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A Review of the Competition Law Implications of the Treaty on the Functioning of the European Union

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I. INTRODUCTION

Most competition lawyers tend to view the entry into force of the Treaty on the Functioning of the European Union (“TFEU”), which followed the ratification of the Lisbon Treaty, as business as usual.² While the cosmetics of European Union (“EU”) competition law have undeniably changed with the renumbering of the competition provisions in the TFEU, its fundamentals are generally perceived as stable. This interpretation is, in turn, based on the belief that the Lisbon Treaty primarily sought to address a variety of profound, structural defects of the EU institutional framework, and was thus only remotely concerned with the practice of competition law.

This article investigates whether this assumption is correct. To this end, it is divided into two parts. Part I reviews the competition law provisions of the TFEU and seeks to compare them to the provisions of the now defunct Treaty establishing the European Community (“the EC Treaty”). Part II seeks to determine whether the amendment of a number of transversal, non competition-specific provisions is likely to impact the practice of competition law.

II. THE COMPETITION LAW PROVISIONS OF THE TFEU

The Treaty of Lisbon provides for three sets of amendments to the competition law provisions previously enshrined in the EC Treaty. First, it modifies the numbering and the wording of the EU competition rules. Second, it downgrades, at least in appearance, the status of competition policy in the EU legal architecture in that former Article 3(1)(g) of the EC Treaty has been repealed. Third, the Lisbon Treaty provides for a number of changes in the field of State aid.

A. The New Numbering and Wording of the EU Competition Rules

The competition rules of the TFEU can be found in Articles 101, 102 and 107 to 109, which replace Articles 81, 82 and 87 to 89 of the EC Treaty. As was the case under the previous Treaty, those rules cover agreements between undertakings, abuses of dominance, and anticompetitive State aids respectively.³ Similarly, the substantive wording of Articles 101, 102 and 107 to 109 TFEU is almost identical to the wording of the competition rules of the EC Treaty. Overall, with the exception of State aid provisions, the competition rules thus remain remarkably

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² See N. Parr & N. Cuninghame, *Treaty of Lisbon enters into force*, ASHURST COMPETITION NEWSLETTER, (December 2009); G. Sproul, *The coming into force of the Lisbon Treaty and its impact on competition law*, MAYER BROWN, (December 2, 2009); Linklaters, *The Lisbon Treaty comes into force*, STOP PRESS, (December 14, 2009).

³ Title VII, Chapter 1 TFEU replaces former Title VI, Chapter 1 of the EC Treaty.

stable. The only noticeable change relates to the reference to the “common market” which, under the new Treaty, is replaced by a reference to the “internal market.”

Interestingly, by merely replicating the majority of the competition provisions of the EC Treaty, the TFEU maintains the numerous lexical ambiguities with which EU competition lawyers have grappled over the past decades. For instance, Article 102 TFEU still refers to “one or more undertakings,” thereby leaving open the possibility to hold unlawful the abusive behaviour of several independent firms which jointly occupy a dominant position.⁴ Similarly, Article 101(3) TFEU refers to agreements “improving the production or distribution of goods or to promoting technical or economic progress.” The case law adopted under Article 81(3) of the EC Treaty, in particular the judgments promoting the admissibility of non-economic justifications for anticompetitive agreements, should thus remain applicable under Article 101(3) TFEU.⁵

B. The Abolition of Article 3(1)(g) of the EC Treaty

The Lisbon Treaty repeals Article 3(1)(g) of the EC Treaty, which stated that the “activities” of the European Community included “a system ensuring that competition in the internal market is not distorted.” A new Protocol n°27, appended to the TFEU, however, reproduces almost literally the substantive content of Article 3(1)(g) of the EC Treaty. This Protocol unambiguously states that the internal market “includes a system ensuring that competition is not distorted.”⁶

This modification has triggered a great deal of controversy amongst the competition law community. Ahead of the adoption of the Lisbon Treaty, a number of observers voiced concerns that the proposed abolition of Article 3(1)(g) of the EC Treaty, and its replacement by a mere Protocol, would mark—in line with the intentions disclosed by some Heads of State while negotiating the Treaty⁷—a downgrading of the legal status of competition policy, from an “end” of the EU, to a simple “means.”⁸ This view is partly based on the case law of the European courts, which had repeatedly held that Article 3(1)(g) of the EC Treaty enunciated a true “objective” of the European Community.⁹ In response to this, a high-ranking official of the European Commission

⁴ For a detailed account of the case law related to collective dominance, see N. Petit, *Oligopolies, collusion tacite et droit communautaire de la concurrence*, BRUYLANT, Chapter II, (2007).

