

STARTUP INDIA AND COMPETITION LAW: A CRITICAL STUDY

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Abstract

Startup India and Competition law [1] has an interrelationship. Startup India promotes people for their innovative idea based new business which is amounted as dynamic efficiency, on the other hand competition law through regulating anti-competitive practices promotes overall economic efficiency which can be termed as Allocative, Productive and Dynamic efficiency. In this article, with few questions in mind, I have critically examined the startup India programme and objective of competition law. Are Startup and Competition law foster further the common interest of economic efficiency in India? Are startups capable enough to face the challenges posed by the dominated market players in India?

Keywords: Startup, Competition law, Economic efficiency, Anti- competitive practices.

Introduction

Startup India [2] has begun with the vision to get business and entrepreneurial skill of the Indian people. A vision which promotes talented mind and dreams of ideas and get them converted into successful business. A Startup India Action Plan¹ was announced on 16 January 2016. There are three Central areas of simplification and handholding, funding support and incentives and industry Academia partnership and incubation. The 19 action items make it easier to understand that benefits to startups ranges from tax exemptions, government funding support, public procurement, so on and so forth. The provision of self-certification for startups with respect to various labour and environmental laws can be called a welcome step, which can be complied easily by startups. Among other benefits 80% rebate in patent registration fees [3], 50% in Trademark filing, interaction between question between academia and industrialists are also other key benefits for startups.

Startup Definition [4]: An entity shall be considered a startup: a) Up to FIVE YEARS from the date of its incorporation and registration, b) turnover must not cross RS 25 CRORE per financial years and c) Focus must be towards “Innovation, Development, Deployment or Commercialization of New Products, Processes or Services Driven by Technology or Intellectual Property”.

Startup Definition Expanded [5] (23 may, 2017): An entity shall be considered as a Startup: a) up to seven years from the date of its incorporation or registration; but for the Startups in the biotechnology sector, the period shall be up to ten years and c) turnover must not cross RS 25 crore per financial years and d) working towards innovation, development or improvement of products or processes or services, or scalable business model with a high employment

generation or wealth creation. Provided that any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered a 'Startup'.

Startup Definition Expanded [6] (19 February, 2019):

An entity shall be considered as a Startup:

1. Upto a period of ten years from the date of registration, if it is incorporated as a private limited company or registered as a partnership firm or a limited liability partnership in India.
 2. Turnover must not cross Rs 100 crore per financial year.
 3. Working towards innovation, development or improvement of products or processes or services, or scalable business model with a high employment generation or wealth creation.
- Provided that an entity formed by splitting up or reconstruction of an existing business shall not be considered a 'Startup'.

Advantages for Startups

Self-certification: legal and statutory dimension for running business is a central point and failure to get legal requirements discourages the start-up. In order to establish start-ups, both management of growth and updating with changing laws are required. Start-up India has laid down several measures to make it easy. startups have been allowed to self-certify under various labour and environmental compliances for fixed durations of time. Startup India has arranged and collaborated with various Ministries to provide such ease of functioning for startups. There are number of States in India who have also been encouraged to incorporate such best practices for benefiting the national economic efficiency through startup ecosystem.

It is pertinent to note that the responsibility of compliance is not a one-time affair, but in fact a continuous process. The Ministry of Environment, Forest & Climate Change has published a list of 36 'white' categories based on their pollution load. Industrial sectors that have pollution index of below 20 are recognized as "white" wherein startups under the category will be able to self-certify compliance with respect to three Environment Laws for a period of three years, viz.

- The Water (Prevention & Control of Pollution) Act, 1974 [7]
- The Water (Prevention & Control of Pollution) Cess (Amendment) Act, 2003
- The Air (Prevention & Control of Pollution) Act, 1981 [8]
- The Building and Other Constructions Workers' (Regulation of Employment & Conditions of Service) Act, 1996
- The Payment of Gratuity Act, 1972 [9]
- The Contract Labour (Regulation and Abolition) Act, 1970
- The Employees' Provident Funds and Miscellaneous Provisions Act, 1952
- The Employees' State Insurance Act, 1948

"Self-certification (an initiative by Startup India) is a very good opportunity for startup companies to run business very smoothly, as it covers all labour & other mandatory compliances" – K notebook Networks Private Limited- A DPIIT recognized Startup

"All the information is regularly updated and easily available online. No physical documents are required. It's a great advantage. Many licenses and permissions like labour license can be easily applied for and approved online. - Jarsh Innovations Private Limited" – Jarsh Innovations Private Limited- A DPIIT recognized Startup

Shram Suvidha Portal: has been launched in 2014 under Ministry of Labour and Employment to facilitate businessmen to get all types of registrations and submit returns that are required under labour laws through a single online window. Till February 2020, nine States (Haryana, Madhya Pradesh, Maharashtra, Rajasthan, Gujarat, Uttar Pradesh, Punjab, Uttarakhand, and Delhi) had integrated their regional portals with the Shram Suvidha Portal.

