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India

BRIBERY & CORRUPTION

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in India.

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INDIA

BRIBERY & CORRUPTION



1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

In India, bribery and corruption are governed by:

The Prevention of Corruption Act, 1988 (**PC Act**) is the primary legislation penalising bribery and corruption in India. It specifies acts that constitute offences and provides for prosecution for those offences. Offences under the PC Act are also predicate offences under the Prevention of Money Laundering Act, 2002 (**PMLA**).

Further, bribes are usually funnelled and facilitated through 'benami' transactions in order to conceal the identity of the person taking or giving the bribe. Thus, in this regard, the Prohibition of Benami Property Transactions Act, 1988 (**Benami Act**), which prohibits benami transactions, becomes relevant along with the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (**Black Money Act**) which is aimed at recovering monies illegally stashed abroad (including bribes).

Separately, any gratification, gift, offer or promise which interferes with the free exercise of a person's electoral right or with a person's decision to contest an election is punishable under the Indian Penal Code, 1860 and the Representation of People Act, 1951 (**RP Act**).

Additionally, public servants, judges, political parties, and media organisations are proscribed from accepting any foreign contribution or foreign hospitality under the Foreign Contribution (Regulation) Act, 2010 (**FCRA**). Similarly, under the All India Service Conduct Rules, 1968, the Central Civil Services Conduct Rules, 1964 and state service rules, government servants are prohibited from accepting any gifts or services from persons with whom they have official dealings.

2. Which authorities have jurisdiction to investigate and prosecute bribery in your

jurisdiction?

The following agencies and institutions inquire and, or investigate offences related to bribery:

1. the Central Bureau of Investigation (CBI), a premier centralized investigation agency;
2. the Central Vigilance Commission (CVC) which exercises superintendence over the CBI in respect of corruption cases. CVC has the power to inquire, or investigate on a reference made by the Central Government, and review the progress of investigation conducted by the CBI under the PC Act.
3. anti-corruption bureaus within state police departments;
4. state police, where the state does not have a separate anti-corruption bureau;
5. Lokpal and Lokayukta (statutory bodies similar to ombudsman) established under the Lokpal and Lokayuktas Act, 2013 (Lokpal Act) which investigate allegations, and also have the power to direct the CBI or state police to investigate allegations of corruption under the PC Act against certain public functionaries at the central and state levels respectively.

Prosecutions are conducted by public prosecutors appointed under the Code of Criminal Procedure, 1973. In certain important or complex cases, special public prosecutors are appointed by the investigating agencies.

3. How is 'bribery' (or its equivalent) defined?

The Supreme Court of India (Supreme Court), in the case of *M. Narayanan Nambiar v. State of Kerala*, AIR 1963 SC 1116, defined bribery as the conferring of benefit by one upon another, in cash or in kind, to procure an illegal or dishonest action in favour of the giver.

Although the PC Act does not define 'bribery', the various offences described in the PC Act can be interpreted as expanding the definition laid down in *M.*

Narayanan Nambiar. The PC Act penalises the obtaining, accepting, attempting to obtain, giving, or promising to give, 'undue advantage' from, by, or to, a public servant for:

1. performing, or causing to perform, a public duty improperly or dishonestly;
2. forbearing, or causing forbearance, to perform any public duty; or
3. obtaining or retaining business or an advantage in the conduct of business, in case of commercial organisations (corporations).

The undue advantage from, by, or to, the public servant and any kind of misconduct by a public servant is the core of bribery or corruption. 'Undue advantage' includes any gratification (pecuniary or otherwise) other than legal remuneration. The use of the term 'undue advantage' in the PC Act is in line with the United Nations Convention Against Corruption which India has ratified.

The Indian Penal Code, 1860 (IPC) also penalises bribery. However, its scope is limited as it applies only to offences relating to elections such as gratification or inducement to exercise any electoral right.

4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

The Indian legal system only deals with corruption in the public sector and bribery of 'public servants' (public officials). Bribery of private persons, unless acting on behalf of a public servant, is neither dealt with nor criminalised by Indian law.

'Public servant' includes any person who holds an office in any sector by virtue of which he is authorised or required to perform any public duty (duty in the discharge of which the state, public or the community at large has an interest) such as a person in government service, a judge, arbitrator, etc. The Supreme Court, in numerous judicial pronouncements, has included individuals in private entities which perform public functions within the definition of 'public servant'. In 2016, the Supreme Court, in *CBI Bank Securities and Fraud Cell v. Ramesh Gelli and Ors.*, (2016) 3 SCC 788, held that a chairman, managing director or executive director of a private bank operating under an Indian banking licence holds an office that performs public duty and will, therefore, be considered a public servant. The

key element is his performance of a 'public duty'. Other examples of 'public servant' performing 'public duty' include officers in private universities, and supervisors in district cooperative societies.

