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I. INTRODUCTION

When the EU leaders agreed on the final version of the Lisbon Treaty, one particular amendment caused turmoil in the European competition law community. The Lisbon Treaty suppressed the 50-year-old commitment to "undistorted competition," embedded in the fundamental provisions of the Treaty establishing the European Community ('EC'). According to Article 3(1)(g) EC, the activities necessary to achieve the objectives of the Community included "a system ensuring that competition in the internal market is not distorted." Since the Lisbon Treaty came into force on December 1, 2009, there has been no Treaty provision proclaiming adherence to the principle of undistorted competition. The substantive content of Article 3(1)(g) EC is transferred to a Protocol (No 27) on the Internal Market and Competition, annexed to the Treaty on European Union ('TEU') and the Treaty on the Functioning of the European Union ('TFEU').[2]

The suppression of the reference to undistorted competition is generally attributed to the insistence of the French delegation. It finds its origins in the abandoned draft Treaty establishing a Constitution for Europe ('DTCE'), which, for the first time, expressed competition as an objective in its own right (rather than an activity). French President Sarkozy opposed, arguing that the belief in the merits of competition had become dogmatic. Following the negotiations leading to the Lisbon Treaty, he triumphantly declared: "We have obtained a major reorientation of the objectives of the Union. Competition is no longer an objective of the Union, or an end in itself, but a means to serve the internal market."[3]

According to Article 51 TEU, protocols form an integral part of the Treaties. The legally binding nature of the Protocol was therefore undisputed. Nonetheless, several commentators feared that the replacement of Article 3(1)(g) EC, in substance, by an obscure protocol would downgrade the constitutional status of the competition rules within the EU legal order.[4] They argued that this might inform the EU courts to depart from the pre-Lisbon case law, which

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

[3] In French: "Nous avons obtenu une reorientation majeure des objectifs de L'Union. La concurrence n'est plus un objectif de l'Union ou un fin en soi, mais un moyen au service du marché intérieur." *See* R. Barents, *Constitutional Horse Trading: Some Comments on the Protocol on the Internal Market and Competition*, VIEWS OF EUROPEAN LAW FROM THE MOUNTAIN, 126 (M. Bulterman, L. Hancher, A. McDonnell & H. Sevenster (eds.) (2009).

[4] *See for example* A. Riley, *The EU Reform Treaty and the Competition Protocol: undermining EC Competition Law*, ECLR 12 (2007); A. Weitbrecht, *From Freidburg to Chicago and Beyond—The First 50 Years of European Competition Law*, ECLR 2 (2007); B. J Drijber, *Het Hervormingsverdrag van de EU: stap vooruit of achteruit?*, Markt en Mededinging 5 (2007); F. Graupner, *The Battle over the Role of European Competition Policy: now you see it, now you don't*, COMPETITION L.J. 2 (2007).

frequently relied on Article 3(1)(g) EC as an interpretative guidance for the application of the Treaty competition rules.

Two years after the Lisbon Treaty became law it is now possible to review some of these gloomy forecasts in light of recent case law of the EU courts. This article focuses on the implications of the Lisbon Treaty for two long-standing fundamental principles developed in the case law: the constitutional status of the Treaty rules on competition (section 2) and the concern of EU competition law with harm to an effective competition structure (section 3).

II. THE INTERPRETATIVE VALUE OF THE PROTOCOL ON THE INTERNAL MARKET AND COMPETITION

The Treaty of Lisbon repealed Articles 2 EC and 3(1) EC. When the Treaty of Lisbon came into force on December 1, 2009, it subsumed the EC into the EU. Since the EC ceased to exist, it was necessary to define the objectives of the reformed EU. A single set of "common principles" is now applicable to both the TFEU and the TEU. The present Treaties provide for several means (Articles 3 to 6 TEU) to attain the objectives assigned to the EU in Article 3 TEU.

