

**First Global Congruence to Promulgate International Corporate Governance
Day**

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Draft speech for Sh. S.L. Bunker Member

Ms. Mamta Binani, President ICSI; _____ ; _____ Sh. Vinnet Chaudhary Council Member and Chair Corporate Law Committee, ladies and Gentlemen. At the outset, let me wish all of you a happy international corporate governance day Let me also compliment ICSI for organizing this global congruence to Promulgate Corporate Governance.

ICSI does not need any introduction. It is one of the apex professional bodies in India which has played a catalytic role in shaping our industrial landscape. It has played instrumental role in developing high caliber professionals for facilitating good corporate governance. On behalf of the Competition Commission of India, I thank ICSI for bringing corporate governance to the center stage of discussion today and for enabling the Competition Commission of India and myself to connect with such a large audience.

As father of modern day economics Adam Smith said and I quote, ***it is not from the benevolence (kindness) of the butcher, the brewer, or the baker that***

we expect our dinner, but from their regard to their own interest. It clearly highlights that self-interest is the driving force behind economic activity. This self-interest is forced by the market forces to produce a behavior that benefits others. Though the word self-interest may sound as having negative connotations, the negative effect is balanced by the competition. So while self-interest is the motivator behind economic activity, competition is the de-facto regulator of the economy.

This balancing force of competition has been defined as the '*invisible hands*' by Adam Smith that guides the resources towards their most efficient use. So basically the Competition is the ordering force of the economy. Being an ordering force means that competition brings in competitive prices, it bolsters efficiency, productivity and innovation. In short, it fosters allocative efficiency, productive efficiency and dynamic efficiency.

The new economic order adopted in 1991 has empowered the '*invisible hand*' of the market and ensured economic freedom for enterprises. However, it's also true that markets are capable of generating their own rules which may ultimately lead to market failures. And, freedom of choice and human rationality doesn't always result in behavior consistent with what was advocated by the free market theorists.

As a result of which the invisible hands may occasionally malfunction in the presence of information asymmetry, externalities or market power. The problem of market failure provides the theoretical justification for laying down the legal foundations for a free market economy. A regulated free market aims to fulfill not only the utilitarian concept of economic efficiencies but also the moral concept of natural law and also the broader economic markets but also governs it as concept of freedom. Competition law is an economic regulation which promotes free market and regulates it. The enactment of the Competition Act, 2002, and the establishment of the Competition Commission of India were precisely to lay the foundation of a competition ecosystem in the country. The Competition Act, 2002, is different from the erstwhile MRTP Act and promotes competition rather than curb monopolies.

The Competition Act deals with horizontal agreements, vertical agreements, abuse of dominance and regulation of combinations. The Horizontal agreements are considered per se illegal whereas the vertical agreements, requires application of the rule of reason approach. However, whether a business should comply with competition law or not is depended upon a number of factors. As per OECD, factors that encourage compliance are mainly fear of

monetary penalty, damage to reputation, morality and a strong competition compliance culture. Conversely, drivers of non-compliance include uncertainty of law, market conditions, mixed signals regarding compliance from top management and a culture of non-compliance.

During the last 7 years of antitrust regime in India, we have made some landmark judgments and made critical interventions. In total, we have handled by far more than 700 anti-trust cases and have disposed around 600 of them. Thus achieving a disposal rate of around 81.7%. We had also cleared few merger cases by recommending structural remedies. In terms of impact, our interventions have resulted in positive outcomes. For instance, Indian Trade Promotion Organisation (ITPO) and All Indian Origin Chemists & Distributors Ltd. (AIOCD Ltd) have corrected their policies in alignment with principles of competition. The CUTS reports on 'Competition and Regulation in India, 2015' has highlighted that the Level of Awareness about CCI has increased to 71%.

Since the crux of the compliance function are well informed firms, CCI makes use of its advocacy interventions to spread awareness about the competition law. It informs the businesses about their rights and responsibilities under the Act. It makes them aware about the importance of compliance and the harmful effects of non-compliance with the competition law. It basically follows

an ex-ante approach which plays a key role in reducing the potential of non-compliance. CCI's advocacy initiatives concentrate on providing expertise to the enterprises on how to ensure compliance culture at their premises even in cases when there is no contravention of the law. Its advocacy interventions are in the form of lectures, discussions, seminars and workshops with a range of stakeholders which includes trade associations, company secretaries, cost accountants, legal practitioners, business heads, professionals and other representatives of the businesses

However, to have a healthy competition, having just a competition law is not enough. The economy requires a strong structure of corporate governance as well. As we all know that Corporate governance is not a new concept as it also existed during the ancient period. To mention a few, Chanakya's Arthashastra which was written during the 4th century BC provided guidelines on management practices to be followed for achieving the welfare objectives of the states. Many ideas practiced today in governing business entity have evolved from the ancient system. For instance: when Chanakya said "*Kingdom should be enjoyed by all*". It can simply mean in today's world as the welfare of stakeholders, investors, environment, society, nation etc. which the business should try to achieve. Also,

the Social welfare ideas of king and his team can be linked to present day's Corporate Social Responsibility (CSR).

