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

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8. CHAPTER 8: OVERALL CONCLUSION AND RECOMMENDATIONS

8.1 Answers to the research sub-questions

From different perspectives and through the use of different research methods, the previous chapters have addressed the five research sub-questions listed in Section 1.2 of this dissertation. This section brings the insights provided in the respective chapters together by formulating answers to the research sub-questions. These responses form the building blocks for the overall response to the main research question which will be given in the next section.

Sub-question 1

What is the current state of parallel enforcement of international or global cartels? How has this evolved over time?

This question has been addressed through both quantitative research (Chapter 2) and a case study analysis (Chapter 7).

The quantitative research is based on data regarding 41 cartels with global characteristics that have been subject to fines in the last thirty years. The choice for global cartels rather than mere international cartels was made in order to draw more firm conclusions on the evolution of parallel cartel enforcement. What all global cartels have in common is that they have affected markets across the world. One may therefore expect most jurisdictions with established competition law regimes to jump on these cartels. But the analysed data shows that parallel enforcement of global cartels by more than a few authorities is a fairly recent phenomenon. For cartels discovered before 2004, it was quite unlikely for any authority outside of North America and Europe to impose fines. Since then, it is common that the conduct is targeted in parallel in more than five jurisdictions, sometimes even more than ten. Thus far, at least seventeen jurisdictions have penalised one or more global cartels. Along with the higher number of jurisdictions actively going after global cartels, total fine levels for global cartels have sharply risen. There have thus far been nine global cartels with a combined fine amount exceeding USD 1 billion per cartel.

The research of Chapter 2 hence supports the statement that the world is characterised by increasingly widespread, active and parallel cartel enforcement. Two stages can be distinguished in this respect. First the more active cartel enforcement by the mature regimes in North America and Europe as of the early and mid-1990s. And secondly the much more widespread and therefore increasingly parallel enforcement of global cartels as of 2004. It can be expected that these developments will continue to characterise global cartel enforcement for the foreseeable future.

The case study on the enforcement of the LIBOR and other benchmarks manipulation illustrates the multitude of different authorities across different jurisdictions that may consider themselves competent and well placed to pursue global collusive misconduct. At least 28 different authorities have been involved, including financial regulators, competition authorities and anti-fraud agencies. Together, they have imposed fines on twelve banks and two brokerage firms for a total amount of over 9.5 billion euro. This includes the record fines imposed on Deutsche bank totalling over 3 billion euro. Admittedly, this has been a unique example of widespread, parallel enforcement of the same overall conduct given the different types of authorities involved. The issues triggered by these cases – in terms of double jeopardy concerns, proportionality of (overall) fine amounts, and administrative and procedural burdens for the defendants – may hence be of a different *magnitude* than they will be in other international cartel cases. But the *nature* of these issues will be the same, which is why the case study is valuable for analysing the current state of parallel enforcement of international cartels and the concerns resulting from such enforcement.

Sub-question 2

What choices can and do individual authorities make in exercising their jurisdictional discretion when prosecuting international cartels? How do jurisdictional limitations affect the extent to which enforcement and punishment of international cartels overlap? How is jurisdiction being shared and allocated within the European Competition Network?

The relevance and impact of jurisdictional boundaries and self-restraint in the context of parallel cartel enforcement has been addressed in various ways in this dissertation. Chapter 3 has focused on both the legal boundaries as confirmed by the EU and US courts as well as the enforcement practices in these jurisdictions as revealed in the LCD cartel cases. Chapter 4 has expanded the EU legal analysis by looking at the developing decision practice and case law leading up to the 2017 *Intel* judgment. The issue has been studied in the unique context of the ECN in Chapter 5. And finally, Chapter 7 illustrates on the basis of the interest rate derivative benchmark manipulation cases how jurisdictional limitations and choices affect the extent to which *parallel* enforcement actually results in *overlapping* enforcement.

As a starting point, it is not necessary for parallel enforcement to result in overlapping enforcement in the sense that the same part of particular cartel conduct is subject to enforcement in more than one jurisdiction. Authorities can avoid or at least limit such overlap by carefully limiting their own exercise of jurisdiction. There are choices of potential jurisdictional self-restraint to make on three levels:

1. The basis for asserting jurisdiction, i.e. the legal ground justifying the application and enforcement of national competition laws in respect of (foreign) cartel conduct;
2. The object of the prosecution and sanctioning, i.e. the scope of what part of the overall cartel is being punished; and
3. The calculation of the cartel fine, in particular the sales or commerce on the basis of which the basic fine is determined. This third element will not avoid overlap in respect of the object of enforcement because it still captures the entire conduct, but it does limit the overlap by only considering certain of the conduct's (potential) effects.

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

- In Europe, the Commission's LCD cartel decision and the subsequent *InnoLux* judgments have sparked a debate on the limits to extraterritorial cartel enforcement within an increasingly globalised economy. Various writers and notably AG Wathelet have submitted that the Commission overstretched its powers by imposing a fine in relation to sales that lacked a sufficient nexus to the EEA. But the ECJ's ruling accepted the expansive approach taken by the Commission by separating the need for a jurisdictional link from the Commission's broad discretion in calculating the fine. While this discretion does not seem to be territorially unlimited, the *InnoLux* judgments do not clarify where the boundary is. It is clear, however, that the Commission is under no (proactive or reactive) obligation to avoid double counting of the same sales by two or more authorities, nor to take into account penalties imposed elsewhere. The legal framework applied by the ECJ therefore does little to force the Commission to pursue greater self-restraint in its enforcement of international cartels.

