Chapter-7

NATURE AND REGULATION OF RESTRICTIVE TRADE PRACTICES

INTRODUCTION

The purpose of this Chapter is to analyse the various categories of agreements relating to Restrictive Trade Practices which are deemed to be agreements relating to Restrictive Trade Practices requiring compulsory registration with the Director General of Investigation and Registration. These fourteen categories of agreements are explained in detail in this Chapter, stating clearly what practices have been held to be restrictive and what practices have not been held to be restrictive.

ANALYSIS OF CATEGORIES OF R.T.P.

(I) REFUSAL TO DEAL

An agreement or arrangement where a group of sellers agree to sell only to defined buyers and vice versa falls under this category. 'Refusal to Sell' is a trade practice adopted by a seller when he refuses to sell to a particular buyer or class of buyers. The expression refusal to deal covers both 'refusal to sell and refusal to buy'. The practice of 'refusal to deal' will become a restrictive trade practice when the refusal is intended to eliminate or restrict competition. But, when it is being exercised as an independent discretion by the seller in selection of buyers, it would not be a restrictive trade practice. In other words, there is nothing wrong if an individual trader is confining his buying or selling to the persons of his choice. The agreement contemplated here is one as between sellers or as between buyers, restricting the freedom of the parties to such agreement to trade with others. The official view in the United States correctly states the position thus:
Individual businessman's refusal to deal, standing alone, are entirely legitimate and should not be viewed as legally suspect. They may evince commendable efforts to develop an enterprise intelligently, through promoting productive while abandoning barren business relationships or channels of distribution... And failure to commence or continue trade relations may certainly stem from unsatisfactory past dealings, unfavourable credit rating, or even purely personal dislikes. Yet a refusal to deal may lend itself to abuse as an instrument of monopoly power or implement a course of conduct in restraint of trade. Hence, only a thoroughgoing factual inquiry into the surrounding circumstances can reveal the true position. However, concerted and conspiratorial refusals to deal, group boycotts of customers or suppliers and combinations for coercing others' business policies or patterns of commerce are unreasonable restraints opposed to law.¹

The practice may arise out of - (i) collective action by an agreement or arrangement among sellers only to sell to certain buyers or by an arrangement among buyers, only to buy from certain sellers; (ii) bilateral action by an agreement or arrangement between seller and buyer, that the former will sell only to the latter and the latter will buy only from the former; and (iii) unilateral action by a seller not to buy from a particular seller/sellers.

In the United States, the approach of the courts has been to discourage such practices only when they are indulged in either to create or maintain a monopoly or conspiracy which may have an adverse effect on competition.² Thus, an individual refusal to deal would not be in violation of Section 1 of the Sherman Act, if it is being exercised as

an independent discretion as to the parties with whom he would deal. In the United Kingdom, such practices are covered by the Restrictive Trade Practices Act, 1976, as being in respect of the persons or classes of persons to or from whom goods are to be supplied or acquired.

In India, the agreements of refusal to deal are covered within clause (a) of Section 33(1) of the MRTP Act. In the Act the relevant clause reads as follows:

"any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought [Section 33(1)(a)]."

What is Refusal to Deal?

A mere refusal to deal with one particular party would not amount to a Restrictive Trade Practice. A trader or manufacturer engaged in an entirely private business is free to exercise his own independent discretion as to parties with whom he will deal. He can also announce in advance the circumstances under which he would refuse to sell. Therefore, a mere refusal to sell without anything more, does not offend Section 33(1)(a) but if the refusal to sell is to have market control or to achieve a monopolistic purpose and the like, then it would amount to 'refusal to deal'. What is required to be seen is what is the effect of the agreement on competition.

Kinds of Restrictions Under the Clause

(a) Collective (Horizontal) agreements in the nature of a cartel among sellers not to sell goods to a particular person or class of persons, and amongst the buyers not to purchase goods from a particular person or a class of persons or to purchase only from a few to the exclusion of the others.
(b) Bilateral (Vertical) agreements between seller/manufacturer and the buyer that the latter will sell the goods only to a particular person or class of persons and not to others.

(c) Any agreement between the manufacturer and the supplier of the raw material that the former shall purchase raw material only from the latter and not from any other supplier.

Such restrictions on dealings with a category or class of persons will have the effect of foreclosing markets to competitors and also coerce the dealers to adopt trade practices which they might not otherwise adopt.

The MRTP Commission has considered several cases falling within this clause and the important practices held as restrictive are as under:

**Practices Amounting to Refusal**

(a) Restriction on the intending buyers and other visitors from entering the place of a reduction sale and the compulsion to buy entry cards for the purpose.

(b) Even restrictions of the nature of tie-up sales and territorial restrictions have been held to fall within this clause, if the dealings are conditional upon acceptance of these restrictions.

(c) The clause in a dealership agreement that "you may appoint your own subserving dealer at your risk and responsibility but with prior permission" would be restrictive in nature. The words, 'but with prior permission' require to be dropped.

(d) Any concerted action by an association or issuing of circulars to its members that they shall not deal with any particular company/category of persons, would be
boycotting the goods of or dealings with the aggrieved party and would amount to refusal to deal.

(e) Where certain manufacturers, mainly partnership firms from a new partnership firm to which they agree to sell their entire production and they do not sell to any others it would amount to refusal to deal with others, particularly, where the manufacturing firms control a preponderant part of the production of goods. (In a case, the manufacturing firms controlled nearly 94 per cent of the total ice produced in a city and as a result of the agreement to sell their entire production to new partnership firm formed by them, the price of ice rose by 0.50 p. per kg., the Commission was persuaded in holding that it amounted to Restrictive Trade Practice of refusal to deal.

Restrictions Not Amounting to Refusal

(a) The policy of appointing only one or two wholesalers in a particular area for marketing the goods is not a refusal to deal, so long as there is nothing in the agreement excluding appointment of other dealers.

(b) Where the marketing share or the marketing power of a manufacturer or supplier is less or insignificant, then such manufacturer is free to devise a suitable marketing policy to remain in competition. In other words, to suit one's own business requirements, minimum dealers may be appointed or dealers may not be appointed for certain regions. Such measures would not amount to refusal to deal with any dealer who is not appointed for distribution of products or services.

(c) A cooperative enterprise of some traders in a city to import a product otherwise permitted to be imported under an open general licence, may not be of any consequence as far as the competition in the Indian market is concerned, provided that there is no obligation
for the exporter under the agreement to refuse to sell to any other trader in India.

(d) Where there is a refusal to deal with a person on the ground that he indulged in shady deal of cornering material while in the employment of the company, it would not amount to refusal to deal particularly if there are other dealers already functioning in an area and the company is unable to add any more dealers in that area.

(e) Where there is no tie-up of sale of spares with sale of computer and the seller is willing to let know the foreign source of supply of spares and further the import policy permits imports of spares by actual users, the sellers cannot be said to refuse to deal with the buyers of computers.

(f) Where a new stockist is appointed in the area in place of the existing one and the latter refuses to supply on the ground that there were delays in making payments and that supplies cannot be made because of shortage of goods concerned, there won't be any charge of refusal to deal.

(g) Where there is a refusal to deal because of very poor sales performance of a dealer or stockist, appointment of another dealer or stockist in his place would not amount to refusal to deal with the former.

(II) TIE-UP SALES AND FULL-LINE FORCING

A tie-up sale in its wider connotation is an agreement or arrangement whereby a purchaser, lessee or licensee is forced to take one or more other products, services or patents or other technology. It refers to an arrangement by a manufacturer or dealer of goods to compel a buyer to purchase some goods which he does not want, along with goods he wants to purchase. Under the tying arrangement a buyer agrees to buy
a product 'X' on the seller-imposed condition that he will also purchase product 'Y' from the seller, rather than from some other dealer. Thus, the sale of product 'Y' (tied product) is tied to the sale of product 'X' (tying product). Tying arrangement consists in the conditioning of the sale or purchase of a product or service, upon the purchase or sale of one or more other products or services. Such a situation occurs where the tying product is the subject of scarcity either due to product shortage or deliberately manipulated. Tying sales are common where the tying product is protected by patent, copyright or trade mark or when prices of a commodity are fixed by law. In such case the tied product is usually one whose price is not controlled or supply exceeds the demand at the controlled price. The common core of tying arrangement is the forced bying of a second distinct commodity along with the desired purchase of a particular product, resulting in economic harm to competition in the 'tied' market. But, where the buyer is free to take either product the seller may offer the two items as a unit at a single price.

The 'tying arrangements' serve hardly any purpose beyond the suppression of competition. Generally, they are against the interest of the consumers. By conditioning his sale of one commodity on the purchase of another a seller coerces the abdication of buyers' independent judgement as to the 'tied' product merits and insulates it from the competitive stresses of the open market. Instrincts superiority of the 'tied' product, if there be any, would convince freely choosing buyers to select it over others, anyway. The effect of the tying device on competing attempting to rival the 'tied' product is indeed drastic as it enables the seller adopting the tying arrangement to enjoy market control while other existing and potential sellers are foreclosed from offering their goods to a free competitive judgement though being effectively excluded from fair market dealings. But, sometimes, the tie-up sales may be justified for legitimate
business purpose. The articles though physically distinct, may be related through circumstances. It would not be thought, for example, that a one-legged man could insist on purchasing only one shoe. What can fairly be treated by a seller as 'inseparable' from the point of view of his business, will have to be judged by taking into account all the circumstances.

In the United States, the law relating to tie-up sales is covered under Section 1 of the Sherman Act, Section 3 of the Clayton Act, and Section 5 of the Federal Trade Commission Act. Such sales are not illegal per se.

However, in International Business Machines Corp'n. Vs. U.S. (298 U.S. 131, 1936) the U.S. Supreme Court rejected the Company's argument that improperly made punch cards would injure the computing machine and held that leasing of machines on the condition that they be used only with the punch card manufactured and sold by it, constituted an illegal, tie-up, since the effect of the condition might be substantially to lessen competition.

However, where the products were identical and the market same, tie-up between such products would not contravene the provisions of Section 1 of the Sherman Act.

In the United Kingdom, there is no specific provisions dealing with tie-up sales. However, such sales are being covered under Clause (c) of Section 6(1) of the Restrictive Trade Practices Act, 1976 which provides for restrictions in respect of the terms or conditions on or subject to which goods are to be supplied or acquired. The agreement containing the restriction shall be deemed to be contrary to the public interest unless the court is satisfied that the restriction falls under any of the gateways specified under Section 10(1) of the Act. In the European Economic Community, tying arrangements are expressly prohibited under Clause (e) of Article
85(1) of the Treaty of Rome. It prohibits all agreements, decisions and concerned practices which amount to making the conclusion of contract subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial practice, have no connection with the subject of such contracts.

In India, the second type of agreement which is deemed to be an agreement relating to Restrictive Trade Practice is what is called 'Tie-up Sales' or 'full-line forcing'. Section 33(1)(b) of the MRTP Act which covers this type of trade practice reads as follows:

"Any agreement requiring a purchaser of goods as a condition of such purchase or purchase some other goods."

What is Tie-up Sales?

If a buyer of goods is allowed to purchase them subject to the condition that he purchases some other product/goods also, then it would be a tie-up sales. As such, a supplier is, free to supply any quantity of various goods to any customer irrespective of the nature of the products/goods provided the buyer is also willing to take them. Only where a supplier compels the buyer to purchase a product 'B' along with a product 'A' it would be a tie-up sales.

Where a customer requires a gas connection from a dealer and the customer is asked to purchase, as a pre-condition, a gas stove from such dealer only in order to obtain the gas connection, then it would be a tie-up sales. On the other hand, where a customer is willing to purchase the gas stove also from the dealer giving the gas connection then it would not be a tie-up on the part of the dealer.

Usually a tie-up in sales is a tact adopted by dealers to push up the sales of an otherwise slow moving product with a fast moving product and it is the tied slow moving
product in respect of which the competition gets distorted. Due to such tie-up, the competitors have to overcome not only the ordinary business obstacles, but also the barriers imposed by those indulging in tie-up sales. Normally, competition gets adversely affected by such practices only when the firm indulging in tie-up has a substantial market power in respect of the tying product.

**Tie-up Sales - When Restrictive**

1. Forcing dealers to buy a bathing soap along with washing soap.
2. Requiring the buyer of pressure cookers as a condition of such purchase to buy containers/separators along with it.
3. Collecting service changes from customers of cars at the time of the delivery of the cars along with cost of the cars or even at a subsequent point of time.
4. Requiring the buyers of duplicating machine to buy and use stencils, inks and spare parts of that company only during the period of guarantee.
5. Selling superior grade material with inferior grade material.
6. Making a condition to purchase hot plates or gas stoves or trolley in order to obtain gas connection. This includes, indifference as well as delay on the part of the dealer in granting connections to those who do not purchase hot plates/gas stoves.
7. Requiring a buyer of a scooter to purchase helmet or alternatively take out a comprehensive insurance policy.
8. Compelling buyers of motorcycles to obtain the accessories only from such dealer or persons specified by such dealer.

