

World Competition's Editor, José Rivas, interviews Mrs. Margrethe Vestager, Commissioner for Competition

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Dear Reader,

As the Editor of World Competition, I am pleased to begin the June 2015 issue by introducing an interview with Commissioner Vestager, who has kindly agreed to answer our questions after her first semester in office.

José Rivas: What do you believe EU competition law is, first and foremost, intended to protect: (1) consumer welfare; (2) a system of undistorted competition as part of the internal market; (3) consumer choice; (4) the competitive process; (5) competition on the merits; or (6) efficiency?

Margrethe Vestager: I would like to take your question a step deeper in order to consider the fundamental values underlying competition. Competition law seeks to achieve fairness, equal treatment, and transparency. However, in striving to achieve these, a number of the things you mention are essential. Indeed, much of competition law has to do with making markets work better, minimising the loss of resources, increasing consumer choice, improving the price-quality ratio, and enhancing innovation. Competition law seeks to make it possible for consumers and business to thrive in better markets.

José Rivas: Commitment decisions have become a convenient means of disposing of cases quickly. However, their lack of precedential value is often seen as problematic. Particularly when they are used in cutting-edge cases, leaving unanswered important legal questions that could only be addressed in Article 7 decisions. There is, moreover, a risk that widespread use of Article 9 proceedings could undermine deterrence. That is, if dominant companies perceive that they can avoid fines for past abuses by simply offering commitments as to future conduct. What role do you see for Article 9 Decisions during your mandate?

Margrethe Vestager: I think this is a very interesting debate. Article 7 and Article 9 proceedings differ in their characteristics and effects on the market. And it is certainly true that the choice of procedure will affect the evolution of the case law and, by shaping companies' views of competition enforcers, have implications for deterrence. There is a balance to be struck in this regard. On the one hand, the principle of equal treatment - which requires cases to be dealt with on a case-by-case basis - makes it impossible to introduce either formal or informal "quotas" for cases to be dealt with via a given procedure. On the other hand, it is important not to shy away from Article 7 because some cases call for a development in the case law.

José Rivas: Paragraph 52 of the Commission's Vertical Guidelines permits suppliers operating selective distribution systems to ban sales through online market places (such as eBay or Amazon). However, some national competition authorities - notably the Bundeskartellamt in *Adidas* and *Asics* – have held that such restrictions are unlawful. What is your view on this apparent challenge by NCAs to the Vertical Guidelines?

Margrethe Vestager: I think it is very important that NCAs recognise the validity of the Commission's Guidelines. Indeed, the existence of the Guidelines is one of the main reasons why there is such good cooperation between the Commission and NCAs on verticals. Certainly, the Commission alone would not have been able to issue the very large number of decisions it adopted in the last few years.

However, the Commission has to enforce competition law, and I am aware of the importance of trying to reach a homogeneous pan-European approach to avoid legal uncertainty. So I plan to reflect further on this issue before the next Competition Network meeting.

José Rivas: Is competition in the online world an area of particular concern for you?

Margrethe Vestager: As you know, at the Commission we have a working project called the Digital Single Market. At this stage, we are trying to identify the main barriers to the free flow of online services and examining how they are best overcome. Clearly competition is a key pillar of this project. However, there may also be a role for regulation, as there are limits to what competition can achieve in areas like privacy and intellectual property rights.

It is very difficult to make predictions about the future of the internet, so we should try to find a future-proof approach. I want to make absolutely sure that we have room for both internet services connected to brick and mortar, such as the distribution of physical goods, and the direct delivery of services over the internet.

José Rivas: The Commission has recently adopted a novel role as "coordinator" of several NCAs' investigations into hotel online booking services. Is this a role you foresee the Commission taking in other cases during your mandate?

Margrethe Vestager: Cooperation with NCAs and the Competition Network allows the Commission to work very efficiently. But the fact that the Commission is currently testing a new role as the coordinator in the hotel booking investigations does not necessarily mean that we will take this approach in future cases. However, it was appropriate for this particular investigation in order to support national authorities to finalise their investigations.

