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WILL THE LISBON TREATY HAVE AN IMPACT ON FUTURE EU COMPETITION POLICY?

On 1 December 2009, the Lisbon Treaty entered into force. All 27 Member States of the European Union (EU) had signed this Treaty on 13 December 2007, but several of them took time to ratify it.

The Lisbon Treaty introduces a series of fundamental institutional reforms for the EU. These reforms primarily aim at making the EU decision making process more efficient (e.g., more majority voting) and more democratic (e.g., more involvement of the European Parliament and even an early say in the process for the national parliaments). The Treaty also strengthens the Union's role in the field of foreign and security policy. The Union's High Representative (Baroness Ashton), who could be best described as the EU's Minister of Foreign Affairs, but who will, at the same time, be Vice-President of the Commission, will receive support from a newly created European External Action Service (EEAS)—with a support function broadly similar to that of the US State Department or the UK Foreign Office. A European Council President (Belgium's former Prime Minister Van Rompuy) should further enhance the EU's visibility on the world scene although his main job will be to chair the regular intra-EU summit meetings between the 27 European Heads of State and Government and the President of the Commission.

This advisory examines the extent to which the Lisbon Treaty might impact future competition law enforcement in the EU. We review the amended provisions of the EU's two core Treaties—the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Both Treaties have the same legal value. The former contains more "constitutional" provisions than the latter while the latter focuses on the concrete functioning of the EU, *inter alia* by providing the basic framework for all EU policies (except the foreign and security policy that remains covered by the TEU).

MINOR AMENDMENTS TO THE CORE ANTITRUST AND STATE AID TREATY PROVISIONS

The Lisbon Treaty has led to the renumbering of the basic Treaty provisions on antitrust and state aid. These will henceforth be contained in Art. 101–109 of the TFEU. In substance, these provisions are identical to Art. 81–89 of the EC Treaty, except in the following three respects.

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First, while pursuant to Art. 107-2 (c) TFEU (ex-Art. 87-2 (c) EC), state aid granted to the economy of certain areas of the Federal Republic of Germany that have suffered from the division of Germany (which ended in 1990) shall remain automatically compatible with the internal market, the Council of Ministers now has the power to repeal this provision five years after the entering into force of the Lisbon Treaty (i.e., after 1 December 2014). Once this specific regime has expired, any aid in favor of such German companies will need to be assessed on its merits in accordance with Art. 107-3 TFEU, which empowers the Commission to assess and approve sectoral and regional state aid measures on an *ad hoc* basis.

Second, the scope of Article 107-3 (a) TFEU (ex-Art. 87-3(a) EC), which provides that state aid to areas where the standard of living is abnormally low or where there is serious underemployment may be considered compatible with the internal market, is now extended to cover aid to "promote the economic development of" a number of French, Spanish, and Portuguese regions outside continental Europe (i.e., Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira, and the Canary Islands).

Third, two new Treaty provisions give the Commission an explicit legal basis for the adoption of block exemption regulations in the area of antitrust (Art. 105-3 TFEU) and state aid (Art. 108-4 TFEU) when the Council of Ministers has adopted a regulation enabling the Commission to do so. These amendments are not groundbreaking. They essentially codify existing practice.

THE ROLE OF COMPETITION POLICY WITHIN THE TREATY FRAMEWORK

The most eye-catching amendment is the repeal of Art. 3-1 (g) EC, which provided that the activities of the Community include "a system ensuring that competition in the internal market is not distorted". Some observers have wondered whether this amendment—masterminded by French President Nicolas Sarkozy early in his presidency in 2007—might downgrade the crucial role competition policy has so far played in the European integration process. On balance, we think that is unlikely.

It is true that, apart from the repeal of Art. 3-1 (g) EC, the new Articles 3 of the TEU and the TFEU contain language that seem to make things even worse.

Art. 3-3 TEU, which is part of a series of provisions that set out the EU's main goals, indeed refers to the establishment of an internal market, but then adds that the Union will "work for (…) a "highly competitive *social* market economy"—which makes one wonder whether this will give future EU competition policy an unorthodox twist that will interfere with the consumer welfare objective that it is ultimately supposed to serve.

In addition, while identifying—as before—competition policy as one of the EU's exclusive competences, Art. 3 (c) TFEU qualifies this competence as being confined to the establishment of "competition rules *necessary* for the functioning of the internal market". In other words, it would seem that the protection of the competitive process for the purpose of promoting consumer welfare will no longer be an end in itself.