**Tie-up Sales - When Not Restrictive**

1. Issue of equity shares (both new and rights issue) linked with debentures issue is not tie-up sales.
During the warranty period for a car, if a company insists that an Air-Conditioner can be fixed in that car by an authorised dealer only, it will not amount to a tie-up as the condition is for the period of warranty only and that too it is to ensure that the job of installing an AC does not affect the performance of the car during the warranty period. Particularly because, fixing an AC would be intermeddling with the engine of the car, which requires trained technicians to undertake it.

What is Full-line Forcing?

It is extreme form of tie-up sales. A trade practice by which a manufacturer or a supplier requires the buyer of a particular product to buy the entire range of products of that manufacturer or supplier, may be termed as full-line forcing. A slightly different form of full-line forcing is to bind the dealer to take the full quantum of products which the manufacturer chooses to allocate to him. However, in a large number of cases even the stipulation of a minimum off-take and of a minimum stock to be maintained by the distributor at all times have been held by the Commission to be amounting to full-time forcing.

Full-line Forcing - When Restrictive

1. Requiring wholesaler under an agreement to purchase a specified quantity of different varieties of the products, say, footwears of a particular gross value irrespective of the demand for them.

2. Requiring that redistribution stockists should buy and accept such stocks which the company sends at its discretion.

3. Requiring that distributors to buy the entire range of products.
Full-line Forcing - When Not Restrictive

A manufacturer has full right to supply the goods keeping in view the requirements of the retail agents, departmental stores, stockists and other commitments made by him and the availability of stocks. The following cannot be termed as full-line forcing:

(1) The stipulation in an agreement that the dealer should take a fixed minimum quantity of goods per month and should endeavour to increase this quantity every month.

(2) Provision in an agreement that the company is not responsible for meeting all the requirements of stockists; and the requirements of any stockist will be met consistently with the requirements of other fellow stockists and the supply position of the company, can be said to be a reasonable arrangement.

(3) If quantity of goods to be taken or distribution is fixed on the basis of mutual consent between the supplier and the distributor, it would not be normally objectionable.

(4) Requiring the authorised dealers as a condition of purchase to place a minimum order of the quantity and value specified by the Company.

(5) Requiring the distributors, to stock goods of certain minimum value and to display them within show-rooms.

(6) When a publisher charges a combined rate for advertisement in all the editions of a newspaper or journal, this does not by itself result in a tie-up or full-line forcing as there can be no loss to a party in advertising his product in different language versions of the publication by paying a combined rate, unless that party has a specific preference for any one or more edition(s) only.

(7) If a dealer of sophisticated and expensive machinery is also required to maintain spares in adequate quantity, it will not be restrictive in the following circumstances:
i. the expensive machinery is to be employed for expensive works or projects; and

ii. non-availability of spares in time will result in escalation in costs.

(8) In order to ensure operational efficiency and better after-sales services with reference to technologically complicated devices/machines, if all parts/components are to be bought from the manufacturer only, it won't be restrictive in special circumstances of the case.

(III) EXCLUSIVE DEALING

'Exclusive Dealing' is an arrangement or practice whereby a manufacturer or supplier requires his dealers to deal exclusively in his products and not in the products of his competitors.

'Exclusive Dealing' agreement has also been defined as an agreement between two or more enterprises that one or both will deal exclusively with the other and refuse to deal with third parties in respect of a commodity or class of commodities, a specified service or class of services, or specified technology or class of technology.\(^3\)

Generally, in such a case, the dealer usually agrees not to deal in the products of other suppliers who compete with the seller and the seller agrees not to sell to buyers who compete with the dealer. Sometimes such a term is embodies in a written agreement but more often, a manufacturer holding a dominant position enforces exclusive dealings, by verbal instructions or threats.

An exclusive dealership arrangement may not be objectionable, if it does not prevent, distort or restrict

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competition or tend to create a monopoly. But, if the market for the products in question is not competitive such an arrangement must be prejudicial to public interest as supply and price will depend on the discretion of the dealer. Unlike, the tying arrangements, exclusive arrangements may in fact promote competition. They may be preferred by customers as assuring a steady adequate source of supply, affording protection against price fluctuations. For the seller, an exclusive dealing arrangement may reduce selling expenses and encourage an evenly scheduled economically planned production. Above all, exclusive arrangements can protect the market position of weaker competitor against more powerfully entrenched rivals and also enable new entrants to gain a foothold by assuring a definite volume of business in the beginning stages. On the other hand, exclusive dealing arrangement may also clog competition in the channel of distribution. To the extent a seller blankets the market with exclusive arrangements, to that extent the opportunity of rivals to compete is restricted. Whenever, a seller though pre-empting access to consuming markets restricts his rivals' opportunities to compete, the potential impairment of the competitive process readily appear. In case of exclusive arrangement, the point for consideration is whether any such arrangement in fact 'forecloses' competitors in the field to a substantial competition or create a monopoly in the line of business concerned.

In the United States, Section 3 of the Clayton Act prohibits 'exclusive dealing'. It declares an 'exclusive dealing' arrangement as illegal if it substantially lessens competition or tend to create a monopoly in any line of commerce. Further, under Section 5 of the Federal Trade Commission Act an 'exclusive dealing' agreement may be declared as an 'unfair method of competition'.

In the United Kingdom, the Monopolies Commission classified exclusive dealing agreement into three categories: (i) agreements by seller only to sell to certain buyers; (ii) agreements by sellers to sell only to certain buyers in exchange for agreements by those buyers only to buy from those sellers; and (iii) agreements by buyers only to buy from certain sellers. These agreements are confined to horizontal arrangements only, since the provisions of the (U.K.) Restrictive Trade Practices Act, 1976 do not apply to bipartite exclusive dealing agreements, provided the agreements contain no other restriction specified under Section 6(1) of the Act.

In the European Economic Community, the Treaty of Rome does not contain any specific provision relating to exclusive dealing arrangements. However, the general prohibition laid down under article 85(1) of the Treaty may be attracted if the agreement is such, which may affect trade between Member-States and the object or effect of which is to prevent, restrict or distort competition within the common market. But exclusive agency agreements with commercial agents are outside the scope of article 85(1) of the Treaty because such agreements have no adverse effect on competition. The commercial agent is not an independent trader, he acts on behalf of his principal.

In India, the third of the categories of the agreements which are deemed under the MRTP Act to be an agreements relating to Restrictive Trade Practice is what is called 'exclusive dealing'. In the Act, relevant clause reads as follows:

"Any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person." [Section 33(1)(c)].
Exclusive Dealing - When Restrictive

(1) When there is a categorical condition in the agreement, that the purchaser shall not buy from any other party, the products for sale in India.

(2) When the agreement says "during the currency of this agreement you will not distribute any competitive brand."

(3) When dealers are required not to deal directly or indirectly in the sale of any competing brands.

(4) Even though an agreement is termed as a sole selling agency agreement validly entered into under the Companies Act, if the terms of agreement show that the dealings are to be on a principal to principal basis.

(5) Where a manufacturer of a product, pressure cooker and its spare parts, is required under an agreement to manufacture them only for the distributor exclusively.

(6) Any agreement between a manufacturer of gramophone records etc. and artists, requiring them to enter into a long-term contract for giving performance exclusively to the company.

(7) Where, by an agreement between an Indian manufacturer and a foreign collaborator, the Indian manufacturer is obliged not to sub-licence the technology and the foreign collaborator is prevented from setting up or carrying on any similar competing business, it was held to be restrictive as this exclusive practice profits only the company and prevents further flow of know-how into the country (the products in a case of this type of restriction, were chemicals and pharmaceuticals).

(8) Where a manufacturer of medicines denies to his agents the freedom of choice of medicines manufactured by others.
Exclusive Dealing - When Justified

(1) Where exclusive distributorship is resorted to by a manufacturer who has a very little share in the market and is also pitted against dominant and giant undertakings having more than 75 per cent share in the market, then such exclusivity may be necessary for the survival of the manufacturer.

(2) Exclusive dealing is justified when a company faces stiff competition from a foreign company having such exclusive dealing arrangements.

(3) The nature of product requiring efficient and specialised after sales service, hire-purchase facility, indemnity to the lending banks, prompt repair and supply of spare parts, effective implementation of the guarantee etc., may be factors justifying exclusive dealings in public interest.

(4) It may be justified when the impact of exclusive dealership on competition is marginal. The Commission has allowed exclusively in such cases:

(a) in the case of manufacture and distribution of fans, exclusive dealing was allowed in so far as it covered towns having a population of more than one lakh people only;
(b) when there were sufficient number of suppliers of the product;
(c) when there was no dearth of outlets in the trade in any place where the company's stockists were located;
(d) when exclusivity applied only to first line of distribution (that is, wholesalers) and not to the second line of distribution (that is, retailers).
(IV) CONCERT IN PRICES AND TERMS AND CONDITIONS OF PURCHASE OR SALE

Collective tendering or bidding is an agreement or arrangement between two or more persons - (i) to tender for the supply or purchase of goods or services at prices or on terms agreed or arranged between them; or (ii) as to the prices which any of them bids, at an auction for sale of goods or whereby any party to the agreement or arrangement agrees to abstain from bidding at any auction for sale of goods. Such arrangements or practices eliminate competition between the parties inter se, or to exclude other competitors. They are also referred to as 'knock-out' agreements.

The object of these agreements or arrangements, which are usually from their very nature kept secret is to protect suppliers against the powerful position enjoyed by buyers, whether the latter consists of public authorities and government departments or private undertakings. There are many types of techniques adopted. Sometimes the parties agree to put in identical bids for every job, the assumption being that each will, in the long run, receive a fair share; in addition, however, they may agree upon the payment of compensation to those who do not receive a fair share. In other cases, the members report their intended tendering price to each other or to the association. The association may then have power to eliminate tenders which it is considered cannot be fulfilled except at loss if this is to be done there must be a cost accounting system which enables a fair price to be determined. In some cases the association communicates the prices, but not the names of firms quoting, to the members so that they may decide upon their course of action. Sometimes, the association determines which supplier is to receive the contract, the others are then directed either not to tender at all or to give him protection.

The main problem in checking the practices or arrangements of collective tendering or bidding is how to detect
the secret understandings between the parties in the absence of any evidence. The problem becomes more acute, when the parties do not quote or bid the same rates but vary them slightly with the intention that it should appear to others as if there has been no collusion.

In the United States, there is no specific provision in the antitrust legislations to deal with collective tendering or bidding. But, an agreement or practice relating to collective tendering or bidding is covered by the general prohibition under Section 1 of the Sherman Act, which provides that every contract, combination or conspiracy in restrain of trade or commerce...is illegal.

In the United Kingdom, the 'knock-out' agreements are covered by the Auctions (Bidding Agreements) Act, 1927. The said Act provides that if any dealer agrees to give or gives or offers any gift or consideration to any other person as an inducement or reward for abstaining or having abstained from bidding a sale by auction, either generally or for any particular lot, or if any person agrees to accept or accepts or gift or attempts to obtain from any dealer any such gift or consideration as aforesaid, he shall be guilty of an offence under the Act. There is no special provision relating to collective tendering or bidding in the Restrictive Trade Practices Act, 1976.

In the European Economic Community also there is no specific provision regarding the collective tendering or bidding. However, the agreements or practices of collective tendering or bidding will fall under clause(a) of article 85(1) of the Treaty of Rome. It prohibits all agreements, decisions, decisions by associations or concerted practices which amount to the direct or indirect fixing of purchase or selling prices or of any other trading conditions, which may affect the trade between Member-States.
In India, the fourth category of agreements which are deemed to be agreements relating to Restrictive Trade Practice is 'concert in prices and terms and conditions of purchase or sale'. Section 33(1)(d) of the MRTP Act which covers this type of Restrictive Trade Practice reads as follows:

"Any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms and conditions agreed upon between the sellers or purchasers."

**What is Cartel?**

This clause seeks to cover the following types of agreements:

(a) Agreement among suppliers/sellers to sell goods only at prices and terms and conditions agreed upon among themselves;
(b) Such an agreement to tender for the sale of goods only at agreed prices and terms and conditions;
(c) Agreement among purchasers to purchase the goods only at agreed prices and terms and conditions;
(d) Such an agreement to tender for the purchase of goods only at agreed prices and terms and conditions;

The trade practices under this clause also go by the other names, 'collusive price fixation', 'collusive tendering', 'cartel', etc. The collusive arrangement may be with respect to:

(a) price of the product;
(b) allocation of certain share or territories in the market;
(c) giving commission, discount etc.
In fact most of the agreements described in Section 33 would fall within the scope of this clause whenever such agreement is collectively entered into (orally or in written form) by two or more suppliers, dealers, etc. This would include apart from collective price fixation tendering, etc. collective resale price maintenance, collective withholding of output or supply of goods, limiting territories for market, collective boycott, collective refusal to deal, etc.

Such collusive agreements among producers or manufacturers gives them enormous power to control the market and dictate prices and terms to the wholesalers, retailers and consumers. This also prevents new entrants to the market and obstructs the natural and free play of the forces of competition.

For instance, whenever a group of traders come together to fix the price of their product or service in concert, they voluntarily as a group give up price competition and bring into operation a price mechanism which is determined by such combination, ignoring the consumers' reaction and the benefits of an otherwise free competition among them.

