

INDIA

Little or no enforcement

2.1% of global exports

Investigations and cases

In the period 2016-2019, India initiated no investigations of foreign bribery, commenced no cases and concluded no cases.

Recent developments

The office of *Lokpal* (the Ombudsman) became functional in 2019 with the appointment of the first *Lokpal*.¹ This is the first institution of its kind in independent India, established under the Lokpal and Lokayuktas Act, 2013 to investigate allegations of corruption against public officials.²

Pursuant to amendments to the Prevention of Corruption Act passed in July 2018, persons who pay bribes can be penalised as those principally responsible for instigating a bribe, not merely as abettors. It is now an offence punishable by up to seven years in prison to give or offer an “undue advantage” to another person, with the intention to “induce” or “reward” a public servant to improperly perform a public duty.³ A mere promise, coupled with the requisite intention, is sufficient to constitute the offence of bribe-giving. The intended bribe recipient need not accept the “undue advantage” offered.

Under the Companies Act, 2013, company management can be held liable for corrupt practices

committed by the director. As per the amended Prevention of Corruption Act of India, an offence committed by an employee, agent or subcontractor of a commercial organisation shall be presumed to have been performed on behalf of the organisation, unless proven to the contrary.

In 2019, the Ministry of Corporate Affairs issued a notification to amend the Companies (Significant Beneficial Owners) Rules. The rules were formulated under section 90 of the Companies Act, 2013, which provides the disclosure requirements for significant beneficial owners in a company.

Transparency of enforcement data

The Indian government does not publish any statistics on foreign bribery enforcement, nor does it provide such statistics on request. However, enforcement agencies do release some general enforcement statistics.

The Central Bureau of Investigation (CBI) is the main investigating and prosecuting agency of India.⁴ It publishes information related to the First Information Report, number of charge sheets filed and the outcome of cases investigated and prosecuted by the CBI.⁵ The Central Vigilance Commission also publishes data in annual reports.⁶ The Indian government does not publish any statistics on mutual legal assistance requests made or received. Decisions of the Supreme Court of India are published on a government website.⁷

Beneficial ownership transparency

Beneficial ownership information is contained in an online public register of company documents maintained by the Ministry of Corporate Affairs.⁸ The Companies (Amendment) Act, 2017 introduced

¹ <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1577175>

² http://lokpal.gov.in/?about_us?about_lokpal?0101

³ <https://www.reedsmith.com/en/perspectives/2018/10/significant-updates-to-indias-anti-corruption-law>

⁴ www.cbi.gov.in/pressreleases/pressrelease.php

⁵ http://cbi.gov.in/view_firs.php; <http://cbi.gov.in/pressreleases/pressrelease.php>. The office of *Lokpal*, the office of Chief Vigilance Officers of Central Public-Sector Undertakings (including banks), the State Anti-Corruption Bureau, the Serious Fraud Investigation Office, and, in some states, the office of the *Lokayukta* (Ombudsman) are also involved in the investigation of cases related to corruption.

⁶ <https://cvc.gov.in/reports/monthly-performance-reports>; <https://cvc.gov.in/reports/annual-report>

⁷ <https://main.sci.gov.in/judgments>

⁸ www.mondaq.com/india/corporate-and-company-law/804156/mca-introduces-amended-rules-for-significant-beneficial-ownership; taxguru.in/company-law/form-no-ben-1-ben-2-ben-3-ben-4.html?amp

the concepts of “beneficial interest in shares” and “significant beneficial owner” under sections 89 and 90 of the Companies Act, 2013, with a view to promoting corporate transparency and preventing misuse of corporate vehicles for illicit purposes, such as corruption, tax evasion and money laundering.^{9,10} The Amendment Rules came into force in February 2019. Anyone who knows the name of a company can access documents including beneficial ownership declaration forms by paying a nominal fee.

