CHAPTER - III

CONTROL OF RESTRICTIVE TRADE PRACTICES IN INDIA

This chapter aims at enumerating and evaluating the operation of the provisions of the Monopolies and Restrictive Trade Practices Act in relation to restrictive trade practices. Important problems faced by the enforcement agencies in effectively implementing the provisions have been identified and appropriate policy measures have been suggested for overcoming those problems.

RESTRICTIVE TRADE PRACTICES AND THE MRTP ACT:

The MRTP Act defined restrictive trade practice as a practice 'which has or may have the effect of preventing distorting or restricting competition in any manner and in particular which tends to obstruct the flow of capital or resources into the stream of production, or which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions'¹. The Act adopted a system of registration of restrictive trade agreements for the detection of restrictive trade practices in the economy. It specified different categories of

1. MRTP Act, Section 2(0).
Restrictive trade agreements which are to be registered with the 'Director General of Investigation and Registration'. These agreements include refusal to deal, tie-in sales, exclusive dealing, collusive price fixing, price discrimination, resale price maintenance, territorial restrictions, control of manufacturing process, boycott from trade association membership, agreements on price fixation, collective discrimination and collective bidding\(^2\). The register is a public register. However, the MRTP Commission may direct the Director General to keep a special section in the register for the entry of certain particulars, the publication of which is contrary to public interest or damage legitimate business interests of any person\(^3\).

The MRTP Commission is empowered under the Act to inquire into restrictive trade practices (1) upon receiving a complaint from any trade association, or from any consumer or a registered consumers' association whether such consumer is a member of that consumer association or not (2) upon a reference received from the Central Government or State Government or (3) upon an application made to it by the Director General of Investigation and Registration, or (4) upon its own knowledge or information\(^4\). If the Commission

\(^2\) MRTP Act, Section 33.
\(^3\) MRTP Act, Section 36(2).
\(^4\) MRTP Act, Section 10.
after inquiry finds that the practice is prejudicial to public interest, it can pass orders directing the parties to discontinue the practice or declare the agreement relating to restrictive trade practices void or direct that the agreement may be modified. The Act empowers the Commission to grant a temporary injunction restraining the undertaking from carrying on restrictive trade practices until the conclusion of the enquiry, if it is proved that the practice is likely to affect prejudicially the public, traders or consumers. It also empowers the Commission to award compensation to affected parties in case it is held that as a result of restrictive trade practices loss or damage has been caused. In order to ensure that the orders issued by the Commission are carried out, the Act confers on the Commission to cause investigation to be made to ascertain whether the orders have been complied with.

In the scheme of curbing restrictive trade practices, the Commission has to evaluate the practice in terms of its effect (actual or probable) on competition in the relevant trade. Restrictive trade practices are presumed to be against the public interest, unless they can be justified

5. MRTP Act, Section 37(1).
6. MRTP Act, Section 12A.
7. MRTP Act, Section 12B.
8. MRTP Act, Section 13A.
against certain carefully defined criteria set out in Section 38(1) of the Act which are generally called 'gateways'. These gateways include: (1) protecting the consumer from injury (2) conferring some specific benefits to the consumers (3) creating a countervailing power to obtain fair terms from the predominant buyer or seller (4) avoiding unemployment (5) maintaining and promoting export earnings (6) counteracting measures to restrict competition taken by a person not a party to the agreement (7) securing the continuation of a restrictive agreement already found by the Commission to be beneficial to the public interest (8) not resulting in reduction of competition to any material degree in any trade. To these eight gateways, three more gateways were added by the MRTP (Amendment) Act, 1984 namely, (1) when the restrictions have been expressly authorised and approved by the Central Government (2) the restrictions are necessary to meet the requirements of the defence of India or any part thereof or for the security of the State or (3) where the restrictions are necessary to ensure the maintenance of supply of the goods and services essential to the community.

Resale Price Maintenance:

The MRTP Act contains special provisions for the control of minimum resale price maintenance. The Act

9. MRTP Act, Section 39.
outright prohibits the establishment or enforcement of minimum resale price. The Act also makes it unlawful to withhold supplies from a dealer on the ground that he is likely to sell the goods at cut prices. However, suppliers are permitted to withhold supplies from dealers who have been using the goods as 'loss leaders'. The MRTP Commission, is empowered to exempt particular classes of goods from the general prohibition of resale price maintenance on one or more of the following specified grounds; these are:

1) abolition of price maintenance would reduce the quality or the variety of goods available;

2) abolition would lead in general to higher prices in long run; and

3) abolition would interfere with the pre-sales or post-sales services.

REGISTRATION PROVISION: AN EVALUATION

The system of registration of restrictive trade agreements is an important element in the scheme of curbing restrictive trade practices in India. Here an attempt is made to briefly evaluate the provisions relating to registration of restrictive trade agreements in India.

10. MRTP Act, Section 40(3).
11. Ibid.
12. MRTP Act, Section 41.
Registrable agreements:

Sections 33 to 36 of the MTP Act deal with the registration of agreements relating to restrictive trade practices. Section 33 indicates the categories of agreements which are to be registered with the Director General of Investigation and Registration within sixty days from the date of the agreement along with the complete terms of agreement. These agreements are:

a) Refusal to deal: any agreement which restricts, or is likely to restrict, by any method the persons, or classes of persons, to whom goods are sold or from whom goods are bought.

b) Tie-in sales or full-line forcing: any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

c) Exclusive dealing: any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

d) Horizontal agreements regarding price fixing etc.: any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at
prices or on terms or conditions agreed upon between
the sellers or purchasers;

e) Discrimination in dealings: any agreement to grant
or allow concessions, benefits including allowances,
discount, rebate or credit in connection with, or
by reason of dealing;

f) Resale price maintenance: any agreement to sell
goods on condition that the prices to be charged on
resale by the purchaser shall be the prices stipu-
lated by the seller unless it is clearly stated
that prices lower than those prices may be charged;

g) Restriction on output or supply, market sharing or
allocation of an area: any agreement to limit,
restrict or withhold the output or supply of any
goods or allocate any area or market for the disposal
of the goods;

h) Control of manufacturing process: any agreement
not to employ or restrict the employment of any
method, machinery or process in the manufacture of
goods;

i) Boycott from trade association membership: any
agreement for the exclusion from any trade association
of any person carrying or intending to carry on,
in good faith the trade in relation to which the trade association is formed;

j) Collusive price fixation to eliminate competition or predatory pricing: any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;

k) Restrictions on the number of sellers: any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be bought;

l) Restrictions on bidding in auctions: any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction for the sale of goods;

m) Agreements notified by the Central Government on the recommendations of the MRTP Commission: any agreement not hereinbefore referred to in this section which the Central Government may, by notification specify for the time being as being one relating to restrictive trade practice within the meaning of this sub-section pursuant to any recommendation made by the Commission in this behalf;
n) any agreement to enforce the carrying out of any such agreement as is referred to in this sub-section.

Restrictive trade agreements which are authorised by any law or approved by the Government or which have Government as a party to the agreement need not be registered. If there are variations in the agreements registered these variations should be furnished to the Director General of Investigation and Registration within one month. Any agreement made by a trade association is deemed to be made by all persons or firms who are members of the association. Where specific recommendations express or implied are made by a trade association with respect to action to be taken or not to be taken by its members in relation to any matter pertaining to their trade, then the constitution of the association would be treated as an agreement as if it contained a term whereby each member agreed to comply with its recommendations.

It is the responsibility of the Director General of Investigation and Registration to keep the register of agreements in the prescribed form. The Act made a provision for the maintenance of a special section in the register.

13. MRTP Act, Section 33 (3).
14. MRTP Act, Section 35 (3).
15. MRTP Act, Section 35(5), Explanation II and III.
for the entry of particulars containing information, the publication of which in the opinion of the MRTP Commission, is contrary to the public interest or would substantially damage the legitimate business interest of any person. Any party to the agreement can apply to the Director General of Investigation and Registration for the exclusion of the agreement from registration on the ground that the agreement has no substantial economic significance. The party can also apply for the inclusion of the agreement in the special section. The Director General of Investigation and Registration should dispose of these matters in conformity with the general or special directions issued by the Commission in this behalf.

