

NEW AND EMERGING FORMS OF CORRUPTION AND THE EFFECTIVE COUNTERMEASURES

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The outbreak of the deadly Covid-19 virus, which has been sweeping across the world, has caused the loss of life in millions in every corner of the world. Governments have come up with a variety of countermeasures to contain the spread of Covid-19 for the livelihood and survival of the mankind. Corruption, which is tantamount to another form of pandemic and much more lethal than Covid-19 in causing the irreparable destruction to any civilization, as if corruption is yet to eradicate society from stem to stern. A new form of corruption has emerged during the pandemic as some unscrupulous people take advantage of the incentives or subsidies offered by the government to groups that are underprivileged and who are struggling to make ends meet.

Against that backdrop, the Government of Malaysia announced the economy stimulus package in March 2020 which includes financial aid, incentives, training or reskilling courses etc. for the poorer or underprivileged to ease their burdens during the Covid-19 pandemic movement control order (MCO), or the lockdown, that was implemented by the authorities to curb the spread of Covid-19 across Malaysia.

For instance, the Ministry of International Trade and Industry (MITI) of Malaysia introduced the “Service Provider for Employability and Re-Training Local Talent” programme (ERT) which amounted to RM 40 million in June 2020 being the course to enhance skill and value of the workforce in the automotive industry that has been badly hit by the pandemic. Unfortunately, the goodwill of the ministry did not reach the labours of this dying industry, but the scenario is deteriorating because of some irresponsible parties who manipulated the programme and eventually pocketed the financial allocation of the ministry that was initially meant to train people earning low incomes to be much more competitive, competent and productive in this automotive industry. The chief executive officer (CEO) of the subsidiary company, i.e. A2Z which is wholly owned by the ministry (MITI), had manipulated this ERT programme by awarding this programme to another company, i.e. AKSB, and in return the CEO solicited RM 5 million from AKSB which obtained the ERT programme. The CEO instructed AKSB to camouflage the corrupt gratification of RM 5 million as a purported friendly loan given by AKSB by way of entering the loan agreement between the CEO and AKSB. The AKSB channelled the RM 5 million to the account of a law firm that acted as a stakeholder for the CEO upon the instruction of the CEO after the purported loan agreement entered by the parties. The said law firm was involved in money-laundering activities by way of helping the CEO to disburse the corrupt money to various parties on the instruction of the CEO. Moreover, part of the sum of RM 5 million was used by the CEO as paid-in capital to set up the law firm which eventually helped the CEO with money-laundering activities. Ironically, the legal practitioners of said the law firm, who supposedly act as guardians to steadfastly uphold justice and the rule of law but opted to dip themselves into the clandestine money-laundering plot for the ill-gotten gain.

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Another new form of corruption took place in Malaysia during the Covid-19 pandemic when the organizer of an employee training course in the automotive industry misappropriated the budget allocated by the MITI (the ministry). The said organizer manipulated the module and the syllabus of the training course, that is being designed initially to intensify the skill and experience of the workforce in this industry. AKSB, the company that organized the employee training course, was supposed to hold the training at a designated site. Instead, the company held the online course virtually to dispense with the physical appearance of the employees at the training site. The change of the training module and syllabus by the organizer at the very last minutes defeated the goal of having the employees become more productive, efficient and competitive regarding the workmanship in the automotive industry as the training course was held virtually and theoretically without physical practice at the site, defying the golden rule principle of “Practice Makes Perfect” which is applicable in every industry.

On 5 June 2020, the Government of Malaysia announced an economic restructuring plan under which hiring incentives would be paid to the employers who keep their employees in the course of business throughout the Covid-19 pandemic. The purpose of the plan was to relieve the financial burden on the employer for survival and sustainability during this hard time. The authority in charge was namely, PERKESO, was to reimburse the employer the hiring incentives which amounted to RM 800 monthly per employee below the age of 40 years old and RM 1000 monthly per employee above the age of 40 years old. The hiring incentives were to be paid monthly to the employer in six months continuously after the incentive application made by the employer was approved by PERKESO. Unfortunately, the hiring incentives were misused by irresponsible parties who made false statements to substantiate their claims to PERKESO. ESM, a company which engages in the field of construction, had submitted to PERKESO incentive applications that contained false particulars such as the number and details of the employees are in doubt. The modus operandi of the ESM began with a job offer that requires the personal particulars as application credentials via a social media platform such as Facebook or WhatsApp and such personal particulars of the job applicant were stated in the incentive application to PERKESO. Sometimes, ESM paid RM100 to each job applicant, while RM800 or RM1000 was received by ESM from PERKESO as hiring incentives albeit no job applicant was hired by ESM. Seventy-four (74) false incentive applications were submitted by ESM and approved by PERKESO, which suffered the loss of RM 370,800.00.

Meanwhile, there is a scenario where an unscrupulous employer instructed his employees to set up new companies and, accordingly, to submit incentive applications that contained false particulars of the purported working personnel, whereas there is no employment in the light of the incentive application. All the correspondence and documentation were prepared by the employer for the approval process of PERKESO before the false incentive application was submitted by his employee under the purported new company. The said employee will be paid RM 2000 by the employer in the event that the incentive application of the new company incorporated by his employee is approved by PERKESO.

