

White-Collar Crime Investigations – Legal Milestones Financial Year 2020-21 and a Look Ahead

14 April 2021

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1 The Year that Was

The year 2020 commenced with India being ranked 86th in the Corruption Perception Index of Transparency International (a leading not-for-profit organisation) - a six-rank drop compared to the previous year. The banking sector was severely hit by fraud and corruption-related issues, involving alleged misappropriation of approximately INR 600 billion. Consequently, enforcement and investigative agencies remained busy through the year along with a deeper scrutiny by the regulators.

Given the global impact of the COVID-19 pandemic and various nationwide lockdowns, the year witnessed a shift in the approach and methodology of conducting forensic and internal investigations. Investigators adapted quickly to online methods of collecting data, conducting interviews etc. On the legislative front, much movement was seen, with major developments such as the notification of the Lokpal (Complaint) Rules 2020; enactment of the Companies (Auditor's Report) Order, 2020 (CARO, 2020) and amendment of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (SEBI LODR).

Despite the onslaught of the global pandemic and nationwide lockdowns, enforcement and investigative agencies were aggressively active in 2020. The year also witnessed increased online forensic and internal investigations. This update summarises some of these developments along with our expectations for the year ahead.

2 Major Developments in the Financial Year 2020-2021

2.1 Major Investigations in India

The Central Bureau of Investigation (CBI) registered 596 cases, and around one-third of the cases were related to bank frauds. Amongst these cases, a few high profile matters included the alleged fraud concerning, (a) the then fifth largest private sector bank of India (and its MD and CEO, among others); (b) a Hyderabad based engineering and construction company for approximately INR 79 billion; and (c) a Mumbai based export and trading company for approximately INR 36 billion.

The CBI also booked companies and their officials under the newly enacted corporate criminal liability provisions of the Prevention of Corruption Act, 1988. A notable instance was the booking of a Delhi based import/export company on the allegation of providing illegal gratification to the officials of the Inland Container Depot for extending undue favors for inspection and clearance of import assignments. In another case, the CBI also booked a few Kolkata, Delhi and Hyderabad based project and infrastructure companies on allegations of bribery to get undue advantage in securing bids from the Export Promotion Council of Handicrafts.

Recently, the CBI conducted a special drive against multiple defaulting firms which had cheated, diverted funds, and submitted false documents to multiple nationalised banks. The raids were related to more than 30 bank fraud cases amounting to INR 37 billion.

The Enforcement Directorate (ED) registered some high-profile cases and also probed various matters and registered cases under the Prevention of Money Laundering Act, 2002. The notable ones included registering a money laundering case against a prominent TV channel in the television rating point rigging scandal and against a Bollywood actress over the allegations of mishandling of a late Bollywood actor's bank accounts. Prominently in the year 2020, the ED also filed charge sheets in the Embraer defence deal money laundering case and ICICI Bank-Videocon money laundering case.

The Serious Fraud Investigation Office (SFIO) also showed significant activity this year, investigating the affairs of a Vadodara based power transmission and distribution company, concerning an alleged INR 26 billion bank scam. SFIO also made arrests in relation to an accounting fraud of around INR 65 billion in connection with a Kanpur based company, among others.

2020 was also marked by instances of multiple investigative agencies (such as CBI, ED, and SFIO) investigating a single matter. A prominent example of such involvement can be traced to the probe of a Mumbai based private housing finance company, where CBI, ED and SFIO were all involved.

2.2 Prominent Legal Developments

In 2019, the government had appointed the first Lokpal (anti-corruption ombudsman) under the Lokpal and Lokayuktas Act, 2013 (Lokpal Act). Following this appointment, in 2020, the Indian government notified the Lokpal (Complaint) Rules, 2020 under the Lokpal Act. These rules enable the Lokpal to act on pleas made against public servants in corruption-related issues.

The Companies (Amendment) Act, 2020 was passed soon after the notification of the 2019 amendments to the Companies Act, 2013. While the 2019 amendments decriminalised 16 corporate offences, the 2020 amendments further focused on decriminalising, re-categorising and rationalising of less serious offences. Some 48 sections have been decriminalised, however, the offences involving serious fraud, public interest and which are of non-compoundable nature still attract criminal sanctions.

