

MALAYSIA ANTI-CORRUPTION COMMISSION: EFFECTIVE FINANCIAL INVESTIGATION AND ANTI-MONEY-LAUNDERING MEASURES FOR CONFISCATION AND ASSET RECOVERY TO COUNTER NEW AND EMERGING CORRUPTION THREATS

*Shuhaimi Man**

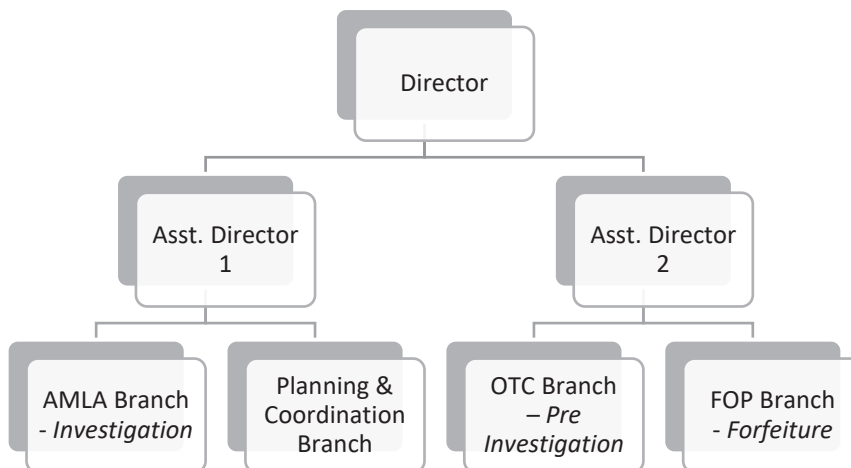
I. INTRODUCTION

Money-laundering is a growing crime this decade. According to a report from the Washington-based Global Financial Integrity Report, Malaysia is ranked fifth in the world with US \$ 39.49 billion in illegal money-laundering. While there have been various steps taken by the authorities to address this problem, the number of money-laundering cases has increased in tandem with the increase in other crimes, and this trend is not only happening in Malaysia but also worldwide. To further support this point, statistical data shows that money-laundering from developing countries is increasing by an average of 9.4 per cent per year.

Serious attention to money-laundering activities began with the signing of the United Nations Convention on Transnational Crime in Palermo Italy in December 2000 (UN 2004). All the countries involved have sought to ensure that the essence of this convention is implemented in their respective countries. This convention provides a framework for participating countries in promoting greater cooperation to prevent and address cross-border crime more effectively.

II. SEGREGATION OF TASKS IN THE AML DIVISION OF THE MACC

AML Division Chart



* Anti-Money-Laundering Division, Malaysia Anti-Corruption Commission, Malaysia.

According to the organizational chart of the AML Division of the MACC (AML Division), there is a separation of duties at each branch within the AML division.

The AMLA branch of the AML Division (the AMLA branch) is responsible to investigate corruption-related money-laundering offences under the AMLATFPUAA Act 2001.

The Asset Recovery Branch of the AML Division (the Asset Recovery branch) is responsible to conduct forfeiture of property in relation to corruption and money-laundering, monitor the expiry of seizure orders and progress of the forfeiture proceedings, and produce reports on the status of all properties under its purview.

The Planning & Coordinating Branch of the AML Division (the Planning & Coordinating branch) is responsible for providing statistics and producing reports required by the National Coordination Committee in Combatting ML/TF for the purpose of a Follow Up Report and Follow-up Assessment on the implementation of the FATF Forty Recommendations, scheduled to be held in 2020. It is also responsible to ensure that the MACC conducts the corruption risk assessment for the country for the period from 2016 to 2018. With an additional scope of work in administration and confidentiality, this section covers the management and coordination of records applications with FIED (Cash Threshold Report (CTR), Suspicious Transaction Report (STR) and International Transfer Transactions).

Meanwhile the OTC Branch is conducting pre-investigation work. The primary focus of the OTC is scrutinization and examination of information obtained from various sources for profiling of the subject and associates, asset identification and tracing, and case risk assessment.

III. OBJECTIVES OF THE AML DIVISION OF THE MACC

The focus of the AML Division is to disrupt and dismantle corruption and related money-laundering activities via two (2) main objectives, as follows:

- To punish offenders/associates;
- To recover and confiscate stolen assets.

A. To Punish Offenders/Associates

Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority or of those “in whose name” the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties. We at the MACC want to emphasize that punishment serves to teach offenders a lesson so that in the process of being punished and being made aware that a crime violated communal values, they will come to see what is good and choose it in the future.