- On the other side of the Atlantic, the DOJ has taken an even more expansive approach in its prosecution of LCD cartelist AUO. First, by not territorially limiting the scope of the cartel conduct for which AUO is sanctioned. Second, by calculating the cartel fine on the basis of a rough estimate of the AUO sales of LCD panels that ended up as finished products in the US in one way or another, irrespective of whether AUO or an independent third party was

responsible for the importation. Compared to the Commission's methodology, this creates much greater risks of foreign authorities taking into account the same sales in punishing the same overall cartel conduct. Still, the US courts have ruled that the DOJ's approach in the proceedings against AUO has not yet reached the boundaries of its territorial reach. This creates a stark contrast with private cartel enforcement in the US, for which the Seventh Circuit has drawn a line in the sand in *Motorola Mobility* in respect of the application of US laws to conduct that has a stronger nexus to foreign nations.

In 2017, the ECJ rendered its judgment in *Intel*. While an abuse of dominance case and not a cartel case, the ruling is vital for the assessment of jurisdictional boundaries applicable to EU cartel enforcement. In its judgment, the ECJ – having dodged the issue for decades – finally accepted the qualified effects as a basis for asserting jurisdiction over foreign conduct. This means that the European Commission has jurisdiction over foreign cartel conduct as long as that conduct produces effects in the EU that are substantial, immediate and foreseeable. Importantly, the ECJ confirmed that the effects must be viewed "as a whole". The European courts hence accept that conduct not meeting the jurisdictional test in itself can be part of the conduct to be sanctioned and can be relevant for the turnover used to determine the fine. This is in line with the approach already taken in *InnoLux*, but this time relating to a jurisdictional test that expands the Commission's reach even further. The ECJ ignored the calls by several Advocate Generals for a restrained application to avoid concerns of jurisdictional overreach and overlapping enforcement. Apparently, the ECJ has not felt that these considerations justified the shaping of more restrictive jurisdictional boundaries for the Commission. In summary, *Intel* has further extended the EU's legal doctrine on extraterritorial competition enforcement compared to the already expansive approaches taken in *InnoLux*. The ruling hence reveals the direction of the reach of European competition law enforcement: towards more rather than less expansive enforcement.

The choices that authorities have in exercising their jurisdictional discretion similarly apply within the European context. But there is a key difference. Embedded in the framework of EU competition enforcement is the principle that the European Commission will take up enforcement of cases that clearly transcend individual Member States, replacing actions on the national level by a single proceeding and punishment at a European level. But not all cross-border European cases are handled by the Commission. Under EU Regulation 1/2003, cartel enforcement has become 'decentralised', meaning that enforcement powers and responsibilities are shared between the Commission and individual NCAs. The framework of cooperation and case allocation within the European Competition Network has created a unique environment in which NCAs have found different ways of avoiding overlapping enforcement. The methods used include (i) prosecuting only the domestic elements of a cartel (i.e. limiting the object of the enforcement), (ii) sanctioning a cross-border cartel for only its domestic effects, (iii) also taking into account foreign sales but applying a gravity factor that reflects only domestic harm, and (iv) imposing a mere symbolic fine in view of enforcement action elsewhere.

By employing these methods, at least some NCAs have been careful to avoid or limit overlapping enforcement. Their willingness to apply self-restraint is partly explained by the application of the principle of *ne bis in idem* under European law, meaning that without a clear delineation of an authority's enforcement actions, other NCAs could be barred from taking subsequent action. But while avoiding or limiting concerns of overlapping and multiple enforcement, the careful approaches taken in the past have also led to sub-optimal outcomes, harming the overall objective of an effective, decentralised enforcement of EU competition law. That may explain why the Dutch competition authority has chosen to test the waters by starting to calculate cartel fines on the basis of EU-wide turnover, hence effectively fining foreign effects of the cartel. Outside of the EU context, this would be equivalent to the Commission or the DOJ prosecuting cartels for their global effects and calculating the fines on the basis of worldwide affected sales. The diverging legal views and practices among Member States reveal that the legal basis for this approach remains questionable even within the European context. But it may well be the recommended approach to ensure efficient, effective and

proportionate cartel enforcement, serving the interest of both the enforcement community and businesses. This is true within the confines of the ECN, characterised by close cooperation and shared responsibilities between authorities. But these findings are also relevant beyond Europe. They show that an expansion of jurisdictional reach and extraterritorial enforcement may not be automatically objectionable, if it facilitates the allocation of enforcement to fewer authorities or perhaps even reserves enforcement exclusively to a single authority.

Within the European context, multiple enforcement by different NCAs can easily be avoided by the Commission stepping in. On a global scale, the establishment of an overarching enforcement body is unlikely to become a reality for the foreseeable future. This is mainly due to the wide differences in substantive and procedural competition laws that still exist, as well as the reluctance of states to give up their prosecutorial discretion, being a key element of their sovereignty. In theory, competition authorities could also prevent parallel enforcement by either (i) delegating the competence to pursue the matter to another prosecuting authority or (ii) deferring prosecution in view of enforcement action taken by other authorities. In practice, the first option of horizontal delegation of prosecutorial competence appears to be unfeasible, as the transfer of competence to a foreign authority raises problems. While an authority may ask a foreign counterparty to consider its interests in the latter's enforcement of cross-border conduct (so-called "positive comity"), it goes much further to transfer actual prosecutorial competence to a foreign party. The second option of deferring prosecution in view of enforcement actions by other authorities seems particularly suitable if the other authorities' actions sufficiently remedy and deter the harmful conduct. In the 1999 OECD report on positive comity it was stated that such voluntary deferral appears to have little potential in hard core cartel cases "*because requesting countries are likely to want to add their own fines or other remedies to any relief that a requested country may obtain*".[1] Whether it is for this reason or (also) for others, there indeed appears to be little appetite for authorities to take this approach. Nevertheless, it seems to gain more support in the international enforcement community. And there have been some rare examples of it happening in practice. As part of the *Auto parts* cartel investigations, the Canadian Competition Bureau agreed to abandon further enforcement against a producer of automotive body sealing products because the US fine took into account both the US and the Canadian affected commerce. Therefore, the Competition Bureau considered the single fine imposed in the US to be an effective remedy also for its own jurisdiction.[2]

