
Introduction

The Government has amended the Prevention of Corruption Act, 1988 (**'PC Act'**) by enacting the Prevention of Corruption (Amendment) Act, 2018 (**'Amendment Act'**) which received the President's assent and became a law on 26th July 2018.

The amendments will come into force from such date as may be appointed by Central Government vide a notification, which is yet to be issued. The PC Act which was enacted in 1988 is the principal law which criminalises corruption and has been in force for three decades now. Later, India ratified the United Nations Convention against Corruption (**'UNCAC'**) in May 2011, in which, India had committed *inter alia* to strengthen its anti-corruption laws. In keeping with its commitment and to bring the law in line with the international standards, the Prevention of Corruption (Amendment) Bill, 2013 (**'the Bill'**) was introduced in India in August 2013. A lengthy process ensued where the Bill was referred to the Parliamentary Standing Committee and the Law Commission for its recommendations. The Bill was finally passed by the Rajya Sabha on 19th July 2018 and by the Lok Sabha on 24th July 2018. The Amendment Act brings about significant changes in the PC Act.

The PC Act was considered restrictive in its scope in comparison to the Foreign Corrupt Practice Act, 1977 (**'FCPA'**) of the United States of America and the UK Bribery Act, 2010 (**'UK Bribery Act'**) of United Kingdom, which are considered to be stringent anti-corruption laws. Vide the Amendment Act, the scope of the PC Act has been widened and the law has been brought on par with several aspects of these international anti-graft laws.

Some of the key changes in the PCA and ELP's brief comments on the same are set out below:

Key changes in PCA

A. Giving of a bribe to a public servant to be an offence

- Giving a bribe by any person to a public servant for improper performance of public duty or to improperly perform a public duty, has specifically been made an offence. This also covers giving bribe to a third person (intermediary) for inducing/rewarding a public servant for such purpose.
- It will not be an offence where a person has been compelled to give bribe. This is subject to the condition that the person compelled to give bribe has reported the matter to the law enforcement agency/ investigating agency within seven days from the date of giving a bribe. Additionally, it will not be considered an offence when a person gives a bribe to a public servant after informing the law enforcement agencies/ investigating agencies in order to assist the agencies in such investigations.
- Prior to the amendment, a bribe giver could not be prosecuted on the basis of a statement made during any proceedings against the public servant to whom such bribe has been given under the PC Act. This provision has been done away with.

ELP Comments

- The PC Act was enacted in 1988 with the objective to address the critical social issue of corruption amongst public servants. The Act mainly focused on the demand side of corruption – making the public servant taking a bribe an offender. Accordingly, there was no specific provision making ‘giving of a bribe’ an offence. However, the bribe giver was charged under Section 12 of the PC Act for abetment of the offence by the public servant. The amendments specifically address the supply side of corruption thereby bringing this legislation in line with other internationally recognised legislations such as the UK Bribery Act.
- The amendment distinguishes between a collusive bribe giver and a coerced bribe giver. In the latter case, the person is not guilty of the offence, provided he reports the same to the enforcement agency / investigating authority within seven days of giving the bribe.
- The deletion of the provision which protects a bribe giver from prosecution for any statement made by him during the proceedings against a public servant, will deter bribe givers from appearing as witnesses in the court and could potentially hamper the trial against the public servant.

B. Offences by a Commercial Organisation

- It will be an offence by the commercial organisation, where any person associated with such commercial organisation gives bribe to a public servant with an intention to obtain or retain business, or, to obtain or retain an advantage in conduct of business, for such commercial organisation. Such offence will be punishable with a fine.
- A person is said to be associated with a commercial organisation if such person performs services for or on behalf of commercial organisation, irrespective of whether such person is an employee, agent or subsidiary of such organisation.
- Commercial organisation has also been defined in a very broad manner to include all incorporated bodies, partnerships or association of persons, whether incorporated / formed in India, or, whether incorporated/ formed outside India but carries on business or part of business in India.
- It shall be a defence for the commercial organisation to prove that it had in place adequate procedures in compliance with prescribed guidelines to prevent persons associated with it from undertaking any corrupt conduct.
- Furthermore, it is provided that where the offence is committed with consent or connivance of any director, manager, secretary or other officer of the organisation, such person shall be punishable with imprisonment for a term of not less than three years which may be extended to seven years, and will also include a fine.

