



TREATY OF LISBON AND ITS IMPACTS ON COMPETITION LAW

By Hemangini Shekhawat
From Manipal University, Jaipur

ABSTRACT

The paper has chosen an International Aspect rather than a domestic one. It refers to how a treaty has impacted Economy and Law, here specifically Competition Law. Paper focuses on the treaty's journey and reasons for passing it along with, major objectives it announces in Introductory Part. Thereafter, the paper speaks of how the treaty has impacted Economy and Competition Law taking European Parliament and competence capacities of High Representative of Foreign Affairs and modifications and analysis by EC Legal Services. Paper focuses on analysis rather than bare text reading to make readers understand of various aspects in own viewpoints. Judicial Review focuses on how treaty has modified Art230(4) of EC into Art263(4) of TFEU impacting the bridges faces in regards to Locus Standi for private users. Landmark Competition rulings have been classified like Microsoft for anti competitive agreements and its significance in Competition Law. Competition Rulings have also focussed on how judgments have been passed in violation of already established doctrines(mentioned in Verizon Communication case)and also charging higher prices is not violation of Competition Law(ruled in Pacific Bell Case). Critical gaps have been analysed in regards to concept of undertakings & social considerations and exemptions, but how those impacts Insurance Companies having both features but not debarring solidarity,hence no exemptions in

regards to social security which should have been there in Competition Law.

INTRODUCTION

2 Treaties which drafted the fundamental essentials of EU are has been modified by Treaty of Lisbon. Treaty was executed in Jeronimos Monastery of Lisbon, Portugal and that's where it derives its name from. Treaty reviews Treaty on European Union (Maastricht Treaty) and Treaty on the functioning of European Union (Treaty of Rome) along with few tagged armistices of treaty establishing European Atomic Energy Community (EURATOM). The treaty did modifications to European law which gets passed which lowered down the state's wide powers of Veto capacity but it did not scrapped out the same. History of Lisbon treaty traces to non fruitful results of above 2 mentioned constitutional treaties¹. Hence, European Council (EC) of 21-23 June, 2007 adopted a comprehensive ratification for a consequent inter jurisdictional colloquium under Portuguese Presidency and same has been endorsed by all member states. Treaty does not enunciates any Union symbols, for eg, National Anthem, flag or any National song. Charter of FR entrusts all citizens with civil, political, economical and social rights. Treaty has considerable 7 articles with tagged along conventions and communiqués, out of which Article 1&2 are utmost crucial. Article 1 of Treaty contains modifications to TEU. Modified TEU has substantial statutes ruling European Unions as well as modified presentations regarding CFSP& enhanced cooperation . Article 2 revises the EC Treaty, which is nominated on the functioning of EU, as EU is legal inheritor of EC. There are 27 member states, out of which UK, Denmark,

¹ www.lexology.com



Ireland and Poland has exercised the option of opt out.

The specific objective of treaty is to consummate the benchmarks of Treaty of Amsterdam & Treaty of Nice with an aim to amplify the proficiency & parliamentary aura of the Union to enhance the intelligibility of the same. It brings more strong standards in EU with more vigorous potential competency for the European Parliament. New text converses the considerable attainments, but is no longer is a serving Constitutional Treaty.

It disentangles in which the EU works by ameliorating the fine institutional structure of Union and the manner in which resolutions are achieved. Under Art 3 TEU it has following objectives-

- Encouragement of tranquillity and wellness of Union's Nationals.
- Freedom, security, justice without internal constraints.
- Imperishable evolution based on economic occurrence and communal fairness.
- Free single market.
- Gregarious traded economy extremely liberal and aiming at exhaustive employment and overall progress.

Treaty conveys 3 essential keys of democratic equality, representative democracy, and participation democracy, whereas participation democracy rules that even Union's citizens can also participate. The revised TEU does to be certainly operating to some extent as the warehouse of constitutional key elements of EU which is generally a fact in regards to Title 1(Common

Pro), Title 2(Democratic principles), Title 3 (Provision on Institution). The articles within these titles unquestionably redress matters of constitutional nature, For eg, emplacement of law making capacity within EU and formation of new enlarged title role of President of EUC.

