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Europe's Antitrust Chief Defies Critics, and Microsoft

Kroes Spurns Offer From Tech Giant; 'We Have to Act'

By CHARLES FORELLE
February 25, 2008; Page A1

BRUSSELS -- Microsoft Corp. last week pledged a new era of cooperation with rival software developers -- and with one person who doesn't write code at all, European antitrust chief Neelie Kroes.

Mrs. Kroes is spurning the olive branch.

Minutes after Microsoft began a widely trumpeted news conference Thursday saying it would give competitors better access to its secret operating-system code, Mrs. Kroes's office responded that it had heard such talk before. In a press release, the regulator tooted up "at least four similar statements" Microsoft had made in the past. The European Union vowed to press ahead with two investigations into the company's practices that it launched just last month.

In no small part because of her tough tack on Microsoft, Mrs. Kroes has emerged as arguably the world's most-feared antitrust enforcer. To many of those in Europe and around the world who have followed her ascent, the aggressive posture comes as a surprise.

When the 66-year-old Dutch politician took over as Europe's competition commissioner three years ago, big business greeted her ascension with a sigh of relief. Mrs. Kroes had spent years climbing the ladder of the Netherlands' pro-business party. She dabbled in corporate lobbying. In recent years, she had held board seats at a score of companies.

European advocates of a tough antitrust policy feared Mrs. Kroes would reverse the course set by her two predecessors, who had forged the EU's reputation as a vigorous regulator unafraid to tangle with the world's biggest corporations. The man she replaced, Mario Monti, famously torpedoed General Electric Co.'s plan to purchase Honeywell International Inc. in 2001. Mr. Monti's parting shot in 2004 was a major case against Microsoft that imposed a fine on the company of €497 million ($613 million at the time). Mr. Monti had crusaded against corporate bullies, antitrust advocates sniped, while Mrs. Kroes served on their boards.
Yet she has staked out a robust course. A number of other U.S. tech companies -- including Intel Corp., Qualcomm Inc. and Rambus Inc. -- are on her docket this year. Google Inc.'s acquisition of DoubleClick Inc., a deal already cleared by the U.S. Federal Trade Commission, hinges on her blessing. She was emboldened in September by an important court victory over Microsoft that ratified her aggressive challenges.

Microsoft, which has pledged cooperation with European inquiries, declined to comment on its relationship with Mrs. Kroes.

Mrs. Kroes is exercising the sweeping powers the EU gives her office. Her investigators have launched surprise office raids to gather corporate documents in broad "sector inquiries." Mrs. Kroes announces big fines -- €329 million on a cartel of zipper makers, for example -- with relish at news conferences and denounces with bombast corporations she believes are trampling consumers.

'Level Playing Field'

In an interview at her office at the Berlaymont, the headquarters of the European Commission in Brussels, Mrs. Kroes refers a half-dozen times to her desire for a "fair, level playing field." While U.S. regulators are more likely to wait and see what happens after a company becomes dominant, Mrs. Kroes is predisposed to pre-emptive action. If a company is "just blocking competition, then at the end of the day, there will be a type of monopoly," she says. "If you are waiting until it is there, then it is too late."

That is particularly true in the tech industry, she says. If a company's prospects are curtailed because it can't operate in a world shaped by Microsoft, "then we have to act," she says.

To critics, she epitomizes the European folly of burdening big business with excess regulation. Proponents say she's taking on the companies the rest of the world is too timid to engage.

"Mrs. Kroes has been remarkably determined and coherent," says Mr. Monti, her predecessor.

Mrs. Kroes at times lacks polish. Her English -- the international language of antitrust -- is rough, sometimes to the point of confusion. She has no formal antitrust training and isn't a lawyer. She dismisses such criticism, saying she sees herself as a "generalist" who uses input from her team of specialists to make "a balanced decision."

Mrs. Kroes was born in the Dutch port city of Rotterdam in 1941, into the devastation brought by German bombers a year before. Cobbled streets, canal-side row houses and medieval squares were reduced to plains of rubble.

Rotterdam's postwar reconstruction presented opportunities. The U.S. Army had come with vast quantities of materiel that became surplus when World War II ended. Mrs. Kroes's father borrowed money from aunts and uncles to buy a truck to haul Army surplus during the rebuilding effort.

