Subject:

LAW

Production of Courseware
Content for Post Graduate Courses

Paper: COMPETITION LAW

Module: Unfair & Restrictive trade practices
Module Overview: The Module on Restrictive and Unfair Trade Practices introduces students to such practices which are restrictive and unfair for the trade and consumers. It is necessary for students to understand the distinction between such trade practices and their effect on ultimate consumers. The erstwhile Monopolies and Restrictive Trade Practices Act, 1969 had elaborately dealt with them. After the repeal of the Act, restrictive and unfair trade practices were added to the provisions of the Consumer Protection Act, 1986. The Competition Act, 2002 has also included them under the categories of anti-competitive agreements and unfair discriminatory trade practices under the category of abuse of dominant position by an enterprise.

Subject Name: Law

Paper Name: Competition Law

Module ID: 8

Pre-requisites: Knowledge of trade as well as general trade practices

Objectives:
- To understand restrictive trade practices and their effect
- To know what are unfair trade practices and understand how they become unfair to consumers
- To know how the Consumer Protection Act covers restrictive and unfair trade practices to protect consumers’ interests.
- To understand the difference between MRTP Act and Competition Act in relation to restrictive trade practices (RTPs) and unfair trade practices (UTPs)
Keywords: Restrictive Trade Practices, Unfair Trade Practices, trade and trade practice, exclusive dealing agreements, refusal to deal, resale price maintenance, dominant enterprise, discriminatory practices

Learning outcomes:

- **Appreciate**
  - Restrictive and unfair trade practices under Consumer Protection Act and Competition Act

- **Analyze**
  - Effect on trade and understand why from MRTP Act such practices have been brought into Consumer Protection Act.

- **Understand**
  - The unfair trade practices and restrictive trade practices under the Competition Act

Introduction: Restrictive trade practices, as the term indicates, are practices which are restrictive in nature and put restrictions on flow of supplies in a market and trade. Any agreement which is restrictive in nature, whatever may be the manner of restriction will be a RTP (1). Unfair trade practices are unfair to the consumers. Both these practices are injurious to interests of consumers. Different types of practices have been established which fall under these two categories. The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) dealt with both UTPs and RTPs originally. The module will chalk the development in such practices from MRTP Act to present day inclusion in Consumer Protection Act and the Competition Act.

First of all, it is necessary to understand what constitutes a 'trade practice'. According to s. 2 (u) of the MRTP Act, trade practice means any practice relating to the carrying on of any trade and includes,

i. anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or class of traders;

ii. a single or isolated action of any person in relation to any trade.

S. 2 (x) of the Competition Act, 2002 defines 'trade' as any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes provision of any services.
S. 2 (m) of the Competition Act, 2002 defines a ‘practice’ as ‘includes any practice relating to the carrying on of any trade by a person or an enterprise.

The Competition Commission of India dealt with restrictive and unfair trade practices recently in few important cases. Let us discuss a case before examining definitions of such practices under different Acts. In the case of DLF, information was filed by Blaire Owners Association for delay in possession of flats and violations of building restrictions norms. It was contended that DLF had abused its dominant position and inflicted several arbitrary and unfair terms of contract on the apartment allottees of Group Housing complex called ‘Blaire’. Apartment Buyers Agreement was examined by the Commission and it was found that DLF had unilateral power to change clauses of agreement and superseding of terms without any right to allottees, right to change layout without consent of home owners, flexibility to change site plans, pricing contingent on location, right to determine ownership rights on apartment land, right to decide for development of common lands and commercial development, arbitrary forfeiture of amounts paid by allottees, no exit option except its failure to deliver possession on time but without any right to claim interest or refunded money, exit clause giving full discretion to DLF, sole right to make modifications etc were found to indicate unequal bargaining power between the parties. This agreement was found to unfair and besides imposing the penalty on DLF, it was directed by CCI to cease and desist for formulating and imposing such unfair conditions in its agreements with buyers.

I. Restrictive Trade Practices:

Definition of Restrictive trade practices as defined in MRTP Act, Consumer Protection Act and Competition Act are discussed below:

A. MRTP Act, 1969: According to s. 2(o), RTP means any practice which has or may have the effect of preventing, distorting or restricting competition in any manner. A practice will be a RTP in the following cases:
   i. when it tends to obstruct the flow of capital or resources into the stream of production;
   ii. when it tends to bring about manipulation of prices, or conditions of delivery or flow of supplies in the market relating to goods or services in such manner so as to impose on the consumer unjustified costs or restrictions.

