The Treaty of Lisbon has entered into force. An important question for European competition lawyers is whether, and possibly to what extent, this major institutional development may have an impact on their practice.

Here is one element they should pay attention to in that respect.

During the intergovernmental conference, the French President Nicolas Sarkozy insisted that the reference to free and undistorted competition should be removed from the list of objectives to be pursued by the European institutions.

The request was accepted—in part at least. The reference in question was removed. But another one was made in an annex to the Treaty. To be precise, under the heading 'Internal market and competition', a Protocol now provides that the internal market includes a system ensuring that competition is not distorted.

But what are the implications of that Protocol for European competition law practice?

Link with the internal market

A link between competition and the internal market has long existed in Europe. One might even say that such a link constitutes a specific feature of the European system as compared to other competition regimes such as, say, that of the USA.

For instance, one remembers United Brands Company, where a firm was found to abuse a dominant position for hindering parallel imports or exports of bananas between national territories (United Brands Company [1976] OJ L95/1; Case 27/76 [1978] ECR207).

Or consider Consten & Grundig, where the Commission and the Court set aside a system protecting distributors from parallel commerce carried out by intermediaries and/or final consumers (Grundig-Consten [1964] L161/2545; Case 56 and 58/64 [1966] 299).

More recently the liberalisation process which was brought to bear across Europe and affected several economic sectors was officially justified on account of the internal market, which had hitherto been hindered by national monopolies.

The road to efficiency

However, these references to the internal market have progressively diminished in importance. In recent jurisprudence, economic integration has become superseded, in the application of the rules of competition, by another value: that of the enhancement of efficiency and, more generally, the improvement of Europe’s economic performance.

That progressive modification has given rise to certain interesting decisions.

A good example is Glaxo II where, for the first time, the European Court of Justice allowed, in practice, a dominant firm to restrict parallel commerce, where this was necessary to safeguard profits. The Court remained careful in its wording and the case was limited to the sector concerned—the pharmaceutical industry. But despite these precautions, the change remains a fact. For the first time, the Court allowed parallel commerce to be restricted in the name of efficiency (Cases 468 to 478/06 Glaxo II [2008], not yet reported).

Back to square one?

The initiative of the French President, and the subsequent changes in the Treaty, make for interesting analysis.

For some, these changes will have no consequence. Articles 101 seqq can all be applied on a stand-alone basis. The old objective clause in article 3 which mentions undistorted competition was never really pivotal to the respective ECJ judgments. For others, the changes may, on the contrary, serve as a reminder, from the Heads of State and Government and addressed to the European Commission and the European Courts, that
the primary value to be defended in the application of the rules of competition is economic integration.

Which interpretation will prevail? It will be for the Commission and the Courts to decide. Practitioners will play an important role in that process. The quality of their arguments will determine, to a substantial extent, the future direction of the jurisprudence . . .

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