

Regulating Unfair Trade Practices: an Analysis of the Past and Present Indian Legislative Models

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Abstract The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) which for the first time incorporated detailed provisions as to unfair trade practices (UTPs) in India has now been repealed and succeeded by the Consumer Protection Act, 1986 which has included the same substantive definition of UTPs. This article analyses the law as to UTPs under the repealed MRTP Act including the cases decided thereunder and compares it with the structure of the Consumer Protection Act with the objective of evaluating whether the present Consumer Dispute Redressal Agencies under the Consumer Protection Act have adequate substantive provisions and effective procedural competence to ward off UTPs. Our analysis of legislative provisions and decided cases shows that the present system of protection against UTPs under the Consumer Protection Act is blighted by a strict and restrictive definition of *consumer*; lack of in-house enquiry and investigation system, incompetency of traders and trade associations to pursue cases, and lack of inherent power of the Consumer Dispute Redressal Agencies to *suo motu* take up matters. The article uses analytical and statistical methods to quantify, in terms of actual effect, these drawbacks which significantly hamper the present system and suggests various means to improve the functioning of the system so as to effectively deal with UTPs.

Keywords MRTP · UTP · Misleading advertisements · Consumer protection

In India, a specific law on unfair trade practices (UTPs) was first introduced in 1984 in the Monopolies and Restrictive Trade Practices Act of 1969 (MRTP Act). The MRTP Act

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prohibited the use of unfair and deceptive trade practices that would harm competitors and consumers and was enforced by the establishment of the MRTP Commission. The MRTP Act, which now stands repealed, has been the precursor of the Consumer Protection Act, 1986 and the Competition Act, 2002. Through a thorough and exhaustive study of the cases decided¹ by the MRTP Commission during its existence, this article presents an analysis of UTP law under the MRTP Act and compares it with the UTP law under the Consumer Protection Act, 1986. The article is the outcome of research which has been done with the objective to find answers to the following three questions:

- Whether the model of the MRTP Commission was efficient and successful to check UTPs, and if so, what were the reasons for its efficient enforcement?
- Whether the successors of the MRTP Act, i.e., the Consumer Protection Act, 1986 and the Competition Act, 2002, have sufficient substantive provisions and adequate procedural competency to effectively deal with the cases of UTPs?
- What improvements in the overall regime of existing law relating to UTPs are required?

Indian Law on UTPs

Placement of Law on UTPs

Tracing the history, law relating to UTPs was initially seen as a part of unfair competition, which dealt with the practice of distracting customers from honest competitors and negatively affecting their interests. Therefore, rules against UTPs had been included in competition laws in many countries. However, with the advance of consumerism, the concept of UTPs has been included within the law designed to protect consumers from the commercial malpractices of traders. Hence, the rights to fight UTPs have come to be exercised by the individual consumers and their organizations.²

Specific Incorporation of UTP Rules in the MRTP Act, 1969

In India, a specific law to regulate UTPs was, for the first time, enacted in 1984 by an amendment to the existing MRTP Act of 1969 which was the first competition law enacted by the Indian Parliament. However, it cannot be said that before this Indian law afforded no protection against UTPs because such practices could be availed of under the general laws of contract, tort, and crimes. However, in order to bring about more clarity and specificity in the law regulating UTPs, it was felt prudent to

¹ The MRTP Act, 1969 has already been repealed in 2009, and the MRTP Commission wound up. Even during its presence, there was no journal that specifically reported the cases decided by the MRTP Commission although various journals carried these cases according to their subject matter. Since the UTP provisions were added in the MRTP Act in 1984, we looked for decided cases from 1984 to its winding up, i.e., 2009. We searched all the available online and print journals for all such decided cases and found as many as 719 cases decided by the MRTP Commission and 26 cases decided by the Supreme Court of India on UTPs. These cases comprise the *database of cases* on the basis of which we have attempted our analysis and have drawn conclusions.

² Consumers' organizations are typically private associations which act as representatives of the broader consumer or public interest in fair competition and fair commercial practices. These organizations do receive funding from the government in many countries.

incorporate specific rules together with investigative and enforcement machinery in the MRTP Act of 1969. This specific form of regulation was probably inspired by the US Federal Trade Commission Act.

The 1984 Amendments in the MRTP Act were done to enlarge the scope of the Act as a result of the recommendations of the Sachar Committee (Jalan 2004). The MRTP Act before the amendment was directed against monopolies and restrictive trade practices only. These provisions proceeded on the assumption that if dealers, manufacturers, or producers can be prevented from distorting competition, the consumers will get a fair deal. Of course regulating monopolistic and restrictive trade practices does help the cause of consumers, albeit only partly. Therefore, to sufficiently protect the interests of consumers, it was felt necessary by the Sachar Committee that UTPs be incorporated in the MRTP Act. The Committee reported³:

There is now a greater recognition that consumers need to be protected not only from effects of restrictive trade practices but also from practices which are resorted to by the trade and industry to mislead and dupe consumers.

The Sachar Committee highlighted the total silence of the MRTP Act on this aspect which resulted in the consumer having no protection against false or deceptive advertisements. All these resulted in a very safe heaven for the suppliers and a position of frustration and uncertainty for the consumers.⁴ It was felt by the Sachar Committee that UTPs belong to the same genesis as monopolistic and restrictive trade practices; therefore, in its estimation, it was only natural for the MRTP Act to incorporate provisions regarding UTPs.

The Sachar Committee noted with approval that the welfare of consumers cannot be left to the dynamics of market because perfect market is an economist's dream and consumer's sovereignty is a myth (Chakravarthy 2014). Modern commerce has led to a situation in which the public must be prevented from being made victims of false advertisements blatantly made even though it may not have any adverse effect on the competition. Therefore, in order to detect and eradicate frauds against consumers, some special protection was required to be accorded to them. Highlighting the objective of the incorporation of UTP provisions, the Sachar committee reported: "The object of the legislation is only to bring honesty and truth in relationship between the seller and the customer."⁵ Exemplifying the objective—while there are enormous advantages of advertisements and modern commerce is inconceivable in the absence of advertising, the idea of the amendment was not to prevent advertisements but only to attack the falsehood that is sometimes practised with advertising. Advertisements should not be allowed to become counter-productive and should not result in erosion of confidence of the public.

