

# The International Handbook on Private Enforcement of Competition Law

---

*Edited by*

Albert A. Foer

*The American Antitrust Institute, Washington, DC, USA*

Jonathan W. Cuneo

*Cuneo, Gilbert & LaDuca, LLP, USA*

*Associate Editors*

Randy Stutz

*Research Fellow, American Antitrust Institute*

Bojana Vrcek

*Ph.D., M.E.S., Research Fellow, American Antitrust Institute*

**Edward Elgar**

Cheltenham, UK • Northampton, MA, USA

© Albert A. Foer and Jonathan W. Cuneo 2010

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by  
Edward Elgar Publishing Limited  
The Lypiatts  
15 Lansdown Road  
Cheltenham  
Glos GL50 2JA  
UK

Edward Elgar Publishing, Inc.  
William Pratt House  
9 Dewey Court  
Northampton  
Massachusetts 01060  
USA

A catalogue record for this book  
is available from the British Library

Library of Congress Control Number: 2010925997



ISBN 978 1 84844 877 3

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire  
Printed and bound by MPG Books Group, UK

---

## 31 India

*Pradeep S. Mehta<sup>1</sup> and Cornelius Dube<sup>2</sup>*

---

### **Introduction**

The Indian case with respect to private antitrust enforcement offers a unique example, given that private enforcement has to be administered by the same institutions tasked with public enforcement of competition law. The Monopolies and Restrictive Trade Practices Commission (MRTP Commission), established by the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), was the sole body responsible for the enforcement of competition law in India until 20 May, 2009, when the Competition Commission of India (CCI), established by the Competition Act, 2002 (Competition Act), became effective. The Competition Appellate Tribunal (CAT), which is also provided for under the Competition Act, was inaugurated on 19 October 2009. The CAT is established to hear appeals against orders of the CCI and to preside over compensation claims relating to violations of the Competition Act. In terms of the Competition Act, the MRTP Commission was expected to continue to prevail for two years after the Competition Act took effect to handle pending cases, although not entertaining any new cases.<sup>3</sup>

However, in a surprising turn of events, the MRTP Commission came to a premature demise on October 14, 2009 when the President of India promulgated the Competition (Amendment) Ordinance, 2009 amending section 66 of the Competition Act. In terms of the Ordinance, from October 14 all monopolistic or restrictive trade practices pending before the MRTP Commission would be transferred to the CAT. However, the MRTP Act will still be in force, given that in deciding these outstanding cases, the CAT would only apply the provisions of the MRTP Act.

Private enforcement of competition law, in the Indian context, refers to situations where private agents use the provisions of the MRTP Act and/or the Competition Act to seek compensation for damage suffered as a result of anticompetitive behaviour. Although there have been numerous applications for receiving compensation from violators of the MRTP Act's provisions related to unfair trade practices, the same cannot be said about applications relating to violations of restrictive and monopolistic trade practices. For example, during the period April–December 2004, there were 1,231 applications for compensation being considered under section 12B (of which only 75 were filed during the same period and others were brought forward from previous period). During the period April–December 2006, there were 1,323 cases being considered (114 were fresh applications) while for the period April–December, 2007, there were 1,187 applications

---

<sup>1</sup> Secretary General, CUTS International (psm@cuts.org and www.pradeepsmehta.com), India.

<sup>2</sup> Economist, CUTS CCIER, (cd@cuts.org) India. Significant contribution came from Dr S Chakravarthy, a civil servant by profession and formerly Member, MRTP Commission.

<sup>3</sup> This is as per the provisions of §66 of the Competition Act, 2002.

being considered (79 cases were new applications).<sup>4</sup> It can be established however that these applications related largely to unfair trade practices, with cases relating to anti-competitive practices cropping up once in a while. Thus in India private enforcement of competition law has generally not been pursued.

Section 12B of the MRTP Act was the legal basis for private enforcement of competition law in India, while under the Competition Act, private action for damages is provided for under section 53N of the Competition Act, 2002.

This chapter is an analysis of the various issues on private enforcement of competition law in India. Private enforcement will be discussed with respect to provisions of both the MRTP Act and the Competition Act to reflect the current position where both pieces of legislation are operational.<sup>5</sup>

### **1. What practices are illegal and what are the elements of proof?**

The MRTP Commission was actively involved in competition enforcement for decades, although its performance has never been satisfactory, with cases remaining pending for long periods. With respect to cartels and abuse of dominance, the lack of private actions for damages following these prolonged investigations compounded the problem of public under-enforcement. Under the MRTP Act, there are three categories of cases that are illegal. These are classified as monopolistic trade practices, restrictive trade practices and unfair trade practices.

