AmCham EU 40th Annual Competition Policy Conference

Remarks of Maria Coppola, Director, Office of International Affairs

Reflection on the Dividends of Long-term Investments: Transatlantic Enforcement Cooperation

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I appreciate the opportunity to join this event celebrating 40 years of the US-EU relationship, and to talk about the development of the transatlantic relationship in the field of competition enforcement.[1]

More specifically, I will focus on the evolution of enforcement cooperation, and discuss why agencies charged with enforcing domestic laws developed close relationships with international counterparts, and the impact this has had on international antitrust. As part of this discussion, I feel obliged to address the recent scrutiny of US competition cooperation and explain my concerns with the false narratives.

When colleagues met at the first AmCham EU conference on competition policy in 1983, the landscape was radically different. That period was aptly described by a retired FTC colleague, John Parisi, as "the dark ages of conflicts".[2] These were the times of "Fortress Europe", the uranium cartel case, the adoption of blocking statutes, and so forth. 1989 brought the EC merger regulation, and, not coincidentally, the launch of the foundational US-EU cooperation agreement in 1991. This framework was put to good use during the cross-border M&A wave of the 1990s and enabled greater engagement between agencies, including the US and Europe, and others as well, primarily at the principals' level but with some staff engagement on specific cases. Indeed, we have one of our panelists today to thank for this development. Philip Lowe, then-Director of the EC's Merger Task Force, encouraged DG COMP and US colleagues to work together on the growing case load of international mergers, and established the framework in which present day cooperation functions – including the first waivers of confidentiality by merging parties.

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[1] I wish to thank Andrew Heimert, Jon Nathan, Paul O'Brien, and Kelly Signs for their comments and suggestions on these remarks, and Jill Canning for her assistance. My comments today are my own and do not necessarily reflect the position of the Federal Trade Commission or any individual Commissioner.

[2] Parisi, J. (2010), *Cooperation Among Competition Authorities in Merger Regulation,* Cornell International Law Journal, Vol. 43(1)y, 55-72. (https://ww3.lawschool.cornell.edu/research/ILJ/upload/Parisi.pdf)

Then came the schisms at the turn of the century. The most notorious of these merger debacles served as my introduction to international antitrust beyond textbooks. While in law school, I participated as a research assistant in a small, closed-door meeting with US and EU enforcers at Columbia University on the margins of the Fordham conference. This was October 2001. The International Competition Network (ICN) had just been launched to great fanfare on Thursday by top antitrust officials from 14 jurisdictions, including the US and EU. Here we were, Saturday morning, and I was frantically scribbling notes to record a heated discussion about portfolio effects. Simmering anger soon gave way to jabbing fingers, red faces, raised voices. Cooperation and hard-won trust had failed to avoid a conflicting outcome.

Despite lingering shell shock from this event, I joined the FTC the next year, and began working in international antitrust. Scarred by the recent conflicts and against the backdrop of a massive proliferation in the number of jurisdictions with merger control, in the aughts all stakeholders doubled down, emphasizing the importance of international cooperation, especially for mergers. It was a golden era for international cooperation. The ICN's first project was to develop principles and practices that would streamline procedures for multijurisdictional merger review. The OECD adopted a Council Recommendation on Mergers that called on countries to facilitate effective co-operation and co-ordination of merger reviews, including to adopt national legislation that eliminated or reduced impediments to cooperation and coordination. For its part, the FTC entered into several additional bilateral cooperation agreements, including with Japan, Israel, and Mexico.

The legal and business community, including the United States Chamber of Commerce, American Bar Association, and International Bar Association, drove the push for cooperation as much as, or in some cases more than, the agencies themselves.[3] For example, the American Bar Association, in 2006

