

# Unfair Trade Practices and Institutional Challenges in India

## *An Analysis*



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## Abbreviations

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AICs:	Administration for Industry & Commerce
AIR:	All India Radio
AML:	Anti-Monopoly Law
ARN:	Public Board for Consumer Complaints
ASCI:	Advertising Standards Council of India
B2C:	Business to Consumer
CABE:	Central Advisory Board of Education
CCI:	Competition Commission of India
CCP:	Competition Commission of Pakistan
CEE:	Central and Eastern European
COPRA:	Consumer Protection Act
CPA:	Consumer Protection Agency
CPFTA:	Consumer Protection and Fair Trade Authority
CPL:	Consumer Protection Law
DEA:	Department of Economic Affairs
DGIR:	Director General of Investigation and Registration
FAS:	Federal Anti-Monopoly Service
FDA:	Food and Drugs Administration
FSLRC:	Financial Sector Legislative Reforms Commission
FSSA:	Food Safety and Standards Act
FSSAI:	Food Safety and Standards Authority of India
FTC:	Federal Trade Commission
HRD:	Human Resource Development
IAA:	Israel Antitrust Authority
IRDA:	Insurance Regulatory and Development Authority
MFL:	Swedish Marketing Practices Act, 2008
MRTP:	Monopolies and Restrictive Trade Practices
MRTPC:	MRTP Commission
NCDRC:	National Consumer Disputes Redressal Commission
NGCOs:	non-governmental consumer organisations
NIV:	National Institute of Virology
OECD:	Organisation for Economic Cooperation and Development
PCI:	Press Council of India

RTPL” Restrictive Trade Practices Law

SAIC: State Administration for Industry & Commerce

SEBI: Securities & Exchange Board of India

SMEs: small and medium enterprises

UCL: unfair competition law

UDTPA: Uniform Deceptive Trade Practices

UTPs: Unfair Trade Practices

## Executive Summary

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This report entitled, “Unfair Trade Practices and Institutional Challenges in India: An Analysis”, tries to analyse and understand the concept of Unfair Trade Practices (UTP) in India by comparing the concept in other countries also. The paper, upon examining the institutional set-up established in India to deal with such UTPs, highlights the various institutional challenges and finally suggests efficient approaches to tackle the same.

The term Unfair Trade Practice broadly refers to any fraudulent, deceptive or dishonest trade practice or business misrepresentation of the products or services that are being sold which is prohibited by a statute or has been recognised as actionable under law by a judgement of the court. However, the term does not have a universal standard definition.

Chapter 1 of the report tries to define Unfair Trade Practices and studies the definition of UTP in different countries, including India. The treatment and definition of UTPs in a country is majorly derived from the nature of its markets. Because of this reason, there has been a fair amount of uncertainty across countries regarding how to deal with the concept of unfair trade practices, 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 law, and in some other cases, they are dealt with by a separate law/act.

Chapter 1 also examines the legal and institutional framework set up to deal with UTP in select countries of the world, including India. The treatment of UTPs is different in different countries. In some countries like India, South Africa, Israel and Brazil, UTPs are covered under Consumer Law. USA, Russia and Pakistan on the other cover UTPs under Competition Law. China is one of the very few countries with a specific law i.e. the Law of the People’s Republic of China against Unfair Competition to manage the prevalence of UTPs.

Chapter 2 analyses the impact of UTPs on the market and economy. It is apparent that UTPs largely impact the price and quality of goods and services; micro, small and medium enterprises and hence, adversary affect consumer confidence.

Chapter 3 highlights the importance of effectively dealing with UTPs in light of the growth and development of economy and markets and the role of consumer awareness in the same. The Chapter investigates prevalence, instances and impact of UTPs in various sectors, including, pharmaceuticals, food processing industry, financial services, education, and examines the legal protection present against UTPs in each sector. The chapter acknowledges that misleading advertisements are the most prevalent form of UTPs.

The Chapter lists out, *inter alia*, the following reasons for prevalence of UTPs:

1. Business to business disputes not covered under Consumer Protection Act, 1986 (COPRA)
2. Inordinate delays in delivery of justice
3. Dominance of judges’ opinion over other members of consumer forum
4. No power to take up a case *suo motu* under COPRA
5. COPRA mainly a compensatory legislation
6. No investigative powers under COPRA
7. Lack of awareness among consumers

8. Concurrence of Sectoral Regulations along with COPRA
9. Cross-Border disputes not covered under COPRA
10. Lack of importance attached to UTPs
11. Other Enforcement Gaps

Chapter 4 gives a brief history and development of the concept of UTPs in India and the current legal and institutional framework dealing with UTPs in India and the institutional challenges being faced in the country presently in tackling UTPs.

Finally, Chapter 5, after analysing the social, economic and legal framework in place to deal with UTPs in India and globally and highlighting the challenges being faced in India in relation to such UTPs, suggests way forward and highlights a need for amendment in the current institutional set-up of the country. One of the ways suggested is to have an independent and specialised consumer protection agency within the Ministry of Consumer Affairs, with horizontal powers for catering to consumer protection in India, including UTPs, misleading advertisements and unsafe products impacting a large number of consumers and having principle legal relevance. Another view which seems more efficient and is also endorsed by CUTS International is to strengthen the institutions under COPRA.

Therefore, one observes that, while there is no single approach that can be elicited as being “the best”, it is important to provide a balanced regulatory framework, taking into account the interests of consumers, of competitors and of the general public interest in fair and honest competition and creating incentives for those actors who have legitimate interest of protection to engage in the enforcement of the law.

## Methodology

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### Objective of Study

The overall objective of the project is to understand the situation regarding unfair trade practices in India and suggest an efficient approach to tackle the same.

### Hypothesis

There is a need to highlight the issues pertaining to Unfair Trade Practices in India in light of the present institutional set up in the country, taking examples of best practices across the world so as to suggest effective and efficient policy actions by the government.

### Scope and Limitations

Given the paucity of time in hand for finalising the report, the report is based on mainly desk research and interviews of relevant stakeholders completed within a short span of 6 weeks. The Annexure I list out the relevant stakeholders interviewed in the process of finalising the report.

### Research Methodology

The research methodology adopted in the dissertation is Doctrinal. Research is analytical and descriptive since few case studies and relevant statistics have been examined to understand and analyse the concept of Unfair Trade Practice in India. Uniform Footnoting style has been used throughout the dissertation.

Tools taken in the project preparation have been chiefly secondary. The Bare Acts referred to in the paper are the only primary source relied on. Various reports, books and internet websites have been used as secondary source.

In addition to the above, the stakeholders as mentioned in the Annexure I were also interviewed to obtain pertinent first-hand experience in different sectors.



# Chapter 1: Introduction

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## Unfair Trade Practices- Brief Background

The term Unfair Trade Practice (UTP) broadly refers to any fraudulent, deceptive or dishonest trade practice; or business misrepresentation of the products or services that are being sold; which is prohibited by a statute or has been recognised as actionable under law by a judgement of the court. However, the term does not have a universal standard definition.

Misrepresentations can be about any characteristic of a good or service, real or imagined. Consequently laws prohibiting unfair trade practices often include a general provision and more specific provisions addressing some of the more common types of misrepresentations.<sup>1</sup>

Unfair trade practices 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.<sup>2</sup>

UTPs can arise in any line of business and also frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement.

At the international level, the World Bank and the Organisation for Economic Cooperation and Development (OECD) Model Law list the following trade practices to be unfair<sup>3</sup>:

- 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.

Article 10bis of the Paris Convention prohibits the following components of unfair competition: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; and (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the

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<sup>1</sup> Buik, Carl, "Dealing with Unfair Trade Practices", Addis Ababa, May 2008, source: [http://www.circ.in/pdf/CPS-06-Unfair\\_Trade\\_Practices.pdf](http://www.circ.in/pdf/CPS-06-Unfair_Trade_Practices.pdf) accessed on October 5, 2012.

<sup>2</sup> Pham, Alice (2007), "Competition Law in Vietnam: A Toolkit", CUTS HRC, Hanoi, source: [http://www.cuts-international.org/HRC/pdf/Vietnam\\_Toolkit.pdf](http://www.cuts-international.org/HRC/pdf/Vietnam_Toolkit.pdf), accessed on October 19, 2012.

<sup>3</sup> World Bank & OECD, (1999), "A Framework for the Design and Implementation of Competition Law and Policy", Washington D.C., source: <http://www.oecd.org/daf/competition/liberalisationandcompetitioninterventioninregulatedsectors/aframeworkforthedesignandimplementationofcompetitionlawandpolicy.htm>, accessed on October 19, 2012.

nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.<sup>4</sup>

### Definition of UTPs by Different Countries

The treatment and definition of UTPs in a country is majorly derived from the nature of its markets. The analyses of how open or closed markets are in such country, sale and purchase trend within that country, its domestic laws, level of restrictions imposed on the public authorities dealing with UTPs and other social and economic conditions decide the definition of UTP in such country.

Because of this reason, there has been a fair amount of uncertainty across countries regarding how to deal with the concept of unfair trade practices, in theory as well as in practice. As mentioned herein below, in some countries, UTPs fall within the purview of the competition statutes, in some others, that of the consumer protection law, and in some other cases, they are dealt with by a separate law/act.

Similarly, the notion of “fairness” involved in the concept of UTPs also is analysed separately since it means different things to different groups of stakeholders, and might vary according to contexts in a given market economy.

For example, when UTPs are inflicted upon consumers by enterprises in the market, the damage is pretty clear. 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 and market share.

### India

In India, pursuant to the replacement of the Monopolies and Restrictive Trade Practices Act, 1969 (**MRTPA Act**) by the Competition Act, 2002 (the **Competition Act**), clarity emerged that UTPs would continue to be dealt under the Consumer Protection Act, 1986 (**COPRA**) which defines UTPs to mean a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice, and includes, *inter alia*, the following:<sup>5</sup>

- making any statement, whether orally or in writing or by visible representation which:
  - falsely represents about goods or services relating to its standard, quality, price, value, nature, guarantee/warranty, affiliation, sponsorship received, etc.;
  - gives false or misleading facts disparaging the goods, services or trade of another person;
- permitting the publication of any advertisement for the sale or supply at a bargain price of goods or services that are not intended to be offered for sale or supply at the bargain price;
- permitting the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole or conducting any contest, lottery, game of chance or skill, for the purpose of

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<sup>4</sup> WIPO (1883), “Paris Convention for the Protection of Industrial Property”, source: <http://www.wipo.int/treaties/en/ip/paris/>, accessed on October 19, 2012.

<sup>5</sup> The Consumer Protection Act, 1986, source: [http://www.ncdr.nic.in/1\\_1.html](http://www.ncdr.nic.in/1_1.html), accessed on October 15, 2012.

promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

- withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme;
- permitting the hoarding or destruction of goods, or refusing to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services; and
- manufacturing spurious goods or offering such goods for sale or adoption of deceptive practices in the provision of services.

### ***Australia***

The Australian Competition and Consumer Act, 2010 deals with competition and consumer related issues in Australia. As per Part 3.1 of Schedule 1 of the Act, the “*Unfair Practices*” include, *inter alia*, the following<sup>6</sup>:

- False or Misleading Conduct, such as:
  - false or misleading representation about goods or services relating to its standard, quality, value, nature, guarantee/warranty, affiliation, sponsorship received, etc;
  - false or misleading representation about sale etc. of land relating to its location, pricing, nature of interest, use to which such land may be put, facilities associated with land etc.;
  - misleading conduct relating to employment offered to a person;
  - offering any rebate, gift, prize or other free item with the intention of not providing it;
  - Bait Advertising;
- Unsolicited Supplies and assertion of right to payment for unauthorised entries or advertisements;
- Participation in pyramid schemes;
- Engaging in multiple pricing;
- Referral selling; and
- Harassment and coercion.

### ***United States of America***

Similarly, Section 5 of the Federal Trade Commission Act, 1914 (“**FTC Act**”) of the United States of America (USA) prohibits “*unfair and deceptive acts or practices*” in or affecting commerce. Such practices broadly include<sup>7</sup>:

- an act or practice that causes or is likely to cause substantial injury to consumers, that cannot be reasonably avoided by the consumers and is not outweighed by countervailing benefits to consumers or to competition; and
- an act or practice where a material representation, omission or practice misleads or is likely to mislead the consumer, who has reasonably interpreted such representation, omission or practice.

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<sup>6</sup> The Competition and Consumer Act, 2010, source: <http://www.comlaw.gov.au/Details/C2011C00003>, accessed on October 8, 2012

<sup>7</sup> The Federal Trade Commission Act, 1914, source: <http://www.ftc.gov/ogc/stat1.shtml>, accessed on October 4, 2012.

### ***South Africa***

In South Africa, the Consumer Affairs (Unfair Business Practices) Act, 1988 defines “*unfair business practice*” to mean any business practice which, directly or indirectly, has or is likely to have the effect of<sup>8</sup>:

- harming the relations between businesses and consumers;
- unreasonably prejudicing any consumer;
- deceiving any consumer; or
- unfairly affecting any consumer.

Hence, it can be seen that although not one uniform standard definition of the UTP has been formulated globally and the term is defined differently by different countries based on their domestic laws and market economies, yet the essence of all the definitions is the same and all of them seem to refer to UTP as a practice of misleading, deceptive and unlawful trade practice adopted for the purpose of promoting sale or supply of a particular good or provision of a particular service.

Australia, like India, tries to list out specific practices, without limiting the definitions just to those inclusions. The USA and South Africa on the other hand have avoided listing out the acts or the practices and define the concept broadly encompassing all related activities where unfair injury is caused to the consumer due to deceptive acts or practices even where the consumer purchases a particular goods or services after reasonable consideration.

### **The Legal and Institutional Framework in Select Countries**

This section analyses the legal and institutional framework in a few selected developing and transitional economies of the world, namely BRICS countries, Pakistan and Israel. Additionally, the section also examines the institutional set-up in the USA which is considered one of the well-developed frameworks in reference to the unfair trade practices.

#### ***India***

In India, till 2002, the MRTP Act, which was enacted to prevent monopolies and restrictive trade practices in India, was the foremost legislation to deal with unfair trade practices in the country.

Prior to 1984, the MRTP Act contained no provisions for protection of consumers against false or misleading advertisements or other similar unfair trade practices and a need was felt to protect the consumers from practices resorted to by the trade and industry, to mislead or dupe them. The GoI thus appointed a high power expert committee on the MTRP Act, under the chairmanship of Justice Rajindar Sachar (**Sachar Committee**), to review and suggest changes required to be made in MRTP Act in light of the experience gained in administration and operation thereof<sup>9</sup>.

The Sachar Committee recommended that a separate chapter should be added to the MRTP Act defining various unfair trade practices so that the consumer, the manufacturer, the supplier, the trader and other persons in the market can conveniently identify the practices,

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<sup>8</sup>The Consumer affairs (Unfair Business Practices) Act, 1988, source:

[http://www.dti.gov.za/business\\_regulation/acts/consumer\\_affairs.pdf](http://www.dti.gov.za/business_regulation/acts/consumer_affairs.pdf), accessed on October 6, 2012.

<sup>9</sup>Chakravorthy, S., “Evolution of Competition Policy and Law in India”, *Evolution of Competition Laws and their Enforcement: A Political Economy Perspective*, Editor: Mehta S., Pradeep, Routledge Studies in Global Competition, Routledge, Oxon, 2012, source: <http://books.google.co.in/>, accessed on October 29, 2012.

which are prohibited.<sup>10</sup> This led to introduction of provisions relating to Unfair Trade Practices in the MRTP Act in the year 1984.

The 1984 amendment also created a new authority in form of an independent body known as the Director General of Investigation and Registration (**DGIR**) which was supposed to work closely with MRTP Commission and on the basis of a complaint, or *suo motu*, DGIR was entitled to investigate into a claim of a restrictive or an unfair trade practice as listed out in Section 36A of the MRTP Act and bring the matter before the MRTP Commission (**MRTPC**) established under the MRTP Act to assess the need for MRTPC to initiate an enquiry.

The MRTPC, on determining a practice to be an unfair, was entitled to order the offending party to cease and desist the practice under Section 36D of the MRTP Act, if the practice was found to be 'prejudicial to the public interest or to the interest of any consumer or consumers generally'.

Apart from MRTPC taking *suo motu* action, the other people who can approach MRTPC with a complaint under MRTP Act included the individual consumer, trade associations and registered association of consumers.

To meet the growing needs of liberalisation and globalisation and to arrive at a better mechanism for regulating business practices and settling disputes, the Government of India appointed a committee on Competition Policy and Law under the chairmanship of Mr. S.V.S. Raghavan in October 1999 (**Raghavan Committee**) with an aim to shift the focus of the law from curbing monopolies to promoting competition in line with the international environment. The Raghavan Committee concluded that the MRTP Act is limited in its sweep, and was deficient in many ways either to allow reaping of full benefits from the new economic opportunities or to meet the challenges thrown up by the policies of liberalisation, privatisation and globalisation.<sup>11</sup>

Following Raghavan Committee's recommendations, the government repealed the MRTP Act and gave way to the Competition Act, 2002. A Competition Commission of India (**CCI**) was established under the Competition Act with effect from October 14, 2003. Also, as per the recommendation, it was decided that all the cases pending in the MRTPC will be transferred to the CCI for adjudication from the stages they are in. However, the Raghavan Committee was of the view that the Competition Act should not be burdened with UTPs and thus this was, instead, given effect under COPRA which was already dealing with unfair trade practices.<sup>12</sup>

Thus, 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 transferred from the MRTP Act into the COPRA.

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<sup>10</sup> "Report of the High-Powered Expert Committee on Companies and MRTP Acts, 1977" Ministry of Law, Justice and Company Affairs, Government of India, New Delhi, August, 1978, *Committees and Commissions in India, 1977*, Volume 15, Part B, source: <http://books.google.co.in/>, accessed on October 29, 2012.

<sup>11</sup> Keynote Address of Shri Vinod Dhall, during "Competition Advocacy Seminar for States" in New Delhi, May 19, 2005, source: [http://www.cci.gov.in/images/media/Advocacy/Awareness/speech\\_member.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00](http://www.cci.gov.in/images/media/Advocacy/Awareness/speech_member.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00), accessed on October 19, 2012.

<sup>12</sup> Report of High Level Committee on Competition Policy, 2000, source: <http://ebookbrowse.com/gdoc.php?id=115899518&url=4a6c2f5ebd6e8ca816bdb382dd05a63e>, accessed on October 19, 2012

COPRA is an important milestone in the field of consumer protection in India and it created three-tier quasi-judicial bodies: (a) the District Forum; (b) the State Forum; and (c) the National Forum; through which a consumer could seek remedy in the event any of his/her rights as a consumer are violated. 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.

However, as discussed later in this paper, these agencies do not have any investigative powers and suffer from a lack of infrastructure and qualified personnel, especially at the local level. Also, it is important to note that, in the course of being transferred from the MRTP Act into the structure of COPRA, the definition of a ‘consumer’ was narrowed and a person purchasing the goods/services for reselling or with a commercial purpose could not take up a case of an unfair trade practice before a consumer forum. These issues and gaps are discussed in this paper later.

### ***China***

China’s first antitrust law was enacted on August 31, 2007 with effect from August 1, 2008 under its Anti-Monopoly Law (**AML**), with an aim to prohibit: (a) anti-competitive agreements; (b) abuse of dominant position; and (c) merger control; and to promote healthy development of the socialist market economy. AML establishes a two-tier enforcement regime which includes: (a) the Anti-monopoly Commission, which will act as a steering committee to formulate competition guidelines; and (b) the Anti-Monopoly Enforcement Authority, which will conduct investigations and enforcement of AML.<sup>13</sup> The enforcement of the AML is done by the Anti-Monopoly Enforcement Authority designated by the state council, under the supervision of the Antimonopoly Commission.

Additionally, a specific law to curb unfair trade practices, i.e., the Law of the People’s Republic of China against Unfair Competition, to safeguard wholesome development of socialist market economy, to encourage and to protect fair competition, to curb unfair competition and to protect rights and interests of businesses and consumers in China has been in force since 1993 in China.