In Europe's postwar boom, her father's company, Zwatra, found a niche in unusual cargo -- airplanes, for instance, or giraffes for the zoo. "It sounds very nice and easy but it was blood,
sweat and tears," Mrs. Kroes said. Relaxing wasn't tolerated. "I grew up in a family that was really working quite hard and not complaining."

Mrs. Kroes watched her father expand his company beyond the Netherlands. That piqued her interest in the nascent project of a unified Europe, she says, and in taking down barriers that prevented ambitious companies from growing.

At university, Mrs. Kroes studied economics. She joined the Volkspartij voor Vrijheid en Democratie, or VVD, a pro-business party, and became a board member of Zwatra. She was the eldest of three children and keenly interested in business, but she wouldn't succeed her father; in that era, she said, it wasn't seen as acceptable for a woman to take over the company. (Her brother sold the company last year.)

She turned to politics, becoming a city councilor in Rotterdam and eventually working up to the Dutch parliament, to ministerial jobs and finally transport minister. She crossed party lines to marry Bram Peper, a Labor Party politician. The marriage, her second, ended in 2003. She has one son.

In 1989, Mrs. Kroes left Dutch politics. She advised the EU on transport policy for two years, then served for nine years as president of Nyenrode Business Universiteit in Breukelen, Netherlands. By 2000, she says, she wanted to divide her life into a "triptych" -- participating in cultural institutions, performing charitable service and earning "my money for eating bread." For the latter, she joined corporate boards.

**Hard to Refuse**

A disclosure statement filed in 2004 lists pages of "outside activities" from the prior 10 years, including at least 28 positions -- mostly board seats -- at private companies. They included Volvo and the Dutch arms of McDonald's Corp., Lucent Technologies Inc., PricewaterhouseCoopers LLP and defense contractor Thales SA.

Securities filings show that in 2004 she cashed out $250,000 worth of options and shares granted during two years of service on the board of one company, Denver-based logistics concern Prologis Inc. Mrs. Kroes's home is in Wassenaar, a wealthy suburb of The Hague on the North Sea coast.

Around that time, Jozias van Aartsen, then the chief of the VVD, suggested she be the Dutch candidate for a seat on the EU's executive body of commissioners; each member nation gets one slot. "I said, 'Come on. Ten years earlier it would be a nice idea, but not at this moment. I am absolutely enjoying life,'" she recalls.

At the same time, the incoming European Commission president expressed a desire to have more female commissioners. Dutch officials realized, Mrs. Kroes says, that their country could get a plum post, such as competition commissioner, if it helped fill the gap. Mr. van Aartsen insisted she go for it. Invoking the sense of duty she learned as a child, Mrs. Kroes explains: "When your party is asking you to take your responsibility, it is quite difficult to refuse."

At an intense hearing before the European Parliament, legislators pounced on her for her business background. Mrs. Kroes severed her business ties, including those to her family's company, resigned her directorships and promised not to return to a business career. Still, some members of the European Parliament -- even those from her own country -- accused her of conflicts of interest.
Mrs. Kroes called the allegations unfounded.

Paul van Buiten, one of the most vocal opponents, says now: "As commissioner she is performing very well. And I have nothing to add to that."

Karel Van Miert, the antitrust commissioner who preceded Mr. Monti, says claims that Mrs. Kroes wouldn't stand up to business were "a complete misreading."

'Need to Have Rules'

Mr. Van Miert, a Belgian who speaks Dutch and is a confidant to Mrs. Kroes, says she is in favor of a market economy. But, he adds: "I don't think she believes that the market always gets it right. You need to have rules."

Arriving in office in late 2004, she inherited one of the biggest antitrust battles Europe had ever waged. At the end of his term, Mr. Monti had charged Microsoft with abusing its market power by withholding technical documentation from one rival, and bundling a media-player application into its Windows operating system to undercut competitors.

Microsoft appealed, vowing to fight the case with Mrs. Kroes. It mounted a vigorous public-relations campaign, saying Europe was stifling innovation.

U.S. regulators and antitrust lawyers expected her to take a hands-off, pro-business approach. "She was the Margaret Thatcher of antitrust," says J. Bruce McDonald, a top Justice Department antitrust official until last year and now a lawyer at Jones Day.

