Extra-territorial Jurisdiction of CCI

Introduction

The year 1991 was the “big bang” year for India as it ushered a wave of liberalisation and globalisation that swept the almost in tatters Indian economy. Although it was a change that was hailed by one and all, it also brought a big threat in the form of competition from foreign entities in India. The then existing Monopolistic and Restrictive Trade Practices (“MRTP”) Act, 1969 was found wanting and inadequate at several instances and was finally repealed by the Competition Act, (“Act”), 2002. The Act sought to prevent any appreciable adverse effect on competition (“AAEC”) by regulating anti-competitive agreements and combinations. Competition Commission of India (“CCI”) established under the Act started looking into violations of the Act, a task based on its own knowledge or information or complaints by individuals and references made by the government, state or central government or statutory authorities. Like most of the other prevailing laws in India, the Act also extends to the whole of India. However, Section 32 of the Act gives CCI powers to inquire and pass adequate orders for arrangements outside India having an AAEC in India.

This bulletin provides a limited overview of the concept of extra-territorial jurisdiction generally and, then, extra-territorial jurisdiction under the MRTP Act. Finally, it attempts to discuss the concept under Section 32 of the Act.

1. Extra-territorial jurisdiction: the concept

The concept of extra-territorial jurisdiction is an extension as well as a contradiction to the concept of sovereignty. Sovereignty, a nation’s exclusive right to govern itself, has its roots in public international law but has been internalised to the extent that it has become a cornerstone for the constitutions of various nations around the world. India, in this case, is not different and has sovereignty mentioned as one of its characteristics in the first line of its Preamble to the mammoth Constitution. On the other hand, the concept of extra-territoriality finds its roots under Article 245(2) of the Constitution which reads as “(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation.” Thus, a combined reading of the concept of sovereignty and Article 245(2) leads to an inference that India not only has the sole right to govern itself by legislating, enacting and executing various laws and regulations but it also has a right to frame laws that gives it unbridled powers to govern beyond its territory. However, this inference is unacceptable as it is in direct contravention to the concept of sovereignty. Can really the powers of a sovereign state or one of its government body be unbridled?

For sovereignty and extra-territorial operation of laws to co-exist, a balance between the two should be achieved. In the case of GVK Industries Ltd. v. Income Tax Officer, it was held by the Supreme Court of India (“SC”) that only those extra-territorial laws are valid that have a nexus with India. In other words only those extra-territorial laws that seek to

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1 With the exception of the state of Jammu and Kashmir
2 (2011) 4SCC 36
address/remedy a cause through which the Indian interests are getting affected and the one that is in direct contravention with the law of the land, are valid. In India, there are no full-fledged laws that are extra-territorial in nature. However, there are laws that have specific provisions confirming their extra-territorial jurisdiction.

For instance, Section 4 of the Indian Penal Code, 1860 reads as ‘The provisions of this Code apply also to any offence committed by (1) any citizen of India in any place without and beyond India; (2) any person on any ship or aircraft registered in India wherever it may be.’ This provision of the Indian Penal Code uses the active nationality principle through which the nationality of the accused is invoked consequent to which the trial is as per the national laws. The nexus that invokes the operation of Section 4 is the nationality of the accused.

Similarly, Section 9 (1) of the Income-tax Act, 1961 provides a deeming fiction to effectively treat income of a non-resident assessee taxable which accrues or arises in India. Section 9, thus is extra-territorial in nature as it is applicable to non-resident assesses, although it seeks to tax only that part of their income which has a nexus in India.

Information Technology Act, 2000 was amended by notification dated October 27, 2009. Apart from its application to the whole of India, its provisions also apply to any offence or contravention committed outside the territorial jurisdiction of the country by any person irrespective of his nationality. In order to invoke its extra-territorial operation, such an offence or contravention should involve a computer, computer system or computer network located in India. Thus, extra-territorial provisions having a nexus with Indian interests are considered to be intra-vires and valid.

2. Extra-territorial operation of MRTP Act, 1969

MRTP Act, 1969 was enacted to ensure that the operation of the Indian economic system does not result in the concentration of economic powers in the hands of few by controlling the monopolies and it also prohibited associated monopolistic and restrictive trade practices. Although there was no express reference of extra-territorial jurisdiction of the MRTP Act, Section 14 which provided for MRTP commission’s jurisdiction only for practices which were carried in India turned out to be a bone of contention in the important case of Haridas Exports v. All India Float Glass Manufacturers Association for ascertaining its possible extra-territorial operation.

