Chapter III

Monopolies and Restrictive Trade Practices Act 1969; MRTP Mechanism, its establishment, features and Functioning

Introduction

Development of Economic Strategy in India

Growth of Monopolies of concentration of economic power in India

The Inception of Indian Competition Law

The principle basis of MRTP Act

Objectives of the MRTP Act

*Restrictive Trade Practices*

*Unfair Trade Practices*

MRTP and Consumer Protection Act

MRTP Commission

*Terms of office, conditions of services etc*

Failure of the MRTP Act

High level Committee report on Competition Policy and Law

Conclusion
Chapter III

MRTP mechanism; Its Establishment, Feature and Functioning

The Government of India enacted Monopolies and Restrictive Trade Practices 1969, with an objective of preventing the concentration of economic power to the common detriment of the public, for the control of the monopolies and prohibition of monopolistic and restrictive trade practices. The MRTP Commission was set up to deal with the cases pertaining to the provisions of the MRTP Act. In the wake of globalization, the Indian Government liberalized its regulations making the flow of foreign investment into India simply thereby increasing the number of foreign investors doing business in India. Here in this chapter we shall discuss about the role of the MRTP Act as the competition regulator of India. The impact of the Industrial policies in framing the said legislation, and the Amendments made to the Act. And the International pressure cast on India to frame New-legislation owing to the failure of the MRTP Act.

Introduction

Competition is inevitable in today’s modern world. Its presence can be felt in almost all the countries across the globe and India is not an exception to it. During the nineteenth century, both law and economics began to develop theories of competition as well as ideological defenses of competition as a social good. These were the socio-economic settings in which the founding fathers had to chart out a programme of nation-building. To eliminate poverty and to raise the level of development through rapid industrialization, they adopted the method of economic planning. The planning commission was set up\(^{80}\) and India adopted five year plans for the development of the economy. The framers of the independent India were deeply influenced by Socialism and the same is reflected in the manner in which India followed the Soviet style of industrialization that required extensive State intervention along with import substitution. The Government of free India wanted rapid industrial development and equitable distribution of wealth. The same is reflected under the Constitution of India as adequate provisions were made in the Directive Principles of State Policy.

---

\(^{80}\) The planning commission was set up on March 1950.
Development of Economic strategy in India

The Indian National Congress, under the inspiration of Jawaharlal Nehru, set-up the National Planning Committee (NCP) towards the end of 1938. The Committee produced a series of studies on different subjects concerned with economic development. The Committee laid down that the state should own or control all key industries and services, mineral resources and railways, waterways, shipping and other public utilities and, in fact, all those large-scale industries which were likely to become Monopolistic in character. Just after the attainment of the Independence the then the Prime Minister Jawarlal Nehru set up the planning Commission in 1950 to assess the country’s needs of material capital and human resources and to formulate economic plans for their more balanced and effective utilization. The Directive Principles of the Indian Constitution are an expression of the will of the people of India for rapid economic growth. Accordingly, the Government of India adopted planning as a means of fostering economic development. The planning Commission set out the following four long term objectives of planning;

1. To increase production to the maximum possible extent so as to achieve higher level of national and per capita income;
2. To achieve full employment;
3. To reduce inequalities of income and wealth; and
4. To set up a socialist society based on equality and justice and absence of exploitation.

India is regarded as a good example of a Mixed economy. Under the Directive Principles of the Indian Constitution, it has been laid down that the State should strive “to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life”. In the economic sphere, the State is to direct its policy to secure a better distribution of ownership and control of the material resources of the community and to prevent concentration of wealth in the hands of a few and the exploitation of labour. It would be impossible for the State to attain these ends implied in the directive principle unless the

---

81 The First Five year plan commenced in 1950-51 and it was followed by series of Five-Year Plans.
State itself enters the fields of production and distribution. This explains the rationale behind the deliberate policy of expansion of the public sector to promote rapid industrialization and self-reliance. To protect the weaker sections, the State is also expected to control the distribution of essential commodities. Similarly, by controlling financial system, viz., insurance and banking, the State can endeavour to direct investment in socially desirable channels. Besides, in a poor and under-developed country like India, market forces based on profit motive cannot, by themselves, induce the private sector to move into infrastructural development (which involves heavy capital investment long gestation period, low rate of return, etc). Accordingly, the State has to promote infrastructural facilities like hydro-electric projects; irrigation, road and railway transport and has to create conditions conducive to a higher level of investment so that national and per capita incomes of the people can be improved continuously. At the same time, the government cannot leave the private sector to develop in its own unorganized manner. Naturally, the Government will have to prepare an integrated economic plan in which the private sector will also have a well-defined role. The State will guide, direct and control the private sector through various incentives. This was an important reason for the creation and dominance of the public sector in India during the first three decades of planning.

In order to attain the paramount goals of equality of distribution of wealth and resources economic concentration and to check this government appointed the committee called Mahalanobis Committee, on distribution of Income and levels of Living in the year 1960 which highlighted growing income inequality in India in the post-Independence period.

The Government appointed the Monopolies Inquiry Commission (MIC) for the following purposes:

---

82 Prof. Mahalanobis was the real architect of the second plan. And was responsible for introducing a clear strategy of development based on Russian experience.

83 Vide Notification dated 16th April, 1964 with following terms of reference;

a) to inquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity other than agriculture with special reference to;

i) The factors responsible for such concentration and monopolistic and restrictive practices;

ii) Their social and economic consequences and to extent to which they might work to the common detriment; and
To investigate the extent and effect of concentration of power in the private sector, i.e. its factor and social consequences, and

To suggest necessary legislative, or other measure in light of the findings.

The growing income inequality was contrary to unambiguous provisions contained in the Directive Principles of Constitution against concentration of wealth, which made the government sit up and take notice of the problem of economic concentration. The MIC couldn't define the term concentration of power beyond generality. In its report submitted to the Government of India\textsuperscript{84}, the MIC underscored that there was high concentration of economic power in over 85 percent of industrial items in India\textsuperscript{85}. The Committee noted that dominant positions allowed firms to manipulate prices and output, and even producers and distributors that were not dominant engaged in restrictive practices. Further, it said that big business were at an advantage in securing industrial licenses to open and expand undertakings. This intensified concentration, especially as the Government did not have the adequate mechanism to check it. The government policies were found to be the chief cause of economic concentration.

The Economic meaning of the “monopoly “is that there is only one firm in the Market. The legal meaning of “ monopoly’ is less rigorous in the sense that it refers to a firm that, although not the only firm in the market, is the largest firm in the market and accounts for the majority of sales in the market. Adam Smith spoke of “the wretched spirit of monopoly”, the “mean capacity, the monopolizing spirit” in which “the oppression of the poor must establish the monopoly of the rich”. The purpose is to earn maximum profit at the cost of the consumers and rival competitors, more than the natural profit which the fair and free competition endures. It also destroys efficiency and discourages innovation. Monopoly power was defined by the MIC as the ability to dictate price and to control the market. The committee also set out the objectives for the legislative recommendations in

\textsuperscript{84} To The Commission submitted its report on October 1965.
terms of achieving the highest possible production with least damage to people at large while securing maximum benefits. Thereafter, the planning Commission of India, appointed Hazari Committee\textsuperscript{86} to review the operation of the existent industrial licensing system under Industrial ( Development and Regulation ) Act 1951. The report echoed previous concerns regarding the skewed benefits of the licensing system and also concluded that the working of licensing system had resulted in disproportionate growth of some of the big business houses in India\textsuperscript{87}. After a heated parliamentary debate over the report, the Government of India appointed the committee under the chairmanship of Mr. Subimal Dutt\textsuperscript{88} known as Industrial Licensing Policy Inquiry Committee – to enquire into the working of the licensing system in India (ILPIC), Which was asked to look into the licensing and Financial Structure. The ILPIC submitted its report two years later, which suggested that;

(1) No specific instructions had been given to licensing authorities, for the purpose of preventing concentration and monopolistic tendencies and that;

(2) The procedures, in fact, nurtured the growth of large industrial houses.