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[3]*See, e.g.*, U.S. Department of Justice, *U.S. Dep't of Justice and Fed. Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation, Issued Jan. 13, 2017, Comments of the U.S. Chamber of Commerce at 3* (Dec. 1, 2016), https://www.justice.gov/media/868566/dl?inline (welcoming that the updated international antitrust guidelines "extend beyond enforcement and now include cooperation," and observing that "[a]ntitrust cooperation between jurisdictions is increasingly important, particularly with regard to merger review"); U.S. Department of Justice, *Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Proposed Update to the U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation* (Dec. 1, 2016), https://www.justice.gov/media/868561/dl?inline ("The Sections welcome the addition of Chapter 5 [addressing international cooperation]. The International Competition Network ("ICN") Merger Working Group has highlighted that effective international cooperation depends on mutual understanding of frameworks, timetables, procedures and confidentiality rules and investigative processes between jurisdictions. The Agencies could consider also referring in the Proposed Update to the importance of ensuring that such mutual understanding exists."); U.S. Department of Justice, *IBA Cartels Working Group Comments on the Updated Antitrust Guidelines for International Enforcement and Cooperation,* (Nov. 30, 2016), https://www.justice.gov/media/868481/dl?inline ("welcom[ing] the Agencies' initiative to discuss at great length the scope of international cooperation" and noting "that effective international cooperation depends on mutual understanding of frameworks, timetables, procedures and confidentiality rules and

comments to a congressionally mandated commission that was examining whether US antitrust laws needed changing, recognized the significant efforts the U.S. antitrust agencies invested in promoting international cooperation, and urged greater sharing and obtaining of evidence, and legislation to allow for staff exchanges. The ABA comments noted that the "lack of coordination, . . . would threaten to undermine the efficiency of business and the efficacy of antitrust policy."[4]

Both underpinning and responding to these efforts, the FTC, DOJ, and the EC were firmly committed to an ever-closer US-EU working relationship. This reimagination would grow and flourish in the decades that followed. The US-EC Mergers Working Group was launched, involving senior staff and frequent meetings where they addressed difficult topics in private settings. The Working Group produced important public-facing documents such as the 2011 "Best Practices on Merger Cooperation", an advisory framework for interagency cooperation. The framework set forth best practices the three agencies would seek to apply when they review the same merger, and emphasized the substantial contribution that merging parties can play in facilitating cooperation among reviewing agencies.[5] During that decade, regular engagement on enforcement matters became routine.

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investigative processes between the jurisdictions. Therefore, the Agencies could consider including reference in this section to the importance that such mutual understanding of investigative practices and procedures are in place, so as to increase transparency and effectiveness."); American Bar Association, *Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding International Cooperation: Are There Technical or Procedural Changes that the United States Could Implement to Facilitate Further Coordination with Foreign Antitrust Authorities?* (2006), https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2006/comments-inter-coop2-06-comm.pdf ("The U.S. antitrust agencies have invested significant effort in promoting international antitrust cooperation generally, and in developing effective relationships with key foreign jurisdictions to coordinate enforcement efforts and work toward policy convergence. They have done remarkably well at it, within the limits of their resources and the inevitable disparities in approach and capability among the world's antitrust agencies. In general, the Antitrust Section believes the agencies should continue these important efforts.").

[4] American Bar Association, *Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding International Cooperation: Are There Technical or Procedural Changes that the United States Could Implement to Facilitate Further Coordination with Foreign Antitrust Authorities?* (2006), https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2006/comments-inter-coop2-06-comm.pdf.

The ABA comments were made in response to the Antitrust Modernization Commission, a bipartisan commission created by Congress to examine whether antitrust law needed to be modernized. The Commission was charged with evaluating the advisability of reform proposals, and to prepare and submit to Congress and the President a report. The comments read, "The advance of economic globalization and the proliferation of jurisdictions with antitrust laws have heightened the need for coordination among the world's antitrust authorities. Lack of coordination, at its extreme, would threaten to undermine the efficiency of business and the efficacy of antitrust policy. Businesses could be subject to unnecessary degrees of uncertainty, delay, heightened transaction costs, and overly restrictive regulation. Antitrust enforcement could be frustrated by inconsistent policies and outcomes, loss of credibility and support, and diminished cooperation from businesses and their lawyers."

[55] U.S. Federal Trade Commission, *US – EU Merger Working Group, Best Practices on Cooperation in Merger Investigations*, (October 1, 2011), https://www.ftc.gov/legal-library/browse/us-eu-merger-working-group-best-practices-cooperation-merger-investigations.