The list of objectives and activities in Articles 2 and 3 EC are partially integrated in the new catalogue of objectives. Contrary to the corresponding provision in the DTCE,[5] Article 3(3) TEU simply states: "The Union shall establish an internal market."[6] A system of ensuring undistorted competition is no longer mentioned. Instead, this principle now appears in 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.[7]

The reference to Article 352 TFEU aims to preserve the legislative powers of the Union in the area of competition policy.[8] When the Treaties have not provided the necessary powers, Article 352 TFEU (ex Article 308 EC) allows the Union to adopt appropriate measures "to attain the objectives set out in the Treaties" whenever action should prove necessary. This legal basis was used *inter alia* for the adoption of the EU Merger Regulation. The abolition of Article 3(1)(g) EC risked undermining the Union's competence in merger control. The Protocol resolves this problem.

In the past, the EU courts have relied on Article 3(1)(g) EC as interpretative guidance to support an expansive, teleological reading of the competition rules, expressly referring to the

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[5] According to Article I-3(2) DTCE, "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted."

[6] The change of nomenclature from "common market" to "internal market" (also in the competition provisions) does not signal substantive change. It simply harmonizes the language used in Article 26 TFEU. P. CRAIG, THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM, 318 (2010).

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

[8] *See* J. Drexl, *Competition Law as Part of the European Constitution,* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 2nd edition, 663 (A. von Bogdandy & J. Bast, eds.) (2010).

principle of undistorted competition as a "fundamental objective" or "chief objective" of the Community,[9] a "fundamental provision,"[10] or a "general principle of EU law."[11]

For example, Article 3(1)(g) EC, in conjunction with Article 3(4) TEU (ex Article 10 EC), was instrumental in establishing that, even though Articles 101 and 102 TFEU are directed exclusively at undertakings, they also prohibit Member States from taking measures inducing undertakings to infringe these provisions.[12]

Similarly, in the seminal *Continental Can* judgment, the Court of Justice of the European Union ('CJEU') linked Article 102 TFEU (then Article 86 EEC) with the principle of undistorted competition (then Article 3(f) EEC), to uphold the Commission's view that a merger strengthening an existing dominant position constituted an abuse. A literal interpretation of Article 102 TFEU did not support this view. The Court, however, emphasized the need to consider the spirit and general scheme of the article as well as the system and objectives of the Treaty.[13] Accordingly, the Court supported the Commission's attack of a merger on the basis of Article 102 TFEU—long before the adoption of the first Merger Control Regulation.

Several commentators questioned whether the EU courts, when confronted with novel questions of scope, would be able to maintain their broad purposive interpretation of the competition rules on the basis of a protocol.[14] Surely a protocol could not achieve the same interpretative status as the preamble and the first few Treaty articles?

Somewhat surprisingly, much of the debate has revolved around the question whether the Lisbon Treaty downgraded the protection of undistorted competition from an "objective" to an "activity." As pointed out by high-level officials from the Commission, only in the failed DTCE did the principle of undistorted competition appear as an objective. Article 3(1)(g) EC, on the contrary, clearly listed competition as an activity, i.e. a necessary means to achieve the objectives set out in Article 2 EC.[15]

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[9] *See for example* ECJ, C-289/04 P, Showa Denko KK v Commission, 29 June 2006, ECR, 2006, p. I-5859, § 55; ECJ, C-308/04 P, SGL Carbon v Commission, 29 June 2006, ECR, 2006, p. I-5977, § 31; CFI, T-69/04, Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v Commission, 8 October 2008, ECR, 2008, p. II-2567, § 207; CFI, T-25/04, González y Díez SA v Commission, 12 September 2007, ECR, 2007, p. II-3121, § 55; CFI, T-83/91, Tetra Pak International SA v Commission, 6 October 1994, ECR, 1994, p. II-755, § 114.