The Dutt Committee accepting the fact that the Industrial Licensing policy favoring the Large Industrial Houses stated that; “it was not, however, necessary to grant multiple licenses to the same House in a given industry. It was also not necessary to grant capacities much higher than necessary on techno-economic grounds and thereby concentrate licensed capacity among a few units belonging to the Large Industrial Sector … A consideration of preventing monopoly does not seem to have entered the picture at all”.\textsuperscript{89} Thus the Industrial licensing system, specifically meant to implement the industrial policy of the Government, failed miserably to achieve the objective of planned economic

\textsuperscript{86} The Government of India appointed the committee the under the chairmanship of Dr.R.K. Hazari to review the working of industrial licensing in the year 1967

\textsuperscript{87} The committee revealed that some leading houses especially the Birla’s followed the practice of multiple applications for the same product, and for a wide variety of products which are meant to foreclose licensing capacity.

\textsuperscript{88} The committee was set up in the year 1967 and it submitted its report in the year 1969.

\textsuperscript{89} Government of India : REPORT of Industrial Licensing Policy Inquiry Committee, July1969, p 12
development. Besides, it failed to prevent concentration of economic power in the hands of a few large industrial and business houses. As the Dutt Committee observed: “when there was a choice between the public sector on the one side and the private sector on the other, the licensing authorities in some important cases took decisions in favour of the private sector”. The Dutt Committee recognized the fact that industrial licensing was a negative instrument and as such could only play a limited role in industrial development. The Committee, while accepting the fact that other monitory and fiscal instruments be pressed into service to achieve the goal of development, still voted for the continuance of the licensing system so as to make it a positive instrument of industrial growth. The Industrial Licensing and Policy Inquiry Commission (ILPIC) felt that licensing was unable to check concentration, and suggested that the Monopolies and Restrictive Trade Practices (MRTP) Bill (as proposed by the MIC) be passed to set up an effective legislative regime. The establishment of the MRTP Commission included the recommendation to tackle concentration in various sectors of the economy. However, public sector enterprises, cooperative societies and agriculture were exempt from the purview of the proposed Act.

The model of the Act was given by the Monopolies Inquiry Commission set up by the Government of India in 1964. Substantial departure was, however, made at the time of its enactment, retaining only the skeleton. The provisions on restrictive trade practices, including the resale price maintenance, are substantially based on the UK legislations and particularly the Restrictive Trade Act, 1956 and the Resale Price Act, 1964. Likewise, the newly introduced provisions on unfair trade practices are influenced by the UK. Fair Trading Act, 1973. The anti-trust legislations in USA, notably the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, as also the Australian and Canadian legislation on the subject have also been a guide in framing the provisions relating to Monopolistic, Restrictive and Unfair trade practices.

**Growth of Monopolies and concentration of Economic power in India**

---

90 See Indian Economy, by Ruddar Dutt & KPM. Sundharam, published by S. Chand & Company Ltd, Ram Nagar, New-Delhi 110055, p197

Under the industrial policy resolution of 1948 and 1956 as well as through licensing procedures and guidelines, the Government sought to restrict the scope and the growth of the private sector. However, it was soon observed that many of the large enterprises in the private sector operated under the conditions of virtual monopoly and oligopoly. Taking advantage of the absence of foreign competition and sheltered markets, the large enterprises entered into combinations, eliminated internal competition openly or secretly, got effective control of the markets for their products and thus exploited their helpless consumers. Many of them managed to create artificial scarcities (by restricting their production) and created the impression of excessive demand for their products. They influenced government policies to their own advantage and secured favorable tax measures and fiscal incentives for exports and foreign collaboration agreements. They were able to mobilize vast financial resources from the market and the public sector financial institutions and banks. Naturally these private sector enterprises have come to enjoy considerable economic power and demonstrate the same through their monopoly power and restrictive trade practices in the market.

"When a large number of concerns engaged in the production or distribution of different commodities are in the controlling hands of one individual or family or group of persons ..... Concentration of economic power will also be clearly considered to exist".

The Government appointed Monopolies Inquiry Commission (MIC) enquired into monopoly power and restrictive trade practices of the private sector and submitted its report in 1965. The Monopolistic Inquiry Commission was concerned with the two manifestations of economic power, viz., monopolistic practices and restrictive trade practices. “One such manifestation is the achievement by one or more units in an industry of such a dominant position that they are able to control the market by regulating prices or output or eliminating competition. (Monopolistic practices). Another is the adoption by producers and distributors, even though they do not such a dominant position, of practices which restrain competition and thereby deprive the community of the benefit effects of

92 Report of Monopolies Inquiry Commission (1965) on Concentration of economic power
competition". The Industrial Policy Resolution and Industrial Development and Regulation Act established a system of licensing both for setting up new projects and expansion of existing facilities. MIC discovered preferential treatment given to big business by banks and financial institutions in matters of lending, naturally the big got bigger. Having noted the special economic conditions prevailing in India at the relevant time, the MIC set out the objectives for the legislative recommendations in terms of achieving the highest possible production with least damage to people at large while securing maximum benefits. In order to achieve these objectives, concentration was to be curbed when it resulted in reduced production or was against fair distribution.

The Inception of Indian Competition Law

In order to ensure a really free and competitive market and to assure consumers low prices and high quality that flow from the effective competition, it is necessary to curb abuses of the market power i.e. predation, takeovers and mergers and cartelization. The process of competition must be supported by regulations which preclude any attempt at subversion of free trade and competition. Forces of competition have to be reinforced with a competition law particularly to counter the force of monopoly. By its enactment the government takes the responsibility for assuring competition among private firms. The Competition Law of India was contained in the Monopolies and Restrictive Trade Practices Act, 1969. Its genies is traceable to Directive Principle of State Policies, Which inter alia, provide that the state shall strive to promote the welfare of the people by securing and protecting as effectively, as it may be, a social order in which justice, social, economic and political, shall inform all institution of the natural life and State shall in, particular, direct its policy towards securing;

1) That the ownership and control of material resources of the community are so distributed as best to subserve the common good; and

---

93 ibid
95 See Article 38 and 39 of the Indian Constitution Law
That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The Act has a general social policy function as well as economic policy function. The influence of the Constitution of India is eminently clear. The Indian Constitution contains directive principles that guide state policymaking and include the concept that the economic system should function in a manner that does not lead to the concentration of wealth in the hands of the few. Further, the constitutional mandate is also clearly in favor of serving the common good of the society. While the MRTP Act embodied this constitutional mandate, it exempted governmental companies from its purview and focused only upon private entities. Perhaps the philosophy underlying the MRTP Act was that governmental companies were the champion of the public interest, and that private companies were the only entities for which regulation is necessary to promote the public interest. However, after the liberalization of the economy in 1991, the MRTP Act was found inadequate to address the needs of the new, globalized economy. It would have been a monumental task to amend the MRTP Act to address the needs of the economy. Hence, India opted for modern competition legislation that would enhance consumer welfare through sustaining competition in the market.

*The principle basis’s of MRTP*

The major premises of the MRTP is behavioral and reformist in nature. In terms of the behavioral doctrine, the conduct of the entities, undertakings and bodies which indulge in trade practices in such a manner as to be detrimental to public interest is examined with reference to whether the said practices constitute any Monopolistic, Restrictive or Unfair Trade Practice. In terms of reformist doctrine, the provisions of the MRTP Act provide that if the MRTP Commission, on enquiry comes to a conclusion that an errant undertaking has indulged either in Restrictive or Unfair Trade Practice, it can direct such undertakings to discontinue or not to repeat the undesirable trade practice. Thus, the primary concerns of the Act are disciplining and regulating the trade practices or market forces and behavior so that there is no concentration of economic power, to prohibit all attempts to stifle competition and to protect consumers from being exposed to unfair trade practices.
Objectives of the MRTP Act

The main objectives of the MRTP Act are as follows:

1. Prevention of concentration of economic power to the common detriment;
2. Control of monopolies;  
3. Prohibition of monopolistic trade practices;
4. Prohibition of restrictive trade practices
5. Prohibition of unfair trade practices.