A private person may be charged for corruption under the PC Act as an abettor where he gives or promises to give undue advantage to a public servant inducing him to:

1. perform a public duty improperly or dishonestly;
2. forbear performance of a public duty; or
3. retain, obtain, or secure, an advantage in his business.

5. What are the civil consequences of bribery in your jurisdiction?

Commission of bribery may result in:

1. attachment and confiscation of monies and properties procured through bribery under the PC Act, Benami Act, and the PMLA;
2. declaration as a 'fugitive offender' under the Fugitive Economic Offenders Act, 2018, where the amount involved exceeds INR 1 billion, and consequent attachment and confiscation of properties of the 'fugitive offender' in India and abroad. A 'fugitive offender' and, or, any entity in which he holds a key managerial position or controlling interest, are barred from putting forward or defending any civil claims.
3. suspension of the public servant from service during pendency of any investigation, inquiry, trial or upon arrest (custody for more than 48 hours) under the Central Civil Services (Classification, Control and Appeal) Rules, 1965;
4. restrictions on travel within and outside the country without the permission of court;
5. assessment and recovery of loss caused to the public from a public servant and beneficiaries of such bribery under the Lokpal Act upon conviction;
6. upon conviction, dismissal, removal or compulsory retirement of the public servant; and
7. upon conviction under the RP Act, disqualification from contesting elections or holding office of a Member of Parliament or Member of Legislative Assembly or Legislative Council of a State for a certain time period, upon conviction or dismissal from services on charges of corruption.

6. What are the criminal consequences of bribery in your jurisdiction?

A person convicted of bribery may be subject to imprisonment and, or, a fine. Conviction under the PC Act may entail imprisonment for up to 10 years and a fine. A commercial organisation may be subjected to heavy fines in addition to its officer-in-charge being sentenced to imprisonment. Further, under the IPC, bribing any person to exercise an electoral right is punishable with imprisonment for a period of up to year and, or, a fine.

Offences under the PC Act are also predicate offences for proceedings under the PMLA. In addition, these offences could also entail criminal consequences under the Benami Act and the Black Money Act. Therefore, individuals or corporations charged with corruption also face possible prosecution under PMLA, Benami Act and Black Money Act, and, upon conviction, may be subjected to further imprisonment and, or, fines for offences therein.

As a rule, the sentences run concurrently.

7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials? Are there specific monetary limits?

The law regulates the conduct of public servants in India through 'Service Rules' which includes the Central Civil Services (Conduct) Rules, 1964, the All India Services (Conduct) Rules, 1968 and similar state-specific rules.

The Service Rules delineate the permissible scope of expenses that public servants can incur on hospitality, travel, and entertainment depending upon the magnitude, nature, and extent of the activities undertaken by the public servants. Illustratively, under the Central Civil Services (Conduct) Rules, 1964 and All India Services (Conduct) Rules, 1968:

1. public servants are proscribed from accepting any gift whose value exceeds INR 5,000 without the permission of the Government;
2. on occasions such as weddings, funerals, and religious functions, public servants may accept gifts from close personal contacts with whom they have no official dealings, in accordance with prevailing religious or social norms. However, a public servant must disclose receipt of any such gifts whose value

exceeds INR 25,000;

3. acceptance of lavish and frequent hospitality is prohibited, and only casual meals or other social hospitality are permitted;
4. Free transport, boarding or lodging are considered gifts and are, therefore, prohibited.

Under the FCRA, public servants cannot accept or receive any foreign contribution or any foreign hospitality while visiting any territory outside India except with the prior approval of the Government of India. Urgent medical aid due to sudden illness is exempted provided the Government is informed within one month of receipt of such medical aid from the foreign source. The FCRA makes an exception for articles of personal use, currency and securities received from any foreign source or foreign hospitality.

In general, public servants cannot exceed the specified limits on expenditure or accept monetary or non-monetary compensation for such expenses from individuals whom they have met or interacted with during the discharge of their public duties.

As far as foreign public officials are concerned, there are no specific regulations in India restricting hospitality, travel, and entertainment expenses for foreign public officials.

8. Are political contributions regulated? If so, please provide details.

The RP Act, FCRA and Companies Act, 2013 regulate political contributions.

The RP Act permits political parties to receive political contributions from individuals or companies (except government companies) in India and mandates the disclosure of receipt of contributions exceeding INR 20,000 to the Election Commission of India through the filing of annual reports.

