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## IMPLICATIONS OF VESTAGER'S NEW DUAL ROLE AS HEAD OF DG COMP AND DIGITAL POLICY

Margrethe Vestager, the current Commissioner for Competition since 2014, has been nominated both to continue in this role for a second term of five years and to be Executive Vice-President for digital policy. The decision to combine an antitrust enforcement role with a policy role on digital affairs has been seen by some to give rise to an unjustifiable conflict of interest.

### **Vestager's dual role**

As Commissioner of the politically-independent DG Competition team, Vestager's role would include strengthening competition enforcement and reviewing Europe's competition rules. During her current term, Vestager has made a name for herself by imposing record billion-dollar fines and requiring tax repayments from the likes of Google and Apple, with Facebook and Amazon also falling foul of her competition enforcement strategy. In her new capacity as Executive Vice-President, she will be tasked with strengthening the EU's digital industry, including by coordinating work on a new Digital Services Act whose aim will be to complete the digital single market and upgrade liability and safety rules for digital platforms and services (see further below).

Commission President-elect Ursula von der Leyen described Vestager's dual role as "*absolutely a perfect combination*", while Vestager explained that the two roles are actually complementary: "*I see no trade-offs between the two legs of my portfolio, but rather synergies: it will allow me to use the insights and general market knowledge acquired under the competition portfolio when designing regulatory initiatives in digital matters*".<sup>1</sup>

Vestager's opening statement before the EP already indicates her priorities during her tenure as Executive Vice-President for digital affairs. In particular, she identified what she believes are a number of general deficiencies in the European digital economy, including the need: (i) for platform workers to enjoy fair conditions; (ii) for digital companies to pay their fair share of tax; (iii) for an upgrade of liability and safety rules for digital services and products offered by companies and platforms alike; (iv) to regulate the way in which data is collected, used and shared; and (v) for ethical rules for the use of artificial intelligence.

As for her role as Commissioner for Competition, Vestager will move forward with a review of competition law which she already began under her current term. During her hearing, she also shed some light on digital platform [regulation](#). She discussed the issue of dominant platforms promoting their own products instead of ensuring fair competition between those products and the products of retailers using the platform as a distribution channel (so-called 'self-preferencing'). According to Vestager, the platform regulation is aimed to tackle this risk by obliging platforms to set fair and transparent conditions, and give businesses using the platforms redress possibilities (for further detail, see also our previous newsletter). However, Vestager also made clear during her hearing that, while she sees the platform regulation as the "*absolute necessary minimum*", she is also alive to detrimental over-regulation of platforms – which would lead to a stifling of

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<sup>1</sup> See "[Answers to the European Parliament Questionnaire to the Commissioner-Designate Margrethe Vestager](#)", dated 27 September 2019.

innovation to the detriment of consumers and competition.

### Potential challenges

Particular opposition to the dual-hatted role has come from the European Parliament's centre-right grouping. The European People's Party said there was a "clear incompatibility" between the two jobs, stating that "one cannot strengthen antitrust efforts and fine tech giants and, at the same time, count on Google or Apple's cooperation for a digital industrial strategy".<sup>2</sup>

The concern is that Vestager will now be expected to work alongside these companies to advance industry and innovation, which may not fit with Vestager's pro-active approach previously taken in relation to antitrust enforcement against Big Tech. Vestager has moved to quell this concern by calling the independence of competition enforcement "non-negotiable"<sup>3</sup> and cited internal checks, case law and EU treaties as safeguards against any potential conflict between the roles. She has also said that legislative proposals will be drafted by colleagues and not her.

Another challenge for Vestager relates to calls to reform the merger control regime by certain Member States. Following the European Commission's prohibition of the Siemens/Alstom merger, France, Germany and Poland published a joint proposal calling for the merger regime to be updated.<sup>4</sup> The proposal advocates greater flexibility in the regime in order to "protect strategic common European interests". Von der Leyen echoed a similar idea in her mission letter to Vestager, calling for Competition to "[provide] business with the incentive to invest, innovate and grow".<sup>5</sup>

Vestager's new term in the dual role is due to begin on 1 December 2019, provided the EP approves the nominations at a final vote. The term was due to begin on 1 November 2019 but has been delayed because of the EP's rejection of the French, Romanian and Hungarian nominees.

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<sup>2</sup> See [statement by the EPP group](#) on 8 October 2019.

<sup>3</sup> See "[Answers to the European Parliament Questionnaire to the Commissioner-Designate Margrethe Vestager](#)", dated 27 September 2019.

<sup>4</sup> See "[Modernising EU Competition Policy](#)" dated 4 July 2019.

<sup>5</sup> See [mission letter to Vestager](#) dated 10 September 2019.

