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European Competition Policy: The View From the Top

We recently held a wide-ranging discussion with European Competition Commissioner Mario Monti about Europe's competition culture and the European Commission's competition policy

GS: Thank you for seeing us. We would like to begin by asking you for an overview of European Union competition policy. In particular, how have your priorities changed over time, and what are your priorities for the next year?

MM: In the last two or three years we have followed rather clear priorities. One concerns an activity which anti-trust agencies normally do not engage in, other than the European Commission, which includes in its remit the control of state aid. Because of the supranational nature of the Commission, this is part of our responsibility in the setting up of the European Union, namely to have overview and control of any aid granted to companies by the Member States of the EU.

We are putting a lot of effort into this because this is a potentially deeply distorting factor relative to the single market in Europe. I would like to mention one or two recent decisions that denote the intensity of our effort in this area. Perhaps the most significant is the removal of the public guarantees to the German public banks, the Landesbanks and the savings banks. This changes after a century the landscape of the German financial system and brings it in line with competition rules. I am sure it will also provide an element of dynamism in the consolidation and restructuring of the financial industry in Germany, and perhaps also beyond that. In addition, we have blocked a number of state aids by France and Italy to their respective banks.

Another priority, which is clearly the core activity of any competition agency, is the fight against cartels. In 2001 we fined 10 cartels, in which 61 companies had participated, with aggregate fines of Euro 1.8 billion. In the pipeline for 2002 we have a broadly similar number of decisions.

I would also like to underline another priority, which is the development of international cooperation. This takes the form of intensified bilateral cooperation in particular with the US in merger and non-merger cases; it also takes the form of multilateral cooperation. We in the European Commission have been working, first with the Clinton Administration in Washington, and now with the Bush Administration, on two projects which are now underway. One, born in Doha, is the idea of a chapter involving trade and competition in the World Trade Organisation negotiations. The other one, the establishment of the ICN, the International Competition Network, will for the first time get together in a systematic way anti-trust agencies from around the world.

I think we can say that the joint efforts of the US and the EU competition authorities have been instrumental on both projects. We know how much the business community looks for greater and greater convergence and coordination, and I also believe that this is a needed response by governments to increased globalisation.

Of course, these are the priorities as visible from the outside, that is, in terms of policy actions. Considerable effort has been made and is being made in strengthening the resources devoted to producing these policies, and also in improving the mechanisms of implementing these goals, including in the merger area, to which I am sure you will turn. ■

Mario Monti has been member of the European Commission in charge of Competition since September 1999. In the previous Commission (1995-1999) he was in charge of the Single Market, Financial Services and Tax Policy.

From 1989 to 1994 he served as Rector of Milan's Bocconi University, of which he was appointed President in 1994. At Bocconi he was professor of Economics and Director of the Institute of Economics.

Born in Varese in 1943, he received a degree in economics from Bocconi University and pursued graduate studies at Yale University. He taught at the Universities of Trento and Turin before returning to his *alma mater*. He has also served on the boards of directors of several companies.

Important disclosures appear on the back cover of this document.

Merger Control

GS: What do you consider the most potentially significant change that may result from the Green Paper review of European merger regulations?

MM: There will be significant changes concerning three areas—jurisdiction, substance and procedures—but it will be up to the marketplace to determine which is the most significant change. We want to proceed in a balanced way on all three fronts.

Certainly, particular efforts will be made in ensuring that due process is guaranteed in all our cases, and that we find a way to combine what is a universally recognised advantage of the EU merger control system—the time limitation—with sufficient time for the parties to discuss remedies with us. This is the most critical phase of the merger control procedure, and we are considering some 'stop-the-clock' device for this purpose.

The whole spirit of the exercise is to strengthen and improve an instrument that has worked well for over 12 years now, but that can certainly be improved.

GS: One question our clients pose is whether the Commission would, during this Green Paper review, consider establishing a position that is essentially one of a devil's advocate. This would be someone who is not intimately involved in reviewing specific cases but whose job would be to challenge the case handlers.

MM: We already have a considerable degree of internal checks and balances, but as part of the merger reform package that we will present at the end of the year, there will also be structural innovations regarding due process—including an enhanced role of economic analysis. But it is too early for me to comment on this now.

