Anti-Competitive Activities in India

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ANTI-COMPETITIVE PRACTICES

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Competition laws in India were governed by the Monopolistic Restrictive Trade Practices Act, 1969 which is substantially taken from U.K Legislations, particularly the Restrictive Trade Practices Act, 1956 and Resale Prices Act, 1964. This Act established the Monopolistic and Restrictive Trade Practices Commission whose main functions was to control restrictive and monopolistic trade practices. With economic reforms and liberalization of the economy, it necessary to review the existing law. This exercise resulted in the enactment of the Competition Act, 2002 which was passed by Parliament in December, 2002 and it received the assent of the President in January, 2003. Certain provisions of the Act have been notified by Government but many other provisions of this new Act are still awaiting notification. This new Act establishes the Competition Commission of India in place of the earlier MRTP Commission.

The material difference in the framework and scheme of the two enactments are1:

1) The emphasis under the MRTP Act was in respect of trade practices that adversely affected competition and were subject to the rule of reason whereas under the Competition Act, the anti-competitive agreements are declared void.

2) Under the MRTP Act till the cease and desist order was passed by the MRTP Commission, a particular trade practice was not considered void or illegal whereas this is not the case under the Competition Act.

For a market economy to function properly the competition must be free and fair. In a competitive market all the competitors will try to gain consumer confidence and increase its market share by continuously trying to improve the quality of the goods, look to reduce prices and find more efficient means of production.

There is a very thin line of difference between acceptable business practices and practices which are considered to be anti-competitive in nature. Firms engage in anti-competitive activities not to build on to their own advantage but to exploit their position in the market to the disadvantage of its competitors or consumers. Such activities usually lead to increase in prices, reduced output, decrease in quality, less consumer choice, barriers for new entrants etc.

A comparison of section 33 of the MRTP Act, 1969 with the corresponding provisions of Section 3 of the Competition Act, 2002 would show that the anti-competitive agreements particularized in sub section 3 and 4 of the Competition Act, 2002 are nothing but restrictive trade practices specified in clauses (a)-(d), (f)-(h), (j), (ja), (jb) of sub-section 1 of section 33 of the MRTP Act, 1969. Also the term ‘Restrictive Trade Practice’ under the old Act has now been changed to ‘Anti-Competitive Agreements’ under the new Act.

Anti-Competitive Practices are mainly of the following three types:

1. **Resale Price Maintenance:**
   Resale Price Maintenance (RPM) is a form of price fixing. RPM exists with a supplier specifying the minimum (or maximum) price at which the product must be re-sold to customers. Price maintenance usually occurs where a firm tries to set a minimum price at which another firm can sell its product. It is one of the most pervasive restraints in the marketplace. RPM is a vertical kind of restriction where a wholesale supplier and a retailer which resells the supplier's products fix a price at which the goods are to be sold.

   The Committee on Resale Price Maintenance in the U.K. popularly known as Lloyd-Jacob Committee made a detailed investigation into the whole system of RPM. The practice of RPM was described in the report of the committee as being “designed to ensure that, whatever the channels of distribution through which a particular article has passed, it shall be sold to the retail customers at a price which has been fixed in advance by the manufacturer, producer, wholesaler, importer or other supplier”.

   RPM is different from direct price maintenance, where the manufacturer has his own wholesale or retail outlets from where he sells the goods manufactured by him at a fixed price. It is also different from agency agreements where the wholesaler or retailer is merely an agent of the manufacturer and sells the goods of the manufacturer. Direct maintenance or agency agreements fall out of the purview of RPM as the ownership of the goods continues to remain in the hands of the manufacturer.

   The resale price may take and of the following three forms:
   1. A fixed price at which the product is to be sold
   2. A maximum price above which the product may not be sold.
   3. A minimum price below which the product may not be sold.

   It is very complex to determine whether a particular arrangement between two parties leads to RPM. The Canadian Committee in its report popularly known as the VanDuzer Report of 1999 gave some economic indicia of anticompetitive price maintenance as follows:
   1. The person implementing price maintenance (the “Supplier”) has market power, a characteristic of which is limited opportunities for customers to change suppliers;
   2. The Supplier does not have an efficiency based justification, such as a desire to increase service or prevent brand impairing practices, which would include loss laddering or misleading advertising; and
   3. The Supplier was induced to implement price maintenance in relation to one customer by another customer who competes with the first.

