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Comparative
Legal Guides**



Practical cross-border insights into business crime law

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Under Article 145(3) of the Federal Constitution, the Attorney General (“AG”) has the power, exercisable at his discretion, to institute, conduct, or discontinue any proceedings for an offence. According to Section 376(1) of the Criminal Procedure Code (“CPC”), the AG shall be the Public Prosecutor and shall control and direct all criminal prosecutions and proceedings under the CPC. While there are no different enforcement authorities at the regional level, the relevant law enforcement authorities at the national level include:

- the Commercial Crime Investigation Department (“CCID”) of the Royal Malaysian Police (“RMP”);
- the Malaysian Anti-Corruption Commission (“MACC”);
- the Companies Commission of Malaysia (“CCM”);
- the Securities Commission (“SC”);
- the Central Bank of Malaysia (“BNM”); and
- the Competition Commission (“MyCC”).

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

Depending on the nature of the offence, different enforcement agencies investigate different types of offences, set out as follows:

- the CCID, as a department within the RMP, is responsible for investigating white-collar crimes, and offences under the Penal Code such as embezzlement, fraud, and cheating;
- the MACC, as the commission established to prevent corruption, is responsible for investigating offences under the Malaysian Anti-Corruption Commission Act 2009 (“Anti-Corruption Act”) such as bribery of an officer of a public body and corruption by gratification;
- the CCM, as the commission established to regulate matters relating to companies and to promote the conduct of business activities within established norms of corporate governance, is responsible for investigating offences under the Companies Act 2016 (“Companies Act”) such as breach of directors’ duties and breach of disclosure obligations;
- the SC, as the commission established to regulate the capital markets in Malaysia, is responsible for investigating offences under the Capital Markets and Services Act 2007 (“CMSA”) such as insider trading and market manipulation;

- the BNM, as the authority responsible for regulating and supervising financial institutions, and as the competent authority empowered to investigate money laundering offences, is responsible for investigating offences under the Financial Services Act 2013 (“FSA”) and the Islamic Financial Services Act 2013 (“IFSA”) such as illegal deposit-taking, as well as anti-money laundering offences under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (“AMLATFA”); and
- the MyCC, as the authority responsible for safeguarding free and fair competition in the markets, is responsible for investigating anti-competitive agreements and abuse of dominant position infringements under the Competition Act 2010 (“Competition Act”).

Prosecution is usually brought by the Attorney General’s Chambers (“AGC”). For certain specialised offences, however, the relevant regulatory agency may conduct prosecution.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Under Section 200 of the CMSA, the SC may institute civil proceedings against persons who have committed the offence of:

- false trading and market rigging under Section 175;
- stock market manipulation under Section 176;
- providing false or misleading statements under Section 177;
- fraudulently inducing persons to deal in securities under Section 178;
- use of manipulative and deceptive devices under Section 179; and
- dissemination of information about illegal transactions under Section 181.

In such circumstances, the SC may recover any amount that does not exceed three times the gross amount of pecuniary gain made, or loss avoided by such person, and claim a civil penalty not exceeding 1 million ringgit. Firstly, the amount recovered will be used to reimburse the SC for all costs of the investigation and the proceedings in respect of the contravention. Secondly, the amount recovered will be used to compensate the persons who have suffered loss or damage as a result of the contravention.

Under Section 234 of the FSA, and Section 245 of the IFSA, the BNM may, by an order in writing, take administrative action to compel compliance against a person in breach of:

- the provisions of the FSA and IFSA and any regulations thereunder;
- any directions issued by the BNM; and
- any standards, conditions, restrictions, specifications, requirements or codes.

The BNM may also impose a monetary penalty not exceeding: 5 million ringgit on a body corporate; three times the gross amount of pecuniary gain made or loss avoided as a result of the breach; or three times the amount of money that is the subject matter of the breach – whichever is greater.

