

# The CPI Antitrust Journal

February 2010 (1)

## A New Treaty, A New Commissioner, A New Competition Policy?

Christophe Lemaire  
Ashurst  
Sorbonne School of Law

Simon Naudin  
Ashurst

# A New Treaty, A New Commissioner, A New Competition Policy?

Christophe Lemaire & Simon Naudin<sup>1</sup>

## I. INTRODUCTION

For the European Union, the year 2010 is characterized by two important developments:

1. This is the first year of implementation of the Lisbon Treaty, which entered into force on December 1, 2009.
2. The new Barroso Commission takes office by Mid-February, with a new Commissioner in charge of competition policy.

Knowing that these institutional developments take place in the context of a major economic crisis, the discussion below examines whether and how they could impact the EU's competition law and policy.

## II. A NEW TREATY

The Lisbon Treaty that came into force on December 1, 2009 substantially modified the institutional framework of the EU. It has amended, but not replaced, the founding Treaties of the EU, that is to say the Treaty on European Union ("TEU") and the Treaty establishing the European Community ("EC Treaty"). The latter has been renamed the Treaty on the functioning of the European Union ("TFEU").

It is important to remember that the Lisbon Treaty was negotiated in a very sensitive political context, because it was adopted as a "replacement solution" following the rejection of the European Constitutional Treaty by France and the Netherlands. The political climate was particularly tense in France, where it was believed that the Constitutional Treaty's explicit references to the EU's attachment to an open free-market economy, in general, and to free competition in particular, had a very negative impact on the French public opinion, and explained in part why the French had voted against the Constitutional Treaty.

This particular context explains why the main changes brought about by the Lisbon Treaty as regards competition law concern the provisions dealing with the role and legal status of competition policy within the legal order of the EU. As explained below, these textual amendments, which were negotiated by the French government, are unlikely to have any substantial effect in practice.<sup>2</sup>

---

<sup>1</sup> Christophe Lemaire is a counsel in the Competition and EU law department of Ashurst in Paris. He is also Senior Lecturer in French and European competition law and regulatory law, Sorbonne School of Law, (The University of Paris I Panthéon-Sorbonne). Simon Naudin is a lawyer also in the Paris office of Ashurst.

<sup>2</sup> For a detailed analysis of the impact of the Lisbon Treaty on competition law, see "*Competition law and the Lisbon Treaty*", *Concurrences*, Nr 1-2008, nr 15364, pp. 99-102.  
[http://www.concurrences.com/article\\_revue\\_web.php3?id\\_article=15354&lang=fr](http://www.concurrences.com/article_revue_web.php3?id_article=15354&lang=fr).

## A. Changes Brought About by the Lisbon Treaty

### 1. No modification of the key substantive provisions governing competition law

The Lisbon Treaty has not modified the key substantive provisions governing EU competition law. It has only changed the numbering of these Articles: former Articles 81 (prohibition of cartels), 82 (abuse of dominance), 86 (public bodies and services of general economic interest), 87 and 88 (State Aids) are now, respectively, Articles 101, 102, 106, 107 and 108 of the new TFEU. These provisions have actually remained unchanged since the signing of the original Treaty of Rome in 1957.

### 2. Modification of the provisions on the role of competition policy within the legal order of the EU

#### a. The former EC Treaty

Under the former EC Treaty, the "tasks" of the European Community were defined—in rather broad terms—in Article 2 and the "activities" of the Community (i.e. the means to achieve the goals listed in Article 2) were set out in Article 3.

Free competition was not mentioned as one of the tasks of the European Community under Article 2. However, it was mentioned as an "activity" under Article 3.1 (g):

For the purposes set out in Article 2, the activities of the Community shall include [...] (g) a system ensuring that competition in the internal market is not distorted.

Therefore, free competition within the EU was not as such a task or an objective of the European Community, but it was expressly recognized as a means to achieve the Community's objectives.

Article 3.1(g) had been used in the past by EU legislators and Community Courts as a legal basis to expand the EC Community competences in various fields, including merger control.

#### b. The Lisbon Treaty

The Lisbon Treaty has modified in depth the structure and content of the provisions dealing with the objectives and means of the European community. In substance, the former Article 3 of the EC Treaty has been deleted and replaced by Article 3 of the new TEU, which sets out a detailed list of the "objectives" of the European Union. However, Article 3 of the TEU does not mention competition policy. As a result, there is no explicit reference to competition policy in the introductory paragraphs of the EU Treaty which set out the objectives and policies of the EU.

