The important aim of the chapter is to know the approach adopted by the Indian Monopolies Commission in curbing various types of restrictive trade practices. By discussing the important judgements pronounced by the Commission under each category of restrictive trade practice, an attempt is made to assess the approach.

I. CONCLUSION

Concert:

Independent business enterprises engaged in the same line of business activity can reduce or eliminate competition among themselves by collusive agreements. These agreements may be related to prices, output, markets and prevention of competitors. Price agreements are agreements among independent firms to fix a common price which is a convenient way to avoid price competition. Firms may agree among themselves to limit the total output or amount of output coming into the market at any particular time to eliminate competition. Firms may come to an agreement to divide the market among themselves on the basis of geographical areas or class of customers. Allocating markets makes each firm a monopolist in its own domain. As such,
it has freedom to set prices and determine marketing practices without fear of competition. Firms may also come to an agreement to exclude or eliminate unruly or undesirable competitors. This practice is generally called group boycott. When a collusive agreement is open it is generally called explicit collusion or cartel. Competition can also be eliminated or reduced without any open agreement among competitors, but through the activities of trade associations and also through uniformity of behaviour especially in oligopoly situations. Such oligopolistic uniformity of behaviour is generally called tacit collusion or conscious parallelism.

The aim of collusion is to raise prices, reduce output and thus increase the profits of the firms. Traditional oligopoly theory suggests that the character and scope of collusive conduct is related to the structural and legal conditions confronting the firms in a market. Collusive agreements are likely to be made in an industry where (1) number of firms is small, (2) the level of industry concentration is high, (3) the product is homogenous (4) the rate of technological change is low, (5) the demand for the product is stable, (6) the demand for the product is relatively inelastic, (7) the orders are frequent, regular and small and (8) the ratio of overhead cost to operating
costs is relatively low. It is very difficult to test empirically the relative importance of these conditions as collusion is the result of the combination of these various factors which are not willing to submit themselves to systematic analysis.

Indian Scene:

Since its inception to 31 December 1984, the MRTPC Commission disposed of 107 cases relating to collusive price fixing. In a majority of the cases the Commission passed "Cease and desist" orders. In a very limited number of cases only the Commission held that the collusive practice was not prejudicial to public interest in the special circumstances of the case and allowed them to pass through gateway under Section 38(1)(b). The practice of collusive price fixing has been mainly indulged in by manufacturers and dealers in India. The practice is mainly prevalent in industries where the product is homogeneous in nature. The Commission conducted a very large number of collusive price fixing enquiries in tyre and newspaper industries.

majority of the cases trade associations were instrumental to a large extent in evolving and enforcing collusive price fixing arrangements. The cases decided by the MRTF Commission on collective boycott, exclusion from trade association, collective restriction of output and market sharing are very limited and in most of these cases also the Commission passed 'cease and desist' orders.

Leading cases:

Leading cases of collusion decided by the MRTF Commission during the period 1970-84 are presented in the following pages mainly with a view to examining the approach of the MRTF Commission in curbing this anti-competitive practice.

Hindustan Times Ltd. and Others:

Six leading newspaper publishers were charged by the Commission with acting in collusion and increasing the prices of newspapers either by informal consultations amongst them or with the aid of an advice of the Indian and Eastern Newspaper Society (IEHS). All the respondents companies except one submitted to 'cease and desist' order, by the Commission under Section 37(1). However, one publisher, Raishina Publications contended before the Commission that

2. RT&E No. 48 of 1975, Order dated 3- 6-1977.
it was not a party to the concert and it increased the price taking into account its own financial conditions and also depending upon the market conditions. It further argued that the rise in the price of the newspaper did not have the effect of prevention, distorting or restricting the competition in any manner and so it was not a restrictive trade practice.

The Commission held that the collusion among newspapers for fixing prices constituted a restrictive trade practice. It observed:

"Now it does not require much argument to state that if certain traders combine together or have a concert to fix the prices of the commodity they deal in or to raise price of the commodity together i.e., at the same time or about the same time, they voluntarily and as a group give up competition between each other in the matter of pricing. The competition is abjured and in its place a price mechanism determined by combination or concert is brought into operation. The price is no longer fixed by free forces of supply and demand but by the fiat of a combination or a concert. The consumers' reactions are completely ignored or not taken into account. Prima facie therefore, a combination to fix prices is anti-competitive in effect and would constitute restrictive trade practice".
Examining the other issue i.e., whether Raishina was a party to such a concert the Commission held as under:

"It is always a ticklish question whether on the facts and in the circumstances of a particular case, the party to a concert or whether its action although in line with the decision of its competitors, was arrived at independently by commercial consideration relevant to its own case. It is now settled law that for a concert or combination or even for conspiracy you do not require a documentary proof. It is enough if the concert or combination or conspiracy can be inferred from the conduct of the parties and or surrounding circumstances".

In the circumstances of that particular case it was held that M/s Raishina Publications was not a party to the concert.

Sandvik Asia Ltd., and three Others:

This is an enquiry started against Sandvik Asia Ltd., Widia (India) Ltd., and India Hard Metals Ltd., and India Tools Manufacturers Ltd. The first allegation was that the prices of comparable types of tips and tools fixed by these companies were identical since 1973 and they were making price revisions almost simultaneously. Further, the

discount rate structure of the companies for tungsten carbide tips was almost similar. Another allegation was of discriminatory pricing on the ground that they granted quantity discount upto 10 per cent on list price and a special quantity discount upto 25 per cent for different categories of customers. The respondent companies contended that the allegations were self contradictory. The allegation of parallel pricing policy was incongruous with the allegation of discriminatory pricing. It was pointed out that while the basic prices and the discount rates were more or less uniform further discount given clearly showed that the net price charged by each of the respondent company was different and there could be no allegation of parallel pricing.

The Additional Director of Investigation contended that there was concert in respect of the basic price and the basic discount and that special discount or final discounts could not be treated as part of the price.

The Commission did not agree with the Director and pointed out that discount by whatever name it was called and by whatever adjectives it was qualified, was essentially a component of the price and in determining whether there was any concert or not and whether competition in the relevant field was affected or not, one has necessarily to
see the final effective price to the customer and not the basic price or the basic discount. The Commission observed that there was an inherent contradiction between the two allegations of parallel pricing and discriminatory pricing and accordingly held that there was no parallel pricing.

Hindustan Lever and Tata Oil Mills Company Ltd. ⁴:

This is an enquiry against two leading producers of toilet soaps. The allegation was that the companies acted in concert by revising the prices of different brands of soap manufactured by them from the same date namely 16-1-1978.

Hindustan Lever argued before the Commission that the effective date for increase in price in the market was not 16-1-1978 and the effective date could only be after the old stocks were exhausted. It further argued that it had decided to increase the prices independently without any concert as the Government of India declined permission to import raw material at lower prices.

Tata Oil Mills Company also argued before the Commission that the increase in price of soaps was not effective from 16-1-1978 and the increase was effective only in respect of soaps produced by it on or after 16-1-1978.

⁴. RTPE No. 4 of 1978, Order dated 27-7-1982 and 17-12-1982.
The time lag was necessary for efficient communication of the increase in price to the various establishments of the company and to make necessary arrangements.

The Director of Investigation on the other hand contended that the increase in prices of soaps was made effective from 16-1-1978 and it could not have been done without prior consultation between the two companies and that it was inconceivable that the prices of raw material had affected the companies equally simultaneously.

The Commission while examining whether there was collusion in fixing prices by the companies identified two important requirements which are to be satisfied in order to call a trade practice collusive trade practice.

The first requirement is that the trade practice must either influence the market behaviour of the undertakings concerned and remove in advance uncertainty as to the future competitive conduct of an undertaking or to maintain or alter commercial conduct of the undertakings concerned in a manner which is not in keeping with competitive forces.

