

SIM DUGAR

GUIDE TO
COMPETITION
LAW

CONTAINING COMMENTARY ON
THE COMPETITION ACT, MRTP ACT &
CONSUMER PROTECTION ACT

5th Edition 2010

VOLUME 2

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Nagpur

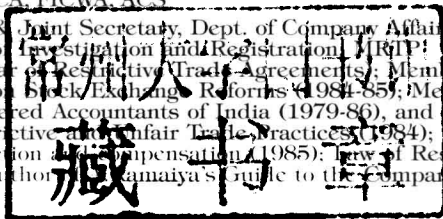
Guide to Competition Law (Containing Commentary on Competition Act, MRTP Act & Consumer Protection Act)

Commentary on 'Competition Act, MRTP Act and Consumer Protection Act'. With exhaustive comments, in juxtaposition with provisions of erstwhile MRTP Act and caselaw given thereunder from selected foreign countries Also, contains relevant excerpts from the Reports of Monopolies Inquiry Commission (1964-65), High Powered Expert Committee (Sacher Committee) on Companies and MRTP Acts (1977-78), High Level Committee (Raghvan Committee) on Competition Policy and Law (1999-2000) and indepth analysis of provisions of Competition and Consumer Laws in U.S.A., U.K., Canada and Australia),

by

S. M. Dugar, Ph.D., LL.B., FCA, FICWA, ACS

Formerly Member, Company Law Board & Joint Secretary, Dept. of Company Affairs, Government of India; Director General of Investigation and Registration (MRTP) Commission (then designated as Registrar of Restrictive Trade Agreements); Member, High Powered Committee (Patel Committee) on Stock Exchange Reforms (1984-85); Member, Central Council of the Institute of Chartered Accountants of India (1979-86), and Author of publications : Law of Monopolistic, Restrictive and Unfair Trade Practices (1984); Unfair Trade Practices under MRTP Act—injunctive relief and compensation (1985); Law of Restrictive Trade Practices (1976); and co-revising author of Kamaiya's Guide to the Companies Act.



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Volume 2

by

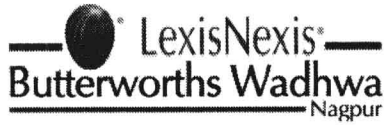
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and

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ISBN : 978-81-8038-575-9

Printed at
Sai Printo Pack Pvt. Ltd.,
A-102/4, Okhla Industrial Area, Phase II,
New Delhi - 110 020

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Printed and bound in India.

First Edition	1979
Second Edition	1992
Third Edition	1998
Fourth Edition	2006
Fifth Edition	2010
—Volume 1	2010
—Volume 2	2010

To
My Wife
Mridula
and loving Sons
Amitabh and Abhijeet
their Spouces
Mala and Priti
and grand children
Arushi and Aditi
Arnav and Anushree

By laissez faire one does not automatically get perfect competition. To reduce imperfections of competition, a nation must struggle perpetually and must ever maintain its vigilance.

— Paul A. Samuelson

preface to the fifth edition

Competition and Consumer protection laws in the country are benevolent examples of legislation enacted in the post independent era which are intended to protect a large body of consumers from exploitation. In view of the policy shift from curbing monopolies to promoting competition, the MRTP Act, 1969 was replaced by the Competition Act, 2002 to prevent practices having an appreciably adverse effect on competition, as also to promote and sustain competition in markets. Taking cognizance of the importance of these developments, we felt it would be appropriate to rename the book so as to reflect the changes in legislation and policy. The book has thus been rechristened as "Guide to Competition Law (Containing Commentary on the Competition Act, MRTP Act & the Consumer Protection Act". The Competition Act has been structured to bring within its ambit anti competitive agreements, abuse of dominant position and combinations. The Consumer Protection Act, 1986 also seeks to provide speedy remedy for redressal of grievances of consumers with respect to defects in goods and deficiency in services besides curbing restrictive and unfair trade practices. Of late, there has been a great deal of activities on the part of the Government and social activists in spreading consumer awareness and educating consumers of their rights under these enactments.

