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Legal Guides**



Business Crime

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

India has a quasi-federal political structure comprising 28 states and eight centrally administered Union Territories. It has a democratically elected Union Government (also called the Central Government) and each state has its own democratically elected state Government. Police is a state subject, and therefore both its establishment and maintenance are in the hands of the state Governments.

There is a unified (all India) legislation called the Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973 (CrPC) and the Evidence Act, 1872 prescribing the substantive and procedural laws relating to crime.

The Central Government has established a central investigative agency called the Central Bureau of Investigation (CBI). The CBI has its own prosecution wing called the Directorate of Prosecution. The CBI derives its powers from the DSPE (Delhi Special Police Establishment) Act, 1946.

The CBI is involved where it is necessary to entrust investigation to an independent agency, free from local influence or where there are inter-state ramifications.

Another central agency for investigating and prosecuting white-collar crime is the Serious Fraud Investigation Office (SFIO) operating under the Ministry of Corporate Affairs. This consists of experts in the fields of accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation.

Recently, on August 11, 2023, the Central Government introduced three bills in the lower house of Parliament to repeal and replace the IPC (with the Bharatiya Nyaya Sanhita Bill), the CrPC (with the Bharatiya Nagarik Suraksha Sanhita Bill) and the Evidence Act, 1872 (with the Bhartiya Sakshya Bill). The Bills are currently under examination by a Standing Committee. The Committee's report is expected by the year end.

The Bills are intended to overhaul and replace laws that have been in existence since the 1860s and to reflect evolving societal values. For instance, the Bills provide for an increased use of technology, including the use of forensic evidence during investigation, a timeframe for completion of an investigation, speedier trials through video conferencing hearings, etc.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body that will investigate and prosecute a matter?

The CBI is involved either at the behest of the concerned state or upon direction of the High Court/Supreme Court.

1.3 Can multiple authorities investigate and enforce simultaneously?

Yes, multiple authorities can investigate and enforce simultaneously. For instance, currently, in a high-profile case involving a high-profile politician, the Directorate of Enforcement (ED) is investigating allegations relating to money laundering and the CBI is inquiring into corruption charges.

1.4 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

The Government of India has set up various agencies to enforce the law and combat crime. Some significant ones are:

- (1) The ED (for foreign exchange, money laundering and fugitive economic offences, and implementation of the Foreign Exchange Management Act, 1999 (FEMA) and Prevention of Money Laundering Act, 2002 (PMLA)).
- (2) The Central Bureau of Narcotics (for drug-related offences).
- (3) The Directorate General of Revenue Intelligence (for customs, excise and service tax-related offences).
- (4) The Securities and Exchange Board of India (SEBI) (to protect the interest of investors and regulate the securities market).
- (5) The Directorate General of Income Tax.
- (6) The Directorate General of Foreign Trade (to monitor and curb illegal foreign trade).

1.5 What are the major business crime cases in your jurisdiction in the past year?

Some high-profile business crimes are described below:

- The ED launched a probe against the former Deputy-Chief Minister of Delhi and later arrested him on February 26, 2023. The allegation against him was that he received kickbacks for illegally tweaking the state liquor policy to benefit a number of wholesale businesses.
- The CBI has framed charges against a former MD and CEO of a leading bank, Mrs Chanda Kochhar, and her husband, Mr Deepak Kochhar, for alleged kickbacks

in loan transactions to a leading corporate (Videocon Group). The CBI has arrested Mr and Mrs Kochhar as well as the Videocon Group head, Mr Dhoot.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

The exclusive criminal courts constituted in each state are:

- (i) courts of Judicial Magistrates (in metropolitan areas, these are called courts of Metropolitan Magistrates); and
- (ii) courts of Sessions.

Each state is divided into administrative divisions called Districts. Each District consists of a Sessions Court and courts of Judicial Magistrates.

Special courts are set up to deal with cases investigated by the CBI and to deal with offences under specialised statutes, for instance, under the Companies Act, 2013 and under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

2.2 Is there a right to a jury in business crime trials?

No, there are no jury trials in India.

2.3 Where juries exist, are they composed of citizens members alone or also professional jurists?

This is not applicable.

3 Particular Statutes and Crimes

3.1 Please describe the statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused.

• Securities fraud

The Securities and Exchange Board of India Act, 1992 (SEBI Act) and Rules framed thereunder deal with fraud related to securities, the issue, purchase or sale of securities, and the contravention of the aforesaid statutes. Fraud includes any act, expression, omission or concealment committed, whether in a deceitful manner or not, by a person with his connivance or by an agent to deal in securities (whether or not there is any wrongful gain or avoidance of any loss), and also includes having knowledge of misrepresentation of the truth or concealment of material fact.

Under the SEBI Act, the Board set up thereunder has the power to prohibit fraudulent or unfair trade practices relating to securities markets. Penalties include a fine for failure to furnish information, failure by any intermediary to enter into any agreement with clients, failure to redress investors' grievances, etc.

• Accounting fraud

Accounting fraud includes forgery, falsification of accounts, professional misconduct including failure to disclose a material fact that is not disclosed in a financial statement, and failure to report a material misstatement that is to appear in a financial statement. Under the Companies Act, 2013 (last amended in March 2021), the Central Government is empowered to inspect the books of accounts of a company, direct special audits, order investigations and launch prosecutions. The IPC sets out the

punishment for forgery and falsification of accounts. In 2023, the Central Government further amended the PMLA to include accountants and company secretaries within its scope.