The second requirement of concert according to the Commission is that there should be positive contact, however slender, between the parties either by meeting or discussion or in any other manner and that contact should have the above noted objectives in view.
As far as the first requirement is concerned, the Commission pointed out, the facts of the case establish that the two companies removed in advance the uncertainty as to the future competitive conduct of either. The Commission emphasising this point observed:

"... the important thing in the allegation of concert is the date of announcements of the rise and date on which the rise became effective and on both these counts as well as scale of rise in prices in so far as comparable varieties of toilet soaps were concerned, behaviour of the respondents is more consistent with hypothesis of cartel than any other hypothesis. There was advance notice to both the competitors and both the competitors had announced their decision to revise the prices on the same date and made it effective also from the same date. It is immaterial from the point of view of cartel that respondent-I had applied it to the stocks released as on and from 16-1-1978 and respondent-II to production. Important thing was that each had advance notice of other's price behaviour and with effect from the same date rise in respect of comparable cases was identical".

Regarding the second requirement, the Commission rejected the arguments put forward by the Director of Investigation that because the companies were dominant in
their field of activity and because they were members of ISTMA the contact between the parties can be implied or inferred. The Commission observed:

"... it is too much to say that just because they were members of the executive committee whose decisions, members carried out or just because they were dominant in business that the contact necessary for supporting the allegation of concert can be implied or inferred".

Accordingly the Commission decided that it would not be possible to sustain the allegation of concert made out in the notice of enquiry as it did not satisfy the second requirement of concert.

**Approach of the Commission**

In all the cases decided so far the Commission has taken a serious view regarding the collusion and condemned the practice outright. The Commission held that for proving price fixing conspiracy it is not necessary to have documentary proof. It is enough if the collusion can be inferred from the conduct of the parties and/or surrounding circumstances. It has also taken the view that wherever there is a concert or parallel action to fix prices at the same time or about the same time competition is deemed to
be lessened. According to the Commission two important requirements are to be satisfied in order to call a trade practice collusive trade practice. The first requirement is that the trade practice must either influence the market behaviour of the undertakings concerned and remove in advance uncertainty as to the future competitive conduct of an undertaking or to maintain or alter commercial conduct of the undertakings concerned in a manner which is not in keeping with competitive forces. The second requirement is that there should be positive contact, however slender, between the parties either by meeting or discussion or in any other manner and that contact should have the above noted objectives in view. In view of the approach adopted by the MRTP Commission it is suggested that practice of collusive price fixing should be specially prohibited by the Act.

II. TIE-IN SALES/FULL-LINE FORCING:

Concept:

Tie-in practice is a trade practice whereby as a condition of the furnishing of any product, service, patent or technology, or of obtaining the same on preferential terms a purchaser, lessee or licensee is required to take one or more other products, services or patents or other
technology. Hence an agreement by a party to sell one product but only on the condition that the buyer also purchases a different product constitutes a tying arrangement but where the buyer is free to take either product by itself, there is no tying problem even though the seller may offer the two items as a unit at a single price. Thus the core of the tying arrangement is the forced buying of second product along with the desired purchase of a particular product resulting in economic harm to competition in the market. The condition to purchase the second product need not be expressly embodied in a written contract, but it may be inferred from a course of conduct.

Two important elements are required to be present in order to call a trade practice 'tie-in' practice namely:

1) There should be two distinct and separate products, the sale of one of which is tied to the sale of the other; and

2) a refusal by the seller to supply the tying product separately from the tied product.

Tie-in practice is known by a variety of names such as tie-in sales, tying arrangements, tie-up sales, clubbed sales etc. A product which is sold under the agreement is called a 'tying product' while the other product tagged on

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5. OECD Glossary C-10.
to it is known as 'tied product'. In certain cases, the tying device results in a practice known as 'full-line forcing', in which the buyer must purchase an entire line of goods in order to be able to purchase one particular product in that line. Another form of 'full-line forcing' is to bind the buyer to take full quantum of products which the seller chooses to allocate to him.

Firms use tying contracts to (1) increase profits through pricing two complementary products jointly rather than separately, (2) extend leverage in monopoly markets, (3) create barriers to entry, (4) increase profits through price discrimination, (5) benefit from economies of production and sale, (6) control quality, (7) avoid price controls, (8) cheat on a cartel agreement.

Whatever may be the motives the tie-in practices are undesirable from the consumer point of view especially when they are used as a device to monopolise the tied good market which will result in the reduction of volume of output and a rise in the prices. That is why antitrust laws in the most advanced countries expressly prohibit this practice.

The MRTP Commission decided nearly 139 cases of tie-in or full-line forcing during the period 1970-84. The practice is generally based on written or oral agreements between a manufacturer and distributor or stockists. In a majority of the cases the Commission either passed 'cease and desist' orders or consent orders under Section 37(2) of the Act. The Commission was able to detect and curb effectively the tie-in practice resorted to by many newspapers which prescribed and charged joint advertisement rates for publication of advertisements in all editions of the newspaper even though the advertiser wanted the advertisement to be published only in one edition. However, the Commission had to allow tie-in sales practices resorted to by some private sector undertakings on the plea that their major competitor, the public sector, is indulging in similar practice. It is to be recalled here that the Act does not apply to undertakings owned by the Government. In a large number of cases the tying product is a fast moving item and tied product is slow moving. This indicates that the motive behind indulgence of the practice is the extension of monopoly power into the tied good market. The Commission also held that the stipulation of minimum off take or minimum stock to be maintained by the distributor at all times amounted to full-line forcing.
A detailed analysis of two leading cases of tie-in sales is presented in order to clearly understand the approach of the NRFP Commission towards this practice.

Chiranjilal Chandra Bhan:

Chiranjilal Chandra Bhan, the respondent was a firm which was a redistribution stockists of M/s Hindustan Lever Ltd. The allegation against it was that it was forcing the dealers to purchase Lifebuoy soap along with Sunlight soap which was a fast moving item. The DGIR contended that the competition was affected by, by this tie-in practice in five fields, namely - (a) competition between manufacture of Lifebuoy and manufacturers of other soaps, (b) competition between the respondent on the one hand and other redistribution stockists of Hindustan Lever, (c) competition between respondent and redistribution stockists of other manufactures (d) competition between retailers of respondent and retailers of other redistribution stockists of Hindustan Lever Ltd., and (e) competition between retailers of redistribution stockists of other manufacturers.

Examining the contention of the Director that the practice affected competition between the respondent and

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other redistribution stockists of Hindustan Lever, the Commission held that there was no basis for the contention as there was no indication whether the other redistribution stockists of Hindustan Lever were adopting the trade practice alleged against the respondent. If other redistribution stockists of Hindustan Lever followed the same practice, then the competition between the redistribution stockists of Hindustan Lever would not be affected by this practice. On the same footing the Commission held that the competition between the respondent on the one hand and the redistribution stockists of other manufacturers on the other cannot be alleged to be affected because there was no evidence as to whether other manufacturers had redistribution stockists and whether their stockists were resorting to the trade practice alleged against respondent or not. On the same grounds the Commission held that the competition at the retailer level, whether between the retailers of the respondent and retailers of other redistribution stockists of Hindustan Lever or between the retailers of the respondent and the retailers who were covered by other manufacturers, was not affected by the alleged trade practice.

However, the Commission observed that the only field of competition which was really affected by the trade practice of tying up followed by the respondent was the
competition between Hindustan Lever Ltd., and the manufacturers of products competing with soaps manufactured by Hindustan Lever Ltd., and particularly 'Lifebuoy'. Explaining the anti-competitive effect of the practice, the Commission observed as under:

In the ultimate analysis, the competition between the manufacturers of soap was for the retail outlet and for that competition for retail outlet, by reason of the tying practice adopted by the respondent, the manufacturer of Lifebuoy had an edge over its competitors who were manufacturers of soaps which competed with Lifebuoy in the scale of preferences of the consumers.

