

INVESTING OR OPERATING IN MALAYSIA? NEW CORPORATE BRIBERY OFFENCE POSES COMPLIANCE RISK

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Legal Briefings

The Anti-Corruption Commission (Amendment) Act 2018 was passed by the Senate of Malaysia on 5 April 2018. One of the major amendments is the introduction of section 17A. Modelled on the UK Bribery Act's corporate offence, it penalises commercial organisations for corrupt acts by associated persons, subject to a reasonable procedures defence.

The legislation is widely drafted and supplements an already broad anti-corruption framework which criminalises the offer and receipt of bribes in the public and private sectors. Since enforcement to date has focused on individuals, the new corporate offence represents an important tool for Malaysia's domestic enforcement authorities. Whilst it remains unclear when the new Act will come into force (it awaits royal assent), corporates operating in Malaysia should familiarise themselves with the new provisions and ensure they implement adequate compliance procedures.

NEW SECTION 17A

This new provision penalises commercial organisations where an associated person corruptly gives any gratification with intent to obtain or retain business, or an advantage in the conduct of business, for the commercial organisation.

Broad definition of commercial organisation

Section 17A provides an extensive list of "commercial organisations" including:

- (a) companies incorporated in Malaysia, whether carrying on business in Malaysia or overseas;
- (b) companies carrying on business in Malaysia or part of a business in Malaysia, whether incorporated in Malaysia or elsewhere;
- (c) partnerships and limited liability partnerships carrying on business in Malaysia or part of Malaysia.

Such a wide definition is likely to include foreign companies with operations in Malaysia by virtue of the phrase "carries on part of a business in Malaysia".

Persons associated with commercial organisations

A person is associated with a commercial organisation if he/she is a:

- (a) director;
- (b) partner;
- (c) employee; or
- (d) person who performs services for or on behalf of the commercial organisation.

A person who performs services for or on behalf of the commercial organisation is to be determined based on all relevant circumstances, not merely by reference to the nature of the relationship. Category (d) is likely to include agents retained by the commercial organisation who are not direct employees.

Parliament has opted for a broad definition to permit a more expansive interpretation focusing on the facts and surrounding circumstances. As such, the new provision can potentially cover a wide range of corrupt scenarios and call to account corporate corruption in various guises.

Statutory defence

When a commercial organisation is charged with an offence under Section 17A, subsection (4) provides a statutory defence if the organisation is able to show that it has adequate procedures in place to prevent associated persons from carrying out the corrupt conduct.

Heavier penalties

The penalties for the corporate offence are much higher than for other offences in the amended Act. Upon conviction, a commercial organisation, and potentially the directors, controllers, officers, partners and those concerned in the management of its affairs, are liable to:

a) a fine of not less than 10 times the sum or value of the gratification involved, or RM1 million, whichever is higher; or

(b) imprisonment for a term not exceeding 20 years; or

(c) both.

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Although Section 17A only penalises bribe-givers and not bribe-recipients, section 16 of the 2009 version of the Act contains an umbrella provision to penalise any person who corruptly receives or agrees to receive any gratification.

COMMENT

The Malaysian government has been increasingly clamping down on bribery and has issued various rules and guidelines relating to bribery in the public sector. The introduction of Section 17A represents the government's next step in targeting private sector bribery and is likely to stimulate anti-corruption awareness amongst companies with operations in Malaysia.

It is noteworthy that Transparency International's recent Malaysia Business Integrity Country Agenda (BICA) assessment highlighted that most Malaysian businesses do not have anti-corruption programmes or policies. BICA has urged Malaysian businesses to adopt proper anti-corruption policies in line with ISO 37001:2016, which was launched by the Malaysian Anti-Corruption Commission (MACC) together with the Department of Standard Malaysia last year. It is intended to operate as a guide for organisations seeking to implement their own anti-bribery management systems. ISO 37001:2016 is designed for broad application, to be used by public or private and small, medium or large organisations. The statutory defence to section 17A highlights the importance for companies operating in Malaysia to adopt anti-corruption policies such as ISO 37001.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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