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Continuity and Change in EU Competition Policy

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I. INTRODUCTION

The entry into force of the Treaty of Lisbon on December 1, 2009 has brought profound changes to the EU. The Treaty on European Union has been substantially amended, while the venerable Treaty establishing the European Community (TEC) was entirely superseded by the new Treaty on the Functioning of the European Union (TFEU).² There has been a wholesale change of names and acronyms that even touched upon the conservative world of the EU Courts: the well-known to competition specialists “Court of First Instance” or “CFI” has now become the “General Court.” Even more dramatically, the noun and adjective “Community” is rendered obsolete and this covers competition law, too, so let us forget about “EC competition law” or “Community competition rules” and get used to “EU competition.” The numbering of the competition provisions has also changed: Articles 81 and 82 TEC are now Articles 101 and 102 TFEU.

At the same time, at the European Commission level, a Commissioner goes, Neelie Kroes, and a new Commissioner comes, Joaquín Almunia. Change of persons at the Director-General’s post, too: Philip Lowe is replaced by Alexander Italianer.

The interesting question is whether this change of persons, numbers, adjectives, and nouns extends also to the substance of EU competition law and policy, as formulated and applied by the European Commission and the EU Courts. In this short article, we argue that “EU competition” is likely to be very much the same as “EC” or “Community competition”. EU competition law and policy are now too mature and well-developed, for such changes to have any perceptible impact.

II. EU COMPETITION LAW IN THE NEW TREATY

Articles 101 and 102 of the new Treaty, the TFEU, are exactly the same as the old Articles 81 and 82 TEC. So the basic content of the EU competition rules has not changed. What has changed, however, is that there is no longer in the starting articles of the two basic Treaties, the TEU and the TFEU, any reference to the principle of free and undistorted competition. Rather, by way of compensation, there is only a reference to that principle in a Protocol. To illustrate the change, we give below the provisions before and after the Treaty of Lisbon came into force.

A. Before (pre-December 2009):

Article 2 TEC

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high

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² The text of the EU Treaties can be found at <http://eur-lex.europa.eu/en/treaties/index.htm>.

level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.”

Article 3 TEC

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

...

(g) a system ensuring that competition in the internal market is not distorted...”

After (post-December 2009):

Article 3 TEU

1. The Union’s aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro...”

PROTOCOL (No 27) ON THE INTERNAL MARKET AND COMPETITION

THE HIGH CONTRACTING PARTIES, CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,

HAVE AGREED that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.”

The extent of the change may be better appreciated if one looks at the place of the principle of free competition in the ill-fated Constitutional Treaty. There, competition was listed in the guiding principles and objectives of the Union. Article I-3(2) of the Constitution stressed that “the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.” This went further than the equivalent provision of Article 3(1)(g) TEC because the Constitution referred to the principle of free competition in a positive manner (“where competition is free and undistorted”), rather than in a negative one, as was the case of the old EC Treaty (“a system ensuring that competition in the internal market is not distorted”). This was seen as a guiding principle for the interpretation of the specific competition provisions and for ensuring consistency among the various policies and activities of the Union.³ A further innovation of the Constitution was that competition policy was portrayed as the “fifth freedom” of the chapter on the internal market.⁴

It was perhaps this over-arching position that competition had in the Constitutional Treaty that backfired against it. The exclusion of competition from the preambles of the two current Treaties is owed to French President Sarkozy’s view that competition should not be an aim in itself but only a means to serve the internal market. Protocol No. 27 was a compensatory move to assuage the fears that competition is struck out of the Union objectives and policies altogether.⁵

Bearing in mind that Protocols have the same hierarchical status with the Treaties to which they are annexed, it would seem to the untrained eye that there is hardly any change. There is, however, a debate in the EU as to whether this is the case. The basic criticism is that the Court of Justice (“ECJ”) has always attached importance to the old Article 3(1)(g) TEC and has used it as an interpretative tool to stress the importance of the competition rules in the old European Community. The EU Courts have considered that

according to Article 3(g) of the EC Treaty, Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.⁶

