

Report

Interactive Session and Panel Discussion: The Prevention of Corruption (Amendment) Act, 2018

The Interactive Session on Prevention of Corruption (Amendment) Act, 2018 was organized by Bombay Chamber of Commerce and Industry (BCCI) on 21st September, 2018 to discuss, understand and address the concerns of the Private Sector, particularly the provisions relating to criminalizing of private sector bribery. The Session deliberated in detail the 'adequate measures' that could be availed of as defence to mitigate the risk of damage to the reputation of a Company as well as steps required to safeguard its directors, managers, employees and agents from being prosecuted under this new law.

Understanding of the law in general and the provisions relating to the private sector bribery was explained threadbare by **Mr. Suhas Tuljapurkar**, Founder Director of Legasis Services Pvt. Ltd., in his talk. The criminal liability of the supply side, attachment and forfeiture of property/assets and speedy trial were traced to the obligations arising out of the framework of the United Nations Convention on Anti-Bribery (UNCAC) that was signed and later ratified by India in 2011.

This was followed by a panel discussion on the 'Anti-Bribery and Anti-Corruption Management' in the light of the amended Act. The panellists comprised **Mr. Prasad Chandran** - Chairman Seegos and Former MD - BASF and Chairperson, Governance Committee, Bombay Chamber, **Mr. Ramesh Sharma** - Executive Director at Legasis and former Indian Police Service (IPS) officer and Director general of Police of Economic Offences Wing (EOW) MP, **Ms. Savitri Parekh** - Senior Vice President Legal and Secretarial, Pidilite Industries Ltd and Vice Chairperson of Governance Committee, Bombay Chamber, **Ms. Attriye Mukherjee** – Legal Counsel, The House of Tata.

Taking into account the fact that the Indian economy has to perform to its full potential for next several decades, the PCA Bill has made provisions in the law to ensure that the public servant can discharge his/her public duty and take courageous and progressive decisions, without fear of harassment and prosecution on flimsy grounds.

The new law does so by providing the public servant double protection both at the stage of registration of an enquiry/investigation and at the stage of charge sheeting by way of seeking of prosecution sanction from the appropriate authority.

Introduction of Section 17 A provides that no police officer shall conduct any inquiry or investigation into any offence alleged to have been committed by a public servant where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his office and functions or duties without the prior approval of the appointing authorities as specified in the section.

Similarly, the second protection to public servants by way of obtaining prosecution sanction from the appropriate authority before the filing of charge sheet by the investigating agency before the court was already in existence under the Principal Act of 1988 (Section 19).

The issue of double protection to the public servant and virtually no protection to the private sector witnessed a lively discussion. Keeping in mind that such protection to the public servants is ultimately designed for businesses to flourish and grow at a rapid pace, it is equally important that the corporate sector should also be provided safeguards and protected from flimsy complaints, malicious prosecution, extortion and harassment to carry out their business honestly and in good faith, even in the face of individual deviance.

Following salient points emerged:

Adequate Measures:

- Literal reading of Section 9 (1) and 9 (5) is clear enough to indicate that while the former casts the obligation on the private organizations to undertake **adequate measures** to prevent persons associated with it to commit the crime of bribery, the latter casts the responsibility on the Central Government to prescribe such guidelines as may be considered necessary which can be put in place for compliance by such organisations.
- A robust Anti-Bribery and Anti-Corruption Management framework is imperative to be put into place for a company to qualify for the defense of adequate measures and evidence of innocence.

Some such measures should include, inter alia,

- Tone from the Top
- Code of Conduct Policy
- Anti-Bribery and Anti-Corruption (ABAC) Policy
- Gift and Hospitality Policy
- Whistleblower Policy
- Prompt Internal Investigation and appropriate action against the offender
- Incentives and rewards to promote an Ethical Culture
- Third Party Due Diligence
- Periodic ABAC Risk Assessment
- Internal Controls
- Maintenance of proper Accounts Books and Records
- Statutory and Internal Audits
- Communication and Training.

Recommendations to the Government:

The two sessions also deliberated also upon the recommendations that could be made to the Government in terms of providing a buffer and protection to the private sector before an FIR is registered. Some such suggestions include:

- The principle of **'Right to be Heard'** depending on the circumstances of the case, wherein the accused party has a right to present its case in face of the charges levelled;
- If the above is not feasible, a **preliminary enquiry** may be conducted and concluded within a specific period of time to ascertain whether the offence committed under section 8 was an individual act or the organization per se was involved in the act of bribery.
- The enquiry could then also take into account if the organization has put adequate measures in place, as enumerated above, and implemented them in letter and spirit as a defence provided in Section 9 (1) of the new legislation.

The Principle of Business Judgment Rule:

- **The Rule**, as practiced in several developed economies, including the US, UK, Germany and Australia, may be allowed to be invoked by the commercial organization.
- The rationale for the rule is the recognition by courts that, in the inherently risky environment of business, Boards of Directors need to be free to take risks without a constant fear of lawsuits affecting their judgment.

Private Sector Bribery: Non-Criminal Alternatives

- The compounding of offences, as recognized by Indian Laws like the CrPC, the Companies Act 2013, GST etc., may also take the form of **non-criminal alternatives** that is practiced in most of the developed countries. These include:

- **Plea Agreements:** As in the case of individuals, the defendant accepts the charges, admits guilt and is convicted of the offense when presented before the court as mutually agreed upon by the prosecution and the defense. The Plea Agreement may result in reduced sentence and lowering of fine, thereby saving the trials and tribulations of the defendant and going through the judicial process.

- **Deferred Prosecution Agreements (DPAs):** The prosecuting agency files a charge sheet in the court but it simultaneously requests the Court to defer prosecution so as to provide the organization the opportunity to demonstrate its good conduct and cooperation with the enforcement agencies. If the company successfully completes and meets the terms of the agreement, the investigating agency can file to have the charges dismissed without stigma of criminal conviction.

- **Non-prosecution Agreements (NPA):** Under this arrangement, the investigating agency does not file a charge sheet at all in the court while retaining the right to file charges at a later stage if so required. During the NPA, the Defendant has to show good conduct and cooperation much on the same lines as DPAs.

ISO 37001 Certification on Anti-Bribery Management Systems

- While the Certification is no guarantee, as such, against any prosecution, it goes a long way in providing meticulous, step-wise and robust anti-bribery management system to be put in place and implemented in a company. The Certification will ensure the setting up of **Anti-Bribery Management Systems** in letter and spirit to provide a sound defence in the form of implementation of adequate measures.