Accordingly, the Commission ordered that the trade practice of tying up the sale of Lifebuoy with sale of Sunlight be discontinued and should not be repeated by the respondent.

2. Mathrubhum Printing and Publishing Co. Ltd.:

The respondent was a limited company doing business in the publication of newspapers. It publishes a daily called Mathrubhum from Calicut and Cochin in Kerala State. It was alleged that the respondent was resorting to a practice of prescribing and charging the joint combined advertisement

rates for publication of advertisements in the Calicut and Cochin editions of the Mathrubhumi even when the advertiser wanted the advertisement to be published only in any one or more, as the case may be, of the editions of the said newspaper and not in the other editions thereof.

The Director of Investigation gave two examples which according to him gave an idea of the fields of competition which may be affected by this practice. In the first example, according to him the competition was affected between an advertiser 'A' having old and established business, advertising through a newspaper, which was prescribing separate rates for Calicut and another small enterprising entrepreneur wanting to reach the readers of the respondent which were different from the readers of other newspapers, but because the respondent was insisting on combined rate, competitive position was affected by imposition of unjustified costs. In this second example, the competition affected was that between two advertising agents, one was an agent was patronised a newspaper which charged separate rates for Calicut and the other who patronised the respondent who charged a combined rate for Calicut and Cochin. According to the Director General the agent who advertised through the respondent would suffer because his charges would necessarily be higher.
Examining the contention of the Director General the Commission pointed out that in the absence of details about the trades of the advertisers and advertising agents, it was not possible to find out as to whether this practice affected competition. However, the Commission observed that charging combined rates for Calicut and Cochin editions were a case of tying arrangements and the field of competition was competition between Mathrubhumi on the one hand and other newspapers which were prescribing individual rates for different editions whether for Calicut or Cochin on the other.

Commenting on the anti-competitive effect of tying arrangement, the Commission stated:

"... the whole basis of inference of anti-competitive effect in respect of tying arrangement is that there is existence of market control of tying device. In other words, there must be some leverage in the tying product to justify any allegation about anti-competitive effect of tying arrangement in regard to the tied product. As a matter of fact to show anti-competitive effect of a tying arrangement it would be also necessary to say something about the competitive situation in the tied product. If that product is in a highly competitive market the tying arrangement may be a competitive weapon rather than a competitive obstacle".
Analysing the case, the Commission opined that it was not possible to impute any market power to the respondent in regard to any of its editions as there were more than sixty newspapers in Kerala and competition among them was intense and severe. Hence it was not possible to draw the inference that prescription of combined advertisement rates by the respondent for the two editions prevented, distorted or restricted competition in any field in any manner.

**Approach of the Commission:**

The above decisions of the Commission in two important cases reflect the 'rule of reason' approach in curbing the practice. According to the Commission, it is necessary to study the competitive situation in the tied goods market while analysing the anti-competitive impact of the tie-in practice. If the market is highly competitive then the tying device may be a competitive weapon rather than competitive obstacle.

**III. EXCLUSIVE DEALING ARRANGEMENTS:**

**Concept:**

Exclusive dealing arrangement\(^{10}\) is an agreement by a distributor to purchase, sell or otherwise deal only in

\(^{10}\) This practice is also referred to as 'Exclusive Purchasing'.
products supplied or approved by a manufacturer. The requirement not to deal in other products may relate to competitive and non-competitive products. When an exclusive dealing arrangement covers a range of products, the practice can be analogous to tie-in sales. Exclusive dealership arrangement may also be combined with territorial restrictions wherein, each distributor/dealer is assigned a particular territory and the distributor/dealer is not permitted to sell the product outside the assigned territory. Exclusive dealing arrangement may also some times facilitate the enforcement of resale price maintenance which is a restrictive trade practice.

Exclusive dealing arrangements are generally embodied in the contracts entered into by the manufacturer with its dealers, or may be achieved without binding commitment by granting special prices, rebates, or other benefits to those dealers who do not purchase competitive products. These may be also brought by simply refusing to supply dealers who handle competing products. A dominant manufacturer may enforce exclusive dealing simply through oral instructions.


12. The stipulation by a manufacturer that his distributor shall resell particular goods at prices fixed by him or for not less than those prices is called resale price maintenance.
It is necessary to enquire at this stage why dealers agree to such arrangements that limit their freedom to purchase from competing manufacturers and what advantage the manufacturers derive by selling through exclusive dealers.

One of the strongest inducements to the dealer to accept exclusive arrangement is the frequent reciprocal agreement by the manufacturer to make the dealer his exclusive distributor in agreed territory which will naturally make the dealer sole seller of the brand in that territory. It is impractical for the dealer in certain circumstances to handle more than one line of a product because of the heavy investment in inventory and in specialised repair and maintenance service (e.g., Motor Vehicles and farm marketing). In such cases, it is advantageous for the dealer to concentrate on one line of a product. Exclusive dealing may also make the dealer's source of supply more certain, thereby enabling him to operate on a smaller inventory reducing his investment and storage costs. Another common inducement for the dealer is the rebate, discount, or other special benefits offered by the manufacturer to those who adhere to the exclusive dealing policy. Sometimes the public demand for a particular

branded product may be great enough to enable the producer to refuse to supply those who deal in competitive products. Market shortages will also permit the manufacturers to insist upon an exclusive dealing.

The advantages to the manufacturer of selling through exclusive dealers are manifold. By exclusive dealing, he may establish a more certain and reliable contact with the consumer and thus predict his market more accurately with regard to prices and volume of sales. He can also provide better after-sales service and supply genuine spare parts to the consumers where the nature of products requires such services. Undivided support and exclusive promotion of his product by the distributor may also result in increased sales potential. The distribution costs may be reduced through larger and less frequent deliveries and smaller sales force. The manufacturer can also exercise effective control over dealers in matters relating to prices, promotion, credit and delivery by exclusive dealing arrangements. Exclusive dealing arrangements may also improve and maintain the product image and the goodwill of the manufacturer since it precludes the possibility of substitute goods of inferior quality being supplied to buyers. Finally, control over distribution enables the manufacturer to protect himself from being cut-off from his market by competitors and by the same token to exclude
his rivals from access to the consumers. Even though exclusive dealing provides benefits both to the dealers and manufacturers, it is more attractive to the manufacturers.

One of the most important aspects of exclusive dealing arrangements is their effect on competition and consumer welfare. They can be used to handicap competing suppliers and secure or preserve as large a share of the market as possible. Moreover, regardless of purpose, such arrangements may have that effect, well established firms may tie up so many of the better market outlets that a new comer finds it difficult to gain access to the market. The harmful effect on competing suppliers is likely to be greater in competition for the market in a small area which can support only one or a few dealers, but it also may be considerable in a large area when several of the best dealers are tied up by one or more suppliers, whose products have high consumer preference.

The effect of exclusive arrangements on dealers cannot be overlooked. Dealers will be denied freedom to handle the products of other suppliers and thus lose the opportunity to increase their business by satisfying the preferences of more customers. On the other hand, exclusive dealing

14. For a beautiful analysis of the conditions under which a manufacturer is able to deny market access to other competing manufacturers through exclusive arrangement refer C.L. Pass and K.H. Hawkins, "Exclusive dealing, supplier ownership of outlets and the public interest the petrol case", The Antitrust Bulletin, Vol.17, No.2, Summer, 1972, p.571.
may in some cases bring more dealers into the business and thereby increase competition at that level.15

Exclusive dealing arrangements may hit, ultimately, the consumer. If entry of new supplier firms into the market is made more difficult and existing firms are hampered in their expansion or deprived of existing outlets, the consumer suffers in higher prices, lower quality or both. Apart from harm to the consumer resulting from lessening competition at the supplier level, exclusive dealing may cause additional harm by restricting the consumer choice of products and thus suppressing competition at the dealer level, particularly in the small areas. Even if exclusive dealing occasionally brings more dealers into the business, the results may be to increase distribution costs and hence to increase consumer prices.

