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## RENAISSANCE OF CORPORATE WORLD IN INDIA\*

### Abstract

India is claimed to be largest economy by the year 2030. What is marking rapid growth in the economy of this Country? What has made it the new hub of Investors from across the Globe? Authors in this essay answer the exact question, it is the New Government Policy focusing on calling in Investors for incorporating Business in India by various measures like bringing necessary amendment in legislation, grant of subsidies and ease in licensing, launching of programmes like Make in India and tax- free regime etc, encouraging Special Economic Zone, International Financial Services Centre etc. all these focus in providing convince and ease and caters to need of Investors who intend on trading in India, all of which has been dealt subsequently in the Essay.

It is now in India that the development in law and ecosystem is making it a hot hub for investors across the World. The Economist estimated in around 2005 that more than 50% of value of Public Companies was based on Intellectual Property. The Author does not hesitates to state considering the growth rate and change in law and policies it will not be surprising if the next Alphabet emerges from India.

### History

Buisness in India started almost around 1980s. That was the time when equity funding from institutions was very limited and was available mainly in Industrial Sector and focus back then mainly was on importing and adopting. Since past 3 decades many trends in India have largely improved the environment for starting up business. Our support for institutions like Stock Exchanges have increased money flow and has absorbed technologies. Growth and Money Flow has enlarged our market domestically and internationally. Moreover increase in education and its spreadness is creating a pool for skilled labour and global technologies also are also arrivig domestice market every second day.

If around 1990s, an enterprenur with an idea would have wanted to start a business in India, he would need financial capital to bring that idea into a form and eventually into market. Which back then would obviously would have been possible by tapping relatives or friends or quite possibly retail investors in public market which later proved to be one of the major sources for increase startups in India.

Then came phase where banks were nationalised and that helped in raising of capital through lending. Followed by the Infosys phase of India, where less of financial capital and more of intellectual capital was needed and which remarkable success in software sector of the industry. Eventually, entrepreneurs started coming out of their shell and started taking big risk

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like those who had built capital from earlier investment such as in construction or real estate now started investing in power toll roads, airports etc.

Previous decade we saw a US mirrored with other countries which led explosive and unimaginable growth of companies such as Amazon, Netflix, Alibaba, Google and so and so forth. The changed the definition of startups and business across the Globe.

### **The Companies Amendment 2015**

Government has ammended Sections and made new Provisions to Companies Act 2013. Does'nt the obvious question is what could the objective be that the Modi Government almost enacted the whole Legislation again? A genuine indication lies towards attracting the investors for incorporating business in India and hence making laws flexible. This has to be the obvious logic, as stances like Prime Minister's meeting with CEOs of Companies all over the Globe in his United State's trip and eventually encouraging and calling them invest in India, admitting that ongrowing business around the World will not wait for us, passing flexible legislation with provisions like Designated Activity Companies cannot be questioned on ground of their capacity, simplifying process of Megers by utilising Summary Appeal Procedure<sup>1</sup> etc. widens to ambit and scope for Investors to start their business in India. Hence, it was not even surprising to the authors when Netflix announced that it will now open in India.

Subesquently, the importanat ammended provisions of Companies Act 2013 have been dealt which will substantiate the observations made above by the authors.

First and foremost provision which substantiates is, No declarations for commencement of business, etc. and omission of requirement of filing e-form<sup>2</sup>. This reduces the filings which Companies had to made while incorporating business in India. Moreover, non applicability of Doctrine of Ultra Vires Clause vindicates the observation even more as there lays no requirement for Object Clause in Memorandum of Association anymore which will obviously lessen the administrative burden<sup>3</sup>.

Secondly, removal of requirement for Minimum Capital, earlier in order to incorporate new Private Limited or Public Limited Company had to arrange a minimum capital of INR 100000<sup>4</sup> and INR 50000 respectively<sup>5</sup>. Removal of such requirement is big relaxation for Investors who have limited capital while incorporating a new Indian Company.

Thirdly, there lays no requirement anymore for filing commencement report with the Registrar of Companies. Earlier, it was required so, to certify that all subscribers to the proposed paid-up capital have taken up the shares and also have paid the respective subscription amounts into the Company and that the paid-up capital is not less than the minimum prescribed capital<sup>6</sup>.

