LEE HISHAMMUDDIN ALLEN & GLEDHILL JULY-SEPTEMBER 2010

Legal Herald

In this issue

Personal Data Protection Act 2010 1

Trends Creating Green Business Opportunities 12

Do Business Promotion Expenses Amount to Entertainment Expenses? An Analysis of *SM*'s Case 16

Competition Law in Malaysia — 'Just' Another Compliance Issue or a Matter for the Board? 22

Partner Profile 30

© 2010. LEE HISHAMMUDDIN ALLEN & GLEDHILL. ALL RIGHTS RESERVED.

DISCLAIMER: The views and opinions attributable to the authors or editors of this publication are not to be imputed to the firm, Lee Hishammuddin Allen & Gledhill. The contents are intended for general information only, and should not be construed as legal advice or legal opinion.

The firm bears no responsibility for any loss that might occur from reliance on information contained in this publication. It is sent to you as a client of or a person with whom Lee Hishammuddin Allen & Gledhill has professional dealings. Please do not reproduce, transmit or distribute the contents therein in any form, or by any means, without prior permission from the firm.

KDN PP 12853/07/2011(028816)

Personal Data Protection Act 2010*

by Foong Cheng Leong and Halina Jael Abu Bakar

After a long wait, the Personal Data Protection Act 2010 [*Act 709*] ("the Act") has finally been passed. The Act seeks to regulate the processing of personal data of individuals involved in commercial transactions by data users so as to provide protection to the individual's personal data, thereby safeguarding the interests of such individual.

The enactment of the Act is timely, for information can be transferred and transmitted seamlessly and sometimes, effortlessly. From the traditional snail mail to the social networking tool of "Tweet-ing", personal and often very important information can now be easily shared.

New technologies and changing market trends are also contributing to the increasingly important role of information in the global market economy. This information, in particular the personal data of individuals involved in commercial transactions, has become a valuable commodity.

Legislation to protect personal data has been enacted in jurisdictions such as Hong Kong, New Zealand, Canada and the European Union. The Act is similar to legislation enacted in those countries.

Notwithstanding the passing of the Act, it will only come into operation once the Minister responsible for the protection of personal data makes a notification in the *Gazette*, and he can appoint different dates for different provisions of the Act.[1] As at the date of this article, the Act has not yet come into operation.

Personal data

Under the Act, "personal data" means "any information in respect of commercial transactions, which —

(a) is being processed wholly or partly by means of equipment operating automatically in response to instructions given for that purpose;

(b) is recorded with the intention that it should wholly or partly be processed by means of such equipment; or

(c) is recorded as part of a relevant filing system or with the intention that it should form part of relevant filing system,

that *relates directly or indirectly to a data subject, who is identified or identifiable* from that information or from that and other information in the

* All references are to this Act, unless otherwise stated

1 Section 1(2)

Printed by D'Attaphouse Sdn Bhd
18-1 Jalan Jalak 2, Taman Sri Bahtera, 56100 Cheras Kuala Lumpur

any sensitive personal data and expression of opinion about the data subject; ...".[2]

In view of the above, personal data may take various forms, such as the following:

(1) name;

(2) passport/identity card number;

(3) telephone number;

(4) photograph;

(5) fingerprint; or

(6) DNA.

There may be other data which are used daily by individuals but may not be considered as "personal data" under the Act. For example, e-mail addresses are used daily by individuals and each e-mail address is unique to an individual. However, an e-mail address per se may not be "personal data" as it may or may not directly identify an individual —user@gmail.com, for instance, does not directly identify an individual. However, an e-mail address with a person's full name directly identifies an individual and may be considered as "personal data".

There may be other data which are used daily by individuals but may not be considered as "personal data" under the Act.

In a recent decision, the Administrative Appeals Board from the Office of the Privacy Commissioner for Personal Data, Hong Kong held that an e-mail address could be personal data.

Operation and application of the Act

The Act only applies to:

(a) personal data which is processed;

(b) any person who processes and any person who has control over or authorizes the processing of any personal data in respect of commercial transactions and such a person is a "data user";[3] and

(c) to a person in respect of personal data if —

(1) the person is established in Malaysia and the personal data is processed, whether or not in the context of that establishment, by that person or any other person employed or engaged by that establishment; or

(2) the person is not established in Malaysia, but uses equipment in Malaysia for processing the personal data otherwise than for the purposes of transit through Malaysia.[4]

A data user is a party:

"... who either alone or jointly or in common with other persons processes any personal data or has control over or authorizes the processing of any personal data, but does not include a data processor".[5]

The Act envisages situations where the processing is shared, that is, more than one data user processes

2 Section 4
3 Section 2(1)
4 Section 2(2)
5 Section 4

the personal data, or when more than one data user is able to access the pool of personal data. As an example, where a number of subsidiary companies in a group share a common database of personal data, each subsidiary company would constitute a "data user" under the Act.

On the other hand, the individual who is the subject of the personal data is a "data subject" under the Act. Following from this, it is arguable that the Act is aimed at protecting the personal data of individuals only, and not that of companies or societies.

