Competition Advocacy Seminar for Industry

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The Competition Commission of India is privileged to organize this Competition Advocacy Seminar for the Associations of Indian Industry. Competition is accepted as the life blood of the market economy. It spurs innovation and higher productivity leading to accelerated economic growth; to the consumers it brings the benefit of lower prices, wider choices and better services.

I am particularly privileged to be here in the presence of our Hon'ble Minister Shri Prem Chand Gupta, Minister of Company Affairs, who is also the Minister for Competition matters. I have had the honour to meet and discuss with him on quite a few occasions, and I can personally testify to his clear thinking, and to the strong and enlightened leadership he is providing to his Ministry. Besides, he is a successful entrepreneur himself, and has established prosperous businesses both in India and abroad. He is therefore in the unique position to provide the robust & practical perspective of a businessman to the work of his ministry. I have no doubt that under his leadership; the ministry would take significant strides in its work.

Several studies have demonstrated the stimulating effects of competitive markets in terms of growth and prosperity. In his recent book, 'The Power of Productivity', William Lewis underlines this point forcefully with his observations on the growth of productivity in the late 1990s in the United States; he has argued that more than technology, more than other factors, the thing that has mattered above all is competition. Similarly, a new book, 'The Competition Solution' by economist Paul London, concludes that heightened competition in the US over- shadows tax cuts or new technologies in explaining the prosperity of the 1990s. Competitive pressures have helped suppress inflation and raise living standards though improved productivity. It notes that competition from imports forced the steel and auto industry, among other manufacturers, to streamline, thereby pushing manufacturing productivity up by 4% a year. Competition has brought down

real air fares, telephone rates and lot of other costs. Where jobs have been lost in one industry these have been more than compensated by jobs created elsewhere; thus employment has not been destroyed but has shifted from losers to winners. His argument underlines across the board benefits for wide sections of society including consumers, workers and many others.

A fresh OECD paper observes that the Australian Productivity Commission has estimated that Australian households' annual incomes are on average higher by A$ 7,000 on account of competition policy. It also refers to a study by Nicholas and Scarpetta (2001) that pro-competition policy developments in New Zealand and the UK have added around 2.5% to their employment rate over the period 1978-1998.

India has a long history of competitive markets. The value of freeing entrepreneurial energies and allowing competition to drive growth seems to have been lost in past years. The economic crisis in which the country found itself finally led to the reforms that started in 1991. The liberalization and competition that followed have been reflected in higher GDP growth, expansion of employment opportunities, increase in wage levels, and a dramatic rise in the availability and choice of goods and services for the consumer. So there is reason to further reinforce the competitive spirit.

This is not to say that a market economy is free from its own weaknesses or flaws. These too have to be recognized and addressed. For example, the Government cannot lose sight of its social concerns especially for the poor or for the rural or underdeveloped areas. Market failures can take place, and unscrupulous players can undermine the benefits through anti-competitive practices. Such practices include formation of cartels where enterprises collude to determine prices or share markets, and abuse of dominance through predatory pricing or erection of entry barriers. The history of the free market is full of such examples. In the famous case of the vitamins cartel, the colluding firms spent millions of dollars and thousands of employee hours to implement and hide their price fixation and market sharing for over almost a decade. It is estimated that in the U.S. alone, the cartel may have produced US $ 500 millions in over charges. On detection, in

the U.S. case, penalties exceeding US $ 1 billion were imposed, of which Hoffman La Roche and BASF alone paid fines totaling US $ 725 million. The global graphite electrodes cartel operated for about five years until detected. In this case, in the US, six corporations were sentenced to pay fines in excess of US $ 300 million; the cartel affected over US$ 1.7 billion in US commerce alone and is estimated to have hiked the price of graphite electrodes in the US by over 60%. The alleged abuse of its dominant position by Microsoft has embroiled it in anti-trust litigation for years. Recently, the European Competition Commissioner imposed a stiff penalty on the company amounting to Euro 497 million. Developing countries are often hit hard by such market manipulation originating in big western economies.

