Restrictive and Unfair Trade Practices

Where Stands The Consumer?

#0318

कट्स CUTS
Twenty Years of Social Change
1984 to 2003

Restrictive and Unfair Trade Practices

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कट्स ⊠ CUTS

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Introduction

This handbook is prepared as part of a two-year research and advocacy project titled, "A Comparative Study of Competition Regimes of Seven Developing Countries of the Commonwealth", commonly known as the "7-Up Project", undertaken by the *CUTS Centre for Competition, Investment and Economic Regulation* (C-CIER), Jaipur, India. The countries that were studied under the project include India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia. The main objectives of the project were to compare the competition regimes in select developing countries, learn from the experiences of each other, put forward policy recommendations and suggestions, and carry out a comprehensive advocacy drive to build a competition culture in these economies.

Market economy means a competitive market. But a healthy competition in market can be hampered by a monopoly, restrictive business practices (RBPs) or unfair trade practices (UTPs). Competition policy and laws try to see that a free and healthy competition in the market does not get adversely affected by any three of the above. At the same time, competition policy and law should also themselves not become a hindrance to the free movement of the market.

This handbook tries to outline the nature of restrictive trade practices, unfair trade practices and unconscionable conducts, and the response of laws to them in different countries.

Chapter I

Market and Competition

What is a Market? Business needs a customer and a supplier. For any product, for example, edible items, electronic goods or services, *e.g.* banking service, there may be several suppliers and customers. This very combination of customers and suppliers constitutes a market. Therefore,

Market = Product/Service + Supplier + Customer

However, one also sees another interpretation of the term 'market', which is basically from the supplier's perspective. One may hear suppliers saying that there is no market for a particular product, or that there is a "good market" for another one. Here, 'market' reflects the degree of demand of that commodity among the consumers.

Who is a Customer? A customer is one, who buys products from the market. For example, if 'A' goes to buy a TV in the market, then 'A' is the customer.

Are Customer and Consumer Same? 'Customer' and 'consumer' may be both—same or different persons. For example, if 'A' buys a product for 'B', then 'A' is the customer while 'B' is the consumer. A consumer, in most simple terms, is a person, who actually uses the product. The distinction becomes important when a customer is an industry and consumer, the person, who uses the final product.

Box 1: Customer vs. Consumer

To a pharmaceutical industry, some chemicals may be provided by specialised manufacturers of those chemicals. In this case, while the pharmaceutical industry is the customer, it is not the consumer. Consumer is the person, who uses the medicines. In this case, the person using the medicine will be the customer and the supplier may be the retail shopkeeper, who sold the medicine to that consumer.

Who is a Supplier? A supplier is the person, who reaches the products to the customers. For purposes of Competition Act, examined from the consumer's point of view, supplier includes every person in the chain starting from producers to the ultimate retail sellers.

Box 2: Supplier - An Illustration

'A' is the manufacturer of certain components used in computers. Through various unfair practices, he has monopolised the market of some specific component, and as a result, is selling it at a very high price. Since the manufacturer of ready computers will be buying this component at a high cost, the price of computers in the market may go up, which may adversely affect the computer buyers. In this case even though the immediate retailer or the manufacturer of the computer is not indulging into restrictive trade practices, the consumer is adversely affected. Therefore, from the consumer's angle, even the manufacturer of the costly component is the supplier, although in technical terms, he may be the supplier only to the manufacturer of computers.

Market of What – Product or Service? Generally, we use the term market for products. But the market also includes the one for services, like financial services, health services etc. Besides, market can also be that of intellectual property.

TYPES OF MARKET

There can be two types of market: *product market* and *geographic market*. We have to determine a market from the buyer's perspective, *i.e.* a buyer's ability to switch from one product to another, or from one supplier to another.

What is a Product Market? Here, a buyer is able to switch from one product to another closely substitutable product.

Box 3: Product Market - An Illustration

A manual typewriter supplier in a town 'X', who is the only supplier, hikes the price, or two manual typewriter suppliers working in collusion raise its price. But, a sizeable population using manual typewriters decides to switch over to electronic typewriters, as they provide better facilities at about the same price. Here, the product is the manual typewriter, with the electronic one being a close substitute of the former.

It is noteworthy that in product market also, geographic area is important; but it is the product that is substituted rather than the supplier of the product.

What is a Geographic Market: A geographic market is determined on the basis of customers' ability to substitute one supplier with another. If one supplier does a small hike in the price of a product and the customer is able to switch to another supplier with least inconvenience, then both suppliers come into the same geographic area. In practice, the limits of geographic markets are often determined by transportation costs, transportation time, tariffs and regulations. For example, if it takes more time and transportation cost to bring a product home, it may work as a setoff against whatever price advantage the other supplier may be giving. Tariff costs may also limit the area of market.

Box 4: Geographic Market Tariff Cost and Boundaries of Geographic Market
Even if it is otherwise convenient for a buyer to get a laptop from the USA, the heavy duty in India works as a disincentive for the Indian consumer to buy a laptop from outside India. Therefore, from the view-point of Indian laptop consumers, India is their geographic market.

Regulations, such as those protecting health and safety, or licensing requirements, also serve as barriers. A dairy might be licensed to sell milk in one administrative region and not in another, or a professional, such as a healthcare worker, may be licensed to practice in one region, but not in another.

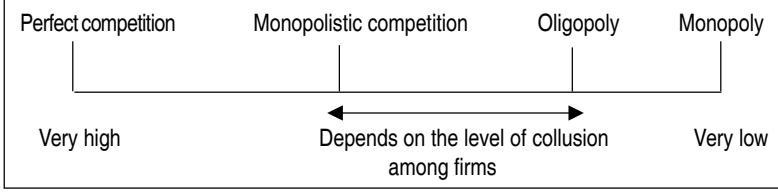
WHAT IS COMPETITION?

Among both customers and suppliers, there works an instinct for gain. A customer wants to get the best-possible product at the cheapest possible price, while the supplier wants to get as much return as possible for the investment he has made in the production and marketing of the product. This instinct to gain of the two together creates a situation for competition. Competition in market means the process, whereby suppliers try to get customers by adopting various methods. These methods can be fair or foul.

MARKET STRUCTURE

Depending on degree and type of competition, a market can be of various types. These very 'types' are called different market structures.

Box 5: Degree of Competition



What is a Perfect Market? An ideal situation for any market would be that there are a large number of suppliers, who try to provide the best-possible product, for which they invest in research and innovation to keep continuously improving its quality and provide the product to the buyer at a price, which, while covering their production and marketing cost, does not prove costly to the buyer also. In other words, sellers try to supply the best product at the best-possible price. In this ideal situation, their aim is not to cheat or defraud the buyer by working in collusion with other sellers or by throwing other sellers out of market and making the buyer helpless. Instead, they try to woo buyers with the quality of their product and marketing ability. In other words, the competition is *positive* and not *negative* and the means employed are fair, not foul. If this situation exists between the community of buyers and sellers, the market is said to be an ideal one — perfect market.

What is a Monopoly? However, there may be an exactly reverse position. There might be a jealous and overbearing seller, who is not ready to tolerate any other seller in the market. For this, he may adopt various strategies. Most common of which is to drive away the competitors (other sellers), he may initially sell his goods at a cost, which is less than the cost that he has invested in producing and marketing the goods.

Box 6: Predatory Pricing

If a TV is normally produced at Rs. 1,000 and packing, marketing and other costs come to Rs. 500, it is only natural that the seller will sell the goods at a price, which is more than Rs. 1,500. But one seller deliberately sells the TV at Rs. 1000 or Rs.1200. Now, this may be because of better and cheaper technology that the seller is able to produce goods at a cheaper cost and, therefore, has an advantage over his competitors; or because he is deliberately pricing it below the cost. While the former will be a practice welcomed in a perfect market, the latter will not, because it is against the normal human instinct of gain of the seller. He is actually selling at loss. The purpose here is to drive out other competitors from the market, as the buyers will go to the seller, who sells at the lowest price because of their instinct for gain. Other sellers, who because of the lack of resources, are not able to price their product at such a low cost, will suffer loss and would close their business.

