

SECTION 17A OF THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 – THE LEGAL RESPONSIBILITIES OF COMMERCIAL ORGANISATIONS AND THEIR MANAGEMENT

PART 1: INTRODUCTION

The Malaysian Anti-Corruption Commission Act 2009 (“**MACC Act**”) has been amended to introduce corporate liability provision for bribery and corruption under section 17A of the MACC Act, which came into effect on 1st June 2020. Prior to the introduction of section 17A, the MACC Act had only primarily focused on the prosecution of natural persons who were involved in corruption. However, with this latest introduction, the MACC is now able to directly impose corporate liability on commercial organisations including public and private limited companies whose employees or associated persons are involved in corrupted practices and dishonest commercial misconducts.

PART 2: THE LAW & OBJECTIVE

Section 17A(1) of the MACC Act provides that:

(1) “*A commercial organization commits an offence if a person associated with the commercial 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.”

Section 17A(2) of the MACC Act provides that:

(2) “*Any commercial organization who commits an offence under this section shall on conviction be liable to a fine of not less than ten 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 pecuniary nature, or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding twenty years or to both.”*

The Government has stated that the aim of this provision is to foster the growth of a business environment that is free of corruption and to encourage all commercial organisations to take the reasonable and proportionate measures to ensure their businesses do not participate in corrupt activities for their advantage or benefit. These measures should take the form of policies and procedures, with training, communication and enforcement to ensure they are effective.[1]

PART 3: QUESTIONS & ANSWERS

3.1 What is a commercial organisation?

Commercial organisation means:

1. a company incorporated under the Companies Act 2016 and carries on a business in Malaysia or elsewhere; or
2. a company wherever incorporated and carries on a business or part of a business in Malaysia; or
3. a partnership under the Partnership Act 1961 and carries on a business in Malaysia or elsewhere or which is a limited liability partnership registered under the Limited Liability Partnerships Act 2012 and carries on a business in Malaysia or elsewhere; or
4. a partnership wherever formed and carries on a business or part of a business in Malaysia.[2]

3.2 Who can be considered as a person associated with the commercial organisation/the company (where such commercial organisation/company will be liable for corruption behaviours of such associated person accordingly)?

A person is considered as an associated person of a commercial organisation if he is a director, partner or an employee of the commercial organisation or he is a person who performs services for or on behalf of the commercial organisation.[3]

Please refer to Part 4 below for further discussion on the definition of “associated persons”.

3.3 Is there any legal defence available to a company that has been charged with a corruption offence under Section 17A (1)?

It is a defence for the commercial organisation to prove that the commercial organisation had in place adequate procedures to prevent persons associated with the commercial organisation from undertaking such conduct.[4]

Pursuant to this in December 2018, the Prime Minister's Department issued a set of "Guidelines on Adequate Procedure". These Guidelines introduce five (5) core principles on adequate procedures (T.R.U.S.T):

1. Top Level Commitment (T);
2. Risk Assessment (R);
3. Undertake Control Measures (U);
4. Systematic Review, Monitoring and Enforcement (S);
5. Training and Communication (T).

Further information and review of such requirements in the Guidelines will be discussed in a separate article.

3.4 If a company is found to have committed an offence under Section 17A(1), can its directors or managers etc be held liable too under the MACC Act?

Where an offence is committed by a commercial organisation, a person who is its director, controller, officer or partner or 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.[5]

3.5 Is there any legal defence available to company directors or managers etc who have been charged for a corruption offence committed by their company under Section 17A(1)?

Yes, a defence is available provided such person is able to prove that the offence was committed without his consent or connivance and that he had 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.

However, the commercial organisation may still be liable whether or not its top level management and/or representatives had actual knowledge of the corrupt acts of its employees and/or associated persons.[6]

3.6 Does Section 17(A) apply to bribe receivers?

No, as this section mainly applies to briber providers including their companies and the company management officers. Bribe receivers have already been covered under other sections of the MACC Act including section 16.

3.7 Company A is a foreign entity investing in Malaysia. It enters into a joint venture business with a local Malaysian partner. If its partner commits bribery acts in pursuit of projects or business opportunities for the joint venture, will Company A be liable for prosecution too under Section 17(A)?

Possibly, a joint venture partner may still be considered as an associated person of Company-A, particularly if Company-A knew or ought to have known that its partner would commit bribery acts in furtherance of the joint venture business.

Please refer to Part 4 below for further discussion on the definition of “associated persons”.

PART 4: THE WIDE LEGAL DEFINITION OF “ASSOCIATED PERSON”

As discussed above, a company will be liable for corruption behaviour committed by its associated person in furtherance of the company’s interests or benefits.

A person is also considered as an “associated person” of a company if he is a person who performs services for or on behalf of the company (Ref: Question 3.2 above).

Due to this wide definition in Section 17A, the meaning of an associated person potentially also covers a range of external parties of the company including joint venture partners, external agents, consultants and contractors provided:

1. such parties perform services for or on behalf of the company; and
2. they commit corruption with intent:
 - a. to obtain or retain business for; or
 - b. to obtain or retain an advantage in the conduct of business for;

the company in a particular commercial project or a series of the same.

The term of “**associated person**” is therefore not limited to those who work within the company only.

The wide definition could potentially cover situations where a company has purposely arranged for its appointed external agents, consultants and contractors or joint venture partners to pay bribes to a third party in furtherance of its commercial interests or advantages.

Under such circumstances, where the bribe conduct was pre-arranged to be undertaken by its appointed external agent or joint venture partner, the company could no longer claim that it should not be found liable for the corruptive acts of its external agent/joint venture partner who could still be considered as its associated person in the above scenario.

PART 5: CONCLUSION

Accordingly, companies are advised to put in place adequate corruption prevention procedures incorporating the T.R.U.S.T principles to:

1. prevent any corruptive acts of their associated persons (including but not limited to its directors, employees, as well as external agents, consultants and contractors etc); and
2. minimise and control the legal risks that the companies and its directors and managers etc be found liable for such offences committed by their associated persons.

The wide definition of “associated persons” as discussed in Part 4 above also reminds companies that their company corruption prevention procedure shall extend its application to those who are or will be externally engaged by the companies as its agents, consultants and contractors etc.

[1] Paragraph 3.2 of the Guidelines on Adequate Procedures pursuant to subsection (5) of section 17A under the Malaysia Anti-Corruption Commission Act 2009
https://f.datasrvr.com/fr1/119/75252/Prime_Ministers_Department_-_Guidelines_on_Adequate_Procedures.pdf

[2] Section 17A(8) of the Malaysian Anti-Corruption Commission Act 2009

[3] Section 17A(6) of the Malaysian Anti-Corruption Commission Act 2009

[4] Section 17A(4) of the Malaysian Anti-Corruption Commission Act 2009

[5] Section 17A(3) of the Malaysian Anti-Corruption Commission Act 2009

[6] Section 17A(3) of the Malaysian Anti-Corruption Commission Act 2009

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