The core objective of the law is to protect fair competition. Curbing unfair competition is a means to protect fair competition, while protecting rights and interests of the businesses and consumers is the direct result of fair competition, and safeguarding wholesome development of a socialist market economy is the indirect result of fair competition.<sup>14</sup>

The above law provides for two categories of unfair competition practices. One of them refers to traditional ones such as:

- counterfeiting a registered trademark and other authentication marks;
- using for a commodity or an enterprise without authorisation, a unique name, package, or decoration of another’s famous commodity or enterprise, or using a name, package or decoration similar to that of another’s famous commodity or enterprise, thereby confusing the commodity or the enterprise with that famous commodity or enterprise and leading the purchasers to mistake the former for the latter;

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<sup>13</sup> <http://www.globalcompetitionforum.org/asia.htm>, accessed on October 6, 2012.

<sup>14</sup> OECD Global Forum on Competition, “The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency-China”, January 9, 2002, *CCNM/GF/COMP/WD(2003)1*, source: <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2485968.pdf>, accessed on October 6, 2012.



- bribery in selling or purchasing commodity or engaging in lottery attached sale activities;
- false or misleading publicity of a commodity as to its quality, ingredients, functions, usage, producers, duration of validity or origin;
- public utility enterprise or any other business operator occupying monopoly status restricting people to purchasing commodities from the business operators designated by them, thereby precluding other business operators from fair competition; and
- infringement of business secrets.

The second category refers to the unfair competition practices carried out by the government or governmental agencies by restricting people to purchase commodities only from the business operators designated by them, thereby precluding other business operators from fair competition as mentioned in Article 7 of the law. The government or governmental agencies are also prohibited from preventing commodities from entering into local market, or preventing local commodities from flowing out of the market.

According to the law, the practices falling into the first category are liable to be reviewed by specific supervision and inspection departments at county-above level, namely, Administration for Industry & Commerce (AICs).

But the unfair practices carried out by a government or its subordinate departments, if having serious consequences, come under the control of the ‘supervision and inspection department’ of their superiors instead of the AICs and if the circumstances are serious, the persons held directly responsible shall be given administrative sanctions by the relevant department at the same or higher levels, such as confiscation of the illegal earnings and imposition of a fine of not less than one time but not more than three times the illegal earnings in light of the circumstances.<sup>15</sup>

Prior to 1999, the enforcement of the law made by the AICs was greatly influenced by local interests due to the direct leadership of local government. As a result, the AICs, though upholding the objective of competition protection during enforcement of the law, had to reconcile with other objectives, e.g. local development, the increase of the revenue of local government and employment.<sup>16</sup>

Aware of the deficiency, the Chinese Central Government reformed the mechanism of the AICs in 1999 by making the province-below AICs subject to leadership of provincial governments and the State Administration for Industry & Commerce (SAIC) instead of local governments. The reform relieves the AICs from the control of the local governments, thus enabling them to deem the competition protection as the only objective of the Law. From then on, it is observed that the significant improvement has been made.<sup>17</sup>

However, as observed earlier, the unfair competition practices adopted by government or governmental agencies are still under the supervision and check of their superior authorities.

In practice, as it is discussed in the report published by OECD,<sup>18</sup> that the government or government agencies are seldom punished for their unfair practices, as the objectives such as

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

regional development, the increase of the revenue of local government and employment generally prevail over the objective of competition protection in dealing with such cases.

Therefore, it is evident that the unfair competition of government and government agencies is still prevalent in China.

Thus, in a word, it appears that the AICs have proven to be very efficient as an independent authority to deal with the unfair trade practices and to enforce the Law of the People's Republic of China against Unfair Competition, as they are well equipped to fairly enforce the law under the single goal of competition protection. However, the local governments themselves are not ideal for enforcement of the law under the impact of other objectives.

### ***South Africa***

South Africa has a well-developed and regulated competition regime under the Competition Act, 1998 to deal with restrictive business practices, abuse of dominant position and mergers. However, the marketing practices and consumer protection issues are not included in the Competition Act, 1998.

As per the OECD Peer Review of Competition Law and Policy in South Africa<sup>19</sup>, the complaints of unfair competition in South Africa are matters for private dispute resolution under common law rules. Consumer protection is included in some specific laws relating to gambling, estate agents, time shares, and other common problems but there is no broadly applicable national law about misleading advertising or unfair marketing practices, in part because consumer protection is a concurrent function between the national government and the provinces.

However, there is in place a Consumer Affairs (Unfair Business Practices) Act, 1988 (the **Consumer Affairs Act**) which provides for prohibition or control of certain unfair business practices and matters connected therewith. Since the definition of "Unfair Business Practices" under the Act, as mentioned herein above, is fairly broad, it appears that it will also include within its ambit the misleading advertising and other unfair marketing practices.

The Consumer Affairs Act has established a special Consumer Affairs Committee to receive and dispose of representations in relation to any matter with which it may deal and conduct preliminary investigations, either by itself or by any other competent authority, in the matter related to unfair business practices. Nevertheless, a detailed reading of the Consumer Affairs Act highlights that the standard of analysis for such UTPs is the "public interest".

The Consumer Affairs Act gives high discretionary powers to the ministers and empower them above the Consumer Affairs Committee to pass a cease and desist order only when upon consideration of a report by the Consumer Affairs Committee, they are of the opinion that an unfair business practice exists or may come into existence and are not satisfied that such practice is justified in the public interest. The Consumer Affairs Act also provides for special consumer courts, which operate on an ad hoc basis.

Hence, it can be seen that although Consumer Affairs Committee is a special agency looking after the issue of unfair business practices in South Africa covering broadly most of the UTPs yet, the Consumer Affairs Committee needs to be given more teeth by giving it more

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<sup>19</sup> OECD, "Competition Law and Policy in South Africa", May, 2003, OECD Publishing, source: <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf>, accessed on October 6, 2012.



discretionary power at power with the ministers to pass a cease and desist order upon existence of an unfair trade practice and to decide the incidences of unfair business practices.

Also, the practice of analysing the unfair business practice on the basis of “public interest” seems to be outdated. The Act also needs to take into account the injury done and the intended injury to an individual consumer.

### ***United States of America***

There are two basic anti-competitive laws in USA, namely, the Sherman Act, 1890 and the Clayton Act, 1914. Both the laws are enforceable either by the Antitrust Division of the Department of Justice, the Federal Trade Commission (**FTC**) or private persons alleging economic injury caused by violation of either of them. In addition to the above two laws, the Federal Trade Commission Act, 1914 (the **FTC Act**), which is enacted to protect trade and commerce against unlawful restraints and monopolies, may also be utilised by FTC and private persons.

However, only FTC, and not the Antitrust Division nor private persons, may enforce the FTC Act. Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce.

The prohibition under the FTC Act applies to all persons engaged in commerce. This empowers FTC to prevent a person, partnership or corporation from engaging in incidences of unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

FTC Act is also given the power to investigate the relevant person, partnership or corporation for the non-compliance of anti-trust laws. At the federal level, FTC is the only entity regulating UTPs. But, along with UTPs, it also deals with other anti-competitive activities like mergers, cartelisation, etc., at the same time. No specific, dedicated agency to watch over unfair trade practices exclusively has been established in USA at the federal level as yet.

Due to efforts and initiation by individual states some special agencies dealing with such UTPs have been established at the state level.

USA has a Uniform Deceptive Trade Practices Act (1964/1966) (**UDTPA**) in place which has been accepted by several states including Colorado, Delaware, Georgia, Hawaii, Illinois, Ohio, etc. The law addresses deceptive practices such as passing off of goods or services as those of another, causing likelihood of confusion or misunderstanding as to the source, sponsorship, approval of goods and services, “Bait and Switch” advertising, etc. The law focuses on protecting both competitors as well as consumers.

The State of California has a specific law that prohibits unfair business practices, namely, California’s unfair competition law (**UCL**). The UCL was first enacted in the year 1933 and was modelled after the federal FTC Act, which prohibits unfair trade practices. As per UCL unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the law.<sup>20</sup>

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<sup>20</sup> Unfair Competition Law, 1933, i.e., Section 17200 of the Business and Professions Code.

Under UCL, any member of the public, including consumers, business enterprises as well as the competitors may sue on his/her own behalf or on behalf of the public generally. Therefore, it can be seen that, UCL does not only limit itself to anticompetitive business practices but also takes care of the right of the public to protection from fraud and deceit.

Further, unlike the Indian situation (as discussed in Chapter 4) the definition of “unfair competition” in UCL is not restricted only to deceptive or fraudulent conduct but extends to any unlawful business practice thus giving the right to sue for an unfair practice to everyone including a natural person, corporation, firm, partnership, etc.

However, it is observed that the UCL does not constitute a special agency for dealing with such unfair trade practices. The most common remedies sought under the UCL are injunctive relief and restitution of illegal business profits and there is no recovery for damages. However, section 17200 of the law authorises injunctive relief and restitution, which the District Court of Columbia in the case *United States v. Philip Morris*, 449 F. Supp 2d 1 has been interpreted as including “disgorgement of ill-gotten gains or unlawful profits”.

Additionally, in a recent development, in 2011 a new Unfair Competition law, titled “Sale of Products - Stolen or Misappropriated Information Technology” was passed, which impacts manufacturers worldwide and deals with the manufacturing of articles or products using stolen or misappropriated information technology (IT), i.e., non-genuine and unlicensed software. As per Section 2 of the law, such manufacturer engages in unfair competition when it sells an article or a product in the state, either separately or as a component of another article or product, in competition with a product made without use of stolen IT.<sup>21</sup>

While, the first laws were passed in the States of Washington and Louisiana, on November 4, 2011, Attorney Generals of 39 other US States have also signed a resolution to combat unfair trade practices in manufacturing by preventing usage of illegal or stolen IT, which provides an unfair advantage in the market place. The Attorney Generals of various states have also urged FTC to consider introducing a Federal Unfair Competition Law at the federal level to prevent IT theft.<sup>22</sup>

Under the law a new cause of action allows private plaintiffs or the Attorney General to sue anyone who engages in this unfair competition, or to bring a claim against products made using stolen IT.<sup>23</sup>

Although FTC is a fully functional and is the competent federal agency to look after the cases of UTPs in the USA, yet various states have always been aware about the fact that UTPs need special attention and from time to time have enacted specific legislations to this effect.

Additionally, the concept of “unfairness” also has been under discussion time and again by the courts as encompassing more than just conduct which would violate the Sherman Act or other antitrust statutes and the conduct which runs counter to established public policy may also be deemed “unfair”.

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<sup>21</sup> “New U.S. Unfair Competition Laws Require ‘IT Compliance’ From Manufacturers Who Export”, source: <http://www.amchamindia.com/AMCHAM-UCA-Member-Advisory.pdf>, accessed on October 6, 2012.

<sup>22</sup> Ibid.

<sup>23</sup> Section 6(1)

It was held in the case *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), that unfair practices may extend to “public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws”.

### **Israel**

The competition law in Israel is regulated by the Restrictive Trade Practices Law, 1988 (**RTPL**) and the regulations promulgated thereunder. RTPL addresses three substantive areas: (a) restrictive arrangements (which include cartels); (b) mergers; and (c) monopolies and is enforced by the Israel Antitrust Authority (**IAA**) which was established in 1994.

Although the competition law in Israel does not cover UTPs specifically, however, the same finds mention in the Consumer Protection Law, 1981 (**CPL**), which prohibits any act involving exploiting consumers in distress by providing misleading information or disseminating false advertising. It also mandates certain information disclosures, and regulates matters such as sales on credit, product labelling, etc.

The Consumer Protection Commissioner, empowered by the CPL, enforces the CPL and its regulations. The Commissioner has the right to request that an infringer of the CPL submit a written undertaking to cease the breach or amend the breach by publishing a statement. The Commissioner may further request that a court issue an injunction against a breach of the CPL. Additionally, the Commissioner may request that a court issue a mandatory injunction, which may include a corrective statement.

Further, the Israel Consumer Council is an additional body established by the Ministry of Industry and Trade to deal with consumer protection.

The Israel consumer law provides for both criminal and civil penalties and also authorises private suits for damages. Criminal cases are prosecuted by the Ministry’s Legal Department, while the Consumer Protection and Fair Trade Authority (**CPFTA**) created in 2006, handles civil penalty actions. Civil damage suits (including many class actions) are litigated primarily by consumer organisations. Along with this, the Consumer Council, created in 1970, is charged with responsibility to prevent, *inter alia*, consumer fraud, inspect the quality of goods and services, etc.<sup>24</sup>

IAA in *General Director of Antitrust Authority v. Dubek, Ltd.*<sup>25</sup> considered that consumer protection policy and competition policy are interdependent, as both are aimed at achieving the common objective of enhancing consumer welfare. The IAA stated that it supports a proactive consumer protection policy and promotes cooperation between itself and CPFTA.

### **Brazil**

The Brazilian Competition Act, 12.529/2011 is the law that deals with most of the anti-competitive activities in Brazil. It is pertinent to note that unfair competition that injures individual competing firms is not addressed in the Brazilian Competition Act, 12.529/2011. However, the same seems to be covered under the Industrial Property Law, 9279/1996 and Brazil’s Consumer Defence Code, 8078/1990.

The Industrial Property Law 9279/1996 that provides a basis for both criminal prosecution and private civil suits and under Article 195 defines the crime of unfair competition to

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<sup>24</sup> *Ibid.*

<sup>25</sup> District Court Rulings 52 (8) 191.

include commercial disparagement, false branding, fraudulent diversion of trade, advertising designed to cause brand confusion, violation of trademark rights, commercial bribery, illegitimate appropriation or disclosure of trade secrets, and false patent claims. Public prosecutors may bring criminal charges under the statute and victims of unfair competition may also invoke the law as the basis for seeking damages and injunctive relief in a civil suit.

Additionally, Brazil's Consumer Defence Code, 8078/1990 (**Code**), regulates such marketing practices as deceptive advertising, false warranties, door to door sales, telemarketing, and abusive price increases, as well as consumer contracts generally.

The three agencies formulated under the Code for its successful implementation are: (1) a federal agency, the Consumer Protection and Defence Department (**DPDC**), which is part of Secretariat of Economic Law and is responsible for overall co-ordination of the system and has various specific responsibilities under the law; (2) state and local consumer protection agencies, (**Procons**), which are located in all 26 Brazilian states, in the Federal District (Brasilia), and in many municipalities, provide specific services to consumers and engage in consumer class action litigation; and (3) non-governmental consumer organisations (**NGCOs**) that include several national, state and regional organisations in Brazil and are active in consumer class action litigation, and also publish consumer magazines, undertake consumer education functions, and conduct other activities (such as comparative product testing).<sup>26</sup>

As per the Code consumer complaints seeking damages may be filed in court by an individual consumer, or by a group of individuals asserting a common claim. In the case of class injury, suits may be also filed by Procons or prosecutors' offices, and NGCOs may likewise commence legal actions in their own name on behalf of a victim class. Besides authorising suits for damages, the law provides for criminal and civil enforcement proceedings.

Criminal actions, which may lead to fines and imprisonment, can be filed by government prosecutors in both federal and local courts. Federal and local civil enforcement suits, which may lead to injunctive orders and monetary consumer redress awards, can be filed by prosecuting attorneys, NGCOs, and (depending on the court involved) by either DPDC or the Procons.<sup>27</sup>

Hence, it is observed that the UTPs, although not directly covered under the anti-trust law of Brazil, are not a neglected area and are well covered under the Industrial Property Law, 9279/1996 and Brazil's Consumer Defence Code, 8078/1990 which have laid down a clear regulatory and administrative framework to deal with such practices.

### **Russia**

Russian Federation Federal Law on Protection of Competition, 2006 is the main law governing the competition in Russia. Article 14 of the Act lists out specific unfair competition incidents which, *inter alia*, include distribution of false information capable of causing losses or injury to the business reputation of another economic actor; publication of incorrect comparisons of goods; falsification or confusion of consumers about the maker, quality or other information about goods; improper use of trademarks or other intellectual

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<sup>26</sup> OECD, "Competition Law and Policy in Brazil: A Peer Review", 2010 OECD Publishing, source: <http://www.oecd.org/daf/competition/45154362.pdf>, accessed on October 8, 2012.

<sup>27</sup> Ibid.

property; and improper receipt or use of secret or proprietary information. Use of intellectual property rights owned by or registered to the violator for the purpose of unfair competition is also covered.

The law is enforced by the Federal Anti-Monopoly Service (**FAS**) which is a federal-level executive governmental organ which controls the execution of the competition laws and related areas.

The law provides that in the case of a violation of this type the question of early termination of such rights may be raised before the appropriate state body. Thus, it is evident that a single legislation in Russia deals with competition law as well as UTPs.

### ***Pakistan***

In Pakistan, the recently introduced Competition Act, 2010 is a broad legislation which seeks to promote free competition in all spheres of commercial and economic activity. The crucial objective of the Competition Act, 2010 is to enhance economic efficiency and to protect consumers from anti competitive behaviour.

Briefly, the law prohibits situations which tend to lessen, distort or eliminate competition such as actions constituting an abuse of market dominance, competition restricting agreements and deceptive market practices. Although essentially an enabling law, it briefly sets out procedures relating to review of mergers and acquisitions, enquiries, imposition of penalties, grant of leniency and other essential aspects of law enforcement.<sup>28</sup>

The Competition Commission of Pakistan (**CCP**) is established as a quasijudicial, quasi-regulatory, law enforcement agency having a specialised umbrella jurisdiction over the economy as a whole. It has the responsibility to ensure free competition in all spheres of commercial and economic activity and of endeavouring to prevent or eliminate anti-competitive behaviour, including unfair trade practices in order to promote economic efficiency and to protect the rights of the general public.<sup>29</sup> Hence, like Russia a single legislation in Pakistan deals with competition law as well as UTPs.

Therefore, with an intention to summarise the legal and institutional framework relating to the treatment of UTPs in the above countries, it can be seen that India along with South Africa, Israel and Brazil have a well-developed competition regime, however, the protection from UTPs is dealt with under the relevant consumer laws of each country. All the above four countries however, recognise the impact of UTPs on individual consumers and thus in addition to the protection provided under the consumer laws, the consumers are also entitled to approach the civil court to claim their rights. In India and South Africa, various sectoral regulations (as discussed in Chapter 4) also protect the consumers. Israel also gives a person to seek remedy under civil law. Similarly, in Brazil, along with the Brazil's Consumer Defence Code, 8078/1990; the Industrial Property Law, 9279/1996 also comes to help a victim of unfair trade practice.

The USA, like Russia and Pakistan, has a single legislation to take care of UTPs. In addition to this, as mentioned hereinabove, various states in the USA are awakening to the concept of UTP and the need to deal with the same separately and to give it special attention.

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<sup>28</sup> "Competition Act", source: [http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=60&Itemid=104](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=60&Itemid=104), accessed on October 5, 2012.

<sup>29</sup> "FAQ", source: [http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=49&Itemid=41#Q-2](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=49&Itemid=41#Q-2), accessed on October 5, 2012.

China is one of the very few countries with a specific law i.e. the Law of the People's Republic of China against Unfair Competition to manage the prevalence of UTPs.

### **Effects of UTPs on the Consumers and the Economy**

The law of unfair competition serves five purposes. First, it protects the economic, intellectual, and creative investments made by businesses in distinguishing themselves and their products. Second, it preserves the good will that businesses have established with consumers. Third, it deters businesses from appropriating the good will of their competitors. Fourth, it promotes clarity and stability by encouraging consumers to rely on a merchant's good will and reputation when evaluating the quality of rival products and, lastly, it increases competition by providing businesses with incentives to offer better goods and services than others in the same field.<sup>30</sup> Thus, the law of unfair competition covers both, the interest of consumers as well as the business enterprises and competing firms.

### ***Impact on Price and Quality of Goods and Services***

Prevalence of UTPs in a market adversely affects the price and the quality of goods and services. In the face of prevalence of unchecked UTPs, consumers may get attracted towards the product of a single producer. This assures the producer a fixed and assured consumer base and income and thus impedes competition. Once a producer or a service provider achieves a strong foothold in the market with the help of such UTPs the confidence of their position in the market and their base of consumers may lead them to increase the prices of the goods or services. The assurance of consumer loyalty may also entice the producer to compromise with the quality of their products to obtain additional profits.

