

Companies (Amendment) Act, 2020: Ease of Living and Doing Business

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The Context

Amidst the din and drama surrounding the three farmers' Bills, the passage of the landmark Companies (Amendment) Bill, 2020 in the Parliament went almost unnoticed. It was introduced earlier this year during the curtailed Budget Session amidst gathering storm of Covid-19. It was passed during the shortened Monsoon Session amidst fears of rapidly reinvigorating curse of the pandemic.

On 22 September 2020, replying to the debate on the Bill in the Rajya Sabha, Nirmala Sitharaman, the Minister of Finance and Corporate Affairs, said that the Bill essentially consists of two different compartments. The first one consists of 48 amendments, all of which aim at decriminalization of corporate offences and related matters, which are important for greater ease of living, both for the companies and also for citizens. The second compartment, having 13 sections, one new Chapter and three new insertions, essentially addresses ease of living. The new Chapter is going to help many producer organizations. Earlier, in the Lok Sabha on 19 September, she had said that decriminalising provisions in the company law will especially benefit medium and small companies.

The amendments under the Act are based on the recommendations of the Company Law Committee, which was constituted with representatives from the industry chambers, professional institutes and legal fraternity. The Committee submitted its report to the Minister of Corporate Affairs on November 14, 2019. The recommendations of the Committee largely addressed re-categorization of certain criminal compoundable offences into civil wrongs carrying civil liabilities, rationalization of penalties, mechanisms for reducing the overall pendency of disputes and certain other ancillary changes to address emerging issues impacting the working of corporates in the country.

Companies (Amendment) Act, 2020 (referred to as “the Act”

hereafter) has been promulgated with a view to foster the initiative of the Government for ease of doing business and ease of living of corporates in India by introducing changes to the Companies Act, 2013 (referred to as “the Companies Act” hereafter). Broadly, the changes introduced by the Act are aligned with the principle of providing ease of doing business to corporates in India, and deal with the following: (a) decriminalization of certain non-grave offences under the Companies Act, especially in cases where the defaults are devoid of any *mala fide* intention or do not involve larger public interest; (b) rationalization of existing penalties; (c) other modifications and relaxations to promote ease of doing business in India, including but not limited to easing the compliance framework for companies and according flexibility for running of businesses; and (d) a framework for faster and effective disposal of cases.

Decriminalising Offences

Certain offences contemplated under the Companies Act, such as defaults in relation to: (i) compliance with the provisions of the Companies Act dealing with variation of shareholders rights; (ii) publication of the order of the National Company Law Tribunal for reduction in shares; and (iii) compliance with the orders of the Tribunal in respect of debentures, amongst others, have been omitted from the Companies Act. Additionally, with respect to certain other non-grave offences punishable with imprisonment and/or with monetary penalty, the Act now provides for levy of monetary penalty only. In this respect, offences such as default in compliance by a company: (i) while purchasing its own securities; (ii) for registration of charges; (iii) in maintaining registers, filing returns or taking other necessary steps regarding declaration of significant beneficial ownership; and (iv) in maintaining books of account to be kept by the company, which currently contemplate imprisonment and/or monetary penalty for defaults, are to be awarded only monetary penalties, as applicable. The rationale for introducing such



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modifications is to decriminalise minor procedural or technical lapses under the Companies Act into civil wrongs and reduce the overall pendency of the courts by removing the criminality in case of defaults, the commission of which is not linked with any *mala fide* intention on the account of the wrong-doer and/or does not involve larger public interest.

The Act also aims to reduce the penalties for certain offences such as non-maintenance of register of members, failure to file annual return within the prescribed timelines, failure to file resolutions and agreements in terms of the Companies Act and non-compliance of provisions relating to unpaid dividend account.

An alternate framework for certain offences has been introduced. For instance, if a company fails to abide by the order of the Regional Director under Section 16(1) of the Companies Act (requiring rectification of the name of the company on the grounds that such name is identical or similar to an existing company, or a registered trademark) within 3 months of passing of such order, then instead of imposing civil liability on the company an auto-generated name shall be assigned to such company, which it shall be bound to use until it is changed through due process as per the provisions of the Companies Act.

