

Cartel

The Criminal Prosecution of Hardcore Cartels in the USA and the EU — A Backdoor Criminalization in the EU by the USA?

By Raphael Reims



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The criminal prosecution of hardcore cartels, i.e. the fixing of prices, imposition of output restrictions or the allocation of sales territories or customer groups by competitors², has a long and consistent tradition in the USA. By contrast, criminal prosecution of hardcore cartels in the EU exists only in some Member States.³ Criminal prosecutions of hardcore cartels by the USA, however, are also carried out outside its borders, including in the EU. Therefore, the question has been raised in the literature as to whether the criminal prosecution of hardcore cartels in the EU by the USA constitutes a backdoor criminalization.⁴

In order to compare the different approaches of the USA and the EU, and to address this question, the legal assessment and prosecution of hardcore cartels in the USA, the EU and the EU Member States will be analyzed.⁵ In addition, the cooperation between the USA and the EU and its Member States in the field of hardcore cartels, and the conditions and de-facto application of extraditions to the USA from EU Member States will be analyzed. Finally, the question regarding backdoor criminalization will be addressed.

I. Situation in the USA

In the following section, the legal assessment and criminal prosecution of hardcore cartels in the USA will be considered.

A. Section 1 Sherman Act⁶

Section 1 prohibits “every contract, combination ... or conspiracy in restraint of trade or commerce among the several States.” This broad construction has been specified by the courts, taking into account the wording, history, systematics and purpose of Section 1. In order for Section 1 to cover a behavior, the following conditions must be fulfilled: (1) an agreement, (2) between at least two parties, (3) unreasonably restraining trade or competition (4) in or affecting interstate commerce.⁷ In order for the relevant criminal sanctions to apply, (5) the acting person must also fulfill the condition of criminal intent, i.e. a corresponding intent or knowledge.⁸

According to the courts, certain types of behavior always fulfill the above-mentioned conditions and therefore always infringe Section 1. Such so-called per-se illegal practices include, for example, group boycotts.⁹ Pursuant to the courts, in order for one of these behaviors to infringe Section 1, the fulfillment of the above conditions does not have to be explained and proven individually, but only the behavior, for example, the group boycott, has to be

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² Cf. e.g. UNCTAD, Model Law on Competition Revised chapter III, https://unctad.org/system/files/official-document/tdrbpconf9L1_en.pdf, p. 8; p. 248; Lee, Strategies to Achieve a Binding International Agreement on Regulating Cartels, 2016, p. 21.

³ An overview of all states with a cartel criminal offence and brief explanations thereof can be found in *Shaffer/Nesbitt/Waller*, Criminalizing cartels: A global trend?, in: Comparative Competition Law, ed. by Duns/Duke/Sweeney, 2015, p. 301 et seq.

⁴ *Stancke*, CCZ 2014, p. 217 et seq.

⁵ The question of whether hardcore cartels should be criminally prosecuted at all will not be addressed as this question has already been answered in detail previously, cf. e.g. *Reims*, Der Kartellbetrug, 2020, p. 31 et seq., 123 et seq., and is, in a sense, the starting point for this study.

⁶ All sections not specified below are those of the Sherman Act.

⁷ Cf. *Broder*, A Guide to US Antitrust Law, 2005, p. 54 et seq. with further references.

⁸ USSC, decision of 29 June 1978, 438 U.S. 422, p. 435.

⁹ Cf. USSC, decision of 14 December 1998, 525 U.S. 128, p. 128.

demonstrated and proven.¹⁰ In the case of any other behavior, for example, a no-hire agreement,¹¹ the behavior and the fulfillment of the conditions must be demonstrated and proven for it to infringe Section 1. These behaviors are analyzed in particular with respect to the condition of unreasonably restraining trade or competition under the so-called rule of reason, as to whether the anticompetitive components outweigh the procompetitive components.¹²

In light of the question raised at the outset, it should be mentioned that the courts have interpreted the Section 1 condition of affecting interstate commerce broadly. Indeed, the courts have explicitly stated that. Furthermore, according to the courts, the condition is already fulfilled if a behavior has a not insubstantial effect on the interstate commerce involved.¹³ For example, price fixing that took place entirely in Japan was considered to be covered because it had a corresponding effect in the USA.¹⁴

