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I. INTRODUCTION

The leadership at the U.S. Department of Justice ("DOJ")—during Democratic and Republican Administrations alike—has actively encouraged competition law enforcers around the world to prosecute cartels, and to increase the penalties imposed on cartels, while encouraging leniency for cartel members that report cartels to officials.

Over the last 20 years, antitrust enforcement efforts have brought down global cartels in industries from air cargo to vitamins and auto parts to memory chips.

Department officials have not, however, always made clear what constitutes a "cartel" and that has left room for mischief. Department rhetoric may be encouraging overly vigorous enforcement against activities that would be reviewed civilly under the rule of reason, not criminally, and not under the *per se* rule, in the United States. Foreign enforcers, sometimes at the instigation of competitors, have brought cases challenging vertical restraints and restraints ancillary to pro-competitive collaborations, characterizing such cases as cases against cartels.

When U.S. officials call on foreign enforcers to prosecute cartels, they ought to first define a cartel: a "naked" price-fixing or market division agreement, which is usually covert. It is not an agreement ancillary to a potentially efficiency-enhancing collaboration.

II. PROSELYTIZING CARTEL ENFORCEMENT

Senior DOJ Antitrust Division officials have long advocated for cartel enforcement worldwide. They argue that "cartel behavior (price-fixing, market allocation, and bid-rigging) is bad for consumers, bad for business and bad for efficient markets generally.… [C]artels are the equivalent of theft by well-dressed thieves, and they deserve unequivocal public condemnation."[2] Antitrust enforcement against cartels is regularly described by officials as the Division's "core mission" and their "highest" or "top" priority.[3] The Division's criminal enforcement program has been described as "fundamentally nonpartisan and bipartisan," fostering "great continuity from one Administration to another."[4]

The ABA Antitrust Section has itself strongly supported the position that cartels are anticompetitive and harm consumers. The Section argued in recent testimony that the Division should continue its policy of prioritizing cartel detection, prosecution, and deterrence, and

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[2] Joel I. Klein, *The War Against International Cartels: Lessons from the Battlefront* (Oct. 14, 1999).

[3] Anne K. Bingaman & Gary R. Spratling, *Criminal Antitrust Enforcement* (Feb. 23, 1995); R. Hewitt Pate, *International Anti-Cartel Enforcement* (Nov. 21, 2004); Scott D. Hammond, *An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program* (Jan. 10, 2005).

[4] Anne K. Bingaman, *The Clinton Administration: Trends in Criminal Antitrust Enforcement* (Nov. 30, 1995).

applauded the Antitrust Division's continued efforts to engage in outreach and cooperation with cartel enforcers around the world.[5]

In the United States, "hardcore cartel activity—such as price-fixing, bid rigging, and customer and market allocation agreements—is a felony violation of our criminal laws, and both corporations and individuals may be held liable."[6] DOJ has consistently argued "there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials."[7]

DOJ leaders have encouraged governments around the world to "dedicate sufficient resources to make anti-cartel enforcement a top priority."[8] DOJ officials have noted that the United States has "taken a leadership role in helping to train competition authorities in other parts of the world in how to detect, investigate and prosecute cartels and in exchanging best practices."[9] They have advocated use of trained investigators and investigative tools such as informants and search warrants. For years the DOJ has hosted annual seminars on cartel enforcement for competition officials from other countries. More than 120 countries now have antitrust laws and many have anti-cartel provisions. Still, the DOJ argues, "[h]aving laws is not enough; they must be enforced."[10]

Other countries are listening. In 1998, the OECD branded cartels "the most egregious violations of competition law."[11] While large numbers of countries at one time used "blocking" and "clawback" statutes to protect their nationals from U.S. antitrust enforcement, they are now supporting cross-national enforcement, coordinating "dawn raids" with service of search warrants in the U.S. A U.K. citizen was even extradited to stand trial and serve jail time in the United States for obstruction of justice in connection with an antitrust investigation. The United States is a party to bilateral agreements to facilitate antitrust cooperation with Australia, Brazil, Canada, Chile, China, the European Union, Germany, India, Israel, Japan, Mexico, and Russia, and has broad mutual legal assistance treaties to obtain assistance in criminal matters with approximately 80 countries.[12]

DOJ has recognized the expanding cartel enforcement: "no longer does the United States stand virtually alone in its commitment to vigorous antitrust enforcement." Indeed, the strengthening of antitrust laws and enforcement around the world has, according to DOJ, led to "the shrinking of safe harbors where foreign cartel members can escape prosecution for their cartel activities."[13]

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[5] Statement on behalf of the ABA Section of Antitrust Law, before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, *U.S. Cartel Enforcement* (Nov. 14, 2013).

[6] Scott D. Hammond, *Fighting Cartels—Why and How? Lessons Common to Detecting and Deterring Cartel Activity* (Sept. 12, 2000).

[7] *Id.*

[8] *Scott D. Hammond, Ten* Strategies for Winning the Fight Against Hardcore Cartels (Oct. 18, 2005).

[9] William J. Kolasky, *U.S. and EU Competition Policy: Cartels, Mergers and Beyond* (Jan. 25, 2002).

[10] *Id.*

[11] Klein, *supra* note 2.

[12] *Antitrust Cooperation Agreements*, available at http://www.justice.gov/atr/public/international/int-arrangements.html; Antitrust Division Manual, Chapter VII.D.4.

[13] Belinda Barnett, *Status Report on International Cartel Enforcement* (Nov. 30, 2000).

