

**“STUDY AND ANALYSE THE SITUATION IN INDIA
REGARDING UNFAIR TRADE PRACTICES AND
LIMITATIONS OF THE LAW ENFORCEMENT”**

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I. BACKGROUND

1.1 UTPs encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret misappropriation, unfair competition, false advertising, palming-off, dilution and disparagement. UTPs can arise in any line of business and frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement. Specific types of UTPs prohibited in domestic law depend on the law of a particular country. The World Bank (WB) and the Organisation for Economic Cooperation and Development (OECD) Model Law, for example, lists the 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 or 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 trade mark, firm name, or product labelling or packaging; and
- unauthorised receipt, use or dissemination of confidential scientific, technical, production, business or trade information.

1.2 Consequently, UTPs not only harm the consumers, but also victimise other market players in the process, especially the smaller enterprises, and more importantly, they may cause damage to the market as a whole as well. For this reason, there has been a fair amount of uncertainty across countries regarding how to deal with them, in theory as well as in practice. In some countries, UTPs fall within the purview of the competition statutes, in some others, that of the consumer protection one, and in some other cases, they are dealt with by a separate law/act.

1.3 There is also the notion of “fairness” being involved, which might mean different things to different groups of stakeholders, and might vary according to contexts. For example, when UTPs are inflicted upon consumers by enterprises in the market, the damage is pretty clear – it results from the deception involved. When UTPs happen in the relationship between businesses/producers, their danger consists mainly in the erosion or loss of goodwill. The harm that a competitor does to his rival through unfair competition, in effect, is to cut down or take away his clientele. However, each and every act of taking away a business' clients does not amount to an UTP. This is so, because such clients may be taken away by virtue of honest and proper competition. A case in point is a competitor taking away a good portion of his rival's clientele by offering a product or service of better quality. Yet, there are other trade practices that aim at taking away a competitor's clients and thereby cutting down the goodwill, which are presumed to be unfair and improper, and, as such, are prohibited by law. Revelations that they are cheated by a producer, or a group of businesses, might also lead the consumers to distrust an entire industry or market, which in turn will affect sales in that market negatively

1.4 UTPs also remain an issue of low significance when compared to the high profile of other antitrust/competition issues, unfortunately. Part of the reason is because the value of UTP cases is smaller as compared to antitrust cases, and UTPs involve mostly the domestic consumers, SMEs – in essence, the small men. This, in consequence, leads to a situation

where policy-making and law enforcement activities related to UTPs is not on the priority list of governments and to a general lack of field/published research on substantive issues of UTPs, to name a few problems. All in all, these problems lead back to the situation where public awareness/understanding about the issues at stake is low, consumers are cheated, small businesses are treated unfairly, which means overall welfare of the society is lessened, while economic gains concentrate on a few elites. More research and information dissemination in this area, hence, is the need of the hour in order to create effective legal institutions to deal with UTPs and also create awareness among relevant stakeholders.

II. CONTEXT AND PROBLEMATIQUE

- 2.1 The MRTP Act, 1969, was enacted to prevent monopolies and restrictive trade practices in the economy. In 1984, it was amended to add a chapter on unfair trade practices. It also created a body called the Director General of Investigation and Registration (DGIR). On a complaint, or on its own, the DGIR could investigate into a claim of a restrictive or an unfair trade practice. The MRTP created a judicial body called the MRTP Commission and the DGIR was to take cases before the benches of the Commission. The Commission, on judging a practice to be an unfair trade practice, could order the offending party to cease and desist the practice.
- 2.2 To understand the working of the law on unfair trade practices, one would need to examine specific provisions of the MRTP Act. Section 36 A of the Act lists unfair trade practices. This is the substantive ground on which the DGIR could start investigations and bring the matter before the MRTP Commission. The Commission could discontinue an unfair trade practice, under Section 36 D, if the practice is 'prejudicial to the public interest or to the interest of any consumer or consumers generally.' Section 36 A has five parts or sub-sections covering different themes. The changed context of liberalization and globalization requires better mechanisms for regulating business practices and settling disputes. The Government of India constituted a Competition Commission of India to recommend legislative measures for protecting and enhancing competition in the economy. Following its recommendations, the government repealed the MRTP Act. The Competition Commission was of the view that the Competition Act should not be burdened with unfair trade practices. This was, instead, given effect under the Consumer Protection Act, 1986 (CPA).
- 2.3 While the Consumer Protection Act was being enacted in 1986, the provisions on unfair trade practices had already had a life for two years under the MRTP Act. Since a consumer needed protection not only from being supplied with defective goods and deficient service, but also unfair trade practices, the provisions on unfair trade practices were copied from the MRTP Act into the Consumer Protection Act. The Consumer Protection Act created a three-tier quasi-judicial bodies — the District Forum, the State Forum, and the National Forum — through which a consumer could seek remedy. The provisions on unfair trade practices, in the course of being copied from the MRTP Act into the structure of the Consumer Protection Act, acquired a new meaning. Within the Consumer Protection Act, a 'consumer' cannot take up a case of an unfair trade practice before a consumer forum. It can only be taken up by a consumer association, central government, and the state governments.
- 2.4 CPA was an important milestone in the field of consumer protection, creating six basic consumer rights and establishing consumer dispute redressal agencies at district, state and central level. These quasi-judicial redressal agencies have the power to adjudicate complaints received from consumers against any defect in goods or services purchased by the consumer

as well as against unfair trade practices. But these agencies do not have any investigative powers and suffer from a lack of infrastructure and qualified personnel, especially at the local level. As a consequence consumer confidence in the redressal system is low and cases can take years to be finally decided upon. Given this, the MoCA has identified the need to establish an enforcement body on consumer protection in India i.e. a Consumer Protection Agency, most likely to be established through an executive order with the objective to investigate cases like unfair trade practices, misleading advertisements and unsafe products impacting a large number of consumers and having principle legal relevance.