From time to time, there have been suspicions or allegations of cartelization or abuse of dominance in major industries in India. Some months back, a press report suggested that several companies producing Copper-T (a birth control device) formed a cartel in supply of the item to Government; surprisingly even a public sector undertaking was allegedly part of the cartel. From time to time, allegations have appeared about the existence of cartels or abuse of dominance in different industries in the country. Some industries are more prone to such malpractices than others.

Lamenting the propensity of businesses to exploit the market for unethical gain, Adam Smith wrote of the "wretched spirit of monopoly" in which "the oppression of the poor must establish the monopoly of the rich". The prevalence or potential for market failure or abuse has led almost a hundred countries to enact modern competition or anti-trust laws and to set up competition authorities to watch the market practices in this area.

The earliest legislative attempts to underpin the competitive market through legal measures were in Canada and the U.S. In 1890, the U.S. enacted the Sherman Act, followed in 1914 by the Clayton Act and the Federal Trade Commission Act. Collectively, these laws prohibited conspiracies in restraint of trade, monopolization and mergers and acquisitions which would 'substantially lessen competition or tend to create a monopoly in any line of business'. The Federal Trade Commission (along with the

Department of Justice) was empowered to take action against violations of competition laws, and has made a significant contribution towards ensuring fair competition in the U.S. market. In the European Union, it is noteworthy that fair competition is embedded in the very Treaty of Rome which is like the 'constitution' of the European Union. The famous Articles 85 and 86 have as their objective that the European market (while being integrated into a common economic market) is governed by effective competition.

In India, the Monopolies & Restrictive Trade Practices Act was enacted in 1969; it underwent a number of amendments, most notably in 1984 and 1991. However, the focus of the MRTP Act was more on the control of monopolies and the prohibition of monopolistic and restrictive trade practices. In the era of liberalization and globalization, the MRTP Act had " become obsolete in certain respects in the light of international economic developments relating more particularly to competition law, and there is need to shift the focus from curbing monopolies to promoting competition."(Statement of Objects and Reasons of the Competition Act, 2002). The Central Government, therefore, constituted a high level committee, and after considering its report and the suggestions from trade, industry and the general public, enacted a new law called the Competition Act, 2002.

In line with the prevailing pattern of modern competition laws, the Indian Competition Act seeks to:-

1) prohibit anti-competitive agreements (including cartels) which determine prices, limit or control or share markets or result in bid rigging, etc.,
2) prohibit abuse of dominant position through unfair or discriminatory prices or conditions (including predatory pricing) limiting or restricting production or development, denying of market access, etc.,
3) regulate combinations, (i.e., mergers, acquisitions, etc.) that cause or are likely to cause an appreciable adverse effect on competition.
4) In addition, the Act gives the Commission the responsibility of undertaking competition advocacy, awareness and training about competition issues.

The Competition Act is a modern competition legislation and has many features that distinguish similar laws in other countries. The Competition Commission can give cease and desist orders, impose penalties, and prohibit or modify a merger above the threshold level. The Competition Act explicitly defines cartel, the most serious of anti-trust violations, and makes the participating enterprises liable to heavier penalty. In order to help detect and investigate cartels, there is a leniency provision whereby a party cooperating in accordance with the act can expect a 'lesser penalty'; global experience shows that after incorporating such leniency provisions, the success rate of anti-cartel action by competition authorities has significantly increased. The new Act's jurisdiction extends to acts taking place outside India, but having an effect in India i.e. 'the effects doctrine'; supplementing this jurisdiction is the enabling provision of entering into cooperative arrangements with overseas competition authorities. The Competition Act, 2002 is distinct from the MRTP Act in many important provisions, and in its thrust and tenor which are progressive and business supportive.

The Competition Act also explicitly mandates the Competition Commission to "eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade…in markets in India" (Section 18). Thus this assigns the Commission a proactive duty to act against anti competitive forces contested markets in the Indian economy. This duty is supported by the mandate to take "suitable measures as may be prescribed for the promotion of competition advocacy, creating awareness and imparting training about competition issues." (Section 49).