Incorporation of UTP Rules in the Consumer Protection Act, 1986

As the movement towards consumer protection gathered momentum in India, a specific legislation for additional protection of the interests of consumers was enacted in 1986 in the form of the Consumer Protection Act (Law Commission of India 2006; Sen 2015). This statute

³ Sachar Committee report (1978); see para. 21.12.

⁴ Sachar Committee report (1978); see para. 21.18.

⁵ Sachar Committee report (1978); see para. 21.14.

incorporated the same concept of UTPs as was present in the MRTP Act of 1969.⁶ The Consumer Protection Act relies predominantly on private enforcement by individual consumers. The Act establishes a three-tier system of quasi-judicial bodies as Consumer Dispute Redressal Agencies existing at district, state, and national level (Dugar 2010). The focus of the law is to provide quick, inexpensive, formality free, and easy availability of justice to consumers.

Enactment of the Competition Act, 2002

With the passage of time, a need was felt for reforms in the Indian competition law and, hence, the Competition Act was enacted in 2002 which focused on restrictions on competition. With the enactment of the Competition Act as the competition legislation of India, the MRTP Act was no longer required and hence repealed. Certain provisions of the MRTP Act were incorporated in the Consumer Protection Act and others in the Competition Act. The provisions relating to UTPs went to the basket of the Consumer Protection Act. Deletion of the provisions regarding UTPs was possibly triggered by the need to avoid overlap (Chakravarthy 2005; Raghavan 2000).

Definition of UTP and Types of UTPs

In the MRTP Act, a definition of UTP was included by way of an amendment brought out in 1984 by inserting a new provision, Section 36A, in the Act.⁷ This definition, which formed the basis of all the actions that had been taken against UTPs under the MRTP Act, had the following five parts:

- (1) False representation as to
 - standard, quality, quantity, grade, composition, style, or model of goods
 - newness of goods
 - sponsorships, approval, affiliation, performance, characteristics, accessories, uses, or benefits
 - warranty or guarantee of the performance, efficacy, or length of life of a product or of any goods that are not based on an adequate or proper test
 - trade of another person
- (2) Listing of a wrong price in an advertisement
- (3) Offering of gifts with the intention of not providing them or conduct of any contest for the purpose of promoting the sale of any product or any business interest

⁶ When the Consumer Protection Act was enacted in 1986, it did not originally contain the definition of *unfair trade practice*. The concept of unfair trade practice was, however, interpreted according to the definition of unfair trade practice, given in the MRTP Act of 1969. However, in 1993, Section 2(1)(r) incorporated an exhaustive definition of unfair trade practice as given under Section 36A of the MRTP Act with a view to making the Consumer Protection Act, 1986 a self-contained Code. See Law Commission of India 199th report on unfair (procedural and substantive) terms in contract, August 2006 at pages 37–39.

⁷ MRTP (Amendment) Act, 1984. The definition was subject to further amendment in the year 1991 by way of the MRTP (Amendment) Act, 1991.

- (4) Sale of goods knowing that the goods do not comply with the standards prescribed by competent authority as necessary to prevent or reduce the risk of injury to the person using the goods
- (5) Hoarding, destruction, or refusal to sell goods so as to raise their price (Bahl 2002; Mittal 2013).

Nature of the Definition of UTP: Non-exhaustive and Inclusive

This definition had five sub-sections mentioning five broad categories of UTPs. Was it necessary for a trade practice to fall within any of these five categories so as to be brought within the ambit of this definition? The opening part of the definition was as follows⁸:

In this part, unless the context otherwise requires “unfair trade practice” means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts *any unfair method* or unfair or deceptive practice including any of the following practices....

The use of the expression *any unfair method* suggests that this definition was not exhaustive. It could potentially include *any unfair method* or unfair or deceptive practice. The expressions *unfair method* or *unfair or deceptive practice* were not defined. However, beyond this, the definition included, quite elaborately, various trade practices which, in certain situations, could amount to unfair trade practice. The word *including* made the listed trade practices only illustrative or exemplary.⁹ So, the definition was inclusive which made the scope of the concept of unfair trade practice quite wide.¹⁰ Therefore, even when a trade practice did not fall within any of the listed categories of Section 36A, it could nonetheless be regarded as UTP, if it was otherwise unfair or deceptive. There was no requirement to prove any loss or damage to the consumer of goods or services as a result of such a practice.

Scope of the Definition of UTP

The definition of Section 36A only defined the unfair element in an *unfair trade practice*; *trade* and *trade practice* were defined separately. Therefore, the definition of trade and trade practice contributed in determining the scope of the concept of unfair trade practice in the MRTP Act. Section 2(s) defined trade so as to mean any trade, business, industry, profession, or occupation relating to the production, supply, distribution, or control of goods and included the provision of any services.¹¹ Since this definition included *profession*, the services rendered by professionals like lawyers, chartered accountants, engineers, architects, doctors, etc., could potentially come under UTPs. Further, trade practice had been defined as¹² any practice

⁸ Section 36A, MRTP Act, 1969. Emphasis added.

⁹ As originally framed in 1984, this definition envisaged that a trade practice should fall within the ambit of one or more of the categories of unfair trade practice as enumerated under clauses 1–5 of Section 36A of the MRTP Act. However, this definition was amended in its present form by the MRTP (Amendment) Act, 1991.

¹⁰ In *Maruti Suzuki India Ltd. versus Rajiv Kumar*, 2009 (7) CP SC 1047: JT 2009 (9) SC 406, it was held by the Supreme Court of India that the definition of unfair trade practice under Section 36A is an inclusive one and not exhaustive. See also *Philips Medical Systems (Cleveland) Inc. versus Indian MRI Diagnostic and Research Ltd. and Anr.*, AIR 2009 SC 1052.

¹¹ Section 2(s), MRTP Act, 1969.

¹² Section 2(u), MRTP Act, 1969.

relating to the carrying on of any trade and included (i) anything done by any person which controls or affects the price charged by, or the method of trading of, any trader or any class of traders and (ii) a single or isolated action of any person in relation to any trade.