2.1 Haridas Exports v. All India Float Glass Manufacturers Association

Brief Facts

The respondent filed a complaint before the MRTP Commission under Section 33(1)(j), (ja) and Section 36A read with Section 2(o) of the MRTP Act against three Indonesian companies alleging that they were manufacturing float glass and were selling it at predatory prices in India, and were; hence, resorting to restrictive and unfair trade practices.

3 Section 1 (2) read with Section 75
4 (2002) 6SCC 600
In the complaint, it was stated that the float glass of Indonesian origin was being exported into India at the CIF price of US$ 155 to 180 PMT. It was alleged that these sale prices were predatory as they were less than not only the cost of production for the product in Indonesia but also the variable cost of production of the product in India. Furthermore, these imports would result in lowering the production of the Indian industry and would force it to become sick which would lead to its closure thus having a direct impact on the employment in the industry.

**Issue**

Whether Section 14 r/w Section 33(1)(j) of the MRTP Act, 1969 gave MRTP commission extra-territorial powers?

**Judgment**

The SC decided against any monopolistic activities being carried out on the part of Indonesian float glass manufacturers. As per the SC only those agreements that take place in India can be adjudicated upon by the MRTP commission. Monopolistic agreements entered into by parties before the import of products into the country were outside the ambit of the MRTP commission.

In essence, the prime reason for SC’s judgment in favour of the Indonesian manufacturers was MRTP Act’s lack of having an express provision concerning extra-territorial jurisdiction. This deficiency has been addressed by the Act.

3. Extra-territorial operation of the Act

It is possible for enterprises without having a fixed place of business in India to control the operations of any enterprise established in India in a manner resulting in an AAEC. Share-holding is not necessary for this purpose and it could be through a distribution agreement, price-fixing arrangement or exclusive dealing agreement. Cartels operating worldwide have a singular objective of establishing their presence in developing countries by eliminating local competition. Such countries are mostly inept to ward off anti-competitive activities either due to absence of strong legislations or enforcement authorities. India, a developing country has surprised other nations as it has equipped itself not only with a detailed Act but also has a strong CCI to keep a tight vigil on the anti-competitive activities. Most importantly, the Act is unique as it extends its jurisdiction over AAEC causing activities beyond the territorial boundaries of India.

Section 32 of the Act provides CCI with the power to inquire and pass orders against entities established beyond the territorial boundaries but causing an AAEC in India. The scope of Section 32 is wide in its ambit as it transcends the nationality/place of incorporation of an entity and is also not limited by the place where an anti-competitive agreement has taken place. Therefore, if two Indian entities or a foreign and an Indian entity enter into an agreement outside India in respect of production, supply, distribution, storage,

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5 Section 14 of the Monopolistic and Restrictive Trade Practices Act, 1969
acquisition of goods or provisions of services that can cause an AAEC in India, CCI is empowered to pass appropriate orders. Similarly, if an enterprise although incorporated outside India is abusing its dominant position in the Indian market, CCI can inquire and take appropriate actions against it.

Similarly, M&As (known as Combinations under the Act) between a foreign and an Indian entity can also cause AAEC in India if it results in eliminating competition. For instance, Cadbury (India), popular in India for chocolates, was acquired by Kraft Foods (USA). If after the acquisition, Kraft Foods through its products or predatory pricing would have eliminated its rival products from Nestle and other leading chocolate brands, CCI by exercising its extra-territorial jurisdiction would rendered such an acquisition invalid.

In light of Section 32 if the case of Haridas exports would have been adjudicated, the SC would have favoured the appellant. The fact that the agreement having an AAEC had taken place outside the territorial boundaries of the country would not have hindered the outcome of the case because Section 32 would have aided the SC in its decision.

Conclusion

The Act was brought into force not only to regulate anti-competitive practices in India but also to protect Indian interests beyond its territorial boundaries. Section 32 rightfully establishes a balance between India’s sovereignty and its limited extra-territorial powers. Although the drafting of Section 32 is clear and unambiguous, it is still to be seen whether CCI can deal with matters concerning foreign entities with equal ease.

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