Unboxing Corporate Liability: Section 17A MACC Act 2009

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Abstract

Malaysia strives to be one of the world's top 10 'cleanest' nation by 2030. Though it is still quite a long way, the Government of Malaysia has shown that it "walks the talk" by amending the Malaysian Anti-Corruption Commission Act 2009 (MACC Act 2009) in 2018 (which came into effect on 1 June 2020), *inter alia*, to introduce statutory corporate liability provision for bribery and corruption under section 17A. This paper aims to explore the roots of section 17A and how it can be implemented. The study deploys the doctrinal method which is based on the secondary data by analysing the primary legal sources (statutes) and secondary sources (decided cases). This paper presents the salient features of section 17A such as commercial organisation, associated person, adequate measures and penalty. Before section 17A came into effect, the MACC Act 2009 only focuses on the prosecution of individuals involved in corruption. Section 17A was enacted to enable commercial organisation involved in corruption activities to be subjected to legal action and persons associated with the commercial organisation will be deemed to commit a corrupt act to obtain or retain business or an advantage in the conduct of business for the commercial organisation unless it can be proven that adequate measures have been put in place. Business owners and senior officers in a commercial organisation must understand the far-reaching implications of section 17A though it is postulated that small commercial organisation may not be aware and/or understand its implication. In conclusion, the efforts and initiatives of the Government of Malaysia to tackle corruption are commendable.

Keywords: Corporate liability, Adequate measures, MACC amendment, Corruption, Commercial organisations

Introduction

Corporate corruption is a growing challenge everywhere to governments. As large and small businesses are the main pillars of economic development, the need to adhere to ethical behaviour in doing business has often been marred by practices which lead to bribery and corruption. Corruption occurs regardless of the type of companies. For example, it has been ages that Siemens had portrayed itself as a business that adhered to the highest ethical and legal standards. It was shocking to know that Siemens paid around US$1.4 billion in bribes to government officials from various countries, while profiteering from the citizens for the affected nations paid the overpriced prices of necessities. Transparency International (2020) reports that Denmark is the least corrupt country based on the 2019 Corruption Perception Index (CPI). Even Denmark is not spared from corruption scandals in 2018. Denmark's reputation was smeared by the money-laundering scandal at the Estonian branch of the Danske Bank and the embezzlement scandal at the Ministry for Children and Social Affairs' administrative department (The Local, 2019).

Malaysia has experienced numerous corruption cases over the decades involving renowned political figures, government officials, high-ranking executives of private and government-linked corporations (GLC), white-collar professionals, blue-collar workers, and the general public. Our country's reputation was marred with scandals namely the Bumiputra Malaysia Finance in 1983, Pan-Electric Industries 1985, Perwaja Steel in the 1980s, Malaysian Airlines (MAS) in 1994-2001, Port Klang Free Zone (PKFZ) in 2007-2008, National Feedlot Corporation (NFC) in 2010, 1Malaysia Development Bhd (1MDB) in 2010, and the Felda Global Ventures in 2017, just to name a few (Shankar Durairaja, et al, 2019).

Table 1: Malaysia's Position under the Corruption Perception Index (CPI)

YEAR	RANK	SCORE
2012	54/176	49
2013	53/177	50
2014	50/175	52
2015	54/168	50
2016	55/176	49
2017	62/180	47
2018	61/180	47
2019	51/180	53

(Source: Transparency International Malaysia)

The corruption level is determined by the CPI. This composite index compares corruption levels, which are described as the abuse of public power for private gain, including small and large forms of corruption. The CPI is based on expert evaluations from surveys of business people and analysts in the region. The scores range from 0 (highly corrupt) to 10, which refers to highly clean (Lambsdorff, 2003, Zaleha Othman, et al, 2014; Nur Shafiqa Kapeli and Nafsiah Mohamed, 2015; Shankar Durairaja, et al, 2019).