Commenting on the scope of the definition, the Supreme Court of India, in *KLM Royal Dutch Airlines versus Director General of Investigation and Registration*,¹³ held that whether a statement constitutes a false or misleading representation will depend upon the facts and circumstances of each case. It is not possible to provide an exclusive list of the statements which may constitute false or misleading representation, nor could there be any strait-jacket formula evolved thereof for the said purpose. However, the statements of the nature which are willfully made knowingly false, or made recklessly without honest belief in its truth, and made with the purpose to mislead or deceive would definitely constitute a false or misleading representation. In addition, a failure to disclose a material fact when a duty to disclose that fact has arisen would also constitute a false or misleading representation.

Analyzing the definition, we find eight distinct types of UTPs being mentioned in Section 36A of the MRTP Act (Table 1). The following is the classification of the database of cases¹⁴ divided according to the types of UTPs¹⁵:

To begin with the Consumer Protection Act, 1986, the definition of UTP was picked from the MRTP Act itself. However, in 2002, the definition was widened to include two more features in it.¹⁶ So, the definition of UTP under the Consumer Protection Act is a little wider than what was under the MRTP Act.

Time of Resorting to UTP: Pre-contractual UTPs and Post-contractual UTPs

An analysis of the database of cases¹⁷ under the MRTP Act shows that 71.35% of complaints pertain either to the terms of contract of sale or breach of contract (Fig. 1). That means in all these cases, the causes arose after the formation of the contract. However, 28.65% of complaints were related to matters which arose either before the contract or they involved a situation which did not arise upon a contract.

In an instance of pre-contractual UTP, the MRTP Commission in *re Kinetic Honda Motors Ltd.*¹⁸ judged the total effect of the advertisement issued by the respondent, looking at it as a whole including the picture, the caption which a purchaser of a scooter was likely to confront. The advertisement had warned the prospective purchaser that if he was contemplating to buy a scooter without any fear of registration

¹³ *KLM Royal Dutch Airlines versus Director General of Investigation and Registration*, AIR 2009 SC 938.

¹⁴ *Supra* note 1.

¹⁵ The total number of cases decided by the MRTP Commission that we have included in our database and that have been analysed is 719; however, there is an increase in the total number of cases in some categories of our analysis because of the presence of one or more elements which has necessitated in repeat counting of a particular case. For example, when we are looking at the breakup of total number of cases where different reliefs have been granted by the Commission, we have to add up all the cases in which relief has been granted. In some cases, multiple reliefs have been granted by the Commission, so the figure of total cases is bound to exceed 719. This method of statistical analysis will have minimal effect on the calculated percentages and will be a more accurate portrayal of the data.

¹⁶ One is about gift schemes and the other about manufacture of spurious goods.

¹⁷ *Supra* note 1.

¹⁸ *In re Kinetic Honda Motors Ltd.* (1994) 15 CLA (Snr.) 6 (MRTPC).

Table 1 Cases filed under the MRTP Act under different types of UTPs

Type of UTP	Cases	Percentage
1. False representation as to standard, quality, purpose, need, composition, etc., of goods or services	403	46.48
2. False representation as to sponsorship, approval or affiliation	83	9.57
3. Misleading warranty or guarantee	221	25.49
4. Disparaging the goods or services of others	33	3.81
5. Publication of bargain price not intended to offered	4	0.46
6. Offering gifts, schemes/contest	76	8.77
7. Selling goods not meeting the standard prescribed	8	0.92
8. Hoarding or destruction of goods or refusal to sell goods or supply services	39	4.50
Total	867	100

problem, Kinetic Honda was the only answer. The Commission pointed out that the impugned advertisement was an instance of disparagement being caused in an indirect fashion as a scare was sought to be created against the products of rivals. The Commission found the features of Kinetic Honda publicized by the respondent to be false and misleading calculated to disparage the products of the rivals attracting clause (x) of Section 36A as the advertisement gave an unfair advantage to the respondent and sought to put the rivals in a disadvantageous position, thereby distorting a free and fair competition in the trade.

In a case¹⁹ of a UTP allegedly being practised after the formation of a contract, the complainant, an advocate, was a subscriber of two telephone connections, one installed at his residence and another installed at his office. At one point of time, he was a Director of M/s. East-West & Co. Pvt. Ltd. The complainant was asked to clear the dues of Rs. 6,55,508/- for the said telephone connections by the respondent, MTNL, a telecom service provider. The complainant immediately took up the matter with the respondent and explained that he had resigned from East-West & Co. Pvt. Ltd. since January 1995 and, as such, could not be made responsible for payment of the aforesaid arrears. Despite the protest, the respondent insisted on recovery of the amount from him and this led to filing of the complaint before the Commission for UTP adopted by the respondent. The complainant had neither disputed the bills raised by the respondent nor the period to which they pertain. Undeniably, the complainant has been a director of the company till January 1995. Thus, the amount pertained to the period when he has been one of the directors of the company. As such, he was liable for the payment of the amount raised against the company. The Commission held that having a close nexus with the company and being involved in running the business, he could not absolve himself from the liability for the payment of the dues which arose during the period when he was the director. In the absence of articles and memorandum of association or any resolution limiting his responsibility, the Commission held that no case had been made out in his favour.

¹⁹ *M.K. Awtaney versus Mahanagar Telephone Nigam Limited*, I (2003) CPJ 85 (MRTP).

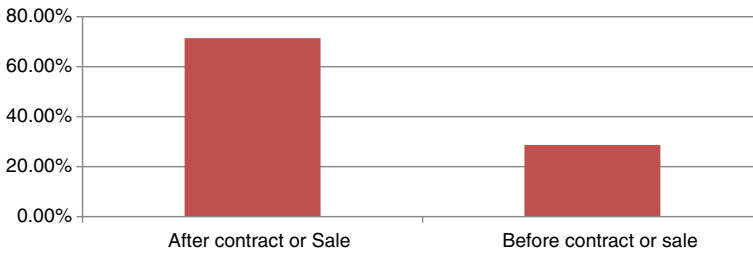


Fig. 1 Percentage of complaints based on the time of practice of UTP under the MRTP Act

It is pertinent to note that under the Consumer Protection Act, one has to be a consumer first for the cause of action to arise (Singh 2005). Hence, the complaint can be filed only after a contract has been formed. Section 12 of the Consumer Protection Act states²⁰:

A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, may be filed with a District Forum, by

- (a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided;
- (b) any recognized consumers' association whether the consumer to whom the goods sold or delivered or service provided or agreed to be provided is a member of such association or not; or
- (c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or
- (d) the Central or the State Government.

