

IN BRIEF – WHITE COLLAR CRIME



While the Indian economy has been resilient post the pandemic, increasing instances of white-collar crimes have been a cause for alarm. Historically, a crisis is often followed by rise in the number of financial crimes, which may be attributed to stimulus packages, subsidies, grants, and other ways and means of pumping in cash flow. India is seeing a huge spike in cases relating to cybercrime, employee fraud, illegal profiteering, accounting malpractices, money laundering, corruption in the grant of government contracts etc., which are expected to grow going forward. In the last 5 years, the focus has been on financial institutions such as private banks, asset management companies, NBFC's, start-ups involving foreign investors, stockbrokers, etc. All investigations largely on financial crimes have been associated with the banking or associate sectors, which include offences ranging from credit card fraud, phishing, KYC fraud to corporate fraud and money laundering.

Financial Crimes/ Offences Applicable to Companies and their Directors - Governing Laws or Regulations

Under Indian law, a company, its director(s), including the key managerial person(s) or the authorized representatives can be tried for criminal offences. Such offences typically include cheating, misappropriation, fraud, embezzlement, tax evasion, money laundering, bribery etc.

Offences such as cheating, misappropriation, fraud, embezzlement, criminal breach of trust, etc., are largely codified under the Indian Penal Code, 1860 ('IPC'), being the primary criminal code of the country, while those relating to illegal gains/ money laundering by a company are governed under the Prevention of Money Laundering Act, 2002 ('PMLA') and the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

The Prevention of Corruption Act, 1988 ('POCA') is a special legislation enacted to combat bribery and corruption amongst public servants, which penalizes offences in relation to acceptance or attempted acceptance of any form of illegal gratification. Any person or a commercial organization engaged in obtaining any undue advantage through such illegal gratification can also be held criminally liable under the legislation. Tax evasions, financial irregularities and statutory violations are governed by the Income Tax Act, 1961 ('ITA') and the Companies Act, 2013 ('Companies Act').

Criminal Liability of Corporates

Indian law recognizes a company as a separate legal entity, being liable for civil and criminal acts. A company is also liable for the acts done by its employees committed within the scope of their employment. Corporate criminal liability is governed by the norms of vicarious liability.

Various provisions of the Companies Act not only make the director criminally liable but also include officers in default under the concept of corporate criminal liability. The term 'officer in default' is a broad term and can include whole-time directors, key managerial personnel ('KMP') and such other directors in the absence of KMP who have been specified by the board of directors.

To determine commission of a criminal act and to array a company as an accused, it must be established that the company through its employee or officer in default either: (i) participated in the commission of the offence; or (ii) did not raise any objection even after having knowledge of the offence; or (iii) where the offence was committed with his consent or connivance.

In [Iridium India Telecom Ltd. v. Motorola Inc¹](#), the Supreme Court held that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring *mens rea*. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. *Mens rea* is attributed to corporations on the principle of 'alter ego' of the company. Through this judgment, the doctrines of attribution and imputation (as prevalent in other jurisdictions) was accepted in India.

Fraud, cheating, bribery or illegal gratification, money laundering and tax evasion are the commonly prosecuted offences personally applicable to a company's director(s), key managerial person(s) or KMP as defined above, officers or authorized representatives.

¹ (2011) 1 SCC 74

How Businesses can Protect Themselves

The Companies Act mandates the board of directors to develop a risk management policy and identify risks that threaten a company. There is an explicit requirement for directors of a company to state that there is in place a proper system to ensure compliance with the applicable laws and that such systems are operating effectively.

Various laws and regulations, however, stipulate penalties for non-compliance of provisions. Legislations such as the Companies Act, Foreign Exchange Management Act, 1999 and almost all labour legislations in India, provide for penalties for non-compliance of various provisions under the respective legislations. Strict compliance of such procedures is the only way to avoid penalties. For example, Section 35(1) of the Companies Act imposes civil liability on every director, promoter or other senior management personnel for any misstatements in the company's prospectus. There are also criminal liabilities attached to non-compliance. Legislations, including foreign exchange regulations, tax, labour and environment laws attract the doctrine of vicarious liability and provide for criminal liabilities of a person in-charge and/ or directors or for KMP in the case of an offence being committed by a company.