The Supreme Court analysed the definition in the case of TELCO v Registrar of the Restrictive Trade Agreements. It was held that definition is an exhaustive one and one of inclusion. Whether a trade practice is restrictive or not can be decided by applying Rule of Reason. Any restriction as to area or price will not be per se a Restrictive trade practice. To determine whether a restriction regulates and promotes competition or suppresses or destroys competition three matters are to be considered. Firstly, what facts are peculiar to the business to which the restraint is applied? Secondly, what was the condition before or after the restriction is applied. Thirdly, what is the nature of the restraint and what is its actual or probable effect. The Supreme Court again observed in Mahindra & Mahindra Ltd v Union of India that the definition is pragmatic and result oriented.

S. 33 of the MRTP Act gave the following list of agreements relating to RTPs which were required to be registered under the Act. They were regarded as RTPs:
   a. Agreement restricting or likely to restrict a person to whom goods are sold or from whom are bought.
   b. Agreement with a condition for purchaser of goods to purchase some other goods

1 (1977) 2 SCC 55 at p. 63
2 (1979)2 SCC 529
c. Agreement restricting purchaser from purchasing or dealing with goods of any person other than the seller
d. agreement between buyers or sellers to buy or sell only at prices or terms and conditions settled between them
e. agreement to allow concessions, benefits, rebate allowances, discount or credit in connection with dealings
f. agreement of sale requiring the buyer to resell only at prices dictated by seller unless buyer gets the right to sell at prices lower than those dictated
g. agreement restricting, limiting or withholding output or supply of goods or allocates a market or area for their disposal
h. agreements restricting or prohibiting employment of any method, machinery or process in the manufacture of goods
i. agreement providing for exclusion form a trade association of a person proposing to carry on in good faith the trade in relation to which association is formed.
j. agreement providing for sale of goods at such prices to eliminate competition or a competitor
k. agreement restricting in any manner wholesalers, producers or suppliers from whom goods may be bought
l. agreement as to making of bids or excluding a person form bidding at an auction for sale of goods
m. agreements notified by the Government as RTPs
n. agreement designed to enforce the carrying out of any type of agreements which fall in any of the above categories
o. Agreements restricting in any manner wholesalers, producers or suppliers from whom any goods may be bought.

**B. The Competition Act, 2002:** S. 3 of the Competition Act prohibits anti-competitive agreements. S. 3(3) incorporates cases in which there is a presumption of anti-competitive activity. This presumption is applicable to cases where enterprises or persons engaged in similar or identical trade or provisions of services make such agreements. If they adopt any practice or take any of the following decision, they will be considered as restrictive trade practices:
S. 3(4) of the Competition Act, 2002 provides for agreements which are likely to have appreciable adverse effect on competition. Agreements may be between persons or enterprises at different levels in the chain of production in different markets. Such agreements include tie-in arrangements, exclusive supply and distribution agreements, refusal to deal and resale price maintenance.

According to the explanation provided by the section, 'tie-in arrangement' includes any agreement requiring a purchaser of goods, as a condition of such purchase to purchase some other goods. It is a compulsory purchase agreement. In *Eastman Kodak Co v Image Technical service Inc*\(^3\), it was defined as an agreement by a party to sell one product on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that (tied) product from any other supplier.

'Exclusive supply agreement' includes any agreement restricting the purchaser from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Such restriction is applicable on the purchaser in the course of his trade restricting him in any manner from acquiring or dealing.

'Exclusive distribution agreement' includes any agreement which limits, restricts or withholding the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

'Refusal to deal' includes any agreement which restricts or is likely to restrict persons to whom goods are sold or from whom goods are bought.

---

<table>
<thead>
<tr>
<th>Price fixing agreements</th>
<th>Practice determines sale or purchase price of goods or services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Output control agreements</td>
<td>It limits or controls production, supply, markets, technical development, investment or provision of services.</td>
</tr>
<tr>
<td>Market allocation agreements</td>
<td>Practice in which market, sources of production or provisions of services are shared by the persons or enterprises. Sharing may be by allocation of geographical area of market, type of goods or services or number of customers in the market or in any other similar manner.</td>
</tr>
<tr>
<td>Bid rigging arrangements</td>
<td>Practices or agreements resulting directly or indirectly in bid-rigging or collusive tendering.</td>
</tr>
</tbody>
</table>

---

\(^3\) 119 LED 2d 265 (1991)
Resale Price Maintenance includes any agreement to sell goods on the condition that the purchaser will charge the same price on resale which is stipulated by the seller. If reduced price is allowed to be charged on resale only then such price can be charged.