In terms of section 2(i) of the MRTP Act, monopolistic trade practices include practices which have or are likely to have the following effects:

- (a) maintaining the prices of goods or charges for services at an unreasonable level by limiting, reducing or controlling the production, supply or distribution of goods;
- (b) unreasonably preventing or lessening competition in the production, supply or distribution of goods or services;
- (c) limiting technical development or capital investment or allowing the quality of any goods or services produced, supplied or distributed in India to deteriorate;
- (d) increasing unreasonably the cost of production of goods or charges for provision or maintenance of services;
- (e) increasing unreasonably the price at which goods and services are provided or increasing unreasonably the profits which may be derived in production, supply or distribution of goods and services.

On the other hand, restrictive trade practices are defined in section 2(o) of the MRTP Act to mean trade practices which have or may have the effect of preventing, distorting or restricting competition in any manner, particularly:

<sup>4</sup> The statistics were extracted from the annual reports of the Ministry of Corporate Affairs, India, for the periods 2004–05; 2006–07 and 2007–08. The choice of periods is just arbitrary.

<sup>5</sup> Although the MRTP Act is only applicable to outstanding cases, the new Act has just started operations and the only experience on private enforcement can be obtained from the MRTP era, hence the inclusion. In addition, any outstanding case on compensation from the MRTP era also has to be addressed by the CAT.

- (a) which tend to obstruct the flow of capital or resources into the stream of production;
- (b) which tend to bring about manipulation of prices, conditions of delivery or affect the flow of goods and services supply in such a manner that they impose on the consumers unjustified cost or restrictions.

This generally covers all kinds of agreements, which must all be registered with the MRTP Commission, as per sections 33 and 35 of the MRTP Act.

Unfair trade practices are defined to mean trade practices which adopt any unfair method or unfair or deceptive practice for the purpose of promoting the sale, use and supply of any goods or services. These provisions, which also fall under the Indian Consumer Protection Act, 1986 (COPRA), are not discussed in this chapter.

Although using different terms, abuse of dominance provisions generally are covered under monopolistic trade practices, while anticompetitive agreements are classified under restrictive trade practices. Mergers and acquisitions are not covered under the MRTP Act.

The MRTP Act does not list any elements that can be used as proof of occurrence for each case besides giving definitions. Instead the MRTP Act calls upon the MRTP Commission to undertake enquiries, which include any hearings it may think fit to hold, to make factual findings.

Under the Competition Act, private actions for damages can be pursued in respect to cases falling under Chapter II of the Act, covering sections 3 to 6. In Chapter II, unlike the MRTP Act that lumps various practices under monopolistic and restrictive practices, anticompetitive practices have been disaggregated to cover anticompetitive agreements (both horizontal and vertical), abuse of dominance and anticompetitive combinations (mergers and acquisitions). For business combinations, the scope for private action probably would be in instances where the parties do not abide by the pre-merger notification requirement provided for in terms of the Competition Act and it is later proven that the combination was anticompetitive. Private parties, typically customers of the business combination, can seek damages for the period in which the combination was in place.

It is difficult to predict at this stage whether cartels, business combinations or abuse of dominance are most likely to give rise to successful private action, as the Competition Act has just taken effect. However private action is likely to be comparatively easier than under the MRTP Act, as provisions on anticompetitive agreements and abuse of dominance are well articulated in sections 3 and 4 respectively of the Competition Act. Section 19 of the Competition Act also lays out the various aspects that are to be taken into account in determining dominance and its abuse, as well as whether any agreement is anticompetitive. Arguing a case for damages will be easier for claimants and their attorneys using these provisions as references, unlike under the MRTP Act scenario.

## **2. How does a damages action get started?**

Under the MRTP Act, section 12B required the aggrieved parties to apply for compensation to the MRTP Commission and granted the Commission exclusive authority over deciding these claims. In this regard, the MRTP Commission had dual functionality: finding of contravention and calculation of damages.

