



# STUDENT PROFESSIONALS TODAY



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# CONTENTS

<b>MESSAGE FROM THE PRESIDENT</b>	<b>3</b>
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## ARTICLES

One Person Company : An Overview	5
Civil and Criminal Liabilities of the Directors while in the Company	9
Concept of Competition Compliance Programme : A Need of the Hour	12
Letter of Undertaking	16

<b>KNOWLEDGE UPDATE</b>	<b>8, 17, 18, 20</b>
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Readers are invited to contribute article/s for the Journal. The article should be on a topic of current relevance on Corporate Law, Tax Law, or on any other matter or issue relating to Economic or Commercial Laws. The article should be original and of around 7-8 pages in word file (approx. 2500 words). Send your articles at email id : [articles@vidhimaan.com](mailto:articles@vidhimaan.com) along with your student registration number. The shortlisted articles shall be published in the Journal.

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## MESSAGE FROM THE PRESIDENT

My Dear Students,

*'Life is all about Chances and Opportunities. Never leave anything to Chance and never let an Opportunity get away'.* Truly, while counting the mantra of a successful career, one should realize the significance of opportunities and also one should analyse the best strategies to come out as a winner while utilizing the opportunities to the best for the common goal.

Friends, the profession of Company Secretaries is also filled in with numerous opportunities unlocking the door of an impending success under the era of good governance. The state of good governance constituting a need of the hour is setting up the principles on which a country should be governed with accountability and transparency leading the masses to the way of comprehensive growth and development.

Taking forward the pursuits of inclusive growth and development of the nation, with India leading the Pro-People Pro-Active Good Governance under the mantra of Reform, Perform and Transform, the Institute as a premier national body too, is in dedicated partnership for establishing, professing and progressing the best practices of good governance in India and worldwide, since fifty years now.

In order to make the most of our golden journey of five decades, we have been vibrant in building the capacity of our students to ensure that they could fly with rising colours while subsuming the best of their professional excellence in the service of nation. In all the initiatives the Institute hold for the all-round development of budding professional, the celebration of ICSI Student Month holds a paramount connotation for the governance professionals of tomorrow.

The concept of Student Month, which was introduced in the year 2016 aims to create vibrancy and awareness about social causes among the student community. In order to achieve the respective aim, the entire month of July is dedicated to the activities of ICSI Student Month.

Continuing with the much stronger cods of achieving the objective of student month in its letter and spirit, the Student Month of year 2018 has begun with July 1, 2018 confirming number of activities involving the students, planned across various Regional and Chapter Office of the Institute Pan India. Further in view to facilitate the students with all latest updates on the activities scheduled to be organized, a dedicated page of Student Month, 2018 is also made available at the website of the Institute.

With this, Golden Jubilee Year 19th All India Students Conference of the Institute is also planned for July 21-22, 2018 at Ahmedabad, Gujarat, exquisitely capturing the theme of Building Strength: Empowering the Future. I am sure that students would participate in larger number and make the most of the intellectual deliberations scheduled to take place in the conference.

Friends, Inclusive, Good-Quality Education is the foundation for Dynamic and Equitable Societies, and with these kinds of activities penned under the vibrant initiatives of the Institute, I am sure of the holistic development of our students who would nurture the era of good governance with their excellence in professional and dedication to society.

At the end, let me quote that *'Working together, we will continue to lay the foundation for a new generation of inclusive economic growth, expand opportunities for the society at large and ensure that innovative businesses have the support they need to thrive and grow in the years to come.'*

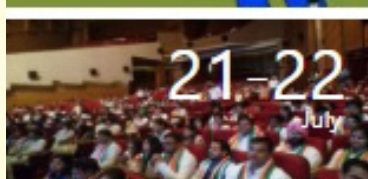
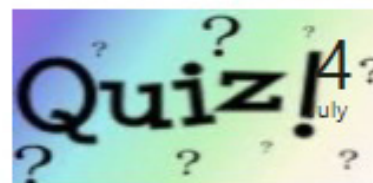
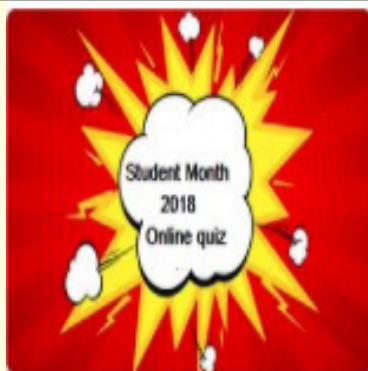
Wishing you all the best for Student Month, 2018 and for all your endeavours.

Best Wishes

**CS Makarand Lele**

President, ICSI







## One Person Company : An Overview

**This article intends to discuss the concept of One Person Company, which is recently introduced in the Companies Act, 2013.**

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### Introduction

India has emerged as the third largest start-up base and such ventures are poised to grow 2.2 times to reach 10,500 by 2020 despite a perception that the ecosystem in the country has slowed down in the last year, says a report. India added over 1000 new startups in 2017<sup>1</sup>. Startups are new business ideas which require ones imagination and funds to execute the same. Funding has always been a critical issue for any startup and as said by Richard Harroch, "It's almost always harder to raise capital than you thought it would be, and it always takes longer. So plan for that." To support and to motivate individuals to start new business, a revolutionary new concept of one person company (OPC) has been introduced by the Companies Act, 2013 (the Act).

### What is One Person Company

'One person company' is defined in clause (62) of section 2 of the Act to mean a company which has only one person as a member.

A OPC is a combined package of a sole proprietorship business and a company, borrowing the best of both concepts. It is also important to note

that section 3 classifies OPC as a private company for all the legal purposes with only one member. All the provisions related to the private company are applicable to an OPC, unless otherwise expressly excluded. OPC will give the young businessman all benefits of a private limited company which categorically means they will have access to credits, bank loans, limited liability, legal protection for business, access to market etc. all in the name of a separate legal entity.

