

WHY IT'S IMPORTANT FOR COMPANIES NOT TO IGNORE INDIA'S ANTI-CORRUPTION AND RELATED LAWS

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Background

Since the advent of globalization, enterprises have started engaging in increasingly complex cross-border transactions. In many cases, such mandates involve dealing, interfacing and obtaining approvals from government entities in foreign countries. So as to ensure transparency and fair play, governments the world over have enacted anti-bribery and anti-corruption legislations, many of which are extraterritorial in nature. Prime examples are the Foreign Corrupt Practices Act, 1988 (FCPA) and the United Kingdom Bribery Act, 2010. As a result, it has become very important for businesses to ensure that they are in compliance with the anti-corruption laws of not only their own country but also of countries where they do business.

Widespread corruption can be cancerous for the economic well-being of a country. It can encourage monopolies, disrupt fair competition and, most importantly, disincentivize fair market conduct. India was [ranked 85](#) among 180 countries in the 2021 Corruption Perception Index. The country's rank has more or less remained stagnant over the years, signaling that no significant improvement has been undertaken to improve India's anti-corruption policies.

Since the beginning of 2022, India Inc. has seen the unfolding of several high-profile corporate scams and scandals. In January 2022, the Supreme Court ruled on the Devas Multimedia-Antrix deal and [called it a "fraud"](#). February saw the [AGB Shipyard scam](#), which can easily be regarded as India's biggest bank fraud. In the same month, the Central Bureau of Investigation (the "CBI") revived its probe on [NSE's co-location scam](#) after the Securities and Exchange Board of India issued its order implicating the former National Stock Exchange CEO, Ms. Chitra Ramakrishna. Further, the proceedings against [Rana Kapoor](#), founder of Yes Bank, for his role in the DHFL scam have been ongoing.

India's anti-corruption legislation

In India, the primary anti-graft legislation is the Prevention of Corruption Act, 1988 (as amended in 2018) (the "PC Act"). It applies to Indian and foreign companies operating in India through subsidiaries or associated entities.

The PC Act was amended in [2018](#) to criminalize [bribe-giving](#), as well as [bribe-taking](#). Section 8 of the PC Act which deals with the offence of bribing a public servant, provides for a punishment of imprisonment for a term which may extend up to seven (7) years or with a fine or both. However, when the offence is committed by a commercial organization, it is punishable only with a fine under Section 9 of the PC Act, except if the offence has been committed with the consent or connivance of any director, manager, secretary or other

officer of the commercial organisation, in which case all such people can be held guilty and can be punished with imprisonment for a term between three (3) and seven (7) years, along with a fine.

Accused persons can defend themselves by proving that they were compelled to provide the undue advantage only if they report the matter to the authorities under the PC Act within seven (7) days.

Section 14 of the PC Act punishes habitual offenders, and if a person convicted under the PC Act subsequently commits another offence under the PC Act, he/she can be punished with imprisonment between five (5) years and ten (10) years, along with a fine.

Although the PC Act extends to the whole of India and even applies to Indian citizens outside India, it has limited extraterritorial reach as it does not cover bribes made to foreign officials. In this context, India's Institute of Company Secretaries has come out with the [Corporate Anti-Bribery Code, 2017](#), which covers the bribery of foreign public officials, and can be voluntarily adopted by companies.

That being said, the PC Act defines a commercial organization to include a body corporate, partnership firm or any other association of persons, which is incorporated or formed outside India and carries on business in India. Given this, as discussed above, Section 9 read with Section 10 of the PC Act can lead to imposition of liability on the foreign directors, managers, secretaries and other officers of a commercial organization.

For instance, in the [Louis Berger International](#) case, a bribe was paid to public officials in India to secure water projects in Goa and Guwahati. A PIL was filed before the Guwahati High Court (*Bhaben Handique v. State of Assam*, 2017 SCC Online Gau 713) seeking an enquiry under the provisions of the PC Act, and the Guwahati High Court ordered the CBI to probe the matter. While the CBI has been investigating the matter since 2017, the police in the State of Goa have also filed a chargesheet against and [arrested](#) several persons, including, the international vice president of Louis Berger. This case evidences the need for directors and officers of foreign entities to be mindful of the risk of being subjected to proceedings under the PC Act despite its limited extraterritorial applicability.

Other important cases

In the cases listed below, Indian regulators have, *inter alia*, initiated action against subsidiaries of foreign companies under the PC Act and other Indian statutes, and these are important examples of how things can go wrong in India on the anti-corruption compliance side.

In the matter of [Cadbury Limited and Mondelez International](#), Cadbury India, a subsidiary of the global multinational, engaged an agent to interact with Indian government officials to obtain licenses and approvals for a chocolate factory in India. However, the subsidiary did not accurately and fairly reflect the nature of the services rendered by the agent in its books and records. The CBI assisted the US Securities Exchange Commission ("**SEC**") in its

investigation and also registered a case against Cadbury India under the PC Act. The charges were settled in 2017 between the entities and the SEC.

Similarly, in the *Embraer* case which was settled in 2016 in the US, Embraer made payments (not appropriately recorded in its books and records) to an Indian agent in connection with the sale of three military aircrafts to the Indian Air Force. Press reports indicate that the Indian government asked the [CBI](#) to probe the corruption charges against Embraer, which resulted in the CBI registering a First Information Report (“**FIR**”) under the provisions of the PC Act. Simultaneously, the Enforcement Directorate, Department of Revenue, Ministry of Finance, Government of India (the “**ED**”) also filed a [chargesheet](#) against Embraer before a special court set up under the Prevention of Money Laundering Act, 2002. While the proceedings in India are ongoing, the ED has attached the assets of Embraer and certain middlemen.

Further, in the *CDM Smith scam*, CDM Smith, through its employees and agents, and those of its wholly owned subsidiary in India (CDM India), paid bribes to Indian government officials in exchange for highway construction, and supervision and design contracts, as well as a contract for a water project. In 2017, internationally, CDM Smith agreed to disgorge \$4 million. In India, the Central Vigilance Commission set up a special investigation team that submitted a report based on which the CBI registered an FIR. In the FIR, certain "unknown officials" of the National Highways Authority of India, CDM India, etc., were [booked](#) under the PC Act.

Key takeaways

Navigating the breadth and contours of the various domestic and international anti-corruption legislations can be a challenging task, and any trip-up can have significant reputational and monetary consequences. To mitigate these risks, companies should undertake the following measures:

- Companies, with or without any international presence, must monitor their compliances on a global-level (even in relation to their procurement and sales);
- Companies should adopt a comprehensive anti-bribery policy, which should, among other things, include provisions:
 - to ensure full compliance of the PC Act and other applicable anti-bribery legislations,
 - to deal with anonymous complaints made on a good faith basis,
 - on petty cash disbursements,
 - on contributions to *bona fide* charities,
 - on adequate internal accounting control, and
 - to deal with third party contractors;
- Companies should set up a hotline to report any non-compliances;

- Companies should undertake annual anti-bribery training programmes for their employees, contractors and other personnel; and
- Companies should undertake periodic audits and interviews of their senior management.