The term "process" or "processing" in relation to personal data has a wide meaning to the extent that it can cover almost anything that might or can be done with personal data. It is defined as "collecting, recording, holding or storing the personal data or carrying out any operation or set of operations on the personal data".[6]

A commercial transaction is one:

> "... of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of goods or services, agency, investments, financing, banking and insurance, but does not include a credit reporting business carried out by a credit reporting agency under the Credit Reporting Agencies Act 2010".[7]

At this juncture, it is unclear whether the Act would apply to an employer-employee relationship. A contract of services may be considered as "supply or exchange of services". In an abundance of caution, it is advisable that employers adhere to the Act.

The Act would not apply to:

(a) any personal data processed outside Malaysia unless that personal data is intended to be further processed in Malaysia;[8]

(b) Federal and State Governments;[9] and

(c) any personal data collected for non-commercial transactions.

Processing personal data — Seven principles of the Act

Each data user, in processing personal data, must comply with the following principles:[10]

(a) the General Principle;

(b) the Notice and Choice Principle;

(c) the Disclosure Principle;

(d) the Security Principle;

(e) the Retention Principle;

(f) the Data Integrity Principle; and

(g) the Access Principle.

Failure to abide by the above principles amounts to an offence. Upon conviction, the data user is liable to a fine not exceeding RM300,000 or to imprisonment for a term not exceeding two years or to both.[11]

Below is a summary of each principle:

6 *Ibid*
7 *Ibid*
8 Section 3(2)
9 Section 3(1)
10 Section 5(1)
11 Section 5(2)

Section	Principle	Description
6	General	1. All personal data other than sensitive personal data can only be processed once the data subject has given his consent to the processing of his personal data.[12] 2. All sensitive data processed must be done in accordance with s.40.[13] 3. However, a data user may process personal data about a data subject if the processing is necessary for[14] — (a) the performance of a contract to which the data subject is a party; (b) the taking of steps at the request of the data subject with a view to entering into a contract; (c) compliance with any legal obligation to which the data user is a subject, other than a contractual obligation; (d) the protection of the vital interests of a data subject; (e) the administration of justice; or (f) the exercise of any functions conferred on any person by or under any law. 4. Personal data shall only be processed if it is:[15] (a) for a lawful purpose directly related to an activity of the data user; (b) necessary for or directly related to that purpose; and (c) adequate but not excessive in relation to that purpose. * The Act does not define "consent". Although consent can be expressed or implied, it is our view that a positive act should be taken to communicate consent. For example, a form requiring certain information can contain an option for the individual to allow or forbid the processing of his personal data for purposes other than the subject matter to which the form relates. Consent should not be assumed if the individual fails to state his option or reply to state its consent for the personal data to be processed. Consent, once given, can be withdrawn under s.38.[16]
7	Notice and Choice	1. All data users must inform a data subject, in writing which shall be in the national and English languages: (a) that personal data is being processed and provide a description of it; (b) the purpose of the personal data being collected and processed; (c) the source of the personal data; (d) the data subject's right to request access to and to request correction of the personal data and contact details of the data user if there are any inquiries or complaints on the personal data;

12 Section 6(1)(a)
13 Section 6(1)(b)
14 Section 6(2)
15 Section 6(3)
16 The data subject may withdraw via written notice consent to the processing of personal data of which he is the data subject. The data user shall cease to process the personal data upon receiving the notice. Failure to comply is an offence.

Section	Principle	Description
7	Notice and Choice	(e) the class of third parties to which the data user discloses the personal data; (f) of the choices and means offered to the data subject to limit the processing of personal data, including personal data of other data subjects which may be identified from that personal data; (g) whether it is obligatory or voluntary for the data subject to supply the personal data; and (h) whether it is obligatory for the data subject to supply the personal data and consequences if the data subject fails to provide the personal data. 2. The notice must be given as soon as practicable — (a) When the data subject is asked to provide the personal data; (b) When the data user collects the personal data of the data subject; or (c) In any other case, before the data user uses the personal data for any other reason than that for which the personal data is collected or discloses the personal data to third parties. * The data user must inform the data subject of all the information prescribed in s.7(1), and not just part of it.
8	Disclosure	1. Subject to consent of the data subject, personal data shall not be disclosed: (a) for any other purpose other than the purpose for which it was disclosed at the time of collection or a purpose directly related to the purpose it was disclosed at the time of collection; or (b) to any party other than the third party of the class of third parties stated in the written notice provided by the data user under s.7(1). * Notwithstanding the Disclosure Principle, the Act allows disclosure of personal data in circumstances specified in s.39.
9	Security	1. A data user must take practical steps to protect the personal data from loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction, taking into account: (a) the nature of the personal data and potential harm that would result if it is not protected; (b) the place or location as to where the personal data is stored;

