Proportionality of Fines in the Context of Global Cartel Enforcement

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This article assesses the fundamental elements of national and international cartel sanctioning practices from a proportionality perspective under both retributive and consequentialist theories on punishment. It finds that the current framework of setting fines for international cartels fails to ensure proportionate overall punishment. This is due to two types of shortcomings. First, the amplification at an international level of the failure of national sanctioning methodologies to fully observe retributive or consequentialist proportionality principles. Second, the absence at an international level of an appropriate maximum limit on the level of punishment or any consideration of the overall proportionality of the overall punishment. Overcoming these shortcomings calls for not only the coordination of sanctions between authorities pursuing the same cartel, but also a serious reconsideration of the fundamental elements of national cartel fining methodologies. At the least, achieving overall proportionate punishment requires authorities to start considering the retributive and consequentialist objectives already achieved by fines imposed elsewhere for the same overall cartel conduct.

Keywords: National and international cartel enforcement, sanctioning policy, fine calculation, concurrent enforcement, over-punishment, accumulation of fines, legal theory on punishment, proportionality, retributivism, consequentialism

1 INTRODUCTION

Global cartel enforcement has witnessed very significant changes over the past three decades. First, an exponential growth in the number of antitrust authorities actively pursuing cartel conduct. In the period between 1990 and 2016, the number of authorities that have successfully prosecuted at least one international cartel has risen from 3 to 75.[1] Not surprisingly, data shows that the dominance of the US and the EU

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[1] OECD, Global Forum on Competition, *Sanctions in Antitrust Cases – Summary of Discussion* (1–2 Dec. 2016), para. 26, https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf (accessed 13 Jan. 2020); OECD, Global Forum on Competition, *Sanctions in Antitrust Cases – Paper by John M. Connor* 6 (1–2 Dec. 2016), https://one.oecd.org/document/DAF/COMP/GF(2016)9/en/pdf (accessed 13 Jan. 2020).

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jurisdictions in respect of overall cartel enforcement has significantly declined with the rise of enforcement action elsewhere.[2] A second development is the dramatic and continuous rise of cartel fine levels. Worldwide, annual corporate cartel fines are reported to have increased by a factor 120 in the period between 1990 and 2015.[3] This is not merely a consequence of the increase in the number of active cartel enforcers. The reports of the International Competition Network (ICN) of 2008 and 2017 on the setting of cartel fines both refer to the level of fines in many jurisdictions having significantly increased over the years.[4]

The combination of rapid proliferation of active cartel enforcement regimes and increasingly aggressive sanctioning policies means that international cartels[5] are increasingly likely to be pursued and heavily fined by multiple authorities across various jurisdictions. But at which point do overall fine levels for international cartels become excessive? And to what extent should authorities take into account fines already imposed elsewhere for the same cartel? There appears to be growing recognition for the relevance of these questions. At the same time, the academic literature on the impact of parallel enforcement on the proportionality of overall fines for international cartels is still underdeveloped. To help fill this gap, this article aims to advance the debate by studying the issue of parallel enforcement of international cartels through the lens of legal theory on punishment.

This article considers notions of proportionality under both retributive and consequentialist theories, also touching upon recently developed theories on the punishment of multiple crimes. This theoretical framework is briefly described in the first part of this article. The second part assesses the extent to which national cartel sanctioning policies adhere to retributive and consequentialist proportionality principles, focusing on corporate fines. The third part of this article considers the particular dynamics of parallel enforcement of international cartels, which in essence entails nothing more than the piling on of multiple national fines.

Various choices have been made to limit the scope of this article, thereby also limiting the comprehensiveness of the analysis. In particular, this article focuses on the enforcement practices of authorities, ignoring the legislative and judicial boundaries that may limit their room for manoeuvre. This article also does not assess the mix of

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2 OECD, *Summary of Discussion*, *supra* n. 1, para. 28. In the 1990s, the United States and the EU accounted for 98% of the world's cartel penalties. However, during 2010–2015 the EU accounted for 44% of all penalties (half of this imposed by EU national authorities), the US for 35%, and the rest of the world for 21%.

3 OECD, *Paper by John M. Connor*, *supra* n. 1, at 3–4.

4 ICN, Report to the 7th ICN Annual Conference, *Setting of Fines for Cartels in ICN Jurisdictions* 44 (Apr. 2008); ICN, Report to the 16th ICN Annual Conference, *Setting of Fines for Cartels in ICN Jurisdictions (2017)* 57 (May 2017).

5 In this article, the term 'international cartels' refers to cartels that are subject to public enforcement in more than one jurisdiction.

private and public enforcement instruments applied in each jurisdiction. It contains a simplified analysis by merely taking into account the monetary penalties imposed on corporations. In reality, when assessing the overall proportionality of the punishment for participants of an international cartel, other instruments of cartel enforcement will certainly play a role. While these and other limitations provide for interesting areas for further research to refine the analysis, the author believes that the key conclusions drawn in this article stand even despite these limitations.

1.1 Legal theory on proportionality

The principle of proportionality is often simply described as the notion that '*the punishment must fit the crime*'. Various scholars refer to the principle of proportionality more specifically as the concept that punishments should be proportionate in severity with the seriousness of crimes.[6] Behind this seemingly simple and unambiguous description lie complex debates about (1) what particular aspects need to be taken into account in determining the proportionality of a penalty ('*proportionate to what?*') and (2) how these aspects must be taken into account to calculate a proportionate penalty (the '*quantum of punishment*'). One's position in these debates, and hence one's interpretation and application of the principle of proportionality, largely depends on why punishment is perceived to be justified and necessary, which in itself is the subject of widely diverging views. This means that it is very difficult and perhaps impossible to find a commonly shared definition of the principle of proportionality that has concrete meaning.[7] Rather, this principle must be understood as encompassing various concepts of proportionality of which the meaning and relevance depends on more fundamental questions regarding punishment.

Two philosophical schools of thought can be distinguished when it comes to the justification and purpose of punishment. The first school of thought is comprised of theories that consider retribution to be the ultimate goal of punishment. Such retributive theories 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 deontological and retrospective as they focus on the need to punish the past moral wrongdoing of the offender. The expression of censure is considered a penalty's main objective under

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[6] Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 Crime & Justice 56 (1992); R. A. Duff, *Punishment, Communication, and Community* 135 (OUP 2003).

[7] *See* Richard S. Frase, *Excessive Relative to What? Defining Constitutional Proportionality Principles*, in *Why Punish? How Much? A Reader on Punishment* 263 (Michael Tonry ed., OUP 2011). *See also* Joel Goh, *Proportionality – An Unattainable Ideal in the Criminal Justice System*, 2 Manchester Student L. Rev. 41 (2013).

retributive theories.[8] Other goals such as specific or general deterrence or incapacitation are rejected for they would amount to the treatment of individuals as a means to another end. This conflicts with the Kantian philosophy – key to retributive theories – of treating all individuals as an end in themselves.

The second school of thought is comprised of theories that consider punishment to serve a consequentialist, utilitarian purpose. In line with the philosophy of Jeremy Bentham, these theories focus on the future societal benefits of punishment. They are based on the notion that the act of punishment itself involves conflicting harm to individuals and that this is only justified if the punishment contributes to a positive net value to society going forward. The prevention of future crime through deterrence is one of the main purposes of punishment under consequentialist theories.