Fourthly, other important provisions like, allowing Companies to have only One Director from the previous requirement<sup>7</sup>, allowing issuance of ESOPs in Private Companies by way of Ordinary Resolution<sup>8</sup>, exemption of certain requirements<sup>9</sup> provided, deposit amount which the

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<sup>1</sup> Chapter 4, Part VII, The Companies Act 2013

<sup>2</sup> Section 11, The Companies Act 2013

<sup>3</sup> Section 38, The Companies Amendment Act, 2015

<sup>4</sup> Section 2(68), The Companies Amendment Act, 2015

<sup>5</sup> Section 2(71), The Companies Amendment Act, 2015

<sup>6</sup> Section 46, The Companies Amendment Act, 2015

<sup>7</sup> Section 128, Companies Act 2013

<sup>8</sup> Section 62(1)(a)(i), The Companies Amendment Act 2015

<sup>9</sup> Section 73(2), The Companies Act 2013

Private Company has accepted does not exceeds full aggregate of paid-up capital as well as free reserves of the company and the relevant filings is made in the Office of the Registrar.

Private Companies after the amendment also have restriction in public access in their Board Meetings, implying, less burden of compliance on Companies<sup>10</sup>. Private Companies can now have same statutory auditor if the companies are from the same group as the barring clause has now been exempted<sup>11</sup>. They even have ease in compliance of appointment of directors with respect to private companies as again even barring provision here as well is exempted<sup>12</sup>etc.

While there have been bold amendments the previous year there also lays concerns as several issues are yet to be adressed such easing placements for those private companies which are held closely, provisions relating to insider trading with respect to Private Companies specifically etc. In order to curb this, the Government has constituted the Committee to identify and recommend guidelines on these issues and their implementation.

But setting aside the ambiguity or even vagueness of certain issued notification, what is of utmost importance here and what the author is trying to bring into consideration, is the speedy meausre taken by Government to bring in the new amended legislation and put into effect immediatly. These actions are indicating time and again towards the renewed interest of the Government of India and their prime goal, that is, calling investors in India for Incorporating Business and turning Indian financial market into a hot hub of flowing economy. The amendments stated above in the legislation also focus only on bringing ease and convinence to Private Companies and inviting them to pool in their money eventually enhancing the trade and investment of the Nation.

### **Alternate Capital Raising**

One of the biggest issue faced by the startups is raising capital in the highly competitive market. Depending on the profitability of and prospects for a company, raising capital can be a difficult challenge.<sup>13</sup> There are various options available to a company to raise capital like IPO (initial public offering), venture capital, crowd funding, raising money through Non-Banking Financial Corporations (NBFC) and so on so forth. On 31<sup>st</sup> March 2015 Securities Exchange Board of India (SEBI) released a discussion on the alternate capital raising platform. These frameworks focus on the regulatory requirements for the startups in accessing the capital markets.

The proposed alternate capital raising platform has been specifically introduced for the companies working in the field of e-commerce, software product development, companies having innovative business model etc. The focus is on the companies which have a new and different kind of business model creating different kind of business opportunities.

In October, 2013 SEBI also introduced the Listing of Specified Securities on Institutional Trading Platform Regulation, 2013. This regulation was introduced to enable small and medium enterprises to get securities listed on the institutional trading platform (ITP) without carrying out an IPO by complying with the SEBI (Issue of Capital and Disclosure

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<sup>10</sup> Section 179(3), The Companies Act, 2013 (*Exempted*)

<sup>11</sup> Section 141 (3)(g), The Companies Act, 2013

<sup>12</sup> Section 160, The Companies Act, 2013

<sup>13</sup> Theodore F. Stefano, *Raising Strategies*, *Ecommerce Times*, <http://www.ecommercetimes.com/story/61130.html>, (last updated Jan, 11, 2008).

Requirements) Regulations, 2009 (the ICDR Regulations). Until now, companies listed on the ITP can raise capital through private placements and right issues of their securities.<sup>14</sup>

This proposed institutional framework of SEBI has realized the need for raising capital through alternate sources. This framework also bars the Retail Individual Investors from investing in the offers for listing on the ITP. One of the most important feature of the new proposal is that the minimum offer size of Rs. 50 Crore and minimum 500 allottees with minimum application size of Rs. 10 lakhs each. Further only those new age companies whose promoter (along with Person Acting in Concert) shareholding is less than 25% can access the proposed alternate capital raising platform.

### **International Financial Services Centre (IFSC)**

The primary motive behind the International Financial Services Centre (IFSC) is to cater to the customers residing outside the jurisdiction of the domestic economy. These centres take the responsibility of flows of finance, financial products and services across borders. The services provided by the IFSCs include cross border mergers and acquisition, wealth management, management of assets and cross-border and global tax management.

One of such IFSCs is set up in Gandhinagar, Gujarat in furtherance of a Special Economic Zone (SEZ). A notification under Foreign Exchange Management Act, 1999 (FEMA) was released by the Reserve Bank of India (RBI) to formulate regulations relating to financial institutions set up in the IFSC.

