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from Brussels

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Margrethe Vestager – One year on



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Margrethe Vestager has been in office as European Commissioner for Competition for one year. It is a good time to evaluate her record so far and to assess where she has taken EU competition policy and enforcement.

A striking feature of Vestager’s mandate is her determination to pursue infringement decisions and impose fines, even if that may extend the duration of the Commission’s investigation by several years and result in more challenges in the EU courts. She constantly refers to the importance of making use of the Commission’s regulatory “tool-box” in the enforcement of competition rules. In marked contrast to her predecessor Joaquín Almunia, Vestager is reluctant to make a habit of settling cases, acknowledging that such deals can be opaque and fail to develop case law. In this sense, we are seeing a return to the approach of Mario Monti (as shown for example in the Microsoft case).

Vestager inherited several complex and high-profile cases which, because of attempted settlements, or for other reasons, had stalled and not advanced very far down the process route. Her very first action as Commissioner 20 days after beginning her mandate was to send a Statement of Objections (SO) in the trucks cartel case.

In April, she made dramatic moves in the Gazprom and Google investigations which had been initiated under Almunia. These steps made headline news around the world. On 15 April she sent an SO to Google in relation to comparison shopping services and initiated proceedings against the company in relation to its Android Mobile Operating System. Then, on 22 April, she sent an SO to Gazprom for allegedly abusing its dominant position in Central and Eastern European gas supply markets. Replies to these SOs have now been submitted and are being considered by the Commissioner and her Services.

In an interview on 26 October Vestager said that the Commission was looking at new data submitted by Google in its response to the SO. She indicated that the Commission has not decided whether to keep pursuing a formal track towards a decision, indicating that this case could still go down the path to settlement.

In the Gazprom case, Vestager is not apparently in a hurry and has declared that “so far every door is open... either for going through to a decision maybe with remedies or to go through a process of binding commitments.”



In May, Vestager opened an industry-wide competition inquiry into how sellers in the internet market place such as Amazon and eBay operate. The Commission is also asking whether the use of personal data by search engines and online platforms should be regulated and whether EU competition law is fit for today's sharing economy. Vestager said that the goal of the probes is to better understand the role of online platforms and determine whether regulation is needed.

In July, she issued the long-awaited SO against MasterCard on cross-border rules and inter-regional interchange fees, and then turned her attention to Qualcomm, initiating dual proceedings against the U.S. chipset maker. "We are launching these investigations because we want to be sure that high-tech suppliers can compete on the merits of their products," she said. "Effective competition is the best way to stimulate innovation."

On 15 July, Vestager adopted her third cartel settlement decision in the blocktrains cartel case.

Then, just before the summer recess, Vestager sent an SO to Sky UK and six major U.S. film studios (Disney, Paramount Pictures, Warner Bros, Twentieth Century Fox, Sony and NBCUniversal) on cross-border provision of pay-TV services in UK and Ireland. "European

consumers want to watch the pay-TV channels of their choice regardless of where they live or travel in the EU. Our investigation shows that they cannot do this today, also because licensing agreements between the major film studios and Sky UK do not allow consumers in other EU countries to access Sky's UK and Irish pay-TV services, via satellite or online," she commented.

Finally, in October, although the sports sector was not considered to be on her priority list, she surprised everyone by opening a formal antitrust investigation into International Skating Union (ISU) rules that permanently ban skaters from competitions such as the Winter Olympics if they take part in events not approved by the ISU.

On the merger front, Vestager's first 12 months make for an interesting comparison with those of her predecessor. She has overseen twice as many Phase I conditional clearances as Almunia did in his first year, and sent many more deals to Phase II (14, or around 4%, compared to Almunia's five, or 1%). This could just be a coincidence, and a product of parties trying their hand at more difficult transactions, but it may also be a sign that Vestager is willing to take a more interventionist stance.

In terms of Phase II investigations, Vestager has overseen eight in her first 12 months compared to Almunia's three. Seven of those eight cases involved remedies and a number gave rise to challenging issues. General Electric's USD13 billion takeover of Alstom's energy business was one example, with the Commission raising concerns that Alstom would halt the development of advanced turbine technology if the deal went ahead as planned. On 8 September, the acquisition was approved subject to the divestment of central parts of Alstom's heavy duty gas turbine business to Ansaldo.

