

## Annex 1

### DRAFT QUESTIONNAIRE

#### Country self-assessment report on implementation and enforcement of G20 commitments on foreign bribery

*G20 countries are invited to complete the questionnaire, below, on the implementation and enforcement of G20 commitments on foreign bribery.*

*Part I questions are drafted directly from the principles outlined in the G20 Guiding Principles on Enforcement of the Foreign Bribery Offence endorsed by G20 Leaders in St. Petersburg, and its background note on Enforcement of Foreign Bribery Offences. Part II questions are drafted from the G20 Anti-Corruption Action Plan and the St. Petersburg Leaders' Declaration.*

*Responses to this questionnaire could be compiled into a summary on the "state of play" in G20 countries on steps taken to date to implement the aforementioned instruments, as well as plans for future actions in this area.*

#### I. Implementation of the Guiding Principles on Enforcement of the Foreign Bribery Offence in G20 Countries

*Note 1: This section of the questionnaire is drafted from the principles outlined in the G20 Guiding Principles on Enforcement of the Foreign Bribery Offence and the background note on Enforcement of Foreign Bribery Offences.*

##### **A. A robust legislative framework**

*In your jurisdiction:*

**1. Is there a clear and explicit foreign bribery offence that covers the key elements of the internationally agreed definition for foreign bribery, including offering, promising or giving of a bribe, bribery through intermediaries, and bribes paid to third party beneficiaries?**

- *If your jurisdiction criminalises foreign bribery*, please provide references to the relevant provisions and/or the full text, if possible.
- *If your jurisdiction does not have a foreign bribery offence:*
  - Please note whether an offence has been “drafted”, “submitted for government review”, or “adopted but not yet entered into force”.
  - Please provide a timeline for the entry into force of draft legislation, where applicable.

**Response:**

In India there is no explicit legislation covering foreign bribery. However, there are some provisions in the general criminal law of the country i.e. Indian Penal Code, 1860 facilitating extra territorial jurisdiction. If the offence is committed in connivance with Indian public servant then it may be covered under section 120-B of IPC and 109 r/w Sec. 107 of IPC.

1. Indian Penal Code, 1860

**Section: 3 Punishment of offences committed beyond, but which by law may be tried within, India:**

Any person liable, by any Indian law to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

**Section: 4 Extension of Code to extra-territorial offences:**

The provisions of this Code apply also to any offence committed by-

- (1) any citizen of India in any place without and beyond India;
- (2) any person on any ship or aircraft registered in India wherever it may be.]

Explanation-In this section-

- (a) the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code;
- (b) the expression "computer resource" shall have the meaning assigned to it in clause (k) of sub-section (1) of section 2 of the [Information Technology Act, 2000](#)(21 of 2000).'
- (3) any person in any place without and beyond India committing offence targeting a computer resource located in India.

Section 120A IPC - Definition of criminal conspiracy - When two or more persons agree to do, or cause to be done, -



- (1) an illegal act, or
- (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

#### Section 120B IPC - Punishment of criminal conspiracy -

- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, (imprisonment for life) or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
- (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

More specifically Section 108-A of IPC states about the Abetment in India of offences outside India:

A person abets an offence within the meaning of this code (IPC) who, in India, abets the commission of any act without and beyond India which would constitute an offence if committed in India.

*Note 2: For questions 2 through 11, jurisdictions without a foreign bribery offence should include updates on plans to address the following issues in efforts to establish the criminalisation of foreign bribery and a framework for enforcing this offence.*

#### **2. What is the statute of limitations for investigating and prosecuting foreign bribery?**

##### Response:

There is a General Act like 'Limitation Act, prescribing limitation in civil matters. The law relating to procedure to be followed in criminal cases including the offences relating to bribery is governed by Criminal Procedure, Code, 1973. It has in built provisions prescribing time limit for various offences by classifying them in to cognizable, non-

cognizable, billable and non-billable. The other related legislations like FEMA, PMLA are also having provisions in this regard. In view of the in built provisions in the Cr.P.C. there is no requirement for any special law relating to limitations in criminal matters.

**Section 468 of Cr.P.C. Imposes** period of limitation on the offences which are punishable up to the imprisonment not exceeding three years. The offences covered under Prevention of Corruption Act, 1988 are punishable with the imprisonment more than three years, hence, there is no limitation on the offences of PC Act cases.