Further, the BNM is also empowered to take civil action under Section 239 of the FSA, and Section 250 of the IFSA for the breaches set out above. In such circumstances, the BNM may recover any amount that shall not exceed three times the gross amount of pecuniary gain made, or loss avoided by such person, and claim a civil penalty not exceeding 25 million ringgit. The amount recovered will, firstly, be used to reimburse the BNM for all costs of the investigation and the proceedings in respect of the contravention. Secondly, it will be used to compensate the persons who have suffered loss or damage as a result of the contravention. Thirdly, it will be paid to the Federal Consolidated Fund unless the court orders for such sums or parts thereof to be given as compensation to persons who have suffered loss.

Under Section 40 of the Competition Act, the MyCC may take administrative action by, *inter alia*: requiring the infringement to be ceased; specifying steps to be taken to bring the infringement to an end; and imposing a financial penalty, which shall not exceed 10% of the worldwide turnover of an enterprise over the period during which an infringement occurred. Section 64 of the Competition Act sets out the right for civil action that may be taken by any person who suffers loss or damage directly as a result of any infringement by way of civil proceedings in court against the infringing party.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In 2021, the MACC charged a company and its director for bribery under Section 17A of the Anti-Corruption Act amounting to approximately USD80,000 to secure a contract. This represents the first-ever charge under the new corporate liability provision of the Act, which came into force on 1 June 2020.

In 2019, criminal charges were brought for offences under the CMSA against 17 directors and former directors at subsidiaries of Goldman Sachs Group Inc (“Goldman Sachs”). This followed from an investigation into the multi-billion-dollar corruption scandal that led to the demise of the sovereign fund, 1Malaysia Development Berhad (“1MDB”). A year later, in 2020, Goldman Sachs entered into a settlement agreement with the Malaysian government that resulted in the payment of USD2.5 billion.

Currently there are 42 charges against the ex-prime minister of Malaysia, for his involvement in the 1MDB scandal for offences ranging from criminal breach of trust to money laundering.

Other ex-senior high-ranking officials have also been implicated in various business crimes. The ex-deputy prime minister has a total of 87 charges pending against him, ranging from money laundering to criminal breach of trust for his actions in certain companies, including charitable organisations, and ex-chairman of Malaysia’s largest pilgrim fund was charged with nine money laundering offences and three bribery offences.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

Criminal offences are prosecuted either in the subordinate courts, which comprise the Magistrates’ Court and the Sessions Court (for less serious offences), or the High Court (for more serious offences).

The Magistrates’ Court may try offences punishable with imprisonment not exceeding 10 years or with a fine only. The Sessions Court may try any offence except those punishable by death. The High Court may try any offence and pass any sentence allowed by law.

The High Court is tasked with hearing appeals from the subordinate courts. The Court of Appeal is tasked to hear appeals from the High Court. The Federal Court, the highest court in Malaysia, may determine appeals from decisions of the Court of Appeal and the High Court, and may confirm, reverse or vary any decision or order a retrial.

There are no specialised criminal courts in Malaysia for offences pertaining to business crimes.

2.2 Is there a right to a jury in business crime trials?

No. Jury trials were abolished in Malaysia in 1995.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused.

• Securities fraud

Under the CMSA, prohibited conduct in relation to securities is set out in Sections 175 to 181, as follows:

- *False Trading and Market-rigging Transactions*
Section 175 prohibits a person from creating, causing to be created or doing anything that is calculated to create:
 - a false or misleading appearance of active trading of;
 - a false or misleading appearance with respect to the market of; and
 - a false or misleading appearance of the price of, any security on a stock market in Malaysia.
- *Stock Market Manipulation*
Section 176 prohibits a person from entering into transactions that have or are likely to have the effect of raising, lowering or pegging, fixing, maintaining or stabilising the price of securities for purposes that may include inducing others to acquire or dispose of the securities of the corporation or related corporation.
- *False or Misleading Statements in Relation to Securities*
Section 177 prohibits the making of a statement or dissemination of information that is false or misleading and is likely to:
 - induce the sale or purchase of securities by the other person; and
 - have the effect of raising or lowering, maintaining or stabilising the market price of securities, regardless of the state of mind of the maker as to the truth of the statement.
- *Fraudulently Inducing Persons to Deal in Securities*
Section 178 prohibits a person from inducing or attempting to induce another person to deal in securities by:
 - making or publishing any statement, promise or forecast that the maker knows to be misleading, false or deceptive;
 - dishonestly concealing facts;
 - recklessly making or publishing dishonestly or otherwise any statement of promise or forecast that is misleading, false or deceptive; and
 - recording or storing in, or by means of any mechanical, electronic or other device information that the maker knows to be false or misleading in a material particular.

- *Use of Manipulative and Deceptive Devices*

Section 179 prohibits, in connection with a sale and purchase of securities, a person directly or indirectly:

- using any device, scheme, or artifice to defraud;
- engaging in any act, practice or course of business that operates or will operate as fraud or deceit; and
- making any statement that is untrue.

- *Dissemination of Information About Illegal Transactions*

Section 181 prohibits the circulation or dissemination of a statement or information that indicates that a transaction will affect the price of the securities if that person has entered into the transaction.

Other securities offences under the Companies Act are as follows:

- Fraudulently inducing persons to invest money. This covers a wide range of statements that give a promise or forecast that the person knows to be misleading, false, deceptive, made by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast that is misleading, false, or deceptive, to induce or to attempt another person to enter into or offer to enter into any agreement:
 - with a view of acquiring, disposing, subscribing or underwriting marketable securities or lending or depositing money to or with any corporation; or
 - the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of marketable securities or by reference to fluctuations in the value of the marketable securities.
- Knowingly furnishing a false report or statement to certain categories of persons including the directors or officers of the company, the SC or the stock exchange with the intent to deceive such person is an offence under Section 592.

- **Accounting fraud**

It is an offence under Section 591 of the Companies Act for any person or corporation to make any false or misleading statements in any report, returns, financial statements and other documents under the Companies Act.

Section 477A of the Penal Code makes the falsification of accounts an offence.

- **Insider trading**

The offence of insider trading is dealt with under Sections 183 to 198 of the CMSA. There are two limbs to the prohibition of insider trading. Firstly, any person who possesses “inside information” is prohibited from trading in the relevant securities. Secondly, any person who possesses the “inside information” is prohibited from communicating that information if the insider knows or ought to reasonably know that the other person will or will tend to trade in the relevant security or procure a third party to trade in the relevant security. The penalty for insider trading is a fine of at least 1 million ringgit and imprisonment of up to 10 years.

- **Embezzlement**

Embezzlement is referred to as Criminal Breach of Trust (“CBT”) under the Penal Code and is an offence under Sections 406 to 409. A person commits CBT if the person is entrusted with property or with dominion over that property and dishonestly misappropriates or converts that property for the person’s own use or dishonestly uses or disposes of that property.

The punishment for CBT is imprisonment for a term not exceeding 10 years, whipping, and a fine. Stricter punishments of up to 14 years’ imprisonment are imposed on clerks or servants who are entrusted with dominion over the property and on public servants who face up to 20 years’ imprisonment.

- **Bribery of government officials**

Sections 16 to 23 of the Anti-Corruption Act prescribe the bribery/corruption offences as set out below. They apply to both public officials and to the private sector:

- *Soliciting/Accepting Bribes*

Under Section 16, it is a crime for any person or agent, corruptly, to solicit/accept/agree to accept gratification as an inducement or a reward to do or not to do an act in relation to a transaction or any official act of his or her principal or employer.

- *Offering/Giving Bribes*

Under Section 17, it is a crime for any person, corruptly, to offer/give gratification as an inducement or a reward for any person or agent to do or not to do an act in relation to a transaction or any official act of his or her principal or employer.