The Act was designed to avoid economic concentration of the power in the Indian economy by exercising surveillance and adopting proper measure in case the economic concentration proves to the common detriment of general public. Concentration was measured in terms of the prescribed value of the assets owned or controlled by any undertaking, singly or along with interconnected undertakings or as a dominant undertaking. The objective that was sought to be achieved at that time through the MRTP Act was ensuring that large industrial houses, which were covered by the definition under section 20 of that Act, in terms of the value of the assets they controlled, did not deprive smaller enterprises of their share of the resources of the country and that large industrial houses fell in line with the country’s planning priority. The main purpose of the MRTP Act was, containment of concentration of economic power not issues relating to competition, through prohibition of monopolistic and restrictive trade practices restraining competition was also within the scope of the Act. The MRTP Act deals and regulates Trade practice. There must be a trade practice in relation to the goods or services. The word ‘trade’ in the Act has been defined to mean any trade, business industry relating to the production, supply or control of goods and includes the provision of services. If the trade practices are restrictive or unfair, the MRTP Act intervenes. The primary concerns of the Act are disciplining and regulation of trade practices are market forces and behavior so that there is no concentration of economic power, to prohibit all attempts to stifle competition and to

---

96 The first two objectives of the Act have been de-emphasized after the 1991 Amendment made to the MRTP Act
97 Section 20-26 were omitted by the MRTP (Amendment) Act, 1991, (w.e.f. 27-09-1991)
protect consumers from being exposed to unfair trade practices. The MRTP Act seeks to regulate three kinds of trade practices there are, Monopolistic trade practices, Restrictive trade practices and unfair trade practices that hamper competition in India or are prejudicial to public interest. Monopolistic trade practice means a trade practice which has or is likely to have the effect of maintaining the prices of goods or services at an unreasonable level, or limiting technical development or capital investment to the common detriment. The definition is based on the recommendation of Monopolies Inquiry Commission, which observed that; “Every monopolistic practice is on the face of it a restrictive practice. Indeed, sometimes the two words are used indiscriminately. Thus, the report of the Committee, which was set up to study Canadian Combines Legislation, treats all combines or common policy among several firms designed to strengthen the market position of a group of firms as monopolistic practice. The definition provided in the Act, as originally framed in 1969 was amended by MRTP (Amendment) Act, 1984 on the suggestions made by Sachar Committee to include unreasonable increase in the cost of production, prices and profits. Before the Amendment Act, 1984, monopolistic trade practice indulged in by an undertaking other than a monopolistic undertaking was not treated as a monopolistic trade practice. Sachar Committee suggested that if it is possible for a non-monopolistic undertaking also to indulge in any monopolistic trade practice and there is no need to retain a separate concept of ‘monopolistic undertaking’ in the Act. The MRTP (Amendment) Act, 1984 omitted the definition of “monopolistic undertaking” in section 2(j) and made necessary changes in section 31 of the Act98. It is, however, difficult to conceive of a monopolistic trade practice indulged in by an undertaking, having a small or marginal share in the market, to the exclusion of a monopolist or oligopolistic with substantial market power. High prices and high profits are not, by themselves, enough to sustain the charge of monopolistic trade practices. For a trade practice to be condemned as

---

98 Section 31 provides for the Investigation by the commission into the monopolistic trade practices on a reference being made by the Central Government which will thereafter pass an appropriate order, if the Commission makes a finding that the trade practice operates or is likely to operate against the public interest. While section 10 (b) gives power to the Commission to inquire into the monopolistic trade practice on its own knowledge or information, there is unfortunately no provision for follow-up action in section 31 which only postulates that the same will be inquired into by the commission only on a reference being made by the Central Government.
a MTP, it has to satisfy the requirements of various sub-clause (i) of section 2\textsuperscript{99}. The “Monopolistic trade practice” means a trade practice which has or is likely to have, the effect of;

i. Maintaining the prices of goods or chargers for the services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods of any description or the supply of any services or in any other manner,

ii. Unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services,

iii. Limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any services rendered, in India to deteriorate.

iv. Increasing unreasonably;____

a) The cost of production of any goods; or
b) Chargers for the provision, or maintenance, of any services,
c) Maintenance of any services\textsuperscript{100};

v. The prices at which goods are, or may be, sold or re-sold, or the chargers at which the services are or may be, provided; or

vi. The profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase of any goods) or in the provision or maintenance of any goods or by the provision of any services;

vii. Preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.

Furthermore, section 32 declared that every monopolistic trade practice was to be deemed to be prejudicial to public interest, expect where excepted as provided in subsection s (a) and (b) of this section, thus introducing a per se rule in the case of monopolistic trade practices.

\textsuperscript{99}DG (L & R) vs. Hindustan Lever Ltd and Colgate Palmolive (India) Ltd, (2002) 46 CLA (MRTPC)

\textsuperscript{100}Inserted by the MRTP (Amendment) Act 1984
The introducing a per se rule in case of monopolistic trade practices. The exceptions were; (a) the trade practice was expressly authorized by any enactment for the time being in force; and (b) the central government, on being satisfied that the trade practice is necessary, permits, by a written order, the owner of any undertaking to carry on the trade practice. Before issuing this permission, the central government was to be satisfied that the trade practice was necessary: (1) to meet the requirement of the defense of India or any part of India or for the security of the state; (2) to ensure the maintenance of supply of goods and services essential to the community; (3) to give effect to the terms of any agreement to which the central government was a party.  

**Restrictive trade practices;**

The Restrictive trade practice is defined to mean a trade practice which has or may have the effect actual or probable of restricting, preventing, lessening or destroying competition, it is liable to be regarded as restrictive trade practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of ‘restrictive trade practice”, even though it may be to some extent, in restraint of trade. Therefore whenever, a question arises as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a priori reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition. Further, the trade practice which tends to obstruct the flow of capital or resources into main stream of production or to bring about manipulation of prices, or condition of delivery or to affect flow of supplies of goods or services so as to impose unjustified cost or restriction on consumers, is also a restrictive trade practices. The MRTP Act lists out certain types of agreements, which are deemed to be agreements relating to restrictive trade practices and required to be registered with the Director General of Investigation and Registration. Certain common types of Restrictive Trade Practices enumerated in the MRTP Act are:

---

102 Mahindra and Mahindra Ltd vs Union of India AIR 1979 SC 798.
103 Section 33 (a) to (l), speaks about the registerable agreements relating to restrictive trade practices: 
   a) Any agreements which restricts, or likely to restricts, by any methods the persons or classes of persons to whom goods are sold or from whom goods are brought;
a) Refusal to deal
b) Tie-up sales
c) Full line forcing
d) Exclusive dealing
e) Price discrimination
f) Re-sale price maintenance
g) Area restriction.