José Rivas: There has been much debate recently about disruptive technology and innovation in light of the complaints filed by the taxi company, Uber.

Margrethe Vestager: The debate is essentially about how existing business models can co-exist with new ones. Businesses that have been around for centuries are trying to figure out how to create a sustainable business model for the future in the face of strong competition from new business models. Uber is at the centre of one of these debates, as it is challenging the traditional model of State-licensed taxi services.

I see these debates as a positive development; we will find a solution and there will be fair competition. You move the world forward through conflicts, because they make you find new solutions. There are many practical examples of this at national level. The ongoing liberalisation of bus transport in France, for example, will drive prices down and make this service more democratic. These are the very basic and concrete results of competition.

Jose Rivas: Do you see a need to adapt the competition rules in order to deal with these kinds of novel developments and technologies?

Margrethe Vestager: This is certainly not the first time that the competition rules have had to deal with conflicts between old and new. It has happened numerous times over the decades as new entrants and new technologies have made us question the way we were doing things up until then. And yet - strikingly - the basic competition rules are as old as the Treaty and have stood the test of time. In that respect, I think we can say that the founding fathers of the Union succeeded in creating a future-proof approach to competition.

José Rivas: And what about the procedural rules? For example, the procedural rights of private parties in State Aid cases are currently very weak. In particular, complainants have no access to information on the Commission's file. As a result, the Commission misses out on a valuable potential source of information while the only effective way for complainants to intervene in a case is to go to Court, often years after the fact when it is usually too late to settle the issues. Does the Commission intend to take any steps to strengthen the rights of private parties in State Aid cases?

Margrethe Vestager: In some instances the Commission is quite open to third-party comments. For example, we have published the opening decisions in our investigations into Amazon, Apple, Starbucks, and Fiat with the precise aim of inviting third-party comments. We also try to make the opening decisions as comprehensive as possible, so that third parties are in a position to comment on them. Unfortunately, very few people have submitted their comments; it would be helpful if more did. But your point about access to file is interesting and I will look into this further.

More generally, at the Commission we try to strike a balance between, on the one hand, securing confidentiality in order to get the information that we need for our investigations and, on the other, enhancing transparency. Certainly, some of our meetings will not be published because companies must be able to come to me and show me the data they have and because our investigations have to stand up in court.

José Rivas: The adoption of the Damages Directive has given victims of breaches of antitrust rules the right to demand compensation. In order to avoid the judicialisation of antitrust damages claims, the Commission has been trying to encourage recourse to “non-judicial” forms of dispute resolution, such as arbitration, mediation, out-of-court settlements, etc. One way to encourage this kind of arrangements would be to reward infringers who voluntarily compensate their victims. Would you consider adapting EU fines to cater for and encourage such "voluntary compensation"? What are your plans in this crucial area of competition policy?

Margrethe Vestager: In principle, we are not opposed to think that if a company compensates the victims of its infringement this may be considered a mitigating factor. However, the fine should have a sufficient deterrent effect and not just be another line in the company's spreadsheet.

Our priority now is to start applying the Directive as it currently stands. Then in 2 years' time we will evaluate how Member States have implemented it and re-consider other options, such as collective redress. We need to gain experience of how the Directive works in order to have a balanced view of whether the Directive is sufficient or whether we also need to adjust the structure of fines.

José Rivas: The publication of Commission Decisions remains very slow. The sooner the Commission publishes its Decisions, the sooner victims can seek redress before national courts. Does the Commission have any plans to address this and speed up the publication process?

Margrethe Vestager: The Commission is aware that citizens need to see that things get done. We therefore try to complete each part of the administrative process as quickly as possible, while prioritising the most important cases. Indeed, some of the high-profile cases are already being dealt within a reasonable timeframe. Besides, we are issuing intermediate versions of some antitrust and merger Decisions. That said, I am very reluctant to make promises as to the speed of publication of Commission Decisions in the future.

José Rivas: on behalf of the readers of World Competition, I would like to thank you for your answers and wish you the best of luck in your highly influential role as European Commissioner for Competition.