### Terms and Restrictions of OPC

OPC requires one member (member refers to someone who subscribes to memorandum/has their name in the register of members/holds shares of the company with their name in the records of depository) and one nominee, who becomes the member of the company in case of death or any other incapacity of the original member. Before prepping up for OPC, the following points must be kept in mind :

- Only a natural person (not association of persons, body of individuals, company, or any other entity) who is a resident of India in preceding calendar year (stayed in India for 182 days) can form OPC.
- A person shall not be eligible to incorporate more than one OPC or become nominee in more than one such company.

<sup>1</sup>. <https://economictimes.indiatimes.com/small-biz/startups/india-will-be-home-to-10500-startups-by-2020-nasscom/articleshow/55068274.cms>

- Minor cannot become member or nominee of the OPC or can hold share with beneficial interest.
- An OPC cannot be incorporated or converted into a company under section 8 of the Act. (Company not for Profit).
- An OPC cannot carry out non-banking financial investment activities including investment in securities of anybody corporate.
- An OPC cannot convert voluntarily into any kind of company unless two years have expired from the date of incorporation of OPC, except threshold limit (paid up share capital) is increased beyond Rs.50 lakh or its average annual turnover during the relevant period exceeds Rs.2 crore, i.e., if the paid-up capital of the company crosses Rs.50 lakh or the average annual turnover during the relevant period exceeds Rs.2 crore, then the OPC has to invariably file forms with the ROC for conversion in to a private or public company, with in a period of six months on breaching the above threshold limits.

### Incorporation of One Person Company

Steps to form a one person company are as follows :

- **Apply for DSC** – The first step is to obtain the Digital Signature Certificate (DSC) of the proposed director. After obtaining DSC, the same needs to be registered with MCA for the purpose of role check. Role checks are internal verification / registration process of MCA. Under this process, the authenticity of credentials submitted via any particular form is validated with information available with MCA in its repository.
- **Apply for DIN** – Once the DSC is made, the next step is to apply for the Director Identification Number (DIN) of the proposed director in SPICeForm (Simplified proforma for incorporating company electronically) along with the name and the address proof of the director. Form DIR-3 is the option only available for existing companies. It means with effect from January 2018, the applicant need not file Form DIR-3 separately.

Now DIN can be applied within SPICe form for up to three directors.

- **Name Approval** – The next step while incorporating an OPC is to decide on the name of the company. The name of the company will be in the form of 'XYZ (OPC) Private Limited'. There are two options available for getting name approved by making application in Form SPICe 32 or by using RUN Web service of MCA by giving only one preferred name along with the significance of keeping that name.

### Incorporation through SPICe (without filing RUN)

Stakeholders can avail of five different services (name reservation, allotment of DIN, incorporation of new company, allotment of PAN and allotment of TAN) in one form by applying for incorporation of a new company through SPICe Form (INC-32) with eMoA (INC-33), eAOA (INC-34). In case eMoA, eAOA are not applicable, users are required to attach the pdf attachments of MoA and AoA. There is no need for reserving a name separately before filing SPICe. One name for the proposed company can be applied through SPICe (INC-32).

### Incorporation through SPICe (with RUN)

- **Name Reservation** – RUN service shall be used for name availability.
- **Incorporate OPC** – After name approval, form SPICe shall be filed for incorporation of the OPC within 20 days from the data of approval of RUN.
- **Filing of Form INC 22** – The company shall file Form INC-22 within 30 days once form SPICe is registered in case the address of correspondence and registered office address are not same. However, with effect from 23rd March, 2018, Ministry has decided to permit two proposed names and one re-submission (RSUB) while reserving unique names (RUN Service) for the companies.

### Documents Required

Following documents are required to be submitted to ROC :



- ◆ The memorandum of association (MoA) which are the objects to be followed by the company or stating the business for which the company is going to be incorporated.
- ◆ The articles of the association (AoA) which lays down the by-laws on which the company will operate.
- ◆ Since there is only one director and a member, a nominee on behalf of such person has to be appointed because in case he becomes incapacitated or dies and cannot perform his duties the nominee will perform on behalf of the director and take his place. His consent in Form INC – 3 will be taken along with his PAN card and Aadhar Card.
- ◆ Proof of the registered office of the proposed company along with the proof of ownership and a NOC from the owner.
- ◆ Affidavit and consent of the proposed director of Form INC -9 and DIR – 2 resp.
- ◆ A declaration by the professional certifying that all compliances have been made

### Filing of Forms with MCA

All these documents will be attached to SPICe Form, SPICe-MOA and SPICe-AOA along with the DSC of the director and the professional, and will be uploaded to the MCA site for approval. After uploading, Form 49A and 49B will be generated for the PAN and TAN generation of the Company which have to be uploaded to MCA after affixing the DSC of the proposed director.

### Issue of the Certificate of Incorporation

On verification, the Registrar of Companies (ROC) will issue a certificate of incorporation and the business can be commenced.

### Reasons to Register OPC

- **Single Promoter** – OPC is the only type of corporate entity that can be started and operated by a single promoter with limited liability protection in India. A corporate form of legal entity

in OPC ensures that the business has perpetual existence and easy ownership transferability

- **Uninterrupted Existence** – A company has ‘perpetual succession’, meaning uninterrupted existence until it is legally dissolved. A company being a separate legal person, is unaffected by the death or other departure of any member and continues to be in existence irrespective of the changes in ownership.
- **Easy Transferability** – Ownership of a business can be easily transferred in a company by transferring shares. The signing, filing and transfer of share transfer form and a share certificate is sufficient to transfer ownership of a company. In a one person company, the ownership can be transferred by altering the shareholding, directorship and nominee director information.
- **Borrowing Capacity** – Banks and financial institutions prefer to provide funding to a company rather than partnership firms or proprietary concerns. However, an OPC cannot issue different types of equity security, as it can only be owned by one person at all times.
- **Owning Property** – A company being an artificial person, can acquire, own, enjoy and alienate property in its name. The property owned by a company could be machinery, building, intangible assets, land, residential property, factory, etc. Further, the nominee director cannot claim any ownership of the company while serving as a nominee director.