The interest rate derivatives benchmark manipulation cases emphasise the importance of authorities exercising jurisdictional self-restraint when pursuing the same worldwide conduct in parallel. Given the large number of authorities involved, one may have expected them to carefully consider how to best avoid overlapping enforcement. In contrast, the assessment of the fine decisions shows that the agencies did not succeed in avoiding jurisdictional overlap. In fact, they all sanctioned the worldwide collusion between financial institutions without applying clear jurisdictional delimitations. This applies to the three different levels referred to above:

1. The basis for asserting jurisdiction: Given the global nature of the economic activities involved, each authority was easily able to exert extraterritorial jurisdiction based on domestic effects.
2. The object of the prosecution and sanctioning: While it would have made much sense for the three types of authorities to focus on different aspects of the overall conduct, they have chosen to all target the same collusive behaviour in its entirety.
3. The calculation of the cartel fine: The fining methodologies applied have not succeeded in avoiding overlapping punishment because the same overall conduct was still subject to multiple fines. The fines have not clearly been calculated on the basis of factors or effects not taken into account elsewhere.

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1 OECD, *Positive Comity* (1999), para 64, <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2752161.pdf>.

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

The effect of such absence of clear jurisdictional limitations is that parallel enforcement has not just resulted in multiple enforcement proceedings triggered by the same overall conduct, but in overlapping, multiple punishment as well. This subsequently raises the question whether authorities are addressing such overlapping punishment through the adjustment of penalty levels.

Sub-question 3

How are international cartel defendants being punished? How do individual jurisdictions fine international cartels? Do authorities or courts take into account penalties imposed elsewhere for the same overall cartel?

The response to this sub-question rests on the assessment of common fining methodologies and fining practices regarding international cartels of Chapter 6, the figures on the level of fines for global cartels presented in Chapter 2 and an example of the lack of international coordination of fines provided by the case study of Chapter 7.

Studies into national cartel fining methodologies show that there is little international consensus on the appropriate level of fines. However, there are certain key elements of sanctioning principles that are nowadays common to many mature cartel sanctioning regimes:

(i) First, the use of a certain proportion of the turnover achieved with selling the cartelised products or services ('relevant sales') to calculate a base fine. Various authorities, including the European Commission, apply a maximum percentage of 30% for cartel infringements, while others use (much) lower maximum percentages and only some use a maximum percentage exceeding 30%. The proportion of relevant turnover used as basis for the fine calculation is widely considered to be an appropriate proxy for the harm caused by the cartel. Still, the actual percentage applied to the relevant turnover is generally not determined on the basis of the actual or estimated overcharge of the cartel, but rather on the overall gravity of the cartel conduct.

(ii) Second, adjustments to the base fine to account for mitigating and/or aggravating circumstances.

(ii) Third, the application of an absolute fine limit. For most jurisdictions, the legal maximum is set at a certain percentage (e.g. 10%) of a company's worldwide total turnover.

Parallel sanctioning of international cartels essentially entails the piling on of individual sanctions imposed under the domestic (or EU) legal framework of the various jurisdictions involved. Even though authorities may acknowledge that the cartel conduct that they are penalizing is part of an international or global conspiracy, they will typically ignore the international context in the calculation of the fine. By stating that their enforcement merely addresses the domestic effects of an international cartel, authorities and courts have been easily dismissing defendant claims that fines already imposed elsewhere should be taken into account.

Chapter 2 demonstrates that total fine levels for global cartels are firmly on the rise. For the 25 global cartels discovered between 1994 and 2003, the average combined fine level was USD 280 million per cartel. For the sixteen global cartels discovered between 2004 and 2018, the average combined fine amount is more than six times that amount, at almost USD 1,800 million. The overall increase in fine levels imposed on global cartels can be linked to individual cartel regimes adopting more aggressive fining policies and practices. In addition, penalties for global cartels are also pushed to higher levels as a result of the proliferation of different authorities pursing these cartels. At the same time, the impact of the additional enforcers is limited by the relatively small fines often imposed by the more recently established regimes.

The increasingly higher total cartel fine levels do not yet appear to convince authorities of the need to coordinate their respective fines. This is also apparent from the case study on the interest rate derivate benchmark manipulation cases. Most fining decisions for these cases reveal the lack of coordination at international level as to the level of sanctions, even where there was a remarkable inter-agency cooperation with respect to the investigative stages and even where various regulators reached simultaneous settlements with a particular defendant. Notable exceptions are the DOJ's deferred prosecution agreement with Rabobank and its settlement with the Dutch authorities. Both explicitly refer to the sanctions already imposed elsewhere in justifying the penalty amount.

There are some other cases in which authorities or courts have been willing to take into account prior, foreign penalties imposed for the same overall cartel behaviour:

- In *TFT-LCD*, the US District Court in San Francisco set the fine for AU Optronics at USD 500 million – half the figure requested by the DOJ – *inter alia* because of the fines that the company had already paid and would still be paying.[3]

- In *Maritime car carriers*, the Federal Court of Australia considered the penalties previously imposed abroad to be a mitigating circumstance, while noting that these penalties generally only concerned the cartel conduct insofar as it impacted those foreign jurisdictions.[4] The same court had previously followed the ACCC in taking into account foreign penalties in *Air cargo*.[5]

- In the *Flour* case, the Belgian NCA considered a symbolic fine to be sufficient as it found the fines imposed in the Netherlands to provide for adequate punishment for the cartel, even though the Dutch fines were solely based on domestic effects.[6]

Despite these notable exceptions, attempts to coordinate the outcome of proceedings in order to reach an overall proportionate fine still appear to be both ad hoc and rare. The standard practice of international cartel sanctioning continues to be based on authorities adopting a purely national and isolated view on appropriate punishment.