A dominant enterprise or a group may become abusive of its dominant position and may indulge into restrictive trade practices. Such practices are dealt under S.4 (2) of the Competition Act. Such practices include limiting production or scientific or technical development, denial of access to market, barriers to entry and expansion, imposition of supplementary obligations and protection of other markets.

C. The Consumer Protection Act, 1986: According to s. 2(nn) of the Consumer Protection Act, 1986, restrictive trade practice means a trade practice which tends to bring about manipulation of price or conditions of delivery or to affect flow of supplies in market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions. Such practices include delay beyond the period agreed by the trader for supply of goods or in providing services which may have increased the prices or is likely to increase the prices and any trade practice which requires a consumer to buy, hire or avail of any goods or services as condition precedent to buying, hiring or availing of other goods or services.

II. Unfair Trade Practices:

A. MRTP Act, 1969: According to s. 36 A of the MRTP Act, unfair trade practice means a trade practice which adopts any unfair method or unfair or deceptive practice for the purpose of promoting the sale, use or supply of any goods or for provision of any services. The following practices are included:

1. False representation: False representation includes the following false representations:
   a. that goods are of a particular standard, quality, quantity, grade, composition, style or model
   b. that services are of particular standard, quality or grade
   c. that any re-built, second hand, renovated, reconditioned or old goods are new goods
   d. that goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have
   e. that seller or supplier has a sponsorship, approval or affiliation which they do not have
   f. that gives a false or misleading representation about need or utility of goods or services
   g. gives a warranty or guarantee of the performance, efficacy or length of a life of a product or any goods not based on any proper or adequate test.
   h. makes a representation to the public that appears to be warranty or guarantee of a product or goods or services or promise to replace, maintain or repair an article or continue a service, if such warranty, guarantee or promise is materially misleading or there is no reasonable prospect of carrying them.
   i. materially misleads the public about the price at which a product, goods or services are sold.
   j. gives false or misleading facts disparaging goods, trade or services of another person.

2. offer of a bargain price for sale or supply of goods or services not intended to be offered so

3. permits offering of gifts, prizes or other items with the intention of not providing them as offered or creating false impression that something is offered free of charge or conduct of any contest, lottery, game of chance, skill for the purpose of promoting sale, use, supply of any product or business interest

4. permits sale of goods that do not comply with the standards prescribed by competent authority as if they comply with standards

5. permits hoarding or destruction of goods or refusal to sell or provide any service.
B. The Consumer Protection Act, 1986: After the repeal of the MRTP Act, 1969, unfair trade practices were inserted in the Consumer Protection Act, 1986. S. 2(r) of the Consumer Protection Act defines unfair trade practices and the same definition from MRTP Act is inserted in the Consumer Protection Act. The definition was amended by Consumer Protection (Amendment) Act, 2003 and following were inserted in the definition:

i. Clause (3-A) was inserted after clause 3 dealing with offering of gifts, prizes etc. Clause 3-A includes withholding from the participants any scheme offering gifts, prizes or other items free of charge, on its closure the information about the final results of the scheme. The explanation added to the clause explains that the participants of the scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time published, prominently in the same newspapers in which the scheme was originally published.

ii. Clause (6) includes manufacture of spurious goods or offering such goods for sale adopting deceptive practices in the provision of services in unfair trade practices. Spurious goods and services mean such goods and services which are claimed to be genuine but they are actually not so.

C. The Competition Act, 2002: Under s. 4 (2) of the Competition Act, a dominant enterprise or a group may indulge into unfair or discriminatory trade practices. When such an enterprise or group directly or indirectly imposes:

i. unfair or discriminatory conditions on sale of goods or rendering of services; or

ii. unfair or discriminatory price in sale or purchase including predatory price of goods or services

The explanation to the sub-section provides that such practices may be adopted if they are necessary to meet competition. Therefore, such practices are not per se unfair or discriminatory but under rule of reason they may be found to be so.