III. THE FAILURE TO DEFINE A CARTEL

While DOJ officials have noted that the Division focuses its criminal enforcement on "hard core violations" where it believes there has been a clear and purposeful violation, and not where there are novel issues of law or fact,[14] it seldom explains that a "hard core" or "naked" cartel is an agreement (i) between competitors to fix prices or divide markets that is "almost invariably covert," (ii) between competitors not engaged in an efficiency-enhancing collaboration, and (iii) lacks "any redeeming value."[15]

The DOJ, at times, has made clear that it only prosecutes "naked cartel restraints," that is, "only those classes of horizontal agreements that carry such a significant threat of restricting output and/or raising price that one need not inquire into the surrounding economic circumstances to conclude they pose a serious danger to consumer welfare." An integral corollary is the recognition that the restraint "has no significant economic potential other than raising price and restricting output," and does "not generate any significant integrative efficiencies."[16]

There is a critical distinction in U.S. antitrust law between "naked" restraints and "ancillary" restraints, restraints ancillary to the main purpose of a lawful contract. Ancillary restraints contribute to or are subordinate and collateral to the main purpose of a joint venture.[17] Such restraints are lawful if they are "reasonably related to … and no broader than necessary to effectuate" or "reasonably necessary" to achieve a venture's procompetitive business purpose.[18]

Under U.S. law, when competitors collaborate in a manner that creates an efficiency-enhancing integration of economic activity—even when their collaboration might ultimately be found to unreasonably restrain trade and violate the Sherman Act—the Antitrust Division does not consider such a collaboration to be a cartel.[19] DOJ's criminal enforcement against cartels is limited to agreements among competitors serving no purpose other than to eliminate competition, which are *per se* illegal.[20] Only naked price-fixing, bid-rigging, and market allocation agreements that have "'manifestly anticompetitive' effects … and 'lack … any redeeming virtue'" are condemned as cartels.[21] Territorial and customer restraints ancillary to a legitimate joint venture are not naked and are analyzed under the rule of reason.[22]

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[14] Thomas O. Barnett, *Criminal Enforcement of the Antitrust Laws: The U.S. Model* (Sep. 14, 2006); ANTITRUST DIVISION MANUAL, Chapter III.

[15] Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19 (2009); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[16] Charles F. Rule, *Criminal Enforcement of the Antitrust Laws: Targeting Naked Cartel Restraints*, 57 ANTITRUST L.J. 257 (1988).

[17] *United States v. Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

[18] E.g., *SCFC ILC v. Visa U.S.A., Inc.*, 36 F.3d 958, 970 (10th Cir. 1994); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003).

[19] FTC & DOJ, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (2000).

[20] Gregory J. Werden, Scott D. Hammond, & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions* (Mar. 1, 2012).

[21] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*, 551 U.S. 877,886 (2007) (quoting *Bus. Elecs. Corp. v Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

[22] *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 228-30 (D.C. Cir. 1986).

Per se liability is "reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" An agreement by musicians to set a price for a blanket license, like an agreement by oil companies in a joint venture to refine and sell gasoline to set a price for gasoline, while "price fixing in a literal sense, … is not price fixing in the antitrust sense."[23]

IV. FOREIGN ENFORCEMENT OF COMPETITOR COLLABORATIONS AS CARTELS

Foreign competition officials do not always understand the difference between a naked cartel and a restraint that is ancillary to an efficiency-enhancing integration.

An example illustrates the problem, which exists across many jurisdictions. The Australian Competition and Consumer Commission ("ACCC") instituted legal proceedings in 2005 against Barton Mines Corp. accusing it and subsidiaries of entering into a market sharing agreement with its joint venture partner regarding alluvial garnet, an abrasive material used in sandblasting and waterjet cutting.[24]

A court decision in another proceeding reveals that Barton had a 50 percent interest in GMA Garnet Pty Ltd, which owned a garnet mine. Barton agreed to sell the garnet from the mine exclusively in certain parts of Australia (Queensland, New South Wales, Victoria, Tasmania, and South Australia) and its joint venture partner agreed to sell exclusively in other parts of the country (Western Australia and Northern Territory). After serious differences arose between the partners, Barton's partner brought the venture to the ACCC's attention.[25]

In announcing a settlement of its enforcement action for $1.5 million, the chairman of the ACCC said the penalty "should serve as a warning to other companies which may try to collude and allocate markets between them" and asserted that the ACCC "will apply the cartel provisions of the [law] just as vigorously to foreign companies as it will to home grown cartel participants." As described by the ACCC, Barton had "entered into an illegal market sharing arrangement" by agreeing to "restrictions in relation to the geographic territories into which [it] would be permitted to supply alluvial garnet." [26]

There is little doubt that such a territorial restriction ancillary to a joint venture would be analyzed under the rule of reason in the United States. It is not a covert, naked cartel, for which a firm should be able to seek leniency and encourage prosecution of its joint venture partner.

If competition is truly to be promoted, enforcement agencies around the world should not summarily condemn restrictions on competition as "cartels" without evaluating first whether such restraints contribute to the success of a venture that promises greater productivity and output.

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[23] *Broadcast Music v. CBS*, 441 U.S. 1 (1979); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5-6 (2006).

[24] ACCC Press Release, *ACCC Institutes Against Garnet Firms Over Alleged Market Sharing Agreement* (March 17, 2005).

[25] *GMA Garnet Pty Ltd v Barton International Inc.,* FCAC 38 (May 4, 2010).

[26] ACCC Press Release, *$1.525 million penalties against garnet producers for market sharing arrangement* (Sept. 22, 2006).

V. CONCLUSION

Antitrust authorities are on solid ground in attacking naked cartels as the equivalent of "theft by well-dressed thieves." But as the DOJ continues to promote cartel enforcement around the world, it should be careful to define the terms it is using so as not to encourage challenges to restraints that are ancillary to pro-competitive collaborations.