Factors Responsible for Concert/Cartel

It has been found in practice that one or more of the following factors, individually, or in combination may influence entering into such collective agreements:

(a) the number of firms in the industry is small;
(b) the level of the industry concentration is high;
(c) the product is homogeneous and the demand for it is relatively inelastic;
(d) there are substantial barriers to entry to the industry, including even the Government policies on licensing, import control, etc.
(e) the rate of technological change is low;
(f) the firms are able to obtain information easily about the prices and other terms of sale of its competitors;
(g) there is a strong personal leadership in the industry;
(h) there is a strong trade association in the industry.

The presence of all these factors does not mean that every time there is a simultaneous price increase among competing firms, collusion is presumed. There is need for evidence to show collective action by competing firms.

**Actions Not Amounting to Collusion or Concert**

Usually price parallelism among a few manufacturers may raise the suspicion of collusive action. This situation arises in a typically oligopolistic situation where a couple of manufacturers dominate the market and the products are generally undifferentiated and standardised. In such a situation price parallelism may be the result of a common reaction or response to market stimuli. In such cases, the price parallelism has to be additionally supported by a 'plus factor' which points to collusive action. In the absence of the 'plus factor' collusion cannot be inferred.

**Actions Amounting to Collusion or Concert**

(1) Publishing of standard price-lists by a trade or industry association. Such arrangements give the parties to the agreement, the power to control the market and it is inconsequential whether that power is exercised or not and the arrangement actually results in a price increase or not.

(2) Collective price fixing by an agreed code of conduct, like "self-regulating rules", adopted by the members of an association at a meeting. A leading example of collective agreements as to price, production and terms of sale etc., has been found in automotive type industry where a General Code a Conduct of members of the industry, aimed at regulating the production, distribution
and sales of tyres and tubes with a view to completely eliminating competition in the industry. This code of conduct was strongly condemned and after a prolonged hearing for four years, order was passed against such practice.

(3) Issue of circulars indicating ceiling prices for various grades of a product. In a leading case relating to caustic soda, a local manufacturers' association had recommended ceiling prices for various goods of caustic soda and had issued a circular to its members stating that "as in the past the prices indicated are only the recommended ceiling and members are in no way bound to follow the recommendations" and that "members had full liberty to sell their products at prices lower than those recommended".

(4) When there is concrete evidence linking price parallelism with a tacit agreement or understanding amongst the parties to the concert. Mere proof of identity of frequent price increases made by companies who dominate the market is not sufficient. In a case, in response to tenders floated by a public sector steel plant, it was found that identical prices were quoted for various items by a few companies, scattered in different parts of the country. In this case even though no positive proof of the parties having met and decided upon the rates was available, the initial burden of establishing the existence of such collusion was shifted to the companies from the complainants on the basis of circumstantial evidence, namely, (i) the parties belonged to different parts of the country; (ii) they quoted same rates even though their costs of production were different; and (iii) when called separately, they were agreeable to price reduction.
Collusive Tendering Justified - Rare Cases

Sometimes, peculiar facts and circumstances of the case, may justify a low geared concert. In a case, several companies in the small sector quoted identical rates, in responses to tenders floated by a government department for supply of blankets. The tender was for a huge quantity which a single small unit was not in a position to supply. The prices quoted by these units were the lowest compared to the prices quoted by other parties. It was contended by the small scale units that this benefitted not only the government but also the small scale units which depended for their survival in such large tenders and if any one of them quoted lower rates, the other units' offer would be rejected leading to closure of the units resulting in large scale unemployment in that area. This was seen in the context of the fact that no single unit could meet the huge demand of the Government Department. The Commission decided that such a practice in that particular case was not prejudicial to the public interest stating that the concept of competition should be understood in a commercial sense.

(V) DISCRIMINATORY DEALINGS

'Price discrimination in dealings' refers to the practice or arrangement or allowing discriminatory concessions or benefits including discounts, rebates or credit in connection with or by reason of dealings. The discrimination may be made by charging different prices from different buyers or by granting discriminatory discount, allowance, or rebate to different buyers. It involves a differentiation in which some enterprises or consumers are given preference over others, particularly in the treatment of purchasers' by a seller such discrimination not being warranted by differences in the circumstances of the transaction; the differentiation or discrimination may relate to prices, terms of sale, or the quality or quantity of what is supplied and may extend refusal to sell.
Normally, the practice of price discrimination impedes competition when it enables the dealer with large turnover to show a part of his differential discount with his buyers and to drive the small dealer out of the market. However, basing the quantity discount on cost saving on large quantities purchased at a time or over a specified period is permitted. This amounts to sharing the cost saving with the dealer purchasing large quantities.

In the United States, up to 1936, Section 2 of the Clayton Act, 1914, provided that it was unlawful for a person engaged in commerce to discriminate in price between different purchasers of commodities intended for resale where the effect of such discrimination may be substantially to lessen competition. Proviso to Section 2 stated that discrimination based on quantity of the commodity sold that made only due allowance for difference in cost of selling or transportation was not unlawful. The Robinson-Patman Act, 1936 amended Section 2(a) of the Clayton Act to lay down that it is unlawful to discriminate in price between different purchasers of commodities where the effect or discrimination may be substantially to lessen competition. Proviso to Section 2(a) states that this would not affect differentials which make only due allowance for differences in cost of manufacture, sale or delivery resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered.

In the United Kingdom, discrimination in dealings has not been specifically classed as restrictive trade agreement in the Restrictive Trade Practices Act, 1976. However, when a group of producers gives aggregated rebates,

The essential character of aggregated rebate is that it should be calculated at a rate which varies according to the total value or quantity to the customer's purchases over a period form members of the group.
The rebate may either be actually paid at the end of the period or allowed as a discount, it may be considered as restrictive trade practice. Such agreement/practice may fall within Section 6(1)(a) of the (U.K.) Restrictive Trade Practices, 1976. Restrictions against inducements of general character not related to the price may fall within Section 6(1)(b) as relating to terms on which goods are to be supplied.

In the European Economic Community, discrimination in dealing its covered under Clause (d) of article 85(1) of the Treaty of Rome. It prohibits all agreements decisions and concerted practices which amount to applying in relation to customers in the trade, unequal conditions in respect of equivalent transactions placing them thereby at a competitive disadvantage. However, such an agreement may be exempted under the circumstances specified under article 85(3) of the Treaty.

In India, the fifth category of agreement deemed to be an agreement relating to Restrictive Trade Practice is 'Discriminatory Dealings'. Section 33(1)(e) of the MRTP Act which deals with this type of Restrictive Trade Practice reads as follows:

"Any agreement to grant or allow concessions or benefits including allowances, discounts, rebates or credit, in connection with or by reason of dealings."

What are Discriminatory Dealings?

According to the clause, there should be no discrimination by any manufacturer or supplier in respect of granting or allowing concessions or benefits including allowance, discount, rebates or credit, by reason of or in connection with dealings.
Discrimination refers to the sale of a product to different buyers at prices which are not proportional to the difference in the cost of such supply, and granting discount, commission, etc., at varying rates to different buyers or classes of buyers on the basis of value or quantity of purchases made, turnover of dealers, etc.

The words 'in connection with or by reason of dealings' suggest that concession or benefits granted in a particular or individual transaction of sale or purchase or the provision of service does not fall within the scope of clause (e) but that the concessions or benefits which would include allowances, discounts, rebates or credits - must be given independent of any particular individual transaction of sale or purchase. 'Dealings' mean series of transactions of sale, purchase or distribution etc. or provision of services with a particular trader or businessman.

Normally, a dealer who obtains the goods at a higher price will not be able to compete with other dealers who obtain them at a lower price from the same manufacturer or supplier. Nevertheless, all price discriminations may not adversely affect competition. The important factors like the nature of the product, its supply and demand position in the market, the market share of the manufacturer or supplier, etc., determine the adverse nature of the practice. Only when the object of giving concessions, etc., is not to benefit the consumer or user but to affect the course of volume of transactions of such sale, purchase, etc., in a market, it has a tendency to affect, restrict or distort competition.

**Discriminatory Dealings - When Restrictive**

(1) Whenever dealers in a particular area or locality are discriminated in the matter of supply of products, arbitrarily or activated by favouritism.
(2) The practice of allowing annual turnover rebate where the small buyers get less rebate than wholesale buyers.

(3) When two or more manufacturers, who enjoy a monopoly in the market, sell their respective products to one another at favoured prices and thus perpetuate their monopoly power.

(4) In the absence of any rationale or reasonable basis for price discrimination, the trade practice would be considered restrictive in character.

In a case relating to Plain Polyester Film (PPF) which was the basic raw material for manufacturing Metallized Polyester Film (MPF) and for which the demand was in excess of production, the sole manufacturer of indigenous PPF exploited its monopolistic position and charged different prices for different customers and refused to supply the raw material at reasonable prices and on reasonable conditions of delivery. The prices were also manipulated suitably to discourage the import of the raw material crucially needed by the manufacturers of Metallized Polyester Film, thus affecting the flow of supplies in the market. In such cases, the defence of the manufacturer that increased price was being charged only for metallizers and no discrimination was made as regards the same class of customers was held to be of no avail.

(5) Where there is a differential discount scheme based on purchases - turnover discount, the discount structure would be considered restrictive.

(6) Where the scheme envisages differential discounts linked with different slabs of off-take of products billed in one invoice - called 'off-take incentive scheme' or where a scheme grants differential discounts on different slabs of monthly off-take of various products - called 'monthly off-take incentive scheme', it would be restrictive in nature. But where such a scheme does not have any effect on intra-brand competition at any
particular locality and in view of the fact that an extra discount to a large buyer would compensate his higher inventory cost, such a discount scheme based on off-take may in special facts and circumstances be considered not to be restrictive.

(7) Where the dealers are differently christened — accredited Dealers and Authorised Dealers — and the Accredited Dealers are given more benefit in the form of discount in comparison to the bonus (which is comparatively less) given to Authorised Dealers, the competition among these dealers would be adversely affected, as the Authorised Dealer in view of low bonus cannot effectively compete with the Accredited Dealer.

Discrimination — When Justified

The Commission normally interferes only if the incentive schemes of any company are shown to be prominently discriminatory, or arbitrary or designed to help the favourite wholesalers and to materially affect competition.

(1) A theoretical possibility that schemes of discounts might have been misused would not be a ground for interference with the marketing strategy devised by a manufacturer to maintain production especially in the face of necessary trends —

In the case of a company engaged in the manufacture and sale of paper and boards, differential discounts were offered by them linked with quantities of products taken, which differed from wholesaler to wholesaler.

This was found restrictive but not prejudicial to the public interest.

(2) Discriminatory rates, commission and credit policy may also be justified on legitimate or sound business considerations and in public interest.
A Newspaper Company was charging discriminatory rates for advertisements in its various editions; it was adopting discriminatory credit policy and allowing discriminatory commission of its agents on booking of advertisements.

(3) Where higher discounts are given to a distributor who has to shoulder higher responsibilities of maintaining trained staff, maintenance of service capability, need to attend to complaints during warranty period, etc., it is not objectionable to have a discriminatory discount structure.

(4) When goods are sold to various stockists bearing in mind the local sales-tax, transportation charges and other incidental aspects of sales, and discount is given as to maintain commonness of prices all over the country, the discriminatory discount would not be objectionable.

(5) Where in an industry a division of customers is recognised, then charging different prices for various categories of customers, dealers, government departments, educational institutions, etc., would not be restrictive, so long as no discrimination is made among the same category of customers.

(6) Where some dealers are given premises free of charge by the manufacturer in comparison to others who are required to have their own arrangement for the premises, a differential discount nearly neutralising the benefit of free premises to the former would not amount to discriminatory dealing.

(7) In a very highly competitive market if the manufacturer gives a target achievement bonus to its dealers, for a particular period, it would only be in the nature of a further incentive to the dealer to take added efforts to push up the sales; it would not amount to any discrimination in dealings.
(8) Where in a franchise agreement, the franchise is given the first right to establish additional capacity for manufacture of a product in case the demand situation so demands in an area, on mutually agreed terms, and in the event of the franchise failing to establish additional capacity, any one else would be given the benefit of establishing the additional capacity, the pre-emptive right in favour of the franchise would not be considered discriminatory.

(9) Where the demand for a particular item is very high in metropolitan cities in comparison to small towns, different sales targets for different towns/cities for being entitled to additional discount can be fixed. In such cases fixing uniform sales targets throughout the country would place the dealers in small towns at a considerable disadvantage.

(10) Where, besides a uniform discount or say 30 per cent for all dealers, additional discount on varying turnovers is given, it may not amount to discriminatory discounts in all cases. The range of discounts would be however a material factor in such cases.

(11) Where incentive bonus schemes are given to a distributor to enable him to get a foothold in the market or where a distinction is made on the basis of geographical differences, it would be justified if it was to ensure equitable distribution at reasonable prices.

(12) When the rate of discount given on the basis of turnover of a specified value is uniform and the cost of saving is passed on to the consumers, it would not be restrictive.

(13) Prohibition by an Association that its members should not give interest free credit for more than thirty days was found justified as smaller traders who did not have much capital could not sell goods on credit for more than thirty days, thereby preventing the rich traders fromcornering the market by their capacity to give credit for a longer duration.
(14) Fixing prices by negotiations according to market situations does not amount to adoption of any tactic to impede competition.

