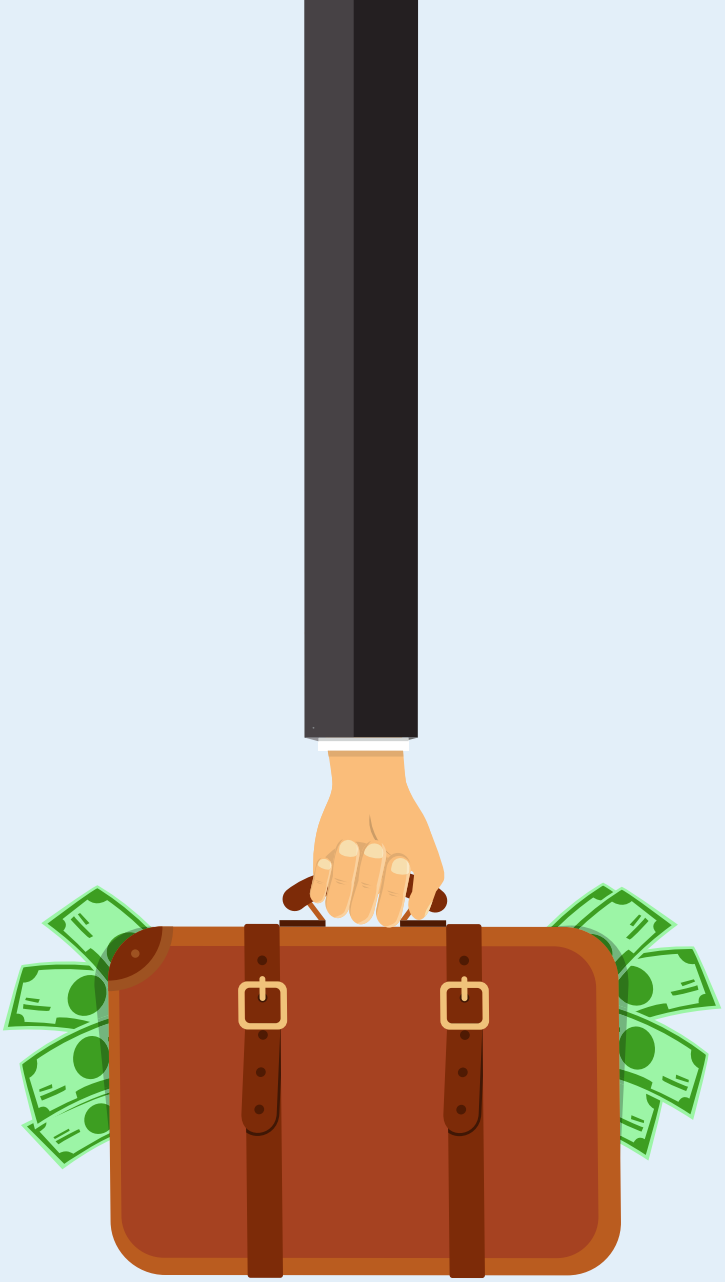
The Prevention of Corruption (Amendment) Act, 2018: Key highlights

KPMG.com/in

Introduction

The Prevention of Corruption Act, 1988 (PCA) was enacted to prevent corruption in public offices. In reality, after the Act's first passage in 1988, for almost 25 years, there has not been much change in the perception about India as a nation with high corruption levels, as measured by Transparency International's Corruption Perception Index (CPI). The CPI ranked India at a historical low of ninety-fifth rank in 2011[1] in the aftermath of the 2G and Commonwealth games scam revelations in 2010. In 2017[2] , owing to pro-governance policies, technology, automation of various government processes with public interface (e.g., passport, train tickets, public procurements such as e-tender/e-procurement/e-payments), India's rank improved to eighty-first position out of 180 countries. Though the score has improved over these years, in reality the corruption perception at the state, departmental and local municipality level remains largely unchanged.

Due to PCA's limited success, there was a need to introduce changes that could help make it more effective. The Prevention of Corruption (Amendment) Act, 2018 (Amendment Act) came into force on 26 July 2018, and seeks to bring the Indian anti-corruption legal framework in conformity with current international practices laid down by the United Nations Convention Against Corruption (UNCAC).



1. Corruption Perception Index 2011, Transparency International, November 2011
2. Corruption Perception Index 2017, Transparency International, February 2018

Key highlights of the Amendment Act[3]

1. Definition of 'undue advantage' — Section 2 (d) of the Amendment Act

The Amendment Act has defined 'undue advantage' to mean any gratification whatever, other than legal remuneration, not being limited to gratifications measurable in monetary terms. Legal remuneration includes all remuneration permissible to be received by a public servant. This implies that even non-pecuniary or non-monetary considerations such as gifts and favours not estimable in money terms, are also covered under 'undue advantage'

2.Specified timeline for completion of trial for corruption cases — Section 4 (5) of the Amendment Act

The Amendment Act provides for the completion of trial for corruption cases by a special judge within a period of two years from the date of filing of case. Extension of time can be provided for six months at a time with reasons to be recorded in writing. However, total period for the trial should not exceed four years.

