

CORPORATE LIABILITY & RISK MANAGEMENT

CORPORATE LIABILITY FOR CORRUPTION UNDER SECTION 17A OF THE MACC ACT 2009

In 2019, Malaysia improved 10 places to 51 out of 180 countries in Transparency International's annual Corruption Perception Index last year, compared with its position in 2018 wherein Malaysia ranked 61 out of 180 countries. However, it is still a troubling fact to many Malaysians that Malaysia remains below many of its Asian counterparts, with neighbours Brunei Darussalam at 35th place and Singapore far ahead in 4th place.

Within that context, on 5th April 2018, Malaysian Anti-Corruption Commission Act 2009 (“**MACC Act**”) was amended to newly incorporate Section 17A, a provision to deal with corporate liability for corruption. It was expressly noted by the Malaysian government when the amendments were tabled in Parliament that the new Section 17A of the MACC Act is modelled after the United Kingdom Bribery Act 2010. As the law comes into force on 1st June 2020, companies in Malaysia have a mere 2 months (as of date of publication of this article) to be ready to comply with the new anti-bribery measure.

Section 17A introduces a new statutory corporate liability offence of corruption by a commercial organisation under Malaysian law. The section deems any director, controller, officer, partner or who is concerned in the management of the affairs of a commercial organisation to be personally liable for the same offence if the commercial organisation is found liable.

Scope of Liability Section 17A(1) states that a commercial organisation commits an offence if a person associated with it corruptly gives, offers or promises any gratification to any person with an intent to obtain or retain business or a business advantage for the said commercial organisation.

Note that Section 17A(6) of the MACC Act provides that persons considered to be “associated” with a commercial organisation include directors, partners and employees of the commercial organisation, as well as any person “**who performs services for or on behalf of the commercial organization**”. It has yet to be determined how the courts will interpret this provision but given the broad language used in Section 17A(6) of the MACC Act, one may assume that a commercial organisation may not only be liable for bribery by its director or partner, but liability extends to actions of employees. This liability may also potentially extend to actions of nominees, trustees, distributors, agents or joint venture partners as well.

Section 17A(8) of the MACC Act clarifies that a commercial organisation means a company or partnership that is formed under Malaysian law or a company or partnership that carries on business or a part of a business in Malaysia. Importantly, this means that companies could be found liable for failing to set up adequate measures to prevent bribery which occurred outside Malaysia, even if these acts were committed by a “company performing services for the commercial organisation” abroad.

“Illustration

Company A is a company incorporated and operates primarily in Malaysia that deals in the production and sale of bicycles.

Company B is a company incorporated and operates primarily in the United Kingdom, but maintains a business presence in Malaysia. Company B is a distributor of bicycles in the United Kingdom.

Company A and Company B enter into a Distributorship Agreement for the distribution of bicycles in England and Wales. While attempting to close deals to sell bicycles from Company A, Company B offers bribes to grease the wheels. Company A was not aware of these bribes.

Company A may be liable under Section 17A for the bribery committed by Company B.”

In line with the strong anti-corruption posture Malaysia has taken in recent years, the punishments under this provision are steep. Section 17A(2) provides that the penalty for an offence under Section 17A shall be a fine of not less than ten times the value of the gratification in question or RM 1 million, whichever is the higher, or imprisonment for not more than 20 years, or both.

Be reminded that given that under Section 17A(3) any director, controller, officer, partner or who is concerned in the management of the affairs of a commercial organisation will be personally liable for the same offence if the commercial organisation is found liable, the penalties under Section 17A(2) can similarly be applied to each individual convicted.

Reversal of the Burden of Proof & Defence

The effect of Section 17A is that the burden of proof has been reversed. The provisions create a presumption of criminal liability by deeming that the accused be required to prove that they exercised due diligence or put in place adequate measures to prevent the commission of the offence as they ought to have exercised, having regard to the nature of their function in that capacity and to the circumstances.

Section 17A(4) of the MACC Act provides that a commercial organisation shall be acquitted of a charge under Section 17A if it proves that it had in place “adequate procedures” designed to prevent persons associated with the commercial organization from undertaking such conduct.

Guidelines on Adequate

Procedures Section 17A(5) of the MACC Act provides that the government shall issue guidelines relating to procedures which would be considered “adequate” as a defence under Section 17A(4). The Guidelines on Adequate Procedures (“GAP”) was issued by the Prime Minister’s Office in December 2018 and is aimed at helping commercial organisations understand what would constitute “adequate procedures” and what they should implement to prevent corrupt practices. Importantly,

provide a defence against corporate liability under Section 17A.