[10] *See for example* CFI, T-217/03 and T-245/03, FNCBV and others v Commission, 13 December 2006, ECR, 2006, p. II-4987, § 97; ECJ, C-453/99, Courage Limited v. Crehan, 20 September 2001, ECR, 2001, p. I-6297, § 20; ECJ, C-126/97, Eco Swiss China Time Ltd v Benetton International NV, 1 June 1999, ECR, 1999, p. I-3055, § 36.

[11] *See for example* ECJ, 240/83, Procureur de la République v. ADBHU, 7 February 1985, ECR, 1985, p. 531, § 9.

[12] *See* ECJ, C-198/01, CIF v Autorità Garante della Concorrenza e del Mercato Consorzio, 9 September 2003, ECR, 2003, p. I-8055; ECJ, C-13/77, SA G.B.-Inno-B.M. v ATAB, 16 November 1977, ECR, 1977, p. 2115.

[13] *See* ECJ, C-6/72, Europemballage Corporation and Continental Can Company Inc. v Commission, 21 February 1973, ECR, 1973, p. 215, § 22.

[14] *See* Barents (2009), *supra* note 3; Riley (2007), *supra* note 4; N. Petit & N. Neyrinck, *A Review of the Competition Law Implications of the Treaty on the Functioning of the European Union*, CPI ANTITRUST J., (January 2010 (2)).

[15] *See* N. Kroes, *A renewed commitment to competition policy in Europe*, CONCURRENCES, No I-2008; M. Petite, *Quel sera l'impact du nouveau traité sur le droit de la concurrence? Regards juridiques*, CONCURRENCES, No I-2008. The position taken by the Commission was not new. *See for example* A. Schaub, *Working paper on competition policy objectives*, EUROPEAN COMPETITION LAW ANNUAL 1997: OBJECTIVES OF COMPETITION POLICY, 122-124, 128 (C.-D. Ehlermann & L. L. Laudati, eds.) (1998).

In the author's view, the observation that the EU courts have described the principle of undistorted competition as a fundamental objective does not invalidate this position. While obviously creating some ambiguity, the case law does not suggest that competition ever constituted an objective in its own right. The references to the principle of undistorted competition (as an objective or general principle) are meant to establish that the provisions on competition, like the provisions on free movement, are fundamental constitutional provisions of the EU legal order. The key question is, therefore, whether the excise of that principle from the front of the Treaties affects the constitutional status of Treaty rules on competition.

Two recent CJEU judgments shed light on the answer to this question. In *Konkurrensverket v TeliaSonera Sverige AB*, the Court for the first time referred to the new Protocol on the Internal Market and Competition. The Court observed that "Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon (reference omitted), is to include a system ensuring that competition is not distorted."[16] By reading the substantive content of the Protocol, together with the objective of establishing an internal market, the CJEU made clear that the Protocol forms a constitutive part of Article 3(3) TEU.[17]

In *Commission v Italian Republic*, the Court went one step further. The case is based on an action for failure to fulfill obligations brought by the Commission against Italy. In 1999, the Commission adopted a decision finding that part of the aid granted by Italy to promote employment violated the State aid rules. The Commission requested the Italian state to recover the illegally awarded sums from those who received them. In 2004, the CJEU declared that Italy, by not adopting within the prescribed time-limit all measures necessary to recover the aid, failed to fulfill its obligations under that decision.[18] In the present judgment, the Court confirmed that Italy, by not fully recovering unlawful State aid from its beneficiaries, failed to comply with its earlier judgment. In determining the amount of the penalty payment proportionate to the infringement, the Court emphasized the vital nature of the Treaty provisions on competition:

> As to the seriousness of the infringement, the vital nature of the Treaty rules on competition must be recalled, in particular those on State aid, which are the expression of one of the essential tasks with which the European Union is entrusted. At the time of the Court's assessment of the appropriateness and the amount of the present penalty payment, that vital nature is apparent from Article 3(3) TEU, namely the establishment of an internal market, and from Protocol No 27 on the internal market and competition, which forms an integral part of the Treaties in accordance with Article 51 TEU, and states that the internal market includes a system ensuring that competition is not distorted.[19]