When a manufacturer engages in unfair trade practice to sell its own good, it mainly tries to increase the sale of its product/service by engaging in fraudulent, deceptive activity such as making its product look better than the other products of similar nature in the market by misrepresenting and deceiving the consumer about the quality of the product or giving incomplete or false information about the sale price of the goods or services.

### ***Impact on Micro, Small and Medium Enterprises***

It is pertinent to note here that most of the manufacturers that engage in UTPs that subsequently lead to deterioration in quality or increase in the prices of the goods or services, are the big market players who cash on their brand value and cheat consumers with their false and short-lived promises. As a result of which, the other producers in the market, especially the small enterprises, who might deserve their dues but are too small to fight back on the same scale slowly get eliminated, thereby also eliminating competition from the market.

Additionally, UTPs are generally carried out by the producers/sellers in an organised manner where most of the time the large industries with clout and resources work in tandem in distributing false or misleading information capable of harming the business interests of small firms working in the same sector.

The large industries also use puffery, misleading statements or set a price which is lower than cost in order to throw out competitors from the market and attracting consumers to their

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<sup>30</sup> "Unfair Competition", source: <http://legal-dictionary.thefreedictionary.com/Unfair+trade+practice> accessed on October 5, 2012.

product or service. The small and medium industries due to lack of sufficient resources are unable to meet this competition and face losses, even if the quality and the standard of the product is the same or better.

For example, it was reported that in Korea, Lotte Group, which owns food manufacturing companies and retail companies, tried to discriminate against small-scale retailers by supplying their products at lower prices to their own retail stores, such as Lotte Department Stores and Lotte Mart. By doing this, Lotte tried to strengthen its position in the retail market. Because Lotte is currently the largest department store operator, and the third largest discount store and supermarket operator, its attempts to discriminate against small retailers might increase the concentration of food retailing and consequently strengthen Lotte's superior market position.<sup>31</sup>

### ***Impact on Consumer Confidence***

A revelation that they are cheated by a producer, or a group of businesses, might also lead the consumers to doubt the integrity of an entire industry or to distrust markets generally, which in turn will affect sales in that market negatively.

Thus, UTPs not only harm the consumers, but also victimise other market players in the process, especially the smaller enterprises, competing firms and more importantly, take away consumer's faith from the services and goods that they purchase thereby causing damage to the market as a whole.

### **Conclusion**

In conclusion, as mentioned above, there is no single uniform definition of UTP globally and it has been defined by various countries based on the nature of markets existing in a particular country. However, all the different definition seem to highlight UTP as a practice of misleading, deceptive and unlawful trade practice adopted for the purpose of promoting sale or supply of a particular good or provision of a particular service

However, every act of taking away the clientele of a business may not amount to an UTP because such clients may also be taken away by virtue of honest and proper competition such as a situation in which a competitor takes away a good portion of his rival's clientele by offering a product or service of better quality.<sup>32</sup> Yet, there are other trade practices that aim at taking away a competitor's clients and thereby cut down the goodwill, which are presumed to be unfair and improper, and, as such, are prohibited by law.

Additionally, the effects of UTP on market as well as economy mentioned in Clause 4 above lead to a situation where public awareness/understanding about the issue is low, consumers are cheated, small businesses are treated unfairly, overall welfare of the society deteriorates, while economic gains concentrate on a few.

In this context it is pertinent to note that competition is fundamental to consumer policy. As is well known, with competition, prices go down while without competition, prices go up.

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<sup>31</sup> Kim, Hwan Dong, "The Case of Korea", *Structural Changes in food retailing: Six Country Case Studies*, Editors: Kyle W. Stiegert and Dong Hwan Kim, FRSG Publication, November 2009, source:

[http://ageconsearch.umn.edu/bitstream/60676/2/!food\\_retailingchapter5.pdf](http://ageconsearch.umn.edu/bitstream/60676/2/!food_retailingchapter5.pdf), accessed on November 6, 2012.

<sup>32</sup> Alemayehu Fentaw, "Ethiopian Unfair Competition Law: A Critical Evaluation", source:

<http://www.scribd.com/doc/7822233/Ethiopian-Law-of-Unfair-Commercial-Competition>, accessed on October 5, 2012.

There may be other benefits in terms of improvements not only in prices but also in services offered and choices available to consumers, generation of more information for consumer decisions and opening up of new markets for competitive firms. Competition is therefore seen as a necessary element for consumer welfare.

Pradeep S Mehta, Secretary General, CUTS International, has time and again emphasised the importance of effective implementation of competition and consumer protection legislations to effectively counter unfair trade practices.

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.



## Chapter 2: Unfair Trade Practices in India

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*“It is not the consumer who is the king, but it is the large corporation who is the king in the economy. Whatever happened is not because the consumer wants it but because large and powerful corporations prefer it that way” – John K. Galbraith*

### Reforms in India and Prevalence of UTP

The unprecedented growth of the Indian economy, the growing interdependence of the world economy and the wide dissemination of new communication and information process technologies have brought in significant economic and social changes that have revolutionised the way markets serve consumers. They have also contributed to the development of universal emphasis on consumer rights protection and promotion. Consumers around the globe are demanding value for money in the form of quality goods and better services.

At the same time due to globalisation and such technological innovations, the problems faced by the consumers have also diversified, the consumers are exploited by way of numerous forms of unethical and unfair practices such as defective goods, deficient services, dubious hire purchase plans, high cost of products, spurious drugs, adulteration of food, poor quality, deficient services, deceptive advertisements, hazardous products, black marketing among others. Clever businessmen through ingenious salesmanship and glossy misleading advertisement about their products, cheat consumers and make them pay for something they did not intend to buy.

In the era of open markets, buyer and seller came face to face, seller exhibited his goods, buyer thoroughly examined them and then purchased them. It was assumed that the buyer would use all care and skill while entering into a transaction. However, with growth of trade and globalisation the principle of ‘*caveat emptor*’, which meant ‘buyer-beware’ is no longer effective in governing the relationship between seller and the buyer.<sup>33</sup>

It has now become nearly impossible for the buyer to examine and have complete knowledge about the goods and services beforehand and to make the matter worse; most of the transactions are concluded by correspondence. Moreover, due to the complex structure of modern goods and services, it is generally only the producer or the seller who can assure the buyer about the quality of the goods and services being sold.

Further, with the advent of the age of revolutionised information technology and with the emergence of e-commerce, the consumers are further deprived of complete information to a great extent and have to rely on the information provided on the website. Changes in technology are making international transactions cheaper, quicker and more accessible, even for low income communities. E-mails, phones, SMSs and websites can make it easier to do business across the world than around the corner, even in economies in transition like India.

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<sup>33</sup> Singh S.S. and Sapna Chadah, “Consumer Protection in India - Some Reflections”, IIPA, source: [http://consumereducation.in/cons\\_book1\\_final.pdf](http://consumereducation.in/cons_book1_final.pdf), accessed on October 7, 2012.

The revolution in information technology has also showered the consumers with newer kinds of challenges like cyber-crimes, infringement of intellectual property etc., which affect the consumers in even bigger way. 'Consumer is sovereign' and 'customer is the king' seems like a myth in the present scenario particularly in the developing societies.

Sometimes, the fact that an enticing offer is being made by a developed economy makes the offer more credible and attractive. As a result the Indian buyer is being misled, duped and deceived every day in the market and the incidences of UTPs are increasing day after day.

### **Lack of Consumer Awareness**

The apathetic behaviour from the sellers/producers side is worsened by the lack of awareness among the consumers about their rights to be informed about the product, quality, price, protection against unsafe products, access to variety of goods at competitive prices, consumer education, etc.

As per CUTS' report on State of Indian Consumer, 2012<sup>34</sup>, in India, even after 25 years, only 20 per cent consumers know about COPRA and just 42 per cent of consumers have heard about consumer rights. However, these findings are still encouraging considering the fact that five years ago the consumer awareness level was just 18 and 34 per cent, respectively.

It is observed that the exploitation due to such UTPs is especially very high in rural consumers, as their right to information, choice, redress and consumer education are not sufficiently fulfilled. Due to ignorance and lack of information the rural consumer has to endure sub-standard products and services, adulterated foods, short weights and measures, dubious advertisements hazardous drugs and exorbitant prices along with unfulfilled manufacturing guarantees and host of other evils.<sup>35</sup>

One of the major problems faced by such rural consumer is that of fake brands and spurious products. Small and regional companies fake the brand image of successful products and sell them in rural areas. Such products are similar in looks and even copy the trademark symbols which create a huge confusion. A rural consumer is brand loyal and understands symbols better thus becoming an easy target of various UTPs.

Services like insurance, banking, electricity and medical have expanded in the rural areas without any checks and balances and the rural consumers continue to be exploited by the service providers. It is common to find that farmers are supplied defective seeds, adulterated pesticides and other commodities.

In a survey done by the Centre for Consumer Studies, in the rural areas, amongst the various ways of exploitation: 40.2 per cent were overcharged, 14 per cent were victims of food adulteration, 12 per cent complained about poor quality of products, 7.5 percent complained about deficiency in services and 7.4 per cent complained about lesser weights.<sup>36</sup>

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<sup>34</sup> State of Indian Consumer Report, 2012. The report is a part of a project: 'Indian Consumers in the New Age: A Forward Looking Agenda to Address the Concerns of the Common People' (*ConsumersUp*) in partnership with Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, Government of India, source: [http://www.cuts-international.org/CART/consumersup/pdf/Overview-State\\_of\\_the\\_Indian\\_Consumer-2012.pdf](http://www.cuts-international.org/CART/consumersup/pdf/Overview-State_of_the_Indian_Consumer-2012.pdf), accessed on November 9, 2012.

<sup>35</sup> Misra Suresh and Pathania Mamta, "Changing Profile of Rural Consumers in India - Need for Education and Awareness", *Consumer Protection in India: Issues and Concerns*, Editors: Suresh Mishra and Sapna Chadah, Indian Institute of Public Administration, New Delhi, 2012.

<sup>36</sup> Ibid.

## UTPs in Various Sectors

It is clear that UTPs are perpetrated in a manner as varied as the number of products and services in a market place. UTPs have been observed in the pharmaceutical sector, food processing industry, finance sector, education, etc. The UTPs are given effect through packaging and labelling, misleading advertising, testimonials by trusted or influential people, for example celebrities, experts, ‘satisfied consumers’, etc.

Herein below, certain incidences of UTPs in select sectors in India are analysed.

### 1. *Pharmaceutical Sector*

Competition amongst generic drugs is a desirable objective as it typically brings substantial savings to consumers. However, it is required that the same remain balanced against the incentives brand manufacturers need to invest in developing innovative new products.<sup>37</sup> Yet, it is often noted that the required degree of competition is often missing from these markets. For instance, fewer new medicines are being brought to market, and the entry of generic medicines is at times restricted through anticompetitive practices.

One incidence of such fight between the generic and branded drugs is the case filed by the Swiss pharmaceutical company Novartis. Novartis wants an Indian patent for its leukaemia drug, imatinib mesylate, which has been patented as Glivec in nearly 40 countries including China, Russia, Mexico, Taiwan, Germany and the UK, and Gleevec in the USA. However, the critics of Novartis’ move state that doing so could ultimately undercut the making of generic drugs that has given India a reputation as a mecca for making affordable medicine and could result in the deaths of thousands of people who will no longer be able to afford the drugs they need<sup>38</sup>.

It is a well-documented fact that pharmaceutical companies spend vast sums of money on drug promotion. They use various tools and methods such as sales representatives, samples, advertisements in broadcast and print media and sponsorships for promoting drugs. It is also known that drug promotion is closely linked to unfair trade practices. An analysis of the drug promotion matrix in India reveals that there are various unfair trade practices prevailing in the industry.<sup>39</sup>

It is widely observed that in case of prescription of a drug, where the doctor is decision maker for the ultimate user, i.e., the patient, the pharmaceutical industry has a powerful influence on prescribing habits of doctors. There is an essential difference between promotion and information. A medical representative while delivering information to the doctors about new drugs, including its usefulness and efficacy may have precompetitive effects. The marketing strategies adopted by firms such as giving the doctors gifts like mobile, cars or even sponsored nursing home, may downplay the demand side and hence raise prices for consumers<sup>40</sup>.

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<sup>37</sup> OECD, “Roundtable discussion on Generic Pharmaceuticals”, October 2009, *DAF/COMP(2009)39*, source: <http://www.oecd.org/daf/competition/abuseofdominanceandmonopolisation/46138891.pdf>, accessed on October 6, 2012

<sup>38</sup> Pidd, Helen, “Indian court to hear crucial Novartis patent case on cut-price generic drugs”, *The Guardian*, August 21, 2012, source: <http://www.guardian.co.uk/business/2012/aug/21/novartis-court-battle-glivec-patent>, accessed on November 7, 2012.

<sup>39</sup> CENTAD, “Competition Law and Indian Pharmaceutical Industry”, 2010, source: <http://www.cci.gov.in/images/media/completed/PharmInd230611.pdf>, accessed on October 11, 2012.

<sup>40</sup> Ibid.

Many instances of unfair trade practices are witnessed in the country almost every day. A case for violation of Drugs & Cosmetics Act, 1940 was imposed on the manufacturing unit of the Thrissur-based manufacturer of 'Ayur Kizhi' (an external heat therapy kit), Institute of Indian Therapy (Ayur Care) for manufacturing and selling the product, Ayur Kizhi, as a branded item without licence. According to the Kerala Ayurveda Drugs Control Department, it had given separate licences for 'Ayur Kizhi Oil' and 'Ayur Kizhi Powder', but no licence had been given exclusively for the single product 'Ayur Kizhi Kit'. Since the company had been giving wide publicity to their products involving cricket players, hence a case of violation of Drugs and Magical Remedies (Objectionable Advertisement) Act was also registered.<sup>41</sup>

Similarly, in the case of *Pooja Roy v. Krishnango Bhattacharya*<sup>42</sup>, M/s Kasko India, a wholesale license drug dealer was charged for engaging in altering the original labels of the manufacturer and pasting fresh printed labels extending the expiry date and selling spurious drugs.

Many such incidences are sighted frequently in the newspaper, claiming that a particular drug will help someone lose weight quickly or help balding people grow hair and gain confidence. The advertisements, most of the time, are very convincing and the producers cash on the human emotions to sell their products by making people more conscious and negative about themselves so that they consider taking the medicine.

A similar instance was seen when in the year 2003, Consumer Education and Research Society, Ahmedabad, brought to the notice of the regulatory authority in Gujarat, the sale and promotion of certain health gadgets by Conybio Health Care, in violation of the Drugs and Magic Remedies (Objectionable Advertisements) Act. The company was found promoting and distributing sun shades to cure migraines and sun strokes, socks for acidity, pillow covers for spondylitis, palm guards for Parkinson's disease, eye-shade for sinusitis, T-shirts for high, low blood pressure, short pants that cure gas, acidity, prostate, piles, urinary system problems, ladies briefs for menstrual problems, bed sheets for paralysis strokes and brassieres for breast cancer. When the regulator asked the company to produce scientific evidence to support the effect of infrared rays which it claimed was present in the products, the company said it had never undertaken such studies by any recognised Indian institute. Subsequently, the regulator prohibited the sale and promotion of the products.<sup>43</sup>

### Box 1: A Glaring Example of UTP in the Pharmaceutical Sector

One of the most shocking examples of UTPs in pharmaceutical sector is that of Neeraj Clinic, Rishikesh. One RK Gupta, claiming to be a doctor, advertised with license, his clinic and claimed that he was offering a 'miraculous cure' for epilepsy. He had been duping lakhs of epilepsy patients by using a high narcotic and psychotropic content in his ultra-expensive, 'miraculous cure'. Gupta claimed to get the 'siddha' (an alternative therapy in the Indian system of medicine) from the plants in Himalayas plucked in the wee hours of the morning but was reportedly using allopathic pills bought from local companies.

<sup>41</sup> "Kerala drugs Dept raids 'Ayur Kizhi' Unit: Case Registered for Violation of D&C Act", April 14, 2011, source: <http://ayurbhishak.wordpress.com/2011/04/14/%E2%99%A3-kerala-drugs-dept-raids-ayur-kizhi-unit-case-registered-for-violation-of-dc-act/>, accessed on October 10, 2012

<sup>42</sup> Calcutta High Court, 2008

<sup>43</sup> CERS press release, November 21, 2003.

Ironically, way back in 2000, the Indian Medical Association had declared him a quack after it was found that he was giving his patients toxic drugs in high doses.

Additionally, in May 2003, on a complaint from a consumer, Advertising Standards Council of India (**ASCI**) had held that the advertisement was in violation of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and Rajasthan Patrika, a respectable daily newspaper wherein the advertisement had appeared, had informed ASCI that its advertisement department had been advised to withhold further advertisements of the clinic.

Yet, Gupta continued to advertise in other newspapers and also on a couple of television channels, wherein he produced “testimonials” from people who, as claimed in the advertisements, had been cured of epilepsy.

It was only when a non-resident Indian, who got his medicines tested, complained through the Indian High Commissioner in Canada, that a case was registered against him under the Narcotic Drugs and Psychotropic Substances Act apart from Section 420 of Indian Penal Code, on the ground that the drugs that administered contained narcotics in high quantities. He was arrested in 2004.

Source: <http://www.indiatogether.org/2005/feb/hlt-epilepsy.htm#continue>

### **Legal Framework**

Some of the important laws and regulations to deal with such UTPs in the pharmaceutical sectors are as follows:

**The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954:** It prohibits advertisements for products and services claiming to cure certain medical conditions. The law prohibits advertisements promising magical cure for any ailment or disease and the rules specify the diseases and ailments that cannot be advertised.

However, the enforcement of the law by the state authorities seems to be poor, as a result of which one finds a number of advertisements in the print media. Additionally, the Act also does not cover advertisements that appear in various media pertaining to health gadgets of unproven efficiency, like tummy trimmers and gadgets to increase height. This Act also does not provide for issuing corrective advertisements.

**Drugs and Cosmetics Act, 1940:** The Act regulates the import, manufacture, distribution and sale of drugs and cosmetics in the country. There are very strict penalties for manufacture and sale of adulterated or spurious drugs or drugs not of standard quality which are likely or cause death or grievances hurt to the user.

**Whistleblower Policy:** Union Health Minister, Ghulam Nabi Azad announced in July, 2009 India’s ambitious Whistleblower Policy to handsomely reward those who help seize spurious, adulterated and misbranded drugs, cosmetics and medical devices.

However, not a single reward has been given out till now in absence of any credible information pin-pointing a place where manufacturing or supply of fake drugs was supplied by the public to the government.<sup>44</sup>

Unfortunately, despite several laws enacted with an aim to protect consumers against such unfair trade practices; false and misleading advertisements continue to exploit the vulnerability of consumers, mainly because of: a) their poor enforcement; and b) the lacunae in some of the laws.

In fact such advertisements now have a wider canvas. While earlier, such advertisements were seen only in the print media, today they cover television also, influencing a larger number of people and impacting even the illiterate consumer.

## **2. Food Processing Industry**

There has been a global concern about food safety and unfair trade practices in quality and quantity of the food products. Almost everyone has come across cases of deliberate addition of chemicals like additives and adulterants, for the purpose of disguising inferior commodities, contaminating and/or earning undue profits or food contamination during production, processing, packaging and storage.

Such unethical and unfair trade practices are of very serious nature since they pose grave threat to consumer's health directly. Non-permissible food colours are used for providing visual effects. Also, there have been various instances of adulteration of various food items by addition of harmful substances like poisonous chemicals and copper in milk, alcohol, *mawa*, rice, etc. to increase the quantity of the food items and increase profit for the seller, which has caused health hazards at mass levels in recent past (*Please see Box 2*).

