CORPORATE GOVERNANCE AND COMPETITION LAW: ARE THEY INTERLINKED?

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Abstract

Distinct structures of corporations and their respective governance norms are followed across countries. However, the one observation that many scholars seem to agree on is the uncontrolled growing power of multinational corporations or 'mergering giants'.[1] This power is then regulated by exposure to compliances under both the Competition Act (where anti-competitive external conduct is regulated) as well as corporate governance norms (wherein internal behaviour is regulated). It is therefore imperative to understand how corporate governance affects competitive behaviour and firms' incentives, which has hitherto not been explored in a methodical manner. This paper aims to bring more clarity on the correlation of managerial or structural efficiency and competition law. It will also explore the lacunae in India's competition law and its subsequent adverse effect on shareholder protection.

I. DEFINING CORPORATE GOVERNANCE AND COMPETITION LAW

Corporate Governance

OECD defines corporate governance as the system by which business corporations are directed and controlled.[2]

Corporate Governance can be simply stated to be the relationship of a corporate entity with its stakeholders, and broadly speaking, the society since it delineates the objectives and aims of a company, the means to attain such aims and also monitoring performance to ensure their optimal achievement.

It further controls the strategic balance between:

1. Economic and social goals; and
2. Individual and community goals.

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[1] *Corporate Governance, Reputation and Competitive Credibility*, N. Balasubramanian and David Kimber, Mangal Deep Publications (2004), p. 136

[2] OECD Glossary of Statistical Terms, https://stats.oecd.org/glossary/detail.asp?ID=6778, last accessed on 12 October 2015

The objectives of corporate governance are to align the goals of the corporation with those of its stakeholders[3], strengthen the corporate functioning and ensure efficiency, discourage mismanagement of the corporation and its resources, and specify and allocate responsibilities to the board of directors and managers.

There is an imminent need for corporate governance in all corporate institutions for various reasons, one of them being to create a culture of consciousness, transparency and openness.[4] It also leads to customer satisfaction and increased shareholder value as well as wealth.[5] The other reasons why this is needed is for:

1. Separation of the ownership from management[6].
2. Gaining the trust of global market players and also to gain credibility with them;
3. Protection of investors;
4. Developing professionalism in light of higher Foreign Institutional Investment (FII) in India;
5. Globalisation and integration of India's capital markets with the world economy;
6. Enabling the management to make better policies and take innovative decisions; and
7. Conduct business ethically and make a distinction between personal & corporate funds in the management of a company;[7]
8. Minimising the heavy costs which will result if good governance is not implemented;[8] and
9. Maintaining the confidence of domestic as well as foreign investors, which will eventually attract long-term capital, thereby inducing stable sources of financing.[9]

Corporate Governance therefore comprises of qualities such as accountability, transparency and independence.

Competition Law

Competition has been defined as a process of rivalry between companies seeking to win customers' business over time.[10] Competition law therefore, was the proposed solution to

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[3] *Corporate Governance Values and Ethics*, Dr. Neeru Vashishth and Dr. Namita Rajput, Taxmann (2010), p. 4

[4] Supra note 1 at 3

[5] Ibid

[6] *Corporate Governance Values and Ethics*, Dr. Neeru Vashishth and Dr. Namita Rajput, Taxmann (2010), p. 4

[7] Report of the SEBI Committee on Corporate Governance (Chaired by Mr. NR Narayana Murthy), (2013) available at: http://www.sebi.gov.in/commreport/corpgov.pdf.

[8] Ibid at para 1.1.6

[9] Ibid at para 1.1.7

some of the problems that the free market or laissez-faire system was plagued with. The House of Lords, during the making of the UK Competition Act (1998) pointed out that competition law provides the framework for competitive activity, and protects the process of competition.[11]

In India, the erstwhile MRTP Act aimed at curbing monopolistic practices, regardless of whether it was a natural monopoly achieved by the interplay of the market forces of demand and supply.

In the early 1990s, the Indian Government opened the doors to liberalisation and globalisation, thereby thrusting the nation into a situation that this obsolete law could not control. As more global players approached the Indian market, it made very less sense to continue following a legislation which ignores natural market forces and takes an interventionist approach.

Thus, the need for a new competition policy was felt, following which the Competition Act (2002) was enacted.

The broad objectives of any competition legislation are to ensure fairness and transparency in dealing in the market, prohibit practices that are detrimental to healthy competition between companies, maintain information symmetry, without which the buyers will not have a fair idea of what is being supplied in the market, protect the interests of consumers and facilitate trade on the whole; and prevent abuse of dominance by a single company or group of companies.

Thus, the need for introducing a competition policy in any market across the globe is to ensure a smooth-flowing current of information in the market, which will increase efficiency, and encourage positivity in the economy.

II. NEXUS BETWEEN CORPORATE GOVERNANCE AND COMPETITION LAW

How are they interlinked?

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[10] Para 4.1.2, Merger Assessment Guidelines of the UK Office of Fair Trading and Competition Commission, September 2010

[11] Introduction to Competition Law, available at http://old.unipr.it/arpa/defi/furse_ch01.pdf, p. 1, last accessed on 14 October 2015

The Institute of Company Secretaries of India (ICSI) defines corporate governance as the *application of best Managementpractices, compliance of law in true letter and spirit and adherence to ethical standardsfor effective management and distribution of wealth and discharge of social responsibilityfor sustainable development of all stakeholders*.[12]

On a parallel note, the objectives of competition law and policy in general are consumer protection (where the consumers must ultimately receive the benefit) and promotion of economic equity.[13] The OECD believes that *Competition should form part of a wider programme encompassing all aspects of compliance and ethics*.[14]

The link between these two diverse areas of corporate governance and competition policy can be analysed by dissecting the ICSI definition into the following aspects:

1. Adherence to ethical standards

As has already been stated, certain practices such as transparency, fairness and accountability are an integral part of corporate governance norms. Competition law promotes information symmetry, which essentials means that a modicum of transparency and accountability must be maintained by a company.

2. Compliance of the law in its true spirit

One of the edifices of corporate governance norms is the adherence to all the disclosures and compliances required under various laws, and also reporting to stakeholders.[15]

Similarly, the Competition Act 2002 provides for competition advocacy, which further includes the creation of Competition Compliance Programs. The intention of these programs is to (1) Promote a culture of compliance (2) Encourage good corporate citizenship; and (3) Prevent violation of competition law.[16] This shows a clear link between these two areas.