CHANGES TO COMPETITION LAW & ECONOMIC SECTOR

Under changes to Competition Law, safeguarding trade, Competition has become a major aim for administrations in Western Europe and Competition Law has emerged as a integral and central wedge of economic and legal side. The C.L of European Union has troicked a key in success of European Integration during last half a century. In yester years, National Competition Laws have also become increasingly crucial, often creating rigidity between new law and European Law directives². Yet, despite its cruciality, images of European experiences with C.L often remains fuzzy and falsified. The forerunner of Lisbon had listed Competition Policy as EU's main goal. Under compulsion from French President Mr Sarkozy, this goal had to be repealed and instead be placed in Protocol No 27 on the Internal Market and Competition which speaks that "internal market set out in Article 3(1)(g) has a technique assuring that competition is not pervert and misrepresented". Yet, a brand new constitutionally indissoluble entity speaks that internal market in Art2 of Treaty on EU incorporates a structure to assure that competition isn't pervert. However impact of this modification may be limited as EC Legal Services has ensured repeal of Art3(1)(g) would not avert a legislator to assume that competition isn't pervert. Under present EC

² <https://competitionpolicyinternational.com>



treaty, Competition is also not one of the community goals and therefore amendments should have no real crashes on application of competition policy. Author doesn't agree with this and has a query as to whether EC Courts will contemplate the associatory connections between protocols and competition law provision in the same manner as they associate the connections between those and the widespread EC treaty provision on goals and strategies.

Under changes to Economic Sector, treaty introduces some significant amendments for Common Commercial Policies (CCP's) and the determination related procedures. CCP is newly added in an expanse with all the external manoeuvres of EU, with foreign and security blueprints, international strategies, profitable expansion aid, economic, financial and technical collaboration with third countries. The essential arenas of CCP have been enlarged to also take foreign direct investments, services and trade concerned aspects of IPR into its own ambit. The amendments impact the role of European Parliament and also operations of EC and competency potential of High Representative of foreign affairs & security strategies and also the European External Action Service³. Together with these amending modifications, there shall also be revisions within plans of action within EU. Changes brought by Lisbon Treaty will impact not only the scope of power of EU Member States on the common mercantile policies, but also impact place of EU in context of International Trading. Article 107(3)(a) of TFEU formerly under Article 87(3)(a) of EC which assists in encouraging the economic maturing and growth of regions where benchmarks of

livelihood are lunatically low has been expanded. The article now includes expansion in economic & social views. Under Art 349 includes territories of Guadeloupe, French Guiana, Martinique, Reunion, Saint Barthelemy, Saint Martin, Azores Madeira & Canary Islands. Article 108(4) of TFEU permits EC to adopt directives in order to encourage State Assistance for beneficiary to sub standard places that may have been exempted from Council.

JUDICIAL REVIEW OF EU ACTS AND POSITION OF COMPETITION LAW AFTER TREATY OF LISBON

Treaty on Functioning of European Union (TFEU) speaks for 2 different modes judicial power deputed to ensure legal management of power by EU Institutions, Offices, bodies. The important provisions are Art 263 in regards to direct measures for repeal and Art 267 in regards to indirect review along the preliminary recommendation procedures from national courts. The court of Justice had stringently transliterated Locus Standi prerequisites set out in former treaties for private suers to provoke the legality of EU Measures in front of EU Courts notwithstanding the denunciation in legal literature over last half a century. Under Article 230(4) EC as they were individually impacted by unlawful EU measures, they could directly plead in front of General Court for repeal of proceedings. Art230(4) reads as,

“Any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which although in form of a regulation/decision addressed to another person, is of direct and individual concerns to former”.

