

WTO/UNESCAP/ASCI Regional Seminar
for Asia and Pacific Economies on
'Competition Policy and the Multilateral Trading
System'

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**Speech of Mr. Vinod Dhall,
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Titles.....

1. Earlier today during my remarks in the opening session of the Seminar, I had the opportunity to highlight some of the features of the global competition fraternity and challenges which these give rise to for the international community. By an un-expected co-incidence, I am now getting the opportunity to outline the situation in India regarding the competition law and policy and the challenges that we see ahead of us.
2. At the outset, I must mention that writ petitions are pending before the Hon'ble Supreme Court of India challenging certain provisions of the Competition Act. I would refrain from discussing any subject that is related, directly or indirectly, to the issues pending before the Hon'ble Supreme Court, and anything I say in my address is subject to the outcome of the

- cases in the Hon'ble Supreme Court. I would therefore confine myself to outlining in a broader perspective the role of the Competition Commission and the challenges before it.
3. For a better appreciation of the Indian competition law, it would be beneficial to know the brief historical background. The Indian economy was subject to controls and regulations for several decades, such as industrial licensing, monopolies and restrictive trade practices, foreign exchange restrictions, small scale industry protection, control on foreign investment and technologies, exit barriers under the Industrial Disputes Act and the Sick Industries Companies Act, quantitative restrictions on imports, administered prices, and control on capital issues. Major economic decisions were in the hands of the Govt. and there was little room in the system for competition policy. At the same time, the domestic industry was sheltered from competition arising out of imports.
 4. The economic consequences of this policy regime, though initially beneficial, were reflected in a poor rate of economic growth, low levels of productivity and efficiency, absence of international competitiveness, sub-optimal size of businesses,

and outdated and inefficient technologies in various sectors. Some firms and business houses were particularly adept at exploiting the system of licenses and controls, and they built up and maintained monopolistic positions in the market to the detriment of public interest.

5. In the late 1980s and 1990s, the realization began to dawn that this policy regime had outlived its utility and the system was crying for reform. Wide ranging policy and regulatory reforms were initiated, such as delicensing of industry, shrinking the monopoly of the public sector industries (*other than those where strategic and security concerns dominated,*) reducing the purchase preferences in Government procurement, removal of quantitative restrictions on imports, market determined exchange rate, liberalization of foreign direct investment, capital market reforms, liberalizing the financial markets, reduction in small scale industry reservations, and a much greater role for the private sector in infrastructure industries such as power, transport and communications. Sectoral regulators were set up in key infrastructure and utility industries which were hitherto dominated by the public sector and were now being opened up.

6. The reform agenda is far from complete. Areas still needing attention are, for example, labour policy, exit policy under the Industrial Disputes Act, infrastructure sectors such as power, coal and roads, and opening of the remaining state monopolies to competition forces. Yet, one must commend the progress made so far. India has been ranked in recent years amongst the top reforming countries. The Indian market today is totally different from what it was a few years back; there is greater availability of goods and there is wider choice for the consumers. Prices of many goods and services have fallen in real terms and, generally speaking, business is growing at a healthy pace. The benefits of competition are particularly visible in sectors such as automobiles, telecommunication, airlines, banking and insurance.
7. The Monopolies and Restrictive Trade Practices Act, which came into being in 1970, was designed for a different era to serve the socio-economic objectives of that time. However, it was soon realized that the Act needed extensive review. A high level committee was set up to suggest a modern competition law in line with international practice and to suit

Indian conditions. The committee recommended a new competition law which was enacted and it came into force in January, 2003.

8. Competition policy typically has two elements: one is a set of policies that enhance competition in local and national markets; as stated earlier by me, these include: liberalized trade policy, industrial licensing policy, relaxed foreign investment and ownership requirements, economic deregulation, privatization, etc. The second element is legislation designed to prevent anti-competitive business practices with minimal Government intervention, i.e., a competition law. Merely having a competition law by itself cannot produce or ensure competition in the market unless this is facilitated by appropriate Government policies. On the other hand, Government policies without a law to enforce such policies and prevent competition malpractices would also be incomplete. Both elements now exist in India: competition policy has come a long way through the process of reform and liberalization, and the law has also been enacted enabling setting up of Competition Commission for its enforcement.

9. The jurisdiction of the Competition Commission of India covers: one, anti-competitive agreements such as cartels, collusive bidding and sharing of markets; two abuse of dominance such as unfair or discriminatory pricing, limiting production or technical development and predatory pricing. The third area of jurisdiction is regulation of combinations, i.e., mergers, amalgamations, acquisitions and acquiring of control. In addition, the Commission has as a fourth responsibility, competition advocacy, public awareness and training. The law provides for investigation, enquiry and adjudication by the Commission, and it can take action based on complaints or references and also on its own motion. The Act contains provisions for penalties and also punishment for non-compliance with the Commission's orders.
10. The Commission was established in October 2003 and so far it has only one Member. It is undertaking preparatory and foundational work necessary for setting up the Commission as well as Competition Advocacy; but no judicial work is being undertaken.