The amendment has been passed with the hope that the judiciary will make due efforts to complete trials within the stipulated period of two years. However, the Amendment Act does not specify the implications in case trials for corruption cases are not completed within the specified timeline. While it is also expected to be impressed upon the investigation agencies that investigations be completed and chargesheets of offences be filed within a reasonable time period, there are no punitive provisions to act as detriment for non-compliance and to ensure timely delivery of justice.

3. Persons liable for offering a bribe to public servants — Section 8 of the Amendment Act

The PCA did not have a separate provision for giver of bribe except for the abetment. Section 8 of the Amendment Act addresses the supply side of bribery and corruption as follows:

a. Any person who gives/promises any undue advantage to another person to induce/reward a public servant for improper performance of a public duty — shall be punishable with imprisonment of up to seven years or fine or both

b. This section shall not apply where the person has been compelled to give undue advantage and has reported to law enforcement agencies within seven days from date of giving such undue advantage

c. It is not relevant whether such undue advantage has been received directly or through a third-party and whether the undue advantage has been received by the same person who is to perform or has performed the concerned public duty.

The above provisions under section 8 of Amendment Act are intended to curb collusive corruption where any person indulges in bribery to get undue advantages in taxation, regulatory matters and so on. However, in certain government departments where a culture of organised corruption has evolved, corruption may not be limited to junior functionaries. Further, there is an apprehension that Commercial Organisations (CO) that report public servants who have demanded bribes will be victimised by government organisations. This is where the overall factors of institutional capacity and strength of the law enforcement, prosecuting authorities and judiciary become relevant. Compared to other developed countries, India still has a way to go as far as the autonomy, independence, capacity, and skillsets of various institutions is concerned, to adequately decide such cases on merit.

4. Corporate liability of CO — Section 9 of the Amendment Act

The Amendment Act defines CO and introduces the concept of corporate liability, covering all categories of CO. CO not only includes 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.

Amended section 9 makes the CO guilty and punishable with fine if any person(s) associated with them gives/promises to give any undue advantage with the intent to (i) obtain/retain any business or (ii) obtain/retain an advantage in the conduct of business for such CO.

Section 9(4) states that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offence under sections 7A, 8 and 9 shall be cognisable.

3. The Prevention of Corruption (Amendment) Act 2018, Government of India, July 2018

This amendment prevents a CO from taking the plea that such bribery and corruption instances are individual offences, except when it can prove that it had adequate compliance procedures and safeguards in place to prevent its associated persons from such conduct. The Amendment Act has not defined adequate procedures, but has mandated the Central Government to formulate and prescribe guidelines to prevent persons associated with the CO from bribing any public servant.

Until the Central Government notifies guidelines on the adequate procedures, the CO operating in India may take guidance from similar guidance/notifications issued by international bodies or law enforcement agencies of other countries that have more developed anti-corruption legal frameworks, such as U.S., U.K.. Some such guiding documents on what may be viewed as 'adequate procedures' include:

a. Foreign Corrupt Practices Act, 1977 ('FCPA'): Resource Guide issued by Department of Justice (DoJ) and Securities Exchange Commission (SEC) in the U.S.

b. Six Principles of Adequate Procedures defined under the U.K. Bribery Act, 2010

c. Organisation for Economic Co-operation and Development (OECD) Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions

d. OECD Good Practice Guidance on Internal Controls, Ethics and Compliance

e. International Organisation for Standardisation (ISO) 37001

5. Granting sanctions for prosecutions — Section 17A of the Amendment Act

The PCA 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 any enquiry, inquiry or investigation prior to prosecution. Accordingly, no police officer shall initiate any enquiry, inquiry or investigation against a current/former public servant for an alleged offence (where the alleged offence relates to recommendations made or decisions taken in the course of his official duties), without the prior approval of the employer government or in any other case, by authority competent to remove him/her from such office (concerned authority). No such approval shall be required for arrests of public servants on the spot on charges of accepting or attempting to accept any undue advantage.

The Amendment Act requires the concerned authority to convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

This amendment creates a concern about leakage of such information to the suspected officer(s) and manipulation or destruction of evidence.

This amendment may have a counter-productive effect in combating corruption as this provision may be misused as a mechanism by government departments/competent authorities to protect public servants from initiation of enquiry/inquiry/investigation proceedings as well as prosecution. In essence, this provision may result in enquiry/inquiry/investigation of only those public servants caught red-handed while accepting or attempting to accept any undue advantage.