Malaysia strives to be one of the world's top 10 'cleanest' nation by 2030. Though it is still quite a long way, the Government of Malaysia has shown that it "walks the talk" by amending the Malaysian Anti-Corruption Commission Act 2009 (MACC Act 2009) in 2018 (which came into effect on 1 June 2020), *inter alia*, to introduce statutory corporate liability for bribery and corruption under the newly inserted section 17A (by Act no A1567). The new corporate liability provisions will make the commercial organization criminally liable for the bribery acts of persons associated with them (including employees) unless the commercial organization had implemented the adequate measures.

On 29 January 2019, the then Prime Minister of Malaysia launched the National Anti-Corruption Plan 2019-2023 (NACP). Under its 5-year NACP, the government identified six priority areas (political governance, public sector administration, public procurement, legal and judicial, law enforcement and corporate governance) and 115 initiatives to "cleanse" Malaysia. The NACP aims to make Malaysia corruption-free by 2023 (Jones, 2020).

This paper presents the salient features of section 17A such as commercial organisation, associated person, adequate measures and penalty. Before section 17A came into effect, the MACC Act 2009 only focuses on the prosecution of individuals involved in corruption. Section 17A was enacted to enable commercial organization involved in corruption activities to be subjected to legal action and persons associated with the commercial organisation will be deemed to commit a corrupt act in order to obtain or retain

business or an advantage in the conduct of business for the commercial organisation unless it can be proven that adequate measures have been put in place.

Background of MACC Act 2009

The government of Malaysia has enforced several anti-corruption laws since its independence (Nur Shafiqa Kapeli and Nafsiah Mohamed, 2015; Wan Murshida Wan Hashim & Mazlena Mohamed, 2018; Muzaffar Syah Mallow, 2018). The Anti-Corruption Act 1997 was repealed with the enforcement of MACC Act 2009. Malaysia's most relevant piece of corruption legislation, namely the Malaysian Anti-Corruption Commission Act 2009 (Act 694) (hereinafter shall be referred to MACC 2009) which came into force on 1 January 2009.

To further reduce the corruption in Malaysia, Parliament passed the amendment on April 5, 2018 (by Act No. A1567), primarily with the insertion of Section 17A and gazetted it on May 4, 2018. The government also allowed commercial organizations to be granted a two-year grace period to make adequate arrangements before the provisions of the new provision came into force on 1 June 2020.

Definition of Corruption

The Merriam-Webster Dictionary defines "corruption" as "the act of corrupting or of impairing integrity, virtue, or moral principle; the state of being corrupted or debased; loss of purity or integrity; depravity; wickedness; impurity; bribery;" "Lack of integrity or honesty (especially susceptibility to bribery); use of a position of trust for dishonest gain." While the definition of the word 'corrupt' and 'corruption' varied in their uses, they all have a negative connotation.

In Malay language, the term 'rasuah' derives from the Arabic word 'al-risywah' and is even mentioned in the Al-Quran as a criminal act (Muzaffar Syah Mallow, 2018). In the case of *Public Prosecutor* v. *Datuk Haji Harun bin Haji Idris (No. 2) [1977] 1 MLJ 15*, the word 'corrupt' was generally explained as:

> '*doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions*' and '*purposely doing an act which the law forbids*'.

MACC Act 2009 does not define "corruption," but refers to it in detail in Section 16 of the Act, which allows for the recognition of gratification as an offence. According to MACC Act 2009, corruption is regarded as an act of giving or receiving of any gratification or reward in the form of cash or in-kind of high value for performing a task concerning his or her job description. Section 3 of MACC Act 2009 defines "gratification" as follows:

> (a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, financial benefit, or any other similar advantage;
> (b) any office, dignity, employment, contract of employment or services, and agreement to give employment or render services in any capacity;
> (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
> (d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
> (e) any forbearance to demand any money or money's worth or valuable thing;

(f) any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f)

Objective

There are two objectives of this study. The first objective is to explore the newly enforced Section 17A of MACC Act 2009 and its salient features. The salient features are namely commercial organization, associated person, adequate measures and penalty. The second objective of this study is to explain the defences available and how it can be implemented.