B. Hardcore Cartels

According to the courts, hardcore cartels are per-se illegal practices for which the fulfillment of the above conditions does not need to be demonstrated and proven individually, and which, therefore, always infringe Section 1.¹⁵ Hardcore cartels are, as a rule, also likely to fulfill the relevant criminal-sanction condition of criminal intent, i.e. a corresponding intention or knowledge. Both can be explained in particular on the premise that, according to economists, the fixing of prices, the imposition of output restrictions or the allocation of sales territories or customer groups by competitors¹⁶, as already mentioned, as a rule, violate free competition by

eliminating the entrepreneurial risk and entrepreneurial freedom of competitors necessary for free competition, and by impairing the freedom of choice of the opposite side of the market necessary for free competition.¹⁷

C. Sanctions, Especially Criminal Fines and Imprisonment

Under Section 1, not only the relevant companies who fulfill the aforementioned conditions are punishable. The acting persons are punishable as well by a criminal fine of up to \$ 1 million or imprisonment of up to 10 years. Section 6 of the later-established Criminal Fine Improvement Act even provides that the criminal fine can be higher, namely up to twice the gross of the profit or loss derived from the infringement of Section 1.

In general, criminal sanctions apply to all forms of infringements of Section 1. In practice, however, the Antitrust Division of the Department of Justice, which is the competent authority in this regard, mainly prosecutes hardcore cartels.¹⁸ This can be explained by the difficulty of demonstrating and proving criminal intent, a corresponding intention or knowledge, outside of hardcore cartels.¹⁹

II. Situation in the EU

In this section, the legal assessment and prosecution of hardcore cartels by the EU will be analyzed.

A. Article 101 TFEU²⁰

Article 101(1) prohibits 'agreements between undertakings, decisions by associations of undertakings and concerted practices which

¹⁰ Cf. USSC, decision of 4 November 1997, 522 U.S. 3, p. 10.

¹¹ Cf. USCA 8th Circuit, decision of 2 April 1997, 110 F.3d 543, p. 545

¹² Cf. USSC, decision of 19 June 1984, 467 U.S. 752, p. 768.

¹³ USSC, decision of 8 January 1980, 444 U.S. 232, p. 246.

¹⁴ USCA 1st Circuit, decision of 17 March 1997, 109 F.3d 1, p. 4.

¹⁵ For the fixing of prices cf. USSC, decision of 23 January 1961, 365 U.S. 1, p. 5. For the imposition of output restrictions cf. USSC, decision of 8 January 1945, 323 U.S. 386, p. 406 et seq. For the allocation of sales territories cf. USSC, decision of 29 March 1972, 405 U.S. 596, p. 608. For the allocation of customer groups cf. USSC, decision of 29 March 1972, 405 U.S. 596, p. 604.

¹⁶ Thus a definition of hardcore cartels, cf. e.g. UNCTAD, supra note 2, p. 8; p. 248; Lee (n 2), p. 21.

¹⁷ Cf. e.g. *Bishop/Walker*, The economics of EC Competition Law, 2007, p. 163 et seq.

¹⁸ Cf. Department of Justice, An Antitrust Primer for Federal Law Enforcement Personnel, www.justice.gov/atr/page/file/1091651/download, p. 1 et seq.

¹⁹ Thus e.g. also *Broder* supra note 7, p. 54.

²⁰ All sections not specified below are those of the TFEU.

may affect trade between Member States, and which have as their object or effect the ... restriction ... of competition'. According to Article 101(3) the 'provisions of paragraph 1 may, however, be declared inapplicable'. This can be accomplished by means of so-called Block Exemption Regulations or by means of a so-called individual exemption, if the conditions set out in Article 101(3) are met. The conditions that must be fulfilled for Article 101 to cover a behavior are thus described more concretely than in Section 1 Sherman Act. However, the courts have clarified, taking into account the wording, history, systematics and purpose of Article 101, that the restriction of competition must be appreciable.²¹

