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Parallel enforcement of rate rigging: lessons to be learned from LIBOR

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ABSTRACT

The manipulation of interest rate benchmarks such as the London Interbank Offered Rate and the Euro Interbank Offered Rate triggered enforcement actions by a multitude of competition authorities, anti-fraud agencies, and financial market regulators. While the authorities involved have closely cooperated in investigating the matter, little inter-agency coordination can be witnessed with respect to the prosecution and punishment of the committed offences. Instead of avoiding jurisdictional overlap, each authority sanctioned the worldwide collusion between the banks without applying any clear delimitation and generally without taking into account fines imposed for the same conduct elsewhere. In these kinds of cross-border and multi-agency cases, maintaining such isolated views creates concerns of double prosecution and excessive punishment. In view of the increasingly crowded international enforcement environment, guiding principles must be developed to coordinate the exercise of prosecutorial discretion from a global perspective and to ensure overall proportionality of sanctions.

KEYWORDS: concurrent enforcement, multiple prosecution, over-punishment, deterrence, proportionality, international cooperation

JEL CLASSIFICATIONS: F55, F68, G18, G28, K21, K42, L41

I. INTRODUCTION

The global investigation, prosecution, and punishment of the manipulation of interest rate benchmarks by some of the world's largest banks has created an unprecedented challenge for the international enforcement community. At least 27 authorities from 12 different jurisdictions are involved in the matter.[1] The focus area of

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[1] The European Commission, the US Department of Justice (DOJ), the US Federal Bureau of Investigation (FBI), the US Securities and Exchange Commission (SEC), the US Commodity Futures Trading Commission (CFTC), the US Federal Reserve, the Canadian Competition Bureau, the UK Financial Services Authority (FSA) (now the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), the UK Office of Fair Trading (OFT), the UK Competition Commission, the UK Bank of England, the UK Serious Fraud Office (SFO), the Swiss Financial Market Supervisory Authority

these agencies ranges from antitrust violations to fraud to financial misconduct. Thus far, settlements have been reached with eight banks and two brokerage firms for a total fine amount of over 4.7 billion euro.[2] This includes the European Commission's record breaking 1.7 billion euro fine settlement. As many of the interest rate benchmark investigations of financial, fraud, and antitrust authorities in the USA and in Europe are still ongoing, even more fines are to be expected.

The benchmark manipulation cases brought so far involved cross-border investigations conducted jointly by several authorities. This article focuses on whether a high level of inter-agency coordination can also be witnessed with respect to the post-investigation phases, ie the prosecution and punishment of the committed offences. To this end, the article examines the underlying conduct that is being sanctioned and the jurisdictional delimitations that are applied by the various enforcement agencies. This assessment will reveal that the authorities did not succeed in avoiding jurisdictional overlap, nor in coordinating their use of prosecutorial discretion. On the contrary, the various authorities all focused on the same underlying collusion between the banks, without applying any clear delimitation. This article further explains that the absence of coordination with respect to the prosecution and punishment of cross-border and multi-agency cases creates double jeopardy or *bis in idem* concerns, as well as risks of over-punishment. Due to the steady growth of aggressive enforcement by competition authorities, financial regulators and fraud agencies around the world, the number of cases involving simultaneous actions by these various types of enforcers will only increase. This is also particularly the case with respect to benchmark manipulation offences, which under the new EU

(FINMA), the Swiss Competition Commission (COMCO), the German BaFin, the German Bundesbank, the Netherlands Authority for the Financial Markets, the Dutch central bank, the Dutch Fiscal Intelligence and Investigation Service, the Australian Securities and Investments Commission, the Japan Financial Services Agency (JFSA), Japan Securities and Exchange Surveillance Commission, the Monetary Authority of Singapore, the Securities and Futures Commission of Hong Kong, the Hong Kong Monetary Authority, the Chinese National Development and Reform Commission and the China Banking Regulatory Commission.

[2] On 27 June 2012, Barclays received a 59.5 million pound (74 million euro) fine from the FSA, a 200 million dollar (160 million euro) fine from the CFTC and a 160 million dollar (128 million euro) fine from the DOJ. On 19 December 2012, UBS received a 160 million pound (197 million euro) fine from the FSA, a 700 million dollar (531 million euro) fine from the CFTC, a 500 million dollar (379 million euro) fine form the DOJ and a 59 million swiss franc (49 million euro) fine from the FINMA. On 6 February 2013, the Royal Bank of Scotland received fines from the FSA (87.5 million pound; 102 million euro), the CFTC (325 million dollar; 240 million euro), and the DOJ (150 million dollar; 111 million euro). On 25 September 2013, ICAP received fines from the FSA (14 million pound; 17 million euro) and the CFTC (65 million dollar; 48 million euro). On 29 October 2013, Rabobank received fines from the FCA (105 million pound; 123 million euro), the CFTC (475 million dollar; 344 million euro), the DOJ (325 million dollar; 235 million euro) and the Dutch public prosecutor (70 million euro). On 4 December 2013, the European Commission reached settlements with eight financial institutions for a total amount of 1712 million euro. On 15 May 2014, RP Martin was fined by the FCA (630,000 pound; 772,000 euro) and the CFTC (1.2 million dollar; 875,000 euro). Lloyds was fined on 28 July 2014 by the FCA (35 million pound (excluding the fine imposed for manipulation of the Repo Rate); 44 million euro), the CFTC (105 million dollar; 78 million euro) and the DOJ (86 million dollar; 64 million euro).In this article, non-euro amounts have been converted into euro using the exchange rate of the day on which the relevant fine was imposed, as indicated on the website www.oanda.com.

Directive and Regulation on insider dealing and market manipulation will need to be pursued as criminal offences by the individual Member States.[3] In view of the increasingly crowded international enforcement environment, new guiding principles must be developed to ensure overall proportionality of sanctions. This article explores the elements that may guide authorities in future global investigations towards a more coordinated and proportionate punishment.

II. THE FACTUAL CONDUCT

The benchmark manipulation cases focus on the process whereby so-called 'panel banks' submit rates as input for the daily calculation of interest rate benchmark figures. The submitted rates ought to reflect the interest rate at which an individual panel bank expects to be able to borrow funds from another bank.[4] The benchmark figure is calculated by first discarding the submissions on the highest and lowest ends of the spectrum and averaging the remaining rates.[5] The London Interbank Offered Rate (LIBOR) is the most frequently used benchmark for interest rates and relates to a variety of currencies such as the Dollar, the Yen, the Sterling, the Swiss Franc or the Euro.[6] Other reference rates include the Euro Interbank Offered Rate (Euribor), the Tokyo Interbank Offered Rate (TIBOR), the Singapore Interbank Offered Rate (SIBOR) and the Hong Kong Interbank Offered Rate (HIBOR). All these benchmarks are published for a variety of maturities (eg two weeks or six months).

The investigations have revealed two distinct forms of benchmark manipulation by the panel banks. First, the submission of artificially high or artificially low rates in an attempt to influence the overall benchmark figure and to increase profits made on the basis of derivative or money market trading positions. Due to the calculation method of the benchmark rates, the more panel banks collude in submitting artificial rates, the greater the impact of the manipulation. Internal emails of UBS employees show that such manipulation can be very profitable. Moving the benchmark by just one basis point could result in profits or losses for the bank of as much as 4 million dollar.[7] The UK Financial Services Authority found evidence that this type of profit-driven manipulative conduct took place as of January 2005 and continued until

[3] Commission, 'Libor Scandal: Commission Proposes EU-wide Action to Fight Rate-fixing' (25 July 2012) <http://europa.eu/rapid/press-release_IP-12-846_en.htm> accessed 30 September 2014.

[4] The precise definition of the rates panel banks have to submit varies per benchmark. The LIBOR definition for example refers to the rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for and then accepting interbank offers in reasonable market size, while the EURIBOR definition refers to the rate at which Euro interbank term deposits are offered by one prime bank to another prime bank.

[5] The LIBOR benchmark excludes the highest and lowest 25% of submissions while the EURIBOR benchmark excludes the highest and lowest 15% of submissions.

[6] FSA, *Final Notice to UBS AG* [2012] 9 <http://www.fsa.gov.uk/static/pubs/final/ubs.pdf> accessed 30 September 2014 (FSA fine on UBS).

[7] FSA fine on UBS 21.

at least January 2011.[8] However, there are indications that this type of behaviour may have occurred as early as the beginning of the 1990s.[9]

The second form of manipulation was reputation-driven and arose with the start of the financial crisis in August 2007. At that time, panel banks learned that what they submitted as their estimated costs of borrowing was seen in the market as a reflection of their creditworthiness and their financial health.[10] This resulted in management requests for lower submissions. At times, a profit-driven incentive for higher rates conflicted with the reputation-driven aim to submit lower rates. In this respect, a UBS manager clarified in an email to other UBS managers on 9 August 2007 that 'It is highly advisable to err on the low side with fixings for the time being to protect our franchise in these sensitive markets. Fixing risk and [profit and loss] thereof is secondary priority for now'.[11]

The reputation-driven manipulation was implemented through unilateral behaviour by panel banks. In contrast, the profit-driven manipulation was often implemented by several colluding panel banks and brokers in coordinated attempts to alter the interest rate benchmark. Such collusive schemes were effected through a combination of the following four types of actions:

a. making submissions that take into account internal requests from traders to benefit the bank's derivative and money market trading positions;
b. making submissions that take into account requests made by traders at other panel banks or requests made by brokers on behalf of traders at other panel banks;
c. requesting other panel banks (either directly or through brokers) to make submissions that benefitted one's own derivative and money market trading positions; and
d. asking brokers to disseminate false and misleading information on interest rates on which other panel banks relied in an attempt to influence those banks' submissions.

The willingness of competing panel banks to participate in the collusive schemes was based on the promise of reciprocity and was facilitated by friendly relations between traders.[12] The cooperation of brokers was ensured by offering extra trades or 'wash trades' to generate additional broker fees.[13]

[8] For Barclays the relevant period was January 2005–July 2008, for UBS 1 January 2005–31 December 2010, for the Royal Bank of Scotland October 2006–November 2010 and for Rabobank May 2005–January 2011.

[9] Douglas Keenan, 'My Thwarted Attempt to Tell of Libor Shenanigans' (*FT*, 26 July 2012) <http://www.ft.com/cms/s/0/dc5f49c2-d67b-11e1-ba60-00144feabdc0.html#axzz35AaQZpIB> accessed 30 September 2014.

[10] See eg Mark Gilbert, 'Barclays Takes a Money-Market Beating' (*Bloomberg*, 3 September 2007) <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8uEKKBYY7As> accessed 30 September 2014.

[11] FSA fine on UBS 24.

[12] See eg CFTC fine on UBS 17-20.

[13] See eg CFTC fine on UBS 27-29. Wash trades are trades that have no economic justification or ultimate financial result other than the payment of commissions to intermediaries.