Literature Review

In Malaysia, there is a mindset among government and the private sector in high positions, who perceive that corrupt practices to be reasonable and they would not hesitate to be involved in corruption when possibilities arose (Jones, 2020). The finding lends support to KPMG's survey among the chief executive officers (CEOs) of public listed companies on Bursa Malaysia from January 2010 to December 2012. It is interesting to note that 71% of the respondents believe that bribery and corruption is an unavoidable cost of doing business. It is shocking to find that 64% of respondents claimed that their business cannot achieve the financial goal had they do not pay bribes in Malaysia. It is the common norms that corruption will ease in doing business despite knowing its repercussion not only to those involved in this unethical practice. Nevertheless, such unethical behaviour affects the society and the country as well. A study conducted by Lambsdorff, (2003) had established sufficient link between link corruption to low productivity. Suffice to say that a government that turns a blind eye and/or condones the unethical behaviour will not be able to attract investors. No one in the right mind would invest money in a country where corruption is rampant which is further exacerbated with low productivity.

In recent years, corruption in Malaysia has deteriorated as its CPI score has dropped from 52 in 2014 to 47 in 2018 (Transparency International, 2019). However, the change in government in the May 2018 general election resulted in the then Prime Minister's arrest on 3 July by the new Pakatan Harapan government for money laundering and abuse of power. The change in government and the Pakatan Harapan government's strong anti-corruption stance is reflected in Malaysia's improved CPI score of 53 in 2019 as shown in Table 1 (Transparency International, 2020; Quah, 2020).

Corruption may occur regardless of the status of the countries and/or companies. It may occur in developed countries or even in less developed countries. For instance, Denmark's was tainted with the money-laundering scandal at the Estonian branch of the Danske Bank, though it was the least corrupt country based on CPI 2019. Peltier-Rivest, (2020) conducted an extensive study on Rolls-Royce's indictment covering 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. He attributed that corruption occurred due to the failure of its internal control. Jones (2020) corroborated with the finding of Peltier-Rivest that bribery was facilitated by weak internal rules against money laundering in banks in Malaysia

and elsewhere. In the case of 1MDB, the bribery offered by Goldman Sachs and accepted by 1MDB officials Malaysian Government to allow Goldman Sachs to arrange and underwrite the bond issues in 2012 and 2013 for a very high underwriting fee.

The findings derived from Zaleha Othman et al (2014) postulated the reasons behind corruption. The study revealed that power, opportunity and moral impurity are among the top reasons why the respondents would commit bribery and corruption without a blink in their eyes. This finding may lend support to KPMG (2013) as a majority of the CEOs in Bursa Malaysia perceive that bribery and corruption are part and parcel of doing business. Hence, it is not an easy task to change this type of mindset.

Shankar Durairaja et al (2019) conducted a systematic literature review on corruption in Malaysia. The findings can be grouped into studies that discussed the government's initiative to combat corruption over the past decades, the second group of studies criticized the failures and limitations of the government's anti-corruption actions. A third group involving a study that analysed the reasons behind corruption (Zaleha, et al, 2014). Finally, one study surmised the problems in the judicial system when handling bribery and corruption cases (Rohana Abdul Rahman, et al, 2014). Nur Shafiqa Kapeli and Nafsiah Mohamed (2015) provided an insight into anti-corruption initiatives led by the Government of Malaysia. Many studies discussed the various government initiated anti-corruption actions over the past decades and criticized the failures of the government's initiatives. Part of the failure was due to MACC's lack of independence (Wan Murshida Wan Hashim & Mazlena Mohamed, 2018; Muzaffar Syah Mallow, 2018; Nur Shafiqa Kapeli and Nafsiah Mohamed, 2019).

