

Why India Adopted a new Competition Law

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Preface

The relevance and role of competition policy and law in countries' national development strategies remains a very frequently visited topic. There is a growing trend of countries adopting competition policy and law as groundwork for their market-based reform, liberalisation and deregulation process. Additionally, a great number of countries across the globe are revisiting their old competition laws, with many of them even taking a completely fresh approach of adopting a new law, while repealing the old one.

CUTS has initiated yet another research project "Why do countries adopt new Competition Laws" (an endeavour similar to the recently released research report entitled '*Competition Regimes in the World – A Civil Society Report*' – www.competitionregimes.com) to study 20 countries, which have enacted a new competition law, after scrapping the old one. It will certainly add value to the debate as to 'Why countries adopt a competition law'?

The countries have been selected randomly from the developed, transition, developing, and large emerging economies. Researchers and various scholars would be invited to contribute a country paper on a pro-bono basis. The useful collection will be brought out in the form of an edited volume.

India is among twenty odd countries selected for this purpose and the chapter has been contributed by Dr S Chakravarthy, former Member of the MRTP Commission and Fellow at CUTS Centre for Competition, Investment & Economic Regulation.

The India chapter has been presented in the form of this stand-alone booklet, which throws light on the developments in the Indian competition regime, since its inception. It dwells on the economic scenario that existed before and after the 1991 reforms in India; the extant competition law i.e.

MRTTP Act; the motivations that lead to evolution of the new competition law i.e. the Competition Act, 2002; comparison between the old and the new law and the improvements that have taken place and the problems that persist; performance of competition agencies within their jurisdictions and the future course of action.

Finally, I would like to extend my sincere gratitude to Dr S Chakravarthy for his excellent contribution.

We request the readers to kindly share their comments with us so that we can improve upon the chapter over time, for inclusion in the final volume of the project at the end. Please forward it to c-cier@cuts.org

Jaipur
August 2006

Pradeep S Mehta
Secretary General

1

Introduction

This chapter addresses the evolution of competition policy and law in India, tracing during its narrative course, the economic scenario in India before and after the 1991 reforms, the extant competition law in the country, the Monopolies and Restrictive Trade Practices Act, 1969 (briefly referred to as the MRTP Act) and the evolution of the new competition law, the Competition Act, 2002 (briefly referred to as the Act) passed by the Parliament in December 2002.

Since attaining Independence in 1947, India, for the better part of half a century thereafter, adopted and followed policies comprising what are known as 'Command-and-Control' laws, rules, regulations and executive orders. The competition law of India, namely, the MRTP Act was one such. It was in 1991 that widespread economic reforms were undertaken and consequently the march from 'Command-and-Control economy to one based more on free market principles commenced its stride. As is true of many countries, economic liberalisation has taken root in India and the need for an effective competition regime has also been recognised.

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Historical Developments Leading to the Enactment of the MRTP Act

2.1 Constitutional Provisions

The Constitution of India, in its essay in building up a just society, has mandated the State to direct its policy towards securing that end. Articles 38 and 39 of the Constitution of India, which are part of the Directive Principles of State Policy, mandate, *inter alia*, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing

1. that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and
2. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The MRTP Act was in consequence of the aforesaid mandate in the Directive Principles in the Constitution of India, namely, prevention of concentration of economic power.

2.2 Development Strategy After Independence And Its Impact

India adopted the strategy of planned economic development since the early 1950s. The Indian Industrial Policy, since Independence in 1947, commenced with the Industrial Policy Resolution of 1948, which defined the broad contours of the Industrial Policy and delineated the role of the State in industrial development, both as a business and as a regulator.

The next important watershed in Industrial Policy was the 1956 Resolution, which emphasised growth, social justice and self-reliance. It further

defined the parameters of the government's regulatory mechanism. The most significant thrust of the 1956 Resolution was making industrialisation subject to government intervention and regulation. In particular, the private sector was allowed limited licensed capacity in the core sector and the public sector was given the mantle to achieve the 'commanding heights' of the economy by being made responsible for the development and growth of core areas like, steel, coal, power etc.

Government intervention and control pervaded almost all areas of economic activity in the country. For instance, there was no contestable market. This meant there was neither an easy entry nor an easy exit for enterprises. Government determined the plant sizes, their location, prices in a number of important sectors, and allocation of scarce financial resources. Their further interventions were characterised by high tariff walls, restrictions on foreign investments and quantitative restrictions. It may thus be seen that free competition in the market was under severe fetters, mainly because of governmental policies and strategies.

The licensing policy of the government favoured big business houses for they were in a better position to raise large amount of capital and had the managerial skills to run the industry. The business houses also had the advantage in securing financial assistance from the bankers and financial institutions. With no proper system of allocating licences in place, licensing authorities were naturally inclined to prefer men who had proved their competence by success in big industrial ventures in the past to men who had still to establish their ability. This also led to pre-empting of licences by a few business houses. Another reason why big businessmen succeeded in getting new licences was their ability to secure foreign collaboration.

Thus, the system of controls in the shape of industrial licensing restricted the freedom of entry into industry and also led to concentration of economic power in a few individuals or groups of business houses. This entrenchment of a few individuals led to the emergence of monopolistic industries and consequently to their indulging in restrictive trade practices, which were detrimental to the consumer and the economy.

2.3 Trigger Cause

There were essentially three enquiries/studies, which acted as the lodestar for the enactment of the MRTP Act.

The first study was by a Committee chaired by Mr Hazari, which studied the industrial licensing procedure under the Industries (Development and Regulation) Act, 1951. The report of this Committee concluded that the working of the licensing system had resulted in disproportionate growth of some of the big business houses in India (Hazari, 1965).

The second study was by a Committee set up in October 1960 under the chairmanship of Professor Mahalanobis to study the distribution and levels of income in the country. The Committee, in its report presented in February 1964, noted that the top 10 percent of the population of India cornered as much as 40 percent of the income (Mahalanobis, 1964). The Committee further noted that big business houses were emerging because of the 'planned economy' model practised by the Government in the country and suggested the need to collect comprehensive information relating to the various aspects of concentration of economic power.

The third study was known as the Monopolies Inquiry Commission (MIC), which was appointed by the Government in April, 1964 under the Chairmanship of Mr Das Gupta. It was enjoined to enquire into the extent and effects of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity (other than agriculture). The Monopolies Enquiry Commission (1965) presented its report in October 1965, noting therein that there was concentration of economic power in the form of product-wise and industry-wise concentration. The Commission also noted that a few industrial houses were controlling a large number of companies and there existed in the country large-scale restrictive and monopolistic trade practices.

As a corollary to its findings, the MIC drafted a Bill to provide for the operation of the economic system so as not to result in the concentration of economic power to the common detriment. The Bill provided for the control of monopolies and prohibition of monopolistic and restrictive trade practices, when prejudicial to public interest.

