five jurisdictions, sometimes even more than ten. Thus far, at least seventeen jurisdictions have penalised one or more global cartels. Only the DOJ and the European Commission have sanctioned more than half of the 41 global cartels. Most authorities have imposed fines for less than five global cartels. In addition, many jurisdictions have only recently entered the stage of global cartel enforcement. Still, there are major economies that have yet to show their willingness and capability to pursue global cartel conduct.

It is not surprising that along with the higher number of jurisdictions actively going after global cartels, fine levels have sharply increased. The average combined fine imposed by all pursuing authorities for global cartels discovered after 2004 is six times as high as that for global cartels discovered between 1994 and 2003. There have thus far been nine global cartels with a combined fine amount exceeding USD 1 billion. These fine levels are only partly explained by the piling on of multiple fines imposed by different authorities for the same conduct. They are also caused by more aggressive fining policies and by the large volumes of commerce being affected by the relevant cartel conduct.

The foregoing confirms a statement implicitly included in the main research question: the world is indeed characterised by increasingly widespread and active cartel enforcement.

This chapter has also explored part of the third sub-question of this dissertation: *Do authorities or courts take into account penalties imposed elsewhere for the same overall cartel?* It finds the increasingly crowded landscape of global cartel enforcement has set the stage for some forms of greater inter-agency coordination. Significant steps have already been made in respect of the investigative stage of cartel enforcement. But when it comes to the sanctioning of global cartels, authorities still act as if they prefer to maintain a purely national perspective. Observing prosecutions from the outside, attempts to coordinate the outcome of proceedings in order to reach an overall proportionate fine appear to be both ad hoc and rare.

3. CHAPTER 3: TERRITORIAL LIMITS TO EU AND US PUBLIC ENFORCEMENT

This chapter is based on the article 'InnoLux v AU Optronics: comparing territorial limits to EU and US public enforcement of the LCD cartel', 6 Journal of Antitrust Enforcement 2, 1 August 2018.

3.1 Introduction

How far can a competition authority reach to punish cartel conduct committed abroad by foreign undertakings? This continues to be a key question of cartel enforcement around the globe. It has now been widely accepted that jurisdictional powers can extend to foreign conduct on the basis of the harmful effects to domestic competition. But diverging legal views and enforcement practices still exist with respect to the point at which the nexus between the foreign conduct and the domestic effects on competition becomes too weak to justify the exercise of extraterritorial jurisdiction. On one end of the spectrum, authorities may try to expand their jurisdictional reach as far as possible to prevent cartels with any domestic impact – even if small or indirect – from escaping punishment under national competition laws. On the other end, authorities may favour greater levels of self-restraint in deciding whether or not to pursue foreign cartel conduct, in view of comity considerations and to avoid any potential concerns of over-punishment and double jeopardy.

The previous chapter provided an overview of the evolution of parallel enforcement of global cartels. With this background in mind, this next chapter and the following two chapters address the second research sub-question of this dissertation: *What choices can and do individual authorities make in exercising their jurisdictional discretion when prosecuting international cartels? How do jurisdictional limitations affect the extent to which enforcement and punishment of international cartels overlap? How is jurisdiction being shared and allocated within the European Competition Network?* It hence focuses on the extent to which individual authorities apply jurisdictional limits when targeting international cartels. Such 'jurisdictional self-restraint' determines the extent to which parallel enforcement also amounts to overlapping enforcement.

The scope of analysis in this chapter is limited to a comparison of the current position on territorial limits to public cartel enforcement in the EU and the US, two of the most mature and active antitrust regimes. These limits are assessed on three levels:

1. The basis for asserting jurisdiction, ie the legal ground justifying the application and enforcement of national competition laws in respect of (foreign) cartel conduct;
2. The object of the prosecution and sanctioning, ie the scope of what part of the overall cartel is being punished; and
3. The calculation of the cartel fine, in particular the sales or commerce on the basis of which the basic fine is determined.

States and their competition authorities can use their discretion in respect of each of these three levels to ensure that the enforcement of national competition laws is justified and proportionate in light of the nexus between any (foreign) cartel conduct and the domestic impact on competition.

The comparison between the EU and the US approach in this respect is made on the basis of the decisions and court rulings on both sides of the Atlantic in respect of the global price fixing cartel involving liquid crystal display (LCD) panels. The cartelised LCD panels were manufactured by a number of Asian producers with varying levels of direct and indirect imports into the EU and the US Both the European Commission (Commission) and the Department of Justice (DOJ) had to establish an approach to define the territorial limits to their enforcement in respect of this international cartel. They also had to defend their approach in court, as two manufacturers – InnoLux in the EU and AU Optronics (AUO) in the US – decided to fiercely fight the enforcement by the respective authorities.

Interestingly, a comparison between the EU and US sanctioning of the LCD cartel shows that while the Commission's approach was considered by many in Europe to be on or over the edge of lawful extraterritorial cartel enforcement, it went nowhere near as far as the approach of the DOJ. First, the Commission defined the territorial limits of the cartel conduct that was subject to its enforcement, something the DOJ omitted. Secondly, and more importantly, the Commission only based its fine calculation on those sales of cartelised panels that were directly imported into the European Economic Area (EEA) by the cartel members themselves, either as panels or as finished products in which the panels were incorporated. In contrast, the DOJ took into account all sales of cartelised LCD panels that ended up in finished products sold in the US, no matter how many intermediate transactions between independent parties separated the first sale by the cartel members from the import into the US

The courts in both the EU and the US confirmed the legality of the approaches by the Commission and the DOJ, both in respect of the authorities' long territorial reach and their wide discretion in determining the basis for the cartel fine. It is submitted that these legal precedents are a cause for concern in view of the increasingly crowded global arena of cartel enforcement and the growing risk of overlapping and disproportionate punishment. While there is an increased need for international principles to delineate the territorial scope of one authority's cartel enforcement from that of other authorities, the *InnoLux* and *AU Optronics* rulings do little to move the Commission and DOJ away from maintaining an isolated, solely national perspective and towards greater self-restraint in the enforcement of international cartels.

3.2 Background and overview of the LCD cartel cases

The LCD cartel concerned liquid crystal display panels, which are the main component of flat screens used in televisions, computer monitors and electronic notebooks. These panels are mainly produced in Korea, Japan and Taiwan, and subsequently either sold to third party manufacturers of computers and TVs such as Apple, Dell and Hewlett Packard, or incorporated into finished products intra-group.

The Commission and DOJ found evidence that from 2001 to 2006, six LCD manufacturers fixed prices and exchanged sensitive information, namely the Korean firms Samsung Electronics (Samsung) and LG Display (LG) and the Taiwanese firms AUO, Chimei InnoLux Corporation (InnoLux), Chunghwa Picture Tubes (Chunghwa) and HannStar Display Corporation (Hannstar).[1] To discuss and agree on prices, these companies held circa sixty so-called 'Crystal meetings', mainly taking place in hotels, tea houses and karaoke bars in Taiwan.

The investigations by the Commission and the DOJ were initiated by leniency applications submitted by Samsung in 2006. For the Commission, the subsequent investigation resulted in a decision adopted in December 2010 imposing fines for a total amount of EUR 648 million. Samsung received full immunity, and LG, AUO and Chunghwa received fine reductions under the Lenience Notice. In the US, the DOJ succeeded in securing plea agreements with LG and Chunghwa in 2008, with InnoLux in 2009 and with HannStar in 2010. The total fine amount imposed under these plea agreements was USD 715 million. Samsung satisfied the terms of its conditional leniency application and avoided a

[1] In the U.S., the DOJ also pursued three Japanese companies for their participation in separate LCD price-fixing conspiracies: Hitachi Displays, Epson Imaging Devices Corporation and Sharp Corporation. The Commission considered that it did not have sufficient evidence against certain Japanese suppliers to impose a fine on them as well. See the judgement of the General Court of 27 February 2014 in Case T-91/11, *InnoLux*, ECLI:EU:T:2014:92, para 139.

fine. Outside the EU and US, fines were also imposed in relation to the LCD cartel by authorities in Japan[2], South Korea[3], China[4] and Brazil[5].

AUO was the only conspirator pursued by the DOJ for its role in the LCD cartel that refused to enter into a plea agreement. It chose to fiercely fight the allegations in court. The key argument maintained by AUO was that the DOJ had exceeded the limits of its jurisdictional reach by applying US antitrust laws to conduct occurring in Asia. The company lost this argument both in trial before the US District Court of the Northern District of California in 2012 and on appeal before the Ninth Circuit in 2014-2015. The company was convicted to pay a USD 500 million fine, matching the highest cartel fine that was ever imposed in the US, but still only half of what the DOJ had asked for.

AUO had applied a different approach in Europe. It was the third company to file for leniency, some three months after receiving a request for information from the Commission.[6] But according to the Commission AUO "*did not show a spirit of cooperation*", tried to unduly minimise the content and meaning of available evidence through misinterpretation and insisted that the only conclusion which could be drawn from the evidence was "*that the market was highly competitive*".[7] AUO still received a 20% fine reduction. The company appealed the decision before the General Court, *inter alia* claiming a lack of jurisdiction.[8] However, it decided to discontinue these proceedings in May 2013.[9]

Innolux did pursue its appeal against the Commission's decision.[10] As one of its main grounds for appeal, InnoLux contested that the Commission had exceeded the limits of its territorial jurisdiction by taking into account internal sales of the LCD panels that were made entirely outside the EEA. The General Court dismissed Innolux's arguments on this point. But during the further appeal proceedings before the ECJ, Advocate General (AG) Wathelet did find – after a long deliberation on the territorial scope of EU competition law – that the Commission had overstretched its jurisdictional reach. The ECJ however did not follow Wathelet's opinion and instead dismissed InnoLux's appeal in its entirety in July 2015.

3.3 The EU and US approach to establishing jurisdiction

A. The EU's approach in InnoLux

In its LCD cartel decision, the Commission claimed to assert jurisdiction over the cartel members on the basis of the territoriality principle. More specifically, the Commission applied both the 'implementation' test following from the *Woodpulp* case (1988) and the 'qualified effects' test applied in the *Gencor* case (1999).[11] The implementation test considers not the location where a cartel agreement was formed but the location where a cartel agreement was implemented. The ECJ confirmed in *Woodpulp* that international cartel conduct is covered by the territoriality principle if it was implemented in the Union by cartel members selling products to customers in the Union at coordinated prices. The Commission considered the implementation test to be "*supplemented*" by the qualified effects test, which considers whether foreign conduct "*has immediate, foreseeable and substantial*

2 Japan Fair Trade Commission, 'Cease and Desist Order and Surcharge Payment Order against Manufacturers of TFT Liquid Crystal Display Module for "Nintendo DS" and "Nintendo DS Lite"' (18 December 2008) < https://www.jftc.go.jp/en/pressreleases/yearly-2008/dec/individual-000068.html>.

3 Korea Fair Trade Commission, 'KFTC Fines 10 LCD Producers 194 Billion Won for TFT-LCD International Cartel' (28 October 2011) available on KFTC website <http://www.ftc.go.kr/eng/>.

4 Kathrin Hille, 'China cracks down on global LCD cartel', *Financial Times* (4 January 2013) <https://www.ft.com/content/e449cdea-5657-11e2-aa70-00144feab49a?mhq5j=e5>.

5 Administrative Council of Economic Defense, 'Cade signs three new agreements in cartel investigations' (21 August 2014) <http://en.cade.gov.br/press-releases/cade-signs-three-new-agreements-in-cartel-investigations>.

6 *LCD* (Case COMP/39.309) Commission Decision C(2010) 8761 final (8 December 2010), paras 57, 59, 469.

7 Ibid., para 470.

8 Case T-94/11, *AU Optronics*, Application [2011] OJ C120/34.

9 Case T-94/11, *AU Optronics*, Order for Removal from Registry, ECLI:EU:T:2013:313.

10 LG Display also appealed the Commission's decision before the General Court (Case T-128/11) and the Court (Case C-227/14 P).

11 Commission decision in *LCD* (n 6), paras 230-243.

effect in the Union".[12] In most cases, the qualified effects test will be met if the implementation test is satisfied and vice versa. However, there is light between the two jurisdictional doctrines and one can think of scenarios where one test is met but not the other.[13] While the Commission has applied the qualified effects test in various cases in the past, it was only in the 2017 *Intel* judgment that its legality as a standalone basis for asserting jurisdiction over foreign anticompetitive conduct was confirmed by the ECJ.[14] This judgment and its implications are the subject of the next chapter of this dissertation.

The Commission found the implementation test to be met in the LCD cartel case as it found that LCD suppliers concerted on the prices to be charged to their customers in the EEA and put that concertation into effect by selling to those customers at prices which were actually coordinated.[15] According to the Commission, implementation of the cartel in the EEA took place through the direct sales to customers in the EEA of (i) LCD panels (so-called "*Direct EEA Sales*") and (ii) finished products that incorporate LCD panels where the incorporation took place intra-group (so-called "*Direct EEA Sales Through Transformed Products*").[16] The Commission hence implicitly excluded *Indirect Sales*, ie sales that were first sold to independent third parties outside the EEA before being imported (as part of finished monitors) into the EEA. Yet, the Commission later defended that indirect sales would have also met the jurisdictional test based on implementation.[17]

In addition, the Commission found that the LCD cartel had produced an immediate, foreseeable and substantial effect in the EEA.[18] It noted that it was not necessary for this test to be met individually by each cartel member, but rather by the cartel as a whole. The effect of the cartel was found to be immediate on the basis of the direct influence on price setting resulting from the monthly fixing of prices. The effect was regarded as foreseeable on the basis of the evident consequences of the higher prices on European customers. And it was considered substantial based on the seriousness of the infringement, its long duration and the role of the parties on the European market for final and intermediate products.

Upon appeal before the General Court, InnoLux submitted that the Commission had exceeded the limits of its territorial jurisdiction by taking into account Direct EEA Sales Through Transformed Products. The General Court rejected this claim, solely relying on the implementation test of *Woodpulp*.[19] The General Court first observed that the mere sale of cartelised products on the internal market is sufficient to constitute 'implementation' in the internal market.[20] It then held that the concept of 'undertaking' under EU competition law has to be regarded as having a decisive role in establishing the limits of the Commission's territorial jurisdiction.[21] What matters is whether a sale of the cartelised product in the EEA has taken place by the undertaking as a whole, irrespective of whether any internal transaction or transformation of the product took place between different companies belonging to the same undertaking.

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12 The Commission in its decision practice always considered the qualified effects test as an alternative test to the implementation test – as later confirmed by the ECJ in *Intel* – but this was not fully clear in the Commission's LCD decision, which states that "*all that matters is whether the cartel as a whole was implemented and had immediate, foreseeable and substantial effects in the EEA*". Ibid., para 239.

13 An export cartel preventing imports into the EU or a boycott of certain European customers may for example be caught by the qualified effects test while not being implemented within the Union. Cedric Ryngaert, *Jurisdiction In International Law: United States and European Perspectives* (2007), para 326; Opinion of AG Wahl of 20 October 2016 in *Intel*, ECLI:EU:C:2016:788, para 294.

14 ECJ judgement of 6 September 2017 in Case C‑413/14 P, *Intel*, ECLI:EU:C:2017:632, para 45, where the ECJ accepted the qualified effects test by reasoning that "[t]*he qualified effects test pursues the same objective, namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market*". See Chapter 4 of this dissertation.

15 Commission decision in *LCD* (n 6), para 236

16 Ibid., para 237.

17 EU submission for the OECD *Roundtable on Cartels Involving Intermediate Goods* (October 2015), available at <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)40&doclanguage=en>.

18 Commission decision in LCD (n 6), paras 238-239.

19 It ruled that the qualified effects test as applied in *Gencor* did not cast doubt on the *Woodpulp* case law and so in other words was considered irrelevant. General Court's judgement in Case T-91/11, *InnoLux* (n 1), para 64.

20 Ibid., para 66.

21 Ibid., para 69.

AG Wathelet delivered an elaborate opinion on the subsequent appeal lodged by InnoLux before the ECJ. Wathelet agreed with InnoLux that the Commission had indeed overstretched the territorial limits of EU competition law in its LCD cartel decision. He based his analysis both on the implementation test of *Woodpulp* and the qualified effects test of *Gencor*. Without paying attention the fact that InnoLux had also directly sold LCD panels to customers in the EEA, Wathelet found that neither test was met in the case of Direct EEA Sales Through Transformed Products. First, the implementation test was not met because (i) the actual internal sale of cartelised LCD panels by InnoLux took place outside of the EEA and (ii) the subsequent sale within the EEA of transformed products incorporating the cartelised LCD panels did not concern products that were the subject of the infringement.[22] Second, Wathelet submitted that the Commission had clearly failed to present the evidence necessary to demonstrate that the qualified effects test was met, as it had merely stated that the effects could be "*reasonably assumed*".[23] Wathelet therefore found the Commission to lack the jurisdiction to take Direct EEA Sales Through Transformed Products into account.

In contrast to the approach adopted by the General Court and the AG, the ECJ did not assess whether the Direct EEA Sales Through Transformed Products as such fell within the territorial scope of the Commission's jurisdiction.[24] Instead, it simply determined whether the cartel participants, including InnoLux, had implemented the worldwide LCD cartel in the EEA by making sales in the EEA of the goods concerned by the infringement to independent third parties.[25] The ECJ did not consider it necessary for all sales taken into account for the fine calculation to fall within the territorial scope of the Commission's jurisdiction, as long as there were at least some sales by the cartel members of the cartelised product in the EEA. This was indeed the case for the LCD cartel, since all six addressees of the Commission's decision had at least some Direct EEA Sales. The ECJ did not see any need to apply a qualified effects test for jurisdictional purposes, or in any other way question the scope of the Commission's territorial jurisdiction as applied in this case.[26] The ECJ clarified that whether the Commission was entitled to take into account Direct EEA Sales Through Transformed Products for the calculation of the fine was a question that was separate from the territorial scope of the Commission's jurisdiction.[27]

B. iiyama (UK) Ltd and others v Samsung Electronics Co Ltd and others

The applicable jurisdictional tests and the territorial scope of Article 101 in the context of the LCD cartel play a central role in the private damages proceedings before the English High Court started by iiyama, a Japanese manufacturer of television and computer monitors, against Samsung and LG, two of the addressees of the Commission's LCD cartel decision.[28] The complexity of the case results from the fact that iiyama's claims relate to LCD panels and monitors incorporating LCD panels purchased outside the EEA. The relevant products were not imported by the defendants but were solely brought into the EEA through intra-group sales by iiyama to its European subsidiaries. For this reason, the defendants consider the claims to fall outside the territorial scope of European competition law and have asked the High Court to dismiss the claims without the need to conduct trial proceedings.

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22 Opinion of AG Wathelet of 30 April 2015 in Case C-231/14 P, *InnoLux*, ECLI:EU:C:2015:292, para 31. Referring to the ECJ's earlier ruling in *Guardian Industries* (Case C-580/12 P, EU:C:2014:2363), Wathelet submitted that the implementation of the LCD cartel took place when the cartelised LCD products were sold for the first time, irrespective of whether this sale was made to a third party or intra-group. Ibid., paras 25, 29.

23 See Commission decision in *LCD* (n 6), para 394.

24 This is actually the third time the ECJ has refused to follow an AG's recommendation in respect of the applicable jurisdictional test, after doing the same in *Dyestuffs* and *Woodpulp*. See Chapter 4 of this dissertation and Peter Behrens, 'The extraterritorial reach of EU competition law revisited: The "effects doctrine" before the ECJ', Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration, No. 3/16 (2016), available at <http://hdl.handle.net/10419/148068>.

25 ECJ judgement of 9 July 2015 in Case C-231/14 P, *InnoLux*, ECLI:EU:C:2015:451, para 73.

26 It was only in the 2017 *Intel* judgement that the ECJ for the first time confirmed that the qualified effects test can be a sufficient basis for the Commission's jurisdiction. See Chapter 4 of this dissertation.

27 ECJ judgement in *InnoLux*, (n 25), para 74.

28 *iiyama (UK) Ltd and others v Samsung Electronics Co Ltd and others*, [2016] EWHC 1980 (Ch) (*iiyama v Samsung Electronics* first instance) and the subsequent appeal [2018] EWCA Civ 220 (*iiyama v Samsung Electronics* appeal).

Justice Morgan went a long way in concurring with the defendants. He considered the cartel to have been implemented only at the first step of the supply chain when LCD panels were sold to third parties (OEMs). As this step solely occurred in Asia, the basic supply line through which iiyama obtained LCD panels or monitors incorporating such panels did not involve implementation of the cartel within the territorial scope of Article 101.[29] It is also clear from the judgment that Justice Morgan did not consider the qualified effects test to be met in the case of sales of cartelised LCD panels in Asia that were imported into the EEA through intermediate steps involving third parties, presumably for a lack of an *immediate* effect.[30] However, he did not go as far as to strike out the claim or give summary judgment dismissing the claim. He considered it arguable for the claim to be based not on the purchase of cartelised products at inflated prices in Asia, but on the argument that without the implementation of the cartel in the EEA (as concluded by the Commission) purchasers such as iiyama would have bought the products not in Asia but in Europe at prices that were not inflated.[31]

In the subsequent proceedings before the Court of Appeal, Justices Longmore, Henderson and Asplin reached a different outcome, largely based on the ECJ's recognition of the qualified effects test as a standalone jurisdictional test and the ECJ's approach in applying this test in *Intel*. They saw substantial support for the argument that the qualified effects test may be satisfied in the case of a worldwide cartel which was intended to produce substantial indirect effects on the EU internal market. In particular, they were not convinced that the test of immediacy could never be satisfied because of "*the mere existence of even one prior sale to an innocent third party outside the EU at the early stage of the supply chain*".[32] For the Justices of the Court of Appeal, "[t]*he important point is that purchases are ultimately made, at an inflated cartel price, within the territory of the EU*".[33] They also did not want to rule out of the possibility of the implementation test being satisfied by the purchases made by the iiyama claimants.[34] The Court of Appeal hence ruled that the matter of territoriality must be reserved for full analysis following trial proceedings and is not suitable for summary determination on the basis of assumed facts.

The iiyama proceedings are still ongoing and may have much more valuable insights to offer. Thus far, the proceedings already show the direct impact of the ECJ's lenient jurisdictional approach in *Intel*. The Court of Appeal considers this judgment to mark "*an important new stage in the evolution of the EU jurisprudence*" on the issue of territoriality.[35] In this new stage, indirect sales into the EEA may well be considered sufficient to meet the applicable jurisdictional tests.[36]

C. The US approach in AU Optronics

The DOJ's indictment against AUO alleged that AUO and other co-conspirators had entered into a conspiracy to suppress and eliminate competition by fixing the prices of LCD panels in the US and elsewhere, in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act.[37] AUO moved to dismiss the indictment for failure to allege an adequate jurisdictional basis.[38] First, it argued that the indictment should have alleged that there were "*intended and substantial effects in the United States*". This argument was based on the Supreme Court's 1993

29 *iiyama v Samsung Electronics first instance* (n 28), para 42.

30 This is in line with the prior assessment of Justice Mann in parallel private damages proceedings by iiyama in relation to the CRT cartel. Justice Mann considered the sales of cartelised products in Asia to merely result in "knock-on effects" in the EU, not an immediate effect. *iiyama and others v Schott and others* [2016] EWHC 1207 (Ch), para 148.

31 *iiyama v Samsung Electronics first instance* (n 28), paras 43-49.

32 *iiyama v Samsung Electronics* appeal (n 28), para 98.

33 Ibid., para 100.

34 Ibid., para 102. It is striking that the Court of Appeal disagreed with the view of Justice Mann in light of the ECJ judgement, because the ECJ did not say anything of substance concerning the implementation test in *Intel*.

35 Ibid., para 101.

36 As noted above, this is already the position of the Commission, although the Commission has acknowledged that it has not yet pursued any cases purely on the basis of indirect sales. EU submission for the OECD *Roundtable on Cartels Involving Intermediate Goods* (n 17).

37 Superseding Indictment, *United States v. AU Optronics Corp.*, No. CR 09-0110-SI (N.D. Cal. 10 June 2010), p. 2.

38 Order Denying Defendants' Motion To Dismiss the Indictment, *United States v. AU Optronics Corp.*, No. CR 09-0110-SI (N.D. Cal. 18 April 2011).

judgment in *Hartford Fire*[39] and the First Circuit's 1997 ruling in *Nippon*, the latter stating that "*Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States*".[40] Judge Illston dismissed the argument on the basis that the LCD cartel did not involve "*wholly foreign conduct*" given the overt acts both inside and outside the U.S by various co-conspirators, including AUO's US subsidiary.[41] Secondly, AUO argued that because the LCD cartel included conduct occurring outside the US, the indictment had to plead facts sufficient to establish that the domestic effects test of the Foreign Trade Antitrust Improvements Act (FTAIA) was met.[42] The FTAIA excludes from the scope of the Sherman Act all non-import trade with foreign nations, except where such foreign trade has a direct, substantial, and reasonably foreseeable effect on domestic commerce and where this effect gives rise to a claim under the Sherman Act.[43] Judge Illston dismissed this argument as well. She found that the criminal charges were based at least in part on conduct involving import trade, to which the FTAIA's general exclusionary rule does not apply.[44]

The next battle to be fought regarding the DOJ's jurisdiction was over the jury instructions, which guided the jury on the applicable law and indicated, in layman's terms, what the government had to prove for the jury to come to a conviction. AUO had requested the jury to be instructed that it must find the substantive elements to be met of both *Hartford Fire*, meaning a "*substantial and intended effect*" on US commerce, and the FTAIA, meaning according to AUO that its conduct had to involve import trade by being directed at the US import market.[45] The DOJ considered neither instruction to be appropriate, as it claimed the case against AUO to involve "*domestic conduct and domestic victims*".[46] Instead, its proposed jury instruction merely referred to the government's need to prove that at least one co-conspirator had transported LCD panels across state lines or between any part of the US and any other country.[47]

Judge Illston decided to give instructions to the jury on the application of the Sherman Act in accordance with *Hartford Fire* and the FTAIA, as requested by AUO. But she significantly limited the scope of the applicable tests. Pursuant to her instructions, the jury did not have to find a "*substantial and intended effect*" in the US if the government had proved "*that at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States*".[48] Illston further instructed that the domestic effects test of the FTAIA did not have to be satisfied if the government had proved that the members of the conspiracy engaged in fixing the price of LCD panels targeted by the participants to be sold in the United States or for delivery to the United States. [49] Following the trial proceedings, the jury found AUO guilty of violating the Sherman Act as charged.[50]

On appeal before the Ninth Circuit, Judge McKeown stated that the appeal raised "*complicated issues of first impression regarding the reach of the Sherman Act in a globalized economy*".[51] In its initial order filed 10 July 2014, the Ninth Circuit held that it may have been questionable whether the effects of AUO's foreign sales were sufficiently *direct* to satisfy the domestic effects test of the FTAIA. But it ruled that it was not necessary to resolve this issue because the evidence demonstrating import trade alone was sufficient to convict the defendants of price-fixing in violation of the Sherman Act.[52] It

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39 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

40 *United States v. Nippon Paper Industries Company*, 109 F.3d at 9 (1st Cir. 1997).

41 Order Denying Defendants' Motion To Dismiss the Indictment (n 38), p. 4-5. Judge Illston held that even if the Nippon test were to apply, the indictment contained sufficient allegations to establish an "*intended and substantial effect in the United States*".

42 Ibid., p. 7.

43 15 U.S.C. § 6a.

44 Order Denying Defendants' Motion To Dismiss the Indictment (n 38), p. 7.

45 Defendant's Proposed Preliminary Jury Instructions on the Elements of the Offense, and Memorandum in Support of Proposed Instructions, *United States v. AU Optronics Corp.*, No. CR 09-0110-SI (N.D. Cal. 2 November 2011).

46 United States' Opposition to Defendants' Proposed Preliminary Jury Instructions on the Elements of the Offense; United States' Proposed Alternative Preliminary Instruction, *United States v. AU Optronics Corp.*, No. CR 09-0110-SI (N.D. Cal. 23 November 2011), p. 1.

47 The DOJ did propose an alternative instruction on the FTAIA should the court consider that appropriate. Ibid., p. 7.

48 Jury Instructions, *United States v. AU Optronics Corp.*, No. CR 09-0110-SI (N.D. Cal. 1 March 2012), p. 10.

49 Ibid.

50 Special Verdict Form, *United States v. AU Optronics Corp.*, No. CR 09-0110-SI (N.D. Cal. 13 March 2012).

51 Order and Amended Opinion, *United States v. Hsiung*, No. 3:09-cr-00110-SI (9th Cir. 30 January 2015), p. 7-8. The proceedings against AUO have been combined with the proceedings against other AU Optronics corporate and individual defendants (eg Hsiung).

52 Opinion by Judge McKeown, *United States v. Hsiung*, No. 3:09-cr-00110-SI (9th Cir. 10 July 2014), p. 39-42.

found the government to have sufficiently pleaded and proved that the conspirators had engaged in import commerce, because it found at least a portion of the transactions in this case to involve direct importation of LCD panels into the US[53] This was despite AUO's claim that virtually all of its sales of LCD panels were to customers outside the US for incorporation into finished products that were sold globally.[54] On 30 January 2015, the Ninth Circuit filed an amended order and opinion in which it reversed its ruling in respect of the FTAIA's domestic effects test. The Ninth Circuit now found that "[l]*ooking at the conspiracy as a whole*", the conduct was sufficiently direct, substantial and reasonably foreseeable with respect to the effect on US commerce.[55] It considered there to be an "*integrated, close and direct connection between the purchase of the price-fixed panels, the United States as the destination for the products, and the ultimate inflation of prices in finished products imported to the United States*".[56] Still, the Ninth Circuit repeated that the evidence in support of the import trade theory alone was sufficient to convict the defendants.[57]

D. Motorola Mobility LLC v. AU Optronics Corp.

In addition to the DOJ's criminal prosecution of AUO, various civil suits were brought against the company and its co-conspirators in the US One of these suits was the claim for treble damages put forward by US mobile devices manufacturer Motorola. Its claim related in part to foreign sales of cartelised LCD panels to Motorola's Asian subsidiaries for incorporation into mobile phones that were subsequently imported into the US[58] A key focus of the *Motorola* legal proceedings was on whether pursuant to the applicable jurisdictional tests, Motorola could claim damages under US antitrust laws in respect of these foreign sales. The Seventh Circuit ruled that this was not the case and that it was for the injured foreign subsidiaries of Motorola to seek remedies for violations of the antitrust laws in the countries in which they do business, not in the US[59]

In its initial opinion, the Seventh Circuit decided that the foreign sales of cartelised LCD panels lacked a *direct* effect on US commerce, and therefore failed to satisfy the FTAIA's domestic effects test.[60] Moreover, even if the effect would have been direct, the Seventh Circuit found that it was the foreign conduct and effects that gave rise to Motorola's antitrust claims, and not the effect on US commerce as required by the FTAIA.[61] Following this initial opinion, Motorola successfully petitioned for rehearing of the case. Various parties filed amicus curiae briefs to express their opinions on the matter. On the one hand, several foreign nations, including Japan, Korea, Taiwan and Belgium, expressed their opposition to an unreasonably expansive extraterritorial application of US antitrust law.[62] On the other hand, the DOJ and Federal Trade Commission (FTC) submitted briefs arguing that the Seventh Circuit had applied the FTAIA criterion of *directness* too narrowly.[63]

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53 Ibid, p. 31-36. The Ninth Circuit did not consider it necessary to address the issue of whether it was sufficient for conduct to be directed at a U.S. import market rather than involving direct importation. See p. 33, footnote 7.

54 Opening Brief for Defendants-Appellants AU Optronics Corporation and AU Optronics Corporation America, *United States v. AU Optronics Corporation* and *United States v. AU Optronics Corporation America*, No. 3:09-cr-00110-SI (9th Cir. 4 February 2013), p. 60-62.

55 Order and Amended Opinion, *United States v. Hsiung* (n 51), p. 41.

56 Ibid., p. 43.

57 Ibid., p. 44.

58 Memorandum Opinion and Order, *Motorola Mobility v. AU Optronics Corporation, et al.*, No. 1:09-cv-06610 (N.D. Ill. 23 January 2014), p. 2.

59 Ibid., p. 7.

60 Decision Re: Petition for Leave to Take an Interlocutory Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, *Motorola Mobility v. AU Optronics Corporation, et al.*, No. 14-8003 (7th. Cir. 27 March 2014), p. 4.

61 Ibid., p. 5-7. The domestic effect identified by the Seventh Circuit was based on the prices charged by Motorola for its finished products in the U.S. But it was not this effect that gave rise to Motorola's claim. Instead, it was the effect of the alleged price fixing on Motorola's foreign subsidiaries.

62 See Supplemental Brief for the United States as Amicus Curiae, *Motorola Mobility v. AU Optronics Corporation, et al.*, No. 14-8003 (7th. Cir. 27 June 2014), p. 1-3; Brief of the Belgian Competition Authority as Amicus Curiae in Support of Appellee's Position Seeking Affirmation of the District Court's Order, *Motorola Mobility v. AU Optronics Corporation, et al*., No. 14-8003 (7th. Cir. 9 October 2014).

63 Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing *En Banc*, *Motorola Mobility v. AU Optronics Corporation, et al.*, No. 14-8003 (7th. Cir. 24 April 2014); Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party, *Motorola Mobility v. AU Optronics Corporation, et al.*, No. 14-8003 (7th. Cir. 5 September 2014). The DOJ and FTC were not so much concerned with a narrow interpretation of the "*gives rise to*" element, which merely relates to a plaintiff's claim in a civil context and therefore does not affect the authorities' jurisdictional reach. The Seventh Circuit seems to have agreed with this point. Amended Opinion, *Motorola Mobility v. AU Optronics Corporation, et al*., No. 14-8003 (7th Cir. 15 January 2015), p. 19.

After rehearing, the Seventh Circuit came back on its initial assessment of the effect of the foreign sales on US commerce. It held in its final ruling that this effect "*might well be direct*".[64] While it still considered the domestic effect of the foreign sales to probably have been modest, the Seventh Circuit assumed the FTAIA's domestic effects test to have been satisfied. This was ultimately not decisive as the Seventh Circuit ruled that Motorola's claims in respect of the foreign sales could in any event be dismissed for failure to give rise to a claim under the Sherman Act.

Because the Seventh Circuit's ruling ultimately rested on the *gives rise to* element of the FTAIA – which is only relevant in a civil damages claims context – the judgment does not limit the jurisdictional reach of the DOJ in future criminal cases. The *Motorola* judgment also does not directly contradict the final ruling of the Ninth Circuit in *AU Optronics*, despite the application of slightly different interpretations of what constitutes import commerce[65] and what constitutes a *direct* effect.[66] Both courts came back on their initial scepticism concerning the directness of the effect of foreign sales of LCD panels on US commerce, and ultimately accepted or assumed that the domestic effects test under the FTAIA was met. A notable difference between the civil *Motorola* and the criminal *AU Optronics* proceedings is that international comity considerations seemed to have only played a significant role in the former.[67] It is not evident why an over-expansive application of US antitrust laws would harm the interests of foreign nations more in a civil context than in a criminal context.[68]

E. Comparing the EU and US approach to establishing jurisdiction

The outcomes of the *InnoLux* and *AU Optronics* proceedings show that in both the EU and the US, little is required to justify the exercise of jurisdiction over foreign cartel conduct. It is sufficient for there to have been at least some import of cartelised products by the cartel members. In the US, the Ninth Circuit left open whether this may be based on mere indirect imports effected through unrelated third party undertakings, whereas the Seventh Circuit appears to hold that only direct imports can avoid application of the FTAIA's general exclusionary rule. The LCD Commission decision and the *Innolux* ruling are based on the view that the implementation test is met on the basis of direct imports into the EEA by the cartel members. While the Commission has later defended that the test would also be met by indirect imports, it has apparently not been so sure of this position to apply it in the LCD decision. Importantly, the ruling of the General Court in *Intel* allows for the test to be achieved not just on the basis of direct sales by the infringing undertaking(s), but also on the basis of the implementation of certain conduct by the customer of such undertaking(s).[69] The ECJ did not endorse or dismiss this wider interpretation in the *Intel* appeal.[70] Still, the *Iiyama* private litigation shows that – similar to the situation in the US – it cannot currently be excluded that indirect imports may be sufficient to establish the necessary jurisdictional nexus for public cartel enforcement.

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64 Amended Opinion in *Motorola Mobility v. AU Optronics* (n 63) , p. 5.

65 On the circuit split in respect of the definition of import trade or commerce, see also Lauren Giudice, 'What effects are "Direct" Enough to Satisfy the FTAIA: An Analysis of 2014 FTAIA Decisions in Foreign Trade Antitrust Improvements Act', *Boston University International Law Journal* (29 April 2015), available at < https://www.bu.edu/ilj/2015/04/29/what-effects-are-direct-enough-to-satisfy-the-ftaia-an-analysis-of-2014-ftaia-decisions/>.

66 The two Circuit Courts did apply a different interpretation of "direct effects", with the Ninth Circuit requiring an effect to "follow as an immediate consequence", and the Seventh Circuit merely requiring a "reasonably proximate causal nexus". Ibid.

67 The DOJ and Seventh Circuit imply that comity considerations did not play a part in the criminal proceedings against AUO, but the government of Taiwan did submit an amicus curiae brief in respect of the imposed penalty. Motion to File Amicus Letter Brief of the Ministry of Economic Affairs of the Republic of China in Support of Defendant AUO's Petition for Panel Rehearing, *United States v. AU Optronics Corporation* and *United States v. AU Optronics Corporation America*, No. 3:09-cr-00110-SI (9th Cir. 4 September 2014).

68 See Laura S. Shores, 'The Starting Point: Negotiating "Volume of Commerce" with the Antitrust Division', *Cartel and Criminal Practice Committee Newsletter*, available at <http://www.pepperlaw.com/uploads/files/shores_abacartelcriminalpractice_02_2012.pdf>, p. 12. Connolly suggests that this may be because foreign competition authorities may benefit from the DOJ leading the way in prosecuting international cartels, while still having sufficient consideration for comity concerns, in contrast to private plaintiffs. Robert E. Connolly, 'Repeal the FTAIA! (Or At Least Consider It as Coextensive with *Hartford Fire*)', *CPI Antitrust Chronicle* 1 (September 2014), available at <https://www.competitionpolicyinternational.com/assets/Uploads/ConnollySEP-141.pdf>, p. 4-5. Another explanation might be related to the controversial treble damage remedies offered under U.S. laws.

69 Behrens has commented on the judgement by the General Court that is a welcome opportunity to ensure the EU's 'long arm' would finally become equally long as that of the US. Behrens (n 24), p. 14.

70 The fact that the ECJ has chosen to solely relied on the qualified effects test and has avoided confirming the General Court's application of the implementation test seems a strong indication that it has its reservations about the approach. This is understandable also given the strong criticism of AG Wahl, see Opinion of AG Wahl (n 13), paras 311-313.

As an alternative to an imports-based test, jurisdiction can also be asserted in both the EU and the US on the basis of a qualified effects test. The status of this test under EU law was unclear for a very long time, until it was acknowledged by the ECJ as a standalone jurisdictional test in 2017 in the *Intel* case. Based on the rulings of the Ninth and Seventh Circuits, it appears that the required direct, foreseeable and substantial effect on the domestic commerce under the FTAIA can be applied to the conspiracy as a whole, and can be met even where one or more intermediate transactions separate the first sale of a cartelised product from its first sale in the US It is interesting that AG Wathelet in his opinion in *InnoLux* referred to the Seventh Circuit's initial opinion in *Motorola* where it found a mere *indirect* effect on domestic commerce of foreign sales of LCD panels that were subsequently imported into the US as part of finished products. He did not refer to the Seventh Circuit's final judgment in which it had reversed its ruling on this point. Moreover, he did not discuss the Ninth Circuit's ruling in the criminal proceedings against AUO, which seemed even less restrictive in its view on the territorial application of the Sherman Act. It is not clear whether the ECJ would have allowed for a lenient application of the qualified effects test similar to that maintained by the Ninth Circuit, as it solely relied on the implementation test in the *InnoLux* appeal. But the ECJ's judgment in the *Intel* case seems to point in this direction. In this case the ECJ held that for the application of the qualified effects test, the Commission was allowed to consider the relevant conduct as a whole and take into account the overall intended strategy in determining whether particular conduct outside the EEA was capable of producing an immediate effect in the EEA.[71]

The *Motorola* and *iiyama* litigation in the US and the United Kingdom respectively confirms that in a private enforcement setting, the jurisdictional tests are not merely relevant for confirming the ability to pursue the conduct. Rather, they define the scope of the liability and the scope of the sales in relation to which claims can be made. In its *Motorola* judgment, the Seventh Circuit has drawn a clear line in the sand barring claimants from bringing claims under the Sherman Act in relation to indirect sales into the US. The turn in the *iiyama* litigation in the United Kingdom – inspired by the lenient jurisdictional approach adopted by the ECJ in *Intel* – seems to go in a different direction. Under the latter approach, the focus is not on the need to avoid an overly expansive legal system but on the need to avoid an artificial fragmentation of infringements as a result of which certain conduct may escape jurisdiction.[72]

3.4 The EU and US approach to defining the territorial scope of sanctioned cartel conduct

A. The EU's approach in InnoLux

In its decision, the Commission stated that "[a]*s regards the geographic scope, the infringement covered the entire EEA. In fact, the geographic scope of the cartel was more than EEA wide, namely world-wide*".[73] Other sections in the decision clarify that the Commission only identified an infringement insofar as the arrangements affected competition within the EEA and trade between EEA Member States – as required by the substantive elements of Article 101 TFEU.[74] Activities of the cartel relating to sales in countries outside the EEA were expressly considered to lie outside the scope of the Commission's decision.[75] The infringement identified by the Commission can hence be considered to exclude indirect sales into the EEA.[76] The territorial scope of the infringement is therefore aligned with the scope of conduct that was demonstrated by the Commission to meet the applicable jurisdictional tests.

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71 ECJ judgement in *Intel* (n 14), paras 48-58.

72 *iiyama v Samsung Electronics* appeal (n 28), para 99, referring to para 57 of the ECJ's judgement in *Intel* (n 14).

73 Commission decision in *LCD* (n 6), para 408. At least one of the addressees, Hannstar, seems to have considered that the Commisson wrongly regarded the geographic scope to be world-wide, see para 412.

74 Ibid., para 229.

75 Ibid., para 331.

76 See the conclusion reached by Justice Mann on the similar exclusion of indirect sales by the Commission in the CRT cartel. *iiyama and others v Schott and others* (n 30), paras 52 and further.

It is interesting in this context to consider the ECJ's approach in *Intel*. In the Intel decision, the Commission identified various abuses and considered those abuses to constitute a single and continuous infringement. One of the abuses consisted of Intel making inducement payments to Lenovo, a computer OEMs that only purchased the relevant microprocessors from Intel in Asia. Intel argued in the appeal proceedings before the General Court and the ECJ that this alleged abuse fell outside the territorial scope of the Commission's jurisdiction to apply Article 102 TFEU. Both courts rejected Intel's argument. The courts did not reject the argument simply by pointing to the single and continuous infringement involving at least some direct sales in the EEA satisfying the implementation test or the qualified effects test. Neither did the courts reject the argument by confirming the satisfaction of one or both jurisdictional tests specifically by the identified abuse relating to the inducement payments to Lenovo. Instead, the ECJ ruled that it was sufficient for the qualified effects test to be met by the overall exclusionary strategy, viewed as a whole, of which this conduct was part.[77] The risk of this approach is that it opens the door to the application of Articles 101 and 102 TFEU to conduct with insufficient nexus to the EEA on the back of other conduct that does satisfy the applicable jurisdictional tests.

By applying the ECJ's reasoning in *Intel*, the English Court of Appeal has seen sufficient arguments for the view that sales of cartelised LCD panels to unrelated third parties in Asia may fall within the territorial scope of Article 101 TFEU. If this were to be confirmed, it would mean that the Commission may no longer hold back on finding an infringement (also) on the basis of indirect sales.

B. The US approach in AU Optronics

The DOJ's indictment charged AUO with a violation of Section 1 by entering into a conspiracy to agree to fix the prices of LCD panels for use in notebook computers, desktop computer monitors, and televisions "*in the United States and elsewhere*".[78] The final jury instructions only clarified the elements that had to be proved to establish a sufficient basis for the conduct to be caught by Section 1 of the Sherman Act. Nothing in the indictment or jury instructions suggests that if found guilty, the territorial scope of AUO's infringement was geographically limited in any way. It was only in the context of the discussion on the maximum fine that Judge Illston hinted at such a limitation, where she stated that "[t]*he "offense" at issue is the conspiracy to fix prices of TFT-LCD panels within the United States*".[79] This seems to indicate that for Judge Illston the alleged infringement was territorially limited to that part of the conspiracy that had an effect on the US The Ninth Circuit's affirmative ruling did not shed any further light on the territorial limits of AUO's infringement under the Sherman Act.

It is interesting that in a criminal context there appears to be no need to identify and delineate only that part of the cartel conduct that falls within the scope of the Sherman Act. As long as at least some of the sales meet the applicable jurisdictional test(s), the conspiracy as a whole seems to be brought within the DOJ's grasp. This situation is clearly different in a civil context, where the courts award damages claims only to the extent to which they relate to sales that are within the scope of the Sherman Act. Even the DOJ and FTC agreed with this approach in *Motorola*, stating that "[p]*ermitting Motorola to recover on all its claims because it purchased some panels in import commerce would allow recovery for independently caused foreign injuries on the basis of happenstance*".[80] It is arguably difficult to justify why in the same logic the DOJ should not be barred from pursuing and sanctioning conduct that is only within its reach because it happens to include some transactions with a sufficient nexus to the US

77 ECJ judgement in Intel (n 14), paras 48-58.

78 Superseding Indictment (n 37), p. 2.

79 Order Re: Preliminary Jury Instructions, *United States v. AU Optronics Corp.*, No. CR 09-0110-SI (N.D. Cal. 23 December 2011), p. 2.

80 Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party, *Motorola Mobility v. AU Optronics* (n 63), p. 15.

C. Comparing the EU and US approach to defining the territorial scope

There is a notable difference between the two jurisdictions in terms of defining the scope of sanctioned cartel conduct. In the EU, the Commission has clearly made an effort to express in its LCD cartel decision what part of the worldwide cartel conduct it targeted. In view of the later *Intel* ruling, the Commission may have even taken a conservative approach in this respect by only pursuing those effects of the cartel for which it had found the applicable jurisdictional tests to be satisfied. The US approach in the proceedings against AUO was markedly different. Once the application of the Sherman Act was confirmed, the DOJ and US courts were not bothered with clearly breaking down the cartel conduct into a part that is grasped by the US antitrust laws and a part that is not. The absence of such delineation makes it difficult to make a convincing claim that there is no overlap between the sanctioned conduct pursued by the DOJ and that targeted by the authorities of other states.[81]

3.5 The EU and US approach to calculating the cartel fine

A. The EU's approach in InnoLux

The Commission's fining guidelines stipulate that cartel fines are calculated by first determining a basic amount for each undertaking and then determining whether there is a need to adjust this basic amount upwards or downwards based on aggravating and mitigating circumstances.[82] The starting point for the calculation of the basic amount is "*the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA*".[83] Once the total value of relevant sales is established, a proportion of up to 30% is applied to this value and the resulting figure is multiplied by the number of years of infringement.[84] In addition, the basic amount also includes an additional sum (the 'entry fee') of between 15% and 25% of the value of sales to deter undertakings from even entering into cartel agreements.[85]

In its LCD cartel decision, the Commission identified three types of sales of LCD panels that it considered directly or indirectly concerned by the infringement *in the EEA*:

a) *Direct EEA Sales* – sales of LCD panels to other undertakings in the EEA;

b) *Direct EEA Sales Through Transformed Products*[86] – sales to other undertakings in the EEA of panels that were first sold intra-group outside the EEA for incorporation into a monitor;

c) *Indirect Sales* – sales of panels to other undertakings outside the EEA for incorporation into a monitor that is subsequently sold by those purchasing undertakings in the EEA.[87]

The Commission decided to include in the relevant value of sales both Direct EEA Sales and Direct EEA Sales Through Transformed Products. According to the Commission, in both situations the first sale of the cartelised product is made to an independent customer in the EEA, so that "*a direct link with the EEA territory is established*".[88]

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81 Cf. the ECJ's judgement in Case C-17/10, *Toshiba*, ECLI:EU:C:2012:72, paras 101-102, where it ruled that a fine imposed by the Commission not cover any anti-competitive consequences of the relevant cartel in the territory of the Czech Republic in the period prior to 1 May 2004 – and hence did not violate the principle of *ne bis in idem* – by looking at the fining decision's language on the scope of the punished conduct and the method of calculating the fine.

82 Commission, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* [2006] OJ 210/2, points 9-11.

83 Ibid., point 13.

84 Ibid., points 19-24.

85 Ibid., point 25.

86 Interestingly, the Commission initially labelled this category of sales as "indirect EEA sales". Commission decision in *LCD* (n 6), footnote 384.

87 Ibid., para 380.

88 Ibid., para 393.

Notably, the Commission stated that it could have included the Indirect Sales in the relevant value of sales as well, but that it decided not to do so in this case as sufficient deterrence was already achieved without including these sales.[89] In its decision, the Commission did not explain on what grounds it could have taken the Indirect Sales into account for the fine calculation other than qualifying it as sales directly or indirectly concerned by the infringement in the EEA. It is hence unclear whether the Commission also considered a *direct link with the EEA* to exist in the case of Indirect Sales (which seems unlikely based on the Commission's own reasoning) or whether it considered such a link not be required (which seems equally unlikely because why would the Commission otherwise refer to this link to justify the inclusion of both Direct Sales and Direct EEA Sales Through Transformed Products?). It is also unclear whether in the context of assessing the presence of a *direct link* with or a *strong nexus* to the EEA, the Commission saw any need to apply the jurisdictional tests of implementation and/or qualified effects. The Commission does at some point appear to refer to these tests in justifying the scope of the relevant sales, but does this too implicitly to draw a clear conclusion.[90] In any event, the Commission apparently considered the inclusion of the Indirect Sales to have been possible within the applicable legal framework and the decision whether or not to do so to be solely dependent on its enforcement discretion.

