

MEMORANDUM ON THE COMPANIES (AMENDMENT) ORDINANCE, 2020



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PREFACE

The Companies Act, 2017 (the Act) was promulgated on 30th May 2017 to replace the Companies Ordinance, 1984 (the Ordinance). The Act retained the fundamental principles and the structure and text of the Ordinance. It brought in certain new concepts, introduced new types and classes of companies, eased the incorporation process, trimmed the compliances for small sized companies, provided more protection to shareholders and inculcated corporate governance principles. Also it added provisions to counter and control unwarranted business activities. At the same time, however, the Commission emerged more empowered.

The Act has now been amended by the Companies (Amendment) Ordinance, 2020, primarily targeting the amendments brought in by Act. We have explained the changes made and where necessary provided our comments, which represent our interpretation of the legislation. We, therefore, recommend that while considering their application to any particular case reference be made to the specific wordings of the Ordinance.

The memorandum can also be accessed on our website www.mooreshekhamufti.com

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1. EFFECTIVE DATE

The Companies (Amendment) Ordinance 2020 comes into effect from the date of its issuance i.e. on April 30, 2020.

2. CONCEPTS AND PROVISIONS INTRODUCED

ij) Startup Company (Section 2)

In furtherance of the Government's agenda of "Ease of Doing Business", a new concept by the name "Startup Company" has been introduced. A company may be classified as a "Startup" if

- a) It works towards the innovation, development or improvement of products or processes or services or is a scalable business model with a high potential of employment generation or wealth creation.
- b) It has not been formed for more than 10 years
- c) Its annual turnover has never crossed Rs. 500 million

The Commission can add to the above type and class of companies so as to give companies the status of a Startup. The Ordinance qualifies that a company formed by splitting up or reconstruction of an existing company shall not be considered a Startup.

A notification should be in the works spelling out details as to the operating mechanism of this concept at the end of the Commission, privileges available to companies classified as startups and their reporting obligations.

ij) Shares other than as Right (Section 83)

A private company has also been allowed to issue shares other than as right, both for cash

and for other than cash, subject to permissibility by its Articles of Association and passing of a special resolution.

The Commission shall notify conditions and requirements for issuance of shares in the subject manner.

iii) Employees Stock Option (Section 83A)

Now private companies can also offer shares to their employees as Employees' stock option, has been allowed to all companies. This would be under the authority of special resolution and in accordance with the provisions in the Articles of Association of the company.

The procedure and conditions will be specified by the Commission.

iv) Buy back of Shares (Section 86 & 88)

Public unlisted and private companies have also been allowed to buy back their shares. However, such shares cannot be retained as treasury shares and will have to be cancelled.

It is anticipated that Listed Companies (Buy-Back of Shares) Regulations, 2019 will be amended to cater to this amendment or a separate set of regulations will be introduced.

The Ordinance has restrained a listed company from doing a buyback through tender mode; effectively leaving stock exchanges as the only mode allowed.

v) Register of Foreign Companies (Section 435(4) and 443A)

A Register of foreign companies shall be maintained by the Registrar. Foreign Companies under the Act signifies foreign entities not incorporated in Pakistan but having a presence in Pakistan as a branch or a liaison office.

The Registrar can strike off the name of a foreign company where a) the permission issued by the relevant authority (Board of Investment) is cancelled or the company ceases to operate consequent upon revocation of a license granted by the Commission or any other licensing authority. Besides, five scenarios have been outlined which can result in striking off the name of a foreign company.

vi) Ease of Doing Business (Section 458A)

The Commission endeavors to facilitate corporate sector by implementing various measures including improving regulatory quality and efficiency and facilitating innovation and the use of technology. The Commission has been vested with powers to introduce and implement measures under this agenda, irrespective of other provisions of the Act.

3. CONCEPTS AND PRACTICES DONE AWAY BY THE COMPANIES ACT, 2017, NOW REINTRODUCED

i) Certificate of Commencement of Business (Section 19)

The practice of issuing certificate of Commencement of Business has been reintroduced. The certificate is issued by the Commission to a newly incorporated public company upon completion of formalities, like minimum subscription etc.

ii) Circular for Further Issue of Shares as Right (Section 83)

The requirement of sending a circular to shareholders and filing it with Registrar, withdrawn under the Act, has been reintroduced.