In May, the Food and Drugs Administration (**FDA**) officials seized 500 kg mangoes worth Rs. 25,000 that were being ripened with the use of a chemical called calcium carbide during a raid at a shop of a mango trader in Pune. Artificial ripening by using carbide is banned under the Prevention of Food Adulteration Act. The chemical, if consumed in large quantities, damages internal organs. The FDA officials destroyed the mangoes at a dumping ground, while the chemical samples were sent to a city-based public health laboratory for further investigations.<sup>45</sup>

In 2011, false claims by water purifier 'Pureit' (a brand of Hindustan Unilever) that it could "destroy one crore viruses in one litre of water" and announcement that National Institute of Virology (NIV) had confirmed these claims, agitated the Pune-based NIV and a legal notice was served to HUL for making such unsubstantiated claims. In a letter to HUL dated 2 June 2011, AC Mishra, the director of NIV, explained the details of the tests conducted by the Institute and informed the company that its advertisements were not based on facts and requested the company to refrain from twisting and misrepresenting the facts. NIV also threatened to resort to legal action against the company upon its failure to take immediate

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<sup>44</sup> "India's Chemists to Help Check Commercial Sale of Fake, Spurious Drugs", September 9, 2012, *The Economic Times*, source: [http://articles.economictimes.indiatimes.com/2012-09-09/news/33713590\\_1\\_spurious-drugs-cosmetics-and-medical-devices-fake-drugs](http://articles.economictimes.indiatimes.com/2012-09-09/news/33713590_1_spurious-drugs-cosmetics-and-medical-devices-fake-drugs), accessed on October 9, 2012.

<sup>45</sup> "Food and Drugs Administration seizes 500 kg mangoes being artificially ripened", May 10, 2012, *The Times of India*, source: [http://articles.timesofindia.indiatimes.com/2012-05-10/pune/31655099\\_1\\_calcium-carbide-rule-44-aa-kg-mangoes](http://articles.timesofindia.indiatimes.com/2012-05-10/pune/31655099_1_calcium-carbide-rule-44-aa-kg-mangoes), accessed on October 9, 2012.



corrective measures. A legal notice was served by NIV after not receiving any reply from HUL.<sup>46</sup>

### Box 2: Health Hazards Caused by Adulterated Food Items

**Case 1:** Dipali (age 10) has been facing stomach problems for last 3 years. Doctors have given up saying that the same is because of adulterated food items available in market. Similarly, 19 years old Ayush has permanent skin allergy due to adulterated food items. Both of them have no option but to have food only at home from now on and be very careful while purchasing any food item, thereby resulting in a life-long problem for them at such a young age.

**Case 2:** Dr. Ramesh Ruprai, gastroenterologist, informs that the artificial colours added in various eatables in market contain Arsenic, which is capable of harming bone marrow or lowering body resistance.

It is observed that such adulteration in food items is more rampant during festival season. As per Dr. Dinesh Mathur, a skin specialist, adulteration of food items may lead to cancer allergies, ulcer, red spots on body, stomach disorders, etc. Similarly, adulterated wheat may also develop a toxin named alpha-fetoprotein which can cause liver cancer.

**Source:** “Milavat se kisi ke Chera Bigda to kisi ki Sehat”, October 29, 2012, Rajasthan Patrika, Jaipur.

Another example of such UTPs in food industry was seen when a case was filed in the district forum by Consumer Guidance Society from Vijaywada, Andhra Pradesh against Amway India Enterprises (*Consumer Guidance Society v. Amway India Enterprises*, C.C. 140 of 2007, decided on 16th day of October, 2007), which was offering variety of consumer goods and food products including dietary supplements or sale through network marketing at exorbitant prices.

It was observed that some of the products marketed by Amway India were misbranded and some of them were adulterated. For example, Nutrilite Protein tins contained less fat content than the label declaration and hence misbranded. Amway Madrid Safed Musli (Apple) also contained class-II preservatives, which were not declared on the label; Kohinoor Ginger Garlic Paste did not conform to class-II preservatives requirements. In view of the findings it was held that Amway India had adopted unfair trade practice in publishing and selling their products. The District Forum directed Amway India to remove the adulterated and misbranded products from the market and not to indulge in such unfair trade practices in future. It was further directed to issue a corrective advertisement regarding the products, which are misbranded and misstated. Exemplary damages of Rs. 1,00,000 was imposed on them to be deposited in the Consumer Welfare Fund and Rs. 2,000 as cost to be paid to the Consumer Education Society.<sup>47</sup>

The abovementioned case studies are mere examples of how the manufacturers, sellers and service providers indulge in UTPs to serve their own selfish motives risking thousands of lives. False claims, misbranding of goods, food adulteration, etc. are not the practices unheard of by the everyday customers.

<sup>46</sup> “Consumer Advertising: False Claims”, July 28, 2011, *Moneylife*, source: <http://www.moneylife.in/article/consumer-advertising-false-claims/18902.html>, accessed on October 9, 2012.

<sup>47</sup> “Misbranded and Adulterated Products”, source: <http://www.consumerisking.in/casestudies/casestudies.php?csid=125&cid=17>, accessed on October 9, 2012.

### **Legal Framework**

The most important sector specific legislation in this sector is the **Food Safety and Standards Act, 2006 (FSSA)**. The Act which consolidates and repeals various acts and orders that have hitherto handled food related issues in various Ministries and Departments<sup>48</sup> seeks to consolidate the laws relating to food and to curb food adulteration by prescribing higher penalties for violation of food laws. FSSA came into effect on August 4, 2011.

FSSA aims to ensure availability of safe and wholesome food for human consumption and enforcement of the food safety standards and seeks to regulate the law relating to advertising and unfair trade practices in the food sector. As per new rules in FSSA, a penalty will be levied on, and prosecution undertaken against restaurants found violating the provisions of FSSA. The proposals in FSSA apply to all types of food businesses – from a roadside food stall to a five-star hotel.

A Food Safety and Standards Authority of India (**FSSAI**) has been established under FSSA which has been created for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import to ensure availability of safe and wholesome food for human consumption.<sup>49</sup> FSSAI receives complaints relating to the food sector from the consumers.

Additionally, food safety committees have also been established in each state. Such food safety committees meet each month and discuss the development in each state to learn from the best practices as well as to decide on future course of action.<sup>50</sup>

It has been informed to CUTS by an FSSAI member that FSSAI is planning to come out with new guidelines to deal specifically with misleading advertisements shortly. Such guidelines will specify what content is allowed to be published/broadcasted in the advertisement and what is prohibited. Such guidelines will bring more clarity in the field of misleading advertisements.<sup>51</sup>

Although the implementation of the Act is facing the initial hitches, which is expected during gestation period of any new legislation, yet, it is only with time that one will be able to tell if this one legislation consolidating all other important legislations in this field was a wise decision or not.

### **3. Financial Services Sector**

#### **Insurance**

Consumers become a part of insurance policies either by virtue of buying insurance themselves or by being covered under insurance bought by either the Government or their employers or by being part of any other group that is insured.<sup>52</sup> Insurance is an important financial services sub-sector catering to individuals and the number of insurance consumers is

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<sup>48</sup> Prevention of Food Adulteration Act, 1954, Fruit Products Order, 1955, Meat Food Products Order, 1973, Vegetable Oil Products (Control) Order, 1947, Edible Oils Packaging (Regulation) Order, 1998, Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967, Milk and Milk Products Order, 1992, Any other order under Essential Commodities Act, 1955 relating to food

<sup>49</sup> <http://www.fssai.gov.in/>, accessed on October 29, 2012.

<sup>50</sup> As per CUTS discussion with a member of FSSAI.

<sup>51</sup> Ibid.

<sup>52</sup> Narayan, Hari J., “Consumer Protection in Insurance”, *Consumer Protection in India: Issues and Concerns*, Editors: Suresh Mishra and Sapna Chadah, Indian Institute of Public Administration, New Delhi, 2012.



steadily increasing. Insurance is an intangible product and the only document that the policyholder receives is a piece of paper for the premium paid and does not obtain any immediate benefit for the consideration paid.<sup>53</sup>

With the increase in the consumers comes the issue of unfair trade practices in this sector. Insurance offers a promise that, upon a contingent event at a later date, the policyholder will get a particular benefit or reimbursement for a loss or damage. A deficiency in service would mean either a delay or a non-fulfilment of that promise. Thus, it is seen that in insurance heavy reliance is placed on the public's trust that the promises made will be delivered.<sup>54</sup> Companies often lure consumers with attractive schemes, but later try to renege on their commitment.

However, most of the time a lack of transparency is observed on part of the insurers and intermediaries, which is a serious market concern. Such lack of transparency causes greater harm where the transactions are not frequent, entry or exit costs are low and the consumer payout is due after a long period.<sup>55</sup>

The insurance policies are complex documents with a deluge of legal jargon, intricate terms and conditions, special inclusions and exclusions. It is difficult to assess and understand by a layman even when all the relevant information is disclosed to the policy-taker.

Most of the times, the insurance contracts also contain unfair terms tilting the contract heavily in favour of the company. Apart from the fact that the abstract legal theory of a contract as an agreement arrived at through discussion and negotiation is completely given the go-by, these contracts turn out to be a case of the big business enterprises legislating in a substantially authoritarian manner. Such large scale business concerns get expert advice and introduce terms, in the printed form, which are most favourable to themselves. They contain many wide exclusion and exemption clauses favourable to large enterprise. The favourable terms are often in small prints which the individual never reads since it is a laborious and profitless task to discover what these terms are.<sup>56</sup>

Due to all this, even if an individual purchases an insurance policy after a thorough review and understanding he misses out on something or the other and fails to make a well-informed decision and falls prey to such unfair trade practices.

The companies also do not give proper and complete information about the policy at the time of selling or indulge in mis-selling by misrepresenting to the consumer about policy's risk, growth factors, term of the policy, etc.

Mis-selling of insurance policies is a very common phenomenon and there is an urgent need to curb this. The office of Consumer Ombudsman in Chandigarh has stated that mis-selling of insurance policies and delay in claim settlements top the list of 2,341 complaints lodged by aggrieved customers with the Chandigarh Insurance Ombudsman as it is having over 2,000 complaints pending pertaining to life insurance and non-life insurance products.<sup>57</sup>

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Rajpal, Lokesh, "Unfair Terms in Contract and Legal Remedy Available in India", *Corporate Law Dossier*, source: <http://coporatelaws.wordpress.com/2010/05/13/unfair-terms-in-contract-and-legal-remedy-available-in-india/>, accessed on November 6, 2012.

<sup>57</sup> "Complaints: Insurance Mis-Selling tops", October 9, 2012, source: <http://www.financialexpress.com/news/complaints-insurance-misselling-tops/1014321/>, accessed on October 22, 2012 and "HDFC Standard Life Insurance asked to pay Rs five

Recently, on October 18, 2012, in one of such cases, Insurance Ombudsman in Chandigarh asked private insurer HDFC Standard Life Insurance to pay Rupees Five Lakhs with interest to an NRI complainant after holding the company responsible for mis-selling a policy. The complainant, Satnam Singh Randhawa, who is working as a driver in the USA, had bought life insurance policy from HDFC Standard Life Insurance under single premium mode in the year 2006 as a single premium policy as informed to him by the agent of the company but later on it was found that it was a yearly premium policy with Rs. 5 lakh to be paid annually.

When Randhawa approached HDFC Standard Life Insurance, he was told that only Rs 2.70 lakh was payable which was not acceptable to him. The complainant also accused the company of not delivering the policy bond despite several reminders. The Insurance Ombudsman held that the case was of clean mis-selling of the insurance policy.<sup>58</sup>

### Box 3: IRDA Taking Strong Steps

In a significant ruling, the Central Mumbai District Forum bench came down heavily on Bajaj Allianz and directed the insurance company to pay penal and deterrent compensation, which is rarely, if ever, done. Onkar Prasad Dixit, a senior official of Sahara Commercial Corporation, had taken a policy known as Bajaj Allianz Swarna Vishranti Pension Plan from Bajaj Allianz General Insurance on July 19, 2004 with a sum insured of Rs 26 lakh, plus bonus.

In the case, although a yearly premium of Rs. 6,17,929 was payable, the insurance company offered a rebate of Rs. 18,870, thereby reducing the premium to Rs 5,99,099 to be paid every year for a period of five years. Thereafter, the insurance company was supposed to pay a monthly pension of Rs. 22,944 during the lifetime of the insured and on his demise the amount was supposed to be paid to his wife.

However, the detailed terms and conditions of the policy were not furnished to Dixit. Dixit kept paying the insurance annual premium from 2004 to August 2009 and in this was paid an additional sum of Rs. 24,832. Yet, no benefits were released by the company even upon request.

Subsequently, the company informed Dixit that it committed a mistake in stating the benefits under the policy and additionally, it also informed Dixit that the insurance plan taken by Dixit has been withdrawn upon obtaining permission from the IRDA and hence Dixit's policy automatically stood cancelled. However, the company offered to refund Rs. 29,35,599, which was little less than the premium amount paid by Dixit till now.

Subsequently, Dixit took the LIC Jeevan Akshay VII policy, and asked Bajaj Allianz to transfer the premium paid by him to LIC. Even though this was done, there was a difference in the benefits available under the LIC's policy, which had a lower annuity amount, resulting in a loss of Rs. 5,78,360 to Dixit.

lakh", October 19, 2012, source: <http://www.financialexpress.com/news/hdfc-standard-life-insurance-asked-to-pay-rs-five-lakh/1019313/0>, accessed on October 22, 2012.

<sup>58</sup> "HDFC Standard Life Insurance asked to pay Rs five lakh", October 19, 2012, source: <http://www.financialexpress.com/news/hdfc-standard-life-insurance-asked-to-pay-rs-five-lakh/1019313/0>, accessed on October 22, 2012

Finally, in November 2009, Dixit filed a complaint before the Central Mumbai District Forum.

The forum observed that the insurance company had failed to produce any proof or documents to show that the IRDA had granted permission for the withdrawal of the policy. It noted that the insurance company had misled the consumers by offering an attractive policy, but refusing to honour its commitment, after collecting nearly Rs. 30 lakh as premium.

The forum indicted Bajaj Allianz of having indulged in unfair trade practice and held that there was deficiency in service. The forum also awarded heavy compensation as a deterrent so that such unfair trade practices would not be repeated in the future.

**Source:** “Insurance Firm Indicted for Unfair Trade Practices-Landmark Judgments”, [http://ccrc.in/landmark\\_judgements.php?id=5](http://ccrc.in/landmark_judgements.php?id=5), accessed on October 9, 2012.

### **Legal Framework**

The legal framework in insurance sector in India includes the following:

**Insurance Act, 1938 and relevant rules and regulations:** As per section 45 of the Insurance Act, two years from the date of policy, an insurer can repudiate the policy on the ground that any material fact in the proposal or document is inaccurate or false. After the expiry of two years an insurer can repudiate the policy on fulfilling all three conditions mentioned in section 45.

**Insurance Regulatory and Development Authority Act, 1999 (IRDA Act) and relevant rules and regulations:** The IRDA Act has established the IRDA as a statutory regulator to regulate and promote the insurance industry in India and to protect the interests of holders of insurance policies.

**The IRDA (Insurance Advertisements and Disclosure) Regulations, 2000:** The Regulations impose regulation on advertisements, lay down strict guidelines not only on the content of the advertisements issued by insurers and their intermediaries, but also on their compliance.

Besides stipulating that all advertisements follow the code formulated by ASCI, the regulations mandate that the advertisements related to insurance policy should not in any way be unfair or misleading. If an advertisement is not in accordance with these regulations, then the Authority can direct issue of corrective advertisement; it can direct discontinuance of the advertisement or any other action deemed fit by the Authority, keeping in view the circumstances of the case, in order to ensure that the interests of the public are protected.

**IRDA (Protection of Policyholders’ Interest) Regulations, 2002:** these Regulations cast obligations on insurers to have in place effective redress mechanisms. The regulations provide for turn-around times in respect of various services parameters of an insurer’s operations, including pre-sale, post-sale and post-intimation of claim.

**Insurance Ombudsman:** This is an institution created by the central government under the “Redressal of Public Grievances Rules, 1998” framed by the Government of India in exercise of power conferred on it under Section 114(1) of the Insurance Act, 1938.

The Rules aim to resolving insured's complaints relating to the settlement if disputes, delay, repudiation, etc. with insurance companies in a cost effective, efficient and impartial manner. These Rules apply to all insurance companies, whether they are operating in the general insurance business or the life insurance business; or in public sector or private sector.

The Ombudsman appointed under Rule 6 of the Rules functions within a set geographical jurisdiction (Rule 10). There is no appeal against a decision given by the Ombudsman, but the complainant may exercise the right to take recourse to the normal process of law against the insurance company. Further, dismissal of a complaint by the Insurance Ombudsman does not vitiate the complaint's right to seek remedy against the insurer, as per normal process of law.<sup>59</sup>

### **Securities Market**

The Indian securities market, considered one of the most promising emerging markets, is among the top ten markets of the world. The Stock Exchange, Mumbai, which was established in 1875 as "The Native Share and Stockbrokers Association" (a voluntary non-profit making association), has evolved over the years into its present status as the premier Stock Exchange in the country. At present 24 stock exchanges operate all over India. These stock exchanges provide facilities for trading securities. Securities markets provide a common platform for transfer of funds from the person who has excess funds to those who need them and is regulated by the Securities & Exchange Board of India (SEBI).<sup>60</sup>

The major components of a security market include<sup>61</sup>: (i) Securities-Shares, Bonds, Debentures, Futures, Options, Mutual Fund Units; (ii) Intermediaries-Brokers, Sub brokers, Custodians, Share transfer agents, Merchant Bankers; (iii) Issuers of securities-Companies, Bodies corporate, Government, Financial Institutions, Mutual funds, Banks; (iv) Investors-Individuals, Companies, Mutual funds, Financial Institutions, Foreign Institutional Investors; and (v) Market Regulators-SEBI, RBI (to some extent), Department of Company Affairs.

It is pertinent to note that the stocks, bonds and other securities are not guaranteed by country's government and can lose value because of abusive practices by market participants and fellow investors. Regulations are of crucial importance in securities markets as the absence of conditions of perfect competition and existence of information asymmetry make it possible for certain participants to take unfair advantage of investors by exploiting regulatory inadequacy.<sup>62</sup>

Malpractices such as price manipulation and frauds not only cause substantial financial loss to investors but also disable the orderly functioning of securities markets and the efficient allocation of investible resources of the economy. The main areas of concern for the investor community in the security market are frauds relating to vanishing companies, price manipulation and insider trading and are discussed herein below.<sup>63</sup>

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<sup>59</sup> Patil, Ashok R., "Consumer Protection under Health Insurance Sector", *Consumer Protection in India: Issues and Concerns*, Editors: Suresh Mishra and Sapna Chadah, Indian Institute of Public Administration, New Delhi, 2012.

<sup>60</sup> "Overview of the Indian Securities Market", source: <http://www.niftydirect.com/nsebsse/market-gyan/Learning%20Session%205th.pdf>, accessed on October 9, 2012.

<sup>61</sup> Ibid.

<sup>62</sup> Bose, Suchismita, "Securities Market Regulations: Lessons from US and Indian Experience", *Money and Finance*, January –June, 2005, source: <http://www.icra.in/Files/MoneyFinance/2005-jan-june-suchismita%20bose.pdf>, accessed on October 11, 2012.

<sup>63</sup> Ibid.

### Vanishing Companies

In India, in the mid-1990s, many new companies tapped the capital market and collected funds from the public through issue of shares/debentures/fixed deposits, and taking advantage of regulatory lapses in the capital market, defaulted, often leaving no trail.

One finds that when it comes to regulatory enforcement, SEBI has been very lenient in its definition of fraudulent (vanishing) companies (reducing the number of such errant companies to barely above 200) and has failed to track down the persons concerned in the case of 30 per cent of these companies even after 8 to 10 years of the crimes.<sup>64</sup>

Only mild punishment (like debarment for just a few months to 5 years) has been meted out to those who have been traced and convicted, while the issue of attachment of assets of directors/promoters of vanishing companies in order to compensate investors, is still being examined by a central committee.

### Insider Trading

Illegal insider trading on the basis of non-public price sensitive information, and using confidential information to make a profit or avoid a loss at the expense of other co-investors is cause of great concern in the Indian securities market and even after being declared illegal more than 12 years back, the practice is still flourishing.

### False, Misleading or Incomplete Information

As for the insurance contracts, various security documents also are very complex documents with a deluge of legal jargon, intricate terms and conditions, special inclusions and exclusions and therefore difficult for a layman to access and understand even after going through all the relevant information. Such contracts are also marred by unfair terms. The companies also do not give proper and complete information about the security document such as Initial Public Offering or IPO, etc., at the time of selling or indulge in mis-selling by misrepresenting to the consumer about the risks involved.