The Act contains penal provisions for non-registration of agreements which are registrable. Under Section 48, if any person fails to register an agreement which is subject to registration he shall be punishable with imprisonment which may extend to three years or with fine which may extend to five thousand rupees or with both. Section 42 also empowers the Director General to call for information by issue of a notice from a party to an agreement if he has reasonable cause to believe that the party from whom he

16. MRTP Act, Section 36(2).
17. MRTP Act, Section 36(3).
is seeking information may be involved in an unregistered agreement. If the party fails to furnish the information, the Director General can request the Commission to direct the party to comply with notice issued by the Director General. On the failure of the party to comply, the Commission can pass an order restraining the parties to the agreement from acting on such agreement and from making any other agreement to the like effect.

The introduction of registration provision in anti-trust legislations is not new. As early as 1920, Norway had such an arrangement and over the years registration of restrictive agreements has become a common feature of European legislation. However, registration provision does not exist in various countries like Australia, Belgium, Canada, France, Ireland, Sweden, Switzerland and United States of America.

The purpose of registration is two-fold. First, it provides a census of restrictive trade agreements in operation in the country and forms a basis for the selection of agreements by the Director General for detailed enquiry before the MRTP Commission. Secondly, it provides a salutary form of publicity which will enable informed opinion to draw its own conclusions on the effect of restrictive trade agreements; and thus possibly influence business people to withdraw or modify such practices. It is necessary at this
stage to enquire how far these objectives have been fulfilled by the registration provision in India.

Table - III.1 shows year-wise as well as the cumulative restrictive trade agreements filed and registered with the Director General of Investigation and Registration. The cumulative number of both filed and registered agreements has increased gradually although the rate of increase after 1978 was only marginal. The number of filed and registered agreements started declining considerably from 1977 and the number was 527 and 478 respectively for the year 1983. The decline was mainly due to the Supreme Court's Judgement in TELCO Case. Prior to the judgement the Commission had been taking the view that the categories of agreements enumerated in Section 33(1) were illustrations of restrictive trade practices and hence they must be compulsorily registered with the Director General. This view was disapproved by the Supreme Court which held that Section 33 did not provide statutory illustrations to Section 2(0), which defined a restrictive trade practice but only enumerated some types of trade practices which if they are restrictive within Section 2(0) require registration. Because of this, the parties to a restrictive trade agreement can afford not to register the agreement on the ground that, in their view

18. TELCO v. RRTA, AIR 1977, Supreme Court 973.
<table>
<thead>
<tr>
<th>Year</th>
<th>Agreements filed during the year</th>
<th>Agreements filed (cumulative)</th>
<th>Agreements registered</th>
<th>Agreements registered in force (cumulative)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970-71</td>
<td>8,896</td>
<td>8,896</td>
<td>7,050</td>
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</tr>
<tr>
<td>1972</td>
<td>2,250</td>
<td>11,146</td>
<td>10,894</td>
<td>NA</td>
</tr>
<tr>
<td>1973</td>
<td>2,823</td>
<td>13,969</td>
<td>12,926</td>
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<tr>
<td>1974</td>
<td>3,343</td>
<td>17,312</td>
<td>15,569</td>
<td>NA</td>
</tr>
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<td>1975</td>
<td>2,398</td>
<td>19,710</td>
<td>17,932</td>
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</tr>
<tr>
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<td>2,079</td>
<td>21,689</td>
<td>19,719</td>
<td>NA</td>
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<td>1,439</td>
<td>23,228</td>
<td>21,073</td>
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<td>887</td>
<td>24,115</td>
<td>21,574</td>
<td>5,716</td>
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<td>1979</td>
<td>623</td>
<td>24,738</td>
<td>22,152</td>
<td>6,289</td>
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<td>1980</td>
<td>610</td>
<td>25,348</td>
<td>22,737</td>
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<td>1981</td>
<td>616</td>
<td>25,964</td>
<td>23,257</td>
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<td>1982</td>
<td>527</td>
<td>26,491</td>
<td>23,735</td>
<td>7,872</td>
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<tr>
<td>1983</td>
<td>1,157</td>
<td>27,648</td>
<td>24,754</td>
<td>8,891</td>
</tr>
<tr>
<td>1984</td>
<td>2,825</td>
<td>30,543</td>
<td>27,541</td>
<td>11,673</td>
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</table>

Source: Annual Reports pertaining to the execution of the provisions of the MRTP Act, 1970-84.
the agreement in question does not constitute a restrictive trade practice within the meaning of the effects described in Section 2(0) even though their agreement falls within the categories listed in Section 33(1). However, this difficulty has been removed recently by the MRTP (Amendment) Act 1984 which provided clearly that every agreement falling within one or more of the categories specified in Section 33(1) shall be deemed to be an agreement relating to restrictive trade practice and shall be registered.

A majority of the agreements that have been registered are no longer in force. A review of the registered agreements undertaken by the Director General indicates that only 11,678 agreements were in force at the end of 1984. The remaining agreements were either determined or expired by efflux of time.

The system of registration not only uncovered a wide range of hitherto unknown agreements but also proved to be an important source of enquiry against restrictive trade practices. Out of the 627 RTP enquiries instituted by the Commission upto 31st December 1984, 211 enquiries were instituted on the basis of agreements objected to by the Director General. However, the public made little use of the register of agreements by way of making inspection of, or taking copy of or extracts from the register. During
the 14 year period the register has been inspected on not more than six occasions, by the members of public. Thus the registration system has served only as a sort of control and monitoring device and a source of information regarding trade practices rather than an effective tool for giving publicity of objectionable trade practices.

If the registration system has to serve its purpose effectively it must meet several requirements.

The first requirement is that the criteria for registration should be such that all types of anti competitive agreements be made registrable. The existing list of registrable agreements covers only those types of business agreements in which the intention of the parties is clearly identifiable and the restrictive effects of the agreements are transparent. As a result, several important forms of agreements are excluded from registration, even though in their effects these agreements are often, if not necessarily, restrictive of competition - for instance, agreements imposing standardisation of products, agreements for sharing price information (open price agreements) and agreements for sharing of patented processes or technical co-operation. The British experience suggests that agreements for standardisation, patent sharing or technical co-operation though ostensibly made for purposeful co-operation, may
result in restriction of competition, particularly in oligopolistic markets. Similarly the omission of 'open price' agreements from the registrable categories is a serious one, for even in apparently non-collusive oligopolies the edge of price competition is blunted by conscious parallelism in price policies resulting from the adoption of open price agreements. In the U.K. agreements by which the parties agree to exchange information but which do not accept any obligation to act in a particular way on receipt of information (Information Agreements) and the recommendations of the trade association to their members are also registrable under the Restrictive Practices Act. Hence it is suggested that it is necessary to include the above agreements also in Section 33(1).

Secondly, there must not be any scope for evading registration of restrictive agreements. The Indian Act provides for two alternative approaches in dealing with evasion. Recourse could be had either to the penal provisions contained in Section 48 or to supplementary provisions contained in Section 42. Under Section 48, if any person fails to register an agreement which is subject to registration he shall be punishable with imprisonment which may extend to three years, or with fine which may extend to five thousand rupees. Section 42 empowers the Director General
to call for information (by issue of a notice) from a party to an agreement, if he has reasonable cause to believe that the party from whom he is seeking information may be involved in an unregistered agreement. If the party fails to furnish the information, the Director General can request the Commission to direct the party to comply with the notice issued by the Director General. This does not mean that there is no evasion of registration of restrictive agreements in India. Routine Investigative activities done by the office of the Director General, revealed that most of the trade associations have not registered their memorandum and articles of associations eventhough they are registrable under the Act. The problem is that the Director General does not have adequate powers and resources to conduct market surveys to unearth unregistered agreements. Further, there is no effective statutory means to bring unregistered agreements to an end once they are brought to the notice of DGIR. In U.K. failure to register an agreement renders its restrictions void and it is unlawful for any person in the U.K. to give effect to them. Civil proceedings for damages may also be instituted by any person who has suffered loss from the operation of the unregistered agreement. Similar types of provisions can be incorporated in Indian Act in order to make the registration provision more effective.
is another problem regarding the registration of agreement. Under the existing Act if an agreement is expressly authorised by or under any law or has the approval of the Central Government or if the Government is a party to such agreement, it need not be registered. The important words here are 'expressly authorised' and 'has the approval of the Central Government'. The Commission considered the expression 'has the approval of the Central Government' in the matter of the agreement relating to the sale of nylon filament yarn in the case of J.K. Synthetics and Others\(^{19}\) and has taken the view that unless the approval is specific from the point of view of the MRTP Act, the fact that the agreement was approved by the Government for some other purpose may not necessarily exempt it from registration. This view was however reversed by the Allahabad High Court in J.K. Synthetics v. R.D. Saxena\(^{20}\). The legal position is not clear even now. In U.K., the provision regarding exemption is more clear and specific. The requirement of registration does not apply in U.K. to any agreement which is expressly authorised by any enactment or by any scheme, order or other instrument made under any enactment. Hence it is necessary to be more clear in this respect. It is also necessary to incorporate

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20. 47 Company Cases 323.
a provision in the Act, that in case a party raises an
issue regarding the registrability of an agreement, the
issue may be settled by the MRTP Commission.