• Insider trading

The SEBI Act prohibits insider trading. No "insider" shall (directly or indirectly) deal in securities of a listed company when in possession of unpublished price-sensitive information (UPSI). Also, an insider cannot communicate, counsel or procure UPSI. Prosecutions are launched by SEBI to prohibit insider trading in securities. In continuation of its efforts against insider trading, SEBI also notified the Prohibition of Insider Trading Regulations, 2015 (amended from time to time, most recently in November 2022). With the introduction of the Regulations, the scope of who is an "insider" or a "connected person" is significantly widened. Therefore, any person, whether or not related to the company, may come within the purview of the Regulations if he is expected to have access to, or possess, UPSI. The Regulations specifically define trading and prescribe a more structured disclosure regime. The Regulations prescribe for initial and continuous disclosures to be made by certain categories of persons in a company whose securities are listed on a stock exchange, along with public disclosure requirements for the company. Further, the Board of every listed company is required to formulate and publish its policy and a code of practices and procedures regarding disclosure of UPSI to determine what will constitute a "legitimate purpose" for holding on to UPSI, whistle-blower norms for reporting leaks of UPSI, and inquiry norms for determining the source of leaks. Recent notable amendments include the requirement to store contents of the structured digital database for the preceding eight years at any point in time. The structured digital database, which was mandated earlier in 2019, must now contain details on the nature of the UPSI and the details of the person sharing it. Further, by virtue of the amendment in 2020, maintenance of the database cannot be outsourced. Additionally, all listed entities, intermediaries and fiduciaries are required promptly and voluntarily to report any Code of Conduct violation in the prescribed format, identifying the violation to the stock exchange(s) where the concerned securities are traded.

• Embezzlement

Embezzlement under the IPC includes criminal breach of trust and dishonest misappropriation of property. The person entrusted with such property should have either dishonestly misappropriated or converted to his own use the property concerned, or have used and disposed of that property in violation of law. The offence carries imprisonment for a term that may extend to two years or a fine, or both.

• Bribery of government officials

The law dealing with the bribery of Government officials is contained in the Prevention of Corruption Act, 1988. The following offences by public servants/other persons/commercial organisations attract a penalty under the Act:

- (i) Taking gratification other than legal remuneration in respect of an official act.
- (ii) Taking gratification by corrupt or illegal means to influence a public servant.
- (iii) Taking gratification for the exercise of personal influence with a public servant.
- (iv) A public servant obtaining valuable things without consideration from the person concerned in proceedings, or business transacted by such public servant.
- (v) Any person who gives or promises to give undue advantage to a person with an intent to induce or reward a public servant to perform their public duty "improperly".

- (vi) Any person associated with a commercial organisation who gives or promises to give undue advantage to a public servant to obtain or retain business or an advantage in the conduct of the business for such commercial organisation.

The Act also provides for punishment for abetment by a public servant, whether or not the offence has been committed. For all the above offences, the acceptance, or agreement to accept or attempt to obtain such gratification or give or promise to give an undue advantage to a public servant, is enough to constitute an offence. Further, a public servant may also be charged for criminal misconduct, wherein the public servant abuses his position to gain a pecuniary advantage for himself or any other.

Other acts, such as the IPC, the Benami Transactions (Prohibition) Act and the PMLA, are also used for penalising acts such as the bribery of Government officials.

• Criminal anti-competition

The Indian anti-competition laws do not envisage any criminal prosecution (see below).

• Cartels and other competition offences

Under Indian law, remedies for cartel and other competition offences are civil in nature, i.e., in the form of a cease and desist order or penalty, or both as prescribed under the Competition Act, 2002. Wilful disobedience of these orders or failure to pay the penalty may result in imprisonment for a term that may extend to three years, or a fine that may extend to USD 3 million (approx.). The Magistrate has the power to take cognisance of the offence, provided that it is on the basis of a complaint filed by the Competition Commission, or a person authorised by it.

• Tax crimes

Under the Income Tax Act, 1961, the Customs Act, 1962, the Central Sales Tax Act, 1956 & VAT, the Central Excise Act, 1944, and the Central Goods and Services Tax Act, 2017, various tax crimes (such as tax evasion, smuggling, customs duty evasion, value-added tax evasion, and tax fraud) are prosecuted. It should be a deliberate act by a person and not an act of negligence, viz. a “deliberate act or omission prohibited by law”.

• Government-contracting fraud

See “Bribery of government officials” above.

• Environmental crimes

The significant statutes dealing with the subject are: (i) the Water (Prevention and Control of Pollution) Act, 1974; (ii) the Air (Prevention and Control of Pollution) Act, 1981; and (iii) the Environment (Protection) Act, 1986.

(i) *The Water (Prevention and Control of Pollution) Act, 1974*

Any person who knowingly causes or permits any poisonous, noxious or polluting matter into any stream, well, sewer, land or otherwise contravenes the provisions of the Act, is liable to imprisonment for a term no shorter than 18 months, but which may extend to six years and a fine. A subsequent contravention shall render the person liable for imprisonment for a term no shorter than two years, but which may extend to seven years and a fine. The functioning of the Act is entrusted to Pollution Control Boards.