This is a change not only from the former institutional scheme (although competition policy was an activity, not an objective or a task of the Community) but, more significantly, from the aborted Constitutional Treaty.

One of the notable features of the Constitutional Treaty was that free competition was "promoted" as an objective of the EU. Pursuant to Article I-3 of the Constitutional Treaty (which corresponds to Article 3 of the revised TEU), the EU was:

[to] offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market **where competition is free and undistorted**.

Initially, a similar provision was to be included in Article 3 of the revised TEU, which would have explicitly associated free competition with the internal market objective. However, due to the opposition of the French government, the final version of Article 3 of the revised TEU does not include any reference to free and undistorted competition.

The Commission feared that the absence of any reference to competition policy in the initial Articles of the revised TEU could have weakened the legal basis of certain competition law instruments (in particular the merger control regulation which was adopted *inter alia* on the basis of Article 3.1 (g)). The Commission therefore obtained the adoption of Protocol Nr 27 which states that the Member States, "[consider] 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**" and that the European Union may accordingly adopt all necessary measures to attain that objective pursuant to Article 352 of the TEU (principle of subsidiarity).

### 3. Other Issues

Two new provisions were introduced by the Lisbon Treaty as regards competition law:

1. It includes "the establishing of the competition rules necessary for the functioning of the internal market" within the European Community's exclusive competences (Article 3 of the TFEU).
2. It empowers the Commission to enact exemption regulations for agreements falling within the scope of Article 101.

It must also be noted that a Protocol (Nr 26) dealing specifically with services of general economic interest was adopted at the initiative of France. This protocol recognizes the importance of these services and the Member States' rights to provide, commission, and organize these services. These principles have long been recognized by EC Courts, and so this protocol as such does not affect the current scope of competition law and policy.

### **B. Impact on Competition Law and Policy**

When the Lisbon Treaty was adopted, the legal impact of the absence of any reference to competition policy in the introductory paragraphs of the new TEU and of the deletion of Article 3.1 (g) was the center of much attention. It was asked whether this affected the position of competition policy within the EU legal order and, possibly, competition law enforcement itself.

Today, this debate has noticeably eroded, for three reasons:

First, from a legal point of view, the absence of any reference to competition policy in the final version of Article 3 of the TEU may arguably not have any legal impact at all. The protocol annexed to the TEU should be considered as "an integral part" part of the treaty (Article 51 of the TEU) and clearly identifies competition law as inherent to the internal market objective. There are, therefore, arguments to suggest that not only was competition policy not affected by the revised TEU, but that it has now been promoted as an "objective" of the EU.

Second, even if one considers that from a legal point of view competition policy may not be considered as an objective of the TEU, this would presumably have no impact on the legal status of competition law and policy. The annexed protocol, the exclusive competence of the EU for the adoption of competition rules, and, most importantly, the unchanged substantive provisions governing competition law provide a legal basis for competition law enforcement which is arguably equivalent to the one that existed under the former institutional scheme (under which competition policy was not recognized as an objective of the EU in any case). The EU has actually been granted new competences in the field of competition law (exclusive competence for the establishing of competition rules and adoption of exemption regulations by the Commission).

Third, there is nothing to suggest, in the recent statements and decisions of the European Commission and of national competition authorities, that the new institutional scheme is perceived as affecting in any way the nature or legal authority of competition rules.

For the reasons set out above, the new institutional scheme is very unlikely to have any deterrent effect on competition law and policy.

### III. A NEW COMMISSIONER FOR A NEW COMPETITION POLICY?

The Spaniard Joaquín Almunia is succeeding Nelly Kroes as Commissioner in charge of competition within the second Barroso Commission, which took office on February 10, 2010. Mr. Almunia was heard by the European Parliament on January 12<sup>3</sup> and delivered his first speech as competition Commissioner during the first annual conference of the *Concurrences* review on February 15<sup>4</sup>.

Mr. Almunia, a socialist, is aged 61 and has been the EU's Commissioner for economic and monetary affairs since 2004. As economic and monetary affairs Commissioner, he was known for his strict defense of the European stability pact and his tough stance against excessive public deficits.