As regards other offences defined in Indian Penal Code there is provisions of extension of period of limitation under section 473 Cr.P.C.

**Section 473 Cr.P.C. - Extension of period of limitation in certain cases. -** Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may make cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

**3. Please describe the form of jurisdiction available over the foreign bribery offence (i.e; territorial or nationality jurisdiction).**

Response:

There is no specific legislation in this regard. However, there are provisions in I.P.C conferring extra territorial jurisdiction as under:

1. Indian Penal Code, 1860

**Section: 3 Punishment of offences committed beyond, but which by law may be tried within, India:**

Any person liable, by any Indian law to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

**Section: 4 Extension of Code to extra-territorial offences:**

The provisions of this Code apply also to any offence committed by-

- (1) any citizen of India in any place without and beyond India;
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Explanation-In this section-

(a) the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code;

(b) the expression "computer resource" shall have the meaning assigned to it in clause (k) of sub-section (1) of section 2 of the [Information Technology Act, 2000](#)(21 of 2000).'

(3) any person in any place without and beyond India committing offence targeting a computer resource located in India.

**4. Please indicate whether your jurisdiction has a corporate liability regime for the offence of foreign bribery.**

*If your jurisdiction does not have a corporate liability regime for the offence of foreign bribery, please provide a timeline for implementation of corporate liability.*

Response:

There is no special law relating to corporate liability regime for the offence of foreign bribery. However, there are provisions of the civil liability of Legal persons like companies, corporations and other legal bodies are well defined under Companies Act and Indian Contract Act etc. The issue is also dealt with the help of the general legal principle of 'Strict Liability' and legal bodies are being prosecuted in India.

1. Cr.P.C.:

Sec. 305 of Cr.P.C. is relevant in this regard, which states as under:

**Sec. 305. Procedure when corporation or registered society is an accused:**

(1) In this section, "corporation" means incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a court is or is not such, representative, the question shall be determined by the court.

#### **Judicial Decisions:**

The question as to whether a company can be proceeded against when a mandatory imprisonment is prescribed in law came up for consideration before the Constitution bench of the Hon'ble Supreme Court in *Standard Chartered Bank Vs Directorate of Enforcement* (2005 (4) SCC 530) wherein the Court after considering the existing case law on the subject as also the principle of 'lex non cogitadimpossabilia' held that:

“We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.”

The above said view has been affirmed by the Apex Court in *Iridium India Telecom Ltd. Vs Motorola Corporate &Ors.* (2011 (1) SCC 74). In this case, the Court observed that a Corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when offences committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or body of persons

The Supreme Court of India, in *Standard Chartered Bank &ors v Directorate of Enforcement &ors* (2005), held that the corporation in the case could be prosecuted and punished with fines regardless of the mandatory punishment of imprisonment required

under the respective statute. Finally in the Standard Chartered Bank case, the bank was prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act, 1973 (“FERA”). Recently, the Supreme Court of India, through a landmark judgment (Iridium India Telecom Ltd. V Motorola Incorporated &ors (2010), has added a new dimension to the jurisprudence relating to corporate criminal liability in India with respect to offences requiring mens rea or criminal intent, holding that despite being a legal fiction, a company can be said to possess mens rea required to commit a crime.

**5(a) Please describe the sanctions and confiscation measures available for natural and legal persons for the crime of foreign bribery.**

**5(b) Please provide the number of criminal, administrative, and civil cases of foreign bribery that have been opened against natural or legal persons, and indicate(i) how many of these cases have resulted in a criminal conviction or acquittal, or similar findings under an administrative or civil procedure, and (ii) the number of natural and legal persons who have been convicted or otherwise sanctioned, specifying the actual enforcement outcome (e.g. fine and/or imprisonment).**

- *Where possible, please provide references to the relevant provisions and/or the full text, if possible.*

Response:

No specific law regarding sanction and confiscation measures for crime of foreign bribery. However, there ample provisions regarding sanctions and confiscation in general data or case is available.

The legal system in India is based on the principles of ‘Equality’ and ‘Fair hearing’. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The principle of equality enshrined in Article 14 must guide every state action, whether it is legislative, executive, or quasi-judicial. See *Maneka Gandhi v. Union of India* (1978 (1) SCC 248; *Ajay Hasia v. Khalid MujibSehravardi* (1981 (1) SCC 722); *Som Raj v. State of Haryana* (1990 (2) SCC 653).