The law is never static. It has accordingly been necessary to update this treatise with the latest amendments and case laws over the years. The basic scheme of the book continues to be the same. It is in two parts. Volume I deals with commentary on the Competition Act, 2002. It also contains commentary on the MRTP Act, 1969, since repealed, as restrictive and monopolistic trade practices under the 1969 Act have been referred to as anti competitive agreements and abuse of dominant position, respectively under the 2002 Act. Further, the Competition Appellate Tribunal constituted under the 2002 Act has been assigned the jurisdiction to hear and decide the cases pending before the MRTP Commission on its abolition. Volume II deals with commentary on the Consumer Protection Act, 1986 apart from their rules, regulations and reports. Other cognate legislation dealing with consumer protection in India and legislation abroad on the subject also forms part of Volume II.

This treatise will be very useful to lawyers, accountants and company secretaries apart from consumers, traders, corporate entities and all those concerned with these enactments.

New Delhi
19th August, 2010 "Krishna Janamashtmi"

U.P. MATHUR

preface to the fourth edition

Anti-competitive and Consumer Protection laws have to play an important role in maintaining the competitiveness in the Indian Markets and generation of best products at the lowest prices to provide benefits to consumers. The Competition Commission is meant to curb anti-competitive agreements, abuse of dominance and anti-competitive mergers. The Redressal Authorities, set up under the Consumer Protection Act, enforce Consumer Protection law to prevent deception and unfair marketing practices, which hurt to the Public at large, as consumers of goods and services. Thus, these two regulatory authorities ensure that nation's markets are vigorous, vibrant, efficient, and free from restrictions that harm trade and industry as also the consumers. This has, indeed, become a task of prime importance in the context of present day global markets, high-technology innovations and the fast changing economic land scape.

The pre-merger notification programme under the Competition Act is an important element of the anti-competitive mission pursued by the Competition Commission. Mergers and Joint Ventures (for convenience sake "mergers") can generate efficiencies and most mergers are either pro-competitive or competitively neutral. But, mergers that are anti-competitive, however, can lead to rise in Consumer prices of magnitude at unpredictable intervals. Such questionable mergers might also significantly diminish product quality and output as also consumer choice and innovation. To distinguish between mergers that threaten free markets and those likely to promote them, sophisticated economic analysis and through factual investigations are necessary. The fact that the ongoing globalization of the economy, which has significant impact on maintaining competition within the country and continued growth of commerce beyond National boundaries has been duly recognised in the regulatory provisions contained in section 5 of the Competition Act.

With the repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (on the enforcement of the Competition Act), the mandate for the protection of consumers against unfair, and restrictive. Trade practices primarily vests with Redressal Authorities established under the Consumer Protection Act. To facilitate their task, the definitions of 'Unfair Trade Practice' and 'Restrictive Trade Practice', have been suitably revised. Anti-competitive agreements (hitherto referred to as Restrictive Trade Practices under the erstwhile MRTP Act) and abuse of Dominance (hitherto referred as Monopolistic Trade Practice under the erstwhile MRTP Act), fall

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preface
to the fourth edition (contd.)

under the domain of competition commission under the Competition Act.

In writing this treatise, the author has been benefited greatly from the assistance rendered by S/Shri U.P. Mathur and D.D. Pandey, Advocates, who were earlier with the Department of Company Affairs, Ministry of Law, Justice and Company Affairs (now, Ministry of Company Affairs).

The Crystal understanding of the Shri U.P. Mathur, of these complex legislations, indeed, greatly helped me in shaping my thoughts and bringing out this treatise in the present form.

I acknowledge the contribution of Shri Dinesh Agnani, Advocate, for his useful suggestions to make this book, a real reference book, not only for the lawyers and members of fellow professions but also for the readers generally.

On a personal note I record my appreciation for the forbearance of my wife, Mridula Dugar, to have put up with my pre-occupation that the authorship of such book entails. It gives me pleasure to also acknowledge the invaluable help rendered by my two sons, Dr. Amitabh Dugar and Abhijeet Dugar and their spouses Mala and Priti which has resulted in successfully bringing out this publication.

Lastly, I convey my sincere thanks to the Publishers M/s. Wadhwa and Company Nagpur for their enthusiastic assistance and advice, from time to time, in bringing out this publication. I am indebted to them for their efforts in speedily bringing out this publication, with high quality printing, and excellent stylistic get-up.