As further explained below, retributive and consequentialist theories have a very distinct understanding of the notion of proportionality.

1.1[a] *Proportionality Under Retributive Theories*

Under retributive theories, proportionality is a fundamental concept for determining the level of a penalty. As these theories rest on the notion that an offender is punished because he or she deserves it, proportionality is crucial to ensure 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. But they are divided on the question what key elements determine the degree of blameworthiness.[9] So-called 'harm-irrelevant retributivists' solely focus on the culpability of the offender rather than the harm caused. They argue that the actual outcome of a culpable state of mind is simply a matter of chance or luck and should not be relevant for the level of punishment.[10] Others also consider the harm to society to be a factor of primary importance.[11] Still, even when culpability and harm are both considered to be key elements determining blameworthiness, greater weight is generally attached to culpability. This is also reflected in the principle that there can be punishment without harm but no punishment without culpability.[12]

The great difficulty of seeking retributive proportionality in practice is how to actually measure the 'right' quantum of punishment on the basis of an offender's blameworthiness. Across societies, great differences exist in respect of the severity

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8 von Hirsch, *supra* n. 6, at 65–68, also referring to – and criticizing – the alternative 'benefits and burdens theory'.

9 Max Minzner, *Why Agencies Punish*, 53 Wm. & Mary L. Rev. 882–883 (2012).

10 *Ibid.*, referring to Alexander & Ferzan, Fletcher and Moore. Minzner argues that purely intent-based retributivism is a well-respected and arguably dominant view.

11 Minzner, *supra* n. 9, at 882–883, referring to Moore, Katz and Perry.

12 *Ibid.*, referring to Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 193 (1997).

of penalties for the same types of crimes. Even among the citizens of a particular society, widely diverging views may exist on the appropriate penalty for a particular crime. It is therefore difficult to maintain the view that the principle of proportionality automatically sets fixed sentences for each specific crime, irrespective of cultural, societal or even personal norms.[13]

Andrew von Hirsch has proposed a solution to the dilemma of defining the right quantum of punishment by making a distinction between ordinal and cardinal proportionality.[14] Ordinal, or relative, proportionality concerns the notion that penalties must be scaled according to the comparative seriousness of crimes. Crimes involving greater blameworthiness must be punished with greater severity.[15] This also means that offenders of similar crimes must receive similar punishment. Cardinal proportionality is the principle prescribing that there must be a reasonable proportion between the gravity of a crime and the level of punishment. Cardinal proportionality hence guards against very severe sentences for minor offences and insignificant penalties for crimes involving great personal or societal harm. Given the difficulty of determining what the deserved penalty is for a particular type of crime, cardinal proportionality can only place broad and imprecise constraints on the overall sentencing levels of a society's penal system.[16] But once the anchoring points of a penal system are set within these outer limits, the more restrictive requirements of ordinal proportionality can be applied.

1.1[b] *Proportionality Under Consequentialist Theories*

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). This justifies that similar crimes may be punished differently depending on an offender's likelihood of reoffending. It also justifies that some crimes committed by culpable offenders may still not be pursued if this would require an inefficient use of enforcement resources. Especially for economic crimes, quantitative assessments can be made to estimate the optimal level of sanctions to ensure deterrence, also taking into account the economic value of lower crime levels compared to the costs of enforcement.[17] This means that contrary to retributive theories,

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13 von Hirsch, *supra* n. 6, at 76.
14 *Ibid.*, at 76.
15 Complex issues arise in actually comparing the seriousness of one type of crime with that of another. *Ibid.*, at 79–83.
16 *Ibid.*, at 83.
17 *See* in the context of antitrust fines Wouter P. J. Wils, *Optimal Antitrust Fines: Theory and Practise*, 29(2) World Competition L. & Econ. Rev. 190–191 (2006).

consequentialist theories generally allow for sentencing for certain crimes to be based on a more precise measurement of the 'right' level of punishment.[18]

Even though sentencing levels under consequentialist theories are based on utilitarian considerations of crime prevention rather than the blameworthiness for crimes committed, there is still a role to play for proportionality considerations.[19] First, utilitarianism prescribes that prosecution and punishment should only be pursued if the benefits of doing so outweigh the costs (so-called 'ends proportionality'). Second, punishment must not be more costly or more severe than is necessary to achieve the same intended benefits to society ('means proportionality', also referred to as the principle of parsimony).[20] However, even if these forms of proportionality are respected, consequentialist views on sentencing still allow for the justification of a penal system in which deterrence is achieved by low levels of enforcement combined with harsh penalties even for minor offences.

1.1[c] *Proportionality and Multiple Offences*

Research shows that when a person is convicted for committing multiple crimes, judges tend to impose overall sentences that are lower than the sum of the standard sentences for each individual crime committed.[21] In addition, individuals are often allowed to serve sentences for multiple crimes concurrently rather than consecutively. Psychological studies confirm that this sentencing practice is in line with intuitive notions of fair and proportionate punishment.[22] But the practice is difficult to explain under legal theory on retributive punishment.

For retributivists, multiple-offense sentencing discounts seem to be at odds with the principle that penalties need to be based on the degree of blameworthiness of the offender. If person A steals five cars while person B steals only one car and both are equally responsible for their actions, should person A not receive a sentence five times that of person B? Various types of retributive theories have

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18 Peter Whelan, *A Principled Argument for Personal Criminal Sanctions as Punishment Under EC Cartel Law*, 4(1) Competition L. Rev. 14 (2007). But see criticism of Wils in the case of cartel fines in *The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis*, 30(2) World Competition L. & Econ. Rev. 210 (2007).

19 *See* e.g. Frase, *supra* n. 7, at 266–267.

20 For its use in the specific context of cartel enforcement, *see* e.g. Marcel Boyer, Anne Catherine Faye & Rachidi Kotchoni, *Challenges and Pitfalls in Cartel Policy and Fining*, Toulouse School of Economics Working Paper 17-852, 18 (2017). *See also* Harold Houba, Evgenia Motchenkova & Quan Wen, *Legal Principles in Antitrust Enforcement*, 120(3) Scandinavian J. Econ. 861 (July 2018).

21 Jesper Ryberg, *Retributivism, Multiple Offending, and Overall Proportionality*, in *Sentencing for Multiple Crimes* 13 (Jan de Keijser, Julian V. Roberts & Jesper Ryberg eds, OUP 2017); Jan de Keijser, Julian V. Roberts & Jesper Ryberg, *Sentencing the Multiple Offender*, in *Sentencing for Multiple Crimes* 3 (2017).

