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Analysing developments impacting business

Prevention of Corruption (Amendment) Act 2018 – Booster for the honest or the corrupt?

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INTRODUCTION

The Prevention of Corruption Act, 1988 (PC Act) was enacted to prevent corruption in Government departments and to prosecute and punish public servants involved in corrupt practices. As the PC Act saw limited success an amendment was enacted (Amendment Act) and brought into force on 26 July 2018. The Amendment Act attempted to bring the PC Act in line with United Nations Convention against Corruption 2005, which was ratified by India in 2011.

Highlights of the Amendment Act

- Definition of 'Undue Advantage': The Amendment Act provides that any public servant who accepts or attempts to accept from any person, any 'undue advantage', either for himself or for any other person, in lieu of performance of a public duty, shall be punishable with imprisonment for a minimum term of 3 (three) years and maximum of 7 (seven) years. The Amendment Act has defined 'undue advantage' to mean any gratification other than legal remuneration that a public servant is permitted to receive. Further, 'gratification' is not limited to pecuniary gratifications or to gratifications estimable in money. By virtue of such an expansive definition, even non-monetary considerations such as a better posting, post-retirement benefits, gifts and favours not estimable in money can also be covered under the ambit of undue advantage.
- Persons liable for offering a bribe to public servants: Previously, the PC Act did not contain a separate provision for a person who gives or promises to give an undue advantage, but the Amendment Act makes giving an undue advantage by a person to a public servant, a specific offence punishable by 7 (seven) years imprisonment or fine, or both. However, if a person is forced / coerced to give an undue advantage but reports the same to the concerned authority within 7 (seven) days of doing so, he shall not be liable for the same. Further, as per the PC Act, during a corruption trial, if a person made a statement that he gave an undue advantage to a public servant, it would not be used to prosecute him for the offence of abetment. The Amendment Act omits this provision. Effectively, it may become a potential risk for bribe givers to testify against the corrupt, and they may be discouraged from appearing as witnesses in a trial against public servants.
- Offering of bribes by commercial organisations: The Amendment Act has defined 'commercial organisation' to mean not just a company or partnership incorporated in India and carrying on business in India or outside India, but also a body or partnership incorporated or formed outside India but carrying on business in India.

Section 9 of the PC Act has been substituted by the Amendment Act to provide for a specific provision for offences committed by commercial organisations and persons associated with it. It provides that if a commercial organisation commits any of the offences listed out in the PC Act with the intention to obtain or retain business or obtain or retain an advantage in the conduct of its business, then such commercial organisation shall be punishable with fine, quantum of which is not prescribed in the Amendment Act.

The Amendment Act mandates the Central Government to formulate and prescribe guidelines to prevent persons associated with commercial organisations from bribing any public servant. A commercial organisation can defend itself when accused of any offence under the PC Act, if it proves that it had adequate procedures in place to ensure compliance with such guidelines issued by the Central Government to prevent persons associated with the commercial organisation from undertaking such conduct. The corporate sector in India will have to be swift in enacting its internal guidelines and ensure that its employees are well informed and abide by these guidelines to protect itself from any kind of prosecution under the PC Act, in the event of any associated person charged with the act of giving a bribe.

Further, if such an offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the organisation, then such person shall also be prosecuted under the PC Act.

- Redefining criminal misconduct: Under the PC Act, criminal misconduct by a public servant *inter alia* included: (i) using illegal means to obtain any valuable thing or monetary reward for himself or any other person; (ii) abusing his position as a public servant to obtain a valuable thing or monetary reward for himself or any other person; and (iii) obtaining a valuable thing or monetary reward without public interest, for any person. The Amendment Act replaces this section with a truncated definition of criminal misconduct to include only the following two acts: (i) misappropriation or conversion for his own use, any property entrusted to or under the control of a public servant; and (ii) amassing assets disproportionate to known sources of income. To prove the latter, the intention to acquire assets disproportionate to income must also be proved, in addition to possession of such assets. Thus, the scope of criminal misconduct has been narrowed and the threshold to establish the offence of possession of disproportionate assets has been increased by the Amendment Act.
- Prior sanction of appropriate government for investigation and prosecution: The PC Act required prior sanction of the appropriate government for prosecution of serving public officials. The Amendment Act extends this protection of requirement of prior approval to investigation prior to prosecution. Further, such protection is extended to former officials as well, for offences done while in office. The third proviso to Section 19(1) provides for a directory (not mandatory) time period of 3 (three) months within which the appropriate government must convey the decision on such sanction. Additionally, the Central Government may prescribe guidelines for grant of sanction for prosecution.
- Attachment of property: The Amendment Act has provided for application of the Prevention of Money Laundering Act 2002 and Criminal Law Amendment Ordinance 1944 for attachment and administration of property procured by means of an offence under the PC Act.
- Time frame for trial: The PC Act did not provide a time frame within which the trial was to be completed. However, the Amendment Act now prescribes that the Special Judge shall *endeavour* to complete the trial within 2 (two) years. This period can be extended by 6 (six) months at a time and up to a maximum of 4 (four) years

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in aggregate subject to proper reasons for the same being recorded. The wording of the section is directory in nature and not mandatory, making it less likely that the courts will abide by such timelines.

- Enhancement of Punishment: Punishment has been increased from a minimum imprisonment term of 6 (six) months to 3 (three) years, and from a maximum of 5 (five) years to 7 (seven) years, with or without fine. Punishment for abetment of offences has also been increased by the same quantum.

Comment

The Amendment Act can be considered as a positive development in respect of anti-graft regime as it includes various provisions relating to commercial organisations and persons who give an undue advantage. It has also modified and enhanced the definitions and penalties for offences related to accepting an undue advantage, being a habitual offender and abetting an offence.

Despite bringing about the much-needed changes, the Amendment Act has created additional hurdles for investigation and prosecution. The Amendment Act provides for the requirement to obtain prior sanction from appropriate Government to initiate a probe on serving as well as former public servants. While the intent was to prevent victimisation of honest officers, the Amendment Act seemingly strengthens the shield available to officials accused of corruption.

Further, under the PC Act, the guilt of the person was presumed for the offences of accepting an undue advantage, being a habitual offender or abetting an offence. This presumption now only applies to the offence of accepting an undue advantage. Burden of proof is shifted to the prosecution for persons accused of being habitual offenders and abetting an offence.

The Corporate sector will be required to watch out for the Central Government guidelines to ensure internal compliance mechanisms are in place for establishing potential defence in case of allegations of bribery.

Other aspects such as quantum of fine for commercial organisations have not been specified. The Rules, when formed and notified by the Central Government, should provide specifics on the authority to whom a potential bribe giver may report in advance of execution of a potential act of bribery within the stipulated time frame.

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