The existing literature comprised of studies made before the newly insertion of corporate liability to MACC Act 2009. The newly inserted section 17A came to force on 1 June 2020, thus to the best of the researcher's knowledge, there is no academic article so far to deliberate on the section 17A of MACC Act 2009. Hence, the gap in the literature exists. This article will fill in the current gap in knowledge.

Methodology

This article is based on doctrinal legal research methodology. The word doctrinal is derived from the word "doctrine," which is Latin for the word "doctrina," which means education, knowledge or learning (Hutchinson and Duncan, 2012). Doctrinal legal research is an established traditional genre of research in the legal field. The doctrinal study refers to any systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination. It is an addition to existing knowledge or refute something into existing knowledge. It is also known as "black-letter law". It is used by judges, lawyers and law academics.

A doctrinal study is a research into the legal concept and principle of all types of case, statutes and rules. The doctrinal research is concerned with the analysis of the legal doctrine and how it has been developed and applied. Doctrinal research which involves any systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them (Anwarul Yaqin, 2007).

Doctrinal legal research is always based on secondary data that comes from authorities. Though data can be retrieved from both primary and secondary authorities, doctrinal research never deals with the primary data of social facts collected first-hand from surveys, field studies or

any other empirical means (Jain, 1982; Anwarul Yaqin, 2007). The doctrinal researcher analyses available secondary data from authoritative sources which have already been collected and processed by others different from the researcher. In doctrinal research, usually, researchers analyse secondary available data, which come from statutes, laws, judicial decisions and other legal texts, to verify the legal proposition and reach to a conclusion. The doctrinal legal research acquires its data basically from primary or secondary authoritative sources, either from the law itself or legal texts having some sense of sovereign or authority therein. Primary authorities include the actual rules or statements of law created by authentic governmental bodies such as constitutions, legislation and judicial decisions, and even regulations, rulings of the administrative agencies. Secondary authorities include materials that explain or comment on areas of law such as law review articles, treatises, books, restatements of the law, legal encyclopedias and so forth (Jain, 1982; Anwarul Yaqin, 2007; Kharel, 2018).

The research methodology of this study was purely qualitative. The protocol employed was by way of critical analysis of MACC 2009. The study deploys the doctrinal method which is based on the secondary data by analysing the primary legal sources (statutes) and secondary sources (decided cases). Besides that, a descriptive analysis on corporate liability in Malaysia through the study of journal articles, websites, newspaper articles and conference proceedings was carried out to newly added Section 17A to the existing MACC 2009 vide the amendment made in 2018.

Discussion

The newly inserted provision on corporate liability emulates the United Kingdom Bribery Act 2010. Before section 17A came into effect, the MACC Act only focuses on the prosecution of individuals involved in corruption. In criminal law, it requires 2 principles to prove its crime:

a) actual physical act (actus reas)
b) intention to commit (mens rea)

Historically, English law provides that a company is distinct from its members sue to the doctrine of separate legal entity. As stated by Lord MacNaghten in *Solomon* v. *Salomon* ([1897] AC 2, at 51):

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

The company and its senior personnel were previously exempted from such liability. Due to the doctrine of separate legal entity propounded by Lord MacNaghten, the company will not be liable for crimes committed by its members and vice versa. As above mentioned, a criminal act requires proof of a criminal mind (*mens rea*), however it is not easy to determine a criminal mind of a company. A company, being an artificial person, does not have a mind of his own.

The law sought a way around this through the recognition or attribution doctrine. In *Lennard's Carrying Co Ltd* v. *Asiatic Petroleum Co Ltd*, ([1915] AC705 at 713) in finding actual company liability based on the acts of the company's management, Lord Haldane attributed to the company the acts of the person "who is really the directing mind and will of the corporation,

the very ego and centre of the personality of the corporation." The doctrine of attribution applies to bribes if the employees involved are the centre of the corporate power, that is, the mind of the company such as the board of directors, the managing director and perhaps other senior personnel who carry out the functions of management and speak and act as the company. In *Tesco Supermarket Ltd* v. *Nattrass* ([1972] AC 153 at 170), Lord Reid said that:

> "the person acting for the company is an embodiment of the company, and his mind is the mind of the company, such that if it is a guilty mind, then that guilt is the guilt of the company. However, the rules on corporate attribution depend on the involvement of senior officers of the company, and are deficient where only junior officers are involved in the relevant criminal acts."

