Speech delivered by Mr. Amitabh Kumar, Director General, CCI, at CII Conference, 29 October, 2004

I am honoured to be here amidst this gathering of business leaders. I am grateful to CII for giving me this opportunity to talk about a new law that will affect business in a big way. You are aware that Writs are pending in the Hon'ble Supreme Court. The Competition Act can become fully operative only after the decision of the Hon'ble Court.

I am happy to be in this city, which was my home until 7 months ago. The attraction of this seminar is thus doublefold.

The Competition Act, 2002 was enacted in January, 2003. The Competition Commission of India was established last October. It is yet to become fully functional. The new law follows the Monopolies and Restrictive Practices Act, 1969, which, loosely speaking, was the first competition law of the country. Government constituted a committee in 1999 to examine the MRTP Act for shifting the focus of the law from curbing monopolies to promoting competition and to suggest a modern competition law in line with international developments to suit Indian conditions. The Expert Committee observed that the MRTP Act is not complete in its sweep and has outlived its utility in the changed business and trade scenario in the domestic as well as global markets. Pursuant to the recommendations of the Committee, the Competition Act was enacted to eliminate anti-competitive practices, to promote and sustain competition in the markets with the objective of protecting interest of consumers.

The MRTP Act represents an era of aggressive government interventionist policy reflected unambiguously in controls, licensing, permits and promotion of public sector. The dawn of liberalization in 1991, following a financial crisis, rendered some laws inconsistent with new economic policies. One of them was MRTP Act. An effort at redefining this Act, through major amendments, worked for a while. The need for change was urgent and the resultant is the new law.

The MRTP Act was meant to curb monopolies and did so by exercising control over the size of the enterprise. The task of the enforcer was made easy by incorporating deeming provisions and mechanical definitions. To grow fat in human society is tolerable but is an anathema in the business world under the MRTP regime. In more than three decades of operation of the MRTP Act, not only public sector monopolies thrived, even private monopolies weren't rare. The failing of the stated objective was partly attributable to the regulator being toothless. The MRTP Commission could not enforce its orders but had to depend on courts. It did not have powers to impose penalties for breach of its directives. Its chief investigator, the DG(I&R) did not have powers to even enforce attendance of a witness. Budget was measly for the enormity of the task. Personnel were not having the right skills to delve in to what can be called investigation of economic transactions. Of course, some failings cannot be shifted.

The Competition Act has been tailor-made for the new economic environment; one that holds in high esteem entrepreneurship and creation of wealth that goes with it. Growing fat is no longer a taboo but bullying will no longer be an acceptable behaviour. The emphasis clearly has shifted from size to behaviour and effect. And behaviour must always be established under common law. The Act lays down carefully the contours of

unacceptable behaviour in business and also the parameters to be considered in coming to any conclusion. Anti-competitive agreements are void *per se* and, therefore, cartels, tie-in sales, etc will have to be shunned by the business community. Dominance of an enterprise no longer rests on market share alone. Even a dominant enterprise need not apprehend intervention until it abuses its dominant position by way of either exclusionary or discriminatory behaviour or predatory pricing or ousting competitors or creating entry barriers. There are no deeming provisions to come to the rescue of the Competition Commission. Anti-competitive behaviour has to be 'established' by Rule of Reason on a case-by-case basis. As head of the investigative arm of the Commission, my job is certainly unenviable!

I must dispel any apprehensions regarding the role of the Commission that may have crept in. What has been said so far should not sound like creation of a policing authority. We are not policemen but facilitators. The Act is as trade friendly as can be. No competitor could file a complaint under the MRTP Act but shall be able to do so now and thus get a right to be a party to the proceedings. Consumers of intermediate goods, who do not qualify as consumers before the Consumer Courts, are eligible under the Act to seek 'Cease and Desist' orders and also seek compensation to offset business loss. Even Government departments engaged in production or supply of goods or providing services are within the ambit of the Act. Acts done outside the national boundries, but having appreciable adverse effect on competition in markets, in India, are within its purview. The law recognizes the 'effects doctrine' and hence domestic industry facing effects of anti-competitive behaviour by foreign dominant players can seek redressal from the Commission. In this era of globalization and melting national economic boundries, such provisions should be soothing to your ears.

