CORPORATE LIABILITY FOR CORRUPTION OFFENCES

By Sabarina Samadi

On 4 May 2018, the Malaysian Anti-Corruption Commission (Amendment) Act 2018 (the MACC Amendment Act 2018) was published in the Gazette. The MACC Amendment Act 2018 introduces Section 17A, which provides that a commercial organisation is deemed to commit an offence if any person associated with the commercial organisation corruptly gives, agrees to give, promises or offers to any person any gratification to obtain or retain business or advantage for the organisation. The corporate liability provisions in the MACC Amendment Act 2018 is expected to be enforced within two years from the date of gazetting.

A person is associated with a commercial organization 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. The corporate liability provisions in Malaysia is similar to the Bribery Act 2010 in UK and the US Foreign Corrupt Practices Act 1977 in USA to make company directors/business owners/controllers/associate persons/senior officers liable for the corrupt/bribery acts by their employees, for making/accepting a facilitation payment etc.

Q&A

Who is a commercial organisation under section 17A?	Section 17A classifies the following as commercial organisations: (i) A company which has been incorporated under the Companies Act 2016 and carries on a business in Malaysia and elsewhere. (ii) A company which was incorporated wherever and carries on a business or part of a business in Malaysia; (iii) A partnership under the Partnership Act 1961 or a limited liability partnership under the Limited Liability Partnerships Act 2012. This partnership carries on a business in Malaysia or elsewhere; or (iv) A partnership wherever formed and carries on a business in Malaysia or elsewhere.
Who is a person associated with the commercial organisation?	Section 17A provides that a commercial organisation commits the corruption offence if a person associated with the commercial organization commits the corrupt act. The section further provides that a person associated with the commercial organization is a director, partner, employee of the commercial organisation or a person who perform services for or on behalf of the commercial organisation. It may be observed that the last category is wide and could include a wide range of entities or persons who might be capable of committing the corruption act.
What are the Penalties under Section 17A of the MACC Amendment Act 2018?	A commercial organisation that commits an offence shall on conviction be liable to: (i) a fine of not less than 10 times the sum or value of the gratification that is the subject matter of the offence, where the gratification is capable of being valued or is of a pecuniary nature, or a fine of One Million Ringgit Malaysia (RM1,000,000.00), whichever is higher; or (ii) imprisonment for a term not exceeding 20 years, or both.

Q&A

Is there a Defence to the Corruption Charge?	Section 17A (4) provides that if the commercial organisation is charged for an offence under section 17A (1), it is a defence for the commercial organisation to prove that it had in place adequate procedures to prevent persons associated with the commercial organization from undertaking such conduct. 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 can escape liability if he or she is able to prove that the offence was committed without his or her consent or connivance and that he or she exercised due diligence to prevent the commission of the offence[1].
Guidelines on Adequate Procedures under section 17A(5)	On 10 December 2018, the MACC launched the Guidelines on Adequate Procedures under section 17A(5) **(Guidelines)**. The Guidelines is expected to prepare commercial organisations in establishing proportionate or adequate anti-bribery measures that allow for the prevention, detection and eventually response, in the event of bribery occurring and will take effect from 1 June 2020[2].

There are **FIVE GUIDING PRINCIPLES** under the **GUIDELINES** which are set out as follows:

1. **Top level commitment:** The top-level management is primarily responsible to ensure that the commercial organisation practices the highest level of integrity and ethics and complies fully with applicable laws and regulatory requirements on anti-corruption.

2. **Risk assessment:** The commercial organisation should conduct periodic, informed and documented assessment of the external and internal risks of corruption. This risk assessment should be used to establish appropriate processes, systems and controls to mitigate specific corruption risks that the business is exposed to.

3. **Undertake control measures:** The commercial organisation should put in place appropriate controls and contingency measures that are reasonable to the size and nature of the organisation, to address corruption risks arising from weaknesses in the organisation's governance framework, processes and procedures, which include due diligence procedures, an accessible and confidential trusted reporting channel which may be used anonymously (whistleblowing channel) and policies and procedures that cover a general anti-corruption policy, conflicts of interest, donations, donations and sponsorship etc.

4. **Systematic review, monitoring and enforcement:** the top management to ensure regular reviews to assess the performance, efficiency and effectiveness of the anti-corruption programme and that it is enforced. The review may be done by internal audit or carried out by an external party (for example by MS ISO 37001 auditors). The review should form the basis for any efforts to improve existing anti-corruption controls in the organisation.

5. **Training and communication:** to develop and disseminate internal and external training and communications relevant to anti-corruption management system, in proportion to its operation, covering (i) policy, (ii) training, (iii) reporting channel and (iv) consequences of non-compliance.

CASE STUDY IN THE UNITED KINGDOM

Sweett Group plc **(SG)** is the first case where a commercial organisation was convicted and sentenced for the section 7 offence of failing to prevent bribery by an associated person under the UK Bribery Act 2010. SG's case confirms that a subsidiary can be an "associated person" of its parent company and therefore, the parent company can be liable under the Corporate Offence for bribes paid by the subsidiary. In November 2015, SG pleaded guilty to the draft charge provided by the Serious Fraud Office. SG was sentenced in February 2016 and ordered to pay a sum totalling over £2.3 million (a confiscation order for £851,152.23, a fine of £1.4 million, and costs to be paid to the SFO of £95,031.97).

In the UK's first contested case for failure to prevent bribery under s7 of Bribery Act 2010, Skansen Interior Limited **(SIL)** reported bribery by its former managing director, to a former project manager at real estate company DTZ Debenham Tie Leung, to secure contracts worth 6 million pounds ($8.3 million today) to refurbish offices in London. SIL was then itself charged with the section 7 offence. SIL contested the prosecution for failing to prevent bribery and relied on an "adequate procedures" defence under section 7. On 21 February 2018, SIL was found guilty of failing to prevent bribery under section 7 after the jury were unconvinced that the company had adequate procedures in place to prevent bribery.

WHAT'S NEXT?

The MACC has also established the Corporate Anti-Corruption Compliance Centre (CACCC) under the Malaysia Anti-Corruption Academy. The CACCC will provide training for organisations within both the public and corporate sectors.

As the corruption provisions under the MACC Amendment Act 2018 will come into force in 2020, corporates and commercial organisations should start looking into establishing proportionate or adequate anti-bribery measures that allow for the prevention, detection and eventually response, in the event of bribery occurring. The measures may include preventive measures such as risk assessments, consistent monitoring and review, due diligence, communications including training, and top-level commitment to prevent corruption.

Commercial organisations may also consider putting in place tangible measures such as applying for Anti-Bribery Management System (ABMS) ISO 37001:2016 certification, which prescribes anti-bribery standard procedure for organisations to follow. The ISO Guidelines sets out the methods to prevent, detect and respond to common forms of bribery by corporations. It also lays down requirements and guidance for the establishment, implementation, maintenance and improvement of an anti-bribery management system.

As section 17A of the MACC Amendment Act 2018 has not come into force at the time of writing, it remains to be seen how the Malaysian courts will determine what measures would constitute adequate procedures under the law.