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"I'd like to propose a toast" Marking the 20th Anniversary of U.S.-EU Antitrust Cooperation

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I. INTRODUCTION

Anniversaries are marked by celebration, reflection, and renewals of commitment. On this occasion, the 20th anniversary of the agreement between the United States and the European Union regarding the application of their competition laws, ("Agreement") the U.S. Chamber of Commerce and BUSINESSEUROPE would like to propose a toast. A toast to the visionaries that set the world's two leading jurisdictions on a path to cooperation and coordination, to what has been accomplished in the last two decades, and to a rededication both to the work that remains bilaterally and the transatlantic leadership needed multilaterally.

The Agreement and the continuing agency dialogue that has developed within its framework have undoubtedly made positive contributions to the difficult process of navigating through the labyrinth of compliance issues arising from the scores of distinct state, national, and supranational antitrust enforcement systems originating in the United States and European Union. No one would suggest that such cooperation efforts have been anything less than productive; indeed, it is hard to envision a world in which the United States and European Union did *not* engage in a significant degree of consultation and information exchange on antitrust matters of mutual interest. The Agreement has made a measurable and lasting contribution to bilateral convergence and reducing costs and burdens.

While mindful of the valuable contributions cooperation has made, there remains a great deal of work to be done if antitrust enforcement is to be transparent, fair, predictable, reasonably stable over time, and grounded firmly in sound economic analysis. Business wants competition enforcers to be an integral and credible part of developing and sustaining market economies around the world. After all, business needs markets that function efficiently, and in a manner that is largely self-regulated and governed by competitive forces. Business favors enhancing innovation that results in the economic progress typical of highly innovative economies, while also advancing consumer, not producer, welfare.

The remaining points of convergence needed between U.S. and EU antitrust enforcement requires focused attention of senior policymakers and must be met with the same visionary leadership that launched us on the journey we now commemorate. Improvements in the coherence of transatlantic antitrust enforcement have become critical to convergence in global antitrust enforcement. Historical preoccupation over divergence between the United States and European Union is quickly giving way to recognition that there is a compelling and urgent need to develop new and more effective ways to address the rapidly increasing

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complexities arising from scores of *additional* antitrust enforcement systems that continue to emerge across Africa, Asia, and Latin America.

II. CELEBRATION & REFLECTION

Based only on the words of the Agreement, there could have been room for substantial doubt regarding its utility. The Agreement was mostly a protocol for notification and information exchange in specific enforcement situations, but always subject to the reservation that neither party would take any action inconsistent with its own laws or its "important interests." It gave neither signatory any enforceable rights or obligations, and private parties had no mechanism to insist on any particular action by either government or its antitrust agencies. Being thus limited, the Agreement might easily have slipped into disuse or irrelevance. However, those who negotiated the Agreement must have believed in its potential, trusting that the Agreement would be a cornerstone to deeper cooperation over time. Those who led the agencies at the time have been proven correct. The Agreement's potential continues to be realized as subsequent Commissioners and Assistant Attorneys General have remained dedicated to fostering and strengthening the relationship over the past twenty years.

However, this deepening of cooperation easily might not have been the case. For a time following conclusion of the Agreement the United States veered toward a "hard convergence" approach to international antitrust, enacting the International Antitrust Enforcement Assistance Act ("IAEAA") in 1994, which set out more specific and compulsory protocols for antitrust enforcement cooperation. But "soft convergence"—convergence attained primarily by means of dialogue, persuasion, and voluntary accommodation within the framework of existing laws—soon overtook the IAEAA approach, and the first IAEAA Agreement (with Australia in 1997) was also the last.

Soft convergence won out in part because antitrust was expanding too rapidly to proceed through legislative changes and formal treaties. An extended period of rapid global proliferation of new and strengthened competition laws was already underway, accelerating rapidly following dissolution of the Soviet Union on Christmas Day, 1991—just three months after the Agreement was officially executed. With explosive growth in the number of new antitrust enforcement systems (from less than a dozen in 1990 to more than 100 now), there arose an urgent need for prompt and practical accommodations among the scores of independent agencies beginning to require merger reviews, challenge restrictive agreements, and prevent abusive dominant-firm behavior.