On the other hand, there was a company which employed the worker with pay that was below the minimum wage, which is RM 1000 as prescribed by the government, and the company submitted the incentive application to PERKESO in order to facilitate the hiring incentive claim of RM 800 or RM 1000 per person during the pandemic.

The foregoing reflects that new forms of corruption took place in Malaysia during the Covid-19 pandemic. Such corrupt practices have rendered the entire effort of government in vain as the poor keep getting poorer and richer keep getting richer; hence, the needs of society

are not addressed effectively and efficiently pertaining to the hardship and misery caused by the Covid-19 pandemic. Indirectly, the spread of Covid-19 failed to be contained by the government, as the poor and underprivileged continued to work during the pandemic to make ends meet although they knew they would be highly exposed to this deadly virus.

In a nutshell, corruption is a menace to the country. Therefore, effective countermeasures must be taken to eradicate this disease which is much more fatal than Covid-19. I would like to adopt and apply the principle of T.R.U.S.T, which is distilled from the ministry guidelines concerning corporate liability, which might give us some ideas in thinking of corruption countermeasures. The principle of T.R.U.S.T consists of the following:

Top-Level Commitment:

- (a) The top-level management of the commercial organization (“Top-Level Management”) must ensure that the highest level of integrity and ethics is practised in the commercial organization. There should be full compliance with the applicable laws and regulatory requirements on anti-corruption and key corruption risks of the organization must be effectively managed.
- (b) The Top-Level Management must provide assurance to its internal and external stakeholders that the organization is operating in compliance with its policies and applicable regulatory requirements.
- (c) The Top-Level Management must establish, maintain and periodically review an anti-corruption compliance programme and communication of the organization’s anti-corruption policies and commitment internally and externally.
- (d) The Top-Level Management must encourage the use of any reporting (whistle-blowing) channel. The results of any audit, reviews of risk assessment, control measures and performance are reported to all top-level management including the full Board of Directors and acted upon.

For instance, in the case study of ERT that I mentioned earlier, there is an urgency to have an effective, efficient and expedient reporting system implemented promptly within or outside the commercial organization to encourage its subordinate to report any alleged wrongdoing of anyone including the CEO or director of A2Z to authorities such as the Malaysian Anti-Corruption Commission (MACC) or the top management of the commercial organization before the same report is lodged to the MACC without putting the whistle-blower at the risk of identity exposure. Statutory protection is conferred to the whistle-blower under the Whistle Blower Protection Act 2010, an act to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector, to protect persons making those disclosures from detrimental action, to provide for the matters disclosed to be investigated and dealt with and to provide for other matters connected therewith.

Meanwhile, section 17A of the Malaysian Anti-Corruption Commission Act (MACC) 2009 entered into force in June 2019 concerning corporate liability. In the case of ERT, the AKSB should be indicted under this provision as the AKSB bribed the CEO of A2Z, and the CEO of A2Z should be charged in court for accepting a bribe. We must eradicate corruption from stem to stern adamantly and relentlessly. Section 17A of the MACC Act 2009 is reproduced as follows:

(1) A commercial organization commits an offence if a person associated with the commercial organization corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person or another person with intent-

*(a) to obtain or retain business for the commercial organization; or
(b) to obtain or retain an advantage in the conduct of business for the commercial organization.*

(2) Any commercial organization who commits an offence under this section shall on conviction be liable to a fine of not less than ten times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is of pecuniary nature, or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding twenty years or to both.

(3) Where an offence is committed by a commercial organization, a person-
*(a) who is its director, controller, officer or partner; or
(b) who is concerned in the management of its affairs,*

at the time of the commission of the offence, is deemed to have committed that offence unless that person proves that the offence was committed without his consent or connivance and that he exercised due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his function in that capacity and to the circumstances.

(4) If a commercial organization is charged for the offence referred to in subsection (1), it is a defence for the commercial organization to prove that the commercial organization had in place adequate procedures to prevent persons associated with the commercial organization from undertaking such conduct.

(5) The Minister shall issue guidelines relating to the procedures mentioned in subsection (4).

(6) For the purposes of this section, a person is associated with a commercial organization if he is a director, partner or an employee of the commercial organization or he is a person who performs services for or on behalf of the commercial organization.

(7) 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.

(8) For the purposes of this section, "commercial organization" means-
(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.*

Furthermore, top level commitment must be shown blatantly, fearlessly and unreservedly by the government and the private sector as we do not tolerate any form of corruption in Malaysia. A good illustration, on 23 August 2022, was when the apex court in the case of *Dato Sri Mohd Najib Bin Hj Abdul Razak v Public Prosecutor* (Criminal Appeal No: 05(L)-289-12/2021) upheld the conviction and sentence meted by the High Court against the former premier of Malaysia in respect of 1 charge of abuse power, 3 charges of criminal breach of trust and 3 charges of money-laundering in relation to RM 42 million entered into the account of the former premier in the case of SRC International. The former premier has to serve 12 years' incarceration and pay a fine of RM 210 million.

