

# Antitrust: Sherman's March Across The Globe

BY CLYDE WAYNE CREWS JR.

President Bush's bipartisan Antitrust Modernization Commission held its first meeting in July. But after 114 years, America's antitrust regulatory regime is overdue for burial, not botox. This comes on the heels of Europe's antitrust regulators nailing Microsoft's success, to the tune of €497 million (\$612 million), for a dominance assailed as impermissible and constituting market abuse.

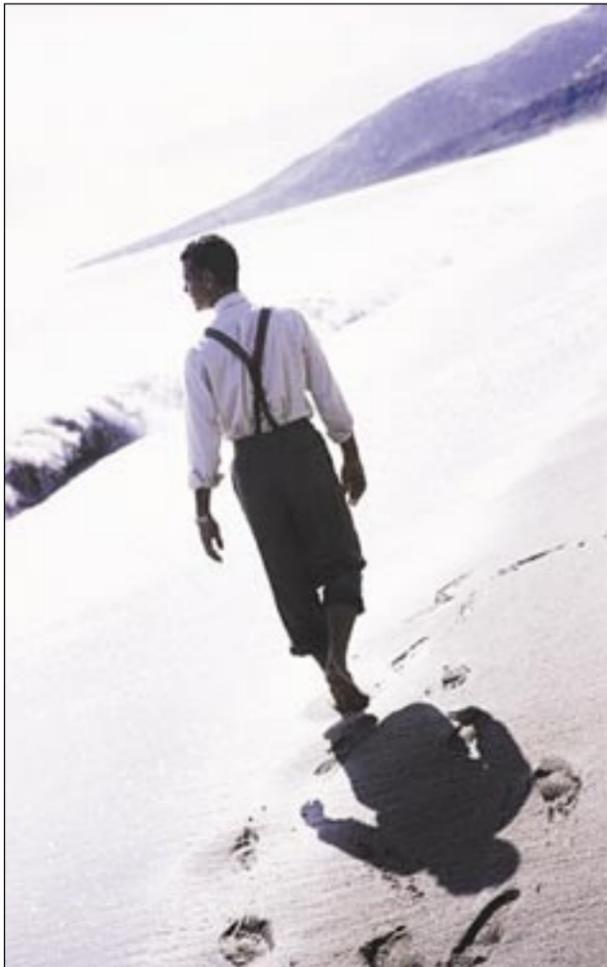
Antitrust regulations were first enacted as a way to prevent monopolization and restraint of trade. But, by elevating government intervention above the market's competitive discipline, antitrust has allowed disgruntled firms to mount legal attacks against their more successful competitors. Particularly given today's global economy is that other governments are now emulating U.S. antitrust regulations to "protect" their own industries.

The Sherman Antitrust Act of 1890 was brought to us by John Sherman, the brother of the Civil War's General William Tecumseh Sherman. I've heard it joked that Sherman's March across the South did far less economic damage than his brother's century-plus march through the greater economy. Now John Sherman is marching across the globe.

## Hurting us all

Today, antitrust enforcers see monopoly or unfair competition throughout the technology sector: computer operating systems, business accounting software, databases, Internet routers, chips, online instant messaging, broadband services, cable, telephony. Purveyors of all these technologies have been called "anti-competitive." Antitrust empowers protectionists, allowing overseas competitors and governments to target U.S. firms like Microsoft to prevent "bundling" of services like security and media player software. This global oneness will hurt us all.

No one can predict when the antitrust hammer will fall, but it gets every industry eventually. In the U.S., recent antitrust investigations have hit the Orbitz travel site, the Oracle-PeopleSoft merger, and MusicNet-Pressplay. The EchoStar-DirecTV merger was blocked outright.



Putting business on the beach

Even Google was accused of unfairly prioritizing links—as if consumers can't migrate to another search engine.

In its most extreme applications—like proposals to break up Microsoft—antitrust regulation doesn't simply pick winners and losers, it dictates entire business models by reorganizing industry itself.

## Nixing mergers

Despite earlier attempts to "modernize," smokestack-era antitrust law is alive and kicking in non-technology sectors too. Washington regulators halted the Heinz-Beechnut baby food merger to prevent the monopolization of pureed fruits and vegetables. The Staples-Office Depot business supply "superstore" merger was nixed. The Philip Morris-Nabisco merger required selling off the "intense mints" business. (Ice Breakers' breath fresheners were apparently poised to take over the economy.) The U.S. Federal Trade Commission (FTC) has even considered whether premium ice cream and jarred pickles are monopolizable markets!

No economy can afford the antitrust albatross, especially in an age of advanced global trade. But too many

bureaucrats make their living at antitrust to be receptive to the "kill it" message. Denigrating antitrust is today what arguing for Social Security privatization was 20 years ago: Those who "know better" look at you like you have two heads. But the case must be made, much as the Washington-based Cato Institute, among too-few others, advocated Social Security privatization when the idea was considered extreme. Fortunately, the example of Chile's remarkable success means that at least that model of liberalization stands a chance at broader adoption. Is an antitrust analog possible?

