Overview of the Companies (Amendment) Act, 2020*

Corporate laws form the bedrock of commercial regulation by governing entry of corporates into the market, regulating their functioning, ensuring accountability to their shareholders, as well as laying down corporate governance norms. Over the last few decades, India has witnessed a significant shift in its corporate governance framework. The enactment of the Companies Act, 2013, often noted to be one of the most significant legal reforms in India in the recent past, which was aimed at bringing Indian company law in tune with global standards. The enactment of the Companies Act, 2013 and various legal reforms undertaken since then in the field of companies' law have been intended to promote formation of corporate structures for conducting business, and making such conduct of business easier.

In view of constant effort of Government of India to facilitate ease of doing business in India to the corporates, a Company Law Committee (CLC) consisting of representatives from Ministry of Corporate Affairs, industry chambers, professional institutes and legal fraternity was constituted on the September 18, 2019 headed by Mr. Injeti Srinivas (Secretary of MCA), to give recommendations to decriminalize some more provisions of the Companies Act, 2013 and facilitate ease of living related changes.

Company Law Committee submitted its report on November 14, 2019. On the basis of this report, the Finance Ministry has proposed some major amendments in the Companies Act, 2013 under the Companies Amendment Bill, 2020 which was introduced in Lok Sabha on March 17, 2020. Later it was passed by the Lok Sabha on September 19, 2020 and by the Rajya Sabha on September 22, 2020. Finally on September 28, 2020, the Companies (Amendment) Act, 2020 received the assent of Hon'ble President of India.

Major Highlights of The Companies (Amendment) Act, 2020 :

1) **Decriminalisation of the Companies Act, 2013- Reduction in Penalties:**
   The roots of necessity to decriminalize certain compoundable offences are elevated from the Ministry of Corporate Affairs (MCA) vide *order dated 13.07.2018*, wherein, The MCA has constituted a review committee under the chairmanship of Mr. Injeti Srinivas, to review the offences which are prescribed under the Act and to analyse, examine and peruse the need to decriminalize some of the offence by making recommendation to the Central Government *inter-alia* on re-categorisation of certain 'acts' punishable as compoundable offences to 'acts' carrying civil liabilities, improvements to be made in the in-house adjudication mechanism etc.

* *Directorate of Academics*

Views expressed in the Article may not express the views of the Institute.

The relevant recommendations regarding compoundable offences suggested by the Committee are as follows:

1. Re-categorizing of 16 offenses out of 81 which are in the category of compoundable offenses to an in-house adjudication framework wherein defaults would be subject to penalty by an adjudication officer.
2. Instituting a transparent and technology driven in-house adjudication mechanism and increasing the transparency in the in-house adjudication mechanism by minimizing physical interface, conducting proceedings on an online platform and publication of the orders on the website.
3. Strengthening the in-house adjudication mechanism by necessitating a concomitant order for making good the default at the time of levying penalty, to subserve the ultimate aim of archiving better compliance.
4. Declogging the NCLT by enlarging the jurisdiction of Regional Director (RD) by enhancing the pecuniary limits up to which they can compound offences under section 441 of the Companies Act, 2013.

Based on the recommendations made by the Committee, the Central Government brought in relevant changes by passing of the Companies (Amendment) Act, 2019.

Despite the ease in penal pressure brought about by the above enactment, the Government continued to feel the acute need to further liberalise and relax the stringent penal provisions of the Act. This clubbed with the urge to promote ease of doing business and to foster growth of corporates, led to the constitution of the Company Law Committee in September 2019.

Company Law Committee recommended for the decriminalization of the Companies Act, 2013, as the much needed change in today's corporate world. In line with global practices, it is essential to strike a balance between civil and criminal liabilities for corporates. It was noted that serious violations of the law, especially wrongful conduct involving fraudulent elements, should be dealt with under criminal law, due to the nature of such wrongs and the degree of public interest involved, it may be prudent to adopt a strict approach to fraudulent conduct. However, procedural, technical and minor non-compliances, especially the ones not involving subjective determinations, may be dealt with through civil jurisdiction instead of criminal.

The Companies (Amendment) Act, 2020 removes the imprisonment for certain offenses, substitutes fine by penalty in and reduces amount of payable as penalty across the board. In certain minor omissions, etc. penal consequence has been omitted. The various aspects of Decriminalisation of offences are:

(i) **Omission of certain offences -** The Companies (Amendment) Act, 2020 has omitted certain offences which relate to the non-compliance of orders of the NCLT, i.e. orders with respect to variation of shareholders rights, rectification of register of members, publication of order of the NCLT for reduction of Share Capital, redemption of debentures on maturity or payment of interest etc. Further, offences provided under Section 342(6) of the Companies Act, 2013 related to the penal provisions w.r.t. non-cooperation by the Liquidator or any present and past officer of the Company, is omitted, leaving it to the prosecuting court to mandate cooperation.