⁵ For a detailed account of this case law see C. Townley, *Article 81 EC and Public Policy*, HART PUBLISHING, (2009).

⁶ See Protocol n° 27 on the internal market and competition, O.J., 9 May 2008, C 115/309.

⁷ See, *A Less 'Anglo-Saxon' EU. Sarkozy Scraps Competition Clause from New Treaty*, DER SPIEGEL, (June 22, 2007).

⁸ See A. Riley, *The EU Reform Treaty And The Competition Protocol: Undermining EC Competition Law*, CEPS POLICY BRIEFS, (September 24, 2007), who supports the view that the Lisbon Treaty watered down competition policy. See also A. Weitbrecht, *From Freiburg to Chicafo and Beyond—The First 50 Years of European Competition Law*, ECLR 2, at. 81 to 88 (2008). One may indeed argue that the mere replacement of Article 3(1)(g) with the EC Treaty in Protocol n°27, while the Contracting Parties had the opportunity to codify the *acquis communautaire* and to endorse the interpretation promoted by the European Court of Justice (“ECJ”) of this provision, implies a downgrading of the legal status of competition policy.

⁹ For example, in the Club Lombard case, the Court of First Instance (“the CFI”) expressly referred to “the fundamental objective of undistorted competition embodied in Article 3(g) EC.” See CFI, T-259/02 to 264/02 and T-271/02, Raiffeisen Zentralbank Österreich AG and Others v Commission, 14 December 2006, ECR, 2006, p. II-5169, §255. See also ECJ, C-289/04 P, Showa Denko KK v Commission, 29 June, 2006, ECR, 2006, p. I-05859, § 55, judging that free competition within the common market “constitutes a fundamental objective of the Community under Article 3(1)(g) EC.” See also Advocate General KOKOTT, C-95/04 P, British Airways plc v Commission, 23 February 2006, §69, referring to “the purpose of protecting competition in the internal market from distortions (Article 3(1)(g) EC)” ; and ECJ, 6/73 and 7/73, Istituto Chemioterapico Italiano and Commercial Solvents v Commission, 6

(the “Commission”) has contended that, pursuant to the wording of Article 3(1)(g), the system of undistorted competition was simply a means of the EU.¹⁰ Because “an objective that does not exist cannot be lost,” it was thus arguably wrong to claim that the new Treaty brings about a relegation of EU competition policy.¹¹

On close examination, both views appear sound. Almost inevitably, the resolution of this debate will therefore require the European courts to rule on the status of Protocol n°27 in the context of future judicial proceedings. In this regard, we believe that a useful distinction may be drawn between, on the one hand, the question of the ranking of Protocol n°27 within the hierarchy of European rules and policies and, on the other hand, the substantive content of Protocol n°27. On the first issue, the most likely conclusion is that Protocol n°27 ranks as high as former Article 3(1)(g) of the EC Treaty, so that conflicts between EU competition policy and other European policies (or “activities”) should be dealt with according to the traditional case law standards. This is because Article 51 of the Treaty on the European Union (“TEU”)—*i.e.* the other new Treaty which besides the TFEU deals primarily with institutional issues—states that Protocols form an integral part of the Treaties and have a legal value identical to Treaty provisions.

On the second issue, however, the European courts face more options. They may, for instance, decide to follow their traditional case law, and consider that the content of Protocol n°27 enshrines an “objective” of the EU. However, the European courts may resort to teleological interpretation and, in line with the reported intentions of some Heads of State, judge that a system of undistorted competition should no longer be an “objective” of the EU, but simply a means that might, for instance, be traded-off against other, more important, goals.

From a public policy perspective, we believe that the latter interpretation could have a number of detrimental and undesirable consequences. First, it could undermine the adaptability of competition rules to new issues, which were not foreseen by the Treaty drafters. In the past, Article 3(1)(g) of the EC Treaty has indeed often been used to legitimize extensions of the scope of Articles 81 and 82. For instance, Article 3(1)(g) of the EC Treaty was instrumental in entitling the Commission to challenge exclusionary abuses under Article 82.¹² Similarly, the European courts have also relied on Article 3(1)(g) of the EC Treaty to establish Member States’ liability in cases where regulatory intervention had induced/coerced firms to conclude unlawful agreements.¹³ Finally, the Courts found support in Article 3(1)(g) of the EC Treaty in order to hold that violations of Article 81(1) could lead to a right to damages before national courts.¹⁴

Second, this interpretation may weaken the effectiveness of competition law enforcement. The gradual and continual increase in the fines imposed on cartels has, for instance, partly found its legal basis in Article 3(1)(g) of the EC Treaty.¹⁵ In the same vein, this provision has been a stepping stone for the devolution of increased powers to National Competition Authorities

March 1974, Rec, 1974, p. 223, § 25, referring to “the objectives expressed in article 3(f) of the treaty and set out in greater detail in Articles 85 and 86.”