It is interesting to compare the current practice of piling on various national fines imposed on corporate cartel defendants to the way in which individuals responsible for international cartel conduct are punished. In the *Marine Hose* case, both the US and UK were pursuing criminal charges against three UK nationals. It was clear that the US and UK prison sentences imposed were solely based on the domestic effects in the US and the UK, respectively. Nevertheless, the US plea agreements provided for a reduction of the US sentences for any period of imprisonment in the UK, effectively allowing the individuals to serve the US and UK sentences concurrently. While this arrangement resulted in a complete deferral of the US sentences, the DOJ considered the outcome to be a clear victory for US consumers because the three individuals were 'punished adequately'. This shows that in the context of criminal enforcement of individuals – and in sharp contrast to the practice of corporate sentencing – proportionality and deterrence considerations are more easily accepted to transcend national borders.

Sub-question 4

What is proportionate punishment? How does parallel enforcement of international cartels affect the overall proportionality of punishment?

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

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

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

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

This sub-question is addressed in Chapter 6 through the lens of legal theory on proportionate punishment. The case study of Chapter 7 illustrates how parallel enforcement by a range of different authorities across multiple jurisdictions can affect the overall proportionality of fines.

The principle of proportionality is regularly invoked by defendants trying to have their cartel fine annulled or reduced. But it appears that invoking the principle is easier than defining what it actually entails. The principle of proportionality is often simply described as the notion that '*the punishment must fit the crime*'. But legal theory on the subject clarifies that one can only give concrete meaning to proportionality after taking a position on why punishment is perceived to be justified and necessary. Two schools of thought exist in this respect:

(i) Retributive theories, which are based on the notion that offenders need to be punished because they *deserve* to be punished for having violated societal norms. These theories are retrospective as they purely focus on the past wrongdoing of the offender, ignoring other goals such as specific or general deterrence or incapacitation.

(ii) Consequentialist theories, which consider punishment to serve a utilitarian purpose and which focus on the future societal benefits of punishment. The prevention of future crime through deterrence is one of the main purposes of punishment under consequentialist theories.

Proportionality has different meanings depending on whether a retributive or consequentialist perspective is adopted. Under retributive theories, proportionality is a fundamental concept for determining the level of a penalty, ensuring that the offender does not get more (or less) punishment than what is deserved. In determining what is deserved, retributivists rely on the degree of blameworthiness, which in turn is based primarily on culpability and to a lesser extent on harm. Under consequentialist theories, the quantum of punishment does not rest on a proportionate link between the penalty and the blameworthiness of the offender. Instead, optimal penalties are considered to be those penalties that are necessary and sufficient to result in net societal benefits by serving the aim of crime prevention (e.g. through specific and general deterrence). The principle of proportionality merely plays a role in prescribing that (i) punishment should only be pursued if the benefits of doing so outweigh the costs (so-called 'ends proportionality') and (ii) punishment must not be more severe than is necessary to achieve the same intended benefits to society ('means proportionality', also referred to as the principle of parsimony).

A study of common features of national cartel fining methodologies reveals that – borrowing the words of Max Minzner – antitrust authorities 'talk like consequentialists but act like retributivists'. National sanctioning policies refer to specific and general deterrence as the key objective behind imposing (heavy) cartel fines. But fining methodologies hardly consider the elements that are most relevant to assess optimal deterrence levels: the expected gains of cartelists and the likelihood of detection and punishment. They also typically ignore principles of parsimony, by not considering at which fine level the deterrence objectives have been satisfied. Instead, cartel fining methodologies are primarily based on elements that aim to ensure retributive proportionality of cartel fines, focusing on the culpability of the offender and the actual or potential harm of a cartel.

A key feature of current national cartel fining methodologies is the direct and linear link between the level of the fine and a cartelist's turnover achieved with selling the affected products. This means that, all other things being equal, a cartel member earning twice as much with the sale of cartelised products will also be punished twice as hard. It is submitted that this approach conflicts with theories on retributive proportionality and multiple punishment. First, cartel fines should better reflect a certain base culpability for the conduct that forms the essence of the infringement: entering into and maintaining a cartel. Second, instead of a linear or proportional function, a regressive relationship between a proxy for harm and the severity of the penalty is more consistent with retributive proportionality and empirical research on intuitive notions of fair punishment.

The identified shortcomings of national cartel sanctioning policies are amplified when it comes to the enforcement of international cartels. First, the undiscounted accumulation of individual fines ignores the fact that each fine will reflect – at least for a significant part – the same base culpability for entering into the overall cartel. Secondly, a combination of national fines that are each calculated on the basis of a proportional function of the value of affected sales, increases the overreliance on harm as opposed to culpability as the main element underpinning the level of punishment. Thirdly, the lack of parsimony considerations being applied at the national and the international level increases the risk of overall fine levels well exceeding what is necessary and sufficient for future crime prevention purposes. Fourthly, no totality principle or other appropriate absolute maximum exists at a worldwide level to limit the total fine amount imposed for the same overall conduct, nor is any authority considering the overall proportionality of the overall punishment. Based on these four main shortcomings, I have concluded that the current legal framework of imposing fines for international cartels fails to adhere to proportionality principles under both consequentialist and retributive theories.

