

# FIDC

## Finance Industry Development Council

*(A Representative Body of Assets and Loan Financing NBFCs)*

101/103, Sunflower, 1<sup>st</sup> Floor, Rajawadi Road No.2, Ghatkopar (East), Mumbai – 400 077  
Tel: 022 21029898/9820035553 • E-mail: [directorgeneral@fidcindia.org](mailto:directorgeneral@fidcindia.org); Website: [www.fidcindia.org](http://www.fidcindia.org)

To  
The Secretary,  
Ministry of Finance,  
Department of Financial Services  
Jeevan Deep Building, 3<sup>rd</sup> Floor,  
Sansad Marg,  
New Delhi 110001.  
Email: [bo2@nic.in](mailto:bo2@nic.in)

17<sup>th</sup> June 2020

Respected Sir/Madam,

**Sub: Decriminalisation of Minor offences for improving business sentiment and unclogging court processes – 138 of Negotiable Instruments Act 1881**

**Ref: Circular dated 08/06/2020**

**The Finance Industry Development Council (FIDC)** is a representative body of Asset and Loan Financing of the NBFCs registered with Reserve Bank of India. FIDC was formed 16 years ago and is the recognised face of the NBFC sector. Being a key stakeholder, FIDC is involved in regular interaction both with the RBI and Government of India which includes important policy related meetings. Almost all the leading NBFCs and a large number of small and medium sized NBFCs are our members.

FIDC is critically concerned with the decriminalisation of the offences, more particularly of the move to decriminalise the offence punishable under Sec.138 of NI Act, as the NBFCs will stand to lose a vital legal instrument to sustain their financial viability, and at the same time will lead to higher cost of borrowing for the scrupulous borrowers, whereas unscrupulous borrowers will stand to gain. FIDC submits the following points for consideration of your good office:



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1. The statement of reason to the circular dated 8<sup>th</sup> June, 2020 issued by DFS, rightly observed that the decriminalisation of minor offences are expected to go a long way in improving the ease of doing business and helping unclog the court system and prisons. Whereas the intent is laudable, but given the realities on the ground, doing away the provision regarding Sec. 138 of the Negotiable Instruments Act, 1881, will be entirely counter-productive. India has one of the lowest ranking in the world for enforcement of contract, and doing away with the criminality in Sec. 138 N.I. Act which offence is against the private individual the prosecutor being a private individual, unlike other offences mentioned in the proposal which are all mostly compliance related matters, prosecution being the state, thus causing no burden on the prosecutorial arm of the government, will cause more harm than good. Decriminalising the offence under Sec. 138 N.I. Act will act against the intent of the statement of reason of ease of doing business, as it would lead to further deterioration in enforcement of contract, especially in terms of honouring acknowledged debt and liability. Small and medium enterprises, apart from NBFCs will be the worst sufferers and the market place will be relegated to cash and carry transactions, with cheques losing their value as a means to secure transaction.
2. At the offset, the offence under Sec.138 of NI Act is a vital offence impacting the integrity of transactions in economic marketplace, as weak enforcement of commercial transaction between two parties commutatively and systemically harms the integrity of the trade system. There is *mala fide* intent on the part of the drawer of the cheque who dishonours the cheque issued in a commercial transaction. The original object, intent and purpose of imparting criminality to the wilful breach of provisions of Sec.138 of NI Act to promote efficacy and integrity of commercial transactions have not lost its meaning as no corresponding laws or provisions have been brought into force to ensure equally efficacious methods of enforcement of legal rights to enforce a valid debt under an instrument.
3. It is pertinent to note the object of introducing Sec. 138 of N.I. Act into statute books by **Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988** which reads as under:



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**“(xi) to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.”**

If the said provision is decriminalised, it would largely defeat the object of enhancing the acceptability of cheques in settlement of liabilities and consequently adversely affect the credit system in the country as cash settlement will become the order of the day since the recovery mechanism through civil remedy will take a longer time.

