

New and improved? Corporate liability for corruption in Malaysia

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Section 17A of the Malaysian Anti-Corruption Commission Act raises the possibility of corporate liability for corruption in addition to personal liability for board and senior management members involved. The provision, which came into force mid-last year (2020), was invoked for the first time in March 2021. This article sets out implications for international businesses operating in Malaysia.

Since its inception in 2009, the Malaysian Anti-Corruption Commission Act (MACC Act) has been Malaysia's key tool in its fight against corruption. In furtherance of the government's anti-bribery and corruption agenda, Parliament amended the MACC Act in 2020 to include a new section 17A which introduced a corporate liability provision for bribery and corruption. In March 2021, the Malaysian Anti-Corruption Commission (MACC) invoked it for the first time. As it almost certainly will not be the last, both Malaysian and international businesses operating in Malaysia should take heed of this recent change to the law and its implementation.

Corporate liability

Section 17A(1) of the MACC Act provides that a commercial organization commits an offence if a person associated with the organization corruptly gives, offers or promises any gratification to any person with an intent to :

- Obtain or retain business for the commercial organization.
- Obtain or retain an advantage in the conduct of business for the commercial organization.

Notably, a commercial organization on the receiving end of a bribe will not fall within the ambit of section 17A. The provision is specifically aimed at the giver, promisor, or offeror of a bribe. Nevertheless, recipients of a bribe may still be individually liable under sections 16 and 17 (which provide that a person or agent commits an offence by accepting a bribe).

'Person associated'

To establish corporate liability, it must be shown that the corrupt act is carried out by a "person associated" with the commercial organization. As per section 17A(6), this person can be a director, partner, an employee or other person who performs services for and on behalf of the commercial organization.

The inclusion of the last category of persons means that a commercial organization will not only be liable for corrupt acts carried out by its director or partner or employee, but also for corrupt acts perpetrated by its agents, distributors, and potentially, joint venture partners or subsidiaries. This provision appears to set a high bar for compliance – third party service providers represent one of the largest corruption risks for businesses in Southeast Asia.

This risk may be amplified for companies operating in certain industries, such as energy and construction, where work is commonly sub-contracted, and the use of third parties is prevalent. Having a robust framework to monitor third parties in the supply chains will be crucial going forward.

Personal criminal liability of senior personnel

Under section 17A(3), a commercial organization convicted of an offence under section 17A(1) will see its directors, controllers, officers, partners or members of management deemed to have personally committed the offence unless the relevant individual or individuals can prove that:

- The commercial organization had committed the offence without their consent or connivance.
- They had exercised due diligence to prevent the commercial organization's commission of the offence, having regard to the nature of their function and to the circumstances surrounding the offence by the commercial organization.

In essence, the board and senior management of a commercial organization convicted of an offence will need to demonstrate both that they had nothing to do with the offence and that they took steps to prevent it. This provision signals Malaysia's intention to hold individuals accountable for corrupt acts perpetrated through businesses they helm. It also emphasises the need for individuals to be proactive in preventing corruption.

Extraterritorial application?

Under section 17A(8), a commercial organization means a company or partnership formed under Malaysian law, or a company or partnership that carries on business or a part of a business in Malaysia. Based on this definition, it appears that section 17A has extraterritorial application that can extend to the following entities:

- A foreign company carrying on business or part of a business in Malaysia.
- A Malaysian company, partnership or limited liability partnership, whether carrying on a business in Malaysia or elsewhere.

Accordingly, both Malaysian and international businesses operating in Malaysia should pay close attention to section 17A.

Penalties

If found liable under section 17A, a commercial organization will be liable to a fine of not less than 10 times the sum or value of the gratification or MYR1 million¹ (whichever is higher). Individuals deemed to have personally committed the offence may also be liable for the fine, imprisoned for a term not exceeding 20 years, or both. These penalties would be in addition to other legal and non-legal consequences of a conviction, such as the triggering of reporting obligations and reputational damage.

¹ Equivalent to approximately US\$245,000 based on the exchange rate at time of writing.