The risk of over-punishment due to individual authorities failing to consider the overall deterrence and retributive objectives is illustrated by the benchmark manipulation cases. From the perspective of the various prosecuting authorities, it can be argued that the fraud, financial misconduct and antitrust elements of the collusive benchmark manipulation all entail distinct offences. So in their view, each separate violation needs to be punished and prevented through deterrence in accordance with the authority's own sentencing guidelines. However, from the perspective of the accused undertaking, such approach seems artificial, unnecessary and unjustified. In the minds of the colluding persons, there was no separate consideration to (i) collude to jointly manipulate the benchmark (ii) submit false rates and (ii) trigger potential anti-competitive effects. All three artificially distinguished elements are inherently linked in the specific context of the benchmark manipulation for higher profits. To be effective and proportionate, it is sufficient for a penalty to appropriately punish the undertaking for its conduct and to deter this undertaking in particular and other undertakings in general from engaging in this conduct in the future. Successful enforcement hence does not require punishment and deterrence in relation to each separate offence that can be constructed on the basis of the factual elements of the conduct. It added to the risk of excessive punishment in the benchmark cases that the various authorities have independently pursued a particularly high level of deterrence. As each individual authority appears to have included a deterrence 'premium' in its own sanctions the overall sanctions imposed on undertakings are likely to be an accumulation of record fines that reflect overlapping punishment and deterrence objectives.

Sub-question 5

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

This final research sub-question is predominantly normative in nature. It focuses not just on the possibilities that I have identified for better coordination of international cartel sanctioning but also on the options that I believe would be most feasible, suitable and worthy to pursue. My policy recommendations in this regard have mainly been discussed in Chapters 3, 6 and 7. Moreover, it is relevant in the response to this sub-question to draw from the 2013 article that I have written together with John Terzaken, calling for the development of global principles to guide the punishment of international cartels.

Based on the research presented in this dissertation, I find that the objective of better coordination of international cartel sanctioning should be the pursuit of an effective but overall proportionate punishment, to be imposed through as few distinct proceedings as possible. Achieving this objective calls for considerations to be made at various stages of the enforcement of international cartels:

1. Is prosecution and punishment justified given the nexus of the conduct to one's own jurisdiction?

2. Is there a need for prosecution and punishment in one's own jurisdiction in addition to the enforcement of the same conduct elsewhere, or would deference to other authorities be appropriate?

3. In the case of parallel enforcement, how can overlapping punishment be avoided or at least minimised through self-restraint in respect of the part of the conduct that is subject to domestic enforcement?

4. In the case of residual overlapping punishment, how can fine levels be coordinated or unilaterally adjusted to avoid disproportionate fines that go beyond the overall deterrence and retributive objectives sought?

Within the context of the EU, when a cartel involves more than three member states, the European Commission is considered 'best placed' to pursue the matter. The European Commission will then impose one European fine as an alternative to one or several national fines imposed by national authorities. This system allows for proportionality considerations to be applied beyond the confines of national jurisdictions. It also replaces multiple national legal limits on cartel fines by one single European maximum fine amount that is still considered to be appropriate for punishing cartel conduct. In similar fashion, having one overarching authority impose a single fine for cartels involving multiple jurisdictions also beyond the EU would be an ideal solution to prevent the piling on of national cartel fines targeting the same international cartel. However, no 'global competition authority' exists, nor is it very likely to ever be established.

An alternative for avoiding parallel enforcement is the allocation of enforcement to a single national authority as the lead enforcer in cartel cases involving multiple jurisdictions. Either through delegation or deference, other authorities could then enable this lead enforcer to impose a single overarching cartel fine. But for the reasons described above in response to research sub-question 2, the feasibility of this solution seems doubtful. Nevertheless, there are already some notable examples of authorities waiving prosecution in view of enforcement elsewhere.

Especially given the continuing proliferation of active cartel enforcement regimes, it must be expected that international cartels will likely continue to be pursued by multiple authorities in parallel. It is then for the relevant authorities to consider how to avoid or at least limit this *parallel* enforcement from resulting in *overlapping* enforcement and punishment. To this end – and as also explained above in response to the second sub-question – jurisdictional and prosecutorial limitations and self-restraint can be applied on three levels: (i) the basis for asserting jurisdiction, (ii) the material scope of the cartel conduct that is being prosecuted and sanctioned (iii) the calculation of the fine. In respect of the latter element, while current practices generally seek to calculate a fine on the basis of only domestic effects, this will not avoid overlapping enforcement given that the same overall conduct is still subject to multiple fines.

To the extent that (residual) overlapping enforcement exists in respect of the sanctioned cartel conduct, the best way to achieve overall proportionate punishment is through coordination of fines. Ideally, such coordination would entail all authorities of significantly affected jurisdictions to agree on both the desired level of punishment for the overall conduct as well as its translation into individual sanctions. But this would require all authorities to be able to agree on the appropriate overall punishment, despite differing views on how harshly cartel behaviour needs to be punished. As a more practical point, such collaboration would also require more or less simultaneous investigations resulting in comprehensive insight into the scope and scale of the cartel in all relevant jurisdictions at the same time. This seems very hard and perhaps impossible to achieve in practice. Authorities such as the DOJ handle cartel cases through separate, successive proceedings against individual defendants, whereas authorities such as the European Commission are adopting a single fine decision for all defendants involved. Despite these challenges, I would certainly support efforts to achieve genuine international coordination of cross-border cartels, for example through the use of ad hoc inter-agency

task force, adequate and timely information sharing and case coordination between the authorities involved, and where possible the pursuit of simultaneous settlements or sentences that take into account the desired level of overall punishment and deterrence.

