

Regulation of Advertising under the MRTP Act

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Advertising is an essential ingredient of modern marketing and a potent tool in the hands of a businessman. In their pursuit of profit maximisation, unscrupulous businessmen are often tempted to misuse advertising and thereby harm the consumer and the public interest. In order to protect the interest of the consumer and the general public, the need for regulation of advertising needs no emphasis.

The statutory provisions for the regulation of certain aspects of advertising in India are contained in the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"), which seeks to prevent concentration of economic power to the common detriment, to control monopolies, and to prohibit monopolistic and restrictive trade practices. The Act, which came into force on June 1, 1970, does not apply to Public Sector Undertakings. Under the scheme of the Act, anti-competitive advertising may be dealt with under two heads: (i) restrictive trade practice and (ii) monopolistic trade practice.

Advertising as a restrictive trade practice

An advertising practice may amount to a 'restrictive trade practice' if it has, or may have, the effect of preventing, distorting, or restricting competition in any manner, and in particular, if it tends to obstruct the flow of capital or resources into the stream of production, or to bring about manipulation of prices or conditions of delivery, or to affect the flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions.¹ A single or isolated advertisement may well amount to an advertising practice.

¹ MRTP Act, section 2(o).

The Monopolies and Restrictive Trade Practices Commission ("MRTP Commission"), a quasi-judicial body set up by the Central Government for purposes of the MRTP Act, is empowered to inquire into a restrictive trade practice on one of the four bases: (i) a complaint received from a trade or consumers' association having 25 members or more or from 25 or more consumers, (ii) a reference received from the Central Government or a State Government, (iii) an application of the Registrar of Restrictive Trade Agreements ("RRTA")² and, (iv) its own knowledge or information.³ After making an inquiry, if the Commission is of the opinion that the practice is prejudicial to the public interest, it may direct the party concerned to discontinue the practice or not to repeat the same. It is referred to as a "Cease and desist" order. The Commission can also declare the relevant agreement void, in respect of the relevant restrictive trade practice, or order a modification of the agreement in the specified manner. The Commission may, on an application of the party concerned, permit him to take such steps within the specified time to ensure that the trade practice is no longer prejudicial to the public interest. In case the Commission is satisfied that the necessary steps have been taken within the specified time, it may drop the inquiry.⁴

A restrictive trade practice is presumed to be prejudicial to the public interest, unless the Commission is satisfied of one or more of the circumstances, commonly referred to as "gateways" of public interest, specified under Section 38 (1) of the MRTP Act.

Advertising as a monopolistic trade practice

An advertising practice may amount to a monopolistic trade practice if it has, or is likely to have, the effect of—

- (i) maintaining prices at an unreasonable level by limiting, reducing, or otherwise controlling the production, supply, or distribution of goods of any description, or the supply of any services, or in any other manner; or
- (ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods, or in the supply of any services.⁵

The MRTP Commission may inquire into a monopolistic trade practice either on a reference made to it by the Central Government or on its own knowledge or information.⁶

2 RRTA is an officer appointed by the Central Government for purposes of the registration of restrictive trade agreements and certain other functions.

3 Section 10(a)

4 Section 37(1) and (2)

5 Section 2(i)

6 Section 10(b)

The finding of such an inquiry is to be reported to the Central Government which may pass an appropriate order to remedy or prevent any mischief which may result from the trade practice. Such an order may include an order : (a) regulating the production, supply, distribution, etc., and fixing the terms of sale (including price), (b) prohibiting the undertaking from resorting to any act or practice or from pursuing any anti-competitive advertising policy, and (c) fixing standards for the goods used or produced by the undertaking.⁷ Thus, the action provided against indulging in a monopolistic trade practice is more serious than that in the case of a restrictive trade practice.

The provisions relating to control of monopolistic and restrictive trade practices are broad enough to cover those advertising practices which have or may have an adverse effect on competition and are, therefore, harmful to the consumer interest. However, the role of the MRTP Commission, as an agency of protecting the consumer against harmful advertising practices, has not been clearly spelt out in the Act. Moreover, the existing legislative framework does not provide for adequate remedy. There is no provision for award of any damages—compensatory or punitive—to those who have suffered a loss from any anti-competitive advertising. The only consequence of indulging in a restrictive trade practice, as provided under the MRTP Act, is a cease-and-desist order which takes effect from the date it is passed. A delinquent party enjoys immunity during the period of inquiry till the MRTP Commission passes a final order.

The High-Powered Expert Committee (“Sachar Committee”)⁸ appointed by the Central Government, in 1977, to review the working of the Companies and the MRTP Acts has suggested that the MRTP Commission should be given powers to grant injunction.⁹ The Sachar Committee has also recommended a provision for the award of damages to the extent of the loss or damage suffered by any person, together with any additional amount that the MRTP Commission may allow for costs.¹⁰

Restrictive trade practice inquiries

From its inception in August, 1970 to December 31, 1981, the MRTP Commission instituted 376 inquiries into various restrictive trade practices of business undertakings. It passed final orders in 320 of those inquiries upto December 31, 1981. The number of inquiries instituted into the alleged restrictive trade practices relating to advertising is, however, only four. None of these inquiries had been disposed of upto December 31, 1981.

7 Section 31

8 Government of India, Department of Company Affairs, *Report of the High-Powered Expert Committee to Review the Working of the Companies and the MRTP Acts* (Chairman : Rajinder Sachar), New Delhi, 1978. As on December 31, 1982 the Report was under consideration of the Government.

