Comments by Mario Monti, European Commissioner for Competition
to the speech given by
Hew Pate, Assistant Attorney General, US Department of Justice,
at the Conference
"Antitrust in a Transatlantic context"

Brussels, 7 June 2004

Mr Attorney General, Mr Ambassador, Ladies and Gentlemen,

It is indeed a very auspicious coincidence, as Ambassador Schnabel underlined, that we should have this meeting in the very days when D-day is commemorated. This focuses our attention - beyond some, I hope, short-lived tensions between America and Europe- on the immense debt that Europe has and will have forever to the United States. This debt is deep, broad and manifold. Having helped us decisively substantially to rescue Europe from dictatorship and tyranny is, of course, a fundamental reason for our debt. But there are also intellectual and policy debts which also have to do with freedom and liberty, in a society and in an economy. In this area, amongst others, Europe is historically indebted to the US for having invented antitrust.

Against this background, you can easily imagine how much I feel privileged today to have with us the highly respected leader of the most authoritative and time-honoured antitrust agency in the world, the Antitrust Division of the Justice Department. Besides being – as is obvious from today – an expert

entomologist[1], Hew Pate, with a very distinguished background in antitrust law and policy, has succeeded in less than two years in impressing an important mark on the US, and indeed international, antitrust policy. We have been beneficiaries of this in several respects, including the further impulsion given by Hew Pate to the bilateral transatlantic cooperation.

I am deeply touched by the gracious and generous words that Hew pronounced with respect to my term of office as Competition Commissioner. Of course, nothing could have been achieved if I had not been able to rely on the highly dedicated professionalism and motivation of our staff in DG Competition, which during my term of office has been led first by Alexander Schaub and currently by Philip Lowe. I am deeply indebted to them and more broadly to the Commission as an institution. It is not obvious for an institution like the Commission to consistently support a vigorous enforcement of competition rules and I think it is important to acknowledge this to the collegial body within which competition policy in Europe is conducted. And of course we have a great debt to the United States in helping us to forge our developments, including very recent ones, in antitrust policy and enforcement. The results we have achieved owe indeed much to the inspirations we received over time from our US colleagues. The Commission's success in recent years in the fight against cartels, which Hew kindly mentioned, would not have been possible without the leniency policy largely borrowed from the US. I am also thinking of the modernisation of our antitrust enforcement, including the end of notifications: something amazingly new for the European business and legal community, but of course there are no notifications in the US system and I am not aware that American companies ever complained about that.

I fully share the view that we should see our relationship in a long-term perspective and not let the few divergences undermine the good work. Our

[1] See Hew Pate's speech delivered at this conference.

relationship was formalised in 1991, with a first US-EU co-operation agreement. There have been very few divergences, and those few divergences for sure caused some noise, as if they were cicadas. (By the way, Hew, I do not have to tell you that according to entomologists the classes of cicadas with a 13-year cycle are slightly more numerous than those with a 17-year cycle, so I pause to note that 13-years have elapsed since the first bilateral cooperation agreement with the US).

We have built a deeply rooted and thorough cooperation with our US counterparts in all areas of antitrust enforcement. It would be vain to state that intensive cooperation means that we have to agree on each and every issue. In a world of multiple enforcers a certain degree of divergence may never be excluded, nor can it be excluded, for that matter, even within a single legal system like the US, where from time to time divergences between the Federal Antitrust agencies and the States, as well as among the various States themselves, do occur in particular cases, including important ones. What should be underlined, as Hew Pate did so eloquently, is indeed the very high level of cooperation and convergence that is the key note of these 13-years.

Cooperation in cartel investigations is now a matter of daily routine as we coordinate surprise investigations and the course of our procedures. As I said, the US provided a very important source of inspiration when the Commission revised, in 2002, its leniency or immunity policy. In many respects our policies now converge, notably where it comes to providing legal security to 'the first ones on the door'. As a result, we have seen a dramatic increase in the number of leniency applications in the last couple of years.

The fight against international cartels requires international efforts. There, I am particularly grateful for the leadership Hew Pate and the Antitrust Division of the Justice Department are providing to all of us in the international arena. As

Chairman of the Working Party 3 of Cooperation and Enforcement of the OECD, Hew Pate has launched an important initiative on a Recommendation on the exchange of information in international cartel investigations and I am likewise grateful for his key contribution to the setting up of the Cartel working group within the International Competition Network (ICN).

I have mentioned the cooperation in cartel cases as one example. But of course there is excellent cooperation in all areas of antitrust. Most visible perhaps, in recent years, has been the cooperation on assessing mergers involving both jurisdictions. I will not spend time here on expanding on this area of cooperation that has already been highlighted on several occasions.