It is notable that in the field of anti-corruption enforcement, authorities have been successful in pursuing genuine cross-border coordination of sanctioning. In the 2017 Telia case for example, a global settlement of USD 965 million was reached with US, Dutch and Swedish authorities, comprising fines and disgorgements.[7] The fines and disgorgements were divided between the authorities. Interestingly, it has been suggested that "*international anti-corruption enforcement could look to the experience of antitrust enforcement in seeking ways to create a global regime in which multinational enforcers work together for the public good*".[8] I would argue that this is likely the other way around when it comes to the coordination of sanctioning.

Why can international coordination of fines work for anti-corruption enforcement while being so difficult to achieve for cartel enforcement? Adequately answering this question would require further research beyond the scope of this dissertation. But there are basic differences between the two fields that I believe play an important part:

(i) International cartel infringements are more likely than corruption infringements to trigger enforcement in a variety of different jurisdictions. In jurisdictions other than the one where the conduct took place, cartels create more tangible adverse effects than corruption does. This makes it more likely for authorities to be able and willing to claim jurisdiction over the conduct. Many jurisdictions may also have more established laws, enforcement policies and investigative capabilities in the field of antitrust compared to anti-corruption, making it more likely for foreign cartel behaviour to be prosecuted. The greater the number of authorities involved, the more difficult it is to reach a coordinated outcome;

(ii) Cartel enforcement typically involves the prosecution of multiple cartelists, while corruption cases often involve just one main corporate defendant. This has an impact on the logistics and timing of proceedings, making it much easier to reach a simultaneous and coordinated outcome between authorities;

(iii) In the field of cartel enforcement, most mature regimes have developed fining policies stipulating how cartel fines must be calculated. In the field of anti-corruption enforcement, there generally seems to be a less stringent framework for the calculation of fines, leaving more room for a coordinated solution;

(iv) The current practice of fining international cartels is based on each individual jurisdiction sanctioning a cartel only in respect of its domestic effects. This is the basis for dismissing double jeopardy concerns expressed by defendants. The same approach does not apply to corruption behaviour, which is much more difficult to break down geographically between affected jurisdictions because of the less tangible effects in countries other than where the conduct took place. This seems to have created greater pressure on enforcing authorities to address potential double jeopardy claims by seeking a coordinated penalty rather than piling on multiple individual fines for the same conduct.

At the current stage of international cartel enforcement, a more feasible form of coordination of fines would rest on each prosecuting authority considering the fines already imposed for the same overall conduct elsewhere and unilaterally determining the appropriate level of additional sentencing. In particular, this would require authorities to assess whether the overall conduct warrants any further

7 Roan Lamp, De Brauw, 'Settlements in brief: record-breaking Telia case shows cross-border cooperation' (17 October 2017) available at <https://www.debrauw.com/legalarticles/settlements-brief-record-breaking-telia-case-shows-cross-border-cooperation/>.

8 Jay Holtmeier, 'Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities', 84 *Fordham Law Review* 2 (2015) 519, footnote 160 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5143&context=flr>.

punishment – from a retributive proportionality and/or parsimony perspective. Using the words of the Business and Industry Advisory Committee to the OECD: "*once any jurisdiction sets a fine at an appropriate and proportionate level, another jurisdiction imposing penalties on top of that needs to strike a proper balance*".[9] This assessment clearly goes beyond merely checking whether any foreign sanction has already covered domestic interests (which it will normally not have). It also goes much further than merely avoiding any double counting of relevant turnover.

It is important that the result of any coordination of international enforcement actions or unilateral restraint is clearly described in the fine decisions. Such transparency allows parties to assess whether the authorities have indeed succeeded in avoiding over-punishment. Moreover, it enhances legal certainty and the credibility of enforcement, benefitting market players as well as the enforcement community.

Requiring authorities to take into account the retributive and deterrence objectives already achieved by earlier fines for the same overall cartel is easier said than done. It assumes that authorities are able to assess the appropriate level of overall punishment and to assess the extent to which previous fines have contributed to the desired retribution and deterrence. But how can this be achieved in practical terms, given that not even the national fining guidelines are adequately and transparently taking into account the considerations on proportionate retribution and deterrence? I believe that this question should be the key focus of inter-agency discussions on international coordination of cartel fines. In my view, authorities may in part find solutions by reference to key elements of their existing fining methodologies. For example, they may consider whether the sum of prior fines and the national fine that would normally be imposed exceeds (i) the absolute fine maximum applied by the authority and/or (ii) the penalty that the authority would have imposed if all the effects of the conduct had been confined to its own jurisdiction. Also, it may be considered whether certain aggravating circumstances may have already been sufficiently taking into account elsewhere. But for a large part, adequately taking into account prior foreign fines will require authorities to depart from their existing sanctioning frameworks. They will need to develop a new framework for assessing the extent to which fines – foreign and their own – achieve retributive and deterrence objectives. At the least, this would in my view involve the identification of that part of fines that can considered a basic penalty for entering into the overall cartel agreement, irrespective of the scope of harmful effects, so that duplication or multiplication of sanctioning of this part of the penalty can be avoided. It would also involve a better weighing of deterrence considerations, comparing fine amounts with actual and anticipated gains and enforcement risks.

The proposed approach also assumes that authorities would be willing to unilaterally relinquish the collection of fine amounts in the (cartelist's) interest of overall proportionality. Even if – for example through multilateral agreements on reciprocity – such willingness can be found, there is a risk of authorities rushing through their cartel investigations to avoid being barred from imposing (full) penalties.[10] Overcoming these and other obstacles to achieving better coordination of overall punishment will surely be challenging. It would be much easier to maintain the status quo of authorities imposing cartel fines from a purely national perspective while ignoring the international context of both the conduct and the punishment. But it is submitted that such an isolated and simplistic view on international cartel enforcement is no longer sustainable given the increasingly crowded enforcement arena. As with most other aspects of our global economy, international coordination is needed to address issues arising from cross-border economic activity in a uniform and overall satisfactory and effective manner. Inevitably, this should and will also be the direction for international cartel enforcement.