The reform package will be made up of a draft modified merger regulation, plus notices or communications on market power. I leave it open now as to whether it will be dominance, in which case we would stick with the current substantive test, or whether it would be to adopt a 'substantial lessening of competition' definition, if we were to change our test. This is still an open issue. I think it will be in the context of this notice that we will develop the efficiency aspects. Plus there will be reforms and improvements concerning the structure and the processes.

Also very importantly, we are working closely with the legal community to devise some sort of code of best practice in the actual handling of the cases.

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The Green Paper Review of Merger Control

In June 2000, the European Commission launched a major review of the EC Merger Regulation, and in December 2001 it adopted a Green Paper outlining possible avenues for reform and inviting public comment. This comprehensive review encompasses jurisdictional, procedural and substantive reforms. In a recent speech,* Commissioner Monti gave an overview of feedback received and plans to execute the reforms, including:

Jurisdictional Issues

- One-stop-shop and multi-jurisdictional filings: New mechanisms for improving the effectiveness of case referrals, including a proposal for automatic Commission jurisdiction for deals notifiable in three or more Member States, and easing conditions for Commission referrals to Member States.

Substantive Issues

- Possible change of existing substantive test from 'creation or strengthening of a dominant position' to US, UK and Irish standard of a 'substantial lessening of competition'; and

- Defining the role and scope of efficiency considerations.

Procedural Issues

- 'Stop-the-clock' provision for remedies (likely only at the companies' request and possibly available in both Phases 1 and 2);

- Due process and judicial review to address complaints regarding protecting merging parties' rights of defence. Includes consideration of further changes to the court system and possibly administrative, procedural and structural reforms of the Commission.

The Commissioner laid out a **roadmap for reform proposals**, as follows:

- Draw up proposed amendments to the Merger Regulation and submit them for European Commission and Council approval;

- Produce draft interpretative guidelines for substantive test application, including regarding market power analysis and efficiencies;

- Produce best practice guidelines for handling merger cases;

- Reflect on appropriate accompanying structural and management changes, especially to address due process issues and to strengthen the role of economic expertise in decision-making. ■

* 'Review of the EC Merger Regulation: Roadmap for the Reform Project,' delivered at the British Chamber of Commerce's Conference on Reform of European Merger Control in Brussels, 4 June 2002. For further details on the Green Paper Review, please refer to the DG Competition website at http://europa.eu.int/comm/competition/mergers/review/

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Merger Control

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Consideration of Efficiencies

GS: You have spoken publicly about efficiencies, indicating that the Commission may be interested in giving them more weight in the merger review process. Can you discuss this in any more detail?

MM: I understand that, in the present juncture of global capitalism, and with some recent negative developments concerning huge corporations born out of recent mergers, it may appear odd to speak of efficiencies in mergers. In fact, much of the literature has recently concentrated on the frequent failure of mergers to deliver efficiencies.

I think it is necessary to have a balanced and somewhat sceptical approach about promises of efficiencies from mergers, but at the same time to make it easier for the parties to a merger to clarify how they see efficiencies coming from the merger, and to be faced with as much guidance and certainty as possible, as to how the Commission will take this into consideration.

Claiming efficiencies has never, ever played against companies in the European Union merger control process, so there has never been such a thing as an 'efficiency offence.' We *are* interested in assessing efficiencies. It is my intention in the merger reform package to provide companies with as much clarity as possible as to how efficiency calculations are taken into account in merger control. This will be done in the guidelines that we will present before the end of the year.

GS: Will the Commission be willing to consider efficiencies in cases brought before the guidelines are issued?

MM: That is already possible. It is not that we are overwhelmed by a huge number of merger cases at the moment!

The Role of Economics

GS: How do you, as a trained economist, see the possibilities to develop the role of economics in merger control, and what are the options for the Commission to do that? Is it principally a matter of additional staffing, or are there other mechanisms in terms of practices and the review guidelines?

MM: I think it is both. Certainly, we need qualified resources, high-quality economists who can bring the benefits of evolving economic thinking to bear on the cases. We also need to think about positioning such competence in the process so that it can have a real impact, and so that the legal and economic aspects can really be developed. We must make sure that economic competence acquires a sufficiently key and central role in the overall decision-making process. Again, you will have much more detail on this in four to five months, when we issue the guidelines.