- *Making a False Claim*

Under Section 18, any person who gives to an agent, or any agent who gives to his principal/employer, any document that he knows contains false material particulars, which his principal/employer has an interest in, with an intent to deceive/mislead his or her principal/employer, commits the crime of making a false claim.

- *Abuse of Position/Office*

Under Section 19, it is a crime for any officer of a public body to use his or her office or position for gratification by making a decision or doing an act in relation to any matter in which that officer, his family or his associates have an interest in either directly or indirectly.

In relation to an officer of a public body, there is an additional offence under Section 21 of the Anti-Corruption Act for any person to offer to an officer of any public body, or being an officer of any public body, to solicit or accept any gratification as an inducement or a reward for:

- the officer voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to the public body;
- the officer performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any official act;
- the officer aiding in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or
- the officer showing or forbearing to show any favour or disfavour in his capacity as such officer,

notwithstanding that the officer did not have the power, right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the affairs of the public body.

The Anti-Corruption Act also makes it an offence to give, promise or offer, or to agree to give or offer, to any foreign public official, or being a foreign public official, to solicit, accept or obtain, or to agree to accept or attempt to obtain, any gratification as an inducement or reward for, or otherwise on account of such a foreign public official:

- use his or her position to influence any act or decision of the foreign state or public international organisation for which the official performs any official duties;
- perform, having done or forborne to do, or abstain from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any of his or her official duties; or
- aid in procuring or preventing the granting of any contract for the benefit of any person,

notwithstanding that the foreign public official did not have the power, right or opportunity so to do, show or forbear, or

accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the scope of his or her official duty.

An attempt, an abetment of or a criminal conspiracy to commit any of the above offences is also an offence, as is dealing with, using, holding, receiving or concealing any property that was the subject matter of an offence indicated above.

• Criminal anti-competition

Competition law infringements do not carry criminal penalties in Malaysia. It is a criminal offence, however, to obstruct investigations in respect of competition law infringements.

• Cartels and other competition offences

The Competition Act sets out two anti-competitive practices. The first being entering into an anti-competitive agreement, and the second being the abuse of a dominant position.

■ *Anti-competitive Agreement*

Under Section 4 of the Competition Act:

- A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.
- Horizontal agreements that have the object of (i) fixing prices or trading conditions, (ii) sharing market or sources of supply, (iii) limiting or controlling production or market access, or (iv) performing the act of bid rigging, are deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services. Once this is invoked, the burden of proof shifts to the infringing party to show that the agreement did not have the object of significantly preventing, restricting, or distorting competition.

An enterprise may seek relief of liability based on Section 5 of the Competition Act if the following requirements are met:

- there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

■ *Abuse of Dominant Position*

Under Section 10 of the Competition Act:

- An enterprise is prohibited from engaging, whether independently or collectively, in any conduct that amounts to an abuse of a dominant position in any market for goods or services.
- An abuse of a dominant position may include, *inter alia*: directly or indirectly imposing unfair purchase or selling prices; limiting control or supply of production; applying different trading conditions to equivalent transactions; and predatory behaviour towards competitors.

A market share of 60% is indicative of dominance. However, the MyCC will also look at other factors such as the dominant enterprise's ability to act without concern for its competitor's

responses. Mere dominance alone is not an infringement; the dominance must be accompanied by abuse.

Under Section 10(3) of the Competition Act, a dominant enterprise is not prohibited from taking steps that have reasonable commercial justification or represent a reasonable commercial response to the market entry or market conduct of a competitor.

• Tax crimes

The key offences under the Income Tax Act 1967 are highlighted below:

- Failure to furnish returns or give notice of chargeability under Section 112.
- Providing incorrect returns under Sections 113 and 113A.
- Wilful evasion of tax under Section 114.
- Leaving Malaysia without payment of tax under Section 115.
- Failure to keep records without reasonable excuse under Section 119A.