The Act only required to send offer letters with a statement of information as specified under the regulations. Now a Circular shall be sent to shareholders together with offer letters in respect of off of right shares under Section 83(1) on such form as may be specified. It shall also be filed with the Registrar simultaneously; it is dispatched to the shareholders.

iii) Annual Return (Section 130)

Companies where there has been no change in particulars since the last annual return, private companies with capital up to three million and single member companies, were not required to file the Annual Return. The requirement to file by such companies has been reinstated.

iv) EOGMs of Listed Companies at a shorter notice (Section 133)

Now listed companies have also been allowed to hold their Extra Ordinary General Meetings EOGM at a shorter notice, where they can also

pass a special resolution. Prior permission of the Commission has to be obtained.

Under the repealed Companies Ordinance, 1984, every company, whether private, unlisted public or listed, had an option to hold its EOGM with a shorter notice period, where directors make a request to the Registrar. The Act allowed private and public unlisted companies to do so without going to the Registrar, provided all members entitled to attend, agree to it. Whereas the option was withdrawn for listed companies, it has now been reintroduced.

In view of the above, definition of "Special Resolution" has also been revised.

v) Annual Return (Section 130)

Companies where there has been no change in particulars since the last annual return, private companies with capital up to three million and single member companies, were not required to file the Annual Return. The requirement to file by such companies has been reinstated.

vi) Review and Revision (Section 479A)

An order passed by the Registrar or an Officer exercising powers of the Commission, shall be subject to revision by the Commission if an application is filed by any aggrieved person or the Registrar, within sixty days from the date of such order. The order of the Commission in revision shall be final. Order passed under section 479 of the Act and a revision order passed, shall be an exception to a revision application.

The order passed by the Registrar, Commission and Federal Government, other than a revision or a review order, shall be subject to self-review, either on their own or an application received, within sixty days of the such order.

4. AMENDMENTS MADE TO CONCEPTS AND PROVISIONS BROUGHT IN BY THE COMPANIES ACT, 2017

i) Financial Statements Redefined (section 2)

The term "financial statements" have been redefined so as to synchronize its elements with those outlined in the financial reporting frameworks adopted by the Act.

ii) Definition of Private limited company (Section 3)

Any restriction on transfer of shares put in place by the Articles of Association of a private company will remain subject to relevant provisions of the Act.

The definition of private limited company has been amended accordingly.

iii) Protection to legal status of a Private Company (Section 76)

Section 76 allows shareholder of a private company to dispose his shares to outsiders, upon decline of offer by existing members of the company. Now such a shareholder has to be mindful that upon entry of outsiders the number of members should not go beyond the maximum of fifty, as prescribed for by the Act for a private company.

iv) Offer price of Shares (Section 76)

Section 76 vested an authority to the Commission to outline general principles for determination of price of shares being offered for sale in a private company. The mechanism was prescribed in The Companies (General Provisions and Forms) Regulations, 2018. The reference to this price determination has been removed from the Act, effectively leaving this matter to the Company; through its Articles of Association.

v) AGMs of Listed Companies (Section 132)

Listed companies have to now hold their Annual General Meeting only in the town where the registered office is located and the facility of holding AGM in nearest city has been withdrawn by the Ordinance.

However, upon an application, the Commission is now empowered to allow the listed companies to hold their AGMs at any location.

It is safely assumed that such location inevitably has to be situated in Pakistan.

vi) Members Resolution by Circulation (Section 149)

The Act allowed members of an unlisted company to pass a resolution without calling a meeting i.e. by circulation, to the exclusion of matters which are domain of the AGM. The ceiling of 50 members assigned to an unlisted public company to pass such a resolution has been removed.

vii) National Tax Number for Foreign Directors (Section 153)

It has been clarified that ineligibility of a director due to non-holding of National Tax Number, under Clause (h) shall not be applicable on a foreign national who is not required to hold a National Tax Number under the Income Tax Ordinance, 2001.

viii) Cap on Directorship (Section 155)

The Act fixed an upper limit on the number of directorships an individual can hold, including that of an alternate director, excluding directorship in a listed subsidiary. The wordings of the section created confusion and clarity remained pending.

The earlier reference to maximum number of seven directorships has now been removed and the ceiling relevant to class of companies now appear separately.

ix) Independent Director (Section 166)

A director nominated by Government shall henceforth be considered as an independent director.

x) Disposal of Business (Section 183)

The Boards now need approval of shareholders through a special resolution rather the earlier required ordinary resolution to dispose subsidiaries or undertakings or sizeable part thereof.

