

The coming into force of the Lisbon Treaty and its impact on competition law

On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the EC Treaty (the “Treaty of Lisbon”) came into effect. The most significant changes relate to the reform of the European Union (“EU”) institutions and legislative procedures, and the treaty will have a relatively minor impact on the application of competition law in Europe. Most of the substantive provisions of the EC Treaty remain unchanged, although there are some changes to:

- terminology
- the numbering of key provisions, and
- the treaty articles dealing with state aid.

The reference to competition has also been removed from the list of the EU’s objectives, although it is questionable whether this will have any real effect.

Background

The Treaty of Lisbon amends, but does not replace:

- The Treaty establishing the European Community (otherwise known as the EC Treaty or the Treaty of Rome); and
- The Treaty on European Union (otherwise known as the Maastricht Treaty).

The EC Treaty is amended to provide the organisational and functional details, as well as most of the substantive provisions of EU primary law. Most of these substantive provisions remain unchanged. The Treaty on European Union is amended so that it essentially sets out the objectives and principles of the EU, and provides for a Common Foreign and Security Policy.

Changes in terminology

The EU has a single legal personality and replaces and succeeds the European Community. All references to “Community” and “European Community” are therefore replaced by the word “Union”. The “EC Treaty” is now referred to as the Treaty on the Functioning of the European Union (the “TFEU”). Finally, the European Court of Justice (the “ECJ”) is now known as the Court of Justice of the European Union (the “CJEU”) and the Court of First Instance (the “CFI”) has been renamed the General Court.

Re-numbering of EC Treaty provisions

The numbering of the treaty articles in the TFEU has been amended. The key provisions are re-numbered as follows:

Old treaty provision(s)	New treaty provision(s)	Details of the provision(s)
Article 81	Article 101	Prohibits anti-competitive agreements
Article 82	Article 102	Prohibits abuse of dominance
Article 86	Article 106	Provides an exclusion from the above two provisions for undertakings engaged in services of general economic interest and for revenue-producing monopolies
Articles 87 and 88	Article 107 and 108 respectively	Prohibit national authorities from granting state aids that distort competition and trade in the EU
Article 226	Article 258	Allows for a challenge of a Member State’s failure to fulfil a Treaty obligation
Article 230	Article 263	Allows for review of the legality of acts of the EU institutions
Article 232	Article 265	Allows for review of an EU institution’s failure to act
Article 234	Article 267	Allows national courts to make a preliminary reference to the CJEU

Changes to state aid provisions

The numbering of the treaty articles in the TFEU has been amended. The key provisions are re-numbered as follows:

- Article 107(2)(c) TFEU (previously Article 87(2)(c) EC) now allows for the repeal, five years after entry into force of the Treaty of Lisbon, of the provision that allows aid to be granted to the economy of certain areas of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.
- Article 107(3)(a) TFEU (previously Article 87(3)(a) EC), which allows aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment, is broadened so as to allow aid to be granted to the regions referred to in Article 349, in view of their structural, economic and social situation. The regions referred to in Article 349 are Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands.
- Article 108(4) TFEU allows the European Commission (the “Commission”) to adopt regulations relating to the categories of state aid that the Council has determined may be exempted from notification.

Removal of the reference to competition from the list of the EU’s objectives

Article 3(1)(g) EC Treaty, which listed one of the EU’s objectives as the implementation of “a system ensuring that competition in the internal market is not distorted”, has been repealed by the Treaty of Lisbon. Some commentators have expressed concern that this will undermine the Commission’s ability to enforce competition law and that it will alter the European courts’ interpretation of the relevant treaty provisions relating to competition law.

However, a new legally-binding Protocol on Internal Market Competition states that “the internal market as set out in Article 2 of the Treaty on European Union includes a system ensuring that competition is not distorted.” Furthermore, the European Council’s Legal Service has issued an opinion stating that the removal of Article 3(1)(g) would not prevent the legislator from acting to ensure that competition in the internal market is not distorted. The real effect of this change may be limited therefore.

Mayer Brown has a wealth of experience representing clients in all types of competition law and regulatory proceedings. If you have any questions about the above news item, or would like to discuss any aspect of your own business conduct in confidence, please contact Gillian Sproul:

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