

Corporate &amp; Commercial

## Have you Earned the TRUST of MACC? – Practical Measures to Defend Against Corporate Liability Charges

It has been three months since the Malaysian Anti-Corruption Commission (the “**MACC**”) issued the Guidelines on Adequate Procedures (“**Guidelines**”). The Guidelines, which were issued pursuant to Section 17A(5) of the Malaysian Anti-Corruption Commission Act (“**MACC Act**”), set out adequate procedures a commercial organisation (“**CO**”) needs to put in place as a defence to a corporate liability charge under the MACC Act. For context, if convicted, a CO is liable to jail term of up to 20 years, and/or a minimum fine of 10 times the value of the gratification or RM1 million, whichever is higher. Further, its director, controller, officer, partner or a person concerned in the management of its affairs (“**Senior Management**”) is deemed to have committed the same offence, and would in turn be personally liable for that offence.

### Which COs should be concerned?

The MACC Act covers both the public and private sector, and it applies to citizens and permanent residents of Malaysia. In other words, any CO that is incorporated in Malaysia or has business activities in Malaysia—whether it is a private entity or a government-linked company, or is local or foreign owned—must comply with the MACC Act. It is also important to note that the MACC Act has extraterritorial reach, where a CO can be held liable under the MACC Act for an offence that has been committed outside of Malaysia.

### What are the adequate procedures?

The Guidelines are not prescriptive in nature and are not intended to be. This is for the simple reason that there is no one-size-fits-all compliance programme that would work for COs across different industries and business climates. However, there are certain baseline practices, processes and procedures a CO can adopt and tailor to its organisation, and in turn, demonstrate that it stays on the right side of the law. With this in mind, the MACC has clustered the building blocks to having adequate procedures behind five principles:

- T = Top Level Commitment
- R = Risk Assessment
- U = Undertake Control Measures
- S = Systematic Review, Monitoring and Enforcement
- T = Training and Communication

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**Corporate & Commercial****Does your current compliance programme reflect the five principles of TRUST?**

If your CO operates in a regulated industry or is a multinational corporation, more likely than not there would already be some checks and controls in place to ensure proper corporate governance. Some COs have even gone a step further by signing the corporate integrity pledge with the MACC and have obtained the ISO 37001 anti-bribery management system certification from SIRIM (Malaysia's national standards certification body) in furtherance of their anti-bribery commitment. But are these steps enough or, in MACC's lingo, adequate?

There is unfortunately no straight yes or no answer to this question. Compliance is not about ticking the boxes (again why emphasis is placed on the principles rather than specific items for COs to tick off under the adequate procedures defence). A holistic approach must be taken in considering the measures and safeguards a CO has, to objectively assess whether the adequate procedure principles are effectively put into play. We will briefly examine each principle and offer a few practical measures COs may wish to consider adopting.

- **T = Top Level Commitment** – A CO's Senior Management must be seen to own and endorse compliance such that ethical behaviour becomes a part of a CO's DNA and culture. Senior Management must, at every opportunity, be seen to be observing both the form and substance of complying with the law in their conduct. This is important not just to send the correct message but also to mitigate personal liability for Senior Management.

For instance, we would recommend Senior Management attend anti-bribery and anti-corruption related trainings and dialogues together with the rest of a CO's employees, rather than attending separate sessions, so there is increased visibility on leadership commitment to compliance. Senior Management could also adopt an open door policy, where employees are able to communicate anti-bribery and anti-corruption concerns to Senior Management directly. Furthermore, Senior Management should always keep themselves abreast on bribery and corruption issues, and ensure that regular training for themselves and all employees is conducted. We would also suggest that Senior Management requires the preparation of, and reviews reports and updates on compliance with such policies and initiatives from the working level on a regular basis. One way would be to have an anti-bribery and anti-corruption update as a permanent topic in the Board agenda. This would allow for the management to report to the Board at each Board meeting, to better allow the Board to provide timely guidance and feedback on specific anti-bribery and anti-corruption issues.

