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A view
from Brussels

Michael Reynolds | 2016

Margrethe Vestager

Half-way through her mandate



Margrethe Vestager
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Margrethe Vestager has now been in office as European Commissioner for Competition for two years, and is effectively at the half-way point in her mandate. This is an appropriate time to evaluate her record so far and to assess where she has taken EU competition policy and enforcement.

The past year has been notable for the emphasis the Commissioner has put on state aid and tax cases. Tax policy is essentially a competence of the Member States. Vestager's use of state aid rules to tackle preferential tax ruling is novel and contentious. It has attracted widespread criticism in the United States, as many of the companies involved are U.S. multinationals.

The state aid inquiry into tax rulings was initiated by Vestager's predecessor, Joaquín Almunia, but soon after the start of her mandate, Vestager extended the scope to include all Member States.

In October 2015, Vestager ordered the Netherlands to claim back EUR25-30m in unpaid tax from a Starbucks subsidiary, and ordered Luxembourg to collect a similar sum from a Fiat Chrysler Automobiles subsidiary. In December 2015, she opened a formal investigation into Luxembourg's tax treatment of McDonald's. In this case, the Commission found that McDonald's had not paid any tax on its profits in Luxembourg or the U.S. since 2009. Vestager stated:

"A tax ruling that agrees to McDonald's paying no tax on their European royalties either in Luxembourg or in the US has to be looked at very carefully under EU state aid rules."

On 30 August 2016, Vestager announced that two tax rulings granted by Ireland had artificially reduced Apple's tax burden over two decades, in breach of the EU state aid rules, and that Apple had to repay benefits worth to up to EUR13bn.

The Irish authorities had allocated profits between Apple's international Irish branch and head office, most of the profit being attributed to the latter. The Commission held that splitting the profits had no factual or economic justification, as the head office had no employees, no premises and no real activities. Vestager said this tax treatment of Apple was illegal under the state aid rules, and gave Apple a significant benefit over other businesses.

There has been strong criticism of and reaction against these investigations in the U.S., but none of this has so far deterred Vestager. The U.S. Treasury warned that the tax investigations into Apple, Starbucks, and Amazon would affect corporate tax

revenues. In January 2016, four U.S. senators from the Senate Finance Committee wrote to condemn Vestager's decisions as inconsistent with internationally-accepted standards and to urge the Obama Administration to examine whether it should use its regulatory authority to impose additional taxes on EU citizens and corporations in retaliation. The U.S. Treasury released a paper criticising the EU tax approach as new, partly articulated, theories, on the basis of which the Commission should not seek to retroactively recover amounts related to prior tax years. Vestager's reaction has been to declare firmly that U.S. corporations are receiving the same treatment as EU corporations. However, U.S. criticism and reaction is likely to increase under the new Trump Administration. Mr. Trump's campaign platform emphasised that the U.S. wanted to assert its economic independence, and used strong rhetoric to suggest that the U.S. government would be less restrained in responding to perceived trade inequities. Since the election, Mr. Trump has also proposed a drastically lower corporate tax, which is designed to lure companies like Apple back to the U.S.

On the cartel front, we have seen less activity by (by volume of cases, if not by fines imposed) under the Vestager mandate. The major investigation remains the Trucks cartel case, in which Vestager sent out a Statement of Objections at the very beginning of her time in office. The case closed with record-breaking fines of EUR2.9bn, but it is important to note that this is a hybrid case, as Scania refused to settle and so a decision against that company is pending.

There were also hefty fines imposed in the Parking heaters (EUR68m), Optical disc drives (EUR116m), and Retail food packaging trays (EUR115m) cases, and, in January 2016, in the Car parts alternators and starters case (EUR37m).

What may have greater significance is the decision of the General Court at the end of 2015 to annul the Commission's decision in the Airfreight cartel case on the basis of

inconsistencies in the decision. The judges found, for example, that there was a contradiction between the grounds of the decision, which said there was a single and continuous cartel, and its operative part, which referred to four separate infringements. This is probably the most significant General Court loss for DG COMP since over a decade ago, when the Court overturned three merger cases in quick succession.

The contested decision was not a decision adopted during her mandate, and so, as with Mario Monti, the Commissioner in 2002, Vestager has had to deal with the overturning of a decision that she inherited. The ruling raises questions about how DG COMP conducts investigations and puts together decisions, and Commissioner Vestager has had to make efforts to shore-up DG COMP's morale and deal with the negative fall-out. Re-adoption of the decision may also prove difficult. Most in DG COMP seem to be blaming the defeat on past officials who have since retired or moved on. This may have had a dampening effect on the opening of new cartel cases.

The Commissioner has not been afraid to close cartel proceedings, as she has done in the CDS case against the banks that began in 2011 and the suspected global cement manufacturers case. Other cases have been abandoned or downsized, for example, the proceedings against Shell, BP and Statoil in the suspected manipulation of the methanol benchmark.

This all goes to explain why there are at present relatively few major cartel decisions coming down the pipeline.



