Business Entities’ Liability for ‘Associated Persons’ Corruption: Key reflections

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Abstract

Section 17A of the Malaysian Anti-Corruption Commission Act 2009 imposes liability on business entities and their management if persons associated with them offer a bribe for their benefit. It provides a new regulatory capture to the meaning ‘Associated Person’ and corporate liability. This doctrinal research highlights the associated person legal framework that business entities should take cognisance of and incorporate in business operations. A comparative approach is undertaken to investigate how other jurisdictions deal with the issue. The study’s findings are significant to Malaysia’s business entities in curbing the associated person’s corruption acts.

Keywords: corporate liability; associated person; corporate corruption; risk assessment

1.0 Introduction

Corruption’s pervasiveness has no bounds (Omar et al., 2020). Businesses are one of four areas of the private sector that are corrupt (Sartor & Beamish, 2020). Commercial bribery, kickbacks, corporate fraud, collusion, and insider trading are examples of widespread business corruption (Sartor & Beamish, 2020). A World Bank’s Enterprise Survey shows that up to 51 per cent of companies experience at least one bribe payment request per year in some countries (UNODC, 2019a). In 2020, according to Pricewaterhouse Coopers (PWC), bribery and corruption were among the four most disruptive forms of fraud experienced in Malaysian organisations in the last two years (PricewaterhouseCoopers, 2020). Bribery in business is a central focus of international conventions such as The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) 1997 and The United Nations Convention against Corruption (UNCAC) 2003 (Lord et al., 2018). The United Nations Global Compact tenth principle on anti-corruption, adopted in 2004, declares that businesses should fight corruption in all of its manifestations, including extortion and bribes, and proactively develop policies and concrete programmes to address corruption internally and within their supply chains (United Nations Global Compact, n.d.).

In Malaysia, to address and curtail the problem of corruption by business entities and their associated persons, a corporate liability provision in Section 17A of the Malaysian Anti-Corruption Commission (MACC) Act 2009 Act (Act) was introduced on 1 June 2020.

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(Low, C. K., & Low, 2020). This section imposes liability on business entities and their officers holding managerial positions ("management") if persons associated with them offer a bribe to a third person for the business entities' benefit. The MACC first prosecution against Pristine Sdn Bhd for its former director alleged bribery and Deleum Primera Sdn Bhd’s chief operating officer receiving the bribe marked a new direction to business entity’s liability allowing authorities to take action against companies whose employees have been found guilty of corruption offences (Raof et al., 2021). The National Anti-Corruption Plan 2019-2023 has also been developed to address problems on corruption and integrity in Malaysia (National Centre for Governance Integrity and Anti Corruption (GIACC), 2019). Business entities commit an offence if their "Associated Persons" are involved in outbound gratification intending to benefit the former (Section 17A(1) the MACC Act). The ‘Associated Persons’ are the (i) directors, (ii) partners, (iii) employees or (iv) persons who perform services for or on behalf of the business entities (Section 17A(6) of the MACC Act) (Associated Persons).

Nevertheless, as regards (iv), the determination is via reference to all the relevant circumstances. It is not just dependent on the type of personal and business interactions. The risk of business entities being charged for corruption due to corrupt acts by individuals or entities within the phrase ‘Associated Persons’, as is the ‘relevant circumstances, are not to be taken lightly. The failure to prevent and control corruption will be an offence under section 17A of the MACC Act. The crime carries a maximum fine of ten times the bribe sum or RM1 million, whichever is greater, or both (Raof et al., 2021). This study aims to examine the categories of Associated Persons involved in corrupt activities under Sections 17A(1), 17A(6) and 17A(7) of the MACC Act and the extent of the involvement of the Associated Persons that give rise to the liability of business entities. The research objective is to compare ‘Associated Persons’ legal position under the MACC Act to the United Kingdom Bribery Act 2010 (UKBA) and the United States Foreign Corrupt Practices Act 1977 (USFCPA) for comparison study and insights.

