

MEASURES TO FREEZE, CONFISCATE AND RECOVER PROCEEDS OF CORRUPTION, INCLUDING PREVENTION OF MONEY-LAUNDERING

*Chew Tham Soon**

I. INTRODUCTION

The development of a financial approach to investigations into criminal organizations has become one of the major concerns of investigative police departments and judicial authorities as well as international organizations such as the United Nations, the European Community and the ICPO-Interpol.

Financial measures could have an important role to play in taking powerful economic instruments out of the hands of dangerous people, preventing them from undertaking further similar activities and returning the proceeds of their illicit parasitic activities to society.

Imprisonment and fines have been found inadequate in deterring capital organizations, whilst seizure of assets curtails the financial ability of such groups to continue criminal operations. Assets may include money, property, businesses, cars, boats, or any item which have been involved in, or the products of, a criminal enterprise.

Assets seizure has emerged as one of the most powerful tools to break the back of criminal enterprise. Forfeiture, the ancient legal practice of government seizure of property used in criminal activity, may prove a particularly useful weapon against organized economic crime.

The consciousness of the fight against corruption as a result of its attendant ills on socioeconomic development of nations have risen in recent times. To minimize its incidence, respective countries have put in place anti-corruption agencies, backed by laws which are now being tailored to meet recommendations of the United Nation's Convention against Corruption (UNCAC), in terms of prevention, criminalization, international cooperation and assets recovery.

II. HOW IS MONEY LAUNDERING CONNECTED WITH SOCIETY?

Organized criminals who are involved in supplying goods and services to a co-operating public, and who utilize extortion, corruption and other techniques of intimidation, accumulate their profits through the commission of a series of criminal acts carried out by a number of different individuals over a substantial period of time, and involved in numerous territorial jurisdictions.

Corruption will play a central part in an organized criminal enterprise when it is required to allow the illegal market to operate smoothly. Corruption is more likely to occur in markets where the public regards provision of goods or services, such as prostitution, illegal gambling or drugs, and counterfeit products, as a mere misdemeanour. These are markets which traditionally been lucrative ones for organized crime, and the cash resources available to organized criminals allow them to corrupt others in order to protect and further their activities.

Organized crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and, indeed, governments. The economic and political influence of criminal organizations can weaken the social fabric, collective ethical standards, and, ultimately, the democratic institutions of society. The criminal influence can undermine countries undergoing the transition to democratic systems. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.

* Head, Compliance Office, Secretariat to Inspector General of Police, Royal Malaysia Police.

III. HOW DOES FIGHTING MONEY LAUNDERING HELP TO FIGHT CRIME OR CORRUPTION?

Many governments have already established comprehensive anti-money laundering regimes. These regimes aim to increase awareness of the phenomenon both within the government and the private business sector, and then to provide the necessary legal or regulatory tools to the authorities charged with combating the problem.

Some of these tools include making the act of money laundering a crime; giving investigative agencies the authority to trace, seize and ultimately to confiscate criminally derived assets; and building the necessary framework for permitting the agencies involved to exchange information among themselves and with counterparts in other countries.

Money laundering is a threat to good functioning of a financial system. However, it can also be the Achilles heel of criminal activity. In law enforcement investigations into organized criminal activity, it is often the connections made through financial transaction records that allow hidden assets to be located and that establish the identity of the criminal and the organization responsible.

When criminal funds are derived from robbery, extortion, embezzlement or fraud, a money laundering investigation is frequently the only way to locate the stolen funds and restore them to the victims.

Most importantly, however, targeting the money laundering aspect of criminal activity and depriving the criminal his ill-gotten gains means hitting him where he is vulnerable. Without a usable profit, the criminal activity will not continue.

