

Legislative Brief

The Fugitive Economic Offenders Bill, 2018 and Ordinance, 2018

The Fugitive Economic Offenders Bill, 2018 was introduced in Lok Sabha on March 12, 2018.

The Fugitive Economic Offenders Ordinance, 2018 was promulgated on April 21, 2018.

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Highlights of the Bill and Ordinance

- ◆ The Bill allows for a person to be declared as a fugitive economic offender (FEO) if: (i) an arrest warrant has been issued against him for any specified offences where the value involved is over Rs 100 crore, and (ii) he has left the country and refuses to return to face prosecution.
- ◆ To declare a person an FEO, an application will be filed in a Special Court (designated under the Prevention of Money-Laundering Act, 2002) containing details of the properties to be confiscated, and any information about the person's whereabouts. The Special Court will require the person to appear at a specified place at least six weeks from issue of notice. Proceedings will be terminated if the person appears.
- ◆ The Bill allows authorities to provisionally attach properties of an accused, while the application is pending before the Special Court.
- ◆ Upon declaration as an FEO, properties of a person may be confiscated and vested in the central government, free of encumbrances (rights and claims in the property). Further, the FEO or any company associated with him may be barred from filing or defending civil claims.

Key Issues and Analysis

- ◆ Under the Bill, any court or tribunal may bar an FEO or an associated company from filing or defending civil claims before it. Barring these persons from filing or defending civil claims may violate Article 21 of the Constitution i.e. the right to life. Article 21 has been interpreted to include the right to access justice.
- ◆ Under the Bill, an FEO's property may be confiscated and vested in the central government. The Bill allows the Special Court to exempt properties where certain persons may have an interest in such property (e.g., secured creditors). However, it does not specify whether the central government will share sale proceeds with any other claimants who do not have such an interest (e.g., unsecured creditors).
- ◆ The Bill does not require the authorities to obtain a search warrant or ensure the presence of witnesses before a search. This differs from other laws, such as the Code of Criminal Procedure (CrPC), 1973, which contain such safeguards. These safeguards protect against harassment and planting of evidence.
- ◆ The Bill provides for confiscation of property upon a person being declared an FEO. This differs from other laws, such as CrPC, 1973, where confiscation is final two years after proclamation as absconder.

PART A: HIGHLIGHTS OF THE BILL AND ORDINANCE

Context

Economic offences relate to fraud, counterfeiting, money-laundering, and tax evasion, among others. Currently, various laws contain provisions to penalise such offences. These include: (i) the Prevention of Money-Laundering Act (PMLA), 2002 which prohibits money-laundering, (ii) the Benami Properties Transactions Act, 1988 which prohibits benami transactions, and (iii) the Companies Act, 2013 which punishes fraud and unlawful acceptance of deposits. Other laws such as the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 also cover economic offences, such as forgery and cheating.

In 2017, the Ministry of Finance released a draft Bill to address cases of high-value economic offenders fleeing the country to avoid prosecution.¹ It observed that a new legal framework was required as the current civil and criminal laws do not contain specific provisions to deal with such offenders.² The Ministry further stated that procedures under these laws are time-consuming, which obstructs investigation and impacts the financial health of banks.²

Recently, in March 2018, the Ministry of External Affairs stated that over 30 businessmen, under investigation by the CBI and the Enforcement Directorate, had absconded to avoid facing prosecution before Indian courts.³ The Fugitive Economic Offenders Bill, 2018 was introduced in Lok Sabha on March 12, 2018.⁴ Subsequently, an Ordinance containing similar provisions was promulgated on April 21, 2018.⁵

Key Features

- **Fugitive economic offender (FEO):** An FEO is a person against whom an arrest warrant has been issued for committing any offence listed in the Schedule to the Bill, and the value of the offence is at least Rs 100 crore. Further, the person has left the country and refuses to return, in order to avoid facing prosecution. The Bill lists 55 economic offences in the Schedule, which include: (i) counterfeiting government stamps or currency, (ii) dishonouring cheques, (iii) benami transactions, (iv) transactions defrauding creditors, (v) tax evasion, and (vi) money-laundering. The central government may amend the Schedule through a notification.
- **Authorities:** The authorities under the PMLA, 2002 will exercise powers given to them under the Bill. These powers will be similar to those of a civil court, including: (i) search of persons in possession of records or proceeds of crime, (ii) search of premises on the belief that a person is an FEO, and (iii) seizure of documents.

