

Anti-Bribery & Anti-Corruption

Prevention of Corruption (Amendment) Act, 2018

Multilateral Commitments of India



- **United Nations Convention against Corruption-** General Assembly Resolution 58/4 of 31 October 2003
 - India signed the Convention in 2005 and ratified in 2011
 - First global legally binding international anti-corruption instrument
- **UN Global Compact** – A voluntary initiative based on organisation participation - A call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals.
 - 12,000+ signatories in over 170 countries
 - Around 300 Indian companies have signed

***“NEITHER PEACE, DEVELOPMENT NOR
HUMAN RIGHTS CAN FLOURISH IN AN
ATMOSPHERE OF CORRUPTION”***

*- Ban Ki- moon, Former United Nations Secretary-
General*

Prevention of Corruption Act, 1988



The Prevention of Corruption Act, 1988, was amended in 2018 by the Prevention of Corruption (Amendment) Act, 2018 (“Act”).

- **Supply side prosecution introduced.**
 - However, bribing foreign officials has not been included, unlike in the more sophisticated jurisdictions.
 - Immunity to bribe giver removed.
 - Distinction drawn between willing and unwilling bribe giver – subject to reporting by unwilling bribe giver.
- **Time bound completion of trial (within 2 years but extendable to 4 years).**
- **Definition of ‘undue advantage’ is very broad and would include all kinds of favours.**
 - Including sexual favours and thus some alignment with POSH Act, where any public servant seeking sexual favours would not only run afoul of POSH Act, IPC but also POCA if such favours are sought in a manner to trigger section 7 prosecution.
- **Commercial organisations are brought within the ambit of the Act.**
 - Punishment is prescribed for the director, manager, secretary or other officer, where it is shown that the act of corruption was committed with the consent/connivance of such person(s).

Prevention of Corruption Act, 1988



- **Prior Approval needed.**
 - The Act bars an “enquiry or inquiry or investigation” by an anti-corruption agency (CBI included) against a public servant without the prior approval of the Centre or the state government, as the case may be, or the disciplinary authority.
 - Importantly, no enquiry is now permissible against an incumbent minister or, for that matter, a former minister, without the prior approval of the President. In case of MPs and MLAs, approval of the Speakers concerned shall be essential.
- **Power of confiscation**
 - The Act provides for attachment or confiscation of money or property procured by means of an offence under this Act.

Corporate Liability

- The law covers both direct bribery by a corporation/partnership as well as bribery through a third party.
- Having '**adequate provisions**' is a defence for a commercial organisation. However, although having 'adequate procedure' is a total defence under Bribery Act, the same is not clear under the Act.
- Guidelines for adequate procedures to be followed by corporate organisations are still awaited. However, the guidelines are likely to be on similar lines as in UK.
- The UK guidelines for 'adequate procedures' is based on 6 key principles:
 - Proportionate procedures
 - Top-level commitment
 - Risk Assessment
 - Due diligence
 - Communication (including training)
 - Monitoring and review
- In absence guidelines, corporates may refer to UK guidelines and also to ISO standard 37001.

Understanding Corruption



Certain **red flag** situations:

- A contract requires the use of a third-party consultant where the third party's principal or owner is a government official.
- Sham service contracts, under which corrupt payments are disguised using a consulting agreement or other arrangement are typical modalities for indulging in bribery or corrupt activities.
- Any potential partner who provides guarantees of success or claims to have the ability to obtain licenses or other government approval without providing a description of a legitimate manner by which those goals will be accomplished.
- Transactions involving unusual payment patterns or financial arrangements. Accordingly, a request to pay unusually high commissions is a warning sign of possible corruption.
- A potential counterparty who refuses to accept an ABAC or anti money laundering clause in the proposed contract.
- A proposed counterparty resists or fails to provide details of parentage or has undisclosed principals, associates or subcontractors with whom it splits fees.

Key Judicial Pronouncements (1)



PRIOR TO AMENDMENT

- **Central Bureau of Investigation, Bank Securities and Fraud Cell and Ors. v. Ramesh Gelli and Ors., (SC-2016)**
 - Supreme Court has held that the Prevention of Corruption Act would extend to the private sector as well.
 - Based on certain facts and circumstances of this case, Ramesh Gelli and Sridhar Subasri were held to be 'public servants' in spite of being officers of a private bank and the Supreme Court held that they cannot escape punishment.
- **Iridium India Telecom Ltd. v. Motorola Inc. (SC - 2010)**
 - Supreme Court held that companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary *mens rea* for the commission of criminal offences.
 - Principle of attribution – wrongdoing of the directing minds of the company shall be attributed to the company.
- **Sunil Bharti Mittal v. Central Bureau of Investigation ("CBI") and Others (SC - 2015)**
 - The principal of attribution is applied to impute criminal intention to the company on account of criminal intention of its alter ego (directing minds) and not the other way round. The Court held that the principle of attribution cannot be applied in the reverse scenario to make the directors liable for offences committed by the company.
 - The Court observed that in the following circumstances a director/person in charge of the affairs of the company can also be prosecuted, along with the company as an accused:
 - If there is sufficient evidence of his active role coupled with criminal intent;
 - Where the statute specifically imposes liability.

Key Judicial Pronouncements (2)



- **Krishan Chander v. State of Delhi (SC - 2016)**

- The Supreme Court postulated on the essential factors for determining whether bribery, as contemplated under the Act, has been committed.
- The court held that in order to prove an offence under these sections, it is necessary to establish that the public servant both demanded and accepted the bribe.

POST AMENDMENT

- **T. N. Bettaswamaiah v. State of Karnataka (Karnataka HC – 2019)**

- The High Court of Karnataka has held that the amendments made to the Prevention of Corruption Act, 1988, making it mandatory to take prior sanctions, both to conduct investigation as well as prosecution, of even retired public servants is “prospective” in nature.

- **Station House Officer, CBI/ACB/Bangalore v. B.A. Srinivasan and Anr. (SC - 2019)**

- There is no need to seek sanction before prosecuting a retired government employee in a corruption case, holding that such protection is available to a public servant only during service.



Checks & Balances



- Right to Information Act, 2005
- Judiciary
- Comptroller & Auditor General / CVC
- Active Media
- Non-Government Organizations
- Government initiatives – Demonetisation, sanctions against black money, etc.

Check & Balances within an Organisation

- Adoption of ABAC Policy
- Ethics Counsellors
- Compliance Officers
- Regular trainings and awareness creation
- Robust internal audit
- True and fair accounts
- Compliance audits by external auditors
- Ensuring compliance by vendors
- Consequences for non-compliance



THANK YOU