III. OVERVIEW OF ENFORCEMENT ACTIONS

The start of government investigations

Soon after the start of the reputation-driven manipulation by panel banks, financial regulators were made aware of the 'lowballing' of LIBOR submissions. On 28 August 2007, an internal email from a Barclays submitter reporting on 'unrealistically low libors' was forwarded to a wide group of addressees including officials from the Federal Reserve Bank of New York, The World Bank and the Dutch Ministry of Finance.[14] Barclays and other banks also contacted the New York Federal Reserve, the Bank of England and the UK Financial Services Authority (FSA) themselves to complain about artificially low LIBOR submissions.[15] An internal FSA report indeed shows that the issue of unrepresentative LIBOR rates was well known and widely discussed within the FSA from the end of 2007 onwards.[16] This did not initially result in any enforcement action. The FSA was of the opinion that the LIBOR-setting process was the responsibility of the British Bankers' Association (BBA), the UK trade association for the banking and financial services sector.[17] As the BBA was not regulated by the FSA, the FSA was reluctant to intervene. It did, however, closely monitor which measures the BBA was taking to ensure that panel banks were making honest submissions.[18]

After several newspapers had reported on the unrealistically low LIBOR submissions in April 2008, the US Commodity Futures Trading Commission (CFTC) contacted the FSA to find out which steps were taken by the UK financial regulator.[19] The CFTC received little response. Two months later, the CFTC again approached the FSA and indicated that it wanted to request information from the BBA and from certain panel banks to investigate the matter.[20] According to the FSA, the subsequent inquiries ultimately caused the UK regulator to formally initiate its own investigation.[21]

The competition authorities in the UK were independently looking at the LIBOR-setting process as early as November 2008.[22] At that time, the UK competition authorities the Office of Fair Trading (OFT) and the Competition Commission expressed their concerns to the FSA regarding 'the potential for collusion amongst

[14] The email was forwarded to a long list of people including Pat Leising of the World Bank, Fabiola Ravazzolo of the New York Federal Reserve Bank and Daniel Koerhuis who worked at the Dutch Ministry of Finance at that time. The email is available at <http://www.newyorkfed.org/newsevents/news/markets/2012/libor/August_28_2007_mass_distribution_emails.pdf> accessed 30 September 2014.

[15] FSA, *Final Notice to Barclays Bank Plc* [2012] 27 <http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf> accessed 30 September 2014 (FSA fine on Barclays).

[16] FSA, *Internal Audit Report: A Review of the Extent of Awareness Within the FSA of Inappropriate LIBOR Submissions* [2013] 19–25 <http://www.fsa.gov.uk/static/pubs/other/ia-libor.pdf> accessed 30 September 2014 (FSA Audit Report).

[17] ibid 42.

[18] See eg the FSA's involvement in the review the BBA conducted of the LIBOR setting process in the first half of 2008. ibid 47–50.

[19] ibid 53–55.

[20] ibid 69–70.

[21] ibid 69.

[22] ibid 80.

submitting banks to the detriment of consumers or other banks'.[23] Interestingly, the head of the FSA urged the head of the OFT not to launch an investigation into the LIBOR manipulation.[24] According to the FSA, there was no need for such an investigation as the BBA was already making progress in improving the rate setting process. Moreover, the FSA warned for the financial stability implications of announcing an investigation into LIBOR.

It was not until 2011 that other competition authorities got involved, apparently only after leniency applicants made these authorities aware of the alleged anti-competitive conduct. On 5 January 2011, UBS requested leniency from the Canadian Competition Bureau, leading to the start of an investigation on 4 May 2011 into anti-competitive conduct relating to Yen LIBOR by six banks and two brokers.[25] UBS also obtained conditional leniency from the Swiss Competition Commission.[26] The Antitrust Division of the US Department of Justice (DOJ) granted UBS conditional leniency with respect to the LIBOR and TIBOR manipulation, while granting Barclays conditional leniency in relation to the Euribor manipulation.[27] The European Commission commenced its investigation into the benchmark manipulation in March 2011, first focussing on Euribor and later also covering LIBOR and TIBOR.[28] The European investigations also arose out of leniency applications by UBS and Barclays.[29]

In addition to financial regulators and competition authorities, anti-fraud agencies are the third type of enforcers that became involved in the matter. The DOJ Criminal Division's Fraud Section, which acts in close coordination with the CFTC and the DOJ's Antitrust Division, is pursuing both banks and leading individuals for criminal charges of wire fraud.[30] As of July 2012, the UK Serious Fraud Office,

[23] ibid 80–81.

[24] ibid.

[25] Superior Court of Justice, East Region, Court of Ontario, Canada, *Affidavit of Brian Elliott* [2011] 7; UBS, *Annual Report 2012: Our Performance in 2012* (March 2013) 382 <http://www.ubs.com/global/en/about_ubs/investor_relations/annualreporting/2012.html> accessed 30 September 2014.

[26] UBS (n 25) 382.

[27] ibid. Barclays, 'Barclays Bank Plc Settlement with Authorities' (27 June 2012) <http://www.newsroom.barclays.com/Press-releases/Barclays-Bank-PLC-Settlement-with-Authorities-901.aspx> accessed 30 September 2014.

[28] Commission, 'Libor Scandal: Amendments to Proposed Market Abuse Legislation to Fight Rate-fixing – Frequently Asked Questions' (25 July 2012) MEMO/12/595 <http://europa.eu/rapid/press-release_MEMO-12-595_en.htm> accessed 30 September 2014. Commission, 'Antitrust: Commission Confirms Inspections in Suspected Cartel in the Sector of Euro Interest Rate Derivatives' (19 October 2011) <http://europa.eu/rapid/press-release_MEMO-11-711_en.htm?locale=en> accessed 30 September 2014. 'EU's Almunia Says Rates Probe May Be Wider' (*Reuters*, 25 July 2012) <http://www.reuters.com/article/2012/07/25/eu-almunia-libor-idUSL6E8IPKPW20120725> accessed 30 September 2014.

[29] Commission, 'Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry' (4 December 2013) <http://europa.eu/rapid/press-release_IP-13-1208_en.htm> accessed 30 September 2014.

[30] See eg *United States of America v UBS Securities Japan Co., Ltd.*, Plea Agreement [2012] <http://www.justice.gov/ag/executed-plea-agreement-appendix-b.pdf> accessed 30 September 2014 (UBS Plea Agreement); *United States of America v Tom Alexander William Hayes and Roger Darin*, Complaint [2012] <http://www.justice.gov/ag/Hayes-Tom-and-Darin-Roger-Complaint.pdf> accessed 30 September 2014.

which only targets individuals, decided to pursue the benchmark manipulation as well.[31]

Imposed sanctions

The US and UK financial regulators, together with the DOJ's Fraud Section, have sanctioned the benchmark manipulation by simultaneously entering into individual fine settlements one financial institution at a time. On 27 June 2012, Barclays was the first banks to reach a settlement with the authorities, followed by UBS, the Royal Bank of Scotland, ICAP, Rabobank, RP Martin, and Lloyds. The Swiss Financial Market Supervisory Authority (FINMA) was also involved with respect to UBS, while the Dutch financial regulator and central bank DNB and the Dutch public prosecutor (DPP) joined the UK and US authorities in sanctioning Rabobank. The settlements of Barclays, UBS, and Lloyds related to both the reputation-driven and the profit-driven manipulation, whereas the other banks and brokers were only sanctions in respect of the latter.

Interestingly, the US and UK sanctions imposed on a particular bank do not always relate to the same conduct. The Financial Conduct Authority (FCA, a successor to the FSA) for example identified collusive manipulation by Rabobank of Yen and Dollar LIBOR, while the CFTC and DOJ found Rabobank to have colluded with others in respect of Yen LIBOR and Euribor.

As for antitrust sanctions, the Royal Bank of Scotland thus far is the only bank to have been sanctioned by the DOJ's Antitrust Division in relation to the benchmark manipulation. It is remarkable that Barclays was not pursued by the Antitrust Division for collusion with respect to LIBOR submissions. The bank only obtained conditional leniency with respect to Euribor and the DOJ's Fraud Section clearly established that Barclay's collusive behaviour extended to Dollar LIBOR as well.[32] Rabobank and Lloyds were not charged with antitrust violations by the DOJ either, even though the DOJ, CFTC, and FCA conclude that the Yen LIBOR submitters of both banks colluded from at least mid-2006 to October 2008 to adjust their respective Yen LIBOR submissions to benefit the banks' trading positions.[33]

On 4 December 2013, the European Commission imposed its record breaking 1.7 billion euro fine for collusive manipulation on Barclays, UBS, the Royal Bank of Scotland, Deutsche Bank, Société Générale, JPMorgan, Citigroup, and RP Martin. Rabobank and Lloyds were not targeted by the Commission. The overall fine actually

[31] SFO, 'LIBOR: SFO to Investigate' (6 July 2012) <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/libor-sfo-to-investigate.aspx> accessed 30 September 2014.

[32] DOJ, Criminal Division, Fraud Section, *Non-prosecution Agreement with Barclays Bank Plc*, Statement of Facts [2012] 12-23 <http://www.justice.gov/iso/opa/resources/931201271017342636594l.pdf> accessed 30 September 2014.

[33] DOJ, 'Lloyds Banking Group Admits Wrongdoing in LIBOR Investigation, Agrees to Pay $86 Million Criminal Penalty' (28 July 2014) <http://www.justice.gov/opa/pr/lloyds-banking-group-admits-wrongdoing-libor-investigation-agrees-pay-86-million-criminal> accessed 30 September 2014, CFTC, 'CFTC Charges Lloyds Banking Group and Lloyds Bank with Manipulation, Attempted Manipulation, and False Reporting of LIBOR' (28 July 2014) <http://www.cftc.gov/PressRoom/PressReleases/pr6966-14> accessed 30 September 2014, FCA, *Final Notice on Lloyds Bank plc and Bank of Scotland plc* [2014] paras 2.12, 2.15, 4.36, and 5.6 <http://www.fca.org.uk/static/documents/final-notices/lloyds-bank-of-scotland.pdf> accessed 30 September 2014.

relates to one multilateral cartel infringement concerning Euribor and seven distinct bilateral cartels concerning Yen LIBOR. This distinction allowed both UBS and Barclays to receive immunity from fines as a result of their leniency applications in relation to Yen LIBOR and Euribor, respectively. As a result of their applications, Barclays avoided a 690 million fine while UBS escaped an otherwise unprecedented 2.5 billion fine. Most other financial institutions received significant fine reductions under the EU Leniency Notice for their cooperation. Moreover, all settling parties received a 10 per cent fine reduction for using the cartel settlement procedure, thereby allowing the European Commission to go through a simplified fining procedure.

Thus far, the sanctions imposed by the European, UK and US authorities have resulted in a total fine amount of 4708 million euro. Most severely punished is UBS with a total penalty of 1156 million euro, followed by the Royal Bank of Scotland (844 million euro), Rabobank (772 million euro), Deutsche Bank (725 million euro), Société Générale (446 million euro), and Barclays (362 million euro). Due to the additional costs of stricter compliance requirements, sanctions on employees and directors, reputational harm and numerous private claims for damages, the overall financial impact of the enforcement for the institutions involved is even much greater.

While not imposing fines, the Japan Financial Services Agency (JFSA) has taken administrative actions against Japanese subsidiaries or branches of Citigroup, UBS, the Royal Bank of Scotland and Rabobank. All four parties received Business Improvement Orders relating to the respective banks' internal processes and compliance. In addition, the Citigroup and UBS subsidiaries received Business Suspension Orders requiring the suspension of certain derivative transactions for a limited time.