Startup India Hub: has been fixed as action plan to create single platform for all startup stakeholders. It provides knowledge that how to get funding.

Mobile app and portal: Mobile application and Portal provides a single platform for dialogue between Government regulating Institutions and start-ups for the growth of startups. Around 2Lac queries and 2.85 lakh Aspiring entrepreneurs have learnt about development programs under this scheme.

Legal support and fast-tracking patent examination: Fast-tracking patent examination creates awareness about Intellectual Property Rights among start-ups. Till November 2020, around 459 patents have been granted. 510 design facilitators [10] and 292 Trademarks facilitators have been empanelled under the start-ups scheme.

Relaxed norms of public procurement: all recognised startup are exempted from depositing of earnest money or bid security for public procurement. This facility of exemption sorts out the problem of substantial capital locking in tendering process participations. Procurement” or “public procurement” (or ‘Purchase’, or ‘Government Procurement/ Purchase’ in certain contacts) means acquisition by way of purchase, lease, license or otherwise, either using public funds or any other source of funds (e.g. grant, loans, gifts, private investment etc.) of goods, works or services or any combination thereof, including award of Public Private Partnership projects, by a Procuring Entity, whether directly or through an agency with which a contract for procurement services is entered into, but does not include any acquisition of goods, works or services without consideration, and the term “procure” or “procured” shall be construed accordingly.

Rule 170 (i) of GFR 2017: exemption from submission of EMD /Bid Security in public procurement tenders. Rule 173 (i) has been incorporated in GFR, 2017: relaxation of conditions of prior turnover and prior experience for DPIIT recognised startups in all government tender requests. Recognised startups are preferred bidders during public procurement process while participating in tenders on Central Portal for Public Procurement (CPPP).

GEM STARTUP RUNWAY: A dedicated corner for startups to sell products & services “After finishing many years of research and innovations in the water sector, I planned to work as a social entrepreneur for eradicating clean water challenges in rural and sub-urban India. As a start-up company, I was initially worried to conduct business in India. However, Startup India program of Government of India helped me a lot and changed my vision and attitude with positivity. Today, I am elated and proud to say that H₂O Mantra is grown up, providing employment to many people and contributing steadily to the growth of India by doing business through GeM, a startup friendly interface which provides us easy and open access to customers across the country. Through the guidance of Startup India Program, H₂O Mantra was registered on GeM portal in July 2018 and it has successfully completed sale of Rs 1.33 Crore till date through the GeM portal.” - Dr Shailesh Kharkwal, Founder & CEO, H₂O Mantra Pvt. Ltd

“We have built an innovative emission control technology to reduce emission from diesel generators (DG sets) used extensively for power back up across India. Being an innovation driven hardware startup, we did face some unique challenges and the Startup India initiative by The Department for Promotion of Industry and Internal Trade has been very helpful to overcome some of these challenges. We are a recognised startup by the Government of India and received financial assistance on the patent we filed for our unique technology. We were also given relief from various labour laws during the early stage to ensure that we spend most of our time and energy on bringing our innovation to life. Under the Startup India initiative, we got the opportunity to meet various officials from multiple Ministries to advocate for changes in rules and regulations and create a robust eco system for clean-tech ventures like ours. This ensured that our efforts were aligned to the larger objectives of the government and we could play a meaningful role in the development of the country. We are also the beneficiaries of the Startup portal on Government e-Marketplace (GeM). The portal ensured that we could work with large public sector undertakings at a very early stage of our journey. It also eliminated the long tendering process and ensured we could work with the government in a fast and transparent way. With the funding round led by IAN Fund in April 2019, we have been able to create over 70 jobs in the manufacturing sector and also build intellectual property to contribute towards India’s growth and prosperity. The funding has also helped us build manufacturing and engineering capabilities to be able to partner with large and established corporations at a very early stage in our journey. We boast of having technical capabilities superior to corporations with over 50 years of experience. This acceleration in Innovation has been possible due to the financial support provided by the government under the Fund of Funds scheme. We are on track to create over 100 jobs in the manufacturing sector by the end of this financial year and scale up our operations to improve the air quality in multiple Indian cities including Delhi NCR, Chennai, Pune, Lucknow and Bangalore.