The RP Act further prohibits political parties, candidates for election, legislative members, office bearers of political parties, and any organisation of a political nature, from accepting any foreign contributions as defined under the FCRA. Additionally, every candidate for election is bound to inform the Central Government of any foreign contributions (with details of the source thereof) received by him within the 180 days preceding his nomination as a candidate. Failure to do so is punishable with imprisonment for up to one year and, or, a fine.

The electoral bonds scheme was introduced through the

Finance Acts of 2016 and 2017 – which amended the FCRA, the RP Act; the Income Tax Act, 1961 and the Companies Act, 2013. Under the scheme, an individual or corporate entity may purchase an unlimited number of electoral bonds to donate to political parties of their choice. The most significant amendment was the exemption from reporting donations made via electoral bonds to the Election Commission as would ordinarily have been required under the RP Act which some critics believe has led to a lack of transparency and accountability. The validity and constitutionality of the electoral bonds scheme has been challenged by a number of persons, and proceedings are currently pending before the Supreme Court.

In 2020, the Government amended the FCRA to restrict the inflow, usage, and transfer, of foreign funds. Pursuant to the amendments: (i) public servants were prohibited from receiving foreign funds; (ii) restrictions were placed on the transfer of foreign funds received in India to any other person; (iii) foreign funds could only be received in a designated FCRA account; (iv) the limit on administrative expenses was reduced from 50% to 20%; and (v) the Government was empowered to impose restrictions on usage of unutilised foreign funds.

The amendments to the FCRA were challenged before the Supreme Court in *Noel Harper and others v. Union of India* and another (2022). However, the Supreme Court dismissed the challenge, and held that the right to receive foreign contributions for election campaigning or any other purposes is not an absolute right. This decision is consistent with the position of the international community which recognises that foreign contributions may influence national polity or impose political ideology.

The Companies Act, 2013 stipulates that any political contributions made by a company must be approved by its Board of Directors, and reflected in the annual profit and loss statement.

9. Are facilitation payments regulated? If not, what is the general approach to such payments?

Unlike the US Foreign Corrupt Practices Act (**FCPA**), the PC Act expressly prohibits and criminalises facilitation payments. Receipt of any gratification, monetary or otherwise, is an undue advantage under the PC Act. The mere demand, receipt or attempt to receive an undue advantage is an offence irrespective of any consequent favour having been extended by the public servant receiving such undue advantage or if the performance of the public duty has been improper or dishonest.

10. Are there any defences available to the bribery and corruption offences in your jurisdiction?

While there are no statutory defences available for the offences of bribery and corruption for individuals, the PC Act does carve out certain exceptions. These exceptions include cases of coercive bribery (where one is compelled to offer bribes to get what they are otherwise legally entitled to) provided that the person compelled to give any undue advantage to a public servant reports the matter to a law enforcement agency within 7 days from the date of giving such undue advantage.

A commercial organisation can plead the existence of an adequate and stringent compliance program as a defence to prevent persons associated with it from undertaking corrupt or illegal practices.

11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

Where an allegation is made against a commercial organisation, the organisation may put up a defence by demonstrating that it has adequate procedures in place to prevent persons associated with it (including employees) from engaging in corrupt or illegal practices.

The adequacy of the compliance program depends on the organisation's compliance with the government prescribed guidelines. The compliance program must be genuine and not just cursory or a sham. While, in the absence of legislative provisions, judges have the discretion to determine adequacy, they have often relied on certifications of adequacy or effectiveness from auditors or professionals.

The Indian Government is yet to prescribe guidelines for such compliance programs. In the absence thereof, commercial organisations usually draw reference from the guidelines under the FCPA and the UK Guidance Note issued by the UK Government under the UK Bribery Act, 2010.

The Companies Act 2013 and the Securities and Exchange Board of India (Sebi), India's securities market regulator, also require that certain categories of companies set up internal vigil mechanisms which must necessarily ensure:

1. whistle blowers' access to the audit committee of the board;
2. safeguards against victimisation of a whistle blower; and

3. adequate publication of the mechanism on the company's website and its inclusion in the company's board report.

Additionally, multinational companies, as a matter of policy, have clauses pertaining to professional conduct and ethics in their employment contracts, which acts as a defence to, or mitigate against, liability.

Since the Companies Act, 2013 recognises compliance programs as a defence, even where the defence is unsuccessful, the compliance programs may act as a mitigating factor to reduce liability. Multinational companies also obtain and maintain sufficient documentation such as Know your Customer (KYC) or Know Your Business Partner (KYBP) and due diligence documents so as to eliminate bribery, and in case liability is attributed to the company, these compliances are pleaded in defence to mitigate charges by demonstrating that it took adequate proactive steps.

12. Who may be held liable for bribery? Only individuals, or also corporate entities?

Both individuals and corporate entities may be held liable for offences relating to corruption and bribery. Where a company is convicted of an offence relating to corruption or bribery, the officers of the company responsible for the acts resulting in the criminal action will be held personally liable.