### OPC vs Private Limited Company

- **Cost of Registration** – The cost for registration of OPC is lower than the cost of registration of a private limited company.
- **Numbers of Persons to Incorporate** – To incorporate an OPC, two persons are required, namely, the director of the OPC and nominee director. The nominee director is responsible for management of the company in case the director is not able to execute his functions. To incorporate a private limited company, two persons are required.

- **Shareholding** – The 100 per cent shares of an OPC can be held by a single person. A private limited company must have a minimum of two shareholders. Therefore, 100 per cent of the shares of a private limited company cannot be held by a single person.
- **Board of Directors** – There is no concept of board of directors in an OPC as the entity can be managed by a single person. The concept of annual general meeting and board meetings is also not applicable for an OPC. A private limited company has a board of directors comprising of a minimum of two directors to a maximum of seven directors.
- **Limitations** – AOPC must be mandatorily converted into a private limited company if the annual sales turnover exceeds Rs.2.00 crore or the paid up capital of the OPC exceeds Rs.50 lakh. A private limited company has no such limitations and no requirement for mandatory conversion under any circumstances.

## Conclusion

An OPC is doing well in European Countries. In United States and Australia an OPC is strengthening the economy of the countries. Though the concept of an OPC is still very new in Indian entrepreneurship and thus very revolutionary, it will take time for such a new concept to be incorporated with complete efficiency, but as and when the time will pass, an OPC will have a sparkling future and it will be embraced as a most successful business concept. The reason behind it is that its incorporation involves less paper work, one person can form a company without any additional shareholder, and if the member is willing to add shareholders, all he needs to do is to modify the memorandum of association and file it before the Registrar of Companies. Small entrepreneurs will grow in Indian entrepreneurship, be it weaver, traders, artisans, small to mid level entrepreneurs, OPC is a bright future for them to grow and to get a recognition globally.



## KNOWLEDGE UPDATE

### CASE LAW

#### Competition Act, 2002

**Right to main appeal being statutory cannot be denied for not depositing 10 per cent of amount of penalty attached to the order for stay of penalty.**

Where the order of the Commission imposing penalty for indulging in anti-competitive and unfair trade practices was challenged and along with the appeal the applicant had also filed application for stay of the operation of the order of the Commission during the pendency of the appeal, and appeal was admitted, and stay was granted subject to the condition that the appellant would deposit 10 per cent of the amount of penalty, the condition of deposit was attached to the order of stay, and in case of non-compliance of the said condition, the consequence would be that stay had ceased to operate, but non-compliance would have no bearing insofar as the main appeal was concerned,

because the right to appeal was statutorily provided under section 53B – *B Himmatlal Agrawal v. Competition Commission of India*, CA No. 5029 of 2018, 18th May 2018

#### Insolvency and Bankruptcy Code, 2016

**Where default was apparent and the Adjudicating Authority was satisfied that a default had occurred and the application was complete and duly signed by executive officer of the bank, the application could not be rejected.**

Where it was not in dispute that there was debt which the corporate debtor failed to pay to the financial creditor in time, resulting in default and giving rise to proceedings under section 19 of the Debt Recovery Act, the application under section 7 of the Code could not be rejected on the basis of the decision of the joint lenders forum – *Mahesh Kumar Sureka v. SBER Bank*, CA (AT) (Insolvency) No. 319 of 2017 dated 3rd April 2018.





## Civil and Criminal Liabilities of the Directors while in the Company

In this article, the author discusses the concept of directors of the company, their classification, duties, civil and criminal liabilities, and removal.

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### Introduction

Directors are solely responsible for the operations of the company including sale purchase of a property or entering into contract. This privilege often comes with some responsibilities and duties too. The members of the company or the subscribers may sell off their interest in the company without the prior consent of other members. Cases like Satyam or Kingfisher are calling for some more stringent rules in this regard so as to hold a person liable for the operations. Unequivocally, this concept is known as the 'lifting of a corporate veil'.

### Who is a Director of a Company

As per section 2(34) of the Companies Act, 2013 ('the Act'), a director is the one who is appointed as a board member of a company. As the company is a juristic person and requires the agent to act on its behalf. The foremost purpose of a director is to act as a trustee and execute those functions which are mandatory to protect a company. These activities may relate to decision making or in concern of the appointment of an auditor or a company secretary. All contracts need to be signed by someone who is authorised by the board or the company. Director may be the appointed authorised signatory. Moreover, in case of default, it is a director who is seen as a defaulter in the first place. We can see an example of this in the delay of the condonation scheme, 2018. In this, the government has barred the director to hold the same position in any of the company for five years, provided, they make the default good within the stipulated time.

### Classification of Directors

Classification of director as per their work is as follows :

- **Managing Director** – Managing director is a person solely responsible for the decision making and managing various activities of the company. He is having substantial powers of managing various affairs of the company.
- **Whole-time Director** – Whole time directors are fully dedicated to the company only. They spend whole of their time in the operations of the company and have a significant interest in the company.
- **Independent Director** – An independent director means a director other than a managing director, whole-time director or a nominee director. The detailed definition of independent director has been given in sub-section 6 of Section 149 of the Companies Act, 2013.

Classification of directors on the basis of circumstances in the company is as follows :

- **Shadow Directors** – Shadow director is a person with whose instructions normally other directors comply with. The director need not be a professional. In other words, a person who is not a director still has an influence on the other directors. Thus, this shadow director may be treated as an 'Officer in default' under the provisions of the Companies Act.
- **Alternate Directors** – In the general meeting, if this resolution is passed that there will be a director who will be responsible for the operations in the absence of the original director than the company can appoint one. There is no time

constraint on the alternate director. However, the provisions of re-appointment for the retiring director only apply to the original director and not to the alternate one.