4. With the commercial globalisation of Indian Economy, there was a rapid increase in trade and commerce and a thrust was needed to create confidence in the Industry with regard to banking operations. With the increase in trade and commerce, the use of cheques has also increased and so also the dishonour of the cheques. To promote efficacy of banking operations and to ensure credibility in business transactions through cheques, Sec.138 of NI Act was introduced making the dishonour of cheque a criminal offence.
5. The object of Sections 138 to 142 of NI Act is to punish unscrupulous drawers of cheque, who though issue a cheque towards payment/ discharge of their liability, have no real intention of making payment or discharge their liability. The provisions of Sections 138-142 of NI Act were specifically introduced to impose the criminal liability on such unscrupulous drawers of cheque, who have dishonest and *mala fide* intention of avoiding their legal liability, after issuing a cheque purporting towards the payment or discharge of the liability.
6. However, with a view to avoid unnecessary and unwarranted prosecution of honest drawer of the cheque and with a view to afford an opportunity to an honest drawer of the cheque to make amends, the prosecution under Sec.138 of N.I. Act has been made subject to conditions, like issue of statutory notice, opportunity to pay the amount within a time frame etc. The statute also provides for safeguards to protect honest drawers of such cheques, where the dishonour may take place for reasons other than arising out of dishonest intention. The statute also envisaged a notice on the drawer of the instrument



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calling upon him to make the payment covered by the cheque and permits prosecution only after the expiry of the statutory period mentioned in the statute.

7. The Act while providing deterrence of criminal prosecution to ensure that the *mala fide* act of the parties do not go unpunished, has also provided protection or opportunity to honest drawers of the cheque and therefore strikes a good balance between punishment and protection. The amendment to the NI Act imposing criminal liability has brought a lot of confidence in the traders and industry, where crores of rupees are disbursed on the issuance of cheques. Incidentally, it may be noted that a similar provision in Sec. 25 of the Payment and Settlement Systems Act, 2007 has not been sought to be decriminalised.
8. As per the 213<sup>th</sup> report of the law commission, 20 per cent of the litigation pending in the court relates to dishonour of cheques which is an indication of the Magnitude of the trade and commerce that is done on the strength of cheques. It also indicates the relevance and importance of cheques and its dishonour in the Indian Economy.
9. Decriminalization of Section 138 of the NI Act, would lead to surge in contract enforcement disputes, which would clog the civil courts thereby shifting the nature of the legal battle from 'criminal' to 'civil' defeating and acting against the prime objective of ease of doing business and unclogging the court system.
10. While there is a need to address the expeditious prosecution/disposal of the cases like referring the cases to mediation or Lok Adalat before commencement of trial and creating a separate tribunals for trying such cases, the decriminalisation of the offences punishable under Section 138 NI Act may take the lid out of the same and will embolden the unscrupulous drawers of the cheque, adversely affecting the trade relations and Economy.
11. The prosecution for the cheque dishonour is an important source of collection mechanism for Finance industry and if the same is decriminalised, it would increase the stress on already battered industry besides increasing the operating cost notwithstanding the delay in disposal of Section 138 cases.



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12. The answer perhaps lies in putting in place more efficient case management system for dealing with cases under Negotiable Instrument Acts and systems can be evolved to carry out most of the case flow through online summary systems, with those opting for trial having to bear severe costs and consequences for abusing the process of court if it is found the same is done with *mala fide* intent. This will speed up the case disposal and lessen the burden on judiciary. In fact, a small fraction of successful claim can go to a court system argumentation fund to keep on improving the system.

13. While we welcome the steps taken by the Government of India in creating atmosphere for ease of doing business, we also request the Government to reconsider the proposal of decriminalisation of offence under Sec.138 of NI Act as it may impact the efficacy of banking transactions and may instil a sense of fear and insecurity in the traders who use to transact on the strength of cheques. As the industry is always willing to collaborate and work along with the Government in finding ways to reduce the litigation, the decriminalisation of offence of Sec. 138 of NI Act may not be a step in a right direction.

***We would earnestly request you to consider our request.***

***We would be grateful if you could give us an opportunity to discuss with you the aforesaid matter.***

Thanking you,

Yours faithfully,

For **FINANCE INDUSTRY DEVELOPMENT COUNCIL**

**MAHESH THAKKAR**  
**DIRECTOR GENERAL**  
**98200 35553**



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