Formerly, the scope of the PC Act was limited to accepting or receiving of bribes by public servants and bribe giver was given immunity. However, in 2018, the PC Act was amended to criminalise acts of promising or giving undue advantage by private individuals and corporate entities (i.e. to hold bribe givers accountable). Private individuals and corporate entities who extend, or promise to extend, any undue advantage to a public servant with the intention of inducing or rewarding such public servant to contravene their public duty are guilty of an offence under the PC Act.

A corporate entity is liable for the offence of bribery if any person associated with it gives, or promises to give, an undue advantage to a public servant, with the intention of obtaining or retaining:

1. business for such entity; or
2. an advantage in the conduct of business for such entity.

A person is said to be associated with a corporate entity if he performs services for, or on behalf of, the entity.

The capacity in which the person serves the entity (whether as employee, agent, subsidiary, etc.) is immaterial, and the determining factors for ascertaining the nature and extent of the association of such person with the entity shall be based upon the relevant factual circumstances. Where the person accused of an offence is an employee of the corporate entity, there is a statutory presumption of association. Vicarious liability is further imposed on the person in-charge (i.e., director, manager, secretary, or other officer) of the commercial organisation with whose consent and connivance the offence has been committed by the commercial organisation.

13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction?

The Central Government is yet to prescribe guidelines to facilitate the compliance of commercial organisations with the extant anti-corruption and bribery laws, and, at present, commercial organisations usually model their compliance programs on the FCPA, the UK Bribery Act, 2010 and the UK Guidance Note. The UK Guidance Note essentially recognises the following broad principles as constituting an adequate anti-corruption mechanism:

1. the procedures employed must be proportionate to the risk the organisation faces and to the nature, scale and complexity of the organisation. It should be clear, accessible, practical and effectively implemented. The procedure must comprise of a policy articulating the anti-bribery stance of the organisation and the intended processes for the policy's effective implementation;
2. there should be strict adherence and commitment to the policy and to creating a work environment wherein bribery is not acceptable;
3. there should be periodic risk assessment within the organisation which should be informed and documented;
4. due diligence must be exercised with respect to persons who perform or will perform services on behalf of the organisation;
5. communication of the policies and procedures to persons associated, including periodic trainings; and
6. monitoring and review of the policies and procedures from time to time.

In addition, corporate entities usually adopt

internationally recognised practices when implementing compliance programs, and engage in training and mentoring their employees, vendors and external consultants against bribery and corruption. Subsidiaries and affiliates of foreign companies model their compliance programs on those of their parent entities.

So far, there are no precedents in India that may provide guidance to corporates on how to comply with the anti-bribery and anti-corruptions laws in India.

14. Does the law in your jurisdiction provide protection to whistle-blowers?

Although India enacted the Whistle Blowers Protection Act, 2011 (**Whistle Blowers Act**) in 2014, it has yet to be made operational. The Whistle Blowers Act primarily aims at providing necessary safeguards to combat the victimisation faced by whistle blowers and is applicable only to persons reporting matters of corruption, wilful misuse of power or discretion, or the commission of criminal offences by public servants.

The Whistle Blowers Act lays down a mechanism for:

1. whistle blowers to make public interest disclosures (bona fide complaints made with a reasonable belief that the allegations are substantially true) to competent authorities;
2. conduct of discreet inquiries;
3. statutory protection to whistle blowers against revealing of their identities; and
4. redressal of whistle blowers' grievances of victimisation.

The CVC is the designated nodal agency to receive complaints from whistle blowers.

Further, the Companies Act 2013 and the Sebi require certain categories of companies to set up internal vigil mechanisms which must ensure:

1. whistle blowers' access to the audit committee of the board;
2. safeguards against victimisation of a whistle blower;
3. adequate publication of the mechanism on the company's website and its inclusion in the company's board report; and
4. in the case of listed companies, implement effective whistle blowers' policies to enable stakeholders, employees, and representative bodies to raise concerns about illegal or unethical practices.

Additionally, multinational companies, as a matter of

policy, have clauses pertaining to professional conduct and ethics in their employment contracts, which acts as a defence to, or mitigates against, liability.

Although a semblance of structure does exist in India to accord protection to whistle blowers, the whistle blower regime in India is not as robust as those in more developed jurisdictions. As whistle blower complaints are on the rise, it is essential that a robust mechanism be put in place to safeguard whistle blowers.

15. How common are government authority investigations into allegations of bribery? How effective are they in leading to prosecutions of individuals and corporates?