9 *Ibid.*, para 21.14

10 *Ibid.*, para 22.25

The first such inquiry¹¹ was instituted against Britannia Biscuit Co. Ltd. (now named Britannia Industries Ltd). According to the notice of inquiry, it appeared to the MRTP Commission that Britannia Biscuit Co., a dominant manufacturer of biscuits in the organised sector, increased its expenditure on advertising and sales promotion from Rs. 17.80 lakhs in 1974-75 to Rs. 57.30 lakhs in 1975-76 and spent a large sum of Rs. 457.60 lakhs on packing materials in 1975-76 which alone accounted for about 20% of the total cost of production. Moreover, the distributive trade was being given margins of 36 or 37% and the company had increased the biscuit prices by 38% to 80% between 17th January, 1973, and 16th August, 1976.

The second inquiry¹² relates to Parle Products Pvt. Ltd., another major manufacturer of biscuits. The allegations made against Parle is that it had been steadily raising its advertisement and sales promotion expenditure over the preceding three years, as shown below :

<i>Year</i>	<i>Advertising expenditure</i>	<i>Other sales promotion expenditure</i> (Expenditure in rupees/lakhs)	<i>Total</i>
1974-75	16.1	7.8	23.9
1975-76	15.8	6.8	32.6
1976-77	32.1	42.2	74.3

It was also alleged that during the year 1976-77, Parle spent a large amount of Rs. 492 lakhs on packing, which represented 27.9% of the cost of production of biscuits. According to the notice of inquiry, it appeared to the MRTP Commission that the high expenditure on advertising and packing had or might have the effect of preventing, distorting, or restricting competition in the following manner :

- (i) High advertising expenditure would put the majority of small-scale competitors at a disadvantage by bringing about product differentiation and avoiding price competition, which would have been beneficial to consumers.
- (ii) High packing costs created brand image preference and added an undue cost burden on consumers, thus putting the competitors at a disadvantage by bringing about differentiation in the product and restricting the price competition, which would have been beneficial to consumers.

11 RTP Inquiry No. 8 of 1977, Notice of inquiry dated 17.2.1977.

12 RTP Inquiry No. 25 of 1978, Notice of Inquiry dated 29.8.1978

The third inquiry¹³ relates to the practice of increasing and maintaining advertising expenditure at a high level by Richardson Hindustan Ltd., in respect of its two products, Vicks brand cough drops and vaporub, both of which were already well established in the market. While the expenditure incurred by the company on cough drops reportedly increased from Rs. 10.90 lakhs in 1968-69 to Rs. 22.30 lakhs in 1976-77, the expenditure on vaporub increased from Rs. 16.34 lakhs to Rs. 24.92 lakhs during the corresponding period. As stated in the notice of inquiry, the advertising expenditure on such a large scale enabled the company to boost the sale of cough drops from Rs. 66.96 lakhs in 1968-69 to Rs. 204.75 lakhs in 1976-77, and the sale of vaporub from Rs. 151.65 lakhs to Rs. 450.17 lakhs. Further, the MRTP Commission felt that through heavy advertising expenditure the company attempted to continue and strengthen the product differentiation in favour of the two products and to the disadvantage of the smaller competitors and those entrepreneurs who intended to introduce competing products in the market but could not afford to spend large amounts on advertising, and that the company had thus created a major barrier to entry to the industry and had excluded the new competition in the relevant trade.

The fourth such inquiry¹⁴ relates to the advertising practices of Amrutanjan Ltd., a leading manufacturer of pain balm. The allegations against this company are almost similar to those against Richardson Hindustan.

In all the four inquiries, leading manufacturers of popular consumer products are involved. All the four inquiries have been instituted by the Commission on its own knowledge or information.

Monopolistic trade practices inquiries

In March, 1974, the Central Government made a reference to the MRTP Commission for inquiry into certain monopolistic trade practices reported indulged in by Cadbury-Fry (India) Pvt. Ltd., a leading manufacturer of beverages, chocolates, etc. One of the allegations against this multinational company is that it did not reduce its administrative overheads, particularly the advertising expenses.¹⁵ The proceedings before the Commission were stayed by the Delhi High Court on a writ petition filed by the company. The writ petition was dismissed by the High Court in December, 1979. Later, the company filed an appeal before the Supreme Court against the order of the Delhi High Court. As on December 31, 1982, the matter was pending before the Supreme Court.

Since none of the restrictive and monopolistic trade practice inquiries instituted by the MRTP Commission into the legality of heavy advertising expenditure by certain manufacturers has been decided, the Commission's views on this major marketing strategy are not yet known.

13 RTP Inquiry No. 26 of 1978, Notice of inquiry dated 30.8.1978

14 RTP Inquiry No. 27 of 1978, Notice of Inquiry dated 20.9.1978

15 Government of India, Department of Company Affairs, *The Fourth Annual Report on the Working of the MPTP Act, 1974*. New Delhi, 1975), pp. 18-19.

Concluding Remarks

There has been no significant achievement in the relation of advertising under the MRTP Act. This can be attributed to the following reasons :

- (i) inadequate scope of statutory provisions and for regulation of advertising and the underfined role of the MRTP Commission in this field.
- (ii) inadequate infra-structure and resources of the Commission, and
- (iii) lack of consumer awareness of the statutory provisions and the Commission's functions in this area.

It is worthwhile to mention that no complaint has so far been received from any consumers' association or a trade association, or from 25 or more consumers, against any restrictive/anti-competitive advertising practice. This seems to be deplorable in view of the fact that the people often grumble about such practices being indulged in by many companies.

Moreover, barring one reference for inquiry into the monopolistic trade practices no reference for inquiry into any restrictive trade practice in advertising has been made to the MRTP Commission either by the Central Government or by any State Government. Thus the Central Government and State Government too have evinced little interest in curbing anti-competitive advertising practices.