3. Best Management Practice (BMP)

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[12] *Corporate Governance Emerging Issues*, Dr. Vandna Dangi, Ocean Books Pvt. Ltd. (2013), p. 43

[13] Competition Law, Richard Whish and David Bailey, 7th Ed (2012), p. 20

[14] Promoting Compliance with Competition Law, available at http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf, last accessed on 15 October 2015

[15] *Corporate Governance Values and Ethics*, Dr. Neeru Vashishth and Dr. Namita Rajput, Taxmann (2010), p. 10

[16] *Competition Compliance Programme for Enterprises*, Competition Commission of India, p. 4, available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf, last accessed on 16 October 2015

A BMP is a practice or combination of practices which are most effective and practicable to achieve an objective, while at the same time making best or optimum use of the company's resources. This essentially amounts to efficiency in functioning of the company, which is one of the aims of both corporate governance norms as well as competition law. One instance of how BMP is a link between corporate governance and competition policy is the decision of the French Competition Authority (FCA) to publish a document on Competition Compliance Programmes which includes best practices in it.[17]

Is there a direct nexus?

The direct nexus, of course, lies in the categorisation of corporate governance itself. Corporate governance is of two kinds- (1) internal and (2) external.[18]

The internal corporate government environment includes the Board of Directors, Internal Stakeholders and the Company's mission, values and norms.[19] On the other hand, the external environment comprises of government regulations and laws, capital market, investor activities, etc.[20] Thus, competition laws enacted by the government may act as external governance mechanisms in themselves.

Additionally, we see that the quality of the internal mechanism is closely related to a better corporate performance.[21] This shows that the internal corporate governance has a positive impact on a company's performance in the market. Thus, the nexus is proved both ways.

Other factors

The first OECD Corporate Governance Principle states that the corporate governance framework should promote transparent and efficient markets.[22] This essentially means that

[17] Paris EUC e-bulletin, Herbert Smith Freehills (February 2012), available at http://www.herbertsmithfreehills.com/-/media/HS/P-150212-5.pdf, last accessed on 16 October 2015

[18] *Recent Developments in Corporate Governance: An overview*, S. Gillan, Journal of Corporate Finance , Vol. 12 (2006), pp. 381-402

[19] *Corporate Governance Values and Ethics*, Dr. Neeru Vashishth and Dr. Namita Rajput, Taxmann (2010), p. 10

[20] *The Effectivity of Internal and External Corporate Governance Mechanisms Towards Corporate Performance*, Christiana Dharmastuti and Sugeng Wahyud, Research Journal of Finance and Accounting, Vol 4, No. 4 (2013), p. 132

[21] *Do stock prices reflect the corporate governance quality of Japanese firms*, Aman H, Nguyen P, Journal of the Japanese and International Economics, Vol. 22 (2008), pp. 647-662

[22] OECD Principles of Corporate Governance, available at http://www.oecd.org/corporate/ca/corpoategovernanceprinciples /31557724.pdf, last accessed on 16 October 2015

the framework should be devised such that it promotes transparent and efficient markets and maintains market integrity, which is also the aim of competition law and policy.

In most countries, the corporate governance framework is largely focussed inward, i.e. towards the composition of the management, presuming that the correct internal structure will automatically ensure quality of performance. Very few companies are able to keep in mind that external mechanisms such as competition is also very important, even though there is less emphasis placed on the relationship between internal and external governance mechanisms.

Usually, when we look at the governance of a corporate entity, we look at internal variables and external variables separately, but rarely analyse the symbiosis between these variables. These variables, when move in the same direction, can complement each other and lead to greater productivity. If they move in opposite directions, they might become each other's substitute.[23]

Thus, there exists a nexus between corporate governance and competition law, and the extent of this nexus will be analysed in the further segments.

Outcomes of Corporate Governance and Competition

The outcomes of these two areas can be analysed from three perspectives- (1) Sustainable Development of Business (2) Fair Competition (3) Consumer Interest.[24]

1. Sustainable Development of Business

For the business enterprise, sustainable development would mean adopting strategies that would play the dual role of meeting the needs of the enterprise and its stakeholders and also protecting and sustaining the resources important for the future.[25]

A balanced approach between protection and use is the basis of the concept of sustainable development. This was also recognised by the World Commission on Environment and Development, which stated that economic activity cannot be allowed to degrade natural and

[23] *Takeovers, Restructuring and CorporateGovernance*, Fred J. Weston, Mark Mitchell and Harold J. Mulherin, Pearson Education, 4th ed. (2008), p. 589
[24] *Corporate Governance Aligned with Competition*, CS. Ankit Das (2012), p.11
[25] Business strategies for sustainable development, available at https://www.iisd.org/business/pdf/business_strategy.pdf, last accessed on 16 October 2015

human resources beyond repair.[26] In the long run, corporate or business sustainability will create shareholder value, which is one of the aims of corporate governance norms.

Since competition law and policy is made with a view to encourage healthy competitive practices in the market vis-à-vis economic efficiency and consumer welfare, the principles of competition law would inherently benefit a company's corporate structure by instilling a more sustainable model of business.

Competition policy aims at *enhanced operational efficiency, cutting costs, keeping down administrative expenses and affording quality products at reasonable prices to the consumers*.[27]The task of corporate governance norms here would be to ensure that there is no anti-competitive behaviour inspite of the trend towards prince fixing. Thus, a company which follows corporate governance norms, both internal and external will automatically lean towards healthy competition in the market.

2. Fair Competition

In *Re: Shri Shubham Srivastava and the DIPP*[28], the CCI stated its position on Indian competition law, and clarified that it is like any other competition law as it seeks to ensure free and *fair competition* among firms at the market place, so that firms can offer competitive products and services without tweaking their supply or fixing prices. It added that such fair competition would ultimately lead to consumer benefit as well as producer welfare (total welfare).

Fair competition creates a set standard by whose yardstick, all companies- big or small can operate, without bias or any favours towards a single set of companies. This will eventually lead to consumer protection. When competition conditions in the market are not optimal, or there are not enough 'fair competition' measures, we see a direct nexus to the governance structure in companies slackening, as they delay or postpone matters, thereby contributing further to the inefficiency.