## GERMAN PROPOSALS FOR THE DIGITAL ECONOMY: COMPETITION LAW 4.0

In view of the rise of new business models in the digital economy, governments and competition authorities around the world are currently reconsidering existing competition rules and discussing potential reforms. In that spirit and in light of Germany's EU Council Presidency in 2020, Peter Altmaier, the German Federal Minister for Economic Affairs and Energy, has set up a Commission of experts on 'Competition Law 4.0' ("**Expert Commission**") tasked to evaluate the existing EU competition law regime and to draw up specific suggestions for potential amendments. On September 9, 2019, the Expert Commission published its final report, an [85-page analysis](#) (currently only available in German – [English-language summary](#)) forming the basis for 22 specific recommendations.<sup>6</sup> These recommendations are quite far-reaching and have a clear focus on taming tech platforms such as Google, Amazon and Facebook. The report covers, inter alia, the following key topics:

### **Rethinking the Methodology for Market Definition and Market Power**

The starting point of each competition law and merger control assessment is the definition of the 'relevant market', which sets the scene for determining market power. In the view of the Expert Commission, the EU Commission's [Notice on the Definition of Relevant Market](#) from 1997 should be revised by taking into account conceptual and practical challenges arising from dealing with new digital business models, and should be supplemented by a separate notice and guidelines that specifically address market definition and market power with regard to digital platforms, as well as digital economy-specific theories of harm such as those focusing on innovation and conglomerate effects.

### **Stricter Rules for Incumbent Platforms**

The Expert Commission advocates for the introduction of a new EU Platform Regulation imposing rules of conduct on dominant online platforms. The new EU Platform Regulation should include a ban on self-preference of own services over third party providers. This measure targets 'hybrid platforms', which offer both intermediary services for third party providers and direct distribution of own products and services. The Expert Commission further recommends that the new EU Platform Regulation should tighten rules on data portability for dominant platforms by setting requirements for real-time portability and data formats interoperability between services of different providers.

### **All about Data**

Another focus of the Expert Commission is the issue of data access as a key factor for companies to be innovative and competitive in the digital economy. The Expert Commission takes the view that EU competition rules and enforcement may struggle with situations where unequal access to data becomes a systematic problem. The Expert Commission therefore calls for several legislative initiatives aimed at strengthening consumers' autonomy in handling data, such as the tightening of rules on data portability as mentioned above and supplementary sectoral regulation – following the model provided by the [Payment Services Directive](#).

### **Legal Certainty for Novel Forms of Co-Operations – Revival of the 'Comfort Letter'?**

The Expert Commission acknowledges the pro-competitive potential of novel forms of co-operation in the digital economy, such as data pooling (i.e. agreements between companies to exchange, share, and collect data) or the joint establishment of platforms, networks,

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<sup>6</sup> The report of the Expert Commission builds on a number of previous reports, including the independent expert reports commissioned by the UK government ("[Unlocking Digital Competition](#)") and the EU Commission ("[Competition Policy for the Digital Era](#)").

and ecosystems. Such co-operations may animate innovation and lower barriers to entry. However, the Expert Commission takes the view that companies often refrain from such co-operations due to an uncertainty about the legal limits set by EU competition law. Indeed, in 2003 a notification system that provided companies the possibility to get a decision or informal 'Comfort Letter' from the EU Commission confirming the EU competition law compliance of their proposed co-operation was abolished, leaving them to undertake a potentially difficult self-assessment. To increase legal certainty, the Expert Commission recommends reviving the clearance procedure for co-operations in the digital economy, according to which the EU Commission, upon notification, shall review co-operations within 90 working days.

**Outlook**

The discussion on reforms of competition law regimes is gaining momentum. As shown by a recently published draft bill, the upcoming 10th amendment of the German competition rules (called "GWB-Digitization Law") is expected to tighten rules on issues such as the importance of data access and include a specific ban on platforms' abusive behaviour. With the German EU Council Presidency in 2020 and Ursula von der Leyen heading the EU Commission, the report of the Expert Commission and the GWB-Digitization Law will certainly form a significant piece in the on-going discussion on reforms at EU level. For the time being, they will likely have an impact on the EU Commission and other competition authorities by indirectly providing support for existing theories of harm in on-going proceedings in the digital sector.

## BENELUX PROPOSALS FOR THE DIGITAL ECONOMY

In their [joint memorandum](#), the national competition authorities from Belgium, Luxembourg and the Netherlands (Benelux) indicate that the digital economy requires faster enforcement. First, the authorities want to optimise EU-wide cooperation, including by speeding up antitrust enforcement procedures within the European Cooperation Network (ECN) leading to multi-jurisdictional settlement or commitment decisions, possibly also supported by publicly announcing dawn raids on companies suspected of infringements of competition law. Second, the authorities want to publish more general *ex ante* guidance papers on specific issues, and make more use of individual/case-by-case guidance letters. Third, the authorities want to introduce an *ex ante* enforcement tool i.e. introduce the possibility to impose remedies before an infringement is established. Such remedies may include platform access, data portability, data-sharing and non-discriminatory ranking, as tailor-made remedies are likely to be more proportionate than general regulation. While these kind of interim measures are not new (for example, telecoms regulation allows similar remedies to be imposed on telecom companies with significant market power), existing legislation would need to be amended as interim decisions cannot currently be imposed without a *prima facie* finding of an infringement.