In Article 102 cases, a distinctive feature of Vestager's mandate has been the lack of any inclination to settle cases in back-room deals, in sharp contrast to her predecessor, Joaquín Almunia. She takes the view that the Commission should use its "toolbox" to produce formal decisions which can be appealed to produce case law.

"It's very important not to make a habit of settlements. They are much more quick and much more smooth and everyone can move on, but still you need occasion to develop [case law] and only our judges and going to court can do that."

This accords with Commissioner Vestager's determination to ensure that the consumer interest is fully protected (it is interesting to speculate as to whether her strong Lutheran background influences this concern to some degree). She has spoken of the need, in certain circumstances, for example in the Gazprom case or the Czech railway company case, for Commission intervention to prevent powerful companies exploiting customers by charging excessive prices or imposing unfair terms:

"[b]ecause we have a responsibility to the public. And we should be willing to use every means we have to fulfil that responsibility".

Perhaps the most high-profile Article 102 case that she is dealing with is the long-running Google investigation. Google has replied at length to the Commission's various objections and the Commissioner has said that her Services are digging deeply:

"into huge amounts of data that we took on board in order to analyse them. [Information from other companies can lead us] to go one layer deeper."

All of this makes it hard to say when the EU might move to a final decision potentially involving fines. The Commissioner has said:

"It will take some time because it is analysis and data comparison etc., which is challenging".

The Commission has also complicated the proceedings by opening new fronts against Google beyond the Google search case. It is interesting that the Commissioner does not think of it as one Google case but *"literally as different investigations and different cases"*. While she clearly feels under pressure to deliver some decisions at the half-way stage in her mandate, that is still far from happening.


In the Gazprom case, the other major Article 102 case inherited from her predecessor, the Commissioner may be minded to use an Article 7 commitment to produce a tangible result more quickly.

"We have received a formal answer to the [S]tatement of [O]bjections [and are analysing that] and we have had draft commitments from Gazprom. So we are exploring along the road of the formal track [and] also if there is a way to solve the case before you get to a final decision."

In merger cases, Vestager has been keen to adopt a hard stance from the start. Earlier this year she boasted:

"[w]e got a lot of attention last year for launching in-depth investigations in 11 cases. That's more than in any year since 2007".

Most of the Phase II proceedings launched by the Commission were ultimately approved, although often on condition of extensive divestitures as seen in the Ball/Rexam and GE/Alstom cases. One of the most high-profile of the Commission's Phase II conditional clearances was the 1 September 2016 decision approving a 50/50 joint venture between VimpelCom, parent company of Wind, and CK Hutchison, parent of Italian mobile operator 3 Italia (where Allen & Overy advised VimpelCom) to create a leading Italian mobile network operator. To date, this is the only 'four-to three' mobile network consolidation cleared under Vestager and comes in the wake of the prohibition of Hutchison's proposed acquisition of O2 in the UK in May 2016 (thus far the only merger prohibition during Vestager's watch, although the Halliburton/Baker Hughes



merger was withdrawn following strong opposition from the U.S. authorities) and the abandonment in September 2015 of the Danish merger between TeliaSonera and Telenor after the parties to that deal failed to agree commitments sufficient to address the Commission's concerns.

Like her predecessor but one, Neelie Kroes, Vestager believes strongly in sector inquiries and has been keen to use this particular tool in the "toolbox". She announced that she would look first at areas set out in the Commission "common agenda" mentioning the digital and energy sectors as priorities for Juncker's team. This led to the e-commerce sector inquiry and the state aid inquiry into electricity capacity mechanisms. Just before Easter, Vestager released an issues paper specifically focusing on geo-blocking in advance of the preliminary report which appeared at the beginning of September. A final report should appear in 2017.

Another important initiative has been the strengthening of the enforcement capabilities of national competition agencies in the EU. A consultation was launched in December last year and the Commission has now unveiled a plan aimed at "empowering national competition authorities (NCAs) to be more effective enforcers". NCAs would get more power to prosecute breaches of competition rules depending on completion of an "impact assessment" to justify the need for the law. For the draft to become law, the Commission will need the approval of the European Parliament and the EU Member States.

An unprecedented event which has occurred during Vestager's mandate is the 23 June referendum in the UK, the outcome of which was a decision to leave the EU. As in other areas, this will have considerable implications for competition enforcement. However, it now seems that the Article 50 withdrawal process will not begin until March 2017. Then there has to be the negotiation of a new agreement between the UK and EU, which may take many years.

It is doubtful if the full consequences of withdrawal for competition enforcement will become apparent before the end of Vestager's mandate. The potential scenarios have been fully analysed in Allen & Overy papers on Brexit.

Johannes Laitenberger replaced Alexander Italianer as Director-General of DG COMP one year into Margrethe Vestager's mandate. As mentioned in our earlier View from Brussels, the relationship between the Commissioner for Competition and the Director General of DG COMP is crucial. All indications are that Margrethe Vestager and Johannes Laitenberger get on extremely well, and this has served to enhance Vestager's effectiveness.