2.5 Thus, the research study as proposed by CUTS would be to document the real unfair trade practices prevailing in the Indian markets to support the development of guidelines and recommendations for establishment of the Consumer Protection Agency. Anecdotal evidences, once collected, could come back to inform the improvement of the legal and regulatory framework, and strengthen the institutions, making them more suited to the needs and level of development of the national economy and markets, instead of borrowed concepts from elsewhere.

III. PURPOSE OF THE STUDY

The purpose of this study is to objectively investigate the current context in India and undertake a situation analysis on the status of UTPs in India and international best practices and to recommend a clear way forward on how to address the issue within the framework of Indian law.

IV. SCOPE OF THE STUDY

The study will investigate and undertake the following specific tasks:

- Determine the relevant policy, regulatory and implementation challenges with reference to unfair trade practices
- Identify specific unfair trade practices that are currently in existence in India and define their nature and magnitude.
- Propose measures on how to address possible unfair trade practices in relation to international good practices¹
- Provide recommendations on how unfair trade practices can be effectively addressed through the appropriate enforcement body based on national and international experience.

V. EXPECTED OUTCOMES

Identify possible areas for the improvement of MOCAs trade defence laws and practice, with a view to increase their efficiency (e.g. in terms of transparency, enforceability of measures and streamlining of procedures)

¹CUTS International through its office in Hanoi, is implementing a project, “Study on Unfair Trade Practices in select 05 ASEAN countries” and relevant experience gained in implementation of the project, would help CUTS research team to analyse good international practices. For more on project, please visit - <http://cuts-hrc.org/en/active-projects/study-on-unfair-trade-practices-in-select-asean-countries>

VI. RESEARCH QUESTIONS

Against this background, there are certain critical questions to be analysed, as follows:

- What are the special development contexts for promulgating/enforcing laws and regulations on unfair trade practices law in developing economies, such as India? How are they different from the more advanced economies/jurisdictions?
- Should unfair trade practices be regulated in a separate statute or should they be included in the same book as anticompetitive practices (as in an antitrust law) or consumer protection issues (as in a consumer protection law)? Should there be prohibition on specific unfair trade practices or should there be blanket protection for consumers and small and medium-enterprises (SMEs)?
- Should there be a separate regulatory body taking charge of UTPs or should the hybrid model be followed? What should be the design of the future regulatory body (CPA), in view the possible resource constraints (both financial and human) in developing economy?

VII. METHODOLOGY

7.1 At the beginning, research process would be undertaken which will involve **Desk Research** and **One to One Interviews** (using ICT Tools, such as emails). Desk Research would comprise of review of relevant laws/legislations, literature review to capture experience of other developing countries, etc. Desk research would also provide us with relevant inputs to design the interview tools i.e. questionnaire.

Further, the effectiveness of any law in a country depends on the extent to which the law has actually evolved in the country in tandem with socio-economic and historical developments in the country. It is necessary that there be some amount of acceptability and ownership of the law among the stakeholders. This is possible only if their expectations are taken into consideration while drafting/amending the laws, and designing new institutions. Thus, for the research process in this proposed project, we would also undertake one to one interviews. This activity will not only provide the research team with the perceptions of the relevant stakeholder groups on UTPs, their expectations of the best-suited legal and institutional frameworks for dealing with these practices, but also additional information on real-life unfair trade practices.

7.2 Given the paucity of time, only a selective sample would be chosen for the interviews, *i.e.* those who are most informed about the policy dealing with UTPs in India, as well as its enforcement, and the real market situation, not a large sample of the general public, who are most likely unaware of high-level and complex policy issues, or of business strategies. The direct interview method (person-to-person) would be utilised. The respondents would tentatively include:

- government officials;
- representatives from notable consumer organisations, as representatives of individual consumers;
- chambers of commerce and industry, as representatives of the business; etc

7.1 Based on the desk research and analysis of information received during the interviews, the **research report** would be prepared. The outline of the report is provided below.

Outline of the Research Report

Introduction:

- Definition of UTPs
- Treatment at the International level; mapping of legal and institutional framework in select developing countries
- Effects of UTPs on consumers and economy

Unfair trade practices in India:

- Prevalence of the practices in India
- Types of business most often engaged in the practices and the mechanisms to deal with them
- Gaps perceived in dealing with the practice

Current legal and institutional framework on UTPs in India:

- Current laws or regulations in the India as regards UTPs such as competition laws, consumer protection laws, as well as other sectoral regulations, etc
- Current institutional designs to enforce those laws
- Initial analysis and comments on the regulatory structure, etc

Stakeholders' Feedback

- This section will present the understanding and expectations of different groups of stakeholders collected through the interview process.

The Way Forward& Recommendations

- Recommendations on the structure, legal basis, functioning, powers, tasks, etc of the relevant agency to deal with UTPs in India

VIII. MANAGEMENT AND PROJECT TEAM

The overall management of the project will vest with CUTS International. The project will be headed by a National Expert. The National Expert would develop the broad framework of the research, analyse the collected information and draft the final report.

IX. ACTIVITY SCHEDULE

ACTIVITIES	WEEKS (6)					
	01	02	03	04	05	06
Preparatory Work						
Desk Research						
One to One Interviews						
Submission of Research Report						