My readers will be placing me under deep debt of gratitude if they bring to my notice any omissions and give their suggestions to make this publication more useful.

New Delhi
18th July, 2006

S.M. DUGAR

**preface
to the third edition**

The primary object of the MRTP Act when it was enacted in the year 1969, following the recommendations of the Monopolies Inquiry Commission set up by the Government of India in 1964, was to curb concentration of economic power in private hands, which it was generally believed, led to the then prevailing inequality in the distribution of income and levels of living of the populace of the country. The monopolistic and restrictive trade practices were thought of as attendant functions of the concentration of economic power and hence regulatory measures therefor also came to be introduced in the MRTP Act. With the amendment of the Act in 1991, the focus of this legislation shifted to consumer protection. Apart from the provisions on unfair trade practices which have a direct bearing on the protection of consumers, the regulatory provisions which seek to curb restrictive and monopolistic trade practices, in the ultimate analysis, also subserve the consumer interest.

The MRTP Act is concerned with two distinct branches of Law, namely Consumer Protection and preservation of competition in trade and industry. When the competition process is frustrated, the MRTP Act provides for the intervention by the MRTP Commission. The scope of the MRTP Act is, thus, much wider than that of the Consumer Protection Act, 1986. The Consumer Protection Act has a limited perspective, namely redressal of the grievance of a consumer who hires any service or buys goods for his personal use (and not for any commercial purpose or for resale) by requiring removal of defect in goods or deficiency in service. Hence, lies the continued importance of the MRTP legislation, as its utility is not only *qua* the consumer but for regulating the market behaviour in general.

Consumer Protection and Competition Law, relatively speaking, is a new and a growing subject. A treatise on this subject, therefore, requires periodical updating. I hope this edition of the book, which contains in-depth analysis of the MRTP legislation in the context of the cases decided by the MRTP Commission and the Courts, in the backdrop of the contemporary foreign legislations, notably the American, British, Australian and Canadian and the case law developed in these Countries, would be found useful by all those who are interested in Consumer Protection Law as such. The Lawyers and

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**preface
to the third edition (contd.)**

other professionals authorised to appear before the MRTP Commission and the Courts on behalf of their clients, I fondly hope, would find this revised updated edition of the book quite informative.

The law is stated as amended up-to-date (i.e. covering the MRTP (Amendment) Act, 1991). Later developments (including amendment of Rules and Regulations etc.) and the decisions of the MRTP Commission and the Courts have been noted in this publication.

Before concluding, I wish to acknowledge the all-round unfailing support extended by Shri U. P. Mathur, Former Director of Inspection & Investigation in the Department of Company Affairs and presently practising as an Advocate & Corporate Laws Consultant. My thanks are also due to Shri G. R. Bhatia, former Deputy Director (Legal) in the MRTP Commission and now with the Department of Company Affairs, for the assistance rendered in updating the case law on the subject. I also record my appreciation for the sincere efforts put in by the publishers Messrs. Wadhwa & Co., who have handled this publication with utmost competence and promptness.

No less is the contribution of my wife, Mridula as also my sons Amitabh and Abhijeet and their wives Mala and Priti. Their contribution has been immensely useful in many ways. But for the encouragement provided by them, it would not have been possible for me to bring out this edition of the book.

New Delhi
May 25, 1997

S.M. DUGAR

preface to the second edition

The MRTP Act has been designed as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that unrestrained inter-action of competitive forces would yield greatest material progress through best allocation of our economic resources and at the same time it would result in the availability of goods and services of highest quality at lowest prices, thereby provide a just and fair deal to the consumers. All business enterprises, whether corporate entities registered under the Companies Act or non-corporate organisations, e.g., proprietary concerns and partnerships fall within the ambit of this legislation. It encompasses the fields of production as well as distribution, and covers both goods and services. Indeed, there is no other legislation in our country which is so small in size as the MRTP Act, and yet so vast conceptually.

