

Regulating for Globalization

Trade, Labor and EU Law Perspectives

EU Competition Commissioner Vestager emphasises that businesses should expect closer scrutiny of M&A involving unique data sets

Sharon Malhi (Freshfields Bruckhaus Deringer) · Thursday, November 8th, 2018

Speaking today on the centre stage at the Web Summit in Lisbon, and introduced as the “*most important woman in the world for tech*”, I heard today from EU Competition Commissioner Margrethe Vestager, who emphasised the role of technology players in promoting fairness, privacy and democracy.

Consistent with the “[fair play in tech](#)” message she delivered at last year’s Web Summit, the Commissioner communicated her views around the role of “tech” in promoting broader policy objectives, and her view that competition enforcement is only one part.

Looking ahead at the signals the Commissioner was sending to tech businesses, there were three key points:

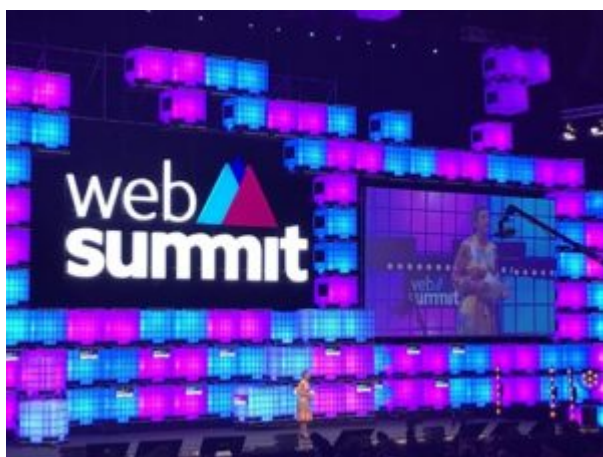
1. Continue to expect closer scrutiny of M&A involving “unique” data sets – the Commissioner warned that the approval of the Microsoft / LinkedIn and Apple / Shazam acquisitions should not be understood as a sign that the Commission has “*closed down*” its focus on data. Rather, she emphasised that the Commission will “*keep focusing*”, “*keep analysing*” and keep “*keeping an eye*” on data-driven M&A. Interestingly, the Commissioner did reference: (i) “*unique*” data sets; (ii) data which might “*close down competition*”; and (iii) data “*needed for competition*”. It will remain to be seen whether this more focused approach will be seen in practice, or whether we are in danger of approaching an enforcement environment in which the theory is in search of a case – and in which any merger involving companies with data sets will always be subject to lengthy and complex merger reviews in Europe and potential remedies discussions.

2. Opportunities to aggregate data to stimulate innovation – as a message perhaps to the start-up community in the Web Summit audience, the Commissioner remarked that it is not necessarily the case that a company needs a “*big mass of data*” to compete. In this regard, the Commissioner noted that there is nothing in competition law stopping companies getting together to create “*pools of data*” or to facilitate data sharing which allows innovation. It will remain to be seen how the Commission and other European competition law agencies will balance the creation of such opportunities with the restriction on competitor information sharing, as well as user privacy concerns and the GDPR.

3. Fairness, privacy and democracy are policy objectives here to stay – warning that technology needs to serve people and not serve itself, and reiterating her confidence in the Commission’s recent enforcement decisions against Google, the Commissioner emphasised the

need to ensure opportunities exist for any company, big or small, to compete for the best ideas. While it is clear that promoting fairness, privacy and democracy is not required of any business in competition law, businesses should continue to expect these values to form the backdrop of competition law enforcement discourse and policy.

And finally, the Commissioner likened riding the current technology wave to "riding a roller-coaster" – where no one (regulators, investors and innovators alike) knows what the next twist will be – but where it remains essential to give users the confidence that "*the ride they are taking will be safe*". In my view, the same analogy is just as relevant to the importance of upholding legal certainty. In such fast moving markets which have proven to be innovative, it is essential that we ensure that the competition law rules are: (i) not incorrectly enforced; and (ii) are sufficiently certain to uphold legal certainty and accuracy – values which are crucial for encouraging continued innovation in the years to come.



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This entry was posted on Thursday, November 8th, 2018 at 5:02 pm and is filed under [Competition Law, EU, Regulating](#)

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