The MRTP Act provides only for follow-on cases in which claimants wait for MRTP

Commission judgments to file for compensation claims. Although claimants can also seek compensation on cases that have not yet been investigated by the MRTP Commission when they believe there have been violations and they have suffered damage, that can only be done if they also provide details to necessitate an investigation to prove occurrence, as the claim would be considered only after the Commission has established the contravention. There is no time limit provided by the MRTP Act for investigation and response and the MRTP Commission uses its discretion in each case.

Although the compensation quest was unsuccessful, the case of *Narang Store v T.T. Krishnamachari and Co. (1999)* can be used to substantiate this. Narang Stores filed a complaint with the MRTP accusing TT Krishnamachari of restrictive trade practices such as discriminatory pricing, refusal to deal and exclusive dealing among others. In the same application, Narang Stores pursued compensation for losses suffered due to some of these practices under section 12B. In its judgement, the MRTP Commission dismissed the restrictive trade practices on which these compensation claims were based, and on that basis, dismissed the compensation claim without any further analysis. However, the company was found guilty of area restrictions, a charge to which the claimant had not linked his compensation claims.<sup>6</sup>

Under section 53N of the Competition Act, damages actions can be pursued through applications to the Competition Appellate Tribunal and not to the Competition Commission, a slightly different set-up from the MRTP Act. The explanation to section 53N explicitly states that such applications can only be made after the Commission or Tribunal has found evidence of violations and no compensation application requiring new investigations would be permitted. The claimants are therefore requested to attach the findings of the CCI or the Tribunal with respect to public enforcement in their application.

Private parties can also pursue injunctive relief, given that an injunction may be granted both under the Competition Act and the MRTP Act pending a final decision on the main application.

### **3. Who may pursue a claim?**

Under both the MRTP Act and the Competition Act, any party who has suffered loss or damage as a result of the practices may pursue a claim. This includes Central Government, State Government, Local Authority, any enterprise, trader or class of traders or any consumer. Thus the determinative factor is having suffered losses or damage as a result of a practice that is in contravention of the competition law rather than the status of the claimant.

### **4. How may claims be aggregated?**

Under both the MRTP Act and the Competition Act, where any loss or damage is caused to multiple parties having the same interest, one or more of such parties may make an application on behalf of others in accordance with the terms of the Code of Civil Procedure, 1908 (5 of 1908). Under Rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 a person may request the permission of the court to claim

---

<sup>6</sup> MRTP Commission Judgment found at <http://indiankanoon.org/doc/876664/>.

on behalf of other parties, after which the court will notify the parties of the intended suit, either individually or through advertisement, at the plaintiff's expense. The Code provides that people may be joined in one suit as plaintiffs where a right to relief arising out of the same act is alleged to exist in such persons or where, if such people brought separate suits, any common question of law or fact would arise. Thus the Code provides for an 'opt-in' system to class action, where no person can be added as a plaintiff without seeking his/her consent. It is unclear whether an 'opt-out' system for claims aggregation may be adopted in the future.

### **5. What procedural defences are available short of trial?**

Once the MRTP Commission ruled that the practice engaged in was a monopolistic or restrictive trade practice, it was difficult to stop the initiation of a damages suit with respect to the offending practice. One of the grounds upon which private enforcement was dismissed short of a trial was the period that elapsed between the time that an individual purchased the product and the time that the claim for compensation was sought.

In the case of *Shiva Motors v TVS Suzuki Ltd 2002 CTJ 292 (MRTP)*, the applicant was aggrieved by the termination of a dealership agreement by the respondent on October 14, 1997 and filed a section 12B application with the MRTP Commission in the year 2001. The Commission dismissed the compensation claim as being time barred, placing reliance on a Supreme Court decision in the case of *Corporation Bank v. Navin Shah*, which stated a maximum time limit of three years after the offence.

### **6. What devices are available to obtain evidence?**

While evidence gathering in the case of public enforcement is provided for under both the MRTP Act and the Competition Act, there are no separate provisions on evidence gathering for private enforcement. During hearings on compensation cases relating to unfair trade practices under section 12B of the MRTP Act, the onus was largely on the claimant to provide evidence on how s/he suffered damage. No court procedure has been laid down in India for gathering evidence by private parties.

Provisions on evidence gathering for public enforcement include section 12 of the MRTP Act, empowering the MRTP Commission to summon defendants or witnesses and to request any document for use as evidence in its investigations. Where it believed documents might be hidden, destroyed, altered or mutilated, the Commission was empowered to enter storage facilities and search and seize any document from an undertaking for use in its preliminary investigation. Similarly, under section 36 of the Competition Act, the CCI has the power to summon witnesses and respondents and can order them to produce any documents it feels are necessary for its investigations. Moreover, the section empowers the CCI to call upon experts from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it. Information gathered in such a manner can also be used for private enforcement.