Section	Principle	Description
9	Security	(c) the security measures incorporated in any equipment which stores the personal data; (d) the measures taken to ensure the reliability, integrity and competence of personnel having access to the personal data; and (e) the measures taken to ensure the secure transfer of the personal data. 2. A data user must ensure that the data processer provides sufficient guarantee in respect of the technical and organisational security measures and ensure that reasonable steps are taken to ensure compliance with the security measures. *It is not clear what "practical steps" means under the Act but it arguably should be the measures that can be taken by the data user. Thus, the data user would need to identify the appropriate measures taken in respect of the nature and type of personal data processed in adopting "practical steps" to protect the personal data.
10	Retention	1. The personal data processed shall not be kept longer than necessary for the fulfilment of the purpose. 2. The data user must take all reasonable steps to ensure that all personal data is destroyed or permanently deleted if it is no longer required for the purpose for which it was processed.
11	Data integrity	The data user must take all reasonable steps to ensure that the personal data is accurate, complete, not misleading and kept up-to-date, having regard to the purpose, including any directly related purpose for which the personal data was collected and further processed.
12	Access	A data subject must be provided access to his personal data held by the data user and be able to correct his personal data, except where compliance with a request for such access or correction is refused under the Act.

Disclosure of personal data

Although the Act requires the consent of the data subject before any personal data can be disclosed, s.39 also allows disclosure of personal data in the following circumstances:

(a) the disclosure —

(i) is necessary to prevent crime or for the purpose of investigations; or

(ii) is required or authorized by law or by an order of court.

(b) The data user acted in reasonable belief that he had the legal right to disclose the personal data to another party;

(c) The data user acted in reasonable belief that he would have had the consent of the data subject if the data subject had known of the disclosing of the personal data and the circumstances of such disclosure; or

(d) The disclosure was justified as being in the public interest in the circumstances determined by the Minister.

Sensitive data

Under the Act, a distinction has been made between "sensitive personal data" and "personal data". "Sensitive personal data" is:

> "... any personal data consisting of information as to the physical or mental health or condition of a data subject, his political opinions, his religious beliefs or other beliefs of a similar nature, the commission or alleged commission by him of any offence or any other personal data as the Minister may determine by order published in the *Gazette*".[17]

Any disclosure of sensitive personal data must be done in accordance with s.40 of the Act, which requires a data user to be more careful in processing sensitive personal data.

Due to the nature of sensitive personal data, a higher restriction is imposed for data users in processing it. A data user must not process sensitive personal data unless with the explicit consent of the data subject. While "explicit consent" is not defined in the Act, arguably, the data subject should be required to provide his clear and express consent to the processing of his sensitive personal data.

Notwithstanding the requirement for explicit consent from the data subject, s.40 of the Act also allows the processing of sensitive personal data where:

(a) the processing is necessary —

(i) to exercise or perform any right or obligation which is conferred or imposed by law on the data user in connection with employment;

(ii) in order to protect the vital interests of the data subject or another person, in a case where consent cannot be given by or on behalf of the data subject or the data user cannot reasonably be expected to obtain the consent of the data subject;

(iii) in order to protect the vital interest of another person, in a case where

17 Section 4

consent by or on behalf of the data subject is unreasonably withheld;

(iv) for medical purposes and is undertaken by a healthcare professional;

(v) for any legal proceeding;

(vi) to obtain legal advice;

(vii) for the administration of justice;

(viii) for the exercise of any functions conferred by law; or

(ix) for any purpose as the Minister thinks fit, or

(b) the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

It is an offence to process sensitive data contrary to s.40 of the Act. If convicted, a data user will be liable to a fine not exceeding RM200,000 or to imprisonment for a term not exceeding two years or both.

Registration of data users

Under s.14, the Minister may, by an order published in the *Gazette*, specify a class of data users which must register itself as data users under the Act. At present, there is no such specification.

A data user who wishes to register under the Act must apply to the Personal Data Protection Commissioner[18] ("the Commissioner'), who may register the applicant and issue a certificate of registration, or refuse the application.[19] The Commissioner may also impose conditions or restrictions in the certificate of registration.[20]

The class of data users who must be registered under the Act is unknown at the moment. However, we are of the view that these may be telecommunications, insurance, banking, pharmaceutical and entertainment companies.

On the assumption that a data user falls within the class of data users which must register and fails to do so, yet processes personal data without a certificate of registration, the said data user has committed an offence. This offence, upon conviction, is subject to a fine not exceeding RM500,000 or to an imprisonment for a term not exceeding three years or both.[21]

Personal Data Protection Commissioner

The Commissioner will be appointed by the Minister for the purposes of carrying out the functions and powers assigned under the Act.[22] One of the Commissioner's functions is to receive complaints from the public on any contravention of the Act and to investigate the same. His decision can be appealed by way of an appeal to the Appeal Tribunal.[23]

Transfer of personal data overseas

The Act prohibits the transfer of personal data to a place outside Malaysia unless to such place as specified by the Minister, upon the recommendation of the Commissioner, by notification published in the *Gazette*.