- **R = Risk Assessment** – An anti-bribery and anti-corruption risk assessment is an important element to a CO's anti-bribery efforts. The Guidelines recommend a risk assessment to be conducted at least once every three years at the minimum. As certain industries may warrant more regular assessments, our view is that each CO should assess their operational risks on

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an annual or even twice a year basis. A risk assessment ought to cover both external and internal risks of a CO, which includes the following categories:

### External risks

- a) country risk – higher levels of corruption in certain countries where a CO has a business presence;
- b) sectoral risk – higher levels of corruption in certain business sectors a CO may be operating in;
- c) transaction risk – higher levels of corruption in obtaining certain regulatory licences or permits for transactions, e.g. those related to public procurement;
- d) business opportunity risk – higher risk of facilitation payment for new projects; and/or
- e) business partnership risk – higher risk in certain joint venture relationships; and

### Internal risks

- f) deficiencies in employee knowledge resulting in employees not being equipped with the relevant skills and knowledge in resisting demands for facilitation payment and/or handling bribery and corruption issues;
  - g) bonus culture that rewards excessive risk taking;
  - h) lack of clarity in an organisation's stance on anti-bribery and anti-corruption; and/or
  - i) lack of financial control.
- **U = Undertake Control Measures** – Broadly, the Guidelines recommend conducting due diligence, having policies and procedures, and having a reporting channel in place. These measures should be proportionate and reasonable to the size and nature of a CO's business.

The policies and procedures ought to cover gifts, hospitality, entertainment, donations and sponsorships, conflicts of interests, facilitation payments, financial and non-financial controls, record keeping and whistleblowing. Additionally, due diligence measures typically include requiring third parties that work with a CO to complete due diligence checklists, conducting desktop research on third parties, reviewing third parties' anti-bribery and anti-corruption policies, red flagging third parties' evasiveness to a fair request for information or elaborate payment mechanism involving unrelated parties or unusual requests for reimbursements, etc.

Other control measures a CO could consider would be incorporating strict anti-bribery contract clauses and corresponding termination rights in its contracts with third parties to allow a CO to walk away from contracting with parties that breach such provisions or who are tainted with corrupt practices. Operational safeguards such as a system to approve invoices and make payments, in order to detect attempts to pay bribes, would be another example of a financial

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control which could form one of the many building blocks of a CO's anti-bribery and anti-corruption system.

It is also important that an anti-bribery and anti-corruption system includes a reporting or grievance mechanism for a CO's stakeholders or third parties to report any non-compliant behavior of a CO or its associated persons. An effective reporting channel must provide assurance on confidentiality, ideally be easy to navigate, and include the commitment that each report will be treated seriously.

- **S = Systematic Review, Monitoring and Enforcement** – Closely intertwined with the principles of conducting risk assessments and undertaking the control measures discussed above, the Guidelines recommend having both internal and external parties to audit the anti-bribery and anti-corruption system of a CO, as well as having a sufficient task force to monitor compliance and enforce the policies and procedures that have been rolled out. This means a CO must allocate adequate resources to hire a sufficient number of competent compliance officers, proportionate to the scale of its business. Needless to say, a CO should direct its focus on areas identified to be a high risk for its business.
- **T = Training and Communication** – Last, but not least, is a CO's emphasis on training and communication of its policies and procedures to its stakeholders and third parties. This entails giving proper training and timely refresher courses to its Senior Management, employees, contractors, agents and third parties crucial to a CO's business. Trainings could range from classroom style to webinars, depending on the needs of a CO. Attendance should be made compulsory, and a short assessment at the end of each module should be introduced to ensure there is effective and tangible take-away from these training sessions.

### **Can commercial organisations still kick the can down the road?**

Whilst there is no guidance from the MACC or judicial authority in Malaysia on the standard of care or proof required for a CO to discharge its liability under a corporate liability offence, it is apparent from the Guidelines that these adequate procedures are extremely high hurdles to clear. Given the extremely high standard that a CO will need to meet in order to avail themselves of a defence under the adequate procedure principles based on foreign caselaw, this should hardly come as a surprise.