B. To Recover and Confiscate Assets

Stolen assets can be hidden either domestically or abroad. Such assets are often hidden in banks located in the financial centres of developed countries, although financial havens have begun to

appear in emerging market countries as well. Further, multinational corporations from developed countries are often the source of bribes paid to public officials in developing countries. The crimes of bribery, corruption, and money-laundering (ML) are inextricably linked; indeed, ML, understood as hiding or obscuring the source, ownership, control, and movement of assets, could be seen as the last link in a long chain of corrupt acts. ML seeks to lower the chances of detecting stolen funds, as well as breaking the direct link between the kleptocrat or politically exposed person (PEP) and the stolen assets by disguising ownership.

The MACC is also aggressively collaborating with the Financial Intelligence Unit, other Law Enforcement Agencies and international authorities to share expertise and information to expedite investigations and produce quality investigative papers. In addition, the MACC has sought to recover movable or immovable property arising from illegal activities. By conducting comprehensive investigations such as freezing assets and seizing criminals' property, the MACC hopes to cripple these criminal activities as their financial resources are seized and frozen.

Integrated financial investigation is an essential element of any strategy for targeting proceeds from crime. The investigative process is the core activity, forming the basis for any asset recovery effort, asset recovery (particularly at an international level) involving an overlapping of anti-corruption, anti-money-laundering and broader law enforcement agendas. A jurisdiction where funds have been secreted will not confiscate or repatriate the assets to the country of origin unless evidence is presented, linking them to an illegal activity. This evidence must, furthermore, be admissible in court proceedings. As a preliminary activity to the recovery of stolen assets, the identification and tracking of the proceeds of crime and securing the property for final confiscation is an essential part of the process.

This is a demanding task which should be conducted in parallel with the investigation of the criminal offence generating material benefit. It requires intense cooperation between law enforcement agencies or those tasked with tracing assets, Financial Intelligence Units and, in most instances, the prosecutor. Where an investigation focuses, for example, on a public official's receipt of bribes or otherwise unlawful financial enrichment, this will require the involvement of experienced investigators in gathering and analysing financial evidence. In many instances, it will also require the involvement of a forensic accountant, i.e. an expert, to assist in unravelling complex financial transactions, and an understanding of the role played by gatekeepers in assisting (sometimes unwittingly) criminals disposing of their criminal profits.

IV. STRATEGIES TOWARD EFFECTIVE INVESTIGATION & CONFISCATION

A. Strong Collaboration with FIUs & Domestic LEAs through Exchange of Information

The MACC collaborates with FIUs, domestic and international law enforcement agencies and NGOs through exchange of information to foster understanding and share expertise in combating corruption and money-laundering. Among the key points for the collaboration are:

- Sharing of expertise and information in the areas of operations, prevention and training; and
- Implementing capacity-building programmes to boost capability in combating corruption.



Domestic collaboration

- Public Private Partnership (MyFINet - FIU, MACC & Reporting Institutions)
- A member of the National Coordination Committee on ML/TF
- A member of special taskforce on IMDB



International taskforce

- Grand corruption involving multiple jurisdictions
- 1. Effective platform for clarification of facts
- 2. Sharing of Information & documents prior to MLA
- 3. Overcoming legal impediments



Introduction of new & proposed new provision

- Malaysian Anti-Corruption Act 2009
- New Section 17A – Corporate Liability
- Proposed new section that will criminalize wrongful declaration of beneficiary ownership information in government procurement



Integrity Unit

- Requirement to set up Integrity Unit within Government Ministry, Agencies & Government Link Companies

B. International Taskforce

MACC participates in a wide range of formal and informal task forces, including multi-agency task forces. Multi-agency task forces involve a broad range of partners working together to disrupt criminal enterprises through intelligence-led responses. Internationally, the MACC is working closely with the Department of Justice (DOJ), FBI, ICAC Hong Kong; Egmont Group; Anti-Corruption Bureau (BMR), Brunei Darussalam; Corrupt Practice Investigation Bureau (CPIB), Singapore; Commission on Corruption Eradication (KPK), Indonesia; Government Inspectorate of Viet Nam (GIV); National Anti-Corruption Commission (NACC), Thailand; International Criminal Police Organization (INTERPOL) and others aim to share information, Joint Legal Aid (MLA) and share ideas or opinions in conducting investigations.

C. Introduction of New and Proposed Provisions

New provisions recommended by MACC:

1. Section 17A of the MACC Act 2009–Corporate Liability Offence for Corruption

The amendment to the Malaysian Anti-Corruption Act 2009 to include this new provision was tabled in and passed by the Malaysian Parliament on 4 April 2018 with the Royal assent granted on 27 April 2018. The Bill introduces a new strict liability offence on corporations for failing to prevent bribery and shifts the burden of proof to the corporation to establish that it has adequate measures in place to prevent corruption. The corporation commits an offence if a “person associated with the commercial organisation” corruptly gives, agrees to give, promises or offers to any person gratification with the intent to secure business or an advantage for the commercial organization. The penalties could be in the form of a fine of not less than ten times the value of the gratification (if capable of being valued), or RM 1 million, whichever is higher, or imprisonment for a term not exceeding 20 years, or both.