The explanation to section 53N of the Competition Act makes it clear that compensation decisions by the Tribunal would be based on the evidence obtained under public enforcement, and the task of the Tribunal would be only to determine the eligibility and quantum of the compensation due. Thus public enforcement evidence would guide private enforcement.

### **7. What do plaintiffs get if they win?**

Under both the MRTP Act and the Competition Act, plaintiffs get compensation if they win, where the compensatory award equals the damage shown to have resulted from the contravention. Claimants receive only actual damages, as opposed to the punitive or treble damage regimes in other countries.

The methods for determining the damages amount have not been provided for under both set of laws. Going by the previous cases handled by the MRTP Commission on unfair trade practices, the claimants submit their own calculation on how much they have suffered but the MRTP Commission has the final say in how much should be awarded. There are no established cases where the MRTP Commission resorted to ordinary civil laws or code in determining damages.

The same is the case under the Competition Act, as the Tribunal makes the final decision on the damages amount based on the amount that it feels is 'realisable' from the enterprise as well as 'any loss or damage shown to have been suffered' by the plaintiffs.

### **8. How does the plaintiff's lawyer finance private enforcement?**

Given the dearth of private enforcement in India, it is difficult to ascertain how plaintiffs' attorneys finance private enforcement efforts. While both the MRTP Act and the Competition Act provide that the claimants should claim for compensation for amounts relating to damage suffered, there appears to be nothing that can prevent the claimants from including legal costs incurred in recovering the damages in their application.

### **9. How does private enforcement interact with public enforcement?**

In India, private enforcement interacts closely with public enforcement. As has already been explained, under both the MRTP Act and the Competition Act, private enforcement is based on public enforcement outcomes. Private enforcement becomes possible only after cases have been investigated and concluded through public enforcement.

### **Conclusion**

Although there has been a basis for private enforcement of competition law in India due to the insertion of section 12B provisions into the MRTP Act in 1984, the level of private enforcement two decades later is troublingly almost non-existent. The paltry number of private actions may be the result of systematic under-enforcement on the part of the MRTP Commission.

The MRTP Act itself was very weak, with no mention of anticompetitive practices such as abuse of dominance and cartels, rendering it less effective in containing them. The MRTP Commission was poorly resourced, and unable to meet the expectations of a big country such as India. The biggest failure of the MRTP Commission was in the prosecution of cartels, where it has failed to take action amid allegations of cartels in various sectors, including cement, steel, tyre, trucking and family planning services.<sup>7</sup> Some competition cases involving abuse of dominance, which are resolved expeditiously in other jurisdictions, would take more than five years for the MRTP Commission to handle.

In such an environment, it is inevitable for a similar trend to be witnessed for private

---

<sup>7</sup> See CUTS (2007), *Competition and Regulation in India*, 2007, CIRC, Jaipur.

enforcement, which is entirely dependent on the outcomes of public enforcement actions.

As a deterrent tool, private enforcement can play a bigger role in India than public enforcement, given that the MRTP Commission could only pass cease and desist orders for violation of the law (except in resale price maintenance, for which fine is provided for under section 51), and could only impose fines if its orders were not followed. In addition to cease and desist orders, the CCI is empowered to impose financial penalties of up to 10 per cent of turnover for the last three preceding financial years for violations of the Competition Act. However more private enforcement action would have a greater deterrent effect on would-be offenders than public enforcement.

The role of private action is likely to become more prominent during the next few years with the newly-effective Competition Act. The current arrangement where the CCI is not responsible for private enforcement (unlike the MRTP Commission) would allow the CCI to concentrate only on public enforcement while the CAT is responsible for hearing private claims. Moreover, the CCI has more teeth compared to the MRTP Commission, given its stronger legislative framework; hence this is likely to stimulate private players into action, as their chances of getting compensation would be enhanced. Thus in the next five years, private enforcement is likely to gather momentum.

Increased private enforcement is only possible if the public is made aware of the important role of private actions in deterring anticompetitive practices. The consumer practitioners and movements need to be active in building the capacity of consumers and public-minded lawyers in bringing more compensation claims.