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9 OECD, *Summary of Discussion of the OECD Roundtable on Cartels Involving Intermediate Goods* (27 October 2015), https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN2/FINAL/en/pdf, at 8.

10 Wouter P.J. Wils, *The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26 World Competition, 2 (2003), at 143. The risk of authorities trying to avoid being barred from imposing (full) cartel fines already exists to a limited extent in situations of inability to pay.

8.2 Answer to the main research question and final considerations

The aforementioned responses to the five research sub-questions form the building blocks for the answer to this dissertation's main question:

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

The answer to this research question starts with a confirmation that the world is indeed characterised by increasingly widespread and active cartel enforcement. The past three decades have witnessed a remarkable proliferation of active cartel enforcement regimes. For global cartels discovered before 2004, it was quite unlikely for any authority outside of North America and Europe to impose fines. Since then, it is common that the conduct is targeted in parallel in more than five jurisdictions, sometimes even more than ten. At the same time, total cartel fine levels have substantially increased, *inter alia* due to the proliferation of active cartel regimes and the more aggressive fining policies adopted by these regimes.

Despite the increasingly crowded international cartel enforcement community, there are still little signs of authorities being willing to limit multiple enforcement of the same overarching cartel behaviour. With rare exceptions, and judging the practices from the outside on the basis of publicly available materials, authorities do not appear inclined to defer prosecution and punishment in view of (prior) enforcement elsewhere.

Authorities have the ability to limit or even avoid *parallel* cartel enforcement from resulting in *overlapping* enforcement and punishment, i.e. the same overall conduct being pursued by multiple authorities without applying clear jurisdictional delimitations. They can do so by exercising jurisdictional self-restraint in respect of (i) the basis for asserting jurisdiction, (ii) the scope of the cartel conduct that is being sanctioned and (iii) the calculation of the cartel fine.

In respect of the first element of asserting jurisdiction, it is notable that despite the growing number of authorities actively pursuing the same international cartel, the trend seems to move towards more expansive rather than less expansive jurisdictional approaches. This is illustrated by the ECJ's final acceptance of the qualified effects test in its 2017 judgement in *Intel*, having dodged the issue for decades. It may not be surprising that with foreign conduct more easily affecting domestic markets, authorities feel the need to expand their reach to target such behaviour. But with authorities exploring the limits of extraterritorial enforcement, concerns of overlapping punishment are only increasing.

Such concerns are further enhanced by all prosecuting authorities focusing on the same overarching collusive conduct in its entirety, especially where a great number of different (types of) authorities are involved. This is demonstrated by the interest rate derivative benchmark manipulation cases. At least 28 different authorities were involved in pursing these cases, including financial regulators, competition authorities and anti-fraud agencies. Together, they have imposed fines on twelve banks and two brokerage firms for a total amount of over 9.5 billion euro. While each authority may have imposed its penalties merely from its own enforcement perspective (antitrust, fraud, financial misconduct) and only in view of domestic harm, it cannot be denied that they have all punished the exact same overarching conduct.

In respect of corporate fining practices, it has become common practice for competition authorities to calculate cartel fines on the basis of affected sales in one's own jurisdiction. This is also the basis for dismissing defendant claims of double jeopardy and over-punishment: each authority is merely punishing the domestic effects of a cartel. But this argument fails to convince from the perspective of proportionality of overall punishment. It suggests that the offence of entering into (and maintaining) a cartel is comprised of multiple, distinct parts for each affected jurisdiction, and that it is justified for

each such specific part of the conduct to be punish and deterred by a separate penalty. In the eyes of cartel defendants, such an approach will likely be artificial. While theoretically possible, it is quite unlikely for the cartel participants to have deliberately decided for the cartel arrangements to cover each individual jurisdiction, at least where global markets are concerned. Given that the offence committed essentially concerns one and the same international infringement, punishment should be limited to what is necessary to achieve the overall retributive and deterrence objectives in respect of that single overarching infringement.

A key feature of common national cartel fining methodologies is the direct and linear link between the level of the fine and a cartelist's turnover achieved with selling the affected products. This approach in itself is difficult to reconcile with either retributive or consequentialist notions of proportionate punishment It is submitted that cartel fines should better reflect a certain base culpability shared between all cartel participants. Furthermore, instead of a linear or proportional function, a regressive relationship between a proxy for harm and the severity of the penalty would be more consistent with retributive proportionality and empirical research on intuitive notions of fair punishment.

The sanctioning of international cartels currently entails little more than the piling on of multiple national fines, amplifying the identified shortcomings of national cartel sanctioning policies. It enhances the overreliance on relevant sales as a proxy for harm caused by the cartel as opposed to culpability for entering into (and maintaining) the cartel. The lack of parsimony considerations being applied at the national and the international level increases the risk of overall fine levels well exceeding what is necessary and sufficient for future crime prevention purposes. Finally, no totality principle or other appropriate absolute maximum exists at a worldwide level to limit the total fine amount imposed for the same overall conduct, nor is any authority considering the overall proportionality of the overall punishment.

Based on the research presented in this dissertation, it is submitted that the ultimate common objective of international cartel enforcement should be the pursuit of an effective but overall proportionate punishment, to be imposed through as few distinct proceedings as possible. In the absence of any 'global competition authority', authorities should strive to limit parallel enforcement of the same cartel conduct through delegation or deference to those best placed to pursue and adequately punish the behaviour. While there are some notable examples of authorities waiving prosecution in view of enforcement elsewhere, it remains doubtful whether authorities would be willing and able to turn this into common practice.