Exclusive dealing arrangements may serve useful economic functions without harm to competition and may even encourage competition or they may cause substantial harm depending upon many factors and circumstances.16 Certainly

15. If dealer II is allowed to handle only Brand 'A', Dealer II Brand 'B' etc., then the producer of Brand 'X' will have to search for a new dealer. Whether this is possible will depend upon the type of product involved.

16. The factors which are to be taken by the antitrust enforcement authorities while assessing the anti competitive impact of exclusive dealing arrangement are extensively analysed by William B. Lockhart and Howard R. Sacks. For this refer William B. Lockhart and Howard R. Sacks, "The relevance of economic factors in determining whether exclusive arrangements violate section 3 of the Clayton Act", Harvard Law Review, Vol.65, No.6, April 1952, pp.923-30.
in evaluating the economic justification for a particular exclusive arrangement and its effect on competition it is necessary to look into all these factors and circumstances.

Indian scene:

The MRTP Commission disposed of nearly 122 cases relating to exclusive dealing during the period 1970-84. In India, exclusive dealing arrangements are based on written agreements only and it goes by and large with the allocation of an area to the distributor. Exclusive arrangements in India are common in consumer durables and automobile equipment in view of the special circumstances in these industries. In a majority of the cases, the Commission passed 'cease and desist' orders. However, in certain cases, the Commission allowed the practice to continue as the practice was not prejudicial to public interest in the special circumstances.

Leading cases:

Leading cases of exclusive dealing arrangement decided by the MRTP Commission during the period 1970-84 are presented below mainly with a view to examining the approach of the MRTP Commission in curbing this anti-competitive practice.

17. Important cases on exclusive dealing are already presented in Chapter III of the report while discussing gateways and their use in India. As such it may not serve any purpose in again discussing those cases. Here, however, some more cases which are relevant for assessing the approach of the Commission are presented.
Mafatlal group of Mills, who are the textile manufacturers have appointed several parties to run approved retail shops for the sale of textiles manufactured by it. One of the clauses in the agreement with the retail stockists stipulates that the retail stockists shall never buy stock nor sell any goods other than those manufactured by Mafatlal group of mills. The DGIR made an application under Section 10(a)(iii) of the MRTP Act, 1969 for an enquiry by the MRTP Commission into the alleged practice of exclusive dealing. The company pleaded with the Commission that the decision of the Commission in the case of Swadeshi Mills Co. Ltd., and others was to be applied in their case also. The contention of the company was that the provision of the showroom facility by the dealer would enable the customer to have an idea of the products made by the company. It also stated that its products were marketed through other outlets also in addition to the retail shop. It observed that there was no dearth of outlets in the trade in any place, where the company's exclusive stockists were located. The company further claimed that a small percentage (8 per cent) of the production earmarked for the sale through retail shops did not affect the competition to a material degree in the trade.

18. RTPE No.5 of 1976, Order dated 8-5-1978.
concerned. The Commission taking into account all the relevant facts and considering the decision given in the Swadeshi Mills case, held that the practice did not affect competition to a material degree in the relevant trade and was therefore not prejudicial to the public interest.

Delhi Cloth Mills Ltd. 19:

The Delhi Cloth Mills Company entered into an agreement with wholesaling agents for selling the textile products of the company stocked in wholesale godowns for which the rent was also paid by the Delhi Cloth Mills Ltd.

One of the clauses in the agreement stipulated that the selling agent during the period of continuance of these shall not store, display, or sell any commodity which is not supplied to them by the DCM. The clause further stipulates that the selling agent should not sell or deal with similar products manufactured by Indian or Foreign Companies. The DGIR objected to the clause on the ground that it was a restrictive trade practice of exclusive dealing. The Commission, however, opined that the company was justified in preventing its wholesale agents from not selling the goods of the competitors as they were specially engaged by the company to stock and sell their products and the rent for stocking the goods was also paid by the company. Hence

it was not a restrictive trade practice. Similar agreements of the company with the retailers and retail stockists have also been held by the Commission as not amounting to restrictive trade practice.

Cooper Engineering Ltd. 20:

Cooper Engineering Ltd., which is engaged in the manufacture or diesel engines, pumpsets entered into agreement with its dealers for the sale of the products. One of the clauses in the agreement says "the dealer hereby undertakes and agrees not to associate with or take direct interest in any person, firm or company engaged in the manufacture of sale of any type of engines either diesel or petrol or kerosene whether indigenous or imported, which in the sole discretion of the principals provides or is likely to provide competition to business activities of the principals provides or is likely to provide competition to business activities of the principals in general and to the said products in particular". The DGIR objected to the clause that it related to the restrictive trade practice of exclusive dealing. The company on the otherhand maintained that the clause did not amount to a restrictive trade practice. According to the Company, the exclusivity clause in the agreement aimed at giving the customer after sales

service and ensured that spurious or substandard goods or spare parts were not passed on to the customers who were mostly illiterate farmers. The Company further contended that the product was not a consumer item and demonstration of the engine or pumpset was necessary before it was sold. Without exclusive dealing agreement it was not possible to achieve this. It further contended that the Commission upheld a similar clause in the Usha Sales Pvt. Ltd., case. The Commission after quoting the Supreme Court's decision in TELCO case wherein it was ruled that exclusive dealing arrangement of TELCO with its dealers was not a restrictive trade practice, held that the clause did not constitute any restrictive trade practice.

**Indian Express and others**

Four Newspaper companies viz., Indian Express (Madurai) Pvt. Ltd., Andhra Prabha Ltd., Indian Express (Bombay) Pvt. Ltd., Kasturi and Sons., are preventing their agents from selling and/or distributing any other newspaper or periodicals except those published by them. When the DGIR objected to this restrictive trade practice the Commission opined that the agreement was an agency agreement and hence not a restrictive trade practice.

A careful analysis of the cases decided by the MRTP Commission reveals that in the Commission's view the practice of exclusive dealing is not per se restrictive, and the anti-competitive impact of exclusive dealing is to be judged on the basis of conditions present in a particular industry or market. In the opinion of the Commission, if in an industry, each manufacturer has his own exclusive arrangements for marketing the products the customer's choice of buying any make he likes is not reduced, on the otherhand, it is enhanced. According to the Commission, if a product requires after-sales service, hire purchase facility, prompt repair and supply of genuine spare parts, exclusive dealing arrangements are not only desirable for effectively carrying out these functions but also act as a weapon of competition. With regard to exclusive retail outlets of textile manufacturers, the Commission is of the view that if the percentage of the cloth sold by the textile companies through exclusive dealing is very small, there is no danger to competition in the market. The Commission is also of the opinion that if the exclusive dealing

22. The Commission is holding this view after the Supreme Court's decision in TELCO case wherein it was held that exclusive dealing is not per se restrictive. Before the TELCO decision the Commission in a large number of cases, held that exclusive dealing is ipso facto a restrictive trade practice.
arrangement is confined only to intermediate outlet and not to any final outlet to the consumers, the effect on competition is very negligible. Exclusive agency agreement being an agreement between principal and his agent does not have adverse effect on competition by the sale of the principal's own products by its own agents.