(ii) Removing imprisonment and subjecting the offences to fine alone

Based on the recommendation of the CLC, the legislature has removed imprisonment for the certain listed offences while retaining the criminal liability to payment of fine alone, such as, for the contravention of the matters prescribed or to be stated in the prospectus as per Section 26, failure of the Company to comply with the requirements of the special license given to Section 8 companies, default in complying with buy-back requirements under Section 68 etc.

(iii) Re-categorization of Offences

Keeping in mind the overall pendency of cases in courts and in an attempt to alleviate the burden of such courts, the Companies (Amendment) Act, 2020 seeks to enforce and adopt a principle-based approach in removing the imposition of penal consequences in case of minute and technical defaults. Further, the levying of such monetary penalties can now be adjudicated by In-house Adjudication Mechanisms (IAM) as provided under section 454 of the Companies Act, 2013, without having to approach criminal courts.

Thus in case the default relates to non-compliance of section 92(4) or sub-section (1) or sub-section (2) of section 137 and such default has been rectified either prior to, or within thirty days of, the issue of the notice by the adjudicating officer, no penalty shall be imposed in this regard and all proceedings under this section in respect of such default shall be deemed to be concluded.

(iv) Extended applicability of section 446B

The Companies (Amendment) Act, 2020 extended applicability of Section 446B relating to lesser penalties for small companies and one person companies, to all provisions of the Companies Act, 2013 which attract monetary penalties and also extend the same benefit to Producer Companies and start-ups.

In case of One Person Company, small company, Start-up company or Producer Company, or by any of its officer in default, or any other person in respect of such company, then such company, its officer in default or any other person, as the case may be, shall be liable to a penalty which shall not be more than one-half of the penalty specified in such provisions subject to a maximum of two lakh rupees in case of a company and one lakh rupees in case of an officer who is in default or any other person, as the case may be.

(v) Offences for which alternate mechanism is provided

The amendment has further brought in alternate framework or mechanism for the supervision of certain provisions such as non-compliance with the order of the RD directing change of name of the Company, the criminal fine provided under Section 16(3) is substituted by enabling the Central Government to allot a new name to the deterrent company and directed the Registrar to enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name, which the company shall use thereafter. Another important change brought in under this mechanism is with regard to Section 441(5), in the case of non-compliance with the order of the compounding authority, punishment by way of imprisonment and criminal fine is substituted by doubling the compounding fee automatically. The intention of the legislature is to deter non-compliance by imposing a greater penalty, rather than by initiating a separate offence for the same non-compliance.

Further a contravention of Section 284 of the Companies Act, 2013 which deals with the failure of employees, promoters and directors to co-operate with the company liquidator, attracted an imposition of a fine as prescribed under the Act. However, the Amendment Act has removed such a fine and has empowered the company liquidator to apply to the NCLT in order to obtain directions from it.

2) Easing out of the framework for Corporate Social Responsibility

Under the Companies Act, 2013, every companies with net worth of Rs. 500 Crore or more, turnover of Rs. 1000 Crore or more or net profit of Rs. 5 Crore or more during the immediately preceding financial year are required to constitute CSR Committees and spend 2% of their average net profits of the company made during the three immediately preceding financial years, towards its CSR policy. The Companies (Amendment) Act, 2020 exempts companies with a CSR liability of up to Rs. 50 lakh a year from setting up CSR Committees. Further, companies which spend any amount in excess of their CSR obligation in a financial year can set off the excess amount towards their CSR obligations in subsequent financial years.

With regard to the penal provision, if a company is in default in complying with the provisions of sub-section (5) or sub-section (6) of Section 135 related to CSR expenditure, the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII of the Companies Act, 2013 or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII of the Companies Act, 2013, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less.

3) Change in Definition of Listed Company under Section 2 (52)

Prior to the Amendment Act, the definition says that "a company which has listed any of its securities on any recognized stock exchange is a 'Listed Company'". The Company Law Committee felt that classifying a private limited company as a 'listed company' merely based on listing of certain debt securities offered on a private placement basis seems inappropriate and is required to be addressed as they are sceptical about the strict regulations imposed on listed companies as opposed to unlisted private companies. There was no differentiation under the Act that, whether the company is an equity listed company or a debt listed company and the compliances are the same, which is not the case with SEBI Listing Regulations, wherein the compliances are less for debt listed companies. In line with the Government's steps to promote ease of doing business, the Committee decided that it would be more appropriate to exclude such private companies from the definition of a 'listed company'.