In an old American case of FTC v. Beech- Nut Packing co, there was no contract for fixing, enforcing or maintaining resale prices but there was enforcement of resale price maintenance by refusing to make further supplies. It was held to be an unfair method of competition. The company in the case customarily marketed its products principally through jobbers & wholesalers, who in turn resold the products to retailers who were selected as desirable customers. The scheme necessarily constrained the traders, to maintain the prices suggested by it in case they wanted to have the products. Traders would have to maintain prices indicated by the company. In case of their failure to do so, they would be put on the undesirable price cutter list, to whom the goods will not be sold till they gave satisfactory assurance not to resell the goods of the company except at prices suggested by it.

Conclusion: All the restrictive trade practices and unfair trade practices from the MRTP Act have been inserted in the Consumer Protection Act (CPA). One has to see that the objectives of and the reliefs provided by the MRTP Act/ Competition Act and the CPA are different. MRTP Act has been replaced by the Competition Act (CA). The Competition Act has actually wider scope and powers in comparison to MRTP Act. It prohibits RTPs if they are restrictive and therefore, become anti-competitive agreements. It prohibits dominant enterprises from abusing their position by indulging into UTPs or RTPs. The CA, 2002 takes care of the business to business agreements, it instructs business what to do and how to price goods or services? It deals with behavioural issues of business i.e. ex ante issues, before they occur. It makes markets and business competitive and therefore, indirectly promotes consumers interests. The Consumer Protection Act instructs business not to do indulge into

---

466 L Ed 307
any practice after the consumer has suffered and the dispute reaches it. It deals with ex post issues. Its objective is consumer welfare and it has reliefs directly for the consumers. The CA, 2002 directly does not provide any relief to consumer but it may take cognizance of a case either suo motu or on information provided by any consumer where it finds that any enterprises has been indulged in any cartel or any other RTP or UTP. It may prohibit the enterprise from continuing in such as practice and fine it for such indulgence. For example, DLF has been fined by CCI for its involvement in making apartment buyers agreements which were unfair to the buyers.

It is also necessary to understand that apart from practices having presumption of RTPs, in all other practices rule of reason has to be applied to find out whether the practice in question is RTP or UTP. Such practices may be necessary to be adopted by any enterprise for its business and may have pro-competitive effect.

Cases on Restrictive trade Practices:

**Bengal Chemists of Druggists Association [(1997)27 CLA182 (MRTPC)]:** Scheme under the enquiry imposed restrictions on the appointment of authorized stockiest, distributors, appointment after termination of the existing stokiest services or on the introduction of new products by existing manufacturers of medicines was held to restrictive trade practice prejudicial to public interest.

**Bata Co Ltd [(1976) 46 Comp Cas 441]:** Bata made agreements with small scale producers of footwear and restrained them from purchasing raw materials from parties other those approved by Bata and also prohibited them from selling additional production to any other party or at prices without Bata approval.

**In re Radhakrishnan International School [RTP Enquiry no 43/1992]:** Students were forced by the school to take at least one full booklet consisting of fate tickets numbering 20 in one booklet. Each ticket was rupees five each. Students were forced to pay for the unsold tickets as a part of the school fees. It was held to be RTP.

**Erlanger Motors Inc. v Ford Motor Co [267 F 2d 11 (6th Cir. 1959)]:** An automobile manufacturer in his franchise agreement required his dealers exclusively handle the manufacturer's car parts and accessories.

Cases on Unfair Trade Practices:

**In re Hindustan Export Corporation [UTP Enquiry no. 29/1985]:** The respondent company offered free gift with every rupees fifty purchase except wool. It also announced discount sale up to 40% on all winter needs. It was held to be an UTP.

**In re Vijay International Products [UTP Enquiry No. 11/1984]:** In this case, the respondents were manufacturing and marketing stoves under the brand name Nutan The stoves were designed by Indian Oil Corporation. They were sold without competent authority inspection and clearance. The stoves that marketed were sub-standard. It was held to be an UTP.

**In re Shreeji Chemicals [UTP Enquiry No. 101/ 1988]:** The company offered free toothbrush with a pack of Vimal washing powder under a sales promotion scheme in 1985 from April to September. The company increased the price of the detergent during the scheme in order to
avoid giving anything free of cost. It was found to be an UTP.

**Summary:** An effort was made in the module to make students appreciate what are restrictive and unfair trade practices and how they are covered by the Consumer Protection Act and Competition Act? The module discussed the concepts of restrictive and unfair trade practices under the MRTP Act, 1968, the Consumer Protection Act, 1986 and the Competition Act, 2002.