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# CPI ANTITRUST CHRONICLE

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## COMPETITION POLICY AND START-UPS IN INDIA

By YDhanendra Kumar & Abir Roy

Technology has spurred innovation in the market. In India, the number of start-ups has rallied up significantly. They are playing a pivotal role to challenge the status-quo of market. To this end, the present article dives into analyzing the Government Policy and reforms which are conducive to foster innovation, growth and promote healthy competition in the digital market with a focus on start-ups. The Economic Survey Report of 2021-2022 and Union Budget of 2022-2023 presented by the Indian Government has been discussed here to project the market potential. The article also discusses the position of law and the measures that can be taken to hone competition law policy for scalability of start-up business in India. The other focal point of this article is to take lessons from denigrating market practices that harm competition and then equalize them with public good initiatives of the government hinged on promoting competitive environment. The Unified Payment Interface and the notion of Open Network of Digital Commerce are few examples discussed here. The concurrent theme of this article is to advocate for market agnostic laws and policy that unlock the innovation quotient of India while harboring a safe legal environment within the start-ups.

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# I. INTRODUCTION

India is witnessing its start-up moment. As mentioned by Finance Minister Nirmala Sitharaman in her Budget Speech on February 1, 2022:

*“Start-Ups have emerged as the drivers of growth for our economy. Over the past few years, the country has seen a manifold increase in the number of successful start-ups.”*

As the Economic Survey Report of 2021-2022 (the 2022 Report) points,<sup>2</sup> start-ups in India have grown remarkably over the last six years. India has become the third largest start-up ecosystem in the world after the US and China which added 487 and 301 unicorns respectively in 2021. It is notable that as of January 14, 2022, India has 83 unicorns with a total valuation of US\$ 277.77 billion.

It is imperative to note that, to facilitate the growth of any burgeoning business, the laws regulating the market must not only be facilitative, well-equipped but also be agnostic and efficient in ensuring level playing field in the market. The new age start-ups are not only budding innovators but also competitors who can challenge the status-quo for the benefit of consumers with new products and competitive prices. Therefore, to augment the future success of business on fair terms, the antitrust law has a pivotal role to play.

The Department for Promotion of Industry and Internal Trade, Ministry of Commerce, and Industry organized the first-ever Startup India Innovation Week during January 10 to 16 where Over 150 startups had been divided into six working groups based on themes including growing from roots, Nudging the DNA, from local to global, Technology of Future etc. The Prime Minister announced National Startup Day on January 16 every year and recognizing the role of technology in this regard, called it a “techade.” The aim of the government and policy makers is to understand how startups can contribute to the national needs by innovation and technology in various domains, healthcare, pharma, agri-tech, defense, Edutech, infra, logistics, etc. and how government can assist the same. The time in India is ripe to seize the opportunity and showcase innovative solutions.

In this article, we delve into the role of Competition Law and Policy in ensuring a conducive business environment for start-ups in India. While defining the operation of new age market in general, the article discusses the policy measure taken to promote competition and innovation in the digital market. We also discuss the position of law and the measures that can be taken to hone our competition law policy for scalability of start-up business in India.

## II. START-UP AND THE UPSURGE OF DIGITAL MARKET

The Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry defines “*startup*”<sup>3</sup> as an entity incorporated as a private limited company, registered partnership firm or as a Limited Liability Partnership in India with period of existence and operations not exceeding 10 years from the date of incorporation. The entity should have an annual turnover not exceeding INR 100 Crore for any of the financial years since its incorporation and it should work towards development or improvement of a product, process, or service and/or have scalable business model with high potential for creation of wealth & employment.

India’s capital markets, have done exceptionally well and have allowed record mobilization of risk capital for Indian companies. The year 2021-22 so far has been an exceptional year for the primary markets with a boom in fundraising through IPOs by many new age companies, tech start-ups and unicorns. In April-November 2021, Rs. 89,066 crores were raised via 75 IPO issues, much higher than in any year in last decade.<sup>4</sup> The exuberance associated with the listings manifested in huge oversubscriptions by retail, High Net worth Individuals and institutional investors and stellar listing gains have pushed more and more companies to tap the markets. The tremendous response by all categories of investors in IPOs of companies was reflective of not only the confidence in markets, but also that in corporate sector performance and prospects of the economy in the long run.