Article 101(1) distinguishes between restriction by object and restriction by effect. According to the courts, a restriction of competition depends, among other things, on an actual restriction or real concrete potential restriction of the decision-making independence on a competition parameter of the participating undertakings.²² An anti-competitive object exists, according to the courts, among other things, if the concerted practice is objectively suitable to cause such a restriction of competition.²³ Restrictions by object include, for example, resale price maintenance where the manufacturer supplies its brands only to distributors on the condition of fixed, minimum or maximum resale prices.²⁴ In contrast, an anticompetitive effect exists, according to the courts, if the concerted practice causes the restriction of competition.²⁵ Restrictions by effect include, for example, selective

distribution, where the manufacturer supplies its brands only to distributors who fulfill certain, usually quality-related criteria.²⁶ It is already evident that this alternative is unpopular because the analysis then requires demonstrating an effect in practice. Moreover, this alternative also requires calculating the appreciability of a restriction of competition by market shares of the participating undertakings,²⁷ whereas, according to the courts, the appreciability is always given in case of an anticompetitive object.²⁸

B. Hardcore Cartels

According to the European Commission, hardcore cartels, as a rule, infringe Article 101.²⁹ This is because they generally have an anti-competitive object, as they are generally objectively suitable to cause at least an actual or real concrete potential restriction of the decision-making independence on price, output, sales territories or customer groups of the cartelists.³⁰ In addition, hardcore cartels are generally appreciable because the appreciability of a restriction of competition is, as mentioned, always given in the case of an anticompetitive object.³¹ Furthermore, within the framework of the Block Exemption Regulations, hardcore cartels are generally excepted from exemptions.³² And an individual exemption according to Article 101(3) is usually out of the question, because hardcore cartels generally do not achieve the required fair share of efficiencies to consumers.³³

²¹ ECJ, decision of 13 December 2012, C-226/11, para. 17.

²² ECJ, decision of 28 May 1998, C-7/95 P, para. 88.

²³ Cf. ECJ, decision of 30 June 1966, 56/65, p. 303.

²⁴ ECJ, decision of 3 July 1985, 243/83, para. 44.

²⁵ ECJ, decision of 28 March 1984, 28/83, p. 1703 et seq.

²⁶ Cf. ECJ, decision of 11 December 1980, 31/80, para. 15 and 16.

²⁷ Cf. Communication from the Commission of 30 August 2014, Notice on agreements of minor importance which do not appreciably restrict competition, Official Journal of the EU, C 291, para. 8.

²⁸ ECJ, decision of 13 December 2012, C-226/11, para. 37.

²⁹ Cf. European Commission, Guidance on restrictions of competition, www.ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf, p. 5 et seq.

³⁰ Cf. Communication from the Commission of 27 April 2004, Guidelines on the application of Article 81(3) of the Treaty, Official Journal of the EU, C 101, para. 21.

³¹ ECJ, decision of 13 December 2012, C-226/11, para. 37.

³² Cf. *Whish/Bailey*, Competition Law, 9th edition, 2018, p. 178.

³³ Cf. Commission, decision of 8 July 2009, COMP/39.401, para. 265.

C. Sanctions, Especially the Question of a Possibility of a Criminal Offence

According to Article 23(2) Regulation on the implementation of the rules on competition,³⁴ only companies who fulfill the aforementioned conditions are administratively punishable with a fine. However, the acting persons are neither administratively punishable with a fine, nor punishable by a criminal fine or imprisonment.

Criminal sanctions would most likely also not be permissible. On the one hand, according to the principle of conferral of Article 5(1) TEU, the EU has a legislative competence only to the extent that it has been delegated to it by the Member States.³⁵ This is the case according to Article 103(2)(a) for administrative punishments with a fine for competition law infringements. On the other hand, the implementation of criminal offences is a fundamental competence of a state, which is not the case for the EU as a sui generis entity.³⁶

III. Situation in the EU Member States

In this section, the legal assessment and criminal prosecution of hardcore cartels in the Member States of the EU will be considered.

A. National Competition Laws and their Interpretation

The relevant substantive competition laws of the Member States are broadly similar to Article 101 TFEU. As an example, the Irish Section 4(1) Competition Act prohibits “agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the . . . restriction . . . of competition.” The only difference that can

be observed in the first instance is the absence of the interstate clause of Article 101 TFEU, the condition of affecting trade between Member States.³⁷ In addition, some of the relevant competition laws, for example, in Section 4(2) et seq. Irish Competition Act, differ from Article 101 (3) TFEU in the structure of their prohibition exemptions.

