

Speech of
Mr Vinod Dhall,
Member,
Competition Commission of India

CUTS International Conference on
‘Moving the Competition Policy Agenda in India’
31 January-1 February, 2005.

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The process of economic reform in India started in earnest in 1991, when the regime of license and control began to be dismantled. Some time after this process began, but rather lately, the Government turned its attention to having a genuine competition law. In a free economy, there could be market failures, and enterprises could form cartels or abuse their dominance. Adam Smith (to quote his words) wrote of the 'wretched spirit of monopoly' in which 'the oppression of the poor must establish the monopoly of the rich'. Thus liberalization is incomplete unless it is complemented by a competition watch dog that can discipline players that seek to undermine the market for individual advantage. This wisdom has in fact compelled almost 100 countries to rewrite or freshly enact a competition law, and set up a modern competition authority.

The Indian Government set up of a high level committee to study the matter; after considering its report and the suggestions from trade, industry and others, a new Competition Act was enacted in January, 2003. This Act is a modern piece of competition legislation moulded on the pattern of similar laws in the world. It covers the usual three fields of: anti-competitive agreements, abuse of dominance, and regulation of mergers and acquisitions. In addition, it mandates undertaking competition advocacy.

The Competition Act marks a conscious departure from the previous Monopolies and Restrictive Trade Practices Act (commonly referred to as the MRTP Act). The MRTP Commission represented the regime of license and control, and it became an anachronism in the new economic order. According to the Preamble, the Competition Act is for establishing a Commission which is to prevent anti-competitive practices, promote competition, protect the interests of consumers and ensure freedom of trade; the Act specifically makes these the duties of the Commission. This is very different from the

purpose of the MRTP Act which was to control monopolies, defined in terms of size; the Competition Act punishes behaviour, not mere size. There are other critical differences between the new Act and the MRTP Act; for example the Competition Act clearly defines and penalizes cartels, regarded as the most pernicious form of competition violation; the Commission can impose heavy penalties; it has extra-territorial jurisdiction and can additionally enter into arrangements with overseas competition authorities; it incorporates a leniency programme, and so on. Overall, the two bodies and the two laws are poles apart in their philosophy, tenor and thrust.

The Competition Commission was established in October, 2003. But, the new Act has faced legal challenges in the hon'ble Supreme Court of the land. Thus so far the Commission has not undertaken regulatory or adjudicatory work. However, the Commission has during this time been doing intensive professional work despite severe constraints faced by it. This work is in addition to the normal administrative and establishment work involved in setting up any new organization, which is quite enormous in a governmental system. The objective of this work has been to prepare the Commission professionally for starting its onerous duties once the writ petitions have been disposed off by the Hon'ble Supreme Court, and the legal clouds have cleared.

The Commission has some of the best professionals networking with it to develop the economic and legal concepts and practices included in the Act. We have separate expert groups working with the Commission on its Regulations, on Economic Information, on Market Studies and Research Projects, on Predatory Pricing, on Competition Advocacy, and on Academic Course Curriculum. These expert groups comprise of economists, legal experts, trade and industry representatives, consumer organizations, and other such professionals. In this way, the Commission, even with a small team of officials on its roll, has been able to avail of the knowledge and skills of highly regarded experts in the field of competition economics and law.

We have initiated a number of market studies and research projects. Some of these projects are proposed in specific sectors of the market eg pharmaceuticals,

telecommunications, transport, and food retailing, while some projects relate to broad horizontal concentration in the manufacturing industry. Some other projects are aimed at studying the laws, policies and practices of the state governments or of the central government in particular sectors that might be impeding competition and thereby injuring the economy or the consumers, for example in public transport and liquor trade. The aim of such studies is to give the Commission a better insight into the structure of a sector, market behaviour of major players, and the potential for, or prevalence of, anti-competitive practices. This will help the Commission apply professional analysis to its regulatory and adjudicatory work when deciding about violations of the law. It will also aid the Commission in its public awareness work. Such studies will also underpin the Commission's advocacy work with the Central and state governments, and hopefully facilitate legislative and policy changes that will promote competition, not stifle it. These studies are to be carried out through highly reputed academic and research institutions in the country. Also, we have an expert group of eminent economists, industry representatives and others to steer these studies while assessing their rationale and usefulness.