22 de Keijser, Roberts & Ryberg, *supra* n. 21, at 4; Julian V. Roberts & Jan de Keijser, *Sentencing the Multiple-Conviction Offender*, in *Sentencing for Multiple Crimes* 148 (2017). But note the criticism from Ryberg in respect of what he calls 'scope-insensitivity'. Ryberg, *supra* n. 21, at 25–28.

been developed to justify why this should not be the case. Roberts and De Keijser justify multiple-offense sentencing discounts by arguing that the culpability for committing two crimes is lower than twice the culpability for committing a single crime, especially when multiple crimes are related and committed within a continued culpable state of mind.[23] In other words, they focus more on the culpability of the offender than on the harm caused by the offence in determining the right quantum of punishment, and find that for multiple offences the culpability is often overlapping. Bennett has developed an alternative theory, based on the notion that the need for the state to express blame and the need for an offender to make amends for multiple wrongdoings discovered at the same time, is not much greater than what would be required for a single instance of the wrongdoing.[24] Yet other scholars (Jareborg, Bottoms, Lippke) have argued that retributive punishment requires the application of a certain absolute maximum penalty irrespective of the number of offences committed, hence setting a limit on undiscounted accumulation of sentences for individual offences.[25] This is consistent with the totality principle, i.e. the notion that in case of multiple crimes, the overall punishment must reflect the overall culpability.[26]

While the various theories justifying multiple offence sentencing discounts may make sense intuitively, they have been criticized for being implausible or grounded on non-retributive principles.[27] Some therefore consider mixed theories that incorporate consequentialist principles to provide a better justification. In particular, it is argued that sentencing discounts are warranted to ensure that punishment is not more severe than is needed to serve its purposes.[28] In this view, a maximum sentence will still be set by retributive proportionality principles while allowing parsimony or 'means proportionality' to further limit the overall penalty level. In practice, this may result in a sentencing regime that calls for concurrent rather than consecutive punishment for multiple offences, albeit with a limited upwards adjustment for every additional, distinguishable offence to achieve marginal deterrence.[29]

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[23] Roberts & de Keijser, *supra* n. 22, at 145–146.

[24] C. Bennett, *Do Multiple and Repeat Offenders Pose a Problem for Retributive Sentencing Theory?*, in *Recidivist Punishments: The Philospher's View* 148 (C. Tamburrini & J. Ryberg eds, Lexington 2012). *See* criticism from Zachary Hoskins, *Multiple-Offense Sentencing Discounts* (2017), in *Sentencing for Multiple Crimes* 80–84.

[25] Hoskins, *supra* n. 24, at 76–80. *See also* the discussion of the notion of 'overall proportionality' by Natalia Vibla, *Toward a Theoretical and Practical Model for Multiple-Offense Sentencing* (2017), in *Sentencing for Multiple Crimes* 169–172; and the criticism of Ryberg, *supra* n. 21.

[26] Christopher Bennett, *Retributivism and Totality Can Bulk Discounts for Multiple Offending Fit the Crime?* (2017), in *Sentencing for Multiple Crimes* 59–60, referring to Thomas.

[27] Hoskins, *supra* n. 24, at 75.

[28] *Ibid.*, at 88–89.

[29] Richard S. Frase, *Principles and Procedures for Sentencing of Multiple Current Offenses* (2017), in *Sentencing for Multiple Crimes* 191–192.

1.2 Proportionality of national cartel fining methodologies

Sanctions imposed on corporations for international cartel conduct essentially comprise the sum of individual fines set under national fining methodologies. Before considering the proportionality of overall fine levels applied to international cartels, it is therefore necessary to first focus on the proportionality of cartel fines imposed at the national level. This section will do so by looking at the common features of national cartel fining methodologies as described in two surveys amongst antitrust enforcement regimes: the 2017 ICN study *Setting of Fines For Cartels in ICN Jurisdictions*[30] and the 2016 study *Sanctions in Antitrust Cases*[31] by the Global Forum on Competition of the Organisation for Economic Cooperation and Development (OECD). These studies have assessed the enforcement practices of thirty-three (ICN study) and forty-three (OECD study) jurisdictions.

1.2[a] *Common Features of Cartel Fine Methodologies*

The ICN study into cartel fine setting practices for cartels finds that there is little international consensus on the appropriate level of fines. The study concludes that there is 'no single nor simple solution to effectively deter, detect and punish cartels'.[32] This reflects the continued existence of various types of fine calculation methodologies, but also the variation of sanctions other than corporate fines that may be used by authorities. At the same time, both the ICN and the OECD studies identify certain key elements of sanctioning principles that are nowadays common to many mature cartel sanctioning regimes. This concerns (1) the use of relevant turnover to calculate a base fine, (2) adjustments to the base fine in case of mitigating and/or aggravating circumstances and (3) an absolute fine limit, often linked to total worldwide turnover.

1.2[a][i] Relevant Turnover as the Basis for Fine Calculation

The vast majority of jurisdictions assessed by the ICN in 2017 calculates the fine for an individual cartel member on the basis of a variation of the turnover that relates to the products affected by the cartel, e.g. 'relevant turnover', 'value of affected sales' or 'volume of affected commerce'.[33]

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30 ICN (2017), *supra* n. 4.

31 OECD, Global Forum on Competition, *Sanctions in Antitrust Cases - Background Paper by the Secretariat* (1–2 Dec. 2016), https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf (accessed 13 Jan. 2020).

32 ICN (2017), *supra* n. 4, at 3, 57.

33 There are (still) a few jurisdictions that rely on a company's total global turnover or total turnover in the relevant country as the basis for cartel fine calculations. But there appears to be international

Most fining methodologies use a certain proportion of the relevant turnover to arrive at a 'base fine', also taking into account the duration of the cartel.[34] 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%.[35] 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.[36] But it is notable that 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.[37] The EU fining guidelines for example indicate that the percentage – also called the gravity factor – is determined by 'a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented'.[38] There are only a few jurisdictions that attempt to relate the percentage of relevant turnover to the estimated harm. In the US and Canada, the base fine is normally set at 20% of the volume of affected commerce. In the US, this percentage was chosen to reflect the estimated average gains from cartels (10%) plus the additional harm due to consumers no longer being able or willing to purchase the relevant products at inflated prices (10%).[39] In Canada, the 20% is comprised of 10% as proxy for the overcharge and other economic harm caused by the cartel plus an additional 10% for deterrence 'to ensure that the fine does not represent a mere licensing fee or cost of doing business'.[40] Japan's base fine methodology is also noteworthy, as it focuses on the disgorgement of illegal gains resulting from the cartel. To this end, surcharge rates are applied to the relevant turnover. These rates have been set on the basis of estimated long-term average profit rates for businesses of different types and sizes.[41]

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convergence towards the use of relevant rather than total turnover. ICN (2017), *supra* n. 4, at 19–20. ICN (2008), *supra* n. 4, at 44. For an overview of variations, *see* OECD, *supra* n. 31, at 11–12.

34 There is a notable divergence between authorities on how the duration of a cartel is taken into account in the fine calculation. *See* ICN (2017), *supra* n. 4, at 26; OECD, *supra* n. 31, at 12–13.

35 OECD, *supra* n. 31, at 13.

36 *Ibid.*, at 11; ICN (2008), *supra* n. 4, at 15, 19.

37 ICN (2017), *supra* n. 4, at 24–25; OECD, *supra* n. 31, at 13–15.

38 European Commission, 2006 Fining Guidelines, point 22.

39 ICN (2008), *supra* n. 4, at 16, 20; United States Sentencing Commission, *Guidelines Manual 2018 (USSG)* 312 (2018).

40 OECD, Global Forum on Competition, *Sanctions in Antitrust Cases – Contribution by Canada* 10 (1–2 Dec. 2016), https://one.oecd.org/document/DAF/COMP/GF/WD(2016)9/en/pdf (accessed 13 Jan. 2020).