Even if the information is given, it is in such fine print and complex language that it is either very easy to ignore or very difficult to find and understand in the policy. Due to this, even if an individual enters the security market after a thorough review and understanding he misses out on something or the other and fails to make a well-informed decision and falls prey to such unfair trade practices.

Similarly, most of the equity-related documents are required to list the risk factors involved clearly, however, most of the time one could see that such risk factors even if mentioned are mentioned at a place in the document where they are difficult to find out or is in such fine print that it is difficult to read. Also, specifically in the audio advertisements on the radio or audio-visual advertisements on the television the risk related to the mutual funds or other equity documents cannot be fathomed. Most often, the risk attached to the product is “under wraps”. Thus, the long term benefits of remaining invested in these funds over a long term horizon are lost on the investor.<sup>65</sup>

SEBI recently restrained seven entities, including three individuals, from the securities market for allegedly indulging in unfair trade practices in the shares of Temptation Foods,

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<sup>64</sup> *Ibid.*

<sup>65</sup> ASSOCHAM, “Mutual Fund Industry: Sustaining Growth in Emerging Markets”, November 26, 2010, New Delhi, source: [http://www.pwc.com/in/en/assets/pdfs/financial-service/Sustaining\\_Growth\\_in\\_Emerging\\_Markets\\_\(FV\).pdf](http://www.pwc.com/in/en/assets/pdfs/financial-service/Sustaining_Growth_in_Emerging_Markets_(FV).pdf), accessed on October 12, 2012.

Bang Overseas, Cals Refineries and two other companies. As per SEBI, these entities were involved in “circular trading of shares” of Temptation Foods, Bang Overseas, Confidence Petroleum India, Cals Refineries and Shree Precoated Steels (presently known as Ajmera Realty & Infra India) and restrained them from “buying, selling and dealing in securities and accessing securities market for a period of four years from the date of interim order dated June 4, 2009”.<sup>66</sup>

#### **Box 4: Unfair Trade Practices in Securities Market**

Recently, adjudication proceedings were initiated by SEBI against K&A Securities Private Limited, a member of National Stock Exchange and Bombay Stock Exchange in cash as well as Futures and Options segments, to inquire into and adjudge under sections 15 F(a), 15HA and 15 HB of SEBI Act, the alleged violation of the provisions of the SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992, the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003.

The Company was involved in several irregularities, viz. doing transactions involving receipt and payment of cash, non-segregation of funds between business account and client’s account, non-issuance of contract notes, allowing clients to trade in spite of debit balance in their accounts, providing trading terminals to sub-brokers not registered as Authorized Person, providing trading terminals to its clients, margin funding without entering into agreement with clients, accepting third party cheques from clients, dealing with unregistered sub-brokers, misleading investors by indulging into fraudulent and unfair trade practices, etc.

This way the company was fraudulently representing itself as well as the shares being sold by it to be something they were not. However, in this particular instance subsequently, the company proposed a consent notice and in pursuance of the consent terms, the company was asked to pay a sum of Rs. 12,00,000 (rupees twelve lakh only).

**Source:** Order dated April 27, 2012, Matter before the adjudicating officer, SEBI, CO/MIRSD-NRO/2042-2010/AO/SRP/DL/264/2012, at [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1335757482318.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1335757482318.pdf), accessed on October 11, 2012.

#### **Legal Framework**

The vast majority of securities regulations in all countries aim primarily at promoting fair and full disclosure of all material information relating to the markets, and to specific securities transactions, including all aspects of market trading as well as the financing and financial reporting by public companies, so as to present all investors with a level playing field.<sup>67</sup> Securities market in India is regulated by following governing bodies:

- SEBI;
- Department of Company Affairs;
- Reserve Bank of India; and
- Stock exchanges

<sup>66</sup> Order dated September 25, 2012, In the matter of Temptation Foods Limited et al, WTM/RKA/IVD/ID-4/ 39 /2012, source: [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1348577680271.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1348577680271.pdf), accessed on October 12, 2012.

<sup>67</sup> Bose, Suchismita, “Securities Market Regulations: Lessons from US and Indian Experience”, *Money and Finance*, January –June, 2005, source: <http://www.icra.in/Files/MoneyFinance/2005-jan-june-suchismita%20bose.pdf>, accessed on October 11, 2012



Some of the significant legislations for the securities market are the following:

**The SEBI Act, 1992**, establishes SEBI to protect investors and development and regulate securities market. All the powers under this act are exercised by SEBI.

**The Companies Act, 1956** sets out the code of conduct for the corporate sector in relation to issue, allotment and transfer of securities, disclosures to be made in public issues and non-payment of dividend. Powers under this Act are exercised by SEBI in case of listed public companies and public companies proposing to get their securities listed.

**The Securities Contract (Regulation) Act, 1956**, provides for regulation of transaction in securities through control over stock exchanges. Most of the powers under this act are exercised by Department of Economic Affairs (DEA), some are concurrently exercised by DEA and SEBI and a few powers by SEBI.

**The SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003** enables SEBI to investigate into cases of market manipulation and fraudulent and unfair trade practices. As per the Regulations indulging in an act which creates false or misleading appearance of trading in the securities market constitutes an unfair trade practice. The regulations specifically prohibit fraudulent dealings, market manipulation, misleading statements to induce sale or purchase of securities, unfair trade practices relating to securities.

SEBI can conduct investigation, *suo motu* or upon information received by it, by an investigating officer in respect of conduct and affairs of any person buying, selling, and otherwise dealing in securities. Based on the report of the investigating officer, SEBI can initiate action for suspension or cancellation of registration of an intermediary.

**SEBI (Mutual Fund) Regulations, 1996**, regulate the mutual funds in the security market. Under the Regulations, the mutual fund companies are required to involve the reference to these risk factors by making a disclaimer, i.e. “Mutual funds are subject to market risk. Please read the scheme-related offer documents carefully.” With respect to the audio-visual advertisements, the new regulation re-emphasises the need to be audible and understandable to the viewers or listeners.

**The Depository Act, 1996**, provides for electronic maintenance and transfer of ownership of dematerialised securities, SEBI administers the rules and regulation under this Act.

**Prohibition of Insider Trading Regulations, 1992**, seeks to prohibit the illegal practice of trading on the stock exchange to one’s own advantage through having access to confidential information. SEBI also has the power to direct the person who acquired the securities in violation of these regulations to deliver the securities back to the seller or to transfer the proceeds of the deal to the investor protection fund of a stock exchange.

The GoI had set up a Financial Sector Legislative Reforms Commission (**FSLRC**) in 2011 to review regulations of the entire financial sector in the country (including review of legislations). Its report is awaited.

#### 4. Education Sector

Right to Education has been declared as a fundamental right in India by way of the 86<sup>th</sup> Constitutional amendment in 2002. The Right of Children to Free and Compulsory Education Act which came into effect in 2010 makes it obligatory on part of the state governments and local bodies to ensure that every child gets education in a school in the neighbourhood.

India has one of the world's largest education systems, spread over 1.3 million schools, 30,000 colleges and 542 universities.<sup>68</sup> The schooling segment covers the largest population of our society as compared to any other form of education. The segment is also the largest education segment valued at US\$44bn in 2011 and is expected to reach US\$144bn by the year 2020.<sup>69</sup> According to the Education Division at Technopak Advisors, the size of the public education sector was US\$40bn and the private sector amounted to US\$60bn in 2011.<sup>70</sup>

With the unprecedented growth of education sector, the unfair practices in the sector have also increased. In India there has been an alarming increase in the number of fake universities and colleges. Such institutions do not have approval from the government and required permissions to offer courses in various streams.

A former head of the consumer department, West Bengal as well as a member/judge of district forum, Delhi during a discussion with CUTS stated that cases of unfair trade practices by the educational institutes form a bulk of the cases in the consumer forums.

With the growth in the number of engineering and medical colleges, there is an increasing public concern over the unfair practices that are prevailing in the higher education system.

The unfair practices in technical college and higher education institutes usually include demanding huge capitation and donation for securing admission, not recording any payments made by the students by not issuing receipts, non-transparent and suspicious means of admitting students for professional courses, poor quality of education imparted, misleading students and parents by giving advertisements which are not real in terms of the quality of education and in terms of the facilities and infrastructure provided to students. There are institutions which withhold the certificates of students to force them to make payments or to make them work without adequate compensation.<sup>71</sup>

In addition to this, primary schools also have a beehive of rampant unfair practices. Many schools recommend or instruct students to buy their books, stationeries and uniforms from a particular place.

Most of the time the price charged by such recommended sellers is higher than the price in open market. Also, some times, the schools make the purchase compulsory and the students have no option but to purchase the items from the recommended sellers.

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<sup>68</sup> Hector, Dearton Thomas, "Budget 2012: Education sector expects another big push", March 2, 2012, *Business Today*, source: <http://businesstoday.intoday.in/story/budget-2012-education-sector/1/22699.html>, accessed on October 20, 2012.

<sup>69</sup> Saxena, Aurobindo, "Indian Education Sector Outlook", *Technopak Education Outlook*, July, 2012, Source: <http://www.technopak.com/resources/Education-Outlook.pdf>, accessed on October 30, 2012.

<sup>70</sup> Ibid.

<sup>71</sup> "How to prevent unfair practices in Education?", source: <http://entrance-exam.net/how-to-prevent-unfair-practices-in-education/>, accessed on October 30, 2012.



There have been instances where parents were called to their child's school by the authorities and were asked not to create a fuss about purchasing the uniform and stationery through the school. In such cases parents have no option but to silently accede to the unreasonable demands. Such practices curtail the right to choice of a student and its parents.

In the year 2003, the Bombay High Court, in a public interest litigation filed in this respect by the Forum for Fairness in Education and Prakash Sheth, a diamond merchant in this respect, ruled that schools can no longer force parents to buy stationery and uniforms from any particular store. This has come as a big relief for the parents specially.<sup>72</sup>

However, one observes that even after the High Court judgement, the overall situation has not improved and the schools still shamelessly impose such conditions upon innocent parents. Another major reason for such practices to flourish is the lack of awareness among the parents who accede to such demands to avoid any unreasonable behaviour with the student in the school.

In the year 2002, a class X student, along with her father, filed a civil suit in the court of civil judge senior division against the Mercedes Benz international school, Pune for collecting 'capitation fees' under the guise of a building donation fund worth Rs. 2 lakhs over and above the annual fee of Rs. 2.75 lakhs. According to the suit the school refused to allow the student from attending classes when she refused to pay the 'capitation fee'. Such demand was requested to be declared illegal under the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987.<sup>73</sup>

While deciding one such case of unfair trade practices, the district forum, Chandigarh observed as follows<sup>74</sup>: *"It is unfortunate that in the name of education, the commercial teaching 'shops' have emerged to trap innocent, unsuspecting students to make easy money. They fleece students through flashy advertisements of providing a bright future. This is a slur on the fair and noble profession of teaching and such acts need to be condemned."*

#### **Box 5: Blatant Unfair Trade Practices in an Education Institute**

In the case of *Bhupesh Khurana v. Vishwa Buddha Parishad*, a case was filed in the National Commission by the students of Buddhist Mission Dental College and Hospital against Vishwa Bharati Parishad, which was running the dental college indulging in various unfair trade practices thereby causing irreparable injury to the students who took admission there based on the claims made by the university.

##### **Misleading Advertisement**

The Respondent had advertised in national newspaper inviting application for admission for the BDS course. It was represented in the advertisements that the college was under Magadh University, Bihar and Dental Council of India, New Delhi thereby giving clear

<sup>72</sup> "Parents hail HC ruling on school 'diktats'", April 15, 2003, *The Times of India*, source: [http://articles.timesofindia.indiatimes.com/2003-04-15/pune/27264707\\_1\\_school-uniforms-dress-code-english-medium-school](http://articles.timesofindia.indiatimes.com/2003-04-15/pune/27264707_1_school-uniforms-dress-code-english-medium-school), accessed on October 30, 2012.

<sup>73</sup> "Student files suit against Mercedes school", February 13, 2002, *The Times of India*, source: [http://articles.timesofindia.indiatimes.com/2002-02-13/pune/27113500\\_1\\_capitation-fee-student-files-suit-maharashtra-educational-institutions](http://articles.timesofindia.indiatimes.com/2002-02-13/pune/27113500_1_capitation-fee-student-files-suit-maharashtra-educational-institutions), accessed on October 30, 2012.

<sup>74</sup> "Unfair trade practice: Institute to pay Rs 50,000, refund fees", August 26, 2009, *Express India*, source: <http://www.expressindia.com/latest-news/unfair-trade-practice-institute-to-pay-rs-50-000-refund-fees/507212/>, accessed on October 30, 2012.

impression that the said college is duly recognised by the Dental Council of India which is a statutory body for the purpose of running such kind of institution and also affiliated with Magadh University for the purpose of conducting the annual BDS examination and giving the degree course on completion of the course.

#### *False Promises*

At the time of admission, the college assured the students that it was fully equipped with library, laboratory, medical appliances and instruments, hostel accommodation and well qualified staff.

#### *No Receipt on Payment of Fees*

The college collected admission fees and tuition fee from the students who took admission in the college based on the misrepresentation by the college. However, no receipt for the same was provided. Huge amount was also collected by the respondent for capitation fee, college dues, etc., from the students.

It was found out later that the college was neither affiliated to Magadh University nor recognised by the Dental Council of India and was not competent to hold examinations.

The National Commission ruled that the same is gross misrepresentation and deficiency in service and is tantamount to unfair trade practice. The respondents were asked to refund the admission expense paid by the complainants at the time of the admission with interest at the rate of 12 per cent p.a. and also pay to Rs. 20,000 to each complainant as compensation.

The National Commission defined “Deficiency” to mean any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

**Source:** NCDRC order dated September 29, 2000.

#### **Legal and Administrative Framework**

Although there is a lack of a national legislation regulating unfair trade practice in the country, some of the states have come with their own set of legislations in this respect.

For example, Maharashtra enacted the **Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987** to prohibit collection of capitation fee for admission of students in an educational institution and to promote higher standards of education. Similarly, the state of Karnataka and the state of Andhra Pradesh have enacted the **Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984** and **A.P. Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee) Act, 1983**, respectively, to the same effect.

Apart from the legislative steps, some **administrative steps** also have been taken in past to curb UTPs in the education sector. In March 2012, the district administration in Indore prohibited school managements from compelling students to purchase books and uniforms

from particular shops, which is a step aimed at ending the practice allegedly by some schools with a motive to earn commission from book and uniform sellers.

The most recent development in this area is the proposed **Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill, 2010**, waiting to be passed in Parliament in the Winter Session.<sup>75</sup> The Bill aims to provide an institutional mechanism for preventing, prohibiting and punishing unfair practices in technical and medical educational institutions and universities.

The institutions are expected to mandatorily disclose information related to admission process by publication of its prospectus, which will bring about public accountability of such institutions and act as a check on use of unfair practices being adopted *vis-a-vis* students.<sup>76</sup> The Bill provides for educational tribunals in every State and one at the Centre to handle these complaints exclusively and award penalties.<sup>77</sup>

Similarly, a draft legislation to prohibit unfair practices in school education sector has been drafted as directed by the Human Resource Development (HRD) Ministry. The legislation seeks to make a punishable offence any offer or payment of capitation fee or donation, by way of consideration either in cash or kind or otherwise, for obtaining admission to any class in any school. It prohibits publication or circulation of false or misleading advertisements by educational institutions and prohibits schools from insisting students, directly or indirectly, on private coaching on campuses or outside.<sup>78</sup>

A seven-member Central Advisory Board of Education (CABE) comprising Education Ministers of various States formed by HRD Ministry has proposed stricter norms to curb malpractices in school admission process while drafting the abovementioned legislation to prohibit unfair practices in school education sector.<sup>79</sup>

Thus, it is observed various kinds of UTPs are practiced across the sectors. Some of the unfair practices such as misleading advertisements, misrepresentation, false/misleading statements are found in almost all the sectors. On the other hand there are some sectors specific unfair practices prevalent in that particular sector only. The *Table 1* below systematically represents the UTPs as found in the abovementioned analysed sectors.

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<sup>75</sup> Pushpavanam, S., "A boon of a bill for students", December 11, 2011, *The Hindu*, source: <http://www.thehindu.com/opinion/open-page/article2704624.ece>, accessed on October 30, 2012.

<sup>76</sup> <http://piib.nic.in/newsite/erelease.aspx?relid=77230>, accessed on October 30, 2012.

<sup>77</sup> Pushpavanam, S., "A boon of a bill for students", December 11, 2011, *The Hindu*, source: <http://www.thehindu.com/opinion/open-page/article2704624.ece>, accessed on October 30, 2012.

<sup>78</sup> "Bill to curb malpractices in schools on the cards", October 28, 2012, *Deccan Herald*, source: <http://www.deccanherald.com/content/288356/bill-curb-malpractices-schools-cards.html>, accessed on October 30, 2012.

<sup>79</sup> Kumar, Rajesh, "Panel mulls stricter norms to curb malpractices in schools", *The Pioneer*, October 6, 2012, source: <http://dailypioneer.com/city/99822-panel-mulls-stricter-norms-to-curb-malpractices-in-schools.html>, accessed on October 30, 2012.

**Table 1: Types of Unfair Trade Practices in Across Various Sectors**

Kinds of UTPs	Sector				
	Pharmaceutical	Food Processing	Insurance	Securities	Education
Misleading Advertisements	✓	✓	✓	✓	✓
Labelling/ Misbranding	✓	✓			
Adulteration		✓			
Business to Business	✓	✓	✓	✓	
Misrepresentation	✓	✓	✓	✓	✓
False/unfair/ Misleading information	✓	✓	✓	✓	✓
Hoarding	✓	✓			
Starting an offer without the intention to comply			✓	✓	
Tied Sales					✓

### Misleading Advertisements

In addition to and apart from the abovementioned sectors wherein UTPs are prevalent in India, another broad area covering most of the above sectors where UTPs are widespread and flourishing is the arena of misleading advertisements.

The influence of advertisements on consumer choice is undeniable. Advertisements play an important role in gaining undivided attention of target audience, making them interested in the offering, creating desire for the products and services and help in brand building and image creation. It is this fact that makes it imperative that advertisements should be fair and truthful.

Misleading and false advertisements are not just unethical; they distort competition and of course, consumer choice. An advertisement is called deceptive when it misleads people, alters the reality and affects buying behaviours.<sup>80</sup>

False and misleading advertisements in fact violate several basic rights of consumers: the right to information, the right to choice, the right to be protected against unsafe goods and services as well as unfair trade practices.<sup>81</sup>

<sup>80</sup> Kapur Sheetal, "Advertising and the Consumer-The Ethical Concerns", *Consumer Protection in India: Issues and Concerns*, Editors: Suresh Mishra and Sapna Chadah, Indian Institute of Public Administration, New Delhi, 2012.

<sup>81</sup> Girimaji, Pushpa, "Misleading Advertisements and Consumers", IIPA, New Delhi, 2006, source: <http://consumereducation.in/misleadingeng.pdf>, accessed on October 8, 2012.

Consumers are misled by the advertisements in various forms. Generally, the important facts, the real terms and conditions of the offer are hidden in the fine print. Some of the unacceptable use of disclaimers and the fine print include conditions in obscure locations of the advertisement or text that is too small or text flashed on screen for only a moment or voice-overs that are too quick or too quiet.

The advertisements can be misleading in many ways, such as:

#### Advertising contents carrying inappropriate information

The use of untrue testimonials to convince buyers, quoting misleading prices or disparaging a rival product in a misleading manner are some of the examples of misleading advertisements. Advertisements of fairness creams, anti-aging creams, weight loss programmes, etc. usually make exaggerated product claims.