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In addition to the changes in the Companies Act 2013, the CARO, 2020 was introduced requiring certain companies to report all whistle-blower complaints to their auditor. However, the Ministry of Corporate Affairs has deferred the applicability of the CARO, 2020 till 1 April 2021 due to the COVID-19 pandemic. The CARO, 2020 will require applicable companies to take significant steps to improve procedures to deal with whistleblower complaints that they may receive.

This year, the Institute of Chartered Accountants of India (ICAI), has issued 13 Forensic Accounting and Investigation Standards, with another eight standards in the pipeline. The standards would be useful for law enforcement agencies, corporates, banks and other stakeholders and will help in formation of common practices and procedures for conducting forensic accounting and investigations.

The Securities and Exchange Board of India (SEBI) also amended the SEBI LODR on 8 October 2020, requiring listed companies to disclose to stock exchanges the initiation of any forensic audit. The amendment requires listed companies to disclose the fact of initiation of a forensic audit, the name of the entity initiating the audit, the reasons for the same (if available) and the final forensic audit report (other than where the audit is initiated by regulatory/enforcement agencies).

On the judicial front, the Delhi High Court in the case of *Deepti Kapur v. Kunal Julka* considered the question of whether illegally procured evidence is admissible in courts. The court while permitting a man to place an audio-video recording of his wife's conversation with a friend on record held that any evidence collected by breaching someone's privacy does not automatically make it inadmissible in court. The court further held that even though privacy is recognised as a fundamental right, that alone cannot make evidence collected in breach of that inadmissible.

2.3 Implementation of the Fugitive Economic Offenders Act, 2018

While the Fugitive Economic Offenders Act, 2018 (FEO Act) was enacted in 2019, the impact of its implementation was largely felt in 2020. One such significant action under the FEO Act in 2020 was the ED's confiscation of assets worth INR 3.29 billion of diamond merchant Nirav Modi in connection with an alleged bank fraud (exceeding USD 2 billion) at a Punjab National Bank branch. In another notable case, a Delhi local court declared four accused involved in a multi-crore bank fraud case as fugitive offenders and paved the way for confiscation of their properties.

2.4 Internal Investigations and the COVID-19 Pandemic

With enforcement agencies being particularly active in the white-collar crime space this year, internal investigations in the Indian corporate market gained significant momentum despite the limited availability of resources during the COVID-19 pandemic. Many investigations initiated in 2020 were pursuant to whistle-blower complaints. Also, a majority of internal investigations were conducted in banking and IT sector companies over allegations of financial misappropriation.

While a majority of the internal investigations were inevitably conducted through online means, this posed a challenge for the companies from a data privacy and data protection perspective. Concerns revolved around the higher standards of data privacy and data protection that companies needed to adopt in these circumstances, such as express consent requirement for data procurement and sharing, protection of sensitive personal data and personal data of the employees, etc.

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2.5 Scrutiny by Foreign Regulators and Multilateral Development Banks

The year 2020 saw only one settlement with US regulators on charges of bribing public servants in India. In this settlement, a US based company engaged in business of production and distillation of beverages agreed to pay a penalty of nearly USD 20 million to resolve a Department of Justice (DOJ) investigation into FCPA violations involving its Indian subsidiary. No India related settlements were observed with UK regulators during the year.

Further, the World Bank took action against three Indian companies. It imposed a two-year conditional non-debarment on the Indian entity of a French construction consultancy company for corrupt and fraudulent practices in two World Bank financed projects in India. In another case, an engineering, procurement and construction company based out of Gurgaon was sanctioned with debarment, with conditional release after a minimum period of four years. As a member of a joint venture, bidding on multiple contracts under a World Bank financed project, this Gurgaon based company made some misrepresentations and was found liable for fraudulent practice. Based on the World Bank debarment, the Asian Development Bank also cross debarred some of these Indian entities, but did not pursue any debarment actions of its own this year.

3 Looking Ahead

In 2021, we are likely to see a continuation of the aggressive approach of the ED through the FEO Act and more actions and confiscations under this Act. Further, the notification of the Lokpal (Complaint) Rules, 2020 could open the floodgate of complaints to ombudsman in months to come.

To cushion the impact of the COVID-19 pandemic and consequently, the ease of doing business in India, reports indicate that the Government may consider further amendments to the Companies Act, 2013. Additionally, the implementation of CARO, 2020 may help curtail fraud at an early stage and lead to an increase in internal investigations conducted by companies.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed [here](#).

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