The quoted paragraph is significant for two reasons. First, the CJEU again considered the Protocol to be an essential constituent of Article 3(3) TEU. The choice to move the principle of undistorted competition to a Protocol annexed to the Treaties does not seem to have affected its legal value in informing the application of the competition rules. Second, the Court expressly

[16] *See* CJEU, C-52/09, Konkurrensverket v TeliaSonera Sverige AB, 17 February 2011, not yet reported, § 20.

[17] *See also* Opinion of Advocate General Kokott, C-109/10 P, Solvay SA v Commission, 14 April 2011, not yet reported, note 115 (stressing that the Court's judgment confirmed that the same legal position of the principle of undistorted competition, expressed in Article 3(1)(g) EC, can now be inferred from the Protocol).

[18] *See* ECJ, C-99/02, Commission v Italian Republic, 1 April 2004, ECR, 2004, ECR, p. I-3353.

[19] *See* CJEU, C-496/06, Commission v Italian Republic, 17 November 2011, not yet reported, § 60.

relied on its combined reading of Article 3(3) TEU and the Protocol to emphasize the gravity of Italy's infringement. As such, it reaffirmed the status of Treaty rules on competition as fundamental provisions.

This allays the fear that the Protocol would not have the same interpretative value as the appealed Article 3(1)(g) EC. In the post-Lisbon world, the principle of undistorted competition remains a fundamental principle of the economic constitutional law of the EU.

III. DAMAGE TO THE STRUCTURE OF THE MARKET VS. PROOF OF CONSUMER HARM

The European Commission's recent attempts to redefine the objectives of EU competition policy signals how an exclusive efficiency approach, which has come to dominate modern U.S. antitrust law thinking, is gradually taking hold in Europe. In recent years, the Commission has advocated the view that EU competition policy should focus on enhancing economic efficiency, which it believes will promote consumer welfare. [20] Numerous inconsistencies between this new conception of the objectives of EU competition policy—which closely relates to the advent of a "more economic approach" but also affects the substantive interpretation of the competition rules—and the normative underpinnings of the EU's constitutional order have so far undermined the persuasiveness of these policy statements.[21]

Since the late 1990s, the Commission has undertaken notable efforts to move towards a more economic, effects-based approach in the area of EU merger control and Article 101 TFEU. In comparison, the modernization attempts in relation to Article 102 TFEU have been less successful. The implementation of an effects-based approach that looks directly to consumer welfare effects does not sit well with the formalistic case law of the EU courts. The judicial interpretation of Article 102 TFEU prioritizes the protection of the structure of competition as such. It does not focus on the analysis of competitive effects in terms of output and price, as U.S. antitrust law tends to do.[22]

The principle of undistorted competition, previously contained in Article 3(1)(g) EC, played a central role in the case law according to which EU competition law protects consumers indirectly by protecting the competitive structure. According to some commentators, the excise of Article 3(1)(g) EC might create a shift in favor of an effects-based adjustment of EU competition law doctrine.[23] This section examines, in light of recent case law, whether the removal of that provision implies a normative case for a more economic approach to Article 102 TFEU.

In its jurisprudence in the 1970s and early 1980s, the CJEU relied on Article 3(1)(g) EC (then Article 3(f) EEC) to establish that the mere proof of damaging an effective "competition

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[20] *See for example* P. Lowe, *Consumer Welfare and Efficiency—New Guiding Principles of Competition Policy?*, address given at 13th International Conference on Competition, Munich, 27 March 2007; N. Kroes, *European Competition Policy—Delivering Better Markets and Better Choices*, address given at European Consumer and Competition Day, London, 15 September 2005; Commission, *Guidelines on the application of Article 81(3) of the EC Treaty*, O.J., 27 April 2004, C 101/97, §13.