The Monetary Authority of Singapore in June 2013 sanctioned 19 banks for their deficiencies in the governance, risk management, internal controls, and surveillance systems relating to the SIBOR submissions.[34] The banks were required to place additional statutory reserves—varying from 60 million euro to over 700 million euro—with the authority at zero interest for a period of at least one year.

Lastly, on 14 March 2014 the Hong Kong Monetary Authority reported on the outcome of its investigation into collusion in relation to the HIBOR benchmark. The authority did not find evidence of collusion between panel banks, but it did identify misconduct by UBS on the basis of internal communication between traders and submitters aimed at influencing UBS' HIBOR submissions.[35] UBS was merely ordered to take appropriate disciplinary action against the individuals involved and to implement a remedial plan. No fine was imposed.

Ongoing investigations

A large part of the investigations into the benchmark manipulation is still ongoing. First, the FCA and the CFTC, the main financial regulators involved, together with the DOJ have so far only reached settlements with seven financial institutions, while some dozen other parties may have also participated in the wrongdoings. Indeed,

[34] MAS, 'MAS Proposes Regulatory Framework for Financial Benchmarks' (14 June 2013) <http://www.mas.gov.sg/news-and-publications/media-releases/2014/mas-proposes-legislation-for-a-regulatory-framework-for-financial-benchmarks.aspx> accessed 30 September 2014.

[35] HKMA, 'HKMA announces outcome of investigations into HIBOR fixing' (14 March 2014) <http://www.hkma.gov.hk/eng/key-information/press-releases/2014/20140314-3.shtml> accessed 30 September 2014.

the DOJ warned after punishing Rabobank that other banks should pay attention as its investigation 'is far from over'.[36] Secondly, Crédit Agricole, HSBC, JPMorgan (in relation to Euribor only), and ICAP still face fines from the European Commission for the Euribor or Yen LIBOR manipulation as these parties refused to participate in the cartel settlement procedure. Thirdly, additional fines may result from the European Commission's separate investigations into collusive manipulation of Swiss Franc LIBOR.[37] It is not clear whether the Commission is also looking at other denominations such as Dollar LIBOR or Sterling LIBOR.[38] Fourthly, the Swiss competition authority's investigation into collusion in relation to LIBOR, TIBOR, and Euribor is still ongoing. Lastly, there are financial regulators other than the FCA and CFTC that are still working out how to discipline the banks incorporated in their jurisdiction. The German regulator BaFin for example is yet to finalize its assessment of the misconduct at Deutsche Bank.[39]

In the wake of the investigations into corporations, the investigations into the responsible individuals are now gathering speed. The UK Serious Fraud Office (SFO) has put some 60 investigators on the case and is targeting at least 22 bankers and brokers.[40] Three men have been charged with offences of conspiracy to defraud so far, two former RP Martin brokers and Tom Hayes, a former UBS and Citigroup trader. The DOJ is separately pursuing individuals, either by settling with or by filing criminal charges against various former employees of Barclays, ICAP, Rabobank, and UBS, including Hayes.

In addition to these ongoing investigations, it cannot be ruled out that new authorities will initiate investigations into the interest rate benchmark manipulation. In December 2013, a complaint was filed to various Chinese authorities, asking for enforcement action to be taken in response to the adverse effects of the manipulation in China.[41] As a result of the complaint, the National Development and Reform Commission, the Chinese authority responsible for price-related antitrust offences, and the China Banking Regulatory Commission may decide to launch their own investigations.

[36] DOJ, 'Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay $325 Million Criminal Penalty' (29 October 2013) <http://www.justice.gov/opa/pr/2013/October/13-crm-1147.html> accessed 30 September 2014.

[37] Gaspard Sebag and Aoife White, 'UBS to RBS Said to Be in EU Talks Over Franc Libor Fines' (*Bloomberg*, 22 January 2014) <http://www.bloomberg.com/news/2014-01-22/ubs-to-rbs-said-to-be-in-eu-talks-over-franc-libor-fines.html> accessed 30 September 2014.

[38] It has been suggested that the scope of the European Commission's investigations has been limited to allow for a more expedient case resolution. See Caroline Binham and Alex Barker, 'Euribor fines reveal vital pieces to scandal's puzzle' (*FT*, 4 December 2013) <http://www.ft.com/cms/s/0/3546e878-5cff-11e3-81bd-00144feabdc0.html#axzz2sRVKo6kv> accessed 30 September 2014.

[39] Thomas Atkins and others, 'Watchdog slams Deutsche Bank for Libor Probe Response: Report' (*Reuters*, 5 January 2014) <http://www.reuters.com/article/2014/01/05/us-deutschebank-libor-report-idUSBREA0408G20140105> accessed 30 September 2014.

[40] Harry Wilson, 'SFO Plots Charges Over Libor Scandal' (*Telegraph*, 28 December 2013) <http://www.telegraph.co.uk/finance/financial-crime/10540896/SFO-plots-charges-over-Libor-scandal.html> accessed 30 September 2014. Suzi Ring, 'U.K. Prosecutor Investigating 22 More People in Libor Probe' (*Bloomberg*, 21 October 2013) <http://www.bloomberg.com/news/2013-10-21/u-k-prosecutor-probing-22-over-libor-as-u-s-charges-possible.html> accessed 30 September 2014.

[41] Joy C Shaw, 'Extended Rate-Rigging Complaint Filed to Chinese Authorities' (*PaRR*, 19 December 2013).

IV. THE CONDUCT'S LEGAL QUALIFICATION

Non-coordinated manipulation

The unilateral manipulation of submissions by panel banks is targeted by the financial regulators and the anti-fraud agencies, but not by antitrust authorities. The legal qualification of the unilateral conduct differs per enforcement body. The Fraud Section of the DOJ finds the conduct to constitute wire fraud.[42] The US financial regulator CFTC identifies three distinct infringements relating to price manipulation.[43] In contrast, the European financial regulators have used overarching business conduct provisions to capture the bank's behaviour.[44] This difference can be explained by the general lack of legislation in EU Member States that more specifically targets price or benchmark manipulation. The European Commission has responded to this 'regulatory loophole' by obligating Member States to qualify benchmark manipulation as a criminal offence under their national laws.[45] Moreover, the Commission has proposed a new Regulation with rules on the functioning and governance of benchmarks.[46]

Coordinated manipulation

The FCA, CFTC, DOJ, FINMA, and DNB/DPP have not confined themselves to punishing only the unilateral act of submitting artificial rates. Their sanctions also particularly target the collusion between panel banks, either direct or through brokers.[47] The legal qualification of the collusion is often the same as that of the non-coordinated behaviour, ie (attempted) manipulation of the price of a commodity in interstate commerce (CFTC), improper business conduct (FSA, DNB, FINMA), and wire fraud[48] (DOJ Fraud Section). Only the CFTC also identifies an infringement solely relating to the collusion, namely aiding and abetting the attempts of traders at other banks to manipulate the benchmark in violation of the Commodity Exchange Act.[49]

[42] A violation of Title 18 USC § 1343. The former UBS employees Tom Hayes and Roger Darin were also charged with conspiracy to commit wired fraud. Hayes (n 30) 1–2.

[43] The infringements are: (i) spreading false, misleading and knowingly inaccurate information concerning market information that affects the price of any commodity in interstate commerce (a violation of s 9(a)(2) of the Commodity Exchange Act, 7 USC § 13(a)(2) (2006)), (ii) manipulating the price of a commodity in interstate commerce, and (iii) attempting to manipulate the price of a commodity in interstate commerce (ii and iii both a violation of ss 6(c), 6(d) and 9(a)(2) of the Commodity Exchange Act, 7 USC §§ 9, 13b and 13(a)(2) (2006)).

[44] For the FSA/FCA, it constitutes a breach of the obligation to observe proper standards of market conduct (a violation of Principle 5 of the FSA/FCA's Principles for Businesses), the DNB finds Rabobank to have seriously violated the requirements regarding controlled and sound business operations for financial institutions (a violation of ss 3:10 and 3:17 of the Dutch Financial Supervision Act) and FINMA qualifies UBS's non-coordinated conduct as infringing proper business conduct requirements.

[45] Commission, 'Libor Scandal' (n 3).

[46] Commission, 'New Measures to Restore Confidence in Benchmarks following LIBOR and EURIBOR Scandals' (18 September 2013) <http://europa.eu/rapid/press-release_IP-13-841_en.htm> accessed 30 September 2014.

[47] See eg FSA fine on Barclays 38; CFTC fine on UBS 56–57; UBS Plea Agreement, Exhibit 3.

[48] Tom Hayes and Roger Darin were not only charged with wire fraud but also with conspiracy to commit wired fraud. Hayes (n 30) 1–2.

[49] A violation of s 13(c) of the Commodity Exchange Act, 7 USC papas 13(a)(2) (2006).

Antitrust authorities pursue the collusion between panel banks because of the conduct's anti-competitive aspects. To qualify the collusion as an antitrust offence makes sense conceptually. The factual behaviour of the panel banks contains the standard characteristics of cartels: (i) collusion between firms acting on the same market, (ii) which alters the natural process of price setting, (iii) with the aim to increase the firms' profits, (iv) at the detriment of customers and consumer welfare, (v) without creating offsetting benefits. However, whether the benchmark collusion indeed qualifies as an antitrust violation in a particular jurisdiction depends on that jurisdiction's substantive antitrust laws.

In the USA, the elements of section 1 of the Sherman Act are three-fold: (i) there must be a contract, combination or conspiracy between two or more entities, (ii) which unreasonably restrains trade, and (iii) which affects interstate or international commerce.[50] Hard core violations such as horizontal price-fixing, market allocation, output restrictions and bid-rigging are considered *per se* unreasonable restraints. The DOJ Antitrust Division has found the three elements of price-fixing to be present in the conduct of the Royal Bank of Scotland and of former UBS traders Hayes and Darin.[51] According to the Division, the substantial terms of the concerted action by the conspirators were 'to fix Yen LIBOR, a key price component of Yen LIBOR-based derivative products'.[52] Interestingly, in a subsequent civil law suit before the US District Court of the Southern District of New York, Judge Buchwald dismissed plaintiffs' antitrust claims in relation to the LIBOR manipulation because of the plaintiff's failure to demonstrate an antitrust injury.[53] The judge did not identify any lessening of competition because: (i) the benchmark setting process is not intended to be competitive, (ii) the benchmark rates did not necessarily correspond to actual interest rates charged, (iii) the colluding panel banks continued to fully compete on the derivate and money markets, and (iv) the same injury could have resulted from unilateral misrepresentation by the panel banks.[54] The findings of Judge Buchwald were repeated in a more recent decision by Judge Daniels in another civil law suit before the US District Court of the Southern District of New York.[55] Judge Daniels went even further, ruling that the relevant conduct does not constitute a *per se* antitrust violation and that the presented facts were not sufficient to support any anti-competitive aspect or effect of the conduct.[56] It was therefore ruled that the plaintiff failed to plead a Sherman Act violation.