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[26]*Green Management: Theory and Applications*, M. Karpagam and GeethaJaikumar, Ane Books Pvt. Ltd. (2010), p. 193

[27]*Metamorphosing Into a Governance Professional*, Dr. S K Dixit and Ms. Lakshmi Arun, ICSI Backgrounder (2013), p. 1

[28] Case No. 39 of 2013 (CCI)

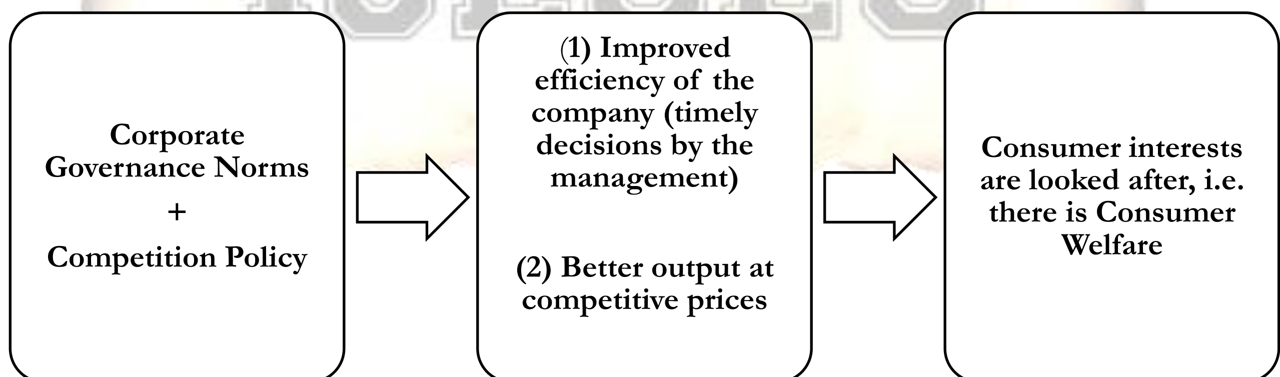
The importance of corporate governance norms here is to manifest itself in decisions of the Management and the Board or Key Managerial Personnel (KMP), and compel them to make timely decisions which will increase efficiency.

3. Consumer Interest

Section 2(i) of the Competition Act 2002 defines a consumer as one who:

a. Buys any goods for a consideration or under any system of deferred payment, or
b. Hires or avails of any services for consideration or under any system of deferred payment (including beneficiary of such services).

A consumer is one of the two components of a market (the other being the seller or the company), and is the end point of all corporate activities (ultimate beneficiary). The OECD defines consumer welfare as being *the benefit derived from the consumption of goods and services*.[29] The premise of competition policy is the rational allocation of economic resources and fair deal to the consumers. Corporate governance norms play an important role in this. This can be seen in the following illustration, which shows the theoretical relation between corporate governance/competition policy and consumer welfare.



Relationship between CG/ Competition Policy and Consumer Interests

Thus, the combined effect of corporate governance norms and competition policy will lead to consumer welfare.

29 *Glossary of Industrial Organisation Economics and Competition Law*, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD (1993), available at https://stats.oecd.org/glossary/detail.asp?ID=3177, last accessed on 16 October 2015

Thus, the main three outcomes of the symbiotic interplay between competition policy and corporate governance are (1) Sustainable Business Development (2) Fair Competition and (3) Consumer Interest and Welfare.

III. COMPETITION ACT 2002 AND CORPORATE GOVERNANCE MEASURES

Anti-Competitive Agreements

One of the objectives laid down in the Preamble of the Competition Act 2002 is to prevent practices that have adverse effects on competition. Certain companies which supply goods and services are not beyond manipulating the market to maintain their profits through price-fixing, inducing artificial scarcities and dividing the market, in order to reduce or eliminate their competitors. Such agreements would be anti-competitive if they adversely affect competition to an appreciable extent.[30]

Section 3 of the Act prohibits agreements, practices and decisions that are anti-competitive in nature, and the term 'agreement' covers agreements between enterprises, or associations of enterprises or persons, or associations of persons, or in any combination of the above.[31] The term 'person' is construed widely and includes companies as well, thereby making this restriction applicable to them.[32]

The key ingredients to invoke Article 3 are:

a. There must exist an agreement;
b. The agreement must affect competition;
c. This effect must be adverse; and
d. The adverse effect must be appreciable.

The agreements must be with respect to any of the following- production, supply, distribution, storage, acquisition or control of goods or provision of services.[33]

Section 3 divides the agreements into two broad categories:

a. Horizontal Agreements

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[30] *Competition Law in India: Policy, Issues and Developments*, T. Ramappa, Oxford India, 2nd Ed (2009), p. 50
[31] Ibid at 51
[32] Ibid
[33] Ibid

These agreements are between competitors operating at the same level in the economic process, engaged broadly in the same business or activity. Section 3(3) deals with this and also gives certain instances such as agreements which cause bid rigging or collusive bidding.

b. Vertical Agreements

These are entered between undertakings that are non-competing, and are at different levels of the economic process of manufacture and distribution. Section 3(4) provides a wide amplitude to these agreements, and includes tie-in arrangements, refusal to deal, exclusive supply or distribution agreements, and resale price maintenance (RPM). For instance, in the case of *Dr. Miles Medical Co. vs. John D. Park & Sons Co*, fixing minimum prices at which products can be sold was held to be one example of RPM.[34]

Companies enter into horizontal or vertical agreements to evade the exactitudes as well as the risk in a competitive market. The term 'agreement' has a very wide connotation here. This is because the companies' involvement in such agreements is illegal, and thus will not be in writing in most cases.[35] It can therefore be unwritten, tacit, oral, or any understanding.

The conduct of the company which will not result in appreciable adverse effect on competition (affecting the price or output in a manner that will harm competitors) will not be prohibited per se.[36]

How can corporate governance norms restore healthy competition in the market?

Here, an efficient internal governance structure is more than sufficient to avoid the violation of this provision of law. Where the company is aware, and keeps accurate records of the agreements entered into with the suppliers, distributors, vendors, clients and other connected persons, and these agreements are thoroughly scanned before being signed, there is less scope for violation of section 3. This is because there will be a set of transparent mechanisms in place, which will filter out the anomalies of the higher management which enters into agreements or makes key decisions. Here, we see how important transparency and accountability is to promote healthy competition and information symmetry, thereby necessitating proper corporate governance norms.

Abuse of Dominant Position

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[34] 220 U.S. 373 (1911)

[35] *Competition Law in India: Policy, Issues and Developments*, T. Ramappa, Oxford India, 2nd Ed (2009), p. 51

[36] *Pawan Hans Ltd. vs. Union of India*, [2013] 114 Comp.Cas. 676 (SC); *Competition Law and Practice*, D.P. Mittal, Taxmann, 3rd Ed (2011), p. 175

Section 4 of the 2002 Act deals with this provision. It particularly looks at the conduct and behaviour of a company that is already in a dominant position.

Explanation 2 of Section 4 defines dominant position as having the following elements:

a. The company must be in a position of strength;
b. This position must be maintained in a relevant product (goods and services) and geographical market in India[37]; and
c. This position must allow the company to operate independently of competitive forces in the relevant market (i.e. the trading practices of this company are not controlled by market conditions, and it has the capacity to impose its own conditions).

The report of the Raghavan Committee on Competition Law observes in paragraph 4.4-8 that the current market share of a company is only one of the factors of determining what constitutes as dominance, and we must also look at constraints faced by it on its ability to act independently (such as purchasing power of the customers).[38]

One of the instances of how a company abuses its dominant position is by predatory pricing. This happens when the company fixes the prices of the goods or services at a price lower than the cost determined by the regulations in order to reduce or eliminate competitors.[39] Other such practices include denial of market access and price-fixing.