6. Punishment provisions strengthened — Section 7, section 12 and section14 of the Amendment Act

Punishment for offences by public servants has been increased from a minimum imprisonment term of six months to three years, and from a maximum of five years to seven years, with or without a fine. Punishment for abetment of offences has also been increased by the same quantum.

Punishment for recurring offence has been increased from a minimum imprisonment term of two years to five years, and from a maximum of seven years to 10 years, with or without a fine.

However, the Amendment Act has not specified the fines that could be levied on the CO found guilty of violations of the Amendment Act.

7. Attachment and Forfeiture of Property — Section 18A of the Amendment Act

The Amendment Act states that except as provided under the Prevention of Money Laundering Act, 2002, the provisions of the Criminal Law Amendment Ordinance, 1944, shall apply to the attachment or confiscation of money or property procured by means of an offence under this Act.

Commercial organisations - Need for a proactive outlook

Some of the COs operating in India are subject to U.S. FCPA, UK Bribery Act, 2010 or working on funding/ projects supported by public international organisations/ multilateral development banks, already have or are required to have an effective anti-corruption compliance framework. However, for other COs that were not previously subject to such rules, are now on level playing field — it is incumbent on their part too to take immediate and swift actions to develop safeguards against the potential risk of bribery and corruption and reiterate their organisation-wide stance against corruption.

COs will be proactively required to identify bribery and corruption risks applicable to their businesses, and develop adequate procedures in compliance with such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct. This set of adequate procedures, typically known as the Anti-bribery and Corruption (ABC) compliance framework, have policies and procedures designed to mitigate bribery and corruption risks in various organisations that are already subject to similar statutes in their parent countries. These include, but not are not limited to:

1. Proactive steps

a. ABC risk assessment including identification and categorisation of bribery and corruption risks into high/medium/ low; assessment of existing entity level controls to mitigate bribery and corruption risks; development and implementation of an appropriate ABC framework; and assistance in monitoring of ABC compliances

b. Developing, implementing and monitoring ABC policies and internal controls: Ongoing technical support to corporates with ABC compliances such as periodic monitoring of their books and records, advising on mitigating steps for high risk transactions

c. Senior officers to be in compliance: Adequate procedures require:

1. **ABC training:** Development of e-learning training modules and conduct face-to-face training on ABC compliances
2. **Vigil mechanism:** Implementation of an effective whistleblower mechanism that provides a platform to various stakeholders to raise their concerns
3. **Adequate documentation:** Maintaining adequate documentation to demonstrate and prove adequate procedures

d. Pre-acquisition due diligence: Similar to ABC risk assessment, but this is suitable when any CO is planning to acquire a new business and wants to understand the bribery and corruption risk of the new business it would be acquiring.

2. Reactive steps

Investigation of alleged/suspected instances of corruption by individuals and corporates.

Summary of key offences and respective penalties/imprisonment under PCA, 1988

Section	Offence	Description	Penalty/Imprisonment
S. 7	Relating to a public servant being bribed	Any public servant who takes an undue advantage from any person	Imprisonment of three years to seven years and also liable to a fine
S. 7A	Taking undue advantage to influence a public servant	Whoever accepts any undue advantage to induce a public servant to perform improperly	Cognisable offence — Imprisonment of three years to seven years and also liable to a fine
S. 8	Offence relating to bribing a public servant	Any person who gives any undue advantage to another person with intention to induce a public servant to perform improperly	Cognisable offence — Imprisonment up to seven years or fine or both
S. 9	Offence relating to bribing a public servant by a CO	CO commits any of the offence, if any person associated with such organisation gives any undue advantage to a public servant	Cognisable offence — CO shall be punished with a fine
S. 10	Person in charge of CO to be guilty of offence	If offence u/s. 9 is proved to have been committed with the consent or connivance of any director	Such person shall be liable to be proceeded against, and imprisonment of three years to seven years and a fine
S. 11	Public servant obtaining undue advantage without consideration	If a public servant accepts an undue advantage without consideration from any person concerned in proceedings or business transacted or having connections with the official functions of themselves	Imprisonment of six months to five years and a fine
S. 12	Punishment for abetment of offences	Whoever abets any offence under this Act, whether or not that offence is committed in consequence of that abetment	Imprisonment of three years to seven years and a fine
S. 13	Criminal misconduct by public servant	Any public servant who commits criminal misconduct* as defined under the Act	Imprisonment of one year to seven years and a fine
S. 14	Punishment for habitual offender	Whoever convicted of an offence, subsequently commits an offence under this Act	Imprisonment of five years to 10 years and a fine
S. 15	Punishment for attempt	Whoever attempts to commit an offence under section 13 (1)(a)	Imprisonment up to three years and a fine

Extract of some key sections of the Prevention of Corruption Act after amendment

Amended section 8 — Offence relating to bribing of a public servant

(1) Any person who gives or promises to give an undue advantage to another person or persons, with the intention of:

(i) inducing a public servant to perform improperly a public duty or

(ii) rewarding the public servant for the improper performance of public duty

shall be punishable with imprisonment for a term which may extend to seven years or with a fine or both.

Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage.

Provided further that the person so compelled shall report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such an undue advantage.

Provided also that when the offence under this section has been committed by a commercial organisation, such commercial organisation shall be punishable with a fine.

Illustration: A person, 'P' gives a public servant, 'S' an amount of INR10,000 to ensure that he is granted a license, over all the other bidders. 'P' is guilty of an offence under this sub-section.

Explanation: It shall be immaterial whether the person to whom an undue advantage is given or promised to be given is the same person as the person who is to perform, or has performed, the public duty concerned, and, it shall also be immaterial whether such undue advantage is given or promised to be given by the person directly or through a third party.

(2) Nothing in sub-section (1) shall apply to a person, if that person, after informing a law enforcement authority or investigating agency, gives or promises to give any undue advantage to another person in order to assist such a law enforcement authority or investigating agency in its investigation of the offence alleged against the latter.

Amended sections 9 and 10

9. Offence relating to bribing a public servant by a commercial organisation: (1) Where an offence under this Act has been committed by a commercial organisation, such an organisation shall be punishable with a fine, if any person associated with such a commercial organisation gives or promises to give any undue advantage to a public servant intending:

(a) to obtain or retain business for such commercial organisation or

(b) to obtain or retain an advantage in the conduct of business for such commercial organisation.

Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.

(2) For the purposes of this section, a person is said to give or promise to give any undue advantage to a public servant, if he is alleged to have committed the offence under section 8, whether or not such person has been prosecuted for such offence.

(3) For the purposes of section 8 and this section:

(a) 'Commercial organisation' means—

(i) A body which is incorporated in India and which carries on a business, whether in India or outside India

(ii) Any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India

(iii) A partnership firm or any association of persons formed in India and which carries on a business whether in India or outside India or

(iv) Any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India.

(b) 'Business' includes a trade or profession or providing service

(c) A person is said to be associated with the commercial organisation, if such person performs services for or on behalf of the commercial organisation irrespective of any promise to give or giving of any undue advantage which constitutes an offence under sub-section (1)

Explanation 1: The capacity in which the person performs services for or on behalf of the commercial organisation shall not matter irrespective of whether such a person is an employee or agent or a subsidiary of such a commercial organisation.

Explanation 2: Whether or not the person is a person who performs services for or on behalf of the commercial organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between such person and the commercial organisation.

Explanation 3: If the person is an employee of the commercial organisation, it shall be presumed unless the contrary is proved that such a person is a person who has performed services for or on behalf of the commercial organisation.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offence under sections 7A, 8 and this section shall be cognisable.

(5) The Central Government shall, in consultation with the concerned stakeholders including departments and with a view to preventing persons associated with the CO from bribing any person, being a public servant, prescribe such guidelines as may be considered necessary which can be put in place for compliance by such organisations.

10. Person in charge of commercial organisation to be guilty of offence: Where an offence under section 9 is committed by a commercial organisation, and such offence is proved in the court to have been committed with the consent or connivance of any director, manager, secretary or other officer shall be of the commercial organisation, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to a fine.

Explanation: For the purposes of this section, 'director' in relation to a firm means a partner in the firm.

KPMG in India contacts:

Vijay Chawla
Partner and Head
Risk Advisory
T: +91 80 6833 5509
E: vschawla@kpmg.com

Jagvinder S. Brar
Partner and Head
Forensic Services
T: +91 124 336 9469
E: jsbrar@kpmg.com

Sidhartha Gautam
Partner
Forensic Services
T: +91 98991 83331
E: sidhartha@kpmg.com

Suveer Khanna
Partner
Forensic Services
T: +91 22 3090 2540
E: skhanna@kpmg.com

Manoj Khanna
Partner
Forensic Services
T: +91 80 3065 4532
E: manojkhanna@kpmg.com

Sudesh Anand Shetty
Partner
Forensic Services
T: +91 22 6134 9703
E: sashetty@kpmg.com

Tanmay Bhargav
Partner
Forensic Services
T: +91 90040 18599
E: tanmayb@kpmg.com

Vinit Agarwal
Technical Director
Forensic Services
T: +91 88827 19878
E: vinitagarwal3@kpmg.com

home.kpmg/in

Follow us on:
home.kpmg/in/socialmedia