In common with prevailing international practice, the issues that are likely to come up before the Commission will involve complex economic theory based on modern industrial organization economics, together with the expert application of theoretical principles and econometric techniques to the available empirical data of specific markets underpinning each case brought forward. As a concrete illustration, in order to prove "abuse of dominant position" under section 4, dominance of the respondent enterprise will have to be established for which economic/commercial criteria are set out in the Act:

Dominance depends on the determination of the relevant market, which is basic to effective enforcement of competition laws, and is usually the necessary first step in the analysis of any conduct. This in turn requires determination of the relevant product market and the relevant geographical market, in essence a determination of how substitutable or interchangeable goods are perceived to be by buyers. The determination of these economic terms essentially requires derivation of the residual demand curve facing the firm, the elasticity of demand (the proportionate change in quantity upon change in price) and an analysis of the time series data on prices of the relevant product. Econometric modeling and statistical tools (regression analysis, correlation analysis, hypothesis testing, etc.) have been traditionally used by well established competition authorities the world over for their calculations.

The requirement of such economic data compilation and analysis brings to the functioning of the Competition Commission a highly professional character. In the U.S. and the European Union, competition authorities have relied heavily on such analysis in their work. Recently the UK also changed its law to bring it in line with the more professional nature of the European competition law.

The Competition Commission of India was established in October, 2003. However, all the provisions of the Act have not been notified so far. Also writ petitions had been pending in the hon'ble Supreme Court of India in respect of the Act and the Commission. The main petition has recently been disposed off by the hon'ble Supreme Court making certain important observations. It is in the realm of the Government to consider appropriate action in the light of the hob'ble Supreme Court's judgement. In my speech, I would not like to refer to any issue that was before the hon'ble Court or in its respected judgement, or is before the Government following the judgement.

In view inter alia of the above facts, so far no regulatory or adjudicatory work has been undertaken by the Commission. However, the Commission has been undertaking intensive foundational and preparatory work essential to equip the Commission for its full responsibilities. This includes administrative and establishment work such as setting up

offices and services, designing the organizational structure, recruiting a core team and undertaking capacity building. In addition, competition advocacy, public awareness and training, as mandated by law, have been undertaken by way of seminars, workshops and meetings with various trade associations, though in low key. It organized its first out-reach Competition Advocacy Seminar with Professional Bodies, other than legal fraternity, on 2nd March, 2005 and it was overwhelmingly appreciated by the participants. Equally significant is the preparatory professional work undertaken by the Commission. The Commission has set up several expert groups / committees for professional advice in specific areas. For example, there are separate expert groups/committees to give advice for: the Commission's Regulations, Competition Advocacy, Market Studies and Research Projects, Economic Information, Predatory Pricing, and Academic Course Curriculum. These expert groups/ committees comprise of economists, legal experts, consumer organizations, industry chambers, media experts and such other professionals. In this way, the Commission, even with a very small team of officials at present, has leveraged this position to benefit from the knowledge and advice of some of the most eminent professionals in the country in the field of competition economics and law.

The Commission has set up a Competition Forum, to which it invites eminent experts for talks/ discussions on competition issues. International competition experts, economists, legal professionals, consumer representatives, industry representatives and organizational experts have participated in the Forum in over 25 sittings. The Competition Forum has become an invaluable platform for capacity building of the Commission and its officers as well as for interactive communication between the Commission and stakeholders. This has helped the Commission in understanding the economic theories and econometric tools required for enforcement of competition law.

The draft Regulations of the Commission have been finalized after consulting an expert committee of fifteen persons under the chairmanship of the Member. The draft was prepared in-house after extensive study of the laws, regulations and practices of established competition authorities in other countries and incorporates many best

practices and innovative features like, pre-hearing conference, consent orders, cap on the number of adjournments, and time limit for pronouncing orders by the Commission.

The Commission has initiated the process to carry out analytical studies/research projects in some sectors of the market, like retail food, food-grains, transport and telecommunications, as well as broad horizontal concentration in the manufacturing sector in order to understand the market structure. These studies are expected to provide solid background for competition advocacy, and will provide better insight into market structures and behaviour. Two, out of seven, Market Study Projects have been undertaken during the previous financial year and are expected to provide important economic information to the Commission soon.