The third requirement for the effective working of
the registration system is that there must be effective
scrutiny of the agreements registered both by the Director
General and the general public. The staff in the Director
General's Office needs to be increased to ensure effective
scrutiny of very large number of agreements registered as
the existing staff is not adequate for the purpose. A
provision should also be incorporated in the Act to publicise
the trade agreements registered under the Act and the
restrictive stipulations contained therein.

ENQUIRIES CONDUCTED BY THE MRTP COMMISSION: AN ASSESSMENT:

From its inception in August 1970 to 31st December
1984 the MRTP Commission instituted 627 restrictive trade
practice enquiries and disposed of 499 enquiries. The
remaining enquiries were pending before the Commission
(Table - III.2). Bulk of the restrictive trade practice enqui-
ries instituted by the Commission were either based on
applications made by the Director General (211 out of 627)
or on the basis of Commission's own knowledge or information
(388 out of 627). Only 26 enquiries were instituted on the
basis of complaints received from consumers or consumers'
<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Inquiries instituted/source</th>
<th>Total</th>
<th>No. of Inquiries disposed/source</th>
<th>Total</th>
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<td></td>
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<td>Section 10(a) (iii)</td>
<td>Section 10(a) (iv)</td>
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<td>10</td>
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<td>1973</td>
<td>1</td>
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<td>40</td>
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<td>1978</td>
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<td>19</td>
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<td>1980</td>
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<td>2</td>
<td>-</td>
<td>9</td>
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<td>1984</td>
<td>8</td>
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<tr>
<td>Total</td>
<td>26</td>
<td>2</td>
<td>211</td>
<td>398</td>
</tr>
</tbody>
</table>

Source: Annual Reports pertaining to the execution of the provisions of the MRTP Act, 1970-84.
associations and only two enquiries were instituted on the basis of a reference made by the Central Government. The lack of complaints from consumers or their organisations suggests that the consumer movement is not yet well developed in India. It may also be due to lack of publicity of the provisions for protecting the consumer. Even the Central and State Governments have made hardly any use of the machinery for regulation of restrictive trade practices. The primary reason for this appears to be lack of awareness of the legal provisions particularly the procedural aspects of making a formal reference to the Commission among the Government departments.

The number of applications filed by the Director General declined considerably after 1976 due to the Supreme Court’s judgement in TELCO case. In this case the court indicated that the Director General has to consider certain matters relating to the effects of the practice on competition even before filing an application before the MRTP Commission. This created difficulty for the Director General as the Act gives him no authority to collect the data necessary for filing the cases before the Commission as indicated by the Supreme Court. Therefore, the Commission has to depend upon its ‘own knowledge or information’, for instituting majority of the enquiries. It has evolved a certain procedure
for the purpose. If the information is received from any source that a restrictive trade practice is likely to exist, the Commission's research division is asked to collect data and make investigation. If on the basis of such information it is felt that a prima facie case exists, an enquiry is instituted.

The restrictive trade practices alleged in 499 cases decided by the MRTP Commission during the period 1970-94 are presented in Table - III.3. The cases decided related to different categories of restrictive trade practices. They include horizontal arrangements of different types such as sharing of markets, collective price maintenance, not competing along certain lines, enforcing certain extra charges etc., vertical arrangements such as tie-in sales/full line forcing, exclusive dealing, allocation of markets to particular dealers, resale price maintenance, price discrimination etc. Other categories of restrictive trade practices which have been enquired by the Commission include those relating to discrimination among users according to their previous off-take, deliberately denying supplies by monopolistic producers to their potential or existing competitors when these have to depend upon the monopolistic producers for certain intermediate produces and tying down producers of spare parts. The practices of resale price
<table>
<thead>
<tr>
<th>S.No.</th>
<th>Nature of restrictive trade practice</th>
<th>No. of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Collusive price fixing practices</td>
<td>107</td>
</tr>
<tr>
<td>2</td>
<td>Tie-in sales/full-line forcing</td>
<td>139</td>
</tr>
<tr>
<td>3</td>
<td>Exclusive dealing</td>
<td>122</td>
</tr>
<tr>
<td>4</td>
<td>Price discrimination</td>
<td>169</td>
</tr>
<tr>
<td>5</td>
<td>Resale price maintenance</td>
<td>146</td>
</tr>
<tr>
<td>6</td>
<td>Limiting, restricting, or withholding output or supply</td>
<td>48</td>
</tr>
<tr>
<td>7</td>
<td>Allocation of area or market for the disposal of goods</td>
<td>136</td>
</tr>
<tr>
<td>8</td>
<td>Control of manufacturing process etc.</td>
<td>17</td>
</tr>
<tr>
<td>9</td>
<td>Exclusion from or boycott of trade association's membership</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Other categories</td>
<td>55</td>
</tr>
</tbody>
</table>
maintenance, price discrimination, tie-in sale are widely prevalent in India as they were cited in a large number of cases. Many companies against which restrictive trade practices were alleged imposed several restrictions on dealers/stockists and included them in one and the same agreement. For example, allocation of an area and exclusive dealing were cited in every case jointly. It however calls for further study to identify the reasons as to the common prevalence of these trade practices.

Product-wise distribution of the total restrictive trade practices cases decided by the MRTP Commission shows the different segments of the economy reached by the MRTP Commission in its attempt to regulate restrictive trade practices. Such a distribution of cases is presented in Table - III.4. Among various products covered by the 499 cases in which various restrictive trade practices were alleged by the Commission the largest number of 102 cases related to the product group of chemicals and chemical products. Sixty two cases related to the industry group of transport equipment and its parts. Another major product group which accounted for a relatively large number of cases is paper and paper products and printing and publishing. The product-wise distribution does not suggest any discernible pattern of industry-wise prevalence of the restrictive trade practice
<table>
<thead>
<tr>
<th>S.No.</th>
<th>Nature of product</th>
<th>Total No. of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Chemicals and chemical products including paints, varnishes, toiletries, synthetic resins and plastic materials</td>
<td>102</td>
</tr>
<tr>
<td>2</td>
<td>Transport equipment and parts</td>
<td>62</td>
</tr>
<tr>
<td>3</td>
<td>Paper, paper products and printing and publishing</td>
<td>54</td>
</tr>
<tr>
<td>4</td>
<td>Electrical machinery, apparatus appliances and supplies and parts</td>
<td>56</td>
</tr>
<tr>
<td>5</td>
<td>Machinery, machine tools and parts, including products like refrigerators air conditioners and their parts components and accessories, general items of non-electrical machinery</td>
<td>45</td>
</tr>
<tr>
<td>6</td>
<td>Food products</td>
<td>40</td>
</tr>
<tr>
<td>7</td>
<td>Metal products and parts</td>
<td>24</td>
</tr>
<tr>
<td>8</td>
<td>Textiles</td>
<td>24</td>
</tr>
<tr>
<td>9</td>
<td>Rubber, plastic, petroleum products</td>
<td>23</td>
</tr>
<tr>
<td>10</td>
<td>Production and distribution of motion pictures</td>
<td>13</td>
</tr>
<tr>
<td>11</td>
<td>Basic metal and alloy industries</td>
<td>10</td>
</tr>
<tr>
<td>12</td>
<td>Non-metalic mineral products</td>
<td>10</td>
</tr>
<tr>
<td>13</td>
<td>Others</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>499</strong></td>
</tr>
</tbody>
</table>
in India. The practices have neither been confined to nor have been a typical feature of any particular industry. It is suggested that an analysis may be made by the MRTP Commission to identify the reasons for differences in the prevalence of various types of restrictions in companies manufacturing different types of products.