3

Enactment of The MRTP Act, 1969

The Bill, drafted by the MIC and amended by a Committee of the Parliament, became the Monopolies and Restrictive Trade Practices Act, 1969 and was enforced from June 01, 1970. The Act drew its inspiration from the mandate enshrined in the Directive Principles of State Policy in the Constitution, which aims at securing social justice with economic growth.

The Preamble to the Act says that the statute is enacted to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

The premises on which the MRTP Act rest are unrestrained interaction of competitive forces, maximum material progress through rational allocation of economic resources, availability of goods and services of quality at reasonable prices, and finally, a just and fair deal to the consumers. An interesting feature of the statute is that it envelops, within its ambit, fields of production and distribution of both goods and services.

Thus, one of the products of the planned and controlled economy was the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). Its cousin, to regulate, control and grant foreign exchange, was born in 1973, christened the Foreign Exchange Regulation Act. In the planned and controlled regime, the market suffered from little or no competition resulting in detriment to economic efficiency and productivity. Self-reliance was synonymous with import substitution and consequently, indigenous availability criteria ensured automatic protection to domestic producers, regardless of cost, efficiency, and comparative advantage.

3.1 Thrust Areas

The thrust of the MRTP Act is directed towards:

- the prevention of concentration of economic power to the common detriment;
- the control of monopolies;
- the prohibition of restrictive trade practices;
- the prohibition of monopolistic trade practices; and
- the prohibition of unfair trade practices

A criticism is often voiced that the statute prohibited growth. This is fallacious and erroneous. The statute regulates growth but does not prohibit it. Even in its regulatory capacity, it controls growth only if it is detrimental to the common good.

In terms of competition law and consumer protection, the objective of the MRTP Act is to curb monopolistic, restrictive and unfair trade practices, which disturb competition in the trade and industry and which adversely affect the consumer interest (monopolistic, restrictive and unfair trade practices are described later in this chapter). A parallel legislation known as the Consumer Protection Act, 1986 has also come into being, which prevails in the realm of unfair trade practices, while its main mandate is to make available a simple and easy to access consumer complaints redressal facility at the local level¹.

The regulatory provisions in the MRTP Act apply to almost every area of business: production, distribution, pricing, investment, purchasing, packaging, advertising, sales promotion, mergers, and amalgamations and take-over of undertakings (provisions relating to mergers, amalgamations and take-overs were deleted in the MRTP Act by the 1991 amendments to it). They seek to afford protection and support to the consuming public by reducing, if not eliminating, monopolistic, restrictive and unfair trade practices from the market.

3.2 MRTP Commission (MRTPC)

One of the main goals of the MRTP Act is to encourage fair play and fair dealings in the market, besides promoting healthy competition. Under the MRTP Act, a regulatory authority called the MRTP Commission (briefly, MRTPC) has been set up to deal with offences falling under the statute.

¹ See Mehta, Pradeep S. *How to Survive as a Consumer*, CUTS, 1998

3.3 Doctrine Guiding The Act

Behavioural and reformist doctrines inform the MRTP Act. In terms of the behavioural doctrine, the conduct of the entities, undertakings and bodies, which indulge in trade practices in such a manner as to be detrimental to public interest is examined with reference to whether the said practices constitute any monopolistic, restrictive, or unfair trade practice.

In terms of the reformist doctrine, the provisions of the MRTP Act provide that if the MRTP Commission, on enquiry, comes to a conclusion that an errant undertaking has indulged either in restrictive or unfair trade practice, it can direct that undertaking to discontinue or not to repeat the undesirable trade practice. The MRTP Act also provides for the acceptance of an assurance from an errant undertaking that it has taken steps to ensure that the prejudicial effect of trade practice no more exists.

The veneer of the MRTP Act is essentially based on an advisory or reformist approach on the ground that mere deterrence by punishment approach is not the only way to make an errant undertaking behave.

3.4 Amendments to the MRTP Act in 1984

Less than a decade had elapsed after the MRTP Act came in force, when the Government appointed a high-powered expert committee on the Companies Act and the MRTP Act, under the Chairmanship of Justice Rajindar Sachar, to review and suggest changes required to be made to the MRTP Act in the light of experience gained in the administration and operation thereof.

The Committee observed that it (MRTP Act) contained no provisions for the protection of consumers against false or misleading advertisements or other similar unfair trade practices and that they needed to be protected from practices which are resorted to by the trade and industry to mislead or dupe them (Sachar, 1978). To quote the Sachar Committee: 'Advertisements and sales promotion have become well established modes of modern business techniques. That advertisements and representations to the consumers should not become deceptive has always been one of the points of conflict between business and consumers'.

In many countries, particularly in developing countries like India, a large number of consumers are illiterate and ill-informed and possess limited purchasing power, in an environment where there is shortage of goods and services. Very often, one witnesses the spectacle of a large number

of non-essential, sub-standard, adulterated, unsafe, and less useful products being pushed through by unscrupulous traders by means of unfair trade practices and deceptive methods. Subtle deception, half-truths and misleading omissions inundate the advertisement media and instead of the consumer being provided with correct, meaningful and useful information on the products, they often get exposed to fictitious information, which tends to their making wrong buying decisions. Transparent information is missing and needs to be a goal to be chased.

The Sachar Committee, therefore, recommended that a separate Chapter should be added to the MRTP Act defining various unfair trade practices, so that the consumer, the manufacturer, the supplier, the trader and other persons in the market can conveniently identify the practices, which are prohibited. The 1984 amendments to the Act brought unfair trade practices within its ambit.

The 1984 Amendment also created a new authority, in the form of the Director-General of Investigation and Registration (DGIR), which was supposed to function in close liaison with the Commission. On matters relating to restrictive trade practices, unfair trade practices, and monopolistic trade practices, the DGIR has the power to make preliminary inquiries to assess the need for the Commission to initiate an inquiry. The Commission can also ask the DGIR to investigate such matters and submit reports to the Commission. Trade agreements that incorporate restrictive clauses must be registered with the office of the DGIR.

In addition, the 1984 amendments to the MRTP Act tightened certain provisions therein, like definitions of 'dominant undertaking', 'inter-connected undertakings', 'group', 'monopolistic trade practice' etc.

3.5 Ambit and Coverage of MRTP Act

The Indian statute, as most competition laws in the world, encompasses within its ambit essentially three types of prohibited trade practices, namely, Restrictive, Unfair and Monopolistic. Very briefly, the contours of such practices are enumerated below.

3.5.1 Restrictive Trade Practice (RTP)

A Restrictive Trade Practice is generally one, which has the effect of preventing, distorting or restricting competition. In particular, a practice, which tends to obstruct the flow of capital or resources into the stream of production, is a RTP. Likewise, manipulation of prices and conditions of

delivery or flow of supply in the market, which may have the effect of imposing on the consumer unjustified costs or restrictions are regarded as Restrictive Trade Practices.