In the US, Courts have held that (1) erosion of competition and (2) immediate destruction of a particular competitor can be viewed as the two main motives for predatory price discrimination.[40]

Section 4(1) prohibits abuse by a company of its dominant position. However, Clause (2) (a) of this section provides an exemption in cases where such activities are undertaken to meet competition, and not thwart it.

How can corporate governance norms restore healthy competition in the market?

In this case, we see that the onus of not abusing the dominant position that a company is in lies with the higher management of the said company. Their decisions will impact the price of the product, and since they are in a position to not be governed by independent market forces,

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[37] Section 2(s) of the Act defines Relevant Geographic Market and is to be read with Section 19(6). Similarly, Section 2(t) read with Section 19(7) tells us what a Relevant Product Market is.
[38] *Competition Law and Practice*, D.P. Mittal, Taxmann, 3rd Ed (2011), p. 291
[39] *Competition Law in India: Policy, Issues and Developments*, T. Ramappa, Oxford India, 2nd Ed (2009), p. 141
[40] *Utah Pie Co. vs. Continental Baking and others*, 386 US 685 (1967)

their decisions will be a law unto itself of sorts. Thus, it is imperative that there is a policy of integrity that a company must follow at all times, which will ensure that it does not abuse its upper hand and create instability in the market.

Most multinational corporations (MNCs) also maintain an inherent corporate governance structure in their company's mission statement or policy.

Let us take the hypothetical situation where MNCs such as Accenture or Capgemini Accenture are in a dominant position.

Accenture, a global Information Technology (IT) giant states explicitly on its webpage that (1) its ethics and compliance program fosters the highest ethical standards (2) they prevent, detect, report and address any allegations of misconduct and (3) they comply with all laws and standards applicable as part of their corporate governance and business ethics code.[41]

Similarly, Capgemini, a competitor also is guided by seven core values as part of its Code of Business Ethics, of which 'Business Integrity' is one core value. As part of business integrity, the company works towards maintaining fair competition, anti-corruption measures and avoids conflicts of interest.[42]

While neither of these companies is in a dominant position, their mission statements show excellent corporate governance initiatives on part of the management, which will automatically reduce or minimise the chances of abuse of their position.

In India, complaints were recently filed with the CCI against Flipkart India Pvt Ltd, Jasper Infotech Pvt Ltd (owner of Snapdeal.com), Xerion Retail Pvt Ltd (owner of Jabong.com), Amazon Seller Services Pvt Ltd and Vector E-commerce Pvt Ltd (owner of Myntra.com). The CCI held that there is no contravention of Sections 3 or 4 of the 2002 Act as they have not abused their dominant position and violate competition norms.[43]

Amongst these companies, Amazon has a code of ethics which expressly provides against price fixing, and states that all applicable laws, rules and regulations must be followed at all

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[41] Ethics and Compliance Program and Code of Business Ethics, Accenture Ltd., available at https://www.accenture.com/us-en/company-ethics-code.aspx, last accessed on 16 October 2015

[42] Code of Business Ethics, Capgemini Ltd, available at https://www.capgemini.com/about/group/our-code-of-business-ethics, last accessed on 16 October 2015

[43] *Competition Commission of India Says E-Commerce Companies Not Abusing Dominant Position, NDTV Gadgets 360* (5 May 2015), available at http://gadgets.ndtv.com/internet/news/competition-commission-of-india-says-e-commerce-companies-not-abusing-dominant-position-689010, last accessed on 16 October 2015

times. It is due to such strong corporate governance policies that it is not abusing power in the market in spite of being in a dominant position.

Regulation of Combination

In order to understand the effect of a transaction, it is imperative that we first ascertain the degree of autonomy the company has.[44] The level of autonomy enjoyed by any company changes in certain circumstances, such as when mergers, acquisitions or takeovers occur. In a merger, there is a sudden upheaval of autonomy, and in acquisitions, the acquiring company will have more discretion to decide the future course of the company. The aim of any competition policy across the globe would be to prevent that the persons gaining such autonomy do not mar the competitive structure. The relevant sections in the 2002 Act are:

a. Section 5 of the Competition Act 2002 uses the term 'combination' to consolidate mergers, acquisitions, and acquiring control of a company. This section is attracted when a combination is said to be resulted. Acquisition may be of shares, voting rights or assets of a company, or control over management or assets of a company (as defined in Section 2(a)).
b. Section 6 deals with regulation of combinations, and for this section to be applicable, the combination under Section 5 should have an appreciable adverse effect on combination (in which case, it would be void). But first, the said combination must cross a certain set threshold provided.
c. Section 24(4) lays down the factors that the CCI must keep in mind while assessing if a combination has an appreciable adverse effect on combination or not. Some of these factors are:
    i. Barriers to entry

    This is a measure adopted to prevent new companies from entering the market, i.e. preventing new entrants. Few instances are high initial cost of investment and limited availability of the required technology.

    ii. Level of combination in the market

    If the market position of the company is highly concentrated, then a combination effected by those controlling the market will eliminate the existing competition.[45]

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[44] *Competition Law in India: Policy, Issues and Developments*, T. Ramappa, Oxford India, 2nd Ed (2009), p. 183
[45] Ibid at 209

iii. Extent of vertical integration

Let's take the example of an e-commerce company such as Flipkart. Hypothetically, if Flipkart acquires Blue Dart for courier and delivery services, this would amount to a vertical integration as these are two different stages of the supply chain. This may severely affect the other courier services which are not able to compete with this new combination of companies. Thus, the extent of vertical integration is also essential to see if the combination has an appreciable adverse effect on competition.

iv. Extent of competition likely to sustain in a market

This is an important factor as this looks at the position after the combination has come to effect. If the effect shows a substantial reduction in competition, even if not total elimination, this combination should be struck down.

v. Potential to increase prices or profit margins

If the proposed combination will have the effect of increasing the price to such an extent that it would drastically affect the competitors, then this would have to be kept in mind by the CCI while deciding the validity of such a combination.

There are several other factors such as availability of substitutes through imports, possibility of a failing business, etc.

d. Section 31 states what orders the CCI may pass in cases of certain combinations.

The CCI may either approve, modify or reject the proposed combination based on the appreciable adverse effect it may or may not have in the market.

How can corporate governance norms restore healthy competition in the market?

Under clause (2A) of Section 6, no combination can take effect unless:

a. The CCI has passed an order to that effect

   OR

b. The passing of 210 days from the date of filing a valid notice with the CCI.

The 2007 amendment to the Act mandates the filing of this notice, thus ensuring that no proposed combination can be effected unless CCI approval is granted.