Notwithstanding the said prohibition, a data user

18 Section 15(1)
19 Section 16(1)
20 Section 16(2)
21 Section 16(4)
22 Section 47(1)
23 Section 93

may transfer any personal data to a place outside Malaysia if —

(a) the data subject has given his consent to the transfer;

(b) the transfer is necessary for the performance of a contract between the data subject and the data user;

(c) the transfer is necessary for the conclusion or performance of a contract between the data user and a third party which —

  (i) is entered into at the request of the data subject; or

  (ii) is in the interests of the data subject;

(d) the transfer is for the purpose of any legal proceedings or for the purpose of obtaining legal advice or for establishing, exercising or defending legal rights;

(e) the data user has reasonable grounds for believing that in all circumstances of the case—

  (i) the transfer is for the avoidance or mitigation of adverse action against the data subject;

  (ii) it is not practicable to obtain the consent in writing of the data subject to that transfer; and

  (iii) if it was practicable to obtain such consent, the data subject would have given his consent;

(f) the data user has taken all reasonable precautions and exercised all due diligence to ensure that the personal data will not in that place be processed in any manner which, if that place is Malaysia, would be a contravention of this Act;

(g) the transfer is necessary in order to protect the vital interests of the data subject; or

(h) the transfer is necessary as being in the public interest in circumstances as determined by the Minister.

A data user who contravenes the above prohibition is liable to a fine not exceeding RM300,000 or to imprisonment for a term not exceeding two (2) years or to both.

Right of data subjects

A data subject has various rights to his personal data kept by data users. These are:

Right of access to personal data[24]

An individual is entitled to be informed by a data user whether personal data of which that individual is the data subject is being processed by or on behalf of the data user. A requestor may, upon payment of a prescribed fee, make a data access request in writing to the data user for information of the data subject's personal data that is being processed by or on behalf of the data user and to have communicated to him a copy of the personal data in an intelligible form.

A data user must comply with the request not later than 21 days from the receipt of the request but may refuse to comply with the request under a few cir-

24 Section 30

cumstances. For example, the request does not have enough information for the data user to locate the information.

Right to correct personal data[25]

A data subject has the right to make a data correction request in writing to the data user that the data user makes the necessary correction to the personal data. A data user must comply with the request not later than 21 days from the receipt of the request but may refuse to comply with the request under a few circumstances.

Right to withdraw consent[26]

A data subject may by notice in writing withdraw his consent to the processing of personal data in respect of which he is the data subject. The data user shall upon receiving the notice, cease the processing of the personal data. Failure to comply with this requirement attracts a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding one year or to both.

Right to prevent processing likely to cause damage or distress[27]

A data subject may, at any time by notice in writing to a data user, require the data user at the end of such period as is reasonable in the circumstances, to cease processing any personal data in respect of which he is the data subject if, based on reasons stated by him —

(i) the processing of that personal data or the processing of personal data for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another person; and

(ii) the damage or distress is or would be unwarranted.

The data subject may refuse to comply with the notice under certain circumstances, for example, if the data subject has given consent to the processing of the personal data.

Right to prevent processing for purposes of direct marketing[28]

A data subject may, by notice in writing to a data user, require the data user to cease or not to begin processing his personal data for purposes of direct marketing. "Direct marketing" means the communication by whatever means of any advertising or marketing material which is directed to particular individuals.[29]

Conclusion

The Act provides that where a data user has collected personal data from the data subject or any third party before the date of coming into operation, he shall comply with its provisions within three months from such date.

Notwithstanding the grace period of three months, it is advisable that data users start complying with the provisions of the Act as soon as possible. Any use of personal data by a data user would require consent, hence data subjects should start acquiring consent from data users to use the personal data.

25 Section 34
26 Section 38
27 Section 42
28 Section 43
29 Section 43(5)

Other than the aforesaid, data users may also want to consider the following:

(1) All documents such as customer forms should be reviewed to determine whether they comply with the Act;

(2) Avoid collecting sensitive information;

(3) For companies that deal directly with individuals, designate a special officer to deal with any personal data matters at the ground level;

(4) Appoint a privacy officer such as Chief Privacy Officer to deal with privacy-related matters;

(5) Implement security and procedures to protect personal data from being abused;

(6) Implement procedures to handle customer complaints and announce the same to all customers; and

(7) If a third party is appointed to handle the personal data, ensure that terms and conditions are set out properly to control the process of personal data. **LH-AG**

Foong Cheng Leong
fcl@lh-ag.com

Halina Jael Abu Bakar
hj@lh-ag.com

About the authors

Foong Cheng Leong and **Halina Jael Abu Bakar** are Senior Associates with the Intellectual Property Practice Group and the Transactional Services (Mergers & Acquisitions) Practice Group in the Corporate and Conveyancing Department, respectively.

Trends Creating Green Business Opportunities

by Genelle Chung Sim Yee

The market for eco-friendly products and services is exploding. If you are thinking of starting a new business or need to revamp your existing company, the current climate is ideal for entrepreneurs to enter the green industry and take advantage of new, untouched opportunities.

There are many reasons to be a green entrepreneur, but more importantly, the increasing trend is a solid base for a successful business opportunity. Society has triggered the green movement, which has recently been supported by government and is waiting for businesses to take advantage.

Going green is a big business trend — so big, in fact, that it is not one trend but comprises several. For many, the move is seen as timely as in the 21st century, green technology would encourage the growth of the green revolution, and, at the same time, provide new business opportunities.

"We need to go green. We have to provide enough incentives for the private and public sectors to invest in green technology."