Certain common types of Restrictive Trade Practices listed in the MRTP Act are:

- i) Refusal to deal;
- ii) Tie-up sales;
- iii) Full line forcing;
- iv) Exclusive dealings;
- v) Concerted practice;
- vi) Price discrimination;
- vii) Re-sale price maintenance;
- viii) Area restriction; and
- ix) Discriminatory pricing.

All Restrictive Trade Practices under the MRTP Act are deemed legally to be prejudicial to public interest. Therefore, the entity, body or undertaking charged with the perpetration of the Restrictive Trade Practice, can, after the establishment of the charge, only plead for gateways provided in the MRTP Act itself, to avoid being indicted.

If the gateways are satisfactory to the Commission, and if it is further satisfied that the restriction is not unreasonable, having regard to the balance between those circumstances and any detriment to the public interest or consumers likely to result from the operation of the restriction, the Commission may arrive at the conclusion that the RTP is not prejudicial to public interest and discharge the enquiry against the charged party.

Furthermore, if a trade practice is expressly authorised by any law for the time being in force, the Commission is barred from passing any order against the charged party.

3.5.2 Unfair Trade Practice (UTP)

The 1984 amendments to the Act brought Unfair Trade Practices within its ambit. Essentially, Unfair Trade Practices fall under the following categories in the Indian law:

1. Misleading advertisements and false representations.
2. Bargain sales, bait and switch selling.
3. Offering of gifts or prizes with the intention of not providing them and conducting promotional contests.

4. Product safety standards.
5. Hoarding or destruction of goods.

Making false or misleading representation of facts, disparaging the goods, services or trade of another person is also a prohibited trade practice under the Indian law.

3.5.3 Monopolistic Trade Practice (MTP)

The definition of monopolistic trade practice was amended by the 1984 amendment to the Act. MTP is a trade practice, which has, or is likely to have, the effect of:

- i) maintaining the prices of goods or charges for services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner;
- ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services;
- iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any services rendered, in India, to deteriorate;
- iv) increasing unreasonably:
 - a) the cost of production of any goods; or
 - b) charges for the provision, or maintenance, of any services;
- v) increasing unreasonably:
 - a) the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or
 - b) the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase of any goods or in the provision or maintenance of any goods or by the provision of any services; and
- vi) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.

3.6 Dominance

In the MRTP Act, the basis of determining dominance is whether an undertaking has a share of one-fourth (25 percent) or more in the production, supply, distribution or control of goods or services.

3.7 Composition Of The MRTP Commission

Under the MRTP Act, a Commission has been established, the Chairman of which is required to be a person who is or has been or is qualified to be a judge of the Supreme Court or High Court (of a State). The Members of the Commission are required to be persons of ability, integrity and standing who have adequate knowledge or experience of, or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs, or administration. The Commission is assisted by the Director General of Investigation and Registration for carrying out investigations, for maintaining register of agreements and for undertaking carriage of proceedings during the enquiry before the MRTP Commission.

The powers of the Commission include the powers vested in a civil court and include further powers:

- i) to direct an errant undertaking to discontinue a trade practice and not to repeat the same;
- ii) to pass a 'cease and desist' order;
- iii) to grant temporary injunction, restraining an errant undertaking from continuing an alleged trade practice;
- iv) to award compensation for loss suffered or injury sustained on account of RTP, UTP or MTP;
- v) to direct parties to agreements containing restrictive clauses to modify the same;
- vi) to direct parties to issue corrective advertisements; and
- vii) to recommend to the Central Government, division of undertakings or severance of inter-connection between undertakings, if their working is prejudicial to public interest or has led or is leading to MTP or RTP.

3.7.1 Investigation and Enquiries

The MRTP Commission can be approached with a complaint/reference on Restrictive or Monopolistic or Unfair Trade Practices by:

- a) an individual consumer;
- b) a registered association of consumers; or
- c) a trade association.

The Commission can also be moved by an application from the DGIR or by a reference by the Central or State Governments. The law provides for *suo motu* action on the part of the Commission, if it receives information from any source or on its own knowledge.

The law provides for a temporary injunction against the continuance of alleged monopolistic, restrictive or unfair trade practices, pending enquiry by the Commission.

A salutary provision in the MRTP Act is the power of the Commission to award compensation for loss or damage suffered by a consumer, trader, class of traders or government as a result of any monopolistic/restrictive/unfair trade practice indulged in by any undertaking or person.

4

Economic Reforms and Impact on the MRTP Act

4.1 Key Elements of Economic Reforms

It was in 1991 that India took the initiative in favour of economic reforms consisting essentially of liberalisation and de-regulation. In a manner of speaking, India embarked on what may be described as the LPG regime, an acronym for liberalisation, privatisation, and globalisation.

In the post-1991 LPG policy paradigm, a number of changes were introduced in policies relating to industrial licensing, foreign investment, technology imports, government monopolies and ownership, price and purchase preferences for the public sector, reservations for the small scale sector, financial sector, etc. The main objective has been, and is, to make the market driven by competitive forces, so that there could be incentives for raising productivity, improving efficiency, and reducing costs.

The concept of size and monopoly, not viewed with prejudice any more, resulted in amendments to the MRTP Act. Furthermore, the licensing requirement became confined to a very short list of industries. The other features of the post-1991 paradigm include de-controlling, de-regulating, delicensing, de-canalising, and de-bureaucratising of industry and trade. Constraints of space prevent a description of the reforms in the various sectors of the economy.

4.2 Amendments to the MRTP Act and their Impact

Major amendments were effected to the MRTP Act in 1991. Two of the five objectives mentioned earlier, namely: prevention of concentration of economic power to the common detriment; and control of monopolies, have been de-emphasised, after the 1991 amendments to the MRTP Act.

Prior to the 1991 amendments, the MRTP Act essentially was implemented in terms of regulating the growth of big size companies, called the monopoly companies. In other words, there were pre-entry restrictions therein requiring undertakings and companies with assets of more than Rs 100 crores (about US\$25 million) to seek approval of government for setting up new undertakings, expansion of existing undertakings, etc.

Provisions relating to concentration of economic power and pre-entry restrictions with regard to prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and takeovers of undertakings, were all deleted from the statute through the amendments.

4.3 Applicability of The MRTP Act

During the year 1991, a notification was issued by the Government that the MRTP Act shall apply to SoEs, whether owned by the Government or by Government companies, statutory corporations, undertakings under the management of various controllers appointed under any law, cooperative societies and financial institutions. Thus, there is no distinction, post-91, between the SoEs and private sector companies in the matter of monopolistic, restrictive and unfair trade practices.