IV. PRICE DISCRIMINATION

Concept:

The sale of similar goods and services to different buyers at different prices is generally regarded as price discrimination. However, if the costs incurred in making different sales are different and the prices are varied accordingly, there would be no price discrimination. "Discrimination occurs most clearly when the same goods, of the same quality, are sold in the same quantity, at the same time under the same conditions and on the same terms to different buyers at different prices". Discrimination may take either the form of variation in the prices or the variation in the discounts accompanying a uniform price. It may also appear in differences in the quality of the goods and the character of services provided by sellers and in the allowances made by sellers for services rendered for them by the buyers. Price discrimination may be categorised

in terms of primary line and secondary line. Primary line discrimination can be said to occur when a producer or seller charges different prices in order to eliminate other competing producers or sellers or lessen their sales. The most common example of primary line discrimination occurs when a large firm sets different prices for its product in different markets divided on the basis of geographical area, income of the buyers etc., and the differences in the price charged cannot be explained by the variations in costs. Predatory pricing is an extreme example of primary line discrimination whereby a large firm cuts its prices below cost in competitive markets with the intention to eliminate competitors and make good its losses by selling the products in such markets where it has monopoly, at higher prices. Secondary line discrimination occurs when a buyer is granted a preferential price and, as a result, its competitors are injured. The most common example is a low price charged by a manufacturer to a large wholesaler. Under such conditions, small wholesalers may not be able to compete in the market as the prices at which they purchase are higher.

Indian Scene:

During the period 1970-94, the NMC Commission disposed 169 cases relating to price discrimination. In India secondary

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line price discrimination has been prevalent widely and it emanated from the bilateral agreements between manufacturer and his distributor. The secondary line discrimination has taken various forms namely, grant of quantity discount, turnover bonus, incentive rebates, overriding commission, discriminatory terms of credit and delivery and different prices for different customers and markets.

In most of the contested cases, the Commission allowed the practice to pass through gateway (h) of Section 38(1) of the Act holding that the practice will not directly or indirectly restrict or discourage competition. Only a small number of cases of suspected predatory price cutting were brought before the Commission and in none of the cases could the allegation of predatory pricing be proved.

**Leading cases:**

With a view to finding out the approach of the Commission in deciding the price discrimination practice, some important cases are discussed below.

**Carborandum Universal Limited**

Carborandum Universal Limited is a manufacturer of aluminium oxide abrasive grains, partly for captive consumption and partly for sale to the manufacturers of branded abrasives and others. The company is charging prices for the sale

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of its products on 'slab basis' i.e., higher prices for the purchasers of smaller quantities and lower prices for the purchasers of large quantities which amounts to making discrimination in charging prices. The company tried to justify the pricing on the ground that it was related to cost saving and provided incentive to the customers to plan their requirements and place orders in advance. However, the Commission, after analysing the number of customers under each slab, concluded that the maximum advantage of the lowest price under the slab went only to one large monopolistic producer of grinding wheels, i.e., Grindwell Norton Ltd., which helped them to have an important cost advantage vis-a-vis their smaller competitors. Hence it was ordered that the practice should be discontinued and under any circumstances the differences in the rates of discount between one slab and the next higher slab should not exceed 1 per cent on the sale price. A similar type of enquiry has been conducted on Grindwell Norton Ltd., which manufactures silicon carbide abrasive grains.

Bata India Ltd.: 27

Bata India Ltd., the respondent is engaged in the manufacture of leather and rubber canvas footwear. It also

27. RTPE No. 3 of 1974, Order dated 5-5-1975.
buys footwear manufactured by small-scale entrepreneurs and markets the same through its own retail and wholesale outlets. The footwear sold by the respondent through its retail shop bears the brand name of Bata and those sold to the wholesalers are marketed with the brand name of BSC. There is no difference in quality of the products marketed with brands Bata and BSC. The reasons for adopting different brands for marketing the respondent's products are said to be that Bata brand articles are marketed through its own retail shoe stores and agency shops whereas BSC brand articles are marketed through wholesalers and independent retailers.

The company executed an agreement with its wholesalers for the sales and distribution of its footwear. The DGIR alleged that the agreements provided for the restrictive trade practices of full-line forcing, resale price maintenance and payment of discount bonus. The respondent agreed to submit to such order under Section 37 as the Commission may pass with regard to the restrictive trade practices of resale price maintenance and full-line forcing. However, the respondent contended that the practice of paying discriminatory discounts/bonus did not directly or indirectly restrict or discourage competition to any material degree in the trade and hence passed through gateway (h).
The respondent gives a uniform discount of 8.25 per cent for leather chappal and hawai wedge categories and 8.5 per cent for other categories and gives a further discount of 1 per cent on the total contracted turnover provided certain conditions are fulfilled. For eligibility to earn the discount no minimum turnover in terms of value or quantity is prescribed and it is given irrespective of the volume of the contracted turnover. It is in the nature of incentive for the due performance of the contract. The respondent also gives an extra discount of 1 per cent on so much of the turnover as is in excess of the specified value provided certain conditions are fulfilled. It is this extra discount which results in price discrimination between large buyers and the small buyers. The respondent contended that discount based on certain conditions were granted by the respondent in view of the considerable savings in cost resulting from the due fulfilment of the conditions. For example, the condition of retirement of documents and payment of invoices within time results in savings of considerable amounts on account of interest to the respondent company. So also the condition of lifting of stocks within time prevents accumulation of stocks and results in smooth flow of goods manufactured which in turn results in increased productivity and better production planning. Having regard
to the savings resulting to the company, the granting of 1 per cent discount to the wholesalers amounts to the passing on of a part of the savings by the company to the wholesalers.

The Commission was convinced by the argument and held that the extra discount based on turnover of the specified value allowed by the respondent in this case will not affect competition in any material degree and considering that it represents cost saving passed on to the purchaser, on the balance, the practice is not unreasonable to the facts of this case. Therefore, it is entitled to benefit of gateway (h) and the balancing clause thereof.

Andhra Sugar Works Ltd.\textsuperscript{28} and DCM Chemical Works\textsuperscript{29},

In the above cases the Commission ensured that the prices charged for the sale of caustic soda to dealers concerned would be uniform in each district or city as the case may be at any given time. However, it opined that the sale by the companies to direct users was not likely to affect competition in any field by reason of the discriminating price policies adopted by them, because the impact on the total cost of the product by reason of any differential

\begin{footnotesize}
\textsuperscript{28} RTPE No.50 of 1977, Order dated 17-12-1980.
\textsuperscript{29} RTPE No.49 of 1977, Order dated 18-12-1980.
\end{footnotesize}
pricing of caustic soda would be negligible.

**Allied Distributors & Co.**  

The sole selling agency agreement of Bengal Potteries Ltd., a leading manufacturer of crockery, with allied Distributors & Co., provided for compensation for damages to the goods, brokerage or incentive to increase the sale of a special item of production. The DGIR contended that the above clause in the agreement amounted to a restrictive trade practice of price discrimination. Rejecting the contention of the Director General of Investigation and Registration, the Commission held that the practice of making provision for compensation for damages to the goods or brokerage or incentives to increase the sale of any special item of production would not come under price discrimination clause because it was not a concession given in connection with or by reason of dealings but was for increasing the sale of any special item of production.

**Tri-Sure India Ltd.**

Tri-Sure India Ltd., a dominant manufacturer of flanges and bungs used for effective closure of barrels and drums, was charged of quoting low prices in order to wipe out small

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competitors and quoting different prices to different customers without reference to the company's own price list.

The respondent company clarified that nearly 80 per cent of the sales made by it were only against tender, and therefore, no question of any differential pricing could arise in this regard. Further, according to the company, the balance of its products was sold only to direct users on the basis of negotiated prices and that the impact of this on competition was almost negligible.

The company, however, undertook not to sell the products at a price below the cost price determined on established principles, and if any contingency arose to sell the products at prices below the cost, it would do so only in the case of extreme difficulties leading to distress sales and that it would not do so with a view to wiping out competition. The Commission accepted the undertaking and passed an order under Section 37(2) of the MRTP Act.