Other forms of bilateral and multilateral cooperation soon followed. The Competition Committee of the OECD became a more active and robust forum for multilateral discussion of antitrust questions. Inspired by the Report of the U.S. International Competition Policy Advisory Committee, the International Competition Network was created in 2001. The ICN, rapidly joined by almost every active antitrust agency on earth, went on to develop recommended practices covering a variety of common antitrust issues—Merger Notification and Review Procedures, and Dominance/Substantial Market Power Analysis and Merger Analysis being among the more important. These recommended practices have had a measurable impact in a variety of specific areas by bringing some degree of convergence to previously disparate agency enforcement practices, especially in the area of merger notification and review procedures.

The pervasive international conversation about antitrust has, in part, subsumed the U.S.-EU dialogue; nonetheless, the U.S.-EU relationship has been central to the development and the

coordination of this international conversation. In fact, the U.S.-EU relationship will become only more important in delivering leadership multilaterally going forward. Despite the undeniable multilateral nature of today's antitrust conversation, there remain many occasions for direct bilateral consultation and information exchange between the United States and European Union. The two jurisdictions frequently cooperate in making unannounced inspections where global cartels are afoot. Structural transactions that become subject to notification in the United States and European Union quickly become the subject of U.S.-EU discussion pursuant to now-routine confidentiality waivers provided by the parties. And complex issues of dominant-firm conduct often arise simultaneously in the United States and Europe, giving rise to yet more occasions for U.S.-EU consultation.

But U.S. and E.U. views are now just two among many that find vigorous expression in the numerous international discussion fora that encompass antitrust—not only the multilateral government organizations like the ICN, OECD, APEC, and most recently those comprised of the BRICS (Brazil, Russia, India, China, and South Africa) countries, but also numerous conferences where bar associations, law schools, and other private organizations provide an open platform for the exchange of views among agency officials, distinguished practitioners of antitrust law and economics, and representatives of business groups, consumer groups, and others. These include the annual meeting of the American Bar Association Section of Antitrust Law, the Annual Conference on International Antitrust Law and Policy of the Fordham Competition Law Institute, the Annual Competition Conference of the International Bar Association Antitrust Committee (the "Fiesole Conference"), along with dozens of other similar conferences held both periodically and episodically throughout the year.

III. RENEWALS OF COMMITMENT

The emergence of a routine habit of dialogue around both individual cases, and broader antitrust issues of common interest to many jurisdictions is, of course, a welcome legacy of the Agreement. While U.S.-EU dialogue often occurred before the Agreement—in the early 1980's in connection with the U.S. and EU challenges to the business conduct of IBM Corp., for example—the Agreement formalized (to a degree) and provided a helpful framework for routine discussion. Apart from the specifics of particular case outcomes or changes in specific rules and/or agency practices (such as requiring a distinct and substantial local nexus for any transaction required to be notified in a particular jurisdiction), cooperation between the U.S.-EU agencies witnessed by broader international audience has yielded a variety of helpful basic perspectives. These include:

1. An understanding that dialogue, communication, and a continuous effort to reduce or eliminate divergent substantive rules, procedures, and remedies is a common obligation of antitrust enforcement agencies throughout the world;
2. An understanding that antitrust agencies have an obligation to formulate and disclose their policies, procedures, rules and standards, especially with the spreading threat of criminal remedies, nine-figure fines and damage awards, and other serious remedies; and
3. An understanding that procedures must be designed and implemented in a manner that produces objective outcomes without excessive burden and expense.