Yet, as we have already noted, the specific renumbered Treaty rules on competition have been left completely unchanged. Moreover, the new Protocol n° 27 concerning "the internal market and competition", which has been annexed to the TEU and the TFEU, seems to neutralize the repeal of Art. 3-1 (g) EC. According to this Protocol, "the internal market as set out in Art. 3 TEU includes a system ensuring that competition is not distorted". This is an almost *verbatim* copy of Art. 3-1 (g) EC, with no reference to the need to preserve or promote a "social" market economy. Let us recall that pursuant to Art. 51 TEU (ex-Art. 311 EC), Protocols "shall form an integral part" of the Treaties. Thus, they have the same legal status as the TEU or the TFEU.

In any event, we are not sure one should polarize or exaggerate the differences between the wording in Art. 3 TEU and Art. 3 (c) TFEU and the Protocol. In the EU, competition law enforcement has often had a social component and the EU's Founding Fathers drafted the EC Treaty on the premise that all EU policies, including competition policy, should contribute to the creation of a single market. In that sense, the "social" and "internal

market" dimensions of EU competition policy reflect core cultural values that have regularly played a role in day-to-day competition law enforcement but overall, we do not think they have ever dominated it.

SERVICES OF GENERAL ECONOMIC INTEREST

The question of the extent to which the EU's antitrust and state aid rules apply to companies that have been entrusted by Member States with the operation of so-called services of general economic interest—services that address the citizen's basic needs and should, therefore, be available to all of them at affordable conditions—has been hotly debated over the last 20 years.

The Lisbon Treaty has not modified a single iota to Art. 86-2 EC (now Art. 106-2 TFEU), the Treaty provision that provides a general answer to this question. Pursuant to this provision, companies operating these services remain subject to the rules on competition "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". Art. 106-3 TFEU (ex-Art. 86-3 EC, unchanged) empowers the Commission "where necessary" to "address appropriate directives or decisions to Member States". It should be stressed that Art. 106-3 TFEU is the only Treaty provision that grants the Commission autonomous regulatory powers and that it does so paradoxically in an area where Member States have constantly fought against too much Commission interference.

However, it may be the case that the EU legislature, the Council and European Parliament, will monitor the Commission more closely in future. Art. 14 TFEU (ex-art. 16 EC, now amended) indeed confers the power upon them to regulate the "principles and conditions, particularly economic and financial conditions, which enable [the companies entrusted with the operation of services of general economic interest] to fulfill their missions". It also specifies that any regulatory activity in this regard is "without prejudice to the competence of Member States in compliance with the Treaties, to commission and to fund such services".

It is too early to tell whether Art. 14 TFEU will create some regulatory "rivalry" between the Commission and Council/Parliament and whether any regulatory action undertaken by the latter pursuant to Art. 14 TFEU will *de facto* cripple the Commission's power to vet state aid to individual companies entrusted with the operation of services of general economic interest. It might. In this regard, let us also refer to new Protocol n° 26 which recognizes *inter alia* "the essential role *and the wide discretion* of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users" (emphasis added). This Protocol invites the Commission to think twice before concluding that the application of EU competition law will not jeopardize the public service mission entrusted upon a company charged with the operation of a service of general economic interest, as Art. 106-2 TFEU requires. However, in our experience, the Commission usually does so anyway.

FUNDAMENTAL RIGHTS

1. Charter on Fundamental Rights

On 7 December 2000, the Commission, Council, and Parliament "solemnly proclaimed" and signed a Charter of Fundamental Rights (O.J. C 364/1). This Charter contains a number of provisions that are potentially relevant for companies involved in antitrust investigations. For instance, it refers to a right to good administration pursuant to which "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union" (Art. 41), a right to a fair trial (Art. 47), the presumption of innocence and right of defence (Art. 48), the principles of legality and proportionality of criminal offences and penalties (Art. 49), and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Art. 50).

A new Art. 6-1 TEU stipulates that the Charter "shall have the same legal value as the Treaties". In a separate new Declaration n° 1, the High Contracting Parties observe that this Charter "confirms" the fundamental rights as one finds them listed in the European Convention for the Protection of Human Rights and Fundamental Freedoms

(ECHR), signed on 4 November 1950 by all 47 Council of Europe member countries, and as they result from the constitutional traditions common to the Member States.

Leaving aside that pursuant to a new Protocol n° 30, neither the Court of Justice of the European Union (CJEU) nor national courts will have the power to invalidate national laws in the United Kingdom, Poland, or the Czech Republic if they are inconsistent with one of the Charter's provisions, it is uncertain to what extent Art. 6-1 TEU will have a material impact on EU competition law enforcement.