The first half of the Vestager mandate has revealed her to be a very tough Commissioner who has made a major impact in a number of areas, most notably, of late, in the state aid field. Other striking features of her tenure have been her determined stance on mergers and her aversion to dealing with major cases (such as Google) outside the formal decisional process.

We can expect much of this to continue until the end of the mandate in 2019, although, before then, there is likely to be increased pressure on DG COMP to produce actual decisions, especially in the cartel area and in the Article 102 cases. How feasible this is in reality remains to be seen. Vestager has a strong position. She has a good relationship with the Commission President and much support in the College of Commissioners. One commentator even went so far as to describe her as the current Commission's "Superstar".

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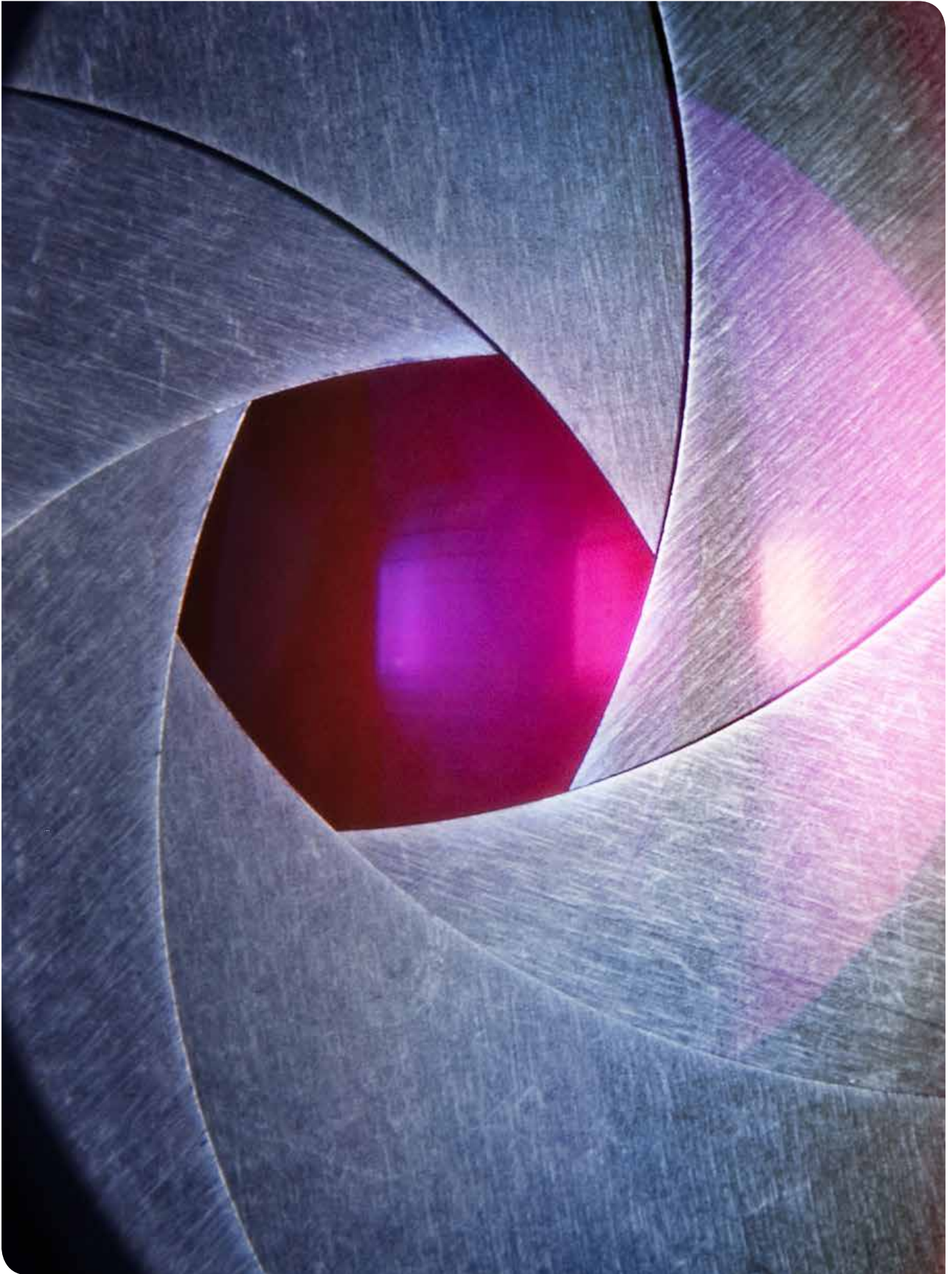
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Michael Reynolds is a well-known name in the global legal profession and the world of competition law. He founded Allen & Overy's antitrust practice when he opened the firm's Brussels office in 1979. At the time, just five countries had antitrust regulatory regimes; now more than 70 have effective antitrust enforcement regimes and over 100 have regulators who impose merger controls. Becoming a partner in Allen & Overy in 1981, Michael 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. He 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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