The Central Government has now been empowered to exclude such class of companies under the definition of Listed Companies, which are listed or intended to list such class of securities, as may be prescribed in consultation with the SEBI. Thus, companies which have listed only debt securities (NCDs) may be excluded from the definition of listed company for the purposes of the Companies Act, 2013.

4) Introduction of chapter on Producer Companies

The concept of producer companies was introduced in India in 2002 with the insertion of Part IXA in the 1956 Act. The purpose behind introduction of the concept of a producer company is to regulate the Indian agrarian economy more effectively. a producer company is a body corporate comprising of farmers and agriculturists who work in cooperation with each other to promote better standards of living and gain easier access to credit, technology, market etc. The Companies Act, 2013 does not contain any separate provisions for regulation of producer companies. By virtue of Section 465 of the Companies Act, 2013, producer companies continue to be governed by Part IXA of the Companies Act, 1956. Considering that the 1956 Act has been repealed, it is not feasible to amend any of the provisions of Part IXA of the Companies Act, 1956, even though these continue to remain in force. The procedure for amending provisions pertaining to producer companies even if it is assumed that such amendment is legally tenable, would become convoluted and tedious in the light of the repeal of the Companies Act, 1956.

CLC propounded that since the government is keen on promoting producer companies, it may be appropriate to take up amendments and relaxations to the applicable law for such companies instead of waiting for more time for a new law to be enacted in this regard. In line with CLC's proposal, the Companies (Amendment) Act, 2020 has introduced provisions that are similar to the Companies Act, 1956 for the governance of such companies. At the outset, these provisions relate to incorporation of producer companies and other matters, share capital and members right, general meetings, share capital, Powers and functions of Board, mergers and amalgamations of producer companies etc.

5) Reduction of timeline for rights issue

A rights issue is an option exercisable by existing shareholders of a company to purchase further share capital in proportion to their current holding, which is exercisable for a specified period. Companies typically pursue rights issue as an avenue to raise funds for various reasons, ranging from expansion or acquisitions to paying down debts. Section 62 of 2013 Act, governs this process.

Earlier this year, SEBI issued a discussion paper reviewing the process of rights issue. The paper highlighted the need to reduce the timelines in both the pre-issue opening phase and after issue closure to better serve the interests of both the issuers and investors. It also proposed several measures for the same by making amendments to the regulatory mechanism under relevant SEBI regulations. Through this, the timeline from the date of the board meeting to decide upon the rights issue to the date of listing of shares was proposed to be cut down from 55-58 days to roughly 31 days. In line with this, the CLC observed that as per market practice, the issuance of an offer completely closes within 2-3 days and allotment is completed within 5-7 days. The Committee was of the view that, in light of market practices that Section 62(1) of the Companies Act, 2013 be amended to enable the Central Government to prescribe a shorter time period than the mandatory 15 days' time period provided in this provision. In line with CLC recommendation the Amended Act has inserted the words 'or such lesser number of days as may be prescribed, after 'not being less than fifteen days'. The amended provision now reads as *"the offer shall be made by notice* *specifying the number of shares offered and limiting a time not being less than fifteen days or such lesser number of days as may be prescribed and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;'*. This enables the companies to close the rights offer in a shorter period and to complete the process

6) **Constitution of NCLAT benches**

The Amendment Act has inserted section 418A with the objective of setting up more benches of National Company Law Appellate Tribunal (NCLAT) that will ordinarily sit in New Delhi or such other places as the Central Government may, in consultation with the Chairperson, notify. The said benches of NCLAT will be constituted by atleast one Judicial Member and one Technical Member. Considering the quantum of cases that NCLAT has to deal with, this is a welcome move which will not only reduce the burden of NCLAT but also will ensure speedy disposal of matters addressed to the NCLAT.

7) **Provisions for allowing payment of Remuneration to Non-Executive Directors in case of Inadequacy of Profits**

Sections 197 and 198 of the Companies Act, 2013 Act set out the provisions for the remuneration payable by a public company to its executive directors (including whole-time directors, managing directors and managers) and non-executive directors (other than whole-time directors, managing directors). Section 197(3) provides that if a company has no profits or its profits are inadequate, then the company shall not pay any remuneration (other than sitting fee) to its directors, including managing director, whole-time director or manager, except as provided under Schedule V of the Companies Act, 2013. The abovementioned provisions read together provide for remuneration payable to executive directors in every case, including in case of inadequacy of profits or losses. While Section II of Part II of Schedule V of the Companies Act, 2013 provides remuneration payable to managerial persons where the company has no or inadequate profits, similar provisioning has not been done for nonexecutive directors. The Committee also noted that in case of independent directors, Section 149(9) provides that *"notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under subsection (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members."*

