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Brussels' new antitrust powerhouse: Ready for business

SHANA TING LIPTON 20 APRIL, 2015

Shana Ting Lipton profiles the European Commissioner for Competition, Margrethe Vestager.

When new European Commissioner for Competition, **Margrethe Vestager**, left behind a two decade-long career in Danish politics, in November 2014, to fill one of the most powerful positions in Europe, she was forced to confront a veritable maelstrom of an in-tray.

Among the items on her to-do list, passed on from her predecessor **Joaquín Almunia**: high-stakes, high-profile tax probes of multinational companies like **Apple** and **Starbucks**, alongside an 'abuse of a dominant position' case against tech behemoth **Google**.

Such political hot potatoes can be seen as part of a trial-by-fire for the cool-headed new Competition Commissioner, who has a reputation in Denmark for having the stalwart determination to stick to her guns and implement her agenda. If her unwavering commitment to upholding the Commission's 'zero tolerance' message on all cartels is any indicator ("detecting and punishing cartels is a top priority," she asserts), Vestager's reputation will indeed follow her.

"A good thing about Danish politicians is that most of them are used to being in a minority in the government and used to arguing for a very long time in order to find consensus," says **Morten Schwartz Nielsen**, partner at **Lund Elmer Sandager** in Copenhagen. As Denmark's political system has not enjoyed a single party majority in Parliament since 1909, its governments often take the form of such minority administrations.

Likewise, Vestager had been political leader of the Social Liberal Party, which garnered 9.5% of the vote, when she concurrently took up the post of Minister for Economic Affairs and the Interior in 2011. Nielsen believes that such experience, fighting tooth and nail for the underdog, could make her the right woman for the job of completing what had become an

epic – and ultimately failed – public four-year battle against Google under Almunia's watch.

The Google case is perhaps uniquely hyper-politicised in nature in that it not only prompted an unusual vote from the European Parliament in favour of breaking up the tech company – but also saw US President Barack Obama attack Europe's efforts to curb the multinational's market behaviour, branding them commercially motivated. Vestager was poised to take on another highly political 'abuse' case when she prepared to make a move against the state-owned **Gazprom**, one of Russia's key energy traders.

All of this could place a heavy onus on the fresher commissioner to stand behind an agenda to promote 'European champions' (robust European businesses that can compete globally), potentially at the cost of the Commission's liberal independence, say critics.

But getting behind the Google case is not just politics as usual, or even about putting to rest her predecessor's unfinished business – it also means paving the way towards one of the Commission's chief

priorities, the facilitation of a Digital Single Market, which would ideally generate up to EUR 250 billion in additional growth for Europe within the next five years.

"We want to remove unjustified barriers to the efficient functioning of the Digital Single Market," says Vestager, explaining that the Commission is ensuring that companies do not hamper online trade with unjustified restrictions that breach competition law.

She adds: "There would be no point in removing regulatory barriers if we then allowed companies to continue to divide the EU into separate markets with anti-competitive practices." This issue of so-called 'geo-blocking' is seen as a possible impediment to both competition and the Digital Single Market.

As the online world continues to evolve at high-bit-rate speeds, so does the traditional definition of such practices. "Antitrust enforcement has to stay in tune with market developments and to be aware of market functioning, especially when it comes to fast-moving technology markets," says Vestager, who has publicly proclaimed data as the currency of today's e-commerce-centric world while virtually in the same breath discussing more generally the possibility of re-launching sector inquiries. The last such investigation into specific industry-wide practices culminated just over five years ago with a probe into the pharmaceutical sector.

Considering that the market for pharmaceuticals was worth the equivalent of 2% of the EU's GDP prior to that inquiry, and with 30% of Western European companies now expected to adopt big data by the end of this year, it does seem reasonable to speculate that big data could be the first sector inquiry of Vestager's tenure.

"Sector inquiries are one of the tools available to help us get a better understanding of how markets work but we have other tools, as well, for requesting information from market participants," she guardedly says. "The trick is to choose the right and most effective tool in order to accumulate the market knowledge needed to develop competition policy properly." She does confirm, however, that she will continue to reflect on the impact of big data on competition.

One such area of reflection may well be how companies monetise, via targeted advertising revenue, the data they aggregate from consumers, with the latter often unwittingly paying the (hidden) cost of 'free' online services with their valuable personal information. "Data can

therefore be an important parameter of competition that we can take full account of in applying EU competition rules,” she says.

Such developing areas can seem to straddle the jurisdictional line between the Competition Commission and the data protection authorities, implying possible future cooperation between the two as the areas continue to converge.

Vestager is quick to underscore that “data protection rules are ... complementary but separate and distinct from competition rules”, suggesting that the Competition Commission liaising in some capacity with the EU data protection authorities when mutually beneficial interests arise is unlikely.

She is, however, working closely with Vice President of Jobs, Growth, Investment and Competitiveness Jyrki Katainen as part of the new collaborative structure under the Juncker Commission – a setup which has left some commercial lawyers wondering whether social impacts of mergers will increasingly be considered in competition cases.

“Individual competition cases are dealt with exclusively by me as Commissioner of Competition,” Vestager maintains, stressing that “impartiality, neutrality and fairness are extremely important”.

On the policy end, she says the new structure will maximise “the contribution of competition policy initiatives (such as legislation and guidelines) to other EU policy objectives”. It will also act as a sort of vehicle to promote the benefits of competition directed at other Commission members, while facilitating close-knit cooperation between different policy areas.