Table - III.5 indicates the nature of the orders passed by the MRTP Commission in 499 cases decided by it during the period 1970-84. In majority of the cases decided by the Commission orders have been passed directing the respondents to 'cease and desist' from all alleged restrictive trade practices. In some cases the Commission ordered modifications of the agreements removing restrictive clauses in them. The analysis thus shows that once a restrictive trade practices enquiry is launched by the MRTP Commission almost invariably, the company is not able to defend the alleged restrictive trade practices, at least in the form they existed in the original agreement.

Table - III.6 analyses the time taken by the Commission in passing final orders in respect of the enquiries relating to the various restrictive trade practices from the date of the issue of notice of enquiry. As is noted from the table, as many as 277 out of the 499 enquiries, where the final orders have been passed up to December 31, 1984 were
### CATAGORISATION OF THE ORDERS PASSED BY THE MRTP COMMISSION
### DURING 1970-62

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Nature of order</th>
<th>No. of orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Inquiries in which the Commission passed cease and desist orders</td>
<td>211</td>
</tr>
<tr>
<td>2</td>
<td>Inquiries in which the practice was given up and orders under Section 37(2) were passed</td>
<td>138</td>
</tr>
<tr>
<td>3</td>
<td>Inquiries in which the allegation did not establish or proved</td>
<td>39</td>
</tr>
<tr>
<td>4</td>
<td>Inquiries in which the Commission held that the allegation did not amount to a restrictive trade practice</td>
<td>64</td>
</tr>
<tr>
<td>5</td>
<td>Inquiries in which the Commission did not examine the merits of the allegation and terminated enquiry following the single judge decision of Allahabad High Court in the J.K.Synthetics case</td>
<td>2</td>
</tr>
<tr>
<td>6</td>
<td>Inquiries in which the Commission passed an order on a particular restrictive trade practice</td>
<td>4</td>
</tr>
<tr>
<td>7</td>
<td>Inquiries in which the Commission terminated the enquiries</td>
<td>34</td>
</tr>
<tr>
<td>8</td>
<td>Inquiries in which the Commission held that a particular restrictive trade practice had no adverse effect on competition</td>
<td>15</td>
</tr>
<tr>
<td>9</td>
<td>Inquiries in which Commission dropped the inquiry as the company went into liquidation</td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>Inquiries in which the Commission did not feel any necessity to interfere with the regulations and code of ethics of the IENS</td>
<td>2</td>
</tr>
<tr>
<td>11</td>
<td>Inquiries in which the Commission held that a restrictive trade practice is not prejudicial to public interest</td>
<td>2</td>
</tr>
<tr>
<td>12</td>
<td>Inquiries in which the Commission terminated the inquiry on the ground that the public sector units were beyond the purview of the MRTP Act.</td>
<td>2</td>
</tr>
</tbody>
</table>

**Note:** As the Commission passed different types of orders for different types of restrictive trade practices in the same enquiry, the total number of orders do not tally with the total number of cases decided by the Commission.
<table>
<thead>
<tr>
<th>S.No.</th>
<th>Time taken</th>
<th>No. of inquiries</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Upto one year</td>
<td>277</td>
</tr>
<tr>
<td>2</td>
<td>Over one year but not over two years</td>
<td>101</td>
</tr>
<tr>
<td>3</td>
<td>Over two years but not over three years</td>
<td>55</td>
</tr>
<tr>
<td>4</td>
<td>Over three years but not over four years</td>
<td>44</td>
</tr>
<tr>
<td>5</td>
<td>Over four years but not over five years</td>
<td>11</td>
</tr>
<tr>
<td>6</td>
<td>Over five years but not over six years</td>
<td>3</td>
</tr>
<tr>
<td>7</td>
<td>Over six years but not over seven years</td>
<td>1</td>
</tr>
<tr>
<td>8</td>
<td>Over seven years but not over eight years</td>
<td>3</td>
</tr>
<tr>
<td>9</td>
<td>Over eight years but not nine years</td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>Over nine years but not ten years</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>499</strong></td>
</tr>
</tbody>
</table>
disposed of within a year of the institution of the enquiry itself. However, there are many cases where the legal proceedings before the Commission took much longer time. The time taken in making preliminary investigation and in the processing of the cases before the issue of notice of enquiry is also considerably long. As such, it should not be beyond the ingenuity of the Commission to find out ways and means for fixing up a reasonable time limit for disposal of enquiries relating to the restrictive trade practices.

Assessment of problems:

It is generally considered that the MRTP Act and the MRTP Commission have been more successful in the area of restrictive trade practices than in other areas like concentration of economic power and monopolistic trade practices. However, due to a limited number of members, inadequate staff and lack of infrastructure, the Commission could take up only a limited number of restrictive trade practices cases. A large number of restrictive trade practices which prevail in many regional and local markets has been continuing unabated because it is impossible for the Commission to get information on these practices which are prevalent in different regions of the country. The State Governments barring one or two have not created any
administrative machinery to keep a watch over trade practices and wherever necessary make references to the MRTP Commission to institute inquiries. Even the consumer associations, could not make use of the provisions of the Act, for making complaints against firms resorting to restrictive business practices.

The Commission has also been facing difficulties in enforcing compliances with its orders. The present practice of enforcing compliances is that the respondent company has to file an affidavit of compliance with the commission. When such affidavits of compliance are received by the Commission, they are sent to the Director General of Investigation and Registration for his comments. Comments received relate only to prima facie compliances, since the DGIR neither has an organisation nor powers to make field enquiries for the purpose of ascertaining whether the restrictive practices which were ordered to cease have in fact ceased. Only in 1984, the Commission has been given statutory powers to order investigation in order to ascertain whether the orders made by it have been complied with.

Further, the MRTP Commission has no powers under the Act to institute enquiries against public sector undertakings as the Act is not applicable to them. In fact, it had terminated enquiries instituted against two public sector under-
takings indulging in restrictive trade practices as it has no jurisdiction over them. Again it had to allow two private sector companies to continue the restrictive trade practices of tie-in sales on the plea that a public sector undertaking in the same industry was indulging in the same type of restrictive trade practice. Even though the Sachar Committee recommended that the provisions relating to control of restrictive trade practices should be made applicable to public sector undertakings also, the Government did not accept the recommendation.

There is no justifiable reason to exempt public sector undertakings from the operation of the Act in so far as the control of restrictive trade practices are concerned. Many public enterprises at present are operating in competition with private sector undertakings. It looks anomalous that while the trade practices of the private sector can be examined and appropriate order can be issued under the Act, similar practices of public enterprises in the same area of production remain out of the purview of the Act.

It is true that working of the public sector is subject to the scrutiny of the public Accounts Committee, Committee on Public Undertakings and Estimates Committee of the Parliament. But it would be unrealistic to expect
them to regulate the trade practices of the numerous public undertakings. In any event the Parliamentary Committees would not adopt the specialised approach of an expert body like the MRTP Commission. The matter is little more involved because restrictive trade practices by a public corporation may well be invoked as justification by private undertakings to indulge in similar restrictive trade practices. Section 38(1)(e) itself provides a gateway so that the restrictive trade practice may be justified as necessary to counteract measures of a person who is not a party to the agreement. Moreover, the possibility of indulging in restrictive trade practices by the public undertakings is greater, as many of them are enjoying monopolistic positions in their respective areas of production. In view of all these, it is necessary to bring the state owned undertakings also under the purview of provisions of the Act which relate to restrictive trade practices.