IV. THE DANGEROUS DRUGS (FORFEITURE OF PROPERTY) ACT 1988

The Dangerous Drugs (Forfeiture of Property) Act 1988, which was effective from 10 June 1988, empowers the court to forfeit property upon conviction for an offence of trafficking drugs or planting and cultivation of drugs. Where it is proved to the satisfaction of the court that the above offence has been committed, the court shall make an order for the forfeiture of all property which is the subject matter of that offence or which has been used for the commission of that offence, notwithstanding that no person may have been convicted of the offence. (Section 3 and Section 4 of the Act)

The public prosecutor, if he has reason to believe that any person is a *liable person*, he may apply in *ex parte* to the high court for an order of forfeiture of all the property of which such person is a holder and which the Public Prosecutor has reason to believe are illegal properties. The forfeiture of property shall be proceeded against:-

- (a) every person
 - (i) who has been convicted for an offence of using property for promoting, managing, establishing, or carrying on any act, activity or conduct or facility, assisting in the promotion, management, establishment or carrying on of the act, activities or conduct of trafficking, planting or cultivation of drugs.
 - (ii) who is or was detained after the commencement of this Act pursuant to an order of detention or restriction made under any law in respect of any activities relating to or involving the trafficking in any dangerous drug.
 - (iii) who holds, conceals, receives, or uses or causes or allows to be used, any illegal property knowing of having reason to believe the same to be illegal property.
- (b) every relative of such person ;
- (c) every associate of such person ;
- (d) any holder whether or not a relative ;
- (e) where a person referred to in para (a) is deceased, his personal representatives.

A. Powers of Freezing and Seizure

Section 16 of the Dangerous Drugs (Forfeiture of Property) Act 1988 provides power to any senior police officer to enter any premises and there search for, to search and arrest any person who is in or on such premises in whose possession any property liable to seizure or forfeiture, seize and detain any book or document found in or on such premises or on such person.

Sections 25 & 26 deals with the seizure of movable property by senior police officer, while section 28 deals with the seizure of immovable property by senior police officer.

There is also a special provision relating to seizure of a business by an order in writing issued by the designated police officer under section 27 of the Act.

B. Forfeiture of Property Seized

Section 32 of the Act deals with the forfeiture of property seized under this act where there is no prosecution for any offence under this law is instituted with regard to such property; and no claim in writing is made by any person that he is lawfully entitled to such property, the property shall become forfeited immediately upon the expiration of the said period of three months.

V. THE ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCING ACT 2001

The Anti-Money Laundering and Anti-Terrorism Financing Act 2001 was introduced in Malaysia on 15 January 2002 (Royal Assented on 25 June 2001) to provide for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences and to provide for the forfeiture of terrorist property and property involved in, or derived from, money laundering and terrorism financing offences, and for matters incidental thereto and connected therewith.

Malaysia adopts a non-integrated approach for its anti-money laundering regime under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001. The legal framework under the Act provides for multi-agency implementation by the Financial Intelligence Unit (FIU) in Bank Negara Malaysia (the central bank), the regulatory and supervisory authorities of reporting institutions, as well as the relevant law enforcement agencies.

It is the strategic objective of the government to disrupt and dismantle criminal organizations by depriving them of the use of the economic proceeds of their crime and of properties used to facilitate their crime.

The Anti-Money Laundering and Anti-Terrorism Financing Act 2001 shall apply to any serious offence, foreign serious offence or unlawful activity whether committed before or after the commencement date. The Act shall apply to any property, whether it is situated in or outside Malaysia.

Money Laundering means the act of a person who:-

- (a). engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
- (b). acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity ; or
- (c). conceals, disguises or impedes the establishment of the true nature, origin, location. Movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity.

Where –

- (aa) as may be inferred from objective factual circumstances, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
- (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

Serious offence has been defined as:-

- (a) any of the offences specified in the Second Schedule; or
- (b) an attempt to commit any of those offences;
- (c) the abetment of any of those offences.

A. Powers of Freezing and Seizure

Section 44 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 provides power to an enforcement agency to issue an order freezing any property where he has reasonable grounds to suspect that an offence under section 4(1) has been committed, for duration of not more than ninety days.

Sections 45 & 46 deals with the seizure of movable property, while section 50 of the Act provides power to the Public Prosecutor, after the expiry of the order issued by the enforcement agency, to issue an order directing the financial institution not to part with, deal in, or otherwise dispose of such movable property or any part of it until the order is revoked or varied.