The trade practices does not ipso facto becomes a restrictive trade practice because it falls within one of the illustrations under section 33 and it has also to fulfill the definition of restrictive trade practice as defined under section 2(o) of the MRTP Act ....... restrictive trade practice means a trade practice which has , or may have , the effect of preventing , distorting or restricting competition in any manner and in particular ,(i) which tends to obstruct the flow of capital or resources into the stream of production ,or (ii) 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 unjust costs or restrictions; The special feature of the MRTP Act had been that inquiry into restrictive nature of the trade practice is related to the effect on competition. The whole thrust of section 2(o) was held to be related to the effect of the trade practice on the relevant competitive situation. Thus, effect on competition was considered to be touchstone under section 2(o) and before any trade practices could be regarded as restrictive in nature, some damage, however, slight must be indicated in the context of the relevant competitive situation. Section 37 to 40 provides for the control of certain restrictive trade practices. The starting point was registration, under section 33 of an agreement relating to a restrictive trade practices. The Commission had the power under section 37 to investigate into any restrictive trade practices and the nature of the order it could pass. The Commission could act independently and pass final orders itself relating to any restrictive trade practice. Section 38 declared the ‘gateways’ by which it could be shown that a restrictive trade practices was not prejudicial to public interest. If a restrictive trade practice that was being inquired into could not be justified under any gateway, under the section, the restrictive trade practice was to be deemed to be prejudicial to public interest. Thus, through the amendment, the trade practices mentioned in section 33 falls within the genus of restrictive trade practices and are treated as statutory illustrations of the same. Hence, the courts could not examine on the basis of surrounding circumstances decide whether the agreement was restrictive or not.

**Assessing the rule determining the effect on Competition**

The Rules for determining the effect of any anti-competitive conduct or practice on the relevant market are; The Rule of Reason and the per se Rule. Under the per se rule, the acts or practices specified by the Act as deemed or presumed to have an appreciable adverse effect on competition are by themselves prohibited. It is unnecessary to considered, under the per se rule, if they limit or restrict competition. This is on the basis of established experience of their nature to produce anti-competitive effects. The presumption is such that the acts or the practices have an appreciable adverse effect on competition and that the provision of per se illegal rule is rooted under the principles of antitrust laws of United
States wherein most of the agreements dealing with price fixing agreements, boycotts and agreements dealing with exclusive dealing. Under the rule of reason, the effect on competition is found on the facts of the case, the market, and the existing competition, the actual or probable limiting of competition in the relevant market, etc. what determines the issue is, on the facts, the actual or probable restraint on competition. Under the rule of reason analysis, the true of legality is whether the restraint imposed is such that it merely regulates or promotes competition or whether it is such that it suppresses or destroys competition\textsuperscript{104}. Most of the agreements are tested on the rule of reason basis according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed and nature and effect of the restraint. Under the MRTP Act, after the amendment in 1984, of section 33(1) of that Act, any agreement falling within one or more of the categories set out in section 33(1)(a) to (l) was deemed for the purposes of the Act, to be an agreement relating to restrictive trade practices \textellipsis \textsuperscript{104}. The practices that may be covered by section 33(1) (a) to (l), as a consequence, became per se restrictive trade practices. Those agreements stipulate the per se restrictive practices were required to be registered under the Act and were the starting point of investigation into restrictive practices. Even though these trade practices were per se restrictive trade practices, section 38 of the MRTP Act provided certain “gateways” through which any of such practices could be shown as not prejudicial to the public interest.

In a landmark decision of the Supreme court of India, in Tata Engineering and Locomotive Co. Ltd vs Registrar of Restrictive Trade Agreement\textsuperscript{105} where the among other principles, the rule of reason was illustrated. It was a case under MRTP Act and the decision rested on the interpretation of section 2(o) of that Act defining a “restrictive trade practice’. The question before the Supreme Court of India, on appeal from the decision of the MRTP Commission, was whether the agreement between Telco and its dealers allocating territories to its dealers within which only the dealers could sell bus and truck

\textsuperscript{104} National Society of professional Engineers vs United States 435 US 679  
\textsuperscript{105} (1977) 47 Comp Cas 520 Supreme Court
chassis referred to as the vehicles produced by the company, constituted a ‘restrictive trade practice.’ The complaint before the Commission was that the clauses in the agreements between Telco and its dealers for commercial vehicles, fixing an area in which only a Telco dealer may sell the vehicles purchased from Telco, prohibiting a dealer from selling commercial vehicles supplied by enterprises other than Telco, and fixing minimum prices for resale by a dealer of commercial vehicles purchased from Telco, were all restrictive trade practices. During the hearing before the commission, Telco reported that it had discontinued the practice of resale price maintenance, thus putting an end to that complaint. Telco contended before the Commission that allocation of an area was considered necessary so that unequal and unfair distribution of these vehicles in various parts of the country could be avoided. The company defended exclusive dealership arrangements on the ground that there was no system of preferred buyers and that dealers were selected after a careful study of their experience so that they would be in a position to extend to the buyers of Telco vehicles high quality after-sales service, and the only way by which this could be secured was through exclusive dealership agreements, which was also common to that trade. Telco claimed that the issues were to be determined under section 2(o) of the MRTP Act and that none of the practices that were the subject of the complaint would cause any restraint on competition within the meaning of that section. Following from this, it also argued that the agreements containing these clauses were not registerable under section 33(1) of that Act. It should be noted that it was only in 1984, that section 33(1) was amended to declare certain categories of agreements as agreements deemed to be agreements relating to restrictive trade practices. The Commission ruled that the issues were to be decided under section 2(o), viz. whether any of the practices would fall under the definition of a restrictive trade practice, and if so whether it was open for Telco to avail of any of the gateways under section 38 showing that the practice was not prejudicial to the public interest. The commission held that exclusive dealership was a restrictive trade practice, but that Telco had the benefit of section 38(1) (h) which was a defense on the ground that the restriction did not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and was not likely to do so. The Commission noted that there were only four manufacturers, including Telco, of
commercial trucks and buses chassis in India and that each major manufacturer had its own exclusive channels. Therefore, Telco’s exclusive dealership agreements did not directly or indirectly restrict or discourage competition to any material degree. The Commission held that allocation of territory was a restrictive trade practice as there was no material before it to show that it led to ensuring fair distribution of vehicles among different areas of the country and that no evidence was furnished by Telco about the economics of dealership or service points. It held further that no justification under section 38 providing the gateways was also shown. Telco appealed to the Supreme Court of India. First, in explaining section 2(o), the court stated: ‘The instances set forth in the definition of restrictive trade practices emphasize the factors which go to establish a restrictive trade practice. Clauses (i) and (ii) in section 2(o) of the Act afford graver instances of restrictive trade practice’. On the application of section 2(o), the court said; the definition of restrictive trade practice is an exhaustive and not an inclusive one. The decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will per se be a restrictive trade practice,’

The court explained that the following was required to be determined for deciding whether a restraint promoted competition or suppressed competition; to determine this question three matters are to be considered. First, what facts are peculiar to the business to which the restraint is applied? Second, what was the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual and probable effect.’ The Court also held that an agreement would be registrable under section 33(1), as it stood then, only if the trade practice fell under section 2(o) defining restrictive practice, and that the agreements set out in section 33(1) were not statutory illustrations of section 2(o). Considering the fact that the supply of commercial vehicles in India was far below demand, and keeping in view the great demand for Telco vehicles and the need to establish good quality after-sales service, of the kind assured by Telco throughout the country, the Court was satisfied that from the point of view of the consumer, there should be the widest and equitable geographical distribution of Telco vehicles, avoiding concentration of sales only in big cities. If the territorial restriction were to be removed, it would be possible to divert sales to more profitable areas, depriving certain areas of supply of these vehicles.
Telco showed that there was a basis in allocating territories to dealers, which took note of: (a) population of commercial vehicles in the dealers territory; (b) orders from customers pending with the dealer; (c) preference for Tata diesel vehicles as against other makers in the territory of the dealer; (d) past sales performance of the dealer; (e) effective after-sales services provided by the dealers; (f) special requirements of the territory during the erection of government projects such as steel plants, construction of dams, etc; (g) emergency requirements of the territory on account of drought, flood relief etc; (h) government recommendations for meeting certain specific requirements; (i) requirements of state government and nationalized transport undertakings procured through dealers. The Supreme Court held that when supply was shown as being far below demand and when the dealers were not in a position to sell below permissible prices, the charge of territorial restrictions restraining competition had no merit. The Court also started that the territorial restriction ensured equitable distribution of the commercial vehicles in all parts of the country, where Telco had appointed dealers, and that if, without that restriction, Telco dealers were free to sell anywhere, the commercial vehicles would find their way to big cities and upcountry locations and small backward states would be deprived of the supply. It decided that the territorial restriction imposed by Telco did not fall under section 2(o).