(15) Discrimination in accordance with a recognised commercial practice is justified, like the practice of selling at lower prices to government or its agencies.

(VI) **RESALE PRICE MAINTENANCE**

Resale price maintenance refers to a practice whereby a manufacturer or supplier of goods secures that those goods are sold by persons to whom they are supplied at, or not below, a specified price stipulated by the manufacturer or supplier. The arrangement of resale price maintenance may be contractual or may consist in a policy of withholding supplies of goods (whether the price-controlled goods or other goods) from dealers who do not maintain the specified prices. It may be individual, that is, enforced separately by each manufacturer or supplier, in respect of his own goods, or collective, so that failure to maintain the specified prices may expose a dealer to collective action (e.g. loss of supplies, etc.) from a group of manufacturers or suppliers.

The price stipulation may be prescribed in three forms—fixed price, when the goods are to be sold only at that price and no departure is permitted; maximum resale price, when the goods may be sold below but not beyond that price; and minimum resale price, when the goods shall not be sold below that price and if it is not followed by the dealer, the supplies are stopped and may even liable to pay compensation. Thus, in case of resale price maintenance, there is strict enforcement of the stipulated price below which goods cannot be sold by the dealer. Generally, the strict enforcement of the stipulated price is possible only when a manufacturer uses a selective or exclusive distribution pattern and when the brand had achieved a high degree of customer adoption and popularity. Resale price maintenance enables a supplier
to exercise control over the distributors by prescribing the price and the margin of profit at each stage of distribution. Thus, he can secure the support of distributors at each level of distribution by ensuring an adequate margin to them.

As a matter of fact, resale price maintenance kills the price competition between the actual distributors of the goods and often keeps the prices which the ultimate consumer has to pay higher than they would otherwise have been. Thus, it prevents price reduction to the consumer.

However, those who indulged in the practice of resale price maintenance defend by arguing that, firstly, it guarantees an adequate margin of profit between wholesalers and retailers and thus leads to a large number of outlets which benefit the consumers. Secondly it maintains a price stability and attracts the consumer and if the lesser price is charged for their goods that might harm their reputation as regards quality. Thirdly, it enables the small traders and shopkeepers to survive the competition of big merchants and powerful chain stores. Fourthly, it prevents the practice of 'loss leader'. Fifthly, for the sale of durable consumer goods like car, scooter, television, airconditioner, refrigerator, etc. requiring a long-term after-sale service, it is necessary to ensure sufficient margin of profit to provide the satisfactory service and is not undercut by sellers interested only in quick sale. However, these advantages would be outweighed by the injury caused to the public in general as a result of reduction of competition. The consumers have to pay a higher price than would be the case if the maintenance of minimum resale price maintenance requires to be prohibited in the interest of the consumers.

In the United Kingdom, collective resale price maintenance was prohibited by Restrictive Practices Act, 1956.
The subject received further examination, and by the Resale Prices Act, 1964, it was provided that any term or condition of a contract for sale of goods by a supplier to a dealer or of any agreement between a supplier and a dealer relating to such sale would be void in so far as it purported to establish or provide for establishment of minimum prices to be charged on the resale of the goods. The general purpose of the Act was to prevent suppliers of goods from fixing minimum prices at which the goods are to be resold and to prohibit the withholding of supplies from dealers who sell at a price below the minimum so fixed. However, the legal provisions relating to resale price maintenance have recently been consolidated in the Resale Prices Act, 1976.

In the United States, resale price maintenance is covered by the general prohibition under Section 1 of the Sherman Act, 1890.

It declares every contract, combination or conspiracy, in restraint of trade or commerce among the several states, or with foreign countries, to be illegal.

Price fixing is contrary to the policy of competition underlying the Act. It is per se violation of Section 1 of the Sherman Act. The anti-competitive character in resale price maintenance would be eliminated when the dealers have freedom to resell the goods at a price below the stipulated price.

In Canada, the practice of resale price maintenance has been prohibited since 1951 by an amendment made in the Combines Investigation Act. Further, the provisions relating to resale price maintenance have been strengthened by an amendment to the Act which came into force on January 1, 1976. It has widened the scope of the Act by covering the services also. The Act now prohibits any supplier or dealer to induce or attempt to induce any other person to resale an article or commodity.
In India, the sixth category of agreement which is deemed to be agreement relating to Restrictive Trade Practice is 'Resale Price Maintenance' Section 33(1)(f) of the MRTP Act which deals with this, reads as follows:

"Any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged."

Scope of the Clause

In order to fall within the scope of this clause:

(a) the condition for sale should be that the prices to be charged on resale should be those stipulated; and

(b) the agreement should not have stated clearly that prices lower than the stipulated price may be charged.

In other words, agreements containing a recommended price resale price and also granting the freedom to charge lower prices would not be registrable and would not be deemed to be per se restrictive.

This resale maintenance covers vertical agreements in contrast to the horizontal price maintenance already discussed under clause (d) of Section 33(1) dealing with concerts. Resale price maintenance is looked upon as a technique for preventing price competition among manufacturers and distributors. Fixing a maximum price is justified as it prevents arbitrary price rise in times of shortages. The MRTP Commission has dealt with several cases under this category and has not objected to the stipulation of a maximum price, provided it is specifically mentioned or a clear indication is given that price lower than the stipulated one can be charged.
A provision in an agreement that resale price of the dealer shall not exceed 11 per cent of his purchase price clearly indicates that lower prices can be charged.

**Resale Price Maintenance - When Restrictive**

(1) A joint advertisement by the dealers of a product (automobiles) on uniform terms indicates that the dealers have agreed to practice resale price maintenance and to sell the products on agreed terms. (Collective resale price maintenance).

(2) Where price lists are circulated, without specifying whether they are minimum or the maximum prices, such a list is bound to create an impression on the dealers that prices lower than those mentioned are not to be charged and hence would be considered restrictive.

(3) A stipulation in an agreement that the stockists shall, for instance sell the T.V. receivers to the customers at the price not exceeding the recommended list of prices after adding to such price, local sales-tax, insurance charges, octroi and other levies if any, imposed by any local authority or government would not be a resale price maintenance restriction only if it says further that such a price is the maximum price and the stockists is free to sell the products below the prices stipulated therein.

Resale price maintenance is to be distinguished from direct price maintenance by a manufacturer who owns a chain of retail stores and fixes the price for selling. Likewise, agency agreements are also different where a distributor is a mere agent of the manufacturer and he sells on behalf of and on account of the manufacturer.
Special Provisions in Relation to 'Resale Price Maintenance'

The practice of resale price maintenance extensively circumscribes the dealers/stockists freedom to sell the products at less than the recommended prices, even if the situation in the market warrants. A manufacturer can resort to various methods like withholding of supplies to a dealer who does not maintain resale prices. As such a practice carries more vice, the MRTP Act contains some more special provisions in relation to the Restrictive Trade Practice of resale price maintenance. They are -

(1) No contract or agreement of sale should specify any price as a minimum price which is to be charged by a wholesaler or a retailer while reselling the goods in India. Such a stipulation would be void.

(2) No supplier of goods should notify to dealers or otherwise publish any price which is specified as a minimum price or so indicated as to be understood by a reader to be the minimum price which may be charged for the resale of goods in India. Such notification of publication of the minimum price, either specifically or by implication, should not be done either directly or through any person or association.

The term 'supplier' would mean any person who supplies goods for the ultimate purpose of resale and includes a wholesaler. The term 'dealer' includes a supplier and a retailer.

These prohibitions also apply to patented articles as well as the articles made under any trade mark. In such cases, plea cannot be taken that there would be an infringement of the patent or trade mark under the laws governing them if minimum price is not maintained. However, the prohibitions would not affect the regulation of the price of the articles produced or sold by a licensee or assignee of a patent or trade mark, where such a regulation of price is itself a term or condition of the licence granted.
(3) No supplier can withhold supplies of any goods to any wholesaler or retailer on the ground that he has sold goods at a price below the resale price. A supplier of goods shall be deemed to be withholding supplies of the goods to a dealer if he:

(a) refuses or fails to supply the goods to the order of the dealer;
(b) refuses to supply the goods to the dealer except at such prices, terms and conditions as to credit, etc., which are less favourable in comparison to the normal supply made to other dealers carrying on business in similar circumstances; and
(c) treats the dealer on unfavourable terms compared to other dealers in respect of time, methods of delivery or other matters arising in the performance of the contract.

A supplier shall not be deemed to be withholding supplies in the following circumstances:

i. When he has reasonable cause to believe that the dealer has been using as 'loss leaders' any goods of the same or similar description whether obtained from that supplier or not. A dealer shall be deemed to use the supplier's goods as 'loss leaders' when he resells them otherwise than in a genuine seasonal or clearance sale not for the purpose of making a profit on the resale but for the purpose of attracting to the establishment at which the goods are sold, customers likely to purchase other goods, or for the purpose of advertising his business.

ii. He has any other ground which alone would entitle him to withhold the supplies.

The supplier has to prove that the supplies were withheld on reasonable grounds. For instance, if the supplier takes a plea that the dealer had been advising
other customers to switch over to the competitor's products and for that reason the supplies were withheld, the Commission may not be convinced.

Exemptions from Prohibition of Minimum Resale Price Maintenance

In some cases fixing of minimum prices may be justified considering the nature of the goods or the industry producing such goods. Therefore, the Act has made a provision for granting exemption to particular classes of goods from the prohibition of minimum resale price maintenance.

The MRTP Commission can grant exemption if it is satisfied that the following harmful effects would result, if such exemption is not given, namely:

(a) the quality of goods available for sale or the varieties of goods so available would be substantially reduced to the detriment of the public as consumers or users of those goods; or

(b) the prices at which the goods are sold by retail would, in general and in the long run, be increased to the detriment of the public as such consumers or users; or

(c) any necessary services, actually provided in connection with or after the sale of the goods by retail would cease to be so provided or would be substantially reduced to the detriment of the public as such consumers or users.

The Director General or any other interested person can approach the Commission for grant of such exemption.

The Commission has exempted safety matches and newspaper companies from the prohibition of minimum resale price maintenance.
(VII) TERRITORIAL RESTRICTION/RESTRICTION OR WITHHOLDING OF OUTPUT OR SUPPLY

Sometimes, the manufacturers or suppliers may agree among themselves to eliminate competition by limiting, restricting or withholding the output or supply of any goods or the provisions of any services. The object of these agreements or arrangements is to regulate the relative share of each enterprise in the market that the various producers may benefit equally during propriety or in adverse condition in proportion of their respective capital investment. It may be adopted in several ways. One way is to fix and allot to the members percentage quotas of an annual turnover or total of production. Another method of restricting output is when it is agreed to limit the number and size of the machines which may be worked or to prevent installation of other machines or secure the removal of machines. There may also be a restriction upon the number of shifts to be worked. Further, there may be agreements restricting or withholding supply of goods. In such cases, the common practice is to estimate the probable demand and then to allot percentages or units of production. The agreements often contain provisions for fines to be imposed on the members exceeding a stated quantity of production and for the compensation of members who do not attain them.

In the United Kingdom, the restrictive practices of limiting or withholding the output or supply of any goods will fall within the provision of clause (d) of Section 6(1) of the Restrictive Trade Practices Act, 1976, which provides for restrictions relating to the quantities or description of goods to be produced, supplied or acquired.

In the United States, there is no specific provision in the antitrust legislation dealing with such practices, but still these practices will be covered under the general prohibition of Section 1 of the Sherman Act. In the European
Economic Community these practices are covered by clauses (b) and (c) of Article 85(1) of the Treaty of Rome. Clause (b) prohibits all arrangements or concerted practices relating to quotas (Quota agreement are usually associated with schemes or sharing of markets or distribution channels), specialization, (Specialization agreements are those whereby firms agree to refrain from the production of certain ranges of goods on the basis that they can be more efficiently produced by the other party to the agreement. The agreements involve a limitation or control of production and also limited and controlled outlets.) exclusive distribution, joint selling (agreements of joint selling often provide for goods to be supplied exclusive and in agreed proportion to a common sales agency (may be a trade association) which sells at prices and on terms which it determines) and limitation of investments. Clause (c) prohibits the agreements and practices in regard to the sharing of markets (Market sharing, whether in relation to outlets or sources of supply can be horizontal, i.e., whether relevant agreement affects the position of parties at the same trading level, such as a quota arrangement between manufacturers, or vertical, i.e. where the relevant agreement affect the position of parties at different trading levels, such as a distribution agreement between manufacturers and wholesalers) or sources of supply. All these practices restrict competition and are against public interest unless exempted under Article 85(3) of the Treaty.

In India, the seventh category of agreement which is deemed to be an agreement relating to Restrictive Trade Practice is what is popularity called 'territorial restriction or withholding of output or supply'. Section 33(1)(g) of the MRTP Act which deals with this, reads as follows:

"Any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods."
Scope of the Clause

This clause seeks to cover the following restrictions:

(a) Limiting, restricting or withholding the output or supply of any goods; and

(b) Allocating any area or market for the disposal of the goods.