In the wake of the HSBC scandal, tax avoidance in Europe is a hot topic, so it is perhaps not surprising to hear the antitrust chief proclaim: “The fight against tax evasion is a key priority.”

On the Competition Commissioner’s immediate agenda: putting to rest four ongoing in-depth probes into apparent sweetheart tax deals – preferential tax treatment given to certain multinationals by member states, capable of distorting competition.

“The aim is to give ‘good’ state aid that promotes economic growth and innovation and make it easier for the Commission to concentrate its efforts on tackling ‘bad’ state aid that, for example, keeps ‘zombie’ companies alive and puts healthy companies out of business,” she says. The Commission is actively implementing state aid rules which underscore transparency, proactive partnerships with member states and the amassing of solid evidence on the ramifications of aid for evaluation purposes.

The subjects of the immediate investigation into compliance with state aid rules are Apple in Ireland, Starbucks in the Netherlands and **Fiat Finance and Trade** and **Amazon** in Luxembourg – clearly high-visibility multinationals, and the stakes could not be bigger. If Vestager takes a hard position it could mean billions in back tax liability for Apple’s Irish subsidiaries alone. The Competition Commission hopes to finalise these cases by the second quarter of this year.

Once the aforementioned tasks have been completed, Vestager can set her sights on launching additional cases, perhaps stemming from the so-called ‘Lux Leaks’ – journalist-leaked documents chronicling confidential, potentially unlawful, tax benefits afforded to companies such as **JPMorgan Chase** and **Ikea** by Luxembourg. To complicate matters, Commission President Jean-Claude Juncker had been prime minister of Luxembourg at the

time the tax rulings were given.

Looking further ahead into the Commissioner's five-year tenure, competition lawyers are understandably holding their breath to see how the Damages Directive – part of her predecessor's legacy adopted by the European Council in November – plays out once the member states have implemented it by 27 December 2016. It essentially makes it easier for victims of antitrust violations to claim damages – harmonising the interaction between public enforcement and private damages claims – and prompting some critics to question whether the combination of both awards is excessive.

“If companies are paying large amounts of damages and compensation you would think that, from a policy perspective, the fines at the Commission level shouldn't be so high over a medium term,” says **James Killick**, a competition law partner at **White & Case** in Brussels. He explains that although there have not been too many private damages claims that have reached trial thus far, the Commission should be considering the consequences of such double fining in the near future. “I am doing everything I can to ensure [the Damages Directive's] success,” says Vestager. “The more opportunities victims of antitrust infringements have to obtain compensation for the harm they have suffered, the better it is.”

The Commission is also putting together guidelines on the passing on of overcharges – when customers shoulder the burden of higher prices which trickle down from a cartel or monopoly. “To continue to be a credible enforcer, we need a robust and stable track record that withstands in-depth scrutiny by the European courts,” Vestager says, referring to the Commission's unflinching stance on cartels and on ensuring that its highly successful leniency programme and settlement procedures remain attractive and efficient.

“Settlement decisions ensure an end to anti-competitive behaviour while maintaining proportionate penalties on participants,” she says. “They also save resources so that the Commission can tackle more cartels and so increase the deterrent effect of antitrust rules.”

In relation to non-cartel cases involving such behaviour, some lawyers like **Andrzej Kmiecik**, a partner at **Van Bael & Bellis** in Brussels, are concerned about how commitments (a quicker, cheaper method of resolution which came into force in 2004) are being used when perhaps infringement findings should be pursued instead – particularly in more complex cases. “There is this view out there that is being expressed that the Commission has been closing too many cases by way of commitment decisions,” he says of the decisions, which skirt infringement fines and leave no further room for action by the Commission once they are implemented.

“The criticism that is being made is by members of the legal community who favour legal certainty over legal pragmatism and who want definitive findings on the law from the Commission, which, it is true, were few and far between over a number of years other than in cases which were legally rather simple,” he explains.

However, Vestager believes the use of commitments can be effective in addressing competition issues in the immediate future, “especially in fast-moving markets where there may be more to gain from fixing the future functioning of the market than from sanctioning previous behaviour”. She adds, in a characteristically resolute and to-the-point manner: “We apply EU competition rules for the benefit of Europe's economy as a whole, not for the benefit of lawyers.”

On the other hand, Vestager is not all brass tacks when it comes to her dealings with companies in a broader sense – she seems well aware of the power she wields as judge, jury

and executioner, and the concomitant responsibilities placed on such wide oversight. “In the end, as a Commissioner you have to give directions and you often have the final say,” she says, “and that should make you listen even more”.

She maintains she is therefore likely to seek out information from companies and “food for thought”, as she puts it, opening up discussions about potential developments. “As far as I know, the ears and the feet keep growing even as an adult: I see that as a sign that we should listen more and go the extra mile for other people,” she adds.

Such a philosophical approach to a job that makes her ‘the most powerful woman in Brussels’ according to the Wall Street Journal is perhaps not surprising coming from the daughter of two Lutheran priests. In looking ahead, Vestager refers back to her homeland of Denmark, where, at Christiansborg Palace, adjacent to Parliament, there stands a frieze inscribed with the saying “Lev i dit værk mens det øves”. “That translates more or less into: ‘Be present in what you do while you do it’,” she says, concluding, “to me it is a good reminder that even though we plan and look ahead — it is as important to remember to be present right now. That is what I try to do”.

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