41 OECD, *supra* n. 31, at 10, 14.

1.2[a][ii] Mitigating and/or Aggravating Circumstances

Once a base fine is set, authorities typically consider a wide range of mitigating and/or aggravating circumstances to assess whether an upward or downward adjustment is warranted. Some common examples of mitigating circumstances are effective cooperation, voluntary or immediate termination, limited participation, negligence, non-implementation, low profit-rate, compensation of victims, having a compliance programme and acceptance of responsibility.[42] Examples of aggravating circumstances are recidivism, leading role, retaliation against other cartel members, refusal to cooperate and intent.[43] The size of a corporation may be taking into account either as a mitigating circumstance (for small companies) or an aggravating circumstance (for large companies).

1.2[a][iii] Absolute Fine Limit

All cartel enforcement regimes assessed by the ICN in 2017 apply a certain 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.[44] It is notable that worldwide *total* turnover is mostly used for determining the maximum fine, while *relevant* turnover is typically relied on for determining the base fine. This can be explained by the fact that overall legal limits are generally used to prevent cartel fines from jeopardizing the viability of the company as a whole.[45] Clearly, even fines amounting to less than 10% of worldwide total turnover may well result in insolvency risks. This is why almost all antitrust authorities take the 'ability to pay' into account in determining the final fine amount.[46] Authorities are justifying this practice on proportionality grounds and the argument that cartel fines should not result in driving companies out of the market, hence in itself causing a reduction of competition.[47]

1.2[b] *The Objectives of National Cartel Fining Policies: Deterrence Versus Retribution*

Antitrust agencies position themselves primarily as consequentialists, enforcing antitrust laws in order to ensure future compliance. All the agencies responding to the 2017 ICN study state that they are imposing cartel fines with the aim of achieving crime prevention

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42 *Ibid.*, at 15; ICN (2017), *supra* n. 4, at 31–33.
43 OECD, *supra* n. 31, at 15; ICN (2017), *supra* n. 4, at 29–31.
44 OECD, *supra* n. 31, at 21. Alternatively, some jurisdictions rely on domestic turnover or relevant turnover for the calculation of the maximum fine.
45 *Ibid.*, at 20; ICN (2017), *supra* n. 4, at 34. But *see* David R. Little, *The Case for a Primary Punishment Rationale in EC Anti-Cartel Enforcement*, 5(37) Eur. Competition J. 48–49 (2009).
46 OECD, *supra* n. 31, at 23; ICN (2017), *supra* n. 4, at 34.
47 ICN (2017), *supra* n. 4, at 34.

through deterrence.[48] In addition to deterrence, just over half of the agencies also mentioned retribution as a punishment objective. Other aims such as recovering unlawful gains and restitution for victims are pursued by only a few agencies.

If deterrence is the primary goal of cartel enforcement, how should fines be set to serve this objective? Economic theory prescribes that if agencies aim for 'complete deterrence' (i.e. prevent any violations from occurring),[49] fines should exceed the expected gain from the violation multiplied by the inverse of the probability of a fine being effectively imposed.[50] This may be achieved through different combinations of fine levels and enforcement probability (e.g. low chances of punishment compensated by very severe sanctions), as long as the outcome is that the perceived risk outweighs the expected gains.[51] In the case of cartel violations, it may be sufficient that at least for some of the prospective cartel members the expected gains are outweighed by the perceived risk.[52]

It follows from the above that fine calculation methodologies mainly relying on the two factors of (1) gain resulting from the violation and (2) probability of enforcement, confirm the pursuit of complete deterrence as the primary goal of agency punishment.[53] It is very interesting that cartel fining policies seem to have little regard for either factor. Probability of enforcement is not mentioned as a relevant element for cartel fine setting for the jurisdictions assessed by the ICN and OECD. Gain resulting from the cartel violation is an element that has some, but still very limited, relevance. While it may be considered that the percentage applied to relevant turnover constitutes a proxy for excess profits achieved by cartelists,[54] for most jurisdictions the percentage actually has little to do with such profits because the percentage is determined on the basis of gravity considerations. Japan, Canada and the US are notable exceptions, setting the percentage or surcharge rate on the basis of estimated

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48 ICN (2008), *supra* n. 4, at 5–6. The OECD study refers to most authorities imposing fines for deterrence purposes. OECD, *supra* n. 31, at 9. The EU 2006 Fining Guidelines also clearly stress the objective of deterrence and not (also) other objectives such as retribution. *See also* Hans Gilliams, *Proportionality of EU Competition Fines: Proposal for a Principled Discussion*, 37(4) World Competition (2014), para. 4.

49 As an alternative to complete deterrence, agencies may pursue 'optimal deterrence' (also referred to as the 'cost internalization model'), meaning that only those violations are prevented for which the societal harm outweighs the gains. Minzner, *supra* n. 9, at 860–861. However, as this approach only considers net social welfare effects while ignoring welfare distribution (e.g. from consumers to cartel members), it is argued to be unsuitable in the context of antitrust enforcement. Wils, *supra* n. 17, at 191–193.

50 Minzner, *supra* n. 9, at 861; Wils, *supra* n. 17, at 191. Wils has noted not just the difficulty of *ex post* estimating the *ex ante* and subjective expected gains of cartel defendants, but also the biases that affect a defendants *ex ante* estimated gains. *Ibid*., at 193–195; Wils, *supra* n. 18, at 210.

51 Wils, *supra* n. 17, at 195. *See also* Michael K. Block & Gregory J. Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68(5) Geo. L.J. 1131–1139 (1980).

52 Wils, *supra* n. 17, at 202; Wils, *supra* n. 18, at 210, fn. 79.

53 Minzner, *supra* n. 9, at 880–881.

54 ICN (2008), *supra* n. 4, at 19.

average profit rates. The EU fining guidelines mention that for the purpose of deterrence, fines can be increased 'to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount'.[55] However, to the author's knowledge the European Commission has never applied such an increase. There is an obvious reason for why agencies are not generally assessing the gains achieved by cartelists: it is generally very costly and difficult to determine cartel profits, if possible at all.[56] Moreover, if cartel fines were based on gains resulting from the conduct, the absence of reliable data could lead to under-enforcement.[57] This is why profit-based fine methodologies are considered to be far less workable in practice than turnover-based methodologies.

While largely ignoring the factors that would be most relevant to achieving deterrence goals, cartel fining methodologies instead seem to be primarily designed to achieve retributive punishment. The most prominent factors determining the level of the fine are retrospective, relating to the blameworthiness of the past wrongdoing. First, the base fine calculated on the basis of relevant turnover is meant to reflect – albeit as an imperfect proxy – the harm caused by the cartel. Second, the proportion of relevant turnover used to calculate the base fine is typically based on factors determining the overall gravity of the conduct, such as the nature, the market coverage and the geographic scope of the cartel. Duration and most of the typical aggravating and mitigating circumstances also serve to assess the blameworthiness of the offence and the offender. Some of these circumstances relate to culpability, such as the level of intent or negligence, the role played in the cartel (e.g. ring-leader, passive, coerced), the seniority of personnel aware of and involved in the conduct, state encouragement of the conduct, and the existence of an antitrust compliance program.[58]

The emphasis on elements related to harm and culpability suggests that while antitrust agencies primarily position themselves as being driven by consequentialists goals, their fining methodologies are more consistent with the pursuit of retribution. This finding is consistent with empirical studies into punishment intuition of individuals.[59] As stated by Minzner, 'people talk like consequentialists but act like retributivists'.[60] Minzner has found this to apply to several US administrative agencies as well,[61] and the same seems to apply to antitrust agencies.