This type of pricing of goods below cost to drive out the competitors from the market is known as *predatory pricing* (Box 6). Once other competitors are driven out of the market, the buyers are left at the mercy of the only seller left and then that seller also usually raises the price — both to recover the loss he suffered earlier by pricing the goods below the cost and also because now he is not afraid to lose the customers, since there is no other seller in the market.

In order to succeed in his aim, the seller has to ensure that no other competitor enters the market in future also. The means that a monopoly seller adopts to ensure that no other competitor enters the market is known as *entry barrier*. The situation of only one seller left in the market with the whole community of buyers flocking him is known as monopoly.

Monopoly situation is exactly the reverse of the ideal market situation, because it is considered to be in the interest of the customers that there are number of sellers in the market, so that customers may have choice, and the inevitability of competition between sellers because of their interest in profit will eventually further the interests of the buyers by continuously providing them with better goods at the best possible price. A monopoly means end of competition, where the buyer becomes a loser.

However, in real life, while perfect market is impossible, the examples of monopoly are to be found comparatively in good numbers. But what we usually see are examples of monopolistic competition and oligopoly.

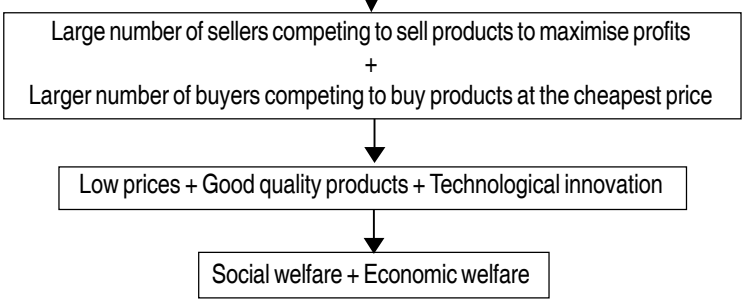
What is an Oligopoly? In oligopoly, there are large number of buyers with few sellers. Sellers work in collusion with each other and barriers of entry are high.

In other words, small number of sellers secure the market for themselves and ensure that no other competitor enters the market. Since the sellers, even though more than one, work in collusion with each other, customers are left at their mercy, which hurts the interests of the customers.

What is a Monopolistic Competition? Monopolistic competition refers to a situation, where there are a large number of buyers and sellers but the sellers are always scared of being thrown out of the market, and this very scare governs their business technique. What they actually apprehend is decrease in the demand of goods from the customers' end. This usually happens when the sellers are not selling identical goods, but closely substitutable goods. In this situation, sellers apprehend that the customers may prefer other substitutable goods in the market to their own goods. This may induce them to indulge in various foul practices.

Therefore, an ideal market is a competitive market, with large number of buyers and sellers adopting fair means to compete. This situation is supposed to be the best, since it compels the sellers to innovate and furthers the interests of buyers by providing them with best-possible product of their choice at the "best-possible" price. This situation furthers the interest of the society as a whole.

Box 7: Perfect Competition



However, as stated earlier, it is difficult to find a perfect market. Competitors may indulge in practices detrimental to the competitive structure of the market. These practices are known as *restrictive business practices (RBPs)* or *restrictive trade practices (RTPs).*

Chapter II

Restrictive Business Practices

Market power is essential for a firm to engage in anti-competitive activities in the market. Thus, competition authorities, while examining the activities of any firm to see whether it is adversely affecting the competitive environment in the market, also examine the market power of the firm.

What is Market Power? The advantageous position of the firm in the market, like greater market share, exclusion of other competitors from the market, entry barriers etc. is called market power.

Box 8:
Market Power

Restrictive Business Practices — Concentration Problem

Competition in the market may get impeded in one of the two ways:

1. Through concentration; or
2. Due to use of restrictive business practices.

What is Concentration? Concentration means reduction in the number of suppliers in the market. When one supplier controls the entire market, it is monopoly; when a few suppliers control the entire market, it is an oligopoly. This concentration may result because of merger of two or more firms into one or by use of restrictive business practices, such as predatory pricing or by restricting the availability of necessary inputs to the competitors, etc. Concentration may also be the result of competitive process, where one competitor, because of his technological achievements etc., is able to get a dominant position in the market.

There is also, what we call, natural monopolies. Natural monopolies result in a situation, where because of the nature of activity, it is not possible to have more than one supplier in the market, *e.g.* railways.

What are Restrictive Business Practices? Restrictive business practices or RBPs are types of competitive behaviour. Competitive behaviour refers to the means adopted by firms in order to achieve their aim to compete. RBPs refer to that behaviour of firms that have the aim and effect of restricting free flow of goods and services to the consumers.

PER SE RULE and RULE OF REASON

As stated earlier, competition can be either/both positive and negative and the means employed can be fair/foul. But it is not possible to always have a positive competition with fair means. The very idea of going ahead, at times, means pushing back the competitor. This pushing back activity is permissible, so far it does not adversely affect competition in the market. Sometimes, even if the activity is adversely affecting competition, it may be permitted, because it is in the public interest. The evaluation of positive impact of a restrictive business practice against its negative impact is known as ***rule of reason.***

In *per se rule,* an activity or a fact is considered to be bad in itself, irrespective of its consequences. For example, *per se rule* is applied against cartel arrangements in the USA.

Most of the countries apply rule of reason while dealing with restrictive business practices (except for cartels, which is illegal in many countries). If one indulges in any business activity, which has an adverse effect on the competitive environment in the market, it is censored by the competition law of the country. If it does not hurt competition, the act is not considered illegal. In fact, some of the RBPs actually help the consumer and the market, *e.g.* capacity adjustment agreements, joint R&D agreements, etc.

Nature of Restrictive Business Practices: RBPs are usually result of an agreement, understanding or arrangement between two or more persons engaged in a trade or industry. The resulting restraint out of these agreements may be either vertical or horizontal. However, some RBPs may also be practised by a firm on its own, *e.g.* predatory pricing. Predatory pricing is linked with the problem of monopoly or concentration of market power.

Box 9: Restrictive Business Practices[1]

Licensing Agreements	Efficiency promoting agreements	Information agreements	Exclusionary & enforcement practices	Vertical arrangements	Horizontal arrangements
- Restrictions on Competition in licence agreements (patents, trademarks, copyright)	- Capacity adjustment agreements	- Investment	- Predatory price cutting	- Recommended resale prices	- Buying
- Cross-licensing (patent pools)	- Joint R&D agreements	- Output, sales, orders	- Collective refusal to deal	- Resale price maintenance	- Selling: Market sharing
	- Standardisation agreements	- Costing & pricing data and systems	- Fines & penalties		- Restrictions of the laying down of capacity
	- Specialisation agreements	- Price	- Secret courts		- Sales restrictions by percentage quotas
			- Loyalty rebates		- Sales restrictions by absolute quotas
			- Refusal of admission to trade association		- Price agreements (informal & formal)
			- Bottleneck agreements & control		
			- Aggregated rebates		
			- Collective exclusive dealing		

VERTICAL ARRANGEMENTS

Vertical arrangements or restraint usually includes a bilateral agreement. The parties involved are usually at the vertical level of business activity–one party is the supplier of inputs to the other party's business activity–like, distribution agreement between the manufacturer and the distributor. The major vertical arrangements involving restrictive trade practices are:

1. Tie-Up Sales: Tie-up sales refer to that act of the seller, whereby he forces the buyer of one product to buy another product service or technology. Such a situation may arise when the product sold by the seller have different levels of demand intensity–while one product is a fast-moving product, the other is a slow-moving one. For example, the manufacturer of a popular brand of tractors may ask the buyer to purchase, in addition to the tractor, also the accessories and attachments, or the supplier of cooking gas may insist on the buyer's buying the burner, along with the gas connection. Through tie-up sales, a

supplier seeks to exploit his dominant position occupied in a fast selling product market in respect of a slow selling product market.