The doctrine of attribution posed a limitation, for instance in *R* v. *P & O European Ferries (Dover) Ltd* ([1990] 93 CR App R 72), where the ferry Herald of Free Enterprise in Zeebrugge harbour capsized which caused loss of life of many passengers. The doctrine of attribution focused on identifying the key staff who had been the mind of the company. The prosecution was unable to identify a human being at a senior level of company management who had the necessary degree of *mens rea* for manslaughter. Hence, the prosecution failed to secure a conviction for corporate manslaughter.

The UK legislators had put aside the doctrine of attribution when they drafted the Bribery Act 2010. Section 7 of the UK Bribery Act 2010 (which is mirrored by section 17A of MACC 2009) strict liability criminal offence for a company that failed to adhere with this section. The UK Bribery Act 2010 goes beyond the doctrine of attribution to avoid limitation in identifying the mind of the company. The proof of criminal mind (mens rea) is not required in strict liability offences, Mukriwi (2015).

Section 7 of the UK Bribery Act 2010 was put to test in *SFO* v *Sweett Group PLC (2016),* The Serious Fraud Office (SFO) opened a criminal investigation into Sweett Group PLC in July 2014 concerning its subsidiary company (CSI) that had made corrupt payments to secure a contract for the building of the Rotana Hotel in Abu Dhabi. In December 2015, Sweett Group pleaded guilty and it was convicted and punished for failing to prevent an act of bribery in February 2016. The case of *SFO* v *Sweett Group PLC* is the very first conviction in the UK for the breach of section 7(1) of the UK Bribery Act 2010. In this case, a subsidiary company (CSI) would be deemed to be a "person associated" of its parent (Swett Group). Despite the separate legal entity that existed between Sweett Group and its subsidiary (CSI), the veil between the parent and its subsidiary was lifted because the court was of the opinion that CSI was controlled/an extension of its parent company. Sweett was unable to rely upon the defence of adequate measures due to the inadequacy of its control framework over CSI's activities

Salient Features of Section 17A

Section 17A was enacted to enable commercial organization involved in corruption activities to be subjected to legal action and persons associated with the commercial organization will be deemed to commit a corrupt act in order to obtain or retain business or an advantage in the conduct of business for the commercial organization unless the commercial organization can prove that it had adequate policies and procedures have been put in place and effectively implemented to prevent such happenings.

Commercial Organization

The definition of 'commercial organization' is provided by Subsection 17A (8) as follows:

(a) a company incorporated under the Companies Act 2016 [Act 777] 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 [Act 135] and carries on a business in Malaysia or elsewhere; or
    (ii) which is a limited liability partnership registered under the Limited Liability Partnerships Act 2012 [Act 743] 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.

The above definition encompasses all business entities but for a sole proprietorship. It is applicable to Malaysian companies/partnership firms operating businesses outside Malaysia and also includes foreign companies/partnership firms operating in Malaysia. The effectiveness of Section 17A of MACC Act 2009 in curbing bribery is likely to be enhanced by its extraterritorial reach so that Malaysian commercial organization committing bribery overseas would face prosecution back in Malaysia.

Asssociated Person

To constitute an offence, the gratification must be carried out by a "person associated" with the commercial organization. A "person associated" with a commercial organization refers to a director, partner, employee of the commercial organization or any person who performs services for or on behalf of a commercial organization, section 17A (6) of MACC Act 2009. The question 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 and the commercial organization, section 17A (7) of MACC Act 2009.