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55 European Commission, 2006 Fining Guidelines, point 31. Under the European Commission's 1998 Fining Guidelines this was mentioned as an aggravating circumstance.

56 *See* e.g. Wils, *supra* n. 17, at 206–208; Wils, *supra* n. 18, at 210; OECD, Global Forum on Competition, *Sanctions in Antitrust Cases – Paper by Hwang Lee* 6 (1–2 Dec. 2016), https://one.oecd.org/document/DAF/COMP/GF(2016)10/en/pdf (accessed 13 Jan. 2020); USSG, *supra* n. 39, at 312–313; Boyer, Faye & Kotchoni, *supra* n. 20, at 25–28.

57 *Ibid*.

58 OECD, *supra* n. 31, at 15; ICN (2008), *supra* n. 4, at 29–31.

59 Minzner, *supra* n. 9, at 862–863.

60 *Ibid*., at 863.

61 *Ibid*., at 903.

This is not to say that future crime prevention plays no role in cartel fining methodologies. Some agencies can increase penalties solely in view of deterrence considerations.[62] Also, two factors that can play an important role in cartel fine setting, recidivism and size of the undertaking, can serve both retributive and deterrence objectives.[63] The same is true for the application of the absolute fine limit.[64] Finally, even where agencies claim to be primarily interested in achieving future compliance through deterrence, they may well consider this aim to be best pursued by imposing sanctions that reflect the punishment that is truly deserved.[65]

1.2[c] *Retributive Proportionality of National Cartel Fines*

Current cartel sanctioning policies can be said to go a long way in meeting the requirements of retributive proportionality of punishment. As explained above, while emphasizing deterrence aims, fine calculation methodologies actually seem to be designed to ensure that cartel fines reflect the penalty that is deserved on the basis of a combination of factors related to both culpability and harm. An important deficiency is the fact that harm is typically only taken into account through the proxy of relevant turnover. But even irrespective of which proxy is used to assess the harm resulting from a cartel, current cartel fining methodologies reveal critical shortcomings in the light of retributive proportionality.

First, current methodologies lack a base penalty that applies irrespective of the level of relevant turnover affected by the cartel. This is surprising given that a cartel agreement can constitute an infringement even if no harmful effects are demonstrated and even if it was never actually implemented.[66] Moreover, the lack of a base penalty fails to recognize the base culpability that is shared by all participants of a cartel. There are good grounds to argue that all companies voluntarily agreeing to restrict competition between them share an equal blame for entering into a cartel, irrespective of differences in existing market positions. Harm-irrelevant retributivists will even argue that cartel fines should in principle be the same for all participants of a cartel, except in case of different degrees of culpability.

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62 *See* e.g. the 2006 Fining Guidelines of the European Commission, points 30 and 37.

63 Minzner, *supra* n. 9, at 895–897, 899–900.

64 Apart from preserving the viability of a company, the fine limit can also be considered to reflect the maximum justified punishment under cardinal proportionality. *See* Niamh Dunne, *Convergence in Competition Fining Practices in the EU*, 53(2) Common Mkt. L. Rev. 475 (2016); Little, *supra* n. 45, at 49. Conversely, Hans Gilliams (*supra* n. 48, para. 38) argues that the 10% statutory limit applied in the EU does not provide a cardinal anchoring point because it bears no relation to the gravity or duration of the infringement, and instead is only to avoid imposing fines on undertakings which they are unable to pay.

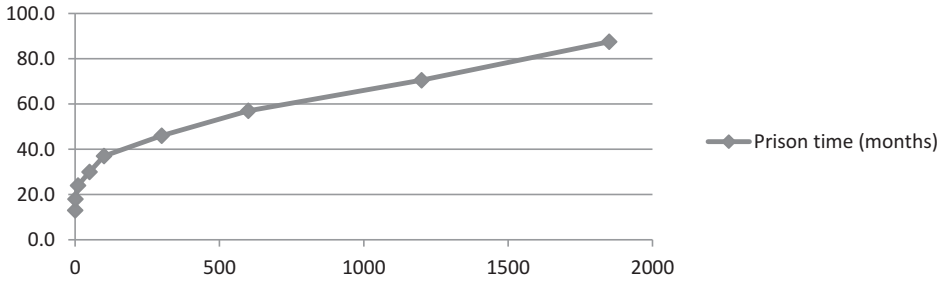
65 Minzner, *supra* n. 9, at 904–905.

66 *See* e.g. the 2006 Fining Guidelines of the European Commission, point 22, indicating that 'whether or not the infringement has been implemented' may affect the gravity factor.

A second shortcoming of current cartel fine methodologies results from the proportional or linear link between relevant turnover and the severity of punishment. This link is maintained until the maximum fine level is reached, at which point additional harm no longer increases the penalty. This is difficult to reconcile with retributive theories on punishment for multiple crimes and empirical research on intuitive notions of fair punishment. Rather than twice the harm resulting in twice the penalty, retributive proportionality principles justify twice the harm resulting in less than twice the penalty, up to a point where the maximum punishment is reached and any additional harm will no longer increase the severity of the penalty. This calls for a regressive link between relevant turnover and cartel (base) fines, meaning that with greater levels of harm the appropriate level of incremental punishment gradually declines.

Cartel sanctioning systems reflecting both base culpability and a regressive increase for greater levels of affected sales do not only exist in the theoretical world of retributive proportionality. This methodology actually forms the basis for the calculation of prison sentences for individuals responsible for cartel conduct under the US Sentencing Guidelines.[67] It entails a base recommended prison sentence of 10–16 months, moving regressively towards a sentence of 78–97 months as greater VoC is involved (see graph below).[68]

Relationship between VoC (USDm) and prison time (months)



If this methodology is applied and apparently considered appropriate for the sentencing of individuals, why are the same principles not applied when fining corporations? Perhaps part of the answer lies in the relatively much more serious impact of

[67] The calculation starts with a 'base offense level' of twelve points, adding offense levels depending on the volume of commerce (VoC). This starts with two additional offense levels for a VoC exceeding USD 1 million, four levels for a VoC exceeding USD 10 million, and eight levels for a VoC exceeding USD 100 million. The maximum number of VoC related offense levels to add to the base level is 16, for an amount exceeding USD 1.85 billion.

[68] This assumes that the defendant has no criminal history, nor that other special circumstances affect the recommended sentence. USSG, *supra* n. 39, at 407 (Sentencing Table).

additional prison time for an individual compared to a higher financial penalty for a corporation. But this does not yet explain why the same methodology would not also work for corporate fines. The main argument against the use of a lump sum starting amount may be that it would affect small corporations much more harshly than large corporations.[69] Clearly, a fixed amount irrespective of relevant or total turnover may well jeopardize the viability of a small company, while at the same time hardly affecting the profitability of a large multinational. Such considerations play no role when imposing prison sentences on individuals, because taking away months or years of someone's freedom can be considered to affect all individuals equally, irrespective of wealth. But as legitimate as these considerations may be when punishing corporations, it is submitted that their justification lies in consequentialist arguments rather than retributive principles. From a purely retributive perspective, it is difficult to justify even the base culpability being subject to differentiation based on one's relevant turnover. In other words, the heavy reliance on relevant turnover in the setting of cartel fines seems to over-emphasize the harm component of blameworthiness over the culpability component. This means that from an ordinal proportionality perspective, cartel members with little affected sales may receive punishment less than what they deserve, while cartel members with high affected sales may receive punishment in excess of what they deserve.