However, the differences between the relevant substantive competition laws of the Member States and Article 101 TFEU are only of limited significance for this study. Because according to Article 3 Regulation on the Implementation of the Rules on Competition,³⁸ these substantive competition laws may not be interpreted differently from Article 101 TFEU to the extent that a behaviour also fulfills the interstate clause of Article 101 TFEU.³⁹ Furthermore, due to the broad conformity in the wording of the relevant substantive competition laws and Article 101 TFEU, as well as the widespread corresponding intention of the national legislators,⁴⁰ the substantive competition laws of the Member States are, interpreted in the same way as Article 101 TFEU even without fulfilling the interstate clause.⁴¹

B. Hardcore Cartels

According to the courts of the Member States and the leading literature, hardcore cartels infringe the substantive competition laws of the Member States.⁴² This can be explained on the premise that hardcore cartels, as a rule, infringe Article 101 TFEU.⁴³ And the substantive competition laws of the Member States are usually interpreted in the same way as Article 101 TFEU.⁴⁴ What has been said about the infringement of Article 101 TFEU by hardcore

³⁴ Official Journal of the EU, L 1, 4 January 2003, p. 1 et seq.

³⁵ *Jones/Menon/Weatherill*, The Oxford Handbook of the EU, 2012, p. 570 et seq.

³⁶ Cf. also *Phelan*, ISR 2012, p. 367.

³⁷ On its interpretation cf. Communication from the Commission of 27 April 2004, Guidelines on Guidelines on the effect on trade concept, Official Journal of the EU, C 101, para. 1 et seq.

³⁸ Official Journal of the EU, L 1, 4 January 2003, p. 1 et seq.

³⁹ Cf. e.g. *Jones/Sufrin/Dunne*, EU Competition Law, 7th edition, 2019, p. 1010.

⁴⁰ Thus e.g. the intention of the Dutch legislator in the case of its competition legislation Mededingingswet, cf. *Wesseling*, The Netherlands, in: The Modernisation of EU Competition Law Enforcement in the EU, ed. by Cahill, 2004, p. 408.

⁴¹ Cf. e.g. *van Gerven*, Substantive remedies for the private enforcement of EC antitrust laws before national courts, in: Modernisation of European Competition Law, ed. by Stuyck/Gilliams, 2002, p. 123.

⁴² Cf. e.g. the Irish court decision IESC, decision of 28 July 2011, 350/08, para. 12 and *Whish/Bailey*, supra note 32, p. 75.

⁴³ Cf. European Commission, supra note 29, p. 5 et seq.

⁴⁴ Cf. e.g. *van Gerven*, supra note 41, p. 123.

cartels therefore applies accordingly to the substantive competition laws of the Member States.

C. Sanctions, Especially Criminal Fines and Imprisonment

Under the competition laws of several Member States, companies who fulfill the aforementioned conditions and, in several cases, the acting persons are administratively punishable with a fine as well.⁴⁵

Beyond that, in some Member States the acting persons are punishable by a criminal fine or imprisonment.⁴⁶ As far as hardcore cartels are concerned, in some Member States they are only subject to criminal punishment in the context of procurement procedures. However, in the following Member States, hardcore cartels are also criminally punishable outside of procurement procedures: (1) Czech Republic: a criminal fine depending on the damage or imprisonment of up to 8 years, (2) Denmark: an unspecified criminal fine, (3) Estonia: a criminal fine of up to 500 days' income or imprisonment of up to 3 years, (4) France: a criminal fine of up to EUR 75 thousand or imprisonment of up to 4 years, (5) Greece: a criminal fine of up to EUR 1 million or imprisonment of up to 2 years, (6) Ireland: a criminal fine of up to EUR 4 million or imprisonment of up to 10 years, (7) Romania: a criminal fine of up to RON 150 thousand or imprisonment of up to 3 years, (8) Slovakia: imprisonment of up to 6 years, (9) Slovenia: a criminal fine of up to 500 days' income or imprisonment of up to 5 years and (10) Spain: a criminal fine of up to 2 years' income or imprisonment of up to 3 years. In the following Member States, hardcore cartels are only subject to criminal punishment in the context of procurement procedures: (1) Austria: imprisonment of up to 3 years, (2) Germany: a criminal fine of up to EUR 10.8 million or imprisonment of up to 5 years, (3) Hungary:

imprisonment of up to 5 years, (4) Italy: a criminal fine of up to EUR 1,032 or imprisonment of up to 5 years and (5) Poland: imprisonment of up to 3 years.⁴⁷