(ii) *The Air (Prevention and Control of Pollution) Act, 1981*

Once again, the functioning of the Act is entrusted to the Pollution Control Boards, and they lay down the standards for emission of air pollutants into the atmosphere.

(iii) *The Environment (Protection) Act, 1986*

This is an omnibus Act, under which the Central Government is empowered to protect and improve the quality of the environment. The Act works through delegated legislation. A significant statutory Rule framed under this Act is called the “Hazardous Waste (Management and

Handling) Rules, 1989”. Violation of any Rule framed under the Act renders the offender liable for imprisonment for a term that may extend to five years (or a fine), and if the contravention continues beyond a period of one year, the term of imprisonment may extend to seven years.

• Campaign-finance/election law

The law regulating elections and electoral campaigns in India is the Representation of the People Act, 1951 (RPA) and the Conduct of Elections Rules, 1961 framed thereunder. The RPA contains provisions regulating the activities of both individual candidates and political parties. The RPA provides for fixing a ceiling on the expenditure that may be incurred by candidates. The Election Commission’s “Compendium of Instructions on Election Expenditure Monitoring”, published in September 2022, prescribes ceilings ranging from USD 35,000 to 120,000 depending on the type of election and state concerned.

Candidates who exceed these limits face the prospect of disqualification and annulment of their elections by the Election Commission. It is mandatory for political parties to declare their income, assets and liabilities, electoral expenses and contributions received.

The Companies Act, 2013 regulates corporate contributions to individual candidates and political parties. The contribution must not exceed 7.5% of the average profits of the past three years. Any contravention would result in a pecuniary liability of up to five times the contributed amount and imprisonment for a maximum period of six months.

Political parties are entitled to accept any amount of contribution voluntarily offered by companies other than Government companies under the RPA. It does, however, place an absolute restriction on contributions from foreign sources.

• Market manipulation in connection with the sale of derivatives

The sale of derivatives is controlled by the provisions of the Securities Contracts (Regulation) Act, 1956 and the SEBI Act.

Section 12A of the SEBI Act prohibits the use of manipulative and deceptive devices, insider trading and substantial acquisition of securities. It provides that no person shall, *inter alia*, use or employ in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognised stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the SEBI Act or the Rules or Regulations made thereunder. Contravention of said provisions is punishable under Section 24 of the SEBI Act, with imprisonment for a term that may extend to 10 years or a fine that may extend to USD 3,048 billion (approx.) or both.

• Money laundering or wire fraud

Offences related to money laundering are dealt with under the provisions of the PMLA. The Act lays down obligations on reporting entities (i.e., banking companies, financial institutions and intermediaries), *inter alia*, in relation to maintenance of records, confidentiality of information, etc. The reporting entities are under an obligation to furnish information to the Financial Intelligence Unit – India (a central national agency responsible for processing, analysing and disseminating information relating to suspect financial transactions). An investigation can be initiated only by authorities designated by the Central Government, including the ED. The Act provides that the Central Government may enter into an agreement with the Government of any country outside India for: (a) enforcing the provisions of the Act; or (b) exchange of information for the prevention of any offence under the Act or under the corresponding law in force in that country or an investigation of cases relating to any offence under this Act. The PMLA provides for rigorous imprisonment for a maximum period of seven years in cases of conviction for the offence of money laundering.

• Cybersecurity and data protection law

The Information Technology Act, 2000 (IT Act) and the Amendment Act, 2008 deal with the subject. The IT Act extends to offences or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

The IT Act prescribes punishment for various offences including cyber-terrorism, identity theft, violation of privacy, sending offensive messages, etc. The Amendment Act, 2008 also provides for data protection by a body corporate and states that it shall be liable to pay damages by way of compensation to a person if the corporation is negligent in implementing reasonable security practices, thereby causing wrongful gain or loss to any person. During recent parliamentary proceedings in February 2021, it was stated that the Ministry of Electronics and Information Technology is taking steps to amend provisions of the IT Act to strengthen the provisions for intermediaries in order to make them more responsive and accountable to Indian users.

The IPC penalises several crimes including forgery of electronic records, destroying electronic evidence, etc.

The CBI has constituted a Cyber Crime Investigation Cell. A majority of states, including Delhi, Gujarat, Karnataka and Maharashtra, have their own Cyber Crime Cell.

In February 2017, the Reserve Bank of India (RBI) constituted a Standing Committee on Cyber Security to establish an ongoing system of security review and analysis of emerging threats to protect the banking system and tackle cybercrimes.

On February 25, 2021, the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (as amended in April 2023) were implemented by the Ministry of Electronics and Information Technology. The Rules were met with immediate resistance and apprehension from major players in digital media such as WhatsApp/Facebook. The Government provided a three-month deadline for social media platforms to comply with the Rules, which expired on May 25, 2021. According to the Rules, a “significant social media intermediary”, i.e., a social media intermediary that has more than 5 million registered users in India, has to establish a three-tier system for observing due diligence. Importantly, a social media intermediary that provides the primary service of messaging would have to enable the identification of the first originator of any information on its computer resources as may be required by a competent court or authority. In May 2021, a petition was filed by WhatsApp before the Delhi High Court challenging the provision regarding traceability of the first originator. It contended that the Rules were in violation of fundamental rights of privacy recognised under the Indian Constitution, and that WhatsApp was being forced to breach end-to-end encryption on its messaging service. The petition is currently pending before the Supreme Court of India. Most media platforms have voluntarily complied with certain provisions of the Rules, while disputing some. Reportedly, Twitter is now in full compliance with the Rules.