THE GATEWAYS AND JUSTIFIABILITY:

The Indian legislation is based on the presumption that restrictive trade practices are against the public interest. In determining whether any restrictive trade practice is not against the public interest the MRTP Commission has to be satisfied that it yields one or more specific benefits set out in the provisions known as 'gateways'. If
a restriction is to pass through one or more of the gateways, the Commission is required by the 'tail piece' to balance those benefits against any detriments to which it may give rise. Only where the Commission is satisfied that the benefits outweigh the detriments can it declare that a restrictive practice is not against the public interest. Thus the gateways constitute a central feature of the legislation. It is against these criteria that the Commission has to judge whether a restrictive trade practice is not against the public interest. Out of the 499 restrictive trade practices cases decided by the MRTP Commission during the period of 1970-84, in only 16 cases the respondents contested before the Commission in terms of available gateways. Table - III.7 and III.8 show the experience of those 16 cases. The trade practices sought to be defended in the sixteen cases related to six different types. The practice of price discrimination was sought to be defended in six cases, exclusive dealing in four, territory restrictions in two and tie-in sales, collusive price agreement and sale of technical know-how in one case each. The practices of exclusive dealing and territorial restrictions were jointly sought to be defended in one case.

Almost all the respondents employed gateway (h) to defend their restrictive trade practices. The next major
### TABLE III.7

**DETAILS OF THE RESTRICTIVE TRADE PRACTICES CASES CONTESTED VIA GATEWAYS IN INDIA 1970-84**

<table>
<thead>
<tr>
<th>S.No.</th>
<th>RTPA No. Name of the Respondent and date of the order</th>
<th>RTPA in respect of which escape through gateway was sought</th>
<th>Gateways claimed by the Respondents</th>
<th>Gateways through which escape has been considered permitted by the Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>2 of 1974 Carona Sahu Co. Ltd., (21-3-1975)</td>
<td>Payment of discriminatory discounts</td>
<td>38(1)(h)</td>
<td>38(1)(h)</td>
</tr>
<tr>
<td>2.</td>
<td>3 of 1974 Bata India Ltd., (5-5-1975)</td>
<td>Payment of discriminatory discounts</td>
<td>38(1)(h)</td>
<td>38(1)(h)</td>
</tr>
<tr>
<td>3.</td>
<td>1 of 1974 TELCO Ltd., (25-7-1975)</td>
<td>Exclusive dealership and territorial restrictions</td>
<td>38(1)(a)(b) and (h)</td>
<td>38(1)(h) for exclusive dealing only</td>
</tr>
<tr>
<td>4.</td>
<td>1 of 1975 Steelage Industries Ltd., (21-8-1975)</td>
<td>Payment of discriminatory discounts</td>
<td>38(1)(h)</td>
<td>38(1)(h)</td>
</tr>
<tr>
<td>5.</td>
<td>9 of 1974 Tata Oil Mills Ltd., (23-9-1975)</td>
<td>Payment of discriminatory discounts</td>
<td>38(1)(h)</td>
<td>38(1)(h)</td>
</tr>
</tbody>
</table>

Contd....
8. 19 of 1974 Swadeshi Mills Co. Ltd., and Others (30-1-1976)

| Section 38(1)(a) | Protection against injury
| 38(1)(b) | Offering specific and substantial advantages.
| 38(1)(c) | Protection against monopolies


| Area allocation | 38(b)(g) and (h) |

10. 8 of 1972 Baroda Mayon Corporation and seven others (6-8-1976)

| 1. Fixation of prices to eliminate competition | 38(b)(f) and (h) |
| 2. Restrictions on output | 38(1)(b) and (h) |
| 3. Restrictions in the matter of dealings | only in respect of fixation of selling price.

11. 58 of 1975 Hindustan Times Ltd., (6-10-1977)

| Payment of discriminatory Commission | 38(b)(h) |
| 38(1)(h) |

12. 28 of 1976 Reckitt and Coleman of India Ltd. (31-10-1977)

| Price discrimination | 38(1)(b)(h) |
| 38(h) |


| Territorial restrictions | 38(1)(a)(b)(d) |
| (g) and (h) |
| 38(1)(h) |

14. 19 of 1975 Chiranjilal Bhanu, (12-12-1977)

| Tie-in sales | 38(1)(h) |
| 38(1)(h) |

15. 45 of 1975 Sarabhai chemicals Pvt. Ltd., and another (6-7-1978)

| Restrictive clauses in the sale of know-how | 38(1)(a)(b)(e) |
| (f) and (h) |

16. 3 of 1976 Motor Industries Co. Ltd., (7-12-1978)

| Exclusive dealing | 38(1)(b) and (h) |
| 38(1)(b) and (h) |

Contd...
Protection against dominant buyer or seller.
Protection against localised unemployment.
Protection against export earnings.
Protection against maintenance of any other restriction
No material effect on competition
Expressly authorised and approved by the Central Government
Restriction is necessary to meet the requirements of the defence of India or for the security of the state.
Restriction is necessary to ensure the maintenance of supply of goods and service essential to the community.
**TABLE - III.8**

**AGREEMENTS CONTESTED VIA GATEWAYS**

<table>
<thead>
<tr>
<th>Gateway</th>
<th>No. attempted</th>
<th>No. upheld</th>
<th>% success</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Protection against physical injury</td>
<td>5</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>b) Offering specific and substantial advantage</td>
<td>11</td>
<td>3</td>
<td>33</td>
</tr>
<tr>
<td>c) Protection against a monopolist</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>d) Protection against predominant buyer or seller</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>e) Protection against localised unemployment</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>f) Protection against export earnings</td>
<td>2</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>g) Protection against the maintainence of any other restriction</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>h) No material effect on competition</td>
<td>16</td>
<td>13</td>
<td>81</td>
</tr>
<tr>
<td>i) Agreements authorised and approved by the Central Government</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>j) Agreements necessary to meet the maintenance for defence of India or the security of the State</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>k) Agreements necessary to ensure the maintenance of supply of goods and services essential to the community</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>All agreements</td>
<td>16</td>
<td>13</td>
<td>81</td>
</tr>
</tbody>
</table>
gateway employed by respondents was gateway (b) which was employed in 11 cases. Among other gateways 38(1)(a) was claimed in five cases, (c) and (f) in two cases each and (d) (e) and (g) in three cases each. Except gateway (h) no other gateway was employed individually to defend the practices. Gateway (h) was employed individually in five cases.

The respondent companies in three cases succeeded in defending their practices (exclusive dealing in two cases and horizontal fixation in one case) through gateway (b) and also (h). In another ten cases also they could succeed in defending their practices (price discrimination in six cases, Exclusive dealing in three cases and Territorial restrictions in one case) through gateway (h). In the remaining three cases, relating to the practices of area allocation, restrictive clauses in the sale of know how and tie-in sales, the respondents could not succeed in defending the practices through the gateway claimed by them. Thus in India, the restrictive trade practices which have been successfully defended have been upheld mostly under section 38(1) (h).

In order to understand the rationale behind the judgements of the MRTP Commission allowing or disallowing the restrictive agreements under different gateways, it is
necessary to discuss in detail important cases contested via gateways.

Carona Sahu Company:  

Carona Sahu Company Limited, the respondent is engaged in manufacturing and marketing of footwear made of rubber, canvas, leather and PVC. Apart from its own outlets, the goods are mainly sold by the company through a network of wholesale dealers and dealers. The company entered into agreements with the wholesale dealers and dealers for the sale of the products. The Registrar alleged that the agreement with the wholesale dealers and dealers provided for full-line forcing, allocation of area, resale price maintenance and payment of discount/bonus. The company, with regard to practices of resale price maintenance and full-line forcing agreed to submit to the orders of the Commission under Section 37(1) of the Act on the assumption that the conditions for passing such orders existed. However, the company contended that the practice of paying discriminatory discounts is not a restrictive trade practice. It further contended that even if it is a restrictive trade practice, it passes through gateway (h) as the differential discount allowed is very negligible and

a large number of wholesale dealers had benefited by this differential discount leading to competition among them.