"We need to go green. We have to provide enough incentives for the private and public sectors to invest in green technology," Malaysian prime minister Datuk Seri Najib Razak asserted in July.[1]

Of course, the rapid growth of green business is not without challenges — the three biggest ones of which with regard to environmental sustainability are environmental awareness, renewable energy and cost-effective green technology. Malaysia first ventured into the field with the launch of the National Green Technology Policy in July 2009.

As outlined in Strategic Thrust 1 of the policy,[2] the government's emphasis on energy, building, water and waste management, and transportation sectors aims to harness green technology development in the country, which would be the catalyst to accelerate the national economy and promote sustainable development.

Scheming to go green

As a way forward, the Ministry of Energy, Green Technology and Water (previously the Ministry of Energy, Water and Communications) ("the Ministry") was introduced. A technical arm called the National Green Technology Centre (GreenTech Malaysia) also came into being through a restructuring exercise of the then Malaysia Energy Centre, or Pusat Tenaga Negara.

Green technology research and innovation towards commercialisation would be intensified, and the incentives offered would create strong promotion and public awareness since it is a new sector. To that end, the government has come up with the Green Technology Financing Scheme ("GTFS") amounting to RM1.5 million, which will be disbursed in the form of soft loans to companies that are producers and users of green technology in specific projects

1 "Green technology among priority areas in 2011 Budget" (www.btimes.com.my/Current_News/BTIMES/articles/6GREEN/Article)
2 Issued by the Ministry of Energy, Green Technology and Water (www.kettha.gov.my/en/content/strategic-thrusts)

related to the identified sectors. The government will bear 2% of the total interest/profit rate. In addition, it will provide a guarantee of 60% on the financing amount, effectively covering RM900 million out of the RM1.5 million, via Credit Guarantee Corporation, with the remaining 40% to be borne by participating financial institutions.[3]

"[T]he government is also considering tax incentives such as tax deduction for contribution towards environmental funds and tax breaks for buildings and designs that work harmoniously with nature, details of which will only be unveiled upon presentation of Budget 2011,"[4] the prime minister said in April.

To encourage the use of green technology, in May 2009 Malaysia launched the Green Building Index or GBI, an industry-recognised green rating tool for buildings to promote sustainability in the built environment and raise awareness about environmental issues and our responsibility to future generations.[5] There are two rating tools, non-residential and residential. Buildings are assessed on six criteria[6] and, depending on the scores achieved, then awarded one of four types of ratings: platinum, gold, silver or certified.

Fiscal incentives[7] to stimulate the emergence of green technology activities include:

(a) income tax exemption[8] for the owner of a new or upgraded building awarded with the certificate between 24 October 2009 and 31 December 2014 equal to 100% of additional capital expenditure incurred by him to obtain the GBI certificate; and

(b) stamp duty exemption[9] for the purchaser of a building awarded with the GBI certificate and executes the sale and purchase agreement between 24 October 2009 and 31 December 2014 to the extent of the additional cost incurred to obtain the certificate.

Recognising that effective financial incentives will be crucial in driving business to explore green technology and adopt green practices, the Malaysia Industrial Development Authority ("MIDA") also offers such incentives as:[10]

(a) Tax incentives for renewable energy ("RE")

For companies generating RE for sale and/or for own consumption, pioneer status with tax exemption of 100% of statutory income for a period of 10 years or investment tax allowance of 100% on qualifying capital expenditures incurred within a five-year period, with the allowance to be set off against 100% statutory income for each year of assessment;

(b) Tax incentives for energy conservation ("EC")/energy efficiency ("EE")

For companies providing EC services and/or companies which incur capital expenditure for conserving energy for own consumption, pioneer status with tax exemption of 100% of statutory income for a period of 10 years or investment tax allowance of 100% on quali-

3 There has been talk of establishing another green fund: see www.btimes.com.my/Current_News/BTIMES/articles/PETER12-2/Article/index_html
4 Excerpt from his speech at the Malaysian Green Forum (www.pmo.gov.my/?menu=speech&page=1676&news_id=263&speech_cat=2)
5 See www.greenbuildingindex.org
6 See www.greenbuildingindex.org/how-GBI-works2.html
7 "GBI Tax Incentives: The Valuation Process and the Role of the Quantity Surveyor", by Loo Ming Chee (www.greenbuildingindex.org/Resources/20100317%20-%20The%20Role%20of%20Professionals%20in%20GBI/20100317%20-%20GBI%20Tax%20Incentives%20-%20The%20Valuation%20Process%20and%20Role%20of%20the%20QS%20-%20MC%20Loo.pdf)
8 Income Tax (Exemption) (No 8) Order 2009 under the Income Tax Act 1967
9 Stamp Duty (Exemption) Order 2009 under the Stamp Act 1949
10 "Tax Incentives and Facilities for Renewable Energy and Energy Conservation/Energy Efficiency" by Lim Bee Vian (www.greenbuildingindex.org/Resources/20091116%20-%20GBI%20Update%20On%20Incentives/20091116%20-%20Tax%20Incentives%20And%20Facilities%20Presentation%20(MIDA).pdf)

fying capital expenditures incurred within a five-year period, with the allowance to be set off against 100% statutory income for each year of assessment;

(c) Incentives to reduce green house gases or GHG

Income derived from trading of certified emission reduction certificates are given income tax exemption under the Income Tax Act 1967 [*Act 53*];

(d) Import duty and sale tax exemption

- exemption from import duty and sales tax on imported machinery, equipment, materials, components, spare parts/replacement parts and consumable ("items") are provided under s.14(2) of the Customs Act 1967 [*Act 235*]; and
- exemption from sales tax on the items purchased from local manufacturers are provided under s.10 of the Sales Tax Act 1972 [*Act 64*].