There are five main principles which a commercial organisation may reference under GAP for to craft anti-bribery policies and procedures. Aptly arranged and easy to remember, the acronym for the five main principles is TRUST, and the principles are as follows:

- Top Level Commitment
- Risk Assessment
- Undertake Control Measures
- Systematic Review, Monitoring and Enforcement
- Training and Communication

It should be noted that GAP is not exhaustive, neither will it be universally applicable. The court is likely to examine each companies’ procedures and policies on a case-by-case basis to determine whether the same are indeed “adequate”. However, the courts are likely to give heavy consideration to compliance with GAP.

After an examination of GAP, below is a **non-exhaustive** list of policies that companies should be implementing to ensure that they are protected from liability under Section 17A:

- Craft a thorough and comprehensive anti-bribery/ anti-corruption compliance policy;
- Conduct periodic corruption and bribery risk assessments (i.e. Every 3 years or when necessary as suggested by GAP);
- Establish transparent and independent reporting channels within the company;
- Create rules, policies and procedures to control, limit or prevent the act of giving gifts, donations, sponsorships, and facilitation payments;
- Strict enforcement of rules relating to declaration and prevention of conflicts of interest;
- Conduct regular due diligence on third parties;

- Conduct regular internal (i.e. directors, employees, etc) and external (i.e. distributors, agents, nominees, etc) training sessions to ensure all parties are familiar with company anti-corruption and anti-bribery policies/procedures;
- Thorough integration of anti-corruption and anti-bribery policies/procedures/controls in all external engagements with entities/persons performing services for or on behalf of the company.

Changes by Bursa Malaysia In conjunction with Section 17A, Bursa Malaysia has announced the amendments to Listing Requirements for Main and ACE Market listed issuer in relation to anti-corruption measures. Both the amendment to the Listing Requirements and the MACC Act shall be effective on 1st June 2020.

The amendments include but are not limited to requiring a listed issuer and its board of directors to ensure that policies on anti-corruption that are (at a minimum) guided by the GAP, as well as policies and procedures on whistle-blowing are established and maintained for the listed issuer and its subsidiaries. The amendments require policies and procedures be reviewed periodically to assess their effectiveness, and in any event, at least once every three years. It has also required that corruption risk be included in the annual risk assessment. Bursa also now requires the listed issuer to publish on its website its policy on anti-corruption; and its policy/ procedures on whistle-blowing.

The Movement Control Order & Moving Forward In response to the COVID-19 global pandemic, on 18th March 2020, the Government of Malaysia introduced the Movement Control Order (“MCO”). Unfortunately, numerous industries in Malaysia have been seriously disrupted as a result of both the virus and the MCO. The economic impacts have been devastating and will continue to be felt for months to come.

Readers should bear in mind that it was announced on 10th December 2018 that the corporate liability amendments to the MACC Act will be brought into force on 1st June 2020. As of this article, companies in Malaysia have gone through close to 1 month of partial lockdown, while the vast majority of employees will continue to be confined to their homes until at least 28th April 2020. At present, companies have less than 7 weeks to complete putting into place measures to ensure compliance.

It goes without saying that the COVID-19 pandemic could not have been predicted by Parliament when Section 17A was introduced. It is crucial that the Government of Malaysia consider that COVID-19 and the MCO have and will continue to impact the ability for companies in Malaysia to comply with the provisions of Section 17A. Given the aforementioned, it is highly likely that a significant number of companies in Malaysia will be unable to successfully implement policy and procedural changes consistent with GAP in time to meet the 1st June 2020 deadline.

As such, companies will be vulnerable to significant legal liability in the near future, especially when one takes into account the heavy penalties under Section 17A. Given the circumstances, the Government of Malaysia should consider deferring the current date of the coming into force of Section 17A, which currently stands at 1st June 2020 in order to provide companies more time to adjust to this radically new economic landscape, sort out its affairs and appropriately make changes to comply with Section 17A.

Further, it is anticipated that in the coming months Malaysia will experience an uptick in corruption. The risk of corrupt acts taking place will likely rise significantly in an environment overseen by overburdened institutions and with many facing desperate economic conditions. In these circumstances, companies are advised to identify and mitigate the potential loopholes and areas where corruption is likely to occur at an early stage with a view to protect itself from exposure under Section 17A.

Messrs Zul Rafique & Partners offers legal consultancy and advisory services to assist companies in Malaysia better understand and comply with Section 17A of the MACC Act 2009. Feel free to contact us.

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The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

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