ELP Comments

- This provision will go a long way in containing the supply side of corruption. The onus is on the organisations to set up comprehensive anti-corruption compliance programs with requisite procedures which should be compliant with the Central Government guidelines (which are yet to be prescribed). It will be essential to set up comprehensive, clear, practical and accessible anti-corruption compliance programs. Generally compliance programs involve employing anti-corruption compliance and ethics codes, training of employees, conducting third party audits, whistle-blower mechanisms, monitoring mechanisms, etc.
- These provisions are similar to the provisions under the UK Bribery Act. The UK Government has based its guidelines on the following six principles - principles of proportionate procedures, top level commitment, risk assessment, due diligence, communication and training, and, monitoring and review.

- Several multi-national organisations operating in India have internal anti-corruption compliance policies as requirements under certain foreign anti-corruption laws which have extra-territorial jurisdiction (such as FCPA and UK Bribery Act). It would be important for such organisations to map their compliance programs with the guidelines to be prescribed by the Government under the PC Act. Further, all other Indian organisations will be required to have similar compliance programs.

C. Pre-investigation approval and sanction for prosecution of public servant

- The police cannot conduct any inquiry or investigation in relation to an offence alleged to have been committed, without the prior approval of the relevant authority or Government. However, such prior approval is not required where the public servant is caught red-handed for accepting or attempting to accept any undue advantage for himself or for any other person.

ELP Comments

- With the increase in scrutiny and enquiry against public servants under the PC Act, a concern was that *bona fide* decisions made by them were questioned and public servants were subjected to harassment by enquiry/prosecution. It could be argued that this resulted in stagnancy in decision making amongst the bureaucracy. Therefore, such an additional protection in relation to prior approval by the Government before initiating an investigation will encourage public servants to avoid taking an overly cautious approach while dealing with their official functions.
- However, it is pertinent to note that such prior approval is required by the police at the very threshold i.e. even before any inquiry/investigation can be made in the matter. Arguably it is during the stage of criminal investigation that facts and circumstances are verified, and evidence is collected. Therefore, in the absence of such evidence, it is unclear on the basis of what information will the sanctioning authority decide on whether to begin investigations or not. This could therefore result in further delays in the investigation and prosecution of genuine cases of corruption.

D. Condition of 'Mens Rea' inserted for prosecution of public servant for criminal misconduct

- The definition of criminal misconduct has been replaced. A public servant will be said to have committed an offence of criminal misconduct only where the intention to enrich himself illicitly is proved.
- Thus, the threshold to establish the offence has been increased to include 'mens rea'.

ELP Comments

- The said amendment was introduced as a result of the abuse of Section 13(1)(d)(iii) of the PC Act that led to unrestrained harassment of honest public servants. The section stated that *"a public servant is said to commit the offence of criminal misconduct... if he, while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest"*. There was no element of mens rea, or 'criminal intent', required as a threshold to initiate prosecution. Resultantly, bona fide decisions were considered the same as mala fide ones and were treated the same. The amendment therefore seeks to do away with the aforesaid and in doing so the legislature has made it onerous for the police authorities to establish the guilt of public servants - the requirement establishing "intention" of the public servant is set at a very high bar.

E. Attachment and forfeiture of property

- Specific provisions for attachment of property have been inserted. Powers have been given to the Special Judge conducting a trial under the PC Act to pass an order in relation to the attachment/confiscation of money or property which has been procured by means of an offence under PC Act.
- Earlier, although powers to attach property derived from corruption were covered under the Prevention of Money Laundering Act, 2002, the PC Amendment Act specifically grants such powers to the Special Judge conducting trial under the PC Act.

F. Time limit for conclusion of trial under PC Act

- Time limit for concluding a trial under the PC Act has been introduced. Such trials are to be concluded within a period of 2 years. However, where the trials cannot be concluded within the specified time limit, the Special Judge can extend the same after recording reasons for such extension provided that the total time period for completion (including the period of extension) of the trial does not extend beyond the period of 4 years.

ELP Comments

- In order to meet the timeline for completion of the trial, it is imperative for the Government to ensure creation of an adequate judicial infrastructure.