The company pays a normal discount on the turnover of the wholesale dealer or dealer at a flat rate of 7½ per cent. In addition to the normal trade discount, incentive bonus is given at the uniform rate of ½ per cent to dealers whose minimum off take is 3,000 pairs of footwear in smaller towns and 6,000 pairs of footwear in bigger towns. In case of wholesale dealers, the incentive bonus varies from 1 per cent to 4 per cent depending on the monthly average turnover of each wholesale dealer, namely 1 per cent on annual turnover of 1,500 to 2,999 pairs and rising to 4 per cent on monthly average turnover of 12,000 pairs and above. The Commission held that this practice is a restrictive trade practice as the wholesale dealers with larger turnover could sell the footwear to the dealers at a price below that at which smaller wholesale dealers could sell to the dealers. This would reduce the competitive opportunities of the smaller wholesale dealers and would hamper competition. On the other hand, the company argued that the discount is negligible and it amounts to passing on of the saving in the cost of manufacture, sale or delivery resulting from the different quantities sold or delivered to the wholesale dealers. For this, the Commission pointed out
that the Indian Law does not expressly condone the passing on of the saving in the cost of manufacture, transport, storage, interest or investment of the purchaser of larger quantities over the period. However, the Commission held that in this case, the differential discount allowed is such as will not affect the competition in any material degree and considering the common law doctrine of cost saving being passed on to the purchaser in England and corresponding statutory provision in the U.S.A. which is a reasonable doctrine to adopt and hence passes through gateway (h).

The same type of approach was adopted by the MRTP Commission in four other cases namely Bata India Ltd., Steelage Industries Ltd., Tata Oil Mills Ltd. and Hindustan Times Ltd. In these cases also the Commission allowed the practice of alleging discriminatory discounts to pass through gateway (h) in similar circumstances.

Tata Engineering and Locomotives Company Ltd.

Tata Engineering and Locomotives Company Ltd., which is engaged in the manufacture of heavy and medium commercial

vehicles along with three other manufacturers namely Hindustan Motors Ltd., Premier Automotives Ltd., and Ashok Leyland Ltd., has entered into agreement with its dealers in standard form for the distribution and sale of 'Tata Diesel Vehicles'. Clauses 1, 3, 6, 13 and 16 of the agreement provided territorial restrictions, resale price maintenance and exclusive dealership. When the Registrar of Restrictive Trade Agreements objected to the clauses on the ground that the clauses related to the restrictive trade practices of exclusive dealing, area allocation and resale price maintenance, the company argued that the clauses relating to exclusive dealing and area allocation do not amount to a restrictive trade practice as defined, in Section 2(0) of the Act as they have no effect of preventing, distorting, or restricting competition in any manner. Regarding exclusive dealing it contended that instead of impeding competition, it promotes competition as the four manufacturers of vehicles have their own national network of dealers and every manufacturer tries to increase the sale through its dealers and the consumer will have the choice of buying any make he likes and his choice is enhanced and not reduced by exclusive dealing. Exclusive dealing according to the company leads to specialisation and improvement in after-sales services which is necessary for such a product. Further the advantage of exclusive dealing is that a dealer specialises in his own
types of vehicles with all the attendant advantages of trained personnel, specialised service stations, workshops and spare parts. The company further argued that if a dealer has more than one franchise the competition between the various makes will be reduced as the dealer tries to push quickly the vehicles on which he is paid a higher Commission. The company claimed that the margin of its dealers is the lowest and in the multiplicity of franchises the dealers may not have an interest in pushing the sale of their vehicles. This may induce according to the company to pay higher commission and reduce the standard maintained by it without any countervailing advantage.

Accepting these arguments of the company the Commission observed:

"... in the market for commercial vehicles as it is organised in India at present, each major manufacturer has his own exclusive channel in almost all the areas. No potential consumer or purchaser is thus left without access to all the makes of commercial vehicles which are available in the country. Exclusive distributorship ensures that the dealer has specialised knowledge about the particular vehicles and is in a good position to bring out its special advantages when dealing with the customers. He can also be a useful effective channel of feed-back information to the
manufacturer of the vehicles regarding the experience and reaction of customers to the various facts of vehicles. Taking into account all these facts it appeared to the Commission that exclusivity in the sale of commercial vehicles in the present stage of the market does not directly or indirectly restrict or discourage competition to any material degree. The respondent company is therefore entitled to the benefit of Section 38(1)(h) of the Act."

The Commission also felt that in the circumstances present in the market there is no necessity of striking down the exclusivity clause in the agreements of other truck manufacturers.

Regarding area allocation the company argued that domestic market in India is diverse and it is necessary to have a wide geographical distribution of vehicles. As such area allocation is necessary. The Commission observed that on the data supplied by the company, it has not at all been proved that the company has a system of vehicle distribution which ensures a fair allocation of vehicles among different areas based on certain objective criteria. The Commission observed that even if initial allocation is assumed to be a fair one helping different areas of the country and especially the less urban and less well-to-do areas obtaining a fair share, there is nothing to prevent
persons from other areas richer and more prosperous from buying these vehicles in one area and transferring them for use in other areas of the country. So, the Commission observed that they have neither proved that the initial allocation is fair by any objective criteria nor have they been able to prove that the initial allocation combined with territorial restrictions helps maintain fair distribution of vehicle population among different areas of the country. The Commission held that territory restrictions do not pass through any one of the gateways claimed i.e., (a) (b) and (h) for it and ordered that these restrictions must go.

Usha Sales Private Ltd. 27:

Usha Sales Private Ltd., a leading supplier of sewing machines, fans, water coolers, and diesel engines, entered into agreements with its dealers for marketing the products. Clause 5 of the agreement with the dealers states that the dealers should not directly or indirectly engage in the sale of any competitive brands of the agreement products. The Registrar of Restrictive Trade Agreements made an application to the MRTP Commission for an enquiry into alleged restrictive trade practice of exclusive dealing, emanating from clause 5 of the agreement. The respondent company contended before the Commission that the clause did not relate to any

restrictive trade practice and in any event the clause would fall within the gateways provided for under Section 38(1) (b) (c) (d) (e) (h) and the tail piece.

The Commission, examining the contention of the company that the clause in the agreement did not relate to any restrictive trade practice, observed that it clearly restricted the dealers from acquiring from or otherwise dealing in any goods other than those of the respondent company and hence come under Section 33(1)(c) of the MRTP Act, which is considered to be a restrictive trade practice as per the decisions of the Commission in a large number of cases decided earlier.

Examining the contention of the company that the practice will fall within the clause (a) of Section 38 of the MRTP Act, the Commission pointed out that the gateway is clearly not applicable to the facts of the case because in none of the categories of goods handled by the company namely, fans, sewing machines, water coolers, diesel engines, there is any considerable danger of injury whether to persons or premises of the users in connection with the consumption or use of the goods. With regard to gateway under Section 38(1) (c), the Commission observed that simply because other manufacturers or distributors in the line were also following the trade practice of exclusive dealing would not qualify
the respondents for claiming the escape through this gateway. This gateway is concerned only with defensive measures against a single monopolist. If any of the commodities dealt in by the respondent company was also dealt in by monopolists, then and only then the practice followed by the company to counteract the policies of the monopolists would escape through this gateway. Similarly, the gateway (d), (e) and (g) are not available to the company as no facts or circumstances were indicated by reference to working of the clause either in reply or in the course of hearing which would support the company’s claim under these gateways. The Commission next considered the possibility of application of other two gateways claimed by the company namely (b) and (h) separately for each product dealt in by the company.

Regarding the sewing machines, the Commission found that the company’s share in the total market was less than 25 per cent and the company faced competition from a foreign company which got the machines manufactured by a local manufacturer and marketed them under its brand name. As the foreign company also had exclusive dealing arrangements covering different parts of the country, there is no possibility of foreclosure in any part of the market. Hence the Commission opined that the adverse impact on the competition in the market would be negligible and the respondent company
would therefore be entitled to the benefit under Section 38(1) (h). The Commission also observed that after-sale service and hire-purchase facility were more effective and training of mechanics and availability of genuine parts and replacements of defective machines became easier if the dealer was an exclusive dealer. The Commission accepted the contention that exclusive dealing eliminated possibilities of spurious machines and parts being passed off as genuine Usha machines and parts and dealers pushing up sale of inferior machines if he was allowed to deal in competitive products. Accordingly the Commission allowed gateway under Clause (b) of Section 38 also.

As regards exclusive dealing in the distribution of diesel engines, the Commission held that in view of the nature of the product necessitating after-sales service, hire-purchase facility, indemnity to the lending banks, prompt repair and supply of spare parts and effective implementation of the guarantee the exclusive arrangements were not only desirable from the point of view of efficient carrying out of these facilities, but also as a weapon of competition. The Commission accordingly allowed the practice to pass through gateways (b) and (h).