2. Declaration of Beneficial Owner

The MACC is proposing a new provision under section 17B of the MACC Act 2009 which makes it an offence for failure to declare the ultimate beneficial owner by any person who enters

into the government procurement process: “*Any person who fails to declare the ultimate beneficiary owner in the government procurement process, has committed an offence under the Act.*” Declaration of a false beneficial owner under any other acts enforceable in Malaysia is to be designated as a prescribed offence under the act.

D. Setting-up Integrity Units

The best public sector governance system and quality work culture are important foundations in raising people's perception of and confidence in their integrity. The Malaysian government is implementing policies to prevent corruption and increase integrity among civil servants. One of them is the establishment of a unit of integrity in the public sector. In this regard, the Government will continue to take steps to strengthen its integrity by ensuring civil servants uphold the principles of integrity and accountability towards better public service.

The establishment of the Integrity Unit was an internal control effort by the agency for managing integrity within the organization. This unit is responsible for the implementation of the following six (6) core functions:

1. Governance
Ensures best governance is implemented;
2. Strengthening Integrity
Ensuring culture, institutionalization and implementation of integrity organization;
3. Detection and Verification
 - (a) Detects and confirms complaints of criminal misconduct as well violations of the conduct and ethics of the organization and ensures appropriate action is taken; and
 - (b) Reporting crime to the responsible law enforcement agency;
4. Complaint Management
Receive and take action on all complaints / information on criminal mischief as well as moral and ethical violations by the organization;
5. Compliance
Ensures compliance with laws and regulations in force; and
6. Discipline
Performs the disciplinary functions of the Disciplinary Board.

Existing functions performed by various parts / branches / units in the agency must be transferred to this Integrity Unit based on the Integrity Unit model designated. The MACC is responsible for implementing agency risk rating to determine the appropriate Integrity Unit model. Risk levels are classified into high, medium or low, and risk rating is required to be performed every three (3) years.

V. TREND AND TYPOLOGIES: CURRENT AND EMERGING



VI. NEW AND EMERGING INVESTIGATION AT THE MACC

In the MACC, there is a branch within the AML Division, called the Operations Target Centre (OTC) that carries out pre-investigation work. The establishment of the OTC serves as the backbone of the Investigation Division at the MACC, especially in cases involving high-profile individuals and of public interest. The focus of pre-investigation work at the OTC is when the information obtained will be examined by analysing information from various angles including risk analysis and subsequently performing profiling to determine whether further investigations are needed before being recommended for further investigation. Pre-investigations carried out by OTC officials require strategic and detailed planning where the actions taken are based on collaborative data obtained from private agencies, overseas enforcement agencies and governments, as well as good analytical measures to determine the effectiveness of effective investigations and meet the targets. The OTC conducted preliminary investigations based on profiling and analysis. OTC officers called Case Analysts (CA) will handle cases with detailed financial and data analysis. The CA may conduct investigations in accordance with the powers of the Malaysian Anti-Corruption Commission Act 2009 (ASPRM 2009), AMLATFPUAA 2001 and the Criminal Procedure Code (KTJ).

A. Profiling and Analysis

Profiling is a fundamental step in every case investigation where identifying both the target and his associates is crucial and key to the next phase. Proper profiling is very useful in determining the pattern of investigation to be applied. The analysis ensures that the investigation is carried out

efficiently and effectively to obtain the required evidence and testimony and to meet the substance of the crime. At this stage, analysis and evaluation are also conducted to identify the following:

- Other criminal issues;
- Information requirements;
- Witnesses-protection requirements under the Whistle Blower Protection Act 2010 and the Witness Protection Act 2009;
- Requirements for the use of the Mutual Assistance in Criminal Matters Act (MACMA), Mutual Legal Assistance (MLA), bilateral & multilateral arrangements or treaties, good practices, both locally and internationally; and
- Other legal issues.

The analysis also includes aspects of identifying other possible offences that may have been committed such as offences under the Penal Code and other applicable laws. Analysis needs to be made from all angles regarding violations of existing laws and regulations.

1. Profiling

Profiling activities include:

- Profiling personal & corporate information,
- Profiling of criminal information,
- Profiling financial & investment information,
- Property information profiling,
- Vehicle information profiling,
- Communication information profiling,
- Travel information profiling,
- Import / export trade information profiling, and
- Open Source information profiling.