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Clause (f) of section 33(1) of the Monopolistic and Restrictive Trade Practices, 1969 with it corresponding provision under Clause (e) of section 3(4) of the Competition Act, 2002 considers RPM to be anti-competitive. RPM under these sections has two essential elements, viz (i) the sale of goods which is made by the manufacturer/supplier in the wholesale or retail outlets is preconditioned to the effect that resale thereof should be on stipulated price and (ii) the agreement therefore should not have clearly provided that prices lower than the stipulated price maybe charged. RPM is a technique for preventing competition between manufacturers and distributors.

Fixing a minimum price at which the goods are to be sold is prohibited under sections 39 and 40 of the MRTP Act, 1969. Any contravention of section 39 or 40 would have led to punishment of imprisonment which may extend upto three months or fine or both. However, in cases where the quality or varieties of goods would be substantially reduced or the prices of goods would increase or after sale service of the goods sold by retail would cease or reduce the Commission has the power the exempt these classes of goods from the purview of section 39 and 40.

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A large number of cases involving ‘fixed’ or ‘maximum’ price stipulations by manufacturers of goods, have come up for inquiry before the Commission, by and large on applications made by the RRTA(now Director General) or suo motu under section 10(a)(iii) or (iv). In these cases manufacturers have been directed to make it unequivocally clear by use of suitable words that their wholesalers or retailers, as the case may be are free to charge prices lower than those indicated. There are many cases where the manufacturers have failed to mention that the dealers are allowed to sell at prices lower than specified in the price lists hence, leading to restrictive trade practices.

In re: E. Merck (India) Ltd, the Commission directed the respondents to amend their dealership agreements to include the clause by which their dealers can charge price lower than the recommended price irrespective of them sending circulars to them saying they could charge prices lower than the recommended prices.

2. **Predatory Pricing:**
Predatory pricing is a deliberate strategy, usually by a dominant firm, of driving competitors out of the market by setting very low prices or selling below the firm’s incremental costs of producing the output (often equated for practical purposes with average variable costs). Once the predator has successfully driven out existing

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6 Section 51, Monopolistic and Restrictive Trade Practices Act, 1969
7 Section 41, Monopolistic and Restrictive Trade Practices Act, 1969
9 RRTA v. Hindustan Lever. RTP Enquiry No. 25/1974, Order Dated 27.3.1975
11 Raymond Woolen Mills Ltd v. MRTP Commission and Anr. (1993) 2 SCC 550
12 RTP Enquiry No. 6, 7 and 8/1986.
competitors and deterred entry of new firms, it can raise prices and earn higher profits.\textsuperscript{11} It is also known as destroyer pricing.

The predator incurs temporary losses during its low pricing policy with the intention of raising prices in the future to recoup losses and gain further profits. Determining when predatory pricing has occurred is complex and difficult. The main problem is that low pricing is commonly complained about by firms struggling to compete but it is hard to distinguish predation from aggressive competition.

Selling any product at a rate lower than its cost of sale or cost of production is known in the commercial circles as “predatory pricing,” which is one the pernicious trade practices that may be conveniently resorted to by the monopolists in the market of that product and even by the other producers of the product if such producers are also the manufacturers of the raw material required for the production of goods. Sometimes market conditions may require predatory pricing as when the goods are not in demand and they are sought to be disposed off to minimize loss.\textsuperscript{12}

The VanDuzer Report, 1999\textsuperscript{13} gives some basic indicators of predation which may be identified as follows, though none is conclusive.

1. Market power defined by reference to market shares and barriers to entry. In the absence of market power, the prospect of recouping the costs of a predatory campaign is small.

2. A policy of selling at prices below some measure of the predator’s cost. (A) Where sales are at prices below average total cost and the predator has no pro-competitive explanation, such as (I) meeting competition or changes in demand conditions; or (II) Excess supply. (B) Where sales are at prices below average variable costs.

3. Evidence of predatory intent.

Since, the main attempt of predatory pricing is illegal monopolization or an attempt to monopolize the market it was considered to be a monopolistic trade practice\textsuperscript{14} under the MRTP Act, 1969.\textsuperscript{15} Under section 4 of the Competition Act, 2002 it is now considered to be an abuse of dominant position as it of high risk and is mostly feasible for dominant players in the market.