As stated earlier, with the amendment of section 33(1) of the MRTP Act in 1984, after this judgment, allocation of an area for the disposal of goods sold became a per se a restrictive trade practice, under section 33(1) (a) of that Act. Further, in Mahindra and Mahindra Limited vs Union of India, wherein it was stated that there may be trade practices which are such that by their inherent nature and inevitable effect, they necessarily impair competition and in case of such trade practices, it would not be necessary to consider any other facts or circumstances for they would be per se restrictive trade practices. Such would be the position in case of those practices which of necessity produce prohibited effect in such an overwhelming proportion of cases that minute inquiry in every instance would be a wasteful of judicial and administrative process. Hence in the light of the same, a statutory fiction was created by virtue of which if an agreement falls within any of the categories mentioned in section 33, it shall be considered restrictive.

Unfair trade practices
The expression “Unfair trade practices” has been defined to mean a trade practice which a person adopts for the purpose of promoting sale, use or supply of goods or provision of any services by any unfair method or unfair deceptive practices\(^{106}\). This definition is specific and limited in its content. The object of provision is to bring honesty and truth in relationship between the manufacture and the consumer. The MRTP Act contained no provisions for protection of consumers against false or misleading advertisements or other similar unfair trade practices and a need was felt to protect them only after the recommendations were made by the Sachar Committee, accordingly MRTP Act was amended in 1984 and became the MRTP (Amendment) Act of 1984. The committee emphasised that consumers needed to be protected not only from the effects of restrictive practices but also from practices which are resorted to by the trade and industry to mislead or dupe the consumers. Further on the Sachar Committee recommendations a separate chapter on Unfair Trade practice was added to MRTP Act, which defined various unfair trade practices so that the consumer, the manufacturer, the supplier, the trader and the other persons in the market can conveniently identify the practices, which are prohibited. Essentially Unfair Trade Practices falling under the following categories were introduced in 1984 in the MRTP Act;

- Misleading advertisement and false representation.
- Bargain sale, bait and switch selling.
- Offering of gifts or prizes with the intention of not providing them and conducting promotional contests.
- Hoarding or Destruction of goods.

The object is thus to prevent false or misleading advertisement. It is often said that the consumers need no special protection; all can be safely left to the market. But the perfect market is an economists dream and consumer's sovereignty is a myth. In real life, products are complex and of great variety and consumers and retailers have imperfect knowledge. Suppliers may have a dominant buying position. As a consequence, bargaining power in the

\(^{106}\) See section 36 A of MRTP Act
market is generally weighted against the consumer. Thus, consumers have felt the need to create organization to identify their interests and to supply information and advice\textsuperscript{107}.

**Amendment to the MRTP Act 1969**

The Industrial policy of 1980 made a sea-change in terms of liberalization of licensing policy in favour of large business houses, particularly in terms of making them free from the provisions of MRTP Act. The Act was amended in 1984 on the basis of Sachar Committee Report. The Sachar Committee looked into the practical difficulties of the operation of the law for the eight years of its existence and found that the role assigned to the MRTPC was limited and mostly advisory. The Sachar Committee felt that apart from making some changes in law, especially for the protection of consumers against unfair trade practices, it was imperative to make the MRTPC more effective and independent. The concept of “interconnected undertaking” which was introduced under the Companies Act 1956 was also sought to be introduced to the MRTP Act. Government undertakings were recommended to be brought under the purview of the MRTP C except for expansions, setting up of new undertakings or mergers, since government control and parliamentary oversight were deemed sufficient to guard consumer interests.

The 1984 amendment introduced provisions relating to UTPs in section 36A. This dealt with cases of misrepresentation as well as misleading or disparaging advertisements since it was convinced that consumers had no protection against such practices. The MRTP Act was amended in 1984, except the non-inclusion of hazardous goods wherein hoarding was also not included. Other amendments followed from time to time to suit the status quo. The number of industries requiring compulsory licensing was reduced from 56 to 26. In the line with the liberalization measures announced during the eighties the government announced a New Industrial Policy on July 24, 1991. This new policy de-regulates the industrial

economy in a substantial manner. The major objectives of the new policy are to build on the gains already made, correct the distortions or weakness that might have crept in, maintain a sustained growth in productivity and gainful employment and attain international competitiveness. Further, the threshold asset limit for companies under MRTP Act was raised from 20 crores to Rs 100 crores. As a consequence, 112 companies came out of the purview of the MRTP Act. The Government also announced its decision to exempt 49 industries from the section 22A\textsuperscript{108} of the MRTP Act. In pursuit of these objectives the government announced a series of initiative in the new Industrial policy. The main aim of the new industrial policy was; ----

- To unshackle the Indian Industrial economy from the cobwebs of unnecessary bureaucratic control,
- To introduce liberalization with a view to integrated the Indian economy with the world economy,
- To remove restrictions on direct foreign investment as also to free the domestic entrepreneur from the restrictions of MRTP Act, and,
- The policy aimed to shed the load to the public enterprises which have shown a very low rate of return or were incurring losses over the years.

All these reforms of industrial policy led government to take series of initiatives in respect of polices in the following areas; a) Industrial licensing; b) Foreign investment ;c) Foreign technology policy ;d) public sector policy and e) MRTP Act. The 1991 amendment removed the need of the government approval to establish new- undertakings or the expansion of existing undertakings, and also diluted the provisions of the mergers and acquisitions clause. Furthermore, it deleted the exemption granted to government undertakings and cooperative sector. Exemption to agriculture was not touched, because it is an issue under the legislative control of states. Thus, the Act was amended in 1991 and the Government realized that pre-entry restriction under the MRTP Act on the investment decision of the corporate sector outlived its utility, and became a hindrance to the speedy implementation of the industrial

\textsuperscript{108} Section 22 A speaks about the ‘Establishment of new undertaking’, the section was later omitted by the MRTP (Amendment) Act, 1991.
projects. The Act was restructured with focus on curbing monopolistic restrictive and unfair trade practices. In a major move to liberalize the economy, the new industrial policy abolished all industrial licensing, irrespective of the level of investment, expect for 18 industries related to security and strategic concerns, social reasons, concerns related to safety and over-riding environmental issues, manufacturing of products of hazardous nature and articles of elitist consumption. The 1991 policy had originally reserved 8 industries for the public sector but government later deserved 4 of them. Thus at present only 4 items of health, strategic and security considerations, remain under the purview of industrial licensing cited in the Annexure II of the policy. The MRTP Act 1969 was amended in 1991 was a part of the new economic reforms set in motion by the Government of that day. The amendment reset the objectives enshrined in the original statute of 1969. The major amendments effected in 1991 were with respect to the provision relating to concentration of economic power and pre-entry restrictions with regard to prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and take-over’s of the undertakings were all deleted from the statute through the amendments. Furthermore, the amendment aims at the Governmental undertakings, i.e. public sector undertakings, Government companies, Statutory corporations, undertakings under the management of various controllers appointed under any law, cooperative societies and financial institutions which were earlier exempted from the purview of the MRTP Act. It may also be mentioned here that after the amendment to the definition of ‘service’, it includes the business of builders and real estate operators. In between that, unfair trade practices were removed from the new law and transferred to the Consumer Protection Act 1986. It may be noted that Consumer Protection Act already dealt with unfair trade practices, as well as restrictive trade practices at the retail level. Both MRTP Act and Consumer Protection Act also have provisions for awarding compensation.