The MRTP Act lays down regulatory measures in three distinct areas, viz., concentration of economic power, competition law and consumer protection. The basic purpose of the provisions on prevention of concentration of economic power, as envisaged in the Act, is not to prevent the growth of MRTP houses *per se*, but to control such growth as is, or may be, detrimental to the common good. The other objective of the Act is to curb monopolistic, restrictive and unfair trade practices, which distort competition in the trade and industry and which adversely affect the consumer interest, too. Though in the realm of unfair trade practices, a parallel legislation, viz., the Consumer Protection Act, 1986 has since been framed and which is independently administered through the redressal machineries setup thereunder, it does not affect the scope and jurisdiction of the MRTP Commission. The scope of Consumer Protection Act is confined to non-MRTP organisations; the MRTP Act continues to regulate the activities of both the MRTP and non-MRTP business establishments, as hitherto. Over the period of last over six years when the regulatory provisions on unfair trade practices were introduced in the MRTP Act, voluminous case law has been built up in this field. The MRTP Regulations which, *inter alia*, lay down the procedure for conduct of enquiries by the MRTP Commission have also been recast, with the replacement of erstwhile 1974 regulations by the MRTP Regulations, 1991.

The basic scheme of the book continues to be the same, as when initially published in 1984. The book is divided into two parts. The first part contains commentary on the provisions of the MRTP Act

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preface
to the second edition (contd.)

duly dovetailed with the latest case law. To enable a better understanding of our Act, relevant provisions of contemporary legislations in the U. S.A , U.K , Australia and Canada, on which we seem to have substantially depended in framing our Act, have also been discussed. The provisions on grant of injunction and award of compensation by the Commission, which, of late, have emerged as the most effective weapons to combat unfair and restrictive trade practices have been dealt with at length in the context of the Indian and the foreign case law. The commentary has been supplemented by exhaustive reference material in the Appendices, which form the Second Part of the Book. The appendices, apart from providing the Rules, Regulations, and Notifications issued under the MRTP Act, contain the guidelines and procedure for seeking approval of the Central Government, *inter alia*, in the matter of substantial expansion, establishment of new undertaking and merger, amalgamation and take-over by the MRTP companies. Press Notes and Notifications, relevant to MRTP companies, issued by the Department of Industrial Development have also been given. Industrial Policy measures announced, from time to time, by the Government have been provided to facilitate the understanding of the rationale underlying the decisions of the Central Government in cases falling within the ambit of Chapter III of the Act. For ready reference, digest of illustrative orders under sections 21 and 22 and full text of a few latest orders under section 23(2) and 23(4) have been given. A special feature of this book is the critique on the Consumer Protection Act, 1986, dovetailed with the case law laid down by the National Commission and the State Commissions, the redressal agencies set up thereunder.

My thanks are due to M/s. Wadhwa and Company, publishers of the book, for their efforts in speedily bringing out this publication and for its high quality printing and excellent stylistic get-up.

Before concluding, I would like to record my appreciation for the forbearance and understanding of my wife, Mridula, but for which it would have, well nigh, been impossible to accomplish the arduous task of revision of this book. I would also like to acknowledge the immense benefit derived by me from the valuable suggestions provided, from time to time, by my sons, Dr. Ainitabh and his wife Mala and Abhijeet and his wife Priti.

The first edition of this book, which was published in 1984, found a ready response from all those concerned or interested in the MRTP

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preface
to the second edition (contd.)

legislation. I fondly hope that this updated revised edition will be found equally useful by them. I would be thankful to the readers for bringing to my notice the shortcomings, if any, in the book and for their suggestions for its improvement.

New Delhi
June 15, 1991

S.M. Dugar

preface to the first edition

We, the people of India, have accepted the socialist pattern of society as our goal. One of the principal methods for establishing such a society is prevention of concentration of economic power in few hands or institutions. The trade practices monopolistic, restrictive and unfair-which result from such concentration of power adversely affect free trade and commerce and hurt consumer interests. Like in any other free society, Indian economy, too, is beset with these highly characteristic and continuing problems, which, far from being entirely economic, have social ramifications as well.