Governance norms here will be to first assess if the proposed combination sets off the mandatory notice filing provisions under the Act, and then filing the notice with the CCI

accurately. In Europe, there is a practice of making compliance checklists which contains all relevant compliances under EU Competition Law and policy. Companies in India can adopt the same model, and make such checklists to ensure that they do not inadvertently miss out on requirements such as the notice under Section 6.

IV. COMPETITION COMPLIANCE PROGRAMS

The Competition Act 2002 imposes several duties on the CCI, one of which is 'Competition Advocacy'. Section 49(3) states that the CCI shall take suitable measures for:

a. Promotion of competition advocacy;
b. Creating awareness and imparting training about (1) competition issues and (2) activities that can strengthen the competition culture in the market.

Certain authors have pointed out that a competition authority must participate more broadly in the formulation of its own country's economic policies which may adversely affect competitive market structure, business conduct, and economic performance, thereby assuming the role of a competition advocate.[46]

One of the initiatives under Competition Advocacy is Competition Compliance Programs. These compliance programs will be part of the internal corporate governance mechanism of a company as they bring adherence to the mandate of the law, and prevent non-compliance.

What is Compliance?

Compliance is said to involve active efforts on part of an enterprise to comply with the provisions of the Competition Act.[47] It is a step ahead of awareness regarding the benefits of the law.[48]

What are Competition Compliance Programs?

When the enterprise takes necessary and concrete steps to ensure that it doesn't (knowingly or unwittingly) infringe the provisions of the Act, it can be said to follow a 'Competition

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[46] *Competition Advocacy in World Bank/OECD*, R. Shyam Khemani and Johan Clark et al. (1999); *Competition Law Today*, Edited by Vinod Dhall, Oxford University Press (2007), p. 536

[47] *Competition Compliance Programme for Enterprises*, Competition Commission of India, available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf, last accessed on 17 October 2015

[48] *Competition Compliance and Role of CCI: Need to Move Beyond Advocacy* (2013), available at http://circ.in/pdf/Competition_Compliance_and_Role_of_CCI_Need_to_Move_Beyond_Advocacy.pdf, last accessed on 17 October 2015

Compliance Program' (CCP).[49] CCPs are based on the concept of a possible self-regulating mechanism wherein companies monitor their compliances strictly, and avoid violating laws and regulations. They also aim at creating a culture of compliance within the organisation.[50]

Need for a Competition Compliance Program

There is a need for every company to have its own CCP. This is due to several reasons:

a. Breach of the Competition Act 2002 can result in penalties under Sections 42 to 48, and there is a separate provision (Section 27) for the breach of Sections 3 and 4. The penalties are harsh in monetary terms. Additionally, the management of the company will be liable to be preceded against and punished, apart from the company itself. The Act makes no distinction between the penalty that is imposed on a company and an individual, contrary to laws in the US and UK, where the penalty for an individual is lower.[51] Thus, having a tailored CCP will greatly reduce the risk of violating the Act.
b. Unenforceability of agreements on which the companies are dependent.
c. Non-legal consequences such as diversion of management time and resources in litigation, bad publicity, continuous scrutiny by the authorities, etc.

The purpose of a CCP is therefore to:

a. Reduce the risk of violating the Competition Act and rules thereunder;
b. Ensure minimisation of potential competition issues;
c. Receive a competitive edge by detecting prospective violations at a nascent stage; and
d. Maintain the reputation earned by the company in the market, i.e. goodwill of the company.

Judicial Affirmation

In 2010, the Supreme Court of India, in the case of *Competition Commission of India vs. Steel Authority of India Ltd*[52] affirmed that the Competition Act 2002 has chalked out a wide mandate for the Commission.

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[49] Ibid

[50] Implementing a Compliance Program, available at https://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program#what-is-a-compliance-program-, last accessed on 17 October 2015

[51] *Competition Law Today*, Edited by Vinod Dhall, Oxford University Press (2007), p. 525

[52] (2010) 10 SCC 744

The significance and importance of CCPs have been affirmed by the CCI in *Re: Kannada Grahakara Koota v. Shri Karnataka Film Chamber of Commerce*[53] wherein it held that the opposing parties were to release a ‘Competition Compliance Manual’ in order to educate its members about the basic tenets of competition law principles, as erring associations must educate their members through competition advocacy.

In the case of *Builders’ Association of India v. Cement Manufacturers’ Association & Ors*[54], the commission imposed a penalty of over Rs. 6300 Crores on cement manufacturers in India who were found guilty of cartelisation (violation of Section 3 of the Competition Act 2002).

In the case of *Microsoft vs. European Commission*[55], the EC decided that Microsoft was indeed abusing its dominant position in the market by tying the Windows Media Player with its operating system software Windows 2000. A record fine of € 497 million.

In Germany, the Bundeskartellamt or the German Cartel Authority uncovered a cartel in the German cement sector in 2002. A year later, authority fined the six largest companies a total of €660 million, the largest fine for such an activity in that nation.[56] The Higher Court upheld this decision on appeal.

Such situations can therefore be avoided with the help of CCPs.

Competition Compliance across the Globe

Now that the importance of CCPs have been discussed, it is imperative for us to compare the India’s efforts towards competition compliance with nations and jurisdictions that have a more sophisticated and evolved system of competition law.

The International Chamber of Commerce (ICC) has observed that several authorities like in Canada, Japan, Australia and Netherlands provide for a competition (anti-trust) compliance program template, while others such as Brazil and Korea have stringent criteria to certify such programs.

a. Australia

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[53] Case No. 58/2012 (CCI)

[54] Case No. 29/2010

[55] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007

[56] *Germany: Highest fine in Bundeskartellamt history to be imposed on cement cartel (*April 12 2013), available at https://www.competitionpolicyinternational.com/germany-highest-fine-in-bundeskartellamt-history-to-be-imposed-on-cement-cartel, last accessed at 17 October 2015