Indian Airlines, nationalised banks, Indian Railways, Post and Telegraphs, and tele-communication undertakings, housing and urban development authorities, are all accountable if they indulge in MTP, RTP or UTP. There are of course a few entities, like defence undertakings, which are outside the ambit of the MRTP Act. It may also be mentioned here that after the amendment to the definition of 'service', it includes the business of builders and real estate operators. This has brought a large number of building activity operators under the ambit of the MRTP Act.

4.4 Mergers and Amalgamation

Concentration of economic power may result from merger, amalgamation or take-over. The MRTP Act does not prohibit merger, amalgamation or take-over, but seeks to ensure that the arrangement subserves public interest.

Before the 1991 amendments, the MRTP Act frowned upon expansion of giant undertakings so as not to permit them to acquire power to put a stranglehold both on the market as well as on consumers, and further industrial expansion of the country.

After the 1991 amendments, the MRTP Act has been restructured and pre-entry restrictions with regard to prior approval of the Government for amalgamation, merger or take-over have been removed. However, the MRTP Act still has power under provisions relating to restrictive trade practices and monopolistic trade practices to take action against mergers that are anti-competitive. This was posited by the Supreme Court in the Hindustan Lever Limited-Tomco merger case (Supreme Court, 1994). The Court observed that the MRTP Act, after the 1991 amendments, did not empower the Central Government to pre-emptively stop a merger, because it is likely to affect competition. Thus, the 1991 amendments to the MRTP Act removed the *ex ante* power of the said statute to block merger deals. This vacuum has been plugged by the Competition Act, 2002, which gives *ex ante* power to the Competition Commission of India to block certain combinations, if found to adversely affect competition.

Furthermore, in relation to concentration of economic power, even after the 1991 amendments to the MRTP Act, the law retains provisions relating to the power of the Government to direct division of an undertaking and severance of inter-connection between undertakings, if the working of an undertaking is prejudicial to public interest or is likely to lead to the adoption of any monopolistic or restrictive trade practice. While the power to conduct an enquiry in this regard is vested with the Commission, only the Government can pass the order for division of understanding or severance of inter-connection, and thus the role of the Commission is advisory.

5

Experience with the Working of the MRTP Act

5.1 Performance of MRTP Commission

The Commission has been successful in dealing with cases relating to restrictive and unfair trade practices. It disposed of nearly 4700 cases in 1999 and only 2404 cases were pending at the end of 1999. The number of new cases declined sharply during 1997 to 1999. The end of 2004 saw the pendency reduced to a little less than 500. There were very few cases relating to MTP.

5.2 Inadequate Budget and Independence of the MRTP Commission

The Department of Company Affairs provides the budget of the MRTP Commission. Data collected for the four years 1996 to 1999 may be seen in Table 1 next page.

Table 1: Annual Budget of the MRTP Commission						
(Rs in billions)						
Year	Actual Expenditure	Budget	Budget of Central Government	(3) as proportion of (4)	GDP	(3)as proportion of (6)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1996	10.48	11.08	2010.07	0.0055	13682.08	0.0008
1997	14.363	14.399	2320.68	0.0062	15224.41	0.0009
1998	16.724	17.728	2793.60	0.0063	17582.76	0.0010
1999	-	17.605	3980.84	0.0044	19569.97	0.0009

Source: CUTS, 2002.

The data in Table 1 shows that the Government subvention towards the budget of the MRTP Commission is a very small percentage of both the GDP and the budget of the Central Government. While there is no benchmark for the percentage, the relatively smaller percentage for India *vis-à-vis* some countries has been well brought out by CUTS (2003), which provides comparative figures for eight countries, besides India. The percentage of the expenditure of the Competition Authority to the total Government budget in all those countries is more than that of India. The inadequacy of the budget allocation by the Government is compounded by the need for the Commission to seek the former's permission to incur expenditure beyond certain limits. The sanction for most posts at the senior level of the Commission has to be given by the Government. The autonomy of the Commission stands impaired to a great extent because of the above constraints.

5.3 Qualitative Output of the MRTP Commission and its Independence

The quantitative output of the MRTPC was briefly touched upon in para 5.1. A scan of the various decisions of the MRTPC over more than three decades shows that, by and large, they have been reasonable good and well argued. They have been essentially in favour of the consumers, who were victims of restrictive and unfair trade practices. A criticism against the MRTPC has been that the cases brought before it take a lot of time, thus delaying justice. It is true that many cases took more than two years before they were disposed off. Essentially, the reason for the delay had been that the MRTPC, because of the statute and the statutory rules and regulations, was following the procedure outlined in the Code of Civil Procedure, 1908. Sequentially, after receipt of a complaint, there would be a reply from the respondent, a rejoinder from the complainant, framing of issues, evidence through interrogatories and discovery of documents, oral evidence of witnesses (with cross-examination and re-examination), arguments by the advocates representing the parties and the final judgment. In other words, a full-fledged trial, like in the case of civil matters in civil courts, rather than a summary trial, governed the conduct of the cases.

The perception among consumers, litigants, and advocates has been that the MRTPC is independent in discharging its investigative and adjudicatory functions. It needs mention that Government has the discretion in the appointment of the Chairman and Members of the Commission, which one could argue may undermine its independence. But, there has been no complaint of the Commission being influenced by the Government because of the latter having discretionary powers for choosing persons

for appointment to the Commission. The bar on the Chairman and the Members of the Commission for seeking appointment in any undertaking, which falls within the ambit of the MRTP Act for a period of 5 years after demitting office, is designed to impart integrity to the functioning of the Commission.

Nonetheless, the MRTPC is independent in discharging its investigative and adjudicatory functions. The Commission acts like a civil court with powers to summon witnesses, record their depositions, receive affidavits and issue commissions for the examination of witnesses and documents.

5.4 MRTP Act Has Outlived Its Utility

The MRTP Act was enacted, as noted earlier, at a time when India had the policy of 'command-and-control' paradigm for the administration of the economic activities of the country. Most of the process attributes of competition, such as entry, price, scale, location etc were regulated. Thus, the MRTP Act had very little influence over these process attributes of competition, as they were part of a separate set of decisions and policies of the Government. As the new paradigm of economic reforms, namely, LPG took root in the mid 80s and intensively from the early 90s, the MRTP Act was hardly adequate as a tool and a law to regulate the market and ensure the promotion of competition therein.

The MRTP Act, though a competition law, could not be effective in the absence of other governmental policies inhering the element of competition. For instance, the protection offered to SoEs in the form of price and purchase preferences distorted competition in the market, where the private sector was also operating. Indeed, this resulted in the SoEs not attempting to be efficient and price competitive. Many of them did not even bother to upgrade their technologies and processes, in spite of the Government providing them preference protection. A pre-requisite for competition law is the creation of competition culture in the market, through putting in place by the Government a chain of policies relating to industrial, financial, fiscal, public sector, labour etc, with a competition perspective. In the absence of such policies, competition law, by itself, cannot exist in a vacuum and act as an effective tool to foster competition in the market.

