

AUGUST 2018

## THE PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2018

### KEY HIGHLIGHTS

#### 1. INTRODUCTION

The Prevention of Corruption Act, 1988 (the “Act”) was recently amended by the Prevention of Corruption (Amendment) Act, 2018 (the “Amendment Act”). Most of the amendments are aimed at tightening up the existing provisions in the Act and expanding the coverage of the offences.

#### 2. HIGHLIGHTS OF THE AMENDMENT

We set out the key changes brought about by the Amendment Act below.

##### 2.1. Key changes to the definitions

The Amendment Act includes the following definitions:

- (a) The term “**Prescribed**” has been introduced to mean rules that may be drafted by the Central Government under the Act. Given that, we anticipate the following rules:
  - Rules for organizations and companies to form internal guidelines and procedures to prevent its employees from affording undue advantage to public servants; and
  - Rules for prosecution of a public servant under the Act.
- (b) The term “**Undue Advantage**” has been defined to mean any gratification other than legal remuneration. The term “**gratification**” has been clarified to *include all forms of gratifications estimable in money besides pecuniary gratification*.
- (c) The term “**legal remuneration**” has been clarified to include all remuneration a public servant is permitted to receive by the concerned authority<sup>1</sup>.

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<sup>1</sup>The meaning of the terms gratification and legal remuneration were previously contained in the explanation to Section 7 prior to being amended by the Amendment Act.

## 2.2. Key amendments

### (a) Time extensions

Under Section 4(4), the courts no longer have complete trials for offences under the Act within 2 years, failing which the judges will need to record the requirement for extension in time. A trial can now be extended by 6 months at a time for up to a maximum of 4 years.

### (b) Exemptions for compulsion

Section 8 prescribes punishment for persons abetting a bribe or attempting to indulge in corruption with a public servant. The Amendment Act *exempts* those acts committed out of *compulsion*, provided a person so compelled files a complaint with the police or investigating agency within 7 days of giving a bribe under compulsion.

### (c) Commercial organisations

Section 9 now specifically deals with *commercial organizations* and *persons associated with commercial organizations*. The term *commercial organization* is clarified to include all forms of business structures and the phrase '*persons associated with commercial organization*' is wide enough to include employees and vendors.

### (d) Punishment

Section 10 now imposes specific terms for imprisonment and a fine where the commercial organization's directors, officers in default or a person with control over the organization has consented to the corrupt act violating the provisions of the Act. It may be useful to note that when amendments to Section 10 and Section 9 (*please see above*) are read together - the amended Act seems to penalize both the commercial organisations for violation of the Act by levying of a fine and the officers in charge of such commercial organization under Section 10 for criminal liability.

### (e) Corruption by public servants

The Amendment Act seems to have diluted the instances where a public servant can be accused of alleged criminal misconduct. The amended Section 13 of the Act only refers to the misuse of property and unjust enrichment as grounds for misconduct (which is assessed by disproportionate assets). Earlier, Section 13 accounted for general tendencies to seek bribes or indulge in corrupt practices as grounds of criminal misconduct.

(f) **Permission to prosecute by an investigative authority**

The Amendment Act appears to make it more difficult to prosecute government employees. The amendment under Section 19 states that for prosecution of a public servant under Sections 7, 11, 13 and 15<sup>2</sup> of the Act, *firstly* a sanction must be obtained from an authority that has the right to dismiss them. *Secondly*, an investigative authority (*such as a police officer*) must seek an application for permission, or else there are multiple layers of compliances that need to be cleared before the court can take cognizance of the offence.

### 3. **INDUSLAW VIEW**

The objective of the amendments at a primary level seem to, perhaps appropriately, place a lot of accountability on commercial organizations.

This principle approach is certainly in line with global standards of anti-bribery and anti-corruption measures. For instance, if any party contracting with a company indulges in corrupt practices and the company accepts it for lack of procedures or guidelines in place, which could otherwise prevented it, then the company (and its directors) could get prosecuted under the Act.

The Amendment Act has multiple interpretational issues, which will surely need to be reconciled.

Firstly, the consequence of not completing a trial within 4 years is not clearly stated in Section 4 of the Act. If the prosecution lapses, then it may encourage related activities to stall or slow down the process.

Secondly, the definition of the term '*Undue Advantage*' makes a generic reference to '*organization*' while clarifying the meaning of legal remuneration. When this definition is applied to Sections 7A or 8, it appears that *every* person involved in the chain of corruption whether working for a private entity or a public enterprise could potentially be prosecuted under the Act.

Thirdly, the changes to Section 9 of the Act, while lacking total clarity, seem to insinuate that Indian companies must start incorporating anti-bribery provisions in their commercial agreements.

Additionally, it appears that if any party contracting with an Indian company indulges in corrupt practices and the Indian company accepts the services of such third party with or without knowledge, then the company itself (and its directors) could get prosecuted under the Act.

The only risk mitigation measure in this context seems to be that Indian companies must develop robust anti-bribery and anti-corruption procedures or guidelines in place with any party it deals with.

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<sup>2</sup>Section 7: Offences relating to public servant being bribed; Section 11: Public servant obtaining undue advantage, without consideration from person concerned in proceeding or business transacted by such public servant; Section 13: Criminal misconduct by public servant; and Section 15: Punishment for attempt.

**Authors:** Avik Biswas | Yeshaswi Narasimhan

**Practice Area:** Anti-Bribery & Anti-Corruption | Government & Regulatory

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