However, to date, the single biggest contribution in the last twenty years has been a deepening reliance and pursuit of sound economic analysis in evaluating competition cases. Today U.S. and EU agencies' economists are increasingly on par with their lawyers, which has

led to an understanding that substantive rules must be formulated and applied with careful attention to scientifically valid (*i.e.,* empirically tested) economic analysis. While not all of these understandings are always followed at all times, the fact that most antitrust agencies around the world now acknowledge the validity of these basic principles is, in part, attributable to the Agreement and the habits of thought and dialogue that emerged from U.S.-EU cooperation. The U.S.-EU cooperation has truly served as a useful base for the rest of the world to build on.

It must be recognized, however, that the increasingly distracting burden of the 100+ overlapping antitrust enforcement systems of the world must be addressed by redoubled efforts to align fundamental objectives, substantive rules, procedures, and remedies. Twenty years of formalized U.S.-EU cooperation and ten years of progress in the ICN and other multilateral fora have not freed compliant businesses from the burdens of complying with conflicting standards and procedures, or uncertainty in determining the reach of each jurisdiction and the substantive coverage of the different competition laws.

Within the antitrust systems of the United States and European Union, the areas that seem most in need of attention include:

1. The need for greater substantive convergence in accordance with sound economic analysis and decision theory, particularly with regard to monopolizing conduct and abuse of dominance;
2. Further efforts to reduce burdens and costs of merger reviews and duplicative investigations of the same conduct by comity principles or other measures;
3. The need for increased transparency and safeguards that assure procedural fairness in decision-making, especially for jurisdictions that assign antitrust enforcement responsibility to agencies exercising unified powers of investigation, prosecution, judgment, and remedy;
4. The need for expeditious and independent substantive review of agency decisions; and
5. A stronger connection between remedies and penalties to the underlying competition concerns or damage to consumer welfare.

The need for further dialogue and progress in the rationalization and reduction of compliance burdens has a special justification when more than 100 jurisdictions have actively enforced systems of antitrust law. Improvements in U.S.-EU antitrust practice are important not only for the sake of U.S. and EU business and consumers, but also because antitrust principles and practice in the United States and European Union inevitably serve as a model for antitrust systems in other jurisdictions.

Recently, full-fledged antitrust systems have arisen in major economies in parts of the world that have not enjoyed the long tradition of free-market competition among privately owned business enterprises as the main locus of productive activity, as in the United States and European Union. China and India are two such economies that spring to mind. But these new antitrust systems can hardly be expected to conform to standards that are matters of disagreement even between two of the world's leading antitrust jurisdictions, the United States and European Union. Indeed, one may question whether U.S. antitrust alone could be viewed as a proper model for international emulation when the two federal agencies in the U.S. express sharp disagreement with each other, or when one U.S. administration abruptly rejects enforcement policies endorsed by the previous administration. Similarly, one is left to question if

EU antitrust alone should be emulated given that it only relatively recently gave prominence to the role of economists within the agency and has come under scrutiny for its over unification of powers to formulate rules and investigate, state objections, render judgment, and prescribe remedies for violations of those rules, all with limited challenge by independent judicial review.

With proliferating antitrust systems, increasingly potent antitrust procedures and remedies, dark clouds moving over the global economic system, and ever-increasing pressures on governments everywhere to deliver economic progress at all levels of the economy, it is more important than ever that differences over antitrust matters be settled responsibly and in accord with scientifically sound economic principles. A rededication to the ideals of competition law enforcement, alignment of policy, substantive principles, and procedure and remedy should begin with the U.S. federal agencies and the United States and European Union. When a contemporary model of coherent antitrust enforcement is fashioned in the oldest and most experienced jurisdictions, the case for persuading other jurisdictions to follow will be far more compelling.

The U.S. Chamber of Commerce and BUSINESSEUROPE would ask you to raise a glass and celebrate 20 years of cooperation and the benefits it has brought, and not only reflect on how difficult the world of antitrust enforcement would be without it, but also to renew our bilateral interest to seek greater common ground given our shared values so that we might jointly be better equipped to address the challenges presented by 100+ overlapping antitrust jurisdictions.