The need for a new law, particularly after 1991, in line with the new LPG paradigm led to the enactment of Competition Act, 2002.

6

Metamorphosis from MRTP Act, 1969 to Competition Act, 2002

During the administration of the MRTP Act over the last three decades and more, there have been a large number of rulings of the Supreme Court of India (binding on everyone in India) and also decisions of the MRTP Commission. These decisions have interpreted the various provisions of the MRTP Act from time to time and have constituted precedents for the future. Thus, where the wording of the existing law has been considered inadequate by judicial pronouncements, redrafting the law to inhere the spirit of the law and the intention of the lawmakers became inevitable, and hence the new law, namely, the Competition Act, 2002.

A perusal of the MRTP Act will show that there is neither definition nor even a mention of certain offending trade practices, which are restrictive in character. Some illustrations of these are:

- Abuse of Dominance;
- Cartels, Collusion and Price Fixing;
- Bid Rigging; and
- Predatory Pricing.

In this context, a question arose if the existing MRTP Act could itself be suitably amended, instead of drafting and bringing a new law into force. An argument in support of the former, namely, amending the MRTP Act, is generally advanced that one particular generic provision [Section 2(o)] of the MRTP Act may cover all anti-competition practices, as it defines a RTP as a trade practice which prevents, distorts or restricts competition. But, the issue has to be viewed in another perspective. While complaints relating to anti-competition practices can be tried under the generic definition of a Restrictive Trade Practice, the absence of specification of

identifiable anti-competition practices always gives room to different interpretations by different courts of law, with the result that the spirit of the law may sometimes escape being captured and enforced. While a generic definition may be necessary and may form the substantive foundation of the law, it is necessary to identify specific anti-competition practices and define them so that there is no scope for a valve or opening on technical grounds for the offending parties to escape indictment.

Some of the anti-competition practices like cartels, predatory pricing, bid rigging, etc are not specifically mentioned in the MRTP Act, but the Commission, over the years, has attempted to fit such offences under one or more of its sections by way of interpretation of the language used therein.

Another dimension is the dynamic context of international as well as the domestic trade and market. When the MRTP Act was drafted in 1969, the economic and trade milieu prevalent at that time constituted the premise for its various provisions. There has been subsequently a sea change in the environment, with considerable movement towards LPG. The law has to yield to the changed and changing scenario on the economic and trade front. This is one important reason why a new competition law was framed. It may be added here that amendments to MRTP Act would have entailed cumbersome innumerable changes in its provisions. Instead, enacting a new law was considered a better option. Hence, the new law the Competition Act, 2002.

6.1 High Level Committee on Competition Policy and Law

In October 1999, the Government of India appointed a High Level Committee on Competition Policy and Competition Law to advise a modern competition law for the country in line with international developments, and to suggest a legislative framework, which may entail a new law or appropriate amendments to the MRTP Act.

Mr S V S Raghavan, a retired senior official of the Central Government, chaired the Committee, which is popularly known as the Raghavan Committee. Among others on the Committee were the Chairman of Hindustan Lever Limited, a large company manufacturing fast moving consumer goods; a Consumer Activist; an Economic Journalist; a Chartered Accountant; and an Advocate, besides the Joint Secretary in the Department of Company Affairs dealing with competition law (the writer was a Member of the Committee and had drafted the report). The

Committee took evidence from the representatives of different Chambers of Industries and Commerce, Professional Institutes, Consumer Organisations (NGOs), Experts, Academics, and Government Officials.

At the time of the Raghavan Committee's deliberations, there were about 80 competition laws of different countries available. No competition law of any one country was adopted as a model, but features of different competition laws considered relevant for India and its prevalent milieu, were reckoned in giving a shape to the report.

In terms of the evidence received by the Committee, there was almost unanimity among those who gave their depositions to the Committee that the MRTP Act had outlived its utility and that a new competition law was required for the country, in tune with the post-1991 LPG paradigm. Anterior to the constitution of the Committee, this was well reflected in the announcement of the Finance Minister in his budget speech in February 1999. He observed that,

"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine the range of issues, and propose a modern competition law suitable for our conditions" (Parliament, 1999).

The Raghavan Committee presented its report to the Government in May 2000. Most (but not all) of the recommendations were unanimous, but two Members attached their supplementary notes to the Committee's report, advising calibrated introduction of the competition law and cautioning against rigid bureaucratic structure for the Competition Commission of India. There were two notes of dissent, one of which was ideologically against any competition law at all and the other against mandatory notification of combinations. What finally emerged is the adoption of a provision in the Act for voluntary notification of combinations, calibrated introduction of the provisions of the Act and a competition law (Act) in line with post-1991 liberal regime.

On the basis of the recommendations of the Raghavan Committee, a draft competition law was prepared and presented in November 2000 to the Government, which thereupon held wide consultations with stakeholders, like Chambers of Industry and Commerce, Consumer

Organisations, etc. While the Chambers of Industry and Commerce favoured a lenient competition law (e.g. high threshold limits for combinations' regulation), the Consumer Organisations suggested a tight competition law with severe penalty provisions.

A bill on the new competition law was introduced in Parliament, outlining the objects and reasons for its enactment. The Parliament remitted the Competition Bill to its Standing Committee for detailed scrutiny. The Standing Committee met with representatives of Financial Institutions, Chambers of Industry and Commerce, Consumer Organisations, Professional Institutes, Experts, Academics, and the relevant Ministries of the Government and presented its report to the Parliament (Standing Committee, 2002). After considering the recommendations of the Standing Committee and effecting some refinements, the Parliament passed in December 2002 the new law, namely, the Competition Act, 2002.

6.2 Rubric of the New Law, Competition Act, 2002

6.2.1 There are three core areas, as noted above, of enforcement that provide the focus for most competition laws in the world today.²

- Anti-competitive agreements among enterprises;
- Abuse of dominance; and
- Mergers or, more generally, combinations among enterprises.

There are, however, differences in emphasis and interpretations across countries and over time within countries. The above-mentioned three areas are not mutually exclusive and there is considerable overlap between them.

The rubric of the new law, **Competition Act, 2002** (Act, for brief) has essentially four compartments:

- Anti-Competitive Agreements;
- Abuse of Dominance;
- Combinations Regulation; and
- Competition Advocacy.

For the purpose of this paper, these compartments are not being described here in detail, but to say that the Act has tried to cover the deficiencies in the earlier law in a manner which can create a better and modern competition law to cope with the changed economic scenario in the

² Although it does not directly form a part of competition law, legislation regarding various regulatory authorities falls under the larger ambit of competition policy.

country. However, just five unique features are being touched upon here in brief:

- Combinations Regulation;
- Extra territorial jurisdiction;
- Harmonisation of Competition Act and IPR Laws;
- Overlaps between Competition Act and Sectoral Regulatory Laws; and
- Competition Advocacy.