Risk Assessment:

- (a) Comprehensive risk assessments are advised to be conducted every three (3) years, with intermittent assessments to be conducted whenever necessary.
- (b) Risk assessment should be used to establish appropriate processes, systems and controls approved by the Top-Level Management to mitigate specific corruption risks and/or potential corruption risks that the commercial organization may be exposed to.

The government and commercial organization should be taking the risk assessment on every high-risk position held by any personnel from time to time to prevent any one-man decision in respect of any matter. In the case of ERT, the impugned CEO held the managerial position at A2Z with exclusive administrative power since its incorporation without any check and balance from the board of directors of A2Z. A rotation of high-risk position is reasonable and in line with the spirit of good governance regardless of the seniority and contribution of the personnel in the organization.

Undertake Control Measures:

- (a) Appropriate controls and contingency measures, which are reasonable and proportionate to the nature and size of the commercial organization, are advised to be implemented and enforced to address any corruption risks arising from weaknesses in the commercial organization's governance framework.
- (b) The said controls and measures should include due diligence and reporting channels.
- (c) Policies and procedures should be endorsed by Top-Level Management, which should be up-to-date and easily available.

Due diligence must be taken in every decision-making process to avoid any unscrupulous party from taking advantage of the weaknesses in the system. In the case of misappropriation of the hiring incentives given by the PERKESO to the applicant, i.e. the employer, the wrongful loss suffered by PERKESO could be avoided as if due diligence performed by the PERKESO in verifying the particulars of the employee stated in each application such as interviewing the

said employee or cross checking with the Inland Revenue Board or other agency. Tragically, no due diligence was done by PERKESO, which merely acted as a rubber stamp on each application.

Systematic Review, Monitoring and Enforcement:

- (a) The Top-Level Management is advised to ensure regular reviews are conducted to assess the performance, efficiency and effectiveness of the anti-corruption programme of the commercial organization and to ensure the anti-corruption programme is enforced effectively.
- (b) Reviews may take the form of an internal audit or an external audit.
- (c) Reviews should form the basis of any efforts to improve the existing anti-corruption controls in place in the organization.

Collaboration among the agencies such as the MACC, Customs Department, Inland Revenue Board, Police Force, Immigration Department etc. is needed badly and swiftly, which will prompt positive and fruitful outcomes as each agency plays the role watchdog to one another in every decision-making process. For example, there is no room for false claims to take place if the Inland Revenue Board or Employee Provident Fund is involved in the inspection of particulars of employees when the incentive application is submitted to PERKESO, even assuming that PERKESO fails to perform due diligence when discharging its duty.

Training and Communication:

- (a) Commercial organizations should develop and disseminate internal and external training and communications relevant to their anti-corruption management system, in proportion to their operations.
- (b) The commercial organization's anti-corruption policy should be made publicly available and appropriately communicated to all personnel and business associates.
- (c) When planning strategies for communicating the organization's position on anti-corruption, the organization should take into account what key points should be communicated, to whom they should be communicated, how they will be communicated, and the timeframe for conducting the communication plan.
- (d) Employees and business associates should be provided with adequate training to ensure their thorough understanding of the organization's anti-corruption position, especially in relation to their role within or outside the commercial organization."

All public servants and private-sector employees should take the training course in relation to anti-corruption, which is paramount to society if this detrimental issue is not sufficiently addressed through deterrence. We must not overlook the cause behind what motivated the people who willingly gave their personal particulars to the purported employer who had ill intention to submit the false incentive application to PERKESO. Such abettors were willing to work in cahoots with others to defraud PERKESO in exchange for RM 100 for personal details given by him. Based on the statistics given by the MACC, the 61 companies involved in the

fraud incentives application to PERKESO and 51 wrongdoers were arrested in relation to this matter. The total loss suffered by PERKESO is RM 38,939,508.00 nationwide. Lack of public awareness and education of the society on the corruption issue is the main reason why everyone takes corruption lightly. Some might even think that corruption creates a win-win situation.

The Federal Court in the case of *Public Prosecutor v Dato' Waad Bin Mansor* [2005] 2 MLJ 101 has articulated the severity and seriousness of corruption which warranted a deterrence sentence to be meted out against the accused who was convicted of a corruption offence:

Any offence, be it murder, rape, robbery or corruption is viewed as an offence against society and the community at large. By stating that the crime of corruption stands in a league of its own and cannot be equated with the heinous crimes of murder, rape, robbery, criminal breach of trust etc, the CA has certainly underplayed the effect of corruption in our society. The offence of corruption, if unabated or undeterred, is more far reaching in its consequences than the crimes of robbery, criminal breach of trust or rape. Thus, we feel that the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences.

Therefore, combating corruption is never done regardless of the form in which corruption emerges. We all have responsibility in maintaining the integrity of society as justice is needed indefinitely and everywhere for any civilization of mankind.