The Digital Personal Data Protection Bill has been in the pipeline (undergoing amendments and re-tabling) for half a decade and recently received the President’s assent (on August 11, 2023). The objective of the Digital Personal Data Protection Act, 2023 is to provide for the processing and disclosure of digital personal data consistent with privacy concerns. Please also see question 7.4 below.

• Trade sanctions and export control violations

The Foreign Trade (Development and Regulation) Act, 1992 provides for regulation of foreign trade and for matters connected with or incidental thereto. Under the Act, the Central

Government has the power to make provisions for prohibiting, restricting or otherwise regulating the import and export of goods. The Act provides that persons are only permitted to engage in the activities of import or export under an Importer-Exporter Code Number granted by the Director General of Foreign Trade, Ministry of Commerce and Industries. Such Code stands to be suspended or cancelled if the Director General believes that a person has made an export or import in a manner gravely prejudicial to the trade relations of India, or to the interest of other persons engaged in imports or exports, or has brought disrepute to the credit or the goods of the country. The Central Government has the power to impose quantitative restrictions if it is satisfied that the imports cause or threaten to cause serious injury to the domestic industry.

• Any other crime of particular interest in your jurisdiction

- The Banning of Unregulated Deposit Schemes Act, 2019 was enacted by Parliament on July 31, 2019. The Ministry of Finance, on February 12, 2020, notified the Banning of Unregulated Deposit Schemes Rules, 2020. The Act provides for a comprehensive code to regulate deposit schemes in order to protect the interest of depositors. Amongst other things, it bans solicitation and receipt of unregulated deposits, creates a framework for reporting and monitoring of deposit schemes, and sets out a prosecution and penalty mechanism for its enforcement. It contemplates punishment of up to 10 years and fines of up to Rs. 50 Crores for violations.
- The Fugitive Economic Offenders Act, 2018 deals with deterrence measures against “fugitive economic offenders” who evade criminal trials for economic offences by absconding even before a formal criminal complaint is filed. A “fugitive economic offender” is defined as an individual against whom an arrest warrant in relation to a “Scheduled Offence” has been issued by an Indian court, and who has left India, or being abroad refuses to come to India in order to avoid criminal prosecution. A “Scheduled Offence” in relation to which the arrest warrant is issued, refers to an offence specified under the Schedule of the Ordinance, where the total value involved in such offence is USD 12 million (approx.) or more. Scheduled Offences include money laundering, customs evasion, insider trading, etc. The Act makes provisions for special courts constituted under the PMLA to declare a person as a fugitive economic offender.
- Parliament has passed the Black Money (Undisclosed Foreign Income and Assets) Imposition of Tax Act, 2015 (on May 27, 2015) and the Companies (Amendment) Act, 2015 (on May 26, 2015) to improve transparency and combat business crime.

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed? Can a person be liable for “misprision” by helping another avoid being located or discovered?

Yes; however, not every inchoate crime is punishable under Indian law. An attempt to commit a crime has not been defined under the IPC. Various judicial decisions have laid down the elements constituting the offence to include: (a) the intention to commit that offence; (b) once the preparations are complete and with the intention to commit any offence, performing an act towards its commission; and (c) that such an act need not be the penultimate act towards the commission of the offence but must be an act during the course of committing that offence.

In very few cases, preparation to commit an offence is a crime by itself.

Furthermore, under Section 202 of the IPC (see question 12.1 below), a person shall be liable if he has the requisite knowledge of an offence and intentionally neglects to give information when he is legally bound to do so.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity? Are there ways in which an entity can avoid criminal liability for the acts of its employees or agents?

An earlier view was that a company/legal entity does not have the *mens rea* for the commission of an offence. However, various judicial decisions have clarified the position that a company/legal entity is virtually in the same position as any individual, and may be convicted of a breach of statutory offences including those requiring *mens rea*.

Most statutes have a clause covering criminal liability of a corporate, which typically reads as follows:

“Offences by companies – (1) where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.”

The circumstances under which an employee's conduct can be imputed to the entity are:

- (a) The employee must be acting within the scope and course of his employment.
- (b) The employee must be acting, at least in part, for the benefit of the corporation, regardless of the fact that it actually receives any benefit or whether the activity might even have been expressly prohibited.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

Yes; in India, there is personal liability for managers, officers and directors for aiding, abetting, counselling or procuring the commission of any offence. (See also question 4.1 above.)

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both? Has the preference changed in recent years? How so?

See question 4.1. Usually, both are pursued. There have been judicial pronouncements wherein it has been held that impleading the company as an accused is *sine qua non* for prosecution of the directors/individuals employed with the company. The position has remained unchanged in the recent years.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply? When does it not apply?

To a large extent this will depend on the mode of merger or acquisition. In a court-approved merger, the court-sanctified scheme will itself provide for successor liabilities. Generally, in a simpliciter case of acquisition of assets (slump sale mode), liability will not follow.