Incentives (a) to (c) apply to applications received by MIDA until 31 December 2010. The project must be implemented within one year from the date of approval of the incentive. Incentive (d) is effective for one year commencing from the date the application is received by MIDA until 31 December 2010.

Eco-labelling

To encourage the spread of green technology, there is also a need to promote greater labelling of environmentally friendly goods and services for easier identification by consumers, such as "Green Building Index", "organic food" and "green tourism".

Through SIRIM[11] and ISO,[12] the government is developing eco-labelling[13] for local products that will be internationally recognised. This can then support its green procurement initiative as well as assist local manufacturers in exporting their products.

Expert assistance sought

Since Malaysia is currently still a newcomer to green technology, it is in need of green technology experts who are willing to share their experience and know-how. More importantly, the country needs RE legislation to start off the capacity building as this will ensure that investments will be secured.

In this regard, the government recently approved the Renewable Energy Policy and Action Plan which will be implemented next year once the institutional framework for the Renewable Energy Law and implementing agency are put in place. Accordingly, the Ministry is drafting a bill on RE that is scheduled to be tabled towards year-end.[14]

Up until 2009, Malaysia had attracted more than RM12 billion in investments from the solar photovoltaic industry through foreign direct investments.

Sustainable living

Among property developers in Malaysia, Sime Darby has embarked on developing EE and sustainable townships, known as the "Sime Darby Idea House" project, following the government's green township

11 SIRIM QAS International Eco-Labelling Scheme
12 "ISO and IEC standard will provide shared international language for energy efficiency and renewables" (www.iso.org/iso/pressrelease.htm?refid=Ref1297)
13 S S Chen, SIRIM Environment & Bioprocess Technology Centre, "Fundamentals of Green Technology", Technology Business Innovation Forum "The Green Technology — New Opportunities for Business", 21 October 2009
14 "Legislation needed to lure green tech investors" (http://biz.thestar.com.my/news/story.asp?sec=business&file=/2010/4/23/business/6111519)

in Putrajaya and Cyberjaya. Some 13,200 houses under construction in those two places will be equipped with EE building materials, such as solar power heating and energy-saving light bulbs.[15]

As stated in the 10th Malaysia Plan, a sewerage treatment plant using green technology will be constructed in Lembah Pantai, Kuala Lumpur, with similar plants to follow throughout the country within the next five years.[16]

Make others green with envy

Following the success of the first Green Energy Asia[17] — reportedly Southeast Asia's biggest expo and conference on green technology — the Ministry is looking forward to welcoming more than 600 participants and renowned local and international experts to the upcoming International Green Technology & Purchasing Conference.[18]

So here they are: the green trends that entrepreneurs can capitalise on to make money while making a difference. With the resources and support available, environmental companies should prove to be cost-effective solutions that last for a long time.

Going green is unlikely to be a passing fad, but the various trends within the green business movement will change direction, creating opportunities for new products and businesses. Entrepreneurs should take advantage of these opportunities for if they play their cards right, leveraging on their innovation and ability to follow current trends, the move could well turn out to be a rewarding venture. So, let's go green! **LH-AG**

Genelle Chung Sim Yee
csy@lh-ag.com

About the author

Genelle Chung Sim Yee is an associate with the Foreign Investment practice group at Lee Hishammuddin Allen & Gledhill

15 "Sime plans green township" (http://biz.thestar.com.my/news/story.asp?file=/2010/4/2/business/5982270&sec=business)
16 See www.btimes.com.my/Current_News/BTIMES/articles/20100610122533/Article/index_html
17 Held at the Kuala Lumpur Convention Centre in June
18 Themed "Green Future: Low Carbon Green Growth", the two-day event will kick off on 15 October (www.gpnm.org/conf/dl/igem_%20brochure.pdf)

Do Business Promotion Expenses Amount to Entertainment Expenses? An Analysis of *SM*'s Case*

by Datuk D P Naban & S Saravana Kumar

Every year, businesses allocate substantial sums of money to promote their business by way of branding, marketing and advertising. The promotion strategies may also regularly involve publicising promotional items to customers and potential customers. From a corporate tax perspective, the issue is whether such business promotion expenses are deductible against the gross income in determining the chargeable income of the business.