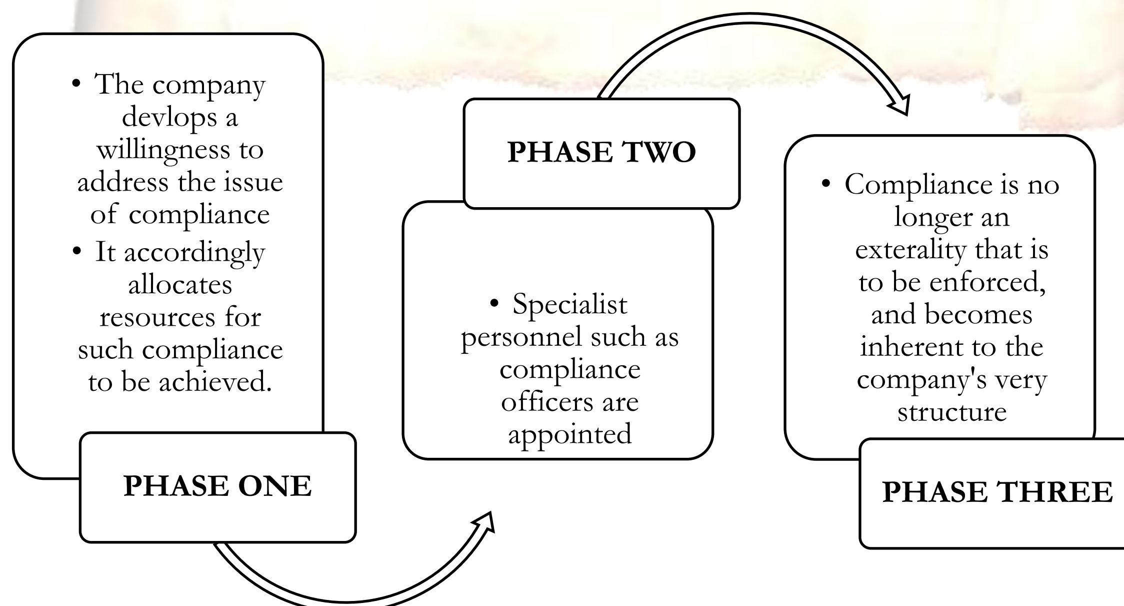
The relevant authority here is the Australian Competition and Consumer Commission (ACCC), and this Commission issued in 2005 a guide named 'Corporate Trade Practices and Compliance Programmes which accepts that CCPs are an important component recommended by the ACCC. However, it refuses to lay down a common program due to the difference in organisational structure. Since smaller companies require a different and less-sophisticated system, the ACCC has come out with guidelines specific to Small and Medium Enterprises.

ACCC guidelines include four CCP template undertakings, and this is in consonance with Section 87B of the 1974 Australian Trade Practices Act which empowers the Commission to accept formal administrative undertakings including CCP obligations.

These templates are a reflection of the preferences of the Commission in each CCP, and are numbered from Levels 1 to 4, the former being for micro businesses and the latter for large corporate entities.[57]

The guidelines also state that in the Commission's experience, most enterprises which institutionalise compliance culture go through three main phases, as illustrated below.

Once a company reaches phase three (the stage where compliance is a business practice), only in extremely rare cases will the company choose to revert to the first phase.



[57] Implementing a Compliance Program, ACCC, available at https://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program#compliance-program-templates, last accessed on 17 October 2015

Phases of Compliance Culture in a Company (identified by the ACCC)

b. United States

The US Federal Courts generally utilise the Federal Sentencing Guidelines to impose sentences for offences, and this is the penal provision used to punish violations of Section 1 of the Sherman Anti-trust Act (the oldest US competition legislation). **§8B2.1**suggests that one method to reduce the quantum of the fine would be to have an effective compliance and ethics programme.[58]

These Guidelines suggest that the company must exercise due diligence and detect criminal conduct and promote an ethical organisational culture which encourages compliance with the law, thus stressing on the importance of such compliance programmes.

The Antitrust Division (part of the Department of Justice) has an ‘amnesty program’ wherein complete immunity is given to the first member of the cartel to confess, regardless of whether or not a compliance programme has been in place.[59]

The problem with the system in the United States is that there is a trend of thrusting companies into compliance with anti-trust laws by threatening them with severe punishments, but there is no positive incentivisation towards compliance.

c. European Union

In late 2011, the EC published a competition compliance brochure[60], introduced to remedy the growing number of violations of competition policies. The applicability of the EU Competition Rules is to anyone who conducts business in the EU, and the brochure stresses that managers as well as employees should be guided on how to abide by the law at all times (a hint at internal corporate governance). The brochure has a portion dedicated exclusively to infringements of EU Competition Rules as illustrated below.

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[58] Chapter VIII, Part B, 2011 Federal Sentencing Guidelines Manual (USA)

[59] *Competition Law Compliance Programs and Government Support or Indifference*, Theodore Banks and Nathalie Jalabert-Doury, Revue Concurrences 2 (2012)

[60] “Compliance Matters- What companies can do better to respect EU Competition Rules”

FINES	• Substantially large fines (as high as 10% of the company's annual turnover), whether or not the motive was achieved
SANCTIONS	• These are imposed on individuals, such as disqualification of director and imprisonment
CIVIL LAW CONSEQUENCES	• Agreements incompatible with law are void and unenforceable, and additional damages may be claimed before national courts
DAMAGE TO REPUTATION	• Negative media coverage adversely impacts the company's reputation

Consequences of Infringement of EU Competition Rules

There is a third portion to the guide which deals with the dos and don'ts of the law. It elucidates upon the two basic types of illegal behaviour prohibited by Articles 101-102 of the Treaty on the Functioning of the European Union, which are:

i. Illegal contracts and agreements between companies
ii. Abuse of a dominant position.

The don'ts or prohibitions are on price fixing, market division or sharing, insider trading (of strategic information), and the like.

Part four of the brochure lays down the ingredients needed for a successful compliance program[61] which are:

i. Clear strategy and commitment to compliance

Here, a strategy would mean assessing the most vulnerable areas of the company, in which it would suffer the most risk of non-compliance. Such areas, the Commission suggests, must (1) be highlighted as *Red Flags* (2) be available in multiple languages (3) receive the support of the higher management of the company. There could also be an internal reporting framework.

ii. Backup measures or alternatives;
iii. Regular updates and training programs

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[61] European Commission Issues Guide on Competition Compliance, *Evelyn Niitvaeli and Stephan Wachs,* (2 February 2012), *available at http://antitrust.weil.com/articles/european-commission-issues-guide-on-competition-compliance/, last accessed on 17 October 2015*

The compliance manuals must be reviewed and updated periodically. Also, training on competition law and policy of the EU must be offered to employees and higher management officials.

iv. Monitoring and auditing.

The EC thereafter concludes with the observation that a CCP may put an end to infringement at a very early stage, instead of letting it run to high penalties and future actions for damages.

The Commission has ensured that small and medium-sized businesses need a program just as much as larger companies do, which is a welcome message.[62]

The drawback of this policy is that the Commission does not take into account the bona fide efforts made by a company to make and adhere to CCPs while doling out penalties, and again as in the case of the US, there is very less positive inventive for compliance.

d. Canada

The relevant authority is the Canadian Competition Bureau, which in 2010 issued a Corporate Compliance Programs Bulletin which describes measures that businesses should consider so that the risk of contravening antitrust laws is reduced. Additionally, a template-like framework has been set out, which contains the elements of a credible and effective CCP. While the law itself does not mandate the implementation of such a program, the Courts may order their implementation in certain circumstances.[63]

The five elements laid out by the Bulletin are illustrated below.