Section 51 of the Act deals with seizure of immovable property by issuing a Notice of Seizure by the Public Prosecutor. There is also a special provision relating to seizure of a business by an order in writing issued by the enforcement agency under section 52 of the Act.

B. Forfeiture of Property Seized

Section 55 of the Act provides power to the Court to make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where:-

- (a) the offence is proved against the accused; or
- (b) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

Section 56 of the Act, where there is no prosecution or conviction for an offence under section 4(1) of the Act, it provides power to the Court, upon application by the Public Prosecutor before the expiration of twelve months from the date of the freeze or seizure, to make an order for the forfeiture of the property if he is satisfied –

- (a) that the property is the subject matter of or was used in the commission of an offence under Section 4(1) or a terrorism financing offence or is terrorist property ; and
- (b) that there is no purchase in good faith for valuable consideration in respect to the property.

VI. THE MALAYSIAN ANTI-CORRUPTION ACT 2009

The Malaysian Anti-Corruption Act 2009 provides power to seize both movable and immovable property for which there are reasonable grounds to suspect to be the subject matter of an offence or evidence relating to the offence shall be liable to seizure.

A. Forfeiture of Property upon Prosecution for an Offence

In any prosecution for an offence under the Malaysian Anti-Corruption Act 2009, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where –

- (a) the offence is proved against the accused ; or

- (b) the offence is not proved against accused but the court is satisfied -
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

B. Forfeiture of Property where there is no Prosecution for an Offence

Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

Where the Judge to whom an application is made under Subsection (1) is satisfied –

- (c) that the property is the subject matter of or was used in the commission of an offence under this Act; and
- (d) there is no purchase in good faith for valuable consideration in respect to the property,

he shall make an order for the forfeiture of the property.

VII. INTERNATIONAL COOPERATION ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE

A. Extradition Act 1992

Malaysia has entered into treaties with many other countries to allow extradition. These are:

- (i) Extradition Treaty between Great Britain and Siam, done at Bangkok on 4 March 1911.
- (ii) Treaty between the Government of the Republic of Indonesia and the Government of Malaysia relating to Extradition, done at Jakarta on 7 June 1974.
- (iii) Extradition Treaty between the Government of Malaysia and the Government of the United States of America, done at Kuala Lumpur on 3 August 1995.
- (iv) Agreement between the Government of Hong Kong and the Government of Malaysia for the surrender of fugitive offenders, done at Hong Kong on 11 January 1995. Protocol supplementary to the agreement done on 1 November 2007.
- (v) Treaty between the Government of Malaysia and the Government of Australia on Extradition done at Putrajaya, Malaysia on 15 December 2005.

B. Mutual Legal Assistance in Criminal Matters Act 2002

The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including:

- (a) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;
- (b) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence;
- (c) the execution of requests for search and seizure;
- (d) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or foreign serious offence.

Malaysia has entered into treaties with many other countries to provide and obtain mutual legal assistance for freezing, seizure, confiscation and forfeiture. There are:

- (i) Treaty on mutual legal assistance in criminal matters (among like-minded ASEAN Member Countries), done at Kuala Lumpur on 29 November 2004, on 17 January 2006 (Myanmar and Thailand)
- (ii) Treaty between the Government of Malaysia and the Government of Australia on mutual legal assistance in criminal matters, done at Putrajaya, Malaysia on 15 November 2005.
- (iii) Treaty between the Government of Malaysia and the Government of the United States of America on mutual legal assistance in criminal matters, done at Kuala Lumpur on 28 July 2006.
- (iv) Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning mutual legal assistance in criminal matters done at Hong Kong on 17 October 2006.

VIII. CONCLUSION

It is important to provide powers for the enforcement agency to seize and freeze the property of criminals for any confiscation order after conviction. A concerted attack on the economic structure of a criminal organization has the most chance of permanently disabling that organization. By undertaking an in-depth assessment of economics of a criminal organization, we will permit the courts to evaluate the criminal activities from the economic and financial vantage point of the criminals. The courts will then be in the position to reduce those criminals to the economic level that they occupied before they embarked on their criminal enterprise.