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

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

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3.1 Introduction

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

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

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

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

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

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

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

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

3.2 Background and overview of the LCD cartel cases

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

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

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

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

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

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

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

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

3.3 The EU and US approach to establishing jurisdiction

A. The EU's approach in InnoLux

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

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

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

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

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

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

7 Ibid., para 470.

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

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

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

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

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

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

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

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

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

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

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

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

16 Ibid., para 237.

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

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

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

20 Ibid., para 66.

21 Ibid., para 69.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The US approach in AU Optronics

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

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

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

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

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

33 Ibid., para 100.

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

35 Ibid., para 101.

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

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

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

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

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

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

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

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

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

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

42 Ibid., p. 7.

43 15 U.S.C. § 6a.

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

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

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

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

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

49 Ibid.

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

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

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

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

D. Motorola Mobility LLC v. AU Optronics Corp.

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

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

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

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

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

56 Ibid., p. 43.

57 Ibid., p. 44.

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

59 Ibid., p. 7.

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

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

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

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

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

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

E. Comparing the EU and US approach to establishing jurisdiction

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

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

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

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

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

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

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

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

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

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

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

A. The EU's approach in InnoLux

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

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

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

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

74 Ibid., para 229.

75 Ibid., para 331.

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

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

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

B. The US approach in AU Optronics

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

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

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

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

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

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

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

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

3.5 The EU and US approach to calculating the cartel fine

A. The EU's approach in InnoLux

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

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

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

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

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

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

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

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

83 Ibid., point 13.

84 Ibid., points 19-24.

85 Ibid., point 25.

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

87 Ibid., para 380.

88 Ibid., para 393.

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

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

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

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

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

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

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

92 Ibid., para 47.

93 Ibid., paras 86-87.

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

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

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

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

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

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

96 Ibid., para 53.

97 Ibid., para 55.

98 Ibid., para 57.

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

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

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

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

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

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

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

B. The US approach in AU Optronics

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

126 Ibid., p. 2-3.

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

128 Ibid., p. 16.

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

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

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

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

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

3.6 Territorial limits and overlapping enforcement

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

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

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

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

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

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

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

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

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

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

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

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

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

141 Ibid., p. 7.

142 Ibid.

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

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

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

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

143 Ibid.

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

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

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

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

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

149 Lee (n 138), p. 17.

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

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

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

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

3.7 Conclusion

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

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

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

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

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

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

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

156 Terzaken and Huizing (n 144).

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

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

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

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

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

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

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

158 Lee (n 138), p. 18.

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

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