Section 90 of the Companies Act, 2013 provides that every “significant beneficial owner” is required to make a declaration to the company specifying the nature of their interest and other particulars, in the prescribed manner. Under the amended rules, a “significant beneficial owner” is one owning not less than 10 per cent of shares or voting rights, or who has the right to participate in not less than 10 per cent of dividends in a financial year, or who has the right to exercise or actually exercises, significant influence or control, in any manner other than through direct holdings alone.¹¹

Inadequacies in legal framework

Although India has been a party to the UN Convention against Corruption since 2011, it has yet to meet the Article 16 obligation to define and criminalise foreign bribery. The country’s legal framework also suffers from other shortcomings which affect its capacity to prevent and prosecute foreign bribery. The G20 has repeatedly encouraged its member countries, including India, to ratify the OECD Anti-Bribery Convention.¹²

The Companies Act, 2013 has a greater focus on transparency, accountability and corporate governance than the previous Companies Act, 1956.

It obliges companies to keep “true and fair accounts” and requires an improvement in the transparency of company ownership. The Act also prohibits companies from recording payments with an “illegal purpose” as expenses and imposes significant sanctions for doing so. Penalties include blacklisting offending companies and other penal actions provided for in the Indian Penal Code. However, it is not certain whether bribing a foreign public official would be considered an illegal purpose under the 2013 Act.

Listed companies, companies which accept deposits from the public, and companies which have borrowed money from banks and public financial institutions in excess of fifty crore (500 million) rupees (US\$6.7 million) are required to establish a vigilance mechanism for directors and employees to report their genuine concerns about unethical behaviour, misconduct or corruption.¹³ In reality, these provisions are minimal and ineffective.

The Whistleblowers Protection Act, 2014 affords protection to a “person or public servant”.¹⁴ This is a wide ambit, because “public servant” has been defined broadly and the meaning of “person” is also not limited in the Act.¹⁵ However, the Act is not operational, as rules are yet to be framed by the central government.¹⁶

Inadequacies in enforcement system

As foreign bribery is not yet criminalised in India, the adequacy of the enforcement system in relation to the specific offence cannot be assessed. However, certain shortcomings in the enforcement system evident from current enforcement of domestic corruption regulations suggest reason for concern over foreign bribery enforcement. While the Indian Penal Code and Prevention of Corruption Act

⁹ http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/180911_A_MCA-notifies-beneficial-ownership-rules.pdf

¹⁰ https://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules_08020219.pdf

¹¹ <https://www.mondaq.com/india/corporate-and-company-law/804156/mca-introduces-amended-rules-for-significant-beneficial-ownership>

¹² In addition to India, a further three G20 countries (China, Indonesia and Saudi Arabia) have also yet to ratify the OECD Convention and criminalise foreign bribery. OECD Convention Ratification Status as of 21 May 2014, www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf.

¹³ Section 177(9) of the Companies Act, 2013 and Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 <http://ebook.mca.gov.in/Actpagedisplay.aspx?PAGENAME=17561>; <http://ebook.mca.gov.in/Actpagedisplay.aspx?PAGENAME=18097>

¹⁴ Section 11, Whistleblowers Protection Act 2014, <http://legislative.gov.in/sites/default/files/A2014-17.pdf>

¹⁵ Section 3(i), Whistleblowers Protection Act 2014, <http://legislative.gov.in/sites/default/files/A2014-17.pdf>

¹⁶ <https://economictimes.indiatimes.com/news/company/corporate-trends/where-the-law-stands-on-whistleblowers-in-india/infosys-episode/slideshow/71770940.cms>

prescribe criminal and civil liability for domestic corruption, the reality is that actions taken against the perpetrators have been rare.

There are multiple agencies in India involved in investigation of cases related to corruption and fraud, and coordination among agencies is seen as the biggest challenge in the timely prosecution of offenders.

High-profile investigations are delayed due to political interference. The Indian investigating agencies are short-staffed and many lack the skills to investigate white-collar crime and other economic offences. The investigation of transnational crimes, especially those linked with corruption and money laundering, are delayed due to lack of timely coordination with foreign investigating agencies. This has long been an area of concern, but remains unaddressed to date.

Recommendations

- Become a party to the OECD Anti-Bribery Convention
- Pass legislation criminalising foreign bribery
- Extend coverage of whistleblower protection to the private sector
- Enforce against foreign bribery to the extent possible under existing legislation.