Airtours and Due Process

GS: The European Court of First Instance recently ruled against the Commission in the Airtours/First Choice case. Do you think the ruling is limited to the facts of that case? If not, what do you see as the implications both for the theory of collective dominance and for the due process issues?

MM: We are still assessing the consequences of the decision. We welcome this clear demonstration that there is effective judicial review in Europe, including on mergers. That will be even more evident once the Court of First Instance starts to adopt decisions under the accelerated procedure in the cases now on a fast-track system.

The judgment also shows that the Court of First Instance accepts that we assess whether mergers create collective dominance. This aspect was not contested by the court. This is not a 'fancy theory,' as some people have labelled it. As we know, this is very largely practiced in the US anti-trust world as well. The name may be slightly different, but the notion is there in the US.

For sure, the decision of the Court shows a number of weaknesses in the assessment made by the Commission, and this has already triggered a thorough consideration by ourselves about the aspects addressed by the courts and how best we can reform and improve the process to minimise the risks in the process. We cannot guarantee that no mistakes will ever be made, but we want to minimise this possibility.

From this point of view, the judgment of the Court—as hard as it may be for the Commission in this specific case—came at a particularly fertile moment given its big engagement in the merger review mechanism.

Before we leave the topic of mergers, I would like to draw your readers' attention to an extremely clear and helpful paper by Goldman Sachs[1] on transatlantic merger review that addresses the appropriate role of economic analysis and the non-role of politics. The fact that this process is immune from political influences is not something that the academic and legal debate tends to focus on, but making sure that there is no such influence is by far the most important aspect of all. I must say, I was not at all surprised, but very pleased, to see that in the 114 responses to the Green Paper, most of which were not deferential at all, there was no suggestion of any political influence in our decisions.

And I would emphasize that, when companies consider mergers, it is very important that they approach the competition agencies as soon as they can, even with preliminary ideas if they wish. We of course ensure full confidentiality. Experience shows that the sooner they get some feel about what the competition problems might be, the better they are able to adjust the concept and the smoother the unfolding of the formal merger control procedure. We are constantly open to pre-notification meetings and contacts. ■

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1 The Goldman Sachs research report to which the Commissioner refers is summarized on page 4.

Transatlantic Differences in Merger Policy: Not Such a Big Deal

There is a high degree of cooperation between the US and EU competition authorities in large merger cases. While this reduces the likelihood of conflicting decisions, it is unrealistic to expect agreement in all cases.

Differing Language, Same Objectives

Under US law, mergers are prohibited if their effect 'may be substantially to lessen competition, or to tend to create a monopoly.' In European law, mergers which 'create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.'

Although the language differs, there seems little to choose between these two concepts in practical economic terms. Both US and EU authorities can be seen as trying to maximize consumer welfare by promoting allocative efficiency through effective competition; the creation or strengthening of a dominant position will tend to lead to a substantial lessening of competition. To quote EU Commissioner for Competition Mario Monti, 'Our rules, while phrased in very different language, and with very different historical antecedents, are—in most respects—pursuing the same objectives.'

Merger control is not an exact science. In any competition policy framework, there is scope for interpretation as to what is meant by a dominant position and how much of a lessening in competition is substantial. Faced with the same set of facts, two competition authorities could easily reach different conclusions.

Even in the US, which has more than a century of anti-trust law, the definition of a substantial lessening of competition has changed significantly over time. US and EU authorities could reach different conclusions even if the competition test were phrased in exactly the same language in both jurisdictions.

Procedural and Jurisdictional Differences Are a Fact of Life

Many of the differences that exist between the two regimes arise from the nature of judicial and administrative structures in each jurisdiction.

The European Commission is often criticized for being prosecutor, judge and jury in merger cases. The Commission does not need judicial assistance in the first instance. While aggrieved parties have recourse to the European Court of First Instance and the European Court of Justice, it can take several years before cases are heard. Judgements from these courts have nevertheless had an impact on the Commission's approach to subsequent merger cases. Furthermore, merging parties in the US often enter into 'consent agreements' with the competition authorities rather than face the courts.

There is scope for political interference in merger decisions in the EU, but there has not been much suggestion of this in the vast majority of cases, particularly in recent years. The US is not immune from this either; senior anti-trust officials are appointed by the President.