In Canada, it is only as of 12 March 2010 that price-fixing conspiracies are treated as *per se* antitrust violations which do not require an analysis of the conduct's impact on competition. Under the old regime, which is the regime governing the panel banks' collusion, a conspiracy to fix prices could only be qualified as a violation of

[50] 15 USC para 1 (2006). The Supreme Court decided in *Standard Oil Co of New Jersey v United States*, 221 US 1 (1911) that only *unreasonable* restrains are prohibited by the Sherman Act.

[51] *United States of America v The Royal Bank of Scotland*, Deferred Prosecution Agreement [2013] 1 <http://www.justice.gov/iso/opa/resources/2820132613312741448 1.pdf> accessed 30 September 2014; Hayes (n 30) 3.

[52] ibid.

[53] *In re LIBOR-Based Fin Instruments Antitrust Litig, 1:11-md-02262-NRB* (SDNY 29 March 2013).

[54] ibid 33–40.

[55] *Jeffrey Laydon et al v Mizuho Bank Ltd et al, 1:12-cv-3419-GBD* (SDNY 28 March 2014).

[56] ibid 18–22.

the Canadian Competition Act if such a conspiracy *unduly* prevented or lessened competition.[57] Case law of the Canadian Supreme Court has clarified that the word 'unduly' mandates a partial rule of reason inquiry into the seriousness of the competitive effects of the agreement through an examination of market structure and behaviour.[58] The Competition Bureau has interpreted this as requiring proof of 'significant anti-competitive economic effects'.[59] On 4 January 2014, the Competition Bureau announced that the evidence it had collected in its benchmark manipulation case was insufficient to meet this requirement.[60] It therefore dropped the investigation.

A cartel offence in violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) requires a finding of: (i) an agreement or concerted practice between undertakings, (ii) which appreciably affects trade between EU Member States, and (iii) which has as its object or effect the prevention, restriction, or distortion of competition.[61] Article 101(1)(a) TFEU explicitly prohibits agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions'. This provision also covers the fixing of components that are part of the overall sale price, such as discounts or surcharges.[62] The European Commission finds that the coordination of the panel bank's submissions constitutes a cartel aimed at 'distorting the normal course of pricing components' for the financial derivatives.[63] The Commission refers to the conduct as a decision by financial institutions to collude instead of competing.[64] The qualification by the Commission therefore seems to differ from Judge Buchwald's finding that the panel banks did not fail to compete where they otherwise would have. Construed as a price-fixing cartel distorting competition in the derivate market by object, the European Commission does not need to demonstrate any anti-competitive effects. The Commission's fine announcement further reveals that the Article 101 TFEU violations that have been found are partly based on the information exchange between the colluding banks. The Commission asserts that the banks have shared with other market players confidential and commercially sensitive information such as their future submissions, their pricing and trading strategies, and their trading positions.[65] Qualifying such exchange of information as being anti-competitive by object is in line with the Commission's strict

[57] Art 45(1)(c) Competition Act as it read prior to the amendment that entered into force on 12 March 2013.

[58] *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606, 657.

[59] Competition Bureau, 'Competition Bureau Discontinues Its LIBOR Investigation' (3 January 2014) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03642.html> accessed 30 September 2014.

[60] ibid.

[61] Art 101(1) of the Treaty on the Functioning of the European Union.

[62] See eg *FETTSCA* (Case IV/34.018) Competition Decision 2000/627/EC [2000] OJ L 268/1 and *Air Cargo* (no public decision available yet), Commission, 'Antitrust: Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel' (9 November 2010) <http://europa.eu/rapid/press-release_IP-10-1487_en.htm> accessed 30 September 2014.

[63] Commission, 'Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry' (4 December 2013) <http://europa.eu/rapid/press-release_IP-13-1208_en.htm> accessed 30 September 2014.

[64] Commission , 'Introductory Remarks on Cartels in the Financial Sector' (4 December 2013) <http://europa.eu/rapid/press-release_SPEECH-13-1020_en.htm> accessed 30 September 2014.

[65] ibid.

approach with respect to information exchange, an approach which is confirmed by recent EU case law.[66]

The above shows that whereas the antitrust authorities, financial regulators, and anti-fraud agencies have all sanctioned the same coordinated behaviour, the legal qualification of this behaviour differs per jurisdiction and per enforcer. The various authorities have found the same collusion to constitute price manipulation, improper business conduct, wire fraud, price-fixing, and illegal exchange of information. This wide range of applied legal qualifications reveals that the authorities have not been willing or able to find international agreement on how the collusive conduct should primarily be qualified. Such international coordination would have allowed for prosecution with respect to the more secondary types of violations to be deferred, thereby preventing overlapping prosecution by various types of agencies at an early stage.

V. OVERLAPPING JURISDICTIONS

As the same collusion translates into various violations, different types of authorities have considered themselves competent to assert their jurisdiction over the overall conduct. This section first examines the legal bases used by the various authorities to investigate, prosecute, and punish the collusion. It then assesses whether the authorities have applied any delimitation in exercising their jurisdictional discretion to prevent any overlap with the focus of other authorities' enforcement efforts.

Jurisdictional bases for sanctioning the overall collusion

The basic ground for asserting jurisdiction over conduct violating a state's laws follows the territoriality principle, which connects the jurisdiction to the territory where the conduct has taken place. International law recognizes various jurisdictional principles that allow states to claim jurisdiction over conduct that has taken place outside of their own territory. The most common of these extraterritorial principles are the active personality (nationality) principle, the passive personality principle, the protective principle and the universal principle.[67]

Additional jurisdictional concepts have been developed in the field of antitrust enforcement. In the 1945 judgment in *United States v Aluminium Co of America,*[68] the US Supreme Court has accepted that foreign conduct that has or is intended to have substantial effect within the territory of the USA can be caught by US antitrust enforcement (the 'effects doctrine'). Pursuant to this doctrine, any antitrust authority in whose territory the products affected by a cartel were sold can claim jurisdiction over the collusion. The European Court of Justice (ECJ) has never explicitly recognized (or rejected) the effects doctrine for EU competition law. Instead, in its judgment in the *Wood Pulp* case[69] the ECJ adopted the slightly less extensive 'implementation doctrine'. This doctrine allows the European Commission to claim

[66] See eg Case T-587/08 *Fresh Del Monte Produce v Commission* (General Court 14 March 2013) and Case C-8/08 *T-Mobile Netherlands and others* (4 June 2009).

[67] See eg Gerard Conway, *'Ne Bis in Idem* in International Law' (2003) 3 Intl Criminal L 225, referring to W Micheal Reisman (ed), *Jurisdiction in International Law* (Ashgate 1999).

[68] *United States v Aluminum Co of America*, 377 US 271 (1964).

[69] *Wood Pulp* (Case IV/29.725) Competition Decision 85/202/EEC [1985] OJ L 85/1.

jurisdiction if the relevant anti-competitive conduct has been implemented in the EU, for example by raising prices of products directly sold into the EU. The ECJ presented the implementation doctrine as an expression of the territoriality principle.[70] In practice, it is just as effective as the effects doctrine in allowing for extraterritorial antitrust enforcement targeting foreign cartel conduct.[71] Whereas extraterritorial application of antitrust laws caused much controversy and debate in the early days of antitrust enforcement, it is now widely accepted and common practice throughout the world.

In relation to the benchmark manipulation, the principle of extraterritoriality allows the US Antitrust Division and the European Commission to easily claim jurisdiction over the overall worldwide conduct. It suffices that the affected products were sold within their respective territories. Given the global nature of the affected derivative markets, it appears that in theory almost all active antitrust authorities could claim jurisdiction over the conduct pursuant to the effects or implementation doctrine.

The financial regulators have used different jurisdictional bases to capture the overall, worldwide manipulative conduct. The FINMA and DNB/DPP have solely sanctioned the banks that are incorporated in Switzerland and the Netherlands, respectively, banks for which they act as 'home supervisor'. It therefore seems that these regulators have claimed jurisdiction on the basis of the active personality or nationality principle. Alternatively, the FSA asserted jurisdiction on the basis of its prudential supervision on banks that are authorized to perform regulated activities in the UK. Although the process of setting benchmark rates was not a regulated activity, the FSA argued that any misconduct of the banks in relation to this process was still caught by the general obligations for authorized financial businesses.[72] The CFTC chose yet another path, basing its jurisdiction on the territoriality principle. It qualified the conduct as partially taking place in the US because: (i) the submissions were disseminated and published globally, including in the USA, and (ii) the benchmarks constituted commodities in interstate commerce in the USA.[73] Interestingly, in April 2008 an FSA employee internally questioned 'what jurisdiction if any [the CFTC] would have in the matter'.[74] The answer he received was that the investigation in the USA would be taken forward as part of the CFTC's 'false reporting statute which applies to inter-state commerce, which in their view, includes the world'.[75]

Through these different routes, the financial regulators regarded themselves competent to impose fines relating to the worldwide manipulation. The way in which jurisdiction is exercised by the UK and US regulators is far from exclusive.

[70] Joined cases89/85 etc, *Ahlström v Commission* [1988] ECR 5193, para 18.

[71] An exception may be that a collective boycott of export to the EU by non-Member States will be caught by the effects doctrine, but not by the implementation doctrine. Nevertheless, the Commission decision in the *Gas Insulated Switchgear* case reveals that the Commission does not shy away from pursuing foreign conduct that does not appear to be implemented within the EU. Richard Whish and David Bailey, *Competition Law* (OUP 2012) 497.

[72] On 22 April 2008, an FSA employee wrote to the CFTC that 'the FSA does not have supervisory responsibility for the BBA rate setting mechanism although (. . .) we do have prudential supervisory responsibility over the FSA authorized banks providing the information to the BBA'. FSA Audit Report 54.

[73] See eg CFTC fine on UBS 4.

[74] FSA Audit Report 55.

[75] ibid 70.

Any other national financial regulator: (i) overseeing a bank's regulated conduct, or (ii) in whose territory the submissions and benchmarks were published, could similarly claim jurisdiction on the basis of that bank's overall misconduct.

As for the jurisdiction of fraud agencies, the DOJ appears to apply both the territoriality principle and the passive personality principle. In its complaint against former UBS employees Hayes and Darin, the DOJ stipulates that: (i) the conspiracy to defraud took place partly in the USA, (ii) the fraudulent information was spread by wire through interstate and foreign commerce, and (iii) counterparties affected by the manipulation were based in the USA.[76] It is not yet clear on which basis the UK SFO claims its jurisdiction. It could point to the same aspects as the DOJ: (i) the fraudulent conduct taking place partly in the UK, (ii) the fraudulent communication being spread globally, including in the UK, and (iii) victims of the fraud being based in the UK. The SFO may also rely on the nationality principle if the individual is a UK national, such as Hayes. In view of the global dissemination of the manipulated rates and the worldwide sale of the products involved, the territoriality and passive personality principles can easily be used by other fraud agencies around the world to assert jurisdiction over the fraudulent behaviour.

It follows from the above that antitrust, financial, and fraud authorities have little difficulty in claiming jurisdiction over the overall conduct because of the global nature of the products involved, the wide presence of panel banks and their traders and submitters throughout the world, and the global spread of submissions and benchmarks through the internet.