Regulation of mergers (our Act calls it combination) is a soft regime. Merger notification is voluntary. By contrast, most developed countries favour compulsory notification regimes. Threshold limits, that decide the jurisdiction of the Commission, are very high. For example, a combination having asset base of at least Rs 1000 crore or turnover of Rs 4000 crore alone need to worry. While notification is voluntary, the Commission has the power to enquire in to a combination for a period of one year from the effective date. The prudent would face no music since the time limit of approval (or disapproval) is a mere 90 days beyond which approval is deemed to have been given. You may recall that under the MRTP Act mergers were regulated by executive action. In contrast, under the new law, it shall be regulated by a separate Mergers Bench following judicial processes.

The Commission has another legislative mandate. Competition Advocacy is an important responsibility of the Commission. Advocacy is enforcement of competition policy without intervention. India is a transitional economy; moving from a control regime to a free economy. Competition cannot be expected to be high on the horizon of business strategy. Our job is to create a competition culture. This has to done in partnership with you and the government. The advocacy role transcends into the realm of policy making. We are, as a matter of fact, planning research projects to study policies, both of the Central as well as State governments, to decipher components that impede competition. In my opinion, the Commission is empowered to suggest policy initiatives unsolicited.

Do we need competition policy? I would have dealt with it much earlier but choose to do so now having acquainted you about the Act. Competition fosters efficiency

and innovation. It ensures optimal allocation of scarce resources. As long as markets are 'contestable', the consumer is guaranteed of the right stuff of the right quality at the right price in adequate quantity. When players in the market contest on merits, they also maximize their profits in the long run. It is a win-win situation for both the producer and the consumer. The raison d'etre of competition law follows as a natural corollary. Competition policy has two components. One deals with government policy such as trade regime, liberalization, FDI, etc and the other consists of law. Both the components are complementary. Simultaneity of their existence is a sine qua non for effectiveness and spread of competition on merits in the markets.

There have been a number of successful enquiries against anti-competitive practices in other jurisdictions. Each of these pointed at huge amounts of monopoly profits earned by the perpetrators. The vitamin cartel was found to have robbed the consumers of billions of dollars across the globe. Abuse of dominance by Microsoft has attracted the attention of the US, Japanese, Korean and EU authorities recently. Similar offences against consumers may not attract punitive measures in our country unless the Competition Act is made operational, the sooner the better.

Existence of other regulators in the recently opened up sector, mostly in infrastructure or networked sectors, can invoke doubts for the rationale of another regulator. Roles of sector specific regulators and competition authority are complementary. The complementarities of the two are widely recognized in contemporary literature on the subject. Developed countries are contemplating shift to soft regulatory regimes in the infrastructure sectors, timing it with growth of competition in these erstwhile monopolies. Until such time, it will be naive to rule out possibilities of 'turf wars'. A group of competition experts are engaged in deliberations, under the aegis of the International Competition Network, to iron out the rough surfaces. We are contemplating some interaction too at the appropriate fora with the sole intention of removing uncertainties for business. It is not going to be easy given the nuisance of 'regulatory capture' by the incumbent monopolist. I am sure we will be able to create an atmosphere of co-operation within the parameters of laws to avoid 'regulatory capture' and 'fora shopping' by unscrupulous rent seeking enterprises.

Laws dealing with IPRs create legal monopolies. Competition law, by definition, is against all kinds of monopolization. Both have to co-exist within the parameters of their respective laws. The Competition Act recognizes creation of legal monopolies and excludes laws dealing with IPRs, under certain conditions, from its jurisdiction. The exclusion is limited to provisions dealing with anti-competitive agreements and does not cover abuse of dominant position. We should not forget that both IPRs and competition law encourage 'innovation' – it is only freezing of 'innovation' that is frowned upon.

We are just about a year old. I am reminded of an official of the Italian competition authority stating that his outfit was a toddler after 15 years of existence (compared to 115 years of the Canadian authority and 114 years of the US one). I have not been able to find a word in English, with my limited knowledge, to describe a state after birth but before becoming a toddler. Our understanding of the subject will grow with time. Business, academicians and civil law will contribute to a deeper understanding. We have to work together and aim at achieving economic super power status sooner than predicted by practitioners of forecasting.