¹⁰ See M. Petite, *La place du droit de la concurrence dans le future ordre juridique communautaire*, CONCURRENCES, I-2008; M. Waelbroeck, *La place du droit de la concurrence dans le future ordre juridique communautaire*, CONCURRENCES, I-2008.

¹¹ *Id.* See also, T. Buck, *Kroes vows to maintain “firm and fair” line on competition*, FIN. TIMES, (June 25, 2007).

¹² See ECJ, Case 85/76, *Hoffmann-La Roche v Commission*, 13 February 1979, ECR, 1979, p.461, § 38.

¹³ See ECJ, C-198/01, *Consorzio Industrie Fiammiferi*, 9 September 2003, ECR, 2003, p. I-8055, §§ 54-55.

¹⁴ See ECJ, C-453/99, *Courage v Crehan*, 20 September 2001, ECR, 2001, p. I-06297, § 20.

¹⁵ Art. 3(1)(g) was invoked to justify the fining of a firm already punished in another legal order. See ECJ, C-328/05 P, *SGL Carbon AG v Commission*, 10 May 2007, ECR, 2007, p. I-3921.

("NCAs"), and in particular, the power to set aside provisions of domestic legislation which frustrate the "*effet utile*" of Article 81.¹⁶

In sum, therefore, the transfer of the content of Article 3(1)(g) of the EC Treaty to Protocol No 27 could possibly entail a weakening of competition law within the EU legal order.

C. State Aid

The TFEU has also brought about a number of discrete, minor changes in the field of State aid. First, pursuant to Articles 107(2)(c) TFEU, the Council of the EU will be entitled to repeal, five years after the entry into force of the Lisbon Treaty, the provision which automatically deems compatible State aid granted to compensate for the economic disadvantages caused by the post war division of Germany. Second, Article 107(3)(a) TFEU has been broadened to allow aid granted for the purposes of stimulating the economic development of the associated overseas territories of the EU (*e.g.*, Guadeloupe, Réunion, the Azores, etc.).

III. COMPETITION SPILL-OVER EFFECTS ARISING FROM OTHER PROVISIONS OF THE TFEU

In addition to the several amendments which have just been described, the Treaty of Lisbon also introduces a number of non-competition specific modifications which might have spill-over effects on the practice of competition law. The TFEU first introduces a number of amendments to the judicial system of the EU. Second, it relaxes the conditions which natural and legal persons must fulfill to bring annulment proceedings (*Locus standi*). Third, it reinforces the so-called "comitology" procedure.

A. The New EU Judicial System under the TFEU

The TFEU entirely reforms the semantics of the EU judicial architecture. The EU judicial system will now generally be referred to as the Court of Justice of the European Union ("CJEU"). The CJEU includes three distinct judicial organs: the Court of Justice ("CJ") which formally replaces the European Court of Justice ("ECJ"), the General Court ("GC") which formally replaces the Court of First Instance ("CFI"), and "specialised courts" (*e.g.*, the Civil Service Tribunal). On this latter aspect, the TFEU provides now at Article 257 a clear legal basis for the creation of courts with jurisdiction for "certain classes of actions" or "proceedings brought in specific areas".¹⁷ Such specialised courts shall be created by Regulations from the Parliament and the Council, on a proposal from either the Commission or the CJEU. Interestingly, Article 257 could therefore open the way to the introduction, at the EU level, of a fully-fledged, first instance, competition court, thereby discarding concerns that the creation of such a court would require amending the Treaties.¹⁸ A number of practitioners, as well as a former CFI judge, have supported in recent years the creation of an EU competition court as (i) a necessary remedy to the lengthy proceedings in competition cases and (ii) a means to overcome the current reluctance of generalist EU judges to review Commission's complex economic assessments.¹⁹

B. Locus Standi Issues under the TFEU

¹⁶ See ECJ, C-198/01, *Conorzio Industrie Fiammiferi*, *supra*, §§ 54-55.

¹⁷ This possibility already existed under the previous Treaties, but was subject to a different legislative procedure.