Box 10: Tie Up Sales by Sugar Plants in Lithuania

Lithuania had four sugar plants. They processed sugar beets grown in Lithuania and produced half of the total amount of sugar consumed in the Republic. The other part of sugar was imported. The plants signed agreements with sugar growers who supplied them with raw materials. The sugar beet growers in the Joniskis district complained to the State Price and Competition Office that the Pavenciai sugar plant refused to sign an agreement with some farmers for the purchasing of sugar beets in the year 1994-95. In addition, the plant imposed additional economic conditions: farmers had to buy sugar beet seeds supplied by the plant and different purchasing prices for sugar beet were fixed.

The circumstances that the plant defrayed transportation expenses to those farmers who delivered sugar beets within the distance of 50 kilometres was taken into account in determining the sugar beet purchasing market. The territory in which transportation expenses were compensated was defined as the geographical market. The compensation of transportation expenses is very high for the Lithuanian farmer. The sugar beet growers within the indicated territory had no choice of to whom to sell sugar beets. For that reason the Pavenciai sugar plant was considered to be a dominant entity in the territory.

An investigation ascertained that the farmers who had complained had always grown sugar beets and sold them to the Pavenciai sugar plant. It was also ascertained that the plant had refused to conclude agreements with those farmers who were unwilling to buy sugar beet seeds from the plant. The farmers complained that the proposal to buy seeds had come too late and that they had already provided themselves with seeds. In spite of this, many farmers accepted the new terms. The investigation led to the conclusion that the plant had infringed the Law of Competition of Lithuania.[2]

2. Exclusive Dealing: Exclusive dealing is the practice, whereby a manufacturer or supplier of goods restraints his distributors from dealing in competitive products and requires them to deal exclusively in the products manufactured and supplied by him. Exclusive dealing invites regulatory measures if it adversely affects, or may affect, competition in the market.

Box 11: Exclusive Dealing by Usha Sales Pvt. Ltd. in India

In *RRTA* vs. *Usha Sales Pvt. Ltd.*, leading supplier of sewing machines, fans, water coolers, and diesel engines, required its dealers not to "deal directly or indirectly in the sale of any competing brand of the agreement products". The MRTP Commission of India held that the stipulation amounted to a restrictive trade practice since it restricted the dealer from acquiring, or otherwise dealing in, any goods other than those supplied by the company. However, the Commission found that these practices were either not adversely affecting competition or they were in public interest therefore it allowed them.

As regards sewing machines, the Commission observed that the company faced competition from a foreign company, which got sewing machines, manufactured by a local company and marketed them under its brand name. The foreign company also had exclusive dealing arrangements. The Commission held that the practice had negligible effect on competition. It observed that the after-sale service and hire-purchase facility were more effective, and training of mechanics, availability of genuine spare parts and replacement of defective machines was easier where the dealer was an exclusive dealer. The Commission accepted company's contention that the stipulation of exclusive dealing eliminated the possibilities of spurious machines and parts being passed off as genuine Usha products and the dealer's desire to push up the sale of inferior machines if he was allowed to deal in competitive products. Therefore Commission allowed the plea of public interest.

As regards exclusive dealing in the distribution of diesel engines, the Commission held that, in view of the nature of the product, necessitating after-sales service, hire-purchase facility, indemnity to the lending banks, prompt repair and supply of spare parts and effective implementation of the guarantee, the exclusive arrangements were not only desirable from the view point of the carrying out of these facilities efficiently, but also as a weapon of competition. Therefore the Commission allowed the practice.

With regard to water coolers, the Commission held that exclusive dealership would hardly have any impact on the situation, because there were five other suppliers of the product, and water coolers were generally purchased by expert buyers and required installation and maintenance services during the guarantee period. Therefore, the Commission allowed the practice.

Contd...

In case of fans, the Commission observed that since Usha sales accounted for only one-fifth of the total sale of fans, the impact of exclusive dealership on competition was marginal, except in small markets where the respondent's stockists were located[3].

3. Price Discrimination: When a manufacturer or a supplier of goods charge, for the same or similar product, a higher price from one dealer and a lower price from another, the practice is referred to as price discrimination. The discrimination in price can be made either through fixing or charging different prices from different buyers or classes of buyers or by granting discount, commission, allowance or rebate at different rates to different buyers or classes of buyers.

Box 12: Price Discrimination in Czech Republic

In a case in Czech Republic, company 'A' were manufacturers of fittings and fitters products in general. They delivered these products to 'X' company. Five of the 'X' company were wholesalers marked as 'XY'. While company 'A' were selling its products to both companies, 'A' provided additional allowances to and rebates to 'XY' group, for doing publicity for the products of company 'A', fort marketing research they were carrying out etc. In the course of investigation it appeared that all three partners owning company 'A' were at the same time co-owners of the 'XY'. It followed from the investigations that the partners of the co-owners of the 'XY' companies, acting as partners both in the manufacturing and distributing companies, wanted to acquire better conditions compared with 'X' companies. These facts convinced Ministry of Economic Competition of Czech Republic that company 'A', was basically interested in the prosperity of 'XY' companies, namely in providing for them more favourable market conditions than were those of the 'X' companies. This approach of the company 'A' was the result of an agreement between 'A' company and 'XY' company infringing competition.

4. Re-Sale Price Maintenance: With a view to exercising control over the price to be charged on re-sale of his product, a manufacturer may stipulate the price to be charged by the dealers. Such a stipulation may be made either through suggested re-sale prices or through fixed re-sale prices.

Box 13: Resale Price Maintenance by Bata India Ltd.

Bata India Ltd., leading manufacturer of footwear, marketing its products under the brand name 'Bata' through its own retail and wholesale outlets also entered into agreement with wholesale and retail dealers for sale and distribution of footwear through them under the brand name 'BSC'. The price lists circulated by Bata to all its dealers indicated the wholesale and retail prices, per pair, for each variety of footwear, and the retail price was embossed on each footwear. The Commission passed a cease and desist order against this practice and directed Bata to conspicuously mention in the price list that "the dealers are free to charge prices lower than those prices" and to emboss on the footwear "Price not to exceed Rs.———"[4]

5. Territorial Restriction: A manufacturer or supplier of goods often allocates a sales territory or geographic area to a distributor, requiring him to confine his selling operations only to that territory. Thus the distributor is required not to sell the product outside the specified territory or market and is deprived of an opportunity of competing with other distributors outside that territory, particularly the distributors of that product.

Box 14: Territorial Restriction by Spencer and Co. in India

In the *Spencer and Co.* case in the restrictive trade practice enquiry against Spencer & Co. Ltd., engaged, *inter alia*, in the distribution of refrigerators and air conditioners, it was alleged that Spencer prohibited its authorised dealers from selling products to any person outside the territory without its written consent. The MRTP Commission of India held that the impugned clause relating to the allocation of territory amounted to a restrictive trade practice. But it was found that the practice was in public interest, as the restriction was not connected with the inter-brand competition, but that it affected competition among the company's dealers *inter se.* It agreed that even out of 20 percent of Spencer's total trade, apart from the sales in large cities, where the number of its dealers was more than one, and therefore, the competition between them was unfettered, the restriction did not directly or indirectly discourage competition to any material extent.[5]

While in the above case practice was considered to be restrictive trade practice but in public interest, in the case given below a vertical arrangement was not considered to be restricting trade.

Box 15: Territorial Restriction not infringing Competition Goetze Case

In *Goetze Case* in the restrictive trade practice inquiry against Goetze (India) Ltd., manufacturer of automotive parts including pistons, rings and sleeves, the MRTP Commission of India held that the territorial restriction applied only to the first line of distribution (wholesale), and not to the second line (retail), and that the arrangement for the imposition of a territorial restriction at the wholesale level ensured that sufficient stocks of products were available in each territory. As such, the practice did not amount to a restrictive trade practice[6].