2.0 Literature Review

Numerous scholars asserted that corruption is detrimental to business (Keremis, 2020) as it creates market entry barriers for companies, hurts their innovation and productivity capabilities (Paunov, 2016). Other studies supported that the corporation is an innocent victim obligated to pay bribes to do business (Cuadrado, 2005). Argandona argued various factors resulted in a country criminalising corporate corruption (Argandoña, 2007). Corporate corruption is ‘the misuse of formal power by a corporate representative for personal and organisational benefit’ (Castro, 2020). Castro stressed corporate corruption continues to be an unresolved issue, undermining business trust and interfering with the effective functioning of competitive markets. In recent years, corruption has been exposed at a real who’s who of the corporate elite, including Airbus, Goldman Sachs, McKinsey, Novartis, Siemens, and Rolls Royce (Castro, 2020). According to Stigler, regulations are an important factor in combatting corruption (Stigler, 1971). Many of the most significant corruption probes involve corporations rather than individuals. Corporate liability is a fundamental aspect of the global fight against corruption (UNODC, 2019b). King and Lord emphasised that law sanctioning procedures should deal with corporate crime to achieve criminal justice and associated enforcement (King & Lord, 2018). According to Vitalii Datsyuk, it is essential to realise that, while corporations are fictitious, they are essentially groupings of individuals who suffer real and severe repercussions when corporate criminal laws are enforced (Vitalii Datsyuk, 2020).

In Malaysia, before enacting Section 17A of the MACC Act, the prosecution is against the individuals under Sections 16, 17, 18 and 21 of the MACC Act 2009. Nevertheless, the identity of the person who performs services for and on behalf of the business entities was a pertinent problem. Numerous individuals and entities could be charged with a corrupt act for violating section 17A(1)(Low, C. K., & Low, 2020). Section 17A(2) of the MACC Act penalises business entities for failure to prevent and control corruption within their organisations, which will expose them and their associates to an offence under section 17A that imposes a fine of not less than ten times the sum or the value of RM1 million, whichever is greater. The penalties may impact innocent third parties. Although there are no direct financial losses, society may also be adversely affected (Kurniawan et al., 2020). The research aims to shed light on this phenomenon by examining the UK and the US approach towards the subject, as Malaysia currently lacks relevant case law. A thorough analysis is conducted in the hope of making a notable contribution.

3.0 Methodology

This paper is based on doctrinal research, which is predominantly library-based. Legislation and case laws as primary legal sources are identified and analysed. The pivotal legislations are the MACC Act, the UKBA and the USFCPA, relevant guidelines and authoritative materials. The secondary legal sources reinforced the data from primary legal sources. Legal journals and articles, books, webpage, news reports and reliable websites and blog sites are gathered to obtain relevant and vital information and a profound understanding of the liability of the business entities due to corrupt acts of ‘Associated Persons’ (Azmi et al., 2021). Online databases such as Web of Science (WoS), Scopus, Lexis Nexis, HeinOnline and the Current Law Journal are also extensively applied. The comparative approach is embarked upon by elucidating the data based on the thematic analysis technique using the important themes in the study. The process of thematic analysis involves data reduction, where the raw data is reduced into meaningful groupings (Gribich, 2007).