A fairness cream, 'Fair and Lovely', was advertised with a claim that the user will get a fair complexion within a month. The television commercial where a father was seen commenting 'Kash Mera Beta Hota' because daughter was dark complexioned and was not getting a good job was banned after issue was raised in the Parliament.<sup>82</sup>

Similarly, in another instance, a complaint was registered with ASCI in October 2003, referring to an advertisement of Hindustan Level saying that Pepsodent is "one and a half times better at fighting germs than the popular toothpaste" that appeared in Sunday Times of India in September that year. The complainant alleged that HLL's own clinical tests confirmed that Pepsodent Germicheck fights germs up to 150 that is only 0.5 times better and not one and a half times better, as claimed in the advertisement. The Consumer Consultative Committee held in December 2003 that the claim "one a half times better at fighting germs than the popular toothpaste" was misleading and the advertisement was withdrawn.<sup>83</sup>

#### Advertising contents with safety issues

At times companies advertise products highlighting health cures and drugs of questionable efficacy and health gadgets of unknown values not caring about the impact it can have on the health of the user. Such products pose a grave health hazard. Tempted by such an advertisement, claiming to increase a person's height, Nadiya, a class VIII student got admitted to Fathima Hospital for surgery on July, 24, 1996, for increasing her height.

The surgery was conducted and a ring fixator was fixed on her legs which was to be adjusted every six hours. However, after the surgery, ironically, the left leg was shorter by half an inch than the right leg and, therefore, Nadiya could not walk and was bedridden till March 1998.

The Commission held the hospital and the doctors negligent and deficient in their services and directed them to pay Rs. 5 lakh.<sup>84</sup>

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<sup>82</sup> Kapur Sheetal, "Advertising and the Consumer-The Ethical Concerns", *Consumer Protection in India: Issues and Concerns*, Editors: Suresh Mishra and Sapna Chadah, Indian Institute of Public Administration, New Delhi, 2012.

<sup>83</sup> Girimaji, Pushpa, "Misleading Advertisements and Consumers", IIPA, New Delhi, 2006, source: <http://consumereducation.in/misleadingeng.pdf>, accessed on October 8, 2012.

<sup>84</sup> Kapur Sheetal, "Advertising and the Consumer-The Ethical Concerns", *Consumer Protection in India: Issues and Concerns*, Editors: Suresh Mishra and Sapna Chadah, Indian Institute of Public Administration, New Delhi, 2012.

### Advertisements violating consumer's right to choice

When material facts which were likely to influence the buying decision are not disclosed, the advertisement becomes deceptive.

For example, in several advertisements it is stated that 'conditions apply', however these conditions are not stated. A print advertisement for a well-known brand mentioned that a one ton split AC is available for Rs. 15,990. However the advertisement was subject to conditions which were mentioned as footnote in small font, namely, prices were valid in Delhi and NCR under exchange only and actual products may differ from those displayed in the offer. Such advertisements mislead consumers by concealing important information from them.<sup>85</sup>

### Advertisements offering sale, bargain price or free gifts with no intention to comply with such offer

When a company permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price that are not intended to be offered for sale or supply at the bargain price or offers gifts, prizes etc, with an intention of not providing them as offered or the company creates the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole, such company indulges in unfair trade practice.

Similarly, a consumer court has held that back-tracking from releasing a sanctioned loan to consumer by a bank amounts to unfair trade practice, and in light of the same ICICI bank was directed to pay a compensation of Rs 1.46 lakh to an Air Force personnel for resorting to such act.<sup>86</sup>

In July 2003, ASCI received a complaint about an advertisement published in the Hindustan Times, Delhi in June 2003 by Ford India, with the caption: "Prices starting Rs. 4.49 lakhs, lowest interest rate-7.9 per cent" the advertisement showed the logo and picture of the new "Ford Ikon NXT" but carried the specifications and offer on the 1.3 NXT and 1.6 NXT models and the review of the "Ikon NXT" done by Autocar, a leading auto magazine. The complainant said that on speaking with the authorised Ford dealers mentioned in the advertisement, he was informed that the bargain price was not for the NXT, but for the old "Endura" model of Ford, which was phased out earlier that year. Nowhere in the advertisement did this fact come up nor did the dealers mention it, till the complainant pointedly asked them about it. In August 2003, it was held that the "Car model different from the one quoted at Rs 4.49 lakhs, likely to directly mislead the consumer about the claim, i.e., prices starting Rs 4.49 lakhs in the advertisement". The advertisement was withdrawn.<sup>87</sup>

Likewise, a scheme was declared by the District Consumer Dispute Forum, Cuttack, Orissa, as unfair under Section 2(1)(r)(3)(b) of COPRA wherein a lucky draw was floated by Hewlett-Packard (HP) India Private Ltd known as "Get Lucky with HP LaserJet's" – "101 Gifts everyday"<sup>88</sup>. The advertisement claimed, "*Get a chance to win a Car, LCD TV, Motorbikes, laptops, fridges and many more exciting gifts! On purchase of any HP LaserJet*

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<sup>85</sup> Ibid.

<sup>86</sup> "Not Releasing Sanctioned Loan by Bank is Unfair Trade Practice", August 25, 2010, *Business Standard*, source: <http://www.business-standard.com/india/news/not-releasing-sanctioned-loan-by-bank-is-unfair-trade-practice/106500/on>, accessed on October 5, 2012.

<sup>87</sup> Girimaji, Pushpa, "Misleading Advertisements and Consumers", IIPA, New Delhi, 2006, source: <http://consumereducation.in/misleadingeng.pdf>, accessed on October 8, 2012.

<sup>88</sup> Agarwal, Mohit, "Unfair Trade Practice – How I Made HP India Pay Me 15k for Lucky Draw Offer", source: <http://info.akosha.com/consumer-complaints/consumer-protection/unfair-trade-practice-how-i-made-hp-india-pay-me-10k-for-lucky-draw-offer/>, accessed on October 9, 2012.

printer”. As per Section 2(1)(r)(3)(b) of COPRA “any sort of scheme adopted by a party, whereby it conducts any contest or lottery or game of chance or skill, for the purpose of promoting its business interest, the same shall constitute unfair trade practice”.

Since the offer was dependent upon luck of the purchaser and not every purchaser stood to benefit from it and also the scheme promoted business interest by sale of printers and drawing away customers from competing entities like Samsung, Canon etc., it was observed that consumer bought an HP Printer with an intention to get the free gifts offered in the advertisement. The forum directed HP India to discontinue such schemes and ordered them to pay a compensation of Rs.10000 alongside litigation costs of Rs.5000 to the consumer who purchased the printer with a hope to get the promised gift.

The arena of misleading advertisement is largely unregulated because of absence of a specific legislation to curb unfair trade practices. The process of regulating the advertisement can be divided into three areas:

#### Self regulation by the advertising industry

Such self-regulation is undertaken by the advertisers themselves in a broad perspective, as their duty towards consumers. Various agencies are involved in such self-regulation, including: (a) agencies within an individual company, eg. Mudra an advertising agency of Reliance has its own code of practice; (b) advertising trade associations such as ASCI, Advertising Association of India, Indian Newspaper Society, Press Council of India (PCI), Prasar Bharati, etc; (c) Individual media and media group such as All India Radio Code for commercial advertising, which although *per se* is only persuasive and not binding.<sup>89</sup>

However, it is pertinent to observe that the self-regulating agencies’ decision only have suggestive value and are not binding. Moreover agencies like ASCI, PCI, beyond a point, will always remain pro-advertising agencies and would not want to harm its own industry by taking strong measures and cut down on the revenues coming to the advertising agency by such advertisements. Similar views were echoed by the President Consumer India during CUTS’ meeting with her.

In addition to this, former head of the consumer department in the state of West Bengal, who has also worked in the field of unfair trade practices, especially misleading advertisements for many years and now wants to face the media agencies/newspaper groups directly, informed CUTS during a meeting that newspaper groups are very strong and influential and it is difficult to tackle them or raise a voice against them.

Additionally, an important member of the Consumer Affairs, Department of Consumer Affairs, Ministry of Consumer Affairs, Food & Public Distribution<sup>90</sup> feels that ASCI does not have adequate consumer representation. Also, no government agency is working in this field.

#### Externally imposed regulations either by the aggrieved party themselves or by the policing authorities

This regulation is done by consumers who either individually or collectively seek action against the defaulting advertisers either by writing to companies which carry the deceptive

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<sup>89</sup> Kapor Sheetal, “Advertising and the Consumer-The Ethical Concerns”, *Consumer Protection in India: Issues and Concerns*, Editors: Suresh Mishra and Sapna Chadah, Indian Institute of Public Administration, New Delhi, 2012.

<sup>90</sup> As informed to CUTS.

advertisement or through consumer organisations. The success rate of this mode is very low and most of the time upon failure, the consumer takes the legal route.<sup>91</sup>

#### Regulations by Government

Apart from the sector specific regulation and COPRA, as mentioned in this paper earlier, the following laws also have horizontal application on in dealing with and imposing restriction on misleading advertisements:

**Cable Television Networks (Regulation) Act, 1995** lays down the procedure for registration of a cable television network and also regulates the programmes and advertisements transmitted on cable network in India.

**The Emblems and Names (Prevention of Improper Use) Act, 1950** prevents improper use of certain emblems and names for commercial and professional purposes. The name, emblems or official seal of certain organisations cannot be used.

**Trade and Merchandise Marks Act, 1958** provides for registration and better protection of trademarks and for the prevention of the use of fraudulent marks on merchandise.

**Multimedia Campaigns:** GoI has launched a massive multi-media campaign since 2005 to make consumers aware of their rights. The slogan ‘Jago Grahak Jago’ has become a household name now. GoI thought this campaign is trying to make the common man aware about his rights.

Thus, it is observed that various sectors lay down sector-specific laws and regulations. However, it is important to note that COPRA is a law with horizontal application across the sectors and the consumers have the option to approach the forums/courts under the sectoral laws or forums under COPRA.

#### **Gaps Perceived in Dealing with the Practice**

Thus, upon analysing the abovementioned case studies it appears that the main motive behind the UTPs is obviously to influence the consumer to buy something he/she won’t otherwise buy, to pay more for the product or the service than otherwise or to switch the consumer from one shop or product or service to another.

UTPs are amongst the trade practices which affect an individual directly and almost every day unlike other anti-competitive activity. UTPs such as misleading advertisements, deceptive sale of goods and services, misrepresentation of the products, etc. are very common and affect even the smallest of consumers. Consumers unlike the sellers are not organised and, therefore, there is very little that they can do to check their systematic exploitation.

Even though proper legislations have been introduced addressing specific concerns, yet, the situation of the consumer seems to be the same if not worse and the incidence of UTPs still prevail across the sectors. Under such circumstances it is imperative to analyse the reasons for the same.

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<sup>91</sup> Ibid.



### ***Business to Business Disputes not Covered***

As has been discussed in Chapter 3, upon replacement of the MRTP Act by the Competition Act, 2002, the provisions relating to unfair trade practices were transferred from the MRTP Act to COPRA and not in the Competition Act. Although the provisions were merely copied, yet, in the course of being copied from the MRTP Act into the structure of the COPRA, the provisions acquired a new meaning.

Within COPRA, a ‘consumer’ only means any person who buys any good or hires/avails of any service for a consideration which has been paid or promised or partly paid and partly promised, and includes any user of such goods other than the person who obtains such goods or avails of such services for resale or for any commercial purpose.<sup>92</sup>

It is important to note that, ‘commercial purpose’ has been interpreted with an intention to protect the interest of small consumers who buy goods for self-employment to earn their livelihood, like a rickshaw puller buying rickshaw for self-employment, or a farmer purchasing fertilizer for his crops, or a taxi driver buying a car to run it as a taxi, etc. who fall within the definition of consumer<sup>93</sup>.

However, such interpretation excludes from the purview of COPRA, the big business houses carrying on business with profit motive. CUTS believes that COPRA fails to acknowledge that sale and purchase transactions do not only include purchasing of goods or availing services by a person for self but sometimes the goods or services are purchased by a person for reselling or other commercial purpose, such as to run another business and such purchasers also should have a remedy against UTPs under COPRA.

In *Laxmi Engineering Works v. P S G Industrial Institute*, 1995 SCC (3) 583, Laxmi Engineering Works, a proprietary concern and a small scale industry placed an order with P.S.G. industrial institute for supply of PSG 450 CNC Universal Turing Central Machine for manufacture of machine parts to earn profits. As per Laxmi Engineering Works, P.S.G. industrial institute not only supplied the machinery six months late but also supplied a defective machine, unlike what was promised.

The Supreme Court observed in this case that a purchase of goods could be said to be for a commercial purpose only if two conditions were satisfied, namely: (a) the goods must have been purchased for being used in some profit-making activity on a large scale; and (b) there should be close and direct nexus between the purchase of goods and the profit-making activity. It was held that as Laxmi Engineering Works was purchasing machine with a commercial purpose and therefore did not fall within the definition of consumer. The complaint by Laxmi Engineering Works regarding defect in the machine was, therefore, not maintainable.

Therefore, the companies engaging in a sale purchase agreement with a commercial purpose or with a purpose to resale the purchased good do not have any direct remedy under COPRA. As a result, under COPRA, although a particular user of goods or services who is injured due to such UTPs can approach the consumer forum directly or through a consumer association or central government/state governments, but any company which purchases goods/services for resale or other commercial purposes cannot qualify as ‘consumers’ and cannot take up a case of an Unfair Trade Practice before a consumer forum.

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<sup>92</sup> Section 2 (d) of COPRA

<sup>93</sup> *Synco Textiles Pvt Ltd v. Greaves Cotton & Co. Ltd* (1991) CPJ 499

Such cases can only be taken up by consumer associations, central government or the State Governments. Thus, within the existing law, a manufacturer whose product is found deficient by another company has no *locus standi* to seek a remedy under COPRA. Competing firms cannot be ‘consumers’ to approach a consumer forum. It is pertinent to understand that these are only oblique routes of seeking justice. Even if a firm were to succeed in getting an advertisement stopped through this route, as it is not a party to the case, it would not get any compensation for loss of profit. Thus, effectively, the field of comparative representation has become very unregulated.<sup>94</sup>

However, the goods though purchased for commercial purposes, have been allowed in a Consumer Forum, when the defects were visible during the warranty period.<sup>95</sup>

During CUTS’ discussion with a relevant member from the Department of Consumer Affairs<sup>96</sup>, CUTS was given to understand that the Department does not intend to bring in such business to business disputes within the realm of COPRA as yet.

### ***Inordinate Delays***

Although COPRA provides for some checks on UTPs under the UTP provisions, but the jurisdiction of the forums and commissions under COPRA are so wide that it covers defective goods, deficient services also along with and in addition to the unfair trade practices, thus making the segment fairly wide in itself and plaguing COPRA with inordinate delays in the delivery of justice, enforcement of orders, etc.

Even though the Act provides for 90 days for redressal, there have been a number of cases which have been pending for more than ten years at all levels.

### ***Dominance of Judge’s Opinion over Other Members of the Forum***

Another important administrative loophole in the decision making process is the dominance of judges’ opinion over other consumer representatives in the consumer forums.

Quoting a senior professor, School of Social Sciences, Jawaharlal Nehru University, “the judges in the consumer forums are mostly the retired civil/criminal court judges who have an experience of adopting adversarial approach to decide a case like they have done in past, however, consumer forums are required to adopt a non-adversarial approach and this mismatch makes it difficult for the judges to adapt to such non-adversarial and simple approach and they make even the proceedings in the consumer adversarial, long and complex.”

### ***No Power to Take Up a Case Suo Motu***

The consumer courts cannot deal with UTPs in same way as MRTPC because they neither have the power nor infrastructure to investigate *suo motu*. They can only take up a matter upon filing of a complaint by a consumer/consumer organisation/central or state government.

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<sup>94</sup> Pathak Akhileshwar, “Liberalisation and Law on Comparative Advertising in India”, source: <http://www.iimahd.ernet.in/publications/data/2004-01-02akhilpathak.pdf>, accessed on October 4, 2012.

<sup>95</sup> *Super Computer Centre v. Globiz Investment Pvt. Ltd.* III (2006) CPJ 265 (NC).

<sup>96</sup> As informed to CUTS by an important member of the Department of Consumer Affairs, Ministry of Consumer Affairs, Food & Public Distribution.

### ***COPRA Mainly a Compensatory Legislation***

A number of stakeholders, namely, a former member of MRTPC, President Consumer India and a member/judge of district forum, Delhi, during their meetings with CUTS have highlighted that COPRA is mainly a compensatory legislation, providing compensation to the consumer for the harm suffered and does not contain any penalty for the wrongdoer, which does not act as a deterrent to the companies engaging in such UTPs.

However, the member/judge of district forum, Delhi stated that the consumer forum, at times, based on case to case may order the wrong doer to give a particular amount to the consumer welfare fund.

### ***No Investigative Powers***

One very important gap in COPRA is the lack of investigatory powers to deal with consumer issues. There is no office akin to office of DGIR of MRTPC under COPRA, which can take action against UTPs. The office of DG (I&R) could investigate the facts of unfair trade practices including misleading advertisements on its own and take action. There is no similar provision in COPRA for this kind of supportive, administrative mechanism of DGIR.

### ***Lack of Awareness among Consumers***

One of the biggest challenges in dealing with UTPs still lies within the general public. The common man is still not completely aware about his rights.

A consumer is vested with right to information when he purchases a good or avails a service and big corporations, but a lack of awareness amongst the consumers about this right deprives him/her from enjoying this right and gives the power to the producers and the sellers to exploit the consumers. This unawareness does not even let the consumer realise that they are being cheated on by the sellers and bear the brunt of this exploitation.

### ***Concurrence of Sectoral Regulations along with COPRA***

It is noticed that in India there is not much co-ordination seen between sectoral authorities and the authorities established under COPRA.

Under Indian law, various sector-specific laws such as Drugs and Cosmetics Act, 1940, Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, Food Safety and Standards Act, 2006, IRDA Act, 1999 and various other regulations co-exist along with COPRA to deal with such unfair practices.

Since most of the times, the consumer does not know or has little knowledge about the legal framework and the mechanism to exercise this right and fight against the unfair trade practices, they are not sure about the forum to be approached and steps to be taken.

A common consumer will always be confused as to which forum will be more appropriate to address their cause and provide them the remedy, given the additional lack of co-ordination between the sectoral authorities and the authorities established under COPRA.

This situation may also lead to forum shopping. Additionally, most often, even if the consumer could have gone to courts, he prefers not to initiate any action against such unfair trade practices, knowing the lengthy and expensive procedures involved.

### ***Cross-Border Disputes not Covered***

It is also observed that the consumer protection authorities are locally (nationally) focused and ignore cross border conduct. Sometimes the local focus is the result of legislation that limits the jurisdiction of authorities.

Even where jurisdictional issues are not the problem, effective international cooperation between consumer protection authorities in different countries is still in its infancy. Often by the time national authorities have coordinated with their international sister authorities the bird has flown; the bad guys have shut up shop and moved on to other countries or the evidence has gone stale.<sup>97</sup> This issue is of particular concern with respect to e-purchases with buyer sitting in one country and seller in the other like on ebay, amazon, etc.

### ***Lack of Importance Attached to UTPs***

It is observed that, unfortunately, UTPs remain an issue of low significance when compared to the high profile of other antitrust/competition issues. 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, small and medium enterprises (SMEs), in essence, the small players. 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.

### ***Other Enforcement Gaps***

As the former member of MRTPC feels rightly, since the consumer forums are composed of only one judicial member and others are mainly non-legal consumer representatives, this makes the forums incompetent to take up big investigations.

With repeal of the MRTP Act by Competition Act a void has been created to control unfair trade practices. The agencies also suffer from a lack of infrastructure and qualified personnel as were there under MRTP Act, especially at the local level. This may also lead to consumers' loss of trust in the redressal system.

Additionally, Government penalties for providing misleading information or perpetuating consumer fraud, although may be high, but are imposed tardily or not imposed at all. India also lacks in a law against warring corporations indulging in unfair trade practices and a justice delivery system to have some 'rules of the game' to compete among themselves. This has made the companies indulging into UTPs more resistant to taking corrective measures and most of the time, if a consumer approaches the companies, such complaints are ignored outright.

In June, 2012, CUTS International observed a few advertisements appearing in various newspapers and All India Radio (AIR) for the promotion of a product "Sugar Remedy" by Umalaxmi Organics Pvt. Ltd. to cure diabetes by natural medicines are prohibited by law as per the provisions mentioned under the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954. According to the Section 3(d) of the Act, "no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the Schedule" (of the Act).