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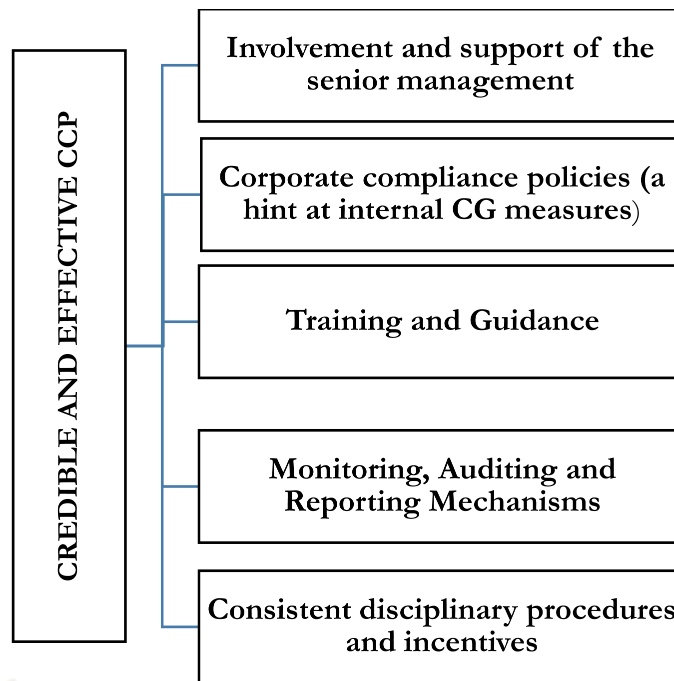
[62] Competition Compliance in the EU: The European Commission Publishes its "Highway Code" but Maintains its
Fining Practice, Matthew Hall, available at https://www.mcguirewoods.com/news-resources/publications/international/international-antitrust-march2012.pdf, *last accessed on 17 October 2015*

[63] Promoting Antitrust Compliance: The Various Approaches of National Antitrust Authorities, International Chamber of Commerce, available at p. 4, http://ec.europa.eu/competition/antitrust/compliance/icc_comparative_study_en.pdf, last accessed on 17 October 2015



Elements of a Credible and Efficient CCP (Canadian Model)

The Bureau has come out with a new Bulletin as recently as June 2015, and has provided for certain expanded compliance tools for companies[64] such as:

i. Detailed due diligence checklists in core competition law areas such as advertising and marketing;
ii. A new template compliance program; and
iii. Employee certification letters.

The drawback of this model is that there are no special guidelines for small and medium businesses, and these CCPs are the same irrespective of the level of complexity and the size of the company.

e. Japan

The relevant authority is the Japan Fair Trade Commission (JFTC). In the case against *Alpine Electronics*[65] in 1991, it was held that employees must made to understand the full extent of the violation of competition law.

[64] Compliance, available at http://www.ipvancouverblog.com/canadiancompetitionlaw-competitionlawcomplianceprograms/, last accessed on 17 October 2015

[65] April 25, 1991 (1991 Recommendation No.5)

In 2005, a recommendation was made against *JFE Engineering Corporation*[66] and 39 others wherein they were asked to establish rules of punishment for violations of the competition law in Japan by the directors or employees of the companies.

Two years later, in a recommendation against *Nisshin Steel Co.*[67] and 5 others, the Commission asked the companies to:

i. Train sales staff on aspects of the competition law in Japan (Antimonopoly Act)
ii. Get the legal affairs personnel to conduct timely audits.

The Commission also coordinates with the Fair Trade Institute (FTI) and has established a sample compliance programme.[68]

f. India

The Competition Commission of India, in June 2008, issued the first booklet on CCPs for Enterprises, which was a mere suggested framework. Then-Acting Chairman Mr. Vinod Dhall stated that the release of this booklet was another step ahead to encourage the understanding of competition law by enterprises.[69] Mr. Amitabh Kumar, then-Director General of the CCI clarified that the CCP must be specific to each enterprise, and that the booklet only provides the basic parameters.[70] This booklet lists out the benefits of compliance[71] such as:

i. Avoiding or reducing the quantum of fines for contravention of the law;
ii. Avoiding entering into agreements that can be potentially void;
iii. Avoiding potential action for damages; and
iv. Increased awareness on competition law within the company.

It also lays down the elements of a CCP such as:

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[66] (November 18, 2005 (2005 Recommendation No.13))
[67] Promoting Antitrust Compliance: The Various Approaches of National Antitrust Authorities, International Chamber of Commerce, available at p.5, http://ec.europa.eu/competition/antitrust/compliance/icc_comparative_study_en.pdf, last accessed on 18 October 2015
[68] *Japanese Antitrust Law Manual: Law, Cases and Interpretation of Japanese Antimonopoly Act*, Akira Inoue, Kluwer (2007)
[69] *Now, CCI Brings out Competition Laws in Print* (25 June 2008), available at http://archive.financialexpress.com/news/now-cci-brings-out-competition-laws-in-print/327039/0, last accessed on 18 October 2015
[70] Ibid
[71] Supra note 55 at 7

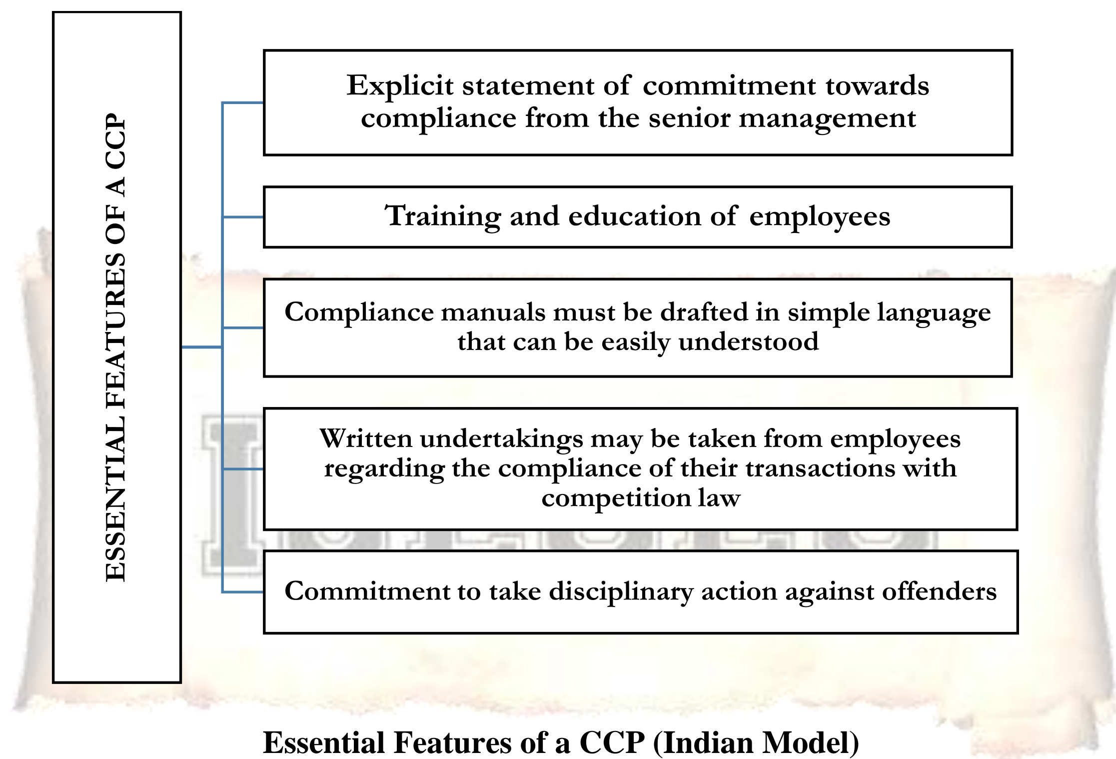
i. *Provisions* for educating employees, particularly senior executives regarding what kinds of behaviour and decisions must be avoided;