Apart from numerous *obiter dicta* about the Charter, we are aware of only one competition case where the Court of First Instance (now called General Court) has relied on a provision in the Charter to uphold a company's position against that of the Commission. In *Max. Mobil* (judgment of 30 January 2002, case T-54/99, *Max. Mobil Telekommunikation Service GmbH* v. *Commission*, ECR II-313), the Court of First Instance relied on Art. 47 of the Charter concerning the right to a fair trial to conclude that a telecoms company that had lodged a complaint according to which Austria had conferred an advantage to one of its competitors in violation of Art. 106 TFEU (ex-Art. 86 EC) had standing to seek the annulment of the Commission's decision rejecting its complaint. However, the Court of Justice (now called the CJEU) overruled this judgment. It did so without even referring to Art. 47 of the Charter. Instead it relied on the "wording" of Art. 106-3 TFEU and on the "scheme of that article as a whole" to conclude that the complainant had no right to challenge the Commission's decision rejecting its complaint (judgment of 22 February 2005 in case C-141/02 P, *Commission* v. *T-Mobile Austria*, ECR I-1283, point 69).

It is doubtful whether the CJEU would have decided this case differently had Art. 47 of the Charter already had the binding effect of a Treaty provision. Even when it applies general EU law principles (e.g. legal certainty, legitimate expectations, proportionality, etc.), which, pursuant to settled case law, are considered to be binding upon the EU institutions, the CJEU indeed does not apply these principles on a stand-alone basis. Rather it interprets them in combination with specific EU law provisions which incorporate or implicitly embrace these principles (systemic interpretation) and it assesses the EU institutions' challenged acts in light of the factual and legal context (teleological interpretation).

2. The Convention of Human Rights and Fundamental Freedoms

In the longer run, Art. 6-2 TEU may have greater potential for change than Art. 6-1 TEU. This provision stipulates that the EU "shall accede to" the ECHR.

A new Protocol n° 8 specifies that the accession Treaty "shall make provision for preserving the special characteristics of the Union and Union law". In the same vein, a new Declaration n° 2 provides that the "Union's accession (…) should be arranged in such a way as to preserve the specific features of Union law", adding that the regular dialogue between the CJEU and the European Court for Human Rights (ECtHR) "could be reinforced when the Union accedes to that Convention".

Nevertheless, once the EU will have adhered to the ECHR, it seems clear that the ECHR will become binding upon the Union and its Member States (cf. Art. 218-7 TFEU, ex-Art. 300-7 EC, unchanged). Furthermore, it would seem that individuals and companies will be in a position to challenge Commission acts on the ground that these violate specific ECHR provisions before the ECtHR. Of course under the Council of Europe's current procedural regime, applicants would first have to exhaust "domestic" judicial review procedures before they can raise the matter with the ECtHR. In antitrust cases, they should therefore first challenge these Commission acts before the EU Courts in Luxembourg without obtaining the desired result before they can reach out to the ECtHR.

In the past, individuals and companies have attempted to challenge Commission acts before the EU Courts on the ground that these infringed specific ECHR provisions. Thus, Hoechst invoked Art. 8 ECHR concerning a right to respect for private life (and the related right of inviolability of the home) to challenge the validity of a dawn raid that the Commission had conducted on the basis of a warrant that the national judge had granted without any meaningful judicial review (cf. judgment of

21 September 1989 in cases 46/87 and 227/88, *Hoechst AG* v. *Commission*, ECR 2859) while Orkem invoked Art. 6 ECHR concerning a right to a fair trial in order to claim a privilege against self-incrimination after it had received a detailed request for information about its alleged involvement in a cartel (cf. jjudgment of 18 October 1989 in case 374/87, *Orkem* v. *Commission*, ECR 3283). In both cases, the CJEU did consider the ECHR provisions as a source of interpretation but ended up interpreting them narrowly and, as would become clear later on, much more narrowly than the ECtHR.

In *Hoechst*, the CJEU indeed took the view that the right of inviolability of the home only applied to "the private dwellings of natural persons", but not in regard to undertakings (point 17). A few years later, in *Niemietz*, the ECtHR ruled that this right *did* extend to business premises. In *Orkem*, the CJEU observed "that neither the wording of that article nor the decisions of the ECtRH indicate that it upholds the right not to give evidence against oneself" (points 29-30). A few years later, in *Funke* v. *France* and *Saunders* v. *UK*, the ECtHR confirmed that Art. 6 ECHR *did* give companies a right against self-incrimination and that this right was "not confined to statements of admission of wrongdoing or to remarks which are directly incriminating but also to exculpatory remarks or mere information or questions of fact". In *Mannesmannröhren-Werke* (judgment of 20 February 2001, case T-112/98, ECR II-729), the Court of First Instance basically ignored this case law. In contrast, in *PVC II* (judgment of 15 October 2002 joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, ECR I-8618, §§ 274-292), the CJEU referred in passing to the fact that the parties had agreed that, since *Orkem*, there have been further developments in the case-law of the ECtHR "which the Community judicature must take into account when interpreting the fundamental rights".