In India, more than 61,400 startups have been recognized in India as of January 10, 2022. Further, a record 44 Indian startups have achieved Unicorn status in 2021 taking the overall tally of unicorns in India to 83, and most of these are in the services sector. The 2022 Report has also observed a change in trend, where Bangalore being the Silicon Valley of India, has been taken over by Delhi for hosting the greatest

<sup>2</sup> Page 336 of 2022 Report.

<sup>3</sup> See here <https://www.startupindia.gov.in/content/sih/en/startup-scheme.html>.

<sup>4</sup> Page 29, 118, 138 of 2022 Report.

number of start-ups. Over 5,000 recognized startups were added in Delhi while 4,514 startups were added in Bangalore between April 2019 to December 2021. The numbers have also rallied from the presence of startups in just 121 districts to 555 districts as of 2021 showing greater spread and inclusivity.

Recently, the Union minister of Commerce and Industry, Shri Piyush Goyal said while chairing the fourth roundtable with global VC funds that global venture capital funds should focus more on startups from tier-II and tier-III cities, for investing, promoting, and protecting the intellectual property created by startups. They should also provide expertise to startups to scale up, and explore greater capital infusion, including risk capital.<sup>5</sup>

### ***A. The Policy Impetus and Boosting Competitiveness in the Market***

The world has seen a tectonic shift exacerbated by the pandemic which has necessitated the shift from physical aisles to virtual carts. Such technological disruption has been driven by increasing internet and technology penetration, proliferation of mobiles, growth of logistics and warehouses, modernization of payment systems, changes in consumer spending and preferences among other factors, which have enabled e-commerce, electronic payments system and other new disruptive technology services to be more efficient and accessible than ever before. The digitization of the global and domestic economy owing to increasing internet user base and favorable market conditions, reiterates the continuing potential of the Indian start-up ecosystem. Let us discuss few Policy hand market highlights that can trigger innovation and competition in the market:

- 1) As the 2022 Report highlighted, there been growth in the number of start-ups engaged in the space technology sector. Just in the last three years number of startups in the space sector has increased from 11 in 2019 to 47 in 2021 with a total of 101 startups commanding their presence in the space technology sector.<sup>6</sup> While opening the accessibility of space sector and to trigger innovation, the government has also setup an independent nodal agency under the Department of Space, Indian National Space Promotion and Authorization Centre (“IN-SPACe”), which shall act as the promotor and regulator of space activities in India by NGPEs (Non-government/private entities).
- 2) Additionally, the heavy regulation around the creation, acquisition, and use of geospatial data, including maps have been drastically simplified by the release of new guidelines by Department of Science and Technology on February 15, 2021. The guidelines are more focused to facilitate Indian companies and start-ups operating in this sector and make data available for them to innovate and compete on merits.
- 3) The Indian start-ups in the technology sector are also constructively utilizing their innovation towards creation of intellectual property assets. There has been gradual increase in the filing and granting of patents in India. The number of patents filed in India has gone up from 39,400 in 2010-11 to 58,502 in 2020-21 and the patents granted in India has gone up from 7,509 to 28,391 during the same time period. Consequently, India’s ranking in Global Innovation Index has climbed 35 ranks, from 81st in 2015-16 to 46th in 2021. The objective of protecting IP assets and promoting innovation and competition is furthered by the insertion of Section 4A in the Competition Amendment Bill, 2020 which focuses on protection to holders of intellectual property rights.
- 4) Furthermore, in August 2021 the Ministry of Electronics & IT (“MeitY”) launched the SAMRIDH program.<sup>7</sup> It is known that MeitY has various programs to facilitate start-ups, but with the SAMRIDH program the focus is to aid start-ups to enhance their software products by providing fiscal incentives and assisting in securing investments for scaling their business. This is imperative as the barriers to entry in the market on funding constraint under competition law will be subsided and start-ups will get the initial boost to innovate.
- 5) Additionally, the Union Financial Budget of 2022 gave boost to Gaming Industry, with the government deciding to promote AVGC (Animation, Visual Effects, Gaming, and Comics) by setting up task force to recommend steps for promotion of AVGC in meeting global demands. It is imperative to note that India presently commands around 10 percent of the global AVGC market and has the potential to reach 20-25 percent by 2027. The move will propel and give thrust to young businesses in tapping the potential of international market and will promote indigenous competition also.