¹⁸ See A. Andreangeli, *EU Competition Enforcement And Human Rights*, EDWARD ELGAR, p. 238 (2008).

¹⁹ See CBI Brief, "The Need for an EU Competition Court", (June 15, 2006); See S. Bodoni, "EU judge calls for a new merger tribunal", INTERNATIONAL HERALD TRIBUNE, (October 24, 2006).

The TFEU relaxes the conditions under which natural or legal persons may directly challenge the validity of regulatory acts (for instance, regulations or directives). Under the former EC Treaty, natural and legal persons could only bring annulment proceedings against regulatory acts which were of “direct and individual concern” to them.²⁰ Importantly, the case law of the Courts has traditionally endorsed a narrow interpretation of the notion of “individual concern.”²¹ In practice, this case law *de facto* immunized pieces of legislation from annulment proceedings brought by private applicants.²²

Article 263(4) TFEU relaxes the requirements which private applicants must meet to bring annulment proceedings. This provision no longer requires private applicants to prove that they are *individually concerned* by the impugned piece of legislation. All applicants can now bring proceedings “against a regulatory act which is of direct concern to them and does not entail implementing measures.”²³

As far as competition law is concerned, the EU courts will probably be called upon, in future cases, to rule on whether the concept of “regulatory act” encompasses all acts of general application²⁴ or only non-legislative acts (such as soft law instruments or decisions addressed to several individuals).²⁵ In our opinion, this question is particularly important from a practical standpoint. Should the former hypothesis prevail, firms and their counsels will be able to challenge the provisions enshrined in future block exemption regulations, implementing regulations (*e.g.*, currently Regulation 1/2003) or regulations governing certain types of business transactions (*e.g.*, rules establishing a merger control regime). Concretely, firms may use the threat of subsequent annulment proceedings to undermine the Commission’s attempts to push regulatory reforms which bring about disputed legal changes (such as, for instance, reforms purporting to increase the Commission’s investigative powers or to “black list” new contractual arrangements).

For the sake of completeness, it ought to be mentioned that under the TFEU, annulment proceedings must be brought within two months of the publication of the challenged measure.

²⁰ The first condition, namely that the applicant be directly concerned, has triggered less debate within the legal community. According to settled case law, for the direct concern criterion to be fulfilled, the disputed measure must “directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules”. CFI, T-177/01, *Jégo-Quéré v Commission*, *supra*, §26; ECJ, C-386/96 P, *Dreyfus v Commission*, 5 May 1998, ECR, 1998, p. I-2309, § 43.

²¹ The applicants had to prove that the measure at stake affected their 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”. CFI, T-177/01, *Jégo-Quéré v Commission*, 3 May 2002, ECR, 2002, p. II-2365, § 27; ECJ, C-25/62, *Plaumann v Commission*, 15 July 1963, ECR, 1963, p. 203, § 107.

²² See N. Reich, *Understanding EU Law: Objectives, Principles and Methods*, INTERSENTIA, 2nd ed., at 258 (2005).

²³ If Article 263(4) TFEU obviously stretches the standing requirements for parties seeking to obtain the annulment of a measure of general application, EU Courts will still have to determine the precise scope of this provision. For example, they will have to determine whether the “no implementing measures” requirement maps the criterion of direct concern, or whether it further narrows down the scope of Article 263(4) TFEU and excludes situations in which implementation measures are taken, even if purely automatic.

²⁴ According to Article 263(4) TFEU acts of an individual nature addressed to third parties still cannot be challenged in the absence of direct and individual concern. This means, for example, that exemption decisions in State aid cases can hardly be challenged by rivals of the aid recipient.

²⁵ On the possible meanings of this notion, see M. Dougan, *After Lisbon: Intergovernmentalism Resurgent, Constitutionalism Moribund ?*, MALTA EUROPEAN STUDIES ASSOCIATION, THE JEAN MONNET SEMINAR SERIES, p. 18, (2008); A. Türk, *Judicial Review in EU Law*, EDWARD ELGAR, 168, (2009).

Beyond this two-month period, parties that could have lodged proceedings before EU Courts can no longer seek to incidentally challenge the measure before national courts (by challenging domestic implementation measures and, during the proceedings, arguing that the underlying EU act is unlawful).²⁶

C. Commission Implementing Powers and the “Comitology” Procedure

Pursuant to Article 103 TFEU, the regulations or directives giving effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament (the “Parliament”).²⁷ This provision—which replicates former Article 83 EC—has served in the past as the legal basis for the adoption of a number of key regulations such as Regulation 17/62 and Regulation 1/2003. Those regulations typically grant—one could say delegate—enforcement powers to the Commission (and, to a lesser extent, to NCAs and national courts) as regards Articles 101 and 102 TFEU.