The Courts have also sought to rely on the general provision of Article 3(1)(g) TEC whenever they felt they needed support from the guiding principles of the Treaties to reach a certain conclusion on the interpretation of Articles 101 and 102 TFEU. For example, they have done so in the following circumstances:

- a) When they thought they were making an expansive reading of the text of Articles 101 and 102 TFEU. In *Continental Can*, the ECJ relied on that fundamental provision in order to interpret Article 102 TFEU in such a way as to bring under the latter provision not only exploitative conduct that directly harms consumers but also exclusionary conduct that harms the effective competition structure and thus prejudices consumers in an indirect

³ See former Commissioner Mario Monti delivering his last official speech, *A Reformed Competition Policy: Achievements and Challenges for the Future*, Center for European Reform, Brussels, 28 October 2004, in: http://ec.europa.eu/competition/speeches/index_2004.html.

⁴ *Id.*

⁵ See Alan Riley, *The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law*, 28 ECLR 703 (2007).

⁶ See e.g. Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, [1999] ECR I-3055, ¶ 36; Case C-453/99, *Courage Ltd. v. Bernard Crehan*, [2001] ECR I-6297, ¶ 20; Joined Cases T-217/03 and T-245/03, *Fédération nationale de la coopération bétail and viande (FNCBV) et al. v. Commission*, [2006] ECR II-4987, ¶ 97.

way.⁷ More generally, in the 1970s, when the Court was dealing with the first cases on abuse of dominance and was developing the relevant case law, references to that provision were quite usual.⁸

- b) When free competition was distorted by certain measures or conduct which was essentially attributed (in the political sense) to the State in general; relying on a guiding principle of the Community in such cases was seen as an important supportive argument in favor of the full application of the principle of free competition as against the State measures. *ERT*,⁹ *Lucas Asjes*,¹⁰ and *GB-Inno-BM*¹¹ are some examples. The liberalization measures that the EU pushed for in the early 1990s owe a lot to Article 3(1)(g) TEC.
- c) When national remedies and procedures went through some degree of “Community transformation” in order to safeguard the effective enforcement of the EU competition rules at the national level,¹² or, indeed, when the ECJ was creating EU remedies available to individuals suffering harm as a result of the violation of those rules.¹³
- d) When the competition rules were in conflict with other policies and objectives and therefore a balancing act had to be performed. In *Albany* the ECJ held that collective agreements between employers and employees to set up a supplementary pension fund did not fall under Article 101 TFEU; in so doing, the Court balanced the competition rules against the social policy provisions of the Treaty and placed particular emphasis on the fact that under Article 3(1) TEC the activities of the Community included not only “a system ensuring that competition in the internal market is not distorted” but also “a policy in the social sphere.”

The question that competition specialists are now asking themselves is whether the absence of the reference to the principle of competition in the first articles of the TEU or the TFEU will have any repercussion for the “status” of the competition rules and for the way these rules are interpreted by the EU Courts. In the words of Alan Riley,

it is open to question how easy it is going to be for a Protocol tacked on to the back of the Treaty to maintain the status of Art. 81 (and 82) as a “fundamental provision.”¹⁴

In our view, the repercussions will be minimal, if not inexistent. First, the EU Courts are not going to revisit their existing case law just because something that was in a Treaty Article before

⁷ Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, [1973] ECR 215, ¶¶ 23-26.

⁸ Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, [1979] ECR 461, ¶¶ 38 and 125; Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission*, [1978] ECR 207, ¶¶ 63 and 183. In *Commercial Solvents*, the first refusal-to-supply case, again the ECJ felt the need to rely on Article 3(1)(g) TEC (see *Joined Cases 6/73 and 7/73, Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission*, [1974] ECR 223, ¶ 32).

⁹ Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Piroforissis et al.*, [1991] ECR I-2925, ¶ 27.

¹⁰ *Joined Cases 209 to 213/84, Criminal proceedings against Lucas Asjes et al.*, [1986] ECR 1425, ¶ 77.