Establishment of an IFSC is of great importance as it will act as a catalyst for the growth of Indian financial sector. The move is expected to increase the revenue of the country by capturing approximately Rs. 1,334 crores per day or Rs.2 lakh crore per year worth of trading in rupee derivatives that presently goes to places outside India.<sup>15</sup>

It will also help the country to attract global investors which are very often lost to other countries due to non-availability of IFSCs. Not only setting up an IFSC in India will attract foreign entities to India but it will also allow foreign companies easy access to Indian companies who will be able to use the potential of the Indian economy in a better way. Apart from this it will also generate various employment opportunities for the people as the various organs of an IFSC require workforce thus creating which which in turn create employment opportunities for the people within a country.

### **Special Economic Zone (SEZ)**

Special Economic Zone (SEZ) is a particularly duty-free enclave and are regarded as foreign territory for the purposes of trade operations and duties and tariffs. SEZ is a geographical region that has economic laws different from a country's economic laws. Usually the goal is to increase foreign investments. SEZs have been created in many countries, including China, India, Jordan, Poland, Philippines and Russia.

Special economic zones are created within the national borders of a country where the laws relating to business and trade are different from the rest of the country. The primary objective of the SEZs is to increase the trade and investment in a country. Their objectives also include

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<sup>14</sup> Surya Kumar Gheda, *Capital Raising Prospects for Startups: India and US Compared*, <http://indiacorplaw.blogspot.in/2015/04/capital-raising-prospects-for-startups.html>, (last updated April, 6, 2015).

<sup>15</sup> SEBI Board Nod for International Financial Services Centre Guidelines, NDTV, <http://profit.ndtv.com/news/market/article-sebi-board-nod-for-international-financial-services-centre-guidelines-748680>, (last accessed on 03 Sept, 2016)

enhancement of foreign investment and create a competitive and free environment for exports. The Special Economic Zone policy in India was first implemented on 1<sup>st</sup> April, 2000.

A legislation relating to the SEZs has also been passed in India which offers tax exemptions to foreign investors. The SEZ Act was passed in the year 2005. This Act provides the much needed framework, and regulations for the development of SEZ and provides for the procedure for the operation of units in SEZs.

In India SEZs can be setup by many parties. Such parties include private, joint sector or state government, its agencies any public entity etc. SEZs can also be setup by foreign agencies also in India.

The establishment of SEZs require great degree of participation from the State government. The member of the inter-ministerial committee who is also a member of the State government is consulted on the proposal of the private SEZ. Before confirming the proposal, the ministry of commerce and industry and the state must be satisfied that adequate resources are present for the establishment of the SEZ.

SEZs can play a vital role in the development of a country's economy. The biggest issue in a country faced by foreign entities are high taxes, laws etc. Establishing SEZs with liberal laws will help in attracting more of foreign investors instead of losing them to other lucrative markets like China.

### **Insider Trading**

Insider trading is the buying and selling of the securities by someone who has access to some material information which is not available to the public. Insider trading can be both illegal or legal depending on when the transaction is done by the insider. For the purpose of this definition, insider is a person who has access to important non-public information about a corporation thus making directors and top executives as insiders. Trading while having special knowledge which is not known to public is illegal and unfair towards other investors.

When analyzing in the light of Indian scenario, it was the responsibility of the Securities Exchange Board of India (SEBI) to regulate insider trading and act as a watchdog.

There was a shift brought by the the Companies Act, 2013 in the regulation of insider trading. The parliament for the first time had passed a law outside the existing SEBI boundaries regulate insider trading. The companies act included some regulations from the SEBI (Prohibition of Insider Trading) Regulations, 1992 but SEBI later introduced new 2015 regulation which again changed the whole scenario considerably. So it is important to discuss the concept of insider trading in India from the both the perspectives.

The 1992 Regulations were restricted in their application to only listed companies. However, the New Regulations apply to both listed companies and companies that are 'proposed to be listed'. It is unclear how the term 'proposed to be listed' will be interpreted. We consider that this is intended to include such companies which have filed draft red herring prospectus with SEBI for an 'Initial Public Offer' or 'Offer for Sale'.<sup>16</sup>

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<sup>16</sup> *New Insider Trading Regime Compliance Issues and Challenges*, Khaitan & Co, 19 Feb. 2015.



When we compare the Companies Act and the SEBI regulations with regard to insider trading we find out that there are serious disagreements between the two. The authors shall analyze the Companies Act, 2013 and SEBI (Prohibition of Insider Trading) Regulations, 2015 side by side for a better understanding.

A very important aspect of insider trading is Unpublished Price Sensitive Information (UPSI). Section 2 (I) of the companies' act defines UPSI as any information relating to the company or the securities of the company which is generally not available to the public and which has the tendency to affect the price of the securities. This section further states certain categories of information which is of vital importance in relation to the securities like financial results, dividends, change in capital structure etc.