Limiting Output/Supply of Goods - When Restrictive

(1) Where, by an agreement, a manufacturer 'A' is prevented from making or selling certain products and is required to sell its existing stocks to a company 'B' and also keeps its plant and machinery idle and not to associate with any one or manufacturing the products - all these in return or an agreed compensation - it would be limiting the supply of products of such manufacturer thereby affecting or preventing competition in such products.

(2) Where a manufacturer by an agreement, is prevented from manufacturing his products then it would be a Restrictive Trade Practice. In a case, there was an agreement between two manufacturers of Beer, namely company 'A', and company 'B', whereby 'B' was to provide technical knowhow, marketing expertise etc., to 'A'. Labels of 'B' were to be put on the bottles of the Beer manufactured by 'A' under strict supervision of 'B'. There was also a clause in the agreement restraining 'A' from manufacturing Beer other than the one manufactured for 'B' under the agreement, without the consent of 'B'. There was already enough control by 'B' to secure quality control as regards the Beer manufactured for it by 'A'. In the circumstances, the restriction on 'A' from manufacturing any other Beer was found unjustified. The restrictive clause was suitably modified to read as under:

"'A' shall be free to produce, market and sell any other product including Beer based on its own knowhow
or that of a third party, as the case may be, except that in engaging itself in any such activities, it shall be ensured that it will not infringe the rights of 'B' to the technology, quality, purity, trade mark and get-up of B's products and will not undertake production and sale of any products likely to be confused with B's products."

(3) When members of an association agree to restrict their output to help out less efficient units in the industry. It would amount to interfering with the natural forces of competition.

(4) A typical case under this clause covering supply restrictions relates to the Nylon Filament Yarn Agreement case. Here, four major spinners of Nylon Yarn and three others with comparatively similar production entered into an agreement with the section of Weavers' Associations whereby 75 per cent of the production of the major producers of Nylon Yarn in the country was sold at concessional rates to a restricted class of persons in the market where Nylon Yarn was in short supply. In such a case the prices of remaining 25 per cent of the goods which the spinners were free to sell in the open market, tended to be high. The Commission found that this practice tended to bring about manipulation of prices and also to affect the flow of supplies in the market relating to Nylon Yarn and also prevented competition among the spinners in the supply and distribution of Nylon Yarn to the excluded class.

**Territorial Restrictions**

The practice of territorial restriction is normally adopted in conjunction with exclusive dealing. This practice may exist in both vertical and horizontal forms of agreements among manufacturers and between manufacturers and dealers.
A manufacturer may require the dealers to concentrate on sales in a particular region or altogether prohibit them from dealing in other areas either directly or through devious means like withdrawing concessions, imposing penalty etc. Such restrictions are not viewed favourably as they tend to result in imperfect competition, unless the circumstances of the case justify them or favour such restrictions in public interest.

Absence of territorial restriction should always be clear in the agreement, even though a manufacturer or supplier does not intend to impose any territorial restriction on the dealers but merely requires the dealers to bestow more interest in a particular area. The following words in an agreement would be objectionable. "We have pleasure in appointing you as one of our distributors for marketing our products in the Eastern Region subject to the following terms..."

In such cases the manufacturers have been directed to amend the clause so as to expressly permit the dealers to operate in other areas also.

Examples of Objectionable Clauses

(i) "Area of operation: It is mutually agreed upon that you will be operating in the following areas and will take prior clearance in writing from the company before approaching any direct consumer to avoid cross interest of other distributors who may be operating in the same areas."

(ii) "Your marketing area for our products will be...District on a non-exclusive basis."

Above clauses found not objectionable when modified as follows:
(i) "Area of operation: As you have expressed your desire to concentrate/operate in the following areas for the time being for promotion of sales of the company's products, the company agreed to it. In case you desire to operate in other areas in future, you can do so on obtaining prior written consent of the company which consent shall not be unreasonably withheld."

(ii) "We are pleased to offer you distributorship for promotion and sales of our Agro Chemicals Products on a non-exclusive basis. You shall concentrate your efforts to further the sale of the said products within the area of... district to the best of your ability."

Not all territorial restrictions are aimed at distorting competition and some of them may be justified under the special circumstances applicable to a particular industry or product and also may be justifiable to ensure equitable distribution and better after-sales services to the consumers.

**Territorial Allocation - When Justified**

(1) When such restrictions are a normal trade practice in an industry on account of its peculiar features or when such restrictions are imposed only at the level of the first line distributors.

In a case relating to Beedi industry, territorial restrictions were placed on the first line distributors but not at the lower levels of the wholesalers and retailers who were free to trade in any brand of Beedis. In fact, in the absence of such a restriction, each distributor was likely to limit his sales to two-three large wholesalers leaving the small ones without the supply of the products. The territorial restriction was found very beneficial to the smaller wholesalers and retailers for ensuring adequate supplies of materials and also to make the distributors accountable
to provide marketing services on a more equitable and wider basis.

(2) When areas are allocated among dealers for a product which is in very high demand but in short supply and such restriction can ensure fair, efficient and equitable distribution, all over the country as well as prompt after-sales service.

It was justified, in the case of a manufacturer of heavy commercial vehicles, where the dealers were not permitted to sell them outside their zones as they had to make heavy capital investment and have sophisticated workshops to meet the demand equitably and also to ensure proper after-sales service. For refrigerators the same claim was held not justifiable.

(3) If dealers are required to sell at particular sale points it will not be treated as a territorial allocation so long as there is nothing further in the agreement to prevent them from operating in other areas.

(VIII) CONTROLLING MANUFACTURING PROCESS

Agreements to restrict the employment of any method, machinery or process in the manufacture of goods fall under this category. Such agreements eliminate competition among the producers of goods and are likely to affect the supply and availability of goods to the public. Such practices may emanate from collective as well as bilateral actions. The restriction should relate to 'any method, machinery or process in the manufacture', not to trading or selling methods, or pricing, or to installation techniques. It may be pointed out that the concept of 'know-how' is in a distinct relationship to that of monopoly.

In United States, there is no special provision dealing with the restrictions on the manufacturing process or technical know-how. However, such arrangements or agreements may
fall under the general prohibition either under Section 1 or Section 2 of the Sherman Act. In the United Kingdom, such agreements are covered under clauses (d) and (e) of Section 6(1) of the Restrictive Trade Practices Act, 1976. In the European Economic Community, these agreements or practices are covered under clause (d) of Article 85(1) of the Treaty of Rome, which prohibits all agreements, decisions and practices, which may affect the trade between Member-States and the object or effect of which is to prevent, restrict or distort competition within the common market, and in particular, which limit or control production, market, technical development or capital investment. However, it is subject to exemption under Article 85(3) of the Treaty. Further, clause (b) of Article 86 of the Treaty prohibits the practice of exploitation in an improper manner, a dominant position within the common market and in particular the limitation of production, markets or technical development to the prejudice of consumers.

In India, the eighth category of agreement which is deemed to be an agreement relating to a Restrictive Trade Practice is what is commonly called 'controlling manufacturing process'. Section 33(1)(h) of the MRTP Act which deals with this reads as follows:

"Any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods."

Scope of the Clause

Whenever there is an effort to obstruct any manufacturer from using modern methods, modern machinery or any effective process in the manufacture of goods with a view to affecting the output in those goods and also the supply of such goods in the market, it would be restrictive in nature, unless it is proved to be in public interest. This practice may
exist along with other practices discussed above. A typical case under this clause relates to manufacture of footwears where an agreement between small scale manufacturer and a leading shoe company:

(a) reserved the right with the company for selection of moulds to be used by the small scale manufacturers;
(b) prohibited the small scale manufacturer from purchasing raw materials etc. from parties other than those approved by the company;
(c) reserved the right with the company to decide on the type of machine to be installed by the small scale manufacturers in the event of enlargement of their capacity;
(d) prevented the small scale manufacturers from enlarging their production capacity without the approval or consent of the company;
(e) bound the small scale manufacturers to enter into a fresh agreement in the event of enhancement of their production capacity; and
(f) required the small scale manufacturers to utilise their full production capacity only for the production of footwear for the company.

These clauses were held restrictive.

(IX) **BOYCOTT**

Trade associations or combination of manufacturers, suppliers or dealers enforce their policies and decisions by boycotting or excluding any person from the membership of their trade association, if he breaks the trade association rules or collective agreements. The purpose of such an action is to enforce discipline among the members of a particular trade or industry and to ensure observance and obedience to the collective agreements.

In the United States, collective boycott falls within the scope of the general prohibition laid down under Section 1
of the Sherman Act. Concerted refusal to deal is per se violation under Section 1. But an individual refusal to deal would not be in violation of the Sherman Act, if it is being exercised as an independent discretion by the seller in selection of his customers. The fact that antitrust violaters actions have no appreciable effect on competition, will not protect his illegal activity. The concerted refusal to buy or sell with a view to enforce stable prices or fair trade pricing will be in violation of the Sherman Act. In the United Kingdom, it is unlawful for any two or more persons carrying on business as suppliers of any goods to make or carry out any agreement or arrangement for enforcement of conditions as to resale prices, whether by withholding supplies, refusing trade terms, or imposing penalties or setting up trade courts. These are the sanctions used for the enforcement of collective agreements and are usually contained in the rules of the association to withhold orders or the benefit of the trade terms, from the members who do not comply with the agreed conditions whether these related to resale price maintenance or to conditions or methods of trading. In the European Economic Community, the collective boycott is covered under the general prohibition under clause (d) of article 85(1) of the Treaty of Rome. It prohibits all agreements between undertakings, all decisions by associations of undertakings and all concerted practices which may effect the trade between member states and the effect of which is to prevent, restrict or distort competition within the common market and in particular to impose unequal conditions in respect of equivalent transactions, placing them thereby at a competitive disadvantage. However, it is subject to exemption under the conditions laid down under Article 85(3) of the Treaty.

In India, the ninth category of agreement deemed to be an agreement relating to Restrictive Trade Practice is what is known as 'boycott'. Section 33(1)(i) of the MRTP Act which deals with this read as follows:
"Any agreement for the exclusion from any trade association of any person carrying or intending to carry on in good faith the trade in relation to which the trade association is formed."

Scope of the Clause

The clause will cover all the cases where members of a trade association enforce their collective decision by refusing to deal with any one amongst themselves or with non-member competitor, or with those who deal with the persons boycotted.

Boycott may be termed as a collective refusal to deal with a person. Boycott, as such, is restrictive in nature unless it is proved by the person indulging in such practice that it does not harm public interest. In most of the cases boycott has been found to be restrictive.

Boycott - When Restrictive

(1) Enforcement of restrictions or rules by threat of boycott or barring entry to membership is restrictive.

(2) No trade association can frame bye-laws or code of conduct prohibiting business dealings with non-members or black listed members.

(a) Resolution of the LPG Distributors' Association to stop the sale of burners manufactured by those who sold or advertised sale of burners through shops other than the LPG Distributors would amount to a boycott;

(b) Where a Motor Merchants' Association required its members not to deal with non-members in the vicinity of the area of operations of the Association and to pay a rebate of 2 per cent to its members only, it was held to be restrictive.
Whenever an agreement seeks to regulate the production and distribution of certain products among the manufacturers in a mutually agreed manner and provides for boycott in case of violation of the code of conduct of the trade association, then it is a Restrictive Trade Practice.

Boycott - When Not Restrictive

Where entry is barred to a newcomer based on territorial reasons then it may not be harmful to public interest. The Articles of Association of a Trade Association may bar membership on the basis of certain territorial limits.

AGREEMENTS HAVING THE EFFECT OF ELIMINATING COMPETITION/COMPETITORS

The practice of predatory pricing involves price cutting with the intention of eliminating competition by driving out the competitors of the market. An extreme example of predatory pricing is when a seller holds the price below the level of its actual cost, for a protracted period until the competitors close down the business altogether or compromise with predator according to his wishes. Generally, the practice is indulged in by a dominant or financially strong undertaking which can bear the losses for the time being with the intention to earn exorbitant profits in future. Sometimes, the goods are offered for sale at a price which shows a loss to the seller in order to attract persons who will buy other goods at a profit to the seller. This is also called as loss leader.

In the United States, the practice of predatory pricing is unlawful under Section 5(a) of the Federal Trade Commission Act and under Section 3 of the Clayton Act. In the United Kingdom, there is no specific provision dealing with the predatory pricing. But, such a practice is covered under clause (a) of Section 6(1) of the Restrictive Trade Practices
Act, 1976, which provides for the price to be charged or quoted for goods. In the European Economic Community also there is no special provision in regard to predatory pricing. However, such practices are covered under the general prohibition under clause (a) of Article 85(1) of the Treaty of Rome.

In India, the tenth category of agreement which is deemed to be an agreement relating to a Restrictive Trade Practice is what is called 'agreements having the effect of eliminating competition/competitor'. Section 33(1)(i) of the MRTP Act which deals with this, reads as follows:

"Any agreement to sell goods on such prices as would have the effect of eliminating competition or a competitor."

