

Can Bank Negara sue 1MDB?

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COMMENT It is a very interesting **statement** that Bank Negara Malaysia unveiled on Monday. From what it said one can infer that 1MDB, our self-styled strategic development company, is not immune to other enforcement, administrative or civil action by the central bank under the Financial Services Act (FSA).

But Bank Negara did not go far enough to outline what can be done, in a clear response to the new attorney-general's assertion that 1MDB has done no criminal wrong under the Exchange Control Act (ECA). The central bank, however, asserts that there were violations under the ECA, especially with respect to disclosure, but conceded that the prerogative to prosecute rests with the attorney-general under the constitution.

Well, before that statement to clarify its position, many of us thought that's the end of matter but clearly that's not the case. Can other actions be taken against 1MDB? And the individuals involved?

What can be done, and cannot? What kind of penalties can be imposed and administrative actions taken? Can Bank Negara sue 1MDB and those responsible at 1MDB? Apparently they can. Let's take a look at the FSA.

Let's start with the more interesting part first. Can Bank Negara sue 1MDB? Yes, there are provisions for civil action in the FSA for the central bank to take action against offending parties.

We will not bore you, dear reader, with the legalese but the FSA is unambiguous about this - Bank Negara can sue a person who has committed an offence even if the person has not been charged in court and the breach proved in a prosecution.

The court may make an order requiring the person to pay an amount not exceeding three times of:

- The gross amount of the gain made or loss avoided, or
- The amount of the breach or non-compliance.

In addition, the court can also order a civil penalty not exceeding RM25 million and direct the person to take measures to remedy the fault.

The court may make an order against a person who is the director, controller, officer or partner, or was purporting to act in any such capacity; or who is concerned in the management of the affairs of a company. That means directors and officials can be held accountable.

Any sum recovered can be used to reimburse first the central bank for all costs of the proceedings, pay persons aggrieved by the contravention, breach or non-compliance, and thirdly to pay into the federal consolidated fund. That means these sums recovered can eventually go into government coffers.

Permutations and combinations

Considering that US\$1.83 billion (RM7.7 billion at current exchange rates) was involved in terms of 1MDB violations of the ECA, it boggles the mind as to what kind of permutations and combinations are involved here in terms of civil penalties.

It may be more than enough to bankrupt those involved many times over but it is pretty difficult to say whether much of that money can be brought back, especially since 1MDB has clearly indicated it has been spent already.

In terms of administrative actions, the central banks are not exactly tied as well. It can order persons in breach to comply with the requirements of the FSA and impose monetary penalty as well. But the penalty is not huge - not exceeding RM5 million for a company and RM1 million for an individual.

But there also seems to be a provision for the monetary penalty to be an amount which shall not exceed three times the pecuniary gain made or loss avoided by the person, or three times the amount of money which is the subject of the breach. We are not legal eagles but we seem to think that here, too, the amounts involved might be mind boggling to say the least.

And what more, in this case it seems to indicate that the penalty can be purely an administrative decision - no need to go to the courts - once the breach is established. That puts, without a doubt, a considerable amount of power in the hands of the central bank.

Again any money paid in will go into and form part of the Federal Consolidated Fund. If a person fails to pay a monetary penalty imposed by the central bank, the penalty imposed may be sued for and recovered as a civil debt due to the government.

How absolutely interesting and fascinating. Now one has to wait and see what Bank Negara chooses to do under administrative and civil powers given to it under the FSA and how much of the powers it chooses to exercise.

And what remedy will 1MDB have with respect to these measures if Bank Negara should choose to employ them? Presumably civil action will be handled by the normal due process everyone has to go through in our judicial system. This may be quite lengthy, prolonged and controversial.

But what can 1MDB or any other aggrieved party do in terms of administrative actions? There is a provision in the FSA to appeal within 21 days to the Monetary Penalty Review

Committee. This committee shall consist of not less than three but not more than five members appointed by the finance minister from among non-executive directors of the bank or other persons. This could prove to be an escape clause.

The net result of all these is that Bank Negara still has measures that it can take to hold 1MDB to account for at least some transgressions which comes under its ambit, despite the attorney-general's refusal to prosecute under the ECA.

I suppose one has to be thankful for small mercies.

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