Extraterritorial Application of the Competition Act and Its Impact

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The Competition Act, 2002 (the "Act") was formulated with the intent to address the lacuna in the Monopolies and Restrictive Trade Practices Act, 1969 and to prevent inequity, while sustaining the competition, in the Indian market and ensure free and ethical trade carried on by the participants in the market. In keeping with this intent, not only is the Competition Commission of India (CCI) vested with powers to monitor anti-competitive behaviour taking place within the country but under Section 32 of the Act also empowered to take cognisance of an act taking place outside India but having an adverse effect on competition in India. The Act by allowing CCI to exercise extraterritorial jurisdiction has made it possible for CCI to take action against anticompetitive conduct involving imports, and foreign cartels which may adversely affect the Indian market. While CCI has been given such powers it is yet to be seen how it balances its domestic responsibilities along with keeping track of international developments keeping in mind the infrastructure available to it. This article attempts to analyses the grant of power to the CCI under Section 32 and the consequences thereof.

The Competition Act, 2002 (Act) was enacted to replace the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), which dealt primarily with the control of monopolies and the prohibition of monopolistic and restrictive trade practices. The much delayed passing of the Act is touted by many as the final signs of the Indian economy maturing and in the process delivering the final blow in unshackling the past of the license raj in India. The very intent of the Act is to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India. In keeping with this intent, not only is the Competition Commission of India (CCI) vested with powers to monitor anti-competitive behaviour taking place within the country but under Section 32 of the Act also empowered to take cognisance of an act taking place outside India but having an adverse effect on competition within India. Section 32 states that notwithstanding the event/ violation/act taking place outside India, the CCI shall have the power to inquire into any such agreement(s) or abuse of dominant position or combination if such agreement(s) or dominant position or

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1 *Haridas Exports* v. *All India Float Glass Mfrs. Association and Ors*. MANU/SC/0596/2002: [2002]111CompCas617(SC)

combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India. It appears that this Section has been categorically introduced so as to address the lacuna in the MRTP Act whereby the Supreme Court held[1] that the Commission constituted under the MRTP Act did not have extra-territorial jurisdiction given the wording of the provisions of the MRTP Act. This article attempts to analyses the grant of power to the CCI under Section 32 and the consequences thereof.

Effects Doctrine

Section 32 is based on what is commonly known as the "effects doctrine", which empowers regulators to extend jurisdiction beyond the "principle of territoriality". In most countries, the legal view taken is that the domestic competition law captures such acts even if the guilty enterprise is not located in the country, provided that the anti-competitive act has an effect in the country.

The effects doctrine is a product of a judicial intervention established in the case of *US v. Aluminium Company of America*[2], known as the "*Alcoa* case" where the U.S. Court of Appeals for the Second Circuit held "that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders" and thus laid down or set out a test of †intended and actual effects on commerce within the US that had to be satisfied in order that US jurisdiction be asserted over the foreign company. The court held a Canadian corporation in violation of Sherman Act[3] for agreeing with European aluminium producers of the world to allocate world markets and not supply to the American Markets[4]. The effects doctrine was given statutory recognition in the US in 1994 by the International Antitrust Enforcement Assistance Act.[5] Similarly, the UK enacted the Protection of Trading Interests Act, 1980[6] which recognises this concept, though with minor theoretical differences.

Effects Doctrine in India

In relation to competition law, the concept of the "Effects Doctrine" was first raised in India when the Alkali Manufacturers Association of India filed a complaint and also an application for grant of temporary injunction before the MRTP Commission alleging that American Natural Soda Ash Corporation (ANSAC), consisting of six producer of natural soda ash, had joined hands together to form an export cartel by virtue of membership agreement amongst them. According to the complainant, ANSAC was a cartel of American ash soda producers and was likely to affect maintenance of prices at reasonable and realistic levels in India and with a view to adversely affect the local production and availability of the soda ash.[7]

The MRTP Commission instituted an enquiry and passed an *ad interim* injunction which was subsequently confirmed by it, directing ANSAC not to indulge in the practice of cartelisation by exporting soda ash to India in the form of cartel directly or indirectly.

Simultaneously, in a separate petition, the All India Float Glass Manufacturers' Association (AIFGMA) filed a somewhat similar complaint against three Indonesian companies, which resulted in a similar injunction against such imports.

2 148 F.2d 416
3 The Sherman Antitrust Act
4 Global Competition Policy by Edward M Graham with J. David Richardson
5 http://www.justice.gov/atr/public/guidelines/internat.htm
6 http://www.legislation.gov.uk/ukpga/1980/11/contents
7 http://www.oecd.org/dataoecd/48/54/34284291.pdf

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Aggrieved by the order passed by the MRTP Commission, both cases went in appeal to the Supreme Court, the Appellants being ANSAC in the first case, and Haridas Exports (the Indian importer of the float glass consignment) in the second case. The Supreme Court of India clubbed both cases (*Haridas* case)[8] and set aside both the injunctions on the grounds that the MRTP Commission lacked jurisdiction. In the case of the *AIFGMA,* the Court held that the MRTP Act had no extra-territorial operation, and the effects doctrine became applicable only with respect to a restrictive trade practice (RTP) after the goods were imported into India. Whereas in the ANSAC case the Court ruled that the MRTP Commission's reach could not extend to the formation of a foreign cartel, unless a member of the cartel carries out business in India.

Critics have long argued that the limitation of the MRTP Act lies in its insistence on agreements involving an Indian party, which was further compounded by the decision of the Supreme Court in the *Haridas* case which effectively deprived the MRTP Act of any extraterritorial operation and thus made it almost impossible for it to take action against anti-competitive conduct involving imports, and foreign cartels in particular.