³ www.mondaq.com



Despite, the condemnation, Court of Justice rubbished to amend its established case law and shifted the thrust on member states for treaty amendment. Hence, Treaty of Lisbon modified Art230(4) of EC to now Art 263(4) TFEU as,

“Not entailing any executing measures , any natural/legal persons set in motion the proceedings against an act impacting directly to such person, and also against regulatory act”

The first branch of Art263(4) TFEU is same to Art 230(4) of EC, hence no words for same⁴. Second branch of Art263(4) TFEU is distinguished from second branch of Art230(4) EC, as it has used the word “act” instead of “decision” and deleted “although in the form of a regulation or decision addressed to another person”. But these amendments simply do consider of the case law of Court of Justice. Now the most crucial modification introduced by Treaty of Lisbon is in the third branch which says probability for natural or legal persons to acquire standing to plead an action without meeting stipulations of “individual concern” provided that, firstly they still meet the requisites of direct concern and there dare is secondly set on account against a regulatory act which therefore does not requires. This treaty has a capacity to alleviate the gap in regards to locus standi for private suers, depending on agreeable exposition by Judiciary. Therefore main attention of this analysis is on the recent order (Inuit Tapirut Kanatami) and judgement of (Microban) of general court which ruled for the first time on exposition of Art263(4) TFEU, since such acts cannot be taken as regulatory acts, the requisition of individual concern, as traditionally elucidated, continues in full

application to such cases. On the other hand, Microban Judgment affirms that the modifications to “locus stand rules” do make it a cakewalk for private suers to provoke non legislature acts directly in some cases.

COMPETITION CASE RULINGS

The Court of Justice is empowered Judicial body to make universal elucidations & applications of Competition Law across EU. European Competition Law within EU members by encouraging regulation of anti competitive assertions by companies to assure prevention of Cartels & Monopolies which would manufacture dominance and abuse of same. Competition Law also known as Anti-trust Law can be executed by public authorities along with individuals. Public authorities directs proceedings against a party which it has a suspicion has violated Competition Law. Abuse will lead to anti competitive agreements and fines alongwith. Nonetheless, execution of competition remains rare but execution of EU&Member States. C.L has been largely been left up with a great wind to competition authorities. In specific, there have been not yet a single case where Member State courts has awarded for abuse of EU Competition laws. The main excuse for non enforcement of C.L in Europe is regulated by Member States creating legal uncertainties .

✚ Microsoft Corp Vs Commission⁵

A case bought by EU against Microsoft for violation of its dominant position under C.L. Novell argued that Microsoft was pushing out its competitors through Anti Competitive agreements because of non disclosure of some interfaces to Windows NT.

Judgment- EU concluded its decision in 2003 and directed the company to offer version of

⁴ <https://openaccess.city.ac.uk>

⁵ T-201/04



Windows without Media Player and requisites necessary for competing networking software to link fully with Windows Desktops & Servers. EU penalized the Microsoft with Pounds 381 Million, (highest ever in its operational conduct) having 120 days to impart the server requisites & 90 days to impart a version of Windows w/o Windows Media Player. In 2004, Neelie Kroes was designated the European Commissioner for Competition who stated benchmarks and open origin are better to anything proprietary in context of fines brought to Microsoft has they had abused their dominant position.

Significance- The case shacked brightness on the distinction between US Anti Trust Laws & EU Competition Law, when Commission erroneously decided that the behaviour by firm is abusive, but the fact is its not the commerce of firm, and the consumer drops out by missing out in the products & service. In this scenario, law is all inclusive known as "False Positive" concerning US Anti Trust laws. But on the other hand, Commission also edges that conduct by firm is not violative, but as a matter of fact, firm is left to its own devices & its anti competitive application which causes losses.