- **De facto Directors** – When in some instance a person not appointed as a director but act as a director of the company and company did not reject his claims person so claiming is a de facto director. The de facto director acts as a director for the outside world. As per the Act, director is liable for the decisions he is involved in.
- **Rotational Directors** – They are the directors who are eligible to retire after certain tenure. Two-third of such directors have to get retired on a rotational basis. They are eligible for re-appointment if such provisions are mentioned in the Articles of Association (AoA).

### Duties of a Director

A director is assigned certain duties under section 166 of the Companies Act, 2013 which are as follows :

- ◆ Work in the best interest of the stakeholders of the company and promote the objective of the company.
- ◆ Be familiar with the situation of conflict and try to avoid as much as possible.
- ◆ Maintain confidentiality in regard to the trade secrets, unpublished work or some procedures which are still not in use and technologies used in the manufacturing of the products.
- ◆ Act in accordance with the article of association of the company.
- ◆ Take care of the related party transactions and must keep a check whether the transactions are done in compliance with the law or not.
- ◆ Use his independent mind and must take a decision with all his due diligence and reasonable care.
- ◆ Not to assign his office to anyone in any condition if done so then that act shall be void.

The director who contravenes the provisions of this act will be punishable with a fine of Rs. 1,00,000 which may extend up to Rs. 5,00,000.

### Criminal Liabilities of a Director

Directors can be held liable if, whatever work they do is against the laws of the company or against the statute. Following are the liabilities for which director can be held liable -

- **Dishonor of Cheque** – As per the provisions of Negotiable Instrument Act, 1881 the official who is responsible for the cheque bounce is held liable instead of the whole company. Besides, there is a provision that company is a separate entity and we cannot hold anyone liable who was not present at the time when the cheque was being presented for the payment.
- **Offences Relating to Labour or Employment Laws** - In case of any mismanagement with any of the dispute which concerns the employee provident funds or the Factories Act, the person in charge of the department shall be held liable. In most of the cases, it is likely to be possible that the director is in charge of that department. Directors who are not given overall charge of the company and having domination over some cannot be held liable under criminal charges.
- **Matter in Relation to Income Tax** – Any company found guilty of evading tax the agent of that company shall be held liable for the offence so committed. Further, if there is any interest or penalty pending on the tax also is also recovered from the director only.
- **Misleading Statement in the Prospectus** – A director can be held liable for the misleading statement in the prospectus. He shall be made to pay compensation to that person who believes that a particular statement in the prospectus is true which is actually not. If there is a certain mistake in the prospectus of the company than the director is duty bound to disclose it. Moreover, if the statement in the prospectus is not true then the director can face a criminal prosecution which is an imprisonment for five years and upto Rs. 20 lakh fine under section 447 of Act.

### Civil Liabilities of a Director

- **Guilty of Negligence** – When directors are found guilty of signing any contract or when due to delay in director's decision, company commits a fraud then the director is bound to compensate the

company of the damages. Director has to prove his innocence that at the time of occurrence of such event he was not available in the company.

- **Director Committed a Breach of Trust** – In the operation of the company if the director is found guilty of breach of trust, he shall be liable to compensate another party with the damages. There may be some cases where specific performance can also be compelled. Breach of trust can be against anyone either shareholders, employees, co-directors or the consumers.
- **Misfeasance** – It refers to a situation when an act is legal but it is done in an illegal manner. There are four essential elements which need to be fulfilled :
  - ◆ Any duty owed to the plaintiff during the course of business
  - ◆ Breach of such duty by the defendant
  - ◆ Cause of such breach of duty
  - ◆ Damages pertaining to such breach of duty
- **Buying Companies Shares** – When a director indulges in buying his company's shares without the knowledge of the other directors this is known as insider trading. Securities exchange board of India (Prohibition of insider trading) Act is silent about the definition of insider trading but it gives us a hint by explaining "Insider", "connected person" and Price sensitive information.
- **Ultra Vires of the Director's Powers** – Director is said to be in ultra vires the power when they act out of their powers which are not mentioned in the articles. This may include buying property or entering into a contract without the consent of other directors and shareholders. Any contract entered into by the director cannot be bound on the other directors if the consent of the same is not granted by them.

### Removal of Directors

As per section 169 of the Act, removal of director can be done in the following two ways :

- **By passing a Resolution by the Company in the General Meeting** – Company may remove the director before the expiration of his tenure, by sending a special notice for the meeting and by ordinary resolution. If any director enters into

a contract with the company that he cannot be expelled under ordinary resolution shall stand void. The exceptions to the above section are as follows :

- ◆ Director appointed by the central Government
- ◆ Director of a private company
- ◆ The company opted to elect two-thirds of the directors by the system of proportional representation
- **By the Tribunal** – If in any case, shareholders of the company file a petition with the tribunal under section 241 of the Act complaining about the mismanagement and tribunal deems fit to provide relief to the petitioners that any contract entered into by the company and the managing director, managers or directors can be set-aside. Also, the tribunal has full right to remove any of the above officials from the company. Any official so removed cannot hold the same position in any of the company till the expiration of the period of five years. Even after the expiration of five years, he has to seek permission of the tribunal. The director cannot seek any damages from the company.

### Conclusion

Director holds a very powerful position in a company and there may be chances that he indulges himself in activities which may harm company's status. Liabilities are well defined in the Act. Moreover, accountability is necessary for effectiveness. A mechanism must be defined so as to evaluate the performance of the directors too. From the above analysis, we can well establish that –

- ◆ A director must work in the good faith and with his diligence
- ◆ They must be confident about all their decisions. Resisting their own decisions make them a bad leader a company can trust upon
- ◆ Working in accordance with the article of association which they all subscribed to is the main purpose
- ◆ They must not have a personal interest in any of the deal which a company enter into and if he makes a profit it must be disclosed.