5 <https://www.livemint.com/companies/start-ups/invest-in-startups-from-tier-2-3-cities-piyush-goyal-asks-global-vc-funds-11642153647602.html>.

6 Page 334 of the 2022 Report.

7 <https://www.meity.gov.in/writereaddata/files/SAMRIDH%20Scheme%20Document.pdf>.

### III. THE COMPETITION LAW REGIME IN INDIA

The antitrust law in India has successfully forayed into uncharted sectors of digital market and has stood the test of present time, which is characterized by multi-sided markets. The endeavor of the Commission has always been to promote competition and innovation in the technology driven markets where each and every player, whether it be big companies or a start-up gets access to market on fair and equitable terms. The Competition Commission of India in its Workshop (CCI Workshop) dated February 04, 2022 on “Start up Ecosystem and Competition” has stated that, “Every possible market, be it retail, e-commerce, food, groceries, payments, deliveries, entertainment, wealth management, trading, health-care, education, or utilities, has undergone digital transformation, and digital startups have played a key role in this journey.”

The Competition Act, 2002 (the “2002 Act”) and the Competition Commission of India (“CCI”) are well equipped to effectively deal with any distortionary conduct of any entity that can possibly create adverse effect on competition in the market. The very objective of the 2002 Act is captured in following terms<sup>8</sup>:

*“It shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.”*

It is trite that digital markets are the epicenter of technological progress and innovation. The CCI in the past has taken steps to remedy conducts in the market so that it promotes innovation. In the operation of non-compete clause in mergers market, CCI has generally taken the position that non-compete obligations should cover only products, either being manufactured or in the process of development, and be reasonable in respect of duration, normally 3 years.<sup>9</sup> The objective is to ensure that the mergers do not adversely affect innovation and introduction of better or new products. The antitrust enforcement goals in digital markets must be to strike an appropriate balance between static efficiencies and the longer-term gains that arise from innovation. The CCI has approached every market conduct case, whether it be SEP disputes or online platform market related disputes, with a very nuanced approach to usher innovation and keep the idea of fair competition intact. The Policy measures are also reflecting in the proposed Competition Amendment Bill, 2020 which seeks to add granular details to better regulate digital market in terms of enforcement as well as merger control measures.

The enforcement powers under Section 3 of the Act deals with anti-competitive agreements in both horizontal and vertically linked markets having appreciable adverse effect on competition in the market.<sup>10</sup> Additionally, Section 4 of the 2002 Act aids in keeping check on possible abusive behavior of any dominant entity in the market. With its tool of enforcement and advocacy, the CCI is continuously endeavoring to promote the start-up environment in India. The Commission has undertaken detailed study and released market reports under its advocacy program in various sectors which includes, E-Commerce, Telecom and Pharma Industry.

### IV. GUARDING AND PROMOTING THE START-UP BUSINESS OPERATION UNDER LAW AND POLICY

A start-up starting its business operation often collaborates and work with multiple market players. The digital market design is also such that multiple players are involved, some operate in the upstream market. In a given business situation, a start-up may operate in a vertical agreement with an entity having significant market power<sup>11</sup> or even a dominant position.<sup>12</sup> The start-up may be belonging to an upstream market and the downstream market may belong to the end-consumer. Most of the digital market business have such business arrangements operating on the thrust of vertical agreement, and a multitude of agreements operate between a big company and a start-up. In this context, it is pertinent to point that as the start-up ecosystem in India evolves and matures, the startup/big tech interface is set to grow in importance. In such a situation, the competition law has a pivotal role to ensure that market operates and competes on fair terms. Speaking from the perspective of antitrust law, these kinds of agreements can be captured either under Section 3(4) or Section 4 of the Act. Mergers and Acquisitions under sections 5 and 6 are also efficiently and expeditiously reviewed, including many under newly introduced “green channel” route acclaimed globally.