[21] *See* B. Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency considerations within Article 101 TFEU*, KLUWER L. INT'L (forthcoming 2012).

[22] *See* P. Marsden & L. Gormsen, *Guidance on abuse in Europe: The continued concern for rivalry and a competitive structure*, 55 ANTITRUST BULL., 875 (2010).

[23] *See* Drexl (2010), *supra* note 8; Barents (2009), *supra* note 3; Riley (2007), *supra* note 4.

structure" amounts to an abuse of dominance.[24] Already in *Continental Can*, the first abuse of dominance case to reach the CJEU, the Court clarified that Article 102 TFEU (then Article 86 EEC): "is not only aimed at practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(f) of the Treaty."[25]

This guiding principle was originally established to confirm that Article 102 TFEU not only prohibited exploitative, but also exclusionary, abuses. Today, however, it stands for the message that the EU competition rules protect the competitive process as a value in itself.[26] This reflects the underlying assumption that the protection of consumer interests is mediated through the protection of an effective competitive structure. While frequently being blamed for distorting EU competition law with outdated economic insights, this line of thought flows from the normative structure of the EU competition rules.[27]

In several more recent judgments, the CJEU continued to follow its earlier case law. In its *British Airways* judgment of 2007, the CJEU dismissed the plaintiff's argument that the Commission and the General Court had failed to establish that its bonus schemes caused harm to consumers. The Court confirmed, relying on *Continental Can*, that Article 102 TFEU covers not only practices likely to cause immediate damage to consumers, but also those that cause damage by undermining an effective structure of competition.[28]

In *Sot. Lelos kai Sia EE*, the CJEU equally rejected a consumer welfare criterion and confirmed the value of protecting competition as such.[29] This line of thought is also evident in two Article 101 TFEU judgments delivered in 2009. In *GlaxoSmithKline*, the CJEU firmly rejected the General Court's novel reasoning that, in order to find that an agreement has an anticompetitive object, it is necessary to demonstrate that the agreement has a direct effect on consumer prices. The CJEU noted that neither the wording of Article 101 TFEU nor the case law lends support to such an interpretation.[30] In *T-mobile Netherlands*, the CJEU reiterated that Article 101 TFEU, "like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[31]

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[24] *See for example* ECJ, 85/76, Hoffmann-La Roche v Commission, 13 February 1979, ECR, 1979, p. 461, § 125; ECJ, 322/81, Nederlandsche Banden Industrie Michelin v Commission, 9 November 1983, ECR, 1983, p. 3461, § 29-30; ECJ, 27/76, United Brands Company and United Brands Continentaal BV v Commission, 14 February 1978, ECR, 1978, p. 207, § 63, 183.

[25] *See* ECJ, C-6/72, Europemballage Corporation and Continental Can Company Inc. v Commission, 21 February 1973, ECR, 1973, p. 215, § 26.

[26] *See* H. Schweitzer, *Parallels and Differences in the Attitudes towards Single-Firm Conduct: What are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC*, EUI Working Paper Law No. 2007/32, at 21 (2007).

[27] *Id. See also* T. Eilmansberger, *How to distinguish good from bad competition under Article 82 EC: in search of clearer and more coherent standards for anti-competitive abuses*, CMLR 42, at 134-135 (2005).

[28] *See* ECJ, C-95/04 P, British Airways plc v Commission, 15 March 2007, ECR, p. I-2331, § 106.

[29] *See* ECJ, C-468/06 to C-478/06, Sot. Lelos kai Sia EE and others v GlaxoSmithKline AEVE, 16 September 2008, ECR, 2008, p. I-7139, § 68.

[30] *See* ECJ, C-501/6 P, C-513/06 P, C-515/06 P, and C-519/06 P, GlaxoSmithKline Services Unlimited v Commission, 6 October 2009, ECR, 2009, p. I-9291, § 63.