■■■



## Concept of Competition Compliance Programme : A Need of the Hour

This article aims at explaining the concept of Competition Compliance Programme which means steps or measures undertaken by an enterprise to ensure that it does not infringe any provisions of the Competition Act, 2002. It helps the enterprise to detect any competitive practices which could have taken place even unknowingly.

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### Introduction

The Organisation for Economic Co-operation and Development (OECD) broadly defines “competition” as “a situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, example, profits, sales or market share.” Healthy competition is an essential requirement in any given business environment and it is necessary to prevent anti-competitive behaviour and unfair trade practices in the interest of both the economy and consumers. Competition helps in economic efficiency and leads to innovation and productivity. The Competition Act, 2002 (‘the Act’) is the primary competition law in force in India and has replaced the erstwhile Monopolies and Restrictive Trade Practices Act, 1969. The preamble to the Act states as follows:

*“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”*

Oftentimes enterprises contravene the provisions of the Act without even being aware of it which results in harsh penalties. It is here where there is an eminent requirement of a Competition Compliance Programme to be adopted by enterprises.

### Competition Compliance Programme – Meaning and Objectives<sup>1</sup>

‘Competition Compliance Programme’ (CCP) means steps or measures undertaken by an enterprise to ensure that it does not infringe any provisions of the Act. It helps the enterprise to detect anti-competitive practices which could have taken place even unknowingly. It can be seen as a tool whereby the enterprise monitors itself. Sections 3 to 6 under Chapter II of the Act provides for the regulation of anti-competitive practices. Section 3 provides for prohibition of anti-competitive agreements such as agreement to limit production and/or supply, bid rigging or collusive bidding, tie-in arrangement, resale price maintenance among others. These agreements should cause or should likely cause an appreciable adverse effect on competition in India. Section 4 provides for prohibition of abuse of dominant position. Sections 5 and 6 provides for provisions relating to combinations and their regulations. Combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and outside India. Entering into a combination which causes

1. [https://www.cci.gov.in/sites/default/files/advocacy\\_booklet\\_document/CCP.pdf](https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf)



or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void. Having an effective CCP ensures that the enterprise does not contravene any of these provisions and allows it to be updated with the current competition laws especially with regards to threshold limits mentioned hereinbefore. An enterprise cannot contend that it was not aware of the law. This is based on the Latin maxim *Ignorantia juris non excusat* which means ignorance of law is not an excuse. The Competition Commission of India (CCI) has come out with an advocacy booklet on “Competition Compliance Programme for Enterprises” implying the significance thereof. Subsequently in 2017, the CCI has also issued a “Competition Compliance Manual for Enterprises”. As stated by CCI, there are three main objectives for adopting a Competition Compliance Programme:

- ◆ To prevent violation of law, i.e., the Competition Act 2002 and all Rules, Regulations & Orders made thereunder.
- ◆ To promote a culture of compliance.
- ◆ To encourage good corporate citizenship.

### Composition of CCP

A CCP is required to be well drafted and it should vary depending upon the type of the enterprise. There cannot be any fixed or uniform CCP that could cater across all enterprises. For example, the CCP followed by a dominant enterprise would be different from that of other enterprises since more precautions and regulations would be needed to be followed in the case of the former. Further, the programme should be capable of being easily understood by the employees and strong legal phrases should be avoided. An excellent example is the Compliance Manual Booklet issued by the CCI, which provides the basic provisions of the Act and other guidelines followed by illustrations in a question and answer format. It is imperative to serve the purpose of CCP in “letter and spirit”.

### Essential Features of CCP

**Commitment by the Senior Management** – There should be a clear statement by the top level management that any contravention of the

competition laws will not be tolerated. This should be aptly communicated to the lower levels of management all the way down to the employees. The compliance policy should be mentioned in the Code of Conduct of the company as well. A compliance officer should be appointed to oversee whether the programme is properly being implemented. Sections 177 and 178 of the Companies Act 2013 provides for the constitution of Audit Committee, Nomination and Remuneration Committee and Stakeholders Relationship Committee. It is desired that a Competition Compliance Committee be set up as well comprising of senior management to check and evaluate the programme and also to ensure its effective implementation.

**Training of Employees** – The concerned employees should be trained with regards to competition laws. They should be aware of whether a particular transaction or agreement would likely affect competition laws and if they are not sure they should be able to communicate or report to the compliance officer or legal team. Being well versed with the basic provisions under the Act allows the employees to properly communicate with the regulator when an investigation is in place. It is necessary to identify employees who are at competition law risks. The legal team is also specifically required to be updated with the laws and receive regular training for the same.

**Compliance Manual** – This is a key requirement under CCP. The compliance manual should state the basic provisions under the Act. The manual helps educate employees on handling competition sensitive business information. It also helps the employees in handling situations during pre and post case scenario of inquiry and investigations. It is advised that the manual be available across all departments for reference. The manual should not be outdated and should be regularly updated implementing necessary changes and after taking into account recommendations from various departments. The CCI has, as mentioned hereinbefore, issued a 50 page compliance manual in 2017 which can be referred to by enterprises.

**Competition Compliance Audits** – A periodic internal audit should be put in place to assess the state of competition law compliance. These audits would help in identifying the source of competition law

violation, if any. Hence audits would have relevance when investigation has been started against the enterprise. It should be conducted by independent professionals. The audit process includes document reviews and thereafter interviews with employees. Interviews are conducted to further investigate and to get clarity on the findings arrived at upon reviewing the documents and to determine the culpability of employees who might have indulged in misconduct.