It is important to stress that Mr. Almunia's nomination, like Nelly Kroes', takes place at a time when the major institutional reforms of European antitrust enforcement have already been implemented (adoption of regulation 1/2003 concerning antitrust and of regulation 139/2004 concerning merger control). This explains why Mr. Almunia's first statements indicate that he should not be expected to revolutionize competition law enforcement, and should essentially follow the path of his predecessor. This is all the more true as Mr. Almunia is not really an "outsider," but was already a member of the European Commission, and a colleague of Nelly Kroes.

It must also be noted that his nomination occurs in the context of an economic crisis which has generated debates on the need for a more flexible implementation of competition rules. This is especially the case concerning State aids, for which a temporary legal framework was adopted by the Commission to facilitate the intervention of Members States.

This being said, the issues which will most certainly be on the agenda of the newly appointed Commissioner are discussed below.

#### A. Sanctions

Under Commissioner Kroes, the level of fines imposed for antitrust infringements substantially increased, with three cases where fines exceeded EUR 1 billion. This fining policy has attracted sharp criticism from part of the business community and has been debated by antitrust experts in the last few years. Certain experts have suggested that a reduction of the level of fines and a parallel development of criminal sanctions could prove more dissuasive and economically efficient than high fines.

---

<sup>3</sup> The summary of Mr. Almunia's hearing is available on the European Parliament's website:

[http://www.europarl.europa.eu/news/expert/infopress\\_page/008-67141-012-01-03-901-20100112IPR67140-12-01-2010-2010-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/008-67141-012-01-03-901-20100112IPR67140-12-01-2010-2010-false/default_en.htm).

<sup>4</sup> Mr. Almunias' speech is available (in French only) on the Commission's website:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/25&format=HTML&aged=0&language=FR&guiLanguage=en>

In this context, the news of Mr. Almunia's nomination has fueled much speculation as to whether this nomination would impact the Commission's fining policy. Mr. Almunia ended this speculation during his hearing, by stating that he believed that the level of fines imposed since 2006 "is appropriate by and large to have [a] dissuasive effect." He confirmed this position during his speech of February 15, specifying that the economic crisis did not justify a revision of the rules governing the setting of fines. During his hearing, Mr. Almunia did, however, acknowledge the difficulties of small and medium-sized companies, for which "the impact of these penalties is greater," and added that this was something the Commission "will have to continue to look at." The outgoing director-general of DG Competition, Philip Lowe, had made a similar comment the day before.

Although these early statements will have to be assessed in the light of the first decisions adopted after he takes office, it seems that Mr. Almunia's nomination should not be expected to bring about any significant change in the Commission's fining policy.

### ***B. Private Enforcement***

The institution of a European private action was one of the major initiatives of Commissioner Kroes. Mrs. Kroes had indicated in November 2009 that a draft proposal for a directive in this respect was "finalized" and "ready" for her successor.

Mr. Almunia has announced that he would develop proposals on collective compensation, although he stressed the need to avoid the "excesses" of certain class action models similar to those in the United States. He specified that the European Parliament would be involved in the process via the co-decision procedure. According to Mr. Almunia, "all the options" will be closely examined before any proposals are made.

Mr. Almunia therefore seems more inclined to continue to reflect on the European class action before submitting a legislative proposal, rather than to go forward immediately with the current proposal.

### ***C. State Aids and the Banking Sector***

Mr. Almunia's statements on State aids were the most eagerly awaited by the business community.

As regard the Commission's general State aids policy, Mr. Almunia welcomed the fact that the Commission managed to subject emergency aids to a competition discipline during the economic crisis. He announced that State aids policy would now have to be used to exit from the crisis.

As regards State aids in the banking sector, Mr. Almunia made it clear (i) that bail-out banks would be required to restructure, in order to avoid a "moral hazard" effect, and (ii) that the Commission would "study very, very carefully" the use of public money by the banks, including the granting of bonuses.

These statements could suggest that after a period of (relative) flexibility in the enforcement of State aids law, the Commission is now willing to revert gradually to a stricter scrutiny of State aids.

### ***D. Rules on vertical and horizontal agreements***

DG Comp is currently preparing a revised version of its guidelines on horizontal agreements. It is expected to include, for the first time, developments on exchanges of information

among competitors (an issue which has been addressed only by case law at this stage). Mr. Almunia said that this new regime will also provide an opportunity to "clarify" the rules governing standardization agreements (i.e. abusive conducts such as the "patent ambush" which European and U.S. antitrust authorities have dealt with in the recent *Rambus* case).