Considering the looming June 2020 deadline to put in place adequate procedures, COs should take stock of their existing policies and procedures to assess whether they stack up to the expectations of MACC, and if not, to start beefing up its adequate procedures. This is especially so given the high standards in the Guidelines, as it will take some time to implement a proper system. And, in the event COs are still in doubt of the severity of the matter at hand, do be reminded that the MACC now has more bite with these new enforcement powers, and the MACC may be more inclined to pursue such offences given the heightened sensitivity towards any form of corrupt activities in Malaysia.

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Should you have any queries on the MACC Act, please feel free to contact our team.



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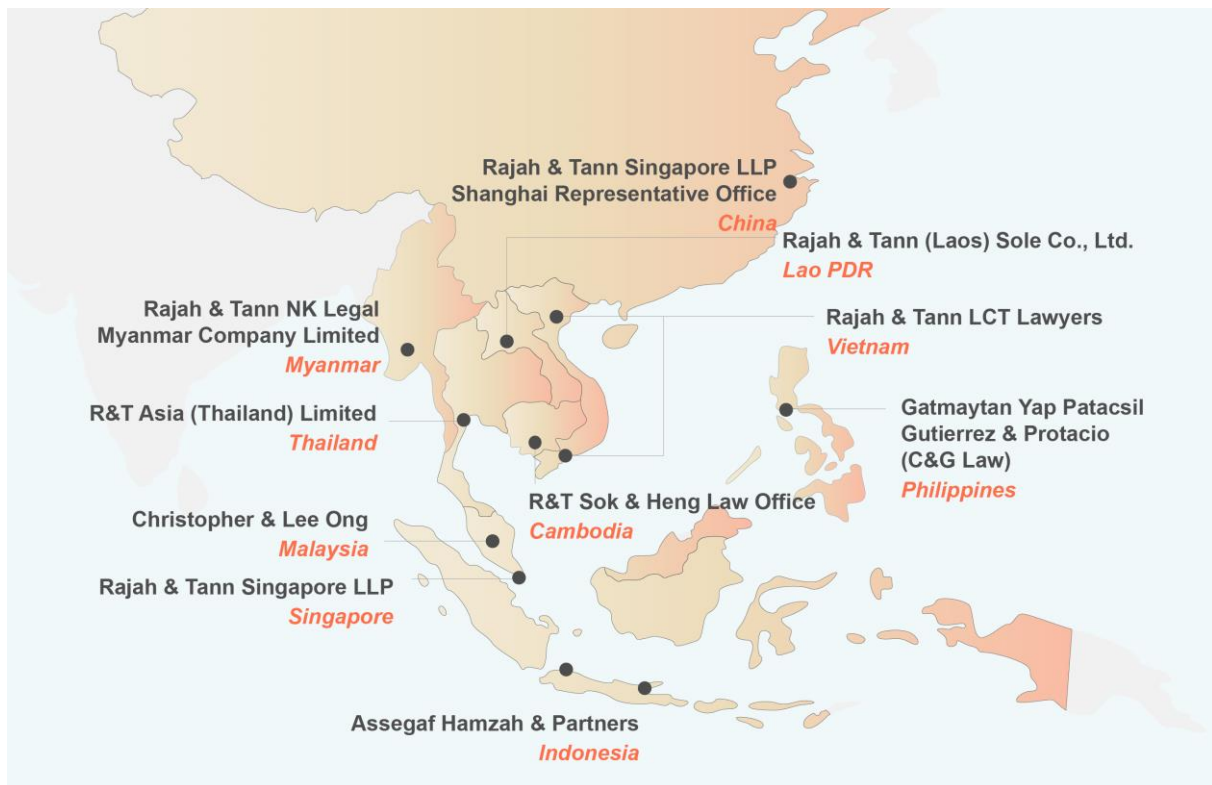
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