<sup>8</sup> Section 18 of the Competition Act, 2002.

<sup>9</sup> See <https://www.cci.gov.in/sites/default/files/speeches/Address-World%20Competition%20Day%20Speech.pdf?download=1>.

<sup>10</sup> See Section 3, 19(3) of the Competition Act, 2002.

<sup>11</sup> For analysis of vertical agreements, EU guidelines clearly points that a market share above 30 percent requires examination. Refer EU Guidelines, Paragraph 110(3).

<sup>12</sup> Section 4, Explanation (a) of the Act defines “dominant position.”



The regulatory need to maximize the full growth potential of the startup industry is to ensure that there is adequate unbundling of services, to increase the contestability in the entire value chain. Internationalization of R&D has resulted in companies becoming eager to build on India's initial advantage in software development and engage in both technology deepening and technology widening activities. There is potential for immense value creation resulting from the complementarities between the strengths of big technology companies operating these platforms and startups. India, slated to produce well over new 100 unicorns by 2025 (presently, in 2022 one unicorn in every 5 days) is likely to witness increased interface between big tech and startups.

### **A. Competition Amendment Bill, 2020**

In order to cater to the needs of digital market, which mainly deals in "provision of services," the proposed Competition (Amendment) Bill, 2020 has also proposed to feed Section 3(4) clause (a) to (e) with the word "services," to capture the transforming digital market. This is a step in the right direction to provide a protected and properly regulated environment for start-ups to grow and compete on merits in the market. For the promotion of constructive exploitation of intellectual property assets by start-ups or any other enterprise the Bill seeks to insert section 4A.

### **B. Analyzing Start-up Business Under Section 3**

A Section 3 analysis must consider the actual market conditions, economic and legal context of such agreements, cumulative effect of several similar agreements must be considered holistically<sup>13</sup> since market can be distorted owing to cumulative effect of multiple similar agreements; an agreement which has the purpose of reducing competition is anti-competitive.<sup>14</sup> Section 3 of the Act is couched in negative terms, which signifies its wide coverage.<sup>15</sup> Furthermore, Section 3(4) of the Act is an inclusive definition, thus agreements which do not fall within clause (a) to (e) of Section 3(4) can also be analyzed as a standalone conduct under Section 3(4). Therefore, competition law in India is well equipped to capture all kind of anti-competitive conduct and furthermore to promote innovation and competition in the market.

### **C. Asymmetry in Bargaining Power and Bundling of Services**

The aspect of asymmetry in bargaining power has been also highlighted by CCI Chairperson in its Workshop speech.

The need of market is to unbundle the innovation quotient which is evident in government projects and initiatives which are said to be revolutionary in terms of digital technology use in public space. These includes the operation of UPI, Account Aggregator framework and Open Network for Digital Commerce ("ONDC)."

### **D. Fair Play in the Market by Data Repositories and Promoting Data Interoperability**

In India, presently the consumer data privacy as a concept is statutorily governed by Section 43A of the Information Technology Act, 2000 ("IT Act") read with the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 ("SPDI Rules"). Now in regards to sharing of information of customers of these e-commerce entities with third-parties, Rule 6(1) of SPDI Rules poses the strict requirement of taking consent in the privacy policy in explicit terms. Furthermore, Rule 4 of the SPDI Rules state that body corporate collects, receives, possess, stores, deals or handle information of provider of information, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and they shall also provide for purpose and usage of specific kinds of data collected.

The CCI Workshop has also highlighted that another area of concerns in terms of use of data by in the absence of interoperability and data portability,<sup>16</sup> disproportionate control over data may make leveraging easier and increase the possibility of exclusionary conduct and it impact the start-ups severely. Right to data portability is expected to increase competition and the range of options for consumers and also startups in digital markets. Data portability makes it easier for consumers to switch between providers and for new providers to offer tailored products or services based on prior information. Several markets in the digital economy are characterized by a high degree of concentration, and data portability is likely to limit switching barriers in these markets, and thus, help increase competition. As has also been highlighted in CCI Workshop, the pro-competition instruments of data interoperability and portability across platforms, too, have multi-dimensional implications spanning across

<sup>13</sup> Case C-234/89, *Stergios Delimitis*, Paragraph 19, 20.