**Evaluation and Review** – Change is constant. This is especially true for laws. It is necessary for enterprises and business organizations to keep up and update themselves with respect to the new laws and regulations. Hence there should be regular evaluation of CCP and it should remain relevant and follow best practices. The level of knowledge of employees should also be regularly tested. There should be set procedures laid down as to how the evaluation is to be conducted. Regular evaluation and review ensures that the CCP is not outdated.

### Advantages of CCP

The CCI mentions the following advantages in its advocacy booklet for maintaining a compliance programme:

- ◆ It inculcates a culture of compliance throughout the organization which in turn can be a business enhancer offering positive benefits to business.
- ◆ There is a competitive advantage enjoyed by enterprises since they are able to detect any violation of provision of law at an earlier stage and can thereby undertake remedial or corrective measures.
- ◆ It assists enterprises to enhance reputation and goodwill. Reputation and goodwill are attained by years of experience and high cost. Non compliance with the law would severely affect how people view the particular enterprise.
- ◆ It obviates or reduces the costs and negative effects of litigation and regulatory intervention.
- ◆ It Establishes enterprises as having social conscience, economic ethics and national interest at heart.
- ◆ A strong efficient compliance programme which shows the eagerness of the management

to comply may reduce the severity of the punishment and penalty imposed.

- ◆ There are major costs involved in non-compliance with the Act, for example, abuse of dominance may result in the Commission ordering division of the dominant enterprise.

### CCP as a Mitigating Factor

Unlike the US, India does not have any 'sentencing guidelines'. As mentioned above by the CCI, a strong efficient CCP may reduce the penalty. Hence it is left to the discretion of the Commission and would depend upon the facts and circumstances of the case as to whether to consider such CCP adopted by an enterprise as a mitigating factor. Nevertheless, the Commission has in various cases considered the existence of an effective programme before imposing penalty. The United States Sentencing Guidelines (USSG) provides that a compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct. This is with respect to antitrust laws as well. Further, a culpable score is arrived at to provide a sentence. This is done by adding or subtracting points. The USSG provides for subtraction of points if the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program. This results in having an effective compliance program to act as a mitigating factor in the US. There are no such laid down rules in India. It is necessary that such incentives are compulsorily provided so that the enterprises can actively take part in implementing a CCP. This can be done only through a statutory backing. It is pertinent to bring in to force a law which provides for the implementation of CCP including as to what constitutes an 'effective' CCP as is provided in the USSG. Similarly rules should be laid down as to how much an effective CCP can contribute towards reduction in penalty imposed.

### Relevant Case Law

- *Crown Theatre v. Kerala Film Exhibitors Federation*

(KFEF)<sup>2</sup> – The informant alleged that the KFEF was contravening the provisions of the Act. These allegations were largely directed towards anti-competitive practices and abuse of dominant position in screening of Malayalam and Tamil films in theatres in Kerala. There was a move to indefinitely close down cinema halls because of certain policies of State Government of Kerala and the informant apprehended that this would result in losses since an upcoming English movie was coming. The informant alleged that the KFEF directed the distributors to abstain from giving films to the informant. Upon completion of investigation, the Commission found that the KFEF indulged in anti-competitive conduct in violation of the provisions of section 3 of the Act. It was further found that the office bearers continued in anti-competitive practice despite the ongoing investigation and the KFEF was also earlier penalised in another case of similar nature. In exercise of powers under section 27 of the Act, the Commission ordered inter alia that KFEF “shall organize, in letter and spirit, at least five competition awareness and compliance programmes over next six months in the State of Kerala for its members”. This emphasises the importance the Commission places on compliance programmes. Similarly in *Ghanshyam Dass Vij v. Bajaj Corp. Ltd.*<sup>3</sup>, the Commission directed the party to “to put in place, in letter and in spirit, a Competition Compliance Manual to educate its members about the basic tenets of competition law principles.”

- *Cartelisation in respect of zinc carbon dry cell batteries market in India*<sup>4</sup> – The Commission took up the case suo moto on a lesser penalty application filed by one of the opposite parties (OPs) viz. OP-3. It was submitted that there existed a cartel among OP-1, OP-2 and OP-3 whereby price would be increased led by one of the OPs and this would be followed by others under the pretext of following the market leader. It was held that there was contravention of section 3 of the Act. However, OP-3 submitted inter alia that it was able to be aware of the existing cartel and could thereby approach the Commission under the Lesser Penalty Regulations because of the CCP in its organisation. The Commission

after considering this along with other factors granted a reduction of 100 percent penalty which could be levied under the Act to OP-3.

- *Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Ltd.*<sup>5</sup> - On the issue of quantum of penalty, the CCI accepted inter alia the existence of CCP as a mitigating factor. Reference was made to the Supreme Court's decision in *Excel Crop Care Ltd. v. CCI*<sup>6</sup> with respect to the principle of proportionality. N. V. Ramana J. had through a separate but concurring judgment held that the Commission may determine the appropriate percentage of penalty based on aggravating and mitigating circumstances. In the instant Hyundai case, the Commission held as follows :

*“In the aforesaid backdrop, while quantifying the penalty in the instant case, the Commission has duly considered the pleas advanced by HMIL in mitigation viz. proportionality, no supra-normal profits, putting competition law compliance programme and first time offender with no previous valid order.”*

## Conclusion

The principle of prevention is better than cure is well established. However compliance is still seen as a burden by some organizations. This should not be the case since top level management should be able to see the long term benefit of compliance. Being compliant with laws helps in preventing payment of fines, protecting the reputation/goodwill of the organization and prevents it from indulging in a long legal battle. There are many enterprises which are not aware of competition laws and hence suffer from the consequences of contravening it. Hence there is a requirement of conducting competition law awareness programmes as well. Notwithstanding the absence of any sentencing guidelines as available in the US, every enterprise should adopt a competition compliance programme, since there might be a chance of it being considered as a mitigating factor. Having a good compliance programme would also mean that the enterprise is in conformity with good corporate governance practice.