The board of directors of a listed company cannot sell or dispose of an undertaking, which may lead to a closure of business or winding up of the company even where they have a viable alternate business plan, as it was earlier allowed by the Act.

xi) Return on Investment in Associated Undertaking (Section 199)

In case of a loan given to an associated undertaking, the directors of investing company were made personally responsible for recovery of interest at a rate not less than the borrowing cost or the rate prescribed by the Commission, whichever is higher. Directors have now been relieved of this obligation.

xii) Private Company with Paid up Capital of less than 1 million (Section 232 & 234)

The Act exempted a private company with paid up capital upto Rs. 1 million from audit and from preparing consolidated financial statements, where its subsidiary's paid up capital also does not exceed Rs.1 million.

Such a company was, however, required to file its unaudited financial statement within 30 days of its AGM, accompanied by an affidavit of CEO or directors confirming the approval of financial statements by the board. This filing requirement has now been waived.

xiii) Threshold of Capital for Audit increased (Section 247)

The Act allowed a Cost & Management Accountant to audit a private company having paid up capital of less than Rs. 3 million, to the exclusion of subsidiaries of public company. This threshold has now been increased to Rs. 10million

xiv) Dispute Resolution through Mediation (Section 276)

The Commission established a "Mediation and Conciliation Panel". Any dispute between a company, its management or its members or creditors can be referred to any individual listed on the panel. Mediation and Conciliation Regulations, 2018 were also issued.

This panel can no more be approached where the matter is pending with the Commission or the Appellate Bench.

xv) Shariah Compliant Company (Section 451)

The Act introduced the concept of Shariah compliant companies and issued Shariah Governance Regulations 2018. Now a belated amendment has been brought in section 451 empowering the Commission to issue such Regulations.

This power to the Commission is similar to the one it has in section 156 of the Act under which Listed Companies (Code of Corporate Governance) Regulations, 2019 have been issued.

xvi) Beneficial Ownership Held Outside Pakistan (Section 452)

Every Pakistani, whether or not a dual national, who is a substantial shareholder or an officer of a company incorporated in Pakistan, is required to disclose his shareholding in a foreign company or body corporate, to the Pakistani Company.

Substantial shareholding has now been defined as 10% so as to remove a confusion which was there. To maintain confidentiality of the information submitted the return filed under this section would not be available for inspection to any other person.

xvii) Acceptance of documents presented after prescribed time

Under the Act no proceedings shall be initiated against a company, not being a listed company, or any of its officers, on account of delay in filing of any document required under the Act to be filed or to be registered with the Registrar on the payment of fee as specified under sub-section (1) and within the period as specified therein.

The Ordinance has excluded the following types of filings from the above:

- (a) a document for which the punishment of imprisonment is provided under this Act; or
- (b) an application required to be filed within a specific time frame provided under this Act or the rules or regulations framed thereunder.

5. OTHER AMENDMENTS

i) Common Seal no more required (Section 23)

The need to have a common seal has been removed. It is no more required on share certificates, proxies given by companies and contracts signed. However, companies are continued to require an official seal for use outside Pakistan.

Table A & General (Provisions & Forms) Regulations, 2018 are yet to be amended to this effect. This amendment, in our view, does not bar continued usage of the seal.

ii) Subscriber information on the Memorandum and Articles of Association (Section 31 & 37)

The requirement to mention father's name or husband's name of subscriber, on the subscriber pages of both the documents, has been removed.

iii) Altered Articles of Association (Section 38)

Altered Articles of Association have to be filed with the Registrar within 15 days of passing of special resolution for alteration, as compared to the previously 30 days. This amendment has synchronized the filing time with the time prescribed for filing of special resolution under Section 150.

iv) Transfer of Assets by a Section 42 Company (Section 43)

Upon revocation of license by the Commission, a section 42 Company has to go into winding up and is required to transfer its assets to another Not for Profit entity. Previously such an NPO had to be section 42 company only. Now it can be of any legal status.

v) Filing upon conversion of Company (Section 48)

Upon approval from the Commission an unlimited company can be converted into a limited company and vice versa. Upon receipt of an order confirming the conversion the Memorandum and Articles of Association, altered to bring the conversion into effect, is to be filed with the Registrar within 15 days of the order.

vi) Share Certificates to be signed (Section 62)

Share certificates of the Company have to be signed by an authorized officer as may specified. Though in practice but was never required by the law. The requirement gets significant in the absence of common seal. The manner of issuing share certificates in physical form has been specified under Regulation 16 of the Companies (General Provisions and Forms) Regulations, 2018, would require amendment by the Commission, to give effect to the elimination of common seal condition.

vii) Filing of Return of Allotment (Section 70)