Jurisdictional delimitation

Where various authorities assert jurisdiction over the same conduct, overlap of enforcement efforts can be avoided by the delimitation of an authority's jurisdictional discretion. Complex, cross-border behaviour can be difficult to split up into separate parts fitting neatly within the competences and fields of expertise of the authorities involved. However, for the benchmark manipulation such a partitioning seems to have been a real possibility. Based on their respective focus areas, it would have made perfect sense for the fraud agencies to solely consider the submission and spread of false and misleading information, for the financial regulators to look at the failings of internal systems and controls within financial institutions, and to let the antitrust authorities deal with the collusion and exchange of sensitive information. Furthermore, it would not have been insurmountable to avoid overlap within these categories by applying a further jurisdictional delimitation. For example, fraud enforcement could have been reserved to the agency based in the territory where the submissions were made to the relevant benchmark organization and financial regulators could have left the enforcement in relation to organizational failures to a bank's 'home supervisor'.

Public statements by the European Commission seem to suggest that the exercise of jurisdictional discretion in the benchmark manipulation cases is indeed characterized by a clear functional delimitation. In response to its own question why

[76] Hayes (n 30) 1–2.

it acts in a field where financial regulators have also been active, the Commission stated that it:

> has looked at the conduct of the relevant bank in respect of financial benchmarks from a different angle. Financial regulatory agencies tackling the possible manipulation of benchmarks may for instance focus on the conduct of single banks rather than a number of banks. By contrast, the Commission has detected and sanctioned cartels'.[77]

In fact, quite to the contrary, the collusion between banks and brokers constituted a large part of the conduct for which the financial regulators and the fraud authorities imposed their sanctions. It appears from the various fine and settlement decision that the authorities have not applied any functional delimitation to avoid any overlap in the object of their enforcement. Moreover, no apparent efforts were made to apply any territorial delimitation, for example by solely considering the part of the conduct that took place within the territory of the relevant authority. Even though some of the authorities may claim that they have imposed a penalty only in relation to the adverse effects in their own respective territories, this does not alter the fact that they have considered themselves competent to assert jurisdiction over the same overall actions producing such effects.

In conclusion, while the angle from which the respective authorities have approached the matter may differ, they have all targeted the same overall, worldwide collusive conduct without applying any apparent jurisdictional delimitation.

VI. THE RISK OF DOUBLE PROSECUTION AND OVER PUNISHMENT

Concerns caused by the parallel enforcement of the benchmark manipulation

From the perspective of the undertakings accused of the benchmark manipulation, two types of concerns arise from the multiplicity of concurrent enforcement procedures. First, in their defence for the same overall collusion the undertakings concerned are faced with a variety of charges brought by a variety of authorities, all following their own procedures. They are burdened with several distinct prosecution or settlement proceedings. Additional proceedings involve additional company resources, such as time devoted by management, disruption of normal business processes, fees of legal advisers, and reputational damage resulting from repeated coverage. Furthermore, multiple enforcement actions lead to continued uncertainty about the undertaking's financial exposure in relation to the manipulation. The undertaking is involved in a repeated and continuing fight, in which any single conviction or settlement does not actually settle the matter.

The second type of concern caused by the great number of authorities prosecuting the benchmark manipulation relates to the proportionality of punishment. An inherent risk of over-punishment arises where several authorities each independently impose a sanction that is considered appropriate for the committed violation,

[77] Commission, 'Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry - Frequently Asked Questions' (4 December 2013) <http://europa.eu/rapid/press-release_MEMO-13-1090_en.htm> accessed 30 September 2014.

without taking into account the level of punishment and deterrence already achieved by earlier fines. The accumulation of unilaterally determined sanctions then likely exceeds the penalty that any single authority would consider reasonable for the relevant overall conduct. The resulting over-punishment infringes the principle of proportionality, which entails that any penalty should fit the severity of the crime. Excessive sanctions not only harm the person being punished, they also have adverse societal consequences.[78] First, the financial losses incurred by a company in case of over-punishment may significantly restrict that company's ability to fully compete on the market. Excessive fines may even lead to insolvency, potentially harming overall competition in the market. Secondly, excessive fines may lead to over-deterrence causing companies in general to become overcautious in their actions.

The risk of over-punishment is particularly serious in the benchmark manipulation cases because all sanctions are imposed largely for the same conduct. From an authority's perspective, it can be argued that the fraud, financial misconduct and antitrust elements of the collusive benchmark manipulation all entail distinct offences and that 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) induce 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 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 adds to the risk of excessive punishment in the benchmark cases that the various authorities have independently pursued a particularly high level of deterrence. The FSA stated that the breaches were 'extremely serious' and that 'the need for deterrence means that a very significant fine (. . .) is appropriate'.[79] CFTC commissioner Chilton said that the UBS fine is 'the granddaddy of CFTC penalties' and that combined with the other regulator settlements, the overall fine amount 'serves as a direct deterrent (. . .) not only for UBS, but for the biggest of the big schemers in the financial world'.[80] A high level of desired deterrence is also reflected in fines imposed by the European Commission for what EU competition commissioner Almunia called 'one of the most irresponsible behaviours of the financial industry to this day'.[81] As each individual authority appears to include a deterrence 'premium' in its

[78] OFT, *An Assessment of Discretionary Penalties Regimes: Final Report* [2009] para 3.22.

[79] FSA fine on UBS, paras 183 and 184.

[80] CFTC Commissioner Chilton, 'A Conscience Isn't Nonsense' (19 December 2012) <http://www.cftc.gov/PressRoom/SpeechesTestimony/chiltonstatement121912> accessed 30 September 2014.

[81] Stefano Berra, 'Almunia: EU Libor Probe Expanded to Swiss Franc' Global Competition Review (22 February 2013) <http://globalcompetitionreview.com/news/article/33093/almunia-eu-libor-probe-expanded-swiss-franc/> accessed 30 September 2014.

own sanctions, the overall sanctions imposed on undertakings are likely to be an accumulation of record fines that reflect overlapping punishment and deterrence objectives.

The principle of *ne bis in idem* or double jeopardy

Since ancient times, legal notions have existed that prevent persons from facing prosecution and punishment twice for the same offence.[82] Such notions today are present in all civil and common law systems, albeit in slightly different forms, such as *ne bis in idem*, double jeopardy, *res judicata*, *autrefois acquit*, *autrefois convict* and *una via*.[83] Within this family of related concepts, a general distinction can be made between two separate objects of protection: (i) the procedural protection against the initiation of a second prosecution after the outcome of the first proceedings has become final (generally referred to as the *Erledigungsprinzip*, and (ii) the substantive protection against a second punishment (referred to as the *Anrechnungsprinzip*).[84] The rationales for the two types of protections differ. The rationale of the *Anrechnungsprinzip* lies in the sphere of proportionality, reasonableness, and equity,[85] and protects against excessive punishment. In contrast, the *Erledigungsprinzip* is considered to safeguard an individual's right not to be burdened twice with the costs and anxiety of prosecution for the same offence.[86] It also ensures that the finality of judgments is respected (in line with the principle of *res judiciata*), thereby increasing legal certainty and predictability and upholding the legitimacy of the state.[87] A further function of the *Erledigungsprinzip* is that it disciplines prosecuting authorities as they will not have a second opportunity to initiate proceedings, leading to more efficient law enforcement.[88] Scholars have identified additional rationales relating to specific jurisdictions, such as the facilitation of freedom of movement in the context of the EU and Schengen[89] and, in respect of the USA, the right of the accused to complete a trial with the jury originally chosen.[90]

Although the application of the principle of *ne bis in idem* or double jeopardy is widespread in common and civil law countries, the precise meaning generally differs from state to state. First, some domestic expressions of the principle attach more weight to the *Erledigungsprinzip*, while other expressions focus more on the *Anrechnungsprinzip*. Second, divergence exists as to the interpretation of '*bis*' or 'twice'. For example, in common law countries the principle of double jeopardy traditionally prohibits an appeal by the prosecution following an acquittal, whereas in civil law countries such an appeal is not considered as a second prosecution.[91] Third, there can be various interpretations of '*idem*' or 'same offence'. In some jurisdictions

[82] Conway (n 67) 221–22.
[83] Bas van Bockel, *The Ne Bis In Idem Principle in EU Law* (Kluwer Law International 2010) 31.
[84] ibid 31–33.
[85] ibid 122.
[86] Renato Nazzini, 'Fundamental Rights beyond Legal Positivism: Rethinking the *Ne Bis in Idem* Principle in EU Competition Law' (2014) JAENFO 11.
[87] ibid 12–13. Van Bockel (n 83) 122.
[88] Nazzini (n 86) 13–14.
[89] ibid 11.
[90] Conway (n 67) 223.
[91] ibid 228.

a second prosecution or punishment is prohibited where it relates to substantially the same facts (the broad interpretation) while in other jurisdictions the principle only applies if in both proceedings the legal qualification of the conduct is the same (the narrow interpretation). Intermediate forms include a consideration of the substantive elements that must be proved[92] or a consideration of the legal interest protected by the respective prosecutions.[93] Because there is no international common ground as to the precise scope and meaning of the principle, it has so far not become a general rule of international law. The principle therefore only applies to the extent that it is codified in national legislation, constitutions, or treaties.

Multiple enforcement of the benchmark manipulation within a single jurisdiction

Thus far, there are three sovereign states in which multiple enforcement actions were initiated involving the same undertaking in respect of the collusive manipulation: the USA (federal level), the Netherlands and Switzerland. In none of these jurisdictions do the concurrent intra-state proceedings appear to have violated the applicable *ne bis in idem* or double jeopardy principle.

In the USA, the prohibition of double jeopardy is a constitutional right incorporated in the Fifth Amendment to the US Constitution.[94] It prescribed that that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb. . .'. This constitutional principle of double jeopardy covers both protection against a second criminal prosecution and protection against double punishment. In one of its landmark cases on double jeopardy, *Blockburger v United States*,[95] the US Supreme Court has clarified the interpretation of 'the same offense'. The Supreme Court held that 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not'.[96] If the *Blockburger* test is applied to the interest rate benchmark manipulation cases, it appears that each of the offences allegedly violated by the relevant panel banks indeed seems to require proof of certain facts that is not required for the other offences.[97] In addition, the CFTC and the DOJ have concluded their settlement agreements and imposed their sanctions simultaneously for each of UBS, Barclays, the Royal Bank of Scotland, and Rabobank. Therefore, even if jeopardy is assumed to

[92] As prescribed by the US Supreme Court in *Blockburger v United States*, 284 US 299 (1932).

[93] This is part of the three-fold test for the application of *ne bis in idem* in EU competition law, articulated by the ECJ in the *Aalborg* case. Joined cases C-204/00 P etc. *Aalborg Portland v Commission* [2004] ECR I-123, para 338.

[94] The double jeopardy provision of the International Covenant on Civil and Political Rights (ICCPR) also applies in the USA, but the declaration accompanying its ratification reveals that that the USA applies a very strict interpretation of this provision: 'The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.'

[95] *Blockburger v United States*, 284 US 299 (1932).

[96] ibid.