• Government-contracting fraud

There are no specific provisions in relation to government-contracting fraud. However, offences under the Penal Code, the Companies Act and the Anti-Corruption Act as highlighted above would be applicable.

• Environmental crimes

The Environmental Quality Act 1974 ("Environmental Quality Act") is the relevant legislation related to the prevention, abatement, control of pollution and enhancement of the environment in Malaysia. The Environmental Quality Act restricts the discharge of waste into the environment and sets out a number of requirements such as the provision of licences for emissions or discharge of any environmentally hazardous substances, pollutants or wastes into the atmosphere under Section 22, and the requirement for environmental impact assessment reports under Section 34A.

• Campaign-finance/election law

The corruption-related offences under the Election Offences Act 1954 include:

- the offence of personation (i.e., the application for and use of duplicate ballot forms);
- the offence of treating (i.e., the provision or offer of food and refreshments to voters to sway votes or decisions);
- the use of undue influence or threats to procure a vote and/or to cause someone to refrain from voting;
- the use of money, gifts or such other valuable consideration to procure votes and/or cause someone to refrain from voting;
- the unlawful nomination and withdrawal of candidacy in relation to an election process;
- the making or publishing of false statements for the purpose of affecting the return of any candidate;
- the making of false statements on the withdrawal of any other candidates; and
- the submission of false election claims.

• Market manipulation in connection with the sale of derivatives

Section 205 of the CMSA criminalises the manipulation of prices of derivatives and cornering. Section 205 provides that no person shall:

- manipulate or attempt to manipulate the price of derivatives that may be dealt in on a derivatives market, or of any underlying instrument that is the subject of such derivatives; or
- corner, or attempt to corner, any underlying instrument that is the subject of a derivative.

• Money laundering or wire fraud

Under the AMLATFA, a person commits a money laundering offence if the person:

- engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;
- acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;
- removes from, or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or
- 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 an unlawful activity or instrumentalities of an offence.

• Cybersecurity and data protection law

The Personal Data Protection Act 2010 (“PDPA”) criminalises obtaining or disclosing personal data without consent.

• Trade sanctions and export control violations

As a member state of the United Nations, Malaysia complies with all sanctions measures imposed by the United Nations Security Council.

Export control comes under the ambit of the Customs Act 1967 (“Customs Act”) and the Strategic Trade Act 2010 (“STA”). The list of prohibited exports is contained in the Customs (Prohibition of Exports) Order 2017. The STA controls the export of sensitive technology and materials in order to combat terrorism, nuclear proliferation and the spread of weapons of mass destruction.

• Any other crime of particular interest in your jurisdiction

The Customs Act makes it an offence for both an offeror and the customs officers or any other person employed for the prevention of smuggling to:

- make any collusive seizure or deliver up or make any agreement to deliver up or not to seize any vessel or aircraft or other means of conveyance, or any goods liable to seizure;
- give, offer, promise or procure and correspondingly to accept, agree to accept, or attempt to obtain, any bribe, gratuity, recompense or reward for the neglect or non-performance of the customs officer or person so employed for the prevention of smuggling’s duty; or
- conspire or connive with any person to import or export or be in any way concerned in the importation or exportation of any goods liable to customs duties or any goods prohibited to be imported or exported for the purpose of seizing any vessel, aircraft or conveyance or any goods and obtaining any reward for such seizure or otherwise.

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Inchoate offences such as attempt, abatement and criminal conspiracy are recognised under the Penal Code for certain types of offences. Therefore, a person may be liable for attempting to commit a crime – even if it is not completed. See question 3.1 above.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee’s conduct be imputed to the entity?

Under the Interpretation Acts 1948 and 1967, a person is defined to include a “body corporate”. Strictly speaking, therefore, whenever the term “person” is used in legislation – as often is the case – it would encapsulate a body corporate.