Under certain special legislations such as the POCA, there is a provision relating to defence for a commercial organization which has been charged with the offence of bribery and/ or corruption if the commercial organization is able to prove that it had in place adequate procedures and guidelines to prevent a person associated with it from undertaking such conduct. While the government is yet to provide guidelines as to what constitutes adequate procedures, these would commonly include:

- frequent checks and training/ hygiene drives - exercises for identification of risks coupled with assessment of controls/ checks and balances;
- proper vigil mechanism incentivizing whistle-blowers to raise their concerns;
- rules regarding maintenance of proper documentation to curb illegal practices;
- prompt internal investigations and enquiries, of suspected instances of illegality with a view to fix liability on the individuals concerned;
- monitoring of high-risk areas with the help of data analytics;
- creation of hotlines for an anonymous, safe and easy reporting mechanism; and
- data backups and cybersecurity.

Entities engaged in business having government interface, cash flow and areas which are regulated and traditionally considered high-risk, as well as organizations dealing with sensitive personal data, must look at swift implementation of such procedures.

Landmark or Notable Cases, Investigations or Developments in the Past Year

Certain notable judicial pronouncements and developments in the past year in the field of white collar crime are:

- The Government introduced the Bhartiya Nyaya Sanhita Bill, 2023 in the Lok Sabha on August 11, 2023, to replace the existing IPC along with two other bills to replace the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. The most significant change in the bill is the consolidation of certain provisions of the IPC; making it more precise as well as introducing certain new offences such as hate speech, terrorism, organized crime etc. Specifically for economic offences, there has not been a significant change except that the term 'economic offence' now finds a definition, albeit, within the ambit of an organized crime syndicate. The definition of economic offences includes a variety of offences (criminal breach of trust, forgery, counterfeiting), but also incorporates wide terms such as 'financial scams', mass-marketing fraud, multi-level marketing schemes with a view to defraud the public at large or obtaining monetary benefits. These are somewhat loose definitions which would require proper consideration before the bills are introduced as legislation.
- In [Rana Ayyub v. Directorate of Enforcement](#)², the Supreme Court observed that the offense of money laundering takes place: (i) where the funds were acquired; (ii) where they are held; (iii) where they are concealed; or (iv) where they are utilized. This judgment broadens the scope of possible jurisdictions for prosecuting money laundering offences beyond just the location of the illicit funds' deposit.
- In [Vijay Madanlal v. Union of India](#)³, the Supreme Court upheld the constitutionality of the provisions of the PMLA. The Court highlighted that the PMLA was neither pure regulatory legislation nor a pure penal legislation, but rather a unique legislation essential to combat money laundering. The decision has a significant impact on the rights of individuals and corporations subject to investigation or prosecution by the Enforcement Directorate ('ED'), since it provides the ED with ample powers to conduct an investigation under the PMLA, including the authority to arrest, dehors the due process safeguards typically available under criminal procedure.
- In [Directorate of Enforcement v. Padmanabhan Kishore](#)⁴, the allegation against the accused was that he conspired with other co-accused and offered bribes to a public servant. The defence contended that as long as the amount in question was in the hands of the accused himself, it could not be said to be tainted money. The Supreme Court held that so long as the amount is in the hands of a bribe giver and till it does not get impressed with the requisite intent and handed over as a bribe, it would definitely be untainted money. If the money is handed over without such intent, it would be a mere entrustment. If it is thereafter, appropriated by the public servant, the offence would be of misappropriation or species thereof but certainly not of a bribe. The crucial part therefore, is the requisite intent to hand over the amount as a bribe and normally such intent must necessarily be antecedent or prior to the moment the amount is handed over.

Fast paced technological advancements without adequate legal checks and balances are often seen to lead to novel ways adopted by offenders in committing crimes of a financial nature. Though there have been changes in governance norms, regulatory and reporting requirements, these changes may not be enough to counter the complexities for rising white-collar crimes. Companies doing business in India must

² 2023 SCC OnLine SC 109

³ 2022 SCC OnLine SC 929

⁴ 2022 SCC OnLine SC 1490

make their internal compliance programs, practices, and policies more robust and in tandem with the myriad laws that hold the field in relation to white collar crimes in India.

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