It is obvious that some of the abovementioned fine amounts are very low. This is partly due to the fact that most of the Member States mentioned de facto do not or no longer really prosecute their cartel criminal offences.⁴⁸ This is the case in the following Member States: (1) Austria, (2) Denmark, (3) France, (4) Hungary, (5) Poland, (6) Romania, (7) Slovakia, (8) Slovenia and (9) Spain.⁴⁹ To the extent that this is the case, however, these criminal offences still carry a risk of criminal prosecution under a different aspect, as will be explained later.

IV. Cooperation Between the USA and the EU and its Member States

In this section, the cooperation in the field of hardcore cartels between the USA and the EU and its Member States will be analyzed.

This cooperation has become necessary because due to increasing globalization, competition law infringements, especially hardcore cartels by internationally active companies, no longer have their object and effect in only one state, but in several states.⁵⁰ Furthermore, it is in the nature of cartels, unlike in the case of, for example, an abuse of a dominant position, that several companies are involved, and therefore all those involved need to be prosecuted, if necessary also on an international level, in order to ensure uniform and effective prosecutions.

A. Agreement Between the USA and the EU

One of the most important agreements in this field is the Agreement between the European Communities and the USA regarding the

⁴⁵ An overview of some of the member states sanctioning practice, including administrative punishments with a fine can be found in *Buretta/Terzaken*, *The Cartels and Leniency Review*, 9th edition, 2021, p. 31 et seq.

⁴⁶ The following listings contain only specific cartel criminal offences and do not include general criminal offences such as fraud or tax avoidance, which can be committed in connection with hardcore cartels.

⁴⁷ An overview of all states with a cartel criminal offence and brief explanations can be found in *Shaffer/Nesbitt/Waller*, supra note 3, p. 301 et seq.

⁴⁸ For e.g. France cf. OECD, *France – The Role of Competition Policy in Regulatory Reform*, 2013, p. 9.

⁴⁹ Cf. *Shaffer/Nesbitt/Waller*, supra note 3, p. 301 et seq.

⁵⁰ Cf. e.g. *Jones/Sufrin/Dunne*, supra note 39, p. 1186.

application of their competition laws and a corresponding supplementary agreement.⁵¹

1. Framework

According to Article II of the Agreement,⁵² cases that are handled by a competition authority of one contracting party shall be notified to the other contracting party, if they may affect its important interests. Further information shall be exchanged between the contracting parties according to Article III. According to Article IV, the competition authorities shall also assist and coordinate each other's enforcement activities. A competition authority may even request that the other competition authority takes up enforcement activities pursuant to Article V.⁵³

2. Application

The competition authorities regard their cooperation resulting from this agreement as particularly useful and as a model for further cooperation.⁵⁴ Certainly, the volume of applications of the agreement shows an intensification of the cooperation. In the first year after the conclusion of the agreement, the competition authorities cooperated in 17 proceedings, and in 162 proceedings 10 years later. However, the vast majority of the proceedings concerned merger control proceedings. Of those 162 proceedings, about 134 were merger control proceedings.⁵⁵ This is most likely due to the fact that in cartel investigations, although, as mentioned, the investigative measures can be coordinated in order to preserve a surprise effect, an exchange of investigative results is only possible to a

limited extent. This is because, according to Articles 8 and 9, the Agreement is subordinate to the law, in particular the following disclosure prohibitions:⁵⁶ according to Article 28(1) Regulation on the implementation of the rules on competition,⁵⁷ the competition authorities of the EU may only use information obtained during investigations for the purpose for which they were obtained. In the case of cartel investigations, this means only information relating to an infringement of Article 101 TFEU and not information relating to an infringement of Section 1 Sherman Act.⁵⁸ Information obtained by a grand jury in the USA may, according to Rule 6(e) Federal Rules of Criminal Procedure, also not be disclosed to competition authorities in the EU.⁵⁹

