Ministry of Corporate Affairs Moots Exemptions to Private Limited Companies under Companies Act, 2013

One of the difficult tasks for any companies' legislation is that it must be flexible and dynamic to be in position to deal with varying types of companies. Such companies can range from the one-person company, a private limited company, a public unlisted company to finally a public listed company. Despite widely differing characteristics that operate in each of these companies, the legislative focus has been somewhat homogenous. While it is understandable that it is difficult for a single legislation to effectively deal with all types of company (and it would equally be unwieldy to have separate legislation for each type), various approaches are generally adopted.

One approach is for companies' legislation to lay down the minimum norms that are applicable to all companies, and then to set up additional norms applicable to large or publicly listed companies. The converse approach would be to set up the most stringent norms to be the generality, and then carve out specific exemptions for smaller or private companies. In India, the Companies Act has historically followed the latter approach.

The Companies Act, 1956 was generally applicable to all companies, but carried specific carve outs for private limited companies. The Companies Act, 2013 (the 2013 Act) has gone much further in making most of its provisions applicable even to private limited companies, to such an extent that most norms generally relatable to public companies must also be adhered to by private companies. What else would explain the possibility that the key managerial personnel of even private limited companies would be subjected to rules against forward dealing in securities (section 194) and against insider trading (section 195)?

One needs rules against forward dealing to prevent speculation that occurs only in widely traded companies, and similarly those against insider trading where there is a possibility of markets being efficient (i.e. that the availability of information can impact the market price). The relevance of these prohibitions to private companies continues to be confounding.

Even the philosophy and focus of regulation varies between private and public companies. In private companies, the relationships between the shareholders and directors are usually strong and they are incorporated partnerships of sorts (that often partakes the legal character of quasi-partnerships). In such cases, parties are able to set

out the terms and conditions of their relationship in the constitutional documents such as memorandum and articles of association, with considerable flexibility as to how they are to be governed. Since no public interest is involved, matters of minority protection are limited to private disputes between shareholders that are usually resolved through mechanisms such as oppression and mismanagement. Public companies (especially listed ones), on the other hand, require a greater focus on public shareholders, corporate governance and investor protection. The company law in India has been far from recognizing this crucial difference in regulatory philosophy and has continued to adopt a "one-size-fits-all" approach, more so than ever in the 2013 Act. Part of this is sought to be moderated now by the Ministry of Company Affairs (MCA) through a proposal made in consultation with the stakeholders. Through this proposal, the MCA seeks to make exemptions from certain provisions of the 2013 Act, many of them with conditions and only to certain types of companies. While this move is welcome and helps to break out of the unnecessary rigours imposed by the 2013 Act, this is arguably inadequate. Some of the dispensations are limited in nature. Others, such as the forward dealing and insider trading provisions discussed earlier, are not even covered in the proposal. This is therefore only of some partial utility, and may require a rather wholesome approach to restructure the 2013 Act.

Moreover, the method of introducing such significant changes through rulemaking would also suggest that the same benefits now conferred upon private companies might also be taken away by a sleight of hand sometime in the future. It was always well-known and the deliberate structure of the 2013 Act to confer significant rulemaking powers to the Government, but its exercise to bring about a paradigm shift in the regulatory scope of the companies' legislation could raise some consternation.

The earlier Companies Act had a separate class of companies, namely, private companies that are subsidiaries of public companies on whom certain additional regulatory requirements were imposed in line with public companies. Under the Companies Act, it has been included in the definition of public company. The proposed amendments would not cover these companies. The proposal is to create a separate class of companies having 50 or less members. Certain restrictions have been proposed to be withdrawn only for companies with 50 or less members. This will make the applicability of the provisions fluid and the benefit of having companies with 200 members for a private company is diminished.

Interestingly, the proposals do not mention a small company and are considering the creation of a third class of private companies that have 50 members or less. In general, the objective of the proposed amendments appears to be to allow private companies to

regulate their own affairs, as was the case under the previous companies act. The real impact of the proposals will be seen only through the actual text of the legislative amendments. The move is certainly something that would be applauded by industry, corporate as well as professionals like company secretaries, auditors and legal professionals.

The major changes proposed to be made are highlighted below:

1. Kind of Capital and Voting Rights
2. Further issue of shares
3. Issue of ESOP in Private Companies
4. Deposits
5. Notice of meetings and other business of companies
6. Qualification of auditor
7. Appointment of directors
8. Restriction on the power of board
9. Loans to directors
10. Related Party Transactions
11. Appointment of managing director, whole time director and manager
12. Appointment of key managerial personnel