The General Court ruled in InnoLux's appeal that the Commission was correct in including the Direct EEA Sales Through Transformed Products in the relevant value of sales. The General Court did not accept the argument that those sales could only be included if an infringement was established in respect of the transformed products. This was because not the full value of sales of those products was included by the Commission but only the proportion of that value represented by the incorporated LCD panels.[91] The General Court held that the Commission could rely on turnover achieved in the sale of LCD panels "*provided that the turnover resulted from sales having a link with the EEA*".[92] Such a link was found to exist where cartelised LCD panels were transferred intra-group and incorporated into finished products that are sold to third parties within the EEA. Conversely, the General Court did not consider such a link with the EEA to exist – or considered that link to be "*too weak*" – where the first sale of the cartelised products to a third party occurred outside the EEA.[93] This indicates that the General Court would not have accepted the inclusion of Indirect Sales in the relevant value of sales if the Commission had chosen to do so.

AG Wathelet maintained a far more restrictive view. He found that the use of the concept of 'Direct EEA Sales Through Transformed Products' by the Commission artificially changed the location of the transaction from the place where the cartelised LCD panels were delivered (intra-group) to the place of sale of the finished products in which LCD panels were incorporated. Such sales could only be taken into account if the Commission was able to demonstrate that these sales could be considered an implementation of the LCD cartel in the meaning of *Woodpulp*, or that through these sales the cartel produced immediate, substantial and foreseeable effects in the EEA. Both tests go further than merely requiring sales to have "*a link with the EEA*".[94] According to Wathelet, neither test was met in the case of Direct EEA Sales Through Transformed Products, which is why he proposed to exclude those sales from the relevant value of sales used for the calculation of the basic fine amount.

As mentioned above, the ECJ separated the question whether the Commission had jurisdiction to sanction the LCD cartel (applying the implementation test of *Woodpulp*) from the question whether the Commission was entitled to take into account Direct EEA Sales Through Transformed Products for determining the level of the fine. In assessing that latter question, the ECJ first noted that these

89 Ibid., para 381. The Commission was asked to further explain its decision not to include Indirect Sales during the OECD *Roundtable on Cartels Involving Intermediate Goods*, but it merely repeated that this was not necessary for deterrence purposes. Summary of Discussion of the OECD *Roundtable on Cartels Involving Intermediate Goods* (7 February 2017), available at <https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN2/FINAL/en/pdf>, p. 7.

90 Commission decision in *LCD* (n 6), para 400.

91 General Court's judgement in *InnoLux* (n 1), para 45.

92 Ibid., para 47.

93 Ibid., paras 86-87.

94 Opinion of AG Wathelet in *InnoLux* (n 22), para 65.

sales were indeed not made on the product market concerned by the infringement, but on the downstream market for finished products incorporating the cartelised LCD panels.[95] Still, the ECJ ruled that the General Court did not err in law in holding that the Commission could nevertheless take into account those sales to calculate the amount of the fine, in particular because the Commission had only included that proportion of sales that corresponded to the value of the cartelised LCD panels incorporated in the finished products.[96] The ECJ further held that it would be contrary to the goal pursued by the fining provision of Article 23(2) of Regulation 1/2003 if vertically-integrated participants in a cartel could have their sales of cartelised goods in the EEA excluded from the calculation of the fine solely on the basis that they first incorporated those goods into finished products outside the EEA.[97] The ECJ found the sale of the finished products to third parties in the EEA to be "*liable to affect competition on the market for those products, and, therefore, such an infringement may be considered to have had repercussions in the EEA, even if the market for the finished products in question constitutes a separate market from that concerned by the infringement*".[98] The ECJ therefore upheld the General Court's finding that the sale of the finished products was related to the infringement in the EEA, and could be taken into account for calculating the fine.[99]

The ECJ did not rule on whether the value of sales could have also included Indirect Sales, which the Commission had claimed it could but chosen not to do. It seems doubtful that such inclusion would have been accepted by the ECJ. This is because its reasoning for allowing the relevant value of sales to include Direct EEA Sales Through Transformed Products relied to a large extent on the need to avoid vertically integrated LCD manufacturers from escaping a proportionate fine merely because of an internal transaction. The same reasoning does not hold when sales into the EEA are made by independent third parties.

InnoLux had made the argument that the Commission's approach allowed for the same turnover to also be taken into account by other competition authorities, resulting in the same conduct giving rise to concurrent penalties. This argument was supported by Wathelet.[100] But the ECJ dismissed the argument by simply stating that neither the principle of *non bis in idem* nor any other principle of law obliges the Commission to take account of proceedings and penalties in non-Member States.[101]

The outcome reached by the ECJ is certainly not above criticism.[102] Bentley and Henry for example consider the reasoning of the ECJ in *InnoLux* to be dangerous because "*it opens the way for abandoning all considerations of jurisdiction in the interests of enlarging the volume of sales on which the fine is calculated*".[103] Ritzenhoff even wrote that following the ECJ's judgment in *InnoLux* "[t]*he theoretical limits to the territorial jurisdiction of the Commission will most probably not deter the Commission from assuming jurisdiction for the inclusion of all different types of sales regardless where they were made in the world*".[104] However, others have applauded the ECJ for its judgment. Martyniszyn for example welcomes the ECJ's focus on the economic significance of an infringement regardless of the

95 ECJ judgement in *InnoLux*, (n 25), para 52.

96 Ibid., para 53.

97 Ibid., para 55.

98 Ibid., para 57.

99 Ibid., para 61. In this finding, the ECJ seems to focus more on the distortive effects to competition in the EEA of the sale of finished products than on the effects of the infringement on the prices of the finished products (which would likely have been affected by numerous factors). However, as noted by Wathelet, the Commission had not in its decision chosen the avenue of proving that the cartel also led to the distortion of competition in the market for finished products in the EEA. See also Philip Bentley and David Henry, 'Calculating the Cartel Fine: A Question of Jurisdiction or a Question of Economic Importance?' 39 *World Competition Law and Economics Review* 3 (2016), p. 442. See also Opinion of AG Wathelet in *InnoLux* (n 22), paras 57-58. The ECJ did also refer to the fact that the cartel members had been aware that the price of cartelised LCD panels affected the price of finished products (para 58). But the ECJ seems to attach less weight to this finding than to the finding that the sale of finished products incorporating cartelised LCD panels itself distorted competition in the EEA. ECJ judgement in *InnoLux*, (n 25), para 61.

100 Opinion of AG Wathelet in *InnoLux* (n 22), paras 42-43.

101 ECJ judgement in *InnoLux*, (n 25), para 75.

102 See eg Bentley and Henry (n 99); Sunny S.H. Chan, 'InnoLux Corp v European Commission: establishment of the effects doctrine in extra-territoriality of EU competition law?' 36 *ECLR* 11 (2015). For a positive view, see Marek Martyniszyn, 'How high (and far) can you go? On setting fines in cartel cases involving vertically-integrated undertakings and foreign sales', 37 *ECLR* 3 (2016), p. 99-107.

103 Bentley and Henry (n 99), p. 443.

104 Lukas Ritzenhoff, 'Indirect Effect: Fine Calculation, Territorial Jurisdiction, and Double Jeopardy', 6 *Journal of European Competition Law Law & Practice* 10 (2015), p. 701.

level of vertical integration and international business structure of individual undertakings.[105] With a view to maintaining sufficient deterrence for international cartel behaviour, he favours the endorsement by the EU courts of a more expansive approach by the Commission (eg including cases where harm to EU markets can be identified even without any direct sales to customers in the EEA).

B. The US approach in AU Optronics

Pursuant to the US Sentencing Guidelines, cartel fines are calculated by first determining a base fine and then applying to the base fine multipliers to arrive at a fine range to guide the court in its ultimate fine decision.[106] While US courts must consider the fine calculation according to the Sentencing Guidelines, they are no longer binding following the 2005 Supreme Court judgment in *United States v. Booker*.[107] Similar to the fining policy in the EU, the base fine in the US is linked to the volume of sales or commerce affected by the conspiracy. In a domestic context, what constitutes 'affected' commerce has been interpreted to be "*very broad and would include all commerce that was influenced, directly or indirectly, by the price-fixing conspiracy*".[108] The Sentencing Guidelines provide that the base fine for cartels is calculated by taking 20% of the volume of affected commerce.[109] This percentage is a proxy for the overcharge that cartels are believed to cause (10%) plus the additional harm to consumers resulting from the fact that some consumers will choose not to purchase the cartelised products because of the higher price (another 10%).[110]

Once the base fine is set, a fining range is determined by applying to the base amount a minimum and a maximum multiplier that are based on a culpability score.[111] The ultimate step in the determination of a cartel fine is to ensure the total fine does not exceed the statutory maximum. The maximum fine under the Sherman Act is USD 100 million (15 USC. § 1). But the DOJ may rely on the alternative fine statute of 18 USC. § 3571(d), which allows for a fine amount of up to twice the pecuniary gain or twice the pecuniary loss resulting from the offense.

By the time the DOJ developed its proposed sentencing methodology for AUO, it had already entered into plea agreements with the other LCD cartel members (excluding Samsung). These plea agreements reveal little about the way the fine amounts were determined, but court documents indicate that the volume of affected commerce took into account the following three types of sales:

- LCD panels imported directly into the US;
- LCD panels billed or invoiced to purchasers located in the US; and
- LCD panels sold to foreign affiliates of US companies that were integrated into final products imported into the US[112]

The DOJ decided to follow a different methodology in the proceedings against AUO.[113] The new methodology was aimed at including all cartelised LCD panels manufactured by AUO that were shipped directly to the US or that were incorporated into finished products shipped to the US[114] The DOJ's economic expert, Keith Leffler, was tasked with calculating the corresponding sales. He relied on data retrieved from five large US computer manufacturers: Dell, HP, Apple, Gateway and IBM.[115]

105 Martyniszyn (n 102), p. 106.
106 U.S.S.G. §§ 8C2.1 – 8C2.7.
107 *United States v. Booker*, 543 U.S. 220, 259-260 (2005).
108 *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1273 (6th Cir. 1995).
109 U.S.S.G. §2R1.1(d)(1).
110 United States' Sentencing Memorandum, *United States v. Hsiung*, No. 3:09-cr-00110-SI (N.D. Cal. 11 September 2012), p. 23.
111 U.S.S.G. §2R1.1(d)(2) and § 8C2.6. The minimum multiplier ranges from 0.75 to 2.00, the maximum multiplier from 0.75 to 4.00. The culpability score is determined on the basis of particular elements such as the size of the corporation, prior offenses, obstruction of justice, the implementation of a compliance program, and full cooperation in the investigation. U.S.S.G. §8C2.5.
112 United States' Sentencing Memorandum, *United States v. Hsiung* (n 110), p. 10.
113 According to the DOJ, it was able to conduct a much more complete, rigorous, and detailed calculation of the volume of affected commerce for AUO than it had conducted for the other defendants following the collection of additional data and the assistance of an outside economic expert. Ibid., p. 43.
114 Declaration of Dr. Keith Leffler Regarding AUO's U.S. Volume of Commerce for Sentencing Hearing, *United States v. Hsiung*, No. 3:09-cr-00110-SI (N.D. Cal. 11 September 2012), p. 1.
115 Leffler did not identify any purchases of AUO LCD panels by Gateway or IBM. Ibid., p. 7.

For each of these companies, Leffler estimated the total sales of AUO panels that ended up in computer monitors and notebook computers that were ultimately sold in the US[116] For example, for Dell, Leffler looked at the purchases of AUO panels by two Malaysian subsidiaries of Dell and estimated what portion of these panels were ultimately sold in the US as finished products.[117] After estimating the total amount of purchases by the five US companies of AUO panels ending up in finished products sold in the US, Leffler extrapolated this amount to cover the entire US market for PC sales on the basis of the combined market share of these five companies (62%). He assumed that the remaining 38% of the market purchased panels from AUO in the same proportion as Dell, HP, Apple, Gateway and IBM.[118] Leffler ultimately arrived at a total volume of affected commerce of USD 2.34 billion.

As a result of Leffler's methodology, and in contrast to the methodology applied to other defendants in the LCD cartel, the volume of affected commerce for AUO included any sales of LCD panels estimated to be sold as finished products in the US, irrespective of whether they were purchased by US or non-US companies, whether they were billed or shipped to the US or whether they were incorporated into finished products by the purchaser of the panels or by an unaffiliated third party. Interestingly, the DOJ argued that it could have included in the volume of affected commerce even those sales of LCD panels incorporated into finished products sold by US companies outside the US[119]

The DOJ stated in the context of the OECD Roundtable on Cartels Involving Intermediate Goods in October 2015 that it in making sentencing recommendations, it would consider all the relevant circumstances, including sanctions imposed by other jurisdictions.[120] However, nothing in the Sentencing memorandum submitted by the DOJ suggests that other fines already imposed on AUO (eg the EUR 116.8 million fine imposed by the Commission) were taken into account in any way. In fact, the DOJ clearly rejected the argument made by AUO that the US fine should take into account foreign fines already imposed for the same cartel conduct.[121]

AUO submitted various grounds to object to the DOJ's calculation of the volume of affected commerce. This included the argument that the volume of commerce should be limited to only those sales that satisfy the domestic effects test under the FTAIA.[122] According to AUO, no *direct* effect on US commerce resulted from its sale of LCD panels outside the US for incorporation into finished products shipped into the US by third parties.

Overruling all of AUO's objections, Judge Illston agreed with the approach taken by the DOJ. She implicitly accepted the DOJ's argument that the jurisdictional limitations of the FTAIA did not affect the calculation of the volume of commerce.[123] Based on a volume of commerce of USD 2.34 billion, the fine range for AUO was found to be between USD 936 and 1,872 million.[124]

Judge Illston also agreed with the DOJ that the statutory maximum fine for AUO was USD 1 billion. This was twice the amount of total pecuniary gains (at least USD 500 million) that were found by the

116 Leffler excluded LCD panels incorporated in TV monitor due to a lack of data. He therefore stated that his estimate of the volume of affected commerce was conservative. Ibid., p. 2.

117 In the case of computer monitors, the LCD panels were not incorporated into finished products by Dell itself but by third party system integrators to which Dell's Malaysian subsidiary resold LCD panels and from which finished products were purchased by regional purchasing entities of Dell.

118 Declaration of Leffler (n 114), p. 7.

119 United States' Sentencing Memorandum, *United States v. Hsiung* (n 101), p. 14.

120 US submission for the OECD *Roundtable on Cartels Involving Intermediate Goods* (October 2015), available at <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)37&doclanguage=en>, p. 3, 5.

121 United States' Reply to Defendants' Sentencing Memoranda, *United States v. Hsiung*, No. 3:09-cr-00110-SI (N.D. Cal. 19 September 2012), p. 31-32.

122 Defendant AU Optronics Corporation's Sentencing Memorandum Part Two: Application of the Sentencing Guidelines, *United States v. Hsiung*, No. 3:09-cr-00110-SI (N.D. Cal. 11 September 2012), p. 64-72.

123 United States' Sentencing Memorandum, *United States v. Hsiung* (n 110), p. 19-20. The DOJ had also put forward this argument in a letter dated 15 November 2010. See Shores (n 68), p. 13-14.

124 Transcript of Proceedings, *United States v. Hsiung*, No. 3:09-cr-00110-SI (N.D. Cal. 21 September 2012), p. 9-10. This is based on a minimum multiplier of 2.00 and a maximum multiplier of 4.00. This was the first time that a fine based on the alternative fine statute was obtained following trial proceedings. See Rachel J. Adcox, 'Getting Your Best Outcome post-AU Optronics: Pay no attention to that Case Behind the Curtain', 23 *ABA Antitrust* 3 (2012), p. 78.

jury to result from the cartel for all cartel members.[125] She dismissed AUO's argument that the alternative statutory maximum must be based on only AUO's gains from the cartel, rather than the gains by the cartel members collectively.[126] She also dismissed the argument that if the maximum fine amount could be based on the collective gains, the fine amounts already collected by the DOJ from the other cartel members (USD 715 million in total) should at least be deducted from the maximum amount of USD 1 billion. AUO could hence not rely on a kind of 'single recovery rule', a rule that exists under US law in a private damages context to prevent excess recovery by plaintiffs resulting from the joint and several liability of conspirators.

While confirming all elements of the DOJ's fining methodology, Judge Illston ultimately did not impose the maximum fine of USD 1 billion requested by the DOJ. Instead, she followed the Probation Officer's recommended fine of USD 500 million.[127] She found the financial ramifications for AUO to have already been massive, based on the amounts already paid in civil suits, the number of pending civil claims, the fines already imposed and new fines to be paid, and the enormous costs of the trial.[128] The sentence was upheld by the Ninth Circuit in the appeal proceedings, which in respect of the sentencing only focused on the maximum fine under the alternative fine statute. [129]

C. Comparing the EU and US approach to calculating the cartel fine

The biggest difference between the EU and US territorial reach in sanctioning the LCD cartel relates to the calculation of the fine. In the EU, it was quite controversial for the ECJ to confirm that the value of sales that was used to calculate the base fine could include the Direct EEA Sales Through Transformed Products. While the Commission had claimed it could have also included Indirect Sales, it is likely that this would have gone too far for the EU courts. The DOJ went much further in its approach to define the volume of affected commerce. The volume of affected commerce included all LCD panels sold by AUO that were estimated to end up as finished products in the US, in one way or another. This included sales to independent third parties outside the US for incorporation into finished products that were subsequently imported into the US, the equivalent of what the Commission characterised as Indirect Sales. It even included LCD panels sold by AUO outside the US that only ended up in the US as finished products after several intermediate sales between independent third parties. The confirmation by Judge Illston of the DOJ's fining methodology reveals that the authority is allowed very wide discretion in determining the volume of affected commerce.[130] Similar to the Commission, the DOJ had argued that it could have gone (much) further and hence applied self-restraint in determining the territorial scope of the commerce taken into account for the fine. Given the marginal test by US courts of the DOJ's methodology in calculating the volume of affected commerce, it appears not unlikely that an even more encompassing approach would have indeed been possible.

Another notable difference revealed by the LCD cases relates to the robustness of the fine calculations. In the EU, the Commission tries to methodically and precisely calculate the total amount of relevant sales, and to neatly follow the further steps of the fining guidelines to arrive at the fine. In the US, the DOJ is permitted to use imprecise estimates and assumptions in calculating the actual amount of affected commerce.[131] The wider discretion awarded to the DOJ may work to a defendant's advantage (eg only including sales of PC monitors incorporating AUO panels but not TV monitors) or

125 This seems to have been a conservative estimate, as Leffler testified that he believe the actual gain derived from the conspiracy to be certainly in excess of USD 2 billion. Ibid., p. 79. Whereas the DOJ had argued that this amount could take into account any gains resulting from the conspiracy anywhere in the world, Illston had accepted that the gains must be limited to those deriving from the conspiracy's effect on the U.S. Order Re: Preliminary Jury Instructions (n 79), p. 2.

126 Ibid., p. 2-3.

127 Transcript of Proceedings, *United States v. Hsiung* (n 124), p. 15.

128 Ibid., p. 16.

129 Order and Amended Opinion, *United States v. Hsiung* (n 51), p. 42-45.

130 On the discretion of the DOJ to take into account not just domestic sales but also foreign or indirect sales, see also Mutchnik, Casamassima and Rogers, 'The Volume of Commerce Enigma', *The Antitrust Source* (June 2008), available at <https://www.kirkland.com/siteFiles/Publications/75E349ED3760CB39B8A5C8E5ACCD3F79.pdf>; Brandon W. Duke, 'The Indirect Bump: Indirect Commerce and Corporate Cartel Plea Agreements', *ABA Young Lawyer Division Antitrust Law Committee Newsletter* (Spring 2013), available at <https://www.winston.com/images/content/6/4/v2/64609/THE-INDIRECT-BUMP.pdf>; Shores (n 68), p. 13-14.

131 Contrary to what is supported by various commentators, see eg Mutchnik, Casamassima and Rogers (n 130), p. 7-9.

disadvantage (eg extrapolating purchases of AUO panels by 62% of the market to 100% of the market without the need to prove such purchases actually existed). Of course, any flaws in calculating the volume of affected commerce will directly affect the accuracy of any fine recommendation or determination based on this volume. But importantly, the DOJ does not determine the fine as the Commission does, this is done by the court. The outcome of the DOJ's calculations and the penalty requested by the DOJ can easily be set aside, as demonstrated by the ruling of Judge Illston. This considerably nuances the importance of the DOJ's calculation methodology.

A comparison between the EU and US approaches to calculating the fine in respect of the LCD cartel also reveals similarities. In particular, in both jurisdictions the courts have confirmed that the tests for establishing jurisdiction are not relevant for defining the territorial scope of sales or commerce that can be taken into account in setting the fine. It is not clear what precise test, if any, is relevant for this purpose. While this leaves the Commission and the DOJ considerable discretion, it also presents the business community with considerable legal uncertainty. One would therefore expect this to be an area of further legal development in the near future.

3.6 Territorial limits and overlapping enforcement

The LCD cases show that in respect of cartel conduct by multinational corporations involving their worldwide sales, the existence of a certain domestic connection to justify the exercise of jurisdiction is almost a given. It is therefore not surprising that a multitude of authorities will generally be able to assert jurisdiction over truly global cartel behaviour. Without any jurisdictional or territorial delineation between authorities on "who sanctions what and by how much", domestic enforcement of international cartel conduct is bound to lead to potential or actual overlapping punishment. It is easy to see how the fining methodologies used by the Commission and the DOJ can result in the same sales being taken into account more than once for the purposes of sanctioning the same overall conduct. Such double-counting increases risks of over-enforcement and disproportionate overall punishment. In order to ensure that on an international level the overall penalty fits the severity of the crime, it is submitted that authorities targeting the same conduct in parallel should avoid unilaterally aiming for the maximum fine available without having any regard for the level of punishment and deterrence achieved by sanctions imposed elsewhere. This is necessary not only to safeguard overall proportionality of fines, but also with a view to comity considerations. Maintaining an isolated and expansive view on cartel enforcement may have been justifiable when antitrust laws were effectively enforced in only a few countries in the world. But with over 125 jurisdictions with active cartel enforcement, this may be the time for the European and American authorities to start adopting a more modest approach.[132] As noted by Connor in the context of his support for the *Motorola Mobility* judgment: "[h]*aving invited the world to join the effort to prohibit and prosecute cartels, and that invitation having been enthusiastically accepted, it is good manners/policy that the competition regimes set up around the globe—which continue to develop—be given due respect and that the views of our partners be given serious consideration*".[133]

The need for international coordination of extraterritorial cartel enforcement is a hot topic in the global antitrust community. It is a recurring theme on antitrust conferences and a key focus of the advocacy efforts of international organisations such as the ICN, the OECD and the International Bar Association (IBA). The focus of such efforts has often been on cooperation in respect of the investigation stages

[132] See also Ginsburg's and Taladay's call for comity considerations as a necessary consequence of the effects doctrine. Douglas H. Ginsburg and John M. Taladay, 'Comity's Enduring Vitality in a Globalized World', *George Mason Law Review* 24(5) (2017). Conversely, some argue for an increase in the severity of U.S. sanctions for global cartels. For example, the American Antitrust Institute (AAI) sees a need for the DOJ to double its efforts and penalties in the prosecution of global cartels. To this end, it is proposed "to use worldwide sales of defendants when they admit to fixing prices abroad and they agree that no other governments' antitrust proceedings are ongoing". AAI, 'American Cartel Enforcement in Our Global Era' (Preview of AAI Cartel Chapter of Presidential Transition Rep.) (24 February 2017), available at <https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Cartels.pdf>, p. 37-38, 48.

[133] Robert Connolly, 'Why the Motorola Mobility Decision Was Good for Cartel Enforcement and Deterrence', *CPI Antitrust Chronicle* (January 20, 2015), available at <https://ssrn.com/abstract=2559149>.

and less on coordination in respect of the scope and level of punishment.[134] But there are more and more calls for authorities to also coordinate their cartel penalties. For example, during the OECD Roundtable on Cartels Involving Intermediate Goods in October 2015, several delegates highlighted "*the importance of taking into account fines or sanctioning decisions already imposed by other competition agencies to minimise concerns about the fairness and proportionality of fines levied in multi-jurisdictional cases*".[135] In June 2016, the Japanese Ministry of Economy, Trade and Industry (METI) published a report on its research into the enforcement of international cartels, in view of the "*growing concern about overlapping application of competition laws or imposition of multiple surcharges by several countries*".[136] Based on its research, the Ministry proposed increased coordination between authorities to take into account concurrent penalties. In December 2016, both the IBA and the American Bar Association (ABA) in their comments on the proposed new DOJ and FTC *Antitrust Guidelines for International Enforcement and Cooperation* called upon the US authorities to stress the need for cooperation regarding sanctioning of international cartel cases to avoid over-deterrence or double-jeopardy.[137] Furthermore, also in December 2016, in one of the key submissions for the OECD's 15th Global Forum on Competition, Hwang Lee specifically pressed for increased efforts by competition authorities to coordinate fining decisions in parallel proceedings.[138] These examples indicate that – while moving slowly – progress is made in recognising the need for commonly accepted principles for coordination between authorities in the sanctioning of international cartels.

Since internationally agreed principles on the coordination of cartel fines are yet to be developed, national self-restraint is currently required to limit the risks resulting from parallel enforcement of international cartels. Such self-restraint can be exercised in respect of any of the three elements assessed in this chapter: asserting jurisdiction, defining the territorial scope of punished conduct and setting the fine.[139] The Japan Fair Trade Commission (JFTC) for example has explained that it cannot currently take into account sanctions imposed by other authorities in determining its own fine because it lacks the discretion to do so.[140] However, in view of international comity, the JFTC does consider enforcement action elsewhere in respect of the same international cartel to decide whether it will also take action. Similarly, in Australia– where cartel fines are set by the court – the authority exercises prosecutorial discretion by considering whether it is more appropriate to leave enforcement activities to jurisdictions where the harm of a cartel was felt most immediately.[141] In contrast, the Korean Fair Trade Commission does not consider sanctions imposed elsewhere for the decision whether or not to bring an enforcement action, but it does have the discretion to consider foreign fines in calculating the surcharge it imposes.[142] The DOJ has indicated that when a sanction in respect of the same cartel is first imposed outside the US, it may take this into account if the sanction accounts for the harm to

134 See eg the OECD *Recommendation concerning International Co-operation on Competition Investigations and Proceedings* (2014), the OECD report *Challenges of International Co-operation in Competition Law Enforcement* (2014), the OECD report *International Enforcement Co-operation* on the related OECD/ICN survey (2013), the OECD Global Forum on Competition's Roundtable *Improving International Co-operation in Cartel Investigations* (2012) and the ICN report *Co-operation between Competition Agencies in Cartel Investigations* (2007). See also the OECD issues paper for the *Roundtable on the Extraterritorial Reach of Competition Remedies* (2017) and the ICN report *Setting Fines for Cartels in ICN Jurisdictions* (2017).

135 Executive Summary of the OECD *Roundtable on Cartels Involving Intermediate Goods* (October 2015), available at <https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN3/FINAL/en/pdf>, p. 4.

136 English summary of the METI *Report on Research for Case Examples concerning the Implementation of Regulations on International Cartel Cases among Overseas Competition Regulatory Authorities* (3 June 2016), available at <http://www.meti.go.jp/english/press/2016/0603_02.html>.

137 ABA comments on proposed update to the *Antitrust Guidelines for International Enforcement and Cooperation* (1 December 2016), available at <https://www.justice.gov/atr/page/file/915786/download>; IBA comments on proposed update to the Antitrust Guidelines for International Enforcement and Cooperation (December 2016), available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=57AFCE72-2189-4E28-9758-DE17F7B64949>.

138 Hwang Lee, 'Sanctions in Antitrust Cases', paper for Session IV at the 15th Global Forum on Competition (1-2 December 2016), available at <https://one.oecd.org/document/DAF/COMP/GF(2016)10/en/pdf>, p. 19.

139 This corresponds to the potential ways the DOJ has said that it may exercise prosecutorial discretion in response to parallel enforcement action: reducing the scope of the activities under investigation, reducing the penalties applicable to the violation, or waiving prosecution of the matter altogether. Scott Hammond, Deputy Assistant Attorney General of the DOJ, Antitrust Division, Remarks Before the GCR Antitrust Law Leaders' Forum: Standards for Satisfying the U.S. Deterrent Interests (5 February 2011).

140 Summary of Discussion of the OECD *Roundtable on Cartels Involving Intermediate Goods* (n 89), p. 3.

141 Ibid., p. 7.

142 Ibid.

businesses and consumers in the US and therefore satisfies deterrent interests of the US.[143] Terzaken and Huizing have suggested altering this latter approach by focusing on whether there is any residual deterrence need following penalties already imposed elsewhere, not on whether specific national harm was considered in the fining methodology applied by a foreign authority.[144]

As an alternative to taking into account penalties imposed elsewhere, Bentley and Henry have proposed that authorities should solely take into account sales for the purposes of fine calculation if such sales meet the applicable jurisdictional tests.[145] This seems a sensible proposal. While it is true that the basis for asserting jurisdiction can be separated from the basis for calculating a fine, as explicitly reasoned by the ECJ, it is hard to justify partly relating a penalty to conduct that in itself would not have a sufficient territorial nexus to trigger potential prosecution. In analogy to the Seventh Circuit's assessment of Motorola's damages claims, it is difficult to accept that foreign sales without such nexus can still be taken into account as part of domestic enforcement as long as they happened to take place alongside some import commerce. Internationally, it may not even be all that controversial to require authorities to calculate cartel fines on the basis of only those sales that create a sufficient jurisdictional link to their territory. A survey by the International Competition Network (ICN) already shows that many jurisdictions maintain the view that only the direct sales of cartelised products should form the basis of a cartel fine in all or most cases.[146]

Bentley and Henry consider their solution to be simpler than requiring authorities to take into account fines already imposed elsewhere. But it is submitted that this is still needed even if authorities only take into account sales that pass the applicable jurisdictional tests, as this does not avoid situations where more than one authority claims jurisdiction.[147] This is especially the case where authorities apply a broad interpretation of a qualified effects test. In such situations, the same sales may still be taken into account more than once. And even if authorities avoid any double counting of sales, international alignment of sanctions may still be required to ensure overall proportionality and an optimal level of deterrence. A truly coordinated approach to international cartel enforcement should therefore more comprehensively focus on the ultimate outcome of the overall enforcement.

It goes beyond the scope of this chapter to discuss at what level cartel fines must be set to achieve both proportionality and optimal deterrence.[148] And it must be noted that it has not been empirically tested whether overlapping cartel fines imposed in multiple jurisdictions actually create a problem of over-deterrence or whether global cartels are (still) more likely to benefit from under-deterrence.[149] But it is clear that an optimal overall penalty for a global cartel is not automatically achieved by the accumulation of several national fines for the same cartel that were considered optimal by the respective authorities. First, such accumulation would likely mean that the overall fine amount increases in a certain proportion to the additional amount of affected sales in the sanctioning jurisdictions. However, proportionality and deterrence are complex principles that not necessarily (directly) related to the level of sales achieved with the cartelised products. Proportionality is typically linked to the elements of culpability of the offender and the harm caused by the offence.[150] Optimal deterrence is typically linked to the expected gains from the offence and the probability of detection and punishment.[151] So it is not obvious to see why in the pursuit of a proportionate and deterrent

143 Ibid.

144 John Terzaken and Pieter Huizing, 'How Much Is Too Much? A Call For Global Principles To Guide The Punishment Of International Cartels', 27 *ABA Antitrust Magazine* 2 (Spring 2013).

145 Bentley and Henry (n 99), p. 449.

146 ICN, Report to the 16th ICN Annual Conference, *Setting of Fines for Cartels in ICN Jurisdictions (2017)* (May 2017) 26, no longer available on the ICN website as the relevant is mistakenly leading to the 2008 report).

147 Bentley and Henry (n 99), p. 449.

148 Chapter 6 focuses on this part of the research of this dissertation.

149 Lee (n 138), p. 17.

150 See eg Andrew von Hirsch, *Past Or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1985), p. 64 and further; Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law', 4 (1) *Competition Law Review* (2007), available at <http://new.clasf.org/CompLRev/Issues/CompLRevVol4Issue1.pdf>, p. 10; Jesper Ryberg, 'Retributivism, Multiple Offending, and Overall Proportionality', *Sentencing for Multiple Crimes* (2017), p. 10.

151 See eg OECD, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws* (2002), p. 3; Wouter P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice', 29 (2) *World Competition Law and Economics Review* (2006),

penalty, the fine amount should increase in direct proportion to the level of affected sales. It may well be that a proportionate and deterrent fine has already been achieved despite not covering all potentially affected sales. In this context, the Business and Industry Advisory Committee to the OECD reasoned that "*once any jurisdiction sets a fine at an appropriate and proportionate level, another jurisdiction imposing penalties on top of that needs to strike a proper balance*".[152] Second, several authorities may take the same factors into account in increasing a fine for deterrence purposes, such as the size of the undertaking. A single authority may determine that in order for a cartel fine to actually 'hurt', it should amount to at least 3% of an undertaking's total turnover. But if five authorities use this approach in respect of the same global cartel, the total fine amounting to 15% of the total turnover may hurt much more than what was considered necessary by each individual authority.[153] Thirdly, many authorities apply a maximum fine amount that is related to the total turnover of an undertaken (eg the cap of 10% as applied by the Commission). Such a cap serves to ensure fines are not excessive or disproportionate[154] and to limit the risks of undue financial difficulties and insolvency (and hence lessened competition) as a result of a fine. But if five authorities were to impose fines for the same global cartel up to a 10% cap, the total fine amounting to 50% of the undertaking's turnover is still quite likely to jeopardise the viability of the undertaking and quite likely to be (perceived as) disproportionate in relation to the size of its economic activities.[155]

In *AU Optronics*, Judge Illston in her discretion decided that USD 500 million was sufficiently deterrent and not excessive, even though the fining guidelines had recommended a fine between USD 936 and 1,872 million. Her decision was also based on the penalties and financial impact already incurred by AUO in other proceedings, something explicitly not taken into account in the DOJ sentencing recommendation. Rather than rigidly applying the domestic fining guidelines, she appears to have adopted a comprehensive approach that considered the overall proportionality of punishment for AUO's cartel conduct and the residual deterrence need. While the EU and US authorities also seem willing to incidentally and on an ad hoc basis take a step back in view of foreign enforcement[156], sound enforcement policies that are aimed to achieving an overall appropriate fine by taking into account the international context of cartel sanctioning are still lacking.[157] It is submitted that the development of such policies is necessary not only to ensure consistency in enforcement practices but also to increase legal certainty, predictability of sanctions and confidence in the proportionality of international cartel enforcement.

3.7 Conclusion

The analysis in this chapter has addressed part of the second research sub-question: *What choices can and do individual authorities make in exercising their jurisdictional discretion when prosecuting international cartels? And how do jurisdictional limitations affect the extent to which enforcement and punishment of international cartels overlap?*

As a starting point, it is not necessary for parallel enforcement to result in overlapping enforcement in the sense that the same part of particular cartel conduct is subject to enforcement in more than one

p. 190; John M. Connor and Robert H. Lande, 'Cartels as Rational Business Strategy: Crime Pays', 34 *Cardozo Law Review* (2012), available at <https://ssrn.com/abstract=1917657>, p. 479; Ioannis Lianos and others, 'An Optimal and Just Financial Penalties System for Infringements of Competition Law: a Comparative Analysis', CLES Research Paper No. 3/2014 (1 May 2014), available at <https://ssrn.com/abstract=2542991>, p. 23-24.

152 Summary of Discussion of the OECD *Roundtable on Cartels Involving Intermediate Goods* (n 89), p. 8.

153 See also Capobianco, Davies and Ennis, 'Implication of Globalisation for Competition Policy: The Need for International Co-operation in Merger and Cartel Enforcement' (2014), available at <https://ssrn.com/abstract=2450137>, p. 44, describing that several authorities taking into account worldwide sales rather than domestic sales may create the risk of excessive enforcement.

154 ECJ judgement in joined cases C-189/02 *Dansk Rørindustri A/S and others v Commission*, ECLI:EU:C:2005:408, para 281.

155 See also Lee (n 138), p. 18-19.

156 Terzaken and Huizing (n 144).

157 It is interesting to note that in respect of remedies for antitrust violations, the FTC has formulated a policy that clearly recognises the need to avoid overly broad extraterritorial reach in view of international comity considerations, and avoid potential duplication and conflicting remedies. FTC Chairman Ohlhausen has suggested this approach based on self-restraint to also be considered by authorities in other jurisdictions. Maureen K. Ohlhausen, 'Guidelines for Global Antitrust: The Three Cs – Cooperation, Comity, and Constraints', *IBA 21st Annual Competition Conference* (8 September 2017), available at <https://www.ftc.gov/system/files/documents/public_statements/1252733/iba_keynote_address-international_guidelines_2017.pdf>, p. 5.

jurisdiction. Authorities can avoid such overlap by carefully limiting their own exercise of jurisdiction. This chapter identifies three levels on which authorities can exercise self-restraint:

1. The basis for asserting jurisdiction, ie the legal ground justifying the application and enforcement of national competition laws in respect of (foreign) cartel conduct;
2. The object of the prosecution and sanctioning, ie the scope of what part of the overall cartel is being punished; and
3. The calculation of the cartel fine, in particular the sales or commerce on the basis of which the basic fine is determined.

Using the LCD cartel cases in the EU and the US for comparison, I have assessed the extent to which two of the most mature and active cartel enforcement regimes actually apply self-restraint on one or more of these levels. I have found little willingness for both the Commission and the DOJ to adopt a restrictive approach in this respect. Moreover, neither authority is seriously forced in that direction by the courts in the respective jurisdictions.

In Europe, the Commission's LCD cartel decision and the subsequent *InnoLux* judgments have sparked a debate on the limits to extraterritorial cartel enforcement within an increasingly globalised economy. Various writers and notably AG Wathelet have submitted that the Commission overstretched its powers by imposing a fine in relation to sales that lacked a sufficient nexus to the EEA. But the ECJ's ruling accepted the expansive approach taken by the Commission by separating the need for a jurisdictional link from the Commission's broad discretion in calculating the fine. While this discretion does not seem to be territorially unlimited, the *InnoLux* judgments do not clarify where the boundary is. It is clear, however, that the Commission is under no (proactive or reactive) obligation to avoid double counting of the same sales by two or more authorities, nor to take into account penalties imposed elsewhere. The legal framework applied by the ECJ therefore does little to force the Commission to pursue greater self-restraint in its enforcement of international cartels. As rightly noted by Lee in its submission for the OECD's 15th Global Forum on Competition, the ECJ's ruling can be considered a missed opportunity that warrants more effort among authorities to cooperate to reach a consistent and more explicit best practice to deal with the risk of double counting.[158]

The comparison made in this chapter indicates that on the other side of the Atlantic, the DOJ has taken an even more expansive approach in its prosecution of LCD cartelist AUO. First, by not territorially limiting the scope of the cartel conduct for which AUO is sanctioned. Second, by calculating the cartel fine on the basis of a rough estimate of the AUO sales of LCD panels that ended up as finished products in the US in one way or another, irrespective of whether AUO or an independent third party was responsible for the importation. Compared to the Commission's methodology, this creates much greater risks of foreign authorities taking into account the same sales in punishing the same overall cartel conduct. Still, the US courts have ruled that the DOJ's approach in the proceedings against AUO has not yet reached the boundaries of its territorial reach. This creates a stark contrast with private cartel enforcement in the US, for which the Seventh Circuit has drawn a line in the sand in *Motorola Mobility* in respect of the application of US laws to conduct that has a stronger nexus to foreign nations.

With *InnoLux* and *AU Optronics* as leading precedents on the territorial limits to EU and US public cartel enforcement, it has become less likely for the Commission and the DOJ to move in the direction of greater self-restraint when pursuing international cartels. This in turn means that the authorities of two of the most mature antitrust regimes may not be the ones guiding the international community towards a less isolationist, more coordinated and overall proportionate approach to the enforcement of global cartels.[159] One hopes that if neither the Commission nor the DOJ takes on this role, other authorities step in to act as thought leaders on how to minimise concerns of disproportionate

158 Lee (n 138), p. 18.

159 Note however the new policy announced by the DOJ in March 2018 to address the concern of the 'piling on' of multiple fines imposed by different authorities for the same conduct, discussed further in Chapter 8. DOJ, 'Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act' (9 May 2018) <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes>.

punishment resulting from parallel cartel enforcement. Given the continuing globalisation of businesses and markets, and the increasingly crowded global arena of cartel enforcement, the need for the development and wide adoption of guiding principles to coordinate enforcement by multiple authorities targeting the same cartel conduct will only become more pressing.

4. CHAPTER 4: THE JURISDICTIONAL IMPLICATIONS OF THE ECJ'S ACCEPTANCE OF THE QUALIFIED EFFECTS TEST

This chapter is based on the article 'The ECJ finally accepts the qualified effects test: now was that so hard?', 38 European Competition Law Review 1, 2018.

4.1 Introduction

In the *Intel* judgment of 6 September 2017, the European Court of Justice (ECJ or the Court) at last confirmed that the qualified effects test can be used on a standalone basis for asserting jurisdiction over foreign conduct infringing European competition law.[1] This is but one of the many interesting outcomes of the *Intel* appeal, but quite a remarkable one given that the Court had dodged this particular issue for decades. One would therefore have expected the Court to support its ruling on this point with an elaborate and nuanced reasoning on the territorial limits of the Commission's jurisdiction. Disappointingly, the Court spent just a few sentences to explain that the qualified effects test could serve as a basis for the Commission's jurisdiction.

The ease with which the Court has now placed the test on equal footing with the implementation test stands in stark contrast to the painstaking efforts taken in the past to avoid even having to address the qualified effect test. Moreover, the Court's substantive interpretation of the qualified effects test was surprisingly lenient, seemingly allowing the Commission a lot of leeway to determine its own jurisdictional boundaries. So one might justifiably wonder: Why all the legal meandering? Was it really so difficult to acknowledge the qualified effects doctrine?

This chapter describes the long journey that the qualified effects test has travelled to reach this stage and discusses its implications for future competition enforcement. This forms an important part of the response to the second research sub-question on jurisdictional limitations, as it shows the status-quo and the evolution of legal doctrine in Europe on this front.

4.2 What is the qualified effects test?

The qualified effects test or the qualified effects doctrine refers to the assessment whether the domestic effects of certain foreign conduct are sufficient to justify asserting jurisdiction over that conduct. The word *qualified* reveals that the mere existence of any effects is not enough. Rather, such effects need to have certain significance, likelihood, predictability, directness and/or occur within a sufficiently short period of time.

The qualified effects test can be considered a member of the family of jurisdictional tests falling under the territoriality principle, albeit a distant family member.[2] It does not rely on any territorial link existing with the location of the conduct or the offenders, only with the effects of the conduct. This is why most refer to enforcement based on an effects test as *extraterritorial* enforcement.[3]

The use of the effects doctrine in the context of competition law enforcement originated in the United States and is ascribed to the judgment of Judge Learned Hand in the 1945 *Alcoa* case.[4] He ruled that the Sherman Act could be applied to agreements concluded abroad "*if they were intended to affect imports and did affect them*". Since the *Alcoa* case, U.S. courts have continued to apply the effects test, but in different ways, with effects required to be "*intended and substantial*", "*direct and substantial*"

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1 ECJ judgement of 6 September 2017 in case C-413/14 *Intel*, ECLI:EU:C:2017:632.

2 See e.g. the opinion of AG Wahl in *Intel*, ECLI:EU:C:2016:788, para 297, and IBA, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, p. 11-13.

3 Some contest this terms to be misplaced unless there truly is no territorial link between the conduct and the enforcing state, also not through adverse domestic effects. See e.g. Cedric Ryngaert, *Jurisdiction In International Law: United States and European Perspectives*, 2007, para 8.

4 *United States v. Aluminium Co of America*, 148 F.2d 416 (2d Cir. 1945).

or merely "*direct or substantial*".[5] With the adoption of the Foreign Trade Antitrust Improvement Act (FTAIA) of 1982, the U.S. legislature settled on the phrase "*direct, substantial, and reasonably foreseeable*".[6]

The confirmation of the extensive application of U.S. laws on the basis of the effects doctrine caused quite a lot of controversy at the time. But in the context of competition law, there is nowadays a "*fair degree of consensus*" internationally that an effects based doctrine can be applied for asserting jurisdiction over foreign conduct.[7]

The qualified effects test was properly introduced in European competition law in the early 1970s, in the context of the *Dyestuffs* case.[8] Since then, it has been relied upon by the Commission, the General Court and Advocates General, but until *Intel* not endorsed by the ECJ. The qualified effects test has certainly not been the primarily used jurisdictional test in EU competition law. That honour goes to the implementation test that was adopted by the ECJ in the *Woodpulp* case.[9] This test assesses whether foreign conduct was *implemented* within the Union. The qualified effects test is generally considered to offer a more expansive basis for establishing jurisdiction than the implementation test.[10] A foreign agreement to cease exports into the EU or boycott certain European customers may for example satisfy the qualified effects test while it would be difficult to demonstrate the implementation of such an agreement within the Union.[11] However, some have argued that an *unqualified* implementation test could *prima facie* have more far-reaching repercussions than the qualified effects doctrine.[12]

4.3 The Commission's reliance on the qualified effects test

For its 1964 Grosfillex & Fillistorf decision, the very first decision relating to what is now Article 101 of the Treaty on the Functioning of the European Union (TFEU), the Commission had to consider whether European competition law could be applied to companies incorporated in third countries. In this decision, the Commission gave negative clearance to an exclusive distribution agreement between the French producer Grosfillex and the Swiss distributor Fillistorf.[13] Seemingly without hesitation, the Commission applied European competition law to the agreement, finding that it was not contrary to Article 101(1) TFEU to prevent Fillistorf from selling any Grosfillex products or any competing products in one of the Member States. The Commission later stated that with the jurisdictional approach underlying its Grosfillex & Fillistorf decision, "[t]*he Commission was one of the first antitrust authorities to have applied the internal effect theory to foreign companies*".[14]

In its second decision on competition law, Bendix & Mertens et Straet, also dating from 1964, the Commission expressly stated that European competition law was applicable on the basis of the effects resulting from the relevant agreement within the common market, despite one of the parties to the agreement being incorporated outside the common market.[15]

The EC further addressed the issue of jurisdiction in the Dyestuffs cartel case, the first case in which the Commission imposed cartel fines on companies incorporated in third countries.[16] In justifying its jurisdiction over Swiss and British companies, the Commission simply stated that it was not necessary

5 Najeeb Samie, 'The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws', 14 *U. Miami Inter-Am. L. Rev.* 23 (1982), p. 23-24.
6 15 U.S.C. § 6a.
7 IBA, *Report of the Task Force on Extraterritorial Jurisdiction*, p. 13; Opinion of Wahl in *Intel*, para 297.
8 Judgement of the Court of 14 July 1972 in case 48/69, *Dyestuffs*, ECLI:EU:C:1972:70.
9 Judgement of the Court of 27 September 1988 in joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *Woodpulp*, ECLI:EU:C:1988:447.
10 See e.g. Ryngaert, para 326; OECD, Roundtable on Cartels Involving Intermediate Goods, submission by the United Kingdom of 27 October 2015, DAF/COMP/WP3/WD(2015)25, para 24.
11 Opinion of Wahl in *Intel*, para 294; Ryngaert, para 326.
12 Ryngaert, para 324; See also Lukas Ritzenhoff, 'Indirect Effect: Fine Calculation, Territorial Jurisdiction, and Double Jeopardy', 6 *JECLAP* 10 (2015), p. 698.
13 Commission decision of 11 March 1964, case IV/A-00061, OJ 58, p. 915-916.
14 Commission, *Eleventh Report on Competition Policy*, 1981, para 35.
15 Commission decision of 1 June 1964, case IV-A/12.868, OJ 92, p. 1426-1427.
16 Commission decision of 24 July 1969, case IV/26.267, OJ L195/11.

to consider the country of incorporation, given that according to the text of what is now Article 101(1) TFEU, the cartel prohibition applies to all restrictions of competition that produce the effects referred to in this provision. The Commission further substantiated its position before the Court in the appeal proceedings brought by the British Imperial Chemical Industries (ICI) and the Swiss companies Geigy and Sandoz. As its first line of defence, the Commission submitted that it had jurisdiction over these foreign companies because the conduct of their subsidiaries established within the European Community could be attributed to them (the economic entity doctrine).[17] As a secondary argument, the Commission argued that jurisdiction could be asserted on the basis of the effects to competition within the common market resulting from the conduct of the foreign companies. In respect of this secondary argument, the Commission argued in favour of "*a prudent application of the doctrine of economic effects, taking into account the extent of the direct economic effects resulting from the conduct of the applicant*".[18] The Commission argued that a reasonable compromise had to be found between the U.S. approach adopted in *Alcoa*, namely that competition laws could be applied to foreign conduct no matter how indirect, distant or negligible the connexion or effects to domestic competition, on the one hand, and on the other hand a strict application of the objective territorial principle, requiring at least part of the relevant conduct occurring within the Community.

In the 1984 Woodpulp cartel case, the Commission had to justify fining foreign companies, some of which did not have any subsidiaries, branches or agents within the Community. The economic entity doctrine hence not being available, the Commission solely relied on the qualified effects test to assert jurisdiction. In its decision, it stated that "[t]*he effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices*".[19]

The Commission embraced the alternative implementation doctrine after its introduction by the ECJ in its *Woodpulp* judgment. But the Commission did not drop the qualified effects test. Rather, it considered the two tests to be supplementary. In its 2004 Guidelines on the effect on trade concept, the Commission stated that "*Articles* [101] *and* [102] *apply irrespective of where the undertakings are located or where the agreement has been concluded, provided that the agreement or practice is either implemented inside the Community, or produce effects inside the Community*".[20] In various cases, the Commission has expressly taken the position that jurisdiction could be based on the implementation test as well as the qualified effects test.[21]

4.4 Endorsements by Advocates General

Over the past several decades, at least four different Advocates General (AGs) have pleaded for the adoption of the qualified effects, each time following careful deliberation. In 1972, AG Mayras gave his opinion in the appeal lodged by ICI against the fined imposed on it in the Dyestuffs cartel. He dismissed the Commission's primary reliance on the economic entity doctrine as unconvincing, but he endorsed the qualified effects doctrine.[22] Mayras found sufficient support for this doctrine under international law and under laws of most national legal systems within the Community. Borrowing from the U.S. development of the qualified effects test, he accepted an effects test based on the conditions that the effects of foreign conduct on competition within the Community must be (i) *direct and immediate* (i.e. not "*only having effects at one stage removed by way if economic mechanisms themselves taking place abroad*"), (ii) *reasonably foreseeable* and (iii) *substantial*.[23]

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17 *Dyestuffs*, p. 627 and further; Opinion of AG Mayras in *Dyestuffs*, ECLI:EU:C:1972:32, p. 693.
18 *Dyestuffs*, p. 629.
19 Commission decision of 19 December 1984, case IV/29.725, OJ L85/1, para 79.
20 Commission, *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, 2004, OJ 101/81, para 100.
21 See e.g. Commission decisions of 8 December 2010 in COMP/39.309 (LCD), para 238 and of 9 November 2010 in COMP/39.258 (Airfreight), para 1035.
22 Opinion of AG Mayras in *Dyestuffs*, p. 691-693.
23 Ibid., p. 694.