¹¹ Case 13/77, *SA GB-Inno-BM v. Association des détaillants en tabac (ATAB)*, [1977] ECR 2115, ¶ 29; Case C-18/88, *Régie des télégraphes et des téléphones v. GB-Inno-BM SA*, [1991] ECR I-5941, ¶ 28. See also Case 229/83, *Association des Centres distributeurs Édouard Leclerc et al. v. SARL "Au blé vert"*, [1985] ECR I, ¶ 9.

¹² *Eco Swiss, op.cit.*, ¶ 36.

¹³ *Courage, op.cit.*, ¶ 20.

¹⁴ *Op.cit.*, p. 705.

is now found in a Protocol. In the unlikely case where the Courts were asked to decide on the normative hierarchy of the “Competition Protocol,” they would surely take the view that the Protocol is part of primary law; therefore, it cannot be considered as inferior to Treaty Articles.

Second, even if one were to opt for substance rather than form and considered that something did indeed change, one quickly realizes that the loss is not dramatic and that the old Article 3(1)(g) TEC has fulfilled its historical role and is no longer very useful for the following reasons:

- a) In the year 2010, the EU competition rules are far more developed than they used to be in the 1960s and 1970s. There is abundant case law by the EU Courts, a rich decisional practice by the Commission and by national competition authorities, and a true European antitrust discipline with ever-increasing numbers of enforcers, lawyers, economists, academics, students, and judges. The European Commission, in particular, which still is the main competition policy-setter in Europe, has amassed an impressive degree of expertise and confidence and will not be affected in the least by the fact that the principle of free competition is in a Protocol instead of a Treaty Article.
- b) As to competition law and State measures, again the case law is quite developed and it is nowadays not considered “daring” for the Commission to go after certain State measures. At the same time, in most Member States a lot of markets have been liberalized and governments are no longer unaware of the duties stemming from the Treaty competition rules. Besides, the Commission retains full initiative to act under both the State aid rules and Article 106 TFEU.
- c) There is now also abundant case law on the EU law requirements for national remedies and procedures for the effective enforcement of the competition rules and the most important issues are no longer discussed at the ECJ; the EU is now bolder and intends adopting secondary legislation in this area, preferring positive to negative integration.
- d) The only areas where the absence of competition from the main body of the Treaty might make a difference, are *Albany*- and *Wouters*-like¹⁵ situations of conflict between the competition rules and other principles and values, such as the environment, social protection, employment concerns, or specific public interests. The problem here is not so much how the ECJ, but rather how the national courts and authorities, would balance these various values. However, this was always an issue even in the pre-Lisbon world and the ECJ remains the final arbiter, so it is doubtful whether the recent change means that the outcome of the ECJ’s balancing would now be different.

Finally, if anything, one might actually find a positive element in the recent change: It could be argued that the disappearance from the main body of the Treaty of the functional link of the competition rules with the internal market may be interpreted as a sign of “emancipation” of the former. It might even be seen as a boost for the Commission’s recent drive away from formalism towards more economic analysis. In the old days of formalism, the functional status of the competition rules was used as an argument against a full-fledged economic analysis. It is no coincidence that in *AKZO* the Commission relied precisely on Article 3(1)(g) TEC to resist a more economic approach:

¹⁵ Case C-309/99, *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577.

According to the Commission, Article 86 [now 102 TFEU] does not make costs the decisive criterion for determining whether price reductions by a dominant undertaking are abusive. Such a criterion does not take any account of the general objectives of the EEC competition rules as defined in Article 3(f) of the Treaty [old Article 3(1)(g) TEC] and in particular the need to prevent the impairment of an effective structure of competition in the common market. A mechanical criterion would not give adequate weight to the strategic aspect of price-cutting behaviour. There can be an anti-competitive object in price-cutting whether or not the aggressor sets its prices above or below its own costs, whatever the manner in which those costs are understood.¹⁶

As a conclusion, the changes brought to the competition rules by the new Treaty are not going to affect their substance. The only area where the new Treaty may have some bearing on competition law is the system of judicial protection. Article 263 TFEU relaxes the standing requirements for private parties seeking to challenge EU measures. Whereas before such parties could only challenge acts addressed to them or which were of direct and individual concern to them, they can now also challenge regulatory acts that are of direct concern and do not entail implementing measures. It is too early, however, to say how this relaxation of the legal standard will be put in effect by the EU Courts and how it may affect the way the Courts apply the competition rules.