Starting in 2011 and continuing for a decade, I was personally involved in the ten to twenty parallel merger reviews we did each year with the EC, and continue engagement today.[6] By the time I became involved in day-to-day case cooperation, there was clear consensus that cooperation: (1) enables the agencies to identify issues of common interest, (2) streamlines investigations, (3) improves analyses, and (4) avoids conflicting outcomes, when possible, in light of our respective regimes. And while I focused on cooperation with the EC and UK, other FTC colleagues handled cooperation with other jurisdictions, such as Australia, Canada, China, Japan, and Mexico, and many others for which consensus on cooperation was as strong. This level of cooperation not only benefits the agencies and ultimately, the consumers and businesses who rely on sound, principled antitrust enforcement; the primary beneficiaries of cooperation are the merging parties, who rely on cooperation to help navigate the multitude of jurisdictions enforcing a panoply of different laws.

As this cooperation expanded, the legal and business communities continued to strongly support these efforts. The ABA, IBA, and Chamber of Commerce, among others, applauded the US antitrust agencies for adding a section on international cooperation to their 2017 International Guidelines revision, with the US Chamber of Commerce specifically welcoming the inclusion of cooperation in the guidelines because it recognized that, "[a]ntitrust cooperation between jurisdictions is increasingly important, particularly with regard to merger review." For multinational deals it was not uncommon that parties would look to align review timetables and work with reviewing agencies early – often before filing – to do so, in order to allow for engagement among investigative staffs and with merging parties at key stages of their respective investigations. A clear indication that cooperation benefits the merging parties is the nearly universal granting of waivers to permit more in-depth engagement. Waivers were viewed as enabling more complete communication and cooperation, allowing agencies to make more informed decisions and coordinate more effectively, often expediting the review. Indeed, waivers were so routine that on occasion I would receive them before the agency had even received a filing.

Cooperation provides benefits even in areas when reviewing jurisdictions have divergent approaches or practices. For transactions with worldwide markets, particularly in non-horizontal mergers where our analyses sometimes diverged, staff of each agency would look to cooperate as closely as possible to collect a common set of facts. Merger review is highly fact specific, and the cooperation between the agencies helped each agency get up to speed quickly and efficiently, especially where the factual circumstances were similar. Joint calls with the parties or third parties were not uncommon. We coordinated review timing and remedies, helping to avoid potentially conflicting or incompatible

[6] Over the past 15 years, FTC has engaged in enforcement cooperation with at least 20 jurisdictions a year, on at least 30 matters each year.

remedies or outcomes that would have resulted in merger delays, substantial extra costs, and potentially, at least in some cases, scuttled deals. We often had a common trustee for divestitures. We mirrored language if a remedy required ongoing monitoring and on occasion had the same monitor. In short, we were cooperating, *as we still are*, exactly the way everyone had always urged us to: close and regular engagement guided by three principles— sovereignty, comity, and respect.

Imagine my surprise, then, when well-known organizations, members of Congress, and even merging parties called out our routine cooperation – cooperation that had been lauded for decades – as "international regulatory collusion".[7] Accusations, for example, that the FTC is somehow manipulating counterparts into doing our bidding, cooperating with foreign governments to "accomplish abroad what it cannot achieve domestically."

What is driving this change in the narrative?

The curriculum in my teenager's school proves useful in answering this question. In lessons on identifying and debunking conspiracy theories the students are asked to consider three questions: Who is behind the information? What is the evidence? What do other sources say?

