

Indian Anti-Corruption Law: Following the Global Trend

1. Introduction

Much has been written and articulated about corruption in India which, ostensibly, pervades at every level and, more so, to get simple tasks done. “Bakshish,” “Expectations,” “Chai-Pani” are words that most Indians are familiar with and, often, accept as a way of life. India is not alone in this; rather, most nations have anti-corruption laws which, in recent years, have seen tougher changes and sanctions in their respective legislations, be it UK, US or Europe. Indian law has to evolve as well and, so on July 24, 2018 the Parliament passed an amendment to the 30-year old Prevention of Corruption Act (“POCA”). The President of India accorded his assent and on July 26, 2018, the Ministry of Law notified Prevention of Corruption (Amendment) Act, 2018 (“Amendment”). Clearly, over 25 years of liberalization combined with recent scams necessitated the need to re-look at the anti-graft law in order to make it stringent so that, going forward, global and Indian conglomerates alike have greater faith in the enhanced transparency and accountability of the system as well as of the government.

This newsletter examines the key changes of the Amendment and its high-level impact on Indian businesses.

2. The Important Changes

Bribe-Givers: Taking a cue from the US and UK anti-bribery legislations, the Amendment has revised section 8 and has now brought bribe-givers within its ambit, unlike before when their prosecution was confined to abetment. The revised section 8, as captured in the Amendment, holds both natural and legal persons liable for giving bribes. For the latter, the reference is to “commercial organization” which is defined in section 9(3)(a) as **(a)** a company incorporated in India and that may do business¹ in-country or overseas; **(b)** a foreign company which carries on business in India; **(c)** an Indian partnership firm or an association of persons formed in India engaged in business in India or overseas; **(d)** any other partnership or association of persons formed outside India which carries on business in any part of India. An exception has been carved out for those who give bribe under compulsion as long as they volitionally report the act to the law enforcement agencies within 7 days. Giving a bribe is now an offence, punishable by 7 years imprisonment.² Section 9(3)(c) clarifies that a person is associated with an organization if they perform a service on its behalf and give or promise to give any “undue advantage”³ so as to obtain or retain either any business or any undue advantage while conducting that business. It would also be fair to infer that the definition makes it clear that favors and gifts will come within its ambit. Commercial organizations and their directors, officers and managers who may have given undue advantage to a public servant, will now be liable for prosecution. Furthermore, even senior officers in organizations will be held accountable and responsible if it is established that their employee or agent has engaged in an act of bribery, with their approval, in order to ostensibly advance the organization's interests.

¹ The word “business” has been defined in section 9(3)(b) and the inclusive definition states that it covers trade or profession or providing service

² For repeat offenders, section 14 of the Amendment has made punishment more stringent and those found guilty can be put behind bars for anywhere between 5 to 10 years

³ Section 2(d) now defines this term to mean any gratification whatever, other than legal remuneration

Criminal misconduct: Section 13 of POCA described the offence of criminal misconduct by a public official. It covered taking bribe habitually, getting anything free or at a concession, obtaining pecuniary advantage for oneself or for another where no public interest was involved. The erstwhile section 13 (1)(d)(iii) penalized an official for enriching a private entity “without any public interest.” It is possible this clause contributed to an apathy within the government where officers postponed decisions in order to limit their exposure and minimize any potential future investigations. The Amendment has deleted this clause.

The revised section 13 states that criminal misconduct will include only two offences i.e., when a public servant dishonestly or fraudulently misappropriates property entrusted to him or under his control or allows any other person to so misappropriate or intentionally accumulates assets while in office, which are disproportionate to his known sources of income i.e., lawful income. A new element of *mens rea* has been added which did not exist earlier and is not easy to establish! There is concern, perhaps valid, that the revised clause requires explicit evidence regarding intent of the officer to enrich himself/herself illicitly. So, any benefit that is not direct and cannot be established as an intentional fraud will not qualify the act as an offence. The pre-amendment position was that there was no need to prove any direct trade-off or bribery, which was very useful while addressing corruption involving senior bureaucrats.⁴

Two pertinent questions arise **(a)** does the revised definition covers non-monetary or indirect benefits given to extended family or third parties. Hopefully, yes as else it would be easy to circumvent the law and would nullify the use of the words “any other person” in the revision; and **(b)** will the foregoing deletion of sub-clause 13 (1)(d) (iii) create an empowering environment for the officials and impel them to take effective decisions. Again, hopefully yes, as the **new** provision is intended to protect public officers from being wrongly prosecuted for official decisions.

Approval for probe: A new section, 17A has been introduced which requires that the police cannot initiate a probe of any public official, i.e., those employed as well as those who have retired, without the prior approval of the relevant authority. In the law as it stood before the Amendment, such permission was linked with the designation of the official, limited to protecting high level serving bureaucrats. The key issue with initiating any kind of probes is the timing. Currently, the investigative authority is expected to communicate its decision within 3 months, with possibility to extend by another one month. It is premature to assume whether the decision makers will stick to the stated statutory period, but 120 days to grant an approval to launch a probe is a lot. If time will be wasted or lost in securing approvals, the purpose of bringing in changes to align the law with global developments shall be lost. Of course, it is necessary to protect honest officers and ensure there is no frivolous harassment but, timeliness cannot be overemphasized and delays should not impede investigations. The only exception to the prior approval will be when an official is caught red-handed leading to arrest on the spot.