Since the late 1990s, Indian regulators as well as industry representatives have undertaken significant efforts to overhaul the country's corporate governance. The current corporate governance regime in India with the Companies Act, 2013 straddles both voluntary and mandatory requirements. The Companies Act, 2013 has put greater emphasis on corporate governance through the board and board processes¹.

Competition policy primarily concerns the relationship between corporations and other market actors regarding horizontal and vertical relationships and Mergers and Acquisitions. In contrast corporate governance defines the relationship between officers, directors and shareholders. However, at the level of basic

¹The New Act covers corporate governance through its following provisions:

- New Companies Act introduces significant changes to the composition of the boards of directors.
- Every company is required to appoint 1 (one) resident director on its board.
- Nominee directors shall no longer be treated as independent directors.
- Listed companies and specified classes of public companies are required to appoint independent directors and women directors on their boards.
- New Companies Act for the first time codifies the duties of directors.
- Listed companies and certain other public companies shall be required to appoint at least 1 (one) woman director on its board.
- New Companies Act mandates following committees to be constituted by the board for prescribed class of companies:
 - Audit committee
 - Nomination and remuneration committee
 - Stakeholders relationship committee
 - Corporate social responsibility committee

principle both promote Fair and ethical business practices. The first OECD Corporate Governance Principle states that the corporate governance framework should promote transparent and efficient markets. When we look at the principles of competition law its basic premise is to promote transparent and efficient markets and maintains market integrity.

CORPORATE GOVERNANCE AND COMPETITION LAW

There exists a strong correlation between corporate governance and competition law. Competition has not much effect on performance for the firms with 'poor' governance; on the contrary, it has significant positive effect in the case of firms with 'good' corporate governance. Corporate governance can be seen as a competition booster. It becomes more essential when competition is lower as it helps in helping the market via the top management. Similarly, competition also boosts corporate governance. Where there is intense competition, more firms realize that corporate governance makes good business sense.

Transparency, fairness and accountability are an integral part of corporate governance norms and Competition law promotes information symmetry, which is an essential condition for attaining transparency and accountability. Company

which follows corporate governance norms itself will automatically promote healthy competition. Similarly, a company which abides with the principles of competition law would inherently benefit by instilling a more sustainable model of business. This in the long run, will create shareholder value, which is one of the aims of corporate governance norms. Moreover, the premise of competition policy is the rational allocation of economic resources and fair deal to the consumer and effective corporate governance mechanisms ensure better resource allocation

Another edifice of corporate governance norms is the adherence to all the disclosures and compliances required under various laws, and also reporting to stakeholders. Competition Act 2002 provides for competition advocacy, which further involves creation of Competition Compliance Programs. The objectives of these programs are to prevent violation of competition law, promote a culture of compliance; encourage good corporate citizenship and build up a positive corporate image and board.

Traditionally, the antitrust authorities have relied on imposition of heavy penalties and sanctions to promote and enforce competition compliance. However, as one of the objectives of the competition regulator is to 'promote and sustain competition in markets', it is imperative for the regulator to focus on

improving compliance. Deterrence through fines and penalties is simply not enough and therefore there is a case for adapting a strategy that promotes compliance. Moreover, deterrence doesn't address business or social perceptions of the morality of the conduct and hence doesn't always foster an ethical business culture². So, the focus should be more on how to engender the culture of compliance rather than merely creating a fear of non-compliance by putting a heavy price on it.

Competition Compliance Programme is a part of internal corporate governance mechanism as they bring in adherence to the mandate of the law, and prevent non-compliance. Simply put, a CCP is the commitment of a company to comply with the provisions of the Competition Act by establishing a formal internal framework to ensure that management and employees comply with competition law (Competition Commission of Singapore). They are a part of possible self-regulating mechanism wherein companies monitor their compliances strictly.

From the enterprise's perspective as well, CCP plays a beneficial role because of the severe penalties prescribed in the Competition Act, huge cost involved in litigation and the loss of reputation of enterprises if found on the

²Zambia Competition and Consumer Commission

wrong side of the competition law. CCP not only help in avoiding penalties and damage to reputation, but also inculcate good corporate governance in their organization. Given the role of company secretaries as the compliance officers, adopting and promoting CCP will help in improving the standard of corporate governance in the company.

Given the recent developments in the world and the ambitious task of attaining a high growth trajectory taken up by India, increasing overall competitiveness becomes essential. It is encouraging to note that we have recorded a remarkable 32-point jump on World Economic Forum's Global Competitiveness Index in two years. Further, the Global Competitiveness Report, emphasise that India's competitiveness has improved across the board in terms of goods market efficiency, business sophistication, and innovation.

Although the government has taken up various reforms with regard to ease of doing business and the enactment of important economic legislations like SARFESI and Bankruptcy code still a lot more needs to be done to improve the global outlook towards the Indian Economy. And thus, importance of competition and achieving good corporate governance can't be ignored. Both the forces are mutually reinforcing at the level of an enterprise and compliance with competition law is akin to good corporate governance. I commend ICSI for playing

a pivotal role in developing a strong structure of corporate governance and also for constantly reinventing itself to work for the progress of the nation. Given the mutually benefitting role of corporate governance and competition law, I invite businesses to come forward and forge proactive partnership with us in building competitive markets and a robust culture of good corporate governance in our country.