The conduct of an employee will be imputed to the entity if it can be shown that the employee was the directing mind and will of the company.

One such example is Section 367(1) of the CMSA, which provides that where an offence has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative or was purporting to act in such capacity, is deemed to have committed that offence unless he is able to prove that the offence was committed without his consent or connivance and that all diligence was exercised to prevent the commission of the offence.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

The principle of separate legal liability applies in Malaysia. However, certain statutes impose personal liability on the officer of the company. A key provision, Section 17A of the Anti-Corruption Act, which came into force on 1 June 2020, has been enacted to introduce corporate liability for corruption offences. It provides that a commercial organisation commits an offence if any person associated with the commercial organisation commits a corrupt act in order to obtain or retain business or an advantage in the conduct of business for the commercial organisation.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

The discretion to prosecute lies solely with the AG. There are no publicly available policies or guidelines in respect of this matter. See question 1.1 above.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

As the company is its own legal person, the company will continue to be liable.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

There are no limitations periods for criminal offences under Malaysian law.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

This is not applicable in Malaysia.

5.3 Can the limitations period be tolled? If so, how?

This is not applicable in Malaysia.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

The general position is that Malaysian enforcement agencies do not have the jurisdiction to enforce their authority outside Malaysia. However, Section 3(2) of the Competition Act provides that the Act applies to any commercial activity transacted outside Malaysia that has an effect on competition in any market in Malaysia. Therefore, in theory, it appears that the Act could apply to acts carried out outside the jurisdiction, though there have been no infringements found on this basis thus far.

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Most investigations are initiated based on complaints or reports made to the relevant authorities, although, in some cases, the authorities are at liberty to initiate investigations based on their own volition. Each authority has its own criteria to adhere to before initiating an investigation.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The mutual assistance in the Criminal Matters Act 2002 sets out the mechanisms for cooperation with foreign enforcement agencies for criminal matters. The Act sets out the procedures to request for mutual assistance under Sections 17 and 18, and circumstances where a refusal of assistance may be warranted under Section 20.

There is no publicly available data on the usage and level of cooperation under the Act, though the mutual assistance is primarily used for serious criminal offences.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

Generally, investigation bodies have the power to:

- conduct searches and seize documents, including conducting “dawn raids”;
- make arrests;
- compel the production of documents; and
- examine witnesses.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

The government may compel a company under investigation to produce documents to assist in an investigation. Failure to do so would result in the obstruction of an investigation, which is a criminal offence. The power to raid a company under investigation and seize documents may be carried out with a search warrant, or without a search warrant if there is reason to believe that the delay in obtaining a warrant would adversely affect the investigation or that evidence may be destroyed.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

In respect of protections against production or seizure of documents, there are generally two types of legal privilege that can be asserted. The first is legal advice privilege. The second is litigation privilege.

Legal advice privilege is codified under Section 126 of the Evidence Act 1950, and relates to the provision of legal advice by an attorney. This covers any legal advice or communications between an attorney and his or her client. Under Malaysian law, legal advice privilege does not extend to in-house legal counsel.

On the other hand, litigation privilege exists in Malaysia by virtue of common law. In order to determine whether litigation privilege applies, it must be established that litigation was apprehended or pending when the document was obtained, and that the document was prepared for the dominant purpose of litigation. As litigation privilege is derived from common law, litigation privilege may apply to in-house legal counsel – though this position remains to be tested by the Malaysian courts.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) that may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Under the PDPA, subject to certain exceptions, data users are generally required to obtain a data subject's consent for the processing (which includes collection and disclosure) of his or her personal data. There are additional data protection obligations, including, for example, a requirement to notify data subjects regarding the purpose for which their personal data are collected and a requirement to maintain a list of any personal data disclosures to third parties.