**Approach of the MRTP Commission:**

The Commission, while dealing with the effect of secondary-line discrimination in competition between buyers and their competitors generally held that competition will be affected whenever there are differences in the prices paid by the buyers or whenever the discounts are allowed.
on the basis of quantity purchased or turnover, reached. The Commission is of the opinion that the discriminatory prices or discounts will not affect competition if the differential discounts or prices merely amount to passing of the saving in the cost of manufacture, sales or delivery resulting from the different quantities sold or delivered to the dealers or distributors. However, it is to be remembered that the existing Indian law does not expressly condone the passing on of such savings to the purchaser of the large quantities. The Commission has also taken the view that if the sales are to actual or direct users, the effect of differential prices or discounts in the relevant field of competition is negligible as their impact on the total cost of the end product by reason of differential pricing would be negligible. The Commission viewed that the practice of making provision for compensation for damages to the goods or brokerage or incentive to increase the sale of any special item of production will not come under price discrimination clause because it is not a concession given in connection with or by reason of dealing but is for increasing the sale of any special item of production. The Commission, while dealing with the effect of primary-line discrimination competition, has generally taken the view that such discrimination will not affect competition if it is adopted by a firm in extraordinary circumstances for its survival.
Resale price maintenance refers to the practice whereby suppliers of products impose upon retail shopkeepers the prices at which their products are to be sold to the public. The price of a product then becomes the same at all points of resale, regardless of differences in location, the range and quality of services provided and the different demands on time, resources and services of the retailers. The imposition of resale price maintenance becomes practicable only when the products are branded. Resale price can be carried out in three different ways: (1) A minimum price below which the product may not be sold. (2) A maximum price above which the product may not be sold. (3) A stipulated price from which no variation is allowed. The frequently applied method is the third one which allows neither increases nor reductions. Sometimes 'suggested or list' prices are circulated by the manufacturer and it is not always clear that the 'suggested price' is only a suggestion or enforced by the manufacturer concerned. Resale price maintenance can be resorted to either individually or collectively.

Individual resale price maintenance is the practice by a

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supplier of prescribing and taking action to enforce retail or wholesale prices for the resale of goods. Collective resale price maintenance is an arrangement among suppliers producing different brands of the same product to prescribe wholesale or retail prices for the sale of their goods by buyer. Both collective and individual resale price maintenance can be resorted together. Between the two, individual resale price maintenance is a lesser evil and can survive even if collective price maintenance is prohibited or given up voluntarily.

There are arguments against and for resale price maintenance. Two important arguments against resale price maintenance are (1) it eliminates price competition at the retail level and thus raises retail prices and retailer's margins and (2) it serves as a restraint upon price competitions among manufacturers. The arguments in support of the resale price maintenance are: (1) consumers would be benefited with the low resale prices enforced by the manufacturers especially when the retailer enjoys local


35. For a detailed study of the arguments in support of resale price maintenance refer author's unpublished thesis on "Control of Restrictive Trade Practices in India with special reference to Exclusive dealing, tie-in sales and resale price maintenance in India," submitted to Nagarjuna University in 1985 for M.Phil degree.
monopoly and tries to fix the retail price higher than the price enforced by the manufacturer (2) it enables small traders and shopkeepers to survive the competition of big merchants and powerful chain stores. Economists do not consider the above arguments in support of resale price maintenance as adequate defence for the practice. They maintain that resale price maintenance obstructs the natural process of price competition, narrows consumer choice, and increases the profits of the distributors. That is why many West-European countries have comprehensive laws prohibiting resale price maintenance.

Indian Scene:

The MRTP Commission decided 146 cases from its inception to December 31, 1994. On the basis of a large number of cases decided by the Commission and the nature of the orders passed by it, it may be concluded that the practice of resale price maintenance referred to under section 33(1)(f) has been widely prevalent in Indian economy. In most of the cases, the Commission passed 'cease and desist' orders indicating the anti-competitive effect of the practice. This practice is generally based on written agreements between a manufacturer and a dealer. This practice is more prevalent in industry groups of electrical machinery, chemicals and chemical products, transport equipment and parts and food products.
Leading cases:

Typical cases on resale price maintenance are presented hereunder in order to assess the approach of the MRTP Commission in curbing this practice.

Allied Distributors & Co.*36:

Bengal Potteries Ltd., a dominant manufacturer of crockery entered into a sole selling agency agreement with Allied Distributors & Co., for the distribution of its products. Clause 3(1) of the agreement provided that the sale price of buyer should not exceed 11 per cent of the purchase price. The clause further stipulated that in case of sale from their depots, Bengal potteries shall be entitled to mark up the purchase price by local taxes and 10 per cent of the purchase price excise duty and other taxes. The Registrar of Restrictive Trade Agreements objected to the clause and contended that the entire clause fall within Section 33(1)(f) of the MRTP Act. The Commission rejected the contention of the Registrar and held that the first part of the clause clearly indicated that lower prices than the purchase price plus 11 per cent could be charged and hence it will not come under Section 33(1)(f).

However, the Commission held that second part in the clause attracts the provisions of Section 33(1)(f) as it did not indicate that 10 per cent was the maximum and the prices which included a lower profit than that might be charged. Hence, it directed that all price lists issued by Bengal Potteries should clearly state that the prices mentioned are maximum and that prices lower than those may be charged.

Tata Engineering and Locomotive Company Ltd. 37:

TELCO, a manufacturer of diesel vehicles entered into an agreement with its dealers for the sale of 'TATA Diesel Vehicles'. One of the clauses in the agreement imposes a condition that 'the price to be charged on resale by the dealer shall be the one fixed by the company'. The Registrar of Restrictive Trade Agreements objected to the clause and made an application to the MRTP Commission for enquiry on the ground that the clause in the agreement amounts to restrictive trade practice of resale price maintenance. The company, however, contended before the Commission that another clause (clause 13) in the agreement makes it clear that the price so fixed is only the maximum price and not minimum or stipulated price. The MRTP Commission held that the clause in the agreement amounts to restrictive trade practice of resale price maintenance, as

it prevents one dealer from competing with another dealer in terms of prices. The Commission further held that clause 13, even though suggestive of maximum price, was not clear enough to tackle the mischief of resale price maintenance without specific mention that prices lower than these prices can be charged. The company agreed to modify the clause and hence the Commission did not make any order.

**Hindustan Lever Ltd.**

Hindustan Lever Ltd., a manufacturer of Vanaspati, toilet preparations, baby milk powder and animal feeds entered into an agreement with its re-distribution stockists for distribution of their products. Clause 5 of the agreement required that the re-distribution stockists 'should carry out all instructions and directions including those as to the maximum resale prices which may from time to time be given by the company or by the company's accredited representative in respect of sale or resale or disposal by the re-distribution stockists of stocks of the products supplied to him in pursuance of the agreements'. Sah Manilal Motichand and Sons, re-distribution stockists of Hindustan Lever Ltd., complained to the Commission that clause 5 of the agreement contained restrictive trade practice of resale price...

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38. RTPE No. 11 of 1974, Order dated 17-3-1976.
maintenance. They further complained that the reference to 'maximum resale price' in clause 5 was merely a camouflage and undercutting of price was not tolerated by the company and that pursuant to clause 5, instructions were issued from time to time regarding maintenance of minimum resale prices and breach of those instructions was treated as breach of the conditions of the agreement entailing its termination. The company on the other hand, contended that on true interpretation of section 33(1)(f) it is not necessary to state that prices lower than those stipulated may be charged on resale unless the prices to be charged on resale by the purchaser are 'stipulated' by the seller. It contended that in clause 5 of the agreement there is reference only to maximum prices and maximum prices are not stipulated prices. However, the Commission opined that maximum price is a stipulated price unless it is clearly stated that prices lower than those prices may be charged. Therefore, the Commission ordered that clause 5 of the agreement shall be discontinued and not repeated.

