

## *The impact of the Lisbon Treaty on competition law*

Following its ratification by the Czech Republic, the last Member State to do so, the Treaty of Lisbon entered into force on 1 December 2009. One of the main objectives of the Treaty of Lisbon is to modernise the institutional and decisional framework of the European Union, with streamlined and modern institutions, simplified working methods and voting rules, and a more effective and efficient decision-making process for a European Union of 27 members.

Overall, the Treaty of Lisbon's impact on competition law will probably remain limited. However, a number of key changes merit attention.

### 1. Institutional and Formal Changes

#### *a. Structure of the Treaties and of the European Union*

- **EC becomes EU** – The Treaty of Lisbon grants the European Union a single legal personality; it replaces and succeeds the European Community. Consequently, all references to "European Community" and "Community" in the European terminology are replaced by the word "European Union" and "Union" (except when referring to the European Atomic Energy Community, which continues to exist).
- **EC Treaty becomes TFEU** – The EC Treaty, which contains most of the substantive provisions of EU primary law, has been renamed the "Treaty on the Functioning of the European Union" (TFEU) and its articles are re-numbered. A consolidated version of the TFEU is available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML>

#### *b. Changes in wording and numbers related to the chapter on competition*

- **Provisions on competition are renumbered** – As a consequence of the EC Treaty's transformation into the TFEU, former Articles 81 to 89 EC become Articles 101 to 109 TFEU.
- **Commission's power to enact block exemption regulations upon delegation of the Council is inserted in primary legislation** – Article 105(3) and 108(4) TFEU recognise the Commission's long established power to enact block exemption regulations on the basis of an act of the Council.
- **"Common" market becomes "internal" market** – References to the common market are replaced by references to the internal market throughout the TFEU, including within the Competition Chapter. This change in names should not have any legal consequence.

### *c. Renaming of the EU Courts*

- **European Community Courts become European Union Courts (“EU Courts”)** – The Court of Justice of the European Communities is renamed the "Court of Justice of the European Union".
- **EU Courts are Court of Justice, General Court and Specialised Courts** – The Court of Justice of the European Union is now composed of the Court of Justice and the General Court (formerly named the Court of First Instance) as well as Specialised Courts attached to the General Court (currently, there is only one Specialised Court, i.e. the European Union Civil Service Tribunal).

## **2. Substantive Changes**

### *a. Status of competition law within the EU legal order*

- **"Undistorted competition" no longer an objective of the EU** – The EU Courts have repeatedly regarded Article 3(1)(g) EC as making the maintenance of undistorted competition a primary objective of the European Community. On many occasions, reliance on Article 3(1)(g) enabled the EU Courts to uphold a broad reading of the provisions on competition.

The Treaty of Lisbon does not mention the maintenance of undistorted competition within the objectives of the European Union. Instead, Protocol No. 27 provides 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". It remains to be seen whether such a "downgrading" of the goal of undistorted competition will have an impact on the interpretation of Articles 101 and following of the TFEU.

- **Competition rules necessary for the functioning of the internal market become officially exclusive competence of the EU** – Article 3(1)(b) TFEU consolidates the view that the European Union has exclusive competence to enact secondary legislation on anti-competitive practices jeopardising the functioning of the internal market. This provision obviously does not impact on the Member States' competence to adopt competition legislation regarding their national markets.

### *b. Entry into force of the Charter of Fundamental Rights*

- **Charter of Fundamental Rights becomes primary legislation** – The Charter of Fundamental Rights enters into force on the same date as the Treaty of Lisbon. Article 6(1) of the revised Treaty on the European Union (TEU) gives the EU Charter of Fundamental Rights the same legal value as the Treaties.
- **Possible changes in case-law on procedural rights** – It is difficult to predict whether the Charter of Fundamental Rights will lead the EU Courts to revise their case-law on the rights of defence in the course of competition proceedings. The text of the Charter is not groundbreaking in this respect. It should be noted, however, that Article 53 of the Charter can be interpreted as meaning that the EU Courts are not allowed to set the level of protection of fundamental rights at a lower level than that set by the European Court of Human Rights in its interpretation of the European Convention on Human Rights.

*c. Minor amendments to provisions on state aid*

- **Possible repeal of compatibility of aids granted to poorest regions of Germany** – Article 107(2)(c) TFEU provides that five years after the entry into force of the Lisbon Treaty, the Council may adopt a decision repealing the general principle of compatibility of state aids granted to the economy of certain areas of Germany affected by the division of Germany.
- **Aids granted to peripheral regions may be compatible with internal market** – Article 107(3)(a) TFEU provides that State aids granted to peripheral regions referred to in Article 349 TFEU (such as Guadeloupe, French Guyana, Martinique and the Canary Islands) may be compatible with the Treaty, in view of the structural, economic and social situation of such regions.

*d. Relaxation of locus standi criteria in annulment proceedings*

- **Regulatory acts are open to individual challenge** – The Treaty of Lisbon amends Article 230, 4<sup>th</sup> indent EC (now Article 263, 4<sup>th</sup> indent TFEU) and somewhat extends the jurisdiction of the Court as individuals may now institute annulment proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures (and not only against decisions and regulations which are of direct and individual concern to them).
- **Regulatory acts are not legislative acts** – Attention should be drawn to the fact that such amendment does not make *legislative* acts (i.e. regulations, directives or decisions adopted by legislative procedure, which means adopted with the participation of both the Council and the European Parliament) open to individual challenge. Article 263, 4<sup>th</sup> indent TFEU only concerns non-legislative acts, i.e. acts not adopted by legislative procedure.