In short, in *Hoechst* and in *Orkem*, the parties relied in vain on the ECHR before the EU Courts and that is where the story ended for them. The EU's accession to the ECHR might change this in future because there would be an additional procedural layer in the judicial review system. One might also see some naturally growing convergence between the case law developed by the EU Courts and the ECtHR. Last, individuals and companies might become more determined to bring new challenges before the EU Courts based on the ECHR. For instance, a *Hoechst-bis* case could emerge. A company whose business premises have been raided by the Commission might invoke the ECHR to challenge the validity of the dawn raid before the General Court on the ground that the national judge has issued a judicial without having seen the file and, as a consequence, without having had the opportunity to examine the necessity for an inspection.

In fact, that company might even challenge the validity of Art. 20 and 21 of Regulation n° 1/2003, which provides that the national judicial authority, which needs to authorize the Commission's inspections, "may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file".

This brings us to our next and last point.

STANDING IN ANNULMENT PROCEDURES

Under Article 230-4 EC, individuals and companies only had standing to seek the annulment of a Regulation if they could demonstrate that this act, in spite of its regulatory nature, was of direct and individual concern to them. Since the early *Plaumann* judgment (case 25/62, ECR 1963, p. 95), the "individual concern" requirement meant that applicants had to demonstrate that the challenged Regulation affected their legal position "by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee". In effect, this meant that genuine Regulations (i.e., acts that "applied to objectively determined situations and produced legal effects *vis-à-vis* classes of persons envisaged in a general and abstract manner") could not be challenged.

In 2001, a French fishing company that operated on a regular basis in the Irish Sea to fish for whiting challenged a Commission Regulation that imposed a series of fishing limitations for hake. For technical reasons, that Regulation also applied to the French fishing company

and would have led to a significant decrease of its catches of whiting. The company argued that it had no other means of challenging the validity of this Regulation other than bringing an annulment action before the Court of First Instance. Sympathizing with the company's position, the Court concluded that "in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him" and that "the number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard" (judgment of 3 May 2002, case T-177/01, *Jégo-Quéré* v. *Commission*, ECR II-2365, point 51).

However, the Court of Justice overruled this judgment on the ground that "such an interpretation has the effect of removing all meaning from the requirement of individual concern set out in the fourth paragraph of Article 230 EC" (judgment of 1 April 2004, case C-263/02 P, ECR I-3425, point 38). In another judgment, the Court had even added that "while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force" (judgment of 25 July 2002, case C-50/00 P, *Union de Pequeňos Agricultores* v. *Commission*, ECr I-6677, point 45).

This is what the High Contracting parties to the Lisbon Treaty have now done. Henceforth, Art. 263-4 TFEU (ex-Art. 230-4 EC Treaty) enables any natural or legal person to institute proceedings against "a regulatory act which is of direct concern to them and does not entail implementing measures". In other words, the "individual concern" requirement has been dropped in cases where the EC Regulation will produce its legal effects without a need for the Member States to adopt implementing measures.

This may have some relevance for a number of Regulations in the competition field. For instance, it would seem that individuals or companies might now have standing to challenge unhelpful provisions in antitrust block exemption regulations (e.g., provisions that blacklist certain anti-competitive contract clauses) or in the state aid block exemption regulation (e.g., provisions that narrowly define certain types of exemptible state aid or exclude other types of state aid from the scope of the block exemption). Similarly, as we have previously explained, there may be provisions in Regulation n° 1/2003 that companies might consider go too far (e.g., those that govern the conditions under which dawn raids can be conducted). Having said this, we believe that the applicants would have to bring a particularly compelling case to be successful in their annulment actions. In line with settled case law, the EU Courts grant the EU institutions a large margin of discretion to develop their policies and confine their judicial review to cases where the institutions have clearly exceeded that margin.

* * *

In conclusion, the Lisbon Treaty introduces a series of minor amendments to the competition-related provisions in the TEU or TFEU. However, the amendments in the area of Fundamental Rights and those concerning individuals' and companies' standing to seek the annulment of EU regulatory acts, which are *not* specifically related to competition law, may—in the long run—have a more significant impact on EU competition law enforcement.

We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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