Trials: A historical challenge has been enforcement, the duration of trials and the delay in closure of trials leading to punishment for corrupt officers. Now, speedy trial provisions have been inserted. Section 4(5) of the Amendment mandates special judges to hold trials on a day-to-day basis and will be expected to conclude them within 2 years. Extensions are permissible and may be made, but even the extended duration cannot exceed 4 years. But, the revised clause is silent on

⁴ There was a rampant belief that such senior people secured gratification secretly in different ways, like in the form of retiral benefits or other monetary benefits but in offshore locations

what happens if the trial is not completed within 4 years. Clearly, an appropriate mechanism to dispense swift justice is critical in the implementation of the Amendment. While the democratic system requires following due process, but the judges who will conduct hearings will have to prioritize and strike a balance to ensure that there is speedy closure in such cases.

Forfeiture of property: A new chapter, IV-A has been added regarding attachment and forfeiture of property so that any person who has gained any kind of benefit from a corrupt act should not be allowed to retain it.⁵ Effectively, the new section applies a 1944 ordinance in order to recover! Briefly, the enforcing agency will have to file an application before a “Special Judge” who will be vested with powers to attach the tainted assets. The judge will have to follow the prescription of the Civil Procedure Code. The provisions are wide enough to allow the judge to pass an interim order even without hearing as long as he finds merit in the allegations. A final order, of course, will require that all stakeholders are heard fully and properly.

3. What It Means

Indian companies, which are subsidiaries of foreign listed multinational companies, that have to adhere to the US and UK anti-corruption laws, had to necessarily comply with them in their Indian activities and operations. Global corporations created detailed and exhaustive anti-corruption compliance frameworks to be followed in the organization at a global level. Yet, there were deviations leading to significant dollar spend for those corporations, be it in the forensic investigations which had to be necessarily launched to examine what went wrong and why, or in the subsequent hearings before the relevant enforcement agencies in their home jurisdictions. The outcome has been staggering in many instances and hard to measure – be it financially for the corporation, or in the morale of the employees or, most importantly, the reputational loss with potential blacklisting. These are all lessons which Indian government lawmakers and India Inc. cannot disregard.

In view of the specific definition of commercial organization in the Amendment, Indian companies will have to take POCA more seriously. Apart from creating necessary systems in place to ensure that the employees are sensitized to the mammoth risks while dealing with government officers, organizations will need effective internal mechanisms to ensure that the systems do not remain merely on paper. Under the revised provisions, even accepting a “gift” is impermissible and is now criminalized. When a gift is received for an established undue advantage or with mala-fide intent, it will qualify as a corrupt act. As noted, this is a departure from the earlier law. In India, giving gifts under the garb of festivals or even as an intrinsic part of a “cultural tradition” has been abused fairly. In recent years, increasingly companies are appointing compliance officer to oversee overall compliance, but it is possible that, at least, for some time to come Indian companies will have to consider and introduce the possibility of extensive techniques to change the inherent mindset. They should consistently and regularly train the employees physically (versus merely conducting online trainings and issuing corresponding certificates for completion of the training);

⁵ The new section 18A states (1) Save as otherwise provided under the Prevention of Money Laundering Act, 2002, the provisions of the Criminal Law Amendment Ordinance, 1944 shall, as far as may be, apply to the attachment, administration of attached property and execution of order of attachment or confiscation of money or property procured by means of an offence under this Act. (2) For purposes of this Act, the provisions of the Criminal Law Amendment Ordinance, 1944 shall have effect, subject to the modification that the references to “District Judge” shall be construed as references to “Special Judge”

train the trainers as well and do regular follow-ups with them; organize frequent meetings with those working in procurement, sales and marketing departments to ensure they are on the right path; hire the right people at the top who will not be hesitant to take tough decisions in order to protect the organization versus securing new business by inappropriate means.

4. Conclusion

With most organizations adopting a zero-tolerance policy towards corruption, it was high time to effect changes to the three-decades old law. The tone, tenor and content of the Amendment is undoubtedly commendable, yet it has come under a fair amount of flak for some of its provisions as critics believe that it shields the offenders more. The legal community too continues to debate and question how a crime can be proved without an investigation. With the Amendment, the government may allow the investigation only **after** it gets the proof. So, supply of proof is a prerequisite while seeking an approval. Effectively, law makers ought to have considered when such evidence can be gathered. Many believe it is only by means of a probe. Hence, absent the proof possibly approval will not be given. That should not be the outcome.

The passage of time will shed light on who is shielded and whether the Amendment will control graft or not. Hopefully, the enforcement agencies will up their game and deliver timely results, so that the faith in the system and judiciary is not eroded. While it may be ambitious, but in time to come, hopefully, in the not too distant future, the legislature shall take steps to include commercial bribery too within the purview of POCA. Until then, with the Amendment, India too is aligning itself with the global trend on anti-corruption law.

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