The Supreme Court in *McLeod Russel India Limited vs Regional Provident Fund Commissioner*, Jalpaiguri (2014) held the successor entity liable to pay damages for any default in remitting provident fund (social security) contributions. The said default was committed by the transferor entity prior to the date of transfer of employees. The Supreme Court clarified that the transferee shall not stand absolved of the liabilities even if such liabilities have been specifically assigned to the transferor entity by way of an express agreement.

In addition, the courts have enumerated five circumstances under which successor liability can be recognised:

- (1) express or implied assumption of liability;
- (2) transfer of assets by the purchaser for fraudulent purpose of escaping liability for the seller's debt;
- (3) mere continuation of the enterprise amounting to consolidation or *de facto* merger;
- (4) the purchasing corporation is merely continuation of the seller for continuity of the enterprise; and
- (5) charge on the property.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

In India, the CrPC provides for the calculation of limitation. As per Section 468 thereof, no court can take cognisance of an offence after expiry of (a) six months, if the offence is punishable only with a fine, (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year, or (c) three years, if the offence is punishable with imprisonment for a term not exceeding three years. The limitations period commences on the date of the offence. However, with regard to certain economic offences/business crimes, the Economic Offences (Inapplicability of Limitation) Act, 1974 provides that provisions of the CrPC relating to limitation shall not apply in relation to, *inter alia*, the following statutes:

- (i) The Income Tax Act, 1961.
- (ii) The Companies (Profits) Surtax Act, 1964.
- (iii) The Wealth Tax Act, 1957.
- (iv) The Central Sales Tax Act, 1956.
- (v) The Central Excises and Salt Act, 1944.
- (vi) The Customs Act, 1962.
- (vii) The Emergency Risks (Goods) Insurance Act, 1971.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

Yes, if it is a “continuing offence” (as opposed to an offence committed once and for all), a fresh period of limitation shall begin to run at every moment of time during which the offence continues.

5.3 Can the limitations period be tolled? If so, how?

The limitations period can be tolled in the following circumstances, if the court is satisfied that the delay has been properly explained or if it is necessary to do so in the interest of justice:

- (i) the time during which a person has, with due diligence, been prosecuting another action against the offender in another court of first instance, court of appeal or revision, if it relates to the same facts and is prosecuted in good faith in another court that could not entertain it or want of jurisdiction or another cause of a similar nature;
- (ii) where the institution of the prosecution has been stayed by an injunction or order (the time excluded is the period during which the injunction or stay operated);
- (iii) where the previous sanction of the Government is required for the institution of the offence (the time excluded is from the date of the application for obtaining the sanction to the date it is obtained); and
- (iv) the time during which the offender has been absent from India or has avoided arrest by absconding or concealing himself.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Under the provisions of the PMLA, if an order is passed freezing any property of a person in possession of proceeds of crime, and such property is situated outside India, the concerned authority may request the appropriate court in India to issue a Letter of Request to a court or authority in the Contracting State to execute the order. "Contracting State" means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise. (Please also see question 6.3 below.)

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? Can third parties learn how the investigation began or obtain the initial file documents? If so, please describe them.

Normally, investigations are initiated by the filing of a report with the concerned police station, called a First Information Report (FIR). Based on the FIR, the police then initiate an investigation. The procedure for conducting an investigation is prescribed in the CrPC.

Pursuant to *Youth Bar Association of India vs Union of India*, a 2016 Supreme Court judgment, all police stations have been directed to upload every FIR preferably within 24 hours of its registration. Third parties have access to FIRs that contain unsubstantiated allegations. However, they do not have access to charge-sheets that are filed in court after due investigation.

In *Saurav Das vs Union of India* (2023), the Supreme Court held that "chargesheet/documents along with the chargesheet cannot be said to be public documents" and uploading such documents will be "contrary to the scheme of the Criminal Procedure Code and it may as such violate the rights of the accused as well as the victim and/or even the investigating agency". Hence, while FIRs are in the public domain, the results of the investigation are not.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Yes, under the provisions of the CrPC (Section 166A), there are formal mechanisms for cooperating with foreign enforcement authorities. One such mechanism is via a Letter Rogatory or a Letter of Request.

During the course of an investigation into an offence, an application can be made by an investigating officer stipulating that evidence is available in a country or place outside India. Subsequently, the court may issue a Letter of Request to such court or authority outside India to examine any person acquainted with the facts and circumstances of the case and to record his statement. The court may also require that such person or any other person produce any document or thing that may be in his possession pertaining to the case, and forward all the evidence to the court issuing such Letter.

In addition, the Indian legal regime provides for other forms of cooperation with foreign enforcement authorities, such as the CBI, which serves as the National Central Bureau for the purpose of correspondence with ICPO-INTERPOL to co-operate and coordinate with each other in relation to the collection of information, the location of fugitives, etc. The Double Tax Avoidance Agreements and finalised Tax Information Exchange Agreements strengthen the exchange of information relating to tax evasion, money laundering, etc. Further, Mutual Legal Assistance Treaties (MLATs) facilitate cooperation in matters relating to service of notice, summons, attachment or forfeiture of property or proceeds of crime, or execution of search warrants. MLATs have been given legal sanction under Section 105 of the CrPC.