Swadeshi Mills Ltd. 39:

Swadeshi Mills and Company Ltd., a manufacturer and seller of textiles, entered into an agreement with its

dealers and stockists for the sale of its products. Clause 2 of the agreement imposes a condition that the stockists shall at all times sell cloth at prices not higher or lower than the one prescribed by the 'Tata Textile Mills'. The explanatory note relating to the above clause further stipulated that the stockists may sell the cloth at lower than their normal selling rates if the cloth is not moved fast with the prior approval of the company. The Registrar of Restrictive Trade Agreements objected to the clause with the explanation and contended that it clearly provided for resale price maintenance and will come within the mischief of Section 33(1)(f). The company contended that the impugned clause was drastically amended so as to provide that the stockists shall at all times sell cloth at prices not higher than those prescribed by Tata textile Mills. It further stated that it had issued a circular to the stockists informing that they are free to sell their goods at any price below the level indicated in the letter of appointment. The company further informed the Commission that the note relating to the impugned clause was deleted from the agreement. The Commission held that all the agreements between the company and their distributors should be modified so that the prices recommended by the company are maximum and stockists are free to sell the products at the price lower than the maximum prices.
From the above discussion of cases, it is clear that the Commission treated recommended resale price as a restrictive trade practice unless it is clearly indicated that prices lower than those may be charged. Further, according to the Commission, a maximum price is a 'stipulated price' and will constitute resale price maintenance unless it is mentioned in the agreement that prices lower than those might be charged. A circular by producer to its dealers giving freedom to sell at lower prices cannot by itself modify a resale price agreement with a dealer, which is a bilateral agreement. In the opinion of the Commission, the price lists issued by manufacturers must clearly state that the prices in the list are maximum prices in order to comply with the provisions of the MRTP Act.

**Resale Price Maintenance as a Prohibited Practice:**

The MRTP Act, 1969 contains special provisions for avoidance of conditions for maintaining minimum resale prices. The Act outright prohibits the establishment or enforcement of minimum resale price. It lays down that any term or condition of a contract for the sale of goods by a person to a wholesaler or retailer or any agreement between a person and wholesaler or retailer relating to such sale shall be void in so far as it purports to establish or provide for the establishment of minimum prices to be charged on the
resale of goods in India. Further, under the Act minimum resale price cannot be notified or published by a supplier of goods. This prohibition applies to patented and non-patented articles also. Thus, the practice of 'minimum resale price maintenance' is per se void. There is neither need to decide the validity of 'restrictive' nature of such a trade practice with reference to the facts and features of the trades to which it relates nor does it require any order of the MRTP Commission to declare such a trade practice void which is necessary in case of other restrictive trade practices.

The Act also prohibits other measures for maintaining minimum resale prices. It provides that no supplier shall withhold supplies of any goods from any wholesaler or retailer seeking to obtain them for resale in India on the ground that the latter has sold or is likely to sell the goods at a price below the resale price. However, suppliers are permitted to withhold supplies from dealers who have been using the goods as 'loss leaders'. Wholesaler or retailer is said to be using goods as 'loss leaders' when he resells them otherwise than in genuine seasonal or clearance sale, not for the purpose of making a profit on the resale but for

40. MRTP Act, Section 39(1).
41. MRTP Act, Section 40(1).
42. MRTP Act, Section 40, Explanation II.
the purpose of attracting to the establishment at which the goods are sold customers likely to purchase other goods or otherwise for the purpose of advertising his business\(^43\).

The Act empowers the MRTP Commission to exempt particular classes of goods from the operation of the provisions relating to prohibition of maintenance of minimum resale prices when the Commission is satisfied that in default of a system of maintained minimum resale prices, the quality or the varieties of goods would be substantially reduced to detriment of the public, or the retail prices of the goods would, in general and in the long run, be increased to the detriment of the public or services incidental to the sale would either cease to be provided or be reduced substantially to the detriment of the public\(^44\).

The Act also provides for the penal provisions for contravention of the provisions relating to prohibition of minimum resale price maintenance. Under Section 51 of the Act contravention of the provisions of Section 39 and 40 is offence punishable with imprisonment which may extend to three months, or with a fine which may extend to 5,000/- or both. However, the powers of imposing penalty and fine are vested in a court of law and not in the MRTP Commission.

\(^43\). MRTP Act, Section 40, Explanation II.
\(^44\). MRTP Act, Section 41.
In the following pages the operation of these provisions prohibiting minimum resale price maintenance is discussed.

Prohibition of Minimum Resale Price Maintenance:

It is not easy to assess the impact of the prohibition of minimum resale price maintenance in India. Two types of investigations are to be conducted in order to assess the impact of the abolition of resale price maintenance. First, investigations of the actual prices charged at a point of time and the extent to which reductions from a manufacturer's recommended price are offered and second, investigations of the trend in retail margins, noting the extent to which the trend after the abolition of resale price maintenance diverges from the trend leading up to that event. Unfortunately, such investigations have not been conducted in India even though the practice has been abolished as long back as 1969. It is beyond the scope of the present study to conduct such an extensive investigation.

Studies on the impact of the abolition of resale price maintenance have been conducted in U.K. where resale price maintenance was abolished in 1964. They generally concluded that the abolition of resale price maintenance has

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led to substantial deviation from recommended prices, given rise to increased competition between retailers and taken in conjunction with evidence on the patterns of gross margins has on balance led to lower retail prices. They also concluded that the ending of resale price maintenance led to an initial reduction in gross margins of retailers.

In short, "Resale Prices Act proved to be highly effective in ending resale price maintenance and evidence suggests that it made a contribution to efficiency in retailing. Nevertheless, although the public as a whole has probably benefited from the elimination of resale price maintenance, particular groups such as small independent shopkeepers and some of their customers may have suffered some disadvantages."

There is an urgent need in India to conduct similar studies on the impact of the abolition of resale price maintenance on retail prices. However, in a country like India, where a sellers' market exists for most of the goods, it is doubtful whether the abolition of resale price maintenance will bring any immediate benefit to the consumers, but in the long run it may be beneficial.

Prohibition of refusal to supply goods:

As already mentioned, the Act also prohibited withholding of supplies by any person to a wholesaler or a

retailer on the ground that the wholesaler/retailer has sold or likely to sell the goods at a price below the resale price. The MRTP Commission disposed of one case on this aspect. It initiated an enquiry against Delhi Kanodia Oil Mills on the basis of a complaint filed under Section 10(a)(1) by food grain and Kirana Merchants Association. The Complainant alleged that the respondent had been notifying a minimum resale price for the supply of mustard oil by it below which the stockists could not sell the oil. It was alleged that the respondent had stopped the supply of oil to M/s Garg and Company on the ground that the firm had been guilty of violation of the above condition and had refused to supply oil to the firm on its request and had asked it to take delivery from the respondent's depot on cash payment as against other stockists who were getting their supply at their own premises on credit. After the enquiry was started the respondent approached the Commission for a consent order under Section 37(2) by which it agreed to modify the conditions of the supply of mustard oil, allow uniform rates of discount to all its stockists and avoid fixation of minimum resale prices in respect of oil supplied by it. The complainant, however, had opposed this modification since it had grievance not only against further conduct of the respondent but also its past conduct because of which
one of the stockists had suffered loss and it wanted status quo ante (that existed prior to the time when the above practice was followed) be restored. The proposed modification was, therefore, refused by the Commission and it did not discontinue the enquiry proceedings for the purpose of giving a finding as to whether the respondent was guilty of violating sections 39 and 40 of the Act. It may be noted that such a finding was necessary for further action that could be taken under Section 51 read with Section 57. This order of the Commission gave good expectation about the results of the completed enquiry and the effective implementation of those provisions. This unfortunately did not materialise since personality matters most significantly initiates working.