1.2[d] Consequentialist proportionality of national cartel fines

As explained in the first section of this article, consequentialist proportionality focuses on both (1) 'ends proportionality' and (2) 'means proportionality' or parsimony. The first principle prescribes that prosecution and punishment should only be pursued if the benefits of doing so outweigh the costs. While this is certainly a relevant consideration to be made by agencies before deciding whether or not to take on a cartel case, they will generally do so as part of an enforcement priority policy, not as part of its fining methodology. It therefore lies beyond the scope of this article to assess the extent to which ends proportionality principles are being adhered to at a national level.

The principle of parsimony prescribes that punishment must not be more costly or more severe than necessary to achieve the same intended benefits to society, e.g. crime prevention through deterrence. Adherence to this principle therefore first requires an assessment of the level of punishment that is necessary in view of its objectives. Economic theory suggests that this is largely determined by the expected gain and the likelihood of detection, two factors that do not play a key role in

[69] This was in fact why the 1998 Fining Guidelines of the European Commission were criticized. *See* Wils, *supra* n. 18, at 207–209.

current cartel fine setting. This indicates that authorities are not fully focused on identifying the appropriate level of punishment from a purely consequentialist perspective. But authorities do use other means to achieve consequentialist goals, for example by adjusting fine levels upwards when the outcome of the standard methodology is considered to provide for insufficient deterrence.[70] The context for this is typically specific deterrence, and on the back of that also general deterrence.[71]

But even where authorities do take deterrence considerations into account in their fine calculations, two critical shortcomings can be identified from a parsimony perspective. First, authorities only seem to be concerned about adjusting fines upwards to achieve additional deterrence, not in adjusting fines downwards in cases where the standard methodology is considered to result in punishment exceeding what would be necessary to achieve sufficient (specific) deterrence. This means that the outcome of largely retributive calculation methodologies can be increased but typically not reduced in view of consequentialist considerations. The second shortcoming is that where authorities feel the need to increase fine levels to achieve sufficient deterrence, they do so without taking into account the key elements determining the appropriate fine level from a deterrence perspective. It appears in practice that the overall size of a company (even beyond the relevant products and markets affected by the cartel) is mainly relied on to assess whether a fine is sufficiently deterrent. But this is ignoring the fact that economic theory calls for an assessment of whether expected risks outweigh the expected gains, not an assessment of whether the potential fine can be sufficiently 'absorbed' or cross-subsidized by the profits made with other activities.

Based on these shortcomings, it is submitted that current cartel fining methodologies do not provide for a robust framework of assessment for determining optimal fine levels from a consequentialist perspective.

1.3 The challenge of ensuring overall proportionality of fines for international cartels

1.3[a] Current practices of sanctioning international cartels

International cartel enforcement 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

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[70] *See* e.g. Commission, 2006 Fining Guidelines, points 30 and 37.

[71] As noted by Gilliams (*supra* n. 48, para. 5), a primary focus on the pursuit of general deterrence would tend to result in much higher fines as even maximum penalties can easily be said to be proportionate to the objective of achieving general deterrence.

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.[72] This is despite cartel defendants often claiming – unsuccessfully – that fines already imposed elsewhere should be taken into account.[73] But such claims are dismissed on the ground that enforcement is merely addressing the domestic effects, so that there is no double punishment or violation of the principle of *ne bis in idem*, even if such a principle were to bind authorities in an international context.[74] Authorities are hence generally not prepared to defer prosecution or to impose lower fines in view of enforcement elsewhere. In other words, companies facing multiple sanctions for the same overall cartel conduct cannot count on any bulk discounts.

There are some exceptions to the purely national perspective on international cartel sanctioning maintained by most authorities. First, there have been ad hoc efforts in some international cartel cases to prevent overlapping punishment through double counting of the same relevant turnover. For example, in the *Air Cargo* case, authorities acknowledged that including all turnover on inbound and outbound flights would result in some of this turnover also being taken into account by other authorities prosecuting the same worldwide cartel. The European Commission, the US Antitrust Division and Australian Competition and Consumer Commission each used a different methodology to tackle this issue.[75]

Second, some authorities have shown willingness to defer prosecution if punishment elsewhere also addresses the domestic effects of an international cartel. The Canadian Competition Bureau for example did not pursue an Auto Parts cartel investigation because a fine had already been imposed in the US which also

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[72] ICN (2008), *supra* n. 4, at 32, stating that few competition authorities seem to adjust their fines when fines are imposed for multinational cartel conduct in other competition authorities. The author is aware of only a handful of cases where authorities or courts have taken foreign cartel fines into account. This includes the conviction of AUO for its involvement in the TFT-LCD cartel (Transcript of Proceedings, *United States v. AU Optronics*, No 3:09-cr-00110-SI (N.D. Cal. 20 Sept. 2012), at 16, and penalties imposed in Australia in connection with the Air Cargo and Maritme Car Carrier cartels (Summaries of the judgments 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; Federal Court of Australia, *Australian Competition and Consumer Commission v. Qantas Airways Limited* (2008) FCA 1976).

[73] A recent example is case T-466/17 *Printeos and Others v. Commission*, in which Printeos had unsuccessfully argued before the General Court that the European Commission should have taken into account a prior fine imposed by the Spanish authority also in connection with cartel conduct regarding the sale of envelopes. The General Court dismissed the argument because of different underlying facts and the lack of territorial overlap. Judgment of the General Court of 24 Sept. 2019, EU:T:2019:671, paras 157 to 161.

[74] *See* e.g. ECJ judgment of 14 Feb. 2012 in case C-17/10 *Toshiba*, ECLI:EU:C:2012:72, paras 101–103. *See also* Pieter Huizing, *Parallel Enforcement of Rate Rigging: Lessons to Be Learned from LIBOR*, 3(1) J. Antitrust Enforcement 190–200 (2015); Pieter Huizing, *Fining Foreign Effects: A New Frontier of Extraterritorial Cartel Enforcement in Europe?*, 40(3) World Competition 365–392 (2017).

[75] John Terzaken & Pieter Huizing, *How Much Is Too Much? A Call for Global. Principles to Guide the Punishment of International Cartels*, 27(2) ABA Antitrust Mag. 55 (2013).

addressed the Canadian effects.[76] Brazil's Administrative Council for Economic Defense (CADE) may close or choose not to open a case if foreign sanctions target the potential effects in Brazil.[77] The US Antitrust Division has also developed a policy for exercising prosecutorial discretion in view of foreign enforcement. But for this policy to result in a reduction of US sanctions, prior foreign penalties must have taken into account harm caused to US consumers and businesses.[78] The reality is that authorities are keen to avoid overstepping their jurisdictional limits by explicitly limiting the scope of their sanctions to domestic effects only.

Third, there are increasingly louder calls for authorities to go even further in the coordination of sanctions imposed for international cartel conduct.[79] 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'.[80] Calls for closer coordination of fines in parallel proceedings have also been made by the Japanese Ministry of Economy, Trade and Industry, noting the 'growing concern about overlapping application of competition laws or imposition of multiple surcharges by several countries'.[81] Both the International Bar Association and the American Bar Association have also stressed the need for cooperation regarding sanctioning of international cartel cases to avoid over-deterrence or double-jeopardy.[82]

There is hence developing advocacy on international coordination of sanctions and there are ad hoc efforts to avoid overlapping enforcement in specific

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[76] DOJ, *Nishikawa Agrees to Plead Guilty and Pay $130 Million Criminal Fine for Fixing Prices of Automotive Parts*, press release (20 July 2016), https://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive (accessed 13 Jan. 2020).

