

# Prevention of Corruption Act (Amendment) Bill, 2013





The Prevention of Corruption Act (PCA), 1988 is largely the only law in India relating to the prevention of corruption and matters connected therewith. It was primarily aimed at prohibiting government agencies and public sector businesses from accepting a bribe in any form as well as to thwart any such motive.

In order to have an effective and exhaustive framework to combat corruption, a bill was introduced in the Rajya Sabha in August 2013 to amend the existing Prevention of Corruption Act ('Prevention of Corruption Act (Amendment) Bill, 1988'). This bill seeks to fill gaps in the statute and bring it in line with current international legislations such as the UK Bribery Act. While the added and revised provisions will come into effect only after the Parliament gives its nod (to the changes in the Amendment Bill); the Cabinet on 9 January 2014 provided its post-facto approval to introduce the amendments.

#### **Key changes suggested in the Amendment Bill**

The Amendment Bill enlarges the scope of the legislation to include the offense of passive bribery, its various aspects including solicitation and acceptance of bribe through intermediaries (private persons). It intends to prosecute the bribe givers in the offence of consensual bribery. The bill also proposes to provide punishment for the offence relating to bribe given to a public servant by a commercial organization and forfeiture of property of a corrupt public servant.

#### **Inclusion of private bribery**

Looking back at most of the major incidents (involving corruption) in the past, they have stemmed from corporations either being the bribe-giver or having facilitated the same. However, the PCA does not contain any legal provisions that address private bribery i.e. bribes paid by corporations or individuals. To prevent bribery on the supply-side (i.e. paying a bribe) and to give the law more teeth to tackle corporates indulging in corrupt practices, the amendment proposes that corporations and their key managers be brought directly under the legal ambit of PCA.

Until now, a corporation or a private individual would find himself liable under PCA only when a public servant is directly/indirectly bribed (including by use of personal influence) and the corporation/personnel abets the commission of this offence. The Bill, for the first time, introduces a direct offence defined as follows: "any commercial organization, which in order to obtain or retain business or a business advantage gives, or promises to give, any financial, or other, advantage to a public servant would be liable to pay a fine".

The term commercial organization here includes all forms of enterprise in India as well as those incorporated outside India but engage in business in India. The Bill also provides that when a commercial organization is in contravention with the PCA, the key personnel running the organization at that time will also be guilty of the offence - and liable to a minimum imprisonment of three years, extendable to seven years, as well as a fine. The only defense for company's here is potentially to be able to show that the company has adequate measures in place to prevent such misconduct and, as such, the person bribing is a rogue employee.

#### **Attachment of property**

The Prevention of Corruption Act, at present, does not specifically provide for the seizure of bribe or assets purchased through proceeds from bribery. The bill now empowers the investigating agencies to attach (or confiscate) such property during an ongoing trial, which can then be "forfeited" to the government if the final judgment from a court is one of conviction.

#### **Habitual bribe takers**

The provisions of the PCA, covering criminal misconduct by a public servant will undergo several changes after the Bill is passed. Whilst the notion of criminalizing habitual acts of accepting bribes are proposed to be omitted - owing to sufficient strengthening of other



provisions that are expected to achieve the desired results - the bill does include reference to repeat offenders wherein, if proved, the offender may be imprisoned for no less than three years and as many as 10 years and may also be fined. In the provision relating to possession of disproportionate assets by a public servant that cannot be accounted for using the 'known sources of income', the term 'known source' will be replaced by 'lawful source'. However, it will be interesting to see how investigating agencies differentiate between lawful-income and bribe in the presence of additional legal sources of income. Determination of the income source would also have an important role in the newly added 'attachment of property' provision mentioned above.

#### **Protection of whistleblowers**

Section 24 of the existing Act provides that a statement made by a bribe-giver during proceedings against a public servant (whistleblowing), will prevent the bribe-giver from prosecution. In majority of the cases in the past, the bribe-giver has gone scot free by taking resort to this provision thereby making it increasingly difficult to tackle consensual bribery. In a bold attempt, the Bill proposes omission of the whistleblower protection provision.

#### **Passive bribery**

The definition of bribe is likely to see a change with this Bill and will cover all aspects of passive bribery, including the solicitation and acceptance of bribe through intermediaries and also acts of public servants acting outside their competence.

#### **Prosecution sanction**

Among other revisions, the Bill allows prosecution of a public servant under PCA only if the complaint has been filed in a competent court and the sanction to prosecute is granted by the competent authority. The Amendment Bill also makes it mandatory for the competent authority to decide on granting prosecution sanction within three months of a complaint. The period can be extended by another month after consulting the Attorney General or the Advocate General.

#### **Jan Lokpal and the PCA**

The PCA, even after the amendment, is expected to suffer from a few pragmatic difficulties. As mentioned above, prosecution requires prior governmental sanction, which is seldom forthcoming and plagued with procedural barriers and red-tapism. This has resulted in abysmally low prosecution rates in the past. The Jan Lokpal Bill can tackle these shortcomings by acting as a back-stopper to the impediments in implementation of the PCA.

Lokpal in the central level and a Lokayukta at the state-level will have the power and independence to investigate and prosecute cases of corruption, allowing individuals to directly approach the Lokpal's office with grievances. It can also help accelerate the investigation procedure as well as the resolution of offences of corruption allegedly committed by government officials without the need for approval from any higher authority.

### Implications for Corporates/Organizations

With direct legal implications for corporations and their key personnel on acts of paying bribe, the tone at the top regarding bribery laws is expected to undergo a sea-change. Since the only recourse from bribe-giving charges is a compliance defense, the need for top-level commitment towards firm-wide compliance is expected to increase manifold on passing of the Bill. To ensure that robust controls and procedures are in places, companies would be required to invest in conducting risk assessments, adequate due-diligence, periodic process reviews and constant monitoring. Furthermore, investments will be required to propagate the tone-at-top by conducting trainings in the coming years.

The removal of the whistle blowing provision is likely to leave no recourse for corporates indulging in bribery. Once a bribe is paid, the corporation and its key management will be held liable irrespective of the nature of bribe – consensual or one-sided. Thus, the amendment will increase focus on compliance with anti-bribery laws and other anti-corruption laws by corporations.

Overall, the bill is proactive in its approach towards corruption and definitely a step in the right direction. It will ensure that organizations begin to take anti-corruption and anti-bribery compliance a lot more seriously. An effective approach towards anti-corruption will also instill confidence in foreign companies looking to enter India and douse their prejudices against the Indian business climate.

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