Intensive interaction has been held with leading Industry Chambers/ Professional Institutes-CII, FICCI, ASSOCHAM, PHD Chamber, as also with professionals. An expert Committee on Competition Advocacy has been set up to assist the Commission in preparing an Advocacy Plan, and advocacy literature. In addition, the Commission has facilitated Competition Advocacy seminars / workshops with chambers and professional institutions.

The Commission has prepared Competition Law and Policy curriculum suitable for various courses of universities and institutes in India, which has been sent to about 140 Universities / Institutes. Encouraging response has been received in including competition studies in the curriculum.

This work has laid a sound, professional foundation for the Commission's regulatory and adjudicatory work, as and when that begins, which hopefully will be soon, as India is the only major economy (other than China) in the world today without a functional, modern competition authority.

Despite the obvious argument in support of having a modern competition law, competition authorities everywhere have not necessarily traveled an easy road. Many authorities have been making a signal contribution to economic growth and consumer welfare; some good recent examples that come to mind are in Australia, Mexico and

Turkey. But success and recognition have often been a long and hard way in coming. Some common challenges that have been faced by newly established competition authorities in developing countries include:

- Promoting the competition culture and awareness in the country. Competition is typically an abstract subject, and it is often hard for the ordinary consumer to appreciate a direct relationship between competition and his interests. Many competition authorities have invested substantial time and resources in getting this message across. In UK, the competition authority undertook a long and sustained programme of advocacy and awareness, which is regarded as having being quite successful. It is also necessary to build a broad body of stake holders having adequate knowledge of competition issues and having a stake in promoting compliance. The competition authorities also need to strategise and concentrate initially on cases that will demonstrate the benefits of their decisions, which sometimes may not be obvious in the short term.
- Building support amongst policy makers. Competition is a cross sectoral discipline, and it can be impacted, adversely or favourably, by the policies of several Ministries, authorities including regulators, and state governments. This will call for effective and extensive advocacy, with the support of the Ministry of Company Affairs. Without such backing by Government authorities, fresh hurdles can arise from time to time and from unexpected quarters. In respect to regulators, it is necessary to have competition on their policy agenda, to have clarity on jurisdiction issues, and harmony in work.
- Unlike some sectoral regulators, competition authorities almost everywhere do not have sufficient source of revenue of their own, and have to depend on Government for budgetary support. This can be a severe constraint in effective competition oversight, and in maintaining autonomy in work. In some countries eg Turkey, the competition authority gets funds from an earmarked source like a cess on registration of companies. Even in smaller countries like Mexico, the budget allocation from Government is substantial. It will be necessary for Government to assure adequate funding for the CCI

- Competition authorities need to establish a reputation for professionalism, credibility and independence. Their proceedings are to be underpinned by expert analysis of economic data and deep understanding of the economic and legal issues involved. They need expert staff eg for investigation, economic analysis, application of legal principles, and communication. Key members of the staff also have to be in position well before the full range of functions of the Commission commence, so as to enable capacity building, training, etc to be undertaken prior to the regulatory and adjudicatory work, as opposed to 'learning on the job'. In our own country, economic data in a form that can be readily used by the CCI may not be available. Data sources therefore have to be developed.
- The competition authorities' decisions are normally subject to judicial review. The quality of their decisions must stand judicial scrutiny; this will enhance the authorities' effectiveness and the respect they enjoy. An organization that has a reputation for professionalism, independence, credibility, and transparency, will have an easier journey in this respect.

These are only illustrative of the range of challenges that the Competition Commission may also face in India. Some of these are quite daunting, and will no doubt require the support of the Ministry of Company Affairs, other Ministries and also the professions in full measure. The legal profession and the economics discipline have been closely involved in our work for quite some time, and we are enthusiastic about the involvement of the chartered accountants, the company secretaries, and the cost accountants for adding value to our activities, and building up their action plans to carry forward the cause of competition.