ii. *Precautions* must be taken to ensure no law is violated;

iii. *Clarity* must be maintained regarding the position of law, especially for companies that are members of the industry or other associations;

iv. *Customised* CCPs will have to be drafted for each company.

The essential features that every CCP must contain are illustrated below.



Essential Features of a CCP (Indian Model)

The positive aspects of the Indian model is that they have adopted the US/EU mandate of customised Competition Compliance Policies according to the size and needs of the companies, and have avoided laying down a generic template.

The drawback is that the CCI's role, in spite of the release of this booklet is very limited in generating awareness. Mere creation of booklets whose content is non-mandatory will not help improve compliance. Thus, a firmer stance is to be taken regarding such programs and their implementation.

V. CONCLUSION: OBSERVATIONS AND SUGGESTIONS

Appraisal of the role of the CCI in governing entities

Positive Actions

1. The Commission has in the matter of *Re: Kannada Grahakara Koota v. Shri Karnataka Film Chamber of Commerce*[72] emphatically stated the need for a 'Competition Compliance Manual' for the erring company to educate its members about the principles of competition law. This shows the effort of the Commission in fulfilling its duty of advocating competition.
2. The CCI has said in the booklet that one of the factors considered in determining the quantum of fine is the existence of an *effective CCP*, thus indicating a policy of probable leniency.

Critique

In India, imprisonment can be granted only if an entity has not complied with the orders of the CCI (under Section 42), and in all other offences, the accused must pay fines.

1. There is no statutory mandate on how the Competition Appellate Tribunal (COMPAT) imposes or reduces a penalty.[73] Thus, the only incentive for compliance with the competition policy is the risk of being slapped with a penalty (monetary) and the possibility of warranting leniency from the CCI.
2. While the US follows the Federal Sentencing Guidelines which are set statutory rules that help ascertain the penalty, the CCI's imposition of penalties is not usually backed by any distinct rationale which forms the basis for ascertainment of such a penalty. Thus, the weightage given to each factor remains uncertain.
3. The drawback in the policy of probable leniency is the subjectivity on what would be considered an 'effective CCP' as there are no set guidelines for assessing its effectiveness.

The Confederation of Indian Industries (CII) has also opined that companies should be incentivised to comply with competition law.[74] This would contribute towards reducing costs and negative effects of litigation as well as regulatory intervention.

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[72] Case No. 58/2012 (CCI)

[73] *Comply or Suffer: Competition Compliance Manual*, Pratibha Jain (24 August 2015), available at http://thefirm.moneycontrol.com/story_page.php?autono=2719341, last accessed on 19 October 2015

[74] *Incentivise India Inc. for Competition Compliance* (10 June 2013), available at http://archive.indianexpress.com/news/-incentivise-india-inc-for-competition-compliance-/1126974/0, last accessed on 19 October 2015

It is important for the CCI to consider the lacunae in its existing framework, and understand the large role it has to play in ensuring that corporate governance norms are implemented effectively in companies.

Economic Observations

If we take a look at the economic analysis of the interplay between corporate governance and competition, economists state that (1) internal competition as well as (2) global competition in the firm's product market has a positive impact in ensuring good corporate governance. The nexus here is explained thus: Competition could limit the discretion of the management.[75] Theories suggest that competition in a product market ensures the survival of the best companies in the industry, which means that when the market is sufficiently competitive, the management will be forced or compelled to act in accordance with shareholders' interests, or else succumb to bankruptcy.[76]

Again, competitive product markets are said to be effective in disciplining underperforming managements irrespective of the underlying ownership structure, and such product market competition will eventually drive out persistently inefficient firms.[77]

This means that competition itself forces the company to improve its internal structure so that it does not get driven out of the market. This shows that strong competition norms boosts companies to improve their efficiency and embrace corporate governance norms.

Concluding observations and suggestions

While the European Commission does not provide any relaxation in penalty despite companies making the efforts of complying with CCPs, India has taken a positive initiative in recognising the existence of CCPs as a mitigating factor, which is commendable and bring the nation at par with jurisdictions like the US, which is a pioneer in competition law as well as corporate governance practices.

In 2010, the Supreme Court of India, in the case of *Competition Commission of India vs. Steel Authority of India Ltd*[78] affirmed that the Competition Act 2002 has chalked out a wide

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[75]*Corporate Governance and Competition: A case study of India*, Manoj Pant and Manoranjan Patnayak, Center for International Trade and Development, Jawaharlal Nehru University (2008), p. 4

[76] Ibid

[77]*Corporate Governance in India*, Jayati Sarkar and Subrata Sarkar, Sage Publications (2012), p. 34

[78] (2010) 10 SCC 744

mandate for the Commission. Since this mandate also includes the power to pass any order as it deems fit under Section 27 of the Act, the CCI could essentially make CCP mandatory.

As has already been stated earlier, the internal corporate government environment comprises of the Board of Directors, Internal Stakeholders and the Company's mission, values and norms, while the external environment comprises of government regulations and laws (amongst other elements). Competition laws enacted by the government thus act as external governance mechanisms in themselves.

We also see that the quality of the internal mechanism is closely related to a better corporate performance, since it is considered to be well established that firms with good governance perform better in competitive markets.[79]This shows that the internal corporate governance has a positive impact on a company's performance in the market.

It is therefore proved, in light of these statements that competition amongst companies acts as an efficient mechanism for ensuring corporate governance in companies and vice versa. There is however, not enough evidence to suggest that this is the ***most*** efficient mechanism available.

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