The sources for the above records are available from the database of the Malaysian Anti-Corruption Commission, the Royal Malaysian Police, the Central Bank of Malaysia, the Attorney General's Chambers (Special Task Force) and relevant government and private agencies. The above agencies will also act as the data centres where the latest data are housed on their own or through the tap of the relevant agencies.

2. Financial Analysis

In addition to the above profiling, financial and investment analysis will be conducted on Cash Threshold Reports (CTR) and Suspicious Transaction Reports (STR), which contain data obtained from the Financial Intelligence Unit, including account statements and cheques provided by financial institutions.

3. Targeting Analysis

In addition to the profiling stage above, the data obtained will be analysed to identify the background of the target being investigated, to determine the level of risk that will be met before planning appropriate on-the-ground intelligence and open investigations.

VII. REPORTING INSTITUTION

Under this Act, several institutions have been named as reporting institutions that need to report to the competent agency (Central Bank of Malaysia) any suspicious transactions that may have elements of money-laundering. Included in the list of reporting institutions are banks, currency exchange agencies, insurance brokers, Coastal Trustees, the Pilgrims' Board, Malaysian Postal Service, the National Savings Bank, the People's Cooperative Bank of Malaysia Berhad and licensed casinos. In addition, the Securities Commission, stockbrokers, external auditors, lawyers and company secretaries also fall into the category of parties who are required to report any suspicious transactions. In addition, banks have also been directed to conduct customer due diligence checks to ensure that criminals cannot use financial institutions in Malaysia for the purpose of money-laundering or terrorism financing.

VIII. OBSCURED BENEFICIAL OWNERSHIP

Increasingly, sophisticated criminals seek access to the country's financial system by masking the nature, purpose or ownership of their accounts and the sources of their income through the use of front companies, shell companies or nominee accounts with unknown beneficial owners. Front companies typically combine illicit proceeds with lawful proceeds from legitimate business operations, obscuring the source, ownership and control of the illegal funds. Shell companies typically have no physical operations or assets and may be used only to hold property rights or financial assets. Nominee-held "funnel accounts" may be used to make structured deposits in multiple geographic locations and corresponding structured withdrawals in other locations. All of these methods obscure the true owners and sources of funds.

IX. CASE STUDY

The information comes from a financial analysis conducted by the OTC in which the initial investigation found that the first suspect had enjoyed the purchase of luxury goods and the receipt of a check paid by Mr. B2 (Suspect 2), owner of Company XXX Sdn Bhd, YYY Sdn Bhd and ZZZ Sdn Bhd. Initial investigations revealed that the three companies had been awarded projects through the KKK Sports Council (KKK) for a programme under the Ministry of SSS. All projects awarded to the three companies were paid by the KKK from the National Trust Fund's (trust fund) provided by the Ministry of SSS.

Each year the Ministry of SSS will be allocated a total of RM 150 million in funding from the Ministry of Finance (MOF). The allocation of the trust fund will be distributed based on project proposal requests by the agencies under the Ministry of SSS including KKK, the National SSS Institute and more. The approval of this application will be presented at the Trust Fund Management Committee Meeting chaired by the Secretary General of the Ministry of SSS. Suspect 1 was also one of the members of the Trust Fund Management Committee.

Initial investigation also revealed that the three companies owned by Suspect 2 had tender projects from SSS, but the work was not implemented. This is because each payment claim received by the company was paid to Suspect 1 by way of AMEX and credit card repayment and other payments. Based on financial analysis, Suspect 1's accounts were found to have been credited via cheques and cash from the three companies.

In this case, the CA had profiled the individual suspects, directly or indirectly, involved in the commission of the corrupt activities. Then, the CA profiled the suspected individual family members. After identifying individuals and their family members, the CA will review if they have any companies. In addition, the CA also conducted an open source search to identify lifestyle, hobbies and so on. This information was used to identify the suspects and their associates favourite meeting places, favourite places to spend their spare time and other information that might be useful in assisting an open investigation.

Subsequently, the CA obtained financial information from the FIU for financial analysis and tracing. Based on financial and tracing analysis, the CA will be able to identify the patterns and modes of operation of the criminal. After all the profiling and financial information, the CA was able to identify the offences that had been committed and proposed that an open investigation be conducted. The information provided will be used by the investigating officer in conducting an open investigation. This method expedited the investigation process.

X. CONCLUSION

Malaysia has been through difficult times for the past few years due to major issues affecting its efforts to fight corruption; but this difficult episode is not expected to be repeated in the future. Quoting the words of Prime Minister Tun Dr Mahathir bin Mohamad, Malaysia should be known for its integrity and not for corruption. By that, in the face of the challenges of globalization and the political scenario of uncertainty, the Government needs to set its direction through development of an integrated and comprehensive strategic effort to fight corruption. Enforcement agencies also need to increase their expertise in various fields, especially in cases of transnational corruption.