The final order in this case has been passed on 18 January, 1980 by the Commission. It held that no satisfactory or credible evidence could be given by the complainant to prove its allegations. It was further held that the refusal to supply oil to M/s Garg and Company was because of the way the firm conducted itself through its agents. The details of the conduct, however, have not been indicated in the order as reported. The two orders passed by the Commission in this case clearly reveal that the respondent was maintaining minimum resale price for its goods which it
had earlier proposed to drop from its agreements with the stockists though it was possible that supplies may not have been withheld on this ground alone which the complainant could not prove satisfactorily. This single case itself indicates the manner in which contested cases are decided by the Commission. The Commission has mostly been passing consent orders even in respect of minimum resale price maintenance cases instead of taking action against the companies as provided under the Act.

Exemptions 47:

The MRTP Commission upto 31 December 1984, received five applications for exemption from the provisions relating to the prohibition of minimum resale price maintenance. In 1971, the Gramophone Company of India Ltd., a dominant manufacturer of gramophone records, gramophone and other sound reproduction equipment sought exemption from resale price maintenance provisions in respect of gramophone records manufactured and marketed by it. The company informed the Commission in 1972, that it did not propose to pursue its application. In 1972, Binny Ltd., Madras a leading a manufacturer of textiles supplied for such exemption for its products 48. Presumably finding it difficult to support its

claim, the company subsequently withdrew its claim. In 1973, two applications, one from Western India Match Company (WIMCO) and another from Joint Council of Indian Pharmaceuticals Trade were received by the Commission for exemption from the provisions of Section 39 and 40 in respect of match boxes and drugs. The Commission granted exemption in respect of match boxes and rejected exemption in respect of drugs. In 1979, the Commission granted exemption from the provisions of Section 39 and 40 in respect of certain newspapers.

Penal Provisions:

Even though the Act provides for penal provisions, no person so far has been punished for any violation of the provisions relating to the maintenance of minimum resale price. The main reason for this seems to be that the powers of punishing the offender with imprisonment or fine are vested in a court of law, and not in the MRTP Commission itself. A court shall take cognisance of such an offence only on a report in writing of the facts constituting the offence by a public servant. Neither the MRTP Commission nor the Registrar has ever initiated such an action before a court. Whenever they came across such a case, they preferred to take action under Section 33(1)(f). For instance, in RRTA v. Gramophone Co., of India Ltd., the matter lay within
the purview of Section 39 but it was dealt with under Section under Section 33(1)(f), even when the company could not make out a case for exemption from prohibition of minimum resale prices. The agreement of American Universal Electric (India) Ltd., with Bajaj Electricals provided that the purchasers' sale price to their dealers shall not be lower than the sale price of similar fans to the manufacturer's dealers. Though this stipulation attracted the provisions of Section 39, no action in that behalf was taken either by the Commission or by the Registrar. The Registrar however, filed an application under Section 10(a)(iii) alleging the infringement of Section 33(1)(f). The Commission instituted an enquiry and passed an order under Section 37(2).

Difficulties in enforcing the provisions:

The above discussion would show that no visible impact has been felt by the abolition of the minimum resale price maintenance in India. Many manufacturers are adopting new techniques to circumvent the provisions of the Act. One such technique is the use of the term 'suggested maximum resale price' in place of the term 'minimum resale price' in their advertisements, notifications etc. But in actual practice the so called 'suggested maximum resale price' remains the 'minimum resale price' and oral instructions
replace written agreements. In some cases manufacturers are also increasing the suggested 'maximum resale price' with the result that the actual prices charged from the customers are not less than what they used to pay previously. This has happened in the case of packaged commodities. When the Government issued directions requiring the stamping selling prices which are high enough to take care of the high margin of profit for the distributors. In order to avoid such practices the Government of India modified the price stamping scheme in respect of textile products. The Government directed all the textile mills to stamp 'ex-factory prices' and excise duty per metre on the face of the pleat and also on every metre of cloth, instead of 'maximum retail price'.

Another technique generally adopted by the manufacturers/suppliers to enforce resale price maintenance without attracting the provisions of the MRTP Act is what is known as 'minimum advertised price'. The technique is based on the normal provisions of credit to dealers to finance their stocks. Manufacturers threaten the dealers that if their advertised prices are lower than a figure specified, their credit worthiness will have to be reconsidered because lower prices would give insufficient profit to make the business viable. Obviously, manufacturers must protect themselves
against bad debts, but the effect of the practice is to achieve uniform retail prices to the detriment of the consumer.

Still, another way generally adopted by the manufacturers to enforce resale price maintenance is to stipulate that the guarantee for the product shall not apply if the goods are sold at other than their recommended sale price. If a particular dealer sells the goods at less than the recommended price, he cannot pass the guarantee to the customer. Since a customer has rights in law against the dealer from whom he purchased a product which subsequently proved defective, the guarantee offered by the manufacturer is in practice of more value to the dealer than to the customer and so will become a means whereby the manufacturer can exert pressure on the retailers to adhere to a recommended price.

Suggestions:

Certain measures are to be taken in India for effectively curbing the practice of minimum resale price maintenance. These measures are:

1) suggestions, recommendations relating to the maximum resale prices are to be prohibited, unless it is specifically mentioned that prices lower than those suggested or recommended can be charged.
This is necessary as the typical Indian consumer cannot distinguish the maximum resale price from the minimum resale price.

2) Collective resale price maintenance should also be prohibited as recommended by the Rajendra Sachar Committee.

3) It is necessary to make it unlawful for a supplier to stipulate in any guarantee to the consumer of a minimum resale price as a condition for honouring the guarantee.

4) The authority to initiate necessary prosecution for violation of the provisions regarding prohibition of minimum resale price maintenance should be vested with the Director General of Investigation and Registration. The authority to try the offences should be vested with the MRTP Commission.

5) Intensive advertising campaign in the newspapers is to be taken up by the MRTP Commission to arouse public/consumer awareness of the harmful effect of the practice.

It is hoped that with the growth of healthy consumers movement in India, the consumers will be able to bargain effectively with the sellers and pay less than what they used to pay before the abolition of resale price maintenance.

SUMMARY

In this chapter, an attempt is made to know the approach adopted by the MRTP Commission in curbing various types of
restrictive trade practices by discussing important cases decided by the Commission under each category.

The Commission outright condemned the practice of collusive price fixing. It held that for proving price fixing conspiracy it was not necessary to have documentary proof. It is enough if the collusion can be inferred from the conduct of the parties and/or surrounding circumstances. It has also taken the view that where ever there is a concert or parallel action to fix prices at the same time or about the same time competition is deemed to be lessened. In regard to tie-in, the Commission adopted 'rule of reason' approach. It is of the view that it is necessary to study the competitive situation in the tied goods market while analysing the anti competitive impact of the tie-in practice. Exclusive dealing, according to the Commission is not per se restrictive and the anti competitive impact of exclusive dealing is to be judged on the basis of the conditions present in a particular industry or market. In the opinion of the Indian Monopolies Commission, if in an industry, each manufacturer has his own exclusive arrangements for marketing the products, the customer choice of buying any make he likes is not reduced, on the other hand it is enhanced. If a product requires after sales service, hire purchase facility, prompt repair and supply of genuine spare parts, exclusive
dealing arrangements are not only desirable but also act as a weapon of competition. Regarding discriminatory discounts the Commission is of the opinion that it will not affect competition if the differential discounts or prices merely amount to passing on the saving in the cost of manufacture, sales, or delivery resulting from the different quantities sold or delivered to the dealers or distributors. The Commission treated recommended resale price as a restrictive trade practice unless it is clearly indicated that prices lower than those may be charged. No visible impact has been felt in India by the abolition of resale price maintenance. Many manufacturers are adopting new techniques to circumvent the provisions of the Act. It is suggested that suggestions, recommendations relating to maximum resale prices should be prohibited unless it is specifically mentioned that price lower than those suggested or recommended can be charged. This is necessary as the typical Indian consumer cannot distinguish the maximum resale price from the minimum resale price. Collective resale price maintenance should also be prohibited.