The Committee noted that non-executive directors, including independent directors, devote their valuable time and have experience to give critical advice to the company. Therefore, they should be appropriately compensated for the same even in case of inadequacy of profits or losses as is permissible for executive directors. The CLC also discussed the crucial role played by independent directors of a company in terms of bringing objectivity into the functioning of the Board and improving its effectiveness. Thus, the Committee felt the need for companies to adopt remuneration policies that would attract and retain talented and motivated directors. It was felt that inconsistency in payment of remuneration in case of inadequacy of profits or losses to executive directors *vis-à-vis* non-executive directors would dis-incentivise the latter. Therefore, Committee concluded that it would be appropriate to bring specific provisions in this regard in Section 149 and 197 before any amendment is made to Schedule V in this regard.

Now by amendment to the provisions of section 149(5) and 197 (3) of the Companies Act, 2013, the payment of remuneration to non-executive directors including Independent Directors has been provided and such remuneration shall be payable in accordance with the provisions of Schedule V of the Companies Act, 2013. Such remuneration shall be exclusive of any fee payable for attending the meetings of the Board or Committees or for any other purpose whatsoever as may be decided by the Board under section 197(5) of the Act. This is another welcome feature and enable companies to attract talented directors on their Boards.

8) Listing of Securities on Foreign Stock Exchanges

New sub-sections 3 and 4 were introduced to section 23 of the Companies Act, 2013 relating to public offer and private placement empowering Central Government to permit certain class of public companies to issue certain class of securities for the purposes of listing on permitted stock exchanges, in permissible foreign jurisdictions or such other jurisdictions, as may be prescribed. The Central Government may exempt any class or classes of public companies referred to in the newly inserted sub-section (3) from any of the provisions of Chapter, III of the Companies Act, 2013 i.e. prospectus and allotment of securities, Chapter IV i.e. share capital and debentures, sections 89 i.e. declaration in respect of beneficial interest in any shares, section 90 i.e. to register significant beneficial owners in a company or section 127 i.e. failure to distribute dividends. This enables the Indian corporates which are well known in international markets, to list their securities in permissible foreign jurisdictions.

9) Exemptions from filing resolutions under section 117

Earlier, the provisions in respect of filing of resolutions passed to grant loans or give guarantee or provide security in respect of loans under clause (f) of sub-section (3) of section 179 in the ordinary course of its business was not applicable to a banking company. However, such exemption was not available to Non-Banking Financial Companies and Housing Finance Companies, though some of them are as big as banking companies and such confidentiality is required. Now the same has been extended to any class of non-banking financial company registered under Chapter IIIB of the Reserve Bank of India Act, 1934 and to any class of housing finance company registered under the National Housing Bank Act, 1987. Therefore, any class of NBFC and any class of Housing Finance Company are also exempt from filing of resolutions passed to grant loans or give guarantees or to provide security in respect of loans in the ordinary course of their business.

10) Periodic financial results for unlisted companies:

At present, only listed companies are required to submit their financial results duly audited or limited reviewed with the stock exchanges under the SEBI Listing Regulations. However, Private companies and unlisted Public companies which are as big as listed companies in size are under obligation to file their results only annually with the Registrar.

A new sub-section 129A is inserted under which the Central Government may, require such class or classes of unlisted companies, as may be prescribed, —

(a) to prepare the financial results of the company on such periodical basis and in such form as may be prescribed;

(b) to obtain approval of the Board of Directors and complete audit or limited review of such periodical financial results in such manner as may be prescribed; and

(c) file a copy with the Registrar within a period of thirty days of completion of the relevant period with such fees as may be prescribed.

11) Companies (Amendment) Act, 2020, *inter alia*, also provided for the following, namely:

- clarified the jurisdiction of trial court on the basis of place of commission of offence under section 452 of the Act for wrongful withholding of property of a company by its officers or employees, as the case may be;
- relaxed provisions relating to charging of higher additional fees for default on two or more occasions in submitting, filing, registering or recording any document, fact or information as provided in section 403;
- exempted any class of persons from complying with the requirements of section 89 relating to declaration of beneficial interest in shares and exempt any class of foreign companies or companies incorporated outside India from the provisions of Chapter XXII relating to companies incorporated outside India;

Conclusion

At the outset, the relaxations provided for under the Act can not only help the companies in the reduction of compliance costs but will also help them focus on their business activities. It will be easier for companies to rectify their defaults, pay the penalty and become compliant as well as aligns with the objective of promoting ease of doing business.

References:

1) Companies (Amendment) Act, 2020

2) Company Law Committee Report, 2019

3) Report of the Committee to Review Offences under Companies Act, 2013, dated 2018.

***