✚ **Verizon Communications Inc v Law Offices of Curtis Vs Trinko, LLP**⁶

Decided by US Supreme Court ruling Telecommunications Act, 1996 had not amended the framework of Sherman Act maintaining assertions that content of Anti trust Benchmarks without drafting latest declarations that goes beyond those benchmarks, hence ruling in contradiction of doctrine established in Aspen Skiing Co Vs Aspen Highlands Skiing Corp.

⁶ 540 US.398(2004)

⁷ 555 U.S.438 (2009)

✚ **Pacific Bell Telephone Co. Vs Linkline Communications**⁷

US Court ruled that there is no duty to deal at retail price level along with no predatory pricing, firm is not bound to mark both of these services in a mode that safeguards rival's profit margin and hence SC did not held Bell's abuse of Sherman act when it charged other interests prices tagged for higher price.

✚ **Re Indep Service Organisation Anti Trust Litigation**⁸

Applying essence of Kodak's Case without Aspen Co Case, Court could not conclude any Anti Trust Liability for denial of license. IP preserved by patents & copyrights because IP Right Holders enjoying immunity to exclusion in interest of risk anti competitive harm.

CRITICAL GAPS IN REGARDS TO COMPETITION LAW

Lisbon Treaty gets a major hit with all the existing members losing their Veto Power in order to accept majority. LT has reduced the scope of Veto along with State's potentiality. Secondly it browbeats all states to adapt European Euro as official currency, getting values of other currencies down which this nowhere sustains the objectives of the treaty. Also, UK is compelled to adapt EU laws, but many times House of Common and House of Lords have enacted laws, which will now create a ruckus for adaption and implementation of same. Under rules of EU Custom, UK will not be able to set its own economic limits.

In regards to Competition Law, the concept of undertakings and social considerations, CL only bids to activities of undertakings and

⁸ 203F.3d, 1322 (Fed.Cir. 2000)



not to the conduct of entities. Therefore, entirely communal based activities are not in the web of C.L. A supreme impact is assumed if public sectors hold crucial part of undertakings subscribed block. Hence, for C.L to be bid in this case the nature of economic activity is not relevant. Under Art106(1) of TFEU, the activities done by state undertakings has no point, but the presence of economical activity has legal potentialities of acting organisation is not relevant. Hence, accounting of social sector can also account up to for same. The decisive query is if rule making capacity connects to economic activities as a matter of fact, any kind of undertaking may be exercised by private sector on the defence to deny the exercise of official authority and to proclaim the applicability of Competition Law. An exemption from C.L is social security, health insurance and old age pensions. Social Securities do not perform an economic activity, for eg under Insurance Benefaction of money also depend upon salaries of insured person and it must be disciplined to the control of state. If so is the matter then Art 101&102 of TFEU are not applicable and economic scheme as conflicted to a solidarity based scheme, might be distinguished by optional membership, the principle of subsidization, its profit making characteristic or by its supplemental character accounting to a basic scheme. If insurance exhibits elements of both kinds, then the liberty to do competition with other social securities does not debar solidarity based feature. Therefore, there is no general immunity from Competition Law for social security sector which should have been there.

The main goal of treaty was to avert it from becoming too clumsy by including the EU Charter within the lap of treaty, this is contradicted by the point that it is designated the same legal worth as treaties and any political or legal consultee will compulsory have it to the hand in the light of legality of EU Laws/National Laws that falls within the ambit of EU laws, and hence treaty distinguishes in certain ways from EU Constitution. If treaty is sanctioned the Charter will have a major effect on Judicial Review for the EU legal orders. Even newly constituted TEU&TFEU are said not to have constitutional temperament for reasons like, 'Constitution' word not applied, EU Minister of Foreign Affairs would be termed as "Higher representative of Union" and words like "law or legal framework" be repealed. Treaty nowhere speaks of dominion of EU Law pertaining to EU Constitution, except a small mention in Declaration 17. Treaty is less clearer in ascertained aspects and the foundation is less perceptible then the Constitutional Treaty, however ratified, will give out elemental base for EU to move forward in coming years.

CONCLUSION-AUTHOR'S VIEW