Table 1: Process under the Bill and Ordinance to declare a person as a Fugitive Economic Offender (FEO)

Process	Details
Application	<ul style="list-style-type: none"> ▪ The authorities appointed under the PMLA may file an application before a Special Court (designated under the PMLA) to declare a person an FEO. The application will contain: (i) reasons to believe that an individual is an FEO, (ii) information about his whereabouts, (iii) list of benami properties, properties believed to be proceeds of a crime, or foreign properties for which confiscation is sought, and (iv) list of persons having an interest in these properties.
Attachment	<ul style="list-style-type: none"> ▪ Authorities may attach any property mentioned in the application with the permission of the Special Court. The attachment will continue for 180 days, which may be extended by the Special Court. They may provisionally attach any property without the permission of the Special Court, if they file an application before the court within 30 days.
Notice	<ul style="list-style-type: none"> ▪ The Special Court will issue a notice to the individual: (i) requiring him to appear at a specified place on a date which is at least six weeks after the issue of notice, and (ii) stating that a failure to appear will result in him being declared an FEO. Notice may also be served at the individual's email address recorded in the PAN or Aadhaar databases.
Proceedings	<ul style="list-style-type: none"> ▪ If the person appears, the Special Court will terminate proceedings. If the person does not appear in person, but is represented by his counsel, the Special Court may allow the counsel a week to file a reply. If, at the conclusion of proceedings, the person is found not to be an FEO, his attached properties will be released.
Declaration	<ul style="list-style-type: none"> ▪ If the person does not appear in person or through his counsel at the stipulated time, the Special Court will proceed with hearing the application. After hearing the application, the Special Court may declare the person an FEO.
Confiscation	<ul style="list-style-type: none"> ▪ The Special Court may confiscate properties of an FEO which are proceeds of crime, benami properties, or any other properties. These properties may be in India or abroad. The Special Court may exempt certain properties from confiscation where any other person has a legitimate interest in them. Upon confiscation, all rights and titles in the property will vest in the central government, free from encumbrances (claims or rights in the property). The central government may dispose these properties after 90 days. ▪ Proceeds of crime will include properties (or equivalent value), which have been obtained by committing a scheduled offence. The standard of proof shall be "preponderance of probabilities".
Bar on civil claims	<ul style="list-style-type: none"> ▪ Any court or tribunal may bar an FEO from filing or defending any civil claim before it. The court may bar a company or a limited liability partnership from filing or defending any civil claim if the promoter, key managerial personnel (such as manager, managing director, or CEO), or majority shareholder has been declared an FEO.
Appeal	<ul style="list-style-type: none"> ▪ Appeals against the orders of the Special Court will lie before the High Court. Such appeals can only be filed within 30 days of the order (extendable to 90 days if the High Court is satisfied with the reasons for delay).

Sources: The Fugitive Economic Offenders Bill, 2018; PRS.

PART B: KEY ISSUES AND ANALYSIS

Barring persons from filing or defending civil claims may violate Article 21

Bill: Under Clause 14, any court or tribunal may bar an FEO from filing or defending any civil claim before it. Further, the Bill allows courts to bar a company from filing or defending any civil claim before it if the promoter, key managerial personnel (such as manager or CEO), or majority shareholder is an FEO. It may be argued that such a bar could violate Article 21 of the Constitution. Article 21 states that no person (or company) can be deprived of their right to life or personal liberty, except by law.⁶ Courts have interpreted this to include the right to access justice, which cannot be taken away.⁷ This right includes the availability of a forum which aggrieved persons may approach to seek legal remedy. The question is whether a bar on filing and defending claims would violate this right.

For instance, an individual who is declared an FEO may be involved in a marriage suit or inheritance dispute. Under Clause 14, courts are allowed to bar the individual from exercising his right to file or defend such a claim.

Further, there may be cases where an FEO is the majority shareholder of a company. In such cases, even though the company is a separate legal entity, it may be barred from filing or defending cases. For example, a company may be barred from filing a suit against a supplier of goods or from defending a case where tax dues are imposed on it. There may also be instances where creditors obtain court orders for repayment of loans against the company, without the company having an opportunity to present its defence. In all such cases, the interests of the remaining shareholders will not be protected owing to such a bar on companies.

Use of sale proceeds from confiscated property not specified

Bill: The Bill specifies that an FEO's properties will be confiscated and vested in the central government, free of encumbrances (claims or rights in the property). The central government may dispose of the properties after 90 days. The Bill does not specify how the central government will use the sale proceeds. That is, would the government be obliged to share the sale proceeds with persons who may have a claim against the FEO.

Bankruptcy Code: Under the Bill, the Special Court may exempt certain properties from confiscation if a person shows his legitimate interest in these properties. For example, this may cover secured creditors who have claims against specific properties of the FEO. The Bill does not require the confiscated properties to be used to settle dues of other claimants (for example, unsecured creditors or persons claiming unpaid wages). In contrast, the Insolvency and Bankruptcy Code, 2016 specifies that sale proceeds from the property of the defaulter will be distributed among all claimants according to an order of priority.⁸

Provisions related to search may not contain safeguards

Bill: Under the Bill, authorities may search a person or premises on the belief that a person may be declared an FEO or has proceeds of crime. The Bill allows a search to be conducted without a search warrant or witnesses. This differs from other laws, such as the Code of Criminal of Procedure (CrPC), 1973, which provide certain safeguards.