Earlier under the MRTP Act, 1969 to determine whether a particular undertaking was in a dominant position, the following arithmetic formula was used\textsuperscript{16}:

An undertaking which by itself or along with interconnected undertakings produces, supplies, distributes or otherwise controls not less than one-fourth of

\textsuperscript{11} OECD Glossary of Statistical Terms, \url{http://stats.oecd.org/glossary/detail.asp?ID=3280}
\textsuperscript{12} \textit{Rallies India Ltd.}, RTP Enquiry No. 5/1982, Order Dated 12.10.1984
\textsuperscript{13} Anticompetitive Pricing Practices and the Competition Act Theory, Law and Practice, October 22, 1999.
\textsuperscript{14} Section 2(i), Monopolistic and Restrictive Trade Practices Act, 1969
\textsuperscript{15} Clause (j), (ja), (jb) of Section 33(1), Monopolistic and Restrictive Trade Practices Act, 1969
\textsuperscript{16} Section 2(d), Monopolistic and Restrictive Trade Practices Act, 1969
the total goods that are produced, supplied or distributed in India or any substantial part thereof, or
An undertaking which provides or otherwise controls not less one fourth of the services that are rendered in India or any substantial part thereof:

Now under the Competition Act, 2002 there is no such arithmetic formula to determine the dominant position of an enterprise. The Competition Act does not say that dominant position as such is bad, but the abuse of it is bad and not allowed. The dominant position of an enterprise is to be determined by its power to operate independently of competitive forces or to affect its competitors or consumers in its favour.\(^\text{17}\) Thus, even an enterprise within less than one-fourth share in the market can be dominant and vice versa.

To determine whether a particular enterprise is in a dominant position is a very difficult task for the authorities. Care has to be taken to determine whether the dominance has actually affected competition. For this rather than the rule of law, the rule of reason needs to be applied to prevent the end of competition and growth.

Abuse of Dominance can be classified into two broad types:
1. Exploitative abuse: Here the needs of the customers as well as the competitors are ignored.
2. Exclusionary abuse: Here the competitors are driven out of the market.

It is usually difficult to prove that a drop in prices is due to predatory pricing rather than normal competition, and predatory pricing claims are difficult to prove due to high legal hurdles designed to protect legitimate price competition.\(^\text{18}\)

However, the Commission after inquiry into abuse of dominant position may direct the enterprise to discontinue such abuse of dominant position and/or impose a penalty which is not more than ten percent of the average turnover of the last three preceding financial years.\(^\text{19}\)

In addition, the Competition Appellate Tribunal can be approached for award of compensation to be paid by any dominant enterprise for any loss or damage shown to have been suffered by any applicant as a result of any contravention of the section 4 by such enterprise, if established by the Commission.

The Act also provides for direction to the dominant enterprise concerned to comply with such other orders and directions, including payment of cost, if any.

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*In re Modern Food Industries (India) Ltd.*,\(^\text{20}\) the commission, while dismissing the complaint of the Director General, observed that the essence of predatory pricing is

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\(^{17}\) Section 4, Competition Act, 2002


\(^{19}\) Section 27, Competition Act, 2002

\(^{20}\) RTP Enquiry No. 78/1992, decided on 7.2.1996.
below one’s cost with a view to eliminate a trade rival. By evidence, it has to be established that in fixing lower prices than the cost of production there is *malafide* intent on the part of charged party to drive its competitors out of business or to eliminate competition.

The Commission in *Union of India v. Hindustan Development Corporation and others*\(^\text{21}\) held that, a mere offer of a lower price by itself does not manifest the requisite intent to gain monopoly and in the absence of a specific agreement by way of a concerted action suggesting conspiracy, the formation of a cartel among the producers who offered such lower price can not readily be inferred. Therefore, whether in a given case, there was formation of a cartel by some of the manufacturers which amounts to an unfair trade practice, depends upon the available evidence and the surrounding circumstances.

*In re Johnson and Johnson Limited*,\(^\text{22}\) it was held by the Commission that to sell a small portion of its products, in public interest, to the Government at prices lower than the prices normally charged to dealers, did not amount to predatory pricing, and particularly when the rates quoted were always above cost of sales.