### **Merger control**

As for mergers in the digital economy, the Benelux authorities ask the European Commission for a further market study that should address, among other things, the treatment of acquisitions by incumbent platforms of nascent competitors (so-called 'killer acquisitions'). One potential tool to ensure that such acquisitions do not fall under the radar could be a revision of the notification thresholds: for instance, by introducing a threshold based on the value of the transaction (as already introduced in Germany and Austria) and/or a threshold concerning the market power of the acquirer. Some of the suggestions have gone even further and asked for a US-like *ex post assessment* tool, which would involve asking the acquirer to keep the target separate for a certain period of time, after which the authorities would re-assess the possible competitive impact of the merger before definitely allowing or prohibiting the merger. Finally, the Benelux authorities questioned whether there should be a reversal of the burden of proof i.e. instead of the regulator having to prove the future negative impact of a merger in the digital economy, companies should themselves have to establish that the merger will not have a negative impact on competition.

## CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

### Online sales bans:

restriction on selling products/services online

- (EU) [Google](#)  
(June 2017, Infringement decision)
- (EU) [Guess](#)  
(March 2019, Closure of Proceedings)
- (EU) [Licensed merchandise](#)  
(Opening of proceedings)  
[Nike](#)  
(March 2019, Press Release)
- (EU) [Consumer electronics](#)  
(December 2013 Inspections)
- (EU) [Pioneer](#)  
(October 2018, closure of proceedings)
- (EU) [Philips](#)  
(October 2018, Closure of proceedings)
- (EU) [Denon & Marantz](#)  
(October 2018, Closure of Proceedings)
- (ES) [Adidas](#) (November 2018, opening of proceedings)  
● (ES) [Adidas](#) (November 2018, press release)

### Resale price maintenance:

obligation to use fixed or minimum resale prices

- (SL) [Chicco toys](#)  
(July 2019, Closure of proceedings)
- (UK) [Fender](#)  
(October 2019, Statement of Objections)
- (AT) [Specialized](#)  
(October 2019, Closure of proceedings)

### MFNs/Price Parity Clauses:

guarantee to an online platform that supplier will treat the platform as favourably as the supplier's most-favoured-customer


Hotel bookings:

- (SE) [booking.com](#)  
(July 2018, Stockholm Patent and Markets Court ruling)
- (EU) [Holiday Pricing](#)  
(February 2017, Opening of proceedings)
  - (EU) [REWE/DER](#)  
(August 2017, Opening of proceedings)
  - (EU) [TUI](#)  
(August 2017, Opening of proceedings)
  - (EU) [Thomas Cook](#)  
(August 2017, Opening of proceedings)
  - (EU) [Kuoni](#)  
(August 2017, Opening of proceedings)
  - (EU) [Melia](#)  
(August 2017, Opening of proceedings)
- (UK) [CompareTheMarket](#)  
(November 2018, Statement of objections)

## CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

### Exclusivity clauses:

preventing access to platforms by competitors

-  (I) [TicketOne](#)  
(September 2018, Press release)
-  (EU) [Amadeus & Sabre](#)  
(November 2018, Press release)
  -  (EU) [Amadeus](#) (November 2018, Opening of proceedings)
  -  (EU) [Sabre](#) (November 2018, Opening of proceedings)



### Geo-blocking:

preventing online cross-border shoppers from purchasing consumer goods or accessing digital content services

-  (EU) [Pay-TV](#)
  -  (EU) [Cross-border access to pay-TV](#)  
(March 2019, Press Release)
  -  (EU) [Cross-border access to pay-TV](#)  
(March 2019, Commitment decision)
-  (EU) [Video games](#)  
(March 2016, Investigation)
  -  (EU) [Capcom](#)  
(February 2017, Opening of proceedings)
  -  (EU) [Bandai Namco](#)  
(February 2017, Opening of proceedings)
  -  (EU) [Focus Home](#)  
(February 2017, Opening of proceedings)
  -  (EU) [Koch Media](#)  
(February 2017, Opening of proceedings)
  -  (EU) [Zenimax](#)  
(February 2017, Opening of proceedings)
  -  (EU) [Video Games](#)  
(April 2019, Statement of Objections)

### Third party platform ban:

restriction on using third-party online market places

-  (NL) [Size Zero](#)  
(October 2018, Amsterdam Court Judgment)
-  (F) [Stihl](#)  
(October 2018, Infringement decision)
-  (UK) [OnTheMarket](#)  
(January 2019, Court of Appeal Judgment)

### Unfair trading practices by online platform:

Use-of-platform clauses which are anticompetitive

-  (FR) [Google](#) (January 2019, decision concerning interim measures)
-  (EU) [Amazon](#) (July 2019, opening of proceedings)
-  (D) [Amazon](#) (July 2019, Commitment decision)
-  (AT) [Amazon](#) (July 2019, Commitment decision)
-  (D) [Facebook](#) (February 2019, final decision)
-  (D) [Facebook](#) (August 2019, OLG Düsseldorf judgment)
-  (IT) [Amazon](#) (April 2019, opening of proceedings)
-  (NL) [Apple](#) (April 2019, Opening of Proceedings)

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