

# EU Competition Chief Vestager Act II; a preview

## Regulating for Globalization

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On 8 October 2019, Margrethe Vestager passed the test and has been approved by the European Parliament (**Parliament**) to become the new European Commission's (**Commission**) Executive Vice President for digital and commissioner for competition. The European Parliament is due to vote on the proposed College of Commissioners as a whole on 23 October 2019. If approved, the Commission will take office on 1 November 2019.

### Most relevant conclusions

Vestager was questioned by the Parliament for about three hours with a strong focus on Vestager's plans for the digital sphere, e.g. the future Digital Services Act, GDPR, e-commerce Directive, e-Privacy, etc. On the competition law policy, some of the most important themes addressed were the following (i) broadening of remedies in abuse of dominance cases (requiring breaking up of companies unlikely) (ii) continued focus on tax rulings in state aid cases (iii) resistance against politicising EU competition rules and (iv) the impact of data possession on competition is also high on the agenda.

#### **1. More focus on remedies expected in abuse of dominance cases, but breaking up companies a measure of last resort**

It is expected that in abuse of dominance cases there will be an increased focus on remedies, aimed at restoring competition. Vestager indicated that fines and the ending of illegal behavior are not (always) a solution to restore competition. She mentioned the Google AdSense case (40411) as an example; despite the 1.5 billion fine and while the decision prohibited Google from favouring its own ads, the market has after two years not "returned to good health". Therefore, the need for stronger market restoring remedies appears an option that is seriously considered by the Commission as a more common tool. As an example of a market restoring measure, Vestager referred to the Google's move to ensure compliance with the Google Android Case (40099), enabling users its Android phones are asked whether they want to download rival search services and browsers. When asked whether Vestager was willing to break up dominant firms she answered this was not excluded, but only an option if all other solutions failed: *"It can be done, [but] I*

*have an obligation to use the least intrusive tools”.*

On market restoration more generally, Vestager’s responses further suggested that the use of interim measures and sector inquiries would likely increase. Interim measures are more commonly used by National competition authorities. But the Commission is authorized to impose them and did so recently for the first time in 20 years. On sector inquiries, Vestager praised CMA’s regime, allowing for investigation and the imposition of remedies without necessarily finding an infringement or imposing fines, when asked how she wants to speed up decision making.

## **2. Importance of data will be considered for the definition of market power**

On data and competition law, Vestager said that in an increasingly data-driven economy, the value of data must be considered to assess market power. Companies’ market shares don’t necessarily capture the value of data and the lack of access to data could constitute a barrier to entry. Vestager did not hint to planned changes in policy in this respect. But apart from scrutiny of data possession substantively, the introduction of a value based merger threshold (instead of turnover threshold only) would appear a logical step.

## **3. No change to merger rules to protect European champions**

Vestager appears to have no intention to change or loosen the EU merger rules, despite pressure of policymakers to protect European industries, following the Commission’s blocking of the Alstom/Siemens merger ([M.8677](#)).

She stressed that on the one hand there was a need to secure fair competition within one single market. On the other hand, Vestager did recognise that *“[a]t the same time, we have to stand up for our European businesses when they are met with unfair competition outside of Europe.”* However, instead of changing the merger rules, she pointed to the importance of preventing non-EU government subsidies and demanding reciprocity from countries whose companies want to participate in Europe.

On legislative changes generally, Vestager did express her eagerness to take on the legislative reform of the vertical and the horizontal block exemption regulations, which are both due to expire at the end of 2022. But there was little attention for this during the hearing.

## **4. Continued focus on tax ruling in the state aid sphere**

It is also apparent that, also in her second term, Vestager will continue scrutinizing tax arrangements of Member States. The EU General Court’s Starbucks-judgment ([T-636/16](#), overturning the Commission’s state aid decision against the Dutch state for lack of proof of an individual economic advantage) would have no impact on this policy. Vestager in fact indicated that the Member States have just been asked for information on their tax rulings to update the materials received in 2013 and to revisit current tax schemes. The recently opened investigation of the Commission in the “excess profit” tax rulings granted by Belgium to 39 multinational companies is a clear example of this continued focus ([SA.53964-SA.54002](#)).

## **5. Potential conflicts of interest between digital and competition agenda**

Vestager also received several questions on the risk of conflict of interest between Vestager's work in the digital sphere and her responsibilities for competition responsibilities. Vestager argued that there should be no concerns because competition decisions were always taken in collegiality in the EU (among members of the College of Commissioners) and that the involvement of the legal service ensures that there is no political interference. However, it is expected that Vestager will be less in the forefront in individual competition cases and that she will leave more to her directorate general, apart from cases with clear broader policy implications.