The actual extreme notion is the idea that government coercion can replace competitive market discipline. Consider the Lens Crafters-Pearle eyewear merger: It is now on hold because the U.S. regulators think eyeglass prices might rise in the "chain store market." Yet price increases, if they happen, create new tiers of economic activity that competitors rush to fill. They are important signals. It seems like socialism must fail catastrophically in every single niche before people finally let go of it.

Antitrust activism in a glo-

bal information economy will cost decades in lost productivity and market evolution. For example, in frontier industries like nanotechnology, bioengineering, and space science, cooperation among competitors can be crucial in coping with uncertainties, sharing research and product ideas. But antitrust regards most cooperation among competitors as illegal collusion.

## Voluntarism

Yet that cooperation can create a rising tide of resource and wealth creation, just as coordination between individuals confers benefits (marriages, tandem canoes). Government research and development is often praised, but market "collusion" might work better than today's alternative of having governments spread research across dozens of universities, national labs, and bureaucracies.

Competition, properly un-

derstood, has little to do with the number of competitors and industry concentration ratios that bewitch government commissions. Its proper expression is simply "voluntarism." Markets are the sum of competition and voluntary agreements between firms. Suppliers, business customers, and consumers have ample incentive to monitor and discipline abusive predatory efforts without antitrust regulations. Unlike voluntarism, antitrust entails confiscation, restraint, and forced aid of competitors. Antitrust doesn't create or assure competitive outcomes; it prevents them.

Bush's Antitrust Modernization Commission -- and, hopefully, European reformers -- can ask fundamental questions rethinking the wisdom of antitrust, or they can tinker. The presumption that trustbuster activism improves upon market processes deserves reexamination. The agenda should not be to recast and polish

antitrust, but to prevent the further global spread of a colossal mistake.

The American commission's most immediate goal must be to encourage our overseas trading partners not to embrace the antitrust activism that we've perpetuated—and seek a similar agenda at home. Given the current focus on antitrust both in the U.S. and EU, all regulators face historic opportunity to start us on the road to ending a century-old campaign that squanders so much of the world's wealth creation. Most regulators probably won't say it outright, but the antitrust laws are an anticompetitive interest-group luxury the world cannot—and never could—afford. Maybe, finally, we will see John Sherman's march turned back.

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## New EU Iron Lady: Gates' Friend or Foe?

BY AOIFE DREW

Nellie Kroes, the newly appointed EU Competition Commissioner, is set to have her hands full as she takes the reins of arguably the most difficult and powerful job in the Brussels executive. Although not officially taking up this position until November 1st, she has already gained her fair share of media coverage. This is thanks not only to her reputation as the Netherlands' "Nickel Nellie", a pragmatic and determined politician in the mould of Margaret Thatcher, but also to her close links to the private sector. She will be faced with numerous challenges from day one in the post.

Kroes is the Netherlands' former minister of Transport and Public Works and a member of the liberal-conservative VVD party. She has a reputation for being tough and during her tenure as minister she drove forward an ambitious liberalisation and privatisation agenda. "She has extraordinary experience as a member of government," commented Commission President José Barroso at a recent press conference. "She knows business and the private sector." Indeed, in addition to her political experience she has been very active in both the academic and corporate worlds, serving as president of Nijenrode University and holding directorships at several high-profile



Nellie Kroes, EU Competition Commissioner appointee

public companies such as Volvo, Thales, MM02, Lucent Technologies and P&O Nedlloyd. She was identified as the Netherlands' most powerful woman by the Financial Times in 1988.

So what is expected of Ms Kroes? Due to her corporate connections, political commentators predict she may not follow the lead of her predecessor Mario Monti. Monti was a tough enforcer of merger, antitrust and State Aid laws, banning a merger between General Electric and Honeywell. He also fined Microsoft €497 million in March of this year and said that it had to disclose software secrets. Microsoft has since appealed this decision and the legal proceedings are expected to be lengthy. A European court is expected to make a ruling on the case close to the time that Kroes takes over.

Kroes awarded Gates an honorary degree from the Nijenrode Business School in 1996, but may now have to change track as her role requires. She will be responsible for monitoring any anti-competitive behaviour and tackling reform of the law on dominant companies. Furthermore, "two of the key issues the new Commissioner will face are the balance of power between member states redefining the way the commission deals with powerful, dominant companies," said Alec Burnside, Head of the EU and Competition group at Linklaters in Brussels. States and companies alike will have to be vigilant about their behaviour if she lives up to her reputation.

Will she succeed in her new role? If her career so far is anything to go by, the answer is a resounding yes. An ex-colleague of hers, Karel Van Miert, EU Transport Commissioner in the early 1990's, believes she will do her utmost in the job. "She is a tough lady who will behave in an independent and coherent way."

Kroes' next challenge will be to present her programme to the European Parliament in October. She must obtain its approval before she can officially direct and enforce competition law for the five years to come. If "Nickel Nellie" performs in her future career as she has up to now, interesting times are certainly ahead.