The reporting time to the Registrar, through a Return of Allotment, has been reduced from 45 days to 30 days.

viii) Shareholder's nominee (Section 79)

In the absence of relatives defined in the section, a shareholder can nominate any other person to protect the interest of his legal heirs.

ix) Inspection of register of charges (Section 102)

A different fee may be applied through the seventh schedule for allowing inspection of register of charges kept by registrar, to any person.

x) Resolution by members (Section 140)

Members having 5% voting power in the company can now give notice of a resolution to be discussed in any general meeting. Previously the requirement was 10% voting power.

xi) Term of Directors (Section 161)

A trade organization has been allowed to keep the term of office of directors for a period of less than three years, as provided in the Trade Organizations Act, 2013 (II of 2013).

Previously this option was available to all companies limited by guarantee and not having share capital.

xii) Ambiguity removed in circular resolution by Directors (Section 179)

A circulation resolution of directors can be passed, if approved in writing, by all the directors on the Board. Earlier the section stated that the resolution is to be signed by all directors which created an impression that such a resolution could be passed by a simple majority. This change has now removed the ambiguity in the section.

xiii) Loan to Chief Executive (Section 182)

Henceforth the CEO of a company can be given a loan without passing of a member's resolution, if there is already a scheme in place approved by the members.

xiv) Integrity of Financial Statements (Section 225)

This section requires that financial statements of companies shall give a true and fair view of the state of affairs of the company, including by complying with the financial reporting framework prescribed in the Third Schedule.

In case of default the responsible person could be subject to an imprisonment of two years and one year respectively in the case of listed and

unlisted companies, besides being penalised financially.

The imprisonment has now been done away with, other than for a continuing default. Penalties have been increased by bringing in level 3 and level 2 penalties respectively for listed and unlisted companies. Continuing default has been defined as non-compliance with the same requirement for two consecutive years.

xv) Directors Report (Section 227)**a) Remuneration Details of Directors & CEO**

A proviso has been inserted whereby the Director's Report of a public company or a private company, if subsidiary of a public company, shall disclose details of remuneration package of each of the directors and chief executive, including but not limited to salary, benefits, bonuses, stock options, pension and other incentives.

The Code of Corporate Governance requires details of aggregate remuneration, such as fee, benefits etc, separately for executive and non-directors. The Code encourages remuneration details of individual directors.

Similar disclosure is required in the financial statements, but in case of directors an aggregate amount has to be disclosed, unlike now in the Directors Report which requires individual director's details.

b) Reasons for not declaring dividend

The directors are now required to explain the legitimate reasons for not declaring dividend despite earning profits and elaborate the future prospects of dividend, if any.

c) Penalties

In case of contravention of any requirement of director's report the responsible person could be subject to an

imprisonment in case of two years and one year respectively in the case of listed and unlisted companies besides being penalised financially. The imprisonment has been done away with and the penalties have also been reduced by bringing in level 2 and level 1 penalties respectively for listed and unlisted companies.

prospectus, offer of shares, books of accounts, application, information or explanation required by or for the purposes of any of the provisions of this Act or pursuant to an order or direction given under the Act.

xv) Consolidated Financial Statements (section 228)

The disclosure requirements of consolidated financial statements shall also be applicable in a situation where the requirement to prepare consolidated accounts comes not from the Act but from the financial reporting framework applicable to the Company.

xvi) Filing of Financial Statements (Section 233)

The Act exempted a private company with paid up capital upto Rs.10 million from the filing its financial statements with the Registrar.

Private companies happening to be public interest companies or subsidiaries or holding companies of public companies, shall not enjoy such an exemption anymore.

xvii) Delay in payment of Dividend (Section 243)

Section 243 allows a company to withhold dividend for reasons listed in the section, by applying for the permission to withhold, within 45 days of declaration. This application is now to be filed within 15 days.

xviii) Penalty for false statement (Section 496A)

Where a person makes a statement, which is false or incorrect in any material particular, or omits any material fact, knowing it to be material, he shall be liable to a penalty of level 2 on the standard scale.

This penalty may apply in respect of filing of any return, report, certificate, financial statements,

6. CONCEPTS BROUGHT IN BY THE COMPANIES ACT, 2017, DONE AWAY WITH

ij) Cancellation of Shares (Section 17)

The Act brought in deemed cancellation of shares if the subscription money is not deposited within the prescribed time (30 days of incorporation) with simultaneous removal of the name of the relevant subscriber from the Register of Members.