**Dumping and Predatory Pricing**

‘Dumping’ as explained by the GATT Anti Dumping Code means introduction of the goods of one country into the commerce of another country at less than normal value prevailing in the importer country. Dumping accompanied by predatory pricing, causes material injury to the industry established in the territory of the contracting (importing) party and it materially retards the establishment and growth of the domestic industry. Dumping is established if a product is priced at less than its normal value i.e. a) less than the cost of production of the product in the country of origin plus reasonable mark up for selling costs and profits or b) less than the comparable price for the liked product when marketed in the export country or c) less than the highest comparable price for the like product exported to any third country in the ordinary course of trade.

*In Haridas Exports. v. All India Fuel Glass Manufacturers Association*,\(^\text{23}\) it was held by the commission that anti-dumping provisions of the customs tariff Act do not per se oust the Jurisdiction of the MRTP commission. The Customs Act and the MRTP Act operate in different fields and have different purposes. The commission cannot prohibit on import. Its Jurisdiction commences after the import is completed and any restrictive trade practice is resorted to.

3. **Price Discrimination:**

Price discrimination occurs when customers in different market segments are charged different prices for the same good or service, for reasons unrelated to costs. Price discrimination is effective only if customers cannot profitably re-sell the goods or services to other customers.\(^\text{24}\)

\(^{21}\) (1993) 3 SCC 499  
\(^{22}\) RTP Enquiry No. 59/1985, Order Dated 29.7.1986  
\(^{23}\) (2002) 49 CLA 307 (SC)  
The VanDuzer Report, 1999\textsuperscript{25} gives three conditions that are necessary for a firm to discriminate.

1. The firm must have sufficient \textit{market power} to set price (otherwise customers charged higher prices would choose to purchase from a competing supplier).
2. The firm must be able to identify different classes of customers with \textit{different levels of sensitivity to the price} of the product, or, more precisely, different price elasticities of demand. These differences may arise because of different needs, income levels or uses of the product.
3. There is \textit{limited opportunity for customers to resell to each other}. It must not be possible for customers paying a low price to sell to those for whom the product is priced more expensively.

Three different forms of discrimination are discernable.\textsuperscript{26}

1. \textit{First degree discrimination}, also known as perfect discrimination, in which each unit is sold for the highest possible price each buyer, will pay. Perfect discrimination is unattainable in practice, since it is impossible for the seller to identify and exploit very small distinctions in preferences between customers.
2. \textit{Second degree discrimination}, in which demand is partitioned into a number of blocks based on the quantity customers prefer to purchase with different prices being charged for each block (\textit{i.e.} quantity discounts).
3. \textit{Third degree discrimination}, where, based on differing price elasticities of demand, buyers are partitioned into different groups with a price set separately for each group. For example, automobile manufacturers may levy different product markups across product lines, posting the highest markup on luxury vehicles.

\textit{Clause (e)} of section 33(1) of the MRTP Act, 1969 prohibits price discrimination in trade dealings, in the absence of any rationale or reasonable justification. It lays down that any concession or benefit, to be construed a restrictive trade practice must satisfy the following two tests\textsuperscript{27}:

a. That differential concessions or benefits must have been allowed or granted in connection with, or by reason of, dealings. Dealings suggest regular course of transactions of sale or purchase, or the provision of service. An individual or isolated transaction does not fall within the scope of restrictive trade practice; and
b. that they are injurious to the competition

Thus failure of any concession or benefit to qualify any of the two tests will take it out of the ambit of restrictive trade practice. Further, it is also necessary that the concession and benefit must have a perceptible effect on competition.

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\textsuperscript{25} Anticompetitive Pricing Practices and the Competition Act Theory, Law and Practice, October 22, 1999.
\textsuperscript{26} Anticompetitive Pricing Practices and the Competition Act Theory, Law and Practice, October 22, 1999.
\textsuperscript{27} Dugar S.M., MRTP Law Competition Law and Consumer Protection Law, 4\textsuperscript{th} Edition, Volume 1, 2006, p333.
The scope of concessions or benefits was succinctly discussed by the commission in the case of *RRTA V Allied Distributors and Co. and Bengal Potteries Ltd.*\(^{28}\) as early as 1974 which still holds good. While discussing the incentive discount, which is a common practice among the business houses to increase their sales, the commission observed that “incentive discount to increase the sake of any special item on production is not hit by section 33(1) (e). This is not concession or benefit given in connection with or by reason of dealings. It is connected with the quantum of sale and not with the fact of dealings itself. It is not that each and every practice of giving allowances, discounts, rebates or credits in the course of trade or business that is the subject matter of clause (e) of section 33(1) but it is only when by any of these forms or manners the concessions or benefits are sought to be allowed or granted in connection with or by reason of dealings that clause (e) is attracted. Echoing this line of thinking, the Commission has observed in *D.G. (I&R) v. Rajashree Cement*\(^{29}\) that “the words 'dealings' used in Clause (e) is used as a commercial term and in the anti-trust laws of various other countries, it has acquired a definite connotation. It would mean series of transactions of sale, purchase or distribution of goods or provision of services ... The concessions or benefits contemplated by Clause (e) must, therefore, be by reason of, or because of, or in consideration of dealings.”