4.0 Findings

4.1 Applicable Laws

4.1.1 Statutes

Section 17A of the MACC Act, Section 7 of the UKBA and the USFCPA creates anti-corruption and anti-bribery rules for organisations with extraterritorial effect. In Section 17A of the MACC Act and Section 7 of the UKBA, a commercial organisation commits an offence if an associated person corruptly gives gratification or bribes another person for its benefit. A ‘commercial organisation’ is a business
entity comprising partnerships, limited partnerships, limited liability partnerships, and companies formed and incorporated in either country or elsewhere with business in both countries. A sole proprietorship is excluded. Business entities can avoid liability if adequate procedures as per the guidelines issued by the authorities can be proven to be in place. In general, the US FCPA prohibits offering to pay, paying, promising to pay, or authorising the payment of money or anything of value to a foreign official to influence his act or decision in the official capacity or to secure any improper advantage to obtain or retain business (Boles, 2014; Young, 2020). It does not address private commercial bribery (Mendelsohn, 2020). The scope of the UKBA is larger than the US FCPA as it criminalises corruption in the private sector (Kobets, 2020). The Resource Guide guides the US FCPA. The USFCPA applies to ‘issuers’, ‘domestic concerns’ (Criminal Division of the U.S. Department of Justice et al., 2020), certain persons or entities acting within the US, and their associates (Mendelsohn, 2020). Other than an issuer, a domestic concern is any person who is a US citizen, national or resident; or any corporation or partnership established under the laws of the US or its states, territories, possessions, or commonwealths (Criminal Division of the U.S. Department of Justice et al., 2020). There are two affirmative defences to the FCPA's anti-bribery provisions: (1) the payment was legal under the foreign country's written laws (the 'local law' defence), and (2) the money was spent demonstrating a product or fulfilling a contractual obligation (Young, 2020). In the US, having a compliance programme is not a defence, but prosecutors examine its effectiveness when evaluating whether or not to file a criminal charge against a company (Hess, 2018).

4.1.2 Guidelines
Guidance on measures to control corruption and bribery are in existence in all three jurisdictions. Although not in exact chronology, adequate procedures that capture similar provisions are available in Malaysia and the UK. In Malaysia, the Guidelines on Adequate Procedures were issued under Section 17A(S) MACC Act 2009 to help business entities develop liability protection strategies (Guidelines). The Guidelines is similar to a risk governance process highlighted in the Malaysian Code on Corporate Governance. The acronym T.R.U.S.T. in the Guidelines stands for Top Level Commitment, Risk Assessment, Undertake Control Measures, Systematic Review, Monitoring and Enforcement and Training and Communication (National Centre For Governance Integrity and Anti-Corruption (GIACC) Prime Minister’s Department Malaysia, 2018b). Case studies on T.R.U.S.T. can be found on the GIACC website (National Centre For Governance Integrity and Anti-Corruption (GIACC) Prime Minister’s Department Malaysia, 2018a). In the UK, six bribery prevention principles are laid down by the Ministry of Justice, namely Proportionate Procedures, Top-level Commitment, Risk Assessment, Due Diligence, Communication (including training) and Monitoring and Review (UK Guidance) (The Bribery Act 2010 - Guidance, 2010). The Quick Start Guide offers a quick guide on the UK Guidance (The Bribery Act 2010 - Quick Start Guide, 2010). However, the mere existence of bribery policies is not sufficient. In Director of the SFO v. Airbus SE (Case No. U20200100) [2020] 1 WLUK 435, Airbus had anti-corruption policies and procedures in place at the time. These policies and procedures were easily circumvented, and a corporate culture allowed bribery by Airbus business partners and/or employees to occur globally. In the meanwhile, the US FCPA Resource Guide details the commitment from senior management and a clearly articulated policy against corruption, code of conduct and compliance policies and procedures, oversight, autonomy, and resources, risk assessment, training and continuing advice, incentives and disciplinary measures, third-party due diligence and payments, confidential reporting and internal investigation, continuous improvement: periodic testing and review, mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration, and investigation, analysis, and remediation of misconduct (Young, 2020).

4.1.3 ‘Associated Persons’
4.1.3.1 Director and Partner
A director and a partner are ‘Associated Persons’ under Section 17A MACC Act. Under the Malaysian Companies Act 2016, a director includes a de facto, a shadow, an alternate or a substitute director and a nominee director (Rahman & Salim, 2010). A partner is subject to the Malaysian Partnership Act 1961 or the Limited Liability Partnerships Act 2012 (LLPA). Concerning a limited liability partnership, partner means any person admitted as a partner therein under an agreement and includes a salaried partner (Section 2, LLP Act). In addition, a director and a partner are deemed to commit corruption when the business entity commits the corruption unless they show proof of disapproval and the conduct of due diligence in preventing the offence. The UK Court in the Airbus SE case found that Airbus SE had failed to prevent the directors from bribing those involved in the purchase of aircraft by AirAsia and AirAsia X from Airbus. The bribes were meant to gain or keep business for Airbus SE (Regina v Airbus SE Statement of Facts, 2020). Directors and auditors are also captured in the USFCPA (Criminal Division of the U.S. Department of Justice et al., 2020).

