

India – Companies (Amendment) Act, 2019

On 31 July 2019, the Ministry of Corporate Affairs introduced the [Companies \(Amendment\) Act, 2019](#) (“**Amendment**”), replacing the [Companies \(Amendment\) Ordinance, 2018](#) (“**Ordinance**” previously discussed hereand crystallising most of its provisions (as further amended in 2018 and 2019).

The provisions of the Amendment are meant to have come into force on 2 November 2018 (date of effect of the Ordinance), save for sections 6, 7 and 8, clauses (i), (iii) and clause (iv) of section 14, section 20, section 31, sections 33, 34 and 35 and sections 37 and 38 which have come into force on 15 August 2019.

Section 21 of the Amendment pertaining to CSR is still to be notified.

Salient features of the Amendment

➤ **Compulsory Corporate Social Responsibility (CSR)**

Under the existing section 135 of the Companies Act, 2013 (“**Act**”), all companies having:

- net worth of INR 5 billion (c. Euro 62.9 million) or more, or
- turnover of INR 10 billion (c. Euro 125.8 million) or more, or
- net profit of INR 50 million or more during any financial year

are required to constitute a CSR committee and dedicate 2% of the average net profits made by the company in 3 immediately preceding financial years to CSR activities (“**CSR Contribution**”).

If the company fails to meet its CSR obligations, the reasons for not spending the CSR amounts are required to be disclosed in the directors' report. The Act does not impose any sanction.

Section 21 of the Amendment introduces changes to section 135 of the Act with the view to lead to greater compliance with section 135.

Once notified, section 135 will provide as follows:

- for the purpose of calculating the CSR Contribution, in cases where an entity has not completed 3 years, the profit for immediately preceding financial year shall be taken.
- companies who do not fully spend their CSR funds will still need to disclose the reasons for the non-spending in their annual report.
- However, in case the CSR funds are not spent:
 - in respect of an ongoing CSR project:

- the company must within 30 days of the end of the financial year transfer the unspent CSR funds into a special account to be opened with a scheduled bank and called an Unspent Corporate Social Responsibility Account (“**Unspent CSR Account**”).
 - Proceeds of the Unspent CSR Account will have to be spent by the company towards the CSR projects within 3 financial years of the date of such transfer.
 - If the company is unable to spend the sum in the Unspent CSR Account within the prescribed period of 3 financial years, such unspent amount should be transferred to a fund specified under Schedule VII of the Act within 6 months of the end of the relevant financial year.
- if there are no ongoing CSR projects: the unspent funds should be directly transferred to the Schedule VII fund within 6 months of the end of the relevant financial year.
- sanction: in case of contravention, a fine of INR 50,000 up to INR 25,00,000 would be imposed on the company and every officer in default (“**OiD**”) shall be punished with imprisonment of up to 3 years or with fine of INR 50,000 up to INR 5,00,000, or with both.

➤ **Commencement of business**

Section 3 of the Amendment reinforced section 10A (commencement of business) of the Act introduced by the Ordinance. Section 10A of the Act prevents a company which is incorporated after the commencement of the Ordinance and having a share capital from commencing any business or exercise any borrowing powers unless a declaration of commencement of business is filed by a director of such company with the Registrar of Companies (“**RoC**”) within 180 days of the incorporation of the company.

Such declaration shall state that:

- every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of filing such declaration; and
- such company has filed a verification of its registered office in accordance with Section 12(2) of the Act

In case of contravention, the company shall be liable of a penalty of INR 50,000 and every officer in default of a penalty of INR 1,000 for each day during which such default continues, subject to a maximum amount of INR 1,00,000.

To be noted: the concept of ‘Commencement of Business’ existed in the erstwhile Companies Act, 1956 and was initially kept in the Act but was done away with in 2015 by the Companies (Amendment) Act, 2015. It has been reintroduced by the Ordinance.

In addition, section 4 of the Amendment introduces a new sub-section 8 in section 12 of the Act empowering the RoC to cause physical verification of the registered office of company, where the RoC has reasonable cause to believe that the company is not carrying on any business or operations in contravention of section

10A of the Act and to initiate action for the removal of the name of such defaulting company from the RoC.