Vestager has also faced challenges in the telecoms sphere, and was one step away from chalking up her first prohibition in relation to the Telenor/TeliaSonera merger before the parties abandoned the deal. In June, speaking at the "New Frontiers of Antitrust" conference in Paris, she fired a warning shot at the telecoms industry, arguing that a wave of mergers between national telecom operators could harm consumers and probably would not lead to greater investment.

"Incumbent operators argue that if they cannot merge with their rivals in the same country they will be unable to increase their investment", Vestager said. "I've heard this claim quite often, but I have not seen evidence that this is the case." She commented that by contrast, there is ample evidence that "excessive consolidation" leads not only to more expensive bills for consumers, but also reduces the incentives of large national telecoms providers to innovate.

This is the clearest sign that Vestager may take a tougher approach toward telecoms mergers than her predecessor who waved through a series of deals that reduced the number of mobile operators in several EU countries from four to three, including in Germany and Ireland. Still, the Telenor/TeliaSonera deal cannot be read as a clear confirmation of a tougher approach. "The first and most obvious point is that there is no magic number – on the number of mobile network operators in a given country... In reviewing mergers, we follow a strictly case-by-case approach assessing each transaction on its own merits. Each market is different and they must be assessed individually."

More generally, Vestager is adamant that she believes in "competition values" and has repeated this:

"My basic view is that competition should be an alliance with citizens, and the best way of forging that alliance is with the parliament."

"Competition policy is a key factor in creating a climate that fosters investment and innovation."

She also highlights the importance of impartiality, neutrality and fairness in carrying out competition investigations in order to provide credibility and predictability, regardless of the size of the businesses under investigation:

"Keeping the internal market fair and level is also empowering."

"Law-abiding entrepreneurs can go about their business safe in the knowledge that, when they suspect foul play, they can turn to us to set things right."

Vestager stresses in her interviews that she is someone who will be acting independently and avoiding political considerations in reaching her decisions, but this does not mean that enforcement of competition policy does not relate to wider political priorities:

“The Juncker Commission is a political Commission with a clear set of objectives and the College of Commissioners play as a team.”

“There should be no doubt that I will do my part to help achieve the Commission’s broader objectives.”

“The final question is: is competition enforcement in individual cases politicised? Here the answer is a resounding ‘No’.”

One of Vestager’s catch phrases is (in Danish) “Sadan er det jo” meaning “that is how it is”. I am also told she often knits during meetings with officials which must be a new experience for them! The fact that she seems more keen than Almunia to pursue final infringement decisions and impose fines (and considers the Commission should not make a habit of settling cases) has made her very popular within DG Comp. However, Vestager now has to work with new Director-General Johannes Laitenberger whom she did not choose and we have yet to see how this combination will work.

It is likely that Vestager’s mandate will continue as it has begun. All the indications are that fines will be as tough as under previous Commissioners (she has promised to impose fines big enough to be “more than another line in the spread sheet”).

The recent state aid tax cases involving allegations of beneficial and discriminatory tax treatment by authorities in Iceland, the Netherlands and Luxembourg will test the limits of state aid law. Vestager’s determination to pursue these cases shows that she is not afraid of upsetting people, including President Juncker who was Prime Minister in Luxembourg when a number of these tax deals were struck.

However, big battles lie ahead as these cases and the Google and Gazprom investigations move towards their eventual outcomes.

Under Vestager’s mandate we are in for four more years of tough competition enforcement in Brussels – with the whole of DG Comp’s extensive “tool-box” being deployed against those who infringe EU competition rules.

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ABOUT MICHAEL



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Michael Reynolds is a well known face in the global legal profession and world of competition law. Michael founded Allen & Overy's Antitrust practice when he opened the firm's Brussels office in 1979. At the time, just five countries had antitrust regulatory regimes – now more than 70 have effective antitrust enforcement regimes and 100 have regulators who impose merger controls. Since becoming a partner in Allen & Overy in 1981, he has over 30 years' experience in European antitrust law and has worked for a range of high-profile European, Asian, U.S. and Latin American clients. Michael first became involved in the International Bar Association (IBA) in 1979 and was President of the IBA for the term 2013-2014. Prior to becoming President, he held a number of senior positions including Vice-President, Secretary General, Chair of the Legal Practice Division and Chair of the Antitrust and Trade Law Committee. He is a director and founding member of the IBA's Global Forum on Competition and is the European Union co-ordinator for the IBA.

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