However, I also agree that we should not close our eyes to the fact that some differences still remain and I do believe that it is a sign of our excellent and healthy relationship that we can speak about them also in public. Assistant Attorney General Pate mentioned the area of unilateral conduct, which in European competition terms we call "abuse of a dominant position". It is fair to say that in this particular field of antitrust there are some differences between our respective systems. It is of course on the occasion of specific high profile cases that such differences are likely to generate some debate. Sometimes these differences are in fact directly written into the law; and sometimes they may stem from different evaluations of the same economic issues. Hew Pate said that the US approach was perhaps more Darwinian whereas the European approach laid more emphasis on "gentlemanly" competition. I don't think really that the expression "gentlemanly competition", quoted by Hew, is an appropriate description of the EU's vision of how competitive processes should be. Not only because "gentlemanly" is not precisely a term very respectful of gender balance, or because it conveys a slightly collusive or at least "clubby" flavour. No, I think we are aiming at safeguarding conditions of Darwinian competition just as our American friends, provided it is Darwinian competition on the merit. If

competition is Darwinian but through means other than the merit, then I believe that the competition authorities should be draconian. I think we can both agree that in competition the best should win on the merits, but only on the merits. Whenever dominant companies can use their market power to win in a market for reasons that are not related to the price or quality of their products, then we should consider intervening. Without such intervention there is a real danger that the process of competition cannot play out, to the detriment of consumers and innovation. Of course distinguishing true competition from predation when we deal with dominant companies may indeed be difficult. However, in my view this should not discourage competition authorities from analysing in depth whether the anticompetitive effect of the unilateral conduct outweighs any potential benefits, bearing in mind ultimately the welfare of consumers.

I have of course listened with great attention and interest to the remarks made by Hew on the Microsoft case. I think it would not be appropriate for me to use this occasion to articulate once again the substantive reasoning at the basis of our decision. I simply wish to express a state of mind, that is why in good conscience we feel pretty comfortable on that decision and we look forward with confidence to the very likely Court proceedings.

First of all, because the process leading to that decision benefited more than any other decision in EU competition history from the compound benefits of all the innovations recently introduced at the Commission to improve the quality of decision making and the checks and balances.

Secondly, and not unimportantly, because there has been continuous and deep consultation with our Department of Justice colleagues at various levels, including many times between Hew Pate and me, both in the course of the formal procedure and in the course of the negotiations in view of reaching a settlement. These consultations took place to an extent that was much greater

than had been the case when the Justice Department reached its settlement in 2001, and I say this in full respect of the explanations that Hew gave in his speech, in particular the difficulty of having many States involved.

This reference to the States brings me to the third reason why we are comfortable with our decision. As we all know, it is not common for the European Union to be as united as the United States, in many policy areas. In this case, concerning the Microsoft decision, the European Union happened to be more united than the United States, where there have been remarkable divergences both at the federal level over time (between the Clinton and Bush administrations) and between the Department of Justice and several States. The decision taken by the European Commission has not been a peculiar or extravagant decision by an activist Competition Commissioner. The decision was taken unanimously by the College of the Commission, with the unanimous support - which is definitely not the case for all competition decisions – of all the National Competition Authorities in the Advisory Committee. So, Europe was indeed very united, and certainly not because there were any specific European industrial or trade interests involved, but rather because of a shared view on the infringements to competition law by Microsoft and the necessary remedies. And I also take some comfort in noting that the comments on this decision – including in the American press – on balance were either positive or less critical than those expressed at the time of the American settlement.

A final observation. Noting the healthy and promising state of our bilateral cooperation in the area of antitrust, I sometimes wonder what are the fundamental reasons of this US/EU success story. I believe the reasons are essentially two. One is shared by Washington and Brussels, the other one resides exclusively in Brussels.

The first one is that we do have in common a fundamental vision on what competition policy is all about, its objectives, and in particular on consumer welfare being the ultimate objective. Of course it is easier to find common solutions, when there is a shared cultural vision. And this shared vision, let me stress it once again, historically owes very much to the US.

The second reason resides in Brussels. I think it would be impossible to have this volume and quality of bilateral relation between the US and the EU if the EU in the area of competition policy were not in a position, and indeed in the obligation, to act as one. This, as we know, is a situation that prevails so far only in three policy areas: trade and competition since the Fifties and monetary policy since five years. The broader lesson that I personally draw from this case of good cooperation is that in Europe we tend too much to note and to criticize drifts by the US towards unilateralism. I do not deny that these drifts sometimes exist, nor do I deny that they are worrying. But we European should ask ourselves: are we a credible and effective interlocutor for a strong transatlantic bilateralism, and, working together with the US, for a growing multilateralism? I believe the answer here resides essentially in Europe. Is Europe able in the different policy areas to act as one? For this reason, I believe it is important that in the draft constitutional Treaty, that we strongly hope will be adopted by the 25 Member States in the next few weeks, the institutional arrangements that have made this bilateral cooperation so successful (i.e. the unitary nature of EU competition policy, even though it is now enforced through a more decentralized system) are confirmed in a crystal clear way. Also thanks to this, I am confident that in one or two or three cicada life-cycles the quality of the US/EU cooperation will be at least as good as it is today.

Finally, I am personally deeply grateful to my friend Hew for the interest that he takes in the EU, well beyond antitrust. The European Union is such a difficult animal, and unlike cicadas it does not appear only every 13 or 17 years. It is

always there and its behaviour is not easy to understand, but Hew really does his best and normally is able to understand even Europe. But of course he does so with the broad picture that he can afford coming from where he comes from. So I thought, Hew, that as a small token of our enormous appreciation for your visit and lecture with us today we should present you with a book which is entitled “Lands of Europe, seen from the Sky”.

Thank you very much.