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Corporate and Personal Liability for Corruption

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“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism and other threats to human security to flourish.”¹

In April 2018, a historic amendment to the Malaysian Anti-Corruption Commission Act 2009 (the Act) was passed — the introduction of a corporate liability offence.² Upon its coming into force next year,³ the introduction of a new section 17A to the Act will mark the first time that a commercial organization in Malaysia can be held liable for an offence if a person associated with it commits an act of corruption (see *inset*).

Section 17A(1) of the Act

Offence by a Commercial Organization

(1) A commercial organization commits an offence if a person associated with the organization corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person or another person with intent —

(a) to obtain or retain business for the commercial organization; or

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

The Prime Minister's Department has elucidated that the aim of this new section 17A is to foster the growth of a business environment that is free of corruption and to encourage

- 1 The late Kofi Annan, former United Nations Secretary-General, in a statement on the adoption of the convention against corruption on 31 October 2003 in New York <<https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>>
- 2 Malaysian Anti-Corruption Commission (Amendment) Act 2018 [Act A1567], s 4
- 3 Section 17A of the Malaysian Anti-Corruption Commission Act 2009 is slated to come into force on 1 June 2020. See “PM launches guidelines for commercial organisations to minimise corruption risk”, *Bernama* (10 December 2018) <<http://www.bernama.com/en/news.php?id=1673929>>

all commercial organizations to take reasonable and proportionate measures to ensure that their businesses do not participate in corrupt activities for their advantage or benefit.⁴

The introduction of this new corporate liability offence is in line with Malaysia's vision in becoming a developed and corruption-free country. Earlier this year, a comprehensive five-year National Anti-Corruption Plan⁵ (the first of its kind to be formulated) was launched, setting out strategies and identifying several areas to be addressed in a move to cleanse Malaysia of corruption. The key areas comprise political governance, public sector administration, public procurement, legal and judicial, law enforcement and corporate governance. Further, the Prime Minister has also recently announced that specialised corruption courts will be set up with a view to expedite trials and cases involving corruption.⁶

'Person associated' with a commercial organization

To constitute an offence under section 17A, gratification must be carried out by a "person associated" with the commercial organization. A person is deemed to be associated with a commercial organization if he is a director, partner or an employee of the commercial organization or if he is a third party who performs services for or on behalf of the commercial organization.⁷ Further, the Act has clarified that the question of whether or not a person performs services for or on behalf of the commercial organization shall be determined by reference to all the relevant circumstances, and not merely by reference to the nature of the relationship between him/her and the commercial organization.

This demonstrates that the offence is one of strict liability, in that the commercial organization would be held liable, irrespective of whether its top-level management or representatives had actual knowledge of the corrupt acts of its employees or any associated persons.

Penalties

Where a commercial organization⁸ is convicted of an offence under section 17A, it would be liable to a fine of not less than 10 times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is of a pecuniary nature or a fine of RM1 million, whichever is the higher, or to imprisonment for a term not exceeding 20 years, or to both.

More importantly, individuals who are officers or concerned in the management of its affairs⁹ at the time of the offence will be held jointly and severally liable with the commercial organization (*see inset*).

Defence

Section 17A(3) of the Act

Where an offence is committed by a commercial organization, a person —

- (a) *who is its director, controller, officer or partner; or*
- (b) *who is concerned in the management of its affairs,*

at the time of the commission of the offence, is deemed to have committed that offence unless that person proves that —

the offence was committed without his consent or connivance and

that he exercised due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his function in that capacity and to the circumstances.