CrPC: Section 94 of the CrPC, 1973 permits a search to be conducted only if a warrant has been issued by a Magistrate. Further, Section 100 requires the presence of two or more independent witnesses while authorities search premises. Typically, other laws such as the Prevention of Money-Laundering Act, 2002 and Securities and Exchange Board of India Act, 1992 follow these procedures specified in the CrPC, 1973 in case of a search. These safeguards seek to protect against instances of harassment of persons or cases where evidence may be planted against the accused.

Note that Rules have been notified under the Fugitive Economic Offenders Ordinance, 2018. These specify that the procedure under the CrPC, 1973 will apply in case of a search.⁹ It may be argued that procedural safeguards related to search should be specified in the law, instead of being notified by the government through delegated legislation.

Procedures under the Bill similar to existing laws

CrPC: The Bill provides for provisional attachment of properties, and subsequent confiscation if a person is declared an FEO. This is similar to the CrPC, 1973, which also allows for attachment and confiscation of properties of absconders. Under the CrPC, 1973, the attached properties may be returned if the absconder appears within two years. This implies that properties will be finally confiscated only after two years of attachment. In contrast, under the Bill, confiscation of properties will be final once a person is declared an FEO by the Special Court.

Most of the procedural aspects under the Bill (with a few exceptions) are similar to existing laws such as the CrPC, 1973, and the Prevention of Money-Laundering Act (PMLA), 2002 (see Table 2).

Table 2: Comparison of current laws with the Bill

Provision	The Fugitive Economic Offenders Bill, 2018	Current Laws
Absconding	<ul style="list-style-type: none"> A person may be declared an FEO if he leaves the country and refuses to return to face prosecution. He may be asked to appear at a specified place at least six weeks after notice. 	<ul style="list-style-type: none"> CrPC: Section 82 allows a Court to issue a proclamation requiring a person evading a warrant to appear at a specified time and place at least 30 days after notice.
Attachment	<ul style="list-style-type: none"> A person's property may be attached for 180 days. Attached properties may include those believed to be proceeds of crime and benami properties. 	<ul style="list-style-type: none"> CrPC: Section 83 allows properties of absconders to be attached. PMLA: Section 8 allows attachment of properties which are proceeds of crime.
Confiscation or recovery	<ul style="list-style-type: none"> An FEO's property may be confiscated and vested in the central government, free of encumbrances. The central government may dispose this property only after 90 days. The Special Court may exempt certain properties from confiscation where any other person has a genuine interest. 	<ul style="list-style-type: none"> CrPC: Section 85 allows attached property to be sold by the state government after six months. It will have to return the property or proceeds if the absconder returns within two years. PMLA: Section 8 allows a person's property to be confiscated upon conviction, or if trial cannot be concluded. Such property will be vested in the central government, free of encumbrances. SARFAESI: Under SARFAESI, creditors can take possession of collateral without court intervention.
Search and seizure	<ul style="list-style-type: none"> Authorities may search premises and persons on the belief that a person may be an FEO, or has proceeds of crime, among others. They may also seize documents. While searching a person, if the person requires, authorities may take him to a gazetted officer or a Magistrate, within 24 hours. 	<ul style="list-style-type: none"> CrPC: Under Section 100, authorities may conduct a search. The search will have to be conducted in the presence of two witnesses, upon issuance of a search warrant. Provisions related to search under CrPC followed in other laws such as: (i) the PMLA, (ii) the Securities and Exchange Board of India Act, 1992, (iii) the Central Excise Act, 1944, (iv) the Companies Act, 2013, and (v) the Central Goods and Services Tax Act, 2017. PMLA: While searching a person, if he so requires, authorities may take him to a gazetted officer or a Magistrate, within 24 hours.
Contracting state	<ul style="list-style-type: none"> The Special Court may request a court or authority in a contracting state (countries with whom an agreement has been signed to enforce provisions of the law) to execute its confiscation order. 	<ul style="list-style-type: none"> CrPC: Under Chapter VIIA, courts may request contracting states to execute their orders (where central government has entered into agreements with such countries). PMLA: Provisions under Chapter IX similar to CrPC. Extradition Act, 1962: Chapter IV allows for the extradition of an offender (accused or convicted) from a foreign country.

Sources: The Fugitive Economic Offenders Bill, 2018; The Extradition Act, 1962; CrPC – The Code of Criminal Procedure, 1973; PMLA – The Prevention of Money-Laundering Act, 2002; SARFAESI – The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; PRS.

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