Some vertical restraints might be considered useful, for example, licensing agreements.

6. Licensing Agreement*:* Licensing agreements in the form of patents, trademarks, copyrights and licenses give patentee the sole right to use the invention. Laws permit the owners of patents to license other parties to use them and these licenses may impose price and sales restrictions on the licensee. The licensing agreements are considered to promote innovation and technology.

HORIZONTAL ARRANGEMENTS

These are usually collective arrangements. These arrangements operate between manufacturers or dealers in the same product line, *e.g.* between producers of gas burners or of cars. These agreements broadly include what are known as cartel agreements and non-cartel agreements. The most common types of cartel agreements among sellers are price-fixing agreements, bid rigging agreements, customer allocation agreements, territorial allocation agreements and output restriction agreements. The most common among buyers are price-fixing agreements, allocating agreements and bid-rigging agreements.

Cartel Agreements

Price Fixing: Price fixing is a term generically applied to a wide variety of actions taken by competitors having a direct effect on price. The simplest form is an agreement on the price or prices to be charged on some or all customers. At a minimum, cartels will generally set prices above those of the least-efficient producer in the market. In addition to simple agreements, on which price to charge, the following are also considered price-fixing:

- Agreements on price increase;
- Agreements on a standard formula, according to which prices will be computed;

- Agreements to maintain a fixed ratio between the prices of competing but non-identical products;
- Agreements to eliminate price discounts or to establish uniform discounts;
- Agreements on credit terms that will be extended to customers;
- Agreements to remove products offered at low prices from the market so as to limit supply and keep prices high;
- Agreements not to reduce prices without notifying other cartel members.
- Agreements to adhere to published prices;
- Agreements not to sell unless agreed on price terms are met; and
- Agreements to use a uniform price as the starting point for negotiations[7].

Box 16: Price Fixing in Pork and Pork Products

In Romania, pork and pork products are an important food of the population, having a large share and traditionally being in higher demand than its substitutes, beef and fowl. The geographical market studied and investigated for the purpose of this case was that of Bucharest since it represented 20-25 percent of the total sales of pork and pork products in the country. The input originates in almost all the country but the main share 70 percent is of six breeders and processors located within 100 kilometres of Bucharest each of which were vertically integrated. An Association of Employers in the field of breeding hogs and processing pork is organised in Romania. Its statutory goal is, among others, granting managerial consulting but without decisional power, to the member breeders and processors. It has no power to establish or impose, in a centralised manner, concerted policies in investments, productions, prices, etc.

During October 1994, it was noticed that without major changes in demand compared with previous months, the supply of pork and pork products decreased significantly on the market of Bucharest. By the end of October, although the supply of pork increased considerably, but along with an increase in the price especially that of the input pork, (which were almost identical to all six suppliers). This led to the leveling up of the prices of all pork products. The investigation of the Directorate General for Policy and Protection of Competition concluded that this general price increase happened after the managers of the six factories met several times, under the aegis of the Association of Employers of pork-producing industry, and concluded an agreement on concerted prices, based on highest marginal costs, thus avoiding competition among them. The investigation found that only one producer offered 20 percent lower prices and that other producers exerted pressure on it (including refusal to deliver to him the input hogs)[8].

Box 17: Price Fixing in Service Sector

An interesting example is the way price fixing is practiced in the banking sector in Bangladesh. Under the structural adjustment reforms in the 1990s, Bangladesh experienced an interest rate deregulation. The ultimate purpose of interest rate deregulation was to ensure a smooth and efficient functioning of the financial market under competitive market forces. Under the reform measures, banks are now totally free to determine the structure of deposit and lending rates. Nevertheless, fixation of interest rates is not determined by competitive market forces but rather through price-fixing and cartelisation. When it comes to fixing interest rates, banks are divided into two distinct clubs: one private commercial club and another national commercial banks club. The relatively smaller banks of each club generally follow the relatively bigger ones in terms of price fixation, rather than trying to compete with one another by differentiating interest rates[9].

Bid Rigging*:* Bid rigging is an agreement between parties over which competitor will win a tender, often from government agencies. This agreement may be accomplished by one or more bidders agreeing to refrain from submitting bids, or by the bidders agreeing on a low bidder and then bidding above that firm's intended (and inflated) price. The tendering process is designed to promote fairness and ensure that the lowest possible prices are received. Bid rigging subverts this competitive process. Generally, following categories of bid-rigging are prevalent:

(i) Bid Suppression: One or more competitors agree to refrain from tendering or to withdraw a previously submitted tender so that another company can win the tender. Those who do not join this agreement may be prevented from tendering by refusing to supply materials or quotes for sub-contracts.

Box 18: Bid Suppression in French TGV

The French TGV cartel attempted to obtain monopoly profits in connection with the building of the high-speed train system. The cartel was threatened by the prospect of a competitive bid from a foreign firm. The cartel members then offered to pay the other firm up to FF 75,000,000 if it could submit a higher bid on one part of the project and did not bid on any other part of the project. After the firm rejected the payment and submitted the lowest bid, the conspirators corrupted the auction process in a second attempt to exclude it, but they were discovered and fined FF 378,000,000[10].

(ii) Complementary Bidding: The competing companies agree among themselves who should win a tender, and then agree that the others will submit artificially high bids to create the appearance of vigorous competition. Or the losing companies may submit competitive prices, but along with other unacceptable terms.

Box 19: Complementary Bidding in Printers

Four major printers used to supply manifold business forms used for computer printout paper, snap set forms and similar products. Historically, the government tendered original orders but placed repeat orders with the firm that had supplied the first order. After concluding that it could improve prices by tendering all orders, the government began to do so from a list of qualified printers, including four major firms. The resultant price decline became a concern to the major companies and their sales managers. The sales managers of the four companies met and agreed on a bidding strategy. The price book of the market leader, available to all, was used to determine benchmark prices for each product for all the companies. It was agreed that when a tender was called, the previous supplier of the particular form would bid at or below the benchmark price, whereas all others would bid higher. After a while, the companies concluded that this method was too difficult and agreed that the former supplier would simply tell the competitors how much it was bidding and others would bid higher or not at all. During the conspiracy, the government called about 300 separate tenders, and bidding patterns were consistent with the agreements. The agreement started to break down after the entry of new competitor, which began winning bids. The new firm was approached to join the existing arrangement. The new competitors, instead, complained to the authorities and provided initial information that led to the start of the investigation[11].

(iii) Bid Rotation: The competitors take turns being the winning tender, with the others submitting high bids. The companies agreeing will generally try to equalise the tenders won by each over time.

Customer and Territorial Allocation*:* Prices can be controlled by agreements among firms to allocate markets or customers among them, thus eliminating competition. Market division agreements may have a greater impact on competition than price fixing. The single remaining market occupant is freed from competition with respect to prices, service quality and innovation. Market-

allocation agreements eliminate the need to police the pricing practices of the companies party to the agreement and the need for producers with different costs to agree on appropriate prices. Firms can decide to allocate markets geographically or according to customers or classes of customers.

Box 20: Customer & Territorial Allocation by Spanish Sugar Production

Four sugar producers in Spain were engaged in market allocation agreement (apart from price fixing, sales quota agreements) that restricted sugar supply to the level at which maximum monopoly profits could be earned. As a result, Spanish sugar prices, for many years, were five to nine percent higher than those in the rest of the Europe. Based on a complaint from associations of businesses that used/purchased sugar, and based on information collected through a raid, the Spanish Service for the Defense of Competition uncovered the sophisticated cartel and slapped 8.7mn euros fine on the four producers[12].

Export Cartels: Export cartels concern only export transactions. They are legal in many countries since they do not affect domestic producers. The agreement affects the consumers of the importing country. In such cases question arises whether courts of importing country can try such cartel agreements since it was made outside the territory of the importing country. Importing countries deal with export cartels in two different ways:

1. Some countries do not take any action against export cartels on the ground that since the agreement was made outside their country therefore the court lacks the jurisdiction.
2. Some countries do take action against export cartels on the ground that the agreement has an effect in their country therefore the court has jurisdiction.