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<sup>97</sup> Buik, Carl, "Dealing with Unfair Trade Practices", Addis Ababa, May 2008, source: [http://www.circ.in/pdf/CPS-06-Unfair\\_Trade\\_Practices.pdf](http://www.circ.in/pdf/CPS-06-Unfair_Trade_Practices.pdf) accessed on October 5, 2012.

As per the schedule, diabetes is among the 54 diseases for which advertisements referring to any drug are prohibited. CUTS International immediately sent them an email in this respect highlighting that any exaggerated treatment claims without any scientific evidence to support therapeutic claims for the most prevalent lifestyle diseases in the country could result in misleading the common people resulting in undue influence on their decision making powers and advised the company to stop the advertisements of its products. However, till date no reply has been received from the company.<sup>98</sup>

Therefore, one observes that even when there is a comprehensive network of laws in India to deal with unfair trade practices, the country is still not able to curb the menace because of various abovementioned gaps in the Indian system.

Please see *Box 6* for differences between the MRTP Act and COPRA

<b>Box 6: Difference between MRTP Act and COPRA</b>		
<b>S.No</b>	<b>MRTP Act</b>	<b>COPRA</b>
1.	MRTPC had the power to take <i>suo motu</i> actions	Consumer forums may exercise their powers only if the complainant approaches them
2.	Definition of consumer include those persons also who obtain goods or services for resale or for any commercial purpose and a competitor in the market.	‘Consumer’ only means any person who buys any good or service for self-use and does not include the person who obtains such goods or services for resale or for any commercial purpose and any competitor.
3.	Had full investigatory powers	No powers to investigate

## Conclusion

Hence, it is seen that with the advent of globalisation, liberalisation and privations and subsequent growth, UTPs are becoming more and more rampant across the world in different sectors of economy. In addition to COPRA, various sectoral laws have been enacted to deal with such unfair practices specifically under each sector.

In spite of a network of laws, regulations and guidelines being in existence to tackle the UTPs both under COPRA and sectoral laws, the UTP still exist and continue to adversely affect the innocent consumer as well as the competition in the market and thus the entire economy.

The gaps in dealing with such UTPs have been analysed in clause 2.5 above and there is an urgent need to take relevant action in this respect.

<sup>98</sup> Based on discussions with a colleague.

## **Chapter 3: Current Legal and Institutional Framework on Unfair Trade Practices in India**

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Unfair Trade Practices in India come under the purview of the consumer law of the country, i.e. The Consumer Protection Act, 1986 or COPRA which applies horizontally on all kinds of UTPs. In addition to COPRA, there are various sectoral laws and regulations which have a vertical application to sector specific UTPs such as in the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 which deals with UTPs in the pharmaceutical sector and IRDA Act, 1999 which has an application in the Insurance sector.

### **Indian Legal Framework to Deal with UTPs**

#### ***Consumer Protection Act, 1986***

COPRA is an important legislative step to curb UTPs in India as it has special machinery and specific provisions to deal with unfair trade practices. Clause 1.4.1 in Chapter 3 of this paper analyses the history of COPRA in great details.

Unfair Trade Practices are defined in Section 2(1)(r) of COPRA. The Act empowers the consumer forums to look into the matters relating to UTPs and protect the consumers against such practices.

It also empowers the consumers to approach the consumer forums established under COPRA upon being victimised by a UTP, based on the quantum of compensation asked for by the consumer. The forums have been given power to pass a cease and desist order against the wrongdoer under Section 14(f) of COPRA.

COPRA also empowers a consumer to approach any of the forum on its own without being represented by any advocate

#### ***Sectoral Laws/Regulations***

Along with COPRA, various sector specific laws, regulations and guidelines regulate prevalence of unfair trade practices in the particular sector. Such sector specific laws have already been dealt with at length in clause 2.2 under Chapter 4 of this paper.

In addition to the regulations mentioned therein, another important legislation enacted in this respect is the Sale of Goods Act, 1930 which enables a buyer to reject goods if they do not correspond with their description or which are not fit for the buyer's purpose or which are not of mercantile quality or the goods which in bulk do not agree with the samples.

However, one can observe that the Act does not provide for any special forum for redressal of consumer grievances, unlike COPRA. Also, the Act is not applicable for defect in providing services.

#### ***Dispute Resolution by Lok Adalat Method***

Lok Adalat, or the people's court, established by the Government of India, is an alternate dispute resolution method to settle dispute through conciliation and compromise. Lok Adalat accepts the cases which could be settled by conciliation and compromise and are pending in the regular courts within their jurisdiction. However, litigants can also voluntarily approach

the LA bench for resolving their matters. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat.<sup>99</sup>

There is no court fee in the Lok Adalat. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws, and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat.<sup>100</sup> The dispute resolution process through the usage of Lok Adalats is becoming very popular and more and more consumers are opting for this alternate way of dispute settlement.

One such example of a consumer dispute being settled by Lok Adalat is that of state commission, Chandigarh. In 2002, the district forum, Gurgaon, had ordered Hyundai Santro to refund the amount towards the purchase of a car after it was alleged that the bright red colour of the new car had faded due to a defect. The company had appealed against the order. Six years later, the case was transferred from Haryana to the Mega Lok Adalat in the state commission of the Union Territory of Chandigarh. The Mega Lok Adalat ordered that the car be brought to the workshop and repainted within a week. The earlier order was set aside.<sup>101</sup>

## **Institutional Set-up to Deal with UTPs**

### **COPRA**

COPRA has created a three-tier quasi-judicial system to deal with the consumer related issues and a consumer could seek remedy through the District Forums, the State Commission or the National Commission, in the event any of his/her rights, as a consumer, are violated.

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.

At present, there are 629 District Forums and 35 State Commissions with the National Consumer Disputes Redressal Commission (**NCDRC** or the **National Commission**) at the apex. NCDRC has its office in New Delhi.<sup>102</sup> Each District Forum is headed by a person who is or has been or is eligible to be appointed as a District Judge and each State Commission is headed by a person who is or has been a Judge of High Court. The National Commission is headed by a sitting or retired Judge of the Supreme Court of India.

A consumer can approach the district forum if the claim does not exceed Rs. 20 Lakhs. If the claim exceeds Rs. 20 lakh but is less than Rs. 1 crore, then the state forum will have the original jurisdiction and in matters where the claim is more than Rs. 1 crore, the consumer is required to approach the national forum. In addition to this, the state forums also have appellate jurisdiction against the order of any of the district forum in the state and the national forum is entitled to hear appeals against the orders of state forums. An appeal against the

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<sup>99</sup> "Lok Adalat", *International Consumer Rights Protection Council*, source:

<http://www.consumergrievance.com/icrpc.org.lokadalat.htm>, accessed on November 8, 2012.

<sup>100</sup> "Lok Adalat", *International Consumer Rights Protection Council*, source:

<http://www.consumergrievance.com/icrpc.org.lokadalat.htm>, accessed on November 8, 2012.

<sup>101</sup> Sareen Aneasha, "Where the Consumer is King", December 22, 2008, *The Indian Express*, source:

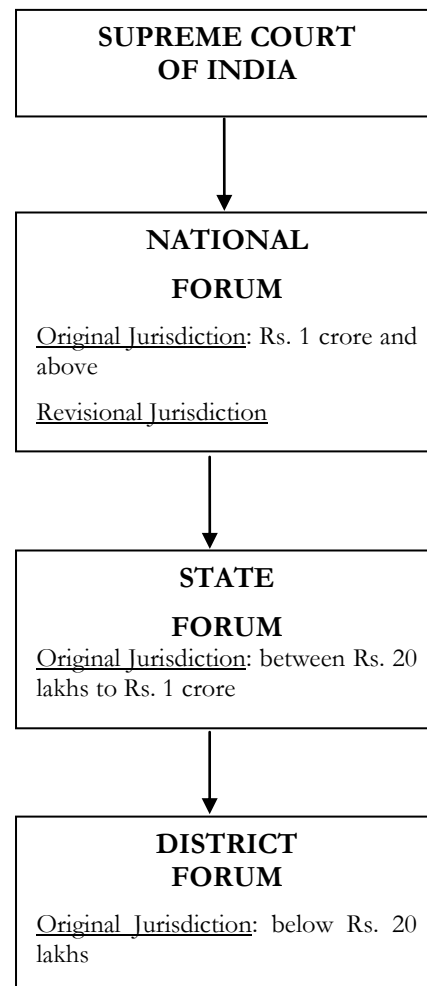
<http://www.indianexpress.com/news/where-the-consumer-is-king-/401336/0>, accessed on November 8, 2012.

<sup>102</sup> "Consumer Protection and National Consumer Disputes Redressal Commission", source: <http://ncdrc.nic.in/>, accessed on October 26, 2012.



order of the national forum may lie in the Supreme Court of India.<sup>103</sup> The consumer is not required to pay any court fee or even processing fee to file any petition or appeal to any of the consumer forums except Supreme Court. Please see *Figure 1* for more clarity.

**Figure 1: Hierarchy of Consumer Forums**



Since the incorporation of provisions relating to UTP in COPRA various cases have been filed and decided in all the three forums. A total of 3827208 number of consumer complaints filed in various forums since inception of COPRA till September 18, 2012<sup>104</sup> (*Also see Table 2 below*).

#### *The National Commission*

The National Commission, in addition to having original jurisdiction and revisional jurisdiction over state commission, is also empowered under Section 22B of the Act to transfer any complaint pending before the district forum of one state to a district forum of another state or before one state forum to another state forum. Such transfer order may be a result of an application of the complainant or of its own motion, at any stage of the proceeding and in the interest of justice.

<sup>103</sup> Chapter III of COPRA

<sup>104</sup> <http://ncdr.nic.in/statistics.html>, accessed on November 8, 2012.

Further, in order to help achieve the objects of COPRA, the National Commission has also been conferred with the powers of administrative control over all the State Commissions by calling for periodical returns regarding the institution, disposal and pendency of cases.

As per the NCDRC website, the National Commission since its inception has disposed off 66560 cases till September 18, 2012 by following normal court procedure and 2 cases till August 31, 2012 by applying the Lok Adalat method<sup>105</sup>.

#### *The State Commissions*

The state commissions since their inception have disposed of 485156 cases by following normal court procedure and 2016 cases till August 31, 2012 by applying the Lok Adalat method as on September 18, 2012.<sup>106</sup>

#### *The District Forums*

The district commissions since their inception have disposed of 2925782 cases by following normal court procedure and 2016 cases till August 31, 2012 by applying the Lok Adalat method as on September 18, 2012.<sup>107</sup>

#### ***Sectoral Regulations/Guidelines***

Each of the sector-specific regulations/guidelines lays down specific machinery to manage UTPs in that sector. Most of the sectors such as Insurance sector, Securities sector, Food Processing sector establish a specialised agency which handles issues arising in the sector, including UTPs. The pharmaceutical sector on the other hand has laid down detailed legislations in this respect. Education sector is a still developing sector and new and very thoughtful policies are in pipeline.

The clause 2.2 under Chapter 4 of this paper describes the institutional set-up in various sectors.

#### ***Lok Adalats***

Throughout the year, the consumer forums generally hold a Lok Adalat every Friday or Saturday for amicable settlement of cases. They may also associate with them for representatives from outside.

### **An Analyses of the Regulatory Structure**

#### ***Freedom from Advocates***

One of the important provisions, which helps COPRA achieve its aim to protect interest of a common man as a consumer, is the freedom given to the consumer to approach any of the forum on its own without being represented by any advocate. By doing this, the forums give the common man a chance to approach the decision making authorities without getting involved in unnecessary legal papers' hassle.

Although it is a common belief that consumers are increasingly being represented by advocates, yet during our meeting with a member/judge of district forum, Delhi, CUTS was informed that consumers still come on their own in the cases which involve small issues and small complaints like defect in washing machine, etc. but engage advocates only for big

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<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

matters such as complaint against educational institution, insurance companies, etc. the consumer do not feel confident about fighting the case on their own because of the complex terms and conditions. She also informed CUTS that even if a consumer comes without an advocate, the approach of the consumer forum is always pro-consumer and the judges try to understand the consumer's point of view even if in common terminology.

### ***Inordinate Delays in Delivery of Justice***

Consumer forum proceedings are summary in nature. The endeavour is made to grant relief to the aggrieved consumer as quickly as in the quickest possible, keeping in mind the provisions of the Act which lay down time schedule for disposal of cases.<sup>108</sup>

Though the framers of COPRA hoped that the consumer will find a quick and speedy justice in the consumer forums, yet, the average time for disposal of a case range from 2 to 3 years as against the stipulated time of 90 days.<sup>109</sup>

The reasons for such delay are manifold. Firstly, many of the district or state forums do not have full members for long term as vacancies are not filled up on regular basis. Secondly, there is a lack of infrastructure, i.e. these courts are not given enough secretarial assistance and, many a times, even proper accommodation is not provided to house these forums.<sup>110</sup>

As a result, the number of cases pending in such forums is increasing everyday which takes away the right of speedy justice from a consumer. This is problematic especially in the cases involving small sum of money or petty issues. After a point of time, the consumer loses hope and energy to keep on fighting the case. Whatever happened to "Justice Delayed Is Justice Denied"!

As has been published by the NCDRC, on its website, a total number of 349710 cases are pending in National Commission, state commission and district commission altogether.

The Bagla Committee Report also highlighted the lack of staff in the consumer forums and raised concerns about the 'the volume of work and highly inadequate staff'. As per the Bagla Committee Report as on November 1, 1999, 1285 original petitions were pending in the forums.<sup>111</sup> Such lack of resources in the consumer forums is also one of the major reasons for the unreasonable delays in justice delivery.

Please refer to the table (*Table 2*) below for the number of consumer complaints pending in each of consumer forums.

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<sup>108</sup> "Consumer Protection and National Consumer Disputes Redressal Commission", source: <http://ncdrc.nic.in/>, accessed on October 26, 2012.

<sup>109</sup> "Dispute Resolution Process in Consumer Protection" source: [http://d-arch.ide.go.jp/idedp/IAL/IAL001600\\_005.pdf](http://d-arch.ide.go.jp/idedp/IAL/IAL001600_005.pdf), accessed on October 28, 2012

<sup>110</sup> Ibid.

<sup>111</sup> "Bagla Committee Report", A Committee headed by Shri S.P. Bagla, former Member, National Commission, source: <http://ncdrc.nic.in/baglacreport.html>, accessed on October 26, 2012.

**Table 2: Total Number of Consumer Complaints Filed/Disposed since Inception under Consumer Protection Law and the Number of Complaints Pending<sup>112</sup>**

(Updated on 06.03.2013)

Sl. No.	Name of Agency	Cases filed since inception	Cases disposed of since inception	Cases Pending	% Disposal
1	National Commission	80014	69253	10761	86.55
2	State Commissions	600097	504834	95263	84.13
3	District Forums	3242324	2994256	248068	92.35
	<b>TOTAL</b>	<b>3922435</b>	<b>3568343</b>	<b>354092</b>	<b>90.97</b>

It is evident from the *Table 2* above that the consumers are widely using the machinery under COPRA and approaching the consumer forums for redressal of their grievances. COPRA is an alternative and cheapest remedy available to the aggrieved consumer other than civil suit. However, the inadequacy of human resources in the consumer forums is a huge issue and should be looked into.

#### ***Sectoral Regulators vis-à-vis Consumer Forums***

It is observed that the proceedings under the sectoral laws are not only time consuming and expensive but also involve complicated and lengthy procedures. Therefore, due to the less expensive (no court fee and no processing fee) and less time consuming proceedings and establishment of special consumer courts under COPRA attract consumers more than the sectoral laws.

However, the Food Safety and Standards Authority of India (FSSAI) has observed that if the damage is small then the consumer usually take recourse under COPRA but in cases of bigger damages and if investigations are required to be conducted, the consumer prefer approaching FSSAI<sup>113</sup>

In the case *Om Prakash v. Assistant Engineer, Haryana Agro*, 1994(3)SCC 504, the Supreme Court observed as follows:

*“The laws intended to protect consumers, as opposed to traders, are comparatively of recent development. Because of general lack of information on the part of consumers, many trade practices may result in causing loss or damage to the consumers. It is well known that many of the traders having advance information, or on speculation regarding the rise in the price of different articles, in order to avail the increase in the price, withhold the supply of different goods or articles to the consumers. In this process they cause loss or damage to consumers by making them to pay the excess price which they would not have been compelled to pay, if the goods or articles had been supplied in time. The object and purpose of the Consumer Protection Act is to save the consumer from such unfair conduct and practice of the traders also.....But, .....any intervention, by (such) Consumer Forums, should be only when they are*

<sup>112</sup> <http://ncdr.nic.in/statistics.html> accessed on October 26, 2012.

<sup>113</sup> Based on CUTS’ meeting with a relevant member of FSSAI.

*satisfied that the loss or damage has been caused to the consumer by the unfair conduct or practice, adopted by the trader.”*

It is important to understand that the roles of sector-specific regulators and the consumer forums overlap but remain quite distinct. Unlike the sector-specific regulators, the consumer forums have a holistic perspective on consumer interest and addresses behavioral issues after problems arise. Please see *Table 3* below in this respect.

**Table 3: Difference in Approach between Sector-Specific Regulator and Consumer Forums:<sup>114</sup>**

Sector-Specific Regulator	Consumer Forums
Tells businesses “what to do” and “how to price products”	Tells businesses “what not to do”
Focuses upon specific sectors of the economy	Focuses upon the entire economy and interest of the consumer in the market
<i>Ex ante</i> - addresses behavioral issues before problems arise	<i>Ex post</i>
Focuses upon orderly development of a sector that would presumably trickle down through that sector, ensuring consumer welfare	Focuses upon consumer welfare

In the event of existence of sectoral regulators concurrently with consumer forums, at first it seems perfect to give primacy to a sector-specific regulator over consumer forums given the fact it is closest to the sector and will most probably be a repository of pertinent information available within that sector.

But, when the institutional setup grants a sector-specific regulator jurisdiction over both sectoral regulation and consumer related matters arising within the sector, conflicts may arise between the objective of protecting interest of the consumer.<sup>115</sup> Additionally, sectoral regulators may shy away from enforcing consumer law in order to reduce the potential for any conflict with regulated entities.<sup>116</sup>

Further, removing the sector-specific regulators altogether is also not practical. Both sector-specific regulators and consumer forums have unique core competencies to offer. Unlike legislation governing sector-specific regulators, consumer legislation grants a private right of action and provides for damages. The twin rubrics of private enforcement and damages ensure a qualitatively higher standard of consumer welfare that is unavailable under the legislative framework of any sector-specific regulator.<sup>117</sup>

<sup>114</sup> Refer, in reference to Competition Law, to Singh, Rahul, “The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators”, *Washington University Global Studies Law Review*, Vol. 8:71, 2009, source: [http://law.wustl.edu/WUGSLR/Issues/Volume8\\_1/singh.pdf](http://law.wustl.edu/WUGSLR/Issues/Volume8_1/singh.pdf), accessed on October 29, 2012.

<sup>115</sup> Refer, in reference to Competition Law, to “Antitrust Enforcement in Regulated Sectors: Introduction”, Seoul, *ICN Annual Conferences*, 2004, source: <http://www.internationalcompetitionnetwork.org/uploads/library/doc377.pdf>, accessed on October 29, 2012.

<sup>116</sup> Refer, in reference to Competition Law, to Department of Trade and Industries and HM Treasury, “Concurrent Competition Powers in Sectoral Regulation”, (May, 2006), available at <http://www.berr.gov.uk/files/file29454.pdf>.

<sup>117</sup> Refer, in reference to Competition Law, to Singh, Rahul, “The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators”, *Washington University Global Studies Law Review*, Vol. 8:71, 2009, source: [http://law.wustl.edu/WUGSLR/Issues/Volume8\\_1/singh.pdf](http://law.wustl.edu/WUGSLR/Issues/Volume8_1/singh.pdf), accessed on October 29, 2012.

Hence, CUTS believes that though sectoral regulators may coexist with the consumer forums in India, the consumer forums must be given precedence over the sector specific regulators.