The next pleading for recognition of the qualified effects test was delivered by AG Darmon in 1988, in his opinion on the appeals brought by Ahlström Osakeyhtiö and others against the Commission's decision in the Woodpulp cartel case.[24] After a thorough assessment of state practices, opinions on international law and academic writings, Darmon recommended the adoption of the qualified effects test as suggested by AG Mayras.[25] He could not identify any prohibitive rule under international law against the qualified effects test, nor a need to reject it in view of international comity considerations.

AG Wathelet expressed his support for the application of the qualified effects to the Court in 2015, in his opinion on InnoLux's appeal against the LCD cartel decision.[26] In this decision, the Commission had tried to justify its ability to take into account sales into the European Economic Area (EEA) of finished products that incorporated cartelised LCD panels where the incorporation had taken place outside the EEA but intra-group. It relied on both the implementation test and the qualified effects test. Wathelet found that neither test was met in respect of the relevant sales and submitted that the Commission had overstretched the territorial limits of EU competition law by taking these sales into account. First, the implementation test was not met because (i) the actual internal sale of cartelised LCD panels by InnoLux took place outside of the EEA and (ii) the subsequent sale within the EEA of transformed products incorporating the cartelised LCD panels did not concern products that were the subject of the infringement. Second, Wathelet submitted that the Commission had clearly failed to present the evidence necessary to demonstrate that the qualified effects test was met, as it had merely stated that the effects could be "*reasonably assumed*".[27] The AG called for greater jurisdictional restraint by the Commission and warned that "*a broad interpretation of the territorial scope of EU competition law would entail the risk of conflicts of jurisdiction with foreign competition authorities and of double penalties for undertakings*".[28]

The *Intel* appeal led AG Wahl to examine the qualified effects test in context of Article 102 TFEU. The Commission had found Intel to have abused its dominant position, *inter alia* by awarding conditional rebates and conditional payments to four OEMs. One of these OEMs, Lenovo, was a Chinese company purchasing microprocessors from Intel outside the EEA, for incorporation into computers manufactured in China. Intel claimed that the agreements with Lenovo were neither implemented in the EEA, nor had any foreseeable, immediate or substantial effect on competition in the EEA. Wahl politely noted that this provided the Court with a welcome opportunity of clarifying and fine-tuning the line of case-law devolving from *Dyestuffs* and *Woodpulp*. He asked the Court to explicitly address the jurisdictional issue and adopt the effects-based approach as suggested by AGs Mayras, Darmon and Wathelet.[29] Wahl emphasised the importance of exercising restraint in asserting jurisdiction on the basis of effects, in particular given that in the currently globalised economy, conduct taking place anywhere in the world will almost inevitably have some sort of effect within the EU.[30] Applying the qualified effects test to the relevant conduct in question, he found that "*far from being immediate, substantial and foreseeable, any anticompetitive effect resulting from the Lenovo agreements appears rather hypothetical, speculative and unsubstantiated*".[31]

4.5 Use of the qualified effects test by the General Court

The General Court (then the Court of First Instance) relied on the qualified effects test for the first time in *Gencor v Commission*.[32] In this case, the South African company Gencor asked for annulment of the Commission's decision to block Gencor's intended acquisition of joint control over certain other

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24 Opinion of AG Darmon in *Woodpulp*, ECLI:EU:C:1988:258.

25 Ibid, paras 53-58.

26 Opinion of AG Wathelet in *InnoLux*, ECLI:EU:C:2015:292, para 53. Wathelet stopped short of actually recommending the application of the test by the Court, as he found that the Commission had in any event failed to demonstrate the test was met in this case.

27 Ibid., para 58.

28 Ibid., para 42.

29 Opinion of Wahl in *Intel*, para 296.

30 Ibid., para 299-300.

31 Ibid., para 324.

32 Court of First Instance judgement of 25 March 1999 in case T-102/96, ECLI:EU:T:1999:65.

South African companies. One of its pleas alleged a lack jurisdiction over the concentration. The General Court rejected this plea, holding that the application of the Merger Regulation "*is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community*".[33] It considered that the concentration would have had an immediate and substantial effect in the Community and that it was in fact foreseeable that the effect of the concentration would also be to impede competition significantly in the Community.

The General Court also seemed to rely on the qualified effects doctrine in the 2006 case *Haladjian Frères v Commission*.[34] But in *InnoLux*, the General Court chose to solely focus on the implementation test.[35] This was surprising given that the Commission had relied on both the implementation test and the qualified effects test in its decision. Also, as demonstrated by the later opinion of AG Wathelet, it was hardly evident that the Commission's exercise of jurisdiction in the LCD cartel case could be justified merely on the basis of the implementation test.

In *Intel*, the General Court addressed and applied both tests, and confirmed that "*in order to justify the Commission's jurisdiction under public international law, it is sufficient to establish either the qualified effects of the practice in the European Union or that it was implemented in the European Union*".[36] In respect of the qualified effects test, the General Court held that the three criteria of immediate, substantial and foreseeable effects did not require the effects to be actual. Otherwise, the Commission would be barred from intervening in cases where the adverse effects of an infringement had not (yet) materialised. The General Court therefore assessed whether the relevant agreements entered into between Intel and OEMs were "*capable of having*" substantial and immediate effects and whether these effects were foreseeable. Importantly, the General Court held that it was wrong to assess the criteria of the qualified effects test for each instance of conduct that was part of the alleged single and continuous infringement. Rather, it had to be determined whether the potential effects of the infringement "*as a whole*" were substantial, immediate and foreseeable.[37]

4.6 The ECJ's past efforts of evasion

The Court arguably came very close to adopting an effects test in the early days of European competition law. In the 1971 *Béguelin* case, the Court dealt with a dispute between two exclusive distributors appointed by a Japanese manufacturer. It considered that European competition law could be applied to an exclusivity agreement even where one of the contracting parties was situated in a third country. In the English translation of the judgment, what is now Article 101 TFEU was held to apply to such an agreement "*since the agreement is operative on the territory of the common market*".[38] However, in French, the authentic language of the case, this section reads: "*dès lors que l'accord produit ses effets sur le territoire du marché commun*".[39] This clearly seems to support an effects-based jurisdictional test.[40] But it soon became apparent that this judgment was not a precursor for full recognition of a (qualified) effects doctrine.

Half a year later, in *Dyestuffs*, the Court had an easy opportunity to act on the suggestion of AG Mayras to set aside the questionable economic entity doctrine in favour of the qualified effects test. But despite the elaborate argumentation of the AG, the Court decided to go along with the Commission's primary argument. It confirmed the Commission's jurisdiction on the basis of the "*unity of conduct*" between a foreign parent company and a subsidiary located within the Community, pursuant to which the parent

33 Ibid., para 90.

34 Court of First Instance judgement of 27 September 2006 in case T-204/03, ECLI:EU:T:2006:273.

35 General Court judgement of 27 February 2014 in case T-91/11, ECLI:EU:T:2014:92, paras 61-65.

36 General Court judgement of 12 June 2014 in case T-286/09, ECLI:EU:T:2014:547, para 244.

37 Ibid., paras 251, 268-271, 280 – 290.

38 Judgement of the Court of 25 November 1971 in case 22/71, ECLI:EU:C:1971:113, para 11.

39 The English version of the opinion of AG Mayras in *Dyestuffs* refers to the phrase: "once the agreement produces effects on the territory", see p. 692.

40 But see the opinion of AG Darmon in *Woodpulp*, which states that "*the fact must not be altogether disregarded that that case concerned an agreement granting an exclusive concession and that one of the parties to it was established within the Community*", see para 13.

company could be considered to have "*brought the concerted practice into being within the Common Market*".[41] The Court did not even mention the qualified effects test.

The next good opportunity to adopt the qualified effects test came with *Woodpulp*. The economic entity doctrine could not be relied upon because some of the foreign cartel members had no establishments within the Community, which was why AG Darmon solely applied the qualified effects test. As noted by Ryngaert, "[e]*ven more than in* Dyestuffs*, it was expected that the ECJ could no longer circumvent the effects doctrine if it were to uphold jurisdiction*".[42] But the ECJ still found a way and instead of adopting the qualified effects test, the Court went in an entirely new direction. The Court reasoned that cartel infringements are made up of two elements, the formation of the cartel agreement and the implementation thereof. It considered the location of implementation to be "*the decisive factor*" for the applicability of European competition law, given that it would be too easy to evade the cartel prohibition if its application were to depend on the place where a cartel agreement was concluded. The Court considered the foreign producers of woodpulp to have indeed implemented their pricing agreement in the common market by directly selling woodpulp at cartelised prices to customers in the Community.[43]

Since *Woodpulp*, it was the implementation test rather than the qualified effects test that was considered to determine the Commission's jurisdictional reach. Then came *InnoLux*, a case involving intra-group sales of component products outside the EEA for incorporation in finished products to be sold within the EEA (so-called "*Direct EEA Sales Through Transformed Products*"). AG Wathelet had argued that these sales could only be brought within the Commission's jurisdiction through proper examination of the effects of these sales on competition within the EEA. But also these circumstances did not bring the ECJ to apply the qualified effects test. The Court found the arguments raised by InnoLux in respect of the territorial jurisdiction of the Commission to be "*irrelevant*" as it held these arguments to concern not the territorial scope of the Commission's jurisdiction but the separate question of which sales the Commission was entitled to take into account in the calculation of the fine.[44] According to the Court, it was not disputed that the Commission had jurisdiction to apply Article 101 TFEU to the LCD cartel because the cartel members, including InnoLux, had implemented the worldwide cartel in the EEA by selling affected products to independent third parties in the EEA. The Court did not consider it necessary for all sales taken into account for the fine calculation to fall within the territorial scope of the Commission's jurisdiction, as long as there were at least some direct sales in the EEA.

4.7 *Intel*: recognition at last

So after all its past efforts to avoid even addressing the qualified effects doctrine, what made the ECJ accept the test in *Intel*? First, it is questionable whether it would have been credible for the Court to apply the implementation doctrine to the agreements between Intel and Lenovo in upholding the General Court's confirmation of the jurisdiction of the Commission. AG Wahl had found the General Court's reasoning in respect of the implementation test to be unconvincing for it focused not on any implementation by Intel but instead on Lenovo's behaviour in a downstream market in order to establish a link to the EEA territory.[45] Also, the General Court had primarily relied on the qualified effects test, and had merely assessed whether the implementation test was met "*for the sake of completeness*".[46]

Second, it was not possible for the Court to take a similar approach as it had taken in *InnoLux*. It was not in the context of the sales taken into account for the fine calculation that the Commission's

41 *Dyestuffs*, paras 125-142.
42 Ryngaert, para 319.
43 *Woodpulp*, paras 13-17. See Ryngart, para 321 and footnote 1006; Opinion of AG Wahl in *Intel*, paras 291-293.
44 *InnoLux*, paras 73-74.
45 Opinion of AG Wahl in *Intel*, paras 311-312.
46 General Court judgement in *Intel*, para 297.

jurisdiction was challenged by Intel. Instead, Intel pleaded that the Commission had wrongly included certain foreign conduct within the scope of the infringement. The agreements between Intel and Lenovo were considered to be standalone abuses of Intel's dominant position, as well as elements of the overall single and continuous infringement of Article 102 TFEU.[47] The Commission's jurisdiction therefore also had to cover these agreements in particular.

A third reason explaining the Court's acceptance may be that it felt less external pressure to continue holding off on recognising the qualified effects doctrine. In the 1970s and 1980s, formal acknowledgement of the qualified effects test would have been more controversial than it is today. It is perhaps mainly due to the development of the globalised economy that it has become accepted legal practice for states to apply their laws to foreign conduct affecting their domestic markets. The use of effects-based jurisdictional doctrines is nowadays commonplace in the world, seemingly without this resulting in general violations of comity considerations or significant international conflicts. These considerations may well have played a part in the Court's decision, although these same considerations apparently were not sufficient to make the Court comfortable to use the doctrine in *InnoLux*.

The Court itself has hardly given any explanation for its acceptance of the qualified effects test. It confirmed that this test could serve as a basis for the Commission's jurisdiction merely because it "*pursues the same objective* [as the implementation test], *namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market*".[48] Given the Court's long evasion of the qualified effects doctrine, this can rightfully be called an anti-climax.

Moreover, one would have expected an acceptance by the Court of the doctrine to be accompanied by an elaborate reasoning on its conditions and limitations. But the Court's first application of the qualified effects test was surprisingly lenient. The Court acknowledged the forward looking approach of the General Court in *Gencor*, namely to examine whether "*it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union*".[49] It also followed the General Court in ruling that the qualified effects test should be applied to the relevant conduct "*viewed as a whole*".[50] In examining the effects of Intel's agreements with Lenovo, the Court held that these agreements formed part of an overall strategy aimed at foreclosing Intel's main rival and that it was this overall conduct that was capable of producing an immediate and substantial effect in the EEA. The Court therefore did not take on board Wahl's criticism that the General Court had wrongly focused on the effect of the agreements on Lenovo's behaviour rather than the effect of the agreements on competition within the internal market.[51] Finally, in respect of the condition of foreseeability, the Court agreed with the General Court that it is sufficient to take account of the "*probable effects of conduct on competition*" in order for the foreseeability criterion to be satisfied.[52]

4.8 Implications

The first responses to the Court's recognition of the qualified effects test by the parties involved have been mixed. EU Competition Commissioner Vestager stated that on the point of jurisdiction the *Intel* ruling was "*a very clear win for the Commission*".[53] But Jean-François Bellis, representing intervener ACT in the proceedings, nuanced the importance of the ruling. He believed that the Commission's "*jurisdictional overreach*" in respect of Lenovo may have been inadvertent and that it seemed that the Court did not consider this relatively minor aspect of the case to be sufficient to question the Commission's jurisdiction.[54] According to Bellis "[s]*een in this specific context, the judgment should*

47 Commission decision of 13 May 2009, COMP/37.990 (Intel), paras 1747-1748.
48 *Intel*, paras 45-46.
49 Ibid., para 49.
50 Ibid., para 50.
51 Opinion of AG Wahl in *Intel*, paras 318-324.
52 *Intel*, para 51.
53 Matthew Newman and Lewis Crofts, 'Intel ruling is 'clear win' for reach of EU law, Vestager says', *MLex*, 18 September 2017.
54 Lewis Crofts and Richard Vanderford, 'Intel ruling gives DOJ food for fought on reach of antitrust law', *MLex*, 15 September 2017.

not be read as opening the floodgates of extraterritorial overreach in cases where the effects of the EU of the infringing conduct as a whole are only indirect".[55]

It is difficult to predict whether the acceptance of the test will result in more expansive enforcement by the Commission. Indeed, in most cases it may still be easier to simply rely on the implementation test on the basis of direct imports into the EEA. That avoids the need to examine whether the effects of foreign conduct were immediate, substantial and foreseeable. It has in the past been noted that the Commission will only use the qualified effects test as *ultimum remedium* and this may well still be the case going forward.[56] But in any event, *Intel* has widened the horizon of possibilities for the Commission and it is likely that the Commission will feel more comfortable to pursue cases that lack significant sales within or into the EEA.

The Court's ruling is likely to accelerate the further development of the qualified effects test under EU law. In their authoritative opinions, AGs Mayras, Darmon, Wathelet and Wahl have consistently and rightly emphasised the need for restraint in applying the conditions of immediate, substantial and foreseeable effects. The General Court and ECJ in their *Intel* judgments seem to demand little such restraint. But future cases will surely shed further light on the correct application of the test, all the more so if the Commission will use the test to explore new boundaries of its territorial reach.

Finally, the formal recognition by the ECJ of the qualified effects doctrine highlights the growing importance of international principles to prevent overlapping enforcement and disproportional punishment. With commercial activities becoming more and more globalised and an increasingly wide number of authorities around the globe being able to easily grasp foreign conduct, defendants in international competition cases will be faced with a growing number of enforcers. Andrew Finch, acting Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, confirmed that the adoption of the qualified effects test in the *Intel* ruling and the expansion of extraterritorial enforcement of competition laws in general are an increasingly important subject to discuss among authorities.[57]

4.9 Final considerations

Looking back at the long road towards final acceptance travelled by the qualified effects test, how sensible was it for the Court to dodge ruling on the legality of this doctrine for decades? One could say that it is admirable for the Court to avoid the acknowledgment of the more controversial test for so long, while still being able to confirm the Commission's jurisdiction in particular cases. But I would say that it is regrettable from the perspective of legal certainty that during this entire time the Court failed to draw a clear line in the sand to define the jurisdictional limits applicable to European competition law. All parties affected by competition law enforcement generally benefit from increased legal certainty on the jurisdictional reach of the Commission. AG Wahl rightly pointed to the need to ensure that undertakings can operate in a foreseeable legal environment, which is a growing challenge given that there are now well over 100 jurisdictions with active competition law enforcement.[58] While the core mission of the European courts may be to ensure compliance with EU law, an essential aspect of the Court's function is to clarify legal boundaries. In this context, it is not very helpful for the Court to seek the easiest way out of fundamental questions. Without arguing for the Court to start ruling on hypothetical questions or matters beyond the scope of particular disputes, I would believe that the development of our European legal system is best served by a Court that not only confirms whether a line has been crossed but also dares to say where the line actually is.

It is doubtful that the *Intel* ruling will significantly change the Commission's enforcement policies, given that it already applied the qualified effects test in absence of the ECJ's acknowledgement. But

55 Ibid.
56 Ryngaert, para 328, footnote 1035.
57 Crofts and Vanderford, 'Intel ruling gives DOJ food for fought on reach of antitrust law'.
58 Opinion of AG Wahl in *Intel*, para 300.

irrespective of the practical implications on enforcement, the key importance of the ECJ's acceptance of the qualified effects test for the research of this dissertation is that it clearly reveals the direction of the reach of European competition law enforcement. One may expect that the increasingly crowded competition enforcement arena would justify a move towards greater jurisdictional self-restraint. This would be in line with the stance of the AGs who have called for the acceptance of the qualified effects test. They have clearly advocated for a restrained application to avoid concerns of jurisdictional overreach and overlapping enforcement. But the ECJ has ignored these considerations or at least has apparently not felt that these considerations justified the shaping of more restrictive jurisdictional boundaries for the Commission.

The assessment in this chapter complements the response to the second research sub-question, in describing the choices that are made in Europe in respect of the exercise of the Commission's jurisdictional discretion. The previous chapter already showed that the Commission and European courts displayed little jurisdictional self-restraint in the LCD cartel case. But even in that case, the ECJ did not go as far – or perhaps did not need to go as far – as to confirm that there was no need for sales into the EEA in order for the relevant conduct to fall within the Commission's jurisdiction. The *Intel* ruling shows that the ECJ now felt comfortable enough to embrace the qualified effects test, and to even do so with very little substantive reasoning.

Three levels of potential jurisdictional self-restraint were identified in Chapter 3: (i) the basis for asserting jurisdiction, (ii) the scope of the cartel conduct that is being sanctioned and (iii) the methodology for calculating the cartel fine. The ECJ's ruling in *Intel* applies to the first/highest level, but it also impacts the second and third levels. The confirmation of the Commission's identification of the Lenovo agreements as a standalone infringement (second level) and inclusion of the relevant turnover (third level) was likely even part of the reason why the ECJ now felt the need to take a new position in respect of the first level. Importantly, by allowing effects to be substantial, immediate and foreseeable when viewed "as a whole", the European courts accept that conduct not meeting the jurisdictional test in itself can be part of the conduct to be sanctioned and can be relevant for the turnover used to determine the fine. This is in line with the approach already taken in *InnoLux*, but this time relating to a jurisdictional test that expands the Commission's reach even further. In summary, *Intel* has further extended the EU's legal doctrine on extraterritorial competition enforcement compared to the already expansive approaches taken in *InnoLux*.

5. CHAPTER 5: EXTRATERRITORIAL CARTEL ENFORCEMENT WITHIN THE EUROPEAN COMPETITION NETWORK

This chapter is based on the article 'Fining Foreign Effects: A New Frontier of Extraterritorial Cartel Enforcement in Europe?', 40 World Competition 3, 2017.

5.1 Introduction

Chapters 3 and 4 have addressed the legal doctrine and practices on jurisdictional limitations and extraterritorial cartel enforcement, focussing on the EU (Chapters 3 and 4) and the US (Chapter 3). This fifth chapter assesses the same issues but from a different perspective, within the specific context of the decentralised enforcement of EU competition law. The term *decentralised* means that it is not just the European Commission that is competent and responsible for the enforcement of EU competition law, so is each individual national competition authority (NCA) within the EU. The Commission and the NCAs together form the European Competition Network (ECN). The sharing of enforcement powers within the ECN gives rise to particular jurisdictional issues not yet addressed in the previous chapters. One particular issue relevant to the research of this dissertation is whether the power of NCAs to prosecute and sanction infringements of Article 101 TFEU could (or should) extend beyond their own national borders.

In designing the system of decentralised cartel enforcement under Regulation 1/2003 (the Regulation), the obvious question arose whether the power of NCAs to prosecute and sanction infringements of Article 101 TFEU could (or should) extend beyond their own national borders. But this issue was considered too sensitive to seriously address in the negotiations on the Regulation. The EU Member States and the Commission therefore left it open whether NCAs had the right or perhaps even the obligation to sanction cross-border cartels for their full effects within the Union. In the absence of any legal basis for such extraterritorial sanctioning by NCAs in the Regulation, the members of the ECN proceeded on the basis of the common understanding that each authority would only pursue cross-border cartels for their domestic effects.[1] Article 101 cartel infringements not dealt with by the Commission have therefore often been broken down along territorial lines, resulting in the businesses concerned at times being faced with multiple national proceedings targeting the same overall conduct.

With its 2012 decisions in the *Silverskin Onions* and *Onion Sets* cartel cases[2], the Dutch NCA (the ACM) has clearly moved away from this approach to decentralised enforcement of cross-border cartels. With the aim to ensure effective enforcement of Article 101, the ACM in these cases imposed fines that took into account the EU-wide effects of the respective cartels. The decisions were upheld by the highest appeal court in 2016. The ACM's approach in these cases has brought back to life the debate on the legality of NCAs fining foreign effects within the Union. In this debate, various authors argue that NCAs have the right to sanction cross-border cartels for their full European effects because of the need to (i) give full effect to the Regulation and (ii) avoid duplicate proceedings from creating double jeopardy concerns. Some even argue NCAs have an obligation to do so. On the other end of the spectrum, several writers maintain that no such right or obligation can be derived from EU law. They believe NCAs remain bound by international public law and the principle of territoriality, preventing NCAs from sanctioning conduct on the basis of harm caused elsewhere.

Now that NCAs have started to test the boundaries of their fining powers unilaterally, it is time for this academic debate to enter the political arena. The territorial extension of one NCA's powers within the ECN by definition encroaches on the powers of other authorities. Any steps in that direction in the absence of a common view shared across the network are therefore likely to result in jurisdictional conflicts. Moreover, a lack of clear guidance as to the ability for NCAs to fine foreign effects within

[1] S. Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law*, 179, 387, 437 (Hart Publishing 2009); E. Paulis and C. Gauer, *Le règlement N° 1/2003 et le principe du ne bis in idem*, Concurrences 1-2005, 34, point 19 (2005).

[2] ACM decision in case 6964 *Zilveruien* (25 May 2012); ACM decision in case 6987 *Eerstejaars plantuien* (18 December 2012).

the Union creates substantial legal uncertainty for businesses and the legal community. That is why this sensitive issue should no longer be ignored within the ECN.

By examining the current enforcement practices in a number of key jurisdictions, this chapter will first highlight the wide differences between NCAs in respect of the territorial scope of fines imposed by them under Article 101. A legal assessment reveals that there is much uncertainty as to the legality of NCAs taking into account foreign effects in sanctioning cross-border cartels. Many of the legal arguments used to either support or object to the right for NCAs to do so are unsatisfactory, at least in the context of the current legal framework. As such a right can significantly enhance the effectiveness of decentralised enforcement of Article 101, it may well be desirable to further explore this new frontier of extraterritorial cartel enforcement within the Union. However, it is submitted that this will require legislative action, so that legal certainty can be provided in accordance with the common views of Member States. While unfortunately not being addressed in Directive 2019/1 on the empowerment of NCAs (ECN+ Directive)[3], the European legislator may still decide to amend the Regulation in order to put in place the necessary procedural rules and safeguards to give NCAs the right to fine foreign effects in a way that ensures effective enforcement and proportionate sanctioning while still allowing for sufficient prosecutorial discretion at the national level.

5.2 A widely diverging NCA practice

This section assesses the current enforcement practices of the NCAs in the Netherlands, the UK, Spain, France, Germany and Belgium. It reveals that there is a clear lack of consistency in respect of the ability and willingness of NCAs to take into account foreign turnover in the calculation of fines for cross-border cartels.

In the Netherlands, the ACM has historically adopted a restricted approach when it comes to the sanctioning of cross-border cartels. In the 2003 *North Sea Shrimps* cartel case[4], the ACM (then NMa) coordinated its enforcement with the European Commission and the Danish and German NCAs and ultimately was the only authority to sanction the cartel. Still, the fines imposed by the ACM only sanctioned the cartel for its effects on the Dutch market.[5] The ACM took a slightly different but similarly restricted approach in the *Flour* cartel case.[6] In this case, the ACM delineated the object of its own enforcement from that of the German and Belgian NCAs by merely sanctioning the part of the overall cartel conduct which was considered to have the object to stabilise the Dutch flour market.

The ACM adopted a markedly different approach in *Silverskin Onions* (2012) by deciding that in this case the 'relevant turnover' used as a basis for the cartel fine calculation should encompass the companies' EU-wide turnover. Whereas the ACM fining guidelines were silent on the ability to take into account foreign turnover, the authority argued that this was necessary mainly to preserve the effectiveness and uniform application of EU competition law.[7] The ACM stated that it followed the principles for the cooperation of NCAs as laid down in the Commission's Notice on cooperation within the Network of Competition Authorities (the ECN Notice)[8] by ascertaining that no other authority had started or intended to start a separate investigation into the alleged cartel behaviour. Later in 2012, the ACM similarly took into account EU-wide relevant turnover in calculating the fines it imposed in the *Onion Sets* cartel case. In the appeal proceedings against the respective decisions, the Trade and Industry Appeals Tribunal confirmed the ACM's power to calculate a cartel fine on the basis of a

3 EU Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

4 ACM decision in case 2269 *Noordzeegarnalen* (14 January 2003).

5 The fines were based on turnover achieved in the Netherlands, using a proxy figure for each party that was calculated by taking the proportion of the parties' combined turnover on the relevant market that was achieved in the Netherlands (40%) and applying this proportion to each party's individual aggregate turnover.

6 ACM decision in case 6306 *Meel* (16 December 2010).

7 ACM decision in *Zilveruien*, para 266.

8 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43 (27 April 2004).

company's EU turnover.[9] It reasoned that this matter is determined by national rather than European law, and that the applicable national laws in the Netherlands do not impose an obligation on the ACM to limit the basis for its fine calculations to domestic turnover. In reaching its conclusions, the Tribunal also took into account that the ACM had assured itself that no other European authority had intended to launch an investigation into the relevant conduct, so that the ACM's approach would not create a potential *bis in idem* situation.

In the UK, the fining guidelines stipulate that in cartel cases sanctioned under Article 101 the authority may take into account foreign effects by including the relevant turnover generated in another Member State in the fine calculation.[10] The guidelines state that this is only possible where the relevant geographic market is wider than the UK and where in each particular case the relevant NCA has given its express consent. This reflects the UK Government's position that under the Regulation, foreign effects may only be sanctioned where the NCAs of the Member States concerned have agreed to this.[11] It is interesting that the UK guidance on the calculation of cartel fines under national law, dating from 2000, already provided that the 'relevant turnover' may include turnover generated outside the UK where the relevant geographic market is wider than the UK.[12] Under this older guidance, there was no need to obtain the prior consent of another Member State. Despite the express legal basis provided in the guidelines, it appears that thus far the NCA in the UK has never used its ability to take into account foreign turnover in the calculation of its cartel fines.

The Spanish fining guidelines adopted in 2009 specify that when the affected market is wider than national, the volume of sales affected by the infringement in the EEA shall be taken into account.[13] In such cases the authority (CNMC) will proceed in accordance with the Regulation and the ECN Notice. Based on the decisions published on the CNMS's website, it does not appear that the authority has ever explicitly relied on this provision in the guidelines. Still, there have been cases in which the CNMC based its cartel fines on turnover achieved outside Spain, such as the export cartel cases on envelopes[14] and sherry[15]. In these two cases, the turnover taken into account was not explicitly limited to sales in the EEA, and at least for the envelopes cartel included sales in countries outside the EEA. The 2009 fining guidelines are no longer applied following a ruling by the Spanish Supreme Court in January 2015 in which the method of calculating fines under the 2009 fining guidelines was found to be contrary to the Spanish Competition Act.[16] However, this has not affected the authority's policy that foreign turnover can be taken into account in the fine calculation where the market affected by the infringement extends beyond Spain. In the 2016 cartel case on international removal services for example, the CNMC calculated the fine on the basis of turnover related to not only international removals with Spain as origin or destination, but also those between countries other than Spain.[17]

In France, the fining guidelines clearly state that cartel fines are calculated on the basis of domestic sales.[18] However, the authority may take into account turnover achieved elsewhere in the EEA where as a result of a market sharing agreement a company refrains from making sales in France.[19] The

9 *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56; *Eerstejaars plantuienkartel* (CBb, 6 October 2016), ECLI:NL:CBB:2016:272.

10 OFT (now CMA), OFT's guidance as to the appropriate amount of a penalty (OFT423), para 2.10 (Sept. 2012).

11 In its 2003 consultation on the changes necessary in view of the entry into force of the Regulation the UK Government considered that 'NCAs should be able to take into account effects on competition in another Member State in calculating the appropriate amount of any penalty when applying Article 81 or 82 provided that the NCA in that Member State agrees that the OFT can take into account effects within its territory in that particular case'. Department of Trade and Industry, Modernisation - a consultation on the Government's proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998, para 5.9 (Apr. 2003).

12 OFT, Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty (OFT 423), para 2.3 (March 2000).

13 CNC, Comunicación de la Comisión Nacional de la Competencia, sobre la cuantificación de las sanciones derivadas de infracciones de los artículos 1, 2 y 3 de la Ley 15/2007, de 3 de julio, de Defensa de la Competencia y de los artículos 81 y 82 del Tratado de la Comunidad Europea, point 11 (6 February 2009).

14 CNMC decision in case S/0318/10 *Exportación Sobres de Papel* (15 October 2012).

15 CNMC decision in case S/0091/08 *Vinos Finos Jerez* (of 28 July 2010). Other cases in which sales outside of Spain have been taken into account include cases *Postensado y Geotecnia* (S/0287/10) and *Carpa Dorada y Club de Variedades Vegetales Protegidas* (S/0312/10).

16 *BCN Aduanas* (Spanish Supreme Court, 29 January 2015), ECLI:ES:TS:2015:112.

17 CNMC decision in case S/DC/0544/14 *Mudanzas Internacionales*, 98 (6 September 2016).

18 Autorité de la Concurrence, Notice on the Method Relating to the Setting of Financial Penalties, point 34 (16 May 2011).

19 Ibid., point 39.

French NCA indeed took into account turnover achieved in both France and Germany in calculating the fines imposed for the *Flour* cartel, a case concerning a French-German market sharing agreement between flour producers in both Member States.[20] In its fining decision, the authority clarified that while the fines were based on sales made in both countries, the sanction should only reflect the gravity of the conduct and the harm it caused to the economy on the French territory.[21] According to the French NCA, it was for the Bundeskartellamt to impose its own sanction for the anti-competitive conduct in respect of its effects on the German market. However, when the German authority imposed cartel fines for the collusion in the flour sector almost a year after the adoption of the French decision, it only sanctioned the collusion on the domestic market, ignoring the French-German market sharing agreement.[22]

The German fining guidelines of 2013 determine that fines must be based on an overall appraisal of all aggravating and mitigating factors within an upper limit set by a combination of a company's total turnover and its domestic turnover in the relevant market affected by the infringement.[23] The guidelines reflect the position that the cartel fines imposed by the Bundeskartellamt should be limited to sanctioning effects in Germany.[24] This is in line with the view Germany has taken in ECN discussions in the context of the entry into force of the Regulation, namely that NCAs only have the power to sanction cartels under Article 101 for the effects on their own territory.[25]

Both in its decisions and in its wider advocacy efforts, the Belgian NCA (BMA-ABC) has historically supported a restricted approach to extraterritorial cartel enforcement.[26] The authority has maintained that it should focus solely on the effects of cartel conduct within its own borders. A first example of this approach is the 2008 *BBP* cartel case[27]. Despite the European scope of the infringement and the affected market, the NCA only took into account sales in Belgium when calculating the fine in this case, reasoning that it has only been given the powers to impose fines necessary to protect competition on the Belgian market.[28] According to the BMA-ABC, even where NCAs sanction cross-border cartels under Article 101, they still pursue an end that is separate from ends pursued by other NCA's, each in its respective market.

In the *Flour* cartel case[29], the BMA-ABC was particularly keen to adopt a very cautious approach to avoid double punishment allegations. This was because the Dutch NCA had already imposed a fine on some of the same flour producers for collusion in the flour market. The BMA-ABC explicitly limited itself to prosecuting only those aspects of the cartel that related to the Belgian market. With respect to the sanctioning, the authority decided to limit the fine for all five addressees to a lump sum fine of EUR 100,000, in view of the penalties already imposed in the Netherlands.[30] Despite the cautious approach by the BMA-ABC, its decision was overturned on appeal for (potentially) violating

20 Autorité de la Concurrence decision in case 12-D-09 *Farine Alimentaire*, para 779 (13 March 2012).

21 Ibid., para 801.

22 Bundeskartellamt, *Bußgeldverfahren gegen Unternehmen der Mühlenindustrie*, Fallbericht Case B11 – 13/06 (27 May 2013).

23 Bundeskartellamt, Guidelines for the setting of fines in cartel administrative offence proceedings (25 June 2013). Similar to the situation in Spain, the current fining guidelines were adopted following a judgement of the German Supreme Court ruling that the previous guidelines incorrectly applied the statutory maximum of 10% of total turnover as a cap rather than an upper limit of the fining range that should be reserved for the worst possible infringements. *Grauzement* (Federal Court of Justice, 26 February 2013), KRB 20/12, WuW/E DE-R 3861.

24 Bundeskartellamt, Guidelines for the setting of fines in cartel administrative offence proceedings, para 11.

25 Bundeskartellamt, *Stellungnahme der Bundesregierung zum Tätigkeitsbericht des Bundeskartellamtes 2003/2004*, vii (22 June 2005). *See* also C.E. Mosso, *A critical view on Chapter 2 - Relationship between EC competition law and national competition law*, in M. Merola and D. Waelbroeck (ed), *Towards an optimal enforcement of competition rules in Europe: time for a review of Regulation 1/2003?*, 460 (Bruylant 2010).

26 *See* e.g. the amicus curiae brief of the BMA-ABC in *Motorola v AU Optronics*, No. 14-8003 (7th Cir. 9 Oct. 2014). Interestingly, outside the realm of cartel enforcement the BMA-ABC seems to be less concerned about enforcement action targeting conduct also with respect to its effects beyond the territory of Belgium. In the 2015 decision against Fédération Equestre Internationale, the authority imposed interim measures calling for the suspension of restrictive clauses in respect of a Belgian organiser of equestrian competitions, without limiting the scope of the measures to Belgium or the EU. BMA-ABC decision in case 2015-V/M-23 *TTB vs FEI* (27 July 2015).

27 BMA-ABC decision in case 2008-I/O-13 *Bayer - Ferro - Lonza - Solutia Europe* (4 April 2008).

28 Ibid., para 67.

29 Decision of the BMA-ABC in case 13-IO-06 *Meel* (28 February 2013).

30 The authority noted that for two of the companies the Dutch fines amounted to 10% of their worldwide turnover, the legal maximum under Dutch law. The BMA-ABC considered that imposing additional fines on these companies would result in these companies being worse off compared to the situation where only one fine was imposed by the European Commission up to the 10% maximum.

the principle of *ne bis in idem*.[31] According to the Brussels Court of Appeal, it could not be ruled out that the Belgian authority had sanctioned the same offender for the same facts in pursuit of the same legal interest. In particular, the court found that by imposing a lump sum fine instead of a fine based on turnover achieved in Belgium, it was not possible to confirm that the BMA-ABC had sanctioned the flour cartel only for its effects on the Belgian territory.[32] Following the ruling, the Belgian NCA adopted new fining guidelines which clarify that fines will be calculated solely on the basis of sales in Belgium.[33] Only in the case of cross-border market sharing agreements may the relevant turnover be based on sales outside of Belgium.[34]

The above review of NCA practices in just a small number of Member States demonstrates that there is clear lack of consistency when it comes to the calculation of fines for cross-border cartels. It appears that most authorities still prefer to limit the territorial scope of their sanctions to their own national borders. But the practices in the Netherlands and Spain show that one can no longer point to a common understanding among NCAs to refrain from fining foreign effects.

5.3 Legal assessment

In assessing the legality of NCAs taking into account foreign turnover in calculating cartel fines, it is important to distinguish three types of situations in which this may be done:

a) to sanction a company for implementing a market sharing agreement as a result of which it refrained from making sales in the relevant Member State;

b) to take into account the overall size of the company reflected by its total turnover; and

c) to sanction a cartel (also) for its effects outside of the relevant Member State.

It is the third situation that gives rise to most legal discussions. These discussions focus on the separate but related themes of jurisdiction, competence, comity, effectiveness of EU law, adequate and proportionate fining, and double jeopardy.

For a large part, the legality of fining foreign effects by NCAs has been a matter of debate because the Regulation and the ECN Notice are completely silent on the issue. A paper published by the Dutch NCA in 2005 on the implementation of the Regulation reveals that there was no political agreement between the Member States to explicitly deal with this sensitive issue in the Regulation.[35] Céline Gauer, involved in the negotiations on the Regulation in the Council, has confirmed that after entry into force of the Regulation it has remained unclear whether NCAs have the power to fine foreign effects in Europe.[36]

The absence of any legislative guidance or rulings from the European courts has allowed for different views to be maintained by authors. Among the various views, one can identify two main approaches in assessing the legality of NCAs fining foreign effects.[37] Under the first approach, the competence for NCAs to sanction cross-border cartels for their full effects in the EU is considered to be derived

31 *Brabomills* (Brussels Court of Appeal, 12 March 2014), 2013MR6.

32 Ibid., 36–38.

33 The relevant turnover for the purposes of the Belgian fining guidelines is "the turnover generated by the relevant undertakings in Belgium to which the infringement directly or indirectly relates". BMA-ABC, Richtsnoeren betreffende de berekening van geldboeten voor ondernemingen en ondernemingsverenigingen bedoeld in artikel IV.70, § 1, eerste lid WER bij overtredingen van de artikelen IV.1, § 1 en/of IV.2 WER, of van de artikelen 101 en/of 102 VWEU, para 5 (26 August 2014).

34 Ibid., para 6(a).

35 P. Kalbfleisch, Director General of the Netherlands Competition Authority (NMa), *The NMa and modernisation: Past, present and future*, paper written for the conference Antitrust Reform in Europe: A Year in Practice, jointly organised by the International Bar Association and the European Commission (9–11 March 2005), https://www.acm.nl/download/documenten/nma/paper_EC_IBA.pdf.

36 Paulis and Gauer, *supra* n. 1, at 34, point 18.

37 *See also* the distinction made by Van Bockel, focusing on the legality of multiple fines being imposed by different NCAs for the same overall cartel conduct but for different effects. B. van Bockel, *De 'lange arm' van ACM bij het bepalen van de boetegrondslag*, 5 Markt & Mededinging 205, 206 (2016).

from the objective of decentralised enforcement of Article 101 under Regulation 1/2003 and the need for Member States to give full effect to this objective. Under the second approach, the competence to sanction conduct also for its foreign effects is considered to stretch beyond the territorial limitations of national enforcement powers and must therefore rest on an express legal basis agreed between Member States. As explained below, both approaches raise many questions in respect of the validity of the underlying legal arguments.

A. First approach: competence based on the need to ensure effectiveness of EU law

The view that NCAs are competent and perhaps even required to sanction cross-border cartels for their full European effects is advocated by Pignataro[38], Brammer[39], Monti[40], Wils[41] and others. Their starting point is the objective that each Article 101 infringement should be handled by a single authority within the ECN, as stipulated in recital 18 of the Regulation. To this end, the Regulation gives each NCA "full parallel competence" to apply Article 101.[42] Article 5 of the Regulation further gives the NCAs the right to impose fine decisions for individual violations of Article 101. Whereas the calculation of cartel fines imposed by NCAs is left to be determined by national law, the duty of sincere cooperation laid down in Article 4(3) TEU requires Member States to ensure the full effectiveness of EU law and requires fines imposed for violations of EU law to be 'effective, proportionate and dissuasive'.[43] According to the authors supporting this view, the effectiveness requirement implies that NCAs should take into account the effects in other Member States when sanctioning cartels under Article 101.[44]

Under this approach, it is submitted that fining cross-border cartels for only their domestic effects would either lead to disproportionately low penalties and hence under-enforcement, or would require duplicate proceedings in different Member States.[45] The latter would be inefficient and contrary to the objective that each cartel case should be handled by a single authority.[46] Moreover, it would create double jeopardy concerns as the alleged cartelists would be prosecuted and punished several times for the same conduct. Such concerns are not considered to be resolved by NCAs splitting up a cartel on the basis of national effects and each NCA only sanctioning the domestic effects. First, because the principle of *ne bis in idem* prohibits multiple prosecution or punishment for the same offence, and not merely for the same effects of an offence.[47] Second, because it is very difficult if not impossible to break down cartel conduct on the basis of its effects, certainly where the cartel conduct is considered to form a 'single and continuous infringement'.[48]

Brammer and Wils argue that the power to fine foreign effects solely derives from EU law, not from national law.[49] They do not consider the territoriality principle under international public law to limit the powers of NCAs in this respect. According to Brammer, the principles of international public law are not unconditionally applicable in the supranational legal order of the EU where Member States

38 L. Pignataro, *La riforma del diritto comunitario della concorrenza: il regolamento n. 1/2003 sull'applicazione degli articoli 81 e 82 del Trattato CE*, 8 Contratto e Impresa – Europa 233, 264 (2003).

39 S. Brammer, *supra* n. 1, at 437-459; S. Brammer, *Don't slice the onion, take the whole bulb*, 4 *Mededingingsrecht in the Praktijk* 14 (2014).

40 G. Monti, *A plea for 'Extraterritorial' antitrust enforcement by national competition authorities*, unpublished paper presented during the fourth ACELG annual conference Ten Years of Decentralised EU Competition Law Enforcement: Success or Failure? (14 November 2014).

41 W.P.J. Wils, *The reform of competition law enforcement brought about by Regulation No 1/2003: Will it work?*, Concurrences 4-2005, 19, point 134 (2005).

42 Joint Statement of the Council and the Commission on the functioning of the network of competition authorities (Joint Statement), 15435/02 ADD 1, para 11 (10 December 2002).

43 *See* Wils, *supra* n. 41, at 19, footnote 205, referring to the ECJ judgements of 21 September 1989 in case 68/88 *Commission v Greece* [1989] ECR 2984, paras 23 and 24, and of 18 October 2001 in case C-354/99 *Commission v Ireland* [2001] ECR I-7684, para 46.

44 *See* in particular Pignataro, *supra* n. 38, at 264 and Brammer, *supra* n. 1 at 439, 447, 459.

45 Ibid., 438.

46 This objective is stated in recital 18 of the Regulation, para 16 of the Joint Statement and point 7 of the ECN Notice.

47 Wils, *supra* n. 41, at 18, point 126.

48 Brammer, *supra* n. 1, at 381; Brammer, *Don't slice the onion, take the whole bulb*, *supra* n. 39), at 16; M. Merola and others, *Relationship between EC competition law and national competition law*, in: M. Merola and D. Waelbroeck (ed), *Towards an optimal enforcement of competition rules in Europe: time for a review of Regulation 1/2003?*, 162, point 85 (Bruylant 2010).

49 Brammer, *supra* n. 1, at 447–448; Wils, *supra* n. 41, at 19, point 134.

have agreed to limit their sovereign rights.[50] Even if these principles were to apply, she stipulates that a distinction must be made between the basis to exercise jurisdiction and the method of calculating a cartel fine.[51] Taking into account foreign effects is argued to merely relate to the latter and does not affect the jurisdictional basis for the enforcement. Brammer and Wils further maintain that a sufficient jurisdictional nexus is ensured on the basis of the criteria under the ECN Notice for considering an NCA 'well placed' to deal with a particular cartel.[52]

As regards comity considerations and deference, Monti submits that no consent of other NCAs is required before an NCA can sanction a cartel for its full effects in the EU.[53] Brammer points to the practice of NCAs informing others in the network of the start of cartel proceedings. Where no other authorities express an interest in the matter, she considers this a tacit approval of the matter being investigated and sanctioned for its full effects by the NCA giving the notice. [54]

The approach of Pignataro, Brammer, Monti and Wils is attractive because it clearly supports the desirable outcome of facilitating effective and efficient decentralised enforcement of cross-border cartels while avoiding double jeopardy concerns. However, its reliance on extensive teleological reasoning can be considered problematic. In particular, to derive the competence to fine foreign effects from the duty to ensure the full effect of EU law completely ignores the fact that in drafting the Regulation, Member States failed to reach agreement on the power of NCAs to sanction a cartel for its full effects in the EU. It is clear that the Regulation does not provide an explicit legal basis for this. The ECN Notice is even based on the assumption that no power to fine foreign effects exists and that effective enforcement may require that a single cartel is fined by several NCAs in parallel.[55] From the start of the entry into force of the Regulation, NCAs have agreed to work together on the basis that each NCA would only fine cartels for their domestic effects.[56] To introduce an obligation for NCAs to fine foreign effects through the backdoor of the need to ensure the full effect of EU law goes against the political will of the Member States and hence the European legislator. Recital 18 of the Regulation must not be made into more than it is, i.e. the mere general objective to guide discussions between Member States on case allocation. It cannot form the basis of a prescriptive rule that there must be only one authority sanctioning cartels for their full EU effects.

The ECN+ Directive also appears to supports the view that NCAs do not have the obligation to sanction cartels for their full EU effects. Article 29(1) of the Directive stipulates that proceedings by one NCA suspend the limitation periods applying to that conduct in other Member States, so that NCAs in other Member States can await the outcome of proceedings elsewhere before pursuing the same conduct themselves.[57] This clause facilitates parallel enforcement of the same conduct by several NCAs, and would not be necessary in the case of an obligation for Article 101 infringements to be sanctioned by a single competition authority.

If the power to fine foreign effects is derived from EU law, the lack of a provision giving NCAs such a power is clearly unsatisfactory. Article 5 of the Regulation cannot reasonably serve as a basis for such power as it merely points to the types of decisions that NCAs can take, without in any way expanding existing fining powers under national law. This was confirmed by the Dutch Trade and Industry Appeals Tribunal, which dismissed the view that an NCA could rely on Article 5 of the Regulation as a legal basis to take into account foreign effects.[58] Instead, the Tribunal ruled that this

50 Brammer, *Don't slice the onion, take the whole bulb*, *supra* n. 39, at 18.

51 Ibid., 17–18. *See also* Van Bockel, *supra* n. 37, at 207–208.

52 Brammer, *Don't slice the onion, take the whole bulb*, *supra* n. 39, at 17; Wils, *supra* n. 41, at 19, point 136.

53 Monti, *supra* n. 40, at 10.

54 Brammer, *Don't slice the onion, take the whole bulb*, *supra* n. 39, at.17. *See also* S. Brammer and others, *Report on the enforcement by NCAs and the ECN*, in: M. Merola and D. Waelbroeck (ed), *Towards an optimal enforcement of competition rules in Europe: time for a review of Regulation 1/2003?*, 303 (Bruylant 2010).

55 *See* in particular point 12 of the ECN Notice. This is acknowledged by Monti, *supra* n. 40, at 8.

56 Brammer, *supra* n. 1, at 179, 387, 437; Paulis and Gauer, *supra* n. 1, at 34, point 19.

57 It is interesting to assess how this clause relates to the principle of *ne bis in idem*. It will be difficult for an NCA to suspend the limitation period in respect of the same conduct that is pursued elsewhere, while on the other hand arguing that there is no 'idem'.

58 *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56, section 4.9.3.

is left for national procedural law to determine.[59] Rather than concluding that the ACM was required to take into account EU-wide turnover because of the need to ensure its fines were effective, proportionate and dissuasive, the Tribunal held that applying this approach did not render the sanction ineffective or disproportionate.[60]

This approach also raises several issues in respect of jurisdictional aspects. First, while in a strict sense the exercise of jurisdiction is indeed a different matter from the method of calculating fines, the two become very closely related when NCAs on the one hand use the effects doctrine to exert extraterritorial jurisdiction and on the other hand calculate fines on the basis of such effects, using relevant turnover as a proxy. Where the relevant turnover and effects both relate to a particular territory, it is difficult to maintain that this has no effect on the jurisdictional scope. The reasoning of Brammer on this point seems to imply that once jurisdiction over a cartel is established (based on nationality, place of conduct and/or effects), no matter how narrow the link, an NCA can exert its jurisdiction over the cartel in its entirety for the purposes of its sanctioning. It is precisely such an extensive interpretation of an authority's jurisdictional reach that creates comity concerns and double jeopardy issues.

Second, it is questionable whether a sufficient jurisdictional nexus can always be ensured through the criteria for 'well placed' authorities under the ECN Notice. The Notice is merely an informal guidance document that is not necessarily binding for NCAs.[61] The Notice itself therefore cannot prevent NCAs from using the power to fine foreign effects in cases that have little or no material link to their own territory. It is also not very plausible that Member States would have effectively given each other the power to sanction cross-border cartels for their full EU effects while not making the essential limitations to such power binding upon the Member States.