The Act substitutes sub-section (6) of Section 348 of the Companies Act which imposed monetary penalties on the company liquidator for non-compliance of the provisions relating to information on pending liquidation as set out in Section 348 of the Companies Act, by a new provision that if a company liquidator, who is an insolvency professional, is in default in complying with the provisions of the aforesaid Section, then the default shall be deemed to be a contravention punishable under the Insolvency and Bankruptcy Code, and the rules and regulations framed thereunder. The Act further omits the penalty imposed on the company liquidator for conduct of audit by a person not qualified to act as auditor under the Companies Act.

Corporate Social Responsibility

The Act provides that the companies which have corporate social responsibility spending obligation up to rupees fifty lakhs will no longer be required to constitute the corporate social responsibility committee in accordance with the Companies Act and the functions of such committee provided under the Companies Act shall be required to be discharged by the board of directors of such company. Further, companies under CSR provision (Section 135) will be allowed to set off any amount spent in excess of their CSR spending obligation in a particular financial year towards such obligation in subsequent financial years.

Producer Companies

The Act adds a very lengthy new Chapter XXI (Producer Companies) to the Companies Act spread over sections 378A to 378ZU. 'Producer Companies' primarily refer to companies that

are engaged in businesses such as the production, harvesting, procurement, grading, pooling, handling, processing, marketing, selling or exporting primary produce or generation, transmission, distribution of power or such other activities, as prescribed under the Companies Act, 1956. The inserted provisions are similar to Part IXA of the Companies Act, 1956 and provide for matters relating to the governance of producer companies, such as incorporation, management, general meetings, share capital and membership rights, finance, accounts and audit, loans to members and investment and amalgamation and merger of producer companies.

Delisting and Listing of Companies

The Act empowers the Central Government to exclude certain companies in consultation with Securities and Exchange Board of India from the definition of 'listed companies' under the Companies Act. The objective of according such flexibility to the Central Government is to exclude such private companies that list their debt securities on a recognized stock exchange upon their allotment on private placement basis, thereby falling under the definition of a 'listed company' under the Companies Act. The Act further provides for permitting listing of certain companies on permitted stock exchanges in permissible foreign jurisdictions or such other jurisdictions, as may be provided by the rules framed in this regard.

Other Notable Amendments

- (a) The Act amends Section 149 and 197 of the Companies Act to include non-executive directors and independent directors (as applicable) at appropriate places to bring parity in remuneration of the non-executive directors with the executive directors and independent directors. The Act also makes special provisions for payment of remuneration to executive directors of a company (including managing director and other whole-time directors) if the company has inadequate or no profits in a year.
- (b) The Act empowers the Central Government to exempt certain companies in certain respects, by amending the following provisions of the Companies Act:
 - i. The Act enables the Central Government to exempt any class of persons from undertaking the compliances as set out in Section 89 of the Companies Act, which *inter alia* deals with declaration of beneficial interest in shares.
 - ii. The Act inserts a new Section 393A with a view to empower the Central Government to exempt any classes of foreign companies or companies incorporated outside India or to be incorporated outside India, from the applicability of the provisions of Chapter XXII of the Companies Act relating to manner of governance of companies incorporated outside India.

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- (c) The Act extends the benefit of reduced penalties which was earlier available to small companies and one person companies to start-ups and producer companies as well.
- (d) The Act attempts to speed up the rights issue process in line with market practices, by reducing the mandatory timelines to be provided for exercising such rights under Section 62 of the Companies Act by empowering the Central Government to provide for a shorter timeline in this respect.
- (e) The Act extends the benefit of exemption from filing of a resolution with the RoC, for grant of loans, or giving guarantee or providing security in respect of loans, as currently available to the banks, to non-banking finance companies and housing finance companies.
- (f) A new section 418A has been inserted in the Companies Act in order to provide for constitution of benches of the National Company Law Appellate Tribunal (“NCLAT”), which will ordinarily sit in New Delhi or such other place, as the Central Government may in consultation with the chairperson, notify.

Conclusion

The amendments now introduced in the Companies Act, 2013 will not only encourage honest stakeholders and corporates to continue their business in India but also help reduce the overall burden of the courts. Further, considering the present situation of COVID-19, where a substantial number of companies are facing losses, it had become imperative for the Government to introduce a more flexible corporate governance regime for the stakeholders. The Act will also ensure smooth running of businesses in India and buttress various initiatives of the government, such as *Atmanirbhar Bharat*, make in India, start-up India, vocal for local, and local for global.

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