Thus, a commercial organization would not only be responsible for the gratification of its senior officers or partner, but also of its employees (regardless of his status or functions within the organization). The commercial organization could also be liable for gratification by its agents or distributors and possibly, joint-venture partners.

Penalty

Section 17A(2) of the MACC Act 2009 provides that a commercial organization who commits an offence under Section 17A shall, upon conviction, be liable to:

- a fine not less than 10 times of the value of the bribe, or RM1 million, whichever is higher, or
- an imprisonment for a term not exceeding 20 years, or
- a combination of both.

Adequate Measures

When the MACC Act 2009 (Amendment 2018) came into force, section 17A introduced two statutory defences for the MACC Act 2009 for the first time:

i. Section 17A (3): 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 has exercised **due diligence** to prevent the commission of the offence, and
ii. if charged with an offence under section 17A (1), a commercial organisation may, as a defence, prove that it had put in place **adequate procedures** designed to prevent persons associated with the organisation from undertaking the conduct that is the subject of the offence, section 17A (4).

This provision mirrored with Section 7(2) of the UK Bribery Act 2010. Section 17A(4) will provide a commercial organisation with the defence of having had in place adequate compliance procedures when charged with an offence under section 17A(1) of the MACC Act 2009.

In response to the new corporate liability provision, National Centre for Governance, Integrity and Anti-Corruption (GIACC) of Prime Minister's Department issued Guidelines on Adequate Procedures (GAP) pursuant to Section 17A(5) of the MACC Act 2009 (Amendment 2018) to assist commercial organizations in understanding what adequate procedures should be implemented to prevent the occurrence of corrupt practices in relation to their business activities. GAP has largely mirrored the guidance issued by the UK Ministry of Justice for the UK Bribery Act 2010, to assist commercial organisations to put in place the necessary and adequate procedures to prevent the occurrence of corrupt practices.

The GAP has been formed based on five (5) key principles which may be used as reference points for any anti-corruption policies, procedures and controls the commercial organisation may choose to implement towards the goal of having adequate procedures as required under the above statutory provision. These five principles shall also be known as the 'TRUST Principles' which will be discussed in turn.

1. **T**OP COMMITMENT

Top-level management (TLM) to be directly involved in anti-corruption compliance matters. TLM must ensure that its organization practices the highest level of integrity and ethics; fully complies with the applicable anti-corruption laws and regulations, and effectively manages its key corruption risks. TLM is also expected to be able to assure its stakeholders that the organisation is operating in compliance with its policies and the regulatory requirements.

2. **R**ISK ASSESSMENT

The commercial organization must conduct a risk assessment periodically to identify, analyse, assess and prioritise risks of corruption. The findings of the assessments can be used for anti-corruption efforts and programmes and to establish appropriate processes, systems and controls to mitigate corruption risks

3. **U**NDERTAKE CONTROL MEASURES

The commercial organization ought to have appropriate control and contingency measures in place to address corruption risks identified. These measures include due diligence, reporting channels as well as policies and procedures. In establishing the reporting channel, it has to consider the protection given to the whistleblower as accorded by the Whistleblower Protection Act 2010 (Act 711).

4. **S**YSTEMIC REVIEW, MONITORING AND ENFORCEMENT

The organization's anti-corruption measures ought to be audited, reviewed and assessed periodically to ensure its effectiveness and efficiency. It is suggested that the review should be done every three years. The review enables the organization to improve the existing anti-corruption measures. Lest smaller commercial organizations feel that they will be spared from the corporate liability and the targets of the new amendment are large commercial organizations such as large conglomerate and multinational corporations.

5. TRAINING AND COMMUNICATION

The organisation's anti-corruption measures and/or policies ought to be disseminated internally and externally. The organisation must also provide adequate and relevant training periodically for employees and stakeholders.

Implementing Adequate Measures or Gap

It is reiterated that there must be a paradigm change in mindset in senior executives of commercial organizations. They have to understand the repercussion of non-compliance of the newly inserted section 17A of MACC Act 2009 (Amendment 2018). They must be aware that apart of adhering with section 17A, they will also have to abide by existing laws governing corruption (Penal Code) and protection given to whistleblower by the Whistleblower Protection Act 2010.