Many persons justify cartels on the ground that otherwise small companies may find it difficult to survive. Still many countries treat cartels as illegal and they invite severe sanctions. In the United States and Canada cartels are prosecuted as crimes.

Non-cartel Agreements

There might be agreements, which may not be a straightforward restraint on trade. It may involve integration of some or all companies' research, manufacturing, marketing or distribution operations, or may entail the creation of a new or improved product or method of distribution.

If the agreement enhances efficiency they may not be condemned. Once a restraint is shown to potentially enhance efficiency, then the investigator must

determine whether the restraint is necessary to achieve the asserted pro-competitive goals and whether the agreement also has the potential to create or facilitate the exercise of market power.

Unlike cartel agreements which are not supposed to promote efficiency in any way and wherein the competition authority examines the effect of an activity on competition in the market (unless *per se* rule is applied against cartels in which case formation of cartel itself will be illegal irrespective of its consequences), in non-cartel agreements competition authority will have to balance the pro-competitive effect against the anti-competitive effect and decide:

Joint Ventures and Agreements to Work Together: Sometimes two or more suppliers may come together and co-operate to be able to perform better in the market. Such agreements include joint ventures and specialisation agreements.

(i) Joint ventures: The firms may have different strengths, but by co-operating they may become more effective or better able to create a new product or service that they could not provide separately. For example, firms operating in different regions could form a team that together would cover a larger area. A firm that has good quality product but a poor sales distribution network could team up with a mediocre product with a large and efficient sales network. These agreements are loosely called joint ventures.

(ii) Specialisation Agreements: This is another form of co-operation. Suppose two firms are making a full line of products, but they decide that they could save money if one firm made only large products and the other firm made only small products, so that each could have economies of scale in production. The firms might enter into a specailisation agreement or joint venture. Each would specialise in manufacturing the products that it makes best but would sell both products under its own name.

The distinguishing feature of joint venture and specialisation agreements is their intent: to make participants better competitors. One quick test of this intent is to examine whether significant competition will be left in the market. If not, then the purpose and actual effects of the joint venture must be examined more closely.

Facilitating Practice Agreements: A facilitating practice agreement calls for the adoption of a practice-sharing information, adopting a product standard, or adopting particular contracting or pricing practices-that makes it easier for a

cartel to operate or for firms in an oligopolistic market to avoid competing with each other, even without any explicit cartel agreement. These facilitating practices may take many forms, including information exchanges, fixing standards for products, or price protection clause, and delivered pricing systems. These actions do not directly restraint competition, but they make it easier for the industry to reach a tacit (or explicit) agreement on pricing or output. As such a facilitating agreement may reduce competition although an explicit agreement on price or output cannot be proven.

Facilitating practices fall into two functional categories:

1. Practices that make it easier to reach an agreement; and
2. Practices that lessen incentives to cheat.

1. ***Practices That Make It Easier to Reach an Agreement:*** The sharing of information may make it easier to reach an agreement on price increases or output restrictions. Incomplete or delayed information about rivals' prices, transactions, and costs can complicate reaching an oligopolistic pricing accord. Agreements to share information that can eliminate or reduce this problem can take a variety of forms: post transaction price verification, cost and customer information compiled by trade associations or companies themselves or public or private announcement of future prices. The information exchange may involve either private information or information that is publicly available but difficult or costly to compile.

2. ***Practices That Lessen the Incentives to Cheat:*** These practices make it easier to police pricing and output in the industry, and thus to detect cheaters, or reduce or eliminate the gains from cheating. Information exchanges make it easier to detect cheating, particularly if detailed information is exchanged about transactions on a regular and current basis.

Other practices that may reduce the gains from cheating are price-protection clauses. Price protection clauses hold that the seller will either meet any price that the buyer is able to obtain from another supplier or release the buyer to purchase from the other seller. These practices are not always anti-competitive. They can benefit customers in many circumstances. However, these practices can become anti-competitive when practised in highly concentrated industries, and when other conditions are conducive to the formation of a tacit or explicit cartel.

Boycott and Joint Refusal to Deal: A horizontal agreement among competitors not to deal with other competitors, suppliers, or customers is a joint refusal to

deal or a boycott. Such agreements could be cartel conduct or part of a non-cartel agreement associated with a potentially pro-competitive joint venture or agreement to co-operate. Joint refusals to deal with customers unless they agree to pricing or other terms set by the participating firms are simply means of imposing these terms. There is no arguable enhancement of efficiency associated with such conduct. Similarly, if competitors join together to pressure suppliers or customers to stop dealing with another competitor, they are also engaging in cartel conduct.

Box 21: Joint Refusal to Deal by Tyre Manufacturers

The agreement among all the eight automotive tyre manufacturers in India during 1971 provided that the defaulting customers should be placed on the 'stop list' if 50 percent or more of the reciprocating competitors approved such an action. The agreement further provided that if two or more competitors objected to the enlistment of a new dealer, he would not be appointed a dealer unless agreed to by them. The MRTP Commission declared the impugned clause of the agreement void and restrained the companies from indulging in the said restrictive trade practice[13].

However, some joint refusals to deal can create efficiency benefits, rendering markets more competitive. Some refusals to deal "serve economic efficiency or advance the group's general economic self-interest without seeking to diminish any other group's profits. Others even advance social and moral goals largely unrelated to the group's business or economic interest. It would seem necessary, at least initially, to assess their economic impact beyond the advantage they create for the group engaged in the boycott" (Gellhorn and Kovacic 1994, 213-14).

A classical example is large-scale boycott organised by the leader of independence movement in India against British goods in the pre-Independence period in India. It was necessary for the establishment of domestic industry.

Trade Associations and Lobbying: There are many advantages of trade unions. But trade association meetings can also provide a forum for cartel activities, and trade associations themselves may occasionally become involved in anti-competitive activities. The sharing of competitively sensitive information can foster or support tacit or explicit collusion, and trade associations are often ideally situated to facilitate such anti-competitive exchanges. Trade association meetings may also create a forum for discussing industry conditions and may

range beyond legitimate bounds and result in agreements to limit output or stem price decreases. Since trade association meetings bring competitors together, unlawful agreements may be hatched in informal meetings or social gatherings away from official activities.

Sometimes trade associations try to persuade the government to take anti-competitive actions. The association could ask for monopoly authority, legalised cartels, import restrictions, setting of cartel prices or restricting of entry, or special restrictions or prohibitions on competitors. "Should such activities be subjected to competition law in a liberal democratic society?" is still a debatable issue.

PREDATORY PRICING

Predatory pricing is pricing of the product below the cost of production with the intention to drive out competitors from the market. Predatory intention is something difficult to prove against any firm. In a way, pricing below cost of production may itself be considered an unusual practice hinting towards predatory intent but sometimes it can be a usual trade practice in some industries.

Box 22: Predatory Pricing by Tri–Sure

In *Tri–Sure India*, a monopolistic manufacturer of flangws and bungs (drum barrel closer sets), was allegedly quoting low prices in order to wipe out small competitors and quoting different prices to different customers without reference to the company's own price list. The company explained that nearly 80 percent of the sales made by it were only against tenders in which no question of any differential pricing could arise and that the balance of its products were sold only to direct users, on the basis of negotiated prices, and that its impact on competition was almost negligible. The MRTP Commission accepted the undertaking of the company that it would not sell the products at a price below cost determined on established principles, and if any contingency arose to sell the products at prices below cost, it would be only on account of extreme difficulties in the form of distress sales, and that it would not do so with a view to wiping out competition[14].

As stated earlier depending on the law of a particular place an activity may be considered *per se* bad irrespective of its consequences or it may be subject to rule of reason approach in the sense of examining how is the activity affecting competition. The process of determining the impact of a restrictive business practice on market is not a simple one.