**MRTP Act and Consumer Protection Act**

---

109 On may 19th 2001, the Government opened up arms and ammunition sector also to the private sector. This now leaves only 3 industries reserved exclusively for the public sector—Atomic energy, Minerals specified in the schedule to the atomic energy (Control of production and use order) 1953 and Rail Transport.

110 Out of five objectives set out by MRTP Act, the first two have been de-emphasized, after the 1991 amendment to the MRTP Act.
The MRTP Act had the responsibility to curb the Monopolistic, Restrictive and unfair trade practices by and between Traders and Consumers. The Act was amended from time to time to enable the prevailing situation to take care of the trade practices prevailing at that time. Based on the Sachar Committee report, the MRTP and Companies Act was further amended to give effect to the then the changed economic conditions. By the year 1986, the World Consumer Awareness towards the protection of the rights of consumers has arisen substantially. India being a member of he UNO had also enacted the Consumer Protection Act in 1986. Since the passing of Consumer Protection Act, the various consumer forums were assigned the responsibility of protecting the rights of consumer and settling disputes between the consumer and the trader. The MRTP Act has been enacted for the benefit of the consumers. However the term “consumer” has not been defined under the MRTP Act. The definition of ‘consumers’ for the purpose of the MRTP Act have been adopted from the definition contained under the Consumer Protection Act 1986. The Consumer protection Act has been enacted to provide for better protection of the interest of consumers and for the redressal of grievances relating to defect in goods bought and deficiency in services hired or availed of by consumers, by the redressal agencies set-up under the Act. As per clause (d) of section 2 of the consumer protection Act 1986, ‘Consumer’ means any “Person”. The word ‘Person” has not been defined either in the MRTP Act nor in the Companies Act and therefore, the same has to be construed with reference to the inclusive definition of person in clause (m) of section 2 of the Consumer Protection Act, according to which a company is not a person. But, the Delhi High Court in one of the case held that a company would be a person within the meaning of section 2 (m) of the Consumer Protection Act. The main thrust of the MRTP Act, when enacted in 1969 was to ensure that the operation of the

---

111 According to Section 2(d) of the Consumer Protection (Amendment) Act 2002, “Consumer “ means any Person who---( i) buys any goods for consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires [or avails] any services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services other than the person who hires (or avail) the services for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person ( but does not include a person who avails of such services for any commercial purpose)

economic system does not result in the concentration of economic power to the common
detriment and for the control of monopolies. But with the restricting of the enactment\textsuperscript{113},
the thrust of the Act shifted on curbing monopolistic Trade practices and restrictive Trade
practices, which resulted in the obstruction of free flow of capitals and resources into the
main stream of production. The provisions for curbing Unfair Trade practices independently
seek to safeguard the interest of consumers by providing them protection against the false
and misleading advertisements or similar deceptive trade practices. Furthermore the
Consumer Protection Act of 1986, has two pronged approach viz (i) to provide simplified
inexpensive and speedy remedy, for the redressal of the grievances of the consumer in
regard to defects in goods brought by him and/or deficiency in services hired or availed by
him and (ii) consumer education to cause awareness as to consumers right.

It would, thus, be seen that there is substantial overlapping coverage by the two enactments
viz, the MRTP Act, 1969 and The Consumer Protection Act, 1986. There are, however,
several distinctive features of these two enactments for example, with regard to the
constitution of the adjudication machinery, Jurisdiction of the two enactments with respect
to the nature of the grievances which may be entertained, types of persons who may seek the
relief, nature and scope of relief and Administration procedure. Under the Consumer
Protection Act 1986, a complaint could be made about any unfair trade practices, as
defined in section 36 A of the MRTP Act 1969, adopted by a trader, other than the owner of
a MRTP undertaking for redressal. In other words, while the consumer redressal forums
were competent to deal with Unfair Trade Practices cases, of non-MRTP Business entities,
the MRTP Commission had the jurisdiction to deal with Unfair Trade Practices indulged in
by any business concern, whether or not covered by the MRTP Act. Section 2 (r) of the
Consumer Protection Act of 1986 which defines “Unfair Trade Practices” has been
amended by the Consumer protection (Amendment) Act 1993 [as a result of deletion of the
concept of MRTP undertaking contained in chapter III of the MRTP Act by the MRTP
(Amendment) Act 1991] and whereby the jurisdiction of the Consumer Protection Act has

\textsuperscript{113} The restructuring of the MRTP Act was effected through the deletion of chapters III and III A of the Act, which
inter alia, provided for pre-entry approvals required to obtained by the MRTP undertakings for establishment of
a new undertaking, expansion of existing undertaking, merger, amalgamation or takeover of undertaking and
acquisition/transfer of shares of certain bodies corporate.
been extended to cover any seller or supplier of goods or services. An aggrieved consumer can thus, approach the MRTP Commission or the Consumer Redressal agencies set-up under Consumer Protection Act for the redressal. Thus, there was a total overlapping of jurisdiction of the MRTP Commission and the redressal agencies set-up under the Consumer Protection Act in regard to curbing of unfair Trade Practices, which have been set out exactly in the same words in these two statutes, viz, the MRTP Act and Consumer Protection Act. However, the basic distinctive features of these two enactments are, firstly, that a complaint cannot lie under the Consumer Protection Act if the goods are obtained for Commercial purposes and Secondly, section 24A of the Consumer Protection Act lays down a limitation period of 2 years for lodging the Complaint. The following are the some of the distinctive features between MRTP Act and Consumer Protection Act:

- Under MRTP Act, the MRTP Commission is the only authority to enquire into the allegation of the Unfair and Restrictive Trade Practices. Under Consumer Protection Act, there are three tier set-up viz, District Forums, State forums and National Commission, with each authorities having its own original pecuniary Jurisdiction.
- MRTP Act did not applied to undertaking s owned or controlled by the Government, a Government Company, a Corporation established by any State/ Central Act. On the other hand, a Consumer Protection Act covers all such undertakings without any exception.
- The provisions of the MRTP Act, do not apply to a banking Company, State Bank of India or a subsidiary Bank, but no such exemptions are provided under the Consumer Protection Act.
- Under the MRTP Act, a complaint can be lodged by the Central / State Government and by the Director General. Also, MRTP Commission may suo-motu initiate an inquiry into Restrictive Trade practices / Unfair Trade Practices indulged in by any person. Under, Consumer Protection Act, the Central or State Government is not eligible to make a reference for enquiry by the Consumer Dispute Redressal Authority.

---

114 Inserted by the Consumer Protection (Amendment) Act of 2002 w.e.f 15.3.2003
The definition of ‘Goods’ under Consumer Protection Act is narrower than contained under MRTP Act. The Consumer Protection Act merely says ‘goods” defined in ‘Sale of Goods Act’ 1930. On the other hand, the definition of goods in the MRTP Act, inter –alia, covers shares and stocks including of Shares before allotment.

**Monopolistic and Restrictive trade Practice Commission**

The central Government has been empowered to establish a quasi-judicial tribunal the MRTP Commission. The Commission is to consist of a chairman and not less than two and not more than eight members. The Chairman can be Judge of a High court or the Supreme Court, or a person eligible to hold such office. The members should be persons having experience in the field of economics, law, commerce, accountancy, public affairs or administration\(^{115}\). The central Government may also by notification appoints a Director General of Investigation and Registration and as many Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration, as it may think fit for making Investigation for the purpose of this Act and maintaining a Register of agreements subject to registration under this Act. Every person authorized to function as the Register of agreements and every Additional, Joint, Deputy or Assistant Directors General shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General. The conditions of service of Director General or any Additional Joint, Deputy or Assistant Director General or of any member of the staff of the Commission shall not be varied to his disadvantage after his appointment\(^{116}\).

**Term of office, conditions of services etc. of members.**

Every member of the commission shall hold the office for the term of five years, not exceeding a total period of Ten years or till he attains the age of 65 years, whichever is earlier. He can resign his office, or may be removed as per provisions\(^{117}\). In absence of the chairman, senior most member may discharge the function of the chairman. In case of difference of opinion among the members, the decision of the majority shall prevail.