If a commercial organization is charged for an offence under section 17A, the only defence is for the commercial organization to provide that it had in place "adequate procedures" to prevent any associated person from committing the act which constitutes the offence. Although "adequate procedures" is not defined, section 17A(5) provides that the Prime Minister shall issue guidelines relating to such procedures. Such guidelines would effectively have the force of law, as one could hardly argue that its internal procedures

4 Guidelines on Adequate Procedures issued by the Prime Minister's Department <<http://integriti.my/giacc/wp-content/uploads/2019/01/Eng-Garis-Panduan-Tatacara-Mencukupi.pdf>>

5 National Anti-Corruption Plan 2019-2023 issued by the Prime Minister's Department <<http://integriti.my/giacc/wp-content/uploads/2019/01/National-Anti-Corruption-Plan-2019-2023.pdf>>

6 "Special court on corruption formed to concentrate on such cases", *Bernama* (19 March 2019) <<http://www.bernama.com/en/news.php?id=1706962>>

7 *Supra* n 2, s 17A(6)

8 A wide approach has been adopted in so far as the definition of "commercial organisation" under the Act is concerned, which includes the following:

- (a) a company incorporated under the Companies Act 2016 and carries on a business in Malaysia or elsewhere;
- (b) a company wherever incorporated and carries on a business or part of a business in Malaysia;
- (c) a partnership —
 - (i) under the Partnership Act 1961 and carries on a business in Malaysia or elsewhere;
 - (ii) which is a limited liability partnership registered under the Limited Liability Partnerships Act 2012 and carries on a business in Malaysia or elsewhere; or
- (d) a partnership wherever formed and carries on a business or part of a business in Malaysia.

9 Including a person who:

- (a) is its director, controller, officer or partner; or
- (b) is concerned in the management of its affairs.

are adequate if they do not conform to the prescribed guidelines.

The new law echoes the trend in modern legislation¹⁰ which has shifted from one of prohibition to punishments for acts of omission by placing the onus of proof on the commercial organization to show that internal policies and procedures have been implemented that will constitute “adequate procedures” to prevent its employee(s) and/or associated persons from undertaking corrupt practices in relation to its business activities.

In early December last year, the Prime Minister’s Department issued a set of “Guidelines on Adequate Procedures”, which was couched in terms of five key principles that will render compliance a wide-ranging, if not unlimited, exercise. It is pertinent to note, however, that the Prime Minister has stressed that such guidelines are designed to be principle-based and for general application by any commercial organization of any size and industry. Such guidelines are intended to be prescriptive and should be applied practically, in proportion to the nature, scale, industry, risk and complexity of the organization.¹¹

The five principles spell out the helpful acronym, *TRUST*:

- (a) **T**op-Level Commitment
- (b) **R**isk Assessment
- (c) **U**ndertake Control Measures
- (d) **S**ystematic Review, Monitoring and Enforcement
- (e) **T**raining and Communication

T — Top-Level Commitment

Commercial organizations should each establish a “tone from the top” (i.e. the organization’s stance against the use of corrupt practices in carrying out business activities). Top-level management of a commercial organization should adhere to the highest level of integrity and ethics and be able to provide assurance to internal and external stakeholders that the organization is operating in compliance with its policies and any applicable regulatory requirements.¹²

The Guidelines go on to set out various responsibilities of top-level management, including, among others, establishing and maintaining an anti-corruption compliance programme consisting of clear policies and objectives that adequately address corruption risks and assigning a competent person (externally or internally) to be responsible for all anti-corruption compliance matters.¹³

The definition of “top-level management” in the Guidelines is wide and covers a person who is a director, controller, officer or partner; or a person concerned in the management of a commercial organization’s affairs.¹⁴

R — Risk Assessment

Commercial organizations are encouraged to conduct corruption risk assessments periodically (i.e. once every three years, with intermittent assessments conducted when necessary) and where there is a change in law or circumstances in its business.¹⁵ Key considerations in such assessments should include:¹⁶

- (a) financial transactions that may disguise corrupt payments;

10 See, for instance, s 24(2) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613] and ss 129(3) (f) and 133(1)(b)(ii) of the Personal Data Protection Act 2010 [Act 709]

11 Guidelines on Adequate Procedures, para 3.4 <<http://integriti.my/giacc/wp-content/uploads/2019/01/Eng-Garis-Panduan-Tatacara-Mencukupi.pdf>>

12 *Ibid*, para 4.1.1

13 *Ibid*, para 4.1.2

14 *Ibid*, Appendix (ii)

15 *Ibid*, para 4.2.1

16 *Ibid*, para 4.2.2

- (b) non-compliance of external parties acting on behalf of the commercial organization regarding legal and regulatory requirements related to anti-corruption. Given the wide definition of an associated person under the Act, a commercial organization can be held liable for the acts of such third parties; and
- (c) relationships with third parties in its supply chain (for instance, agents, vendors, contractors and suppliers) that are likely to expose the commercial organization to corruption.

