

Cooperation or Collusion? FTC Defends Interagency Contacts

A photograph of a modern building with a curved, glass-and-steel facade, showing multiple floors and windows, set against a clear blue sky.

2 MIN READ

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Does interaction between the Federal Trade Commission and other antitrust enforcers around the world benefit merging parties, or does it help the agency bypass U.S. courts potentially unsympathetic to the agency's expansive theories of harm? That is the ongoing debate between the FTC and the U.S. Chamber of Commerce over the *Illumina-Grail* merger saga.

There is a ton of interagency communication today. As antitrust enforcement regimes have burgeoned over the last 20 years, enforcers have increasingly come together to share best practices, as well as share information on specific cases. To give an indication of how much the regulatory world has changed, the International Competition Network, an institution designed to facilitate interactions between competition authorities worldwide, was established in 2001 with authorities from 14 jurisdictions. Today, the ICN has 140 member authorities from 129 jurisdictions.

In addition to the procedural and substantive matters discussed at the ICN, many agencies have bilateral arrangements that lay a framework for communicating about particular cases. The FTC has several bilateral and multilateral arrangements of varying degrees of formality with at least 20 agencies. In the deal context, it has become routine for the FTC and investigating agencies in other countries to request "waivers" of local confidentiality requirements to allow them to share information and ideas. Where a deal has international

impacts and potential remedies that could affect multiple jurisdictions, it is hard for parties to resist such requests.

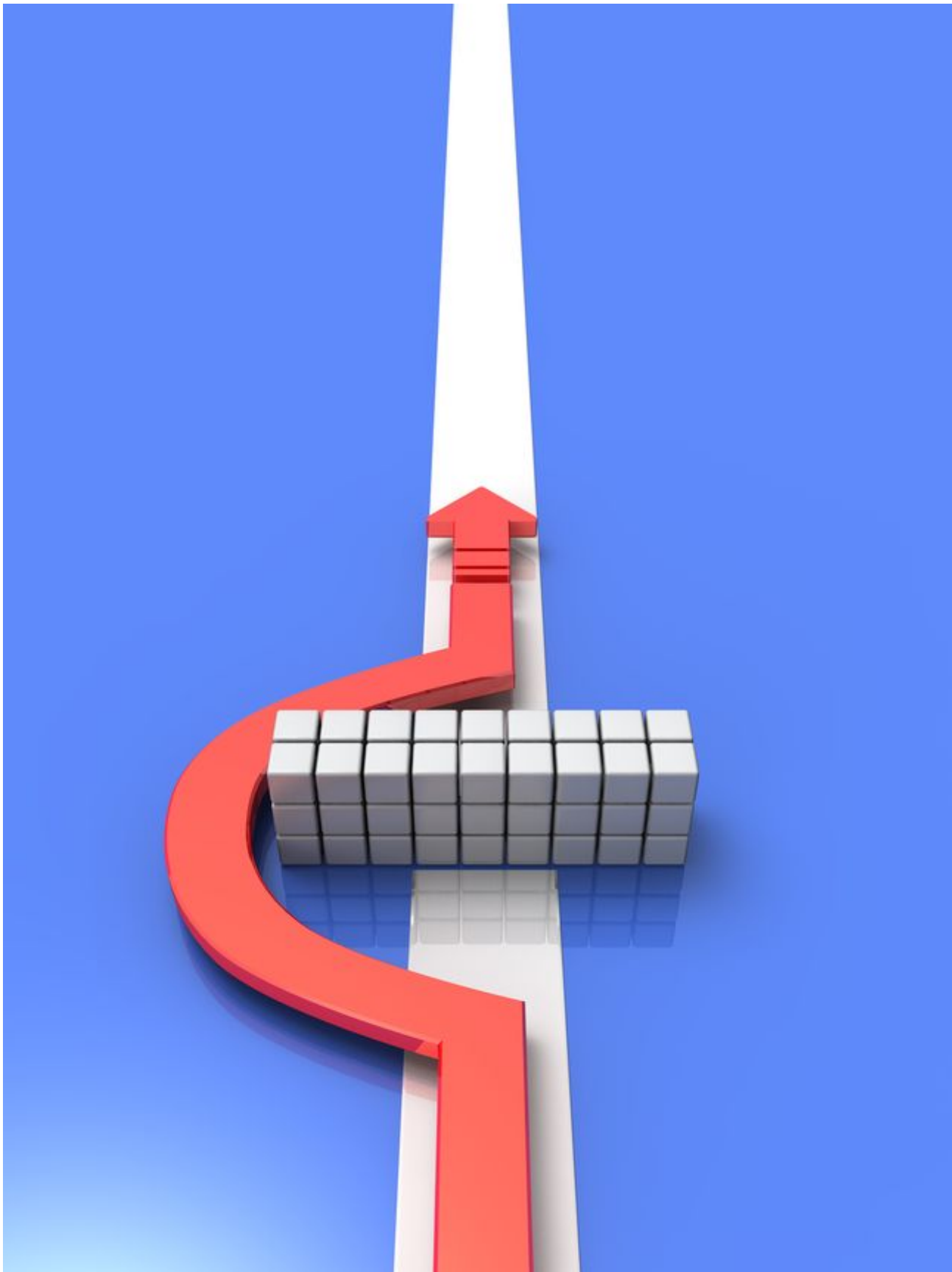
Where once these arrangements were viewed fairly positively by businesses as promoting U.S. enforcement policy, with its economic-based approach to analyzing the impacts of transactions, they are being viewed with increasing suspicion. The U.S. Chamber of Commerce has alleged that the FTC's collaboration with other agencies in the *Illumina-Grail* merger circumvented merging parties' due process rights to have their case heard in court. In that case, the FTC lost its bid to block the deal in its internal administrative procedure. Only five days later, however, the European Commission issued its decision blocking the transaction, effectively mooted the ALJ's decision or any subsequent appeals. The Chamber is digging deeper through the FTC's documents, which it says show that the interagency collaboration was initiated by FTC commissioners seeking help from other agencies.

Was this an end-run around U.S. procedure? Or, was it simply routine cooperation that focused on the facts, and not the FTC strategically leveraging different agency processes to achieve a result it could not in its own house? As the U.S. agencies test out in the courts their expanded theories of harm in the new Merger Guidelines (still in draft), merger reviews are taking longer and there is greater potential for divergent results. Adding to this complexity, companies considering international deals need to factor in the potential impact of interagency communication when developing their merger clearance strategy.

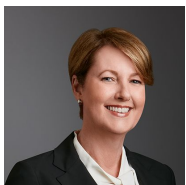
“For decades enhanced engagement, cross-border enforcement cooperation has provided the foundation for a well-functioning international antitrust system. Express or implied allegations that enforcement cooperation is a mastermind effort at collusion discredits the decades of effort spent building trust to ensure an interoperable system.”

- Maria Coppola, Director FTC Office of International Affairs

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