



Universiteit  
Leiden  
The Netherlands

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

Huizing, P.J.F.

### **Citation**

Huizing, P. J. F. (2021, March 10). *Parallel enforcement of international cartels and its impact on the proportionality of overall punishment*. Retrieved from <https://hdl.handle.net/1887/3149355>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/3149355>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/3149355> holds various files of this Leiden University dissertation.

**Author:** Huizing, P.J.F.

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

**Issue date:** 2021-03-10

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

PROEFSCHRIFT

ter verkrijging van  
de graad van doctor aan de Universiteit Leiden,  
op gezag van rector magnificus prof.dr.ir. H. Bijl  
volgens besluit van het college voor promoties  
te verdedigen op woensdag 10 maart 2021  
klokke 16.15 uur

*door*

Pieter Jan Frederik Huizing

geboren te Maarssen  
in 1986

Promotor: prof. T.R. Ottervanger  
Co-promotor: dr. B. Van Rompuy

Promotiecommissie: prof. dr. M.C.E.J. Bronckers  
prof. mr. S.C.G. Van den Bogaert  
prof. dr. J. Steenbergen (emeritus) (Katholieke Universiteit Leuven, België)  
mr. Dr. H.G. Sevenster (Raad van State)

*"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*



## ACKNOWLEDGMENTS

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.

To Leiden University I am grateful for allowing PhD research to be conducted by external students and on the basis of a number of published articles. I am equally grateful to my employer Allen & Overy for giving me the time and resources to pursue a PhD alongside my professional work. The accommodating positions of both organisations have avoided a painful choice between academia and practice.

My articles and this dissertation have been substantially improved by all those who have reviewed my writing, made comments and raised difficult questions. My special thanks in this regard go to Prof. John Connor and Prof. Wouter Wils. Also, I would like to thank the anonymous peer reviewers and editorial boards of the journals that have published my work: the European Competition and Regulatory Law Review, the European Competition Law Review, the Journal of Antitrust Enforcement and World Competition. By far the best anonymous comment I received still makes me smile: *"It would benefit from a tone-check, with the author conducting a rewrite on a happy day filled with goodwill towards mankind"*.

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.





## TABLE OF CONTENTS

|                                                                                                           |     |
|-----------------------------------------------------------------------------------------------------------|-----|
| Acknowledgments .....                                                                                     | 7   |
| Table of Contents .....                                                                                   | 9   |
| 1. Chapter 1: Introduction.....                                                                           | 11  |
| 1.1 General introduction .....                                                                            | 11  |
| 1.2 Research focus and dissertation structure .....                                                       | 17  |
| 1.3 Relevance of the research .....                                                                       | 21  |
| 1.4 Explanation of key terms .....                                                                        | 23  |
| 1.5 Methodology and limitations .....                                                                     | 25  |
| 2. Chapter 2: A quantitative introduction to parallel cartel enforcement .....                            | 37  |
| 2.1 Introduction.....                                                                                     | 37  |
| 2.2 Defining and Identifying 'Global Cartels' .....                                                       | 37  |
| 2.3 General Overview of the Global Cartels .....                                                          | 40  |
| 2.4 Parallel Enforcement of Global Cartels .....                                                          | 42  |
| 2.5 Global Cartel Fine Levels .....                                                                       | 44  |
| 2.6 International Coordination of Fines .....                                                             | 47  |
| 2.7 Conclusion .....                                                                                      | 49  |
| 3. Chapter 3: Territorial limits to EU and US public enforcement.....                                     | 51  |
| 3.1 Introduction.....                                                                                     | 51  |
| 3.2 Background and overview of the LCD cartel cases .....                                                 | 52  |
| 3.3 The EU and US approach to establishing jurisdiction .....                                             | 53  |
| 3.4 The EU and US approach to defining the territorial scope of sanctioned cartel conduct.....            | 60  |
| 3.5 The EU and US approach to calculating the cartel fine .....                                           | 62  |
| 3.6 Territorial limits and overlapping enforcement .....                                                  | 68  |
| 3.7 Conclusion .....                                                                                      | 71  |
| 4. Chapter 4: The jurisdictional implications of the ECJ's acceptance of the qualified effects test ..... | 75  |
| 4.1 Introduction.....                                                                                     | 75  |
| 4.2 What is the qualified effects test? .....                                                             | 75  |
| 4.3 The Commission's reliance on the qualified effects test .....                                         | 76  |
| 4.4 Endorsements by Advocates General.....                                                                | 77  |
| 4.5 Use of the qualified effects test by the General Court .....                                          | 78  |
| 4.6 The ECJ's past efforts of evasion .....                                                               | 79  |
| 4.7 <i>Intel</i> : recognition at last.....                                                               | 80  |
| 4.8 Implications .....                                                                                    | 81  |
| 4.9 Final considerations .....                                                                            | 82  |
| 5. Chapter 5: Extraterritorial cartel enforcement within the European Competition Network.....            | 85  |
| 5.1 Introduction.....                                                                                     | 85  |
| 5.2 A widely diverging NCA practice.....                                                                  | 86  |
| 5.3 Legal assessment.....                                                                                 | 89  |
| 5.4 Future framework for cross-border cartel sanctioning by NCAs .....                                    | 96  |
| 5.5 Conclusion .....                                                                                      | 101 |

|     |                                                                                                 |     |
|-----|-------------------------------------------------------------------------------------------------|-----|
| 6.  | Chapter 6: Proportionality of fines in the context of parallel global cartel enforcement .....  | 103 |
| 6.1 | Introduction.....                                                                               | 103 |
| 6.2 | Legal theory on proportionality .....                                                           | 104 |
| 6.3 | Proportionality of national cartel fining methodologies.....                                    | 107 |
| 6.4 | The challenge of ensuring overall proportionality of fines for international cartels .....      | 113 |
| 6.5 | Conclusion .....                                                                                | 119 |
| 7.  | Chapter 7: LIBOR: A case study on parallel enforcement by antitrust and other authorities ..... | 121 |
| 7.1 | Introduction.....                                                                               | 121 |
| 7.2 | The factual conduct.....                                                                        | 122 |
| 7.3 | Overview of enforcement actions .....                                                           | 123 |
| 7.4 | The conduct's legal qualification.....                                                          | 127 |
| 7.5 | Overlapping jurisdictions .....                                                                 | 129 |
| 7.6 | The risk of double prosecution and over-punishment .....                                        | 132 |
| 7.7 | Ensuring overall proportionality .....                                                          | 140 |
| 7.8 | Conclusion .....                                                                                | 143 |
| 8.  | Chapter 8: Overall conclusion and recommendations.....                                          | 145 |
| 8.1 | Answers to the research sub-questions.....                                                      | 145 |
| 8.2 | Answer to the main research question and final considerations.....                              | 156 |
| 8.3 | Recommendations for further research .....                                                      | 158 |
|     | Annex 1: Abbreviations.....                                                                     | 161 |
|     | Annex 2: List of cases .....                                                                    | 163 |
|     | Annex 3: List of References .....                                                               | 167 |
|     | Annex 4: Executive summary.....                                                                 | 173 |
|     | Annex 5: Samenvatting (Dutch Summary) .....                                                     | 175 |
|     | Annex 6: Curriculum Vitae .....                                                                 | 177 |