Section 33(1) of the Income Tax Act 1967[1] ("the ITA") states that outgoings and expenses wholly and exclusively incurred in the production of income are deductible from the gross income. However, as recognised by the Federal Court in *Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd,*[2] s.33(1) must be read in light of s.39 of the ITA, which expressly prohibits the deduction of certain expenses. Among others, between 1989 and 2003, s.39(1)(l) prohibited the deduction of entertainment expenses unless these fell within one of the provisos to that provision where deduction was permitted.[3]

The word "entertainment" is defined under s.18 of the ITA to include:

(a) the provision of food, drink, recreation or hospitality of any kind; or

(b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of the kind mentioned in paragraph (a),

by a person or an employee of his in connection with a trade or business carried on by that person.

In determining whether the expenses were entertainment or otherwise, the court was of the view that one must examine the true nature of the transaction between the taxpayer and its customers.

In recent years, the Inland Revenue Board ("the IRB") has taken the view that some types of business promotion, like the provision of complimentary items, are entertainment and subject expenses incurred in that respect to the provisions of s.39(1)(*l*) of the ITA.

This issue was resolved in *Aspac Lubricants (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalm Negeri,*[4] where the Court of Appeal held that the complimentary mugs, T-shirts and umbrellas given away by the taxpayer to their customers did not constitute entertainment. The IRB had rejected the expenses incurred for the promotional items on the basis that they were entertainment.

* This article was first published in Q2/2010 edition of Tax Guardian. Tax Guardian is the official journal of the Chartered Tax Institute of Malaysia.

1 [*Act 53*]

2 [1984] 1 CLJ 219

3 Section 39(l)(l) was inserted by s.6 of the Finance Act 1988 [*Act 364*] and took effect from the year of assessment 1989. The subsequent amendment by s.9(a) of the Finance Act 2003 [*Act 631*] allows for half of the entertainment expenses to be deductible expenses from the year of assessment 2004.

4 [2007] 5 CLJ 353

The Court of Appeal, however, held otherwise. In determining whether the expenses were entertainment or otherwise, the court was of the view that one must examine the true nature of the transaction between the taxpayer and its customers. If the taxpayer had incurred the expenses for the sole object of promoting its business, then these could not be described as entertainment.

Despite the decision in *Aspac Lubricants*, the IRB has continued to maintain its position that expenses incurred to provide complimentary promotional items are entertainment expenses.

Recently, in *SM Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri,*[5] the IRB insisted that the airfare and accommodation expenses incurred by the taxpayer in sponsoring doctors for medical conferences constituted entertainment expenses, the sponsorship being a form of entertainment.

As the burden is on the taxpayer to establish the nexus between the business promotion strategy and the production of income and appreciating that this may not be an easy task, this article highlights the grounds argued in *SM* and the lessons to be learnt from that case.

Upon examining the arguments of the taxpayer and the IRB, the Special Commissioners of Income Tax ("the Special Commissioners") in *SM* unanimously ruled in the taxpayer's favour, and held that the sponsorship of the doctors was not a form of entertainment.[6]

***SM*'s case**

In *SM*, the issue was whether the airfare and accommodation expenses incurred by a pharmaceutical company were entertainment expenses. Among others, the taxpayer distributed specialist medications, which could only be sold to the public with a doctor's prescription. The taxpayer was also prohibited by law from advertising those medications to the public.

In light of these restrictions, the taxpayer developed a strategy to promote its products. As the sale of the taxpayer's medications depended on doctor's prescription, the promotion strategy was to approach doctors and educate them on the medical benefits of these products.

The taxpayer sponsored senior doctors for medical conferences that featured the taxpayer's medications. Most of the conferences were held abroad and were organised by the taxpayer's related companies.

Upon returning from the conferences, the senior doctors were invited to comment on the taxpayer's medications at similar conferences organised by the taxpayer in Malaysia. The local conferences were

5 Rayuan No PKCP(R) 26/2008
6 The authors represented the taxpayer in the *SM* case.

attended by other doctors who were not sponsored for the medical conferences held abroad.

At the conferences, the taxpayer's medical representatives interacted with the doctors and impressed upon them the effectiveness of the medications. Brochures and posters of the taxpayer's medications were handed out to the doctors, which in turn were placed by the doctors in clinics and hospitals. This strategy enabled the taxpayer to promote its medications to medical practitioners and the public through the doctors.

In sponsoring the doctors for the conferences organised abroad and locally, the taxpayer incurred airfare and accommodation expenses. The taxpayer treated the said expenses as deductible expenses under s.33(1) of the ITA.

However, subsequent to a tax audit, the IRB treated the expenses as entertainment expenses and rejected them by virtue of s.39(1)(*l*) of the ITA, holding the view that the taxpayer entertained the doctors by sponsoring them for the conferences. The taxpayer, on the other hand, argued that the expenses were incurred solely to promote its business and thus were deductible expenses under s.33(1).

In advancing the taxpayer's case in *SM*, the authors raised the following four grounds to establish that the airfare and accommodation expenses were not entertainment expenses:

(a) promotion of business;

(b) increase in sales;

(c) prohibition from selling and advertising to the public; and

(d) the IRB's inconsistent approach.

(a) Promotion of business

In *Aspac Lubricants*, the Court of Appeal applied the following paragraph from the English Court of Appeal case of *Bentleys, Stokes & Lowless v Beeson*:[7]

> "Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction: an undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purposes for which it has been organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purposes of business, that is, solely with the object of promoting the business or its profit-earning capacity?"