4.1.3.2 Employee
‘Associated Persons’ include employees of business entities in the MACC Act and the UKBA. The MACC Act does not define ‘employee’, prompting serious challenges about part-time or temporary personnel (Low, C. K., & Low, 2020). Employees’ liability may violate the Federal Court’s proportionality test in Pendakwa Raya v Gan Boon Aun (Criminal Appeal No 06 2-05/2016). The defendant’s fundamental rights may not be sufficiently protected (Low, C. K., & Low, 2020). Section 7 enforcement proceedings brought by the UKBA against third parties included actions against the company’s personnel (Giles, 2021). Senior workers were involved, as were employees and third parties, knowing the third parties’ actions. In R v Skansen Interiors Limited (Case No: T20170224 [2018]), corporate employees were the ones paying bribes. The Standard Bank plc’s case (Case No. U20150854) [2015] 11 WLUK 804 involved employees of a local sister company, while R v Sweet Group Plc (unreported) involved employees of a local subsidiary (Giles, 2021). In the Airbus SE case, Airbus employees and other intermediaries bribed third parties to ensure the purchase of Airbus aircraft (Director of the Serious Fraud Office and Airbus SE, 2020). The USFCPA (The Foreign Corrupt Practices Act, 2015) covers employees of issuers (i.e. public companies) (US Department of Justice, 2020). In 2019, Tim Leissner, a Goldman Sachs’ employee and agent, pleaded guilty for acting
in violation of the Exchange Act Section 30A. He had used interstate commerce to bribe foreign officials in the expectation that they would use their official positions to help Goldman Sachs obtain bond deals and other business (Reporter, 2019).

4.1.3.3 Subsidiary
Section 17A does not expressly mention subsidiaries as an associate to business entities. However, a ‘subsidiary’ is considered as associated with business entities under the UKBA. Petrofac Limited (Petrofac) was found to violate Section 7 of the UKBA on 4 October 2021. The Petrofac board oversaw the group’s strategic and governance activities, including agent appointments and other subsidiary activities. While Petrofac did not sign any of the indictment’s contracts, its subsidiaries did. Although the agreements were entered into through subsidiaries, the court found that bribes were paid for Petrofac’s benefit (Cogman et al., 2021). Under the US FCPA, a parent company may be liable for bribery paid by its subsidiary in two ways. First, a parent may have directly participated in the activity. Second, traditional agency principles may attract parent-subsidiary liability. Control is an essential feature of an agency (Criminal Division of the U.S. Department of Justice et al., 2020).