---

\(^{115}\) See sec 5 of MRTP (Amendment) Act of 1984

\(^{116}\) See Sec 8 of the MRTP (Amendment) Act of 1984.

\(^{117}\) See sec 7 of the MRTP Act,
members are debarred from accepting any appointments in, or, be connected with, any industry or undertaking to which this Act applies for a period of 5 years from the date of his ceasing to hold the office as such. Their salary and other allowances and pensions shall be payable from the Consolidation Fund of India\textsuperscript{118}. The terms and conditions of members, as aforesaid, have been provided to ensure maintenance of impartiality of the office held by them.

**MRTP Act and MRTP Commission**

The MRTP Act did not apply to an undertaking owned by the Undertaking either owned by Government or by the Government –owned companies until 1991. It also did not apply to an undertaking owned or controlled by a corporation set up under any Central or State Law. These restrictions were removed by the notification in 1991\textsuperscript{119}. The Act excluded specifically the operation of its provision to Banking and Insurance Companies to the extent that these are covered under specific provision of laws dealing with them. The definitions was enlarged in 1984 by adding unreasonable increases in cost of production or charges for providing services, unreasonable increases in prices or charges or profits and adoption of unfair methods or unfair or deceptive practices. There is particular mention of obstruction to flow of resources into production and manipulation of prices or delivery conditions so as to impose unjustified costs or conditions on the consumers as constituting a Restrictive Trade Practice. The procedures for inquiry have been provided in the law. The MRTP Commission can enquire into a RTP on the basis of a complaint or reference made by the Central or State Government or the application made by the Director General (Investigation and Registration) or suo moto. The MRTP Commission may ask the director general to make a preliminary investigation and report before launching the inquiry. The director general is empowered to make preliminary investigation suo moto or on a complaint made to him. The MRTPC has limited civil court powers to enforce attendance, record statements on oath, and call for documents. However, the director general has no such powers and has to rely on the MRTPC for enforcing attendance and calling records from the respondents.

\textsuperscript{118} See Sec 9 Of the MRTP Act. Of 1969.

\textsuperscript{119} Notification GSR No.605(E) dated 27.9.1991
The power to grant temporary injunction was incorporated by the 1984 amendment. This was further amplified in 1991 to enable granting of injunction without issue of notice to the affected parties. These amendments were made to make MRTPC more effective in dealing with anti-competitive practices. It was felt that without the authority to grant injunction, anti-competitive practice would continue until the end of inquiry, by which time it may be too late to intervene. The MRTPC has the power to award compensation for loss or damage due to anti-competitive practice since 1984, but it can be awarded only on an application by the Central Government or State Government, or a party suffering the loss or damage after the nature and the extent of loss or damage has been determined through a inquiry. The amendment made to the law in 1984 enabled the MRTPC to enforce its orders granting temporary injunction and compensation through courts of law. The MRTPC can call for a compliance report of its orders through the Director General or any other officer. Its powers relating to compliance were further enhanced by providing it with powers of contempt by amendments made in 1991. The MRTPC has extra-territorial reach and can pass orders against parties situated outside India to the extent the anti-competitive practices are carried on in India. This has been acknowledged by the Supreme Court in a recent case\(^\text{120}\). The Intellectual property rights arising out of patents as well as exports are excluded from the ambit of the Law. When it comes to remedies, the powers of the MRTPC are rather restricted. As far as structural remedy of division of an enterprise is concerned, it has only non-binding recommendatory powers and the Central Government have the authority to order such division. Behavioral remedies against MTPs fare no better under the MRTP Act. The MRTPC is left with only advisory role and the remedies can only be sanctioned by the Central Government. The Central Government can regulate production/supply/distribution/fix price, standards, regulate profit and quality. Prevention of monopolistic, restrictive and unfair trade practices has been the main objective of MRTP Act, if any loss or damage has been caused to the Government or any person, the commission may order for the grant of compensation for the loss of damage so caused. Provision relating to Unfair Trade Practices was added to the mandate of the MRTPC by the 1984 amendments and broadly covers unfair methods or unfair or deceptive practices”.

\(^{120}\) AIR 2002 SC 2728 Haridas Exports.
The Director General is to assist the MRTPC in investigation but has no power to compel attendance or evidence. The power of dawn raids vests with the Central Government, which can appoint an inspector for investigation. The MRTPC or the DG does not have any role in this and it is difficult to understand how the Government is expected to get the necessary information. Penal provisions of the civil imprisonment and fines are incorporated in the law, but the authority to penalize the offenders lies with session’s court, which has little experience of the complexities of this kind of economic law. This is perhaps, the weakest link in the armory. Reportedly, cases filed in the civil courts drag for years and make the law considerably less effective. The law has a confidentiality clause. Appeals against the orders of the MRTPC lie with the highest court of the Country i.e., The Supreme Court of India.\(^\text{121}\) Failure to comply with any obligation imposed on a person would deem that person to be guilty of an offence under the Act.\(^\text{122}\)

**Failure of the MRTP Act**

The MRTP Act was very poor with providing the adequate definition in the Act. The Commission was also very poorly resourced with adequate weapons while checking anti-competitive practices in the market. In 1991, rocked by balance of payment crises, government of India introduced market oriented reforms aimed at dismantling the industrial licensing system, giving business the freedom to make investment decisions and the gradual opening of key infrastructure sectors to private investors. Since then, government has begun to lift many import controls, reduce tariffs and liberalization of economy. The review of the of the MRTP Act reveals lack of commitment on the part of the government towards the Act. The Government seems to have made up its mind about the future course of industrial policy in which emphasis is on raising the tempo of industrial production. The problem of checking economic concentration and monopoly has been regulated to the background for the time being. One of the major fallacies of the MRTP Act is that it didn’t contained any express provision for the application of the Act on any anti-competitive conduct outside India and affecting Indian market in an adverse manner. In Haridas Exports vs All India

---

\(^{121}\) Supra 27  
\(^{122}\) Section 13(1)
Float Glass Mfrs, Association\(^\text{123}\), the Supreme Court while deciding the issue of whether Commission has extra territorial jurisdiction held that, for the purpose of the Act,

- The MRTP Commission can inter alia take action when a restrictive trade practices is carried out in India in respect of imported goods. In both the cases, ‘goods’ have been imported into India and hence the matters are beyond the jurisdiction of the MRTP Commission.

- Under the MRTP Act, there is no power to stop import;

- The MRTP Act does not confer extra territorial jurisdiction on the MRTP Commission.

- If a cartel is selling goods in India and still making profit then it is not in the interest of the general body of consumers in India to prevent the import of such goods.

It was realized that in certain aspect the MRTP Act was too narrow in its sweep to deal with competition issues especially in the era of liberalization and globisation. The MRTP Commission had taken up complaints against anti-competitive practices but was handicapped on account of certain limitations in the law. These limitations have been adequately covered in the New-Law.

However the Supreme Court while dealing with the present case invoked “Effects Doctrine” with a view to clothe the MRTP with jurisdiction to pass orders and take actions against the agreements which are entered into outside India but the resultant adverse effect is experienced in India.

*Effects doctrine;*

The Effects doctrine will clothe the MRTP Commission with jurisdiction to pass an appropriate order even though a transaction, for example, which results in exporting goods to India at predatory price, which was in effect a restrictive trade practices, had been carried out outside the territory of India if the effect of that had resulted in a restrictive trade practice in India. If power is not given to the MRTP Commission to have jurisdiction with regard to that part of the trade practice in India which is restrictive in nature then it

\(^{123}\text{AIR 2002 SC 2728}\)
will mean that persons outside India can continue to indulge in such practices whose adverse effect is felt in India with impugnity. A Competition law like the MRTP Act is a mechanism to counter cross boarder economic terrorism. Therefore, even though such an agreement may enter into outside the territorial jurisdiction of the Commission but if it results in a restrictive trade practice in India then the Commission will have jurisdiction under section 37 to pass appropriate orders in respect of such restrictive trade practices. Ten years after this amendment, the government understood that the whole set up had become an anachronism, and a committee was set up to suggest ways and means to promote competition and to advise a modern competition law for India in line with international developments and to suggest a legislative framework.