B. International Organizations

Further cooperation between the USA and the EU and its Member States in this area arises from various international organizations. Admittedly, the Member States of the World Trade Organization have rejected an international competition law regime. Nevertheless, the Organisation for Economic Co-operation and Development recommends cooperation similar to the agreement outlined above.⁶⁰ The de facto application of this cooperation is similar to the agreement outlined above. It is worth highlighting the resulting equivalent direct cooperation between the USA and the Member States of the EU.⁶¹ The International Competition Network promotes joint competition law enforcement as well, for

⁵¹ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, Official Journal of the EU, L 95, 27 April 1995, p. 47 et seq.; Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, Official Journal of the EU, L 173, 18 June 1998, p. 28 et seq.

⁵² All sections not specified below are those of the Agreement between the USA and the European Communities regarding the application of their Competition Laws.

⁵³ Further explanations can be found in e.g. *Jones/Sufrin/Dunne*, supra note 39, p. 1211.

⁵⁴ Cf. e.g. explicitly European Commission, Competition: EU and US celebrate 20 years of cooperation, www.ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_11_1194/IP_11_1194_EN.pdf, p. 1.

⁵⁵ These numbers were reported from the side of the European Commission *Friess*, Speech at the FIW Symposium on 15 February 2002, www.ec.europa.eu/competition/speeches/text/sp2002_007_de.pdf, p. 2.

⁵⁶ Cf. e.g. also *Jones/Sufrin/Dunne*, supra note 39, p. 1212.

⁵⁷ Official Journal of the EU, L 1, 4 January 2003, p. 1 et seq.

⁵⁸ Thus e.g. from the side of the European Commission also *Friess*, supra note 55, p. 6.

⁵⁹ Cf. *Foster*, Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight, <https://crsreports.congress.gov/product/pdf/R/R45456>, p. 1.

⁶⁰ For details on this cooperation through the WTO and the OECD cf. e.g. *Jones/Sufrin/Dunne*, supra note 39, p. 1214 et seq.

⁶¹ Cf. also the equivalent reports, e.g. European Commission, report of 4 October 2000, COM/0618, p. 8.

instance through the harmonization of enforcement activities.⁶²

V. Extraditions to the USA from the Member States of the EU

In the following section, the possibility of extraditions of acting persons of a hardcore cartel to the USA from the Member States of the EU will be examined. This has an essential relevance for the question presented at the outset of this investigation, because the condition of Section 1 Sherman Act of affecting interstate commerce is, as already mentioned, interpreted by the courts so broadly that it is already sufficient if a behaviour has a not insubstantial effect on the interstate commerce involved.⁶³

A. Conditions

The conditions for extraditions to the USA, including for hardcore cartellists, can be found in multilateral extradition agreements, such as the Agreement on Extradition between the EU and the USA,⁶⁴ bilateral extradition agreements, such as the Treaty on Extradition between Ireland and the USA,⁶⁵ and the respective national laws, such as the Irish Extradition Act.

The Member States of the EU have partly implemented different conditions for extradition to the USA. However, there are a substantial number of decisive conditions that are commonly included in all of these extradition regimes.⁶⁶

One of these common conditions, and the most decisive condition, is that of dual criminality. As can be observed, for example in Article 4(1) Agreement on Extradition between the EU and the USA,⁶⁷ this means that a behaviour, e.g. hardcore cartel, is criminally punishable

according to the law of the state requesting extradition, and according to the law of the extraditing state. So far, the above-mentioned states with a corresponding criminal offence are covered. In many cases, the maximum imprisonment for the behaviour must be at least one year. To this extent, the above-mentioned states with a corresponding maximum imprisonment are affected. In order to take into account the specific characteristics of extraditions and different legal systems, it is often sufficient to subsume the facts provided by the requesting state under the comparable criminal offence of the extraditing state.⁶⁸ Moreover, as can be seen for example in Article 4(3), typically not all conditions of this offence have to be fulfilled. Finally, as evidenced by the lack of equivalent provisions, it is irrelevant whether an extraditing state de facto does not or no longer really prosecutes such criminal offences. This is extremely important for the states mentioned in this regard above.