Investigations into allegations of bribery are quite common and are usually initiated on the discovery of violations by the government, public departments, vigilance departments, whistle blowers and private complaints. A public servant will also face departmental inquiries on charges of bribery and criminal misconduct resulting in civil and, or, criminal consequences of bribery and corruption.

Further, per the National Crime Records Bureau Report of 2021 (NCRB Report) published by the Ministry of Home Affairs, state police departments registered a total of 3,745 cases of corruption in 2021. In addition, 457 cases against 549 civil or public servants in 2021. Data regarding the number of corruption cases registered by the CBI in 2021 is not available.

The NCRB Report indicates that the number of corruption cases pending investigation increased from 10,989 at the end of 2020 to 11,056 at the end of 2021. Cases pending trial increased from 25,920 in 2020 to 26,840 in 2021. Trials for only 1,044 corruption cases were completed in 2021, and, of these, 450 cases resulted in conviction. Therefore, in 2021, India had a conviction rate of 42.5% for corruption cases, and a pendency rate of 95.2%.

Bribery and corruption cases also come to light through audits conducted by the Comptroller and Auditor General (CAG), a constitutional authority that audits accounts of the central and state governments. During audits, the CAG examines issues of fraud and corruption and highlights those issues in his report.

Further, allegations of bribery are generally investigated by the state police departments and the CBI. While state police are under the government, the CBI essentially is an autonomous body established under a statute and

operating under Ministry of Personnel, Public Grievances and Pensions. The figures indicate that state police departments take the lead in these investigations primarily since they are duty bound to act on private complaints unlike the CBI, which usually investigates upon a reference from the Central Government, State Government, the CVC, Lokpal or, where investigation is assigned to the CBI by High Courts or the Supreme Court of India.

16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any ongoing impact and, if so, what?

Prior to 2018, the focus was on penalising corrupt public servants. However, with the amendments to the PC Act in 2018, the focus shifted to bribe givers and, more specifically, bribery by corporate entities. Distinguishing coercive bribery from active bribery, the PC Act now also prosecutes the bribe giver who previously enjoyed immunity.

There is an emerging trend of higher vigilance over certain industries – especially the financial and real estate sectors– where the scope for bribery and corruption may be higher. India has also seen increased instances of bribery and corruption in the processes adopted by the ministries and government department for grant of licenses or allocation of public resources like mines, spectrum etc.

Registration of cases, investigation, and prosecution of key management personnel of organisations accused of bribery or corruption of public servants by imposing vicarious liabilities has become very common. The Enforcement Directorate (which investigates money-laundering offences) is increasingly resorting to the attachment of proceeds of crimes (monies involved in bribery and corruption) or assets of equivalent value. The Directorate's focus has not just been punishment, which comes at a much later stage, but also disgorgement of proceeds.

Letters rogatory and the increased invocation of mutual legal assistance treaties signed between governments help asset tracing abroad and have led to an increase in the attachment of assets outside India. Necessary amendments have been made to the PC Act, Benami Act and the PMLA to provide for attachment and confiscation.

Investigators often resort to traps, arrests, and raids to apprehend corrupt officials. Per the NCRB Report, 67.6%

of cases in 2021 were trap cases while the remainder were cases of disproportionate assets, criminal misconduct, etc. Assets of those accused of corruption and bribery, and the assets of their relatives, are scrutinised to assess the disproportionality of assets against income.

Since a transaction may involve violations and offences punishable under special statutes, different cases are registered under these statutes and investigated by multiple agencies. In recent years, there has been an increase in the sharing of information among agencies.

The Covid-19 pandemic had resulted in investigations being delayed or prolonged on account of movement restrictions and non-availability of investigators, judicial officers, forensic experts (either because of they were ill or services were suspended) which adversely affected field investigations, forensic services, evidence collection, interrogations, etc. To overcome these difficulties, investigating authorities resorted to cost-effective measures of correspondence such as communication and transfer of documents through email; and reliance on audio-visual means for interrogating accused persons or witnesses during investigations. The digitisation of courts and the conduct of virtual hearings has also expedited matters.

As Covid-related restrictions have now been lifted, investigation and enforcement by agencies have again picked up and are reaching to pre-pandemic levels. Investigating agencies and courts have continued with steps to improve technological capabilities and infrastructure.

17. Is there a process of judicial review for challenging government authority action and decisions? If so, please describe key features of this process and remedy.

Usually, statutes provide for remedies of filing appeals and revision petitions against the action of the government authority. However, where no legal remedies are prescribed, parties may approach the High Courts under their writ jurisdiction challenging government authority action and decisions.

A writ of mandamus lies against the decisions of a government authority, and a High Court may set aside the decision of the government authority if, upon review and examination, it is found to be arbitrary.