Third, it is a stretch to accept Brammer's argument that NCAs effectively waive their right to impose sanctions by not expressing an interest in the matter when notice is given of the start of proceedings elsewhere.[62] The argument ignores the fact that the interest for an NCA to pursue a matter may well come up at a later stage, for example in response to a complaint that is submitted some time after the start of an *ex officio* investigation by another NCA. Under the Regulation, Member States have only agreed to give the NCAs the right, and not the obligation, to suspend proceedings or reject a complaint regarding a matter already dealt with by another authority.[63] They did not impose an obligation to do so on NCAs, as they did not agree on the enforcement by one NCA to bar all other NCAs from pursuing the matter. To state that a failure to respond to the notice of another NCA nevertheless leads to that result is a questionably extensive interpretation of the information requirements under Article 11 of the Regulation.

Fourth, any limitation of the sovereignty of Member States within the supranational legal order of the EU will arguably still need to be considered *in concreto* and on the basis of the specific powers granted to the European institutions and to other Member States. Member States have given the European Commission the power to sanction cross-border cartels for their full effects in the EU. In the context of decentralisation under the Regulation, Member States have not agreed to give that same fining power to each other. Instead, they have remained silent in this respect. One therefore cannot point to a positive agreement by Member States to limit their sovereignty and waive their rights under international public law by granting extraterritorial fining powers to the NCAs of other Member States.

The argument that NCAs should take into account foreign effects to ensure adequate punishment also raises questions. The sanctioning of cartels is not harmonised throughout the Union and wide

59 Interestingly, while the ACM in its 2005 paper clearly stated that the Regulation contained no explicit basis for NCAs taking into account foreign effects, it adopted the opposite view in the Silverskin Onions appeal before the Trade and Industry Appeals Tribunal. Kalbfleisch, *supra* n. 35, at 6–7; *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56, section 4.9.2.

60 ACM decision in case 6987 *Eerstejaars plantuien* (18 December 2012) section 7.3.8.

61 Brammer and others, *supra* n. 54, at 290.

62 Brammer, *supra* n. 1, at 455–456.

63 Art. 13 of the Regulation.

differences still exist as to the way in which fines are calculated.[64] It is difficult to make a general claim that cartel fines solely based on domestic effects are inadequate, without assessing the way in which such fines are calculated under the national guidelines in a particular case. Furthermore, while fine calculation methods often start with a percentage of the relevant turnover affected by the infringement, it is incorrect to consider that a fine can only be effective and proportionate if it is based on the entire relevant turnover in the EU. This is because the relevant turnover is only used as an imprecise proxy for the harm or the price effects caused by the infringement, without further quantifying such harm or effects. It may well be that a fine calculated on the basis of only part of the relevant turnover is sufficiently deterrent. In the *Flour* case for example, the Belgian NCA considered a symbolic fine to be sufficient as it found the fines imposed in the Netherlands to provide for adequate punishment for the cartel, even though the Dutch fines were solely based on domestic effects.

Lastly, it appears that the support of Brammer, Wils and others for the right to fine foreign effects in the EU rests for a large part on the notion that parallel proceedings targeting different effects of the same cartel conduct create *ne bis in idem* concerns. Whereas this notion is very sensible, it is not (yet) the legal opinion of the European courts or NCAs.[65] In *Toshiba*, the European Court of Justice confirmed that there is no *idem* if authorities sanction the same cartel but in respect of different effects.[66] Even the NCA and courts in Belgium, which arguably have the most respect for *ne bis in idem* considerations, find that an NCA can impose a fine for a cartel that was already sanctioned elsewhere in the EU provided that it solely considers the domestic effects.[67]

B. Second approach: competence requiring an express legal basis in EU law

At the other end of the spectrum, there are those that hold the view that because of the limitations under international public law, Member States are only competent to sanction cartels to the extent that such cartels have caused harm on their territories. This view is advocated by Paulis and Gauer[68], Burnside and Crossly[69], and others[70]. They emphasise that Regulation 1/2003 has not expanded the fining powers of Member States and that the competence to fine foreign effects would require an express legal basis at the bilateral or European level.[71] Consequently, the right to fine foreign effects at a minimum requires the express consent of the relevant other Member States. Without such consent, NCAs do not have the right to effectively bar other NCAs from sanctioning the cartel for the effects relating to their territories. In addition, national law will need to allow NCAs to (i) give consent to another NCA for fining effects on one's own territory and (ii) fine effects in other Member States.[72] This more conservative and restricted view is in line with the consensus that has existed within the ECN after entry into force of the Regulation.[73]

This approach has its own difficulties. First, it is not clear whether international public law indeed prohibits NCAs from fining foreign effects in the absence of any permissive rule at the international

64 While the ECN+ Directive contains some limited measures to harmonise the calculation of fines imposed under Art. 101, wide differences will continue to exist, including because of the different geographic scope of the turnover considered for the determination of the fine.

65 Contra Van Bockel, who argues that it is now a settled matter that parallel enforcement by several NCAs of the same cartel, but for different effects, violates the principle of *ne bis in* idem. He appears to base this conclusion on the 2009 ruling of the European Court of Human Rights in *Zolotukhin v. Russia*, but without considering the ECJ's ruling in *Toshiba* that clearly points in a different direction. Van Bockel, *supra* n. 37, at 207.

66 ECJ judgement of 14 February 2012 in case C-17/10 *Toshiba* [2012] ECR-I 72. paras 101-103.

67 Decision of the BMA-ABC in case 13-IO-06 *Meel* (28 February 2013) paras 184-208; *Brabomills* (Brussels Court of Appeal, 12 March 2014), 2013MR6, 36–38.

68 E. Paulis and C. Gauer, *La réforme des règles d'application des articles 81 et 82 du Traité*, 65 Journal des tribunaux Droit européen 11, point 58 (2003).

69 A. Burnside and H. Crossley, *Co-operative mechanisms within the EU: a blueprint for future co-operation at the international level?*, 10 International Trade Law & Regulation 2, 25, 31–32 (2004).

70 Brammer also refers to Waelbroeck and Temple Lang. Brammer, *supra* n. 1, at 451, footnote 472. *See also* R. Smits, *The European Competition Network: selected aspects*, 32 Legal Issues of Economic Integration 2, 175, 184 (2005).

71 *See* in particular Paulis and Gauer, *La réforme des règles d'application des articles 81 et 82 du Traité*, *supra* n. 68, at point 58.

72 *See also* Kalbfleisch, *supra* n. 35, at 7.

73 *See supra* n. 56. In the Silverskin Onions appeal proceedings, the ACM however argued that Member State have deliberately left each other the freedom to impose fines for the full EU effects of a cartel if national law permitted them to do so. *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56, section 4.9.2.

level. The 1927 *Lotus* case[74] is often referred to in this respect. The Permanent Court of International Justice determined in this case that absent a permissive rule to the contrary, a state may not exercise its power in the territory of another state.[75] However, it further held that States have a wide measure of discretion, only limited in certain cases by prohibitive rules, to exercise jurisdiction in their own territory with respect to persons, property and acts outside their territory.[76] It is not fully clear how to apply the distinction drawn by the court to the situation where a Member State has a jurisdictional link to cross-border cartel conduct (based on nationality, place of conduct and/or effects) and takes into account the effects of the cartel in other Member States in calculating the level of the fine. If an NCA has already established its jurisdiction, what rule of international law justifies a limitation on the elements to be taken into account to calculate the level of the fine? Brammer and others argue that such sanctioning in the strict sense does not amount to the exercise of jurisdiction outside the Member State.[77] The Dutch Trade and Industry Appeals Tribunal held the same view, referring to the ECJ's ruling in *Innolux* in which the existence of jurisdiction and the method of calculating cartel fines were considered two separate matters.[78]

If it is accepted that Member States are prevented from fining foreign effects in absence of any permissive rule at the international level, it is not clear whether the mere consent by another NCA would be sufficient to confer this power on an NCA. Arguably, that would presume that Member States already have the power to sanction foreign effects and that the reason for not doing so is purely a matter of deference and self-restraint. However, if such power is not considered to exist because of the territorial limitations to national jurisdiction and enforcement, it does not seem convincing that this power can be delegated or transferred to a foreign NCA by mere administrative consent in absence of a firm legal basis established through both national and European legislation.

Furthermore, the argument that NCAs are only competent to sanction domestic effects of cross-border cartels is difficult to reconcile with the responsibility given to them under the Regulation to enforce Article 101 in full. The European cartel prohibition aims to protect cross-border competition for businesses and consumers throughout the Union. The decentralisation of enforcement under the Regulation has not changed the substance of Article 101 nor its objectives. It is therefore difficult to argue that national enforcement of this provision can justifiably be limited to only safeguarding competition within one's own national borders.[79]

The main arguments that are used to counter the view that NCAs can only sanction domestic effects are related to the effectiveness of decentralised cartel enforcement and the risk of double jeopardy concerns. As infringements of Article 101 by definition create cross-border effects, not allowing NCAs to consider foreign effects makes it difficult to achieve both effective enforcement at the national level and pursue the single authority objective.[80] Parallel enforcement by the different NCAs whose territories were affected, is hardly an optimal solution. Duplicate proceedings are inefficient, may lead to a waste of enforcement resources and create difficulties in appropriately splitting up a cartel between NCAs.[81] The *Flour* cartel cases in the Netherlands, Germany, Belgium and France demonstrate how NCAs are struggling to break down an international cartel without creating overlaps or leaving gaps.

Multiple national proceedings for the same overall cartel can clearly also be detrimental to businesses. While not (yet) accepted by the ECJ or NCAs, there are many authors taking the view that the *ne bis*

74 *S.S. Lotus (France v Turkey)* (PCIJ, 7 September 1927), series A, No. 10.
75 Ibid., para 45.
76 Ibid., para 46.
77 Brammer, *supra* n. 1, at 451–452; Van Bockel, *supra* n. 37, at 208.
78 *Zilveruienkartel* (CBb, 24 March 2016), ECLI:NL:CBB:2016:56, section 4.9.3 referring to *Innolux* (ECJ, 9 July 2015), C-231/14, ECLI:EU:C:2015:451, paras 73–74. *See also* W.W. Geursen, *Grensoverschrijdende kartels: ook jurisdictieoverschrijdende omzet in de boetegrondslag?*, 7 Mededingingsrecht in de Praktijk 28–36 (2015), on the link between the *Innolux* judgement and the ACM's fines in *Silverskin Onions* and *Onion Sets*. For a critical opinion of the *Innolux* judgement, *see* Philip Bentley and David Henry, *Calculating the Cartel Fine: a Question of Jurisdiction or a Question of Economic Importance?*, 39 World Competition 3, 431 (2016).
79 Monti, *supra* n. 40, at 17–18; Bockel, *supra* n. 37, at 207–208.
80 Brammer, *supra* n. 1, at 438.
81 Ibid., 381; Brammer and others, *supra* n. 54, at 301.

in idem principle should prevent authorities in Europe from targeting businesses more than once for the same cartel conduct, even if they focus on different effects.[82] Brammer and others have rightly noted that it is artificial to split up a cartel on the basis of effects in different territories, in particular where a cartel is considered a single continuous infringement.[83] Relying on territorially defined effects to delineate jurisdictional power is also questionable considering that the effects are not particularly relevant for infringements of Article 101 by object, and hence hardly assessed for cartel conduct.[84] As submitted by Monti, Merola and others, the piling on of national fines for the same cartel may also lead to over-punishment.[85] And finally, irrespective of the legality of parallel proceedings by NCAs, they undoubtedly increase the burdens for companies under investigation. Even where in terms of efficiency they may benefit to some extent from coordination between NCAs during the investigation stage, multiple fining decisions are also likely to result in multiple appeals under different national procedures.[86]

C. The need for legal certainty

It is clear from the above that both approaches to assessing the legality of NCAs fining foreign effects are in many respects unsatisfactory. This reflects the complexity and sensitivity of the matter, which in turn explains the lack of legal certainty and absence of a political consensus that has existed for over 15 years.

The Dutch rulings in the *Silverskin Onions* and *Onion Sets* appeal cases have done little to increase the legal certainty on a European level. First, despite a request from the plaintiffs in *Onion Sets*, the Trade and Industry Appeals Tribunal did not seek a preliminary ruling from the ECJ to confirm whether the matter could solely be determined on the basis of national law.[87] This is to be regretted, as a ruling from the ECJ could have done much to guide NCAs in all Member States on the legal position under EU law. Second, the *Silverskin Onions* and *Onion Sets* cases may be more 'national' in nature than most cross-border cartel cases, as both infringements mainly related to Dutch companies[88] implementing agreements in the Netherlands concerning the Dutch production of silverskin onions or onion sets, respectively.[89] There was no other NCA that had expressed an interest in prosecuting the cartels and perhaps also no other NCA that considered itself 'well placed' to do so under the criteria of the Cooperation Notice.[90] These cases may therefore be of little relevance to situations where there is more potential for positive conflicts and a greater need to pay attention to comity considerations.

The ECN+ Directive also does not clarify whether NCAs have a right to take into account foreign effects when sanctioning cross-border cartels. One recital of the Directive stipulates that in calculating fines imposed for Article 101 factors that might be taken into account include '*the value of the undertaking's sales of goods and services to which the infringement directly or indirectly relates*'. But the geographic scope that NCAs should or may take into account in doing so is not defined.[91]

If it is going to become a more common sight in European cartel enforcement that NCAs are taking into account foreign effects, there needs to be more robust legal framework governing this practice

82 *See* in particular Wils, *supra* n. 41, at 18, point 126; W.P.J. Wils, *The principle of ne bis in idem in EC antitrust enforcement: A legal and economic analysis*, 26 World Competition 2, 131, 145 (2003).

83 *See supra* n. 48.

84 Brammer and others, *supra* n. 54, at 306.

85 Monti, *supra* n. 40, at 20; Merola and others, *supra* n. 48, at 162, point 86.

86 Kalbfleisch, *supra* n. 35, at 7.

87 *Eerstejaars plantuienkartel* (CBb, 6 October 2016), ECLI:NL:CBB:2016:272, sections 7.1.3 and 7.3.3.

88 One of the parties in in the *Onion Sets* operated through both French and Dutch subsidiaries.

89 The ACM decision in *Silverskin Onions* also points to some conduct in Italy. While the fined Dutch producers referred to the involvement of Italian producers, the ACM noted that it had found insufficient evidence to start proceedings against them. *Zilveruienkartel* (District Court of Rotterdam, 20 March 2014) ECLI:NL:RBROT:2014:2045, para 71. The ACM decision in *Onion Sets* indicates that a limited portion of the affected production was located in France. ACM decision in case 6987 *Eerstejaars plantuien* (18 December 2012) paras 105, 107.

90 Ibid., para 76.

91 Recital 47 of the ECN+ Directive.

going forward.[92] Given the political sensitivity of the matter, a situation where some Member States are moving ahead with the sanctioning of foreign effects despite continuing concerns of others may easily give rise to conflicts within the ECN.[93] In addition, the current level of legal uncertainty and lack of transparency as to the way in which NCAs may allocate the sanctioning of cross-border cartels within the ECN is problematic as it diminishes the predictability and foreseeability of penalties for businesses.[94] For these reasons, there is a clear need for legislative action on this topic to create legal certainty in accordance with the common views of Member States. It is a missed opportunity that this was not addressed as part of the ECN+ Directive, but it could still occur through an amendment of the Regulation.

5.4 Future framework for cross-border cartel sanctioning by NCAs

Some have expressed the view that the Regulation failed to achieve the key objective of effective, decentralised competition enforcement because it did not sufficiently empower NCAs to take on the shared responsibility of fully enforcing EU competition law.[95] As a consequence, NCAs have generally treated Article 101 cartel cases in exactly the same way as purely domestic cartel cases.[96] The *Flour* cartel cases show that where a cross-border cartel clearly requires enforcement to cover several Member States, the relevant NCAs fail to adopt a uniform approach and lack an EU-wide perspective. They merely work together to avoid conflicts between their domestically focused proceedings.

While it is not surprising that the entry into force of the Regulation has not fundamentally changed the focus of national authorities, it calls into question the move towards decentralisation. Given the continuing economic integration within the Union, one would expect a continuously more pan-European approach to cartel enforcement. Some have therefore been surprised by the focus on decentralised enforcement under the Regulation.[97] Leaving the availability of resources out of the equation, it makes little sense to let national agencies deal with cross-border conduct if their focus does not transcend the national level. Otherwise, it would be best for the Commission to handle any cases that involve more than one Member State. As the latter would significantly weaken the position of NCAs, the alternative seems more attractive and more realistic: making sure that NCAs adopt a more cross-border approach to enforcement of Article 101 cartel conduct.

From the perspective of efficient and effective cartel enforcement within the ECN, there is little doubt that it would be desirable to grant NCAs the right to prosecute and sanction cross-border cartels with effects beyond their national territories. For the reasons described by Brammer and others, both authorities and businesses could benefit from a more firm commitment to the objective that infringements of Article 101 should be dealt with by a single authority. Using the words of Monti, it would also greatly enhance the ability for NCAs to act as 'real European agencies'[98], which aim to safeguard competition within the Union as effectively as the Commission but in a decentralised manner.

Giving NCAs the right to fine foreign effects therefore seems an appropriate step to help achieve the objective of effective decentralised cartel enforcement. However, it is submitted that this will require (i) political consensus between Member States, (ii) a more robust procedural framework for NCAs and (iii) enhanced safeguards for businesses.

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92 Contra Monti, who argues that no amendment of the Regulation or Cooperation Notice is required. Monti, *supra* n. 40, at 22. Smits submits that the 'apparent gap in NCA enforcement' can be made good by 'particularly close collaboration among NCAs', while also hoping that the ECJ would clarify the matter. Smits, *supra* n. 70, at 190.

93 Burnside and Crossley have even suggested this may lead to Member States adopting blocking statutes, *supra* n. 69, at 32.

94 Such concerns have already been raised under the current functioning of the Regulation. Brammer, *supra* n. 1, at 197–212. Contra Wils, *supra* n. 41, at 26, point 194.

95 *See* e.g. A. Riley, *EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1*, 12 ECLR 657, 664-665, 672 (2003).

96 Monti, *supra* n. 40, at 5–18.

97 Riley, *supra* n. 95, at 671.

98 Monti, *supra* n. 40, at 21.

A. Political consensus between Member States

There are several reasons for why Member States might now agree to give NCAs the right to fine foreign effects. First and foremost, the Dutch decisions in *Silverskin Onions* and *Onion Sets* show that some NCAs may continue down this path anyway. There is therefore a greater need to address the issue and to remove the existing legal uncertainty than there was before 2003. Second, NCAs have gained much experience in mutual cooperation, coordination and case allocation within the ECN. This has led to a certain level of trust in the functioning of the system of decentralised cartel enforcement.[99] At the same time, criticism as to the handling of the *Flour* cartel cases may point Member States to the need to further revise the system to avoid suboptimal outcomes of cases dealt with by multiple NCAs in parallel. Third, while there continues to be much room for improvement, the gradual process of substantive and procedural convergence and strengthening of NCA powers has likely given Member States greater confidence in the way cartel cases are dealt with by others in the network.[100] Fourth, whereas it was hardly discussed in the negotiations of the Regulation due to its sensitivity, explicitly addressing the matter will allow the Member States to empower NCAs while at the same time providing for appropriately caveats and sufficient safeguards to deal with national concerns.

The most sensitive issue for Member States to resolve relates to the circumstances under which an NCA may effectively bar other NCAs from pursuing a matter by sanctioning the cartel for its domestic and foreign effects. Some favour a system where the action by one NCA under Article 101 automatically prevents others from taking action.[101] That effectively comes down to exclusive power being granted to whichever authority is the quickest to start proceedings against a particular cartel, which seems to be an obvious source of conflict. Others favour a system of binding case allocation rules pointing to a single authority, i.e. identifying the 'best placed' authority within the ECN rather than one or more 'well placed' authorities.[102]

Not allowing for any exceptions to the principle that cross-border cartels should be handled by a single authority within the ECN will prevent any duplicate cartel proceedings within the ECN. However, it will also put much pressure on the case allocation system and will require more rules and procedural safeguards to be put in place to govern the actions of NCAs. Even then, it is questionable whether Member States will be willing to fully give up the discretion of pursuing a case with a domestic impact in each situation where another NCA is already dealing with the same cartel or is considered better placed to do so.

Merely giving NCAs the right, not the obligation, to fine foreign effects and making that right subject to the consent of the relevant other NCAs may be a more politically realistic objective to pursue. It does not avoid duplicate proceedings altogether, but it does allow for full enforcement by a single NCA whenever that is considered most appropriate. The discretion of NCAs to hold on to the prosecution of a matter already pursued by another NCA may also be limited in several ways. A refusal to consent to the enforcement by another NCA may for example require a statement of reasons, may be limited to particular circumstances, may result in an obligation for the objecting NCA to start its own proceedings or it may be a trigger for the Commission to take over the case. Requiring mere tacit approval rather than express consent by other NCAs may also help to make full enforcement by a single NCA the rule rather than the exception.

A particular aspect that may also prove to be sensitive is the distribution of financial gains from imposed penalties. Giving one NCA the right to sanction a cross-border cartel also for the harm caused elsewhere leads to the obvious question whether it is fair for the prosecuting authority to keep all

99 *See* Commission Staff Working Document *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, SWD(2014) 230/2, 69–72 (2014).

100 Commission Communication to the European Parliament and the Council, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM(2014) 453 (2014).

101 Monti, *supra* n. 40, at 17.

102 Merola and others, *supra* n. 48, at 163, 167.

proceeds, even more so where other NCAs are required to assist in gathering evidence. As pointed out by Wils, there is a risk that financial incentives may lead to 'pre-emptive prosecutions'.[103] To avoid this risk, it may be preferable to distribute gains from fines on the basis of enforcement efforts or according to the relevant turnover per Member State.[104]

B. A robust procedural framework

If Member States can agree to give NCAs the right to fine foreign effects, more robust procedural rules need to be put in place to ensure this right is used appropriately. Binding rules should be agreed to determine key aspects such as (i) the process of identifying the authority that will take on the responsibility for EU-wide sanctioning, (ii) the process of requesting and obtaining the consent of other NCAs to the sanctioning by the lead NCA 'on their behalf', (iii) the obligations for NCAs to assist the lead NCA in not just investigating but also prosecuting and sanctioning a cross-border cartel in its entirety, and (iv) the obligation for NCAs to refrain from pursuing cases (either *ex officio* or in response to a complaint or leniency application) for which another NCA has already been given the sole responsibility.

Determining which authority will be in the lead of the investigation, prosecution and sanctioning of a cross-border cartel will make it more important to follow sound case allocation principles. It has been pointed out that the rules currently described in the ECN Notice are not precise enough to identify a 'best placed' authority.[105] Alternative or additional criteria will need to be applied that point to a single authority that can best be made responsible for a particular case. These criteria will need to be sufficiently clear and unequivocal. However, as rightly noted by Merola and others, the system should still provide for some flexibility because of the difficulty and sensitivity of allocating sole responsibility to a particular NCA.[106] Making the right of NCAs to act on behalf of the entire network subject to the consent of others will to a great extent help to maintain this flexibility. It can also be considered to give the Commission a right to intervene where case allocation in a particular case results in a suboptimal outcome or where NCAs fail to agree on the allocation.[107]

It is important for the NCAs involved and the businesses under investigation that the allocating of responsibility for the prosecution and sanctioning of a case under Article 101 is determined at an early stage. The Cooperation Notice recognises the need to deal with any re-allocation issues quickly, normally within two months of the first NCA notifying the ECN of the start of its proceedings.[108] A similar time limit should apply to the period in which other NCAs can consent or object to the lead NCA prosecuting and sanctioning a cartel for its entire EU effects. Allowing NCAs to make that decision at a late stage of an investigation will create uncertainty for the businesses concerned and may result in unnecessary duplication of investigative efforts. On the other hand, the time period should be long enough to allow NCAs to consider a cartel's scope and weight of effects and properly assess whether there is a need to hold on to right to prosecute the cartel for its domestic effects in parallel.

The prosecution and sanctioning of a cross-border cartel by a single NCA will require a greater level of investigative assistance from other NCAs. The *Flour* cartel cases in Germany, France, the Netherlands and Belgium show that cross-border cartel conduct can consist of various elements that cut across territories and that involve different sets of participants. Splitting the overall conduct into territorially defined infringements may be artificial, inefficient and problematic from a double jeopardy and proportionality perspective. But it does allow the respective authorities to focus on the conduct for which they are generally best placed to gather the evidence. If a single NCA is given the

103 Wils, *The principle of ne bis in idem in EC antitrust enforcement*, *supra* n. 82, at 146.
104 Ibid., Monti, *supra* n. 40, at 17.
105 Merola and others, *supra* n. 48, at 163.
106 Ibid, 164.
107 Merola and others have proposed that the Commission may be given the authority to determine the best place authority if the NCAs fail to do so within three months. Ibid., 167.
108 ECN Notice, paras 16–19.

sole responsibility to fine a complex, multi-faceted, cross-border cartel, it will rely heavily on the evidence-gathering by its counterparts in other Member States. The Regulation merely gives NCAs the right to carry out inspections or other fact-finding measures on behalf of others.[109] The ECN+ Directive includes some limited measures to strengthen the framework of cooperation between NCAs, also in respect of the enforcement of fine decisions imposed by other NCAs. More far-reaching measures will need to be implemented to ensure that full support is given to the authority that has been made solely responsible for the prosecution and sanctioning of a case. Apart from investigative considerations, any centralisation of enforcement will result in many other practical considerations regarding the conduct of proceedings, e.g. in respect of translations, local representation and logistics of hearings.

Any procedural rules agreed to on an EU level will need to be reflected in the national laws of the Member States. Most importantly, national law would need to give the national authority the right to prosecute and sanction cross-border cartels under Article 101 also for the effects in other Member State (subject to the consent of the other NCAs) and allow domestic effects of cross-border cartels to be prosecuted and sanctioned by NCAs in other Member States (subject to the consent of the national authority). [110]

C. Safeguards for businesses

Granting additional fining powers to NCAs must come at the price of increasing safeguards for businesses. The Commission confirmed that in the consultation on the ECN+ Directive, there was a "recurrent demand from a majority of the stakeholders, including lawyers, business and business organisations that any enhancement in NCAs' enforcement powers be accompanied by increased procedural guarantees at national level".[111] Additional safeguards in the context of Article 101 cartel enforcement at national level are particularly necessary to prevent double jeopardy, disproportionate fines, unpredictable sanctioning, arbitrary use of prosecutorial discretion, opaque coordination within the ECN, and undue investigative processes.

The principle of *ne bis in idem* requires that whenever NCAs prosecute and sanction Article 101 infringements for their full effects across the Union, other NCAs and the Commission must be barred from pursuing the same conduct. To this effect, the first sentence of article 11(6) of the Regulation must be extended to clarify that the initiation of proceedings by one NCA that has been granted sole responsibility for the case shall relieve other NCAs of their competence to apply Article 101 in that case. The Commission should similarly be prevented from starting parallel proceedings.[112]

An extension of the territorial scope of NCA fining competences will likely require an amendment of national fining guidelines to ensure sanctions imposed for the full effects within the Union continue to be proportionate. Simply applying the existing framework of fine calculation to a company's relevant turnover in the EEA rather than the Member State concerned may not result in the appropriate level of deterrence. Importantly, the existence of widely diverging fining practices across the Union confirms that there is no uniform interpretation and application of the notion of proportionality by Member States. The lack of harmonisation means that the same Article 101 infringement will be sanctioned differently depending on the fining practices of the NCA that has been made responsible for the overall sanctioning of the case. This has also been recognised in the ECN+ Directive.[113] Leniency applicants and complainants may be influenced by such national fining differences in

109 Art. 22(1) of the Regulation.

110 Kalbfleisch, *supra* n. 35, at 7.

111 Answer by Competition Commissioner Vestager on behalf of the Commission to the parliamentary question of Mr Schwab, reference E-005658/2016 (12 October 2016). *See* in particular the submission of Business Europe, *Effective enforcement by National Competition Authorities* (16 February 2016), http://ec.europa.eu/competition/consultations/2015_effective_enforcers/businesseurope_en.pdf .

112 It may be necessary to maintain some flexibility to allow the Commission to take over the case from the responsible NCA, for example where in the course of the investigation it appears that more than three Member States are affected.

113 Recital 6 of the ECN+ Directive.

deciding where to go first, hence creating a risk of forum shopping.[114] But an arguably greater risk relates to the lack of predictability of fine levels applicable to cross-border cartel infringements. Fining guidelines generally leave a wide margin of discretion for authorities to determine an appropriate fine in a particular case. Even in a purely national context, it is therefore very difficult for companies to predict the level of fines they could be exposed to. But the combination of diverging national fining practices and unpredictable case allocation principles would make it virtually impossible for businesses to assess their potential exposure for cross-border cartel conduct. The ECN is already criticised for its opaque functioning.[115] Giving NCAs the right to fine cartels for their full effects in the Union will significantly increase the potential impact of case allocation within the ECN. It is therefore all the more important to improve the transparency and traceability of steps taken within the network.[116] In addition, it is rightly suggested that the process of case allocation should also be made subject to legal review.[117] Making it possible for businesses to challenge improper allocation of prosecutorial discretion will provide additional protection against enforcement action being taken by NCAs that have little or no jurisdictional nexus to the conduct concerned.[118]

Clearly the most effective way to ensure predictability of fines and avoid forum shopping is to harmonise the sanctioning of Article 101 infringements. Creating a system in which NCAs have the same competence as the Commission to fine cartels for their full effects in the Union increases the need to provide for uniform sanctioning of such cartels. It is difficult to justify why the exact same cross-border violation of Article 101 would be sanctioned differently merely depending on which authority is taking the lead in prosecuting the case. But harmonisation of fining policies is a far-reaching limitation of the procedural autonomy of Member States and hence a particularly sensitive issue in itself.[119] This is especially the case because harmonisation of the calculation of fines imposed under Article 101 will likely require a similar change to the way fines for domestic infringements are calculated, given that cartel conduct is often found to breach the national and European provisions in parallel.[120] However, the ECN+ Directive does contain some measures to harmonise NCA fining policies, including in respect of the maximum amount of the fine and the elements that need to be considered for the fine calculation.[121] So the Commission has found some room to slowly move towards more harmonised sanctioning of Article 101 infringements. A possible next step might be to require the application of the Commission's fining guidelines only in those instances where an NCA is given the responsibility to prosecute and sanction a cross-border cartel on behalf of all authorities in the ECN.

Lastly, additional safeguards are necessary to ensure due process in cross-border cases that require evidence-gathering in multiple Member States under the prosecutorial responsibility of one NCA. As long as national procedural rules continue to differ, cross-border investigations are subject to a patchwork of due process requirements. Businesses in Europe are already suffering from the absence of a level playing field with respect to procedural safeguards.[122] In the context of the ECN+ Directive, some have called for the application by NCAs of the principles of the Commission's Notice on best practices for the conduct of proceedings.[123] But the Commission appears reluctant to step on the toes

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114 Wils, *The principle of ne bis in idem in EC antitrust enforcement*, *supra* n. 82, at 146–147. Brammer argues the risk of forum shopping is exaggerated as there will in practice be limited NCAs that can suitably deal with a case and case allocation rules will prevent allocation to an NCA that is not 'well placed'. Brammer, *supra* n. 1, at 183–186.

115 Brammer and others, *supra* n. 54, at 294–297; J. Rivas, *Interview with Mr Marín Quemada*, 39 World Competition 4, 525, question 6 (2016).

116 Ibid., 310, 316.

117 Ibid., 307–309.

118 This is not the same as proposing to create individual rights for the companies involved to have their case dealt with by a particular authority as referred to in para 31 of the ECN Notice.

119 This was confirmed in the context of the proposal for the ECN+ Directive by the Commission's response to calls for the application of the Commission's Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU by NCAs (*see* Business Europe, *supra* n. 111 and the parliamentary question of Mr Schwab, reference E-005658-16 (12 July 2016)). Commissioner Vestager responded to these calls by merely stating that "the exercise of the NCAs' enforcement powers should remain subject to the procedural guarantees, as they are assured by the EU Charter on Fundamental Rights". Vestager, *supra* n. 111.

120 *See* Monti, *supra* n. 40, at 10,11, 16.

121 Art. 14 and 15 of the ECN+ Directive.

122 *See* e.g. Business Europe, *supra* n. 111.

123 Ibid.; Schwab, *supra* n. 119.

of Member States by proposing such a limitation of their procedural autonomy through European harmonisation. The ECN+ Directive contains just one article on fundamental rights and procedural safeguards, mainly referring to the general principles of Union law and the Charter of Fundamental Rights of the European Union.[124] This is clearly not sufficient to guarantee a level playing field as regards due process at an appropriate level.[125]

As an alternative to direct harmonisation of due process standards, it has been suggested that where businesses are exposed to 'double standards', they at least need to have the benefit of 'double safeguards', meaning that investigative efforts must comply with the domestic procedural rules of all Member States concerned.[126] In this light, Brammer has argued that authorities should abide by the principle that the highest protection standard always prevails.[127] This arguably results in procedural harmonisation through the backdoor, at a level considered by most to give too much protection. But if NCAs are to be given the right to prosecute and sanction cross-border conduct also on behalf of others in the Union, this necessarily comes with the burden of guaranteeing full compliance with the due process requirements applicable to businesses under investigation across the various Member States.

5.5 Conclusion

It is clear that in the years before 2003, the question whether NCAs should be given the power to fine foreign effects within the Union was too sensitive to address in the negotiations of the Regulation. Since the entry into force of the Regulation, NCAs have proceeded on the basis of the common view that the object of their sanctioning should be limited to domestic effects. Within the ECN, authorities have worked together on an ad hoc and informal way to discuss case allocation and coordinate their respective enforcement efforts to target cross-border cartels. While considered an overall success by the Commission, it is clear that this approach has not always led to an optimal outcome in terms of efficiency, proportionate fining and avoidance of double jeopardy concerns. In 2012, the Dutch NCA started to move away from the shared, more restrictive approach to decentralised cartel enforcement. In the *Silverskin Onions* and *Onions Sets* cartel cases, the authority imposed fines that were calculated on the basis of EU-wide turnover and that were meant to sanction the effects of the cartel across the Union to ensure effective enforcement of Article 101. While it is expected that there will be more such cases going forward, there is currently still a clear lack of legal certainty as to the legality of NCAs fining foreign effects. Moreover, there continue to be widely diverging views within the ECN as to whether it is appropriate for NCAs to sanction cross-border cartels for their full EU effects.

While the ECN+ Directive aims to strengthen and harmonise NCA enforcement of the European competition rules in various ways, it unfortunately does not clarify the right of NCAs to impose fines that take into account effects in other Member States. It is surprising that the European legislator has not taken this opportunity to address the issue through legislative action. It seems that there should now be sufficient political will to do so. Member States will likely agree that giving NCAs the right to fine foreign effects within the Union could greatly enhance the effectiveness of decentralised enforcement of cross-border cartels. However, most will also agree that before exploring this new frontier of extraterritorial cartel enforcement further in practice, a robust legal framework should be put in place that reflects the views of all members of the ECN, provides for the necessary procedural rules and safeguards, and ensures that sanctions are adequate and proportionate.

The debate discussed in this chapter on the legality of NCAs fining foreign effects is unique to the context of European competition law enforcement. But it links to the assessment of jurisdictional limitations and self-restraint also assessed in Chapters 3 and 4 and it adds to the response to the second

124 Art. 3 of the ECN+ Directive.

125 As an example of insufficient safeguards at national level, Business Europe in its response to the consultation on the ECN+ Directive has pointed to the fact that only as of September 2015 does the Polish Competition Authority issue statements of objections as part of its administrative enforcement proceedings. Business Europe, *supra* n. 111.

126 Brammer and others, *supra* n. 54, at 317–318; Brammer, *supra* n. 1, at 306–324.

127 Brammer, *supra* n. 1, at 324.

research sub-question: *What choices can and do individual authorities make in exercising their jurisdictional discretion when prosecuting international cartels? How do jurisdictional limitations affect the extent to which enforcement and punishment of international cartels overlap? How is jurisdiction being shared and allocated within the European Competition Network?*

The practices described in this chapter confirm that also within the European context authorities have choices in exercising their jurisdictional discretion and that these choices affect the extent to which parallel cartel enforcement might result in overlapping enforcement. The methods used include (i) prosecuting only the domestic elements of a cartel (i.e. limiting the object of the enforcement), (ii) sanctioning a cross-border for only its domestic effects, (iii) also taking into account foreign sales but applying a gravity factor that reflects only domestic harm, and (iv) imposing only a symbolic fine in view of enforcement action elsewhere. By employing these methods, NCAs have in past cross-border cartel cases pursued at the national level been careful to avoid overlapping enforcement. This is also due to the application of the principle of *ne bis in idem*, meaning that without a clear delineation of an authority's enforcement actions, other authorities could be barred from taking subsequent action.

The careful approaches taken in the past by several NCAs have led to sub-optimal outcomes, harming the overall objective of an effective, decentralised enforcement of EU competition law. That may explain why the Dutch NCA has chosen to test the waters by starting to calculate cartel fines on the basis of EU-wide turnover, hence fining foreign effects of the cartel. Outside of the EU context, this would be equivalent to the Commission or the DOJ prosecuting internal cartels for their global effects and calculating the fines on the basis of worldwide affected sales. The diverging legal views and practices among Member States reveal that the legal basis for this approach remains questionable. But it may well be the recommended approach to ensure efficient, effective and proportionate cartel enforcement, serving the interest of both the enforcement community and businesses. This is true within the confines of the ECN, characterised by close cooperation and shared responsibilities between authorities. But these findings are also relevant beyond the European context. They show that an expansion of jurisdictional reach and extraterritorial enforcement may not be automatically objectionable, if it is facilitates the allocation of enforcement to fewer authorities or perhaps even reserves enforcement exclusively to a single authority.

6. CHAPTER 6: PROPORTIONALITY OF FINES IN THE CONTEXT OF PARALLEL GLOBAL CARTEL ENFORCEMENT

This chapter is based on the article 'Proportionality of fines in the context of global cartel enforcement', 43 World Competition 1, 2020.

6.1 Introduction

As discussed in greater detail in Chapter 2, global cartel enforcement has witnessed very significant changes over the past three decades. First, an exponential growth in the number of antitrust authorities actively pursuing cartel conduct. In the period between 1990 and 2016, the number of authorities that have successfully prosecuted at least one international cartel has risen from 3 to 75.[1] Not surprisingly, data shows that the dominance of the US and the EU jurisdictions in respect of overall cartel enforcement has significantly declined with the rise of enforcement action elsewhere.[2] A second development is the dramatic and continuous rise of cartel fine levels. Worldwide, annual corporate cartel fines are reported to have increased by a factor 120 in the period between 1990 and 2015.[3] This is not merely a consequence of the increase in the number of active cartel enforcers. The reports of the International Competition Network (ICN) of 2008 and 2017 on the setting of cartel fines both refer to the level of fines in many jurisdictions having significantly increased over the years.[4]

The combination of rapid proliferation of active cartel enforcement regimes and increasingly aggressive sanctioning policies means that international cartels[5] are increasingly likely to be pursued and heavily fined by multiple authorities across various jurisdictions. But at which point do overall fine levels for international cartels become excessive? And to what extent should authorities take into account fines already imposed elsewhere for the same cartel? There appears to be growing recognition for the relevance of these questions. At the same time, the academic literature on the impact of parallel enforcement on the proportionality of overall fines for international cartels is still underdeveloped. To help fill this gap, this chapter aims to advance the debate by studying the issue of parallel enforcement of international cartels through the lens of legal theory on punishment.

This sixth chapter addresses a large part of the latter three research sub-questions formulated in Section 1.2 of this dissertation. It first considers notions of proportionality under both retributive and consequentialist theories, also touching upon recently developed theories on the punishment of multiple crimes. This theoretical framework is briefly described in the first part of this chapter. It responds to the sub-question *What is proportionate punishment?* The second and third parts of this chapter start by explaining the fining practices at the national (part 2) and international (part 3) level. These parts hence address the third separate research sub-question: *How are international cartel defendants being punished? How do individual jurisdictions fine international cartels? Do authorities or courts take into account penalties imposed elsewhere for the same overall cartel?* Based on this assessment, these parts go on to analyse the extent to which national and internal cartel sanctioning policies adhere to retributive and consequentialist proportionality principles, focusing on corporate fines. This responds to the question: *How does parallel enforcement of international cartels affect the overall proportionality of punishment?* Lastly, the final part of this chapter explores answers to the fifth research sub-question: *How can and should the international enforcement community work to develop a framework for the coordination of the sanctioning of international cartels?*

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1 OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Summary of Discussion* (1-2 December 2016), para. 26, https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf; OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Paper by John M. Connor* (1-2 December 2016), at 6, https://one.oecd.org/document/DAF/COMP/GF(2016)9/en/pdf.

2 OECD, *Sanctions in Antitrust Cases - Summary of Discussion*, *supra* n. 1, para. 28. In the 1990s, the United States and the EU accounted for 98% of the world's cartel penalties. However, during 2010-2015 the EU accounted for 44% of all penalties (half of this imposed by EU national authorities), the US for 35%, and the rest of the world for 21%.

3 OECD, *Sanctions in Antitrust Cases - Paper by John M. Connor*, *supra* n. 1, at 3-4.

4 ICN, Report to the 7th ICN Annual Conference, *Setting of Fines for Cartels in ICN Jurisdictions* (April 2008) at 44; ICN, Report to the 16th ICN Annual Conference, *Setting of Fines for Cartels in ICN Jurisdictions (2017)* (May 2017) at 57.

5 In this paper, the term 'international cartels' refers to cartels that are subject to public enforcement in more than one jurisdiction.

Various choices have been made to limit the scope of this chapter, thereby also limiting the comprehensiveness of the analysis. In particular, this chapter focuses on the enforcement practices of authorities, ignoring the legislative and judicial boundaries that may limit their room for manoeuvre. This chapter also does not assess the mix of private and public enforcement instruments applied in each jurisdiction. It contains a simplified analysis by merely taking into account the monetary penalties imposed on corporations. In reality, when assessing the overall proportionality of the punishment for participants of an international cartel, other instruments of cartel enforcement will certainly play a role. While these and other limitations provide for interesting areas for further research to refine the analysis, the author believes that the key conclusions drawn in this chapter stand even despite these limitations.

6.2 Legal theory on proportionality

The principle of proportionality is often simply described as the notion that '*the punishment must fit the crime*'. Various scholars refer to the principle of proportionality more specifically as the concept that punishments should be proportionate in severity with the seriousness of crimes.[6] Behind this seemingly simple and unambiguous description lie complex debates about (i) what particular aspects need to be taken into account in determining the proportionality of a penalty ('*proportionate to what?*') and (ii) how these aspects must be taken into account to calculate a proportionate penalty (the '*quantum of punishment*'). One's position in these debates, and hence one's interpretation and application of the principle of proportionality, largely depends on why punishment is perceived to be justified and necessary, which in itself is the subject of widely diverging views. This means that it is very difficult and perhaps impossible to find a commonly shared definition of the principle of proportionality that has concrete meaning.[7] Rather, this principle must be understood as encompassing various concepts of proportionality of which the meaning and relevance depends on more fundamental questions regarding punishment.

Two philosophical schools of thought can be distinguished when it comes to the justification and purpose of punishment. The first school of thought is comprised of theories that consider retribution to be the ultimate goal of punishment. Such retributive theories are based on the notion that offenders need to be punished because they *deserve* to be punished for having violated societal norms. These theories are deontological and retrospective as they focus on the need to punish the past moral wrongdoing of the offender. The expression of censure is considered a penalty's main objective under retributive theories.[8] Other goals such as specific or general deterrence or incapacitation are rejected for they would amount to the treatment of individuals as a means to another end. This conflicts with the Kantian philosophy – key to retributive theories – of treating all individuals as an end in themselves.

The second school of thought is comprised of theories that consider punishment to serve a consequentialist, utilitarian purpose. In line with the philosophy of Jeremy Bentham, these theories focus on the future societal benefits of punishment. They are based on the notion that the act of punishment itself involves conflicting harm to individuals and that this is only justified if the punishment contributes to a positive net value to society going forward. The prevention of future crime through deterrence is one of the main purposes of punishment under consequentialist theories.

As further explained below, retributive and consequentialist theories have a very distinct understanding of the notion of proportionality.

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6 Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, Crime and Justice 16, at 56 (1992); R.A. Duff, *Punishment, Communication, and Community* (OUP 2003), at 135.

7 See Richard S. Frase, *Excessive Relative to What? Defining Constitutional Proportionality Principles* in *Michael Tonry* (ed.), *Why Punish? How Much? A Reader on Punishment* (OUP 2011), at 263. See also Joel Goh, *Proportionality – An Unattainable Ideal in the Criminal Justice System*, 2 Manchester Student Law Review 41 (2013).

8 Von Hirsch, *supra* n. 6, at 65-68, also referring to – and criticizing – the alternative 'benefits and burdens theory'.

A. Proportionality under retributive theories

Under retributive theories, proportionality is a fundamental concept for determining the level of a penalty. As these theories rest on the notion that an offender is punished because he or she deserves it, proportionality is crucial to ensure that the offender does not get more (or less) punishment than what is deserved. In determining what is deserved, retributivists rely on the degree of blameworthiness. But they are divided on the question what key elements determine the degree of blameworthiness.[9] So-called 'harm-irrelevant retributivists' solely focus on the culpability of the offender rather than the harm caused. They argue that the actual outcome of a culpable state of mind is simply a matter of chance or luck and should not be relevant for the level of punishment.[10] Others also consider the harm to society to be a factor of primary importance.[11] Still, even when culpability and harm are both considered to be key elements determining blameworthiness, greater weight is generally attached to culpability. This is also reflected in the principle that there can be punishment without harm but no punishment without culpability.[12]

The great difficulty of seeking retributive proportionality in practice is how to actually measure the 'right' quantum of punishment on the basis of an offender's blameworthiness. Across societies, great differences exist in respect of the severity of penalties for the same types of crimes. Even among the citizens of a particular society, widely diverging views may exist on the appropriate penalty for a particular crime. It is therefore difficult to maintain the view that the principle of proportionality automatically sets fixed sentences for each specific crime, irrespective of cultural, societal or even personal norms.[13]

Andrew von Hirsch has proposed a solution to the dilemma of defining the right quantum of punishment by making a distinction between ordinal and cardinal proportionality.[14] Ordinal, or relative, proportionality concerns the notion that penalties must be scaled according to the comparative seriousness of crimes. Crimes involving greater blameworthiness must be punished with greater severity.[15] This also means that offenders of similar crimes must receive similar punishment. Cardinal proportionality is the principle prescribing that there must be a reasonable proportion between the gravity of a crime and the level of punishment. Cardinal proportionality hence guards against very severe sentences for minor offences and insignificant penalties for crimes involving great personal or societal harm. Given the difficulty of determining what the deserved penalty is for a particular type of crime, cardinal proportionality can only place broad and imprecise constraints on the overall sentencing levels of a society's penal system.[16] But once the anchoring points of a penal system are set within these outer limits, the more restrictive requirements of ordinal proportionality can be applied.

B. Proportionality under consequentialist theories

Under consequentialist theories, the quantum of punishment does not rest on a proportionate link between the penalty and the blameworthiness of the offender. Instead, optimal penalties are considered to be those penalties that are necessary and sufficient to result in net societal benefits by serving the aim of crime prevention (e.g. through specific and general deterrence). This justifies that similar crimes may be punished differently depending on an offender's likelihood of reoffending. It also justifies that some crimes committed by culpable offenders may still not be pursued if this would require an inefficient use of enforcement resources. Especially for economic crimes, quantitative assessments can be made to estimate the optimal level of sanctions to ensure deterrence, also taking into account

9 Max Minzner, *Why Agencies Punish*, William and Mary Law Review 53 (2012), at 882-883.
10 Ibid., referring to Alexander & Ferzan, Fletcher and Moore. Minzner argues that purely intent-based retributivism is a well-respected and arguably dominant view.
11 Minzner, *supra* n. 9, at 882-883, referring to Moore, Katz and Perry.
12 Ibid., referring to Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (1997), at 193.
13 Von Hirsch, *supra* n. 6, at 76.
14 Ibid. at 76.
15 Complex issues arise in actually comparing the seriousness of one type of crime with that of another. Ibid. at 79-83.
16 Ibid. at 83.

the economic value of lower crime levels compared to the costs of enforcement.[17] This means that contrary to retributive theories, consequentialist theories generally allow for sentencing for certain crimes to be based on a more precise measurement of the 'right' level of punishment.[18]

Even though sentencing levels under consequentialist theories are based on utilitarian considerations of crime prevention rather than the blameworthiness for crimes committed, there is still a role to play for proportionality considerations.[19] First, utilitarianism prescribes that prosecution and punishment should only be pursued if the benefits of doing so outweigh the costs (so-called 'ends proportionality'). Second, punishment must not be more costly or more severe than is necessary to achieve the same intended benefits to society ('means proportionality', also referred to as the principle of parsimony).[20] However, even if these forms of proportionality are respected, consequentialist views on sentencing still allow for the justification of a penal system in which deterrence is achieved by low levels of enforcement combined with harsh penalties even for minor offences.

C. Proportionality and multiple offences

Research shows that when a person is convicted for committing multiple crimes, judges tend to impose overall sentences that are lower than the sum of the standard sentences for each individual crime committed.[21] In addition, individuals are often allowed to serve sentences for multiple crimes concurrently rather than consecutively. Psychological studies confirm that this sentencing practice is in line with intuitive notions of fair and proportionate punishment.[22] But the practice is difficult to explain under legal theory on retributive punishment.

For retributivists, multiple-offense sentencing discounts seem to be at odds with the principle that penalties need to be based on the degree of blameworthiness of the offender. If person A steals five cars while person B steals only one car and both are equally responsible for their actions, should person A not receive a sentence five times that of person B? Various types of retributive theories have been developed to justify why this should not be the case. Roberts and De Keijser justify multiple-offense sentencing discounts by arguing that the culpability for committing two crimes is lower than twice the culpability for committing a single crime, especially when multiple crimes are related and committed within a continued culpable state of mind.[23] In other words, they focus more on the culpability of the offender than on the harm caused by the offence in determining the right quantum of punishment, and find that for multiple offences the culpability is often overlapping. Bennett has developed an alternative theory, based on the notion that the need for the state to express blame and the need for an offender to make amends for multiple wrongdoings discovered at the same time, is not much greater than what would be required for a single instance of the wrongdoing.[24] Yet other scholars (Jareborg, Bottoms, Lippke) have argued that retributive punishment requires the application of a certain absolute maximum penalty irrespective of the number of offences committed, hence setting a limit on

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17 See in the context of antitrust fines Wouter P.J. Wils, *Optimal Antitrust Fines: Theory and Practise*, 29 World Competition Law and Economics Review 2 (2006), at 190-191.

