

Dear valued clients and business partners,

We are pleased to highlight the following legal updates for October 2018.

INTELLECTUAL PROPERTY

Malaysia — Competition Law and IP

The Malaysian **Competition Act 2010** (“CA”), which has been in force for the last six years, prohibits anti-competitive and abusive practices which would have an effect on competition in any market in Malaysia, irrespective of whether the commercial activity was carried out within or outside of Malaysia.

The Malaysia Competition Commission (“MyCC”), an independent body established under the CA, is empowered to enforce the CA and issue and publish guidelines in relation to the implementation and enforcement of competition laws.

A commonly stated objective of competition law is to enhance the process of competition and to increase economic efficiency with a view to ultimately benefit consumers with competitive prices, higher quality products and services and wider choices. It essentially seeks to prohibit or control cartels, monopolies and abuses of dominance.

It is well known that IP rights generally enjoy a special status in that IP rights can have certain monopolistic features as the law generally recognises that there are justifications for such rights. Competition law operates to exercise IP

rights within the limits and boundary of the exclusivity that IP rights give.

A balance needs to be struck as to whether the behavior of the IP owner in the exercise of these IP rights is anti-competitive so that both competition and IP can co-exist and the rights of the IP owners and that of the consumers are protected.

Recently, the MyCC issued draft IP and Competition guidelines (“Draft Guidelines”) and has welcomed public feedback on the guidelines which is hoped to address many of the uncertainties arising from this complex interface.

There are essentially three key prohibitions under the CA, that is:

- anti-competitive horizontal between enterprises;
- anti-competitive vertical agreements between enterprises; and
- abuse of dominance.

Horizontal agreements such as agreements between enterprises at the same level of the production or distribution chain (such as between IP owners of competitors or potential competitors) which are prohibited would include price fixing, market sharing, bid rigging, controlling market access and production.

Prohibited vertical agreements are essentially agreements made between enterprises which operate at different levels in the production or distribution chain which are anti-competitive in nature and would include certain distribution, supply, licensing and contract manufacturing agreements.

Anti-competitive terms to look out for would include terms which impose exclusive distribution rights in one territory, obligations to buy from a single supplier, market partitioning, tying and bundling and resale price maintenance.

In the Draft Guidelines, an exclusive licence by the IP licensor will not infringe the CA unless the licence is coupled with anti-competitive conditions such as price fixing and tying/bundling.

An enterprise would be in a “*dominant position*” if it possesses a significant power to adjust prices, outputs or trading terms without effective constraint from competitors or potential competitors. The percentage of market share of the company would not necessarily be conclusive in determining whether the company is in a dominant position. It is stated in the Draft Guidelines that the normal exercise of IP rights by an IP owner will not constitute abuse.

An abuse of dominance could occur in two ways, either through exploitative conduct or through exclusionary conduct.

Exploitative conduct under the Draft Guidelines are attempts by a dominant enterprise to use the opportunities provided by its market strength in order to harm customers directly. An example would be an IP owner increasing the price above competitive level. Such an assessment of anti-competitive behaviour must however be balanced with the basis of the high price which should not interfere with the incentive to innovate.

Exclusionary conduct which aims to exclude equally efficient competitors from the market in the context of IP rights must be assessed based on the impact on competition in the market and not on its impact on competitors.

The maximum penalty for infringing the CA is very onerous and is up to 10% of worldwide turnover of the enterprise. There are also numerous criminal provisions for obstruction and breaches of the CA. Hardcore cartels involved in activities such as price fixing, market sharing, bid rigging and limiting production or supply are viewed as the most serious of infringements and, after the coming into force of the CA, the MyCC have imposed penalties on businesses that are found to have infringed the CA.

With a strict competition law regime in place in Malaysia, it has become essential for enterprises operating in Malaysia, and those with IP rights, to regularly monitor and review their business practices and strategies to ensure compliance.

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For further information regarding intellectual property law matters, please contact our [Intellectual Property Practice Group](#).

TAX AND REVENUE

Income tax

The [Inland Revenue Board of Malaysia](#) (“IRB”) has recently issued four new public rulings on:

1. **Accelerated Capital Allowance (Public Ruling No. 7/2018)** — issued on 8 October 2018;
2. **Tax Incentives for Bionexus Status Companies (Public Ruling No. 8/2018)** — issued on 9 October 2018; and
3. **Taxation of Unit Holders of Real Estate Investment Trust / Property Trust Funds (Public Ruling No. 9/2018)** — issued on 12 October 2018.

The IRB has also issued the **Guidelines on Income Tax Exemption for Religious Institution or Organization under the Income Tax (Exemption) Order 2017 (P.U.(A) 52/2017)** on 3 October 2018.

Sales Tax

The following orders have been gazetted between 27 September 2018 and 5 October 2018 (both dates inclusive):

1. the **Sales Tax (Persons Exempted from Payment of Tax) (Amendment) Order 2018** has come into operation on 1 October 2018;

2. the **Sales Tax (Goods Exempted from Tax) (Amendment) (No. 3) Order 2018** has come into operation on 9 October 2018; and
3. the **Sales Tax (Rates of Tax) (Amendment) (No. 2) Order 2018** has come into operation on 9 October 2018.

A revised version of the **General Guide on Sales Tax** (as at 25 September 2018) has been published on the [Royal Malaysian Customs Department's MySST website](#).

Further, a revised version of the Specific Guide on **Sales Tax Return and Payment** (as at 29 September 2018) has also been published on the [Royal Malaysian Customs Department's MySST website](#).

Service Tax

The **Service Tax (Amendment) (No. 2) Regulations 2018** have been gazetted on 5 October 2018 and have come into operation on 9 October 2018.

A revised version of the Specific Guide on **Service Tax Return and Payment** (as at 29 September 2018) has been published on the [Royal Malaysian Customs Department's MySST website](#).

Sales and Service Tax

Further, the following new and revised Specific Guides have also been published on the [Royal Malaysian Customs Department's MySST website](#):

1. **Appendix II: Return SST-02 Guidelines & SST-02 Form** (as at 29 September 2018)
 2. **Special Area** (as at 3 October 2018)
 3. **Customs Ruling** (as at 5 October 2018)
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For further information regarding tax and revenue matters, please contact our [Tax and Revenue Practice Group](#).



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