The High Courts usually refrain from interfering with the government authority and actions unless it is shown that the authority has acted arbitrarily, in a mala fide

manner, without jurisdiction or in violation of legal procedure or of a person's constitutional or legal rights. Similar recourse is also available before the Supreme Court, although the Supreme Court is reluctant to entertain cases where an efficacious alternate remedy exists before the High Courts.

18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

There are no immediate further plans or reforms in the public domain. However, the employee strength of Enforcement Directorate has increased by nearly 50% in the last 4 years – this is an indication of the Government's commitment to tackling money laundering.

Separately, the Supreme Court has, in *Vijay Madanlal v. Union of India*, addressed several important questions of law relating to the PMLA including:

1. whether 'proceeds of crime' include property obtained or generated through a scheduled offence but also generated through any criminal activity relatable to the scheduled offence;
2. whether every process and activity in dealing with the proceeds of crime, directly or indirectly, would fall within the ambit of money laundering;
3. retrospective application of provisions of PMLA;
4. admissibility of statements provided during inquiry or investigation to investigating agencies.
5. reversed burden of proof on accused persons, upon framing of charges.

Additionally, it is expected that the government will soon also prescribe guidelines for compliance programs for commercial organisations in terms of the 2018 amendments to the PC Act.

19. To which international anti-corruption conventions is your country party?

India has ratified the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organised Crime, and is a member of the trilateral India-Brazil-South Africa Cooperation Agreement and the Financial Action Task Force. India also engages closely with the Organisation for Economic Co-operation and Development on the Convention on Combating Bribery of Foreign Public Officials in

International Business Transactions.

20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.

Professional communication between a lawyer and client is considered privileged and is protected under the Indian Evidence Act, 1872 (**Evidence Act**), the Advocates Act, 1961 (**Advocates Act**), and the Bar Council of India Rules (**BCI Rules**). Professional communication is any communication during or for the purpose of lawyer's engagement or employment or in anticipation of litigation, the contents of any document shared with the lawyer, and, or, any advice rendered by the lawyer. Under the Evidence Act, professional communication between a lawyer and client will not be considered protected where:

1. disclosure is made with the client's express consent; or
2. the communication is made in furtherance of an illegal purpose or a crime; or
3. a lawyer observes a fact that demonstrates any crime or fraud has been committed after the commencement of his employment.

A lawyer cannot, be compelled to disclose protected communication to the court unless he has volunteered himself as a witness or has been accused of abetting or conniving in the commission of the offence.

Lawyer-led investigations are not statutorily recognised in India. However, lawyers are usually involved in certain internal investigations conducted by organisations or corporations in accordance with their anti-corruption policies and internal vigil mechanisms. Such internal investigations include internal complaints of employees, complaints from whistle blowers, allegations of criminal misconduct, insider trading, and allegations of fraud, corruption, bribery, or other criminal offences.

There has been a steady rise in internal investigations conducted by commercial organisations following the introduction of corporate criminal liability under the PC Act in 2018. To ensure compliance and adequate vigilance, organisations initiate internal investigations where the investigation team usually comprises both in-house counsel and external lawyers. External lawyers are engaged to enable the commercial organisation to claim legal privilege as it is unclear whether legal privilege in India also extends to in-house lawyers.

Further, anti-corruption legislation in other jurisdictions have extraterritorial application. As a result, lawyer-led investigations in those jurisdictions (e.g. under the FCPA or the UK Bribery Act, 2010) become applicable in India to the extent that the foreign entities being investigated have Indian subsidiaries or operations in India.

The extent of protection offered during an internal investigation conducted by lawyers is an evolving issue in India. Under the Evidence Act, in any instance in which a lawyer is employed by a client (which, under the Evidence Act, could include a corporation or an organisation), legal privilege is applicable. Arguably, if external lawyers and in-house lawyers are a part of the internal investigation team, the legal privilege under the Evidence Act should apply and extend to all documents, communication, and correspondence between the parties. If the organisation wishes to initiate legal action based upon the internal investigation, it will have to waive its privilege to introduce evidence that has been procured by the lawyers who were a part of the investigation team and member(s) of the investigation will have to testify as witnesses to substantiate their investigations.

21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

Over the years, India has created a robust legal framework to tackle and mitigate against corruption, both structurally and systemically. Existing legislation has been amended (e.g. the PC Act and the Benami Act) and new legislation has been enacted (the Fugitive Economic Offenders Act, 2018 and the Black Money Act, 2015) to crack down on corruption. The government has also taken certain fiscal measures such as the introduction of faceless assessment under the Income Tax Act, 1961, goods and services tax and demonetisation. Prosecutions of high-ranking public functionaries of government departments, public sector undertakings and commercial organisations under anti-corruption laws are on the rise, which reflects India's commitment to eradicating bribery and corruption.

