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

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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.<sup>1</sup> 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.<sup>2</sup> 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<sup>3</sup>, maritime car carriers agreed to fix the prices charged for certain routes and certain customers, and agreed to allocate customers by rigging tenders.<sup>4</sup> 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).<sup>5</sup> Sales managers of the carriers would meet at each other's offices, in bars, restaurants or other social gatherings.<sup>6</sup> 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.<sup>7</sup> 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).<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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

<sup>2</sup> *ibid* paras 18, 34.

<sup>3</sup> 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.

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

<sup>5</sup> *ibid.* paras 36, 37.

<sup>6</sup> 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](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_962)>.

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

<sup>8</sup> 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](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_655)>.

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

<sup>10</sup> See the 2018 annual reports of K-Line, NYK and Wallenius Wilhelmsen. 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.<sup>11</sup> 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.<sup>12</sup> 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).<sup>13</sup>

Outside of the US, international cartel enforcement received attention in only few jurisdictions before the 1990s.<sup>14</sup> 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.*<sup>15</sup>

The Organisation for Economic Co-operation and Development (OECD) stated that before it adopted its *Recommendation on Hard Core Cartels*<sup>16</sup> in 1998, only very few competition authorities around the world had a fully developed anti-cartel program.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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

<sup>11</sup> International Competition Policy Advisory Committee (ICPAC), *Final Report* (2000) 166 <<https://www.justice.gov/atr/final-report>>.  
<sup>12</sup> *ibid.*

<sup>13</sup> Reference to the years in which the first penalties were imposed.

<sup>14</sup> ICPAC (n 11) 186.

<sup>15</sup> *ibid.* 185.

<sup>16</sup> 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>>.

<sup>17</sup> 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](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2012)5&docLanguage=En)>.

<sup>18</sup> 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>>.

<sup>19</sup> 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.<sup>20</sup>

- (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".<sup>21</sup> 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.<sup>22</sup>
- (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.<sup>23</sup> 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.<sup>24</sup>
- (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.<sup>25</sup> 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).<sup>26</sup>
- (v) The proliferation of effective leniency policies. The DOJ has called this "[t]he single most significant development in cartel enforcement".<sup>27</sup> 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.<sup>28</sup> As cartel participants are generally aware of the illegality of their activities, cartels are almost by definition secret in nature.<sup>29</sup> 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

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

<sup>21</sup> *ibid.* 28.

<sup>22</sup> 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>>.

<sup>23</sup> 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](https://one.oecd.org/document/DAF/COMP/GF(2016)9/en/pdf)>.

<sup>24</sup> *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](https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf)>.

<sup>25</sup> 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>>.

<sup>26</sup> 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.

<sup>27</sup> 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>>.

<sup>28</sup> 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>>.

<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> Witnessing this success, many other authorities have adopted leniency policies to fight cartels. Today, at least 78 jurisdictions have leniency policies in place.<sup>32</sup> 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.<sup>33</sup> The three exceptions were all discovered in the 1990s.<sup>34</sup>

- (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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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

<sup>30</sup> DOJ, Scott D Hammond (n 27) 2.

<sup>31</sup> *ibid.* 3.

<sup>32</sup> 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](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.

<sup>33</sup> See Chapter 2.

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

<sup>35</sup> 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).

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

<sup>37</sup> 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.

<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> 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.*<sup>42</sup>

*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.*<sup>43</sup>

<sup>39</sup> 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](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.

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

<sup>41</sup> 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](https://one.oecd.org/document/DAF/COMP(2014)4/REV1/en/pdf)>.

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

<sup>43</sup> *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*".<sup>44</sup> 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*".<sup>45</sup> 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.

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

<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> 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

<sup>46</sup> 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.

<sup>47</sup> 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.<sup>48</sup> 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

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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/guidelines-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".<sup>49</sup>*

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.<sup>50</sup> Moreover, in the past few years the topic has entered the arena of public debate within the enforcement community.<sup>51</sup> 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.<sup>52</sup> 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".<sup>53</sup>*

<sup>49</sup> 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>>.

<sup>50</sup> 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.

<sup>51</sup> 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](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](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>>.

<sup>52</sup> 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>>.

<sup>53</sup> 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.<sup>54</sup> Occasionally the term 'hard core cartel' is used, most notably by the OECD.<sup>55</sup> 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.<sup>56</sup> 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)).<sup>57</sup> 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.<sup>58</sup> This covers both (i) cartels with one or more participants having its headquarters, residency, or nationality outside the jurisdiction of the investigating

<sup>54</sup> 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>>).

<sup>55</sup> 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.

<sup>56</sup> 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](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](https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1092&context=econ_workingpaper)>.

<sup>57</sup> See e.g. Connor, *The Private International Cartels (PIC) Data Set* (n 56) 4.

<sup>58</sup> *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<sup>59</sup>, 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'.

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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.<sup>60</sup> 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<sup>61</sup>, 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

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<sup>60</sup> See Chapter 2.

<sup>61</sup> 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.<sup>62</sup>
- (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 pursuing 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

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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.<sup>63</sup> 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'.<sup>64</sup>

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<sup>63</sup> 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>>.

<sup>64</sup> 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*<sup>65</sup> and the 2016 study *Sanctions in Antitrust Cases*<sup>66</sup> 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

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<sup>65</sup> ICN (2017) (n 39).

<sup>66</sup> 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](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.<sup>67</sup> 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.

<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>
- 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

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<sup>68</sup> Available at <curia.europa.eu>.

<sup>69</sup> ICN (2017) (n 39); OECD, *Sanctions in Antitrust Cases - Background Paper by the Secretariat* (n 66).



LLP's Cartel Digest.<sup>70</sup> 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.<sup>71</sup>

- 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

<sup>70</sup>

Available at <<https://www.carteldigest.com>>.

<sup>71</sup>

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.<sup>72</sup> This may even result in an interplay between the level of corporate fines and the number of executives subject to imprisonment.<sup>73</sup> 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.<sup>74</sup> 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

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

<sup>73</sup> US plea agreements often include a specific number of executives excluded from the deference of further prosecution.

<sup>74</sup> 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.