India has also adopted the Convention on Mutual Legal Assistance in Criminal Matters. It has operationalised agreements with 39 countries so far.

On March 10, 2016, the Central Government gave its approval for signing and ratification of the Bay of Bengal Initiative on Multi-sectoral Technical and Economic Cooperation (BIMSTEC) Convention on Mutual Legal Assistance in Criminal Matters. The BIMSTEC comprises seven countries – Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka and Thailand. The Convention aims to enhance the effectiveness of the Member States in the investigation and prosecution of crimes, including crimes related to terrorism, transnational organised crime, drug trafficking, money laundering and cybercrimes.

India signed and ratified the United Nations Convention against Corruption on May 9, 2011.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

Generally, the investigation agencies have statutory powers to obtain documents, records and other information from any person, including employees, and to record statements as required. The authorities can conduct search and seizure operations at the premises of the companies, including directors. Under the PMLA, the ED has the power to require banks to produce records and documents relating to suspect transactions and to provisionally attach any property derived, directly or

indirectly, by any person as a result of criminal activity relating to a Scheduled Offence. Electronic evidence may also be procured under the IT Act.

Please also see question 3.1 above, “Any other crime of particular interest in your jurisdiction”.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Please see question 7.1 above.

In addition, various authorities under special statutes, including fiscal statutes, are empowered to compel production of documents if considered necessary for any inquiry or investigation.

For instance, the Central Government may assign investigation of the affairs of a company to the SFIO. Under Section 212 (5) of the Companies Act, a company under investigation is required to provide all information, explanation, documents and assistance to the SFIO.

Income tax authorities have the power to compel production of documents for the purpose of investigation. A raid may be carried out for these purposes.

Under the IT Act, an agency of the Government may be directed to intercept information transmitted through any computer resource in the interest of sovereignty of the state, public order, etc. (Section 69).

The ED, which is under the administrative control of the Department of Economic Affairs, investigates offences under the PMLA and FEMA, among others. It is empowered to demand production of documents, and can also conduct raids when there are suspected violations or involvements in any transactions that are prohibited under the Act.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Indian law recognises privilege or non-disclosure of documents in limited circumstances. Insofar as Government documents are concerned, privilege can be claimed only on the grounds that disclosure will be injurious to public interest (including national security or diplomatic relations).

Communication between husband and wife during marriage is generally privileged.

Lawyer/client communication is privileged if it is made in the course of, or for the purposes of, professional employment.

Mere confidentiality or protection of business secrets is not a ground to resist production of documents. In some cases, the court may examine the document concerned confidentially to judge its relevance/admissibility before ordering its production.

As an exception, the labour laws of India do not protect personal documents of employees even if they are located in company files.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) that may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The IT Act contains specific provisions intended to protect electronic data (including non-electronic records). Section 43A of the Information Technology (Amendment) Act, 2008 provides for protection of “sensitive personal data or information” (SPDI) and deals with compensation for negligence in implementing and maintaining reasonable security practices and procedures in relation to SPDI.

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 lay down the manner in which collection and processing of data is regulated.

Rule 5 of the same states that SPDI shall not be collected unless it is necessary for a person or body corporate to collect such information to carry out its lawful purpose. Additionally, the provider of such information must consent to the collection of information in writing, which he may also withdraw at any point.

The Rules require every company to have in place such information security practices, standards, programmes and policies that protect the collected information appropriately.

The Digital Personal Data Protection Act, 2023, *inter alia*, governs data processing (by individuals or legal entities). “Personal data” means any data concerning an individual who is identifiable by or in relation to such data (i.e., data in digital form, or non-digital form digitised subsequently).

A person may process personal data only in accordance with the provisions of the Act and for a lawful purpose.

The Central Government has the power to notify a “Significant Data Fiduciary” (i.e., any person engaged in processing large volumes of personal data/data that can have an impact on the sovereignty and integrity of India/security of the state). The Significant Data Fiduciary shall appoint a Data Protection Officer based in India and appoint an independent data auditor to carry out a data audit and undertake other measures specified under the Act.

The Act also applies to processing of personal data outside the territory of India if such processing is in connection with any activity related to the offering of goods or services to persons in India.

The Central Government may restrict the transfer of personal data to certain countries through a notification. As on this date, no such notifications have been issued by the Government.

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

Please see question 7.2.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

Please see question 7.2.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

The CrPC empowers the investigating authority to examine any person who appears to be acquainted with the facts and circumstances of the case being investigated. Normally, the questioning takes place at the office of the investigation agency. Similar powers have been given to investigation agencies under other special statutes.

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

Please see question 7.7.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

The right of silence is available only for an accused individual. This does not apply to a person under investigation. At the same time, any confession made to a police officer is inadmissible in evidence, and a person cannot be compelled to sign any statement given by him to a police officer in the course of an investigation. Statements made before the ED, however, are admissible in evidence. A person under interrogation has a right to the passive presence (without any interference, prompting or participation) of his advocate during questioning. The assertion of the right of silence will not result in an inference of guilt at trial. The accused is presumed innocent until he is proved guilty.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

- (i) A Magistrate may take cognisance of an offence in the following manner (Chapter XIV, CrPC):
 - (a) upon receiving a complaint constituting an offence;
 - (b) upon a police report;
 - (c) upon information received from any person other than a police officer; or
 - (d) upon his own knowledge that such offence has been committed.
- (ii) In cases described under (i) (a) above:
 - (a) An individual (of any nationality) or a corporate entity may file a complaint in the court of the jurisdictional Magistrate in respect of a crime.
 - (b) Complaints may also be filed by statutory authorities under various enactments; for instance, for evasion of income tax, a complaint is filed by the competent authority under the Income Tax Act in the court of the jurisdictional Magistrate.