At the administrative level, the government has introduced numerous measures to mitigate against corruption such as the enactment of the Right to Information Act, 2005, and the setting up of e-portals, direct benefit transfer schemes, adoption of integrity pacts by organisations in major procurements, e-tendering for public procurements and e-governance.

Advancements in technology have propelled the creation of new and innovative mechanisms to tackle bribery and corruption and, recently, the government has taken concrete steps towards fighting bribery and corruption. Publication of the 'Citizen's Charter to Fight Corruption' and the launch of Project VIGEYEs by CVC are remarkable steps towards mobilizing citizens and civil societies in the fight against bribery and corruption.

On an international scale the Indian approach is distinctive. This is partly because of the extant political and social complexities in the Indian society – as a result of which there are varied legislations dealing with different classes of persons or individuals.

Notwithstanding all these efforts, India's ranking at the Corruption Perception Index remains dismal. This may be attributed to India's history of weak enforcement of anti-corruption laws, lack of adequate protection to whistle blowers, delayed and tardy investigations, lags in technological advancements, prolonged trials and appeal mechanisms, little or no mechanism to penalise foreign bribery, unfair and opaque political financing, etc. The Government, however, is actively working on these aspects. Recently, an increase of officer strength at investigative agencies has been sanctioned to overcome the delays in concluding of investigations. The PC Act was also amended in 2018 to introduce an outer limit of 2 years for the conclusion of trials under the Act.

22. Generally how serious are organisations in your country about preventing bribery and corruption?

With the introduction of corporate criminal liability under the PC Act, organisations are now increasingly setting up adequate compliance programs to dissuade their management, employees, and even external consultants from engaging in bribery and other corrupt practices.

Several organisations in India have enacted internal compliance mechanisms and programs, in line with the Companies Act, 2013 and Sebi regulations. These compliance mechanisms have emerged as self-regulating structures whereby organisations tackle bribery and corruption through means such as periodic auditing, employee training, cogent KYC and KYBP protocols, following accounting standards, whistle blower protection mechanisms, coherent and accessible grievance redressal mechanisms, etc. Organisations are also focused on building strong in-house legal teams to implement these mechanisms. This is bolstered by the close scrutiny of sector-specific regulators. For instance, the Real Estate Regulatory Authority is specifically designed to tackle exploitation of consumers and

monitor the corrupt practices of builders and their agents, while the Insurance Regulatory and Development Authority aims to protect the interests of policyholders by ensuring financial security of the insurance market and increasing transparency in dealings within the market.

Additionally, for Indian companies with international operations, bribery and corruption have become key concerns primarily due to the extraterritorial application of anti-corruption laws of several jurisdictions. There is thus a growing trend of complying with anti-corruption laws of jurisdictions where these companies have operations. This would apply to Indian companies with operations overseas as well as Indian subsidiaries of foreign companies.

23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?

The factors contributing to India's low ranking on corruption indices are the biggest challenges being faced by the enforcement agencies and regulators when investigating and prosecuting cases of bribery and corruption in India.

India's enforcement of the anti-corruption framework has historically been weak. This can be attributed to factors such as understaffed investigating agencies and public prosecutors' offices, paucity of skilled investigators and public prosecutors, lack of adequate training and modernisation, delayed investigations, prolonged trials, political interference, technological challenges, lack of adequate infrastructure, etc. One of the biggest hurdles is the failure to adopt the latest forensic and scientific tools of investigation. Further, transactions in the business world have become complex, more so due to layering of transactions through shell companies. This makes it difficult to gather and link such evidence to the offence of bribery and corruption. With the rise in crypto laundering, investigating agencies face complex enforcement challenges due to the inherent anonymity and immutability of cryptocurrencies.

Given the absence of a lead or nodal agency, the overlapping jurisdiction of state governments and central agencies over investigation creates a lot of confusion and interdepartmental clashes. This results in a lack of coordination and cooperation, and hampers investigations.

Offenders route and re-route money through companies

located in different countries, thus prolonging the collection of evidence owing to compliance with international conventions and treaties and the need to navigate through diplomatic channels. Letters rogatory or letters of request for collection of evidence are time-consuming and it can sometimes take years to process these requests. Once processed, such letters are often turned down on the basis of executive discretion or territorial sovereignty leading to loss of crucial evidence. Agencies have recently resorted to issuing summons and requests for information to individuals stationed abroad directly via email but such requests are seldom responded to.

In cases which include both Indian and foreign nationals as accused, trials are further prolonged by foreign nationals refusing to surrender to the jurisdiction of Indian courts. For instance, where there are parallel investigations into the same incident in different territorial jurisdictions, foreign nationals can rely on the prohibition of double jeopardy, as enshrined in the UNCAC. These factors further delay prosecution of, and convictions in, complex, transnational cases of bribery and corruption.