11. So, what do we see as the main challenges before the Commission in discharging its work after it becomes operational and undertakes investigation, inquiry and adjudication? Let me outline some of these possible challenges.

- (i) India is a transitional economy which was hitherto subject to regulations and Government intervention in many areas. The culture of competition and awareness of its benefits are still to take root in the popular mind, including the business community itself. Thus to spread the message of competition will take a long time. This cannot be done by the Competition Commission alone and it needs the combined efforts of various organizations, consumer societies, professional institutes and others.
- (ii) As part of its advocacy function, the Commission would be expected to identify Government policies and laws that inhibit competition and to advocate suitable changes at the level of both the Central Government and the State Government. This can be an enormous task, requiring studies and analysis in various sectors

of Governmental economic activities, and also the skills and independence required to take up these issues in an appropriate and persuasive manner with the Government authorities. Often, these efforts may conflict with entrenched interests or may simply face resistance from traditional mindsets that could block the desirable changes.

- (iii) It would be a major challenge to build up the Competition Commission as a highly professional organization and attract well qualified professionals to work in the Commission. Given the Governmental salaries provided for the Commission, it may be difficult to attract and retain professionals and prevent a rapid turn-over of staff, especially economists and lawyers. It is also important to undertake capacity building of the Commission and its staff so that they have a deep understanding of the concepts, both economic and legal, which underlie the Act and also the latest developments in this area across the globe. This challenge extends also to the investigating staff

as they would be required to investigate complaints keeping in mind the complicated economic and legal issues that are bound to arise.

- (iv) It is also important to build up a larger body of professionals, outside of the Commission, having adequate knowledge and experience of competition policy and law such as economists, lawyers, professionals and business managers. Our experience is that, being a new subject, the number of knowledgeable people in the country is very small, confined mainly to the leading lawyers or law firms and a few economists. The law provides that, in addition to advocates, chartered accountants, company secretaries and cost accountants can also appear before the Commission. It is a challenge before them to build up their knowledge and skills to effectively appear before the Commission.
- (v) Not unlike competition authorities in other parts of the world, the Competition Commission of India would have to depend primarily on Government sources for

funding. At this stage when the work of investigation, inquiry and adjudication has not begun, the provision made in the Government budget is adequate. But once the work begins in right earnest, it would be necessary to seek much higher levels of funding from the Government. A comparative analysis of the funding of competition authorities in some countries brings out a wide variation in the levels of budget made available to competition authorities. Given the size and complexity of the Indian market, inadequate budget could seriously impair the effectiveness of the Commission. It is also important not to allow budgetary constraints to adversely affect the financial and functional autonomy of the Commission, and thereby reduce its credibility.

- (vi) Developed economies have multifarious and rich sources of commercial data which the competition authorities can rely on in their work. However, the same may not be the position in developing economies. Even where the data exists, this may not

be available in a form or in sufficient detail as to be usable by the Commission in deciding individual cases. In some places, the data are protected through confidentiality laws or practices. The Commission is planning to use professional help in identifying data sources and building up a network with other organizations in this matter.

- (vii) I referred earlier to the challenges presented by the globalized nature of the business activities. The Competition Act empowers the Commission to take cognizance of cases where an anti competitive practice outside India has its effect in the Indian market i.e. “effects doctrine”. However, to translate this jurisdiction into effective legal action, requires vast amount of resources and skills. It would, almost certainly, require close cooperation with competition authorities outside India. The challenge is to build up a network which exists not merely in theory but which can produce visible and tangible results in investigating and penalizing trans-border anti-competitive behaviour.

(viii) The Commission could also face a ticklish problem in its role in regulated industries like power, telecom and insurance where sectoral regulators have been established or could be established in future. The Competition Act has a “*non-obstante*” clause which allows the Commission to determine competition issues to the exclusion of all other authorities. On the contrary, some of the sectoral regulators have also powers to regulate issues relating to competition in their respective sectors. Having regard to these statutory provisions, it will be essential that the roles of the Commission and the sectoral regulators, be defined and harmonized in an effective manner so as to prevent forum shopping by the litigants, and ensure regulatory clarity in the market.

12. The list of challenges described by me is not exhaustive; as we go along, newer challenges will likely emerge. These challenges are not necessarily typical to India and may echo the experiences of other competition authorities as well. Each country must find its own solutions to these problems within the

framework of the country's law and public policy, as well as within the constraints placed by its resources. Yet sharing of experiences on how these challenges arose and were managed by other competition authorities would provide valuable lessons.

13. It is clear that seminars like this can prove most relevant and beneficial. I trust today's seminar will also provide insights into some of the challenges faced by competition authorities.