- (iii) In cases described under (i) (b) above:

On completion of an investigation, the police force is required to file a report (whether an offence appears to have been committed or not). This is referred to as a chargesheet, and is filed in the court of the jurisdictional Magistrate. On receipt of such police report, the Magistrate takes cognisance of the offence and issues summons to the accused persons named therein.
- (iv) In cases described under (i) (c) above:

The Magistrate may also take cognisance of an offence on the basis of information received by him, other than from a police officer. This may be information received from an unnamed source or an informer.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

Please see question 4.3 above.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

There is no such procedure.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors that courts consider when reviewing deferred prosecution or non-prosecution agreements.

Please see question 8.3 above.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

In India, a defendant can additionally be subjected to civil penalties or remedies (fines). Under criminal remedies, the CrPC provides for compensation to any person for any loss or injury caused by the offence if the court is of the opinion that it would be recoverable by such person in a civil suit. A non-compoundable criminal action cannot be settled by parties entering into a settlement agreement and payment of monies.

8.6 Can an individual or corporate commence a private prosecution? If so, can they privately prosecute business crime offences?

Yes, the CrPC permits private prosecution including relating to business crime offences by an individual or a corporate.

A private prosecution can commence in the court of the Jurisdictional Magistrate after the complainant obtains permission from the Magistrate.

Further, in the case of a state action, the complainant can assist the public prosecutor via a pleader/counsel. The complainant, upon seeking permission from the court, can submit written or oral arguments as may be permitted by court.

See question 8.1 (i) and (ii) above and question 16.3 below.

9 Burden of Proof

9.1 For each element of the business crimes identified above in section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The burden of proof in criminal cases lies with the prosecution, and does not shift during the trial. Under Sections 101 and 102 of the Evidence Act, 1872, it may shift from party to party. With respect to affirmative defence, generally, the party taking such defence bears the burden of proof.

9.2 What is the standard of proof that the party with the burden must satisfy?

The prosecution is required to prove its case “beyond all reasonable doubt”. Criminal cases are governed by a higher standard of proof as compared with civil cases (where only “preponderance of probabilities” is required to be proved). Where the accused pleads an exception in law, it has the same burden as in a civil case (i.e., preponderance of probabilities).

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof? If a jury or group of juries determine the outcome, must they do so unanimously?

The Judge is the arbiter of fact and determines whether the prosecution has satisfied its burden of proof. As stated in question 2.2, there are no jury trials in India.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Yes, a person who conspires or assists another to commit a crime can be held liable. These acts include abetment, conspiracy and acts carried out in furtherance of a common intention. A person will also be liable for abetment if he abets the commission of any act beyond India that would constitute an offence if committed in India (Section 108A, IPC). Criminal conspiracy (Section 120A, IPC) arises when two or more persons agree to commit or cause an illegal act to be carried out or an act that is not illegal, by illegal means. For acts carried out “in furtherance of a common intention” (Section 34, IPC), the two elements required to be established are common intention and participation of the accused in the commission of the offence.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Yes, lack of requisite intent/*mens rea* to commit a crime is a defence to a criminal charge unless the statute provides otherwise. The burden of proof lies with the prosecution.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant’s knowledge of the law?

The maxim “*ignorantia juris non excusat*” (i.e., ignorance of law is not an excuse) applies.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant’s knowledge of the facts?

Sections 76 and 79 of the IPC provide for a mistake of fact as an exception and a complete defence to a criminal charge. The necessary prerequisites here are that: the act must be due to ignorance of fact; and there must be good faith, i.e., reasonable care and caution in doing the act. The burden of proof to prove the exception will lie with the accused/defendant. (See question 9.2 above.)

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or “credit” for voluntary disclosure?

If a person knows or has reason to believe that an offence has been committed and intentionally omits to give such information, where he is legally bound to disclose such information, he will be held liable for failure to report (Section 202, IPC). The punishment would include a term that may extend to six months or a fine, or both. Please see question 13.1 for leniency/credit for voluntary disclosure.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or “credit” from the government? If so, what rules or guidelines govern the government’s ability to offer leniency or “credit” in exchange for voluntary disclosures or cooperation?

