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White Collar Crime | Key Developments under the Indian ABC and AML Regimes

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India has long been viewed as a jurisdiction with a reputation for widespread corruption and questionable business practices. Against the backdrop of increased focus on high-profile white collar incidents and recent "scams", and with a view to aligning the Indian position with international anti-graft laws, various amendments have been made in recent years to the principal Indian anti-corruption and anti-money laundering legislations, the Prevention of Corruption Act, 1988 (the ***PCA***) and the Prevention of Money Laundering Act, 2002 (the ***PMLA***). This note looks at some of these recent changes and certain other developments, which are likely to be relevant for corporates doing business in India.

There has also been an increase in companies conducting internal investigations, as well as search and seizure operations undertaken by enforcement agencies. This note looks at these aspects, and how they tie in with legal privilege concepts under Indian law.

The Prevention of Corruption Act, 1988

The giving of an undue advantage is now an offence

Originally, under the PCA, it was only the acceptance of bribes by "public servants" that was a criminal offence, and the primary focus of the PCA was on public servants that received bribes. Not addressing the "supply side" was widely perceived as a major gap in the legislation, and accordingly pursuant to an amendment in 2018, the giving of an "undue advantage" (a concept which has widened the scope of the gratification provided) to a public servant has now been made a specific offence under the PCA.

It is relevant to note that under the PCA, the offence is committed, even if the undue advantage is not accepted. It is also irrelevant if the undue advantage was given directly or through a third party. The payment of "speed money" (for instance to obtain a licence or permit out of turn) is also now an offence.

The PCA originally provided protection to bribe givers if they became witnesses and provided statements in a prosecution against a public servant. This protection has been significantly limited by the 2018 amendment, with a view to encouraging bribe givers to report offences promptly. The carveout to the offence of bribe giving is now only available to a person who is

compelled to pay a bribe, provided they report the matter within a period of seven days from the day of paying such bribe. At present, there is no real guidance on what is required to demonstrate that a bribe-giver was so "compelled".

Under the amended PCA, bribe givers can now be subject to a prison term of up to seven years or a monetary fine (or both).

There are still no specific statutory provisions relating to bribery involving foreign officials or corrupt practices between private parties in India.

Offences by commercial organizations

Another significant change introduced by the 2018 amendment to the PCA was to expand its scope to specifically apply to commercial organizations. Accordingly, a commercial organization can now be held to be guilty of an offence under the PCA if any person associated with the organization offers, promises or gives an undue advantage to a public servant with a view to obtaining or retaining business or an advantage in the conduct of the business of such organization.

Definition of "commercial organization" and persons "associated" with a commercial organization

The key concepts in this regard have been defined broadly. A "commercial organization" includes a company incorporated outside of India but having a place of business in India. The definition of a person "associated" with a commercial organization includes any person who performs services for or on behalf of the organization and includes an agent. This would therefore include third party intermediaries (who are generally seen as high corruption risks, especially in the Indian context). In addition, all employees are deemed to be persons performing services for or on behalf of the employing organization.

Accordingly, global corporates with Indian business operations could potentially face liability for the actions of their subsidiaries, employees and third party intermediaries in India.

Liability for offence

The amended PCA provides that if a commercial organization is found to be guilty of an offence of giving an undue advantage, such an offence will be punishable with a monetary fine. Further, if such an offence is proved to have been committed with the consent or connivance of any person in charge of the commercial organization (being directors, managers and other officers), such person shall also be considered to be guilty of the offence of bribe giving and can be subject to a prison term between three years and seven years, as well as a monetary fine.

"Adequate procedures" defence

Pursuant to the 2018 amendment, a commercial organisation can take the defence that a bribery and corruption event is not an offence by it, if it can demonstrate it had adequate procedures and safeguards to prevent its associated persons from undertaking such conduct. The central government has been empowered to prescribe what will constitute "adequate procedures", but no such guidelines have been issued so far. Accordingly, at present, most corporates are taking their cue in this regard from the guidance and requirements set out in international laws such as the US Foreign Corrupt Practices Act, 1977, and the UK Bribery Act, 2010. These processes may need to be modified to reflect Indian standards, as and when the guidelines are issued.

Case law

Private bank directors held to be "public servants"

One case in particular has also had the effect of increasing the scope of the PCA. In a 2016 judgment (*Central Bureau of Investigation v. Ramesh Gelli (3 SCC 788)*), the Indian Supreme Court held that the chairman and directors of a private bank would be "public servants" in view of the public duty element and nature of work performed by bankers. This principle could arguably be extended to other corporates which provide services that could be viewed as having a "public duty" element (but this does not appear to have been done so far). As mentioned above, there are currently no specific statutory

provisions specifically dealing with corrupt practices between private parties.

Amendments to have prospective effect

It is also relevant to mention that various Indian high courts have held that the 2018 amendments to the PCA are to be considered prospective in nature (although these judgements have been in the context of defences raised by public servants to the effect that the procedures which became applicable post the 2018 amendment were not followed at the time of initiation of proceedings against them (prior to the 2018 amendment)).