I will skip the specifics of "who", beyond noting that many of them frown upon the return to a more enforcement-minded approach to antitrust. Next, what is the evidence? One source appears to be that we and other reviewing jurisdictions reached the same outcome in some cases. This, of course, is no different than it has been for many years, save that in the past when multiple jurisdictions reached a similar outcome this was applauded by companies and the private bar as a sign of successful cooperation and a mature global antitrust system. Other "evidence", a generous term, seems to be based on redactions in our responses to freedom of information requests. Redactions, for example, of what DG COMP staff wrote in emails to us – material we are obliged by statute to redact. This evidence gathering resembles a creative writing assignment – take what isn't known, imagine the worst, and then fill in the blanks to piece together a story. Another source appears to be the FTC visitors' log, which reflect visits of colleagues from counterpart agencies while they were in town for the ABA Antitrust Section Spring Meeting. It's worth noting that FTC logs from previous Spring Meetings would, without exception, show many of the

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[7] *See e.g*, Vasant, K*., US Chamber says FTC engaged in 'international regulatory collusion' over Illumina-Grail merger* (Feb. 25, 2023) https://mlexmarketinsight.com/news/insight/us-chamber-says-ftc-engaged-in-international-regulatory-collusion-over-illumina-grail-merger; The Wall Street Journal, *The FTC's Antitrust Collusion,* (Feb. 23, 2023), https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-grail-acquisition-a78e03d0; U.S. Senate Committee on Commerce, Science, & Transportation, *Sen. Cruz Blasts FTC for Colluding with EU to Target American Businesses,* (Aug. 22, 2023), https://www.commerce.senate.gov/2023/8/sen-cruz-blasts-ftc-for-colluding-with-eu-to-target-american-businesses.

same visitors, or their predecessors. These meetings merely reflect on-going relationship building, not new-found opportunities for "collusion".

Finally, what do other sources say? Other sources include a series of agency tweets and press releases that underscore the independence of our respective reviews, as evidenced by no less than different outcomes in the same reviews despite similar market conditions.[8] Another source is an agency's general counsel testifying in court that counterpart's actions did not affect decision-making, or my own agency leadership testifying reviews are independent.[9]

The suggestion that our decades of enforcement cooperation has become a grand effort in enforcement collusion and, as a result, should be severely curtailed, are toxic and unsupported by any objective evidence. But what is behind this whisper campaign? Is the objection that agencies are discussing timing, or theories of harm, or possible remedies or outcomes? Yes, we speak with our counterparts in parallel investigations. Yes, we meet with our colleagues. Yes, we discuss our own perspectives and where waivers are provided, even confidential business information. And yes, as experts investigating similar markets, we come to similar conclusions on many occasions, but not all. This is not sinister. This is precisely the engagement that the legal and business communities, as well as agencies, all envisioned, asked for, and worked together to build.

Meanwhile, we have seen merging parties without exception continue to support and facilitate cooperation, including through the provision of waivers and more generally. This continued support for case cooperation belies any concern that the agencies are acting in bad faith. But what if the agencies heeded these calls and cooperation as it has evolved stopped, what should replace it?

For decades, enhanced engagement and in particular cross border enforcement cooperation has provided the foundation for a well-functioning international antitrust system. Express or implied allegations that enforcement cooperation is a mastermind effort at collusion discredits the decades of effort spent building

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[8] *See*, for example, CMA press release in *Microsoft/Activision*, "We are the only competition agency globally to have delivered this outcome." U.K. Competition and Markets Authority, *Microsoft concession a gamechanger that will promote competition,* (Oct. 13, 2023), https://www.gov.uk/government/news/microsoft-concession-a-gamechanger-that-will-promote-competition.

[9] *See* Testimony of Chris Prevett, Interim General Counsel of the UK Competition and Markets Authority. U.K. Competition Appeal Tribunal, *Microsoft Corporation v. Competition and Markets Authority – Non-confidential version of the second witness statement of Mr Prevett*, (Jul. 20, 2023), https://www.catribunal.org.uk/sites/cat/files/2023-07/2023.07.20%20Second%20Witness%20Statement%20of%20Chris%20Prevett%20%28Non-confidential%29.pdf. *See also Chair Lina Khan's Testimony Before House Committee on the Judiciary, July 13, 2023*, (July 13, 2023), https://www.ftc.gov/news-events/events/2023/07/chair-khan-testimony-house-committee-judiciary-july-13-2023.

trust to ensure an interoperable system. And for those of us who have been in the business for decades, we know there is a cost to these claims. If they impact our engagement, it will be a cost borne by many.

I hope that these claims will be short-lived, and the unanimity that international cooperation is positive will prevail.