We See No Anti-US Bias to EU Policy

A number of senior US politicians have expressed concern that the EU merger regime, and the way it is implemented, is biased against mergers involving non-European (particularly US-based) companies. This accusation does not stand up to empirical scrutiny.

The Commission has blocked 18 mergers out of a total of more than 2,000 notified since September 1990, when the Merger Regulation first came into force. Of the 18 prohibitions, nine have been appealed, and one appeal was subsequently withdrawn. The Court of First Instance upheld three prohibitions—Airtours/First Choice is the first one it has overturned. Decisions are still pending on four other prohibition cases, as well as seven cases that the Commission originally cleared.

The European Commission has blocked only two mergers involving at least one US company, and one of those was also blocked by the US. With the high-profile exception of the GE/Honeywell case, the EU's treatment of mergers involving US companies has been virtually indistinguishable from the total. ■

The full paper from which this summary is drawn can be found at http://www.gs.com/ceoconfidential/CEO-2001-14.pdf

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Competition Culture: Cartels, State Aid and Industrial Policy

The Case Against Cartels

GS: Can you comment on the progress made to date against cartels, an area in which you have been very busy, and on the outlook? How do you see the evolution of a competition culture within the European corporate world, and how has your policy affected that?

MM: The results, particularly the ones I mentioned for 2001, came not because Europe is becoming more and more cartelised, but because the fight against cartels has gathered momentum. This has had to do with the application of greater resources and more dedicated resources, which is very important. We have created a special anti-cartel unit and have reinforced it, and this has indeed paid off.

This success is also due to our leniency policy, which was introduced in 1996 and modified in February this year. Under the current rules, the first company to provide information on a cartel will be granted zero fine, and it will have legal certainty that this will be the case. The Commission has also granted full immunity in several cases, including to one company participating in the vitamin cartel.

By the way, this is one of the many aspects of transatlantic convergence. Initially, it was not easy to introduce the notion of leniency in European policy culture, but it has paid off.

You rightly mention the effect that the fight against cartels is having in corporate culture. One case is rather telling: last summer, the Commission fined the cartel between the Scandinavian Airline System, SAS, and Maersk Air. We understand that following that decision, which elicited a lot of emotion in the Nordic countries, many companies of various sizes have for the first time established compliance programmes for their managers.

So there is a growing internalisation of the competition culture, which I think is a good thing.

There are two determinants in competition culture. One involves those who could commit violations and whose compliance is important—the companies. The other determinant is citizens—consumers—who are the beneficiaries of competition and of the application of competition policy. In a sense, there were originally two problems of unawareness. Company executives were not always sufficiently aware of what might have been a competition violation, and to a large extent, the beneficiaries of consumer policy were, understandably, largely or totally unaware that competition policy exists for them.

That is why we have developed a number of programmes of public opinion education and consumer organisation education. I see a role in developing these consumer awareness initiatives, because that will enhance the perception and understanding of what is already the case—namely that European competition policies have as their guiding star consumer welfare. It would not be bad if consumers were made more widely aware of this, and if their organisations took a more active role in competition procedures.

State Aid

GS: Could you say a bit more about the successes you have had in combating state aid in the financial sector? Do you think that this sector is now on a more or less level playing field? Are you going to continue to focus your attention on financial services or shift your state aid attention to other sectors?

MM: No, state aid control is deserved by all sectors, and by no means will we be complacent about what has been achieved. State aid in the financial sector will continue to be very closely watched.

There isn't yet a satisfactory level playing field in Europe for financial services. It is crucial that a more level playing field is achieved in Europe and also that competition is fully applied in this sector. Competition is important in all industries, but, if anything, it is more important in the financial services industry because so much depends on the efficient allocation of financial resources throughout the community.

We recently hit a cartel, not a state aid, of Austrian banks, and we will continue to focus on this. We are looking into the arrangements for clearing and settlement in Europe. In this context, I would like to mention something that has to do with the level playing field in the market for corporate control. That is the recent judgment by the European Court of Justice concerning golden shares.[2] In 1997, in my previous function within the Commission, I started this legal action against a number of Member States, and it has now come to fruition through the court ruling against these golden shares.

Does Europe Need an Industrial Policy?