Chapter III

Regulation of Restrictive Business Practices

Regulation is defined as a "sustained and focused control exercised by a public agency over activities that are valued by a community."[15] This characterisation indicates that regulation is concerned with those activities that are of general value to the community. There are three approaches to regulation:

(a) Collectivist System: Society or government working as an agent of the society *directs* individual's activities to socially desired ends. Therefore regulation is more in the nature of government 'control' of individual activity and market.

(b) Market System: Under the pure market system the idea is that market process itself regulates individual and since every individual as a *rational being* decides for his welfare it finally results in the general welfare.

(c) Regulated Market System: Regulated market system is a moderation of the above two extreme systems. This system works on two presumptions:
   (i) That individual interest and general welfare often clash; and
   (ii) That market cannot be left to individuals alone. For market to work properly and in everyone's interest, there needs to be some regulatory body, which sets and enforces rules of the game.

Thus, regulated market system allows for individual enterprise and freedom unless the activities of individuals adversely affect the working of the market, or are against public interest. Again, much depends on how a country defines its market system and public interest. Therefore, the whole issue of difference between controlled market and regulated market involves the question of degree of regulation employed on the players in the market.

Regulation of restrictive business practices may involve following approaches:

1. Some restraints in some jurisdictions are considered *per se* illegal, for example, cartel in the United States. It is presumed that no efficiency gains result from these arrangements.
2. Some restraints may be examined and allowed on efficiency grounds. An otherwise trade restrictive agreement may be held to be enhancing efficiency because:
   (i) It may be found to be *pro-competitive, or*
   (ii) It may be in *public interest*. Getting exemption on this ground means that an agreement is accepted to be trade restrictive, but the gains from the agreement outweigh its anti-competitive losses.

Per Se Illegal or Presumed to be Trade Restrictive?

In case a trade practice is considered *per se* illegal then only the fact of its existence has to be proved. *Per se* illegal has to be distinguished from presumed to be trade restrictive. If a practice is presumed to be trade restrictive it only shifts the burden of proof on the persons practicing it, to prove that a practice is although trade restrictive is to be still pro-competitive or in public interest.

What if a practice is not *per se* illegal?

If a practice is not considered to be *per se* illegal, then competition authorities have to examine the impact of practice on the competitive environment. For this, they examine the consumer behaviour with relation to relevant industry, transparency in the availability of information relating to that industry, market share of the relevant suppliers and entry barriers in that industry and weigh the benefits of such agreements against their drawbacks.

Examination of Effect of Horizontal Agreements on Competition

Many horizontal agreements may be useful by promoting research and development, create new or improved products or methods of distribution or improve information flow, and thereby, help facilitate the competitive functioning of the market. On the other hand, horizontal agreements among competitors may eliminate competition, restrict output and raise prices. Agreements that may enhance competition should be evaluated to determine whether they are pro-competitive or anti-competitive on balance. A five-step analysis can be employed[16]:

- Is the restraint inherently likely to restrict output and raise prices?
- Is the restraint naked or is obviously related to some pro-competitive integration of economic resources?

- Will the restraint restrict output and raise prices, or otherwise create or facilitate the exercise of market power?
- Is the restraint necessary to achieve the asserted pro-competitive goals?
- Do the restraint's pro-competitive benefits outweigh its anti-competitive risks?

Examination of Effect of Vertical Agreements on Competition

Provisions for vertical agreements or restraints may have some *desirable* effects[17]:

- They may lower prices because of increased output by existing firms arising from the expansion of demand and economies of scale.
- Vertical restraint generally ensures that sellers earn a minimum profit margin that allows for greater efforts to promote a product.
- Competition between different brands, for example, may also be heightened if competing firms provide incentives to promote their respective brands through vertical restraints. That is, although price competition between dealers of the same branded product may be restricted by means of vertical agreements, competition between different brands may be encouraged because of the incentives for increased sales efforts that profit margins under vertical agreements provide.

Vertical agreements can have *undesirable* effects also[18] , as listed below:

- They may be used to help cartelise an industry or prevent market entry. For example, a network of re-sale price maintenance agreements can be used by a group of colluding manufacturer to enforce a price-fixing agreement by making it more difficult to cheat on the cartel, since vertical agreements facilitate monitoring of the retail price of a product.
- A dominant incumbent may also make it difficult or even impossible for rivals to enter the market by tying up scarce distribution channels through exclusive distribution agreements.
- From a competition law and policy point of view, vertical agreements are most likely to be harmful when at least one of the transacting parties is dominant in either the upstream or downstream markets.

In this context, a three-step approach to the analysis of restrictive vertical agreements can be applied[19]:

1. The analysis should focus on signs of the collective exercise of market power or the presence of market dominance at the upstream or downstream levels. If none of the participants in the agreement are dominant in their respective markets and market structure is such that the agreement is not likely to facilitate collusion, it is unlikely that the agreement will be harmful.

2. If these structural concerns exist, the effect of the agreement on competition should be closely examined.
3. If competitive concerns persist, the analyst should determine whether there are significant efficiency gains arising from them that outweigh the harm to competition.

REGULATION OF RESTRICTIVE BUSINESS PRACTICES AND DEVELOPING COUNTRIES

The response of some of the developing countries to Restrictive Trade Practices is outlined below:

PAKISTAN

Pakistan's Monopolies and Restrictive Trade Practices Ordinance (MRTPO) prohibits unreasonably restrictive trade practices outright and then proceeds by giving a list of practices that shall be deemed unreasonable RTP such as price-fixing, market division sharing between competitors, conditional supply, tied sales, etc. These agreements are prohibited if they are unreasonably restrictive. The practices are not deemed to be unreasonably restrictive if it is shown that it contributes substantially to efficiency, technical progress or exports. Furthermore, it must be shown that this could not have been reasonably achieved by less restrictive means and that the benefits clearly outweigh the adverse effects on competition. The onus of establishing the justification will be on the persons or companies involved in the arrangement.

SOUTH AFRICA

The South African Competition Act of 1998 contains a general prohibition on agreements that have the effect of substantially preventing or lessening competition in a market. Four RTPs (three horizontal, one vertical) are prohibited *per se* while all other agreements are subject to "rule of reason" approach. If a party can prove that gains resulting from the practice outweigh its negative effect, it is not prohibited. The onus is on the parties. Apart from the defence of rule of reason, enterprises can also apply for the exemptions from the Act itself on them. The grounds on which such exemptions are granted are focused more on 'public interest' than on economic impact:

- maintenance and promotion of exports;
- promotion of small businesses or firms controlled or owned by historically-disadvantaged persons; and/or
- to stop the decline and economic stability of an industry.

INDIA

Under the MRTP Act, all agreements relating to RTPs were required to be registered with the DGIR, though investigation could be launched or action taken only when the practice was prejudicial to public interest. Practices listed in the Act were obstruction to the flow of capital or resources, manipulation of price, delivery conditions, etc., restrictions on choice of buyers and sellers, tie-up sales/full line forcing, exclusive dealing, collective price-fixation/parallel pricing, discriminatory dealings, re-sale price maintenance, territorial restrictions/ withholding of supply, restrictions on employing specific method or machinery, exclusion/boycott/refusal to deal or supply and predatory pricing.

Competition Act 2002 declares void any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Out of these agreements or practices:

(a) which directly or indirectly determines purchase or sales prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; and
(d) directly or indirectly results in bid rigging or collusive bidding shall be presumed to have an appreciable adverse effect on competition. However, agreements entered into by way of joint ventures if they increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services will not be considered to have an appreciable adverse effect on competition.

In addition tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance shall be void if they cause or are likely to cause an appreciable adverse effect on competition in India.

Four of them are presumed to be anti-competitive. The Act in addition prohibits practices that limit investment and technical development.

SRI LANKA

Sri Lanka's Fair Trading Commission Act (FTCA) does not prohibit RTPs out rightly but requires the proof that such a practice is against 'public interest'. In this situation it is up to the Fair Trading Commission to prove that the practice

was against the public interest. Thus, compared to other countries the law in Sri Lanka reverses the burden of proof and does not consider any RTP by definition detrimental to the public interest.