18 Peter Whelan, *A Principled Argument for Personal Criminal Sanctions As Punishment Under EC cartel Law*, 4 The Competition Law Review 1 (2007), at 14. But see criticism of Wils in the case of cartel fines in *The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis*, 30 World Competition Law and Economics Review 2 (2007), at 210.

19 See e.g. Frase, *Excessive Relative to What?*, *supra* n. 7, at 266-267.

20 For its use in the specific context of cartel enforcement, see e.g. Marcel Boyer, Anne Catherine Faye and Rachidi Kotchoni, *Challenges and Pitfalls in Cartel Policy and Fining*, Toulouse School of Economics Working Paper 17-852 (2017), at 18. See also Harold Houba, Evgenia Motchenkova and Quan Wen, *Legal Principles in Antitrust Enforcement*, 120 Scandinavian Journal of Economics 3 (July 2018), at 861.

21 Jesper Ryberg, *Retributivism, Multiple Offending, and Overall Proportionality* in Jan de Keijser, Julian V. Roberts and Jesper Ryberg, *Sentencing for Multiple Crimes* (OUP 2017), at 13; Jan de Keijser, Julian V. Roberts and Jesper Ryberg, *Sentencing the Multiple Offender* in *Sentencing for Multiple Crimes*, at 3.

22 De Keijser, Roberts and Ryberg, *supra* n. 21, at 4; Julian V. Roberts and Jan de Keijser, *Sentencing the Multiple-Conviction Offender* in *Sentencing for Multiple Crimes*, at 148. But note the criticism from Ryberg in respect of what he calls 'scope-insensitivity'. Ryberg, *supra* n. 21, at 25-28.

23 Roberts and De Keijser, *supra* n. 22, at 145-146.

24 C. Bennett, *Do Multiple and Repeat Offenders Pose a Problem for Retributive Sentencing Theory?* in C. Tamburrini and J. Ryberg, *Recidivist Punishments: The Philospher's View* (Lexington 2012), at 148. See criticism from Zachary Hoskins, *Multiple-Offense Sentencing Discounts* in *Sentencing for Multiple Crimes*, at 80-84.

undiscounted accumulation of sentences for individual offences.[25] This is consistent with the totality principle, i.e. the notion that in case of multiple crimes, the overall punishment must reflect the overall culpability.[26]

While the various theories justifying multiple offence sentencing discounts may make sense intuitively, they have been criticised for being implausible or grounded on non-retributive principles.[27] Some therefore consider mixed theories that incorporate consequentialist principles to provide a better justification. In particular, it is argued that sentencing discounts are warranted to ensure that punishment is not more severe than is needed to serve its purposes.[28] In this view, a maximum sentence will still be set by retributive proportionality principles while allowing parsimony or 'means proportionality' to further limit the overall penalty level. In practice, this may result in a sentencing regime that calls for concurrent rather than consecutive punishment for multiple offences, albeit with a limited upwards adjustment for every additional, distinguishable offence to achieve marginal deterrence.[29]

6.3 Proportionality of national cartel fining methodologies

Sanctions imposed on corporations for international cartel conduct essentially comprise the sum of individual fines set under national fining methodologies. Before considering the proportionality of overall fine levels applied to international cartels, it is therefore necessary to first focus on the proportionality of cartel fines imposed at the national level. This section will do so by looking at the common features of national cartel fining methodologies as described in two surveys amongst antitrust enforcement regimes: the 2017 ICN study *Setting of Fines For Cartels in ICN Jurisdictions*[30] and the 2016 study *Sanctions in Antitrust Cases*[31] by the Global Forum on Competition of the Organisation for Economic Cooperation and Development (OECD). These studies have assessed the enforcement practices of 33 (ICN study) and 43 (OECD study) jurisdictions.

A. Common features of cartel fine methodologies

The ICN study into cartel fine setting practices for cartels finds that there is little international consensus on the appropriate level of fines. The study concludes that there is 'no single nor simple solution to effectively deter, detect and punish cartels'.[32] This reflects the continued existence of various types of fine calculation methodologies, but also the variation of sanctions other than corporate fines that may be used by authorities. At the same time, both the ICN and the OECD studies identify certain key elements of sanctioning principles that are nowadays common to many mature cartel sanctioning regimes. This concerns (i) the use of relevant turnover to calculate a base fine, (ii) adjustments to the base fine in case of mitigating and/or aggravating circumstances and (ii) an absolute fine limit, often linked to total worldwide turnover.

1. Relevant turnover as the basis for fine calculation

The vast majority of jurisdictions assessed by the ICN in 2017 calculates the fine for an individual cartel member on the basis of a variation of the turnover that relates to the products

25 Hoskins, *supra* n. 24, at 76-80. See also the discussion of the notion of 'overall proportionality' by Natalia Vibla, *Toward a Theoretical and Practical Model for Multiple-Offense Sentencing* in *Sentencing for Multiple Crimes*, at 169-172; and the criticism of Ryberg, *supra* n. 21.

26 Christopher Bennett, *Retributivism and Totality Can Bulk Discounts For Multiple Offending Fit the Crime?* in *Sentencing for Multiple Crimes*, at 59-60, referring to Thomas.

27 Hoskins, *supra* n. 24, at 75.

28 Ibid. at 88-89.

29 Richard S. Frase, *Principles and Procedures for Sentencing of Multiple Current Offenses* in *Sentencing for Multiple Crimes*, at 191-192.

30 ICN (2017), *supra* n. 4.

31 OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Background Paper by the Secretariat* (1-2 December 2016), https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf.

32 ICN (2017), *supra* n. 4, at 3, 57.

affected by the cartel, e.g. 'relevant turnover', 'value of affected sales' or 'volume of affected commerce'.[33]

Most fining methodologies use a certain proportion of the relevant turnover to arrive at a 'base fine', also taking into account the duration of the cartel.[34] Various authorities, including the European Commission, apply a maximum percentage of 30% for cartel infringements, while others use (much) lower maximum percentages and only some use a maximum percentage exceeding 30%.[35] The proportion of relevant turnover used as basis for the fine calculation is widely considered to be an appropriate proxy for the harm caused by the cartel.[36] But it is notable that the actual percentage applied to the relevant turnover is generally not determined on the basis of the actual or estimated overcharge of the cartel, but rather on the overall gravity of the cartel conduct.[37] The EU fining guidelines for example indicate that the percentage – also called the gravity factor – is determined by 'a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented'.[38] There are only a few jurisdictions that attempt to relate the percentage of relevant turnover to the estimated harm. In the US and Canada, the base fine is normally set at 20% of the volume of affected commerce. In the US, this percentage was chosen to reflect the estimated average gains from cartels (10%) plus the additional harm due to consumers no longer being able or willing to purchase the relevant products at inflated prices (10%).[39] In Canada, the 20% is comprised of 10% as proxy for the overcharge and other economic harm caused by the cartel plus an additional 10% for deterrence 'to ensure that the fine does not represent a mere licensing fee or cost of doing business'.[40] Japan's base fine methodology is also noteworthy, as it focuses on the disgorgement of illegal gains resulting from the cartel. To this end, surcharge rates are applied to the relevant turnover. These rates have been set on the basis of estimated long-term average profit rates for businesses of different types and sizes.[41]

2. Mitigating and/or aggravating circumstances

Once a base fine is set, authorities typically consider a wide range of mitigating and/or aggravating circumstances to assess whether an upward or downward adjustment is warranted. Some common examples of mitigating circumstances are effective cooperation, voluntary or immediate termination, limited participation, negligence, non-implementation, low profit-rate, compensation of victims, having a compliance programme and acceptance of responsibility.[42] Examples of aggravating circumstances are recidivism, leading role, retaliation against other cartel members, refusal to cooperate and intent.[43] The size of a corporation may be taking into account either as a mitigating circumstance (for small companies) or an aggravating circumstance (for large companies).

3. Absolute fine limit

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33 There are (still) a few jurisdictions that rely on a company's total global turnover or total turnover in the relevant country as the basis for cartel fine calculations. But there appears to be international convergence towards the use of relevant rather than total turnover. ICN (2017), *supra* n. 4, at 19-20. ICN (2008), *supra* n. 4, at 44. For an overview of variations, see OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 11-12.

34 There is a notable divergence between authorities on how the duration of a cartel is taken into account in the fine calculation. *See* ICN (2017), *supra* n. 4, at 26; OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 12-13.

35 OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 13.

36 Ibid. at 11; ICN (2008), *supra* n. 4, at 15, 19.

37 ICN (2017), *supra* n. 4, at 24-25; OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 13-15.

38 European Commission, 2006 Fining Guidelines, point 22.

39 ICN (2008), *supra* n. 4, at 16, 20; United States Sentencing Commission, *Guidelines Manual 2018* (USSG), at 312 (2018).

40 OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Contribution by Canada* (1-2 December 2016), https://one.oecd.org/document/DAF/COMP/GF/WD(2016)9/en/pdf at 10.

41 OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 10, 14.

42 Ibid. at 15; ICN (2017), *supra* n. 4, at 31-33.

43 OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 15; ICN (2017), *supra* n. 4, at 29-31.

All cartel enforcement regimes assessed by the ICN in 2017 apply a certain absolute fine limit. For most jurisdictions, the legal maximum is set at a certain percentage (e.g. 10%) of a company's worldwide total turnover.[44] It is notable that worldwide total turnover is mostly used for determining the maximum fine, while relevant turnover is typically relied on for determining the base fine. This can be explained by the fact that overall legal limits are generally used to prevent cartel fines from jeopardizing the viability of the company as a whole.[45] Clearly, even fines amounting to less than 10% of worldwide total turnover may well result in insolvency risks. This is why almost all antitrust authorities take the 'ability to pay' into account in determining the final fine amount.[46] Authorities are justifying this practice on proportionality grounds and the argument that cartel fines should not result in driving companies out of the market, hence in itself causing a reduction of competition.[47]

B. The objectives of national cartel fining policies: deterrence versus retribution

Antitrust agencies position themselves primarily as consequentialists, enforcing antitrust laws in order to ensure future compliance. All the agencies responding to the 2017 ICN study state that they are imposing cartel fines with the aim of achieving crime prevention through deterrence.[48] In addition to deterrence, just over half of the agencies also mentioned retribution as a punishment objective. Other aims such as recovering unlawful gains and restitution for victims are pursued by only a few agencies.

If deterrence is the primary goal of cartel enforcement, how should fines be set to serve this objective? Economic theory prescribes that if agencies aim for 'complete deterrence' (i.e. prevent any violations from occurring)[49], fines should exceed the expected gain from the violation multiplied by the inverse of the probability of a fine being effectively imposed.[50] This may be achieved through different combinations of fine levels and enforcement probability (e.g. low chances of punishment compensated by very severe sanctions), as long as the outcome is that the perceived risk outweighs the expected gains.[51] In the case of cartel violations, it may be sufficient that at least for some of the prospective cartel members the expected gains are outweighed by the perceived risk.[52]

It follows from the above that fine calculation methodologies mainly relying on the two factors of (i) gain resulting from the violation and (ii) probability of enforcement, confirm the pursuit of complete deterrence as the primary goal of agency punishment.[53] It is very interesting that cartel fining policies seem to have little regard for either factor. Probability of enforcement is not mentioned as a relevant element for cartel fine setting for the jurisdictions assessed by the ICN and OECD. Gain resulting from the cartel violation is an element that has some, but still very limited, relevance. While it may be considered that the percentage applied to relevant turnover constitutes a proxy for excess profits

44 OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 21. Alternatively, some jurisdictions rely on domestic turnover or relevant turnover for the calculation of the maximum fine.

45 Ibid. at 20; ICN (2017), *supra* n. 4, at 34. But see David R. Little, *The Case for a Primary Punishment Rationale in EC Anti-Cartel Enforcement*, 5 European Competition Journal 37 (2009), at 48-49.

46 OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 23; ICN (2017), *supra* n. 4, at 34.

47 ICN (2017), *supra* n. 4, at 34.

48 ICN (2008), *supra* n. 4, at 5-6. The OECD study refers to most authorities imposing fines for deterrence purposes. OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 9. The EU 2006 Fining Guidelines also clearly stress the objective of deterrence and not (also) other objectives such as retribution. See also Hans Gilliams, *Proportionality of EU Competition Fines: Proposal for a Principled Discussion*, 37 World Competition 4 (2014), at para. 4.

49 As an alternative to complete deterrence, agencies may pursue 'optimal deterrence' (also referred to as the 'cost internalisation model'), meaning that only those violations are prevented for which the societal harm outweighs the gains. Minzner, *supra* n. 9, at 860-861. However, as this approach only considers net social welfare effects while ignoring welfare distribution (e.g. from consumers to cartel members), it is argued to be unsuitable in the context of antitrust enforcement. Wils, *Optimal Antitrust Fines*, *supra* n. 17, at 191-193.

50 Minzner, *supra* n. 9, at 861; Wils, *Optimal Antitrust Fines*, *supra* n. 17, at 191. Wils has noted not just the difficulty of *ex post* estimating the *ex ante* and subjective expected gains of cartel defendants, but also the biases that affect a defendants *ex ante* estimated gains. Ibid. at 193-195; Wils, *The European Commission's 2006 Guidelines on Antitrust Fines*, *supra* n. 18, at 210.

51 Wils, *Optimal Antitrust Fines*, *supra* n. 17, at 195. See also Michael K. Block and Gregory J. Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?* 68 Georgetown Law Journal 5 (1980), at 1131-1139.

52 Wils, *Optimal Antitrust Fines*, *supra* n. 17, at 202; Wils, *The European Commission's 2006 Guidelines on Antitrust Fines*, *supra* n. 18, at 210, footnote 79.

53 Minzner, *supra* n. 9, at 880-881.

achieved by cartelists[54], for most jurisdictions the percentage actually has little to do with such profits because the percentage is determined on the basis of gravity considerations. Japan, Canada and the US are notable exceptions, setting the percentage or surcharge rate on the basis of estimated average profit rates. The EU fining guidelines mention that for the purpose of deterrence, fines can be increased 'to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount'.[55] However, to the author's knowledge the European Commission has never applied such an increase. There is an obvious reason for why agencies are not generally assessing the gains achieved by cartelists: it is generally very costly and difficult to determine cartel profits, if possible at all.[56] Moreover, if cartel fines were based on gains resulting from the conduct, the absence of reliable data could lead to under-enforcement.[57] This is why profit-based fine methodologies are considered to be far less workable in practice than turnover-based methodologies.

In contrast to what authorities have stated in the 2017 ICN study to be their main sanctioning objective, their cartel fining methodologies are hence largely ignoring the factors that would be most relevant to achieving deterrence goals. These methodologies instead appear to be primarily designed to achieve retributive punishment. The most prominent factors determining the level of the fine are retrospective, relating to the blameworthiness of the past wrongdoing. First, the base fine calculated on the basis of relevant turnover is meant to reflect – albeit as an imperfect proxy – the harm caused by the cartel. Second, the proportion of relevant turnover used to calculate the base fine is typically based on factors determining the overall gravity of the conduct, such as the nature, the market coverage and the geographic scope of the cartel. Duration and most of the typical aggravating and mitigating circumstances also serve to assess the blameworthiness of the offence and the offender. Some of these circumstances relate to culpability, such as the level of intent or negligence, the role played in the cartel (e.g. ring-leader, passive, coerced), the seniority of personnel aware of and involved in the conduct, state encouragement of the conduct, and the existence of an antitrust compliance program.[58]

The emphasis on elements related to harm and culpability suggests that while antitrust agencies primarily position themselves as being driven by consequentialists goals, their fining methodologies are more consistent with the pursuit of retribution. This finding is consistent with empirical studies into punishment intuition of individuals.[59] As stated by Minzner, 'people talk like consequentialists but act like retributivists'.[60] Minzner has found this to apply to several US administrative agencies as well[61], and the same seems to apply to antitrust agencies.

This is not to say that future crime prevention plays no role in cartel fining methodologies. Some agencies can increase penalties solely in view of deterrence considerations.[62] Also, two factors that can play an important role in cartel fine setting, recidivism and size of the undertaking, can serve both retributive and deterrence objectives.[63] The same is true for the application of the absolute fine limit.[64] Finally, even where agencies claim to be primarily interested in achieving future compliance through

54 ICN (2008), *supra* n. 4, at 19.

55 European Commission, 2006 Fining Guidelines, point 31. Under the European Commission's 1998 Fining Guidelines this was mentioned as an aggravating circumstance.

56 See e.g. Wils, *Optimal Antitrust Fines*, *supra* n. 17, at 206-208; Wils, *The European Commission's 2006 Guidelines on Antitrust Fines*, *supra* n. 18, at 210; OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Paper by Hwang Lee* (1-2 December 2016), at 6, https://one.oecd.org/document/DAF/COMP/GF(2016)10/en/pdf; USSG, *supra* n. 39, at 312-313; Boyer, Faye and Kotchoni, *supra* n. 20, at 25-28.

57 Ibid.

58 OECD, *Background Paper by the Secretariat*, *supra* n. 31, at 15; ICN (2008), *supra* n. 4, at 29-31.

59 Minzner, *supra* n. 9, at 862-863.

60 Ibid. at 863.

61 Ibid. at 903.

62 See e.g. the 2006 Fining Guidelines of the European Commission, point 30 and 37.

63 Minzner, *supra* n. 9, at 895-897, 899-900.

64 Apart from preserving the viability of a company, the fine limit can also be considered to reflect the maximum justified punishment under cardinal proportionality. See Niamh Dunne, *Convergence in competition fining practices in the EU*, 53 Common Market Law Review 2 (2016), at 475; Little, *supra* n. 45, at 49. Conversely, Hans Gilliams (*supra* n. 48, at para. 38) argues that the 10% statutory limit applied in the EU does not provide a cardinal anchoring point because it bears no relation to the gravity or duration of the infringement, and instead is only to avoid imposing fines on undertakings which they are unable to pay.

deterrence, they may well consider this aim to be best pursued by imposing sanctions that reflect the punishment that is truly deserved.[65]

C. Retributive proportionality of national cartel fines

Current cartel sanctioning policies can be said to go a long way in meeting the requirements of retributive proportionality of punishment. As explained above, while emphasizing deterrence aims, fine calculation methodologies actually seem to be designed to ensure that cartel fines reflect the penalty that is deserved on the basis of a combination of factors related to both culpability and harm. An important deficiency is the fact that harm is typically only taken into account through the proxy of relevant turnover. But even irrespective of which proxy is used to assess the harm resulting from a cartel, current cartel fining methodologies reveal critical shortcomings in the light of retributive proportionality.

First, current methodologies lack a base penalty that applies irrespective of the level of relevant turnover affected by the cartel. This is surprising given that a cartel agreement can constitute an infringement even if no harmful effects are demonstrated and even if it was never actually implemented.[66] Moreover, the lack of a base penalty fails to recognise the base culpability that is shared by all participants of a cartel. There are good grounds to argue that all companies voluntarily agreeing to restrict competition between them share an equal blame for entering into a cartel, irrespective of differences in existing market positions. Harm-irrelevant retributivists will even argue that cartel fines should in principle be the same for all participants of a cartel, except in the case of different degrees of culpability.

A second shortcoming of current cartel fine methodologies results from the proportional or linear link between relevant turnover and the severity of punishment. This link is maintained until the maximum fine level is reached, at which point additional harm no longer increases the penalty. This is difficult to reconcile with retributive theories on punishment for multiple crimes and empirical research on intuitive notions of fair punishment. Rather than twice the harm resulting in twice the penalty, retributive proportionality principles justify twice the harm resulting in less than twice the penalty, up to a point where the maximum punishment is reached and any additional harm will no longer increase the severity of the penalty. This calls for a regressive link between relevant turnover and cartel (base) fines, meaning that with greater levels of harm the appropriate level of incremental punishment gradually declines.

Cartel sanctioning systems reflecting both base culpability and a regressive increase for greater levels of affected sales do not only exist in the theoretical world of retributive proportionality. This methodology actually forms the basis for the calculation of prison sentences for individuals responsible for cartel conduct under the US Sentencing Guidelines.[67] It entails a base recommended prison sentence of 10-16 months, moving regressively towards a sentence of 78-97 months as greater VoC is involved (see graph below).[68]

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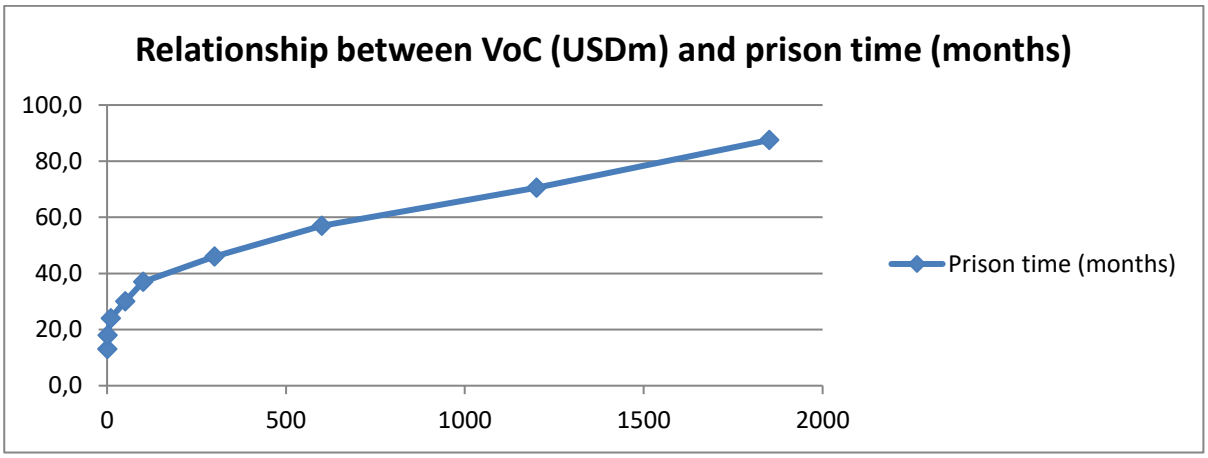
65 Minzner, *supra* n. 9, at 904-905.

66 See e.g. the 2006 Fining Guidelines of the European Commission, point 22, indicating that 'whether or not the infringement has been implemented' may affect the gravity factor.

67 The calculation starts with a 'base offense level' of 12 points, adding offense levels depending on the volume of commerce (VoC). This starts with 2 additional offense levels for a VoC exceeding USD 1 million, 4 levels for a VoC exceeding USD 10 million, and 8 levels for a VoC exceeding USD 100 million. The maximum number of VoC related offense levels to add to the base level is 16, for an amount exceeding USD 1.85 billion.

68 This assumes that the defendant has no criminal history, nor that other special circumstances affect the recommended sentence. USSG, *supra* n. 39, at 407 (Sentencing Table).



If this methodology is applied and apparently considered appropriate for the sentencing of individuals, why are the same principles not applied when fining corporations? Perhaps part of the answer lies in the relatively much more serious impact of additional prison time for an individual compared to a higher financial penalty for a corporation. But this does not yet explain why the same methodology would not also work for corporate fines. The main argument against the use of a lump sum starting amount may be that it would affect small corporations much more harshly than large corporations.[69] Clearly, a fixed amount irrespective of relevant or total turnover may well jeopardise the viability of a small company, while at the same time hardly affecting the profitability of a large multinational. Such considerations play no role when imposing prison sentences on individuals, because taking away months or years of someone's freedom can be considered to affect all individuals equally, irrespective of wealth. But as legitimate as these considerations may be when punishing corporations, it is submitted that their justification lies in consequentialist arguments rather than retributive principles. From a purely retributive perspective, it is difficult to justify even the base culpability being subject to differentiation based on one's relevant turnover. In other words, the heavy reliance on relevant turnover in the setting of cartel fines seems to over-emphasise the harm component of blameworthiness over the culpability component. This means that from an ordinal proportionality perspective, cartel members with little affected sales may receive punishment less than what they deserve, while cartel members with high affected sales may receive punishment in excess of what they deserve.

D. Consequentialist proportionality of national cartel fines

As explained in the first section of this chapter, consequentialist proportionality focuses on both (i) 'ends proportionality' and (ii) 'means proportionality' or parsimony. The first principle prescribes that prosecution and punishment should only be pursued if the benefits of doing so outweigh the costs. While this is certainly a relevant consideration to be made by agencies before deciding whether or not to take on a cartel case, they will generally do so as part of an enforcement priority policy, not as part of its fining methodology. It therefore lies beyond the scope of this chapter to assess the extent to which ends proportionality principles are being adhered to at a national level.

The principle of parsimony prescribes that punishment must not be more costly or more severe than necessary to achieve the same intended benefits to society, e.g. crime prevention through deterrence. Adherence to this principle therefore first requires an assessment of the level of punishment that is necessary in view of its objectives. Economic theory suggests that this is largely determined by the expected gain and the likelihood of detection, two factors that do not play a key role in current cartel fine setting. This indicates that authorities are not fully focused on identifying the appropriate level of punishment from a purely consequentialist perspective. But authorities do use other means to achieve consequentialist goals, for example by adjusting fine levels upwards when the outcome of the standard

[69] This was in fact why the 1998 Fining Guidelines of the European Commission were criticised. See Wils, *The European Commission's 2006 Guidelines on Antitrust Fines*, *supra* n. 18, at 207-209.

methodology is considered to provide for insufficient deterrence.[70] The context for this is typically specific deterrence, and on the back of that also general deterrence.[71]

But even where authorities do take deterrence considerations into account in their fine calculations, two critical shortcomings can be identified from a parsimony perspective. First, authorities only seem to be concerned about adjusting fines upwards to achieve additional deterrence, not in adjusting fines downwards in cases where the standard methodology is considered to result in punishment exceeding what would be necessary to achieve sufficient (specific) deterrence. This means that the outcome of largely retributive calculation methodologies can be increased but typically not reduced in view of consequentialist considerations. The second shortcoming is that where authorities feel the need to increase fine levels to achieve sufficient deterrence, they do so without taking into account the key elements determining the appropriate fine level from a deterrence perspective. It appears in practice that the overall size of a company (even beyond the relevant products and markets affected by the cartel) is mainly relied on to assess whether a fine is sufficiently deterrent. But this is ignoring the fact that economic theory calls for an assessment of whether expected risks outweigh the expected gains, not an assessment of whether the potential fine can be sufficiently 'absorbed' or cross-subsidised by the profits made with other activities.

Based on these shortcomings, it is submitted that current cartel fining methodologies do not provide for a robust framework of assessment for determining optimal fine levels from a consequentialist perspective.

6.4 The challenge of ensuring overall proportionality of fines for international cartels

A. Current practices of sanctioning international cartels

International cartel enforcement essentially entails the piling on of individual sanctions imposed under the domestic (or EU) legal framework of the various jurisdictions involved. Even though authorities may acknowledge that the cartel conduct that they are penalizing is part of an international or global conspiracy, they will typically ignore the international context in the calculation of the fine.[72] This is despite cartel defendants often claiming – unsuccessfully – that fines already imposed elsewhere should be taken into account.[73] But such claims are dismissed on the ground that enforcement is merely addressing the domestic effects, so that there is no double punishment or violation of the principle of *ne bis in idem*, even if such a principle were to bind authorities in an international context.[74] Authorities are hence generally not prepared to defer prosecution or to impose lower fines in view of enforcement elsewhere. In other words, companies facing multiple sanctions for the same overall cartel conduct cannot count on any bulk discounts.

There are some exceptions to the purely national perspective on international cartel sanctioning maintained by most authorities. First, there have been ad hoc efforts in some international cartel cases

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70 See e.g. Commission, 2006 Fining Guidelines, points 30 and 37.

71 As noted by Gilliams (*supra* n. 48, at para. 5), a primary focus on the pursuit of general deterrence would tend to result in much higher fines as even maximum penalties can easily be said to be proportionate to the objective of achieving general deterrence.

72 ICN (2008), *supra* n. 4, at 32, stating that few competition authorities seem to adjust their fines when fines are imposed for multinational cartel conduct in other competition authorities. The author is aware of only a handful of cases where authorities or courts have taken foreign cartel fines into account. This includes the conviction of AUO for its involvement in the TFT-LCD cartel (Transcript of Proceedings, United States v AU Optronics, No 3:09-cr-00110-SI (N.D. Cal. September 20, 2012) at 16, and penalties imposed in Australia in conncection with the Air Cargo and Maritimie Car Carrier cartels (Summaries of the judgements of the Federal Court of Australia in Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha (2017) FCA 876 and Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd (2019) FCA 1170; Federal Court of Australia, Australian Competition and Consumer Commission v Qantas Airways Limited (2008) FCA 1976). Another example within a European context is the flour cartel case, in which low lump sum fines were imposed by the Belgian competition authority in view of the penalties already imposed in the Netherlands.

73 A recent example is case T-466/17 *Printeos and Others v Commission*, in which Printeos had unsuccessfully argued before the General Court that the European Commission should have taken into account a prior fine imposed by the Spanish authority also in connection with cartel conduct regarding the sale of envelopes. The General Court dismissed the argument because of different underlying facts and the lack of territorial overlap. Judgement of the General Court of 24 September 2019, EU:T:2019:671, paras 157 to 161.

74 See e.g. ECJ judgement of 14 February 2012 in case C-17/10 *Toshiba*, ECLI:EU:C:2012:72, paras 101-103. See also Chapters 5 and 7 of this dissertation.

to prevent overlapping punishment through double counting of the same relevant turnover. For example, in the *Air Cargo* case, authorities acknowledged that including all turnover on inbound and outbound flights would result in some of this turnover also being taken into account by other authorities prosecuting the same worldwide cartel. The European Commission, the US Antitrust Division and Australian Competition and Consumer Commission each used a different methodology to tackle this issue.[75]

Second, some authorities have shown willingness to defer prosecution if punishment elsewhere also addresses the domestic effects of an international cartel. The Canadian Competition Bureau for example did not pursue an Auto Parts cartel investigation because a fine had already been imposed in the US which also addressed the Canadian effects.[76] The Brazilian competition authority CADE may close or choose not to open a case if foreign sanctions target the potential effects in Brazil.[77] The US Antitrust Division has also developed a policy for exercising prosecutorial discretion in view of foreign enforcement. But for this policy to result in a reduction of US sanctions, prior foreign penalties must have taken into account harm caused to US consumers and businesses.[78] The reality is that authorities are generally keen to avoid (clearly) overstepping their jurisdictional limits by explicitly limiting the scope of their sanctions to domestic effects only.

Third, there are increasingly louder calls for authorities to go even further in the coordination of sanctions imposed for international cartel conduct. For example, during the OECD Roundtable on Cartels Involving Intermediate Goods in October 2015, several delegates highlighted 'the importance of taking into account fines or sanctioning decisions already imposed by other competition agencies to minimise concerns about the fairness and proportionality of fines levied in multijurisdictional cases'.[79] Calls for closer coordination of fines in parallel proceedings have also been made by the Japanese Ministry of Economy, Trade and Industry, noting the 'growing concern about overlapping application of competition laws or imposition of multiple surcharges by several countries'.[80] Both the International Bar Association and the American Bar Association have also stressed the need for cooperation regarding sanctioning of international cartel cases to avoid over-deterrence or double-jeopardy.[81]

There is hence developing advocacy on international coordination of sanctions and there are ad hoc efforts to avoid overlapping enforcement in specific cases. Still, current enforcement of international cartels is still very much characterised by individual authorities maintaining an isolated and purely domestic view on appropriate punishment. Proportionality and deterrence considerations are applied in the context of only the domestic effects, even for international cartels.

It is interesting to compare the current practice of piling on various national fines imposed on corporate cartel defendants to the way in which individuals responsible for international cartel conduct are punished. This author is aware of only one international cartel case that involved the criminal prosecution of individuals in more than one jurisdiction: the *Marine Hose* case. In this case, the

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75 John Terzaken and Pieter Huizing, *How Much Is Too Much? A Call For Global. Principles to Guide The Punishment Of International Cartels*, 27 ABA Antitrust Magazine 2 (2013), at 55.

76 DOJ, *Nishikawa Agrees to Plead Guilty and Pay $130 Million Criminal Fine for Fixing Prices of Automotive Parts*, press release (July 20, 2016), https://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive.

77 ICN (2008), *supra* n. 4, at 32.

78 Terzaken and Huizing, *supra* n. 75, at 56-57. Note also the DOJ policy announced in March 2018 to improve the coordination with other domestic and foreign authorities with respect to the sanctioning of the same conduct. DOJ, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act* (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes.

79 OECD, Working Party No. 3 on Co-operation and Enforcement, *Roundtable on Cartels Involving Intermediate Goods - Executive Summary* (27 October 2015), at 4, https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN3/FINAL/en/pdf.

80 English summary of the METI *Report on Research for Case Examples concerning the Implementation of Regulations on International Cartel Cases among Overseas Competition Regulatory Authorities* (3 June 2016), http://www.meti.go.jp/english/press/2016/0603_02.html.

81 ABA, comments on proposed update to the *Antitrust Guidelines for International Enforcement and Cooperation* (1 December 2016), at 18-21, https://www.justice.gov/atr/page/file/915786/download; IBA, comments on proposed update to the *Antitrust Guidelines for International Enforcement and Cooperation* (December 2016), at 6, https://www.ibanet.org/Document/Default.aspx?DocumentUid=57AFCE72-2189-4E28-9758-DE17F7B64949.

Antitrust Division of the US Department of Justice entered into plea agreements with three UK nationals amounting to prison sentences of 30, 24 and 20 months for their role in the global marine hose cartel.[82] But the plea agreements allowed the three individuals – who were arrested in the US – to return to the UK to be sentenced under UK criminal law for the same overall cartel conduct. The plea agreements emphasised that the US and UK sentences were solely based on the domestic effects in the US and the UK, respectively. Yet, they provided for a reduction of the US prison sentences for any period of imprisonment in the UK, effectively allowing the individuals to serve the US and UK sentences concurrently. This arrangement resulted in a complete deferral of the US sentences.[83] Still, the Antitrust Division considered the outcome to be a clear victory for US consumers because the three individuals were 'punished adequately'.[84] The sentencing arrangement between the US and the UK has more widely been considered a successful outcome.[85] This shows that in the context of criminal enforcement of individuals – and in sharp contrast to the practice of corporate sentencing – authorities consider that proportionality and deterrence considerations may well transcend national borders.

B. Shortcomings to the proportionality of international cartel sanctioning

The current international cartel enforcement practice reveals several shortcomings when assessed from a retributive and consequentialist proportionality perspective. Some of these shortcomings already exist at a national level and are amplified at the international level. Others solely arise as a result of parallel enforcement of the same international cartel.

A first shortcoming relates to the failure to take into account overlapping culpability in international cartel enforcement. National cartel fine methodologies do not provide for a base penalty to reflect the base culpability equally shared between all cartelists. Instead, culpability is typically reflected in a gravity factor that is applied to the relevant turnover of an individual member of the cartel. This methodology obscures that the fact that the punishment will be based on a company's culpability for entering into the cartel agreement, even irrespective of the (national) effects of the cartel. Without such culpability there can be no punishment, and hence this culpability must to a certain extent be considered to be reflected in each national cartel fine, albeit not clearly and distinctively visible as a base penalty applicable to all cartel members.

For international or global cartels, the base culpability for entering into the cartel is likely to cover the cartel in its entirety, not distinguishing between different jurisdictions. In the case of global markets, a worldwide cartel can arise as a result of the simple agreement among multinationals to raise prices across the board, without discussing particular countries or even continents. It even seems to make little economic sense to have territorial differentiation in the application of the terms of a cartel in the case of truly global markets. It is hence very plausible that in the case of international or global cartels, one decision has been made to enter into the overall cartel, rather than separate and autonomous decisions to enter into the cartel in respect of each potentially affected jurisdiction. While this one decision may amount to a crime in multiple jurisdictions and hence to multiple crimes being committed, these crimes will likely have been committed in '*a continued culpable state of mind*'.[86] In other words, using the framework of assessment of Roberts and De Keijser, there will likely be a maximum relatedness between these crimes because of temporal contiguity, causality and similarity of conduct.[87] This points to an overlapping culpability or '*shared state of culpability*' underlying the respective national crimes. Where these respective national crimes are separately penalised – as is the case under current international cartel enforcement practices – retributive proportionality calls for the

82 *United States v. Bryan Allison, David Brammar and Peter Whittle*, plea agreements (12 December 2007), https://www.justice.gov/atr/case/us-v-bryan-allison-et-al.

83 DOJ, *British Marine Hose Manufacturer Agrees to Plead Guilty and Pay $4.5 Million for Participating in Worldwide Bid-Rigging Conspiracy*, press release (1 December 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-at-1055.html.

84 Ron Knox, *DoJ willing to defer to foreign enforcers - if the punishment is right*, Global Competition Review (17 April 2012), https://globalcompetitionreview.com/article/1055425/doj-willing-to-defer-to-foreign-enforcers-if-the-punishment-is-right.

85 See e.g. IBA, *supra* n. 81, at 6; OECD, *Paper by Hwang Lee*, *supra* n. 56, at 19.

86 Roberts and De Keijser, *supra* n. 22, at 146.

87 Ibid. at 146-149.

application of what Roberts and De Keijser refer to as the '*culpability correction*'.[88] This means that if there has been prior punishment of the same overall cartel elsewhere, authorities need to amend their fine calculations so as not to take into account the same base culpability for entering into the cartel. Not applying this correction in the respective sentences would result in double counting of culpability and hence in over-punishment.

If authorities were to apply a base penalty for entering into a cartel, then it would immediately become clear that under current international cartel enforcement, a base penalty for entering into a cartel is multiplied by the number of jurisdictions in which a particular member of the cartel happens to sell its products. In that case it would become much more apparent that the undiscounted accumulation of such base penalties in the case of parallel enforcement of international cartels violates retributive proportionality principles. However, the absence of a base penalty does not remove this shortcoming, it merely obscures it.

Another shortcoming from a retributive proportionality perspective is the continued overemphasis on harm as opposed to culpability. This overemphasis already exists in national cartel fine methodologies, the effects of which are increased at the international level in the case of parallel enforcement. As explained above, the common use of relevant turnover as the underlying basis for the fine calculation establishes a direct, linear and proportionate link between this proxy for harm caused by the cartel and the fine. As part of parallel enforcement of an international cartel, relevant turnover is essentially accumulated across jurisdictions. This accumulation in turn multiplies the overall (base) fine. As a result, the application of the simple 'twice the harm resulting in twice the punishment' methodology is extended from the national to the international level, enhancing the imbalance between the element of harm and the element of culpability in determining overall blameworthiness. Rather than a linear and proportional link, additional relevant turnover only regressively increasing the overall punishment would be more consistent with retributive proportionality principles.

A third shortcoming of international cartel enforcement is the lack of parsimony being taken into account across jurisdictions. Parsimony calls for authorities to impose the least punishment necessary to achieve their deterrence aims. It is submitted that this is not an exercise that each authority can conduct in national isolation, as that would wrongly assume that punishment for the same conduct elsewhere is not capable of meeting general and specific deterrence objectives at home. In reality, aggressive national enforcement in one jurisdiction will likely contribute to the prevention of international cartels covering this jurisdiction and others at the same time. In the case of international cartel enforcement, it may even be more appropriate to speak of one shared, transnational deterrence objective rather than independent national deterrence objectives.

The lack of parsimony considerations is apparent at the national level, but its effects are amplified at the international level. With an accumulation of national fines for the same overall conduct, the question becomes more pressing whether additional enforcement and penalties still contribute to future prevention of cartel conduct. If only some of the jurisdictions significantly affected by an international cartel were to impose national penalties, the overall punishment may still lack sufficient deterrence even though each underlying fine could be considered sufficiently deterrent in its national context. But with less and less cartel enforcement 'blind spots' in the world, the concern is not so much whether sufficient overall deterrence is achieved, but whether undiscounted accumulation of fines results in over-deterrence and over-punishment.

A fourth shortcoming relates to the lack of any overall proportionality assessment or totality principle being applied at an international level. Under current practices of international cartel enforcement, each authority is solely considering the proportionality of its own punishment. But no one is assessing whether the overall punishment still fits the cartel conduct as a whole. Put differently, no one is asking (except perhaps for the cartel defendants) when 'enough is enough'. This would not be surprising in

[88] Ibid. at 138-139.

case of multiple national crimes lacking any international connection. But it would be quite artificial to consider an international cartel to comprise multiple, wholly independent national cartel violations. Maintaining this fiction lacks credibility in the context of both cross-border cartel enforcement policy and legal theory on proportionality of punishment.

In addition to the absence of an overall proportionality assessment, current international cartel enforcement also lacks a proportionality safeguard in the form of an absolute legal limit to overall punishment. The only absolute limit that applies across jurisdictions is the sum of applicable national legal limits. But this aggregate limit is soon rendered meaningless in the case of multiple authorities all setting the limit at 10% or more of a company's worldwide turnover.[89] Moreover, it is difficult to explain why the number of affected jurisdictions alone – irrespective of the scope or scale of a cartel – multiplies the maximum punishment that can be imposed for a company's participation in the same overall cartel. Why would a company selling cartelised products to consumers solely in country A be subject to a maximum fine of 10% of its worldwide turnover, while another company selling the same type of cartelised products to the same number of consumers for the same amount but spread across country A and country B, deserve a maximum fine of up to 20% of its worldwide turnover? If in a purely national context additional harm at some point is no longer considered to justify a higher penalty, should the same not apply across borders in case of parallel enforcement of the same overall cartel? Especially in the case of fully overlapping culpability, there seems to be no justification for maintaining that companies selling cartelised products in a higher number of countries deserve to be punished proportionately more harshly.

C. Towards overall proportionality of fines for international cartels

The assessment above shows that the standard cartel fining methodology currently used by authorities fails to ensure either retributive or consequentialist proportionality. This applies at the national level and even stronger at the international level. In trying to bring overall punishment of international cartels more in line with proportionality principles, it would seem logical to first resolve the deficiencies at the national level. But it is doubtful that a complete overhaul of common cartel fining methodologies would be feasible or realistic within a reasonable timeframe. For the more mature regimes, the current methodologies are the result of a decades-long evolution of fining practices that have become increasingly curbed by case law. At the international level, the convergence of both mature and modern regimes towards the current standard has been applauded. A proposal for fundamental change to this standard seems unlikely to attract much enthusiasm. And even if national fining methodologies could be changed to achieve perfectly proportionate national cartel sentences, proportionality issues would still arise at the international level in the case of undiscounted accumulation. It hence seems to make more sense to aim for better consistency with retributive and consequentialist proportionality principles at an international level while accepting the fundamental aspects of the cartel fining methodologies currently applied at the national level.

Within the context of the EU, when a cartel involves more than three member states, the European Commission is generally considered 'best placed' to pursue the matter.[90] The European Commission will then impose one European fine as an alternative to one or several national fines imposed by national authorities. This system allows for proportionality considerations to be applied beyond the confines of national jurisdictions. It also replaces multiple national legal limits on cartel fines by one single European maximum fine amount that is still considered to be appropriate for punishing cartel conduct.

In similar fashion, having one overarching authority impose a single fine for cartels involving multiple jurisdictions also beyond the EU would be an ideal solution to prevent the piling on of national cartel fines targeting the same international cartel. However, no 'international competition authority' exists,

89 See OECD, *Paper by Hwang Lee*, *supra* n. 56, at 18-19.

90 European Commission, *Commission Notice on cooperation within the Network of Competition Authorities*, C 101/03 (2004), point 14.

nor is it likely to ever be established.[91] Alternatively, one could consider appointing a single national authority as the lead enforcer in cartel cases involving multiple jurisdictions. Either through delegation or deference, other authorities could then enable this lead enforcer to impose a single overarching cartel fine. But for various reasons, the feasibility of this hypothetical solution seems similarly doubtful.[92]

Accepting that international cartels will likely continue to be pursued by multiple authorities in parallel, the best way to achieve overall proportionate punishment is through coordination of fines. Ideally, such coordination would entail all authorities of significantly affected jurisdictions to agree on both the desired level of punishment for the overall conduct as well as its translation into individual sanctions. But this would call for all authorities to be able to agree on the appropriate overall punishment, despite differing views on how harshly cartel behaviour needs to be punished. As a more practical point, such collaboration would also require more or less simultaneous investigations resulting in comprehensive insight into the scope and scale of the cartel in all relevant jurisdictions at the same time. This seems very hard and perhaps impossible to achieve in practice. A more feasible form of coordination of fines would rest on each prosecuting authority considering the fine(s) already imposed for the same overall conduct elsewhere and unilaterally determining the appropriate level of additional sentencing. In particular, this would require authorities to assess whether the overall conduct warrants any further punishment – from a retributive proportionality and/or parsimony perspective. Using the words of the Business and Industry Advisory Committee to the OECD: 'once any jurisdiction sets a fine at an appropriate and proportionate level, another jurisdiction imposing penalties on top of that needs to strike a proper balance'.[93] This assessment clearly goes beyond merely checking whether any foreign sanction has already covered domestic interests (which it will normally not have). It also goes much further than merely avoiding any double counting of relevant turnover.

Requiring authorities to take into account the retributive and deterrence objectives already achieved by earlier fines for the same overall cartel is easier said than done. It assumes that authorities are able to assess the appropriate level of overall punishment and to assess the extent to which previous fines have contributed to the desired retribution and deterrence. However, not even the national fining guidelines are adequately and transparently taking into account the considerations on proportionate retribution and deterrence. So how should authorities in practical terms take into account prior foreign penalties? In part, they may do so by reference to key elements of their existing fining methodologies. For example, they may consider whether the sum of prior fines and the national fine that would normally be imposed exceeds (i) the absolute fine maximum applied by the authority and/or (ii) the penalty that the authority would have imposed if all the effects of the conduct had been confined to its own jurisdiction. Also, it may be considered whether certain aggravating circumstances may have already been sufficiently taking into account elsewhere. But for a large part, adequately taking into account prior foreign fines will require authorities to depart from their existing sanctioning frameworks. They will need to develop a new framework for assessing the extent to which fines – foreign and their own – achieve retributive and deterrence objectives. At the least, this would in my view involve the identification of that part of fines that can considered a basic penalty for entering into the overall cartel agreement, irrespective of the scope of harmful effects, so that duplication or multiplication of sanctioning of this part of the penalty can be avoided. It would also involve a better weighing of deterrence considerations, comparing fine amounts with actual and anticipated gains and enforcement risks.

The proposed approach also assumes that authorities would be willing to unilaterally relinquish the collection of fine amounts in the (cartelist's) interest of overall proportionality. Even if – through

91 Terzaken and Huizing, *supra* n. 75, at 54-55.

92 See Chapter 7 of this dissertation.

93 OECD, *Summary of Discussion of the OECD Roundtable on Cartels Involving Intermediate Goods* (27 October 2015), https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN2/FINAL/en/pdf, at 8.

multilateral agreements on reciprocity – such willingness can be found, there is a risk of authorities rushing through their cartel investigations to avoid being barred from imposing (full) penalties.[94]

Overcoming these and other obstacles to achieving perfect coordination of overall punishment will surely be challenging. It would be much easier to maintain the status quo of authorities imposing cartel fines from a purely national perspective while ignoring the international context of both the conduct and the punishment. But it is submitted that such an isolated and simplistic view on international cartel enforcement is no longer sustainable given the increasingly crowded enforcement arena. As with most other aspects of our global economy, international coordination is needed to address issues arising from cross-border economic activity in a uniform and overall satisfactory and effective manner. Inevitably, this should and will also be the direction for international cartel enforcement.

6.5 Conclusion

This sixth chapter has first addressed the third and fourth research sub-questions:

> *3. How are international cartel defendants being punished? How do individual jurisdictions fine international cartels? Do authorities or courts take into account penalties imposed elsewhere for the same overall cartel?*
>
> *4. What is proportionate punishment? How does parallel enforcement of international cartels affect the overall proportionality of punishment?*

Following an assessment of the proportionality of fines for international cartels within the framework of legal theory on punishment, this chapter finds that – borrowing the words of Minzner – antitrust authorities 'talk like consequentialists but act like retributivists'. National sanctioning policies refer to specific and general deterrence as the key objective behind imposing (heavy) cartel fines. But fining methodologies hardly consider the elements that are most relevant to assess optimal deterrence levels: the expected gains of cartelists and the likelihood of detection and punishment. They also typically ignore principles of parsimony, by not considering at which fine level the deterrence objectives have been satisfied. Instead, cartel fining methodologies are primarily based on elements that aim to ensure retributive proportionality of cartel fines, focusing on the culpability of the offender and the actual or potential harm of a cartel.

A key feature of current cartel fining methodologies is the direct and linear link between the level of the fine and a cartelist's turnover achieved with selling the affected products. This means that, all other things being equal, a cartel member earning twice as much with the sale of cartelised products will also be punished twice as hard. While this is *prima facie* precisely what retributive punishment prescribes, it is argued in this chapter that retributive proportionality principles actually require cartel fines to better reflect a certain base culpability for the conduct that forms the essence of the infringement: entering into and maintaining a cartel. Moreover, it is submitted that instead of a linear or proportional function, a regressive relationship between a proxy for harm and the severity of the penalty is more consistent with retributive proportionality and empirical research on intuitive notions of fair punishment.

The identified shortcomings of national cartel sanctioning policies are amplified when it comes to the enforcement of international cartels. First, the undiscounted accumulation of individual fines ignores the fact that each fine will reflect – at least for a significant part – the same base culpability for entering into the overall cartel. Secondly, a combination of national fines that are each calculated on the basis of a proportional function of the value of affected sales, increases the overreliance on harm as opposed to culpability as the main element underpinning the level of punishment. Thirdly, the lack of parsimony

[94] Wouter P.J. Wils, *The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26 World Competition, 2 (2003), at 143. The risk of authorities trying to avoid being barred from imposing (full) cartel fines already exists to a limited extent in situations of inability to pay.

considerations being applied at the national and the international level increases the risk of overall fine levels well exceeding what is necessary and sufficient for future crime prevention purposes. Fourthly, no totality principle or other appropriate absolute maximum exists at a worldwide level to limit the total fine amount imposed for the same overall conduct, nor is any authority considering the overall proportionality of the overall punishment. Based on these four main shortcomings, this chapter concludes that the current legal framework of imposing fines for international cartels fails to adhere to proportionality principles under both consequentialist and retributive theories.