Now the timeline for contributing capital against the shares subscribed shall be notified by the Commission. The Registrar has been vested with power to issue direction to the company, as deemed appropriate for compliance. Violation is subject to penalty but apparently shares are no more cancellable.

ii) Certification of Capital Contribution (Section 70)

The requirement of obtain certificate of receipt of cash against capital subscription, to be issued by the auditor or a practicing chartered accountant, as the case may be, has been done away with. Instead a declaration by the Chief Executive to this effect has been introduced.

iii) Protection to Independent and Non-Executive Directors removed (Section 181)

The Act provided protection to independent and non-executive directors of listed and Public Sector Companies. They were to be held liable only where there had been an act of omission and commission.

This explicit protection is no more available.

iv) Conduct of shareholders at General Meetings (Section 215)

This section was brought in the Companies Act, 2017 with an objective of ensuring good conduct by shareholders at the general meetings of the Company. A penalty of level one was reserved for any misconduct.

Realizing the legal and practical difficulties of implementing this perceived authority, the section has been deleted.

v) Vesting of Unclaimed Dividend, Shares and Modaraba certificates (Section 244)

Dividend and share certificates, unpaid and unclaimed for three years, had to be vested with the Federal Government, after giving notice to the shareholders. As was the case before, they will now remain with the Company and the shareholder will retain his right to claim the amount of unpaid dividend and any unclaimed shares.

Unpaid dividend will now be transferred by the Company to a separate bank account and profits earned will be used for CSR activities. The Company is required to communicate with the shareholders and fulfill certain reporting and disclosure requirements.

vi) Investor Awareness & Education Fund (Section 245)

The idea to create an Investor Education and Awareness Fund from the withheld unclaimed dividends has been dropped, consequent to the above-mentioned amendment.

vii) Compromises and Arrangements (Section 279 to 283 & 285)

The authority to sanction scheme of arrangements and reconstructions between a company and its creditors or any class of them or between the company, its members or any class of them or reconstruction or amalgamation of companies or any division of

a company was transferred from the High Court to the Commission.

Soon after the promulgation of Act the Commission was restrained, through a notification [SRO 840(I) of 2017 dated August 17, 2017 of Finance Division] from using this power for public interest companies, large and medium sized companies.

The Commission exercising this authority was always prone to legal complications and now this authority has completely been transferred back to Courts.

viii) Inactive Company (section 424)

The Act introduced the concept of 'Inactive Companies' aimed at reducing reporting and other regulatory requirements for other than listed companies, who are not actively engaged or contemplating to engage in business operations. However, regulations required under the subject were never issued.

The concept has now been done away with by omitting the subject section.

ix) Real Estate Companies (section 456)

The Act brought companies engaged in construction and development of residential and commercial projects under its ambit. However, the section was kept in abeyance and never put in force.

The real state sector has its unique dynamics in Pakistan and the Commission has rightly decided to forego pursuing the idea. Accordingly, the section has now been omitted.

x) Employment of persons with disabilities (Section 459)

Certain types and size of companies were clubbed together to develop the notion of Public Interest Company, primarily for the purposes of determining the financial reporting

framework for such companies. Such companies are listed in the Third schedule to the Act.

Public Interest Companies (PIEs) with 100 or more employees were required to have a special quota of a minimum of 2% for employment of persons with disabilities.

It has been observed that the above requirement of law was not being fulfilled by PIEs. Also any implementation measures by the Commission were never noticed. Whether such a requirement could have been put in place by the Act remained a matter of discussion. The requirement has now been waived.

xi) Registered Valuers (Section 460)

The Act introduced varying instances where services of professional valuers are required by Companies to get valued their assets, liabilities or net worth. To facilitate and regulate the process, the Commission also announced to maintain a panel of registered valuers and to prescribe regulations.

The Commission, however, did not progress in the matter and now by omitting the section shall not develop and maintain a panel of its own.

It is important to highlight here State Bank of Pakistan has for long maintained a panel and valuers enlisted thereon have throughout been used by Companies as well.

xii) Security Clearance of Shareholders and Directors (Section 461)

A provision made part of the Act empowered the Commission to have its own system of doing security clearance of shareholders and directors, subject to notification by the Federal Government.

This system if put into place would have run, to an extent, parallel to the Ministry of Interior's practice of doing security clearance of foreign

shareholders and directors where the flow of information required is routed through the Commission itself.

The section has been removed thereby withdrawing the power earlier provided.

xiii) Powers granted to Minister in charge withdrawn

The Companies Act 2017 granted various powers to the Minister in charge (Minister for Finance). All such powers now vests with the Federal Government

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