4.1.3.4 (i) Person who performs services for or on behalf of the business entities; (ii) Determination of such person is by reference to all the relevant circumstances
These provisions are incorporated in both Section 17A of the MACC Act and Section 8 of the UKBA. The phrase ‘relevant circumstances’ is not defined. Anyone can thus be potentially charged with a corrupt act. Section 8 of the UKBA explicitly states such a person may be the employee, agent or subsidiary of the business entities. The person may comprise those operating within the organisation, such as the employees or senior managers, or on behalf of the organisation, for example, intermediaries, subsidiaries, or agents (Lord et al., 2018). Companies’ biggest bribery risks come from third parties and go-betweens. These threats develop as corporations expand into new areas and outsourcing activities (Transparency International, 2018). A third party is an associate with which a company carries out its activities. The UKBA and USFCPA make no distinction on types of third parties. (Transparency International, 2018). Four out of eight Section 7 UKBA enforcement actions involved intermediaries who assisted in gaining contracts by bribing government officials and/or private individuals (Giles, 2021). The cases are Rolls-Royce (Case No. U20170036) [2017] 1 WLUK 189, [2017] Lloyd’s Rep FC 249, XYZ (Sarclad) Ltd (Case No. U20150856) [2016] 7 WLUK 211, Airbus SE and Director of the FSO v. Airline Services Limited (Case No. U20201913) [2020] 10 WLUK 606. Business partners helped Airbus SE expand its international reach and win sales contracts in several nations in the Airbus SE case. When Airbus sold an aircraft, it would typically pay the business partners a percentage of the sale price or a fixed sum per aircraft sold (Shih, 2020). Payments made to other parties or intermediaries are prohibited under the FCPA (Criminal Division of the U.S. Department of Justice et al., 2020). Companies have been found accountable or investigated under the FCPA for unlawful acts involving third parties. The top ten US FCPA settlements involved bribery initiated within firms and channelled through third parties, including consultants, agents, and joint venture partners (Transparency International, 2018). Businesses can limit third-party agent FCPA risks by having an effective compliance approach that includes agent due diligence (Criminal Division of the U.S. Department of Justice, 2020). The third-party can consist of advisors and consultants (tax, legal, financial, business), service providers (logistics, supply chain management, storage, maintenance, processing), contractors/subcontractors, lobbyists, marketing and sales agents, customs or visa agents (Transparency International, 2018), trustees and distributors. As agents are authorised to represent the company, they are the most vulnerable. Other types of intermediaries, such as lobbyists and law firms, may also be bribed.

5.0 Discussion
The practice of the UKBA and USFCPA in addressing the corporate liability of business entities highlight the importance of business entities complying with adequate procedure guidelines and enforcing a strict anti-corruption policy to avoid corruption risks exposure. Business entities can accurately assess corruption risks associated with ‘Associated Persons’, and internal control systems can be developed and promoted to prevent unlawful behaviours (Lederman, 2020). Appropriate procedure guidelines are a must-have resource. External and internal hazards should both be considered when doing a risk assessment (UNODC, 2019). Organisations must conduct regular evaluations of their corruption risks to improve accountability, trust, and openness. It is also vital to cultivate an ethical corporate culture and exercise caution when engaging with outside parties (UNODC, 2019). Businesses must demonstrate that they have taken reasonable precautions to keep ‘Associated Persons’ from committing the offence in question to defend themselves against corruption charges. Considerable confusion around ‘Associated Persons’ does exist. To what extent may section 17A be applied to an individual who performs services for a commercial organisation, given the challenges inherent with using the identification or attribution principle to so many potential individuals or entities? (Low et al., 2020). The term ‘Associated Persons’ is expansive. Even though the person acted as a service provider for the business entities, the control over them by business entities is not always evident. In borderline cases, the court must evaluate whether someone is linked with the organisation based on the nature of the relationship and all relevant circumstances (Lederman, 2020). The statute’s language suggests that the courts and enforcement agencies will be given latitude and discretion to examine the facts and circumstances of the case (Lederman, 2020). It is up to the courts to assess if proper procedures are in place or not.

6.0 Conclusion and Recommendations
To summarise, since the implementation of Section 17A of the MACC Act is still in its early stages, questions about categories of ‘Associated Persons’ that expose business entities to the corruption offence remain to be answered. Since Section 17A of the MACC Act was modelled after anti-corruption legislation in the UK and the US, their knowledge and experience in dealing with the issue may assist Malaysia in understanding and appreciating the implication and seriousness of the provision. Future research could concentrate...
on qualitative methodologies to examine the impact of ‘Associated Persons’ provision on business entities. The list of people included in "Associated Persons" is not exhaustive. Business entities should exercise caution and acknowledge that, despite detailed anti-corruption policies, business entities may be unable to prevent 'Associated Persons' from engaging in corrupt acts. Thus, the business's sustainability is dependent on demonstrating the availability of appropriate procedures’ mechanisms and adherences to the same. In order to prevent prosecution for the strict liability offence under Section 17A of the MACC Act, this will be the chosen route.

**Paper Contribution to Related Field of Study**

This study assists legal professionals and commercial entities comprehend potential liability for corruption under Section 17A of the MACC Act.

**References**

Director of the Serious Fraud Office and Airbus SE. (2020).