III. CHANGES OF PERSONS

Every change of persons in the higher echelons of power at the European Commission in the area of competition enforcement attracts attention. Europe now has a new Competition Commissioner and a new Director General for Competition. Again, this does not mean that competition enforcement will change in a perceptible way in its substance. Of course, personalities are always important. A duet of Competition Commissioner and Director General that works well is certainly something good and it does happen that certain persons leave eponymous eras behind them. One certainly wishes the best to the two newcomers.

Irrespective of persons, however, competition enforcement in Europe is not as personalized as it is in the United States. In addition, the EU has never experienced, nor is it likely to ever experience, the somewhat dramatic change of antitrust enforcement that sometimes a new administration brings with it in Washington, DC. Brussels, in that sense, is “boring.” It would thus be unthinkable in Europe for a new Competition Commissioner to withdraw or disavow a policy document prepared by his/her predecessor. Changes do take place, but these are slow, almost imperceptible.

There are three parameters that explain this fundamental difference from the U.S. situation:

- a) First, the European Union, though being a supranational entity with ever-increasing powers, is no federal State and lacks a truly European government and truly European parties and politics. Political (and ideological) changes take place in the Member States and not so much in Brussels. There are, of course, some general shifts in the political atmosphere, notably among the governments that make up the Council and in the European Parliament, but these do not lead to perceptible changes of policy in the Commission. Besides, the Commissioners will always represent various sides of the political spectrum, since they are proposed by the Member States and the elections in the latter do not take

¹⁶ Case C-62/86, *AKZO Chemie BV v. Commission*, [1991] ECR I-3359, ¶ 64.

place simultaneously and lead to various results. So the Commission is always bound to be composed of conservatives, liberals, and socialists.

- b) Second, the role of the administration within the European Commission is such that the Directorate-Generals (“DGs”) have considerable power themselves and there is an *acquis* irrespective of the person of the Commissioner in charge of the relevant DG. Then, the personnel within them consist of officials, most of whom enjoy permanent status and there is a powerful sense of continuity. DG-Competition, in particular, enjoys considerable clout within the Commission.
- c) Finally, dramatic shifts in the direction of competition policy in Europe are unlikely to happen because of the tempering attitude of the Commission Legal Service. In the past, any move towards more economic analysis in EU competition policy was the result of a (sometimes painful) procedure of dialogue and compromise between DG-Competition and the Legal Service.

So the new Competition Commissioner is expected to spend his first months in learning more about his portfolio and his recent audition before the European Parliament proves that he learns fast. He will then have to carry forward the reforms and projects that are currently under way in the Commission and in DG-Competition. The new Block Exemption Regulation and Guidelines on Vertical Agreements should come first, while the reform of the equivalent set of rules on horizontal agreements should come second. At the same time, he will have to decide whether officially to present the draft Directive on Damages Actions for antitrust violations, currently a contentious issue in Brussels. The chances are that the draft Directive will soon be adopted by the Commission albeit that the new Commissioner seems to prefer a legal basis that will involve the European Parliament. Whereas Commissioner Kroes was probably minded to use as legal basis Article 103 TFEU, which only requires consultation of the European Parliament, Commissioner Almunia has indicated that he would opt for a legal basis involving co-decision, most likely Article 81 TFEU.

This last instance is a good example of how the transition will take place: There will be continuity but this does not exclude some change. What is certainly true, there will be a change of style but this is inherent in any change of leadership.