Additional examples of those common conditions are the principle of specialty, the prohibition of double jeopardy and the ensuring of human rights.⁶⁹ The first condition requires that the person to be extradited is only prosecuted for the behavior for which he is extradited.⁷⁰ The second condition, relating to the prohibition of double jeopardy, is of little significance in the case of hardcore cartels, as it is argued on behalf of the USA that its prosecution of hardcore cartels relates only to their effects in the USA.⁷¹ And the third condition of ensuring human rights is not likely to be very important in the case of hardcore cartels either. After all, the right to a fair trial is, as a rule, ensured in the USA.⁷² Moreover, the right to life is not endangered in the case of an extradition for a hardcore cartel, so that the otherwise

⁶² For details on this cooperation through the ICN cf. e.g. *Jones/Sufrin/Dunne*, supra note 39, p. 1216.

⁶³ USSC, decision of 8 January 1980, 444 U.S. 232, p. 246.

⁶⁴ Official Journal of the EU, L 181, 19 July 2003, p. 27 et seq.

⁶⁵ Irish Treaty Series, No. 3, 13 July 1987, p. 1 et seq.

⁶⁶ Cf. also e.g. *Girardet*, JECLAP 2010, p. 288 et seq.

⁶⁷ All sections not specified below are those of the Agreement on Extradition between the EU and the USA.

⁶⁸ Both reporting e.g. *Girardet*, supra note 66, p. 288 et seq.

⁶⁹ Cf. e.g. *Girardet*, supra note 66, p. 288 et seq.

⁷⁰ Cf. e.g. *Abbell*, Extradition to and from the USA, 2010, p. 388.

⁷¹ This reporting e.g. *Girardet* supra note 66, p. 288 et seq.

⁷² Cf. e.g. also *Abbell*, supra note 70, p. 264 et seq.

problematic possibility of a death sentence is not relevant here.⁷³

The most significant and decisive difference between the various extradition conditions of the Member States of the EU is that some Member States generally do not extradite their own nationals, mostly for constitutional reasons. Accordingly, Article 17(2) recognizes that the non-extradition of a Member State's nationals is partly protected by their constitutions. The following Member States generally extradite their own nationals or do so at their discretion: (1) Belgium, (2) Bulgaria, (3) Denmark, (4) Estonia, (5) France, (6) Hungary, (7) Ireland, (8) Italy, (9) Luxembourg, (10) Malta, (11) Netherlands, (12) Poland and (13) Romania. The following Member States generally do not extradite their own nationals or do so only under very narrow conditions: (1) Austria, (2) Croatia, (3) Cyprus, (4) Czech Republic, (5) Finland, (6) Germany, (7) Greece, (8) Latvia, (9) Lithuania, (10) Portugal, (11) Slovakia, (12) Slovenia, (13) Spain and (14) Sweden.⁷⁴

B. Application

The Antitrust Division of the Department of Justice of the USA considers extraditions to prosecute hardcore cartels to be highly successful. According to earlier estimates, well over a hundred acting persons of hardcore cartels have been extradited to the USA.⁷⁵ The Department of Justice also, as a rule, places these acting persons on Interpol's wanted list, the so-called Red Notices.⁷⁶

The latter is also one of the reasons why the non-extradition of their own nationals by some Member States of the EU is only of partial relevance. This is because persons included in Interpol's wanted list can be arrested almost anywhere in the EU.⁷⁷ And this is particularly

relevant for the company executives involved in a hardcore cartel. After all, company executives are increasingly of foreign nationality and travel a lot across international borders.⁷⁸

However, even if all the conditions for an extradition are fulfilled, the corresponding extradition requests are de facto not always filed. This is because such requests are extremely labor-intensive. Extradition requests therefore also depend on the complexity of the extradition case and the personnel capacities of the Department of Justice. For an efficient use of the work capacities, the provability of the hardcore cartel and the involvement in it of the person to be extradited in subsequent court proceedings needs to be assessed in advance as well.⁷⁹ To reduce the workload and to help extraditions succeed, the Department of Justice has prepared publicly available internal guidance on this for USA Attorneys and similar officials in its Justice Manual.⁸⁰

VI. Closing Remarks

Finally, the question raised at the outset, whether the criminal prosecution of hardcore cartels in the EU by the USA constitutes a backdoor criminalization, will be addressed.