GS: Some businesses and governments argue that some form of industrial policy is not only necessary but in fact beneficial to Europe, and that without one Europe will have few national champions able to lead consolidation. This will make Europe vulnerable to dominance by foreign firms. What is your view of and response to this argument?

MM: I think the competitiveness of Europe is a perfectly legitimate objective of European policies, including the European Commission's policies. Can competition policies, specifically, have a role in this respect? Yes, in the sense of making the marketplace in Europe more

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2 In three separate cases brought by the European Commission against Belgium, France and Portugal, the ECJ ruled that golden share schemes—which give the state the right to control levels of private ownership through prior authorisation and rights of veto—per se violate free movement of capital rules and the principle of freedom of establishment. The court said such restrictions could only be justified on grounds of general or strategic interest. In addition, the measures prescribed must be based on precise criteria which are known in advance, are open to review by the courts and cannot be attained by less restrictive measures.

Competition Culture: Cartels, State Aid and Industrial Policy

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competitive. This will benefit all companies operating in Europe, and statistically this would be to a large extent still European-based companies.

But my answer would be firmly 'no' if the question were 'should competition policies specifically serve objectives other than keeping markets competitive and enhancing consumer welfare?'. My answer would be 'no' because competition policy has to be blind to national flags.

There cannot be any discrimination between EU-based companies and non-EU-based companies. This is a fundamental prerequisite for the credibility of any competition authority and also for the possibility of international cooperation, which is so important and so much appreciated by companies, be they European or not.

An enterprise policy can and should be developed by the European institutions. The Lisbon Process is the most recent interesting example of action to foster a spirit of enterprise in the European economy. Liberalisation and the full play of competition are part of this process. Looked at from this angle, there is certainly no contradiction between enterprise policy and competition policy, but I repeat what I just said about the essential importance of non-discrimination.

Does the application of rigorous, neutral, non-discriminatory competition policy in Europe necessarily prevent the emergence of very large EU-based groups? No. We have recently seen, for example, the emergence in Europe—with our authorisation—of the largest steel company in the world [Arcelor]. A number of undertakings have been offered to remedy competition concerns. Also in terms of large national groups, we have authorised, again with a number of undertakings, the creation of Total Fina Elf, but we have not authorised the merger between Volvo and Scania. It all depends on the specific competition assessment in each case.

Sectoral Liberalisation and Competitiveness

GS: There seems to be a disconnect in some sectors between countries that have liberalised with enthusiasm and others that have tried to maintain a dominant national champion. In some cases these champions have tried to extend their activity into the more liberalised states. What is the Commission's view on this? What policy is considered appropriate?

MM: Our policy is to favour liberalisation. Member States on occasion are in favour of a more limited and gradual liberalisation. The most serious problems emerge when there is asymmetric liberalisation. In the case of the electricity markets in particular, there have been certain minimum requirements in terms of market opening. Those countries which have just met the minimal requirements of the 1996 Directive on common rules for the internal market in electricity cannot be said to be in breach of it.

On the other hand, those other countries which have gone much further in terms of liberalisation—by the way, thereby deriving benefits for their consumers—feel the pain of this asymmetry, which tends to damage their producers.

What is the best way out of this problem of asymmetric liberalisation? It is to make it symmetric, as is now being gradually done, by accelerating EU legislation towards full liberalisation in the electricity market. In the meantime, competition policy is there and is applied. For example, you will remember that each of the expansions by Electricité de France into other national markets has been scrutinised under the normal rules of merger control. In several cases, undertakings have had to be offered for the authorization, and these undertakings have contributed to making these markets more competitive.

Talking of national changes and non-discrimination, I always like to refer to the two Deutsche Post/UPS cases. These are by no means unique but are rather interesting because of the size and of the phenomenon involved. Last year, we adopted an Article 82 decision against Deutsche Post for abuse of a dominant position. This year, there was a decision on state aid against Deutsche Post, ordering the recovery of around Euro 500 million from Deutsche Post to the German government. Both followed complaints by UPS.

