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

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## ANNEX 4

### EXECUTIVE SUMMARY

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

This dissertation assesses the current practices of parallel international cartel sanctioning and challenges these practices from the perspective of proportionality of overall punishment. It is based on the combined research conducted for the publication of six separate articles. Adopting various perspectives and using different research methods, this dissertation addresses the following main research question: *How does the parallel public antitrust enforcement of international cartels affect the overall punishment of these cartels and how can and should proportionate punishment be ensured in a world characterised by increasingly widespread and active cartel enforcement?*

A quantitative analysis of the enforcement of global cartels reveals that the world is indeed characterised by increasingly widespread and active cartel enforcement. The past three decades have witnessed a remarkable proliferation of active cartel enforcement regimes. This has resulted in global cartels commonly being pursued in parallel in more than five jurisdictions, sometimes even more than ten. This not only multiplies the number of enforcement proceedings for cartel defendants, it also pushes total cartel fines to even higher levels.

While the international community of active cartel enforcers continues to grow, there are still little signs of authorities being willing to limit multiple enforcement of the same overarching cartel behaviour. Rather than adopting jurisdictional self-restraint, authorities appear keen to extend their extraterritorial reach to punish foreign cartel conduct affecting domestic markets. They justify the lack of delimitations as to the cartel conduct that is being prosecuted by claiming that their sanctions are merely addressing a cartel's domestic effects. This is also the basis for dismissing defendant claims of double jeopardy and over-punishment. But this argument assumes that the offence of entering into (and maintaining) a cartel is comprised of multiple, distinct parts for each affected jurisdiction, and that it is justified for each such specific part of the conduct to be punished and deterred by a separate penalty. From the perspective of cartel defendants, such an approach appears to be artificial, inappropriate and unnecessary. They will consider the offence committed to concern one and the same international infringement. Jurisdictional borders were likely irrelevant when implementing the cartel, making it difficult to justify why the number of affected jurisdictions should affect the overall penalty.

With insufficient jurisdictional delimitations, *parallel* cartel enforcement results in *overlapping* cartel enforcement. That should not in itself jeopardise the proportionality of cartel fines if the prosecuting authorities were to – collectively or individually – limit their penalties to what is necessary to achieve the overall retributive and deterrence objectives in respect of the overarching cartel conduct. However, in sharp contrast, current sanctioning of international cartels is characterised by the piling on of individual fines imposed on the basis of domestically-focused sanctioning policies. What's more, national fining policies and methodologies in themselves can be challenged for failing to adhere to either retributive or consequentialist notions of proportionate punishment. These shortcomings are amplified when multiple national fines are combined to punish international cartel offenders. This adds to the concerns that arise at the international level due to the lack of parsimony or retributive proportionality considerations being applied to the overall punishment.

Based on the research presented in this dissertation, it is submitted that the ultimate common objective of international cartel enforcement should be the pursuit of an effective but proportionate punishment for the cartel conduct in its entirety, to be imposed through as few distinct proceedings as possible. Various options exist to avoid multiple authorities pursuing the same overall cartel conduct, but their

feasibility in practice is doubtful. Accepting that parallel enforcement of international cartels will be the reality for the foreseeable future, it is for the prosecuting authorities to seek coordination of not just the object of each respective proceeding but also of the level of fines to be imposed. Ideally, such coordination would entail all authorities of significantly affected jurisdictions to agree on both the desired level of punishment for the overall conduct as well as its translation into individual sanctions. While successfully applied in the field of anti-corruption enforcement, such close coordination of sanctioning seems very hard and perhaps impossible to achieve in the area of cartel enforcement.

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

The conclusion of my dissertation is therefore that overall proportionality of fines for international cartels can only be ensured if authorities will start to take into account the extent to which retributive and deterrence objectives have already been achieved through sanctions imposed elsewhere. There are some promising signs of the enforcement community slowly moving in this direction. Still, many practical and political issues will still need to be overcome before achieving satisfactory coordination of international cartel sanctions. But it is submitted that the status quo of simply piling on national fines in disregard for the proportionality of overall punishment is no longer sustainable in view of an increasingly globalised economy and a growingly crowded enforcement environment.