## Chapter 4: Conclusion and Recommendations

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Hence, after analysing the social, economic and legal framework in place to deal with Unfair Trade Practices in India and globally and highlighting the challenges being faced in India in relation to such UTPs, it appears that there is a need for amendment in the current institutional set-up of the country.

Given the challenges and gaps listed in the chapters above, consumer confidence in the redressal system has reduced and sometimes it takes many years to finally decide a case. In this situation, two options to bring about the desired change or amendment in the institutional framework may be suggested by way of recommendations.

### **Option 1: An Independent and Specialised Consumer Protection Agency**

One of the ways to deal with the challenging situation will be by establishment of a specialised enforcement body on consumer protection in India, i.e., the *Consumer Protection Agency (CPA)*, within the Ministry of Consumer Affairs, with horizontal powers for catering to consumer protection in India, including UTPs, misleading advertisements and unsafe products impacting a large number of consumers and having principle legal relevance. The suggested CPA will also try to incorporate within itself the features which are lacking in COPRA. CPA will have robust investigative powers, sufficient expertise, more stable resources, continuity and effective enforcement of consumer protection legislation.

It is crucial to carefully consider the main elements of the institutional design of CPA. Public agencies with powers to intervene in the economic activity of market actors have to be constrained in the exercise of these powers by principles of good administration, ensuring that they serve the public interest, and that risks of capture and corruption are minimized. It can be suggested that the following main points might be considered and be addressed while establishing the agency:

**Place in the Structure of Government:** The place of the agency in the structure of government and its degree of independence is an important question when setting up the same. Additionally, the degree of centralization of the agency is an issue in point. In countries like Poland and Bulgaria, consumer agencies are having a central office and branches in the different country regions. Conversely, in Sweden the consumer agency is a centralized body with lean management structure.

In a large country with huge disparities like India, it will be advisable to establish one central office for the agency and various regional offices to take care of issues even in remote and small villages, making justice accessible to everyone. However, given the need for huge amount of resources to set up such an institution and the time that will be taken for the same, it is suggested that CPA be established at center first and gradually in different states.

It is also suggested that the agency be an institution that is independent of political influence, however, not ignorant of the same. CPA is also required to have adequate legal and financial ability and resources to meet cost of independent action and enough government support for the same. An eminent professor of economics has suggested that “the agency should be on the lines of Federal Trade Commission in USA which is unaffected by political will in the country. This new agency may be coupled with small agencies at state and district level to



review the working of the independent umbrella agency”. Introducing another bureaucratic body will only not be sufficient, the institution should be independent and parallel legal institution. The finances required for the authority may come from the planned budget. Thus, there is a clear need for political will and political maturity in the country if CPA is introduced.

**Composition, Selection and Appointment:** Consumer agencies with broad investigative and sanctioning powers clearly have the capacity to impact economic relations and individual economic freedoms. Therefore targeted efforts need to be devoted to secure the competence and the integrity of the management and the staff of the agency. Rules on avoiding conflict of interest and on professional integrity are of the essence. The agency can comprise of government officers acting in public interest and the consumer representatives at district and state level to see if the agency is working properly and take appropriate action.

**Accountability:** The consumer agencies are typically accountable to the government or are under the supervision of the Ministry of Consumer Affairs. Ensuring insight in the work of the agency on the part of the government is important, but it is required that the same be balanced against the need for certain decision-making autonomy and independence. Other institutional arrangements, such as consultative boards or supervisory boards, with participation of consumer and business representatives, as well as representatives of broader societal circles (e.g., the Swedish KOV) may be an additional way of holding the agency accountable to its mandate.

**Transparency and Accessibility:** A particularly vital aspect of the design of the consumer agency appears to be ensuring transparency of its work and its accessibility for consumers. Actually transparency is yet another form of accountability vis-à-vis the general public. Providing easy access to the decisions, steering documents, annual reports and priorities of the agency can raise the trust of consumers and of the general public in the work of the agency. This has been an important lesson in building the new public administration in the countries of Central and Eastern Europe, where previously the administration has been characterised by secretive and non-transparent working methods. Effective routines for managing complaints and for sifting out and prioritising are also essential for the success of the agency.

**Powers and Remedies:** The deterrent effect of regulation is to a great extent determined by the powers of the public agency and the remedies it has at its disposal. A well-established requirement is that CPA shall have robust investigatory powers, including access to documents and business premises, hearing witnesses, appointing experts, requiring samples and product analysis, etc.

When it comes to sanctioning powers and remedies different approaches are possible. Consumer agencies are in some countries designed with broad mandate and strict sanctioning powers to impose sanctions, fines and cease-and desist orders (see Bulgaria, Poland). In other countries, the focus of consumer agency work is on market monitoring, negotiations, developing guidelines in cooperation with the business community, as well as requiring voluntary compliance (e.g., Sweden).

The new institution also needs to have a provision for class action. Class action is rarely used under COPRA and even if taken under the provision of civil procedure code, takes a long time, discouraging the applicant from filing the complaint.

**Sectoral laws *vis-à-vis* CPA:** Another important aspect to be given special attention is the relationship between the proposed CPA with horizontal powers and sectoral regulators. At present the COPRA states that its “shall be in addition to and not in derogation of the provisions of any other law for the time being in force” (s. 3 COPRA). Synergies between horizontal and sectoral regulators have to be used, avoiding however, duplication of efforts. In this respect the “springboard” function of the Swedish Marketing Practices Act deserves attention, as well as the Inter-institutional agreement between the Hungarian Consumer and Competition agencies.

It may also be suggested that all profits earned from agency may be used for consumer education and awareness and capacity building. As per a former member of MRTPC, such agency may also have an appellate body to review its judgement and the final say may be with the Supreme Court of India.

Therefore, it is clear that the Consumer Protection Agency established in this manner will be an independent, autonomous agency with regional presence. With the level of autonomy coupled with transparency in working, the agency has the potential of delivering efficient results. Such an agency will be able to provide specialised services and allow extensive coverage of all issues to be dealt with in the consumer law.

However, it needs to be understood that establishing such an agency will require passing of a new legislation, availability of new resources, employment of new staff members, etc. All this will demand a lot of time, money and energy both on the part of the government as well as on the part of other beneficiaries of the agency. It will be a difficult task to bring in new well qualified and experienced staff at the central as well as regional centres of the agency.

During CUTS’ meetings with various stakeholders, an eminent professor of economics mentioned that setting up a new authority will only bring in a new system of bureaucracy in place. As per him the bureaucracy in India is affected by political environment which in turn affects the working of an institution. However, he believes that it will be good only if it will have sufficient support to take independent action free from any political influence and if it will have the adequate legal and financial ability and resources to meet cost of the independent action and enough government support for the same.

Hence, it is prudent to acknowledge that even though establishing a specialised agency may seem desirable the same will require huge amount of resources and time. Ministry of Consumer Affairs also will have to start fresh discussions on a proposed law which will establish CPA. The Ministry of Consumer Affairs will have to take the decision based on a comprehensive analyses of pros and cons of establishing such CPA and the factors that are required to be taken into consideration for its establishment.

### **Option 2: Strengthening the Institutions under COPRA**

Since CPA will initially be established only in one city at centre and the state centres will come into effect only gradually and that might mean a time period as long as 30-40 years. In a country as big and diverse as India, for a consumer from any town to approach the National Commission or State Commission set up under COPRA is still possible than approach one commission established only in one city, given the time and resources involved in pursuing such cases.

In light of the problems mentioned hereinabove, that might be faced while establishing CPA, CUTS believes that it will be more efficient to empower and strengthen the present institutional set-up that is in place, to deal with UTPs along with other consumer related issues. It is therefore suggested here to amend the existing institutional set-up to fill the gaps found in the same. The gaps have been dealt with in this report earlier. Incorporating such features in the present set-up to meet the lacunas and challenges in the framework is not only going to be less expensive and less time/resource consuming, it will also deliver timely and efficient results since the present institutions have been in place and running for almost 28 years now and the staff and the state machinery are already experienced enough to deal with consumer related issues. The consumers are aware and educated to an extent about the legal framework in place. By strengthening this existing set-up, we will be empowering the institutions to deal with their lacunas and thereby improving their performance.

The process of fortification of the existing set-up will also necessarily require study and adoption of best practices from across the world. The following recommendations may be made to start the process of reinforcement of the existing legal and institutional framework:

**Dealing with the “compensation only” nature of COPRA:** In order to tackle unfair trade practices, particularly false or misleading advertisements and protect the interests of consumers, the consumer courts should have the power to issue interim injunctions, pending disposal of the case. Additionally, the consumer courts do not have the power to order corrective advertisements. In this context it will be interesting to take some best practices from Bulgarian consumer protection act which like COPRA deals with UTPs and does not include business to business disputes in that purview. The Bulgarian Commission on Consumer Protection which like the commissions under COPRA have regional units across the country and has a wide spectrum of remedies such as cease and desist order, imposition of administrative injunctive order and penalties and bringing injunction proceedings for protection if consumers’ collective interests before the courts. In Poland, individual consumers are allowed to even bring injunction proceedings acting as representatives of the collective consumer interest (similar to *action popularis*).

There is an urgent need for giving more teeth to the consumer commission both at national and state level and granting them the power to order reasonable penalties other than just compensation.

If the consumer commissions find an advertisement to be misleading or false, they should be given the power to order publication of corrective advertisement and disclosure of additional information as found necessary to correct the impression given by the earlier advertisements. If used effectively, this provision can be a very powerful weapon in tackling false and misleading advertisements. The commission should also be allowed to order that any agreement relating to such unfair trade practice shall be void or shall stand modified as specified in its order.

**Dealing with lack of investigatory power under COPRA:** COPRA unlike MRTPC has no investigatory powers while decision a case on unfair trade practices and there is no office equivalent to DGIR under MRTP Act or the Competition Act.

The Bulgarian Commission on Consumer Protection which like the commissions under COPRA have regional units across the country, has wide ranging powers to investigate unfair commercial practices.

It is therefore suggested that a separate investigatory body on the lines of DGIR under the Competition Act be established under COPRA also, otherwise the onus of proving the prevalence of UTP will only be on the consumers. An eminent professor of economics, while CUTS' discussion with him, raised concerns about the possibility and practicality of giving investigative powers to national forums, state forums and district forums. He also suggested that if the investigatory powers are given to the decision making bodies for UTP, there will be less instances of challenging of the decision and thus the cases will be decided with finality.

**Dealing with non-inclusion of business to business (B2B) disputes:** The UTPs with reference to the consumers are now covered in COPRA, but the main problem is business to business transactions. They are neither covered by the Consumer Protection Act nor the Competition Act and there appears to be a vacuum, in this reference the Swedish Marketing Practices Act, 2008 (MFL) may be referred. MFL is chiefly a consumer protection statute and it also caters to the UTPs. The Act seeks to deal with both business to consumer (B2C) as well as B2B related disputes under one statute. The statute seeks the interests of business and consumers not necessarily antagonistic, but rather as congruent. It works on the premises that honest competitors would typically be adversely affected by acts of unfair marketing, which distracts their consumers, and *vice versa*, consumers will typically benefit by enforcement of marketing practices law, undertaken by competitors.

However, CUTS feels that business to business complaints in the arena of UTP are better outside the COPRA purview, since bringing such disputes within the purview of COPRA will be like bringing the camel under the tent and the consumer forums will be filled with only such litigations instead of individual consumer complaints. COPRA's main aim is to protect consumer interest and business to business disputes may be dealt with under the sectoral laws or under the laws of contract or specific relief.

On a parallel track, granting broader right of competitors to institute proceedings on grounds of unfair trade practices in B2B relations, with indirect positive effect for consumers, can be an issue to explore deeper. Indeed, proposals to amend the Competition Act to include regulation of unfair trade practice involving business to business transactions, which do not concern the end-consumers, have recently been advanced in the Indian regulative debate.<sup>118</sup>

**Sectoral laws *vis-à-vis* COPRA:** As mentioned earlier in this report, there is always confusion among the common people as to whether approaching sectoral regulator is better or approaching consumer commission, which at times lead to forum-shopping. The Swedish Marketing Practices Act, 2008 or MFL in this respect has an important "spring-board" function. A number of sector-specific regulatory acts refer to the consumer protection law and qualify infringement of the sectoral legislation (in particular duties or provisions on marketing and advertising) as constituting unfair commercial practices prohibited under MFL. India may seek to draw from such "spring-board" function.

There is also a need for co-ordination between the consumer law and other sectoral laws. In this respect, it may be suggested that the areas where consumer law as well as sectoral laws co-exist, there should be a sunset clause in the sectoral regulations that after a particular number of years (say 10 years) the sectoral regulation in this respect will come to an end and

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<sup>118</sup> See Report of the Working Group of Consumer Protection, Government of India, Twelfth Plan, 2012-2019, p. 22.

the consumer law will come into play. However, generally this does not happen and even if there is a sunset clause in the sectoral laws, the deadlines is generally extended.

The Ministry of Consumer Affairs may also work with other ministries handling various aspects of unfair trade practices including misleading ads so that laws can be strengthened, administrative arrangements can be streamlined, there is no duplication and public funds are not spent at cross purposes.

**Out of court settlement:** It is always desirable that parties settle their cases without getting involved into the legal issues. An out of court settlement is therefore suggested in UTP related consumer issues since most of the time the infringement of rights is very clear and approaching courts only delays the outcome and causes unnecessary mental harassment to the consumer. Mediation centres may be established across the country. Trying to settle cases first by alternative dispute resolution and then approaching courts will decrease the instances of going to the court as the only option left with the consumers.

It is interesting to note that MFL establishes a Public Board for Consumer Complaints (ARN) which is a public body for out-of-court dispute settlement specialised in business-to-consumer matters. It is a cheap, simple and accessible procedure of solving a dispute and provides a reasonably speedy outcome and high rate of compliance. However, the ARN has only limited investigative powers.

**Dealing with lack of competent staff:** A number of European states, particularly, Central and Eastern European (CEE) countries, have entrusted enforcement of UTP law to competition agencies, whose primary responsibility lies in the enforcement of anti-trust law. Competition authorities are typically strong, independent and well-funded. They enjoy high status and competent staff, well trained in complex economic analysis of market and with sufficient powers to enforce the substantive rules. This appears an advantage from the enforcement point of view. However, it is felt that giving competition authorities the power to enforce the laws against UTPs may distract the attention and resources of such agencies to regulative intervention which has more limited impact on markets than for instance large scale price cartels or abuse of dominant position. Also, since UTP cases are easy to prove the authorities might be more interested in dealing with UTP cases. Therefore, a need is felt to strengthen the human resources in consumer commissions.

**Need to raise consumer awareness:** There is an urgent need to aggressively pursue the importance of consumer right to education, by broad basing the approach, through enlistment of the state governments, local VCOs, Panchayati Raj Institutions, etc. to address the consumer concerns at the District and Taluka levels.

Several necessary steps such as: (a) instituting award for industries on the basis of their responsiveness to consumers and effectiveness of complaint management system at company level; (b) similar awards to recognize efforts of media, educational institutions, consumer clubs, consumer fora, VCOs etc. need to be introduced. The funds for the VCOs may be earmarked by the GoI from the Consumer Welfare Fund. It is also suggested that IITs, IIMs and other reputed institutions set up Centers of Excellences in for continuous studies/research in Consumer Protection.

There is also a strong need for advisory bodies to advise people before filing the suits so that any later confusion may be avoided. University and College libraries should be given the

grant over the plan period to acquire books, journals etc. in the thrust areas of consumer affairs.

Internal Consumer Complaint Redressal System needs to be promoted as the first step in the direction of efficient, effective and reliable mechanism in the interest of consumer justice system. Idea of Ombudsman at the sectoral level viz; Banking Ombudsman, Insurance Ombudsman, Electricity Ombudsman etc. has been appreciated and suggested that on the same line efforts should be made to establish Ombudsman Mechanism for redressal of grievances especially in the service sector.<sup>119</sup>

**Consumer protection and initiatives in individual states:** Each individual state is required to give its honest and earnest contribution in development of such new proposed institutional setup.

**Need for a consumer protection movement:** In addition to strengthen the existing legal and institutional framework and raising consumer awareness, now is the time to start an effective and meaningful Consumer Protection movement which will be marked by the proactive support of the government, business, organisations of Civil Society, educational institutions, such as schools, colleges, Universities and research institutions. Over and above the support of *pro bono publico* and of every individual is a *sine qua non* for the Consumer movement to be purposeful.

The policies, schemes and programmes of the Government of India through the Department of Consumer Affairs are no doubt useful but their effectiveness finally depends on the involvement of the institutions and the people at large. A number of schemes have already been in operation such as, Grahak Jagaran, Consumer Clubs in schools, promoting involvement of research institutions, Universities, colleges, etc. in Consumer Protection and Welfare etc. Similar schemes and programmes are needed at the State Government level also to provide further impetus to the Consumer movement in the Country.

It is imperative to realise that the efficient and effective programme of consumer protection is of special significance to all of us because we all are consumers. Even a manufacturer or provider of a service is a consumer of some other goods or services. If both the producers/providers and consumers realize the need for co-existence, adulterated products, spurious goods and other deficiencies in services would become a thing of the past. The active involvement and participation from all quarters i.e. the central and state governments, the educational institutions, the NGO's, the print and electronic media and the adoption and observance of a voluntary code of conduct by the trade and industry and the citizen's charter by the service providers is necessary to see that the consumers get their due. The need of the hour is for total commitment to the consumer cause and social responsiveness to consumer needs. This should, however, proceed in a harmonious manner so that our society becomes a better place for all of us to live in.<sup>120</sup>

Therefore, one observes that while there is no single approach that can be elicited as being "the best", it is important to provide a balanced regulatory framework, taking into account the interests of consumers, of competitors and of the general public interest in fair and honest

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<sup>119</sup> "Sub-group Report on consumer Awareness and Education", source: <http://consumereducation.in/VOLUME2.pdf>, accessed on January 26, 2013.

<sup>120</sup> Singh S.S. and Sapna Chadah, "Consumer Protection in India - Some Reflections", IIPA, source: [http://consumereducation.in/cons\\_book1\\_final.pdf](http://consumereducation.in/cons_book1_final.pdf), accessed on October 7, 2012

competition and creating incentives for those actors who have legitimate interest of protection to engage in the enforcement of the law.

It will always be useful to learn from world's best practices. The experience of the CEE countries is considered of interest for the Indian situation since they are, like India, emerging economies with dynamic and relatively immature markets, but also because the judicial systems and the public administration in these countries struggle with problems and bottlenecks which may in some respects be comparable to the situation in India. In addition, the CEE countries have during the last decades experimented with different models of enforcement and can thus be looked at as institutional laboratories where advantages and disadvantages of alternative models have been tested.

In order to propose ways of addressing these deficiencies and for fine-tuning of the institutional framework, deeper analysis of the foundations of the judiciary in India is needed along with the link between judicial bodies and schemes for mediation and alternative dispute resolution.

Finally to conclude, it is pertinent to observe that whichever option is adopted by the Ministry of Consumer Affairs after careful consideration, the new regime must be brought slowly and cautiously. It is agreed that too much circumspection leads to inaction, but then justice hurried is justice buried.



## **Annexure I: List of Stakeholders Interviewed**

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1. G.R. Bhatia, former member MRTPC and now Head-Competition Law, Luthra & Luthra Law Offices;
2. M.C. Paul, Professor, School of Social Sciences, Jawaharlal Nehru University;
3. Navneet Sharma, Associate Professor, School of Competition Law;
4. Dhanendra Kumar, Principal Advisor Indian Institute of Corporate Affairs;
5. Asim Sanyal, chief operating officer VOICE;
6. Sri Ram Khanna, Professor. Dept of Commerce, Delhi School of Economics;
7. Jayashree Gupta, President Consumer India;
8. P.K. Agarwal, Consultant Real Estate, Khaitan & Co and former head of the consumer department in the state of West Bangal;
9. Prem Lata, Member/Judge, District Consumer Disputes Redressal Forum, Delhi;
10. S.S. Ghonkrokta, Director (Enforcement), FSSAI;
11. Manoj Parida, Joint Secretary, Consumer Affairs, Department of Consumer Affairs, Ministry of Consumer Affairs, Food & Public Distribution.

## Annexure 2: Further Readings

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