Importantly, under the new Treaty, Article 105(3) TFEU now provides that “the Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b) [which lay down detailed rules for the application of Article 101(3)].” Put simply, Article 105(3) TFEU bestows upon the Commission a general regulatory power to adopt specific rules governing the application of Article 101(3) TFEU. This power remains, however, contingent upon the existence of a prior Council regulation.

In the past, the Commission did not derive from the Treaty any such general power to adopt regulations governing categories of agreements. The Commission had, however, been entrusted with such powers on the basis of *ad hoc*, specific delegations from the Council. A good example of this can be found in Council Regulation 19/65 which entitled the Commission to adopt block exemption regulations.²⁸

Against this background, the new wording of Article 105(3) TFEU raises an interesting legal issue. The Lisbon Treaty, which seeks to establish a balance of powers between the EU Parliament and the Council, embodies several generally applicable provisions concerning delegations of powers among these two institutions, and the Commission. In particular, Article 290 TFEU provides that “A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.” One might therefore consider that Articles 103 and 105 are, in the field of competition law, a specific application of the general delegation principles set out in Article 290 TFEU. After all, when the Council acts under Article 103 TFEU, it only lays down the core content of a legislative act that the Commission will further supplement, through a subsequent Article 105(3) regulation or directive.²⁹ This interpretation is not without practical consequences.

²⁶ See for example ECJ, C-239/99, *Nachi Europe GmbH v Hauptzollamt Krefeld*, 15 February 2001, ECR, 2001, p. I-1197, §§ 35-37.

²⁷ Article 103 TFEU replaces Article 83 of the EC Treaty and eliminates the requirement that the Council rules pursuant to qualified majority voting.

²⁸ See Regulation n° 19/65/EEC of the Council of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted Practices, OJ, P 36, 6 March 1965, p. 533.

²⁹ A similar reasoning could be held regarding State aid. Article 108(4) TFEU now states: “The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.” One might therefore argue that the

Should it be valid, it could be argued that the slight changes brought to the system of delegation of powers allow the Parliament and Council, in line with the delegation practice in other fields of EU law, to flank the Commission with review committees composed of national experts.³⁰ Through the backdoor, the Parliament and the Council may thus be tempted to introduce the so-called “comitology” governance system³¹ in the field of competition policy, thereby asserting arms-length control over a field of EU law that has long fallen under the Commission’s quasi-exclusive competence.

While the above scenario sounds interesting from a conceptual standpoint, one may question its practical plausibility. Comitology committees generally serve two purposes. They may be appointed either to control the Commission (and report to the Member States) or to assist the Commission when dealing with technical matters. As far as competition law is concerned, any such committee would be redundant with (i) the missions discharged by the Advisory Committee on Restrictive Practices and Dominant Positions;³² (ii) the internal scrutiny of the national experts temporarily detached to DG COMP staff; and (iii) the information exchanges which take place within the European Competition Network (“ECN”). Against this background, the setting-up of comitology committees in the field of competition policy would, in our view, simply add a new layer of bureaucracy to the Commission’s decisional processes and should therefore be avoided.

IV. CONCLUSION

Our review of the amendments brought about by the Lisbon Treaty lends support to the view that the TFEU will not have any immediate, significant effect on the practice of competition law. This is further supported by the fact that the drafters of the Treaty have, deliberately or not, left unaddressed most of the hot, burning competition issues which would have required Treaty amendments: setting up of an EU competition agency; migration towards an adjudication enforcement model (where the Commission would have to bring cases to the EU Courts to enforce EU competition rules); introduction of penalties on individuals for competition law infringements (criminal or other); etc.

However, in the mid-to-long run, the TFEU may impact more significantly on competition practice, subject to future case law developments, in particular under Protocol n°27. Therefore, time only will tell whether the TFEU means business as usual for competition lawyers or, on the contrary, marks a new era for competition policy.

power of the Commission to determine the aid measures which are exempted through regulations is a delegated power.

³⁰ The Council is entitled to subordinate the delegation to a number of conditions (in the delegating act). Article 290 TFEU explicitly, but not exhaustively, mentions, as possible conditions to which the delegation can be subject, the revocation of the delegation and the possibility to veto the delegated act. *A fortiori*, less drastic types of conditions—not provided for in Article 290 TFEU, such as the review of the Commission’s action by a board of national experts—may also be imposed. See P. Craig, *EU Administrative Law*, OXFORD UNIVERSITY PRESS, 127, (2006).

