Speech by Mr. Vinod Dhall
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On
"Convergence in the Competition Law of the Commonwealth?"
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I am greatly honoured to have been invited to speak as a member of the panel on 'Convergence in the Competition Law of the Commonwealth?' and to share the dais with Sir Christopher and other eminent competition experts from Commonwealth countries.

Competition law is an integral part of the regulatory framework in a market economy. Competition increases economic efficiency, and enhances consumer welfare. Some recent economic studies have demonstrated in very specific ways the benefits reaped by several economies from a pro-competition policy. My own country, India, has embraced economic reforms since 1991 and the benefits are visible unambiguously in those sectors which have been thrown open to competition.

However, the market economy is also prone to failures where unscrupulous players can undermine the benefits of competition through collusive behaviour or abuse of dominance. This has underlined the need to have a competition law to control and penalize anti-competitive behaviour. Thus, as more and more countries have embraced the market economy, they have also

introduced competition laws and set up competition authorities. So far about 100 countries have done so, up from about 40 a few years back. Within the Commonwealth, at least 15 countries have competition laws, and this number can be expected to expand with time.

I have, with the help of some of my staff, done a quick review of the competition laws of a small number of Commonwealth countries, and the observations I will make in this presentation are based largely on this limited sample.

The competition community within the Commonwealth is by no means a homogeneous one. It includes competition authorities that are several decades old, and are well established and adequately resourced. On the other hand, it includes authorities that are new born babies, that lack trained staff and other resources, so that they can barely be expected to fight powerful enterprises that enjoy political patronage and deep pockets.

There are also variations in the powers enjoyed by the competition authorities. In some countries, the authorities themselves have the power to give remedial orders, while in others they must prosecute in the normal courts for certain types of offences. In either case, though, the orders of competition authorities are generally subject to judicial review.

There is no uniformity in the objectives of the laws, as these have been formulated. While generally, the objective is to protect and maintain competition in the markets, some laws emphasize other objectives as well, such as consumer protection or welfare, enabling domestic enterprises to compete in the world market, expand the base of entrepreneurship, support to small and medium enterprises, and even to promote product safety. Such variation in the objectives could be due to different cultural and economic histories and priorities or due to differing perceptions of public interest. Proponents of the so-called 'pure' competition law view with great reservation the importation of such other objectives in the competition law.

The laws of all the sample countries cover the three standard limbs of a competition statute viz. mergers, abuse of dominance, and anti competitive agreements.

Merger control is generally given a broad connotation and includes in its ambit acquisition of shares or assets or acquisition of control or participation in management. Generally, the laws exclude small mergers by providing a threshold above which only mergers can be scrutinized. However, there are differences in how the threshold is defined e.g. in some countries market share is the defining criterion whereas in other countries the threshold is in terms

of assets or turnover. Several laws require a mandatory notification of the merger to the competition authority, but in India and UK the notification is voluntary. In some countries, a joint venture is generally construed as merger, but the position is not so clear in other countries.

All countries prohibit abuse of dominance. However the way in which the dominance is defined varies. In some countries, no specific test has been prescribed in the law. In other countries, market share is the defining test or is an important factor, whereas in India a host of factors including market share is required to be considered in determining dominance of an enterprise. In some countries, abuse of dominance can be exempted if it serves other objectives e.g. to promote small businesses or exports.

Anti competitive agreements are prohibited in all laws. Generally, these are treated as civil offences, but in Canada cartels face criminal sanctions, and in some countries the authorities have the power to carry out 'dawn raids' in pursuit of cartels or other offences. Some of the countries have provision for granting total or partial immunity to a member of a cartel who is the first to blow the whistle and assist the authority in investigation.

In addition to the three core areas that is mergers, abuse of dominance and anti competitive agreements, some countries also

mandate the competition authority to undertake competition advocacy and public awareness such as in India. Many competition authorities in the world do undertake competition advocacy. However, a specific provision in the law strengthens the hands of the competition commission and vests its advocacy effort with greater authority.

There are also wide differences in the role of the competition authority in regulated sectors of the economy. At the one extreme is Australia where certain sector regulators have been merged with the Australian Competition and Consumers Commission. In other countries, varying levels of authority has been vested in the competition authority to intervene in the regulated sector or in matters before the sector regulators. In South Africa, at one stage the jurisdiction of the competition authority was excluded from regulated sectors, but this position has been reversed in the statute.

The overall position thus is that while the law in all the sample countries cover the three core areas of mergers, abuse of dominance and anti competitive agreements, and also set up autonomous competition authorities, important differences remain in how these three areas are treated, and in some additional matters such as advocacy and the role in regulated sectors. Further, there are significant variations in the objectives of the competition laws as formulated in the statute. These differences in the objectives can

greatly influence the way in which the various authorities may decide a particular case, as for example we have seen in the opposite outcomes of the famous GE-Honeywell merger case before the US authorities and the European Commission.

There are differing views on the practicability or even the desirability of convergence. At the one end is the school of thought which strongly advocates greater uniformity in the laws with a centralized dispute settling mechanism such as in the WTO. At the other end there are people who are skeptical whether harmonization and centralization of competition laws is at all the most appropriate solution. In their view, given the existence of different goals and the varying economic and cultural conditions across different countries, decentralized competition policies are more appropriate.

In my view, conditions are not conducive at this stage to aim at complete harmonization and centralization of the competition laws, and this would be met with great resistance as was the experience in the WTO negotiations. On the other hand, we should aim at a more autonomous and gradual process of convergence. Towards, this end, I have a few suggestions to offer:

i) We should encourage informal communication and formal bilateral cooperation agreements between competition authorities. This is already being done by some of the competition authorities in the Commonwealth e.g. Australia

have Canada and agreements with a number of other countries. Some of the competition authorities, we understand, maintain informal communication either about specific matters or generally about competition issues. This network could be expanded. In fact formal bilateral agreements can greatly strengthen cooperation in specific cases as well as bring about convergence in the broader approach to competition issues.

ii) Technical assistance is an important tool not only towards capacity building but also in bringing about convergence in the laws and in their enforcement. The developed economies that also have the more mature competition agencies can play an important role in this area.

iii) We need to broaden the opportunities for sharing experiences between competition authorities and policy makers. This would expand the knowledge about global best practices and would facilitate convergence in the laws in a more organic manner as compared with a coercive approach. Two global platforms for sharing experiences in competition matters have proved most valuable i.e. the International Competition Network and the OECD Global Competition Forum.

iv) The Commonwealth is unique in its cohesiveness and the similarity of legal and institutional structures; it therefore enjoys a natural advantage in bringing about greater

convergence in the competition laws of its members. It is understood that a model law of competition is under consideration in the Commonwealth but more important is a wider dialogue and sharing of experiences. We may, therefore, consider setting up a Commonwealth Competition Forum to provide greater opportunities for interaction between the competition authorities and policy makers of the Commonwealth countries. Such a forum, if set up and active, could go a long way in narrowing the gaps between the competition laws and enforcement practices in the Commonwealth countries.