High-level Committee on Competition Policy and Law

In the wake of economic liberalization and reforms introduced by Government of India since 1991 with a view to meet the challenges and avail of the opportunities offered by the globalization, the Ragavan Committee was set up in 1999 to assess the need to evolve India's competitive regime. The Committee in its report of 2000 recommended setting up of a modern competition law and phasing out of the MRTP Act. The Committee was set up under the Chairmanship of Shri SVS Ragavan in 1999. The Committee highlighted the point that economic reforms found certain provisions of the MRTP Act obstructive to private investment. The Ragavan Committee noticed that the word ‘competition’ has been used sparsely in the MRTP Act and effectively finds place only at two places; while defining restrictive trade practice in Section 29(o) and in sec38 (1)(h). While a generic definition of competition is provided in Section 2(o) of the MRTP Act, precise definitions of anti-competitive practices like abuse of dominance, cartel, collusion, boycott, refusal to deal, bid rigging, predatory pricing etc are necessary to effectively detect such behavior and impose sanctions against them. Lack of precise definitions had led to different judicial interpretations, sometimes contradictory. These judicial pronouncements are binding precedents for future amendment to the MRTP Act. The Ragavan Committee noted that ‘Cartels’, to give another illustration, are not mentioned or defined in any of the clauses of

---

Section 33(1) of the MRTP Act, though the MRTP Commission has attempted to fit such offences under one or more clauses of Section 33(1) by way of interpretation of the languages used therein.

Moreover the existing law was found to be inadequate to deal with implementation of the WTO agreements. The MRTP Act does not have the merger control provisions since 1991\textsuperscript{125}. The Commission recognized the necessity of having specific merger control provisions at par with other modern competition laws. Provisions dealing with the unfair trade practices overlap with similar provisions in the Consumers Protection Act, 1986 and in the MRTP Act. The Ragavan Committee found that MRTP Act to be falling short of squarely addressing the Competition and Anti–competitive practices. It emphatically stated that --- that the MRTP Act, in comparison with the other Competition Law of many countries, is inadequate or fostering Competition in the market and trade and for reducing, if not eliminating anti–competitive practices in a country’s domestic and international trade”. Based on this analysis, the Ragavan Committee found it expedient to have a new competition law. The Committee desired the focus of the new law to be on preventing anti-competitive practices that reduce welfare. While free markets produce desired outcomes, they do so only when protected from the abuses. Therefore,‘….. The only legitimate goal of the competition law is the maximization of economic welfare”\textsuperscript{126}. The committee further desired that the competition authority should be governed by established competition principles. The committee was aware of the pitfalls and recommended a cautious approach to achieve a balance between over-intervention and exemption from sanction in the name of “public interest”. The role of industrial organization theory in competition analysis was recognized and it recommended incorporation of a host of factors to be considered by the competition authority in competition assessment. The Ragavan Committee was determined to have merger control provisions in the new legislation. It sought to make a distinction between horizontal mergers, vertical mergers and conglomerate mergers on the basis of their differing degrees of impact on competition. But it chose to opt for a soft regime which has voluntary notification for mergers above rather high threshold limits and time bound

\textsuperscript{125} The merger control powers were with the Central Government until 1991.
\textsuperscript{126} P 29 of the Ragavan Committee report.
decisions to reduce transaction cost. The committee perhaps felt that provision for action in law up to one year after merger would provide sufficient deterrence. The Committee was convinced that the Government enterprises as well as departments should be brought under the purview of competition law. The only exception should be sovereign functions of the government like Defense. The policy of purchase or price preference to government owned enterprises was recommended to be discontinued. These recommendations were in spite of the fact that many countries exempt government enterprises from the purview of the competition law. The Committee also recommended that there should be no distinction between ultimate consumer and intermediate consumer. While competition cases are tried by courts in many countries, the Ragavan Committee did not find it suitable for India, given the inexperience of the judiciary in dealing with free market problems. According to the Committee, a specialized agency is preferable in developing country like ours. The Committee made detailed recommendation s regarding the administrative set-up of a competition authority. Its main objectives should be to administer the competition law and engage “proactively in Governmental policy formulation”. In order to achieve these objectives, it should be manned by experts in various fields who can be removed only with the concurrence of the supreme court of India. The body should be independent and autonomous. Its investigative, prosecutorial, and adjudicative function s need to be separate and its proceedings should be transparent and rule–bound. The competition authority s reach should be extra-territorial and it should have powers to punish the guilty and levy fines. The Ragavan Committee laid great emphasis on a competitive advocacy role for the competition authority, and rightly so. The low awareness of competition issues among stake holders and the governments (central as well as states) in India clearly requires intensive advocacy initiative. Owing to all the above flaws, the MRTP Act stands repealed and is replaced by the Competition Act of 2002, the Act further Amended by the Competition (Amendment) Act of 2007 with the effect from 1st September 2009. The MRTP Commission will continue to handle all the old cases filed prior to September 1st, 2009 for the period of two years. However, it will not entertain any new cases from now onwards. All the cases relating to monopolistic and Restrictive Trade Practices shall stand transferred to the Competition Appellate Tribunal and shall adjudicate the cases in accordance with the
provisions of the repealed MRTP Act. And all the unfair trade Practices cases shall be transferred to the National Commission as constituted under the Consumer Protection Act 1986. These cases will be dealt with by them in accordance with the provision of the Consumer Protection Act.

**Conclusion**

The Indian planners visualized the establishment of a socialist society in which everyone would have equal opportunities in the matter of education, occupation, etc. wealth would be distributed equally and there would be no concentration of economic power in the hands of few individuals or families. The Monopolistic and restrictive Trade Practice Act of 1969 was the first legislation towards that goal. MRTP Act gave new dimension to the economic legislation s of the post independence era. The MRTP Act was based on reformatory theory. The MRTP Act initially focused on “size” and emphasis later shifted exclusively on ‘behavior of undertaking’, i.e. prohibiting monopolistic, restrictive and unfair trade practices. It owes its inspiration to Article 38 and 39 of the constitution. The board premises on which the MRTP Act rests are unrestrained interaction of competitive forces, maximum material progress through rational allocation of economic resources, availability of goods and services of quality at reasonable prices and finally a just and fair deal to the consumers . Promotion of the economic growth is the ultimate object of the Act. With the passage of time, it was noticed that the MRTP Acts objectives could not be achieved to the desired extent. Even the 1984 amendment made to the Act couldn't help much .In the new era of globalization the MRTP Act failed miserably in its objective to control monopoly.

Further the MRTPC had a mere advisory role to play. When it comes to remedies, the powers of the MRTPC are restrictive. However, through the passage of time the Judiciary through its interpretations tried to expand the ambit of the MRTPC. MRTPC has extra territorial reach and can pass orders against parties situated outside India to the extent the anti-competitive practices are carried out in India. The year 1991 which brought the watershed of financial crises made the Government to think and act in the line of
International lines owing to Privatization and liberalization of international trade. The need of the new legislation was felt which would allow the Country to get its pace with the international Trade. Eventually a need for a new law was fulfilled by the enactment of the Competition Act of 2002. There is a general impression and a perception that the Competition Act 2002 is either a replica or a revised version of the Monopolistic and Restrictive Trade Practices Act of 1969, which is erroneous and misplaced. The new Act was enacted to protect Competition process and for the establishment of the Commission to prevent practices having adverse effect on competition.