ZAMBIA

The peculiarity of Zambian Competition Law is that it prohibits RTP agreements and arrangements that have the aim of preventing, restricting or distorting competition in the market. Other countries on the other hand prohibit RTPs, which have or are likely to have the effect of preventing restricting and distorting competition in the market. The requirement of proof of 'aim' has more to do with proving the intention of the parties whatever might be the effect.

TANZANIA and KENYA

The Fair Trade Practices Act of 1994 of Tanzania and Kenya's Restrictive Trade Practices, Monopolies and Price Control Act 1989 have similar provisions and define RTPs as acts that either reduce or eliminate the opportunities of competitors or reduce or eliminate the opportunities of buyers to acquire certain goods or services. Both these laws enumerate a large number of practices as RTPs. These include all sorts of agreements and the abuse of dominance.

Chapter IV

Unfair Trade Practices and Unconscionable Conduct

Monopolies and Restrictive Trade Practices or MRTP are considered bad if they endanger the existence of competition in the market. On the other hand there are some practices known as unfair trade practices and unconscionable conduct, which are considered to be bad because they harm particular traders and consumers directly.

These largely include cases where the interaction is directly between the seller and the buyer and the buyer or another trader is adversely affected by an unfair act of the seller.

Laws against unfair trade practice and unconscionable conduct are an exception to the classical principle of *caveat emptor* (buyer beware). The principle of caveat emptor was based on the notion that a buyer should make all necessary examination and take all possible care before buying a thing or before entering into contract of purchase. It is increasingly felt that in the growing complicated world of business a buyer becomes helpless and can be cheated in more ways than one.

UNFAIR TRADE PRACTICE

The term unfair trade practice, or UTP, is used in the context of both domestic business activity and international trade. Unfair trade practice in international trade has however a different meaning. In international trade unfair trade practice again relates to the issue of competition between different suppliers. Unfair trade practices objected to in international trade are dumping and subsidies. These practices are considered bad because they hurt the industry of the country in which they are sold although they may be helpful to the consumer.

Types of unfair trade practices prohibited in domestic law depend on the law of a particular country. The **World Bank and OECD Model Law** lists following trade practices to be unfair:

- Distribution of false or misleading information that is capable of harming the business interests of another firm;
- Distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method of place of production, properties, and suitability for use, or quality of goods;
- False or misleading comparison of goods in the process of advertising;
- Fraudulent use of another's trademark, firm name, or product labeling or packaging; and
- Unauthorised receipt, use or dissemination of confidential scientific, technical, production, business or trade information.

While provisions relating to unfair trade practices are not included in laws of Pakistan, Kenya and South Africa, in India it was there in the MRTP Act but the Competition Act of 2002 has not included it. The Consumer Protection Courts under 'The Consumer Protection Act, 1986' which also covers Unfair Trade Practices will now have exclusive jurisdiction.

In **Tanzania,** in addition to unfair trade practices, the fair trade practices Act prohibits:

- misrepresentations;
- misleading advertising and conduct;
- bait and switch; and
- harassment and coercion.

It imposes the obligation to:

- label prices in shops to increase transparency and hence competition;
- need for statement and conformity with safety standards and warning requirements; and
- labeling product information, product recall requirements, imposition of standards as to quality fitness for purpose, basic warranties and indemnities and the like to prevent unfair trade practices.

In **Zambia,** the Act provides that a person shall not:

- withhold or destroy goods or render unserviceable or destroy means of production with the aim of increasing price;
- exclude liability of defective goods;

- in connection with the supply of goods or services, make any warranty limited to a particular area;
- falsely represent about the style, model, origin, age, sponsorship, and approval Performance etc. of product or service;
- misleading conduct about the nature, price, availability, etc.; and
- Supply any product that may cause injury or does not conform to standards.

UNCONSCIONABLE CONDUCT

Another practice closely related to unfair trade practice is that of unconscionable conduct. Law courts around the world, especially in developed countries, are continuously developing the concept of unconscionability.

What is an Unconscionable Conduct?: Basically it involves the exploitation by a stronger party of a weaker party. While in a business dealing there will generally be an overall winner and loser in the bargain yet there may be dealings that on the face may seem grave exploitation by stronger party of the weaker party and hence may be revolting to the conscience.

Australian Trade Practices Act includes following as unconscionable conduct:-

Unconscionable Conduct in Commercial Dealings: This results from disability in the weaker party that seriously affects his/her ability to decide what is in his/her own best interests. Such disability could be because the party is ignorant of important facts known to the other party, illiteracy or lack of education, poverty, infirmity, drunkenness, or lack of assistance or explanation where these are necessary. If the corporation knows or should have known the disability and the effect on the person but takes unfair advantage of its superior position or bargaining power the corporation is said to indulge in unconscionable conduct.

Unconscionable Conduct in Consumer Dealings: This can be explained with the help of an example. Suppose an insurance agent visits a remote tribal community in the countryside and speaks to a group of workers employed by the local community council. The workers are unfamiliar with the legalese in the documents, and regularly leave the workforce for extended periods for family and cultural reasons. The agent persuades a number of workers to sign insurance/superannuation policies and to authorise their payment by payroll deductions. A term of each policy states that if two monthly payments are missed the policy will be cancelled; this happens to some of the workers, costing them the premiums they had paid. This is an unconscionable conduct

that the agent takes unfair advantage of the workers' itinerant circumstances. On account of being on the move for extended lengths of time, some workers failed to make their monthly payments and suffered losses.

In such situations a court can take into account any considerations tending to establish a special disability as it sees it fit. However, the Australian Trade Practices Act specifically states that the court may have regard to:

- The relative bargaining strengths of the parties;
- The consumer's ability to understand the documentation;
- Whether undue influence or pressure, or unfair tactics were used;
- Whether the conditions imposed went beyond what was needed for the supplier's legitimate interests; and
- The amount the consumer would have to pay for equivalent goods or services elsewhere.

High-Risk Situations: The unconscionable conduct provisions do not prevent the ordinary cut and thrust of everyday commercial life that comes from vigorous competition, and it is a fact of life that parties nearly always do not meet on equal terms in their dealings. However, to avoid claims of unconscionable conduct extreme caution should be exercised in the following situations:

1. *Where the stronger party knows or ought to know, that the weaker party did not fully understand the transaction:* Such situations may arise when the weaker party:
   - is under a serious misapprehension about the terms or subject matter of the transaction;
   - has difficulty with language
   - suffers from mental or physical infirmity;
   - is incapacitated by drugs or alcohol; and
   - has no access to independent assistance or advice.

2. *Where there is no real opportunity for the weaker party to bargain*: these days we have standard form contracts. Standard form contracts are those contracts where the contract does not result by the bargaining of the parties on its detailed terms and conditions. Instead one of the parties usually the trader puts down the terms and conditions of the contract in writing to all who wish to adhere to it and other party has only to accept it fully or to reject it fully. A common example of such contracts is insurance contracts. The use of take it or leave it contracts may be risky if :
   - pressure is brought to bear to make the party sign;
   - the terms of the contract are onerous or their onerous nature is disguised in fine print;

- The weaker party is not allowed to seek independent advice on its rights under the contract.

3. *When a contract is grossly one sided*: Terms and conditions that may be considered grossly one sided, include those:
   - that exclude the legal rights of the weaker party;
   - that state the weaker party has understood the terms and conditions when this is not the case;
   - that are so oppressive that a breach of contract by the weaker party is inevitable; and
   - that allow termination of the contract by the stronger party for technical and/or minor breaches of contract.

4. *Excessive Terms and Prices:* In business, different parties may have different bargaining strengths and same trader may sell same goods to different buyers at different prices depending on the bargaining strength of different parties and the law and the court takes such things to be normal business practice. However, it may happen that the weaker party is paying considerably above what other similar parties are paying or where other excessive terms are imposed, the court may find the conduct to be unconscionable.