With regard to water coolers, the Commission held that exclusive dealership would hardly have any impact on
the competitive situation, because there were few other suppliers of the product and water cooler was generally purchased by expert buyers and requires installation and maintenance service during the guarantee period. The Commission allowed gateway under Clauses (b) and (h).

In the case of fans, the Commission observed that since Usha Sales accounted for only one fifth of the total sales of fans, the impact of exclusive dealership on competition was marginal except in small markets where the respondent's exclusive dealer was either the sole dealer or a dominant dealer. In large towns, an exclusive dealer would be more effective by emphasising the respondent's after-sales services, genuine spare parts, a large range of models and charging of price below the maximum. The Commission allowed exclusive dealing for fans under Section 38(1) (h) in so far as it covered towns having population of more than one lakh and passed a cease and desist order in respect of towns with a population upto 10,000.

Centron Industrial Alliance Private Ltd.28 ;

Centron Industrial Alliance Private Ltd., a manufacturer of blades and blade making machinery entered into agreements with Home Products Marketing Agency

and R.C.H. Barar & Co. for the marketing of blades and blade making machinery. Clause 5 of the agreement with Home Products stipulates that Home Product Agency which is acting as the sole selling agent of the Centron Industrial Alliance should not deal or sell any products similar to the products produced by the Centron Industrial Alliance. Clause 12 of the agreement with R.C.H. Barar & Co., similarly stipulate 'that the purchaser shall not purchase from any other party blades for sale in India'. The Registrar of Restrictive Trade Agreements objected to these clauses on the ground that the clauses resulted in the restrictive trade practice of exclusive dealing. The respondent company on the other hand contended that its agreement with Home Products was only sole selling agency agreements and there was no possibility of competition being affected by reason of the fact that there was only one agent and hence it was not a restrictive trade practice. With regard to Barar Agreement also the respondent contended that the agreement was essentially a manufacturing agreement and in order to concentrate on production undisturbed by the problems of marketing, it had entered into such agreements and not with any intention to restrict competition. Further the respondent company opined that even if these agreements are restrictive in nature, they pass through the gateways (b)
The MRTP Commission rejecting contentions of the respondent that the agreements do not constitute restrictive trade practices, held that the agreements relate to restrictive trade practice. The Commission felt that agreement with Barar will deny other suppliers of blades the marketing opportunities and also deny freedom to the purchaser to secure blades from other sources of supply. Regarding the agreement with Home Products, the Commission held that even though the said agreement does not come under Section 33(1)(c) as the agreement is not concerned with a purchaser but with the sole selling agent, the clause is restrictive in nature under Section 33(1)(a).

Examining the contentions of the respondent company that it is entitled to the protection under Section 38(1)(b) for the exclusive arrangement with Home Products Agency, the Commission opined that even though the arrangement enables the company to concentrate on research and development, quality improvement and new methods of production which would ultimately benefit the industry and consumer, it was not possible to ascertain the exact degree of advantages related to the restriction. It was also not possible to say that the benefits are specific or substantial and hence the benefit under Section 38(1) (b) is not available.
Regarding the protection under Section 38(1)(c), the Commission opined that protection under Section 38(1)(c) is not possible as there is no evidence about the specific measures taken by Malhotra group, a dominant producer to which exclusive arrangement, entered into by the respondent could be related. In regard to Section 38(1)(e), though the company made a reference to its employment potential at Aurangabad where the factory is situated, the Commission observed the protection under Section 38(1)(e) is not at all available. According to the Commission, the protection under Section 38(1)(e) is available only if the restriction has the effect on the general level of unemployment in an area in which substantial proportion of the trade is situated. Moreover, the restriction imposed should be responsible for avoiding serious and persistent adverse effect on the level of unemployment. In the present case, the Commission observed there was no material to indicate that the removal of the restrictions could have a serious and persistent adverse affect. Protection under Section 28(1)(f) is also not available because of the volume of exports effected by the company was not substantial either in relation to the whole business including export business of the blade industry. However, the Commission, considering the company's share in the total market which is only 10
per cent dominant position enjoyed by the Malhotra Group in the industry and the salient features of the blade industry held that the exclusive dealing arrangements between the company and Home Products did not in any manner limit restrict or distort competition. Moreover, the Commission stated, that the exclusive dealing arrangement was confined only to an intermediate outlet and not to any final outlet to the consumers. Therefore, the company is entitled to protection under section 38(1)(h) as the restriction did not directly or indirectly restrict or discourage competition to any material degree in the relevant trade and not likely to do so, so long as the pattern of trade remained the same. With regard to Barar Agreement, the Commission opined that the respondent is not entitled to protection under any one of the clauses of Section 38(1) as the agreement foreclosed the outlet for other producers and it is not all necessary to impose such a restriction in order to get the advantages which the company claimed.

Svadeshi Mills Company Ltd., and Others:

Svadeshi Mills Company Ltd., Ahmedabad Advance Mills Ltd., Tata Mills Ltd., and Central India Spinning and Weaving and Manufacturing Company Ltd., are collectively known as 'Tata Textile Mills' and are engaged in the manufa-

structure of textile goods. They entered into an agreement with a number of stockists for the sale of textiles. One clause in the agreement stipulates that 'the stockists shall stock in such retail shop the textile goods of Tata Textile Mills only and shall not stock or sell or otherwise deal at the said retail shop premises in the textile goods and fabrics of any other cotton textile mills'. The Registrar of Restrictive Trade Agreements objected to the clause and contended that the companies are indulging in the restrictive trade practices of exclusive dealing. On the other hand, the companies argued that the practice was not a restrictive trade practice and even if it was a restrictive trade practice, it would pass through gateways under Section 38(1)(a)(b)(c) and (h) more particularly (b) and (h). They argued before the Commission that the exclusive arrangement with the stockists had several distinct advantages. Firstly, as the cost to the stockists being lower than the cost to the general retailers, the prices charged by the stockists would be lower than the prices charged by the general retailers. Secondly, there is guarantee that in the exclusive stockists shop, genuine Tata products are available, the range of Tata products available in the stockists shop will also be bigger because the general retailer will be interested only in stocking fast moving items. Unlike the general retailer, the
exclusive stockists will have no incentive to push the sale of inferior goods just because the margin of profit therein is higher. According to the respondents these advantages will be lost, if there were no exclusive arrangements and hence the practice was justified under Section 38(1) (b) of the Act.

The respondent companies also argued that the adverse effect of the arrangement on competition was negligible. Out of total production of 8,000 million meters of cloth, only 161.4 million meters cloth was manufactured by the company and out of this production, only 3 per cent was disposed of through exclusive stockists, 3 per cent through Mills shops, 5 per cent through export and the balance through the normal channels of trade namely wholesalers, semi-wholesalers and retailers. The percentage of cloth sold by the companies through exclusive dealing in the total cloth sold in the entire country would come to 0.06. There was therefore no danger according to the respondents of exclusive arrangements in any manner limiting, restricting or distorting competition between the outlets for textiles either manufactured by the company or textiles manufactured by the entire industry as a whole. They further pointed out that all major textile companies were channalising a part of their production through exclusive dealing arrangements
and there was no dearth of outlets in the trade where the trade where the companies exclusive stockists were located.

Examining the arguments of the company for allowing the practice through gateway 38(1)(b), the Commission felt that the companies made little effort to present clear-cut and sufficiently reliable statistical and other factual data to support their claim of benefits like lower prices and supply of genuine Tata Products. The Commission opined that, unless the advantages were specific and substantial the exit under Section 38(1)(b) was not possible. The specific and substantial nature of the advantages could only be established in concrete terms by adequate factual data and more impressionistic evidence of the kind given by the company cannot adequately fill the gap. The companies are, therefore not entitled to the gateway under Section 38(1)(b).

However, the Commission accepting the contentions made by the respondents with regard to the applicability of gateway(h), held that the adverse effect of the exclusive arrangements on the competitive situation in the trade as a whole would be negligible or marginal. Accordingly, the Commission allowed the practice to pass through gateway (h) of the Section 38(1).
Spencer & Company Ltd.:

The company is engaged in the distribution and sale of refrigerators, deep freezers and air conditioners. It prohibited through an agreement its dealers from selling the products outside the territory allotted to each of them without its written consent. When the RTTE instituted an enquiry against the company for indulging in territorial restrictions the company argued that the practice was not a restrictive trade practice and even if it was a restrictive trade practice, it passed through gateway under Section 38(1) (a) (b) (g) and (h).