2. CCI order, Case Number 16/2014

3. CCI order, Case Number 68/2013

4. CCI order, Case Number 02/2016

5. CCI order, Case Number 36/2014

6. (2017) 8 SCC 47



## Letter of Undertaking

In this article, the author briefly explains the mechanism of Letter of Undertaking, through which a bank allows its customers to raise money from another bank.

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### Background

Banks are important segment in any financial system. An effective banking system helps in the national development. Indian banking system has seen many developments and changes since nationalization. Indian banking comprises of public sector banks, private sector banks, cooperative banks, RRB's, NABARD, EXIM Bank, etc. Indian Banks are governed by the provisions of the Banking Regulations Act, 1949 and the Reserve Bank of India Act, 1934. Banking system is a support system for any economy, with the recent development in banking system in terms of inclusion of new products and services or deletion of and services or products from banking. With recent frauds in banking system for around 12000 crores in letter of undertaking (LOU), funding in PNB and other banks has made banking industry weak in terms of faith and capitalization, which has increased NPA's. With latest circular from the Reserve Bank, it has been decided to discontinue the practice of issuance of LOU/ Letter of Comfort (LOC) for trade credits for imports into India by AD category I banks with immediate effects.

### What is LOU

LOU is a guarantee under which a bank allows its customer to raise money from another bank in the form of a short term credit. The LOU serves the purpose of a bank guarantee. It is issued for overseas import payments. A bank, while issuing LOU for a client, agrees to repay the principal and interest on the client's loan unconditionally. When an LOU is issued it involves an issuing bank, receiving bank, an importer and a beneficiary entity overseas. Once the letter of credit is acknowledged

and accepted, the lender (foreign branch of Indian Bank) transfers money to the Nostro account of the bank that has issued the LOU. As a matter of fact, letter of undertaking is a letter of credit issued by one bank that paves way for another bank to give money to supplier of first bank's customer. AD banks are not permitted to issue LOU/LOC in favour of overseas supplier, bank and financial institution for the extended period beyond three years. AD banks are also permitted to issue Letters of Credit/guarantees/ LOU/LOC in favour of overseas supplier, bank and financial institution, up to USD 20 million per transaction for a period up to three years for import of capital goods, subject to guidelines issued by the Reserve Bank from time to time.

### Process Flow Chart in LOU Funding (Buyer's Credit)

- ◆ Custom approaches lender for Buyer's credit facility
- ◆ Customer provides details to lender for setting up credit limit for buyers credit basis which lender sets limit. Borrower to submit request letter along with necessary documents to lender.
- ◆ Lender to share quotes to customer and same to be accepted by borrower.
- ◆ Trade team send swift message to lending institution by blocking applicants limits for principal and interest.
- ◆ When funds are sighted in our Nostro and make payment for import bills or fund is received in NOC issuing bank account.



- ◆ On maturity funds are in the clients account repay the funds principal and interest to the lender. Limit gets released and bill are closed in system.
- ◆ On maturity in funded are not in clients account then bill gets devolve to make payment to lending bank.

### About the Recent Fraud

Punjab National Bank detected fraudulent transactions worth INR 11300 crore. It was found through SWIFT trail that branch official unauthorisedly and fraudulently issued letter of undertaking on behalf of some companies belonging to Nirav Modi group for availing buyer's credit from overseas banks. For raising the LOU, the customer (importer) is supposed to pay margin money to the bank that has issued the LOU and accordingly, they are granted a credit limit. But in PNB scam case, neither was there a credit sanction nor did he ever give margin money. Once the letter of credit is acknowledged and accepted, the lender (foreign branch of Indian Bank) transfers money

to the Nostro account of the bank that has issued the LOU. In this case, Nostro account of Punjab National bank's account held with another bank in foreign country for the purpose of holding foreign currency.

### What is SWIFT

When an LOU issued, the message of credit transfer is conveyed to overseas banks through the society for worldwide interbank financial telecommunication (SWIFT) system. This is significant information as it gives the bank's consent and guarantee.

### Difference between LOU and LOC

LOU is a contract to perform the promise or discharge the liability of a third person. Interbank if say A bank limit India's client takes buyer's credit from A bank limit overseas branch of A Bank limited India will give LOC, where as if funding is arranged from any other bank(overseas branches) A bank limited will give letter of undertaking. This is a direct funding between banks.

■■■

## KNOWLEDGE UPDATE

### CASE LAW

#### Companies Act

**Discretion exercised by the National Company Law Tribunal in appointing independent auditor to complete audit in time bound manner cannot be interfered by the Appellate Tribunal.**

Where the directors of the respondent-company had been disqualified by the Registrar of Companies on the ground of non-filing of the annual returns and balance sheets under sub-section (2) of section 164, and meanwhile a scheme was floated by the Ministry of Corporate Affairs to rectify the default under the 'Condonation of Delay Scheme 2018' pending company petition between the parties, and the National Company Law Tribunal, in the interest of the company taking advantage of the scheme,

proceeded to appoint independent auditor and decided that the audit should be completed in a time bound manner as the deadline of the scheme was 31st March, 2018, till when the DIN of the directors had been reactivated, being basically an order on interim stage, which was appealed against, it was held by the National Company Law Appellate Tribunal that, in view of the litigation, when the auditors appointed had taken steps in terms of the impugned order, which had been questioned before the Principal Bench of the National Company Law Tribunal, which was seized of the matter, it would not be appropriate to interfere in the impugned order and deal with the question whether or not at all the independent auditor should or should not have been appointed – *S P Gupta v. International Commenter Ltd.*, Company Appeal (AT) No. 54 of 2018 dated 6th April 2018.

# KNOWLEDGE UPDATE

## COMPANY LAW

### Companies (Accounting Standards) Amendment Rules, 2018

Central Government has amended the Companies (Accounting Standards) Rules, 2006 by substituting paragraph 32 of Accounting Standard-11.