[97] Elements not included in the other relevant offences seem to include: fixing the price of a commodity, spreading misleading information, and the intent that is part of the manipulation offence.

attach to the authorities' settlements,[98] the prohibition against consecutive proceedings is not infringed. Interestingly, even though there seem to be multiple grounds to dismiss a double jeopardy claim in relation to the fines imposed by the CFTC and the DOJ, the authorities have asked the relevant banks to explicitly waive any claims of double jeopardy.[99]

In the Netherlands, the *ne bis in idem* principle is codified in national criminal and administrative law.[100] The principle also applies on the basis of various treaties ratified by the Netherlands, most notably the International Covenant on Civil and Political Rights (ICCPR), the EU Charter (applicable in all situations governed by EU law) and the Convention Implementing the Schengen Agreement (CISA) (vis-à-vis other Member States of the Schengen Agreement).[101] For its part in the benchmark manipulation, Dutch bank Rabobank paid a fine to the DPP, while 'at the insistence of' the DNB Rabobank took internal disciplinary action, cancelled bonuses and implemented organizational changes.[102] It appears that the enforcement action taken by the DNB did not involve any formal decision taken by the regulator, nor any formal (settlement) agreement. Instead, the DNB and the DPP have coordinated their joint response to Rabobank's conduct, thereby linking the settlement amount determined by the DPP to the quasi-voluntary measures taken by Rabobank under pressure from the DNB. With this approach, the DNB has managed to avoid initiating any formal prosecution proceeding and (formally) imposing any penalty. *Ne bis in idem* therefore does not come into play.

In Switzerland, the principle of *ne bis in idem* as codified in the Swiss Code of Criminal Procedure is interpreted as a corollary a *res judicata*[103] and only covers protection from successive prosecution. The Swiss Supreme Court has ruled that the principle only applies to the extent that the interest protected by the respective prosecutions is identical.[104] This narrow, domestic interpretation of *ne bis in idem* is overshadowed by the much broader concept articulated in article 4 of Protocol 7 to the ECHR, which has been ratified by Switzerland. First, the latter concept includes the prohibition of both double prosecution and double punishment. Second, the European Court of Human Rights has adopted a much wider interpretation of *idem* than the Swiss Supreme Court. In the case of *Sergey Zolotukhin v Russia*, the ECtHR ruled that an interpretation of *idem* focusing on the legal characterization of offences is too restrictive on the rights of individuals.[105] Alternatively, *idem* should be interpreted

[98] It is questionable whether double jeopardy attaches to the settlements given the civil law nature of the CFTC's penalty and the non-final nature of the non-prosecution and deferred prosecution agreements of the DOJ. In the context of the CISA, the ECJ ruled that settlements that are meant to bar future prosecution if the conditions of the settlements are met provides for the same finality as a court imposed punishment would. See Van Bockel (n 83) 42–43, referring to Joined Cases C-187/01 and C-385/01 Gözütok and Brugge [2003] ECR I-1345.

[99] See eg CFTC UBS order of settlement C. 8, 58.

[100] Art 68 of the Dutch Criminal Law Act and arts 5:43 and 5:44 of the Dutch Administrative law Act.

[101] Protocol 7 to the European Convention on Human Rights and Fundamental Freedoms (ECHR) has not been ratified by the Netherlands.

[102] DNB, 'DNB Imposes Measures on Rabobank over Libor Affair' (29 October 2013) <http://www.dnb.nl/en/news/news-and-archive/persberichten-2013/dnb298704.jsp#> accessed 30 September 2014.

[103] Swiss Supreme Court case *Valverde v AMA, UCI and RFEC* [2011] 4A_386/2010, para 9.3.1.

[104] ibid.

[105] *Zolotukhin v Russia* (2012) 54 EHRR 16, para 81.

as referring to 'the identity of facts or facts which are substantially the same'.[106] More specifically, the ECtHR stipulated that an assessment must be made of:

> 'those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings'.[107]

With respect to the benchmark manipulation, a strong case can be made in arguing that the underlying facts of the collusive conduct investigated by the Swiss Competition Commission (COMCO) are indeed substantially the same as the facts for which FINMA *inter alia* imposed a fine on UBS. The key factual circumstances of both cases entail the communication and coordination between traders, submitters and brokers to alter the benchmark and thereby increase profits. The ECtHR clarified in *Zolotukhin* that a comparison of the statements of facts used for the prosecution is an appropriate starting point to assess the presence of *idem*.[108] In this respect it is telling that the exact same communication between a trader of UBS and a trader working at another bank has been used as factual basis for the demonstration of a fraud offence, an antitrust violation and a financial market infringement by the DOJ's Fraud Section, the DOJ's Antitrust Division, and FINMA, respectively.[109] Given the strong similarity of the facts of the respective cases, it can be argued that the ECHR principle of *ne bis in idem* protects UBS from a second prosecution or a second punishment by COMCO following FINMA's fining decision. However, even if the ECtHR's wide interpretation is applied, it appears that the principle of *ne bis in idem* is not infringed by COMCO's current enforcement actions. Not only had the antitrust authority already commenced its proceedings before FINMA's decision became final,[110] it has also granted UBS immunity from fines as a result of its leniency application. Nevertheless, should UBS lose its immunity during the investigation, for example for failure to cooperate fully and sincerely, *ne bis in idem* may well prevent COMCO from being able to impose a second Swiss fine on UBS.

Multiple enforcement of the benchmark manipulation within an overarching jurisdiction

Concurrent proceedings within overarching jurisdictions such as the EU in essence create the same concerns as concurrent proceedings within the same state. However, the application of the *ne bis in idem* or double jeopardy principle across state levels

[106] ibid para 82.

[107] ibid para 84.

[108] ibid para 83.

[109] Hayes (n 30) paras 30 and 33. FINMA, *FINMA Investigation into the Submission of Interest Rates for the Calculation of Interest Reference Rates such as LIBOR by UBS AG: FINMA Summary Report UBS LIBOR* [2012] 6 <http://www.finma.ch/d/aktuell/Documents/summary-report-ubs-libor-20121219-e.pdf> accessed 30 September 2014.

[110] It is not clear if the *Erledigungsprinzip* requires an authority to discontinue a case as soon as an earlier prosecution is finalised. Van Bockel argues in the light of the ECHR that this is or at least should be the case (n 83) 190.

within overarching jurisdictions is less self-evident. The state entities within such jurisdictions are sovereign and a restriction of their jurisdictional powers therefore cannot be *imposed* upon them. Application of the principle within overarching jurisdictions, either inter-state or between the state and the overarching level, thus requires jurisdictional self-restraint by sovereign states.

In the context of the European integration, sovereign states have accepted the transnational application of *ne bis in idem* within the European Union and within the Schengen area. These states have accepted that they can be barred from prosecuting or punishing criminal conduct due to prosecutorial action taken earlier elsewhere in Europe. The European Commission itself is also bound by the principle of *ne bis in idem* under the EU Charter. Article 50 of the EU Charter prescribes that 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. For the precise meaning of this provision, in particular the interpretation of *idem*, Advocate General Kokott has argued in her Opinion in the *Toshiba* case that it follows from the requirement of homogeneity that *idem* should have the same meaning under the EU Charter as under the ECHR and that the same interpretation should apply for all fields of EU law.[111] On the basis of the *Zolotukhin* judgment of the ECtHR and the case law of the ECJ in non-competition cases, Kokott held that *idem* should be determined only on the basis of the material acts, understood as 'the existence of a set of concrete circumstances which are inextricably linked together'.[112] Neither the legal qualification of the conduct, nor the protected legal interest should be a relevant factor in the assessment of *idem*, according to Kokott.

With respect to the consecutive European proceedings targeting the benchmark manipulation, it seems difficult to deny the existence of an inextricable link between the conduct pursued by the UK financial regulator and that pursued by the European Commission. Using the ECJ's formulation in *Kraaijenbrink,*[113] the acts appear to make up an 'inseparable whole'. Jointly fixing a price component of derivatives through manipulation of the benchmark necessarily involves making fraudulent submissions and necessarily involves a violation of proper financial business conduct. The anti-competitive collusive behaviour through manipulation of the benchmark could therefore not have been performed without at the same time performing fraudulent behaviour and misconduct in the financial market. Consequently, it can be argued that pursuant to Kokot's interpretation of *ne bis in idem* under the EU Charter, the European Commission was barred from sanctioning the Royal Bank of Scotland and ICAP for their collusive behaviour because of the fines already imposed by the FSA.[114]

Despite Kokott's insistence for homogeneity, the ECJ clarified in *Toshiba* that it does not intend to accept the ECtHR's broad interpretation *ne bis in idem* in the field

[111] Opinion of AG Kokott in Case C-17/10 *Toshiba Corporation v Urad pro ochranu hospodarske souteze*, paras 120–23.

[112] ibid para 124.

[113] Case C-367/05 *Norma Kraaijenbrink* [2007] ECR I-6619, para 28.

[114] It appears that the FCA is not likewise prohibited from punishing RP Martin following the Commission's fine, given that the FCA was not enforcing rules governed by EU law.

of competition law.[115] The ECJ blatantly ignored the *Zolothukin* judgment and the considerations expressed by Kokott in her Opinion. In contrast, the ECJ simply repeated the phrase from its earlier judgment in the *Aalborg* case that the application of the *ne bis in idem* principle is subject to 'the threefold condition of identity of the facts, unity of the offender and unity of the legal interest protected'.[116] It is striking that the ECJ was unwilling to abandon the latter condition, in particular because it did not rely on this condition in *Toshiba* to argue that the principle did not apply. Rather, it held that in any event there was no identity of facts because the respective enforcement proceedings focussed on different effects of the same cartel.[117] This is an argument used in various forms[118] ever since the 1972 *Boehringer* judgment,[119] often in response to an applicant's plea that the Commission's fine should be reduced in view of a previous foreign sanction imposed for the same cartel. The basis for such pleas to take foreign fines into account had been provided by the ECJ itself a couple of years earlier in *Walt Wilhelm*.[120] In this case, the EU Court held that even if there is no *bis in idem* because different ends are pursued by the respective prosecuting authorities, 'a general requirement of natural justice (. . .) demands that any previous punitive decision must be taken into account in determining any [successive] sanction which is to be imposed'.[121] However, the ECJ in its later judgments has always found a ground to dismiss a claim of identify of facts, thereby consistently denying the application of this 'general requirement of natural justice'.