There are multiple other benefits we have received under the Startup India scheme and congratulate the revolutionary measures taken by the Government of India.” – Kushagra Srivastava, Chakr Innovation
 Faster exit for startups: The insolvency and bankruptcy code 2016 have made great changes in business climate in the country. Now insolvency resolutions among corporate persons and individuals can be taken in a time bound manner.

Funding support: For the growth of innovation driven Enterprises special provisions of funding support have been made. As per data 450 9.6 3 Crore has been invested in 385 startups.

Tax Exemptions: In order to promote investments into startups, tax exemption on capital gains, tax exemptions to startup for three years and tax exemption on investment above fair market value has also been considered a prominent feature for startups. Section 54EE of the Income Tax Act 1961 lays down exemption from tax on long term capital gains. The maximum amount that can be invested in rupees 50 lacs. Till November 2020, 319 startups have been granted Income Tax exemptions [11].

Startup festivals: Startups festivals provides National and international exposure to startup ecosystem in India. The global capital Summit 2018 and 2019 has witnessed participation of over 700 investors delegates.

Launch of Atal Innovation Mission: In technology driven areas, Atal innovation mission promotes world-class innovation hubs.

Harnessing private sector expertise: 86 incubators across the country have been selected by Atal innovation mission to provide financial support. 13,800 jobs have been created by the startups incubated at the Atal centres.

Innovation centres at national institutes: Eight research Parks has been identified for the successful innovation through incubation and joint R&D efforts between academicians and Industrialist. biotechnology sectors are also being prompted. The total number of biotech startups is 3325 till feb. 2020.

Innovation focused programmes for students: Under this plan 158 projects have been approved called Uchchatar Avishkar Yojna.

Successful Startups [12]:

Housing.com: Housing.com is a property search engine started by the youth of twelve IITs. This team of enthusiastic youth wanted to bring transparency in the real-estate domain. In a short span of time, this successful startup has gained massive popularity. It was launched just two years back and regardless of the odds, Housing.com has emerged as a great property portal.

Flipkart [13]: It is not an unknown company. The company managed to fill the gap of a huge stakeholder in the Indian online market. The company was started by Sachin and Binny Bansal. He had previously worked with Amazon and during this time he launched a similar model keeping in mind the Indian market. He started this portal in the year 2007 by selling books and today everything is available on this platform. The company also managed to acquire Myntra for around Rs 2000 crore.

4. Ola Cabs Ola Cabs: No one would have ever thought that cab booking can be so easy and simple. The credit for this goes to Ola Cabs. In this, the cost of a cab journey is still less than that of an auto-rickshaw. Bhavish Aggarwal and Ankit Bhati are the founders of Ola Cabs. He was an IIT graduate who worked with several multinational companies before becoming an entrepreneur. In October 2015, Ola Cabs became one of the best start-ups in India.

Challenges Faced by Startups [14]:

Cut throat competition: The business or corporate market is always full of fierce competition. In the presence of monopoly, monopolistic and oligopolistic and even in the most desired perfect market always there are challenges for new market players, who have sometime no experience, shortage of capital and moreover anti-competitive agreements [15].

Anti-competitive agreements:

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) Directly or indirectly determines purchase or sale prices;

- (b) Limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) Directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation- For the purposes of this sub-section, & bid rigging means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

- (a) Tie-in arrangement;
- (b) Exclusive supply agreement;
- (c) Exclusive distribution agreement;
- (d) Refusal to deal;
- (e) Resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation-For the purposes of this sub-section,-

- (a) "Tie-in-arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) "Exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (c) "Exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) "Refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) "Resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;

(5) Nothing contained in this section shall restrict-

- (i) The right of any person to restrain any infringement of, or to impose reasonable conditions, as may be

necessary for protecting any of his rights which have been or may be conferred upon him under the form of purchase or sale prices, limits or controls production, supply, markets, technical

development, investment or provision of services, bid rigging or collusive bidding, tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, resale price maintenance, abuse of dominance and merger issues. The question is that how these startup would survive with in this world of competition and anti-competitive practices
 Financial management: The startups really find it difficult to manage their finances. Investors take less interest in startups unlike big dominated and branded farms.