In the light of this settled legal and constitutional principle an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions. Article 311 of the Constitution provides immunity from arbitrary removal or dismissal or reduction in rank of any member of a civil service of the

Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State. Under this Article no such person as aforesaid shall be dismissed or removed or reduced in rank shall be dismissed or removed by an authority subordinate to that by which he was appointed except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Under the Provisions of Section 6A of the DSPE Act the Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to the employees of the Central Government of the level of Joint Secretary and above.

**Under Section 19 (1) of the Prevention of Corruption Act,** No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction, -

- (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
- (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
- (c) in the case of any other person, of the authority competent to remove him from his office.

Under Sub-section (2) of section 17 where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed. Sub-section (3) provides that notwithstanding anything contained in the [Code of Criminal Procedure, 1973](#) (2 of 1974), -

- (a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;
- (b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;



(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

It is an established principle of law that when the Statute requires a power to be exercised in a certain manner, the neglect of that manner renders the exercise of the power ultra- vires and the act done becomes void (Chief Commissioner of I.T V Pratap Singh AIR 1961 SC 1028; Naryana V ITO AIR 1959 SC 215; Khub Chand V state of Rajasthan (1967) 1 SCR 120).

**B. Effective detection and domestic coordination**

*In your jurisdiction:*

**5.How is the exchange of information encouraged and facilitated between investigative and prosecutorial authorities in charge of the foreign bribery offence and other competent authorities in charge of related economic and financial crimes (i.e., tax, financial intelligence, money laundering, securities, and other regulators)?Where possible, please cite specific examples.**

Response:

There is no specific special enactment regarding Exchange of information with regard to foreign bribery cases. However, various enactments vide which several enforcing agencies like CBI, Directorate of Enforcement, Income Tax, Customs and Excise are empowered to execute International Agreements for exchange of information and cooperation. India has already entered into several such agreements like customs cooperation agreements, Double taxation avoidance and exchange of information agreements, Exchange of information agreements by CBI etc. In built provisions have already been there in the relevant Acts likes Income Tax Act, 1961 (section 90-91) etc.

**6.What steps have been taken to engage with relevant agencies, such as overseas missions, broader tax administrations, trade promotion, public procurement and export credit agencies, as well as with the private sector, on issues related to implementation and enforcement of the foreign bribery offence? Where possible, please cite specific examples.**

Response:



Various enactments vide which several enforcing agencies like CBI, Directorate of Enforcement, Income Tax, Customs and Excise have been constituted are empowered to execute International Agreements for exchange of information and cooperation. India has already entered into several such agreements like customs cooperation agreements, Double taxation avoidance and exchange of information agreements, Exchange of information agreements by CBI etc.

**7(a) Are appropriate reporting channels available for whistleblowers in both the private and public sectors?**

**7(b) Are appropriate protections available for whistleblowers in both the private and public sectors?**

*Where possible, specific reference should be made to implementation of the G20 Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation.<sup>1</sup>*

Response:

**The Whistleblower Protection Act, 2011**, has been enacted by India which includes specific provisions for providing protection to complainants who file a complaint under the said Act. Besides, there is provision in Cr.P.C. for protection of witnesses.

**Section 195A IPC - Threatening any person to give false evidence.** - Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both;

And if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.

### C. Effective investigation and prosecution

*In your jurisdiction:*

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<sup>1</sup> Available online here: <http://www.oecd.org/corruption/48972967.pdf>

**8. What measures are in place to ensure that the investigation and prosecution of foreign bribery should not be subject to improper influence based on concerns of the national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal person involved.**

Response:

No specific legislation in this regard. However, ample provisions have been made in the Cr.P.C., PC Act, 1988, PMLA, Constitution of India to ensure fair investigation of bribery cases. Where the police transgress its statutory power of investigation the High Court under Section 482 Code of Criminal Procedure or Article 226/227 of the Constitution and the Supreme Court in appropriate case can interdict the investigation to prevent abuse of the process of the Court or otherwise to secure the ends of justice.