This question can only be answered in the affirmative to a limited extent. Admittedly, the decisive condition for the criminal prosecution of hardcore cartels by the USA under Section 1 Sherman Act, that of affecting interstate commerce, is, as already mentioned, interpreted by the courts so broadly that it is already sufficient if a behavior has a not insubstantial effect on the interstate commerce

⁷³ Cf. again Section 1 Sherman Act and Section 6 Criminal Fine Improvement Act.

⁷⁴ Cf. Council of Europe, National Procedures for Extradition, www.coe.int/en/web/transnational-criminal-justice-pcoc/extradition-country-information, in each case p. 1 et seq.

⁷⁵ Cf. Department of Justice supra note 18, p. 10.

⁷⁶ *Sweeney*, The Internationalisation of Competition Rules, 2010, p. 111.

⁷⁷ Cf. Department of Justice, The USA National Central Bureau of Interpol, <https://oig.justice.gov/reports/plus/a0935/final.pdf>, p. 95 et seq.

⁷⁸ Cf. e.g. *Oddou/Gregersen/Black/Derr*, Building Global Leaders, in: *Developing Global Business Leaders*, ed. by Medenhall/Kühlmann/Stahl, 2001, p. 111 et seq.

⁷⁹ Cf. e.g. Department of Justice, Review of the Office of International Affairs' Role in the International Extradition of Fugitives, <https://oig.justice.gov/reports/OBD/e0208/extradition.pdf>, p. 6, 11.

⁸⁰ Cf. Department of Justice, Justice Manual, www.justice.gov/jm/justice-manual, para. 9-15.000 et seq.

involved.⁸¹ Nevertheless, cases are also imaginable in which this requirement is not fulfilled, especially in the case of the aforementioned global hardcore cartels that avoid states with a corresponding criminal cartel law, such as in the case of the USA.⁸²

Moreover, one can only speak of backdoor criminalization in cases where the Member States of the EU do not criminally prosecute hardcore cartels themselves. However, this cannot be said of the above-mentioned Member States that do criminally prosecute hardcore cartels themselves.

Furthermore, the information required for an effective backdoor criminalization of hardcore cartels is admittedly partly exchanged between the USA and the EU and its Member States. However, the exchange of information also has its limits in, among others, the aforementioned Article 28(1) Regulation on the implementation of the rules on competition and Rule 6(e) Federal Rules of Criminal Procedure.⁸³

Finally, the conditions commonly included in the extradition regimes of the Member States of the EU, which are necessary for a de facto consequential backdoor criminalization of hardcore cartels, may indeed be fulfilled now and then. However, an extradition to the USA is often not carried out, inter alia, due to the common condition of dual criminality and the fact that some Member States generally do not extradite their own nationals.⁸⁴

After all, the possibility of extraditions to the USA for involvement in a hardcore cartel increases at least the risk also in the Member States of the EU of being criminally punished for this behavior. This risk is likely to increase with the international tendency toward such criminalization.⁸⁵ In addition, the associated interference with the freedom of movement within the EU can also be regarded as a de-facto sanction. In any case, the USA is very good at asserting its interests and presenting itself in the image of Uncle Sam's long arm.⁸⁶

⁸¹ USSC, decision of 8 January 1980, 444 U.S. 232, p. 246.

⁸² Cf. *Hammond*, Cornerstones of an effective leniency program, www.justice.gov/atr/file/518156/download, p. 8 et seq.

⁸³ Cf. e.g. from the side of the European Commission *Friess*, supra note 55, p. 6.

⁸⁴ Cf. e.g. *Girardet*, supra note 66, p. 288.

⁸⁵ Cf. e.g. *Shaffer/Nesbitt/Waller*, supra note 3, p. 301 et seq.

⁸⁶ *Moeschel*, US versus EU Antitrust Law, [ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/WernhardMoeschel.pdf](http://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/WernhardMoeschel.pdf), p. 1 et seq.