It appears that the ECJ persists in maintaining a very restrictive approach to the application of the *ne bis in idem* principle in the field of competition law. This approach can be explained by the Commission's unwillingness to accept the risk that itself or a Member State will be barred from prosecution or punishment as a result of which part of the cartel conduct will go unpunished. Indeed, it may seem to stretch too far that a cartel fine imposed in one Member State prevents a penalty being imposed in relation to the same cartel in another Member State where the respective sanctions only take into account the cartel's domestic effects, thereby avoiding overlapping punishments. However, a number of aspects are crucial to keep in mind in this respect. First, the self-restraint by Member States in terms of the fine calculation does not alter the fact that the same conduct is subject to multiple prosecution and punishments. Second, calculating a cartel fine on the basis of merely a part of the overall affected turnover does not necessarily mean that insufficient punishment or deterrence is achieved. Cartel fines in the EU are not compensatory in nature, but are intended to punish and deter cartel behaviour.[122] Confusingly, the calculation method of cartel fines nevertheless generally reflects an assumption of excess profits as it is based on a certain percentage of the turnover achieved in selling the cartelized

[115] Case C-17/10 *Toshiba Corporation v Urad pro ochranu hospodarske souteze* [2012] 4 CMLR 22, para 97.
[116] ibid para 97.
[117] ibid paras 98–102.
[118] Nazzini (n 86) 31–34.
[119] Case 7/72 *Boehringer Mannheim v Commission* [1972] ECR 1281.
[120] Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1.
[121] ibid para 11.
[122] ICN, 'Setting of fines for cartels in ICN jurisdictions', *Report to the 7th ICN Annual Conference* (2008) 7–8 <http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf> accessed 30 September 2014.

product.[123] For example, under the EU Fining Guidelines, the calculation of the basic fine amount for cartels starts with 15–30 per cent of the annual turnover of the affected product.[124] This calculation method seems to imply that the proportionality of the overall fine is not affected as long as there is no double counting of turnover. But this ignores the fact that there is no direct link between the fine amount and the actual excess profits made because of the cartel. Especially if a cartel hardly achieved any illicit gains, or if the illicit gains were already recovered through successful private enforcement, it may very well be that a fine of 5 per cent of the turnover of the affected product in one jurisdiction achieves sufficient punishment and deterrence for the overall conduct. Third, the European Competition Network (ECN) allows for intense coordination and cooperation with respect to cartel enforcement and thereby gives the European competition authorities ample opportunity to prevent under-punishment of cartels as a result of the *ne bis in idem* principle.[125] It is even argued that Regulation 1/2003 enables national competition authorities to impose fines for the effects of a cartel in other Member States.[126] If this is the case, it is difficult to see why the EU competition authorities should not be disciplined by the trans-European prohibition of multiple prosecution and punishment of the same collusive conduct.

With respect to the benchmark manipulation, the ECJ's line of reasoning in *Toshiba* creates two paths for the Commission to justify its punishment of the banks' collusive behaviour following the earlier fine settlements reached by the FSA. First, on the basis of the different legal interests protected by the respective authorities. Second, on the basis of the different underlying facts, by arguing that the Commission focused on the anti-competitive effects while the FSA focused on the collusion itself as financial misconduct. It is questionable, however, if either path is sustainable. As for the first path, Nazzini rightly points out that the ECJ's case law upholding the condition of unity of the protected legal interest 'lacks foundation and should be overruled at the earliest opportunity'.[127] Indeed, as Kokott recognized, 'There is no objective reason why the conditions to which the *ne bis in idem* principle is subject in competition matters should be any different from those applicable to it elsewhere'.[128] As for the second path, it is artificial to claim that there is no similarity of facts because of different effects or consequences of the same conduct. As clarified by Wils, *ne bis in idem* provides protection from double prosecution or punishment for the same offence, not merely for the same effects of an offence.[129] This means

[123] ibid 15.

[124] Guidelines on the method of setting fines imposed pursuant to art 23(2)(a) of Regulation No 1/2003, paras 21 and 23. For hard core cartels, the Guidelines provide for an additional 15–25% of the value of sales to be added to the basic fine amount irrespective of the duration for deterrence purposes. ibid para 25.

[125] This is in line with Wils' finding that 'A ban on multiple prosecutions thus appears only desirable to the extent that it covers prosecutors between whom coordination is not for legal or practical reasons impossible or very costly'. Wouter PJ Wils, 'The Principle of ne bis in idem in EC Antitrust Enforcement: A Legal and Economic Analysis' Concurrences (2004) para 34.

[126] Nazzini (n 86) 6.

[127] ibid 31.

[128] Opinion of AG Kokott (n 62) para 118.

[129] Wils (n 125) para 57.

that the facts are certainly the same if a single cartel agreement fixes the price of a product that is sold in several Member States.[130]

There is a stark contrast between the European application of the *ne bis in idem* principle and the way in which the USA has dealt with multiple prosecution and punishment within an overarching jurisdiction. In the USA, each of the 50 states and the federal government have sovereign jurisdiction to pursue criminal conduct that has a sufficient link to their respective territories. Save for voluntary jurisdictional self-restraint, none of the sovereign entities can be barred from prosecution solely because of the actions taken by another state or the federal government. In contrast to the emergence of a trans-European *ne bis in idem* principle, the double jeopardy principle in the USA has not been accepted to apply inter-state or between the state and the federal level. Nevertheless, the US federal government has acknowledged that double jeopardy considerations should be taken into account in determining whether to bring a federal prosecution based on substantially the same acts involved in a prior state proceeding. For this purpose, the DOJ has developed the Dual and Successive Prosecution Policy (or 'Petite Policy'), which sets out guidelines for the exercise of its jurisdictional discretion in view of previous state prosecution.[131] The purpose of the policy is not only to protect persons from multiple prosecution and punishment for substantially the same acts, but also to vindicate substantial federal interests through appropriate prosecutions, to promote efficient utilization of DOJ resources and to promote coordination and cooperation between federal and state prosecutors.[132] The Petite Policy prescribes that a federal prosecution following an earlier state prosecution for the same acts will only be initiated or continued if: (i) a substantial federal interest is involved and (ii) the prior prosecution has left that interest unvindicated.[133] In other words, the policy requires the DOJ to assess whether despite the earlier prosecution there still is a need for (additional) punishment and deterrence. The DOJ recognizes with this approach that it is appropriate to exercise prosecutorial discretion in view of the desired level of overall punishment and deterrence within the overarching jurisdiction.

Multiple enforcement of the benchmark manipulation in a global context

There is no general rule of international law prohibiting double prosecution or punishment following earlier prosecutorial action in a foreign state.[134] Save in the specific context of the European integration, sovereign states generally prove unwilling to restrict their own prosecutorial powers without any control over the scope and effectiveness of foreign prosecution and punishment. Self-interest can also play

[130] ibid. Nazzini (n 86) 20.

[131] United States Attorneys' Manual, 9-2.031 Dual and Successive Prosecution Policy ('Petite Policy') <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm> accessed 30 September 2014.

[132] ibid under A.

[133] ibid. A third condition is that the government must believe that the conduct constitutes a federal offence and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. This condition applies to all federal prosecutions.

[134] See eg Case T-224/00 *Archer Daniels Midland v* Commission, para 92 and the Opinion of AG Tizzano in Case C-397/03 P *Archer Daniels Midland v Commission*, para 93.

a role. Authorities may want to demonstrate their own aggressiveness in pursuing misconduct falling within their field of competence. Moreover, monetary penalties imposed for corporate crimes have reached such proportions that prosecutorial decisions can be influenced by budgetary considerations of authorities or even governments. Accepting the consequences of the *ne bis in idem* or double jeopardy principle is just slightly more complicated if it means that a billion euro fine will be foregone.

Still, from the perspective of the targeted undertaking, multiple prosecution and punishment for the same conduct creates similar concerns, irrespective of whether the respective proceedings take place within the same jurisdiction, within the same overarching jurisdiction or across different continents. The risk that these concerns arise has significantly increased during the last few decades. Business and trade has become increasingly international and increasingly regulated, while (extraterritorial) enforcement of cross border misconduct has become increasingly aggressive. This means that violations by corporations will more easily trigger a multitude of enforcement actions. At the same time, many fields of law have witnessed a growing international convergence both in respect of substantive and procedural legal issues. This allows for closer coordination and cooperation between authorities, more effective information exchange, growing mutual trust in the effectiveness of foreign enforcement actions and a lower less risk that cross border misconduct will go unpunished.

These developments contribute to the possibility of introducing *ne bis in idem* or double jeopardy considerations in the realm of global enforcement of corporate crimes. Indeed, there are signs that authorities are growingly aware of the need to consider the appropriate overall punishment and level of deterrence of particular conduct, rather than merely assessing the appropriateness of one's own sanction in isolation of foreign enforcement actions. The strongest indication of this is given by the DOJ's Antitrust Division, which has developed a test to determine when deterrence achieved abroad can be taken into account in the exercise of its own prosecutorial discretion.[135] The test assesses whether foreign sanctions cover the harm caused to US businesses and consumers, and whether the nature and gravity of these sanctions satisfy the deterrent interests of the USA. Although the test could use some refinement,[136] its application by the Antitrust Division indicates that national notions of double jeopardy and proportionality may slowly find their way to the international level.

Although the FSA/FCA, CFTC, DOJ, FINMA, and the DPP simultaneously imposed their fines on the relevant financial institutions in the interest rate benchmark manipulation cases, there is little indication that the authorities also coordinated the level of their sanctions. The fine guidelines of the FCA specifically allow it to take into account 'action taken by other domestic or international regulatory authorities' in determining the level of a financial penalty.[137] However, the decisions of the UK financial regulator do not mention the fines of the other regulators among

[135] Scott Hammond, former Deputy Assistant Attorney General, DOJ Antitrust Division, 'Standards for Satisfying the US Deterrent Interests' *GCR Antitrust Law Leaders' Forum* (5 February 2011).

[136] John Terzaken and Pieter Huizing, 'How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels' (2013) 27, 2 ABA Antitrust Magazine 56–58.

[137] FCA, *The Decision Procedure and Penalties Manual*, art 6.5A.3 (2)(j), previously art 6.5.2 under 11.

the factors of the fine guidelines that are considered 'particularly important in assessing the sanction'.[138] The fine decisions and reports of the CFTC, DOJ, and FINMA for UBS, Barclays, the Royal Bank of Scotland, ICAP, and RP Martin also do not mention the fines imposed abroad as a factor taken into account in determining the penalties. Notably, this is different for the DOJ's deferred prosecution agreement with Rabobank. This agreement expressly states that both parties agree that the monetary penalty of 325 million dollar (235 million euro) is appropriate given the facts and circumstances of the case, including 'the monetary penalties Rabobank has agreed to pay to other criminal and regulatory enforcement authorities in the Netherlands, the United Kingdom, and the United States relating to the same conduct at issue in this case'.[139] The DOJ thus acknowledges that: (i) the various authorities are targeting the same conduct, and (ii) the overall sanctions imposed for this conduct is a relevant factor to determine whether the settlement of the DOJ is appropriate. The DPP similarly refers to the fines imposed elsewhere to justify the amount to be paid by Rabobank as part of its settlement with the Dutch authorities.[140] This may demonstrate some awareness among enforcement agencies that the accumulation of sanctions in the benchmark manipulation cases calls for a global perspective in assessing the appropriate fine level.

The European Commission does not yet seem to bother itself with such considerations. When the Commission imposed its 391 million euro fine on the Royal Bank of Scotland, this bank had already incurred fines amounting to 453 million euro from other authorities for the benchmark manipulation. In line with its decision practice, the Commission does not appear to have taken the foreign sanctions into account in determining the appropriate fine level.[141] Rather, the Commission continues to uphold the view that it only needs to consider the European competition enforcement context in exercising its prosecutorial discretion, in determining the amount of its fines and in pursuing the objective of deterrence.[142] Such an isolated approach is problematic in view of the increasingly crowded international enforcement

[138] FSA fine on UBS, paras 182–93 and FSA, *Final Notice to The Royal Bank of Scotland* [2013] paras 119–32 <http://www.fsa.gov.uk/static/pubs/final/rbs.pdf> accessed 30 September 2014.

[139] *United States of America v Coöperatieve Centrale Raiffeisen-Boerenleenbank*, Deferred Prosecution Agreement [2013] 10 <http://www.justice.gov/iso/opa/resources/976201310298727797926.pdf> accessed 30 September 2014.