Defences

A commercial organization charged with the section 17A offence may successfully defend the charge if it is able to satisfy the Court that it had in place at the relevant time "adequate procedures" to prevent persons associated with the organization from committing bribery and corruption. However, it remains unclear as to what 'adequate' means; this will be a matter of interpretation for the Malaysian Courts on a case-by-case basis, taking into account the Guidelines on Adequate Procedures (the GAP, discussed below), as well as the nature, industry, and scale of the commercial organization in question.

Enforcement

In March 2021, the MACC invoked section 17A for the first time by charging Pristine Offshore, a ship chartering company, with corruption based on an allegation that one of its former directors had bribed Deleum Primera, an oil and gas services company, to secure a vessel chartering subcontract.² While the case is ongoing, other section 17A prosecutions are likely to follow soon.

Mind the GAP!

To assist commercial organizations in understanding the adequate procedures that should be implemented to prevent corruption, the Malaysian Prime Minister's Department in December 2018 issued the GAP.

The GAP comprises five key principles aptly known as the "TRUST Principles":

- **T**op level commitment – top level management to be directly involved in anti-corruption compliance matters.
- **R**isk assessment – organizations ought to conduct periodic risk assessments based on its size and needs.
- **U**ndertake control measures – appropriate due diligence, screening, policies, and procedures ought to be in place.
- **S**ystematic review, monitoring & enforcement – the effectiveness of anti-corruption policies and procedures ought to be reviewed and assessed periodically; audit and investigations ought to be conducted.
- **T**raining & communication – communication of policies and procedures; periodic training for employees and stakeholders.

However, there is no one-size-fits-all approach to implementing the GAP. Instead, the guidelines should be tailored and applied practically in proportion to the scale, nature, industry, risk and complexity of business activities of the commercial organization.

See the annex for a checklist to help companies, their boards and senior management navigate section 17A. While by no means exhaustive, it is a good place to start to ensure compliance with the new law.

Conclusion

As part of the Malaysian government's ongoing effort to clamp down on corruption, the country will likely witness more MACC Act and MACC investigations and prosecution in the years to come. Moreover, while the case of Pristine Offshore involved Malaysian companies only, the

²Zainul, E. (2021). Offshore vessel company first to be charged with MACC Act's new corporate liability provision. Retrieved 21 April 2021, from <https://www.theedgemarkets.com/article/offshore-company-first-be-charged-under-maccs-new-law>

MACC Act and MACC undoubtedly have the capacity to affect international companies as well. It is therefore imperative that all companies carrying out business in Malaysia take note of section 17A, and implement measures to avoid falling foul of it.

Annex – Do’s and don’ts for commercial organizations

Do	Don’t
<ul style="list-style-type: none"> • Ensure that compliance matters are on the board and senior management’s agenda, for example, by requiring that the latter update the former on the company’s compliance programmes on a regular basis, and ensuring that their messaging emphasises a zero-tolerance approach to bribery and corruption. • Document each engagement with the board and senior management on activities involving bribery or corruption risks. • Carry out independent assessments of business transactions and make adequate anti-bribery and -corruption inquiries, including by way of due diligence. • Include anti-bribery and -corruption protections in agreements and provide organization-wide anti-bribery and -corruption training. • Proactively document steps taken to combat bribery and corruption. 	<ul style="list-style-type: none"> • Simply rubber-stamp or otherwise fail to adequately scrutinise business activities involving bribery or corruption risks. • Only be reactive to crises that arise. Be proactive and have systems, policies and procedures in place beforehand to mitigate and address them. • Rely on generic ethics policies that are not adapted to the relevant business context. For example, bribery and corruption can look different in the construction industry compared to the energy industry – policies should be sensitive to that. • Rely on overly simplistic assertions regarding bribery and corruption, such as "<i>the staff know not to do it</i>" – deeper consideration of compliance culture is necessary. • Turn a blind eye to bribery and corruption concerns that arise during the course of business.

We thank Skrine, one of Malaysia’s leading law firms, and the below-mentioned Skrine lawyers, for their contributions to this piece. Hogan Lovells and Skrine regularly work together on a wide variety of disputes matters, enabling us to seamlessly provide international clients with deep local expertise in Malaysia and across Southeast Asia.

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