The Prevention of Money Laundering Act, 2002

The PMLA has been updated and amended on a fairly regular basis to provide it with more "teeth", with the most recent amendments being made in 2019. Some of the key changes in this regard are set out below.

Money laundering and proceeds of crime

The PMLA defines money laundering to mean directly or indirectly attempting to indulge in, or knowingly assist, or be involved in, a process or activity connected with the proceeds of crime (including their concealment, possession, acquisition or use) and in projecting or claiming that tainted property is untainted.

The PMLA also criminalizes "offences of cross-border implications", which essentially cover offences:

- committed or related to conduct outside India that constitute an offence in the relevant jurisdiction, and which are identified offences under the PMLA, where the proceeds of crime arising from such conduct are remitted to India; and
- committed in India where the proceeds of crime have been transferred from India to a place outside India.

Accordingly, the cross-border transfer of the proceeds of crime are within the ambit of the PMLA.

Definition of "money laundering" widened

Under the substantive definition of money laundering in the PMLA, the proceeds of crime are required to be used / possessed / acquired **and** projected as untainted or as 'white' money. An explanatory note to the definition has been introduced as part of the 2019 amendment which states that this is an **"or"** test – in other words, it is an offence if the proceeds of crime are projected as untainted, without the other elements (such as use or possession) being present. The intention of the amendment is clearly to widen the scope of the offence, but it is unhelpful that the amendment was not made in the substantive definition.

Continuing offence

The 2019 amendment has also clarified that the offence of money laundering is a "continuing offence" for so long as such a person directly or indirectly enjoys the proceeds of crime by its concealment. Prior to the insertion of this clarificatory language, certain court judgements in India had held the offence to be a "one-off" offence.

"Proceeds of crime" definition has been expanded

The definition of the "proceeds of crime" has been steadily widened in recent years. Prior to 2018, the "proceeds of crime" referred to any property derived by a person as a result of certain identified crimes (for instance, offences relating to taking of bribes under the PCA, criminal conspiracy and cheating under the Indian Penal Code, 1860 and fraud under the Indian Companies Act, 2013), and provided that where such property was taken or held outside India, then any property equivalent in value held within India would be considered the proceeds of crime.

This was expanded in 2018, so that property equivalent in value held outside India would also be considered to be the proceeds of crime. Thereafter, the 2019 amendment included an explanatory note which stated that in addition to properties derived or obtained from an identified offence, any property which may be "directly or indirectly derived or obtained as a result of any criminal activity relatable to" an identified offence

will also be considered the proceeds of crime. Accordingly, where amounts which are proceeds of crime are invested, then any return on such tainted amounts (by way of interest or dividends, for example) are also considered to be proceeds of crime.

This clarification has given the enforcement authority the ability to attach a wider range of assets. In recent cases, the enforcement authority has begun to attach bank balances in current accounts as the proceeds of crime, where the tainted property itself has been unidentifiable.

Enhanced powers of the Directorate of Enforcement

The primary enforcement and investigating authority under the PMLA is the Directorate of Enforcement (the ***ED***), which also serves as the enforcement agency for exchange control laws. The ED can initiate proceedings for attachment of property and can launch prosecution in the designated special courts for offences of money laundering.

There were contradictory high court judgements as to whether offences under the PMLA were "cognizable" (which means that an arrest can be made without a warrant) and "non-bailable" (which means only a court of law can grant bail at its discretion for an arrest made under the PMLA after conducting a hearing). The 2019 amendment contains a clarificatory note which confirms that such offences are and have always been cognizable and non-bailable. Accordingly, it has now been clarified that the ED has the power to make an arrest without first requiring a warrant, and the grant of bail to an accused is in the hands of the courts (and not a "right" of the accused).

Increase in reporting obligations

The PMLA imposes obligations on various "reporting entities" such as banking companies, financial institutions and intermediaries (including brokers and money changers) to maintain records of transactions and documents evidencing the identity of their clients and beneficial owners, to furnish such records to the central government and to report suspicious transactions and transactions exceeding a specified value.

The reporting entities (including their employees and directors) are granted immunity against civil and / or criminal proceedings for divulging records of transactions in accordance with the PMLA. However, they may become liable to prosecution if they had knowledge of the proceeds of crime and projected that such proceeds were untainted.

The reporting obligations have been enhanced by the 2019 amendments with the introduction of increased due diligence requirements, pursuant to which reporting entities are required to take additional steps to verify the identity of the clients undertaking specified transactions and to examine the ownership and financial position, including sources of funds of their clients prior to the commencement of each transaction. The reporting entities are also now required to take prescribed steps to record the purpose behind conducting the specified transaction and the intended nature of the relationship between the transacting parties. Where the client is unable to provide the relevant information, the reporting entity is under an obligation to not allow the specified transaction to be undertaken.