The company argued that it was necessary to have territory restrictive clause in the agreement with the dealers in view of the nature of the product sold, requirement of after sales service and the obligation to fulfill the warranty given to the consumers. Further, it contended that the absence of the area restriction clause might result in concentration of sales in the areas where the rate of sale tax was low.

The company claimed the gateway (a) on the ground that there was every possibility of injury to persons or premises if the refrigerator or air conditioner was not properly installed or was not properly used. It also pointed

out that even financial injuries could be personal injuries and hence section 38(1)(a) would be attracted. The company also pleaded for gateways under Section 38(1)(b) and 38(1)(h) on the grounds of provision of after sales service and little impact on competition. It further pointed out that gateway (g) would also be applicable as the restriction would ensure the dealers to get sufficient number of units for sale and thereby guarantee adequate supply of spare parts to the customers.

The Commission examined the possibilities at length for granting gateways under Section 38(1)(a)(b)(g) and (h). The Commission disagreed with the argument of the company that even financial injuries are injuries contemplated under Section 38(1)(a). As far as injury to persons or premises was concerned the Commission pointed out that eventhough it was possible to conceive of a situation in which installation of refrigerator or air conditioner might cause injury to persons or premises in an extreme case of negligence, it was not possible to conceive how such a contingency could be avoided just by preferring a dealer in one territory to another. Accordingly, the Commission pointed out that the company was not entitled to gateway under Section 38(1)(a). The Commission also held that gateway under Section 38(1)(b) was not applicable to the
company as the company could not prove how the removal of the restriction would deny to the public as purchasers or users of any goods other specific and substantial benefits or advantages accruing from after sales service.

Regarding gateway under Section 38(1)(g) the Commission pointed out that the service in respect of products dealt by the company was not sophisticated and hence it was difficult to establish a nexus between territorial restrictions and the insistence of after sales service by the customers.

Coming to gateway under Section 38(1)(h), the Commission realised that the competition between the respondent company and other companies manufacturing the same good would not be affected due to area restrictions. Competition that is affected is competition between the dealers of the respondent company. Even the competition among dealers of the company would not be affected in big cities as there are more than one dealer in these places. The competition that is affected is only the one between dealers situated outside large cities and this would be determined by the distance between the shop of the dealer and the residence of the consumer. Considering the share of the company (20 per cent) in the total trade, the extent of trade affected due to this restriction would be very small and hence the
Commission held that the respondent company was entitled to gateway under Section 38(1)(h).

The above discussion leads us to the conclusion that the gateways have been used to a limited extent in India. It is to be noted that except the gateway (h) and the gateway (b) other gateways were not seriously employed by the respondent companies. All the 16 companies employed gateway (h). The respondent companies in three cases succeeded in defending their practices through gateway (b) and also (h). Another important point which will emerge from the above discussion is that the companies which were trying to defend their agreements were not able to present and produce clearcut and sufficiently reliable statistical and factual data to support their claim for an exit under different gateways.

There is a view at present that the gateways have not been used in many cases and that is why they are not necessary. While accepting that majority of the gateways have been little used and may not therefore be strictly necessary there is no reason to rule out their use in a suitable case in future and it would reduce rather than increase the flexibility of the legislation if they were removed. There is also a strong case for making a change in the case of export gateway (f). It seems illogical to
deal only with the promotion of exports and not to recognise that import substitution can be equally important to the balance of payments. Hence it is suggested that the gateway should be enlarged so that a reduction in imports arising from increased efficiency could be pleaded as a benefit of an agreement.

**SUMMARY:**

The Monopolies and Restrictive Trade Practices Act adopted a system of registration of restrictive trade agreements for the detection and control of restrictive trade practices in India. It specified different categories of restrictive trade agreements which are to be registered with the Director General of Investigation and Registration. These agreements include refusal to deal, tie-in sales, exclusive dealing, collusive price fixing, price discrimination, territorial restrictions, control of manufacturing process, boycott from trade association membership, collective discrimination and collective bidding.

The Act empowered the MRTP Commission to inquire into restrictive trade practices and if after enquiry finds that the practice is prejudicial to the public interest, it can pass 'cease and desist' orders or direct that the agreement may be modified. Under the Act the Commission
has to evaluate the restrictive trade practice in terms of its effect (actual or probable) on competition in the relevant trade. Restrictive trade practices are deemed to be against public interest, unless they can be justified against certain carefully defined criteria set out on Section 38(1)(a) to (k) of the Act which are generally called 'gateways'.

The system of registration not only uncovered a wide range of hitherto unknown agreements but also proved to be an important source of enquiry against restrictive trade practices. Out of the 627 MRTP enquiries instituted by the Commission upto 31st December, 1984, 211 enquiries were instituted on the basis of agreements objected to by the Director General. However, the public made little use of the register of agreements by way of making inspection of or taking copy or extracts from the register. During the 14 year period the register has been inspected on not more than six occasions by the members of the public. Thus, the registration system has served only as a sort of control and monitoring device and as a source of information regarding trade practices rather than an effective tool for making publicity of objectionable trade practices.

The existing list of registrable agreements does not cover agreements imposing standardisation of products, sharing
price information and patented processes or technical information. It does not even cover open price agreements and information agreements. It is suggested to include these agreements also in the category of registrable agreements. There is no effective statutory means at present to bring unregistered agreements to an end once they are brought to the notice of the DGIR. Provisions making an unregistered agreement void and unlawful must be incorporated in the Act in order to make the registration system more effective. The staff in the Director General's Office needs to be increased to ensure effective scrutiny of very large number of agreements registered.

The MRTP Commission instituted 627 restrictive trade practices enquiries and disposed of 499 enquiries during the period 1970-84. Bulk of enquiries instituted by the Commission were either based on applications made by the Director General or on the basis of Commission's own knowledge or information. Limited number of enquiries were instituted on the basis of complaints received from consumers' associations. This indicates that the consumer movement is not yet well developed in India. The cases decided by the Commission related to different categories of restrictive trade practices. The practices of resale price maintenance, tie-in sale and price discrimination are
widely prevalent in India as they were cited in a large number of cases. The product-wise distribution of cases decided by the Commission does not suggest any discernible pattern of industry-wise prevalence of the restrictive trade practices. In majority of the cases decided by the Commission orders have been passed directing the respondent companies to cease and desist from all alleged restrictive trade practices. The time taken by the Commission in disposing of the enquiries was long. Due to limited number of members, inadequate staff and lack of infrastructure, the Commission could not control restrictive trade practices which prevail in many regional and local markets. The Commission has also been facing difficulties in enforcing compliances with its orders. The Commission has no powers under the Act to institute enquiries against public sector undertakings which is a major inadequacy in the Indian legislation.

Out of the 499 restrictive trade practices cases decided by the Commission, in only 16 cases the respondents contested before the Commission in terms of available gateways. Almost all the respondents employed gateway(h) to defend their restrictive trade practices. The next major gateway employed by respondents was gateway (b) which was employed in 11 cases. Among other gateways, Section 38(1)(a)
was claimed in five cases (c) and (f) in two cases each and (d) (c) and (g) in three cases each. Except gateway (h) no other gateway was employed individually to defend the practices. Gateway (h) was employed individually in five cases. The respondent companies in three cases succeeded in defending their practices (exclusive dealing in two cases and horizontal fixation of prices in one case) through gateway (b) and also (h). In another ten cases also they could succeed in defending their practices (price discrimination in six cases, exclusive dealing in three cases and territorial restrictions in one case) through gateway (h). In the remaining three cases relating to the practices of area allocation, restrictive clauses in the sale of know how and tie-in sales, the respondents could not succeed in defending the practices through the gateway claimed by them. Thus in India, the restrictive trade practices which have been successfully defended were upheld mostly under Section 38(i)(h). However, the companies which were trying to defend their agreements were not able to present and produce clearcut and sufficiently reliable statistical and factual data to support their claim for an exit under different gateways.