As wealthier offenders often escape to other jurisdictions, investigating agencies are also hampered by complex extradition procedures and the resultant delays, or inability, to interrogate, arrest, and, or, prosecute accused persons.

24. What are the biggest challenges businesses face when investigating bribery and corruption issues?

Since internal investigations conducted by businesses have no legal backing and are voluntary in nature, the challenges faced include absence of a guiding framework, lack of uniform fact-finding and evidence collection methods and inability to enforce participation from employees in such internal investigations. Additionally, admissibility and evidentiary value of the findings of such internal investigations remains a grey area at present.

Further, in cases of cross-border investigations into Indian subsidiaries of international corporations, the cooperation between various stakeholders is minimal and, at times, there is a difference in perception of corruption issues between the parent corporation and its subsidiary.

An additional challenge is that, due to the archaic statutes and gaps in advocates' rules, legal privilege does not extend to in-house counsel. Thus,

communications, documents, and, or investigations conducted by in-house lawyers are not protected by legal privilege, unlike those conducted by external counsel.

25. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

With the amendments to the PC Act and various other laws and increased public attention, activities and actions of commercial organisations have come under greater scrutiny. Thus, businesses need to ensure that there is an adequate and strict compliance-mechanism in place to conduct inquiries and investigations into allegations of corruption and bribery in a timely manner. In the absence of any guidelines from the government regarding the adequacy of such mechanisms, businesses have been in the lurch and the question of adequacy has been left to courts to determine.

Moreover, with work-from-home policies becoming the norm, organisations exercise less oversight over employees' conduct and communications. This lack of direct oversight can increase an organisation's risk. Employers are likely to face challenges in obtaining the cooperation of employees working remotely for internal investigations.

In addition, as the PMLA allows the Enforcement Directorate to attach properties and assets of businesses if it has the reason to believe that they constitute proceeds of crime, businesses must exercise greater prudence when entering into transactions.

Further, there is an increase in the scrutiny of licences granted to businesses and organisations under the FCRA. This has been bolstered by the Supreme Court recently upholding the amendments to the FCRA which have imposed restrictions on the inflow of foreign funds into India. There has also been an increased vigilance on the foreign investments into Indian businesses with increased corruption in the finance sector. Blanket immunity to investor directors from any non-compliances or defaults of the company or its corrupt activities has dissuaded investors from entering the Indian market.

Finally, given that several investigations (and subsequent prosecution) include politicians and bureaucrats the subject of the investigation (and as accused), businesses and managers who are also the subject of such investigation and prosecution cannot do otherwise than address these situations meaningfully from inception. There are no shortcuts and such

situations need to be addressed holistically and completely; from the commencement of investigation, through trial of 1st instance; and up to the final appeal. This, of course, could entail significant expenditure for any businesses involved in such proceedings.

26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

The most critical steps that the government needs to take are to: (i) address the lack of staff, resources and facilities; (ii) address inadequate training; (iii) modernise the forensic and scientific tools of investigation (including by investing in the 'crime and criminal tracking network and system'); and (iv) use emerging technology for prevention, transparency and greater efficiency – for instance, decentralisation of information through blockchain technology, particularly in cases of land registry or steps to reduce human-interface in bidding or tender processes. State governments in India are presently working towards such technological solutions.

Some other possible measures include the setting up of a nodal investigating agency and increased witness (whistle blower) protection programmes. Such measures would not only create a prevention mechanism, but also lead to speedy investigations and culmination of trials within 2 years (as prescribed by the PC Act).

To align the Indian anti-corruption framework with international law and policy, steps should be taken to penalise bribery of private sector officials and protect corporate whistle blowers. As regards bribery by foreign firms (for instance, the AgustaWestland helicopter case), India must also put in place a strict mechanism to check and criminalise foreign bribery (bribery of foreign public officials in India and bribery by foreign firms in India) to align with the multilateral consensus on criminalising foreign bribery.

At the organisational level, though organisations are implementing anti-corruption measures and internal controls (like risk assessment policies, due diligence procedures while choosing business partners, employee code of ethics, setting up vigil mechanisms), it is essential that the implementation of such steps and controls be more stringent. Merely setting up the mechanisms is not enough; effective implementation is essential. The organisation's firm stance of zero tolerance towards bribery and corruption must be communicated clearly through educational and awareness programs and establishment of sufficient

deterrents to discourage any persons associated with the organisation from engaging into corrupt practices or

ethical conduct. Further, as has been done in numerous organisations, corporate gifting policies should be discontinued.

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