The last part of this chapter has focused on the future and has touched upon the fifth research sub-question, which is addressed more fully in the next chapter:

> *5. How can and should the international enforcement community work to develop a framework for the coordination of the sanctioning of international cartels?*

It is submitted that overall proportionality of fines for international cartels can only be ensured if authorities will start to take into account the extent to which retributive and consequentialist objectives have already been achieved through sanctions imposed elsewhere. Such an approach is likely to raise many practical and political issues, and trying to resolve these issues through increased coordination of international cartel enforcement will surely be challenging. Simply piling on individual fines imposed on the basis of domestically-focused sanctioning policies is sure to avoid difficult discussions between authorities. But this chapter argues that in view of proportionality considerations, maintaining this status quo is not sustainable in the context of an increasingly globalised economy and a growingly crowded enforcement environment.

7. CHAPTER 7: LIBOR: A CASE STUDY ON PARALLEL ENFORCEMENT BY ANTITRUST AND OTHER AUTHORITIES

This chapter is based on the article 'Parallel enforcement of rate rigging: lessons to be learned from LIBOR', 3 Journal of Antitrust Enforcement 1, 1 April 2015.

7.1 Introduction

Building on the elements analysed in the previous chapters, this chapter illustrates how these elements come together and affect the overall enforcement efforts and punishment in a particular case: the global manipulation of interest rate benchmarks such as LIBOR and Euribor. This case study is meant to make the research of this dissertation more tactile, while at the same highlighting the importance of the researched issues. In doing so, the analysis of this chapter serves to complement the responses to all five research sub-questions, and consequently helps to answer this dissertation's main research question.

The interest rate benchmark manipulation is a perfect object for a case study given that the global investigation, prosecution and punishment of the conduct by some of the world's largest banks has created an unprecedented challenge for the international enforcement community. At least 28 authorities from twelve different jurisdictions have been involved in the matter.[1] The focus area of these agencies ranges from antitrust violations to fraud to financial misconduct. Fine settlements and decisions have been concluded in respect of twelve banks and two brokerage firms for a total fine amount of over 9.5 billion euro.[2] This includes the record fines imposed on Deutsche bank totalling over 3 billion euro.

The benchmark manipulation cases involved cross-border investigations conducted jointly by several authorities. This chapter focuses on whether a high level of inter-agency coordination can also be witnessed with respect to the post-investigation phases, i.e. the prosecution and punishment of the committed offences. To this end, the chapter examines the underlying conduct that is being sanctioned and the jurisdictional delimitations that are applied by the various enforcement agencies. This

[1] The European Commission, the United States Department of Justice (DOJ), the US Federal Bureau of Investigation (FBI), the US Securities and Exchange Commission (SEC), the US Commodity Futures Trading Commission (CFTC), the US Federal Reserve, the New York Department of Financial Services, the Canadian Competition Bureau, the UK Financial Services Authority (FSA) (now the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), the UK Office of Fair Trading (OFT), the UK Competition Commission, the UK Bank of England, the UK Serious Fraud Office (SFO), the Swiss Financial Market Supervisory Authority (FINMA), the Swiss Competition Commission (COMCO), the German BaFin, the German Bundesbank, the Netherlands Authority for the Financial Markets, the Dutch central bank, the Dutch Fiscal Intelligence and Investigation Service, the Australian Securities and Investments Commission, the Japan Financial Services Agency (JFSA), Japan Securities and Exchange Surveillance Commission, the Monetary Authority of Singapore, the Securities and Futures Commission of Hong Kong, the Hong Kong Monetary Authority, the Chinese National Development and Reform Commission and the China Banking Regulatory Commission.

[2] On 27 June 2012, Barclays received a 59.5 million pound (74 million euro) fine from the FSA, a 200 million dollar (160 million euro) fine from the CFTC and a 160 million dollar (128 million euro) fine from the DOJ. On 19 December 2012, UBS received a 160 million pound (197 million euro) fine from the FSA, a 700 million dollar (531 million euro) fine from the CFTC, a 500 million dollar (379 million euro) fine form the DOJ and a 59 million swiss franc (49 million euro) fine from the FINMA. On 6 February 2013, the Royal Bank of Scotland received fines from the FSA (87.5 million pound; 102 million euro), the CFTC (325 million dollar; 240 million euro) and the DOJ (150 million dollar; 111 million euro). On 25 September 2013, ICAP received fines from the FSA (14 million pound; 17 million euro) and the CFTC (65 million dollar; 48 million euro). On 29 October 2013, Rabobank received fines from the FCA (105 million pound; 123 million euro), the CFTC (475 million dollar; 344 million euro), the DOJ (325 million dollar; 235 million euro) and the Dutch public prosecutor (70 million euro). On 4 December 2013, the European Commission reached settlements with eight financial institutions for a total amount of 1,712 million euro. On 15 May 2014, RP Martin was fined by the FCA (630,000 pound; 772,000 euro) and the CFTC (1.2 million dollar; 875,000 euro). Lloyds was fined on 28 July 2014 by the FCA (35 million pound (excluding the fine imposed for manipulation of the Repo Rate); 44 million euro), the CFTC (105 million dollar; 78 million euro) and the DOJ (86 million dollar; 64 million euro). The CFTC fined Citibank for 175 million dollar (157 million euro) on 25 May 2016. On 7 December 2016, the European Commission imposed fines on the banks that had not agreed to settle (Crédit Agricole, HSBC and JPMorgan) for an amount of 485 million euro for the Euribor manipulation. It imposed further fines on JPMorgan (61.6 million euro), RBS, UBS, JPMorgan and Crédit Suisse (32.2 million euro) and ICAP 14.9 million euro) for other interest rate benchmark manipulations. On 21 December 2016, COMCO imposed fines totalling 99 million Swiss francs (93 million euro) on seven banks. Deutsche Bank was hit with fines totalling 2,519 million dollar (2,329 million euro), imposed by the CFTC (800 million dollar), the DOJ (775 million dollar), the New York Department of Financial Services (600 million dollar) and the FCA (227 million pound) on 28 March 2017. On 4 June 2018, the DOJ (275 million dollar) and the CFTC (475 million dollar) imposed fines on Société Générale totalling 750 million dollar (643 million euro). On 2 July 2019, COMCO settled with Rabobank and Lloyds for 350 thousand euro and 265 thousand euro, respectively.

assessment will reveal that the authorities did not succeed in avoiding jurisdictional overlap, nor in coordinating their use of prosecutorial discretion. On the contrary, the various authorities all focused on the same underlying collusion between the banks, without applying any clear delimitation. This chapter further explains that the absence of coordination with respect to the prosecution and punishment of cross-border and multi-agency cases creates double jeopardy or *bis in idem* concerns, as well as risks of over-punishment. Due to the steady growth of aggressive enforcement by competition authorities, financial regulators and fraud agencies around the world, the number of cases involving simultaneous actions by these various types of enforcers will only increase. In view of the increasingly crowded international enforcement environment, new guiding principles must be developed to ensure overall proportionality of sanctions. This chapter explores the elements that may guide authorities in future global investigations towards a more coordinated and proportionate punishment.

7.2 The factual conduct

The benchmark manipulation cases focus on the process whereby so-called 'panel banks' submit rates as input for the daily calculation of interest rate benchmark figures. The submitted rates ought to reflect the interest rate at which an individual panel bank expects to be able to borrow funds from another bank.[3] The benchmark figure is calculated by first discarding the submissions on the highest and lowest ends of the spectrum and averaging the remaining rates.[4] At the time of the start of enforcement actions in 2012, the London Interbank Offered Rate (LIBOR) was the most frequently used benchmark for interest rates and related to a variety of currencies such as the Dollar, the Yen, the Sterling, the Swiss Franc or the Euro.[5] Other reference rates included the Euro Interbank Offered Rate (Euribor), the Tokyo Interbank Offered Rate (TIBOR), the Singapore Interbank Offered Rate (SIBOR) and the Hong Kong Interbank Offered Rate (HIBOR). All these benchmarks were published for a variety of maturities (eg two weeks or six months).

The investigations have revealed two distinct forms of benchmark manipulation by the panel banks. First, the submission of artificially high or artificially low rates in an attempt to influence the overall benchmark figure and to increase profits made on the basis of derivative or money market trading positions. Due to the calculation method of the benchmark rates, the more panel banks collude in submitting artificial rates, the greater the impact of the manipulation. Internal emails of UBS employees show that such manipulation can be very profitable. Moving the benchmark by just one basis point could result in profits or losses for the bank of as much as 4 million dollar.[6] The UK Financial Services Authority found evidence that this type of profit-driven manipulative conduct took place as of January 2005 and continued until at least January 2011.[7] However, there are indications that this type of behaviour may have occurred as early as the beginning of the 1990s.[8]

The second form of manipulation was reputation-driven and arose with the start of the financial crisis in August 2007. At that time, panel banks learned that what they submitted as their estimated costs of borrowing was seen in the market as a reflection of their creditworthiness and their financial health.[9] This resulted in management requests for lower submissions. At times, a profit-driven incentive for higher rates conflicted with the reputation-driven aim to submit lower rates. In this respect, a UBS

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3 The precise definition of the rates panel banks have to submit varies per benchmark. The LIBOR definition for example refers to the rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for and then accepting interbank offers in reasonable market size, while the Euribor definition refers to the rate at which Euro interbank term deposits are offered by one prime bank to another prime bank.

4 The LIBOR benchmark excludes the highest and lowest 25% of submissions while the Euribor benchmark excludes the highest and lowest 15% of submissions.

5 FSA, *Final Notice to UBS AG* [2012] 9 < https://www.fca.org.uk/publication/final-notices/ubs.pdf> (FSA fine on UBS).

6 FSA fine on UBS 21.

7 For Barclays the relevant period was January 2005 to July 2008, for UBS 1 January 2005 to 31 December 2010, for the Royal Bank of Scotland October 2006 to November 2010 and for Rabobank May 2005 to January 2011.

8 Douglas Keenan, 'My thwarted attempt to tell of Libor shenanigans' (FT, 26 July 2012) <http://www.ft.com/cms/s/0/dc5f49c2-d67b-11e1-ba60-00144feabdc0.html#axzz35AaQZpIB>.

9 See eg Mark Gilbert, 'Barclays Takes a Money-Market Beating' (*Bloomberg*, 3 September 2007) <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8uEKKBYY7As> accessed 30 September 2014 (link no longer working).

manager clarified in an email to other UBS managers on 9 August 2007 that '*It is highly advisable to err on the low side with fixings for the time being to protect our franchise in these sensitive markets. Fixing risk and [profit and loss] thereof is secondary priority for now*'.[10]

The reputation-driven manipulation was implemented through unilateral behaviour by panel banks. In contrast, the profit-driven manipulation was often implemented by several colluding panel banks and brokers in coordinated attempts to alter the interest rate benchmark. Such collusive schemes were effected through a combination of the following four types of actions:

(a) Making submissions that take into account internal requests from traders to benefit the bank's derivative and money market trading positions;

(b) Making submissions that take into account requests made by traders at other panel banks or requests made by brokers on behalf of traders at other panel banks;

(c) Requesting other panel banks (either directly or through brokers) to make submissions that benefitted one's own derivative and money market trading positions; and

(d) Asking brokers to disseminate false and misleading information on interest rates on which other panel banks relied in an attempt to influence those banks' submissions.

The willingness of competing panel banks to participate in the collusive schemes was based on the promise of reciprocity and was facilitated by friendly relations between traders.[11] The cooperation of brokers was ensured by offering extra trades or "wash trades" to generate additional broker fees.[12]

7.3 Overview of enforcement actions

A. The start of government investigations

Soon after the start of the reputation-driven manipulation by panel banks, financial regulators were made aware of the "lowballing" of LIBOR submissions. On 28 August 2007, an internal email from a Barclays submitter reporting on 'unrealistically low libors' was forwarded to a wide group of addressees including officials from the Federal Reserve Bank of New York, The World Bank and the Dutch Ministry of Finance.[13] Barclays and other banks also contacted the New York Federal Reserve, the Bank of England and the UK financial regulator FSA themselves to complain about artificially low LIBOR submissions.[14] An internal FSA report indeed shows that the issue of unrepresentative LIBOR rates was well known and widely discussed within the FSA from the end of 2007 onwards.[15] This did not initially result in any enforcement action. The FSA was of the opinion that the LIBOR-setting process was the responsibility of the British Bankers' Association (BBA), the UK trade association for the banking and financial services sector.[16] As the BBA was not regulated by the FSA, the FSA was reluctant to intervene. It did, however, closely monitor which measures the BBA was taking to ensure that panel banks were making honest submissions.[17]

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10 FSA fine on UBS 24.

11 See eg CFTC fine on UBS 17-20.

12 See eg CFTC fine on UBS 27-29. Wash trades are trades that have no economic justification or ultimate financial result other than the payment of commissions to intermediaries.

13 The email was forwarded to a long list of people including Pat Leising of the World Bank, Fabiola Ravazzolo of the New York Federal Reserve Bank and Daniel Koerhuis who worked at the Dutch Ministry of Finance at that time. The email is available at <http://www.newyorkfed.org/newsevents/news/markets/2012/libor/August_28_2007_mass_distribution_emails.pdf> accessed 30 September 2014 (link no longer working).

14 FSA, *Final Notice to Barclays Bank Plc* [2012] 27 <https://www.fca.org.uk/publication/final-notices/barclays-jun12.pdf> (FSA fine on Barclays).

15 FSA, *Internal Audit Report: A Review of the Extent of Awareness Within the FSA of Inappropriate LIBOR Submissions* [2013] 19-25 <http://www.fsa.gov.uk/static/pubs/other/ia-libor.pdf> accessed 30 September 2014 (link no longer working) (FSA Audit Report).

16 ibid 42.

17 See eg the FSA's involvement in the review the BBA conducted of the LIBOR setting process in the first half of 2008. ibid 47-50.

After several newspapers had reported on the unrealistically low LIBOR submissions in April 2008, the US Commodity Futures Trading Commission (CFTC) contacted the FSA to find out which steps were taken by the UK financial regulator.[18] The CFTC received little response. Two months later, the CFTC again approached the FSA and indicated that it wanted to request information from the BBA and from certain panel banks to investigate the matter.[19] According to the FSA, the subsequent inquiries ultimately caused the UK regulator to formally initiate its own investigation.[20]

The competition authorities in the UK were independently looking at the LIBOR-setting process as early as November 2008.[21] At that time, the UK competition authorities the Office of Fair Trading (OFT) and the Competition Commission expressed their concerns to the FSA regarding 'the potential for collusion amongst submitting banks to the detriment of consumers or other banks'.[22] Interestingly, the head of the FSA urged the head of the OFT not to launch an investigation into the LIBOR manipulation.[23] According to the FSA, there was no need for such an investigation as the BBA was already making progress in improving the rate setting process. Moreover, the FSA warned for the financial stability implications of announcing an investigation into LIBOR.

It was not until 2011 that other competition authorities got involved, apparently only after leniency applicants made these authorities aware of the alleged anti-competitive conduct. On 5 January 2011, UBS requested leniency from the Canadian Competition Bureau, leading to the start of an investigation on 4 May 2011 into anti-competitive conduct relating to Yen LIBOR by six banks and two brokers.[24] UBS also obtained conditional leniency from the Swiss Competition Commission.[25] The Antitrust Division of the US Department of Justice (DOJ) granted UBS conditional leniency with respect to the LIBOR and TIBOR manipulation, while granting Barclays conditional leniency in relation to the Euribor manipulation.[26] The European Commission commenced its investigation into the benchmark manipulation in March 2011, first focussing on Euribor and later also covering LIBOR and TIBOR.[27] The European investigations also arose out of leniency applications by UBS and Barclays.[28]

In addition to financial regulators and competition authorities, anti-fraud agencies are the third type of enforcers that became involved in the matter. The DOJ Criminal Division's Fraud Section, which acts in close coordination with the CFTC and the DOJ's Antitrust Division, has been pursuing both banks and leading individuals for criminal charges of wire fraud.[29] As of July 2012, the UK Serious Fraud Office, which only targets individuals, has been pursuing the benchmark manipulation as well.[30]

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18 ibid 53-55.

19 ibid 69-70.

20 ibid 69.

21 ibid 80.

22 ibid 80-81.

23 ibid.

24 Superior Court of Justice, East Region, Court of Ontario, Canada, *Affidavit of Brian Elliott* [2011] 7; UBS, *Annual Report 2012: Our Performance in 2012* (March 2013) 382 < https://www.ubs.com/global/en/investor-relations/financial-information/annual-reporting/ar-archive.html>.

25 ibid 382.

26 ibid. Barclays, 'Barclays Bank Plc Settlement with Authorities' (27 June 2012) < https://www.home.barclays/content/dam/home-barclays/documents/investor-relations/IRNewsPresentations/2012News/27-June-Barclays-Bank-PLC-Settlement-with-Authorities.pdf>.

27 Commission, 'Libor Scandal: Amendments to Proposed Market Abuse Legislation to Fight Rate-fixing – Frequently Asked Questions' (25 July 2012) MEMO/12/595 <http://europa.eu/rapid/press-release_MEMO-12-595_en.htm>. Commission, 'Antitrust: Commission Confirms Inspections in Suspected Cartel in the Sector of Euro Interest Rate Derivatives' (19 October 2011) <http://europa.eu/rapid/press-release_MEMO-11-711_en.htm?locale=en>. 'EU's Almunia Says Rates Probe May Be Wider' (*Reuters*, 25 July 2012) <http://www.reuters.com/article/2012/07/25/eu-almunia-libor-idUSL6E8IPKPW20120725>.

28 Commission, 'Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry' (4 December 2013) <http://europa.eu/rapid/press-release_IP-13-1208_en.htm>.

29 See eg *United States of America v UBS Securities Japan Co., Ltd.*, Plea Agreement [2012] <http://www.justice.gov/ag/executed-plea-agreement-appendix-b.pdf> (UBS Plea Agreement); *United States of America v Tom Alexander William Hayes and Roger Darin*, Complaint [2012] <http://www.justice.gov/ag/Hayes-Tom-and-Darin-Roger-Complaint.pdf>.

30 SFO, 'LIBOR: SFO to Investigate' (6 July 2012) < https://www.sfo.gov.uk/2012/07/06/libor-sfo-to-investigate/>.

B. Imposed sanctions

The US and UK financial regulators, together with the DOJ's Fraud Section, have sanctioned the benchmark manipulation by simultaneously entering into individual fine settlements one financial institution at a time. On 27 June 2012, Barclays was the first bank to reach a settlement with the authorities, followed by UBS, the Royal Bank of Scotland, ICAP, Rabobank, RP Martin, Lloyds, Citibank (CFTC only), Deutsche Bank and Société Générale (DOJ and CFTC only). The Swiss financial regulator FINMA was also involved with respect to UBS, while the Dutch financial regulator and central bank DNB and the Dutch public prosecutor (DPP) joined the UK and US authorities in sanctioning Rabobank.

Interestingly, the US and UK sanctions imposed on a particular bank do not always relate to the same conduct. The Financial Conduct Authority (FCA, a successor to the FSA) for example identified collusive manipulation by Rabobank of Yen and Dollar LIBOR, while the CFTC and DOJ found Rabobank to have colluded with others in respect of Yen LIBOR and Euribor.

As for antitrust sanctions, only some banks (the Royal Bank of Scotland, Deutsche Bank) have been sanctioned by the DOJ's Antitrust Division in relation to the benchmark manipulation. It is remarkable that Barclays was not pursued by the Antitrust Division for collusion with respect to LIBOR submissions. The bank only obtained conditional leniency with respect to Euribor and the DOJ's Fraud Section clearly established that Barclay's collusive behaviour extended to Dollar LIBOR as well.[31] Rabobank and Lloyds were not charged with antitrust violations by the DOJ either, even though the DOJ, CFTC and FCA concluded that the Yen LIBOR submitters of both banks colluded from at least mid-2006 to October 2008 to adjust their respective Yen LIBOR submissions to benefit the banks' trading positions.[32]

On 4 December 2013, the European Commission imposed its record breaking 1.7 billion euro fine for collusive manipulation on Barclays, UBS, the Royal Bank of Scotland, Deutsche Bank, Société Générale, JPMorgan, Citigroup and RP Martin. Rabobank and Lloyds were not targeted by the Commission. The overall fine actually relates to one multilateral cartel infringement concerning Euribor and seven distinct bilateral cartels concerning Yen LIBOR. This distinction allowed both UBS and Barclays to receive immunity from fines as a result of their leniency applications in relation to Yen LIBOR and Euribor, respectively. As a result of their applications, Barclays avoided a 690 million fine while UBS escaped an otherwise unprecedented 2.5 billion euro fine. Most other financial institutions received significant fine reductions under the EU Leniency Notice for their cooperation. Moreover, all settling parties received a 10% fine reduction for using the cartel settlement procedure, thereby allowing the European Commission to go through a simplified fining procedure.

Crédit Agricole, HSBC, JPMorgan (in relation to Euribor only) refused to participate in the cartel settlement procedure and were the subject of a regular enforcement procedure. On 7 December 2016, they received fines totalling 485 million euro.[33] The European Commission also pursued the Swiss Franc LIBOR manipulation and imposed a 61.6 million euro fine on JPMorgan,[34] plus a 32.2 million euro fine on RBS, UBS, JPMorgan and Crédit Suisse for operating a cartel on bid-ask spreads of Swiss franc interest rate derivatives.[35] ICAP received a 14.9 million fine for its involvement in the

31 DOJ, Criminal Division, Fraud Section, *Non-prosecution Agreement with Barclays Bank Plc*, Statement of Facts [2012] 12-23 <http://www.justice.gov/iso/opa/resources/931201271017342636594l.pdf>.

32 DOJ, 'Lloyds Banking Group Admits Wrongdoing in LIBOR Investigation, Agrees to Pay $86 Million Criminal Penalty' (28 July 2014) <http://www.justice.gov/opa/pr/lloyds-banking-group-admits-wrongdoing-libor-investigation-agrees-pay-86-million-criminal>, CFTC, 'CFTC Charges Lloyds Banking Group and Lloyds Bank with Manipulation, Attempted Manipulation, and False Reporting of LIBOR' (28 July 2014) <http://www.cftc.gov/PressRoom/PressReleases/pr6966-14>, FCA, *Final Notice on Lloyds Bank plc and Bank of Scotland plc* [2014] paras 2.12, 2.15, 4.36, and 5.6 <http://www.fca.org.uk/static/documents/final-notices/lloyds-bank-of-scotland.pdf>.

33 Commission decision of 7 December 2016 in case AT.39914 *Euro Interest Rate Derivatives*.

34 Commission Decision of 21 October 2014 in case AT.39924 *Swiss Franc Interest Rate Derivatives*.

35 Commission Decision of 21 October 2014 in case AT.39924 *Swiss Franc Interest Rate Derivatives (Bid Ask Spread Infringement)*.

manipulation of Yen LIBOR[36], but later succeeded in appealing the fine before the General Court.[37] HSBC was also successful in its appeal against the Commission's fine decision[38], with appeals from Crédit Agricole and JPMorgan still pending.

Swiss competition authority COMCO imposed fines on seven banks (Barclays, Royal Bank of Scotland, Credit Suisse, JPMorgan, Deutsche Bank, Citigroup and Société Générale) in relation to four separate interest rate benchmark manipulations on 21 December 2016, for a total amount of 93 million euro.[39] Settlements were reached with Rabobank and Lloyds on 2 July 2019, for 350 thousand euro and 265 thousand euro, respectively.[40] Investigations against UBS, HSBC and brokers ICAP, RP Martin and Tullett Prebon were at that time still pending.

Thus far, the sanctions imposed by the European and US authorities have resulted in a total fine amount of over 9,502 million euro. Most severely punished is Deutsche Bank with a total fine amount of 3,059 million euro, followed by UBS with a total penalty of 1,169 million euro, the Royal Bank of Scotland (860 million euro), Rabobank (772 million euro), Société Générale (1,092 million euro) and Barclays (390 million euro). Due to the additional costs of stricter compliance requirements, sanctions on employees and directors, reputational harm and numerous private claims for damages, the overall financial impact of the enforcement for the institutions involved is even much greater.

While not imposing fines, the Japan Financial Services Agency (JFSA) has taken administrative actions against Japanese subsidiaries or branches of Citigroup, UBS, the Royal Bank of Scotland and Rabobank. All four parties received Business Improvement Orders relating to the respective banks' internal processes and compliance. In addition, the Citigroup and UBS subsidiaries received Business Suspension Orders requiring the suspension of certain derivative transactions for a limited time.

The Monetary Authority of Singapore in June 2013 sanctioned nineteen banks for their deficiencies in the governance, risk management, internal controls, and surveillance systems relating to the SIBOR submissions.[41] The banks were required to place additional statutory reserves – varying from 60 million euro to over 700 million euro – with the authority at zero interest for a period of at least one year.

Lastly, on 14 March 2014 the Hong Kong Monetary Authority reported on the outcome of its investigation into collusion in relation to the HIBOR benchmark. The authority did not find evidence of collusion between panel banks, but it did identify misconduct by UBS on the basis of internal communication between traders and submitters aimed at influencing UBS' HIBOR submissions.[42] UBS was merely ordered to take appropriate disciplinary action against the individuals involved and to implement a remedial plan. No fine was imposed.

In the wake of the investigations into corporations, authorities have also turned their attention to the responsible individuals. The SFO concluded its investigations as late as 18 October 2019, having brought charges of conspiracy to defraud against 13 individuals.[43] This includes the high-profile conviction of Tom Hayes, a former UBS and Citigroup trader, with a prison sentence of initially 14 years, later reduced to 11 years. The DOJ has been separately pursuing individuals, including Hayes.

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36 Commission decision of 4 February 2015 in case AT.39861 *Yen Interest Rate Derivatives*.

37 Judgement of the General Court of 10 November 2017 in case T-180/15 *ICAP and others v* Commission, ECLI:EU:T:2017:795. The ruling was upheld in appeal before the European Court of Justice in its judgement of 10 July 2019 in case C-39/18 *Commission v ICAP and others*, ECLI:EU:C:2019:584.

38 Judgement of the General Court of 24 September 2019 in case T-105/17 *HSBC and others v Commission*, ECLI:EU:T:2019:675. The judgement has been appealed by the Commission.

39 COMCO decisions of 21 December 2016 in respect of (i) Yen LIBOR and euroyen TIBOR, (ii) Euribor, (iii) Swiss franc LIBOR and (iv) Swiss franc bid-ask spread manipulations.

40 COMCO decisions of 2 July 2019 in respect of Yen LIBOR, euroyen TIBOR and Euribor manipulations.

41 MAS, 'MAS Proposes Regulatory Framework for Financial Benchmarks' (14 June 2013) < https://www.mas.gov.sg/news/media-releases/2014/mas-proposes-legislation-for-a-regulatory-framework-for-financial-benchmarks>.

42 HKMA, 'HKMA announces outcome of investigations into HIBOR fixing' (14 March 2014) <http://www.hkma.gov.hk/eng/key-information/press-releases/2014/20140314-3.shtml>.

43 See < https://www.sfo.gov.uk/2019/10/18/sfo-concludes-investigation-into-libor-manipulation/>.

It appears however that Hayes has successfully prevented extradition and prosecution in the US.[44] Some individuals have also been targeted by the FCA.[45]

7.4 The conduct's legal qualification

A. Non-coordinated manipulation

The unilateral manipulation of submissions by panel banks is targeted by the financial regulators and the anti-fraud agencies, but not by antitrust authorities. The legal qualification of the unilateral conduct differs per enforcement body. The Fraud Section of the DOJ finds the conduct to constitute wire fraud.[46] The US financial regulator CFTC identifies three distinct infringements relating to price manipulation.[47] In contrast, the European financial regulators have used overarching business conduct provisions to capture the bank's behaviour.[48] This difference can be explained by the general lack of legislation in EU Member States that more specifically targets price or benchmark manipulation. The European Commission has responded to this "regulatory loophole" by obligating Member States to qualify benchmark manipulation as a criminal offence under their national laws.[49] Moreover, the Commission was quick to propose a new Regulation with rules on the functioning and governance of benchmarks.[50]

B. Coordinated manipulation

The FCA, CFTC, DOJ, FINMA and DNB/DPP have not confined themselves to punishing only the unilateral act of submitting artificial rates. Their sanctions also particularly target the collusion between panel banks, either directly or through brokers.[51] The legal qualification of the collusion is often the same as that of the non-coordinated behaviour, ie (attempted) manipulation of the price of a commodity in interstate commerce (CFTC), improper business conduct (FSA, DNB, FINMA) and wire fraud[52] (DOJ Fraud Section). Only the CFTC also identifies an infringement solely relating to the collusion, namely aiding and abetting the attempts of traders at other banks to manipulate the benchmark in violation of the Commodity Exchange Act.[53]

Antitrust authorities pursue the collusion between panel banks because of the conduct's anti-competitive aspects. To qualify the collusion as an antitrust offence makes sense conceptually. The factual behaviour of the panel banks contains the standard characteristics of cartels: (i) collusion between firms acting on the same market, (ii) which alters the natural process of price setting, (iii) with the aim to increase the firms' profits, (iv) at the detriment of customers and consumer welfare, (v)

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44 It is not clear to what extent the SFO and the DOJ have coordinated their prosecution of Hayes. See Anil Rajani, RadcliffesLeBrasseur, 'Was Tom Hayes' conviction a watershed moment for the Serious Fraud Office?' (10 November 2015) <https://www.rlb-law.com/briefings/litigation-dispute-resolution/tom-hayes-sfo/>.

45 FCA press release, ' Two former senior executives of Martin Brokers fined and banned for compliance failings related to LIBOR' (22 January 2015) <https://www.fca.org.uk/news/press-releases/two-former-senior-executives-martin-brokers-fined-and-banned-compliance-failings>.

46 A violation of Title 18 USC § 1343. The former UBS employees Tom Hayes and Roger Darin were also charged with conspiracy to commit wired fraud. *Hayes* (n 29) 1-2.

47 The infringements are (i) spreading false, misleading and knowingly inaccurate information concerning market information that affects the price of any commodity in interstate commerce (a violation of Section 9(a)(2) of the Commodity Exchange Act, 7 USC § 13(a)(2) (2006)), (ii) manipulating the price of a commodity in interstate commerce and (iii) attempting to manipulate the price of a commodity in interstate commerce (ii and iii both a violation of Sections 6(c), 6(d) and 9(a)(2) of the Commodity Exchange Act, 7 USC §§ 9, 13b and 13(a)(2) (2006)).

48 For the FSA/FCA, it constitutes a breach of the obligation to observe proper standards of market conduct (a violation of Principle 5 of the FSA/FCA's Principles for Businesses), the DNB finds Rabobank to have seriously violated the requirements regarding controlled and sound business operations for financial institutions (a violation of Sections 3:10 and 3:17 of the Dutch Financial Supervision Act) and FINMA qualifies UBS's non-coordinated conduct as infringing proper business conduct requirements.

49 Commission, 'Libor Scandal: Commission Proposes EU-wide Action to Fight Rate-fixing' (25 July 2012) <http://europa.eu/rapid/press-release_IP-12-846_en.htm>.

50 Commission, 'New measures to restore confidence in benchmarks following LIBOR and EURIBOR scandals' (18 September 2013) <http://europa.eu/rapid/press-release_IP-13-841_en.htm>.

51 See eg FSA fine on Barclays 38; CFTC fine on UBS 56-57; UBS Plea Agreement, Exhibit 3.

52 Tom Hayes and Roger Darin were not only charged with wire fraud but also with conspiracy to commit wired fraud. *Hayes* (n 29) 1-2.

53 A violation of Section 13(c) of the Commodity Exchange Act, 7 USC §§ 13(a)(2) (2006).

without creating offsetting benefits. However, whether the benchmark collusion indeed qualifies as an antitrust violation in a particular jurisdiction depends on that jurisdiction's substantive antitrust laws.

In the US, the elements of Section 1 of the Sherman Act are threefold: (i) there must be a contract, combination or conspiracy between two or more entities, (ii) which unreasonably restrains trade, and (iii) which affects interstate or international commerce.[54] Hard core violations such as horizontal price-fixing, market allocation, output restrictions and bid-rigging are considered *per se* unreasonable restraints. The DOJ Antitrust Division has found the three elements of price-fixing to be present in the conduct of the Royal Bank of Scotland and of former UBS traders Hayes and Darin.[55] According to the Division, the substantial terms of the concerted action by the conspirators were "to fix Yen LIBOR, a key price component of Yen LIBOR-based derivative products".[56] Interestingly, in a subsequent civil law suit before the US District Court of the Southern District of New York, Judge Buchwald dismissed plaintiffs' antitrust claims in relation to the LIBOR manipulation because of the plaintiff's failure to demonstrate an antitrust injury.[57] The judge did not identify any lessening of competition because (i) the benchmark setting process is not intended to be competitive, (ii) the benchmark rates did not necessarily correspond to actual interest rates charged, (iii) the colluding panel banks continued to fully compete on the derivate and money markets and (iv) the same injury could have resulted from unilateral misrepresentation by the panel banks.[58] The findings of Judge Buchwald were repeated in a decision by Judge Daniels in another civil law suit before the US District Court of the Southern District of New York.[59] Judge Daniels went even further, ruling that the relevant conduct does not constitute a *per se* antitrust violation and that the presented facts were not sufficient to support any anti-competitive aspect or effect of the conduct.[60] It was therefore ruled that the plaintiff failed to plead a Sherman Act violation.

In Canada, it is only as of 12 March 2010 that price-fixing conspiracies are treated as *per se* antitrust violations which do not require an analysis of the conduct's impact on competition. Under the old regime, which is the regime governing the panel banks' collusion, a conspiracy to fix prices could only be qualified as a violation of the Canadian Competition Act if such a conspiracy *unduly* prevented or lessened competition.[61] Case law of the Canadian Supreme Court has clarified that the word "unduly" mandates a partial rule of reason inquiry into the seriousness of the competitive effects of the agreement through an examination of market structure and behaviour.[62] The Competition Bureau has interpreted this as requiring proof of "significant anti-competitive economic effects".[63] On 4 January 2014, the Competition Bureau announced that the evidence it had collected in its benchmark manipulation case was insufficient to meet this requirement.[64] It therefore dropped the investigation.

A cartel offence in violation of Article 101 TFEU requires a finding of (i) an agreement or concerted practice between undertakings, (ii) which appreciably affects trade between EU Member States, and (iii) which has as its object or effect the prevention, restriction or distortion of competition.[65] Article 101(1)(a) TFEU explicitly prohibits agreements which "directly or indirectly fix purchase or selling prices or any other trading conditions". This provision also covers the fixing of components that are

54 15 USC § 1 (2006). The Supreme Court decided in *Standard Oil Co. of New Jersey v. United States*, 221 US 1 (1911) that only *unreasonable* restrains are prohibited by the Sherman Act.

55 *United States of America v The Royal Bank of Scotland*, Deferred Prosecution Agreement [2013] 1 <http://www.justice.gov/iso/opa/resources/2820132613312741448 1.pdf>; *Hayes* (n 29) 3.

56 ibid.

57 *In re LIBOR-Based Fin. Instruments Antitrust Litig, 1:11-md-02262-NRB* (SDNY 29 March 2013).

58 ibid 33-40.

59 *Jeffrey Laydon et al v Mizuho Bank Ltd et al, 1:12-cv-3419-GBD* (SDNY 28 March 2014).

60 ibid 18-22.

61 Article 45(1)(c) Competition Act as it read prior to the amendment that entered into force on 12 March 2013.

62 *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606, 657.

63 Competition Bureau, 'Competition Bureau Discontinues Its LIBOR Investigation' (3 January 2014) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03642.html>.

64 ibid.

65 Article 101(1) of the Treaty on the Functioning of the European Union.

part of the overall sale price, such as discounts or surcharges.[66] The European Commission finds that the coordination of the panel bank's submissions constitutes a cartel aimed at "distorting the normal course of pricing components" for the financial derivatives.[67] The Commission refers to the conduct as a decision by financial institutions to collude instead of competing.[68] The qualification by the Commission therefore seems to differ from Judge Buchwald's finding that the panel banks did not fail to compete where they otherwise would have. Construed as a price-fixing cartel distorting competition in the derivate market by object, the European Commission does not need to demonstrate any anti-competitive effects. The Commission's fine decisions further reveal that the Article 101 TFEU violations that have been found are partly based on the information exchange between the colluding banks. The Commission asserts that the banks have shared with other market players confidential and commercially sensitive information such as their future submissions, their pricing and trading strategies, and their trading positions.[69] Qualifying such exchange of information as being anti-competitive by object is in line with the Commission's strict approach with respect to information exchange, an approach which is confirmed by EU case law.[70]

The above shows that whereas the antitrust authorities, financial regulators and anti-fraud agencies have all sanctioned the same coordinated behaviour, the legal qualification of this behaviour differs per jurisdiction and per enforcer. The various authorities have found the same collusion to constitute price manipulation, improper business conduct, wire fraud, price-fixing and illegal exchange of information. This wide range of applied legal qualifications reveals that the authorities have not been willing or able to find international agreement on how the collusive conduct should primarily be qualified. Such international coordination would have allowed for prosecution with respect to the more secondary types of violations to be deferred, thereby preventing overlapping prosecution by various types of agencies at an early stage.

7.5 Overlapping jurisdictions

As the same collusion translates into various violations, different types of authorities have considered themselves competent to assert their jurisdiction over the overall conduct. This section first examines the legal bases used by the various authorities to investigate, prosecute and punish the collusion. It then assesses whether the authorities have applied any delimitation in exercising their jurisdictional discretion to prevent any overlap with the focus of other authorities' enforcement efforts.

A. Jurisdictional bases for sanctioning the overall collusion

The basic ground for asserting jurisdiction over conduct violating a state's laws follows the territoriality principle, which connects the jurisdiction to the territory where the conduct has taken place. International law recognises various jurisdictional principles that allow states to claim jurisdiction over conduct that has taken place outside of their own territory. The most common of these extraterritorial principles are the active personality (nationality) principle, the passive personality principle, the protective principle and the universal principle.[71]

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66 See eg, *FETTSCA* (Case IV/34.018) Competition Decision 2000/627/EC [2000] OJ L 268/1 and *Air Cargo* (Case AT.39258) Competition Decision of 9 November 2010, C(2010) 7694 final; Commission, 'Antitrust: Commission fines 11 air cargo carriers €799 million in price fixing cartel' (9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm>.

67 Commission, 'Antitrust: Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry' (4 December 2013) <http://europa.eu/rapid/press-release_IP-13-1208_en.htm>.

68 Commission, 'Introductory remarks on cartels in the financial sector' (4 December 2013) <http://europa.eu/rapid/press-release_SPEECH-13-1020_en.htm>.

69 Commission decision of 7 December 2016 in case AT.39914 *Euro Interest Rate Derivatives*, e.g. paras 369 and 384; Commission decision of 4 December 2013 in case AT.39914 *Euro Interest Rate Derivatives*, para 57.

70 See eg, Case T-587/08 *Fresh Del Monte Produce v Commission* (General Court 14 March 2013) and Case C‑8/08 *T-Mobile Netherlands and others* (4 June 2009).

71 See eg, Gerard Conway, *'Ne Bis in Idem* in International Law', *International Criminal Law* (2003, 3) 225, referring to W. Micheal Reisman (ed), *Jurisdiction in International Law* (Ashgate, 1999).

Additional jurisdictional concepts have been developed in the field of antitrust enforcement. In the 1945 judgment in *United States v Aluminium Co of America*[72], the US Supreme Court has accepted that foreign conduct that has or is intended to have substantial effect within the territory of the United States can be caught by US antitrust enforcement (the "effects doctrine"). Pursuant to this doctrine, any antitrust authority in whose territory the products affected by a cartel were sold can claim jurisdiction over the collusion. As discussed in detail in Chapter 4 of this dissertation, it was only in the 2017 *Intel* case that the European Court of Justice finally explicitly recognised the effects doctrine for EU competition law. Before then, it seemed to prefer to rely on the slightly less extensive "implementation doctrine", adopted in the *Wood Pulp* case.[73] This doctrine allows the European Commission to claim jurisdiction if the relevant anti-competitive conduct has been implemented in the EU, for example by raising prices of products directly sold into the EU. The ECJ presented the implementation doctrine as an expression of the territoriality principle.[74] In practice, it is just as effective as the effects doctrine in allowing for extraterritorial antitrust enforcement targeting foreign cartel conduct.[75] Whereas such extraterritorial application of antitrust laws caused much controversy and debate in the early days of antitrust enforcement, it is now widely accepted and common practice throughout the world.

In relation to the benchmark manipulation, the principle of extraterritoriality allows the US Antitrust Division and the European Commission to easily claim jurisdiction over the overall worldwide conduct. It suffices that the affected products were sold within their respective territories. Given the global nature of the affected derivative markets, it appears that in theory almost all active antitrust authorities could claim jurisdiction over the conduct pursuant to the effects or implementation doctrine.

The financial regulators have used different jurisdictional bases to capture the overall, worldwide manipulative conduct. The FINMA and DNB/DPP have solely sanctioned the banks that are incorporated in Switzerland and the Netherlands, respectively, banks for which they act as "home supervisor". It therefore seems that these regulators have claimed jurisdiction on the basis of the active personality or nationality principle. Alternatively, the FSA asserted jurisdiction on the basis of its prudential supervision on banks that are authorised to perform regulated activities in the UK. Although the process of setting benchmark rates was not a regulated activity, the FSA argued that any misconduct of the banks in relation to this process was still caught by the general obligations for authorised financial businesses.[76] The CFTC chose yet another path, basing its jurisdiction on the territoriality principle. It qualified the conduct as partially taking place in the US because (i) the submissions were disseminated and published globally, including in the US, and (ii) the benchmarks constituted commodities in interstate commerce in the US.[77] Interestingly, in April 2008 an FSA employee internally questioned 'what jurisdiction if any [the CFTC] would have in the matter'.[78] The answer he received was that the investigation in the US would be taken forward as part of the CFTC's 'false reporting statute which applies to inter-state commerce, which in their view, includes the world'.[79]

Through these different routes, the financial regulators regarded themselves competent to impose fines relating to the worldwide manipulation. The way in which jurisdiction is exercised by the UK and US regulators is far from exclusive. Any other national financial regulator (i) overseeing a bank's regulated

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72 *United States v. Aluminum Co. of America*, 377 US 271 (1964).

73 *Wood Pulp* (Case IV/29.725) Competition Decision 85/202/EEC [1985] OJ L 85/1.

74 Joined cases 89/85 etc, *Ahlström v Commission* [1988] ECR 5193, para 18.

75 An exception may be that a collective boycott of export to the EU by non-Member States will be caught by the effects doctrine, but not by the implementation doctrine. Richard Whish and David Bailey, *Competition Law* (OUP, 2012) 497.

76 On 22 April 2008, an FSA employee wrote to the CFTC that 'the FSA does not have supervisory responsibility for the BBA rate setting mechanism although (…) we do have prudential supervisory responsibility over the FSA authorised banks providing the information to the BBA'. FSA Audit Report 54.

77 See eg CFTC fine on UBS 4.

78 FSA Audit Report 55.

79 ibid 70.

conduct or (ii) in whose territory the submissions and benchmarks were published, could similarly claim jurisdiction on the basis of that bank's overall misconduct.

As for the jurisdiction of fraud agencies, the DOJ appears to apply both the territoriality principle and the passive personality principle. In its complaint against former UBS employees Hayes and Darin, the DOJ stipulates that (i) the conspiracy to defraud took place partly in the US, (ii) the fraudulent information was spread by wire through interstate and foreign commerce, and (iii) counterparties affected by the manipulation were based in the US.[80] It is not clear on which basis the UK SFO has claimed its jurisdiction. It could point to the same aspects as the DOJ: (i) the fraudulent conduct taking place partly in the UK, (ii) the fraudulent communication being spread globally, including in the UK, and (iii) victims of the fraud being based in the UK. The SFO could also rely on the nationality principle if the individual is a UK national, such as Hayes. In view of the global dissemination of the manipulated rates and the worldwide sale of the products involved, the territoriality and passive personality principles can easily be used by other fraud agencies around the world to assert jurisdiction over the fraudulent behaviour.

It follows from the above that antitrust, financial and fraud authorities have little difficulty in claiming jurisdiction over the overall conduct because of the global nature of the products involved, the wide presence of panel banks and their traders and submitters throughout the world, and the global spread of submissions and benchmarks through the internet.

B. Jurisdictional delimitation

Where various authorities assert jurisdiction over the same conduct, overlap of enforcement efforts can be avoided by the delimitation of an authority's jurisdictional discretion. Complex, cross-border behaviour can be difficult to split up into separate parts fitting neatly within the competences and fields of expertise of the authorities involved. However, for the benchmark manipulation such a partitioning seems to have been a real possibility. Based on their respective focus areas, it would have made perfect sense for the fraud agencies to solely consider the submission and spread of false and misleading information, for the financial regulators to look at the failings of internal systems and controls within financial institutions, and to let the antitrust authorities deal with the collusion and exchange of sensitive information. Furthermore, it would not have been insurmountable to avoid overlap within these categories by applying a further jurisdictional delimitation. For example, fraud enforcement could have been reserved to the agency based in the territory where the submissions were made to the relevant benchmark organisation and financial regulators could have left the enforcement in relation to organisational failures to a bank's "home supervisor".

Public statements by the European Commission seem to suggest that the exercise of jurisdictional discretion in the benchmark manipulation cases is indeed characterised by a clear functional delimitation. In response to its own question why it acts in a field where financial regulators have also been active, the Commission stated that it:

> "*has looked at the conduct of the relevant bank in respect of financial benchmarks from a different angle. Financial regulatory agencies tackling the possible manipulation of benchmarks may for instance focus on the conduct of single banks rather than a number of banks. By contrast, the Commission has detected and sanctioned cartels*".[81]

In fact, quite to the contrary, the collusion between banks and brokers constituted a large part of the conduct for which the financial regulators and the fraud authorities imposed their sanctions. It appears from the various fine and settlement decision that the authorities have not applied any functional delimitation to avoid any overlap in the object of their enforcement. Moreover, no apparent efforts

80 *Hayes* (n 29) 1-2.

81 Commission, 'Antitrust: Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry - frequently asked questions' (4 December 2013) <http://europa.eu/rapid/press-release_MEMO-13-1090_en.htm>.

were made to apply any territorial delimitation, for example by solely considering the part of the conduct that took place within the territory of the relevant authority. Even though some of the authorities may claim that they have imposed a penalty only in relation to the adverse effects in their own respective territories, this does not alter the fact that they have considered themselves competent to assert jurisdiction over the same overall actions producing such effects.

In conclusion, while the angle from which the respective authorities have approached the matter may differ, they have all targeted the same overall, worldwide collusive conduct without applying any apparent jurisdictional delimitation.

7.6 The risk of double prosecution and over-punishment

A. Concerns caused by the parallel enforcement of the benchmark manipulation

From the perspective of the undertakings accused of the benchmark manipulation, two types of concerns arise from the multiplicity of concurrent enforcement procedures. First, in their defence for the same overall collusion the undertakings concerned are faced with a variety of charges brought by a variety of authorities, all following their own procedures. They are burdened with several distinct prosecution or settlement proceedings. Additional proceedings involve additional company resources, such as time devoted by management, disruption of normal business processes, fees of legal advisers, and reputational damage resulting from repeated coverage. Furthermore, multiple enforcement actions lead to continued uncertainty about the undertaking's financial exposure in relation to the manipulation. The undertaking is involved in a repeated and continuing fight, in which any single conviction or settlement does not actually settle the matter.

The second type of concern caused by the great number of authorities prosecuting the benchmark manipulation relates to the proportionality of punishment. An inherent risk of over-punishment arises where several authorities each independently impose a sanction that is considered appropriate for the committed violation, without taking into account the level of punishment and deterrence already achieved by earlier fines. The accumulation of unilaterally determined sanctions then likely exceeds the penalty that any single authority would consider reasonable for the relevant overall conduct. The resulting over-punishment infringes the principle of proportionality, which – as covered elaborately in the previous chapter – essentially entails that any penalty should fit the severity of the crime. Excessive sanctions not only harm the person being punished, they also have adverse societal consequences.[82] First, the financial losses incurred by a company in case of over-punishment may significantly restrict that company's ability to fully compete on the market. Excessive fines may even lead to insolvency, potentially harming overall competition in the market. Secondly, excessive fines may lead to over-deterrence causing companies in general to become overcautious in their actions.

The risk of over-punishment is particularly serious in the benchmark manipulation cases because all sanctions are imposed largely for the same conduct. From an authority's perspective, it can be argued that the fraud, financial misconduct and antitrust elements of the collusive benchmark manipulation all entail distinct offences and that each separate violation needs to be punished and prevented through deterrence in accordance with the authority's own sentencing guidelines. However, from the perspective of the accused undertaking, such approach seems artificial, unnecessary and unjustified. In the minds of the colluding persons, there was no separate consideration to (i) collude to jointly manipulate the benchmark (ii) submit false rates and (ii) trigger potential anti-competitive effects. All three artificially distinguished elements are inherently linked in the specific context of the benchmark manipulation for higher profits. To be effective and proportionate, it is sufficient for a penalty to appropriately punish the undertaking for its conduct and to deter this undertaking in particular and other undertakings in general from engaging in this conduct in the future. Successful enforcement does

[82] OFT, *An assessment of discretionary penalties regimes: Final Report* [2009] para 3.22.

not require punishment and deterrence in relation to each separate offence that can be constructed on the basis of the factual elements of the conduct.

It added to the risk of excessive punishment in the benchmark cases that the various authorities have independently pursued a particularly high level of deterrence. The FSA stated that the breaches were 'extremely serious' and that 'the need for deterrence means that a very significant fine (…) is appropriate'.[83] CFTC commissioner Chilton said that the UBS fine is 'the granddaddy of CFTC penalties' and that combined with the other regulator settlements, the overall fine amount 'serves as a direct deterrent (…) not only for UBS, but for the biggest of the big schemers in the financial world'.[84] A high level of desired deterrence is also reflected in fines imposed by the European Commission for what EU competition commissioner Almunia called 'one of the most irresponsible behaviours of the financial industry to this day'.[85] As each individual authority appears to have included a deterrence 'premium' in its own sanction, the overall sanctions imposed on undertakings are likely to be an accumulation of record fines that reflect overlapping punishment and deterrence objectives.