Scope of the Clause

This clause covers the practice of sustained price cutting, that is "predatory pricing" carried on by any firm or group of firms with the object of disciplining a smaller competitor or to drive him out of the trade. This may be done by selling below the cost of production in such a way as to eliminate a competitor. Normally, this kind of a practice can be resorted to only be a large and financially sound manufacturer or supplier who can offset the loss sustained by him by such price cutting in one product from the profit earned in other products or that his past profits absorb these temporary losses.

Sometimes such price cutting may be resorted to survive in the competition and to meet such price cutting tactics resorted to by other competitors. In a case, three manufacturers of Fibre Glass resorted to low pricing due to low prices of imports and other substitutes and low effective demand for the product, and also to compete with the substi-
tutes available in the market. It was held not harmful to the public interest.

Whenever products are sold at rates lower than the market rates to government or government departments, they are normally treated to be in public interest as a part of widely accepted practice in trade and industry. Especially where a product is going to benefit the farmers, say fertilisers, no harm would be envisaged by lowering the prices.

Any person complaining of 'predatory pricing' has to prove that the competitor is trying to perpetuate his dominance and that he himself had to reduce his prices.

(XI) **RESTRICTION ON CLASS/NUMBER OF SUPPLIES FROM WHOM GOODS MAY BE BOUGHT**

The eleventh category of trade practice which is deemed to be a Restrictive Trade Practice goes by the name 'restriction on class/number of suppliers from whom goods may be bought'. Section 33(1)(ia) of the MRTP Act which deals with this reads as follows:

"Any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be bought."

This clause was in fact introduced in the year 1984 by a specific amendment. The idea, is to see that restriction on the class or number of wholesalers, producers or suppliers from whom any goods may be bought, does not injure competition in any manner. No specific cases have as a come up before the Commission so far on the interpretation of this clause.

(XII) **ABSTINENCE FROM BIDS IN AUCTION**

The twelfth category of the agreement which is deemed to be an agreement relating to Restrictive Trade Practice is 'abstinence from bids in auction'. Section 33(1)(ib) of the MRTP Act which deals with this reads as follows:
"Any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party agrees to abstain from bidding at any auction for the sale of goods."

An auction is intended to generate good competition among the intending bidders, so that a seller is able to realise best possible price for goods under auction. If the intending bidders come to any agreement, in regard to the bids at the auction, it works to the detriment of not only the auctioneer but also to competition among the bidders themselves. Similarly, agreements to abstain from bidding among the intending bidders would be injurious to competition among the bidders which would but for such agreement have been present. Under the Sale of Goods Act, 1930 a combination between intending bidders to refrain from bidding against each other is considered not to be illegal. However, a specific provision in this regard under the MRTP Act makes it unlawful.

(XIII) OTHER NOTIFIED AGREEMENTS

This is the thirteenth category listed in Section 33(1)(k) of the MRTP Act, which reads as follows:

"Any agreement not hereinbefore referred to in this section which the Central Government may, by notification, specify for the time being as being one relating to a Restrictive Trade Practice within the meaning of this sub-section pursuant to any recommendation made by the Commission in this behalf."

The object of this provision is to render it possible for the government to mention some more trade practices which may be required, in future, in the light of experience gained, to be deemed to be agreements relating to Restrictive Trade Practices and thus to be compulsorily registered. What would be the categories which can be notified will depend upon
the exact nature of practices and their adverse effects which may come to light in the years to come.

(XIV) RESIDUARY AGREEMENTS

Section 33(1)(1) deems every agreement which is intended to enforce the carrying out of any such agreement mentioned in Sections 33(1)(a) to 33(1)(k) to be an agreement relating to Restrictive Trade Practice. This is but a logical provision.

SUMMARY

In this chapter the different categories of agreements which are deemed to be agreements relating to Restrictive Trade Practices and which are compulsorily registrable have been discussed in greater detail. The purpose of deeming these agreements to be restrictive is to shift the onus in an enquiry on to the person complained against, of proving the non-restrictive character of the agreement by resorting to specific 'gateways' provided in the Act. One of the gateways which may be noted is that 'restriction does not directly or indirectly restrict or discourage competition at the market price'. While defending a trade practice before the MRTP Commission it would, therefore, be very logical to bring in the three tests laid down in the TELCO's case in support of continuance of a particular trade practice. In fact competition has not been materially affected is a very relevant defence because no restriction can absolutely prevent competition. It would all depend upon many facts and circumstances. Hence this 'gateway' requires to be explored fully while defending any trade practice before the Commission in any enquiry. In narrating in detail the various trade practices and further illustrating what are restrictive in nature and what are non-restrictive in nature, various 'gateways' have also been duly taken into account.
REGISTRATION OF RESTRICTIVE TRADE AGREEMENTS

SCOPE OF AGREEMENT

(A) THE DEFINITION

The foundation of registration of agreement relating to restrictive trade practices lies in the concept of 'agreement' itself. Section 2(a) of the Act defines the 'agreement' to include:

"Any arrangement or understanding, whether or not it is intended that such agreement shall be enforceable (apart from the provision of the Act) by legal proceedings."

The above definition is thus not limited to legally enforceable contracts as defined in Section 2(h) of the Indian Contract Act. It covers both formal or informal agreement whether expressed or implied.

(B) ARRANGEMENT OR UNDERSTANDING

The arrangement or understanding under Section 2(a) of the Act must result from some communication between the parties or some meeting of their minds. To constitute as arrangement or understanding the parties to it shall have communicated with one another in some way, and that as a result of the communication each has intentionally aroused in the other an expectation that he will act in a certain way.

In British Basic Slag case, Willmer, L.J. held that arrangement is something whereby the parties to it accept mutual right and obligation. This test was elaborated by Diplock, L.J., who stipulated three essential elements of an 'arrangement' between A and B: first, a representation by A as to his future conduct with the expectation and intention that such conduct will induce B to act in a particular way; second, communication of that representation to B, who has knowledge that A so expected and intended; and third,
that A's representation or his conduct in fulfilment of it induced B to act in that particular way, whether or not B was also induced by other factors.

The aforesaid test found the approval of the Monopolies and Restrictive Trade Practice Commission in Hindustan Times case.

In the United States, the anti-trust law does not define 'agreement'. However, the restrictive trade practices have been inferred by the U.S. Courts from the conduct of the parties. Thus, when behaviour of the trader seems consistent with a mutual understanding of some kind, the conspiracy, communication or at least concert could be inferred. On the other hand, if hypothesis of independence does not tax the credulity of the Court, the conclusion of innocence may be drawn.

(C) CONCERTED ACTION

The essence of an agreement is the meeting of minds, the coming into accord. Where the exchange is in writing, the record can be examined to see if there is an agreement between the parties within the meaning of Section 2(a) of the MRTP Act. But, where there is no direct evidence as to what, if anything, took place between the parties concerned, it may be necessary to draw conclusions from the observed and established conduct. It is now well established that a concerted action by a group of wholesalers or manufacturers amounting to an arrangement which is not capable of being proved by direct testimony should be inferred from the things actually done. The evidence must point towards acting on common understanding with the object of lessening competition. For instance, in Delhi Automobiles Ltd. and Others, where through a joint advertisement in newspapers, certain dealers of Ambassador Car offered the Car for sale at the specified prices and terms of payment, the MRTP Commission rejected the contention of the respondents that there was no agreement.

5. Eastern States Retail Lumber Dealers' Association Vs. U.S., 234 (1914)
between them nor any other arrangement or understanding and the joint advertisement was given in order to save advertisement expenses of dealers who were then running in losses, and it observed that the impugned act of the respondents amounted to an agreement or arrangement between them and on the face of it, the respondents agreed to practice resale price maintenance and to sell Ambassador Cars on terms and conditions agreed upon between themselves. Thus, the Commission held that the agreement had the effect of preventing competition and amounted to restrictive trade practice.

(D) OLIGOPOLISTIC SITUATION AND CONSCIOUS PARALLELISM

Another related issue is of oligopolistic situation which poses the problem as to the limit of the concept of 'agreement' under the Act. In such a situation, sellers often maintain common prices and adopt uniform sale policies without any explicit agreement, solely as a result to protect their own interest keeping in view the total market situation. Any move to change the price etc. by one seller will generally be countered almost immediately by the other. Thus, in an oligopolistic situation, the sellers usually recognise their inter-dependence. Every one will act after taking into account of the likely reactions of the others. This leads to 'conscious parallelism'—without any agreement between them, each seller aligns its policies on those of its competitors, so as not to upset the market.

This again raises the issue as to what extent 'consciously parallel' action be attributable to an arrangement or understanding?

Both in the United States and in the United Kingdom, Courts have followed the view that conscious parallelism based on economic factors equally applicable to all the parties is not enough to constitute an arrangement or understanding. There must be some inter-dependence of pricing
and other policies of oligopolistic sellers to ascribe an arrangement or understanding.

A similar approach has been followed in India while examining such parallel actions. However, in regard to certain practices where the evidence was not conclusive to prove the collusive trading, the Commission adopted a new device whereby the parties concerned were required to furnish information as to revision of prices etc. so that the Commission could monitor the future conduct and ensure that there was no concert. This appears to be a positive step towards the effective control of such actions.

(E) RECOMMENDATION AND INFORMATION AGREEMENTS

Where a trade association is a party to the agreement requiring registration, it shall be deemed to be made by all the persons who are members of the association or represented thereon. This imposes a duty upon each member of such an association to get the agreement registered. Further, where a trade association makes specific recommendation to its members or to any class of its members as to the action to be taken by them, in relation to any matter affecting the trade conditions of those members, will be deemed to be an agreement among the members and the association. Consequently, the recommendation, even though it is not binding on the members of the association must be registered, together with the agreement for the constitution of the association. Moreover, it is not necessary that the recommendation should be express, it can be implied from the conduct of the members. But the recommendation should be a specific recommendation. The word 'specific' is not free from doubt. It becomes all the more difficult particularly, when the recommendation is not express but implied. The word 'specific' should be read together with the words in relation to any matter affecting the trade conditions of those members, so the requirement is that the recommendations must specifically relate to any matter affecting the trade conditions. Even so, the intention is far from
clear without any indication what is a matter affecting the trade conditions. Thus, it is submitted that the word 'specific' should be deleted so that all the recommendations made by the trade association, affecting the trade conditions may fall within the ambit of the Act.

There is yet another issue related to the registration of agreement for the constitution of the trade association and its recommendations. Many of the agreements and recommendations have not been registered with the Registrar (now the Director General). This may be because the collection of evidence establishing such agreement between the members of the trade association is very difficult, particularly, when the association is unincorporated and the recommendations are not express. Further, the Director General has not been vested with the adequate powers and resources under the Act to detect such association and the agreements between its members. Moreover, the provisions relating to trade associations and agreements between their members have not been clearly spelt out under the Act. It is, therefore, submitted that the provision should be restructured in this regard.

(F) AGREEMENT BETWEEN HOLDING AND SUBSIDIARY COMPANY

Another important issue is whether an agreement or arrangement between a parent company and its subsidiary can fall within the meaning of 'agreement' as laid down in Section 2(a) of the Act. This is a mute point in the Act. The doctrine of one economic unit for the parent and any subsidiary which it controls should not be followed in connection with the MRTP Act. The approach under the Act should be that the parent company and its subsidiary, inter-connected bodies corporate should be treated as separate entities for the purpose of the provisions relating to restrictive trade practices laid down in the Act the activities of the one are not to be imputed to the other unless that is the factual situation. Therefore, there is a need that the legislature should make express provision in this regard.
Deemed Restrictive Trade Practice Agreement to be Registered with the Director General

The fourteen categories of agreements enumerated in the previous paragraphs are to be registered with the Director General of Investigation and Registration, Department of Company Affairs. The registration has to be done by any person entering into such agreement with a dealer, trader or a manufacturer. The term 'agreement' here does not mean only written agreements. It includes an understanding or an arrangement whether it is enforceable at law or not. The particulars to be registered with the Director General of Investigation and Registration are:

(i) the names of the persons who are parties to the agreement: and
(ii) the whole of the terms of the agreement (including the changes made at any time).

Two copies of the agreement should be given along with a certificate in the prescribed form. Where the agreement is not in writing a memorandum in writing containing the whole of the terms of the agreement duly signed by the party shall be furnished to the Director General of Investigation and Registration. Where the agreement is in a standard printed form, two copies of the standard form along with two copies of the list of parties with whom such agreement has been entered into, duration of the agreement, area or markets allocated, products covered, etc. have to be submitted. These particulars of the agreement are to be furnished within sixty days of making the agreement concerned. In case variation in the terms of the agreement is affected subsequently, details of such variation also shall be furnished to the Director General of Investigation and Registration within one month of such variation.
Agreements Not Registrable

The Act provides that any agreement relating to the fourteen categories narrated earlier is not registrable in the following cases:

(i) if the agreement is expressly authorised by or under any law for the time being in force;
(ii) if the agreement has the approval of the Central Government;
(iii) if the Government is a party to such agreement.

Exclusion of Certain Provisions in the Agreement from Registration

Any party to the fourteen categories of agreement narrated earlier may apply to the Director General of Investigation and Registration:

(i) for exclusion of any agreement in part or wholly from registration on the ground that it has no substantial economic significance; or
(ii) for inclusion of any provision of the agreement in the special section of the Registrar of Agreements maintained by the Director General of Investigation & Registration.