The most important provision of the companies act in this regard is Section 195 of the Companies Act. This provision brings private companies, public companies and listed companies under its purview. The 2015 SEBI regulation provides multiple defenses to insider trading. The defences included under the 2015 regulation are, trade undertaken pursuant to a trading plan, communication of Unpublished Price Sensitive Information (UPSI) in furtherance of a legitimate purpose and also includes any off-market transaction with the promoters who are in the possession of any secret information not available to the public in furtherance of a legitimate purpose. Many defences added to the 2015 regulation came from the Sodhi committee.

When we come to Section 195 of the companies Act there is only one defense available to the parties that is the communication required under the ordinary course of business or profession. We can clearly see that the defences under the 1995 regulation have been expanded considerably but these defences have no relation to Section 195 of the companies Act. Section 458 of the Companies Act gives power to the SEBI to give force to Section 195 of the Companies Act.

In the end it is dependent on the insider whether he can undertake to communicate UPSI even if such communication is an exception under the 2015 SEBI regulation and it will be seen over the period of time how SEBI interprets the two insider trading regimes.

### **Make in India**

India is booming with major reforms and has is said to become to be World's economy by 2030. When addressing Make in India objective, Hon'ble Prime Minister while introducing various economic programmes, emphasised working of growth and economy on 3 things namely; democracy, demand and Census-taking star. Skilled labour, favourable legal regime for business, technology shrewd with practical knowledge, combining it all, India is one hub which no investor can overlook.

In order to achieve the above mentioned vision, Government of India has initiated a new national programme, Make in India being the flagship programme. It is designed exclusively to facilitate investment, foster innovation; enhance skill development and build best-in-class manufacturing infrastructure. The vision of this programme is to increase growth contribution rate from 15% to 25% in National GDP. Including Manufacturing Sector, the Government of India through it will focus on 25 priority sectors that will be promoted equally. The crust is encouraging the Investment of Companies across the Globe in India. This will hopefully shoot up India's rank in "Ease of doing Business Index" where it lays low as of now.

Earlier there were various reasons as to investors not showing keen interest in setting up business in India. Some of them were the bureaucratic approach of former governments, lack of robust transport networks, and widespread corruption makes it difficult for manufacturers to

achieve timely and adequate production which the Government plans to curb through this National Programme<sup>17</sup>. And till now successfully the Make in India programme has attracted INR 2000 crore proposals from Investors across the Globe. Even the fact that Foreign Direct Investment across the Globe has fallen but increased in India by 40% proves the success story.

### **Other Initiatives**

The desire of Central Government of boosting Startups in India is not limited only till amendment in the legislation. Along with Make In India Programme, the government has unveiled bunch of incentives like offering tax holiday and inspector raj-free regime for three years, capital gains tax exemption, allocation of Rs 500 crore for Scheduled Caste and Scheduled Tribe and women entrepreneurs and has also announced Rs 10,000 crore corpus to fund them. A self-certification scheme was also declared in respect of nine labour and environment laws. All these measures only at facilitating growth for new Businesses about to enter market.

Steps for encouraging Investors and spreading awareness about the scope of growth is not only being taken by Government. Some of the State Governments are also offering incentives in order attract Investors like, Subsidized Land Prices, Reduced tariff and low rate of Interest at Electricity Power Supply and Loans respectively, Tax concessions for a number of years which fall in the ambit of State List of the Constitution<sup>18</sup>.

For encouraging growth in Backward Areas of the Country, the Government is providing incentives, cost of which is being shared by Central and State Government. These measures are being taken in order to provide convenience to the Companies who find it difficult to work in these areas and hence refrain from establishing their Industry there. Some of these incentives are, subsidies in Transportation for places that can not be easily reached like hilly or dry areas. Under the scheme announced transportation subsidy may range from 50% to 90% depending upon circumstances and area and difficulty being caused to the Companies. Even subsidies at 15% and 3% rate has been announced as a form of investment in Plant, Machinery and New Industrial Units in some areas respectively, this falls under the Capital Investment Subsidy Scheme.

Not only the Government but Financial Institutions like Industrial Development Bank of India and Industrial Finance Corporation of India have come forward for Loans for Entrepreneurs on all India Level. The Industries working in State Level, institutions like State Level Finance and State Industrial Development Corporation can avail for granting loans when in need but it certainly does require fulfillment of certain conditions. Government has also specified criteria for grant of loans in Businesses some of which are, Economic viability of the project, Technical assessment of the project, compliance of Environmental Laws etc.

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<sup>17</sup> Notification- Make in India, Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Government of India, 2014.

<sup>18</sup> 61 Items, Schedule VII, List II, Constitution of India, 1950.