Trust of customers [16]: It has been considered a big issue for startups patronage of customers for more and more sale is required to run and survive in market and without IT competition in market will remove startups from market. Growth strategy developing brand, poor Risk appetite are other problems which are faced by startups unlike big market players.

Competition Law: Competition is a process of economic rivalry between players to attract customers. These market players can be multinational companies, domestic companies, wholesalers, retailers (even our neighbourhood shopkeeper) or a cable operator. Such a competitive situation may also be affected by market contestability, where in competition comes not only from existing players, but also from new players that could enter and contest in the market like [17].

Competition for efficiency: In recent years, efficiency advocates have gained ascendancy, powerfully assisted by the perception that efficiency analysis is scientific and rigorous, as contrasted with the softer values of more inclusive approach that would encompass

- (a) The Copyright Act, 1957 (14 of 1957);
- (b) The Patents Act, 1970 (39 of 1970);
- (c) The Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
- (d) The Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
- (e) The Designs Act, 2000 (16 of 2000);
- (f) The Semi-Conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
- (ii) The right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export noneconomic values. Efficiency is all about maximum utilization and best possible management of scarce resources in a society. Efficient resource allocation is the central idea of any economic market. [18] There are three types of efficiency:

- Allocative efficiency
- Productive efficiency
- Dynamic efficiency

Allocative and productive efficiency are together known as static efficiency. Allocative efficiency deals with optimal allocation of resources and productive efficiency deals with optimal production of resources. Thus, static efficiency aims at a better output with same input. Static efficiency can be achieved in the market by enforcement of a competition policy that seeks to promote competitive pricing and prevent abuse of market power. This is based on the premise that monopoly or any other form of imperfect market structure leads to static

inefficiency as the pricing of product is above the marginal cost resulting in monopoly profits. [19]

Market prices are the signals from marginal consumers of the value they receive from the product, showing their willingness to pay. With the increase in supply, demand will decrease and as a result, price will also decrease. An efficient allocation means this price reflects the cost of producing the goods. Allocative efficiency in a free enterprise economy can be achieved only if all firms are of sufficient size to realize all significant economies of scale, and all markets are either competitively structured (that is, they comprise a significant number of producers with no one or few having market dominance) or entry barriers are low.

In such cases, all producers are price takers; the market, not the producers, sets the price. The market focuses cause resources to move to the production of goods that consumer want, given the distribution of wealth, Prices move down to marginal cost, and output is optimal to serve consumer wants at that cost.

Productive efficiency means optimal production of goods with available input i.e. use of the most cost-effective combination of productive resources available under present technology.

This emphasize on making best possible use of input resources and ensuring no wastage.

Dynamic efficiency refers to development of new products. This can be done by ensuring proper reward to the inventor in lieu of developing and disclosing the invention to public. Out of these efficiencies, productive efficiency can be best measured because productive gains produce directly observable indicia, such a reduced manufacturing costs, that are capable of being assessed with precision. At the same time, dynamic efficiency is very difficult to measure. Static efficiency is achieved by strong price competition. Allocative efficiency is attained when prices are equated to marginal cost, which is a condition for perfect competition. This reveals an inherent tension between static and dynamic efficiency. As stated earlier, for static efficiency, the price should be equal to marginal cost. But in such a situation, dynamic efficient can never be achieved because the cost of producing a goods that has already been discovered is very low, the price charged would also be very low or virtually zero. Such market structure based purely on the competitive price mechanisms does not provide an incentive to innovate and to put in huge quantum of investments in research and development. A pricing policy based purely on competitive practices would thus make a socially desirable innovation non-excludable resulting in loss of potential incentives to innovate.

Inquiry into certain agreements and dominant position of enterprise(19) [20]. The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:

- (a) Creation of barriers to new entrants in the market;
- (b) Driving existing competitors out of the market;
- (c) Foreclosure of competition by hindering entry into the market;
- (d) Accrual of benefits to consumers;
- (e) Improvements in production or distribution of goods or provision of services; or
- (f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Conclusion

On the basis of startups meaning and definition which highlight dynamic efficiency seems fairly common in startup and competition law objectives. Therefore, it can be said that without regulating the anti-competitive practice, abuse of dominance, merger and amalgamation the startup vision to promote the entrepreneurial skill and potential of Indian people cannot be achieved properly.

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