To preserve the laudable ideals of free enterprise and protection of the consumer, the State has to intervene to regulate trade and commerce so that there is no undue concentration of means of production and market dominance, which are inimical to the concept of open society. For this, the Indian Parliament enacted the Monopolies and Restrictive Trade Practices Act. The enactment provides regulatory mechanism and operates in a framework of checks and balances, and in the philosophical milieu of 'laissez faire'. It seeks to curb the concentration of economic power in private hands when it may cause common detriment. Likewise, it relates monopolistic, restrictive and unfair trade practices when they adversely affect the public interest. The purpose is to condone the 'good' and condemn the 'bad'. In essence, it is a protective mechanism and its provisions have to be understood in this context.

The MRTP Act has been on the Statute book for nearly 15 years. The working of the legislation during this period revealed certain weaknesses and loopholes. In an attempt to plug them and to make this legislation more purposeful, extensive amendments have, for the first time, been made by the 1984 Amendment Act. Interpretative problems are bound to arise in the application of the provisions of the Act. More so, as unlike in some of the developed countries of the west, e.g., the U.S.A, Canada, UK and Australia, where there is a plethora of judicial precedents, in our country there is near absence of enough judicial decisions and pronouncements. Official guidelines, which may help in the interpretation of the provisions of the Act, are woefully lacking. Effort has, therefore, been made in this treatise to analyse the provisions of the Act in depth through synthesis of the legislative intention and the judicial thinking on the subject.

The book is divided into two parts. The first constitutes a commentary on the provisions of the MRTP Act. The relevant recommenda-

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**preface
to the first edition (contd.)**

tions of the Monopolies Inquiry Commission on which the MRTP legislation was based when it was initially enacted in 1969, and the recommendations of the Sachar Committee which have been relied upon for the extensive amendments incorporated in the 1984 legislation, have been quoted at appropriate places.

The commentary has been supplemented with details reference material in the Appendix, which forms the second part. The Appendix documents information on procedural matters, apart from containing the rules and regulations framed under the MRTP Act and the extracts from the allied economic enactments which have an intimate bearing on the working of the MRTP Act. The orders of the Government on proposals under Chapter III of the Act, referred to it in the recent past (1980-84), have been given as a backdrop to provide an insight into the administrator's thinking on intricate problems. It shall definitely be of immense help to the entrepreneurs to mould their programmes and policies to bring them in tune with the official thinking. The provisions of the Act on the monopolistic and restrictive trade practices have been subjected to deep and intensive analysis in the light of the cases decided by the MRTP Commission and the courts. Protection of the consumer interest through regulation of unfair trade practices is the new field which comes under the purview of the MRTP Act. The provisions in this regard have been commented upon in the context of the contemporary legislation in other parts of the world, e.g., the U.S.A, Canada, Australia and U.K

The treatise is mainly meant for those who are called upon to advise, i.e., the professional lawyers, Accountants and the Company Secretaries as also those who have to comply with the provisions of the Act. In an effort to make the book as valuable to social scientists and economists, as the layman, the language of the book has been shorn of legal jargon, as far as possible, without sacrificing clarity and precision.

I am grateful to the Hon'ble Shri Jagan Nath Kaushal, Minister of Law, Justice and Company Affairs for condescending to write a 'Foreword' to this book For the permission accorded to me by the Government to publish the treatise, I am thankful to Shri C.G. Somiah, Secretary, Department of Company Affairs. I gratefully acknowledge the assistance in various forms rendered by my colleagues and friends. In particular, I am deeply appreciative of the assistance given by Shri U. P. Mathur, Joint Director (Legal) in the Depart-

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preface
to the first edition (contd.)

Without being formal, I may add that I was greatly encouraged in this endeavour by my wife, Mridula, my son Amitabh and Abhijeet, and Amitabh's wife, Mala.

I feel it my duty to emphasis here that my employment in the Department of Company Affairs should in no way be considered as giving authority to the views and opinions expressed in this book. They are my own and the Department of Company Affairs, the Monopolies and Restrictive Trade Practices Commission or the Government of India are in no way committed to, concerned with, or responsible for, them.

When a treatise of this nature is written, there is always scope for embellishments. For any deficiency in this work, I hope the reader will be forbearing and forgiving. Any suggestion for its further improvements are, of course, most welcome.

New Delhi
October 22, 1984

S.M. Dugar

TABLE OF CASES

(For Table of Cases See Volume I)