[140] OM 'Rabobank betaalt € 70 miljoen ter afwikkeling van LIBOR-onderzoek' (29 October 2013) <https://www.om.nl/vaste-onderdelen/zoeken/@32206/rabobank-betaalt-70/> accessed 30 September 2014.

[141] The European Commission repeatedly rejected requests to take into account foreign sanctions. See eg its decision in *Citric acid* (Case COMP/E-1/36 604) Competition Decision 2002/742/EC [2002] OJ L239/18; *Vitamins* (Case COMP/E-1/37.512) Commission Decision 2003/2/EC [2003] OJ L6/1; *Food flavour enhancers* (Case COMP/C.37.671) Competition Decision 2004/206/EC [2004] OJ L75/1.

Fines imposed abroad may, however, be taken into account in assessing 'ability to pay'-claims. See eg *Electrical and mechanical carbon and graphite products* (Case C.38.359) Commission Decision 2004/420/EC [2004] OJ L125/45, fn 409.

[142] The Commission states that it 'understands that benchmark manipulation is also being investigated by other authorities or that such authorities may have already imposed fines on some of the undertakings involved in these cases, but none of these cases concerns the enforcement of competition rules in the European Economic Area. Investigations of other regulators do not relieve the Commission from its responsibility to also ensure that the rules of fair competition are respected in the banking sector'. Commission (n 81). This approach is in line with the position of the ECJ in Case C-289/04 P *Showa*

environment. It not only ignores the *ne bis in idem* concerns that are involved, it also ignores the fact that anti-competitive conduct affecting the EU can be punished and deterred by enforcement actions taken by other authorities than the Commission.

VII. ENSURING OVERALL PROPORTIONALITY

Possible ways to avoid over-punishment

As part of their duty to ensure proportionate punishment, authorities involved in a cross-border and multi-agency investigation should actively seek to avoid over-punishment. There are two possible ways to achieve this: (i) ensure that there is no overlap in the conduct that is being punished and deterred, or (ii) if there is such overlap, ensure that the level of punishment and deterrence achieved by other sanctions is taken into account in the fine calculation.

Whether or not it is possible to avoid overlap depends on whether the overall conduct can be clearly divided into separate parts that correspond to the respective key focus areas of the authorities involved. In the benchmark manipulation, a distinction could have been made between: (a) the collusion and exchange of commercially sensitive information by the panel banks, to be sanctioned by competition authorities, (b) the submission of false rates, to be sanctioned by anti-fraud agencies, and (c) the failure of internal controls within financial institutions, to be sanctioned by financial regulators. If no clear division of the overall conduct can be made, authorities should at least seek to avoid overlap in punishment and deterrence. To this end, it is most effective for the authorities to agree before the start of any prosecution or settlement discussions on the desired level of punishment and deterrence for the overall conduct and to jointly determine how this level should translate into the individual sanctions. This requires the various investigations to take place more or less at the same time. Alternatively, if other authorities have already imposed their sanctions, subsequent punishments should take into account the level of punishment and deterrence already achieved for the same conduct. Such a unilateral adjustment of fines however is likely to be more complicated to achieve in practice than early coordination on the desired overall fine level and on the fine allocation. Authorities may be reluctant to reduce the fine amount (and hence the contribution to their coffers) just because other authorities imposed their sanctions first. And even if they were to agree to such deference, the result may be a race against time for the authorities that want to impose a full penalty.[143]

Possible ways to avoid consecutive prosecution

Authorities must not only prevent over-punishment through excessive fines, they should also work together to avoid consecutive prosecutions for the same conduct. In the European competition context, parallel proceedings by too many Member States are prevented by allowing for intervention at the overarching, European level. But there is no international body to which the EU itself and individual states outside the EU can delegate the prosecution of cartel cases. Due to the many differences

Denko v Commission [2006] ECR I-5859, para 61 and Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, para 37.

[143] See also Wils (n 125) para 33.

in substantive and procedural competition laws, and the reluctance of states to give up their prosecutorial discretion, the establishment of such a body will remain highly unlikely in the foreseeable future.[144] In the fields of financial regulation and fraud prevention there also is no international body competent to prosecute cross-border cases. Lifting the prosecution of benchmark manipulation type cases to a global level is therefore neither a present option nor a realistic objective worth pursuing in the near future.

There are three alternative possibilities for authorities to avoid consecutive enforcement procedures: (i) delegating the competence to pursue the matter to another prosecuting authority, (ii) deferring prosecution in view of enforcement action taken by other authorities, and (iii) simultaneous enforcement by all authorities involved.

The option of horizontal delegation of prosecutorial competence appears to be unfeasible, as both the transfer of competence to a foreign authority and the transfer of competence to a different type of agency raises problems. First, 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. Within the EU, some national competition authorities have found themselves competent to sanction international cartels with fines that take into account the effects in other Member States.[145] Outside of the EU, this is a very unlikely scenario as it requires sovereign states to implement legislation allowing them to grant foreign agencies jurisdictional power relating to domestic violations. Delegation between different types of agencies is equally problematic. Such delegation would cut across the limits of each authority's particular expertise, procedures, and powers. Even if the complications can be overcome of creating a legal basis for this kind of delegation, the effectiveness of enforcement would very likely be diminished.

A second option is to defer prosecution in view of enforcement actions by other authorities. This option 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'.[146] Still, this approach seems to gain more support in the international enforcement community, most notably by the DOJ's Antitrust Division.

The third option available to avoid successive prosecution is the simultaneous prosecution by all authorities involved. This option has been pursued by the DOJ and the USA, UK, Swiss and Dutch financial regulators in the benchmark

[144] Terzaken and Huizing (n 136) 54.

[145] Nazzini (n 86) 6, referring to the OFT Guidance as to the appropriate amount of a penalty. The Dutch NCA has in a recent case based its fine on the turnover achieved in the entire EU after ensuring that NCAs in other Member States did not intend to pursue the matter. Dutch Competition Authority, *Zilveruien* (silverskin onions) [2012] available in Dutch at <https://www.acm.nl/nl/publicaties/publicatie/10535/Zilveruien/> accessed 30 September 2014.

[146] OECD, *Positive Comity* [1999] para 64 <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2752161.pdf> accessed 30 September 2014.

manipulation cases. Because the European Commission pursues cartels in their entirety instead of prosecuting alleged conspirators one at a time, its proceedings could not easily be aligned with that of the USA and UK authorities. Moreover, the investigations of the financial regulators were already well underway before the Commission became aware of the conduct.

Simultaneous enforcement action by various agencies requires a high level of coordination and cooperation. This starts with effective information sharing between authorities early on in cases that are likely to involve multiple agencies. Save for privileged and confidential information (including information received from leniency applicants), and subject to their national laws and regulations, authorities are free to share information on their enforcement activities with other agencies. The benchmark cases show that such information sharing may not only facilitate inter-agency coordination but also increases the efficiency of individual investigations. If the FSA had picked up on the OFT's interest in the manipulation in November 2008 and the relevant other competition authorities had been promptly informed of the investigation, it would not have taken another two years before the European Commission could get involved.

Coordination and cooperation between authorities can be facilitated by instituting a framework for decision-making and communication. An example of such a framework at a national level is the US Financial Fraud Enforcement Task Force. This coordinating body consists of over 30 government agencies, including the DOJ, the CFTC, the SEC, and the FTC. The task force is used to coordinate the US investigation and prosecution of various financial misconduct cases, included the interest rate benchmark manipulation. To enable authorities to achieve such a level of coordination at an international level, it could be fruitful to set up a similar multi-agency task force that can deal with cross-border conduct. Setting up a permanent international task force for this purpose requires the involvement of a great number of authorities throughout the world and is likely to turn into an unwieldy and bureaucratic body. It may therefore be more effective to use ad hoc international task forces that are specifically set up to coordinate the parallel investigation and prosecution of a particular case.

Towards a more coordinated and proportionate punishment

The benchmark manipulation cases indicate that some enforcement agencies are taking cautious steps to consider the overall proportionality of fines. There seems to be a growing awareness that such proportionality must be achieved across jurisdictional borders, hence requiring coordination between various authorities. Nevertheless, the fining practice of most regulators still ignores the wider enforcement context. Building on the experience of the benchmark manipulation cases, authorities should continue to develop guiding principles that ensure proportionate punishment in future cross-border and multi-agency investigations. The following elements may provide a starting point for such guidance towards an effective, coordinated and proportionate punishment:

1. basic, non-confidential information on the initiation of an investigation should be shared with the relevant authorities upon discovering that other jurisdictions may be affected;

2. investigative efforts should be allocated and coordinated between the prosecuting authorities involved, potentially through an ad hoc inter-agency task force;
3. authorities should determine who has a sufficient prosecutorial interest to pursue the case and they should apply the delimitations that are necessary to avoid or at least limit jurisdictional overlap; and
4. authorities should pursue simultaneous settlements or sentences that take into account the desired level of overall punishment and deterrence.

It is important that the result of any coordination of international enforcement actions 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.

The implementation of the elements set out above will undoubtedly involve many practical obstacles. For example, competition authorities will be hindered from full coordination and information sharing in leniency cases, which nowadays form the majority of cartel cases. Leniency applicants may be willing to waive confidentiality to allow information sharing with authorities that already prosecute the same behaviour in view of ensuring overall proportionality of fines. But they will be less inclined to facilitate information sharing that may lead to an increase in the number of authorities that are aware of the alleged illegal conduct. A second important obstacle to achieving international coordination of appropriate punishment is the willingness of authorities to lower their fines in view of sanctions imposed elsewhere. This will require a firm commitment from the states involved and the promise of reciprocity. It may also require an agreement on how to determine an authority's prosecutorial interest and on how to allocate the overall proportionate fine between prosecuting authorities. Despite such significant obstacles, it is increasingly important that authorities look beyond the national context in exercising jurisdictional and prosecutorial discretion. In the crowded and complex enforcement environment of today, proportionate punishment can only be achieved by adopting a global perspective when pursuing cross-border misconduct.

VIII. CONCLUSION

The benchmark manipulation cases reveal a high level of cooperation between the prosecuting authorities with respect to the investigation of the conduct involved. The simultaneous settlements by the various regulators seem to indicate a similar level of coordination in the prosecution and punishment of the manipulation. An assessment of the fine decisions however shows that the agencies did not succeed in avoiding jurisdictional overlap. In fact, they all sanctioned the worldwide collusion between financial institutions without applying any clear jurisdictional delimitation and generally without taking into account fines imposed for the same conduct elsewhere. In cross-border and multi-agency cases, maintaining such isolated views creates concerns of multiple prosecution and over-punishment. In view of the increasingly crowded international enforcement environment, authorities should develop new guiding principles that ensure a desired level of overall deterrence and

overall proportionality of fines. Vital elements of such principles will include effective information sharing, coordination between all relevant authorities early on in investigations and the exercise of prosecutorial discretion from a global perspective. Whereas the first signs of a more international approach to the enforcement of cross border conduct are slowly emerging, the interest rate benchmark cases reveal that much more work lies ahead. The investigations into the alleged manipulation of oil, gas, and foreign exchange rate benchmarks give the antitrust, financial, and fraud authorities ample opportunity to jointly explore higher levels of coordination in the near future.