Therefore, to overcome this shortcoming under the MRTP Act, it appears that Section 32 has been categorically incorporated in the Act allowing it to exercise extraterritorial jurisdiction on the basis of the effects doctrine, thus removing the restriction which prohibited the MRTP Commission to act in the *Haridas* Case. Therefore, CCI now has power to take action against a foreign entity in a similar situation.

Power of the CCI

Section 32 allows the CCI to inquire into any agreement or abuse of dominant position or combination if such agreement or dominant position or combination that has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of the Act.

This power has been coupled along with the power to conduct enquiry as well the procedure for investigation under Sections 19, 20, 26, 29 and 30 of the Act[9], which lays down the power as well as the procedure to be followed by the CCI in its inquiry into any alleged anti-competitive agreements or any abuse of dominant position or any acquisition or acquiring of control or merger or amalgamation, and inquire into whether such an agreement/combination has caused or is likely to cause an appreciable adverse effect on competition in India. Keeping in mind the shortcomings of extraterritorial jurisdiction and the hiccups involved in the enforcements of private international law, Section 18 of the Act also empowers the CCI to enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provision of this Act.

Nuances

The CCI is currently being lauded for its quick turnaround time on approvals for

8 MANU/SC/0596/2002: AIR 2002 SC 2728

combinations as well as its swift decisions, however such turnaround time in the case of an extra-territorial combination is yet to be tested. The Act may empower the CCI to investigate any acts/agreements /combinations which take place outside India but have an effect in India, however what remains to be seen is the practical application of the same. The question which arises at the outset is how well equipped is the CCI in terms of infrastructure as well as logistics to create a balance between its domestic responsibilities along with keeping track of international developments which may have an effect on competition in India.

Although the CCI is well empowered under Section 32, till date there have been no regulations or rules introduced to govern the manner or the time frame within which the regulator is required to act in matters beyond Indian territorial limits. Whereas the CCI may pass an order against an anti-competitive agreement or prohibiting an action that may constitute an abuse of dominance, in terms of a combination taking place outside India, it would be imperative for the CCI to raise an objection or pass any decision at an appropriate stage, since it would be difficult for the CCI to be able to reverse a combination after it has been consummated in a foreign territory.

Further, as defined in Section 5 of the Act a "combination" already includes within its purview acquisitions and mergers, although taking place outside India, resulting in an acquisition of an Indian entity or business over and above the financial thresholds prescribed under the Act. Therefore, without seeking recourse under Section 32, it would appear that the Act already provides for contingencies that take place outside India but have an effect within India. The moot point of distinction between both provisions however, is the requirement for the pre-merger notification to the CCI under Sections 5 and 6 of the Act and no such requirement present on two foreign parties who, in terms of Section 5 and 6 do not fall under the ambit of the Act.

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Implementation of Orders

With an increasingly globalised market place, the CCI may find it exceeding difficult to tackle a competition problem which arises from action of firm's located oversees at the expense of jeopardising diplomatic relations between countries. Further, given that corporate actions like acquisitions and mergers produce different synergies in different countries, there is a strong chance that a transaction produces conflicting views between the competition regulators having jurisdiction. Implementation of its orders in such instances will be challenging. Similar challenges have been faced by experienced regulators in the EU and the US. For example, the EU blocked the proposed merger between General Electric Company (GE) and Honeywell[10] both American companies estimated worth close to USD 42 billion. In 2000, GE announced that it would attempt to acquire Honeywell. Such merger was cleared by American authorities and competition authorities of 11 other

9 Provided under Section 32 of the Act.

10 In July 2001, the EC prohibited the proposed acquisition by GE of Honeywell. This decision of the EC was upheld by the Court of First Instance being the appeal court in 2005.

jurisdiction but was disapproved by the European Commission (EC) who had parallel jurisdiction because of the amount of business done in Europe. This decision was taken on the grounds that GE's dominance of the large jet engine market, leasing services and Honeywell's portfolio of regional jet engines and avionics, the new company would be able to "bundle" products and stifle competition through the creation of a horizontal monopoly. US regulators however disagreed, finding that the merger would improve competition and reduce prices.

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Similarly, the proposed merger of Boeing and McDonnell Douglas[11] was approved by the US competition authorities but then rejected by the EC, this impasse was ended only after months of intense political negotiations and possible threats of a US–Europe trade war, since the EC wanted to protect the interests of Airbus whereas the US was pushing for the best commercial interests of Boeing.

Such issues have necessitated competition authorities to increasingly co-operate with each other to ensure a free and fair market. The US & EU competition authorities after years of bitter turf wars are now increasingly moving towards entering into a number of bilateral as well as multi-lateral co-operation agreements such as the Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws in 1991, the Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws in 1998, the Agreement on Mutual Legal Assistance between the European Union and the United States of America in 2003.

Way Forward

The increasing globalisation of business along with the global acceptance of the "effects doctrine" has lead to the expanding of the scope of national competition laws to cross-border business activities. The principles of extra-territorial jurisdiction can be bifurcated in two parts, firstly subject-matter jurisdiction and enforcement jurisdiction. For the purpose of subject-matter jurisdiction, the territorial and nationality principles are sufficient to undertake a great number of infringements of competition laws. Whereas, for giving effect to the enforcement jurisdiction it is understood without entering into bilateral or multi-lateral agreements, the provision of the Act may not be given its due effect. Thus, the CCI must endeavour to enter into bilateral/ multi-lateral agreements with other competition regulators under Section 18 of the Act.

The main agenda of the Act is to prevent inequity in the Indian market and ensure free and ethical trade. Since the Act is relatively new, there is a relative paucity of jurisprudence on this subject, it would be interesting to monitor the stance of the regulator in future matters which happen outside India but have an effect on competition in India.