The expression “in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided” signifies the necessity of a contract to invoke the jurisdiction of the consumer fora. Of total UTP complaints under the MRTP Act, 28.65% were filed that pertained to pre-contractual situations. There is no possibility of such complaints being filed under the Consumer Protection Act as it makes it mandatory for a contract to be there before a complaint could be filed. This demonstrates that the present system is narrower in its approach in relation to the time of practice of UTPs, leaving a huge chunk of instances of UTPs falling outside the purview of the present law.

Finality of Decisions Under the MRTP Act and Consumer Protection Act

Under the MRTP Act, the MRTP Commission was the only authority to enquire into the allegations of UTPs.²¹ An appeal from the decision of the MRTP Commission could be made

²⁰ Section 12, Consumer Protection Act, 1986. Emphasis added.

²¹ Section 5(1), MRTP Act, 1969.

directly to the highest court of India, i.e., the Supreme Court.²² It is clear that no discretion had been vested with the Supreme Court to condone any delay in filing the appeal against the order of the MRTP Commission.

However, under the Consumer Protection Act, there is a three-tier set-up of the fora comprising the District Forum, the State Commission, and the National Commission with each having its own pecuniary jurisdiction (Fig. 2). The final appeal lies with the Supreme Court of India.²³ Since a consumer forum is supposed to be present in each of the 640 districts of India, the system under the Consumer Protection Act is much more accessible to the complainant than the system under the MRTP Act where there was only one forum. However, this finding is not absolute in the sense that the three-tier structure of consumer fora is based on pecuniary jurisdiction. So, depending on the pecuniary limit, the National Commission may be the only forum where a complainant could approach for the redressal of his dispute.

An order passed under the MRTP Act in respect of any UTP was final as soon as it was passed by the MRTP Commission. However, under the Consumer Protection Act, the order of a consumer dispute redressal agency shall be final, if no appeal there-against has been preferred. Thus, the finality of the order of the agency has to await the expiry of the prescribed period of 30 days allowed for filing the appeal and, when the appeal is filed, the order appealed against would not be deemed to be final till such time the appeal is decided.²⁴

Who Could Mobilize the UTP Provisions

Under the MRTP Act, the Commission had been vested with two functions: (1) inquiry and (2) adjudication. The MRTP Commission was empowered to inquire into any trade practice in order to find whether it is unfair and, for that purpose, the Central Government was empowered to appoint Director General of Investigation and Registration. Before issuing any process on the basis of a complaint, the MRTP Commission could require the Director General to make a preliminary investigation and to submit a report to the Commission.²⁵ The Director General was also empowered to appear in any proceedings in the course of any inquiry before the Commission, either in person or through a counsel. The process of such inquiry could be initiated by

²² Section 55, MRTP Act, 1969: "Any person aggrieved by any decision on any question referred to in clause (a), clause (b) or clause (c) of section 2A, or any order made by the Central Government under Chapter III or Chapter IV, or, as the case may be, or the Commission under section 12A or section 13 or section 36D or section 37, may, within sixty days from the date of the order, prefer an appeal to the Supreme Court on one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5 of 1908)."

²³ Section 9, Consumer Protection Act, 1986.

²⁴ Section 24, Consumer Protection Act, 1986.

²⁵ Section 11, MRTP Act, 1969 stated: (1) The Commission may, before issuing any process requiring the attendance of the person against whom an inquiry (other than an inquiry upon an application by the Director General) may be made under Section 10, by an order, require the Director General to make, or cause to be made, a preliminary investigation in such manner as it may direct and submit a report to the Commission to enable it to satisfy itself as to whether or not the matter requires to be inquired into. (2) The Director General may, upon his own knowledge or information or on a complaint made to him, make, or cause to be made, a preliminary investigation in such manner as he may think fit to enable him to satisfy himself as to whether or not an application should be made by him to the Commission under Section 10.

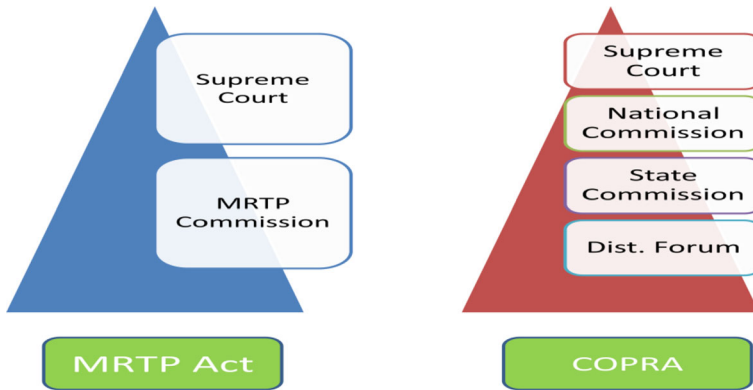


Fig. 2 Fora under the MRTP Act and the Consumer Protection Act

- A trader
- A trade association²⁶
- A consumer
- A registered consumers' association²⁷
- Central or State Government,
- Director General appointed under the MRTP Act, or
- *Suo motu* by the MRTP Commission

In *Paras Steel Emporium versus Hawkins Cookers Limited*,²⁸ in order to become eligible for appointment as the respondent's authorized service centre, the applicant firm deputed its employee to attend the service centre training course organized by the respondent. On successful completion of the training course, the applicant was appointed as the authorized service centre of the respondent for the town of Gonda. The applicant had alleged that the respondent indulged in UTP on the ground that publicity material circulated by the respondent did not contain the name of the applicant. While it was admitted by the respondent that certain leaflets did not contain the name of the applicant firm, it had been explained that the applicant was appointed *Service Centre* with effect from 1 February 1989 and the leaflets referred to by the applicant were printed before that date. Since the old leaflets were printed in large numbers, their circulation continued even after the appointment of the applicant as *service centre*. To the Commission, this appeared to be an inadvertent mistake without any *mala fide* intention behind it; further, the impugned leaflets did not contain the names of any other service centre also which was set up after 1 January 1989 and, therefore, there was no discrimination against the applicant. Moreover, the advertisements released by the respondent in the *Times of India*

²⁶ Section 2(t), MRTP Act, 1969: *Trade association* means a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members.