6.2.2 Combinations Regulation

The Act makes it voluntary for the parties to notify their proposed agreement or combinations to the Mergers Bench (a part of the Competition Commission of India), if the aggregate assets of the combining parties have a value in excess of Rs 1000 crores (US\$220mn) or turnover in excess of Rs 3000 crores (US\$660mn). In the event either of the combining parties is outside India or both are outside, the threshold limits are US\$500mn for assets and US\$1500mn for turnover.

If one of the merging parties belongs to a group, which controls it, the threshold limits are Rs 4000 crores (US\$880mn) in terms of assets and Rs 12000 crores (US\$2640mn) in terms of turnover. If the group has assets or turnover outside India also, the threshold limits are US\$2bn for assets and US\$6bn for turnover. For this purpose a group means two or more enterprises, which directly or indirectly have:

- The ability to exercise 26 percent or more of the voting rights in the other enterprise; or
- The ability to appoint more than half the members of the Board of Directors in the other enterprise; or
- The ability to control the affairs of the other enterprise.

Control (which expression occurs in the third bullet defining a 'group' above), has also been defined in the Act. Control includes controlling the affairs or management by

- (i) one or more enterprises, either jointly or singly, over another enterprise or group; and
- (ii) one or more groups, either jointly or singly, over another group or enterprise.

The threshold limits of assets and of turnover would be revised every two years on the basis of the Wholesale Price Index or fluctuations in exchange rate of rupee or foreign currencies.

The Act has made the notification of combinations voluntary, and not mandatory and has laid down threshold limits for combinations to fall within its surveillance. The reasons that impelled the Government to opt for voluntary notifications and for threshold limits merit mention. The draft law that preceded the Act had mandatory notification provisions. Recommendations in favour of mandatory notification and threshold limits that fashioned the draft law and incorporated therein, were those of the High Level Committee (2000).

Before the Act was passed by Parliament, the draft law was placed on the website and a number of suggestions were received, particularly on the provisions relating to combinations regulation.

Many economists, experts and officials during their discussions with the Government were of the view that at the present level of India's economic development, combinations control should not lead to the shying away of foreign direct investment and participation by major international companies in economic activities through the route of mergers and acquisitions. They suggested that combination approvals (above specified threshold limits) might not be made mandatory. Notification of combinations might on the other hand be made voluntary, albeit with the risk of the discovery of anti-competitive mergers at a later date with the concomitant cost of demergers etc. The trigger cause in the aforesaid suggestions was the felt need for companies in India to grow in size in order to become globally competitive. These suggestions carried favour with the Government, which effected amendments to the draft law leading to the final shape of the Act.

The Act has thus made the **pre-notification of combinations voluntary** for the parties concerned. However, if the parties to the combination choose not to notify the CCI as it is not mandatory to notify, they run the risk of a post-combination action by the CCI, if it is subsequently discovered that the combination has an appreciable adverse effect on competition. There is a rider that the CCI shall not initiate an inquiry into a combination after the expiry of one year from the date on which the combination has taken effect.

On the prescription of threshold limits, the High Level Committee (2000) had this to say: "[i]t is extremely important that the law regarding mergers be very carefully framed and the provisions regarding prohibition of mergers be used very sparingly. This is particularly important at the current

stage of India's corporate development. Relative to the size of major international companies, Indian firms are still small. With the opening of trade and Foreign Direct Investment, Indian firms need to go through a period of consolidation in order to be competitive. Any law on merger regulation must take account of this reality".

Thus the High Level Committee had advised that only big combinations should be placed under the regulations of competition law. The Government in finalising the threshold limits in the Act reckoned the above advice and prescribed the limits in such a way that by and large, only major combinations would fall within its ambit. In other words, small and medium combinations would be outside the pale of the Act.

The Act has listed several factors to be taken into account for the purpose of determining whether the combination would have the effect of or be likely to have an appreciable adverse effect on competition.

The regulatory authority, namely, the Competition Commission of India (CCI) is mandated to adjudicate on mergers by weighing potential efficiency losses against potential gains.

Further, the Act requires the Commission to hand in its adjudicatory decision within 90 working days, lest the merger will be deemed to have been approved.

6.2.3 Extra-territorial Reach

The Act has extra-territorial reach. Its arm extends beyond the geographical contours of India to deal with practices and actions outside India, which have an appreciable adverse effect on competition in the relevant market in India. The CCI has the power to enquire into an agreement, abuse of dominance position or combination, if it has or is likely to have appreciable adverse effect on competition in the relevant market in India, notwithstanding that:

- (a) an agreement has been entered into outside India;
- (b) any party to such agreement is outside India;
- (c) any enterprise abusing the dominant position is outside India;
- (d) a combination has taken place outside India;
- (e) any party to combination is outside India; or
- (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

The above provisions are based on what is known as the 'effects doctrine'. This doctrine implies that even if an action or practice is outside the shores of India but has an impact or effect on competition in the relevant market in India, it can be brought within the ambit of the Act, provided the effect is appreciably adverse on competition. The box in the following page describes a case law on extra-territorial jurisdiction of the outgoing MRTP Act, 1969 and the Supreme Court's ruling thereon. However, the Competition Act as passed by the Parliament includes a provision to overcome the problem covered in the ruling of the Supreme Court on extra-territorial jurisdiction and on imports.

6.2.4 Harmonisation of Competition Act and IPR Laws

The provisions in the Act relating to anti-competition agreements will not restrict the right of any person to restrain any infringement of intellectual property rights or to impose such **reasonable conditions** as may be necessary for the purposes of protecting any of his rights which have been or may be conferred upon him under the various intellectual property right statutes.

The rationale for this exception is that the bundle of rights that are subsumed in intellectual property rights should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind. No doubt, this bundle of rights essays an anti-competition character, even bordering on monopoly power. But without protecting such rights, there will be no incentive for innovation, new technology and enhancement in the quality of products and services.

What is called for is a balance between unjustified monopolies and protection of the property holders' investment.

**Box: Extra-territorial Jurisdiction – Case Law
Relating to Float Glass**

In September 1998 the All India Float Glass Manufacturers' Association (AIFGMA) filed a complaint in the MRTP Commission against three Indonesian companies manufacturing float glass alleging that the latter in association with Indian importers were resorting to restrictive and unfair trade practices, and in particular selling float glass at predatory prices in India. They further alleged that the sale of float glass by the Indonesian manufacturers at predatory prices would restrict, distort, and prevent competition by pricing out Indian producers from the market.