Accepting the reality of parallel cartel enforcement, it is for those authorities pursuing the same conduct to seek coordination to try and limit or even avoid overlapping enforcement and punishment. Coordination of not just the object of each respective proceeding but also of the level of fines to be imposed would be the best way to achieve overall proportionate punishment. Ideally, such coordination would entail all authorities of significantly affected jurisdictions to agree on the desired level of punishment for the overall conduct as well as its translation into individual sanctions. While successfully applied in the field of anti-corruption, such close coordination of sanctioning seems very hard and perhaps impossible to achieve in the area of cartel enforcement.

A more realistic alternative entails each prosecuting authority making a conscious decision on the effectiveness and proportionality of imposing an additional fine, taking into account penalties already imposed elsewhere. This is not to say that any foreign fines should automatically offset or reduce domestic penalties. The approach merely requires authorities to acknowledge that penalties imposed elsewhere will have already contributed to the achievement of the overall deterrence and punishment objectives.

The outcome of my dissertation is therefore that overall proportionality of fines for international cartels can only be ensured if authorities will start to take into account the extent to which retributive and consequentialist objectives have already been achieved through sanctions imposed elsewhere. Such an

approach is likely to raise many practical and political issues, and trying to resolve these issues through increased coordination of international cartel enforcement will surely be challenging. But it is submitted that the status quo of simply piling on individual fines imposed on the basis of domestically-focused sanctioning policies is no longer sustainable. In view of an increasingly globalised economy and a growingly crowded enforcement environment, the need for the development and implementation of guiding principles to coordinate the sanctioning of international cartels will only become more pressing.

There are some promising signs of the enforcement community slowly moving in the right direction. On an ad hoc basis, there have been some cases where authorities and courts have actually taken into account prior fines imposed abroad. The DOJ has advocated for the concern of the piling on of multiple fines imposed for the same conduct to be more firmly addressed through inter-agency coordination and better consideration of the overall punishment objectives.[11] It revised its enforcement policies to this end in March 2018. It is certainly laudable that the US is showing thought leadership in this regard. At the same time, judging from the expansive approaches still taken by the DOJ in the LCD and LIBOR cases, one will have to wait and see how this new internal policy will result in actual self-restraint in imposing corporate penalties.

To advance policy initiatives of individual authorities, I would strongly encourage the ICN and the OECD to expand their advocacy efforts into the area of coordination of international cartel sanctioning. Both organisations have produced a very impressive body of work aimed at advancing the effectiveness of national cartel enforcement and improving international coordination when it comes to the investigation and prosecution of international cartels. It is now time to focus on the development of concrete guiding principles to also start coordinating the punishment of international cartels. I would sincerely hope that those involved in these discussions can draw guidance or at least inspiration from the research and recommendations presented in this dissertation.

8.3 Recommendations for further research

Apart from advancing the policy discussion on the better coordination of sanctions for international cartels, I would also hope for the academic debate in this area to further develop. There are several elements of potential research that I have deliberately excluded from the scope of this dissertation. However, additional research into these elements would be very valuable for gaining a more comprehensive understanding of the relevant issues. In my view, the most interesting areas for further research are the following:

a) *The impact of sanctioning other than through corporate fines*: While this dissertation has solely focused on corporate fines, authorities have a wider arsenal of potential sanctions to punish cartel behaviour, targeting corporations or individuals. Clearly, the extent to which overall retributive and deterrence objectives are achieved can best be assessed on the basis of the full range of sanctions imposed. It would hence be recommended to expand the research to also analyse the interplay between different types of sanctions in ensuring effective and proportionate overall punishment.

b) *The impact of private enforcement*: Effective private enforcement can be said to add significantly to the retribution and deterrence of cartel behaviour, especially where it is not just compensatory but also punitive in nature (as it is in the US on the basis of treble damages). With the increased focus on improving the effectiveness of private enforcement in the EU and elsewhere, it would be very interesting to study the extent to which private enforcement may and should affect public enforcement in the context of proportionality of overall punishment.

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

c) *The economic perspective on optimal fines for international cartels*: There is a wide body of economic literature focusing on optimal cartel enforcement, studying whether current fine levels are sufficiently deterrent. But I believe the research in this field could be expanded by further analysing the impact of parallel enforcement and multiple punishment of international cartels from an economic perspective on optimal fine levels.

d) *A study of authority views on the desired level of overall retribution and deterrence*: The ICN and OECD have both conducted surveys on national fining policies and methodologies. Further studies could be conducted to assess the extent to which authority views diverge on the desired level of overall retribution and deterrence that they believe is warranted in punishing international cartel behaviour. This could form the basis for a debate on potential harmonisation of such views, in turn creating better opportunities for coordinating international cartel fines.

e) *A study of authority perspectives on coordination of fines 'from the inside'*: As I have only based my findings on publicly available materials, I have not had access to internal policy documents or insights from government officials on what goes on 'behind the scenes'. This may be a blind spot if relevant developments, practices and discussions are taking place that are not (yet) visible to the wider public, including myself. It would be very valuable to complement the 'outside view' view presented in this dissertation with an 'inside view' on authority perspectives on possibilities to better coordinate international cartel fines.

f) *Necessary revisions of existing legislative frameworks*: I have largely ignored existing legislative frameworks in discussing possible ways of improving the coordination of international cartel sanctioning and in presenting my recommendations in this regard. But the acceptance of guiding principles on taking into account prior cartel fines imposed elsewhere would surely require legislative action in many jurisdictions or at least would require amendment of existing cartel fining guidelines. As a valuable extension of the research in this dissertation, one could therefore look at the potential implementation of such principles on a national level. This would involve the analysis of existing legislative frameworks and the proposal of concrete adjustments to these frameworks that would be necessary to accommodate the recommendations on better coordination of international cartel fines.