²⁷ Section 2(n), MRTP Act, 1969: *Registered consumers' association* means a voluntary association of persons registered under the Companies Act, 1956 (1 of 1956) or any other law for the time being in force which is formed for the purpose of protecting the interests of consumers generally and is recognized by the Central Government as such association on an application made in this behalf in such form and such manner as may be prescribed.

²⁸ *Paras Steel Emporium versus Hawkins Cookers Limited*, 2001 INDLAW MRTPC 4.

and other newspapers included the name of the applicant. In these circumstances, no case of UTP was held to be made out against the respondent.

In *S. Durga Prasad Rao versus Bata Shoes Store and Anr.*,²⁹ the complainant had purchased a pair of shoes manufactured by the respondent. In purchasing the same, he was led to believe by the representation of the respondents in their advertisements as well as by their reputation that the shoes were of a standard quality. After having used the shoes for hardly a period of 2 weeks, the complainant realized that there was a manufacturing defect in the soles of both the shoes. The complainant wrote a letter to the respondent for replacement of the shoes or for refund of the money which the respondents declined. Since along with the complaint, the complainant had to deposit the shoes and he was also forced to buy another pair of cheaper shoes for his immediate requirement. In the compensation application, the applicant has asked for the cost of the shoes and reimbursement of the expenses along with compensation for mental agony. The Commission held that a single deficiency in service cannot by itself give rise to the charge of indulgence in UTP; however, in the face of a guarantee about the quality of the goods for a specific period of time if the respondent declined to replace the goods or refund the price paid, it would certainly amount to a UTP.

In *DG (I & R) versus Smt Shanta Kumari*,³⁰ the respondent was a contractor who supplied butter to the District Hospital, Kottayam. The patients of the hospital complained that the quality of the butter being supplied to them was inferior inasmuch as it did not have any taste, colour, and smell as was contained in normal butter. A sample of the butter was sent for analysis, and it was found that the butter was adulterated as the same contained foreign fat other than milk fat and that the fat contents were 88.15% only. The butter was found to be adulterated and was not of that quality which it was represented to be by the respondent. The Commission noted that if the supply of adulterated butter was allowed, there would be prejudicial effect on the health of all the consumers of the same including the inpatients of the hospital and issued an ex parte interim injunction as prayed for.

So, varying parties from individual consumers to associations of traders filed complaints before the MRTP Commission and the Commission also acted on governmental reference and *suo motu* cognizance (Table 2). An analysis of the database of cases³¹ shows the following result as to how many cases were initiated by which type of complainant³²:

The above data show that predominantly, the complaints had been filed by individual consumers. The term *consumer* had not been defined in the MRTP Act. This becomes meaningful in the light of the fact that the Consumer Protection Act has a restrictive definition of consumer where a consumer is the one who buys goods or avails of services for consideration or who uses goods/services with the consent of the buyer.³³ This definition does not include a person who obtains such goods for resale or for any commercial purpose.³⁴

Such a restriction was not applicable to the MRTP Act. Further, there is no office or authority in the name of Director General of Investigation and Registration under the Consumer Protection Act who might act as the advocate for public interest in the matter of

²⁹ *S. Durga Prasad Rao versus Bata Shoes Store and Anr.*, 1999 INDLAW MRTPC 59.

³⁰ *DG (I & R) versus Smt Shanta Kumari* (1987) 62 Comp Cas157.

³¹ *Supra* note 1.

³² See *supra* note 15.

³³ See Section 2(d), Consumer Protection Act, 1986.

³⁴ Section 2(d) (explanation), Consumer Protection Act, 1986: For the purposes of sub-clause (i), *commercial purpose* does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

Table 2 Distribution of cases filed under the MRTP Act as per the type of complainant

Complainant	Cases	Percentage
Individual consumers	473	65.24
Government	4	0.55
Suo motu	83	11.45
Trader/company	108	14.90
Consumer association	49	6.76
Trade association	8	1.10
Total	725	100

institution of an inquiry. A trade association also cannot initiate a complaint under the Consumer Protection Act. The authorities under the Consumer Protection Act cannot even *suo motu* initiate any cause of action.

In total, 16% of all the complaints under the MRTP Act had been initiated by traders or trade association and 11.45% of all the complaints had been initiated *suo motu* (Fig. 3). These complaints cannot be initiated under the Consumer Protection Act now because of procedural incompetencies. Therefore, the present system of protection under the Consumer Protection Act is oblivious of a large segment that was instrumental in filing complaints against UTPs severely denting the capacity to fight against UTPs.

The Protection of Public Interest

The MRTP Commission could inquire into any UTP upon receiving a complaint from any consumer, trade association, or registered consumers' association or upon receiving a reference by the Central Government or the State Government or by the Director General. Further, the enquiry could also be initiated based on its own knowledge or information.³⁵ In a matter of enquiry before the MRTP Commission if it could be proved that any undertaking or any person is carrying on, or is about to carry on, any UTP which could likely affect prejudicially the public interest or the interest of any trader, class of traders, or consumers, then the Commission was empowered to issue a temporary injunction to stop that UTP. Such a temporary injunction could be granted upon an appreciation of an affidavit filed by the complainant and even without giving notice to the opposite party.³⁶

This protection accorded to consumers under the MRTP Act could be seen as protection of public interest as well. However, under the MRTP Act, public interest had been mentioned along with and in addition to the interest of a consumer or consumers generally.³⁷ This accommodation of public interest over and above consumer interest signified that public interest contained more than mere consumers' interest. Therefore, the expression *public interest* could be interpreted to subsume the interest of traders as well. This interpretation is

³⁵ See Section 36B, MRTP Act, 1969.

³⁶ See Section 12A, MRTP Act, 1969.