The MRTP Commission issued an injunction against the Indonesian companies from exporting float glass to India. This matter was carried in appeal to the Supreme Court. During the hearing of the case, the extra-territorial jurisdiction of the MRTP Commission came up for consideration by the Supreme Court. The Supreme Court (2002) while observing that “[A] competition law like the MRTP Act is a mechanism to counter cross border economic terrorism”, ruled that the MRTP Commission had no extra-territorial jurisdiction in the float glass case.

The Court added that allowing challenge to the actual import would tantamount to giving the MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to import and that the Commission did not have jurisdiction. It observed that the Commission’s jurisdiction would commence after the import was completed and any restrictive trade practice took place subsequently.

To quote the Supreme Court: “The action of an exporter to India when performed outside India would not be amenable to jurisdiction of the MRTP Commission. The MRTP Commission cannot pass an order determining the export price of an exporter to India or prohibiting him to export to India at a low or predatory price”.

This decision of the Supreme Court led to arming the Competition Commission of India under the Competition Act 2002 with the power to take extra-territorial action by restraining imports, on the ground that the imports (after effectuating) would contravene the substantive provisions of the law. How the CCI would be dealing such cases in future will be eagerly awaited.

The relationship between competition law control and intellectual property rights (IPRs) is inherently contradictory as there is a potential conflict between the two, in that *the existence and the exercise* of IPRs may often produce anti-competitive effects through the monopoly power granted to the holder of the rights.

Indian case laws under the MRTP Act

In India, intellectual property falls in the Union list of the Seventh Schedule under Article 246 of the Constitution, which has itemised the same as “patents, inventions and designs, copyright, trade marks and merchandise marks” (Item 49). From the nature of items brought together, the framers of the Indian Constitution have apparently intended to afford protection,

incentive and encouragement to artists, men of letters, inventors, and the like. Limited monopoly is provided by the Patents Act, 1970, the Copyright Act, 1951 and the Trade and Merchandise Marks Act, 1958 and other IPR statutes balancing the interest of the owners of the right and public interest.

The conflict between IPRs and the competition law came up before the Monopolies and Restrictive Trade Practices Commission (MRTPC) in India in *Vallal Peruman and another Vs. Godfrey Phillips (India) limited* (MRTP Commission, 1994). The Commission observed as follows:

“Applying the above principles to the controversy at hand, it seems, that a certificate of registration held by an individual or an undertaking invests in him/it, an undoubted right to use trade mark/name etc. so long as the certificate of registration is in operation and more importantly, so long as the trade mark is used strictly in conformity with the terms and conditions subject to which it was granted. If however, while presenting the goods and merchandise for sale in the market or for promotion thereof, the holder of the certificate misuses the same by manipulation, distortion, contrivances and embellishments etc. so as to mislead or confuse the consumers, he would be exposing himself to an action —of indulging in unfair trade practices. It will, thus, be seen that the provisions of the Monopolies and Restrictive Trade Practices Act would be attracted only when there is an abuse in exercise of the right protected”
This principle was reiterated in *Manju Bhardwaj’s Case* by the same Commission (MRTP Commission, 1996).

Having said this, it may be noted, that the new Indian competition law, namely, the Competition Act 2002 does not permit any *unreasonable condition* forming a part of protection or exploitation of intellectual property rights. Only reasonable conditions will pass muster in terms of the specific wording in the Act and in particular, the use of the expression ‘reasonable conditions’ in section 3(5) thereof. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs.

6.2.5 Overlap Between Competition Law And Sectoral Regulatory Laws

Over the years, especially after economic reforms were initiated in early 90s, a number of sectoral regulatory authorities have been formed. For telecoms, there is the Telecommunications Regulatory Authority of India (TRAI) and an appellate tribunal. For electricity, there is the Central Electricity Regulatory Commission (CERC) at the federal level with an independent appellate tribunal and a State Electricity Regulatory Commission (SERC) in most states. The Securities and Exchange Board of India (SEBI) along with an appellate tribunal, looks after the operation of the capital market while the banking and the financial sectors are regulated by the Reserve Bank of India, the central bank. The Insurance Regulatory & Development Authority (IRDA) has been created to regulate the newly opened insurance sector. There are other statutory bodies for regulating some other sectors, such as major ports, and some more are in the offing (e.g. oil and gas, railways, civil aviation).

Regulatory authorities have been set up in several sectors to generate competitive outcomes, i.e. foster greater efficiency in resource allocation and consumer welfare through maintaining and promoting competition. The question of overlapping jurisdictions, between the competition authority and sectoral regulators, is going to be a challenge and has become an aging controversy. This would require a proper mechanism to resolve the same.

6.2.6 Competition Advocacy

In line with the High Level Committee's recommendation, the Act extends the mandate of the Competition Commission of India beyond merely enforcing the law. Competition advocacy creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances. A report of the Organisation for Economic Co-operation and Development (OECD) noted as follows:

"In virtually every member country where significant reform efforts have been undertaken, the competition agencies have been active participants in the reform process. This 'advocacy' ... can include persuasion offered behind the scenes, as well as publicity outside of formal proceedings. Some competition agencies have the power, at least in theory, to bring formal challenges against anti-competitive actions by other agencies or official or quasi-official bodies. More indirect, but still visible, is formal

participation in another agency's public hearings and deliberations. What is appropriate depends on the particular institutional setting" (OECD, 1997).

The CCI, in terms of the advocacy provisions in the Act, is enabled to participate in the formulation of the country's economic policies and to participate in the reviewing of laws related to competition at the instance of the Central Government. The Central Government can make a reference to the CCI for its opinion on the possible effect of a policy under formulation or of an existing law related to competition.

In order to promote competition advocacy and create awareness about competition issues and also to accord training to all concerned (including the Chairperson and Members of the CCI and its officials), the Act enjoins the establishment of a fund christened the **Competition Fund**. The Fund will be credited with the fees received for filing complaints and applications under the law, costs levied on the parties, grants and donations from the Government, and the interest accrued thereon.

7

New Wine in New Bottle

The Act is therefore a new wine in a new bottle. The extant MRTP Act 1969 has aged for more than three decades and has given birth to the new law (the Act) in line with the changed and changing economic scenario in India and rest of the world and in line with the current economic thinking comprising the post-1991 liberalisation/reforms paradigm.

The differences between the old law (extant law, namely the MRTP Act, 1969) and the new law (Competition Act, 2002) may perhaps be best captured in the form of a Table 2 displayed next page.

7.1 Improvements in the Competition Act, 2002 over the MRTP Act, 1969

Early in this paper, mention was made of the failings in the MRTP Act and the consequent problems faced by the MRTPC. The new Act has to some extent redressed the situation.