Mrs. Kroes contemplated settling to avoid a drawn-out court fight. She also weighed the risk that the EU would lose, setting a precedent that could imperil future regulatory efforts.

"We had a big and intense discussion to continue, yes or no, what Mario Monti had put on the table," she says. Career staffers who had pursued the case for years persuaded her to press ahead.

Discord With U.S.

The Microsoft offensive posed risks, among them discord with U.S. regulators. The Justice Department had backed off the company since settling its own case in 2001 and requiring relatively few changes to the company's business practices.

During Mrs. Kroes's first year in office, Microsoft chief Steve Ballmer attempted to persuade her that his company was working to turn over documentation that would help machines running rivals' software communicate with computers running Microsoft's platform, as the EU required.

But to Mrs. Kroes, progress was slow. In 2006, she said Microsoft hadn't adequately turned over the documentation that Mr. Monti demanded in 2004. She fined the company €281 million for noncompliance. Microsoft "has still not put an end to its illegal conduct," she said.

In September, Mrs. Kroes scored her biggest victory. The Luxembourg-based Court of First Instance, which hears appeals of EU commission decisions, upheld Mr. Monti's 2004 action. It reiterated that Microsoft must divulge communications protocols used by its operating system on computer servers.
The ruling vindicated Mrs. Kroes's efforts to get Microsoft to produce the documentation. The court also made clear that the European Commission had broad authority to pursue cases under Article 82 of the EU treaty, which governs abuse of market dominance by large corporations. The ruling was critical, because Mrs. Kroes had filed several cases under the provision.

Mrs. Kroes's aggressive tack has produced an uneasy relationship with lawyers who defend the companies she has targeted. Privately, several say she focuses on levying fines and is indiscriminate with her authority. Some cite a decision last month to fine German energy giant E.On €38 million for breaking a seal on a room in a company office where EU investigators had secured documents. (E.On denied any malevolence, suggesting an overly thorough night-cleaning crew was responsible.) Opposing lawyers also say that in meetings, she appears not to grasp firmly the details of antitrust law or individual cases.

Mrs. Kroes held a triumphant news conference on the day the September 2007 Microsoft court ruling was announced. Asked how the ruling would affect Microsoft's dominance, she said she hoped Microsoft's 95% market share would decline -- apparently conflating Microsoft's near-total share of operating systems on desktop PCs with its share of computer servers, which is what the case pertained to and which is lower.

Asked what share she thought would be better, she suggested a major fall -- well more than "a couple of percent." A severe decline would represent a massive reshaping of the industry.

Her staff attempts to keep her scripted. At a conference in Washington last spring, Mrs. Kroes read answers to several prepared questions. Faced with one question, she gave the wrong answer, baffling the audience, according to people who attended.

Other times, she sets her own path: At the same conference, Mrs. Kroes said the EU would consider "structural remedies" -- antitrust argot for a breaking up a company -- if Microsoft failed to submit technical documentation. The invocation of such an extreme penalty stunned her staff.

**Fines for Microsoft**

Mrs. Kroes never sought a breakup, but she has continued to add fines for noncompliance. Microsoft's final tab hasn't been determined, but the total appears to be at least €1.5 billion, three times what Mr. Monti assessed.

In October, a month after the Luxembourg court ruling, Mrs. Kroes and Microsoft -- following personal negotiations between her and Mr. Ballmer -- reached an accord under which Microsoft would license documentation to rivals. Finally, it seemed, the company might be out of Europe's doghouse.

But in January, Mrs. Kroes's office opened two new investigations. She is plumbing whether Microsoft illegally bundles its Internet Explorer Web browser with Windows, to the detriment of smaller browser-makers such as Opera Software ASA. She also asks whether Microsoft's control of file formats and other technical specifications improperly harm software vendors who compete with Microsoft to write programs for Windows. Microsoft's Thursday announcement was intended to alleviate that second concern, but the EU's response suggests it believes Microsoft hasn't gone far enough.

For her part, Mrs. Kroes takes a firm message from the September court victory. Her
interpretation of the ruling: "Go on in this direction," she said. "There's still a lot to do."

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