³⁷ See the opening part of Section 36D(1): "The Commission may inquire into any unfair trade practice which may come before it for inquiry and, if after such inquiry, it is of opinion that the practice is prejudicial to 'the public interest, or to the interest of any consumer or consumers generally,' it may, by order direct that..." Emphasis added.

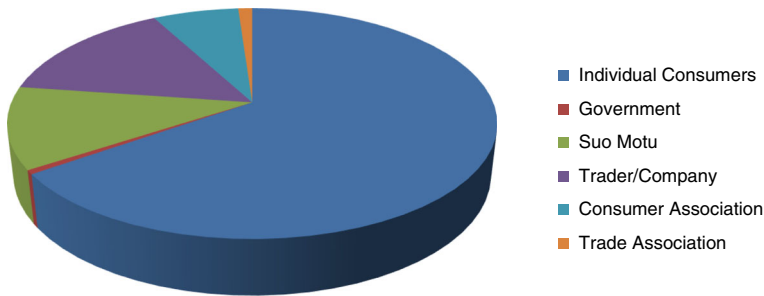


Fig. 3 Percentage of complaints filed by different categories of complainants under the MRTP Act

supported by Section 12B of the MRTP Act which provided for an award of compensation by the MRTP Commission not only to consumers but also to any trader or class of traders.³⁸ Apart from traders, the above provision also envisioned the loss or damage to government.³⁹ That means where the government was the buyer of goods or services, it could also mobilized the machinery of enforcement of the MRTP Act against UTPs.

After the inquiry into a UTP if the MRTP Commission was of the opinion that the practice was prejudicial to public interest or to the interest of the consumer or consumers generally, it could order that

- (a) the practice be discontinued,
- (b) any agreement relating to such UTP be treated as void modified in respect thereof in such manner as might be specified in the order, and
- (c) any information or advertisement relating to such UTP be disclosed, issued, or published in such manner as might be specified.

The Commission could also permit any party to carry on any trade practice only upon taking such steps as might be necessary to ensure that the trade practice was no longer prejudicial to the public interest or to the interest of any consumer or consumers generally.⁴⁰

In *DG (I & R) versus Asian Townville Farms Ltd.*,⁴¹ on behalf of the Director General, an application had been filed for the protection of public interest, praying that a cease and desist order be passed against the respondents, restraining them from indulging in a UTP of making misleading representation in the conduct of their business of seeking investment from the public. The respondent had issued various representations like receiving technical know-how from a reputed company, guaranteed income tax free returns, excellent productive quality of land, etc., all in flowery language. In want of any indication as to the veracity of these tall

³⁸ Section 12B(1), MRTP Act, 1969: "Where, as a result of the monopolistic or restrictive, or unfair trade practice, carried on by any undertaking or any person, any loss or damage is caused to the Central Government, or any State Government or 'any trader or class of traders' or any consumer, such Government or, as the case may be, trader or class of traders or consumer may, without prejudice to the right of such Government, trader or class of traders or consumer to institute a suit for the recovery of any compensation for the loss or damage so caused, make an application to the Commission for an order for the recovery from that undertaking or owner thereof or, as the case may be, from such person, of such amount as the Commission may determine as compensation for the loss or damage so caused." Emphasis added.

³⁹ See *ibid.*

⁴⁰ See Section 36D, MRTP Act, 1969.

⁴¹ *DG (I & R) versus Asian Townville Farms Ltd.* (1986) 60 Comp Cas 1008.

claims and considering the level of illiteracy in the country and the general run of persons expected to respond to the scheme, the Commission found it to be not possible for all or anybody to subject the language of the advertisements and the brochure to a minute analysis or scholastic dissection and felt that misleading and deceptive representation had been made about guaranteed returns against the investment. In *Federation of Parenteral Manufactures of India and Another versus Core Parenterals Ltd. and Another*,⁴² an association representing a manufacturer of certain pharmaceutical products complained to the MRTP Commission against the claim of one of the manufacturing companies in its prospectus offering right-cum-public issues of equity shares for its expansion that the technology employed by it was the latest. It was also urged that the company's representation about the superiority of that technology amounted to disparagement of the products of others. After an examination of the claim, the Commission was satisfied that the technology was the latest so far developed. The Commission also held that an assertion of the superiority of the technology did not tantamount to disparagement of the products of others.

In *DG (I & R) versus Rural Medical Practitioners Association of India*,⁴³ the respondent was engaged in the profession of imparting medical education through postal lessons. The allegation against the respondent was that it has been making misleading claims in its advertisements and representations about its status and standing and about the utility and quality of the services rendered by it in the form of medical coaching and the certificates awarded by it. The Commission prima facie found the claims made by the respondent in regard to its own standing and in regard to the utility and quality of services rendered by it to be false and misleading. The Commission noted: "The loss or injury caused by these claims was two-fold. In the first instance, the members had to pay fees for getting certificates which have no market value. Secondly, the members would acquire only a superficial, perfunctory and theoretical knowledge of medicine and God forbidding, if they decide to practice medicine in rural areas, they will spread only misery and ill-health. This is thus a fit case for grant of ad interim injunction." Thus, the MRTP Commission duly considered the safeguarding of public interest when such complaints were made.

An analysis of the provisions of the MRTP Act and the cases decided shows that protection of public interest finds a place of importance within the scheme of the Act. Complaints could be initiated in pursuance of public interest while there is no mention of the concept of public interest under the Consumer Protection Act, leaving a vacuum in this area. An outcome of this system is that though the consumer fora can provide relief to duped customers upon individual complaints, they cannot eliminate the unfair practice per se.

Limitation Period to File Complaints and Time Taken for Disposal

In order to file a complaint, the MRTP Act did not prescribe any limitation period. Therefore, the complainant could file the complaint against a UTP either immediately after such practice or later on. However, the Consumer Protection Act prescribes a limitation period of 2 years from the date when a cause of action arose within which a complaint has to be filed before an authority under the Act.⁴⁴

⁴² *Federation of Parenteral Manufactures of India and Another versus Core Parenterals Ltd. and Another* (1994) 14 CLA 387 (MRTPC)

⁴³ *DG (I & R) versus R.M.P. of India*, MANU/MR/0009/1988.

⁴⁴ Section 24A, Consumer Protection Act, 1986.