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

See questions 7.1 and 7.2 above.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

See questions 7.1 and 7.2 above.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

Under Section 111 of the CPC, a person who appears to be acquainted with the circumstances of a case shall be required to attend as a witness if compelled. Failure to do so would result in the issuance of an arrest warrant to secure the person's attendance. See question 7.2 above.

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

See questions 7.2 and 7.7 above.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Section 112(2) of the CPC provides that a person shall be bound to answer all questions relating to the case put to him, provided that the person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge.

There is no right to be represented by an attorney during questioning. The accused has the right to silence during the police investigation stage and throughout the trial. No adverse inference can be drawn against him for exercising his rights to silence – though if the prosecution has made out its case, it would be difficult for the accused to raise his defence by remaining silent.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are initiated upon a complaint being made, an investigation being conducted and a charge being issued against the accused, which may or may not result in an arrest.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

See question 1.1 above.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

This is not applicable in Malaysia.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

This is not applicable in Malaysia.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

This is not applicable in Malaysia.

8.6 Can an individual or corporate commence a private prosecution? If so, can they privately prosecute business crime offences?

An individual or corporation cannot commence a private prosecution. However, depending on the circumstances, an individual or corporation may commence a civil action in situations where losses have been suffered.

9 Burden of Proof

9.1 For each element of the business crimes identified above in section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Generally, the prosecution bears the burden to prove the offence. The defence bears the burden to prove an affirmative defence.

9.2 What is the standard of proof that the party with the burden must satisfy?

For criminal offences – beyond reasonable doubt.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The trial judge is the arbiter of fact.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Under Section 120A of the Penal Code, when two or more persons agree to do, or cause to be done, an illegal act, or an act that is not illegal, by illegal means, such an agreement is designated a criminal conspiracy. See question 3.2 above.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Criminal offences generally require the prosecution to establish that the accused had the intention to commit the offence.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

No, ignorance of the law is not a defence.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

No, but the lack of knowledge is considered when determining the state of mind/intention of the accused.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Generally, there is a duty for a person who is aware that a crime has been committed to report it. Further, for example, under the Anti-Corruption Act, failure to report bribery when aware of the same is a criminal offence. This also applies under the AMLATFA where reporting instructions are required to make suspicious transaction reports for specific situations under the Act.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency

or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?

Generally, no. Under Section 41 of the Competition Act, however, a reduction of up to a maximum of 100% of any penalties that would otherwise have been imposed may be available in cases where the enterprise has admitted to entering a prohibited horizontal anti-competitive agreement and provided information and cooperation that have significantly assisted the investigation.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

See question 13.1 above.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

Plea bargaining is provided for under Section 172C of the CPC and operates as follows:

- An accused charged with an offence may make an application to the court where the offence is tried for plea bargaining.
- Upon receipt of the application, the court shall notify the Public Prosecutor and the accused to appear before the court for the hearing of the application.
- At the hearing, the court will, *in camera*, examine whether the accused made the application voluntarily.
- If the court is of the opinion that the application is made involuntarily, the court shall dismiss the application and the case shall proceed before another court.
- If the court is of the opinion that the application is made voluntarily, the Public Prosecutor and the accused shall mutually agree upon a satisfactory disposition of the case.
- If the Public Prosecutor and the accused reach a satisfactory disposition of the case, the court shall give effect to that satisfactory disposition.
- If no satisfactory disposition is reached, the court shall record the observation and the case shall proceed before another court.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

See question 14.1 above.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

The courts retain the discretion for sentencing and will look at aggravating factors and mitigating factors relevant to the case.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

Usually when sentencing corporations, the courts will impose higher fines and take into account factors such as the turnover and profit of the corporation.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Yes, these verdicts are appealable.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

Yes. Both the prosecution and the defence may appeal.

16.3 What is the appellate court's standard of review?

The appellate court may review findings of facts and law, though findings of facts are not usually overturned.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

The appellate court may quash a conviction and either the defendant will be acquitted or the case will be sent for retrial. See question 2.1 above.



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