The Special Section of the Register of Agreement is intended for entering such particulars of the agreement as the MRTP Commission may direct:

(i) containing information the publication of which would in the opinion of the MRTP Commission be contrary to public interest;
(ii) containing information as to any matter, the publication of which, in the opinion of the Commission, would substantially damage the legitimate business interests of any person.

The Register of Agreements is open for public inspection. However the Special Section of the Register is not open for Inspection.
Penalty for Failure to Register Agreements

The fourteen categories of agreements which are deemed for purposes of the Act to be agreements relating to Restrictive Trade Practice are compulsorily required except where such registration is excepted. Failure to register a registrable agreement entails punishment with fine which may extend upto Rs. 5,000.00 and where the offence of non-registration is a continuing one, with further fine which may extend up to Rs. 500.00 per day till the agreement is registered.

'Gateways' for Restrictive Trade Practices

The object of specifying certain agreements as per se agreements relating to Restrictive Trade Practices under the MRTP Act is to bring on official record these categories of agreements which generally have the potential of preventing or distorting competition. Agreements which do not fall under these fourteen categories but are otherwise restrictive within the meaning of the definition of the term 'Restrictive Trade Practice' are not required to be registered. Thus a Restrictive Trade Practice' may be one emanating out of fourteen categories of agreements statutorily codified in the Act or from other agreements. The MRTP Commission has got the powers to enquire into any trade practice irrespective of whether the agreement relating to that practice has been registered or not. If after enquiry, the Commission comes to the conclusion that the trade practice is prejudicial to the public interest, the Commission may pass suitable orders thereon for remedying the situation. A Restrictive Trade Practice shall be deemed to be against public interest unless such a trade practice could pass through one or more of the 'gateways' laid down in the Act. In other words where complaint has been made regarding an alleged trade practice by manufacturer of goods, such a manufacturer has to justify the adoption of such trade practice under one or more of the 'gateways' so that the Commission may not pass any curial orders thereon. The following are the gateways provided in the Act:
(a) the restriction is reasonably to protect the public against injury - whether such injury is to the persons or to premises - in connection with the consumption installation or use of the goods. Here 'injury' contemplated is physical injury and not financial injury. Due regard shall be had to the character of the goods to which the restriction applies. For example, refusal to supply insulin to wholesalers not competent to handle it properly;

(b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom.

Examples where restriction is justified:

i. discrimination against non-standard products to ensure standardisation and lowering of costs and prices;

ii. Price fixation for scrap to keep the steel prices down;

(c) that the restriction is reasonably necessary to enable the persons party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;

(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods, to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring of supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such persons,
controls a preponderent part of the market for such goods.

(e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated;

(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earning of the export business which is substantial either in relation to the whole export business of India or in relation to the whole business (including export business) of the said trade or industry;

(g) that the restriction is reasonably required for purposes in connection with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the Commission not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Commission;

(h) that the restriction does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so;

(i) that such restriction is necessary to meet the requirements of defence of India or any part thereof, or for the security of the State; or
that the restriction is necessary to ensure the maintenance of supply of goods and services essential to the community agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction. This is what is called the 'balancing clause' in the 'gateways'. The detriment to the public would thus be a vital aspect in allowing a Restrictive Trade Practice to be allowed to be pursued.

INVESTIGATION AND CONTROL OF RESTRICTIVE TRADE PRACTICES

Sources of Inquiry

Section 10(a) of the Act empowers the MRTP Commission to inquire into any restrictive trade practice:

(i) upon receiving a complaint of facts which constitute such practice from any trade association or from any consumer or a registered consumers' association, whether such consumer is a member of that consumers' association or not, or

(ii) upon a reference made to it by the Central Government or a State Government, or

(iii) upon an application made to it by the Director General, or

(iv) upon its own knowledge or information.

For initiating an inquiry under any of the aforesaid sources, a prima facie satisfaction of the Commission about the basic or constituent facts which constitute restrictive trade practice, is necessary. These facts comprise the fact which constitutes the cause that brings out the effect on competition, the fact which show the process or chain of
causation and the facts which represent the effect on competition. The fact would connote something has already happened or is happening. It would exclude all imagination or something which has not happened or is not happening. The question as to whether a trade practice actually existed, whether it was restrictive and whether it was also against public interest, can be decided only after the inquiry. The prima facie satisfaction of the Commission may turn into a judicial inference only after the inquiry. Thus, it would be wrong to suggest that existence or restrictive nature of a trade practice must be a condition precedent for the start of inquiry. It would be like putting the cart before the horse and would amount to destroy the basic nature of inquiry. Therefore, at the stage of initiation of proceedings, there is only necessity for prima facie satisfaction of the Commission about the facts which constitute trade practices which were restrictive in character.

For prima facie satisfaction the Commission can order the Director General for preliminary investigation not only in respect of complaints from consumers/consumers' association, but also in respect of references made by the Central or State Governments, applications by the Director General and where the Commission desires to inquire in any restrictive trade practice suo motu. Regulation 21 of the MRTP Commission Regulations, 1974 makes the reports of the Director General and other material or evidence collected by him confidential and provides that only when the report or part thereof is either brought on record for the purpose of inquiry or put into evidence, then the Commission shall communicate such report or part thereof as are brought on record to the party concerned and give the party an opportunity to rebut the material so brought on record. These Regulations are statutory provisions and in case of conflict between the rules of natural justice and statutory provisions, the later must prevail.
(A) **Complaint from Trade or Consumers' Association/Consumers**

Under Section 10(a)(i) of the Act the Commission may institute an inquiry into a restrictive trade practice on the basis of a complaint received from any trade association or from any consumer or a registered consumers' association, whether such consumer is a member of that consumers' association or not. The complaint has to contain the facts which constitute restrictive trade practice. Further, under Section 11 read with regulation 19(1) of the MRTF Commission Regulation 1974, the Commission is required to refer the matter to the Director General for preliminary investigation for the purpose of satisfying itself that complaint requires to be inquired into. Thus, at the start of an inquiry under Section 10(a)(i) what is required is complaint of facts which according to complainant, constitutes restrictive trade practice and further satisfaction by the Commission on a report by the Director General that complaint required to be inquired into. The outcome of inquiry cannot be predicted or prejudged from the beginning. The trade practice may or may not turn out to be restrictive in character or prejudicial to public interest.

(i) **Position of a Complainant**

Section 18(2) of the Act vests certain rights to the complainant viz., the right to be present, the right to be heard, either by himself or by his representative, the right to cross-examine witnesses and the right otherwise to take part in the proceedings. These are not absolute rights. The extent to which these rights can be exercised are to be determined by the Commission. The Commission is free to decide on the circumstances of each case about the extent of participation of such person. Further, regulation 72(3) of the MRTF Commission Regulations 1974 provides that a copy of the amendment in any proceedings shall be furnished to all other parties to the proceedings, while regulation 73(5) leaves
it to the discretion of the Commission whether a copy of the amendment should be furnished to the complainant.

(ii) Complainant and Informant

There is an essential difference between the status of a complainant that of an informant. The complainant is a recognised source of inquiry under Section 10(a)(i) of the Act. It has to satisfy certain statutory requirements laid down under Section 10(a)(i) and even then the Legislature has taken care to provide for a screening process - by way of preliminary investigation by the Director General. If the complaint, even from a group of consumers satisfying the statutory requirements, is found to be filmsy and frivolous, no inquiry can be started. This shows anxiety of the Legislature not to clothe even the complainant with authority to trigger of an inquiry. The position of an informant is much less authentic. As a matter of fact, the MRTP Act does not recognize any entity called informant. He is obviously not qualified even to register a complaint under Section 10(a)(i). He can only bring some facts to the notice of the Commission which the Commission after proper scrutiny, may find good enough to start an inquiry under Section 10(a)(iv). But, the information on the strength of which the Commission starts the inquiry becomes the Commission's own knowledge or information. The informant is, therefore, one place removed from the source of inquiry. He could be said to set in train the inquiry only by proxy. He is only an interested spectator. His rights to be heard are more limited than that of complainant. His right to get documents specified in regulation 73(5) of the MRTP Commission Regulations, 1974 will also be greatly circumscribed his position and by nature of his interest in the subject matter of proceedings. It is not as if informant has an inherent or fundamental right to participate fully
in the proceedings before the Commission. At every stage, for every proceedings, the informant will have to establish his interest in the subject-matter and then exercise his right to be heard in the context of that interest.

(B) **Reference from Government**

The Central Government or a State Government can make a reference under Section 10(a)(ii) to the Commission regarding restrictive trade practices which come to their knowledge. The reference made by the Central or State Government has to contain the relevant facts which constitute a restrictive trade practice. The Commission may if necessary order the Director General for a preliminary investigation, before ordering a formal inquiry. The purpose of preliminary investigation is to make a prima facie satisfaction of the Commission about the facts which constitute a restrictive trade practice.

(C) **Application by the Director General**

Under Section 10(a)(iii) of the Act, the Commission can institute an inquiry in respect of any restrictive trade practice on the basis of an application made to it by the Director General. Prior to the coming into force the MRTP (Amendment) Act 1984, the power to make such application was vested in the Registrar of Restrictive Trade Agreements. However, by the amendment the office of Registrar has been merged in the Director General of Investigation & Registration.

The application for inquiry under Section 10(a)(iii) by the Director General must 'contain the facts which constitute a restrictive trade practice' in terms of regulation 55 of the MRTP Commission Regulations 1974. The Supreme Court while analysing the connotation of the word 'facts', in TELCO case held that mere reproduction of clauses of an agreement and making bald allegation that clauses constitute restrictive trade practices without setting out any facts or features
to show or establish as to how the alleged clauses constitute restrictive trade practices in the context of facts does not satisfy the requirement of regulation. This decision of the Supreme Court brought about a fundamental change in the approach of the Commission while dealing with applications of the Registrar (now the Director General) under Section 10(a)(iii). Prior to this decision, a mere assertion of the Registrar that such and such clauses of an agreement contained restrictive trade practices of a particular nature, used to be considered by the Commission as sufficient disclosure of facts.

(D) **Suo Motu Inquiries**

Section 10(a)(iv) of the Act empowers the Commission to institute an inquiry into any restrictive trade practice upon its own knowledge or information. The provision has been a subject-matter of controversy before the Commission in the case of J.K. Synthetics Ltd. In this case an inquiry was instituted by the Commission under Section 10(a)(iv) of the Act on the basis of a complaint received by the Commission under Section 10(a)(i) of the Act, from All-India Crimpers Association alleging that the operation of the agreement between the Nylon Spinners and Actual Users' Association resulted in several restrictive trade practices. The complaint was from an association of 23 members instead of 25 as required under Section 10(a)(i). The respondents urged that - (a) each of the provision of Section 10(a) is a separate and distinct source of jurisdiction of the Commission and any one of them cannot be super imposed upon another; (b) a defective complaint which is liable to be dismissed under Section 10(a)(i) cannot be turned into the knowledge or information of the Commission under Section 10(a)(iv); (c) by treating a complaint from less than 25 consumers as Commission's information, a defective complaint would be treated on a higher footing than a complaint falling under Section 10(a)(i) in which case the provisions of Section 11 read with regulation 19(1) of the
MRTP Commission Regulations, 1974 made an investigation by the Director mandatory, and, as such, a notice of inquiry based on such complaint would be defective; and (d) Commission's knowledge or information must be derived from another independent inquiry under the Act and cannot be derived from a defective complaint. Rejecting these arguments the Commission held that - (i) there is nothing in Section 10 to limit the sources from which the information of the Commission may be derived; (ii) there is also nothing to indicate that it may not be derived from a complaint made by a single consumer provided the information is satisfactory and reliable; and (iii) there is nothing in Section 10 to impose a limitation on the jurisdiction of the Commission under Section 10(a)(iv) to the effect that the knowledge or information of the Commission must be derived in the course of another independent inquiry. The Commission will order an inquiry only after there is a preliminary satisfaction that the matter required to be inquired into. The satisfaction of the Commission, before ordering an inquiry on information received under Section 10(a)(iv), cannot be of lesser value than the satisfaction of the Central or State Government or the Registrar (now the Director General) under the provisions of Section 10(a)(ii) or 10(a)(iii). Before the Commission issue a notice of inquiry under Section 10(a)(iv), there has to be a preliminary satisfaction of the Commission and the Commission may in fit cases have an investigation made or use the provisions of Section 12(3) of the Act for the purpose of collecting information about existing trade practices and it is only when the Commission is satisfied as a result of such investigation that matter requires to be inquired into that a notice of inquiry is directed to be issued. Similar view was held in another case of I.T.C. Ltd.

Thus, it is now well-established that a suo motu inquiry under Section 10(a)(iv) of the Act can be initiated by the
Commission on its own knowledge or information derived from any source and there is no constraint in the Act regarding the source from which such knowledge or information is derived. It is submitted that any other interpretation of Section 10(a) would defeat the purpose of the Act.