The MRTP Act did not prescribe any time within which a complaint could be investigated or finally decided. However, under the Consumer Protection Act, a forum has to decide about a complaint, as far as possible, within a period of 3 months from the date of notice received by the opposite party where the complaint does not require analysis or testing of commodities and within 5 months if it requires analysis or testing of commodities.⁴⁵ However, because of huge pendency of undecided complaints, all the consumer fora are taking much higher time in deciding complaints filed with them. It now seems that the initial period fixed by the Consumer Protection Rules was too ambitious and impractical considering the available infrastructure.

In *DG (I & R) versus Mrs. Kamlesh Thaper*,⁴⁶ the respondent had started a medical clinic and issued an advertisement which appeared in the newspaper *Hindustan Times*. That advertisement read as under: "HEALTHY BOY OR GIRL Know the sex of the unborn child by amniocentesis of 16 weeks of pregnancy or by CVS study of 8–12 weeks with the aid of ultrasound scanning. ARTIFICIAL INSEMINATION ALSO." The Director General with a view to finding out the correctness of the claims made by the respondent in the said advertisement started investigation and came to the conclusion that the respondent was indulging in UTPs by making all false claims of capabilities of her institute. An ex parte temporary injunction was issued restraining the respondent from indulging in UTPs, and it took the Commission less than a year to dispose of the complaint. In *DG (I & R) versus Thermax Private Limited*,⁴⁷ the respondent had supplied two boilers to the applicant in 1987. These boilers were allegedly old and rusted. It was further alleged that the boilers suffered innumerable breakdowns and operated way below the required efficiency levels and never generated the contractually stipulated steam pressure. As a result, the applicant suffered enormous losses. Although there was a warranty given for a period of 12 months, the respondent failed to rectify the aforesaid defects. The Commission found no evidence on record to show that the boilers in question were old and rusted as contended by the applicant/informant and the DG upon his inquiry while finding merit in the submission of the respondent that it takes a few months to manufacture a boiler and, therefore, it would be unrealistic to expect the shine of a brand new piece of steel on the surface of a boiler. The Commission did not accept the contention of the DG and the applicant that the boilers were substandard and that they suffered from manufacturing defects while noting that the root cause of the problems regarding output and efficiency of the boilers appeared to be non-compliance of the instructions given in the manuals. It took the Commission almost 14 years to decide the case.

Our analysis of data reveals that the time taken to dispose of complaints has varied, ranging from less than a year to as many as 14 years. On the basis of the database of cases,⁴⁸ the average time taken for deciding a UTP complaint has been 2 years and 5 months⁴⁹ which can reasonably be described as *quick disposal of cases* according to Indian standpoint where the judicial system is notoriously slow.

⁴⁵ See Rule 14(4), Consumer Protection Rules, 1987.

⁴⁶ *DG (I & R) versus Mrs. Kamlesh Thaper* (1988) 64 Comp Cas 109.

⁴⁷ *DG (I & R) versus Thermax Private Limited*, I (2003) CPJ 158 (MRTP).

⁴⁸ *Supra* note 1.

⁴⁹ This figure has been calculated by including the cases where interim injunction was granted during the pendency of the inquiry.

Final Comparison Between Past and Present Legislative Models

Having done the analysis of the database of cases together with the relevant provisions of the two legislations, i.e., the MRTP Act and the Consumer Protection Act, we are in a position to answer the questions that we had raised in the introduction of this article.

Whether the MRTP System Was Efficient and Successful in Dealing with UTPs, and if so, What Were the Reasons for Its Efficient Enforcement?

The success and efficiency of the MRTP system was a function of: types of UTPs covered, variety of industries pursued, ease with which different stakeholders could approach the forum, time taken for disposal of disputes, satisfaction of the litigant, and the number of complaints in which relief was granted along with the variety of reliefs granted. The analysis of our data shows that all types of UTPs had been dealt with by the MRTP Commission covering almost all the categories of industries and professions that we know of. The coverage included entities ranging from mighty multinational corporations to small business enterprises. While individual consumers, together with traders and associations, had a good share in the filing of complaints, the percentage of *suo motu* initiation of cases was really its hallmark. The repercussions of the decisions of the Commission were sometimes felt by the whole industry and sometimes only by an individual trader. Grant of some relief in nearly half of the complaints filed and the variety of reliefs granted to different stakeholders made the MRTP model quite impressive. The average time taken for disposal of disputes was nearly 2.5 years which can certainly be described as reasonable if we compare it with the average time taken for disposal of commercial disputes in Indian courts. In short, MRTP can verily be described as a dispute resolution system that guaranteed a combination of clear substantive rules together with effective procedural competencies.

Even though the MRTP Act has been repealed, the decisions rendered by the Supreme Court vis-a-vis the MRTP Act hold good in interpreting analogous provisions in the Consumer Protection Act and the Competition Act and, hence, have continuing legal value. If the principles set out in the decisions militate against the express provisions in the Consumer Protection Act or the Competition Act, then they shall not be operative. So, the principles and portions of those decisions are good in law, if they do not conflict with the provisions of new law. Even the decisions rendered by the MRTP Commission are being cited in analogous cases before the consumer fora for their persuasive value.

Whether the Successors of the MRTP Act, i.e., the Consumer Protection Act, 1986 and the Competition Act, 2002, Have Sufficient Substantive Provisions and Adequate Procedural Competency to Effectively Deal with the Cases of UTPs? If Not, What Are the Suggestions for Improvement?

The Consumer Protection Act relies predominantly on private enforcement by individual consumers. Under the Consumer Protection Act, one has to be a consumer first for the cause of action to arise. Therefore, the complaint can be filed only upon a contract. So, many complaints that were filed without the presence of a contract under the MRTP Act cannot be

filed under the Consumer Protection Act. The analysis of the database of cases⁵⁰ shows that 28.65% of the complaints that were made before the MRTP Commission involved non-contractual or pre-contractual situations. In this regard, the MRTP Act was wider in scope in checking UTPs than the Consumer Protection Act. To remedy this situation, the definition of consumer within the Consumer Protection Act should be suitably amended to include potential consumers as well. This will take care of non-contractual and pre-contractual disputes.