Firstly, explicit definitions have been accorded to the offences of Abuse of Dominance, Cartels, Bid rigging, and Predatory Pricing etc, in the Act. Such explicit definitions are not available in the outgoing MRTP Act. Secondly, the Act specifies criteria for assessing whether a practice has an appreciable adverse effect on competition. The MRTP Act is rather ambiguous and subjective in this regard by not providing any criteria for defining a restrictive trade practice or a monopolistic trade practice. The criterion in that statute is 'reasonableness', which lends itself to differing rulings by the MRTPC, depending on the disposition of the Chairperson and/or the Members sitting on the Bench in a particular case.

Thirdly, the Act mandates that the CCI 'shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908' but shall be guided by the principles of natural justice. The CCI is empowered to

regulate its own procedure. The thinking in the Government, when the new law was passed, was to make regulations so as to provide a summary trial for the cases, unless the CCI felt it necessary to deviate.

Fourthly, the CCI, under the Act, may call upon such experts from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist it in the conduct of any enquiry or proceeding before it. Introduction of competition advocacy functions for the CCI is designed to increase the awareness among consumers, Chambers of Industry and Commerce, Professional Institutes and even the CCI and its officers regarding Competition as an important factor of market driven economy and activities and to create a competition culture in the country.

S. No.	MRTP ACT, 1969	COMPETITION ACT, 2002
1.	Based on pre-reforms command and control regime	Based on post-reforms liberalised regime
2.	Based on size/structure as factor	Based on conduct as a factor
3.	Competition offences implicit and not defined	Competition offences explicit and defined
4.	Complex in arrangement and language	Simple in arrangement and language, and comprehensible
5.	Frowns upon dominance	Acts upon abuse of dominance
6.	Registration of business agreements, such as marketing etc compulsory	No requirement of registration of agreements
7.	No combinations regulations (post-1991 amendment)	Combination regulations beyond a high threshold limit
8.	No competition advocacy role for the MRTPC	CCI has competition advocacy role
9.	No penalties for offences	Penalties for offences
10.	Reactive and rigid	Proactive and flexible
11.	Unfair trade practices covered	Unfair trade practices omitted (Consumer Protection Act, 1986 will deal with them)
12.	Rule of law approach	Rule of reason approach
13.	Blanket exclusion of intellectual property rights	Exclusion of intellectual property rights, but unreasonable restrictions covered

7.2 Phased Introduction of the Act

The Government has decided on a calibrated introduction of the Act. In other words, the main four compartments of the Act will be introduced in a phased manner. In the first phase, during the first year of the coming into force of the Act, the CCI has been called upon to carry on only competition advocacy functions. The first year is and will be devoted to awareness generation and imparting training to all concerned with the implementation and administration of the Act. The thinking of the Government is that the Members of the Parliament and Legislatures should also be educated on the features and implications of the Act. Competition advocacy functions would also include measures for creating awareness about competition issues among all concerned and in particular the public and also include promoting in the country what can be described as 'competition culture' and creating and fostering a competition driven market in the country.

During the second year, the provisions relating to anti-competitive agreements and abuse of dominance would be brought into force. The MRTP Act would then stand repealed and MRTP Commission wound up. During the first year of the introduction of the Act, the MRTP Act would be operational, as the CCI would be addressing only competition advocacy functions. During the third year of the introduction of the Act, the provisions relating to combinations regulations would be brought into force.

This calibrated introduction of the Act is strategically a step in the right direction, as it will help the country to progress gradually on competition related matters but steadily and surely.

7.3 Unfair Trade Practices Not a Part of the Act

The MRTP Act deals with Restrictive Trade Practices, Unfair Trade Practices and Monopolistic Trade Practices. The RTPs and MTPs, with refinements and modifications in their content, language and meaning are included in the new law, namely the Act. The UTPs are totally left out of the Act. This is because the Consumer Protection Act, 1986 (CPA) designed to protect the interests of consumers has provisions relating to UTPs. The MRTP Act and the CPA suffered from a significant overlap on the provisions relating to UTPs. As a matter of fact, the definition of 'unfair trade practices' is literally the same in both the enactments, the MRTP Act and the CPA.

With provisions on unfair trade practices removed, the CCI may face a major challenge to get the public buy-in, and to create a public image. Therefore, even with the handicap, the CCI should take up consumers' issues, which are of systemic nature, to create a public buy-in. These could include: tied sales in schools and colleges over uniforms and stationery or the tie-up of doctors with diagnostic clinics, pharmaceutical companies, and pharmacies.

7.4 Consumer Concerns in the Act

Any consumer can move the CCI for action under the Act for offences relating to anti-competitive agreements and abuse of dominance. Consumer associations are similarly empowered to move the CCI. 'Consumer' finds a comprehensive definition in the Act, which includes those who buy goods or hire or avail of services. The preamble of the Act specifically mandates that the legislation is intended to 'protect the interests of consumers'. While individual consumers who have suffered damage or loss consequent on an enterprise having provided him with a defective product or service have redress available under the Consumer Protection Act, 1986 (mainly unfair trade practices), they have the right to move the CCI for action relating to anti-competitive practices or abuse of dominance. But such cases under the Act are likely to be wider in scope than those filed under the Consumer Protection Act, 1986, as they are likely to affect a large body of consumers, who suffer as a consequence of practices resulting in appreciable adverse effect on competition.

The gains sought through competition law can only be realised with effective enforcement. A weak enforcement of competition law is perhaps worse than the absence of competition law. A weak enforcement often reflects a number of factors such as inadequate funding of the enforcement authority. The Government should provide the required infrastructure and funds to make the CCI an effective Tribunal to prevent, if not eliminate anti-competition practices and also to play its role of competition advocacy.

8

Conclusion

The new Competition Act 2002 is now a part of Indian jurisprudence. Made effective by a Government notification on March 31, 2003, certain sections of the new Act are now in force. Some staff has been appointed and the Commission is operating. One member of the Commission has been appointed. It is currently engaged in advocacy work, including commissioning studies.

When the Central Government appointed a Chairperson of the Commission, the Act was challenged on the ground that it provided that the Chairperson could be any expert in competition and need not be a member of the judiciary. The Supreme Court of India after hearing the parties disposed of the writ leaving the issues raised open (when the government counsel made a statement that government would consider making amendments to the Act) observing that the doctrine of separation of powers in the Constitution i.e. between the executive and judiciary should be respected. Following this, the government has drafted an amendment to the Competition Act in 2006, which proposes to create two bodies: a Commission headed by an expert and an appellate body by a judge. At the time of writing this chapter, the amendment bill is still under the consideration of the Parliament.

While the Act specifies that there shall be a chairperson and not less than two nor more than ten other members to be appointed by the Central Government, one cannot predict exactly when the full Commission will be appointed, or when the Central Government will bring the other provisions of the new law into force, in view of the pendency of the amendment bill in the parliament. In the meantime, the old MRTP Act is in operation and the MRTP Commission continues to function. How well the new regime will operate, and whether it will be an improvement over the MRTP regime it has been designed to replace, remains to be seen.

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