[77] ICN (2008), *supra* n. 4, at 32.

[78] Terzaken & Huizing, *supra* n. 75, at 56–57. Note also the DOJ policy announced in Mar. 2018 to improve the coordination with other domestic and foreign authorities with respect to the sanctioning of the same conduct. 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 (accessed 13 Jan. 2020).

[79] *See also* Pieter Huizing, *InnoLux v. AU Optronics: Comparing Territorial Limits to EU and US Public Enforcement of the LCD Cartel*, 6(2) J. Antitrust Enforcement 255–256 (2018).

[80] OECD, Working Party No. 3 on Co-operation and Enforcement, *Roundtable on Cartels Involving Intermediate Goods – Executive Summary* 4 (27 Oct. 2015), https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN3/FINAL/en/pdf (accessed 13 Jan. 2020).

[81] English summary of the METI *Report on Research for Case Examples Concerning the Implementation of Regulations on International Cartel Cases Among Overseas Competition Regulatory Authorities* (3 June 2016), http://www.meti.go.jp/english/press/2016/0603_02.html (accessed 13 Jan. 2020).

[82] ABA, comments on proposed update to the *Antitrust Guidelines for International Enforcement and Cooperation* 18–21 (1 Dec. 2016), https://www.justice.gov/atr/page/file/915786/download (accessed 13 Jan. 2020); IBA, comments on proposed update to the *Antitrust Guidelines for International Enforcement and Cooperation* 6 (Dec. 2016), https://www.ibanet.org/Document/Default.aspx?DocumentUid=57AFCE72-2189-4E28-9758-DE17F7B64949 (accessed 13 Jan. 2020).

cases. Still, current enforcement of international cartels is still very much characterized by individual authorities maintaining an isolated and purely domestic view on appropriate punishment. Proportionality and deterrence considerations are applied in the context of only the domestic effects, even for international cartels.

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. This author is aware of only one international cartel case that involved the criminal prosecution of individuals in more than one jurisdiction: the *Marine Hose* case. In this case, the Antitrust Division of the US Department of Justice entered into plea agreements with three UK nationals amounting to prison sentences of thirty, twenty-four and twenty months for their role in the global marine hose cartel.[83] But the plea agreements allowed the three individuals – who were arrested in the US – to return to the UK to be sentenced under UK criminal law for the same overall cartel conduct. The plea agreements emphasized that the US and UK sentences were solely based on the domestic effects in the US and the UK, respectively. Yet, they provided for a reduction of the US prison sentences for any period of imprisonment in the UK, effectively allowing the individuals to serve the US and UK sentences concurrently. This arrangement resulted in a complete deferral of the US sentences.[84] Still, the Antitrust Division considered the outcome to be a clear victory for US consumers because the three individuals were 'punished adequately'.[85] The sentencing arrangement between the US and the UK has more widely been considered a successful outcome.[86] This shows that in the context of criminal enforcement of individuals – and in sharp contrast to the practice of corporate sentencing – authorities consider that proportionality and deterrence considerations may well transcend national borders.

1.3[b] *Shortcomings to the Proportionality of International Cartel Sanctioning*

The current international cartel enforcement practice reveals several shortcomings when assessed from a retributive and consequentialist proportionality perspective. Some of these shortcomings already exist at a national level and are amplified at the

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[83] *United States v. Bryan Allison, David Brammar and Peter Whittle*, plea agreements (12 Dec. 2007), https://www.justice.gov/atr/case/us-v-bryan-allison-et-al (accessed 13 Jan. 2020).

[84] DOJ, *British Marine Hose Manufacturer Agrees to Plead Guilty and Pay $4.5 Million for Participating in Worldwide Bid-Rigging Conspiracy*, press release (1 Dec. 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-at-1055.html (accessed 13 Jan. 2020).

[85] Ron Knox, *DoJ Willing to Defer to Foreign Enforcers – If the Punishment Is Right*, Global Competition Review (17 Apr. 2012), https://globalcompetitionreview.com/article/1055425/doj-willing-to-defer-to-foreign-enforcers-if-the-punishment-is-right (accessed 13 Jan. 2020).

[86] *See* e.g. IBA, *supra* n. 82, at 6; OECD, *supra* n. 56, at 19.

international level. Others solely arise as a result of parallel enforcement of the same international cartel.

A first shortcoming relates to failure to take into account overlapping culpability in international cartel enforcement. National cartel fine methodologies do not provide for a base penalty to reflect the base culpability equally shared between all cartelists. Instead, culpability is typically reflected in a gravity factor that is applied to the relevant turnover of an individual member of the cartel. This methodology obscures that the fact that the punishment will be based on a company's culpability for entering into the cartel agreement, even irrespective of the (national) effects of the cartel. Without such culpability there can be no punishment, and hence this culpability must to a certain extent be considered to be reflected in each national cartel fine, albeit not clearly and distinctively visible as base penalty applicable to all cartel members.

For international or global cartels, the base culpability for entering into the cartel is likely to cover the cartel in its entirety, not distinguishing between different jurisdictions. In the case of global markets, a worldwide cartel can arise as a result of the simple agreement among multinationals to raise prices across the board, without discussing particular countries or even continents. It even seems to make little economic sense to have territorial differentiation in the application of the terms of a cartel in the case of truly global markets. It is hence very plausible that in the case of international or global cartels, one decision has been made to enter into the cartel, rather than separate and autonomous decisions to enter into the cartel in respect of each potentially affected jurisdiction. While this one decision may amount to a crime in multiple jurisdictions and hence to multiple crimes being committed, these crimes will likely have been committed in '*a continued culpable state of mind*'.[87] In other words, using the framework of assessment of Roberts and De Keijser, there will likely be a maximum relatedness between these crimes because of temporal contiguity, causality and similarity of conduct.[88] This points to an overlapping culpability or '*shared state of culpability*' underlying the respective national crimes. Where these respective national crimes are separately penalized – as is the case under current international cartel enforcement practices – retributive proportionality calls for the application of what Roberts and De Keijser refer to as the '*culpability correction*'.[89] This means that if there has been prior punishment of the same overall cartel elsewhere, authorities need to amend their fine calculations so as not to take into account the same base culpability for

[87] Roberts & de Keijser, *supra* n. 22, at 146.
[88] *Ibid.*, at 146–149.
[89] *Ibid.*, at 138–139.

entering into the cartel. Not applying this correction in the respective sentences would result in double counting of culpability and hence in over-punishment.

If authorities were to apply a base penalty for entering into a cartel, then it would become much more apparent that the undiscounted accumulation of such base penalties in the case of parallel enforcement of international cartels violates retributive proportionality principles. It would be much easier to call into question why under current international cartel enforcement, a base penalty for entering into a cartel is multiplied by the number of jurisdictions in which a particular member of the cartel happens to sell its products. However, the absence of a base penalty does not remove this shortcoming, it merely obscures it.