³¹ On the comitology procedure, see E. Vos, *The Rise of Committees*, EUR. L. J., 3, at 210 (1997); or the entry Comitology in the Europa Glossary available at http://europa.eu/scadplus/glossary/comitology_en.htm.

³² The Advisory Committee is composed of representatives of the competition authorities of the Member States and must be consulted by the Commission prior to the adoption of certain decisions. See Article 14 of Regulation 1/2003, *supra*.

Annex: Main Changes introduced by the Lisbon Treaty to EU Competition Rules

Summary Description	Treaty establishing the European Community ("TEC") – Prior to Lisbon	Treaty on the European Union ("TEU") and Treaty on the Functioning of the European Union ("TFEU") – Post Lisbon
<i>Changes to the EU Judicial System</i>	<p><i>Article 220 TEC</i> The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.</p>	<p><i>Article 19 TEU</i> 1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.</p>
<i>Wording</i>	<p><i>Article 81 TEC</i> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: [...]</p>	<p><i>Article 101 TFEU</i> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: [...]</p>
<i>Wording</i>	<p><i>Article 82 TEC</i> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. [...]</p>	<p><i>Article 102 TFEU</i> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. [...]</p>
<i>Changes to the procedural framework for the adoption of measures</i>	<p><i>Article 83 TEC</i> 1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from</p>	<p><i>Article 103 TFEU</i> 1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission</p>

<p><i>implementing Articles 101 and 102 TFEU</i></p>	<p>the Commission and after consulting the European Parliament. 2. The regulations or directives referred to in paragraph 1 shall be designed in particular: (a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments; (b) to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other; (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82; (d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph; [...]</p>	<p>and after consulting the European Parliament. 2. The regulations or directives referred to in paragraph 1 shall be designed in particular: (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments; (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other; (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102; (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph; [...]</p>
<p><i>Wording</i></p>	<p><i>Article 84 TEC</i> Until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82.</p>	<p><i>Article 104 TFEU</i> Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.</p>
<p><i>Wording</i></p>	<p><i>Article 85 TEC</i> 1. Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in</p>	<p><i>Article 105 TFEU</i> 1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own</p>

<p><i>Introduction of a new paragraph 3</i></p>	<p>cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. [...]</p>	<p>initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. [...]</p> <p>3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).</p>
<p><i>Wording</i></p>	<p><i>Article 86 TEC</i></p> <p>1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.</p> <p>2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular 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. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.</p> <p>3. [...]</p>	<p><i>Article 106 TFEU</i></p> <p>1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.</p> <p>2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular 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. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.</p> <p>3. [...]</p>
<p><i>New provision providing for a possible repeal of Article 107(2)(c) TFEU</i></p>	<p><i>Article 87 TEC</i></p> <p>1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by</p>	<p><i>Article 107 TFEU</i></p> <p>1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by</p>

<p><i>New types of aids which may be considered to be compatible with the internal market</i></p> <p><i>Changes to the conditions under which the Council can deem aids compatible</i></p>	<p>favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.</p> <p>2. The following shall be compatible with the common market: [...]</p> <p>(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.</p> <p>3. The following may be considered to be compatible with the common market:</p> <p>(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; [...]</p> <p>(e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.</p>	<p>favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.</p> <p>2. The following shall be compatible with the internal market: [...]</p> <p>(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.</p> <p>3. The following may be considered to be compatible with the internal market:</p> <p>(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; [...]</p> <p>(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.</p>
<p><i>Wording</i></p>	<p><i>Article 88 TEC</i> [...]</p> <p>2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such</p>	<p><i>Article 108 TFEU</i> [...]</p> <p>2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or</p>

	<p>aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.</p> <p>If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.</p> <p>On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.</p> <p>If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.</p> <p>3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a</p>	<p>that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.</p> <p>On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.</p> <p>If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.</p> <p>3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a</p>
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<p><i>Introduction of a new paragraph 4</i></p>	<p>final decision.</p>	<p>final decision. 4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.</p>
<p><i>Changes to the conditions under which the Council can adopt regulations in State aid matters</i></p>	<p><i>Article 89 TEC</i> The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 87 and 88 and may in particular determine the conditions in which Article 88(3) shall apply and the categories of aid exempted from this procedure.</p>	<p><i>Article 109 TFEU</i> The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.</p>