There are two orders\(^ {30}\) of this Commission which have laid down a comprehensive interpretation of the law enunciated in Section 33(1)(e) of the Act. In these two orders, the Commission has taken a note of the various orders of the Commission in the past and arrived at certain postulates. They are as follows:

1. Differential or discriminatory incentive bonus or discount based on quantity is a restrictive trade practice within the meaning of section 2(o) in as much as such discounts would reduce the opportunities of the smaller dealers in being able to compete with the bigger ones and this would have the effect of preventing, distorting or reducing competition between them
2. Such a practice is a concession, benefit, allowance, discount or rebate in connection with or by reason of dealings within the meaning of Clause (e) of section 33(1) of the Act;
3. The manufacturers or producers may, however, be allowed to pass through the gateways under Clause (h) of Section 38(1) if they establish that the differential discount is negligible or so insignificant that it is not likely to affect the competition to any material degree.

Concessions of benefits granted by manufacturer or supplier in the form of annual turnover rebates, discriminatory discounts linked to quantum of off-take by the dealer\(^ {31}\), differential discount for different areas in a state\(^ {32}\) are all forms of restrictive trade practices under Clause (e) of Section 33(1).

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30 *In re. Saraikella Glass Works (P.) Ltd.* [1993] 3 Comp LJ 385 (MRTPC) and
   *Director-General (I & R) v. Rajashree Cement* [1995] 83 Comp Gas 712 (MRTPC).
31 *In re Nirmal Chemical Works*, (1987) 61 Comp Cas 488(MRTPC)
32 *In re Wood Craft Products Ltd.*, RTP Enquiry No. 1251/1987 Order dated. 8-12-1989
In re Facit Asia Ltd.\textsuperscript{33} it was held that fixation of differential discount for various broad categories of customers, \textit{viz.}, 1) Private sector 2) Government Corporations and 3) Dealers does not attract \textit{Clause (e) of section33(1)}.

\textbf{Conclusion}

Any practice that is considered to be a restrictive trade practice under section 33(1) in any proceeding under Section 37 shall be deemed to be prejudicial to public interest unless it meets one or more of the following circumstances (called ‘gateways’) under section 38, such as;

- The restriction is necessary to protect the public against injury;
- The removal of the restriction would deny to the consumers, purchasers etc substantial advantages, benefits etc;
- The restriction is necessary to counteract measures taken by parties not part of the agreement to prevent or restrict competition.
- The restriction is necessary for negotiation, acquisition or supply of goods for parties to the agreement;
- Removal of restriction would have a serious and persistent adverse effect on the general level of unemployment in an area or areas taken together;
- Removal of restriction is likely to cause a reduction in the volume or earnings of the export business;
- The restriction is necessary to maintain any of the other restrictions that have been accepted by the parties;
- That the restriction has a minimal effect on competition;
- It has been authorised and approved by the Central Government;
- The restriction is necessary to meet the requirements of the defence of India;
- The restriction is necessary to ensure the maintenance of supply of goods and services essential to the community.

Further it is not enough to satisfy the Commission that one or more of the above circumstances exist. It must also be satisfied that that the restriction is not unreasonable, having regard to the balance between circumstances and any detriment to the public resulting from such restrictions. The detriment to be regarded is a detriment “to the public or to persons, not parties to the agreement.”\textsuperscript{34}

\textsuperscript{33} RTP Enquiry No 51/1984, Order Dated 29-04-1985
\textsuperscript{34} Dugar S.M., MRTP Law Competition Law and Consumer Protection Law, 4\textsuperscript{th} Edition, Volume 1, 2006, p509