In providing adequate measures in combating corruption, it is to be pointed out that GAP is not the sole measure. The commercial organization may also opt to adhere to the ISO Standard 32001 of Anti-Bribery Management System (ABMS).

In implementing the adequate measures be it GAP or ABMS, there must be a concerted effort from various department such administration, legal, human resource and others depending on the size of the respective commercial organization, as long as the anti-bribery and corruption policies are spelt out very clearly. Lest they forget that section 17A is a strict liability offence, which means, no-fault needs to be proven. The burden is now upon the commercial organizations to show that they had adequate procedures in place to prevent associated persons from undertaking such corrupt practices.

It is interesting to note that the size of commercial organizations does not matter. What matters are whether the act of bribery and corruption exist? As the new amendment came into effect on 1 June 2020, there are no decided cases to further explain the enforcement of section 17A. However, reference can be made to the UK case of *R* v *Skansen Interiors Limited*, Southwark Crown Court (7 March 2018), United Kingdom. Skansen Interiors Ltd is a small company having roughly 30 employees was convicted for its failures to prevent bribery made by its managing director to a senior employees of tendering company. The bribery was made to obtain information about the tender for office refurbishment contracts. The new CEO of Skansen reported the incident and launched an internal investigation. Unfortunately, the court found the

company guilty because the jury was cot convinced with the company's measures to combat corruption. It was held that the measures in Skansen were inadequate to avail itself to section 7(2) defence. (which is akin to Malaysia's section 17A(5), MACC Act 2009). The said decision raises a point to ponder as to how adequate is an adequate measure should be?

Practical Implication and Recommendation

All commercial organizations must understand the far-reaching implications of section 17A. However, it is postulated that small commercial organizations may not be aware and/or understand the repercussion of section 17A. It was found that only 59% of listed companies had anti-corruption policies in place, and the majority of these policies required enhancements to bring them in line with GAP (Muhammed Ahmad Hamdan, 2020).

It is recommended that a multi-disciplinary study to determine the awareness of micro and small commercial organizations to be conducted. The findings will enable training programmes to be tailored to suit the micro and small commercial organizations.

Conclusion

This paper has successfully explained the newly enforced Section 17A of MACC Act 2009 and its salient features namely commercial organization, associated person, adequate measures and penalty. This paper has deliberated the second objective on defences available and how it can be implemented.

The efforts and initiatives of the Government of Malaysia to tackle corruption are commendable. The newly inserted corporate liability of section 17A to MACC Act 2009 shows the strong commitment of the Government of Malaysia to combat corruption. It is further complemented with the Government's NACP 2019-2023 that aims to make Malaysia corruption-free by 2023. Nevertheless, such a noble intention might not be successful as it is only a 5-year plan. By making corporate liability offences as strict liability, it is hoped that commercial organizations can no longer treat corruption as a norm of doing business. The commercial organization will be found guilty for breaching section 17A unless they could prove that they have implemented adequate measures. Section 17A is of an extraterritorial application, thus any Malaysia's commercial organization commits corruption in a foreign land may be tried in Malaysia.

Providing a good piece of legal provision to combat corruption alone is insufficient. It has to be complemented by strong and rigorous enforcement. As of to date, MACC is subject to the sanction of the Attorney General's Chambers (AGC). Thus, MACC is not fully independent hence it might impede its efficiency. More attention must be given to small and micro commercial organizations that neither have financial means nor expertise to have adequate measures in place. However, implementation of law and regulations alone are insufficient to ensure the success in curbing corruption in commercial organizations. In conclusion, more awareness programmes to inculcate awareness on the adverse effect of corruption so that become more ethical. Otherwise, Malaysia's aim to be one of the world's top 10 'cleanest' nation by 2030 may be jeopardised.

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