Companies can draw several lessons from these cases:

- There is no sanctuary for the public sector or companies which are still largely owned by the public sector.
- There certainly is no policy of favouritism for the larger Member States.
- A third-country company can see its well-founded arguments brought to significant consequences in Europe.
- A competitor's complaints do not necessarily represent something that should not be followed through. These were two cases where complaints by a competitor have introduced more competitive conditions in the market. ■

The Lisbon Process

In Lisbon in March 2000, EU leaders set the strategic goal of making Europe the most competitive and dynamic knowledge-based economy in the world by 2010 and committed themselves to a host of market-oriented economic reforms aimed at boosting the competitiveness of the EU economies. Key commitments included a single market for financial services by 2005; fully integrated and liberalised telecommunications markets by the end of 2001 (including local loop unbundling by year-end 2000); and better policies for the information society and research and development. Annual follow-up meetings in Stockholm (2001) and Barcelona (2002) additionally committed the Union to achieve an integrated securities market by the end of 2003 and full liberalisation of non-household electricity and gas supply by 2004. ■

International Cooperation

GS: International cooperation and in particular EU/US cooperation is an area of great interest to our clients. How do you see EU/US cooperation evolving, both in terms of cooperation on a case-by-case basis and of the broader policy areas under discussion? Are you hopeful that the differences that remain can be resolved, or are there some areas where disagreement may persist in the longer term?

MM: I think cooperation between agencies belonging to different sovereign states can never guarantee a 100% absence of different outcomes. But the extent to which convergence has in fact been achieved between the US and the European Union is impressive, because the two legal systems are very different both substantively and procedurally. In spite of these differences, the nature and the spirit of the cooperation have guaranteed much convergence, particularly in merger control.

The cooperation is particularly intensive in merger control, in part because companies waive the confidentiality requirement because they have an interest in the agencies cooperating. This cooperation takes the form of even daily contact between the respective teams working on the same case; on the more problematic cases this has occurred many times. There is also frequent contact between the heads of the agencies.

This has, in the case of mergers, enabled us to have a total convergence in all but one recent case, which is of course the GE/Honeywell case. The divergence over that case has prompted both sides to try to strengthen this cooperation even further. In fact, we decided together in September last year, when meeting in Washington to mark the tenth anniversary of the cooperation agreement between the US and the EU in this area, that the EU/US merger working group should concentrate on two issues: procedures and conglomerate mergers. The two issues include timing, which was one aspect which did not help in the GE/Honeywell case.

So we will now consider the two issues—substance and procedure—which may have played a role in that particular divergence. We plan to examine other issues, such as collective dominance, at a later stage.

Cooperation is normally less intimate and intensive in non-merger cases. In the area of cartels, we cooperate in trying to devise synergistic strategies. What information we find in our respective inspections cannot be exchanged, however, as the companies are not normally willing to allow us to do so.

The cooperation applies also to broader policy issues. I would like to mention the participation recently of some of our staff in an exercise in the US, jointly promoted by the Department of Justice and the Federal Trade Commission, on the interaction between intellectual property and competition policy. Two years ago, it was on the emerging B2B phenomenon.

At the same time, in Europe we are developing a system of greater involvement of national competition authorities, and the creation of a network amongst competition authorities in Europe—with Brussels of course still having a key role. Worldwide, we see the close cooperation with the US DoJ and the FTC as the engine of the more ambitious multilateral projects.

The European Convention

GS: Commissioner, are there any other points you would like to address to our readership?

MM: There are issues involving the future of Europe and the European Convention now underway, which touch on the issues of Europe's competitiveness and the argument that European enterprise policy need not conflict with competition policy. The business community, particularly in Europe, has to realise that what is being discussed under the institutional aspects of the convention on the future of Europe, and what will subsequently be negotiated in the inter-governmental conference for the new treaty for the enlarged Europe, is not an abstract subject for the institutionalists, or lawyers or politicians—these are vital subjects for business life. EU and US companies understand this more and more, and they are taking a growing interest in these matters.

A recent paper by the European Roundtable of Industrialists (ERT)[3] noted that one key factor of the competitiveness of a country or a continent is the speed of decision-making. We see this at the level of companies, and this is equally, if not more, important at the level of public policy. For example, reducing as much as possible the subject matters on which the Council must decide with unanimity means making decisions, among them economic-policy decisions or regulatory decisions, faster by one, two, three years.

This is vital. The ERT paper also underlined the importance of keeping a strong competition policy at the core of the European construction, as it has been since the 1960s through to now.

Thank you very much. ■

3 EU Governance: An ERT Discussion Paper (30 May 2002), available at http://www.ert.be

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