The power to grant a pardon can be exercised by the Magistrate during the investigation into an offence. The provision for pardon applies only where the offence would attract a punishment of imprisonment of seven years or more. (For other cases, see the provisions relating to plea bargaining in section 14 below.) A pardon is granted with a view to obtaining evidence from any person supposed to have been directly or indirectly concerned with or privy to an offence. A condition for the grant of pardon is that the person makes a full and true disclosure of all facts within his knowledge. Any person who accepts a tender for pardon shall be examined as a witness in the trial.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

Where a person has accepted a tender of pardon (as described in question 13.1 above) and it is alleged by the public prosecutor that such person has wrongfully concealed an essential fact or given false evidence, or has not complied with the conditions on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered or for any other offence that he appears to have been guilty of, and also for the offence of giving false evidence.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

Plea bargaining is available only for offences that are penalised by imprisonment for fewer than seven years. However, if the accused has previously been convicted of a similar offence, then he will not be entitled to plea bargaining. It is not available for offences that might affect the socio-economic conditions of the country or for offences against a woman or a child below 14 years of age. A chargesheet must be filed with respect to the offence in question, or a Magistrate must take cognisance of a complaint before plea bargaining can proceed.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

The accused is required to file an application for plea bargaining in the court where the trial is pending. On receiving the application, the court must examine the accused *in camera* to ascertain whether the application has been filed voluntarily. The court must then issue notice to the public prosecutor and the investigating officer or the complainant. The negotiation of such a mutually acceptable settlement is left to the free will of the prosecution (including the victim) and the accused. If a settlement is reached, the court can award compensation based on the outcome to the victim, and then hear the parties on the issue of punishment. The court may release the accused on probation if the law allows for it. If a minimum sentence is provided for the offence committed, the accused may be sentenced to half of such punishment; in other cases, the accused may be sentenced to a quarter of the punishment provided or extendable for such offence. The accused may also avail of the benefit under Section 428 of the CrPC, which allows for setting off the period of detention undergone by the accused against the sentence of imprisonment in plea-bargained settlements. The court must deliver the judgment in an open court.

15 Sealing

15.1 Are there instances where the court proceedings or investigation files are protected as confidential or sealed?

India follows a system of open justice and all court proceedings are open to the public, barring a few exceptions, such as rape and matrimonial disputes, where the courts are empowered to hold proceedings *in camera* to protect privacy and related rights. The principle behind this was expounded in a landmark

judgment in *Nareesh Shridhar Mirajkar vs State of Maharashtra* (1966), where the court held that “the court has inherent jurisdiction to pass an order excluding the public when the nature of the case necessitates such a course to be adopted... when the court is either by statutory injunction compelled, or is in the exercise of its discretion satisfied, that unless the public are excluded from the courtroom, interests of justice may suffer irreparably”.

Additionally, Section 327 of the CrPC empowers the courts to withhold information in rape trials concerning the identity of the complainant.

In a series of recent judgments, the Supreme Court has frowned upon the practice of the prosecution handing over sealed cover communications for the court's eyes only. In *Madhyamam Broadcasting Limited vs Union of India* (2023), the court has restricted sealed cover communications to the court only where issues of national security are involved.

See question 6.2 for confidentiality in relation to investigation.

16 Elements of a Corporate Sentence

16.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

When the court determines that a defendant is guilty of a crime, it may order either a fine or imprisonment or both. The imposition of a sentence is largely discretionary in nature. If the Magistrate finds the accused not guilty, he shall record an order of acquittal (Section 248, CrPC). If the accused is convicted, the Judge shall hear him on the question of sentence and then pass the sentence according to law. Imposition of a sentence for a business crime is generally not perceived to be harsh.

16.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

The court must look into the facts and circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, and all other attendant circumstances that would enter into the area of consideration.

16.3 Do victims have an opportunity to be heard before or during sentencing? Are victims ever required to be heard? Can victims obtain financial restitution or damages from the convicted party?

Yes, the victims have a right to be heard before and during sentencing. This was recognised in a recent Supreme Court decision in the case of *Jagjeet Singh & Ors. vs Ashish Mishra* (2022).

Victims can obtain financial restitution from a convicted party. Even in cases where a penalty has not been prescribed, Section 357 (3) of the CrPC empowers the court with discretion to grant compensation to the victim for any loss or injury suffered.

17 Appeals

17.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Yes, there is at least one statutory right of appeal. Thereafter, a discretionary appeal may be made to the High Court and thereafter (in exceptional cases) to the Supreme Court of India, depending on the facts.

17.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

Both parties are entitled to appeal in whole or in part.

17.3 What is the appellate court's standard of review?

If an appeal is from a Magistrates' Court to a Sessions Court, then there is a full review of facts, appreciation of evidence as well as law. If the appeal is to the High Court or the Supreme Court, the review would be confined to issues of law alone, unless there is a gross miscarriage of justice or error apparent on the face of the record. However, if the appeal is from a Magistrates' Court or a Sessions Court on a sentence of more than seven years to a High Court, then there is a full review of facts, appreciation of evidence as well as law. The review by the Supreme Court would be the same as stated above.

17.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

If the appellate court upholds the appeal (Section 386, CrPC), it may:

- (a) From an order of acquittal, reverse such order and direct that further inquiry be made or the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence.
- (b) In an appeal from a conviction or for enhancement of sentence:
 - (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court of competent jurisdiction subordinate to the appellate court or committed for trial;
 - (ii) maintain the sentence; or
 - (iii) with or without altering the finding, alter the nature or the extent or the nature and extent of the sentence but not enhance the same.
- (c) In an appeal from any other order, alter or reverse such order.
- (d) Make any amendment or any consequential or incidental order that may be just and proper.



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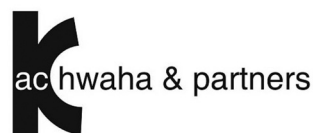
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