[31] *See* ECJ, Case C-8/08, T-mobile Netherlands and others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit, 4 June 2009, ECR, 2009, p. I-4529, § 38-39.

The fear that "the goals promoted by the economic approach, namely consumer welfare and efficiency, might enter the European economic constitution more easily" following the removal of Article 3(1)(g) EC,[32] appears unjustified. It was already observed that the Protocol on the Internal Market and Competition has equivalent interpretative value and thus, in principle, would not inform a fundamental change in the EU courts' interpretation of Article 102 TFEU.

Recent case law confirms this. In its *Konkurrensverket v TeliaSonera Sverige AB* judgment of 2011, the CJEU continuously recognized that Article 102 TFEU must be interpreted as referring not only to practices that may cause damage to consumers directly, but also to those that are detrimental to them through their impact on competition.[33] Similarly, in *Visa Europe and Visa International Service*, the General Court recently repeated that, in accordance with the settled case law, the competition rules of the Treaty are "designed to protect not only the interests of competitors or consumers but also to protect the structure of the market and thus competition as such."[34]

IV. CONCLUSION

This article revisited two fundamental principles of EU competition law that have been flagged by commentators as potentially in peril following the entry into force of the Lisbon Treaty. Recent case law of the EU courts has allayed those worries. First, the CJEU has made clear that the removal of the principle of undistorted competition from the front of the Treaties does not affect the constitutional status of the Treaty rules on competition. The Protocol on the Internal Market is seen as a constitutive part of Article 3(3) TEU and appears to have the same interpretative value as the appealed Article 3(1)(g) EC. Second, the prediction that the excise of Article 3(1)(g) EC might facilitate an efficiency-based reconstitution of competition law doctrine, particularly in the area of Article 102 TFEU, has not become true. While not immune to consumer welfare considerations, the EU courts have recently reiterated the pre-Lisbon case law which, based on the principle of undistorted competition in the internal market, established that a restraint of competition requires no more than harm to the competitive structure.

This obviously does not answer all questions about the potential implications of the Lisbon Treaty for EU competition law. For instance, the expansion of social values and interests in the new catalogue of objectives (Article 3 TEU) and the conferral of legal value to the EU Charter of Fundamental Rights has been interpreted as an external threat to the application of *inter alia* the competition rules. It remains to be seen whether these changes to primary EU law will inform the EU courts to find a new balance between social and economic objectives in the endeavor of EU integration.[35]

What is clear, however, is that the transfer of the principle of undistorted competition to the Protocol has no immediate bearing on the jurisprudence of the EU courts. The French *coup* is

[32] *See* Drexl (2010), *supra* note 8, at 697.

[33] *See* CJEU, C-52/09, Konkurrensverket v TeliaSonera Sverige AB, 2 September 2011, not yet reported, § 24.

[34] *See* GC, T-461/07, Visa Europe and Visa International Service v Commission, 14 April 2011, not yet reported, § 126.

[35] On this issue, *see for example* D. Schiek, *Re-embedding economic and social constitutionalism: Normative perspectives for the EU*, EUROPEAN ECONOMIC AND SOCIAL CONSTITUTIONALISM AFTER THE TREATY OF LISBON (D. Schiek, U. Liebert, & H. Schneider, eds.) (2011); F. Costamanga, *The Internal Market and the Welfare State after the Lisbon Treaty*, OSE research paper No 4 (2011); P. Syrpis, *The Treaty of Lisbon: Much Ado ... But About What?*, 3 INDUS. L.J. (2008).

a momentous reminder of the political opposition competition policy can attract.[36] Yet, so far, the removal of Article 3(1)(g) EC seems to be no more than symbolic.

[36] The long-standing political opposition against the adoption of EU merger control makes an interesting analogy. The French minister of industry and telecommunications at that time demanded that the Commissioner for competition, Sir Leon Brittan, resign and that the regulation would be modified to give greater importance to national industrial policy considerations.