B. The principle of ne bis in idem *or double jeopardy*

Since ancient times, legal notions have existed that prevent persons from facing prosecution and punishment twice for the same offence.[86] Such notions today are present in all civil law and common law systems, albeit in slightly different forms, such as *ne bis in idem*, double jeopardy, *res judicata*, *autrefois acquit*, *autrefois convict* and *una via*.[87] Within this family of related concepts, a general distinction can be made between two separate objects of protection: (i) the procedural protection against the initiation of a second prosecution after the outcome of the first proceedings has become final (generally referred to as the *Erledigungsprinzip*, and (ii) the substantive protection against a second punishment (referred to as the *Anrechnungsprinzip*).[88] The rationales for the two types of protections differ. The rationale of the *Anrechnungsprinzip* lies in the sphere of proportionality, reasonableness and equity[89], and protects against excessive punishment. In contrast, the *Erledigungsprinzip* is considered to safeguard an individual's right not to be burdened twice with the costs and anxiety of prosecution for the same offence.[90] It also ensures that the finality of judgments is respected (in line with the principle of *res judiciata*), thereby increasing legal certainty and predictability and upholding the legitimacy of the state.[91] A further function of the *Erledigungsprinzip* is that it disciplines prosecuting authorities as they will not have a second opportunity to initiate proceedings, leading to more efficient law enforcement.[92] Scholars have identified additional rationales relating to specific jurisdictions, such as the facilitation of freedom of movement in the context of the EU and Schengen[93] and, in respect of the US, the right of the accused to complete a trial with the jury originally chosen.[94]

Although the application of the principle of *ne bis in idem* or double jeopardy is widespread in common law and civil law countries, the precise meaning generally differs from state to state. First, some domestic expressions of the principle attach more weight to the *Erledigungsprinzip*, while other expressions focus more on the *Anrechnungsprinzip*. Second, divergence exists as to the interpretation of "*bis*" or "twice". For example, in common law countries the principle of double jeopardy

83 FSA fine on UBS, paras 183 and 184.
84 CFTC Commissioner Chilton, 'A Conscience Isn't Nonsense' (19 December 2012) <http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement121912>.
85 Stefano Berra, 'Almunia: EU Libor probe expanded to Swiss franc', *Global Competition Review* (22 February 2013) <http://globalcompetitionreview.com/news/article/33093/almunia-eu-libor-probe-expanded-swiss-franc/>.
86 Conway (n 71) 221-222.
87 Bas van Bockel, *The Ne Bis In Idem Principle in EU Law* (Kluwer Law International 2010) 31.
88 ibid 31-33.
89 ibid 122.
90 Renato Nazzini, 'Fundamental Rights beyond Legal Positivism: Rethinking the *Ne Bis in Idem* Principle in EU Competition Law, '*Journal of Antitrust Enforcement* (2014) 11.
91 ibid 12-13. Van Bockel (n 87) 122.
92 Nazzini (n 90) 13-14.
93 ibid 11.
94 Conway (n 71) 223.

traditionally prohibits an appeal by the prosecution following an acquittal, whereas in civil law countries such an appeal is not considered as a second prosecution.[95] Third, there can be various interpretations of "*idem*" or "same offence". In some jurisdictions a second prosecution or punishment is prohibited where it relates to substantially the same facts (the broad interpretation) while in other jurisdictions the principle only applies if in both proceedings the legal qualification of the conduct is the same (the narrow interpretation). Intermediate forms include a consideration of the substantive elements that must be proved[96] or a consideration of the legal interest protected by the respective prosecutions[97]. Because there is no international common ground as to the precise scope and meaning of the principle, it has so far not become a general rule of international law. The principle therefore only applies to the extent that it is codified in national legislation, constitutions or treaties.

C. Multiple enforcement of the benchmark manipulation within a single jurisdiction

Thus far, there are three sovereign states in which multiple enforcement actions were initiated involving the same undertaking in respect of the collusive manipulation: the United States (federal level), the Netherlands and Switzerland. In none of these jurisdictions do the concurrent intra-state proceedings appear to have violated the applicable *ne bis in idem* or double jeopardy principle.

In the US, the prohibition of double jeopardy is a constitutional right incorporated in the Fifth Amendment to the US Constitution.[98] It prescribed that that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb…'. This constitutional principle of double jeopardy covers both protection against a second criminal prosecution and protection against double punishment. In one of its landmark cases on double jeopardy, *Blockburger v. United States*[99], the US Supreme Court has clarified the interpretation of "the same offense". The Supreme Court held that 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not'.[100] If the *Blockburger* test is applied to the interest rate benchmark manipulation cases, it appears that each of the offences allegedly violated by the relevant panel banks indeed seems to require proof of certain facts that is not required for the other offences.[101] In addition, the CFTC and the DOJ have concluded their settlement agreements and imposed their sanctions simultaneously for each of UBS, Barclays, the Royal Bank of Scotland and Rabobank. Therefore, even if jeopardy is assumed to attach to the authorities' settlements[102], the prohibition against consecutive proceedings is not infringed. Interestingly, even though there seem to be multiple grounds to dismiss a double jeopardy claim in relation to the fines imposed by the CFTC and the DOJ, the authorities have asked the relevant banks to explicitly waive any claims of double jeopardy'.[103]

In the Netherlands, the *ne bis in idem* principle is codified in national criminal and administrative law.[104] The principle also applies on the basis of various treaties ratified by the Netherlands, most

95 ibid 228.

96 As prescribed by the US Supreme Court in *Blockburger v United States*, 284 US 299 (1932).

97 This is part of the threefold test for the application of *ne bis in idem* in EU competition law, articulated by the ECJ in the *Aalborg* case. Joined cases C-204/00 P etc. *Aalborg Portland v Commission* [2004] ECR I-123, para 338.

98 The double jeopardy provision of the International Covenant on Civil and Political Rights (ICCPR) also applies in the US, but the declaration accompanying its ratification reveals that that the US applies a very strict interpretation of this provision: 'The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgement of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause'.

99 *Blockburger v United States*, 284 US 299 (1932).

100 ibid.

101 Elements not included in the other relevant offences seem to include: fixing the price of a commodity, spreading misleading information, and the intent that is part of the manipulation offence.

102 It is questionable whether double jeopardy attaches to the settlements given the civil law nature of the CFTC's penalty and the non-final nature of the non-prosecution and deferred prosecution agreements of the DOJ. In the context of the CISA, the ECJ ruled that settlements that are meant to bar future prosecution if the conditions of the settlements are met provides for the same finality as a court imposed punishment would. See Van Bockel (n 87) 42-43, referring to Joined Cases C-187/01 and C-385/01 Gözütok and Brugge [2003] ECR I-1345.

103 See eg CFTC UBS order of settlement C. 8, 58.

104 Article 68 of the Dutch Criminal Law Act and articles 5:43 and 5:44 of the Dutch Administrative law Act.

notably the International Covenant on Civil and Political Rights (ICCPR), the EU Charter (applicable in all situations governed by EU law) and the CISA (vis-à-vis other member states of the Schengen Agreement).[105] For its part in the benchmark manipulation, Dutch bank Rabobank paid a fine to the DPP, while 'at the insistence of' the DNB Rabobank took internal disciplinary action, cancelled bonuses and implemented organisational changes.[106] It appears that the enforcement action taken by the DNB did not involve any formal decision taken by the regulator, nor any formal (settlement) agreement. Instead, the DNB and the DPP have coordinated their joint response to Rabobank's conduct, thereby linking the settlement amount determined by the DPP to the quasi-voluntary measures taken by Rabobank under pressure from the DNB. With this approach, the DNB has managed to avoid initiating any formal prosecution proceeding and (formally) imposing any penalty. *Ne bis in idem* therefore does not come into play.

In Switzerland, the principle of *ne bis in idem* as codified in the Swiss Code of Criminal Procedure is interpreted as a corollary a *res judicata*[107] and only covers protection from successive prosecution. The Swiss Supreme Court has ruled that the principle only applies to the extent that the interest protected by the respective prosecutions is identical.[108] This narrow, domestic interpretation of *ne bis in idem* is overshadowed by the much broader concept articulated in article 4 of Protocol 7 to the ECHR, which has been ratified by Switzerland. First, the latter concept includes the prohibition of both double prosecution and double punishment. Second, the European Court of Human Rights has adopted a much wider interpretation of *idem* than the Swiss Supreme Court. In the case of *Sergey Zolotukhin v Russia*, the ECtHR ruled that an interpretation of *idem* focusing on the legal characterisation of offences is too restrictive on the rights of individuals.[109] Alternatively, *idem* should be interpreted as referring to 'the identity of facts or facts which are substantially the same'.[110] More specifically, the ECtHR stipulated that an assessment must be made of:

"*those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings*".[111]

With respect to the benchmark manipulation, a strong case can be made in arguing that the underlying facts of the collusive conduct investigated by the Swiss competition authority COMCO are indeed substantially the same as the facts for which FINMA *inter alia* imposed a fine on UBS. The key factual circumstances of both cases entail the communication and coordination between traders, submitters and brokers to alter the benchmark and thereby increase profits. The ECtHR clarified in *Zolotukhin* that a comparison of the statements of facts used for the prosecution is an appropriate starting point to assess the presence of *idem*.[112] In this respect it is telling that the exact same communication between a trader of UBS and a trader working at another bank has been used as factual basis for the demonstration of a fraud offence, an antitrust violation and a financial market infringement by the DOJ's Fraud Section, the DOJ's Antitrust Division and FINMA, respectively.[113] Given the strong similarity of the facts of the respective cases, it can be argued that the ECHR principle of *ne bis in idem* protects UBS from a second prosecution or a second punishment by COMCO following FINMA's fining decision. However, even if the ECtHR's wide interpretation is applied, it appears that the principle of *ne bis in idem* is not infringed by COMCO's current enforcement actions. Not only had the antitrust authority already commenced its proceedings before FINMA's decision became

105 Protocol 7 to the European Convention on Human Rights and Fundamental Freedoms (ECHR) has not been ratified by the Netherlands.

106 DNB, 'DNB imposes measures on Rabobank over Libor affair' (29 October 2013) <http://www.dnb.nl/en/news/news-and-archive/persberichten-2013/dnb298704.jsp#>.

107 Swiss Supreme Court case *Valverde v AMA, UCI and RFEC* [2011] 4A_386/2010, para 9.3.1.

108 ibid.

109 *Zolotukhin v Russia* (2012) 54 EHRR 16, para 81.

110 Ibid, para 82.

111 ibid, para 84.

112 *Ibid*, para 83.

113 *Hayes* (n 29), paras 30 and 33. FINMA, *FINMA Investigation into the Submission of Interest Rates for the Calculation of Interest Reference Rates such as LIBOR by UBS AG: FINMA Summary Report UBS LIBOR* [2012] 6 < https://www.finma.ch/en/news/2012/12/mm-ubs-libor-20121219/>.

final[114], it has also granted UBS immunity from fines as a result of its leniency application. Nevertheless, should UBS lose its immunity during the investigation, for example for failure to cooperate fully and sincerely, *ne bis in idem* may well prevent COMCO from being able to impose a second Swiss fine on UBS.

D. Multiple enforcement of the benchmark manipulation within an overarching jurisdiction

Concurrent proceedings within overarching jurisdictions such as the EU in essence create the same concerns as concurrent proceedings within the same state. However, the application of the *ne bis in idem* or double jeopardy principle across state levels within overarching jurisdictions is less self-evident. The state entities within such jurisdictions are sovereign and a restriction of their jurisdictional powers therefore cannot be *imposed* upon them. Application of the principle within overarching jurisdictions, either inter-state or between the state and the overarching level, thus requires jurisdictional self-restraint by sovereign states.

In the context of the European integration, sovereign states have accepted the transnational application of *ne bis in idem* within the European Union and within the Schengen area. These states have accepted that they can be barred from prosecuting or punishing criminal conduct due to prosecutorial action taken earlier elsewhere in Europe. The European Commission itself is also bound by the principle of *ne bis in idem* under the EU Charter. Article 50 of the EU Charter prescribes that 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. For the precise meaning of this provision, in particular the interpretation of *idem*, Advocate General Kokott has argued in her Opinion in the *Toshiba* case that it follows from the requirement of homogeneity that *idem* should have the same meaning under the EU Charter as under the ECHR and that the same interpretation should apply for all fields of EU law.[115] On the basis of the *Zolotukhin* judgment of the ECtHR and the case law of the ECJ in non-competition cases, Kokott held that *idem* should be determined only on the basis of the material acts, understood as 'the existence of a set of concrete circumstances which are inextricably linked together'.[116] Neither the legal qualification of the conduct, nor the protected legal interest should be a relevant factor in the assessment of *idem*, according to Kokott.

With respect to the consecutive European proceedings targeting the benchmark manipulation, it seems difficult to deny the existence of an inextricable link between the conduct pursued by the UK financial regulator and that pursued by the European Commission. Using the ECJ's formulation in *Kraaijenbrink*[117], the acts appear to make up an 'inseparable whole'. Jointly fixing a price component of derivatives through manipulation of the benchmark necessarily involves making fraudulent submissions and necessarily involves a violation of proper financial business conduct. The anti-competitive collusive behaviour through manipulation of the benchmark could therefore not have been performed without at the same time performing fraudulent behaviour and misconduct in the financial market. Consequently, it can be argued that pursuant to Kokot's interpretation of *ne bis in idem* under the EU Charter, the European Commission was barred from sanctioning the Royal Bank of Scotland and ICAP for their collusive behaviour because of the fines already imposed by the FSA.[118]

Despite Kokott's insistence for homogeneity, the ECJ clarified in *Toshiba* that it does not intend to accept the ECtHR's broad interpretation *ne bis in idem* in the field of competition law.[119] The ECJ blatantly ignored the *Zolothukin* judgment and the considerations expressed by Kokott in her Opinion.

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114 It is not clear if the *Erledigungsprinzip* requires an authority to discontinue a case as soon as an earlier prosecution is finalised. Van Bockel argues in the light of the ECHR that this is or at least should be the case (n 87) 190.

115 Opinion of AG Kokott in Case C-17/10 *Toshiba Corporation v Urad pro ochranu hospodarske souteze*, paras 120-123.

116 ibid, para 124.

117 Case C-367/05 *Norma Kraaijenbrink* [2007] ECR I-6619, para 28.

118 It appears that the FCA is not likewise prohibited from punishing RP Martin following the Commission's fine, given that the FCA was not enforcing rules governed by EU law.

119 Case C-17/10 *Toshiba Corporation v Urad pro ochranu hospodarske souteze* [2012] 4 CMLR 22, para 97.

In contrast, the ECJ simply repeated the phrase from its earlier judgment in the *Aalborg* case that the application of the *ne bis in idem* principle is subject to 'the threefold condition of identity of the facts, unity of the offender and unity of the legal interest protected'.[120] It is striking that the ECJ was unwilling to abandon the latter condition, in particular because it did not rely on this condition in *Toshiba* to argue that the principle did not apply. Rather, it held that in any event there was no identity of facts because the respective enforcement proceedings focussed on different effects of the same cartel.[121] This is an argument used in various forms[122] ever since the 1972 *Boehringer* judgment[123], often in response to an applicant's plea that the Commission's fine should be reduced in view of a previous foreign sanction imposed for the same cartel. The basis for such pleas to take foreign fines into account had been provided by the ECJ itself a couple years earlier in *Walt Wilhelm*.[124] In this case, the EU Court held that even if there is no *bis in idem* because different ends are pursued by the respective prosecuting authorities, 'a general requirement of natural justice (…) demands that any previous punitive decision must be taken into account in determining any [successive] sanction which is to be imposed'.[125] However, the ECJ in its later judgments has always found a ground to dismiss a claim of identify of facts, thereby consistently denying the application of this 'general requirement of natural justice'.

It appears that the ECJ persists in maintaining a very restrictive approach to the application of the *ne bis in idem* principle in the field of competition law. This approach can be explained by the Commission's unwillingness to accept the risk that itself or a Member State will be barred from prosecution or punishment as a result of which part of the cartel conduct will go unpunished. Indeed, it may seem to stretch too far that a cartel fine imposed in one Member State prevents a penalty being imposed in relation to the same cartel in another Member State where the respective sanctions only take into account the cartel's domestic effects, thereby avoiding overlapping punishments. However, a number of aspects are crucial to keep in mind in this respect. First, the self-restraint by Member States in terms of the fine calculation does not alter the fact that the same conduct is subject to multiple prosecution and punishments. Second, calculating a cartel fine on the basis of merely a part of the overall affected turnover does not necessarily mean that insufficient punishment or deterrence is achieved. Cartel fines in the EU are not compensatory in nature, but are intended to punish and deter cartel behaviour.[126] Confusingly, the calculation method of cartel fines nevertheless generally reflects an assumption of excess profits as it is based on a certain percentage of the turnover achieved in selling the cartelised product.[127] For example, under the EU Fining Guidelines, the calculation of the basic fine amount for cartels starts with 15-30 per cent of the annual turnover of the affected product.[128] This calculation method seems to imply that the proportionality of the overall fine is not affected as long as there is no double counting of turnover. But this ignores the fact that there is no direct link between the fine amount and the actual excess profits made because of the cartel. Especially if a cartel hardly achieved any illicit gains, or if the illicit gains were already recovered through successful private enforcement, it may very well be that a fine of 5 per cent of the turnover of the affected product in one jurisdiction achieves sufficient punishment and deterrence for the overall conduct. Third, the European Competition Network (ECN) allows for intense coordination and cooperation with respect to cartel enforcement and thereby gives the European competition authorities ample opportunity to prevent under-punishment of cartels as a result of the *ne bis in idem* principle.[129] As discussed at length in

120 ibid, para 97.
121 ibid, para 98-102.
122 Nazzini (n 90) 31-34.
123 Case 7/72 *Boehringer Mannheim v Commission* [1972] ECR 1281.
124 Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1.
125 *ibid*, para 11.
126 ICN, 'Setting of fines for cartels in ICN jurisdictions', *Report to the 7th ICN Annual Conference* (2008) 7-8.
127 ibid 15.
128 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para 21 and 23. For hard core cartels, the Guidelines provide for an additional 15-25 % of the value of sales to be added to the basic fine amount irrespective of the duration for deterrence purposes. ibid, para 25.
129 This is in line with Wils' finding that 'A ban on multiple prosecutions thus appears only desirable to the extent that it covers prosecutors between whom coordination is not for legal or practical reasons impossible or very costly'. Wouter P.J. Wils, 'The principle of ne bis in idem in EC antitrust enforcement: A legal and economic analysis', *Concurrences* (2004) para 34.

Chapter 5 of this dissertation, some even argue that Regulation 1/2003 enables national competition authorities to impose fines for the effects of a cartel in other Member States. If this is the case, it is difficult to see why the EU competition authorities should not be disciplined by the trans-European prohibition of multiple prosecution and punishment of the same collusive conduct.

With respect to the benchmark manipulation, the ECJ's line of reasoning in *Toshiba* creates two paths for the Commission to justify its punishment of the banks' collusive behaviour following the earlier fine settlements reached by the FSA. First, on the basis of the different legal interests protected by the respective authorities. Second, on the basis of the different underlying facts, by arguing that the Commission focused on the anti-competitive effects while the FSA focused on the collusion itself as financial misconduct. It is questionable, however, if either path is sustainable. As for the first path, Nazzini rightly points out that the ECJ's case law upholding the condition of unity of the protected legal interest 'lacks foundation and should be overruled at the earliest opportunity'.[130] Indeed, as Kokott recognised, 'There is no objective reason why the conditions to which the *ne bis in idem* principle is subject in competition matters should be any different from those applicable to it elsewhere'.[131] As for the second path, it is artificial to claim that there is no similarity of facts because of different effects or consequences of the same conduct. As clarified by Wils, *ne bis in idem* provides protection from double prosecution or punishment for the same offence, not merely for the same effects of an offence.[132] This means that the facts are certainly the same if a single cartel agreement fixes the price of a product that is sold in several Member States.[133]

There is a stark contrast between the European application of the *ne bis in idem* principle and the way in which the United States has dealt with multiple prosecution and punishment within an overarching jurisdiction. In the US, each of the 50 states and the federal government have sovereign jurisdiction to pursue criminal conduct that has a sufficient link to their respective territories. Save for voluntary jurisdictional self-restraint, none of the sovereign entities can be barred from prosecution solely because of the actions taken by another state or the federal government. In contrast to the emergence of a trans-European *ne bis in idem* principle, the double jeopardy principle in the US has not been accepted to apply inter-state or between the state and the federal level. Nevertheless, the US federal government has acknowledged that double jeopardy considerations should be taken into account in determining whether to bring a federal prosecution based on substantially the same acts involved in a prior state proceeding. For this purpose, the DOJ has developed the Dual and Successive Prosecution Policy (or "Petite Policy"), which sets out guidelines for the exercise of its jurisdictional discretion in view of previous state prosecution.[134] The purpose of the policy is not only to protect persons from multiple prosecution and punishment for substantially the same acts, but also to vindicate substantial federal interests through appropriate prosecutions, to promote efficient utilisation of DOJ resources and to promote coordination and cooperation between federal and state prosecutors.[135] The Petite Policy prescribes that a federal prosecution following an earlier state prosecution for the same acts will only be initiated or continued if (i) a substantial federal interest is involved and (ii) the prior prosecution has left that interest unvindicated.[136] In other words, the policy requires the DOJ to assess whether despite the earlier prosecution there still is a need for (additional) punishment and deterrence. The DOJ recognises with this approach that it is appropriate to exercise prosecutorial discretion in view of the desired level of overall punishment and deterrence within the overarching jurisdiction.

130 ibid 31.
131 Opinion of AG Kokott (n 115), para 118.
132 Wils (n 129) para 57.
133 ibid. Nazzini (n 90) 20.
134 United States Attorneys' Manual, 9-2.031 Dual and Successive Prosecution Policy ("Petite Policy") <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm>.
135 ibid, under A.
136 ibid. A third condition is that the government must believe that the conduct constitutes a federal offence and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. This condition applies to all federal prosecutions.

E. Multiple enforcement of the benchmark manipulation in a global context

There is no general rule of international law prohibiting double prosecution or punishment following earlier prosecutorial action in a foreign state.[137] Save in the specific context of the European integration, sovereign states generally prove unwilling to restrict their own prosecutorial powers without any control over the scope and effectiveness of foreign prosecution and punishment. Self-interest can also play a role. Authorities may want to demonstrate their own aggressiveness in pursuing misconduct falling within their field of competence. Moreover, monetary penalties imposed for corporate crimes have reached such proportions that prosecutorial decisions can be influenced by budgetary considerations of authorities or even governments. Accepting the consequences of the *ne bis in idem* or double jeopardy principle is just slightly more complicated if it means that a billion euro fine will be foregone.

Still, from the perspective of the targeted undertaking, multiple prosecution and punishment for the same conduct creates similar concerns, irrespective of whether the respective proceedings take place within the same jurisdiction, within the same overarching jurisdiction or across different continents. The risk that these concerns arise has significantly increased during the last few decades. Business and trade has become increasingly international and increasingly regulated, while (extraterritorial) enforcement of cross border misconduct has become increasingly aggressive. This means that violations by corporations will more easily trigger a multitude of enforcement actions. At the same time, many fields of law have witnessed a growing international convergence both in respect of substantive and procedural legal issues. This allows for closer coordination and cooperation between authorities, more effective information exchange, growing mutual trust in the effectiveness of foreign enforcement actions and a lower risk that cross border misconduct will go unpunished.

These developments contribute to the possibility of introducing *ne bis in idem* or double jeopardy considerations in the realm of global enforcement of corporate crimes. Indeed, there are signs that authorities are growingly aware of the need to consider the appropriate overall punishment and level of deterrence of particular conduct, rather than merely assessing the appropriateness of one's own sanction in isolation of foreign enforcement actions. The strongest indication of this is given by the DOJ's Antitrust Division, which has developed a test to determine when deterrence achieved abroad can be taken into account in the exercise of its own prosecutorial discretion.[138] The test assesses whether foreign sanctions cover the harm caused to US businesses and consumers, and whether the nature and gravity of these sanctions satisfy the deterrent interests of the United States. Although the test could use some refinement[139], its application by the Antitrust Division indicates that national notions of double jeopardy and proportionality may slowly find their way to the international level.

Although the FSA/FCA, CFTC, DOJ, FINMA and the DPP simultaneously imposed their fines on the relevant financial institutions in the interest rate benchmark manipulation cases, there is little indication that the authorities also coordinated the level of their sanctions. The fine guidelines of the FCA specifically allow it to take into account 'action taken by other domestic or international regulatory authorities' in determining the level of a financial penalty.[140] However, the decisions of the UK financial regulator do not mention the fines of the other regulators among the factors of the fine guidelines that are considered 'particularly important in assessing the sanction'.[141] The fine decisions and reports of the CFTC, DOJ and FINMA for UBS, Barclays, the Royal Bank of Scotland, ICAP and RP Martin also do not mention the fines imposed abroad as a factor taken into account in determining

137 See eg Case T-224/00 *Archer Daniels Midland v* Commission, para 92 and the Opinion of AG Tizzano in Case C-397/03 P *Archer Daniels Midland v Commission*, para 93.

138 Scott Hammond, former Deputy Assistant Attorney General, DOJ Antitrust Division, 'Standards for Satisfying the US Deterrent Interests' *GCR Antitrust Law Leaders' Forum* (5 February 2011).

139 John Terzaken and Pieter Huizing, 'How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels', *ABA Antitrust Magazine* 27, 2 [2013] 56-58.

140 FCA, *The Decision Procedure and Penalties Manual*, article 6.5A.3 (2)(j), previously article 6.5.2 under 11.

141 FSA fine on UBS, paras 182-93 and FSA, *Final Notice to The Royal Bank of Scotland* [2013] paras 119 to 132 <https://www.fca.org.uk/publication/final-notices/rbs.pdf>.

the penalties. Notably, this is different for the DOJ's deferred prosecution agreement with Rabobank. This agreement expressly states that both parties agree that the monetary penalty of 325 million dollar (235 million euro) is appropriate given the facts and circumstances of the case, including 'the monetary penalties Rabobank has agreed to pay to other criminal and regulatory enforcement authorities in the Netherlands, the United Kingdom, and the United States relating to the same conduct at issue in this case'.[142] The DOJ thus acknowledges that (i) the various authorities are targeting the same conduct and (ii) the overall sanctions imposed for this conduct is a relevant factor to determine whether the settlement of the DOJ is appropriate. The DPP similarly refers to the fines imposed elsewhere to justify the amount to be paid by Rabobank as part of its settlement with the Dutch authorities.[143] This may demonstrate some awareness among enforcement agencies that the accumulation of sanctions in the benchmark manipulation cases calls for a global perspective in assessing the appropriate fine level.

The European Commission does not yet seem to bother itself with such considerations. When the Commission imposed its 391 million euro fine on the Royal Bank of Scotland, this bank had already incurred fines amounting to 453 million euro from other authorities for the benchmark manipulation. In line with its decision practice, the Commission does not appear to have taken the foreign sanctions into account in determining the appropriate fine level.[144] Rather, the Commission continues to uphold the view that it only needs to consider the European competition enforcement context in exercising its prosecutorial discretion, in determining the amount of its fines and in pursuing the objective of deterrence.[145] Such an isolated approach is problematic in view of the increasingly crowded international enforcement environment. It not only ignores the *ne bis in idem* concerns that are involved, it also ignores the fact that anti-competitive conduct affecting the EU can be punished and deterred by enforcement actions taken by other authorities than the Commission.

7.7 Ensuring overall proportionality

A. Possible ways to avoid over-punishment

As part of their duty to ensure proportionate punishment, authorities involved in a cross-border and multi-agency investigation should actively seek to avoid over-punishment. There are two possible ways to achieve this: (i) ensure that there is no overlap in the conduct that is being punished and deterred, or (ii) if there is such overlap, ensure that the level of punishment and deterrence achieved by other sanctions is taken into account in the fine calculation.

Whether or not it is possible to avoid overlap depends on whether the overall conduct can be clearly divided into separate parts that correspond to the respective key focus areas of the authorities involved. In the benchmark manipulation, a distinction could have been made between (a) the collusion and exchange of commercially sensitive information by the panel banks, to be sanctioned by competition authorities, (b) the submission of false rates, to be sanctioned by anti-fraud agencies, and (c) the failure of internal controls within financial institutions, to be sanctioned by financial regulators. If no clear division of the overall conduct can be made, authorities should at least seek to avoid overlap in punishment and deterrence. To this end, it is most effective for the authorities to agree before the start

142 *United States of America v Coöperatieve Centrale Raiffeisen-Boerenleenbank*, Deferred Prosecution Agreement [2013] 10 <http://www.justice.gov/iso/opa/resources/97620131029872779 26.pdf>.

143 OM 'Rabobank betaalt € 70 miljoen ter afwikkeling van LIBOR-onderzoek' (29 October 2013) <https://www.om.nl/vaste-onderdelen/zoeken/@32206/rabobank-betaalt-70/> accessed 30 September 2014 (link no longer working).

144 The European Commission repeatedly rejected requests to take into account foreign sanctions. See eg its decision in *Citric acid* (Case COMP/E-1/36 604) Competition Decision 2002/742/EC [2002] OJ L239/18; *Vitamins* (Case COMP/E-1/37.512) Commission Decision 2003/2/EC [2003] OJ L6/1; *Food flavour enhancers* (Case COMP/C.37.671) Competition Decision 2004/206/EC [2004] OJ L75/1.
Fines imposed abroad may, however, be taken into account in assessing 'ability to pay'-claims. See eg *Electrical and mechanical carbon and graphite products* (Case C.38.359) Commission Decision 2004/420/EC [2004] OJ L125/45, footnote 409.

145 The Commission states that it 'understands that benchmark manipulation is also being investigated by other authorities or that such authorities may have already imposed fines on some of the undertakings involved in these cases, but none of these cases concerns the enforcement of competition rules in the European Economic Area. Investigations of other regulators do not relieve the Commission from its responsibility to also ensure that the rules of fair competition are respected in the banking sector'. Commission (n 81). This approach is in line with the position of the ECJ in Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, para 61 and Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, para 37.

of any prosecution or settlement discussions on the desired level of punishment and deterrence for the overall conduct and to jointly determine how this level should translate into the individual sanctions. This requires the various investigations to take place more or less at the same time. Alternatively, if other authorities have already imposed their sanctions, subsequent punishments should take into account the level of punishment and deterrence already achieved for the same conduct. Such a unilateral adjustment of fines however is likely to be more complicated to achieve in practice than early coordination on the desired overall fine level and on the fine allocation. Authorities may be reluctant to reduce the fine amount (and hence the contribution to their coffers) just because other authorities imposed their sanctions first. And even if they were to agree to such deference, the result may be a race against time for the authorities that want to impose a full penalty.[146]

B. Possible ways to avoid consecutive prosecution

Authorities must not only prevent over-punishment through excessive fines, they should also work together to avoid consecutive prosecutions for the same conduct. In the European competition context, parallel proceedings by too many Member States are prevented by allowing for intervention at the overarching, European level. But there is no international body to which the EU itself and individual states outside the EU can delegate the prosecution of cartel cases. Due to the many differences in substantive and procedural competition laws, and the reluctance of states to give up their prosecutorial discretion, the establishment of such a body will remain highly unlikely in the foreseeable future.[147] In the fields of financial regulation and fraud prevention there also is no international body competent to prosecute cross-border cases. Lifting the prosecution of benchmark manipulation type cases to a global level is therefore neither a present option nor a realistic objective worth pursuing in the near future.

There are three alternative possibilities for authorities to avoid consecutive enforcement procedures: (i) delegating the competence to pursue the matter to another prosecuting authority (ii) deferring prosecution in view of enforcement action taken by other authorities, and (ii) simultaneous enforcement by all authorities involved.

The option of horizontal delegation of prosecutorial competence appears to be unfeasible, as both the transfer of competence to a foreign authority and the transfer of competence to a different type of agency raises problems. First, while an authority may ask a foreign counterparty to consider its interests in the latter's enforcement of cross-border conduct (so-called "positive comity"), it goes much further to transfer actual prosecutorial competence to a foreign party. As discussed in Chapter 5 of this dissertation, within the EU, some national competition authorities have found themselves competent to sanction international cartels with fines that take into account the effects in other Member States.[148] Outside of the EU, this is a very unlikely scenario as it would require sovereign states to grant foreign agencies jurisdictional power relating to domestic violations. Delegation between different types of agencies is equally problematic. Such delegation would cut across the limits of each authority's particular expertise, procedures and powers. Even if the complications can be overcome of creating a legal basis for this kind of delegation, the effectiveness of enforcement would very likely be diminished.

A second option is to defer prosecution in view of enforcement actions by other authorities. This option seems particularly suitable if the other authorities' actions sufficiently remedy and deter the harmful conduct. In the 1999 OECD report on positive comity it was stated that such voluntary deferral appears to have little potential in hard core cartel cases 'because requesting countries are likely to want to add their own fines or other remedies to any relief that a requested country may obtain'.[149] Still, this

146 See also Wils (n 129) para 33.

147 Terzaken and Huizing (n 139) 54.

148 Nazzini (n 90) 6, referring to the OFT Guidance as to the appropriate amount of a penalty. The Dutch NCA has for example in a 2012 case based its fine on the turnover achieved in the entire EU after ensuring that NCAs in other Member States did not intend to pursue the matter. Dutch Competition Authority, *Zilveruien* (silverskin onions) [2012] available in Dutch at <https://www.acm.nl/nl/publicaties/publicatie/10535/Zilveruien/>.

149 OECD, *Positive Comity* [1999] para 64 <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2752161.pdf>.

approach seems to gain more support in the international enforcement community, most notably by the DOJ's Antitrust Division.

The third option available to avoid successive prosecution is the simultaneous prosecution by all authorities involved. This option has been pursued by the DOJ and the US, UK, Swiss and Dutch financial regulators in the benchmark manipulation cases. Because the European Commission pursues cartels in their entirety instead of prosecuting alleged conspirators one at a time, its proceedings could not easily be aligned with that of the US and UK authorities. Moreover, the investigations of the financial regulators were already well underway before the Commission became aware of the conduct.

Simultaneous enforcement action by various agencies requires a high level of coordination and cooperation. This starts with effective information sharing between authorities early on in cases that are likely to involve multiple agencies. Save for privileged and confidential information (including information received from leniency applicants), and subject to their national laws and regulations, authorities are free to share information on their enforcement activities with other agencies. The benchmark cases show that such information sharing may not only facilitate inter-agency coordination but also increase the efficiency of individual investigations. If the FSA had picked up on the OFT's interest in the manipulation in November 2008 and the relevant other competition authorities had been promptly informed of the investigation, it would not have taken another two years before the European Commission could get involved.

Coordination and cooperation between authorities can be facilitated by instituting a framework for decision making and communication. An example of such a framework at a national level is the US Financial Fraud Enforcement Task Force. This coordinating body consists of over 30 government agencies, including the DOJ, the CFTC, the SEC and the FTC. The task force is used to coordinate the US investigation and prosecution of various financial misconduct cases, included the interest rate benchmark manipulation. To enable authorities to achieve such a level of coordination at an international level, it could be fruitful to set up a similar multi-agency task force that can deal with cross-border conduct. Setting up a permanent international task force for this purpose requires the involvement of a great number of authorities throughout the world and is likely to turn into an unwieldy and bureaucratic body. It may therefore be more effective to use ad hoc international task forces that are specifically set up to coordinate the parallel investigation and prosecution of a particular case.

C. Towards a more coordinated and proportionate punishment

The benchmark manipulation cases indicate that some enforcement agencies are taking cautious steps to consider the overall proportionality of fines. There seems to be a growing awareness that such proportionality must be achieved across jurisdictional borders, hence requiring coordination between various authorities. Nevertheless, the fining practice of most regulators still ignores the wider enforcement context. Building on the experience of the benchmark manipulation cases, authorities should continue to develop guiding principles that ensure proportionate punishment in future cross-border and multi-agency investigations. The following elements may provide a starting point for such guidance towards an effective, coordinated and proportionate punishment:

1. basic, non-confidential information on the initiation of an investigation should be shared with the relevant authorities upon discovering that other jurisdictions may be affected;

2. investigative efforts should be allocated and coordinated between the authorities involved, potentially through an ad hoc inter-agency task force;

3. authorities should determine who has a sufficient prosecutorial interest to pursue the case and they should apply the delimitations that are necessary to avoid or at least limit jurisdictional overlap; and

4. authorities should pursue simultaneous settlements or sentences that take into account the desired level of overall punishment and deterrence.

It is important that the result of any coordination of international enforcement actions is clearly described in the fine decisions. Such transparency allows parties to assess whether the authorities have indeed succeeded in avoiding over-punishment. Moreover, it enhances legal certainty and the credibility of enforcement, benefitting market players as well as the enforcement community.

The implementation of the elements set out above will undoubtedly involve many practical obstacles. For example, competition authorities will be hindered from full coordination and information sharing in leniency cases, which nowadays form the majority of cartel cases. Leniency applicants may be willing to waive confidentiality to allow information sharing with authorities that already prosecute the same behaviour in view of ensuring overall proportionality of fines. But they will be less inclined to facilitate information sharing that may lead to an increase in the number of authorities that are aware of the alleged illegal conduct. A second important obstacle to achieving international coordination of appropriate punishment is the willingness of authorities to lower their fines in view of sanctions imposed elsewhere. This will require a firm commitment from the states involved and the promise of reciprocity. It may also require an agreement on how to determine an authority's prosecutorial interest and on how to allocate the overall proportionate fine between prosecuting authorities. Despite such significant obstacles, it is increasingly important that authorities look beyond the national context in exercising jurisdictional and prosecutorial discretion. In the crowded and complex enforcement environment of today, proportionate punishment can only be achieved by adopting a global perspective when pursuing cross-border misconduct.

7.8 Conclusion

The case study analysed in this chapter provides a valuable insight into the issues that lie at the heart of this dissertation: widespread and severe enforcement of cross-border cartel conduct, parallel and overlapping jurisdiction, prosecutorial self-restraint, (lack of) coordination of penalties, and concerns related to the proportionality of overall punishment. The descriptions and assessments of this chapter therefore help to answer each of the five research sub-questions formulated in Section 1.2 of this dissertation.

First, the benchmark manipulation cases illustrate the multitude of different authorities across different jurisdictions that may consider themselves competent and well placed to pursue global collusive misconduct. At least 28 different authorities have been involved, including financial regulators, competition authorities and anti-fraud agencies. Considering the distinct processes, requests for information and procedural requirements of each authority, one can imagine the difficulty of managing the respective investigations for the defendants.

Second, given the large number of authorities involved, one may have expected them to carefully consider how to best avoid overlapping enforcement. In contrast, the assessment of the fine decisions shows that the agencies did not succeed in avoiding jurisdictional overlap. In fact, they all sanctioned the worldwide collusion between financial institutions without applying any clear jurisdictional delimitation. Given the global nature of the economic activities involved, each authority was easily able to exert extraterritorial jurisdiction based on domestic effects. While it would have made much sense for the three types of authorities to focus on different aspects of the overall conduct, they have chosen to all target the same collusive behaviour in its entirety.

Third, when it comes to the penalties imposed, the authorities generally failed to take into account fines already imposed for the same conduct elsewhere. Most fining decisions reveal the lack of coordination at international level as to the level of sanctions, even where there was a remarkable inter-agency cooperation with respect to the investigative stages and even where various regulators reached simultaneous settlements with a particular defendant. While it cannot be excluded that there actually

was some coordination behind the scenes, this seems doubtful in view of public statements on the irrelevance of prior fines imposed elsewhere. In any event, the complete absence of transparency in that scenario is still a great cause for concern.

In cross-border and multi-agency cases, maintaining isolated views on deterrent and proportionate sanctioning creates concerns of multiple prosecution and over-punishment. In the interest rate benchmark manipulation cases, various authorities all shared and acted on a desire to impose particularly harsh penalties. For one defendant, Deutsche Bank, this resulted in total fines exceeding 3 billion euro. This astronomical level of fines may not in itself suffice to demonstrate disproportionality. But the amount does emphasise the importance of the enforcing authorities at least considering the extent to which overall deterrence and retribution objectives have (already) been achieved. It is submitted that this consideration can only be made by taking into account the international context. In view of the increasingly crowded international enforcement environment, authorities should develop new guiding principles that ensure a desired level of overall deterrence and overall proportionality of fines. Vital elements of such principles will include effective information sharing, coordination between all relevant authorities early on in investigations and the exercise of prosecutorial discretion from a global perspective. Whereas the first signs of a more international approach to the enforcement of cross border conduct are slowly emerging, the interest rate benchmark cases reveal that much more work lies ahead.

8. CHAPTER 8: OVERALL CONCLUSION AND RECOMMENDATIONS

8.1 Answers to the research sub-questions

From different perspectives and through the use of different research methods, the previous chapters have addressed the five research sub-questions listed in Section 1.2 of this dissertation. This section brings the insights provided in the respective chapters together by formulating answers to the research sub-questions. These responses form the building blocks for the overall response to the main research question which will be given in the next section.

Sub-question 1

What is the current state of parallel enforcement of international or global cartels? How has this evolved over time?

This question has been addressed through both quantitative research (Chapter 2) and a case study analysis (Chapter 7).

The quantitative research is based on data regarding 41 cartels with global characteristics that have been subject to fines in the last thirty years. The choice for global cartels rather than mere international cartels was made in order to draw more firm conclusions on the evolution of parallel cartel enforcement. What all global cartels have in common is that they have affected markets across the world. One may therefore expect most jurisdictions with established competition law regimes to jump on these cartels. But the analysed data shows that parallel enforcement of global cartels by more than a few authorities is a fairly recent phenomenon. For cartels discovered before 2004, it was quite unlikely for any authority outside of North America and Europe to impose fines. Since then, it is common that the conduct is targeted in parallel in more than five jurisdictions, sometimes even more than ten. Thus far, at least seventeen jurisdictions have penalised one or more global cartels. Along with the higher number of jurisdictions actively going after global cartels, total fine levels for global cartels have sharply risen. There have thus far been nine global cartels with a combined fine amount exceeding USD 1 billion per cartel.

The research of Chapter 2 hence supports the statement that the world is characterised by increasingly widespread, active and parallel cartel enforcement. Two stages can be distinguished in this respect. First the more active cartel enforcement by the mature regimes in North America and Europe as of the early and mid-1990s. And secondly the much more widespread and therefore increasingly parallel enforcement of global cartels as of 2004. It can be expected that these developments will continue to characterise global cartel enforcement for the foreseeable future.

The case study on the enforcement of the LIBOR and other benchmarks manipulation illustrates the multitude of different authorities across different jurisdictions that may consider themselves competent and well placed to pursue global collusive misconduct. At least 28 different authorities have been involved, including financial regulators, competition authorities and anti-fraud agencies. Together, they have imposed fines on twelve banks and two brokerage firms for a total amount of over 9.5 billion euro. This includes the record fines imposed on Deutsche bank totalling over 3 billion euro. Admittedly, this has been a unique example of widespread, parallel enforcement of the same overall conduct given the different types of authorities involved. The issues triggered by these cases – in terms of double jeopardy concerns, proportionality of (overall) fine amounts, and administrative and procedural burdens for the defendants – may hence be of a different *magnitude* than they will be in other international cartel cases. But the *nature* of these issues will be the same, which is why the case study is valuable for analysing the current state of parallel enforcement of international cartels and the concerns resulting from such enforcement.

Sub-question 2

What choices can and do individual authorities make in exercising their jurisdictional discretion when prosecuting international cartels? How do jurisdictional limitations affect the extent to which enforcement and punishment of international cartels overlap? How is jurisdiction being shared and allocated within the European Competition Network?

The relevance and impact of jurisdictional boundaries and self-restraint in the context of parallel cartel enforcement has been addressed in various ways in this dissertation. Chapter 3 has focused on both the legal boundaries as confirmed by the EU and US courts as well as the enforcement practices in these jurisdictions as revealed in the LCD cartel cases. Chapter 4 has expanded the EU legal analysis by looking at the developing decision practice and case law leading up to the 2017 *Intel* judgment. The issue has been studied in the unique context of the ECN in Chapter 5. And finally, Chapter 7 illustrates on the basis of the interest rate derivative benchmark manipulation cases how jurisdictional limitations and choices affect the extent to which *parallel* enforcement actually results in *overlapping* enforcement.

As a starting point, it is not necessary for parallel enforcement to result in overlapping enforcement in the sense that the same part of particular cartel conduct is subject to enforcement in more than one jurisdiction. Authorities can avoid or at least limit such overlap by carefully limiting their own exercise of jurisdiction. There are choices of potential jurisdictional self-restraint to make on three levels:

1. The basis for asserting jurisdiction, i.e. the legal ground justifying the application and enforcement of national competition laws in respect of (foreign) cartel conduct;
2. The object of the prosecution and sanctioning, i.e. the scope of what part of the overall cartel is being punished; and
3. The calculation of the cartel fine, in particular the sales or commerce on the basis of which the basic fine is determined. This third element will not avoid overlap in respect of the object of enforcement because it still captures the entire conduct, but it does limit the overlap by only considering certain of the conduct's (potential) effects.

Using the LCD cartel cases in the EU and the US for comparison, I have assessed the extent to which two of the most mature and active cartel enforcement regimes actually apply self-restraint on one or more of these levels. I have found little willingness for both the Commission and the DOJ to adopt a restrictive approach in this respect. Moreover, neither authority is strongly pushed in that direction by the courts in the respective jurisdictions:

- In Europe, the Commission's LCD cartel decision and the subsequent *InnoLux* judgments have sparked a debate on the limits to extraterritorial cartel enforcement within an increasingly globalised economy. Various writers and notably AG Wathelet have submitted that the Commission overstretched its powers by imposing a fine in relation to sales that lacked a sufficient nexus to the EEA. But the ECJ's ruling accepted the expansive approach taken by the Commission by separating the need for a jurisdictional link from the Commission's broad discretion in calculating the fine. While this discretion does not seem to be territorially unlimited, the *InnoLux* judgments do not clarify where the boundary is. It is clear, however, that the Commission is under no (proactive or reactive) obligation to avoid double counting of the same sales by two or more authorities, nor to take into account penalties imposed elsewhere. The legal framework applied by the ECJ therefore does little to force the Commission to pursue greater self-restraint in its enforcement of international cartels.

- On the other side of the Atlantic, the DOJ has taken an even more expansive approach in its prosecution of LCD cartelist AUO. First, by not territorially limiting the scope of the cartel conduct for which AUO is sanctioned. Second, by calculating the cartel fine on the basis of a rough estimate of the AUO sales of LCD panels that ended up as finished products in the US in one way or another, irrespective of whether AUO or an independent third party was

responsible for the importation. Compared to the Commission's methodology, this creates much greater risks of foreign authorities taking into account the same sales in punishing the same overall cartel conduct. Still, the US courts have ruled that the DOJ's approach in the proceedings against AUO has not yet reached the boundaries of its territorial reach. This creates a stark contrast with private cartel enforcement in the US, for which the Seventh Circuit has drawn a line in the sand in *Motorola Mobility* in respect of the application of US laws to conduct that has a stronger nexus to foreign nations.

In 2017, the ECJ rendered its judgment in *Intel*. While an abuse of dominance case and not a cartel case, the ruling is vital for the assessment of jurisdictional boundaries applicable to EU cartel enforcement. In its judgment, the ECJ – having dodged the issue for decades – finally accepted the qualified effects as a basis for asserting jurisdiction over foreign conduct. This means that the European Commission has jurisdiction over foreign cartel conduct as long as that conduct produces effects in the EU that are substantial, immediate and foreseeable. Importantly, the ECJ confirmed that the effects must be viewed "as a whole". The European courts hence accept that conduct not meeting the jurisdictional test in itself can be part of the conduct to be sanctioned and can be relevant for the turnover used to determine the fine. This is in line with the approach already taken in *InnoLux*, but this time relating to a jurisdictional test that expands the Commission's reach even further. The ECJ ignored the calls by several Advocate Generals for a restrained application to avoid concerns of jurisdictional overreach and overlapping enforcement. Apparently, the ECJ has not felt that these considerations justified the shaping of more restrictive jurisdictional boundaries for the Commission. In summary, *Intel* has further extended the EU's legal doctrine on extraterritorial competition enforcement compared to the already expansive approaches taken in *InnoLux*. The ruling hence reveals the direction of the reach of European competition law enforcement: towards more rather than less expansive enforcement.

The choices that authorities have in exercising their jurisdictional discretion similarly apply within the European context. But there is a key difference. Embedded in the framework of EU competition enforcement is the principle that the European Commission will take up enforcement of cases that clearly transcend individual Member States, replacing actions on the national level by a single proceeding and punishment at a European level. But not all cross-border European cases are handled by the Commission. Under EU Regulation 1/2003, cartel enforcement has become 'decentralised', meaning that enforcement powers and responsibilities are shared between the Commission and individual NCAs. The framework of cooperation and case allocation within the European Competition Network has created a unique environment in which NCAs have found different ways of avoiding overlapping enforcement. The methods used include (i) prosecuting only the domestic elements of a cartel (i.e. limiting the object of the enforcement), (ii) sanctioning a cross-border cartel for only its domestic effects, (iii) also taking into account foreign sales but applying a gravity factor that reflects only domestic harm, and (iv) imposing a mere symbolic fine in view of enforcement action elsewhere.

By employing these methods, at least some NCAs have been careful to avoid or limit overlapping enforcement. Their willingness to apply self-restraint is partly explained by the application of the principle of *ne bis in idem* under European law, meaning that without a clear delineation of an authority's enforcement actions, other NCAs could be barred from taking subsequent action. But while avoiding or limiting concerns of overlapping and multiple enforcement, the careful approaches taken in the past have also led to sub-optimal outcomes, harming the overall objective of an effective, decentralised enforcement of EU competition law. That may explain why the Dutch competition authority has chosen to test the waters by starting to calculate cartel fines on the basis of EU-wide turnover, hence effectively fining foreign effects of the cartel. Outside of the EU context, this would be equivalent to the Commission or the DOJ prosecuting cartels for their global effects and calculating the fines on the basis of worldwide affected sales. The diverging legal views and practices among Member States reveal that the legal basis for this approach remains questionable even within the European context. But it may well be the recommended approach to ensure efficient, effective and

proportionate cartel enforcement, serving the interest of both the enforcement community and businesses. This is true within the confines of the ECN, characterised by close cooperation and shared responsibilities between authorities. But these findings are also relevant beyond Europe. They show that an expansion of jurisdictional reach and extraterritorial enforcement may not be automatically objectionable, if it facilitates the allocation of enforcement to fewer authorities or perhaps even reserves enforcement exclusively to a single authority.