Offences by companies

It is relevant to mention that if a company is found to be guilty of an offence of money laundering, every person who at the time of the offence was in charge of or responsible for the conduct of the business of the company shall also be deemed to be guilty of the offence along with the company. There is a carveout which provides that the person shall not be liable if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent such an offence.

Under the PMLA, a "company" has been defined to mean any body corporate which includes companies incorporated outside India as well. Therefore, a foreign company which has committed an offence of money laundering (with Indian implications) could also be liable for prosecution under the PMLA.

Legal privilege

In India, communication between an "attorney" and its client is generally considered to be legally

privileged and such privileged communications cannot be used as evidence against the client in a trial. No person can be compelled to disclose any confidential information which has taken place between such person and her attorney, unless such person offers herself as a witness, in which case she may be compelled to disclose any such communication as the court may deem necessary in order to explain any evidence that she has given. Correspondingly, an attorney is not permitted to disclose any communication made to her by or on behalf of her client or to disclose any advice given by such attorney to the client in the course of her professional employment. This rule is, however, subject to certain limited exceptions where such a communication is made in the furtherance of an illegal purpose, or the attorney becomes aware that a crime or fraud has been committed since the commencement of her engagement.

Internal investigations

Against the backdrop of the increased focus (both globally and within India) on anti-graft and money-laundering matters, we have seen an increasing number of internal investigations being undertaken by companies in India (although these are not mandated by Indian statutes). These are often done to achieve the following objectives: to meet the requirements (both statutory and internal) imposed on global parent companies; to enable companies to demonstrate that "adequate procedures" were in place for the purpose of a defence under the PCA; and generally to give companies an opportunity to request leniency.

In this regard, whilst internal investigations are done with a view to portray the companies in question (and their management) as victims, and to show co-operation and seek leniency, enforcement agencies in India will normally seek to implicate the management in the first instance (thereby, putting the onus on the individuals in question to show that they should not be parties to the proceedings). Neither the PCA nor the PMLA contain any statutory mechanism regarding leniency.

Internal investigations in India are normally undertaken by external counsel to obtain the benefit of legal privilege, as communications with in-house counsels are not protected. Other experts are also often engaged through external counsel with a view to obtaining protection for their work product.

Where an investigation uncovers offences which are mandatorily reportable under the Indian Code of Criminal Procedure, prompt disclosure will need to be made to appropriate authorities. Amongst the offences that are compulsorily reportable are a criminal breach of trust by a public servant. Whilst at first blush the relevant provisions put the onus to self-report on the public servant, bribe giving to public officials could get captured by additional requirements to report criminal breaches of trust committed by "agents". Accordingly, a company may well be required to mandatorily report an instance of a bribe given by its employee to a public servant, on the basis that the employee who gave the bribe was acting as the company's "agent".

It is important to ensure that cross border efforts to address an incident in India are not only coordinated across jurisdictions but also balanced, so that (to the greatest extent possible) disclosures and defences in one jurisdiction do not serve to adversely affect the legal position or process in another - in other words disclosures of Indian events to the Department of Justice or the Securities Exchange Commission could reduce fines and penalties in the United States, but could equally result in the Indian entity (and its management) becoming vulnerable to significant liability in India. It is therefore important that such disclosures are made in a manner that comply with the requirements of all relevant jurisdictions but also limit exposure in all such jurisdictions.

Search and seizure operations

As a practical matter, authorities conducting search and seizure operations in India often take a heavy handed approach and may not concern themselves too much with the rules around legal privilege. Whilst in theory, even in case of a search and seizure operation, the party who is being asked to disclose legally privileged information has the option of approaching a court for an interim order upholding the privileged nature of the documents or other information, in practice, this is often difficult to achieve.

Whilst it can be difficult to prevent the authorities from gaining access to legally privileged documents during a search and seizure operation, it is generally possible to exclude such documents from being used as evidence in a court. However, it should be kept in mind that the exclusionary rule of evidence law may not always be treated with sanctity, and an enforcement agency may attempt to use the "fruits of a poisonous tree" to build its case.

Conclusion

Recent instances of high-profile financial criminal cases (involving well-known businessmen such as United Spirits Limited's chief Vijay Mallya and diamantaire Nirav Modi and heads of India's largest private sector banks such as Chanda Kochhar and Rana Kapoor) have brought white collar issues to the forefront in India. In addition to the amendments to the PCA and the PMLA a number of new laws have been passed in recent years, such as the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (aimed at curbing black money, or undisclosed foreign assets and income and imposing tax and penalty on such income) and the Fugitive Economic Offenders Act, 2018 (aimed at bringing to book fugitive economic offenders involved in offences involving sums upwards of INR 1 billion (approx. USD 13.7 million)). We are also seeing increased co-operation and coordination in cross-border enforcement efforts between Indian authorities and their foreign counterparts.

Accordingly, corporates doing business in India would be well advised to keep white collar issues firmly in mind.

If you would like any further information on any aspect of this note, we would be happy to assist.

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