In early February, DG Comp was also finalizing the revised block exemption regulation and the revised guidelines concerning vertical distribution agreements. DG Comp intends to have a finalized draft ready when Mr. Almunia takes office, as the new rules are scheduled to enter into force on June 1. According to Mr. Almunia, the objective is "to clarify and update" the current regime rather than revolutionize it.

One of the most critical topics of these new rules is the question of online sales within a selective distribution network. The current draft confirms the Commission's position by assimilating online sales into passive sales (except in exceptional circumstances) which, as a general rule, may not be restricted, contrary to active sales. It would, however, be possible to restrict online sales to distributors who have a physical shop and meet certain objective criteria. But a general ban on internet sales within a selective distribution network would, in principle, not be block-exemptible. This specific issue was actually referred to the European Court of Justice ("ECJ") for a preliminary ruling by a French Court in the *Pierre Fabre* case, so the Commission's position will have to be confronted with that of the ECJ. The ruling of the ECJ is expected in approximately 18 months.

Mr. Almunia has also confirmed that the Commission is eager to bring vertical distribution agreements in the motor vehicle and insurance sectors (which are currently governed by specific block exemption regulations) within the framework of the general block exemption regulation (although certain sector-specific rules could be maintained when necessary).

### **E. Sector enquiries**

The Commission's recently developed sector inquiries (for instance in the pharmaceuticals and energy sectors) have become an important "source" of infringement proceedings. Mr. Almunia said that these sector enquiries have proved their efficiency, because they have allowed the Commission to collect market information, to open new proceedings and to remedy persistent market failures by adopting structural remedies.

For this reason, the increasing role of sector enquiries in antitrust enforcement is likely to be confirmed in the years to come.

This raises the question of the balance between the wide powers of the Commission and the uncertain rights of the companies in the context of sector enquiries. Contrary to individual investigations, sector enquiries allow the Commission to request a very important number of internal documents without specifying the object of the enquiry. For companies, this practice is a factor of uncertainty and may be quite burdensome.

### **F. Other Issues**

Two issues have not been specifically discussed by Mr. Almunia at this stage, but will most certainly be on his agenda.

The first issue is the clarification of the Commission's approach towards antitrust compliance programs set up by companies. These programs have rapidly developed in Europe during the last few years, but to this day the Commission has refused to take such programs into



consideration as a mitigating factor when setting the amount of fines. Mr. Philip Lowe, the director general of DG Comp, revived this debate recently by expressing doubts as to the practical effects of these programs, when they were not followed by appropriate sanctions against the company's top executives in case of infringement. Mr. Almunia has not clarified his intentions in this respect, and merely said that he would seek to set up a "a real competition culture" within companies. Knowing that the Commission's restrictive approach towards compliance programs is in contradiction with the more favorable approach adopted recently by a number of European competition authorities (including the French and British competition authorities), it may be asked whether Mr. Almunia's silence indicates that he is open to a reassessment of the Commission's policy. In any case, Mr. Almunia's position concerning these programs will be a major issue for antitrust lawyers and for the business community.

The second issue is the new settlement procedure, which was introduced in 2008 but has not yet been implemented. It will be interesting to see how this procedure will be used during Mr. Almunia's mandate, knowing that the first settlement decisions could be taken in 2010.

#### **IV. CONCLUSION**

To conclude, the impulse for change in competition law and policy should not be expected to come either from the entry into force of the Lisbon Treaty, or from the nomination of Mr. Almunia, whose statements indicate that he does not intend to deviate substantially from the path followed by his predecessor.

However, the question may be asked whether more substantial changes should be anticipated as a result of the ever-increasing tension between the high standards of fundamental rights and freedoms which the EU has recently developed, on the one side, and the potential incompatibility of the Commission's organization and procedure with essential due process requirements, on the other side. DG Comp is organized and functions like an ordinary administrative body, and yet it functions as an investigator, prosecutor, and judge, with the authority to impose fines amounting to billions of Euros or even structural remedies.

In parallel, the EU has set increasingly ambitious standards of fundamental rights, as displayed by the entry into force of the European Charter of Fundamental Rights. It is therefore not surprising that the reinforcement of due process guarantees came up as one of the main requests of companies and lawyers consulted in the context of the Commission's report on the implementation of regulation 1/2003. In the next few years, the growing pressure in favor of adequate due process guarantees in the context of antitrust proceedings could well impose considering a procedural reform which is not necessarily on Mr. Almunia's initial agenda.