<sup>14</sup> Case C32/11, *Alianz Hungaria*, Paragraph 16, 24-44

<sup>15</sup> *Excel Crop Care Ltd. v. CCI*, (2017) 8 SCC 47, paragraph 41.1

<sup>16</sup> As recognized under GDPR, the right to data portability allows individuals to obtain and reuse their personal data for their own purposes across different services.

critical aspects of privacy, data security, etc. The process of defining and maintaining common standards for portable and interoperable data may also be relevant.

In the light of foregoing discussion, what is important to note that, the contours of a subject matter law cannot be restrictive rather it has to be complementary. This will aid the growth of tech enabled start-ups who feed on data which they either retrieve directly from consumer or through intermediaries. Data Privacy and use of data is not confined to Privacy law alone rather it is steadily becoming a competition law issue and has been rightly recognized by regulators in India<sup>17</sup> as well as abroad<sup>18</sup>. If regulated and dealt judiciously, the fair usage of data will revolutionize the industry.

### ***E. Promoting a Competitive Environment for Start-ups***

India is the only country which has a digital public infrastructure that broadly comprises Aadhar and the India Stack, enabling private entrepreneurs to create startups quickly and at affordable costs. In fact, the central government, through recent initiatives for the Open Network of Digital Commerce, seeks to facilitate the creation of shared digital infrastructure, as was previously done for identity (i.e. Aadhar) and payments (i.e. Unified Payment Interface). These measures will spur innovation and help facilitate the roll-out of services by start-ups in an efficient manner.

The UPI framework in India has been christened on the touchstone of encouraging competition and promoting innovation. At present there are monthly more than 4.5 billion transaction per month through UPI. UPI through its enabling framework of interoperability allows every bank and financial institution to participate as approved by Reserve Bank of India (“RBI”). The problem of interoperability and data portability from the perspective of end consumer is by design built in the system. Its inherent pro-competition framework is a booster for any start-up in the financial market to reap benefits on innovation and merits. The digital payment system in India through UPI is already an epitome of huge success world over, as far as any government public projects are concerned. Similarly placed is the Account Aggregator framework initiated by RBI. The framework allows consumer to leverage their own data to access funding and provides interoperability. This not only promotes interoperability but also allows young lending platforms to better profile their customer needs who approach for availing service with their data. The ONDC framework has also been designed to promote entry of new players in the upstream market and also promote business efficiency and viability of sellers in the marketplace platforms. These initiatives will promote young start-ups and businesses in India with ease in customer acquisition as well as consumers switching among service providers thus promoting competition.

## **V. CONCLUSION**

The rapid digitization and meteoric expansion of digital market has challenged the status-quo of many existing laws and their effectiveness in addressing the market concerns. Competition Law and Policy in India has been agnostic with the market needs after the overhaul of earlier Monopolistic and Restrictive Trade Practices Act, 1969. Even today, where many other sectoral laws may have failed to scale up the regulatory environment, competition law has been at the forefront (for e.g. *addressing various overlapping concerns on consumer trust and protection, data privacy, e-commerce regulation etc.*). Needless to say, start-up ecosystem has been the engine of growth for the digital economy in India. The interplay of technology, data and law evidences that the start-up ecosystem in the country is really on the rise, thus the legal & policy instruments must be to ensure that spirit of innovation and contestability is kept intact. The Competition law in India is acting as a facilitator in growth of the overall market on merits and on fair and equitable terms where the interest of start-ups as well as established players are balanced in the interest of accelerated economic development. The CCI has played a proactive role in conducting investigation in various digital market issues and carrying out market studies and advocating discussions with stakeholders around issues which pre-empt the market from tapping its full potential. The Competition amendment Bill, 2020 which is expected to be taken up soon, when enacted would definitely provide granularity to the provisions of antitrust law in India and would better serve the need of start-ups and growing digital market.

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17 *Suo Moto* Case No. 01 of 2021.

18 Bundeskartellamt, B6-22/16, 6th Decision Division.



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