**9(a) Please describe the investigative powers granted to law enforcement authorities to proactively and effectively investigate and prosecute foreign bribery, including access to information from financial institutions.**

**9(b) Please describe the specialized training on detecting, investigating and prosecuting foreign bribery provided and/or planned to be provided to law enforcement authorities.**

Response:

There is no special legislation in this regard. However, a Bill regarding Foreign Official Bribery is under consideration. Moreover, in built provisions are there in the general law with regard to investigation.

It is an established principle of law in India that when the Statute requires a power to be exercised in a certain manner, the neglect of that manner renders the exercise of the power ultra- vires and the act done becomes void (Chief Commissioner of I.T V Pratap Singh AIR 1961 SC 1028; Naryana V ITO AIR 1959 SC 215; Khub Chand V state of Rajasthan (1967) 1 SCR 120).

Under Section 154 (1) of Cr.P.C. every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Under Sub-section (2) of this section a copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant. Sub-section (3) provides that any person, aggrieved by a refusal on the part of an officer in charge of a

police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer Subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

Police Officer's power to investigate is provided under Section 156 of Cr.P.C. which provides that:

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one, which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned

**10(a) Please describe the procedures in place for ensuring prompt and effective handling of outgoing and incoming mutual legal assistance requests in relation to foreign bribery cases.** Please indicate how many responses were provided to MLA requests and how many MLA requests were made.

**10(b) Please describe how informal assistance is encouraged, in conformity with your jurisdiction's legal system.**

Where possible, specific reference should be made to implementation of the G20 High-Level Principles on Mutual Legal Assistance.<sup>2</sup>

**Response:**

Central (Nodal) Agencies have been notified with regard to matters relating MLAT (CIVIL) AND MLAT (CRIMINAL). With regard to civil matters Ministry of Law & Justice is the designated central authority and in case of criminal matters Ministry of Home Affairs is the central authority. Already several matters have by handled by these concerned Ministries.

**11. If possible and/or relevant, please describe efforts made to consult with another country or countries' enforcement authorities on the investigation, prosecution and sanctioning of the same alleged act(s) of foreign bribery.**

**Response:**

Central (Nodal) Agencies have been notified with regard to matter relating MLAT (CIVIL) AND MLAT (CRIMINAL). With regard to civil matter Ministry of Law & Justice is the designated central authority and in case of criminal matters Ministry of Home Affairs is the central authority. Already several matters have by handled by these concerned Ministries.

**II. Implementation of Foreign Bribery Provisions in the 2012-2013 G20 Anti-Corruption Action and the St Petersburg Declaration**

*Note 3: This section of the questionnaire is drafted from the 2012-2013 G20 Anti-Corruption Action Plan and the St. Petersburg Leaders' Declaration. It also seeks updates from G20 countries on next steps for fighting foreign bribery.*

**12. Please specify next steps for continuing "efforts to adopt and enforce laws and other measures against foreign bribery".<sup>3</sup>**

**Response:**

<sup>2</sup> Available online here: <http://www.oecd.org/g20/topics/anti-corruption/High-Level-Principles-on-Mutual-Legal-Assistance.pdf>

<sup>3</sup>G20 Anti-Corruption Action Plan 2013 – 2014, Point 2.

A Bill relating to foreign official bribery is under active consideration and India is keen to have a legislation at the earliest.

**13. Please specify next steps for engagement with the OECD Working Group on Bribery with a view to explore possible adherence to the OECD Anti-bribery Convention as appropriate.**

**Specifically and where applicable, please indicate any plans to:**

- Attend meetings of the WGB in 2014;
- Co-organize or attend meetings on foreign bribery; and/or
- Engage in technical assistance activities on the issue of implementation and enforcement of the foreign bribery offence;
- Open discussion for Membership in the WGB, with a view to acceding to the OECD Anti-Bribery Convention.

Response:

Though India is not a Member of OECD, India attends OECD WGB and ADB-OECD Steering Group Meetings on regular basis. Senior representatives from Ministry of Personnel, Public Grievances & Pensions attended ADB-OECD Steering Group Meeting on 2-5 September 2014 in Phnom Penh, Cambodia.

Besides, one officer from Embassy of India at Paris attended the OECD WGB meeting during 14-17 October 2014 in Paris.

In so far as adherence to the OECD Anti-Bribery Convention is concerned, India considers United Nation Convention against Corruption (UNCAC) as the major initiative for anti corruption and the provisions of UNCAC are being adhered to by India.