Under the system of MRTP, there was only one forum at the national level for deciding the cases pertaining to UTPs and its decisions were final subject to appeal to the Supreme Court of India. However, under the Consumer Protection Act, there is a three-tier system of consumer fora, i.e., at district, state, and national levels. The presence of a forum for dispute resolution relating to UTPs at the district level is a huge advantage under the Consumer Protection Act when we compare it with the MRTP Act. However, the jurisdiction of this three-tier structure is pecuniary. That means if a case involves money above a certain limit, then the jurisdiction may lie only with the state or national commission.

One important feature of the MRTP system was the in-house inquiry and investigation wing which could be mobilized in three different ways: (1) by the orders of the Commission, (2) upon complaint or information of any person, and (3) *suo motu*. This system of inquiry and investigation is simply missing from the Consumer Protection Act. The analysis of the database of cases⁵¹ shows that in most of the cases, the MRTP Commission relied on the investigation wing for disposal of the cases and also for post-disposal monitoring as to whether its orders have been complied with or not. While repealing the MRTP Act, its subjects and provisions were distributed between the Consumer Protection Act and the Competition Act. In this process of succession, the substantive provisions as to UTP went in the basket of the Consumer Protection Act and the procedural power to investigate went to the creel of the Competition Act (Srivastava 2011; Thampi 2008). This has created an anomalous situation with respect to UTPs where one forum has the substantive power but lacks the procedural competence to investigate while the other forum has the procedural competence to investigate but lacks the substantive power.

The present system of the Consumer Protection Act is characterized by a lack of power to investigate which is a fallout of the distribution of powers of MRTP between the Consumer Protection Act and the Competition Act. It is clear that an effective fight against UTPs requires this investigative power to be vested in the consumer fora or, in the alternative, the Competition Commission could be vested with the substantive competence to deal with UTP matters. Some scholars are of the view that the substantive competence to entertain complaints relating to UTPs should be given to the Competition Commission under the Competition Act, 2002 because the investigatory skills are essentially the same while consumer investigations most frequently are quicker and less resource intensive (Singh 2012; Buik 2008). However, according to the authors, out of the two approaches, it is better to vest investigative power to the consumer fora as they are already dealing with the substantive issue of UTP. Moreover, it is not required to vest the district fora with such powers; it would be enough to arm the State Commission and the National Commission with this power. Should a matter come before a district forum which requires investigation, the district forum could refer it to the State Commission. In this way, investigation and enquiry could be done at the level of State Commissions in India which have been established in every state of India. Further, if

⁵⁰ *Supra* note 1.

⁵¹ *Supra* note 1.

substantive competence as to try UTP complaints is given in the Competition Act, then it may amount to overburdening the Competition Commission of India which has a geographical limitation of being present only at one place in India. This would also amount to unnecessary duplication between two statutes, leading to a possibility of forum shopping. In various legal systems too, consumer protection authorities have been vested with investigative powers to deal with UTPs.⁵²

The analysis of our data shows that a majority of complaints were filed by individual consumers. However, there was no definition of a consumer under the MRTP Act. This has to be seen in contradistinction of a strict and restrictive definition of consumer in the Consumer Protection Act. So, the group of persons entitled to file a complaint as consumers under MRTP was wider than the same group under the Consumer Protection Act. This restrictive approach, which indeed hampers the struggle against UTPs, can be effectively remedied by suitably amending the definition of consumer in the Consumer Protection Act so as to include potential consumers as well.

In total, 16% of all the complaints under the MRTP Act had been initiated by traders or trade association and 11.45% of all the complaints had been initiated *suo motu* by the Commission. These complaints cannot be initiated under the Consumer Protection Act now because of procedural incompetencies as the Consumer Protection Act does not permit traders or their associations to initiate the complaints before consumer fora. This comes out to be a figure of 27.45% which is quite significant, and the present system does not permit the mobilisation of the process by these persons and groups. It is true that an individual consumer interest represents the collective interests of the society. Therefore, if a consumer approaches a court against a UTP of which he has been a victim and obtains a favourable order from such a court, it would typically benefit all consumers who could be potential targets of such a practice. In this manner, the cumulative harm that such an order prevents could be high while the harm to each consumer may be relatively small. However, individual consumers would have limited incentives or resources to engage in litigation against UTPs. Therefore, it is important that traders and their organizations should be made entitled to initiate complaints against UTPs under the present system. Further, there should be a mechanism where the adjudicatory forum also has the competency to *suo motu* initiate a cause.

The MRTP Act specifically talked about initiating cases in pursuance of public interest while there is no such mention of the concept of public interest under the Consumer Protection Act. The protection accorded to consumers can be seen as protection of public interest as well. However, in Section 36D of the MRTP Act, public interest had been mentioned along with and in addition to the interest of a consumer or consumers generally. This accommodation of public interest over and above consumer interest signifies that public interest contains more than mere consumers' interest. Therefore, the expression *public interest* could be interpreted to subsume the interest of traders as well. However, since under the Consumer Protection Act, relief can be granted to individual consumers alone, so it seldom results in the elimination of the unfair practice per se. Therefore, this specific accommodation of public interest is important to be introduced in the Consumer Protection Act.

⁵² See, for example, Sections 5–8 of the Consumer Affairs (Unfair Business Practices) Act, 1988 of South Africa; Section 45 of the Federal Trade Commission Act, 1914 of USA; and Sections 21–22 of the Consumer Protection Law, 5741 of 1981 of Israel.

Conclusion

While it is true that the Consumer Protection Act of 1986 has revolutionized the consumer protection movement in India especially because of its reach at the level of each district, it, nevertheless, suffers from various deficiencies when it comes to eliminating UTPs. As demonstrated by our research, the present system of fighting UTPs as contained in the Consumer Protection Act can be considerably improved by widening the definition of consumer; making traders, trade organizations, and the government competent to initiate complaints; a specific accommodation of public interest; vesting the consumer fora with *suo motu* powers to initiate a complaint; and establishing an in-house inquiry and investigation wing within the consumer commissions. These measures will increase the sweep and span of the present system of countering UTPs under the Consumer Protection Act from a mere compensating legislation to the one which can aim at eradication of UTPs also.

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