Another shortcoming from a retributive proportionality perspective is the continued overemphasis on harm as opposed to culpability. This overemphasis already exists in national cartel fine methodologies, the effects of which are increased at the international level in the case of parallel enforcement. As explained above, the common use of relevant turnover as the underlying basis for the fine calculation establishes a direct, linear and proportionate link between this proxy for harm caused by the cartel and the fine. As part of parallel enforcement of an international cartel, relevant turnover is essentially accumulated across jurisdictions. This accumulation in turn multiplies the overall (base) fine. As a result, the application of the simple 'twice the harm resulting in twice the punishment' methodology is extended from the national to the international level, enhancing the imbalance between the element of harm and the element of culpability in determining overall blameworthiness. Rather than a linear and proportional link, additional relevant turnover only regressively increasing the overall punishment would be more consistent with retributive proportionality principles.

A third shortcoming of international cartel enforcement is the lack of parsimony being taken into account across jurisdictions. Parsimony calls for authorities to impose the least punishment necessary to achieve their deterrence aims. It is submitted that this is not an exercise that each authority can conduct in national isolation, as that would wrongly assume that punishment for the same conduct elsewhere is not capable of meeting general and specific deterrence objectives at home. In reality, aggressive national enforcement in one jurisdiction will likely contribute to the prevention of international cartels covering this jurisdiction and others at the same time. In the case of international cartel enforcement, it may even be more appropriate to speak of one shared, transnational deterrence objective rather than independent national deterrence objectives.

The lack of parsimony considerations is apparent at the national level, but its effects are amplified at the international level. With an accumulation of national fines for the same overall conduct, the question becomes more pressing whether additional enforcement and penalties still contribute to future prevention of cartel conduct. If only some of

the jurisdictions significantly affected by an international cartel were to impose national penalties, the overall punishment may still lack sufficient deterrence even though each underlying fine could be considered sufficiently deterrent in its national context. But with less and less cartel enforcement 'blind spots' in the world, the concern is not so much whether sufficient overall deterrence is achieved, but whether undiscounted accumulation of fines results in over-deterrence and over-punishment.

A fourth shortcoming relates to the lack of any overall proportionality assessment or totality principle being applied at an international level. Under current practices of international cartel enforcement, each authority is solely considering the proportionality of its own punishment. But no one is assessing whether the overall punishment still fits the cartel conduct as a whole. Put differently, no one is asking (except perhaps for the cartel defendants) when 'enough is enough'. This would not be surprising in case of multiple national crimes lacking any international connection. But it would be quite artificial to consider an international cartel to comprise multiple, wholly independent national cartel violations. Maintaining this fiction lacks credibility in the context of both cross-border cartel enforcement policy and legal theory on proportionality of punishment.

In addition to the absence of an overall proportionality assessment, current international cartel enforcement also lacks an proportionality safeguard in the form of an absolute legal limit to overall punishment. The only absolute limit that applies across jurisdictions is the sum of applicable national legal limits. But this aggregate limit is soon rendered meaningless in the case of multiple authorities all setting the limit at 10% or more of a company's worldwide turnover.[90] Moreover, it is difficult to explain why the number of affected jurisdictions alone – irrespective of the scope or scale of a cartel – multiplies the maximum punishment that can be imposed for a company's participation in the same overall cartel. Why would a company selling cartelized products to consumers solely in country A be subject to a maximum fine of 10% of its worldwide turnover, while another company selling the same type of cartelized products to the same number of consumers for the same amount but spread across country A and country B, deserve a maximum fine of up to 20% of its worldwide turnover? If in a purely national context additional harm at some point is no longer considered to justify a higher penalty, should the same not apply across borders in case of parallel enforcement of the same overall cartel? Especially in the case of fully overlapping culpability, there seems to be no justification for maintaining that companies selling cartelized products in a higher number of countries deserve to be punished proportionately more harshly.

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[90] *See* OECD, *supra* n. 56, at 18–19; Huizing, *supra* n. 79, at 259.

1.3[c] *Towards Overall Proportionality of Fines for International Cartels*

The assessment above shows that the standard cartel fining methodology currently used by authorities fails to ensure either retributive or consequentialist proportionality. This applies at the national level and even stronger at the international level. In trying to bring overall punishment of international cartels more in line with proportionality principles, it would seem logical to first resolve the deficiencies at the national level. But it is doubtful that a complete overhaul of common cartel fining methodologies would be feasible or realistic within a reasonable timeframe. For the more mature regimes, the current methodologies are the result of a decades-long evolution of fining practices that have become increasingly curbed by case law. At the international level, the convergence of both mature and modern regimes towards the current standard has been applauded. A proposal for fundamental change to this standard seems unlikely to attract much enthusiasm. And even if national fining methodologies could be changed to achieve perfectly proportionate national cartel sentences, proportionality issues would still arise at the international level in the case of undiscounted accumulation. It hence seems to make more sense to aim for better consistency with retributive and consequentialist proportionality principles at an international level while accepting the fundamental aspects of the cartel fining methodologies currently applied at the national level.

Within the context of the EU, when a cartel involves more than three Member States, the European Commission is generally considered 'best placed' to pursue the matter.[91] 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 'international competition authority' exists, nor is it likely to ever be established.[92] Alternatively, one could consider appointing 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

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[91] European Commission, *Commission Notice on Cooperation Within the Network of Competition Authorities*, C 101/03 (2004), point 14.

[92] Terzaken & Huizing, *supra* n. 75, at 54–55.

impose a single overarching cartel fine. But for various reasons, the feasibility of this hypothetical solution seems similarly doubtful.[93]

Accepting that international cartels will likely continue to be pursued by multiple authorities in parallel, the 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.[94] But this would call for 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. A more feasible form of coordination of fines would rest on each prosecuting authority considering the fine(s) 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 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'.[95] This assessment clearly goes beyond merely checking whether any foreign sanction has already covered domestic interests (which it will not have). It also goes much further than merely avoiding any double counting of relevant turnover.

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. It 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 – 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.[96]

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93 Huizing (2015), *supra* n. 74, at 201.

94 *Ibid.*, at 200.

95 OECD, *Summary of Discussion of the OECD Roundtable on Cartels Involving Intermediate Goods* 8 (27 Oct. 2015), https://one.oecd.org/document/DAF/COMP/WP3/M(2015)2/ANN2/FINAL/en/pdf (accessed 13 Jan. 2020).

96 Wouter P. J. Wils, *The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26(2) World Competition 143 (2003); Huizing (2015), *supra* n. 74, at 200. 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.

Overcoming these and other obstacles to achieving perfect 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.

2 CONCLUSION

Following an assessment of the proportionality of fines for international cartels within the framework of legal theory on punishment, this article finds that – borrowing the words of 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 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 cartelized products will also be punished twice as hard. While this is prima facie precisely what retributive punishment prescribes, it is argued in this article that retributive proportionality principles actually require cartel fines to better reflect a certain base culpability for the conduct that forms the essence of the infringement: entering into and maintaining a cartel. Moreover, it is submitted that 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, this article concludes that the current legal framework of imposing fines for international cartels fails to adhere to proportionality principles under both consequentialist and retributive theories.

It is submitted 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. Simply piling on individual fines imposed on the basis of domestically focused sanctioning policies is sure to avoid difficult discussions between authorities. But this article argues that in view of proportionality considerations, maintaining this status quo is not sustainable in the context of an increasingly globalized economy and a growingly crowded enforcement environment.