The Commission has finalized its future organizational structure, that is heavily professionals loaded. It will have a strong Economics Wing that will enable expert application of theoretical principles and econometric techniques to the available empirical data of specific markets; it will facilitate the organization of economic data and will coordinate the undertaking of economic and market studies. Presently, networking is being developed with organizations for sourcing economic data required for the analysis, such as determination of the relevant market, dominance of a firm and existence of entry and exit barriers. In this work again the Commission is being assisted by a group of experts.

We have set up a Competition Forum where, every Friday, we invite an eminent expert to talk and discuss with us on some subject related to Competition. We have had economists, international competition experts, legal experts, government departments, consumer representatives and organizational experts. In recent weeks we have been

concentrating on trade and industry associations. Until now we have had about 23 sessions of the Competition Forum; and it has turned out to be an invaluable platform for capacity building of the institution and its staff. It has helped to develop and refine many of the economic concepts embedded in the Act, which have to be applied in the enforcement of the Act and in deciding individual cases. So far, the Forum has been confined to the staff of the Commission; now we are planning to broaden the constituency to others like policy makers and government ministries, economic research institutions, law and management institutes, law firms, business representatives and so on. This will be a powerful tool for spreading the culture of competition and building a competition fraternity. This is in fact integral to the advocacy function of the Commission.

The Commission has carefully studied the regulations and practices of established competition authorities in other countries, and the economic analysis undertaken by them in deciding violations of the law. The effort has been to understand the best practices world-wide and to incorporate these in our work. It is after such study and after consultation with the expert group on Regulations that the Commission drew up its draft Regulations which will determine the procedures of the Commission. The Regulations contain some innovative provisions such as consent order, pre-conference hearing, time limit for passing orders, cap on the number of adjournments, allocation of equal time to parties, etc. The objective is to cut delays, even through imposing discipline on the Commission members, minimize litigation, have professional grounds for decisions, etc. The Commission is also in the process of drawing up separate Predatory Pricing Regulations.

In addition, the Commission has been undertaking Competition Advocacy and Public Awareness. It has been networking with trade and industry associations, and professional institutes for holding seminars and conferences; several such conferences have been held. The Commission has also been interacting with academic bodies for inclusion of competition law and policy in their curriculum. Many such bodies have already done so. We have also developed a web-site, and are now upgrading it.

The Commission has maintained a very low profile in its work, in deference to the on-going proceedings in the Hon'ble Supreme Court. Therefore much of this work has gone unnoticed. However, this work has grown a store-house of competition knowledge in the Commission, and has laid a solid foundation for future regulatory and adjudicatory work.

Competition Policy has two main aspects: one is a state policy framework that defends and promotes competition, and the other is a competition law coupled with an authority that enforces the law. The Competition Act has given the Commission a role in both areas. It is to enforce the Competition Act and it has the Advocacy responsibility in respect of the policy framework. It is the nodal point within the Government structure on competition issues. It is therefore important that it be consulted when a legislative or policy issue arises that is likely to impact competition in any area. For example, we are told that in government, an exercise is underway to design an appropriate regulatory structure for the infrastructure sector. Competition issues do arise in any such exercise, such as, is regulation the preferable framework? if so regulation to what extent? and what should be left to the forces of competition? These are questions on which the Competition Commission can bring an expert view. We have seen press statements about proposals for setting up new regulatory authorities, for some sectors where there is little justification for doing so. In matters of disinvestment or restructuring the public sector too, competition concerns can arise. Section 49 of the Act makes consultation with the Commission optional; perhaps such consultation should be made mandatory, even though the opinion of the Commission is not binding on the Commission.

India is the only major economy in the world without a fully functional competition authority, which is an unfortunate fact. Meanwhile, the Indian economy and its consumers are losing out, and the gainers are those who may be happily profiting at public and national expense, poignantly proving Adam Smith's famous words. The Hon'ble Supreme Court has pronounced its verdict; the Government is now contemplating further action in the light of the judgement. It must be the common hope of all who are concerned about the health of the Indian economy that this exercise will

end the legal uncertainty and will enable the Competition Commission to start its regulatory and adjudicatory work in full measure, sooner rather than later.