### Limited Liability Partnership (Amendment) Rules, 2018

Central Government has amended sub-rule (1) and clause (i) of sub-rule (4) in rule 10 of the Limited Liability Partnership Rules, 2009.

### Companies (Management and Administration) (Second Amendment) Rules, 2018

Central Government has amended the Companies (Management and Administration) Rules, 2014 by omitting rule 13, substituting sub-rule (6) in rule 15, insertion of *Explanation* after clause (ix) of sub-rule (3) in rule 18, and by substituting proviso for sub-rule (16) in rule 22.

### Companies (Registered Valuers and Valuation) (Second Amendment) Rules, 2018

Central Government has inserted clause (h) in sub-rule (2) of rule 19 of the Companies (Registered Valuers and Valuation) Rules, 2017.

### Certain sections of the Companies (Amendment) Act, 2017 notified w.e.f 13th June, 2018

Vide Notification No. S.O. 2422(E) dated 13th June, 2018, as amended by the corrigendum dated 21st June, 2018 the following sections have been enforced with effect from 13th June, 2018:

- ◆ Clause (iii) of Section 21 and Section 22
- ◆ Section 24
- ◆ Section 25

◆ Section 26

◆ Section 71

## INSOLVENCY AND BANKRUPTCY LAW

### Fee and other expenses incurred for Corporate Insolvency Resolution Process

IBBI, vide its Circular No. IBBI/IP/013/2018 dated 12th June 2018, directed the Insolvency Professional to ensure that the fee payable to him, fee payable to an insolvency professional entity, and fee payable to registered valuers and other professionals, and other expenses incurred by him during the corporate insolvency resolution process (CIRP) are reasonable and necessary and are determined by him on an arms' length basis.

### Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018

President has promulgated an ordinance further to amend the Insolvency and Bankruptcy Code, 2016.

## SEBI LAW

### Guidelines for Preferential Issue of Units by Infrastructure Investment Trusts (INVITS)

SEBI, vide its circular no. SEBI/HO/DDHS/DDHS/CIR/P/2018/89 dated 5th June 2018 has issued guidelines for preferential issue of units by Infrastructure Investment Trusts.

### Amendment to Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999

SEBI, vide its circular no. SEBI/HO/MIRSD/DOP2/CIR/P/2018/95 dated 6th June 2018, has amended SEBI (Credit Rating Agencies) Regulations, 1999.

### Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) (Second Amendment) Regulations, 2018

SEBI, vide Notification No. SEBI/LAD-NRO/GN/2018/25 dated 8th June 2018, has amended Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 by substituting the words “held in physical form and” with the symbol “,” in sub-clause (c) of clause 5 of Schedule III.

### **Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fourth Amendment) Regulations, 2018**

Vide Notification No. SEBI/LAD-NRO/GN/2018/24 dated 8th June 2018 has amended Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 by omitting the words “both physical and electronic” in sub-regulation (2) of regulation 7 and sub-clause (2) in clause A of Schedule VII and by inserting proviso in sub-regulation (1) of regulation 40.

### **SEBI Constitutes Group to Review Institutional Trading Platform Framework to Facilitate the Listing of Start Ups**

Vide press release No. 17/2018 dated 12th June 2018, SEBI has constituted a group to look into the existing Institutional Trading Platform framework and suggest measures to facilitate listing of startups.

### **Expert Committee for Listing of Equity Share Capital of Companies Incorporated in India on Foreign Exchanges and Vice Versa**

Vide press release No. 16/2018 dated 12th June 2018, SEBI has constituted an Expert Committee to consider facilitating companies incorporated in India to directly list their equity share capital abroad and vice versa for evolution and internationalization of the Capital Markets.

### **Review of Investment by Foreign Portfolio Investors (FPI) in Debt**

Vide IMD/FPIC/CIR/P/2018/101 dated 15th June 2018 SEBI withdrew minimum residual maturity restriction of three years for investment by FPIs

in Government Securities (G-secs) and State Development Loans (SDLs) and discontinued the auction process being carried out by BSE/NSE. Till date, depositories were monitoring the G-Sec/SDLs utilisation limits and reporting to SEBI. Henceforth, the overall monitoring of G-Sec/SDLs will be done by Clearing Corporation of India Ltd.

## **CASE LAW**

### **Companies Act**

**Refusal to register transfer of shares can be permitted on the ground of violation of law or any other sufficient cause and conflict of interest can also be a cause.**

Where the appellant-company takes specific grounds in the appeal raising questions of law regarding its right to refuse registration of transfer of shares on sufficient ground and the appeal being a statutory appeal under section 10F of the Companies Act, 1956, the High Court should have considered the same among other questions of law – *Mackintosh Burn Ltd. v. Sarkar & Chowdhury Enterprises (P.) Ltd.*, CA Nos. 3322-3323 of 2018 dated 27th March 2018.

**Where there is a special provision contained in proviso to sub-section (3) of section 421, section 5 of the Limitation Act obviously cannot apply.**

Where the National Company Law Appellate Tribunal has dismissed the appeal as not maintainable, inasmuch as the appeal has been filed 9 days after the period of limitation of 45 days has expired and a further period of another 45 days has also expired, there is no reason to interfere with the judgment under appeal. A cursory reading of sub-section (3) of section 421 makes it clear that the proviso provides a period of limitation different from that provided in the Limitation Act – *Bengal Chemists & Druggists Assn. v. Kalyan Chowdhury*, CA No. 684 of 2018 dated 2nd February 2018.

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## KNOWLEDGE UPDATE

### COMPANY LAW

Vide notifications dated 5th July, 2018 the following sections of the Companies (Amendment) Act, 2017 have been notified :

Section	Effective date
Section 15	15th August, 2018
Section 16	15th August, 2018
Section 20	5th July, 2018
Section 75	15th August, 2018
Section 76	15th August, 2018

If undelivered, please return to:  
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