5. *Using Powerful Position to Impose Unreasonable Conditions:* Sometimes, a large business uses its power to extract a deal from a small business on terms unfavorable to the weaker party. This often occurs when the smaller business is vulnerable, e.g. when an agreement is up for renewal. Companies should:
   - ask whether the condition is one that is reasonably necessary to protect the legitimate interests of the stronger party;
   - be clear about the conditions of any renewal of an agreement with a smaller company before entering the original agreement;
   - not build up expectations about a renewal that can be exploited against the commercial interest of a smaller party; and
   - act in good faith at all times.

Chapter V

The Desired Framework

The purpose of a competition law is to ensure that competition exists in the market. A Competition law that is successful in doing this is a good competition law. However a Competition law may be too rigid as the MRTP Act in India was considered to be before 1984, which may have the effect of hindering the competitive process in the market, by excessive bureaucratic control. On the other hand the competition law in the country may be too lax and we may find large firms eliminating other players from the market by acts, which are detrimental to good health of the market. Therefore competition law of the country has to strike a proper balance between freedom to do business and regulation of business activity. For this following are to be kept in mind while framing and executing the competition regime of a country:

1. ***Extension of Jurisdiction beyond Territorial Boundaries:*** In the era of globalisation a competition law which lacks jurisdiction to try anti-competitive agreements made in foreign country would be only half-effective. Therefore the competition authorities should be allowed to have jurisdiction on agreements which although made in foreign county have an effect on the market in their country.

2. ***Involvement of One Competition Authority on Competition Issues:*** Competition regime should also cover the public sector enterprises like electricity, telecommunication, oil gas etc. Most of the countries have separate regulatory authorities for these enterprises. But this arrangement becomes very complicated especially for the foreign and multinational enterprises. Allowing one Competition authority to have jurisdiction on competition issues related to all the sectors would simplify the matter.

3. ***Extension of Greater Co-operation between Countries:*** Countries should try to develop greater co-operation at regional and international level in order to tackle RTPs, which have international dimensions. This can be done by encouraging the countries to share information and experience

and then to co-operate on the specific cases involving more than one jurisdiction. For example Organisation for Economic Co-operation and Development (OECD) began such work in 1960s. United Nations Conference on Trade and Development (UNCTAD) has also played an important role in spreading competition policy to developing countries by creating a set of principles for competition laws and by offering technical assistance in this area. World Trade Organisation (WTO) is also working on competition issues related to international trade. There are two approaches for bringing about greater co-operation:

- Harmonisation of competition laws of different countries at regional and global level. This, however, is opposed by many countries, especially developing countries, that fear that such a law would take away policy autonomy from them; and
- While having independent laws countries can still have co-operation in tackling with competition-related problems, which have international dimensions. Thus, one country may have to depend on another for getting information about the activities of multinational firms, whose activities are having anti-competitive effects in their markets.

4. ***Involvement of Civil Society Organisations:*** There is a need for civil society organisations to educate and help the common man on competition issues because consumer welfare is closely linked to overall social and economic welfare of the country. The continuous growth in the mass of laws protecting the interest of consumers is recognition of the fact that in the present era of large multinational enterprises a normal consumer may find himself helpless against unhealthy business tactics of entrepreneurs. But an individual consumer is often too weak to take any effective action. This is especially true of developing countries where competitive markets are still at their nascent stage. Therefore there is need for effective consumer organisations that may work as a link between both consumer and industries and consumer and the competition authorities. These organisations may be indirectly helpful in preventing many anti-competitive practices especially by being a source of information on the market condition and behaviour patterns of industries wanting to practice anti-competitive practises.

A good example is the working of Consumer International that has been active in helping many of the Latin American and African countries in framing and working of their consumer legislation. Involvement in cases against monopoly practices, including complaints against electricity price hikes and surcharges led Ecuador's consumer organisation *Tribune de Consumidores y Usuarios* into a leading role in the drafting of a competition law for Ecuador.

While this transparency in the operation of market process may help the competitive environment, care has to be taken since these organisations themselves may work as part of anti-competitive process if they start favouring particular industries and may abuse the legal process by bringing frivolous actions against rival industries. In the United States care has been taken to deal with such situations. The United States law (which otherwise protects joint lobbying) permits a challenge under the competition law to joint conduct that constitutes an abuse of government process, such as filing baseless lawsuits simply to injure a competitor or filing false information with a patent claim to improperly exclude competitors.

Conclusion

Economy of the country can be either free or controlled or regulated. The difference between the three depends on the amount of control government exercises on the functioning of the market. When the government interference is at the minimal level, then the economy is said to be free. On the other extreme is controlled economy, where the market works under the complete supervision of the government. In-between is the regulated market, where the government allows the market to play but sets rules for the game, so that no party may be exploited and overall national interest may also be taken into account. The Government of India is transforming the Indian economy from more or less a controlled economy to a regulated market economy. Some of the other developing countries are also witnessing transition more or less on the same lines. This is reflected in more liberalised competition laws in many countries, including India. However, making the law may not be sufficient. The competition authorities have to tread on the narrow dividing line between excessive bureaucratic and legal control hampering the free flow of goods and services in the market and that of allowing large firms to indulge in restrictive business practices and unfair trade practices. An emphasis on either side will eventually endanger the competitive environment in the market and hurt the consumer.

Endnotes

1 The schematic presentation has been based on Swann, D. (1979) *Competition and Consumer Protection,* Penguin: Great Britain.

2 Source, Seminar on Topics in Competition Policy13-14 Feb. 1995 Vienna, OECD Centre for cooperation with Economies in Transition (pp 52-53).

3 RTP Inquiry No. 8 of 1974 order dated 27.11.1975. Cited in OPS Verma, Monopolies Trade Regulation & Consumer Protection (pp 242).

4 RRTA vs. Bata India Ltd. (RTP Inquiry No. 3 of 1974, order dated 5.5.1975). Cited Supra note 2 (pp 250).

5 RRTA vs. Spencer & Co. Ltd. (RTP Inquiry No. 75 of 1975, order dated 3.11.1977) cited *ibid* (pp 255).

6 RRTA vs. Goetze (India) Ltd. (RTP Inquiry No. 11 of 1975 order dated 24.11.1978).

7 A Framework for the Design Implementation of Competition Law and Policy, World Bank and OECD (pp 22).

8 *Supra* note 1 (pp 68-69).

9 *CUTS,* A Review of Macro-economic Scenario, Investment Policies and Regulatory Framework in Bangladesh.

10 Report of the Ministerial level meeting of the OECD, 2000.

11 A Framework for the Design Implementation of Competition Law and Policy, World Bank and OECD.

12 *Ibid.*

13 RRTA vs. Inchek Tyres Ltd. And Others (RTP Inquiry No. 1, 1971, order dated 19.4.1976). Cited Supra note 2, 258.

14 In Tri-sure India Ltd. (RTP Inquiry No. 8 of 1978, order dated 16.1.1980). *Ibid.*

15 P Selznick. Focusing Organisational Research on Regulation, in Roger Noll (ed) *Regulatory Policy and the Social Sciences 1985*, pp 363, in Anthony Ogus.

16 World Bank, OECD, *A Framework for the Design and Implementation of Competition Law*, 1999 (pp 20).

17 *Ibid* (pp 37).

18 *Ibid* (pp 38).

19 *Ibid.*

Publications

PULLING UP OUR SOCKS

This report is the compilation and synthesis of the research results of the 7-Up Project, which is a comparative study of the competition regimes of seven developing countries of the Commonwealth, namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, implemented by CUTS, with the support of the DFID, UK.

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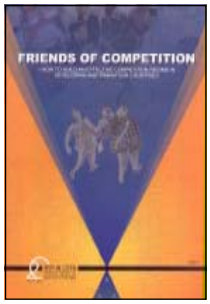

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