Within the European context, multiple enforcement by different NCAs can easily be avoided by the Commission stepping in. On a global scale, the establishment of an overarching enforcement body is unlikely to become a reality for the foreseeable future. This is mainly due to the wide differences in substantive and procedural competition laws that still exist, as well as the reluctance of states to give up their prosecutorial discretion, being a key element of their sovereignty. In theory, competition authorities could also prevent parallel enforcement by either (i) delegating the competence to pursue the matter to another prosecuting authority or (ii) deferring prosecution in view of enforcement action taken by other authorities. In practice, the first option of horizontal delegation of prosecutorial competence appears to be unfeasible, as the transfer of competence to a foreign authority raises problems. While an authority may ask a foreign counterparty to consider its interests in the latter's enforcement of cross-border conduct (so-called "positive comity"), it goes much further to transfer actual prosecutorial competence to a foreign party. The second option of deferring prosecution in view of enforcement actions by other authorities seems particularly suitable if the other authorities' actions sufficiently remedy and deter the harmful conduct. In the 1999 OECD report on positive comity it was stated that such voluntary deferral appears to have little potential in hard core cartel cases "*because requesting countries are likely to want to add their own fines or other remedies to any relief that a requested country may obtain*".[1] Whether it is for this reason or (also) for others, there indeed appears to be little appetite for authorities to take this approach. Nevertheless, it seems to gain more support in the international enforcement community. And there have been some rare examples of it happening in practice. As part of the *Auto parts* cartel investigations, the Canadian Competition Bureau agreed to abandon further enforcement against a producer of automotive body sealing products because the US fine took into account both the US and the Canadian affected commerce. Therefore, the Competition Bureau considered the single fine imposed in the US to be an effective remedy also for its own jurisdiction.[2]

The interest rate derivatives benchmark manipulation cases emphasise the importance of authorities exercising jurisdictional self-restraint when pursuing the same worldwide conduct in parallel. Given the large number of authorities involved, one may have expected them to carefully consider how to best avoid overlapping enforcement. In contrast, the assessment of the fine decisions shows that the agencies did not succeed in avoiding jurisdictional overlap. In fact, they all sanctioned the worldwide collusion between financial institutions without applying clear jurisdictional delimitations. This applies to the three different levels referred to above:

1. The basis for asserting jurisdiction: Given the global nature of the economic activities involved, each authority was easily able to exert extraterritorial jurisdiction based on domestic effects.
2. The object of the prosecution and sanctioning: While it would have made much sense for the three types of authorities to focus on different aspects of the overall conduct, they have chosen to all target the same collusive behaviour in its entirety.
3. The calculation of the cartel fine: The fining methodologies applied have not succeeded in avoiding overlapping punishment because the same overall conduct was still subject to multiple fines. The fines have not clearly been calculated on the basis of factors or effects not taken into account elsewhere.

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1 OECD, *Positive Comity* (1999), para 64, <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2752161.pdf>.

2 DOJ, 'Nishikawa Agrees to Plead Guilty and Pay $130 Million Criminal Fine for Fixing Prices of Automotive Parts' (20 July 2016) <https://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive>.

The effect of such absence of clear jurisdictional limitations is that parallel enforcement has not just resulted in multiple enforcement proceedings triggered by the same overall conduct, but in overlapping, multiple punishment as well. This subsequently raises the question whether authorities are addressing such overlapping punishment through the adjustment of penalty levels.

Sub-question 3

How are international cartel defendants being punished? How do individual jurisdictions fine international cartels? Do authorities or courts take into account penalties imposed elsewhere for the same overall cartel?

The response to this sub-question rests on the assessment of common fining methodologies and fining practices regarding international cartels of Chapter 6, the figures on the level of fines for global cartels presented in Chapter 2 and an example of the lack of international coordination of fines provided by the case study of Chapter 7.

Studies into national cartel fining methodologies show that there is little international consensus on the appropriate level of fines. However, there are certain key elements of sanctioning principles that are nowadays common to many mature cartel sanctioning regimes:

(i) First, the use of a certain proportion of the turnover achieved with selling the cartelised products or services ('relevant sales') to calculate a base fine. Various authorities, including the European Commission, apply a maximum percentage of 30% for cartel infringements, while others use (much) lower maximum percentages and only some use a maximum percentage exceeding 30%. The proportion of relevant turnover used as basis for the fine calculation is widely considered to be an appropriate proxy for the harm caused by the cartel. Still, the actual percentage applied to the relevant turnover is generally not determined on the basis of the actual or estimated overcharge of the cartel, but rather on the overall gravity of the cartel conduct.

(ii) Second, adjustments to the base fine to account for mitigating and/or aggravating circumstances.

(ii) Third, the application of an absolute fine limit. For most jurisdictions, the legal maximum is set at a certain percentage (e.g. 10%) of a company's worldwide total turnover.

Parallel sanctioning of international cartels essentially entails the piling on of individual sanctions imposed under the domestic (or EU) legal framework of the various jurisdictions involved. Even though authorities may acknowledge that the cartel conduct that they are penalizing is part of an international or global conspiracy, they will typically ignore the international context in the calculation of the fine. By stating that their enforcement merely addresses the domestic effects of an international cartel, authorities and courts have been easily dismissing defendant claims that fines already imposed elsewhere should be taken into account.

Chapter 2 demonstrates that total fine levels for global cartels are firmly on the rise. For the 25 global cartels discovered between 1994 and 2003, the average combined fine level was USD 280 million per cartel. For the sixteen global cartels discovered between 2004 and 2018, the average combined fine amount is more than six times that amount, at almost USD 1,800 million. The overall increase in fine levels imposed on global cartels can be linked to individual cartel regimes adopting more aggressive fining policies and practices. In addition, penalties for global cartels are also pushed to higher levels as a result of the proliferation of different authorities pursing these cartels. At the same time, the impact of the additional enforcers is limited by the relatively small fines often imposed by the more recently established regimes.

The increasingly higher total cartel fine levels do not yet appear to convince authorities of the need to coordinate their respective fines. This is also apparent from the case study on the interest rate derivate benchmark manipulation cases. Most fining decisions for these cases reveal the lack of coordination at international level as to the level of sanctions, even where there was a remarkable inter-agency cooperation with respect to the investigative stages and even where various regulators reached simultaneous settlements with a particular defendant. Notable exceptions are the DOJ's deferred prosecution agreement with Rabobank and its settlement with the Dutch authorities. Both explicitly refer to the sanctions already imposed elsewhere in justifying the penalty amount.

There are some other cases in which authorities or courts have been willing to take into account prior, foreign penalties imposed for the same overall cartel behaviour:

- In *TFT-LCD*, the US District Court in San Francisco set the fine for AU Optronics at USD 500 million – half the figure requested by the DOJ – *inter alia* because of the fines that the company had already paid and would still be paying.[3]

- In *Maritime car carriers*, the Federal Court of Australia considered the penalties previously imposed abroad to be a mitigating circumstance, while noting that these penalties generally only concerned the cartel conduct insofar as it impacted those foreign jurisdictions.[4] The same court had previously followed the ACCC in taking into account foreign penalties in *Air cargo*.[5]

- In the *Flour* case, the Belgian NCA considered a symbolic fine to be sufficient as it found the fines imposed in the Netherlands to provide for adequate punishment for the cartel, even though the Dutch fines were solely based on domestic effects.[6]

Despite these notable exceptions, attempts to coordinate the outcome of proceedings in order to reach an overall proportionate fine still appear to be both ad hoc and rare. The standard practice of international cartel sanctioning continues to be based on authorities adopting a purely national and isolated view on appropriate punishment.

It is interesting to compare the current practice of piling on various national fines imposed on corporate cartel defendants to the way in which individuals responsible for international cartel conduct are punished. In the *Marine Hose* case, both the US and UK were pursuing criminal charges against three UK nationals. It was clear that the US and UK prison sentences imposed were solely based on the domestic effects in the US and the UK, respectively. Nevertheless, the US plea agreements provided for a reduction of the US sentences for any period of imprisonment in the UK, effectively allowing the individuals to serve the US and UK sentences concurrently. While this arrangement resulted in a complete deferral of the US sentences, the DOJ considered the outcome to be a clear victory for US consumers because the three individuals were 'punished adequately'. This shows that in the context of criminal enforcement of individuals – and in sharp contrast to the practice of corporate sentencing – proportionality and deterrence considerations are more easily accepted to transcend national borders.

Sub-question 4

What is proportionate punishment? How does parallel enforcement of international cartels affect the overall proportionality of punishment?

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3 Transcript of Proceedings, *United States v AU Optronics*, No 3:09-cr-00110-SI (N.D. Cal. 20 September 2012) 16.

4 Summaries of the judgements of the Federal Court of Australia in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 and *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170.

5 See eg Federal Court of Australia, *Australian Competition and Consumer Commission v Qantas Airways Limited* [2008] FCA 1976, para 42.

6 Decision of the BMA-ABC in case 13-IO-06 *Meel* (28 February 2013).

This sub-question is addressed in Chapter 6 through the lens of legal theory on proportionate punishment. The case study of Chapter 7 illustrates how parallel enforcement by a range of different authorities across multiple jurisdictions can affect the overall proportionality of fines.

The principle of proportionality is regularly invoked by defendants trying to have their cartel fine annulled or reduced. But it appears that invoking the principle is easier than defining what it actually entails. The principle of proportionality is often simply described as the notion that '*the punishment must fit the crime*'. But legal theory on the subject clarifies that one can only give concrete meaning to proportionality after taking a position on why punishment is perceived to be justified and necessary. Two schools of thought exist in this respect:

(i) Retributive theories, which are based on the notion that offenders need to be punished because they *deserve* to be punished for having violated societal norms. These theories are retrospective as they purely focus on the past wrongdoing of the offender, ignoring other goals such as specific or general deterrence or incapacitation.

(ii) Consequentialist theories, which consider punishment to serve a utilitarian purpose and which focus on the future societal benefits of punishment. The prevention of future crime through deterrence is one of the main purposes of punishment under consequentialist theories.

Proportionality has different meanings depending on whether a retributive or consequentialist perspective is adopted. Under retributive theories, proportionality is a fundamental concept for determining the level of a penalty, ensuring that the offender does not get more (or less) punishment than what is deserved. In determining what is deserved, retributivists rely on the degree of blameworthiness, which in turn is based primarily on culpability and to a lesser extent on harm. Under consequentialist theories, the quantum of punishment does not rest on a proportionate link between the penalty and the blameworthiness of the offender. Instead, optimal penalties are considered to be those penalties that are necessary and sufficient to result in net societal benefits by serving the aim of crime prevention (e.g. through specific and general deterrence). The principle of proportionality merely plays a role in prescribing that (i) punishment should only be pursued if the benefits of doing so outweigh the costs (so-called 'ends proportionality') and (ii) punishment must not be more severe than is necessary to achieve the same intended benefits to society ('means proportionality', also referred to as the principle of parsimony).

A study of common features of national cartel fining methodologies reveals that – borrowing the words of Max Minzner – antitrust authorities 'talk like consequentialists but act like retributivists'. National sanctioning policies refer to specific and general deterrence as the key objective behind imposing (heavy) cartel fines. But fining methodologies hardly consider the elements that are most relevant to assess optimal deterrence levels: the expected gains of cartelists and the likelihood of detection and punishment. They also typically ignore principles of parsimony, by not considering at which fine level the deterrence objectives have been satisfied. Instead, cartel fining methodologies are primarily based on elements that aim to ensure retributive proportionality of cartel fines, focusing on the culpability of the offender and the actual or potential harm of a cartel.

A key feature of current national cartel fining methodologies is the direct and linear link between the level of the fine and a cartelist's turnover achieved with selling the affected products. This means that, all other things being equal, a cartel member earning twice as much with the sale of cartelised products will also be punished twice as hard. It is submitted that this approach conflicts with theories on retributive proportionality and multiple punishment. First, cartel fines should better reflect a certain base culpability for the conduct that forms the essence of the infringement: entering into and maintaining a cartel. Second, instead of a linear or proportional function, a regressive relationship between a proxy for harm and the severity of the penalty is more consistent with retributive proportionality and empirical research on intuitive notions of fair punishment.

The identified shortcomings of national cartel sanctioning policies are amplified when it comes to the enforcement of international cartels. First, the undiscounted accumulation of individual fines ignores the fact that each fine will reflect – at least for a significant part – the same base culpability for entering into the overall cartel. Secondly, a combination of national fines that are each calculated on the basis of a proportional function of the value of affected sales, increases the overreliance on harm as opposed to culpability as the main element underpinning the level of punishment. Thirdly, the lack of parsimony considerations being applied at the national and the international level increases the risk of overall fine levels well exceeding what is necessary and sufficient for future crime prevention purposes. Fourthly, no totality principle or other appropriate absolute maximum exists at a worldwide level to limit the total fine amount imposed for the same overall conduct, nor is any authority considering the overall proportionality of the overall punishment. Based on these four main shortcomings, I have concluded that the current legal framework of imposing fines for international cartels fails to adhere to proportionality principles under both consequentialist and retributive theories.

The risk of over-punishment due to individual authorities failing to consider the overall deterrence and retributive objectives is illustrated by the benchmark manipulation cases. From the perspective of the various prosecuting authorities, it can be argued that the fraud, financial misconduct and antitrust elements of the collusive benchmark manipulation all entail distinct offences. So in their view, each separate violation needs to be punished and prevented through deterrence in accordance with the authority's own sentencing guidelines. However, from the perspective of the accused undertaking, such approach seems artificial, unnecessary and unjustified. In the minds of the colluding persons, there was no separate consideration to (i) collude to jointly manipulate the benchmark (ii) submit false rates and (ii) trigger potential anti-competitive effects. All three artificially distinguished elements are inherently linked in the specific context of the benchmark manipulation for higher profits. To be effective and proportionate, it is sufficient for a penalty to appropriately punish the undertaking for its conduct and to deter this undertaking in particular and other undertakings in general from engaging in this conduct in the future. Successful enforcement hence does not require punishment and deterrence in relation to each separate offence that can be constructed on the basis of the factual elements of the conduct. It added to the risk of excessive punishment in the benchmark cases that the various authorities have independently pursued a particularly high level of deterrence. As each individual authority appears to have included a deterrence 'premium' in its own sanctions the overall sanctions imposed on undertakings are likely to be an accumulation of record fines that reflect overlapping punishment and deterrence objectives.

Sub-question 5

How can and should the international enforcement community work to develop a framework for the coordination of the sanctioning of international cartels?

This final research sub-question is predominantly normative in nature. It focuses not just on the possibilities that I have identified for better coordination of international cartel sanctioning but also on the options that I believe would be most feasible, suitable and worthy to pursue. My policy recommendations in this regard have mainly been discussed in Chapters 3, 6 and 7. Moreover, it is relevant in the response to this sub-question to draw from the 2013 article that I have written together with John Terzaken, calling for the development of global principles to guide the punishment of international cartels.

Based on the research presented in this dissertation, I find that the objective of better coordination of international cartel sanctioning should be the pursuit of an effective but overall proportionate punishment, to be imposed through as few distinct proceedings as possible. Achieving this objective calls for considerations to be made at various stages of the enforcement of international cartels:

1. Is prosecution and punishment justified given the nexus of the conduct to one's own jurisdiction?

2. Is there a need for prosecution and punishment in one's own jurisdiction in addition to the enforcement of the same conduct elsewhere, or would deference to other authorities be appropriate?

3. In the case of parallel enforcement, how can overlapping punishment be avoided or at least minimised through self-restraint in respect of the part of the conduct that is subject to domestic enforcement?

4. In the case of residual overlapping punishment, how can fine levels be coordinated or unilaterally adjusted to avoid disproportionate fines that go beyond the overall deterrence and retributive objectives sought?

Within the context of the EU, when a cartel involves more than three member states, the European Commission is considered 'best placed' to pursue the matter. The European Commission will then impose one European fine as an alternative to one or several national fines imposed by national authorities. This system allows for proportionality considerations to be applied beyond the confines of national jurisdictions. It also replaces multiple national legal limits on cartel fines by one single European maximum fine amount that is still considered to be appropriate for punishing cartel conduct. In similar fashion, having one overarching authority impose a single fine for cartels involving multiple jurisdictions also beyond the EU would be an ideal solution to prevent the piling on of national cartel fines targeting the same international cartel. However, no 'global competition authority' exists, nor is it very likely to ever be established.

An alternative for avoiding parallel enforcement is the allocation of enforcement to a single national authority as the lead enforcer in cartel cases involving multiple jurisdictions. Either through delegation or deference, other authorities could then enable this lead enforcer to impose a single overarching cartel fine. But for the reasons described above in response to research sub-question 2, the feasibility of this solution seems doubtful. Nevertheless, there are already some notable examples of authorities waiving prosecution in view of enforcement elsewhere.

Especially given the continuing proliferation of active cartel enforcement regimes, it must be expected that international cartels will likely continue to be pursued by multiple authorities in parallel. It is then for the relevant authorities to consider how to avoid or at least limit this *parallel* enforcement from resulting in *overlapping* enforcement and punishment. To this end – and as also explained above in response to the second sub-question – jurisdictional and prosecutorial limitations and self-restraint can be applied on three levels: (i) the basis for asserting jurisdiction, (ii) the material scope of the cartel conduct that is being prosecuted and sanctioned (iii) the calculation of the fine. In respect of the latter element, while current practices generally seek to calculate a fine on the basis of only domestic effects, this will not avoid overlapping enforcement given that the same overall conduct is still subject to multiple fines.

To the extent that (residual) overlapping enforcement exists in respect of the sanctioned cartel conduct, the best way to achieve overall proportionate punishment is through coordination of fines. Ideally, such coordination would entail all authorities of significantly affected jurisdictions to agree on both the desired level of punishment for the overall conduct as well as its translation into individual sanctions. But this would require all authorities to be able to agree on the appropriate overall punishment, despite differing views on how harshly cartel behaviour needs to be punished. As a more practical point, such collaboration would also require more or less simultaneous investigations resulting in comprehensive insight into the scope and scale of the cartel in all relevant jurisdictions at the same time. This seems very hard and perhaps impossible to achieve in practice. Authorities such as the DOJ handle cartel cases through separate, successive proceedings against individual defendants, whereas authorities such as the European Commission are adopting a single fine decision for all defendants involved. Despite these challenges, I would certainly support efforts to achieve genuine international coordination of cross-border cartels, for example through the use of ad hoc inter-agency

task force, adequate and timely information sharing and case coordination between the authorities involved, and where possible the pursuit of simultaneous settlements or sentences that take into account the desired level of overall punishment and deterrence.

It is notable that in the field of anti-corruption enforcement, authorities have been successful in pursuing genuine cross-border coordination of sanctioning. In the 2017 Telia case for example, a global settlement of USD 965 million was reached with US, Dutch and Swedish authorities, comprising fines and disgorgements.[7] The fines and disgorgements were divided between the authorities. Interestingly, it has been suggested that "*international anti-corruption enforcement could look to the experience of antitrust enforcement in seeking ways to create a global regime in which multinational enforcers work together for the public good*".[8] I would argue that this is likely the other way around when it comes to the coordination of sanctioning.

Why can international coordination of fines work for anti-corruption enforcement while being so difficult to achieve for cartel enforcement? Adequately answering this question would require further research beyond the scope of this dissertation. But there are basic differences between the two fields that I believe play an important part:

(i) International cartel infringements are more likely than corruption infringements to trigger enforcement in a variety of different jurisdictions. In jurisdictions other than the one where the conduct took place, cartels create more tangible adverse effects than corruption does. This makes it more likely for authorities to be able and willing to claim jurisdiction over the conduct. Many jurisdictions may also have more established laws, enforcement policies and investigative capabilities in the field of antitrust compared to anti-corruption, making it more likely for foreign cartel behaviour to be prosecuted. The greater the number of authorities involved, the more difficult it is to reach a coordinated outcome;

(ii) Cartel enforcement typically involves the prosecution of multiple cartelists, while corruption cases often involve just one main corporate defendant. This has an impact on the logistics and timing of proceedings, making it much easier to reach a simultaneous and coordinated outcome between authorities;

(iii) In the field of cartel enforcement, most mature regimes have developed fining policies stipulating how cartel fines must be calculated. In the field of anti-corruption enforcement, there generally seems to be a less stringent framework for the calculation of fines, leaving more room for a coordinated solution;

(iv) The current practice of fining international cartels is based on each individual jurisdiction sanctioning a cartel only in respect of its domestic effects. This is the basis for dismissing double jeopardy concerns expressed by defendants. The same approach does not apply to corruption behaviour, which is much more difficult to break down geographically between affected jurisdictions because of the less tangible effects in countries other than where the conduct took place. This seems to have created greater pressure on enforcing authorities to address potential double jeopardy claims by seeking a coordinated penalty rather than piling on multiple individual fines for the same conduct.

At the current stage of international cartel enforcement, a more feasible form of coordination of fines would rest on each prosecuting authority considering the fines already imposed for the same overall conduct elsewhere and unilaterally determining the appropriate level of additional sentencing. In particular, this would require authorities to assess whether the overall conduct warrants any further

7 Roan Lamp, De Brauw, 'Settlements in brief: record-breaking Telia case shows cross-border cooperation' (17 October 2017) available at <https://www.debrauw.com/legalarticles/settlements-brief-record-breaking-telia-case-shows-cross-border-cooperation/>.

8 Jay Holtmeier, 'Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities', 84 *Fordham Law Review* 2 (2015) 519, footnote 160 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5143&context=flr>.

punishment – from a retributive proportionality and/or parsimony perspective. Using the words of the Business and Industry Advisory Committee to the OECD: "*once any jurisdiction sets a fine at an appropriate and proportionate level, another jurisdiction imposing penalties on top of that needs to strike a proper balance*".[9] This assessment clearly goes beyond merely checking whether any foreign sanction has already covered domestic interests (which it will normally not have). It also goes much further than merely avoiding any double counting of relevant turnover.

It is important that the result of any coordination of international enforcement actions or unilateral restraint is clearly described in the fine decisions. Such transparency allows parties to assess whether the authorities have indeed succeeded in avoiding over-punishment. Moreover, it enhances legal certainty and the credibility of enforcement, benefitting market players as well as the enforcement community.

Requiring authorities to take into account the retributive and deterrence objectives already achieved by earlier fines for the same overall cartel is easier said than done. It assumes that authorities are able to assess the appropriate level of overall punishment and to assess the extent to which previous fines have contributed to the desired retribution and deterrence. But how can this be achieved in practical terms, given that not even the national fining guidelines are adequately and transparently taking into account the considerations on proportionate retribution and deterrence? I believe that this question should be the key focus of inter-agency discussions on international coordination of cartel fines. In my view, authorities may in part find solutions by reference to key elements of their existing fining methodologies. For example, they may consider whether the sum of prior fines and the national fine that would normally be imposed exceeds (i) the absolute fine maximum applied by the authority and/or (ii) the penalty that the authority would have imposed if all the effects of the conduct had been confined to its own jurisdiction. Also, it may be considered whether certain aggravating circumstances may have already been sufficiently taking into account elsewhere. But for a large part, adequately taking into account prior foreign fines will require authorities to depart from their existing sanctioning frameworks. They will need to develop a new framework for assessing the extent to which fines – foreign and their own – achieve retributive and deterrence objectives. At the least, this would in my view involve the identification of that part of fines that can considered a basic penalty for entering into the overall cartel agreement, irrespective of the scope of harmful effects, so that duplication or multiplication of sanctioning of this part of the penalty can be avoided. It would also involve a better weighing of deterrence considerations, comparing fine amounts with actual and anticipated gains and enforcement risks.

The proposed approach also assumes that authorities would be willing to unilaterally relinquish the collection of fine amounts in the (cartelist's) interest of overall proportionality. Even if – for example through multilateral agreements on reciprocity – such willingness can be found, there is a risk of authorities rushing through their cartel investigations to avoid being barred from imposing (full) penalties.[10] Overcoming these and other obstacles to achieving better coordination of overall punishment will surely be challenging. It would be much easier to maintain the status quo of authorities imposing cartel fines from a purely national perspective while ignoring the international context of both the conduct and the punishment. But it is submitted that such an isolated and simplistic view on international cartel enforcement is no longer sustainable given the increasingly crowded enforcement arena. As with most other aspects of our global economy, international coordination is needed to address issues arising from cross-border economic activity in a uniform and overall satisfactory and effective manner. Inevitably, this should and will also be the direction for international cartel enforcement.

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9 OECD, *Summary of Discussion of the OECD Roundtable on Cartels Involving Intermediate Goods* (27 October 2015), https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN2/FINAL/en/pdf, at 8.

10 Wouter P.J. Wils, *The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26 World Competition, 2 (2003), at 143. The risk of authorities trying to avoid being barred from imposing (full) cartel fines already exists to a limited extent in situations of inability to pay.

8.2 Answer to the main research question and final considerations

The aforementioned responses to the five research sub-questions form the building blocks for the answer to this dissertation's main question:

How does the parallel public antitrust enforcement of international cartels affect the overall punishment of these cartels and how can and should proportionate punishment be ensured in a world characterised by increasingly widespread and active cartel enforcement?

The answer to this research question starts with a confirmation that the world is indeed characterised by increasingly widespread and active cartel enforcement. The past three decades have witnessed a remarkable proliferation of active cartel enforcement regimes. For global cartels discovered before 2004, it was quite unlikely for any authority outside of North America and Europe to impose fines. Since then, it is common that the conduct is targeted in parallel in more than five jurisdictions, sometimes even more than ten. At the same time, total cartel fine levels have substantially increased, *inter alia* due to the proliferation of active cartel regimes and the more aggressive fining policies adopted by these regimes.

Despite the increasingly crowded international cartel enforcement community, there are still little signs of authorities being willing to limit multiple enforcement of the same overarching cartel behaviour. With rare exceptions, and judging the practices from the outside on the basis of publicly available materials, authorities do not appear inclined to defer prosecution and punishment in view of (prior) enforcement elsewhere.

Authorities have the ability to limit or even avoid *parallel* cartel enforcement from resulting in *overlapping* enforcement and punishment, i.e. the same overall conduct being pursued by multiple authorities without applying clear jurisdictional delimitations. They can do so by exercising jurisdictional self-restraint in respect of (i) the basis for asserting jurisdiction, (ii) the scope of the cartel conduct that is being sanctioned and (iii) the calculation of the cartel fine.

In respect of the first element of asserting jurisdiction, it is notable that despite the growing number of authorities actively pursuing the same international cartel, the trend seems to move towards more expansive rather than less expansive jurisdictional approaches. This is illustrated by the ECJ's final acceptance of the qualified effects test in its 2017 judgement in *Intel*, having dodged the issue for decades. It may not be surprising that with foreign conduct more easily affecting domestic markets, authorities feel the need to expand their reach to target such behaviour. But with authorities exploring the limits of extraterritorial enforcement, concerns of overlapping punishment are only increasing.

Such concerns are further enhanced by all prosecuting authorities focusing on the same overarching collusive conduct in its entirety, especially where a great number of different (types of) authorities are involved. This is demonstrated by the interest rate derivative benchmark manipulation cases. At least 28 different authorities were involved in pursing these cases, including financial regulators, competition authorities and anti-fraud agencies. Together, they have imposed fines on twelve banks and two brokerage firms for a total amount of over 9.5 billion euro. While each authority may have imposed its penalties merely from its own enforcement perspective (antitrust, fraud, financial misconduct) and only in view of domestic harm, it cannot be denied that they have all punished the exact same overarching conduct.

In respect of corporate fining practices, it has become common practice for competition authorities to calculate cartel fines on the basis of affected sales in one's own jurisdiction. This is also the basis for dismissing defendant claims of double jeopardy and over-punishment: each authority is merely punishing the domestic effects of a cartel. But this argument fails to convince from the perspective of proportionality of overall punishment. It suggests that the offence of entering into (and maintaining) a cartel is comprised of multiple, distinct parts for each affected jurisdiction, and that it is justified for

each such specific part of the conduct to be punish and deterred by a separate penalty. In the eyes of cartel defendants, such an approach will likely be artificial. While theoretically possible, it is quite unlikely for the cartel participants to have deliberately decided for the cartel arrangements to cover each individual jurisdiction, at least where global markets are concerned. Given that the offence committed essentially concerns one and the same international infringement, punishment should be limited to what is necessary to achieve the overall retributive and deterrence objectives in respect of that single overarching infringement.

A key feature of common national cartel fining methodologies is the direct and linear link between the level of the fine and a cartelist's turnover achieved with selling the affected products. This approach in itself is difficult to reconcile with either retributive or consequentialist notions of proportionate punishment It is submitted that cartel fines should better reflect a certain base culpability shared between all cartel participants. Furthermore, instead of a linear or proportional function, a regressive relationship between a proxy for harm and the severity of the penalty would be more consistent with retributive proportionality and empirical research on intuitive notions of fair punishment.

The sanctioning of international cartels currently entails little more than the piling on of multiple national fines, amplifying the identified shortcomings of national cartel sanctioning policies. It enhances the overreliance on relevant sales as a proxy for harm caused by the cartel as opposed to culpability for entering into (and maintaining) the cartel. The lack of parsimony considerations being applied at the national and the international level increases the risk of overall fine levels well exceeding what is necessary and sufficient for future crime prevention purposes. Finally, no totality principle or other appropriate absolute maximum exists at a worldwide level to limit the total fine amount imposed for the same overall conduct, nor is any authority considering the overall proportionality of the overall punishment.

Based on the research presented in this dissertation, it is submitted that the ultimate common objective of international cartel enforcement should be the pursuit of an effective but overall proportionate punishment, to be imposed through as few distinct proceedings as possible. In the absence of any 'global competition authority', authorities should strive to limit parallel enforcement of the same cartel conduct through delegation or deference to those best placed to pursue and adequately punish the behaviour. While there are some notable examples of authorities waiving prosecution in view of enforcement elsewhere, it remains doubtful whether authorities would be willing and able to turn this into common practice.

Accepting the reality of parallel cartel enforcement, it is for those authorities pursuing the same conduct to seek coordination to try and limit or even avoid overlapping enforcement and punishment. Coordination of not just the object of each respective proceeding but also of the level of fines to be imposed would be the best way to achieve overall proportionate punishment. Ideally, such coordination would entail all authorities of significantly affected jurisdictions to agree on the desired level of punishment for the overall conduct as well as its translation into individual sanctions. While successfully applied in the field of anti-corruption, such close coordination of sanctioning seems very hard and perhaps impossible to achieve in the area of cartel enforcement.

A more realistic alternative entails each prosecuting authority making a conscious decision on the effectiveness and proportionality of imposing an additional fine, taking into account penalties already imposed elsewhere. This is not to say that any foreign fines should automatically offset or reduce domestic penalties. The approach merely requires authorities to acknowledge that penalties imposed elsewhere will have already contributed to the achievement of the overall deterrence and punishment objectives.

The outcome of my dissertation is therefore that overall proportionality of fines for international cartels can only be ensured if authorities will start to take into account the extent to which retributive and consequentialist objectives have already been achieved through sanctions imposed elsewhere. Such an

approach is likely to raise many practical and political issues, and trying to resolve these issues through increased coordination of international cartel enforcement will surely be challenging. But it is submitted that the status quo of simply piling on individual fines imposed on the basis of domestically-focused sanctioning policies is no longer sustainable. In view of an increasingly globalised economy and a growingly crowded enforcement environment, the need for the development and implementation of guiding principles to coordinate the sanctioning of international cartels will only become more pressing.

There are some promising signs of the enforcement community slowly moving in the right direction. On an ad hoc basis, there have been some cases where authorities and courts have actually taken into account prior fines imposed abroad. The DOJ has advocated for the concern of the piling on of multiple fines imposed for the same conduct to be more firmly addressed through inter-agency coordination and better consideration of the overall punishment objectives.[11] It revised its enforcement policies to this end in March 2018. It is certainly laudable that the US is showing thought leadership in this regard. At the same time, judging from the expansive approaches still taken by the DOJ in the LCD and LIBOR cases, one will have to wait and see how this new internal policy will result in actual self-restraint in imposing corporate penalties.

To advance policy initiatives of individual authorities, I would strongly encourage the ICN and the OECD to expand their advocacy efforts into the area of coordination of international cartel sanctioning. Both organisations have produced a very impressive body of work aimed at advancing the effectiveness of national cartel enforcement and improving international coordination when it comes to the investigation and prosecution of international cartels. It is now time to focus on the development of concrete guiding principles to also start coordinating the punishment of international cartels. I would sincerely hope that those involved in these discussions can draw guidance or at least inspiration from the research and recommendations presented in this dissertation.

8.3 Recommendations for further research

Apart from advancing the policy discussion on the better coordination of sanctions for international cartels, I would also hope for the academic debate in this area to further develop. There are several elements of potential research that I have deliberately excluded from the scope of this dissertation. However, additional research into these elements would be very valuable for gaining a more comprehensive understanding of the relevant issues. In my view, the most interesting areas for further research are the following:

a) *The impact of sanctioning other than through corporate fines*: While this dissertation has solely focused on corporate fines, authorities have a wider arsenal of potential sanctions to punish cartel behaviour, targeting corporations or individuals. Clearly, the extent to which overall retributive and deterrence objectives are achieved can best be assessed on the basis of the full range of sanctions imposed. It would hence be recommended to expand the research to also analyse the interplay between different types of sanctions in ensuring effective and proportionate overall punishment.

b) *The impact of private enforcement*: Effective private enforcement can be said to add significantly to the retribution and deterrence of cartel behaviour, especially where it is not just compensatory but also punitive in nature (as it is in the US on the basis of treble damages). With the increased focus on improving the effectiveness of private enforcement in the EU and elsewhere, it would be very interesting to study the extent to which private enforcement may and should affect public enforcement in the context of proportionality of overall punishment.

[11] DOJ, 'Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act' (9 May 2018) <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes>.

c) *The economic perspective on optimal fines for international cartels*: There is a wide body of economic literature focusing on optimal cartel enforcement, studying whether current fine levels are sufficiently deterrent. But I believe the research in this field could be expanded by further analysing the impact of parallel enforcement and multiple punishment of international cartels from an economic perspective on optimal fine levels.

d) *A study of authority views on the desired level of overall retribution and deterrence*: The ICN and OECD have both conducted surveys on national fining policies and methodologies. Further studies could be conducted to assess the extent to which authority views diverge on the desired level of overall retribution and deterrence that they believe is warranted in punishing international cartel behaviour. This could form the basis for a debate on potential harmonisation of such views, in turn creating better opportunities for coordinating international cartel fines.

e) *A study of authority perspectives on coordination of fines 'from the inside'*: As I have only based my findings on publicly available materials, I have not had access to internal policy documents or insights from government officials on what goes on 'behind the scenes'. This may be a blind spot if relevant developments, practices and discussions are taking place that are not (yet) visible to the wider public, including myself. It would be very valuable to complement the 'outside view' view presented in this dissertation with an 'inside view' on authority perspectives on possibilities to better coordinate international cartel fines.

f) *Necessary revisions of existing legislative frameworks*: I have largely ignored existing legislative frameworks in discussing possible ways of improving the coordination of international cartel sanctioning and in presenting my recommendations in this regard. But the acceptance of guiding principles on taking into account prior cartel fines imposed elsewhere would surely require legislative action in many jurisdictions or at least would require amendment of existing cartel fining guidelines. As a valuable extension of the research in this dissertation, one could therefore look at the potential implementation of such principles on a national level. This would involve the analysis of existing legislative frameworks and the proposal of concrete adjustments to these frameworks that would be necessary to accommodate the recommendations on better coordination of international cartel fines.

ANNEX 1

ABBREVIATIONS

AAI	American Antitrust Institute
ABA	American Bar Association
ACM	Autoriteit Consument & Markt, the Dutch competition authority
AG	Advocate General
BBA	British Bankers' Association
BMA-ABC	*Belgische Mededingingsautoriteit* / *Autorité Belge de la Concurrence*, the Belgian competition authority
CBb	*College van Beroep voor het bedrijfsleven*, the Dutch Trade and Industry Appeals Tribunal
CISA	Convention Implementing the Schengen Agreement
CFTC	US Commodity Futures Trading Commission
CMA	UK Competition and Markets Authority
CNMC	*Comisión Nacional de los Mercados y la Competencia*, the Spanish competition authority
COMCO	Swiss Competition Commission
DOJ	US Department of Justice
DPP	Dutch public prosecutor (*Openbaar Ministerie* or *OM*)
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECN	European Competition Network
EEA	European Economic Area
EU	European Union
FCA	UK Financial Conduct Authority
FSA	UK Financial Services Authority (now the FCA)
FTAIA	US Foreign Trade Antitrust Improvements Act
FTC	US Federal Trade Commission
DNB	*De Nederlandse Bank*, the Dutch central bank
FBI	US Federal Bureau of Investigation
FINMA	Swiss Financial Market Supervisory Authority
HIBOR	Hong Kong Interbank Offered Rate
HKMA	Hong Kong Monetary Authority
IBA	International Bar Association
ICCPR	International Covenant on Civil and Political Rights
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee

JFSA	Japan Financial Services Agency
JFTC	Japan Fair Trade Commission
LCD	Liquid crystal display
LIBOR	London Interbank Offered Rate
METI	Japanese Ministry of Economy, Trade and Industry
NCA	National competition authority
NMa	*Nederlandse Mededingingingsautoriteit* (now the ACM)
OECD	Organisation for Economic Cooperation and Development
OEM	Original equipment manufacturer
OFT	UK Office of Fair Trading (now CMA)
OPEC	Organisation of Oil Exporting Countries
PCIJ	Permanent Court of International Justice
PIC	Private International Cartels
PRA	UK Prudential Regulation Authority
ROW	Rest of world
SDNY	US States District Court for the Southern District of New York
SEC	US Securities and Exchange Commission
SFO	UK Serious Fraud Office
SIBOR	Singapore Interbank Offered Rate
TFEU	Treaty on the Functioning of the European Union
TIBOR	Tokyo Interbank Offered Rate
UK	United Kingdom
US	United States
VoC	Volume of Commerce

ANNEX 2

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ANNEX 3

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ANNEX 4

EXECUTIVE SUMMARY

PARALLEL ENFORCEMENT OF INTERNATIONAL CARTELS AND ITS IMPACT ON THE PROPORTIONALITY OF OVERALL PUNISHMENT

This dissertation assesses the current practices of parallel international cartel sanctioning and challenges these practices from the perspective of proportionality of overall punishment. It is based on the combined research conducted for the publication of six separate articles. Adopting various perspectives and using different research methods, this dissertation addresses the following main research question: *How does the parallel public antitrust enforcement of international cartels affect the overall punishment of these cartels and how can and should proportionate punishment be ensured in a world characterised by increasingly widespread and active cartel enforcement?*

A quantitative analysis of the enforcement of global cartels reveals that the world is indeed characterised by increasingly widespread and active cartel enforcement. The past three decades have witnessed a remarkable proliferation of active cartel enforcement regimes. This has resulted in global cartels commonly being pursued in parallel in more than five jurisdictions, sometimes even more than ten. This not only multiplies the number of enforcement proceedings for cartel defendants, it also pushes total cartel fines to even higher levels.

While the international community of active cartel enforcers continues to grow, there are still little signs of authorities being willing to limit multiple enforcement of the same overarching cartel behaviour. Rather than adopting jurisdictional self-restraint, authorities appear keen to extend their extraterritorial reach to punish foreign cartel conduct affecting domestic markets. They justify the lack of delimitations as to the cartel conduct that is being prosecuted by claiming that their sanctions are merely addressing a cartel's domestic effects. This is also the basis for dismissing defendant claims of double jeopardy and over-punishment. But this argument assumes that the offence of entering into (and maintaining) a cartel is comprised of multiple, distinct parts for each affected jurisdiction, and that it is justified for each such specific part of the conduct to be punished and deterred by a separate penalty. From the perspective of cartel defendants, such an approach appears to be artificial, inappropriate and unnecessary. They will consider the offence committed to concern one and the same international infringement. Jurisdictional borders were likely irrelevant when implementing the cartel, making it difficult to justify why the number of affected jurisdictions should affect the overall penalty.

With insufficient jurisdictional delimitations, *parallel* cartel enforcement results in *overlapping* cartel enforcement. That should not in itself jeopardise the proportionality of cartel fines if the prosecuting authorities were to – collectively or individually – limit their penalties to what is necessary to achieve the overall retributive and deterrence objectives in respect of the overarching cartel conduct. However, in sharp contrast, current sanctioning of international cartels is characterised by the piling on of individual fines imposed on the basis of domestically-focused sanctioning policies. What's more, national fining policies and methodologies in themselves can be challenged for failing to adhere to either retributive or consequentialist notions of proportionate punishment. These shortcomings are amplified when multiple national fines are combined to punish international cartel offenders. This adds to the concerns that arise at the international level due to the lack of parsimony or retributive proportionality considerations being applied to the overall punishment.

Based on the research presented in this dissertation, it is submitted that the ultimate common objective of international cartel enforcement should be the pursuit of an effective but proportionate punishment for the cartel conduct in its entirety, to be imposed through as few distinct proceedings as possible. Various options exist to avoid multiple authorities pursuing the same overall cartel conduct, but their

feasibility in practice is doubtful. Accepting that parallel enforcement of international cartels will be the reality for the foreseeable future, it is for the prosecuting authorities to seek coordination of not just the object of each respective proceeding but also of the level of fines to be imposed. Ideally, such coordination would entail all authorities of significantly affected jurisdictions to agree on both the desired level of punishment for the overall conduct as well as its translation into individual sanctions. While successfully applied in the field of anti-corruption enforcement, such close coordination of sanctioning seems very hard and perhaps impossible to achieve in the area of cartel enforcement.

A more realistic alternative entails each prosecuting authority making a conscious decision on the effectiveness and proportionality of imposing an additional fine, taking into account penalties already imposed elsewhere. This is not to say that any foreign fines should automatically offset or reduce domestic penalties. The approach merely requires authorities to acknowledge that penalties imposed elsewhere will have already contributed to the achievement of the overall deterrence and punishment objectives.

The conclusion of my dissertation is therefore that overall proportionality of fines for international cartels can only be ensured if authorities will start to take into account the extent to which retributive and deterrence objectives have already been achieved through sanctions imposed elsewhere. There are some promising signs of the enforcement community slowly moving in this direction. Still, many practical and political issues will still need to be overcome before achieving satisfactory coordination of international cartel sanctions. But it is submitted that the status quo of simply piling on national fines in disregard for the proportionality of overall punishment is no longer sustainable in view of an increasingly globalised economy and a growingly crowded enforcement environment.

ANNEX 5

SAMENVATTING (DUTCH SUMMARY)

PARALLELLE HANDHAVING VAN INTERNATIONALE KARTELS EN HAAR IMPACT OP DE PROPORTIONALITEIT VAN ALGEHELE BESTRAFFING

Dit proefschrift richt zich op de huidige praktijk van parallelle beboeting van internationale kartels vanuit het perspectief van proportionaliteit van algehele bestraffing. Het is gebaseerd op het gecombineerde onderzoek verricht voor de publicatie van zes verschillende artikelen. Vanuit de diverse invalshoeken en door gebruik van verscheidene onderzoeksmethoden wordt in dit proefschrift de volgende onderzoeksvraag behandeld: *Welke invloed heeft parallelle publieke mededingingsrechtelijke handhaving van internationale kartels op de algehele bestraffing van deze kartels en hoe kan en moet proportionele bestraffing worden bewerkstelligd in een wereld gekenmerkt door steeds actievere en wijder verspreide kartelhandhaving?*

Een kwantitatieve analyse van de handhaving van mondiale kartels toont aan dat de wereld inderdaad wordt gekenmerkt door steeds actievere en wijder verspreide kartelhandhaving. De afgelopen drie decennia kennen een indrukwekkende proliferatie van actieve kartelhandhavingsregimes. Dit heeft erin geresulteerd dat mondiale kartels regelmatig onderwerp zijn van parallelle handhaving in meer dan vijf jurisdicties, soms zelfs meer dan tien. Hierdoor wordt niet alleen het aantal handhavingsprocedures voor karteldeelnemers vermenigvuldigd, ook worden de algehele kartelboetes naar nog hogere niveaus gebracht.

De internationale gemeenschap van actieve kartelhandhavers blijft groeien. Desondanks zijn er weinig tekenen die wijzen op een toenemende bereidheid van autoriteiten om meervoudige handhaving van hetzelfde overkoepelende kartelgedrag te beperken. In plaats van het hanteren van een restrictieve uitoefening van hun rechtsmacht lijken autoriteiten eerder geneigd hun extraterritoriale bereik voor het bestraffen van buitenlands kartelgedrag te willen uitbreiden. Vervolging van het algehele kartelgedrag, ook waar het buiten de eigen landsgrenzen plaatsvond, wordt gerechtvaardigd door het argument dat de opgelegde sancties enkel zien op de binnenlandse effecten van het internationale kartel. Maar dit argument is gebaseerd op de aanname dat de inbreuk van het aangaan (en in stand houden) van een kartel bestaat uit verscheidene, losse onderdelen voor elke beïnvloede jurisdictie, en dat het gerechtvaardigd is ieder specifiek onderdeel van het gedrag te bestraffen en af te schrikken door een aparte boete. Karteldeelnemers zullen een dergelijke aanpak vermoedelijk beschouwen als kunstmatig, onterecht en onnodig. Zij zullen de gepleegde inbreuk eerder zien als een en dezelfde internationale overtreding. Landsgrenzen waren waarschijnlijk weinig relevant bij het implementeren van het kartel, waardoor het lastig is uit te leggen waarom enkel het aantal getroffen jurisdicties van invloed zou moeten zijn op de algehele bestraffing.

Onvoldoende afbakening van handhavingsbevoegdheid zorgt ervoor dat *parallelle* kartelhandhaving uitmondt in *overlappende* kartelhandhaving. Dat hoeft op zichzelf de proportionaliteit van kartelboetes nog niet aan te tasten, indien de vervolgende autoriteiten – gezamenlijk of individueel – hun boetes beperken tot hetgeen nodig is voor het bereiken van de algehele doelstellingen van vergelding en afschrikking van het overkoepelende kartelgedrag. De huidige praktijk van bestraffing van internationale kartels wordt daarentegen gekenmerkt door het opeenstapelen van individuele boetes die zijn opgelegd op basis van puur nationaal ingestoken boetebeleid. Daar komt bij dat nationale boeterichtsnoeren en -berekeningsmethodes op zichzelf al op gespannen voet staan met rechtstheoretische opvattingen over proportionele bestraffing, zowel vanuit de vergeldingsleer als vanuit het consequentialisme of de preventieleer. Deze tekortkomingen worden verstrekt wanneer verscheidene nationale boetes op elkaar worden gestapeld bij de bestraffing van internationale

kartelovertreders. Dit komt bovenop de zorgen die op internationaal niveau ontstaan als gevolg van de afwezigheid van proportionaliteitsoverwegingen die zien op de algehele bestraffing.

Gebaseerd op het onderzoek gepresenteerd in dit proefschrift wordt betoogd dat internationale kartelhandhaving uiteindelijk gericht zou moeten zijn op het nastreven van een effectieve en proportionele bestraffing voor het kartelgedrag als geheel, opgelegd via zo min mogelijk verschillende procedures. Er bestaan verscheidene opties om te voorkomen dat meerdere autoriteiten achter hetzelfde kartelgedrag aangaan. Maar de haalbaarheid van die opties valt te betwijfelen. Er kan daarom worden aangenomen dat parallelle handhaving van internationale kartels voorlopig de realiteit zal blijven. Tegen die achtergrond dienen de parallel vervolgende autoriteiten te streven naar onderlinge afstemming van niet alleen het voorwerp van de respectievelijke handhavingsprocedures maar ook van de hoogte van de opgelegde boetes. Idealiter maakt dergelijke coördinatie het mogelijk dat alle autoriteiten van significant beïnvloede jurisdicties het eens worden over zowel de beoogde algehele bestraffing als over de vertaling daarvan in individuele sancties op nationaal niveau. Hoewel een dergelijke benadering met succes is toegepast bij de internationale handhaving van corruptie, lijkt het vooralsnog zeer lastig en wellicht onmogelijk om te bereiken op het gebied van kartelhandhaving.

Een meer realistisch alternatief vraagt van iedere vervolgende autoriteit een bewuste afweging te maken van de effectiviteit en proportionaliteit van het opleggen van een aanvullende boete, daarbij rekening houdend met straffen die elders al voor dezelfde algehele gedraging zijn opgelegd. Dit betekent niet dat buitenlandse boetes automatisch verrekend moeten worden met de nationaal op te leggen straf. De aanpak vergt enkel van autoriteiten dat zij erkennen dat straffen die elders zijn opgelegd al zullen hebben bijgedragen aan het bereiken van de algehele doelstellingen van vergelding en afschrikking.

De conclusie van mijn proefschrift is daarmee dat algehele proportionaliteit van beboeting van internationale kartels alleen kan worden bewerkstelligd indien autoriteiten rekening beginnen te houden met de mate waarin doelstellingen van vergelding en afschrikking al zijn bereikt door sancties die elders zijn opgelegd. Er zijn enkele hoopgevende signalen die wijzen op een langzame beweging van de handhavingsgemeenschap in deze richting. Desondanks zullen er nog vele praktische en politieke drempels moeten worden genomen voordat toereikende coördinatie van internationale kartelsancties kan worden bereikt. Maar gelet op de toenemend geglobaliseerde economie en de steeds drukker wordende handhavingsgemeenschap kan niet langer worden vastgehouden aan de huidige status quo van het simpelweg opeenstapelen van nationale boetes zonder rekening te houden met de proportionaliteit van algehele bestraffing.

ANNEX 6

CURRICULUM VITAE

Pieter Huizing was born on 5 February 1986 in Maarssen, the Netherlands. In 2004 he started his academic studies at the University of Groningen, in 2008 obtaining his Bachelor of Arts in International Relations and his Bachelor of Laws in International and European Law (*cum laude*). He graduated from Groningen University in 2010, having obtained a Master of Arts in International Relations (*cum laude*), an LLM in International Law (*cum laude*) and an LLM in International Economic and Business Law (*cum laude*). He won several academic awards and scholarships, including the 2010 University of Groningen Student Excellence Award (Student of the Year Award).

Pieter started his career as a competition lawyer at the Amsterdam office of law firm Allen & Overy LLP in November 2010. Since then, he has focused on various aspects of competition law and regulatory affairs, including cartel and abuse of dominance investigations, merger control, general competition guidance and compliance, and sector specific competition law and regulation in the aviation, energy, health and telecom sectors. Pieter spent six months on secondment to the competition department of the Washington D.C. office of Allen & Overy, 18 months on secondment to the competition department of the London office of Allen & Overy and three months on secondment to the Dutch Competition Authority as the first competition lawyer to participate in the authority's newly set up secondment programme in 2019.

In July 2013, Pieter became an external PhD-student at Leiden University. He obtained a postgraduate diploma in EU Competition Law at King's College London in 2014. Pieter is a guest lecturer on competition law (merger control) at Nyenrode University since 2015 and at Leiden University since 2018.