➤ **Prevention of oppression and mismanagement**

The Amendment amended section 241 of the Act stating that where the Central Government is of the opinion that there exist circumstances suggesting that:

- any person concerned in the conduct and management of the affairs of a company is guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law or of breach of trust; or
- the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices; or
- a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or
- the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest;

the Central Government is empowered to initiate a case against such person and refer the same to the National Company Law Tribunal (“NCLT”) with a request that the NCLT may inquire into the case and record a decision as to whether or not such person is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.

Pursuant to sections 242 and 242 of the Act as amended by the Amendment, the NCLT shall record its decision stating as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company. The person who is not a fit and proper person shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of 5 years from the date of the decision.

In case of removal from office, such person shall not be entitled to, or be paid, any compensation for the loss or termination of office.

➤ **Registration of charges**

The requirement of registration of a charge within 30 days of its creation with the RoC (section 77 of the Act) remains unchanged.

The Amendment confirmed the Ordinance: in case of charges created on or after the commencement of the Ordinance, the RoC may, on an application by the company, allow registration of such charges to be made within 60 days of its

creation, which may further be extended to another 60 days on payment of ad valorem fees.

Section 11 of the Amendment reintroduced the erstwhile 300 day deadline: in case of charges which was created prior to the commencement of the Amendment, the RoC may, upon an application by the company, allow registration of such charges to be made within 300 days of its creation, and provides for a further extension of up to 6 months from the date of the commencement of the Amendment, on payment of additional fees as may be prescribed for different classes of companies.

➤ **Provisions relating to penalties**

Changes in penal provisions introduced by the Ordinance have been made effective for the following non-compliances:

<i>Failure to comply with</i>	<i>Penalty</i>
Prohibition on Issue of Shares at Discount	Company: amount equal to the amount raised through the issue of shares at a discount or INR 5,00,000 whichever is less; refund all monies received with interest at the rate of 12% per annum, from the date of issue of such shares OIDs: amount equal to the amount raised through issue of shares at a discount, or INR 5,00,000, whichever is less
Notice to be given to the RoC for Alteration of Share Capital	Company & OIDs: INR 1,000 for each day during which such default continues, or INR 5,00,000 whichever is less
Filing of Annual return	Company & OIDs: INR 50,000 and in case of continuing failure, with a further penalty of INR 100 for each day after the first during which such failure continues, subject to a maximum of INR 5,00,000
Statement to be Annexed to Notice	OIDs: INR 50,000, or 5 times the amount of benefits accrued

Notice calling a meeting which provide for voting by proxy	OIDs: INR 5,000
Resolutions and Agreements to be Filed	<p>Company: INR 1,00,000, and in case of continuing failure, INR 500 for each day after the first during which such failure continues, subject to a maximum of INR 25,00,000</p> <p>OIDs & Liquidator: INR 50,000 and in case of continuing failure, with further penalty of INR 500 for each day after the first during which such failure continues, subject to a maximum of INR 5,00,000</p>
Report on Annual General Meeting	<p>Company: INR 1,00,000, and in case of continuing failure, with a further penalty of INR 500 for each day after the first during which such failure continues subject to a maximum of INR 5,00,000</p> <p>OIDs: INR 25,000 and in case of continuing failure, with a further penalty of INR 500 for each day after the first during which such failure continues, subject to a maximum of INR 1,00,000</p>
Copy of Financial Statement to be Filed with the RoC	OIDs: INR 1,00,000, and in case of continuing failure, with further penalty of INR 100 for each day after the first during which such failure continues, subject to a maximum of INR 5,00,000
Company to Inform Director Identification Number to the RoC	<p>Company: INR 25,000 and in case of continuing failure, with further penalty of INR 100 for each day after the first during which such failure continues, subject to a maximum of INR 1,00,000</p> <p>OIDs: INR 25,000 and in case of continuing failure, with further penalty of INR 100 for each day after the first during which such failure continues, subject to a maximum of INR 1,00,000</p>
Penalty for Default of Section 152, 155 & 156	OIDs: INR 50,000 and where the default is a continuing one, with a further penalty which may extend to INR 500 for each day after the first during which such default continues

Payment to Director for Loss of Office, etc., in Connection with Transfer of Undertaking, Property or Shares	Director: INR 1,00,000
Appointment of Key Managerial Personnel	Company: INR 5,00,000 OID: INR 50,000 and where the default is a continuing one, with a further penalty of INR 1,000 for each day after the first during which such default continues but not exceeding INR 5,00,000

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