Risk assessments should be used to establish appropriate processes, systems and controls approved by top-level management to mitigate the specific corruption risks the business is exposed to.

U — Undertake Control Measures

The commercial organization should implement control measures to address potential corruption risks that are proportionate to its size/nature. These include:¹⁷

- (a) conducting due diligence on a party and its key personnel prior to entering into any business relationships;
- (b) establishing an accessible and secure information management system to ensure confidentiality of a whistleblower's identity;
- (c) introducing a written anti-corruption policy that addresses areas that would pose potential risk of corruption (e.g. gifting, receipt and payment of funds, donations, etc); and

- (d) establishing policies relating to:
 - (i) anti-bribery in general;
 - (ii) conflicts of interest/disclosure;
 - (iii) gifts/entertainment; and
 - (iv) donations/sponsorship.

S — Systematic Review, Monitoring and Enforcement

The second last principle requires commercial organizations to ensure that systematic review, monitoring and enforcement of their anti-corruption programme are carried out regularly.¹⁸ For this purpose, commercial organizations should consider, *inter alia*, an external audit (for instance, the MS ISO 37001 Anti-Bribery Management System) by a qualified and independent third party at least once every three years to ensure that they are operating in compliance with policies and procedures in relation to corruption. Disciplinary proceedings should also be conducted against personnel found to be non-compliant.¹⁹

T — Training and Communication

Commercial organizations are urged to develop and disseminate internal and external training and communications relevant to their anti-corruption management system, with a view of creating awareness and developing a culture of compliance. An organization's anti-corruption policies should also be made publicly available, and be appropriately communicated to all personnel and business associates in a variety of formats and mediums, including the organization's intranet or website, emails, newsletters, posters, code of conduct/employee handbooks, video seminars or messages and

¹⁷ *Ibid*, para 4.3.1

¹⁸ *Ibid*, para 4.1.1

¹⁹ *Ibid*, para 4.4.3

townhall sessions.²⁰ Additionally, employees and business associates should be provided with adequate training to ensure thorough understanding of the organization's anti-corruption position, in particular, in respect of their function within or outside the commercial organization.²¹

Although section 17A of the Act is expected to come into effect next year, its introduction represents the first step for Malaysia to catch up with international practices in anti-corruption law, for instance, the UK's Bribery Act 2010 (UKBA) and the US' Foreign Corrupt Practices Act 1977. It is interesting to note that the Malaysian government had expressly cited the UKBA when tabling section 17A of the Act in Parliament. Although the offence of corporate liability under section 17A is greatly modelled after the UKBA, this new section has a much wider scope (in that a senior personnel can be deemed liable for corruption by a commercial organization that is committed by an associated person) and imposes a reversed burden of proof by requiring such individuals to prove the absence of consent and connivance, as opposed to the UKBA, under which the prosecution bears the burden of proving the senior officer's consent or connivance.

Steps to be taken

Due to similar anti-corruption legislation already enacted across the globe, most multinational corporations would have in place compliance regimes that can easily be adapted to include compliance with Malaysian law. However, other organizations may find it prudent to consider setting up a compliance regime in line with the Guidelines in anticipation of the new law coming into force. By implementing such "*adequate procedures*", companies can be assured that they have established a defence that can be used to protect both the commercial organization and its top management from an offence under section 17A of the Act.

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²⁰ *Ibid*, para 4.5.4

²¹ *Ibid*, para 4.5.5