PROCEDURE OF INQUIRY

The proceedings under Section 37(1) of the Act are initiated by issuing a notice of inquiry by the Commission to the person or persons alleged to be indulging in restrictive trade practices specified in the notice. Every such notice shall specify the date of hearing before the Commission and shall be accompanied by:

(i) in the case of a complaint under sub-clause (i) of clause (a) of Section 10 of the Act, a copy of such complaint;
(ii) in the case of a reference under sub-clause (ii) of clause (a) of Section 10 of the Act, a copy of such reference;
(iii) in the case of an application under sub-section (iii) of clause (a) of section 10 of the Act, a copy of such application; and
(iv) in the case of an inquiry under sub-clause (iv) of clause (a) of section 10 of the Act, a concise statement of material facts on which the notice is based.

An infirmity in the notice will not be a ground for the termination of the inquiry. In Guest Keen Williams case the Commission held that if the notice is suffering from some infirmity could be remedied by appropriate action under the Regulations. It cannot be contended that if there is a deficiency in the notice in respect of one of the components of the notice or complaint or application, the notice would fail and the inquiry will be terminated. If there are deficiencies in the notice by reason of which it becomes
completely meaningless or futile, then, of course, the notice must be discharged. But, if the deficiencies are such which could be made good by resorting to any of the procedures set out in the Regulations, such a step is not necessary.

Every respondent who wishes to be heard in the proceedings shall, not less than 10 days before the date of hearing specified in the notice of inquiry, enter an appearance in the office of the Commission by delivering to the Secretary a memorandum stating that the respondent wishes to be heard in the proceedings and containing the name of his advocate or other authorised representative. An authorised representative shall either be a member of the Institute of Chartered Accountants of India, the Institute of Cost and Works Accountants of India, or the Institute of Company Secretaries of India having an office in Delhi or New Delhi. Every respondent, who has entered an appearance shall while entering appearance deliver to the Secretary a reply to the notice which shall include:

(i) particulars of each of the provisions of Section 38 of the Act on which he intends to reply; and
(ii) particulars of the facts and matters alleged by him to entitle him to reply on such provision.

Where the respondent relies on say documents (whether in possession or power or not) as evidence in support of his reply he shall enter such documents in a list to be added or annexed to the reply. Where any such document is not in the possession or power of the respondent he shall, if possible state in whose possession or power it is. Every respondent, within seven days after receiving the notice, is required to produce for inspection the documents specified in the list to the Director General and permit him to make copies thereof. The respondent is, however, entitled to claim privilege for any of the said documents.
No pleading subsequent to the reply shall be presented except by the leave of the Commission upon such terms as the Commission may think fit. But, the Commission may at any time require a Pleading or a Rejoinder or a Supplemental Pleading from any of the parties and fix a time for presenting the same. The Commission may, on the application of any party, strike out the whole or any part of a Reply, Rejoinder, Pleading or Supplemental Pleading which appears to the Commission to be frivolous, vexatious or irrelevant. In such a situation, the Commission may allow further time for the delivery of a Reply, Rejoinder, Pleading or Supplemental Pleading.

Any party to the proceeding may at any time supply to the Commission for an order that any person not already a party added as a party to the proceedings. The Commission may at any stage of the proceedings either of its own motion or on the application of any party to the proceedings, order that the name of any party improperly joined be struck out, and that the name of any person who ought to have been joined be added. The question of joinder of parties in a proceeding came up for consideration before the Commission in the case of Indian Oxygen Ltd.6 The respondent was one of the six manufacturers and suppliers of various kinds of gases. The inquiry was initiated only against the respondent but not against others who were following similar restrictive trade practices. The respondent applied for including the other five manufacturers of gases as respondents in these proceedings. The Commission received the application as notice of enquiry was served against these five manufacturers. The joinder of these five would lead the Commission to a number of side inquiries to determine against each party the question of fact as to whether it was indulging in any restrictive trade practice. Each party might like to put forth its separate defences. If required, separate inquiries could be initiated against each of them. Moreover, the respondent's guilt could be minimised merely because other manufacturers

of the same commodities might also be guilty of the same practice. The Commission, therefore, held that for the disposal of the inquiry against the respondent, presence of the other five was not necessary. The Commission on the date of hearing of the application, may either suo motu or on an application by any party give such directions as it may think fit as to:

(a) the amendment of the notice of hearing or any representation, answer or reply;
(b) the delivery of further and better particulars;
(c) the delivery of interrogatories;
(d) the admission of any facts or documents;
(e) the discovery or further discovery or any documents and inspection thereof;
(f) the admission in evidence of any documents;
(g) the mode in which evidence is given;
(h) the taking and recording of any evidence including the appointment of Commissioner for that purpose;
(i) an investigation of the cost in respect of any class of goods, in producing or supplying any goods or in applying any process of manufacture to goods, and the manner in which the result of such investigation is to be brought before the Commission at the final hearing.
(j) any other matter as may be considered necessary or for the proper purpose of inquiry.

The final hearing shall take place in open court. However, if the Commission is satisfied that it is in the public interest that the hearing or part thereof should not take place in open court or that evidence may be given as to a secret process of manufacture or as to the presence, absence or situation of any mineral or other deposits or as to any similar matter, the publication of which is likely to damage substantially the legitimate business interests of any person, it shall, and may in any other case in which it appears proper to the Commission to do so, order that
the hearing or such part thereof as the Commission may direct, shall take place in camera.

**COMMISSION'S ORDERS, NATURE AND SCOPE**

(i) **'Cease and Desist' and 'Consent' Orders**

Under Section 37(1) of the Act, if the Commission after inquiry, is of the opinion that the restrictive trade practice is prejudicial to the public interest, it may order that:

(a) the practice shall be discontinued and shall not be repeated;

(b) the agreement relating thereto shall be void in respect of such restrictive trade practice or shall stand modified in respect thereof in such manner as may be specified in the order.

Thus, clause (a) of section 37(1) authorises the Commission to pass 'Cease and Desist' order. It means that the practice shall not only be discontinued forthwith but shall also not be repeated in future. Further, under clause (b) of Section 37(1) the Commission may declare any agreement relating to such restrictive trade practice as void or may order that the agreement be modified in such manner as specified in the order. Thus, till the orders are passed by the Commission, the agreement remains in operation. The Commission can also adopt an alternative course, viz. instead of passing a 'Cease and Desist' order, it may pass 'Consent' orders. Section 37(2) of the Act provides that the Commission may instead of making any order under this section permit the party to any restrictive trade practice, if he so applies to take such steps within the time specified in the behalf by the Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest and, in any such case, if the Commission is satisfied that the necessary steps have been taken within the time specified, it may decide not to make any order under this section in
respect of that trade practice. Thus, to invoke section 37(2), the conditions required to be satisfied are - (i) that the Commission permitted the party to take such steps (within the time specified) as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest; (ii) that the Commission is satisfied that necessary steps have been taken within the time specified; and (iii) on such satisfaction, the Commission may decide not to make any order under Section 27. The order of the Commission approving the scheme and being satisfied that steps have been taken to ensure that restrictive trade practice is no longer prejudicial to public interest and the Commission deciding not to pass an order under Section 37, are all matters requiring recording of order or orders by the Commission which could be made only under Section 37(2) and under no other provision of Act. Further, Section 37(4) in term refers to possible order under Section 37(2) and, therefore, it cannot be suggested that the legislature did not envisage any order under Section 37(2).

(ii) **Pre-Inquiry Settlement**

In many cases, the Commission has been taking decisions not to institute inquiries where the parties have been giving assurances that they have taken effective steps to desist from restrictive trade practices revealed from investigation conducted by the Director of Investigation (now the Director General). However, there is no provision in the Act which empowers the Commission in this regard. Thus, the practice of not instituting the inquiry and settling the question of future continuance of restrictive trade practice through negotiation, followed by the Commission, has no legal significance and the assurance given by the parties indulging in restrictive trade practices cannot continue the basis for charging them for violation. However, in the United Kingdom, Section 34 of the Fair Trading Act, 1973 empowers the Director General of Fair Trading to use his best endeavour
by communication with the parties indulging in restrictive trade practices to obtain from them satisfactory written assurances that they would refrain from continuing a particular course of conduct in the course of business. It is submitted that a similar provision should be incorporated in our Act also so that curbing of restrictive trade practice through negotiation become legal and effective.

(iii) Orders - Where Party Not Carrying on Business in India

Section 14 of the Act provides that where any practice substantially falls within monopolistic, or restrictive or unfair trade practice, and any party to such practice does not carry on business in India, an order may be made with respect to that part of the practice which is carried on in India. The powers of the Commission to pass an order in respect of any restrictive or unfair trade practices extend to that part of the practices which are carried on in India, even though the party does not carry on business in India.

(iv) Amendment/Revocation of Orders

Section 13(2) or the Act empowers the Commission to amend or revoke any order made by it at any time in the manner in which it was made. This is a curial power conferred on the Commission under the Act. The words, 'in the manner in which it was made' merely indicate the procedure to be followed by the Commission in amending or revoking an order. They have no bearing on the content of the power granted under Section 13(2) or on its scope and admit. However, one thing is clear that the power conferred under Section 13(2) is a corrective or rectificatory power and it is conferred in terms of widest amplitude. There are no fetters placed by the Legislature to inhibit the width and amplitude of the power. In this respect, it is unlike Section 4(4) of the U.K. Restrictive Trade Practices Act 1976, which limits the power of the Restrictive Practices Court under that
section to discharge a previous order made by it by providing in terms clear and explicit that leave to make an application for discharging the previous order shall not be granted except on prima facie evidence of material change in the relevant circumstances. This provision is markedly absent in Section 13(2) and no express limitation is placed on the power conferred under that section. However, regulation 85 of the MRTP Commission Regulations 1974 provides that an application under Section 13(2) for amendment or revocation of any order made by the Commission shall be supported by evidence on affidavit of the material change in the relevant circumstances or any other fact of circumstances on which the applicant relies. The latter part of regulation 85 provides that the provisions of Section 114 and Order XLVII of the Code of Civil Procedure 1908, shall, as far as may be, apply to the proceedings regarding amendment or revocation of an order.

(v) Enforcement of Orders

Prior to 1984 amendment, there was no provision in the Act to initiate any follow-up action in matters of compliance with the orders of the Commission, except the respondents were required just to file affidavits of the compliance of the orders. There was no proper monitoring device to scrutinise such affidavits. There was no machinery to make field inquiries for the purpose of ascertaining whether the restrictive trade practices which were ordered to ease had, in fact, ceased or whether they were continuing. The Commission made a proposal in this regard to the Central Government for creation of an enforcement machinery in the Commission's secretariat. During the pendency of the proposal with the Central Government the Commission itself set up an Enforcement Cell in October 1981 under the Secretary of the Commission. The Enforcement Cell was entrusted with the task of screening the cases where the Commission had passed the orders, and after screening, the Cell was to select cases for detailed investigations including market survey with
a view to find out whether the undertakings in respect of whom orders had been passed by the Commission under Section 37 were complying with the directions given by the Commission and also for finding out whether any other restrictive trade practices were being indulged in by them. The step taken by the Commission to establish an Enforcement Cell was really worth appreciating but still the infrastructure was inadequate. It was necessary to create a strong enforcement machinery which can go through field inquiries, organise surveillance in important areas of the country for ensuring compliance with the Commission's orders.

Accordingly the M.R.T.P. (Amendment) Act, 1984 has inserted a new Section 13A which empowers the Commission to authorise the Director General or any officer of the Commission to make an investigation to find out whether its orders have been or are being complied with. On the conclusion of the investigation, the investigating officer can exercise all or any of the powers conferred on the Director General by Section 11 of the Act. However, the investigation under Section 13A can be made by the Director General, only if the Commission so authorises. He cannot initiate investigation under the said Section of his own. The new provisions will ensure whether the orders of the Commission have been complied within their true spirit. When the investigation report reveals any violation of the orders, proceedings may be initiated for penal action under the Act. It is hoped that the new Section 13A would provide an effective weapon in the hands of the Commission to control restrictive and unfair trade practice.

(v) **Penalty for Contravention or Orders**

If any person contravenes, without any reasonable excuse, any order made by the Commission under Section 37, he shall be punished with imprisonment for a term which shall not be less than, (a) in the case of first offence, six months
but not more than two years, and (b) in the case of any second or subsequent offence in relation to the goods or services in respect of which the first offence in relation to the goods or services in respect of which the first offence was committed, two years but not more than five years, and, in either case, where the contravention is a continuing one, also with fine which may extend to five hundred rupees for every day, after the first, during which such contravention continues. However, the Court may, if it is satisfied that the circumstances of any case so require, impose a sentence of imprisonment for a term lesser than the minimum term as specified above.

Further, if any person carries any trade practice which is prohibited by the Act, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both, and where the offence is a continuing one, with a further fine which may extend to five hundred rupees for every day, after first, during which such contravention continues. The scope of this provision is not clear, since the restrictive or unfair trade practices are not per se illegal under the Act. These practices may be prohibited by the Commission after the inquiry as laid down in the Act. In fact, the provision is new and it is yet to be seen how the Commission/Court will interpret and enforce it.

A person who is deemed, under Section 13, to be guilty of an offence under this Act, he shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees or with both, and where the offence is continuing one, with a further fine which may extend to five hundred rupees for every day, after the first, during which such contravention continues.