Following *Aspac Lubricants* and *Bentleys*, the question is whether the airfare and accommodation expenses were incurred by the taxpayer for the sole purpose of promoting the taxpayer's business. By sponsoring the doctors for the conferences and or-

7 [1952] 2 All ER 82

ganising the local conferences, the taxpayer in *SM* successfully promoted and sold its medications.

During the trial, the taxpayer's marketing manager testified that the company did not intend to entertain the doctors by sponsoring them for the conferences. The taxpayer's experience has shown that upon participating in the conferences, the doctors prescribed the medications to their patients as they appreciated the effectiveness of the taxpayer's medications. The prescriptions issued by the doctors inevitably increased the sale of the taxpayer's medications. According to the taxpayer, the doctors became the "ambassadors" of their medications, a finding endorsed by the Special Commissioners.

The taxpayer also established that the conferences were related to the medications that it sold and the practitioners attending the conferences were in the field of medicine, which was related to the medications sold by the taxpayer.

The exposure to the taxpayer's medications from the conferences held abroad resulted in senior doctors playing an influential and meaningful role in facilitating the registration of the taxpayer's medications with the Drug Control Authority of the National Pharmaceutical Control Bureau. The registration enabled the taxpayer to sell its medications in Malaysia.

Further, the senior doctors were also instrumental in the listing of the taxpayer's medications with the Ministry of Health, Malaysia. The listing resulted in the ministry purchasing huge volumes of the taxpayer's medications for public hospitals in Malaysia.

(b) Increase in sales

Consequent to sponsoring the doctors and organising the conferences, the taxpayer saw a tremendous increase in the sales of its medications, especially between the years 2001 and 2007.

In 2001, the taxpayer's total sales were worth RM37,405,000. By 2007, this figure had risen to RM61,352,000. It is notable that the taxpayer's evidence that its sales had increased between 2001 and 2007 as a direct result of the promotion strategy was not challenged by the IRB during the trial.

(c) Prohibition from selling and advertising to the public

The taxpayer adopted this promotion strategy as the law[8] prohibited the selling of medications to the public without a doctor's prescription; nor could it advertise the products.[9] However, despite these restrictions, the conferences enabled the taxpayer to indirectly reach the public through the doctors who attended the conferences.

8 Section 18 of the Poisons Act 1952 [*Act 366*]
9 Section 3(1) of the Medicines (Advertisement and Sale) Act 1956 [*Act 290*]

(d) IRB's inconsistent approach

The IRB had also been inconsistent in its approach as it had allowed the deduction of the registration fees for the doctors to attend the conferences, but rejected the airfare and accommodation expenses. Likewise, it had allowed the deduction of "hotel conference package" expenses such as hall rental and meals.

Further, in the past, the IRB had allowed the taxpayer to deduct the airfare and accommodation expenses incurred. There was no explanation from the IRB with regard to its inconsistent approach, although the nature of the conferences and expenses remained the same.

Conclusion

The grounds discussed above clearly illustrate that the taxpayer in *SM* incurred the airfare and accommodation expenses as part of its business promotion strategy. The conferences worked as an effective business strategy for the taxpayer to promote its medications, given the restrictions that it faced.

The doctors had not been sponsored for the conferences because the taxpayer wanted to entertain or be hospitable to them, but for the sole purpose of promoting its medications. This strategy had increased the taxpayer's sales over the years as more and more doctors were prescribing its medications. It had also led to the Ministry of Health purchasing those medications in bulk. During the trial, the IRB was unable to challenge the nexus between the taxpayer's business promotion strategy and the increased sales. The decisions in *Aspac Lubricants* and *SM* illustrate that the provision of promotional items or sponsorships do not necessarily amount to entertainment.

Having said that, the authors wish to highlight that early this year, the High Court in another case held that the medical congress expenses incurred by a taxpayer were entertainment expenses.[10] Unfortunately, no further comments can be made at this stage as the written grounds of the High Court's decision have yet to be made available.

Nonetheless, in light of the High Court's decision, there is a compelling reason for taxpayers to provide sufficient evidence to convince the IRB (or the courts, as the case may be) that the provision of promotional items or sponsorship was necessary to their business strategy. Among others, the following documents and information may assist taxpayers in establishing their case:

(a) The brochures circulated to the public help to indicate the taxpayer's intention in organising the promotion strategy;

(b) Internal discussion papers and business proposal papers highlighting the need for the provision of promotional items or sponsorship;

10 *Ketua Pengarah Hasil Dalam Negeri v ELM Sdn Bhd* (R1-14-02-09)

(c) Some details of the competition faced by the taxpayer and the promotion strategy adopted by the competitors;

(d) Photographs evidencing the success of the promotion strategy; e.g. the taxpayer in *SM* exhibited photographs to establish that the conferences were successful as the events attracted a large number of doctors; and

(e) Audited accounts to establish that the taxpayer's sales, turnover and profit had increased over the years as a direct result of the promotion strategy.

At the same time, the authors urge the IRB to examine the taxpayer's intention in providing promotional items or sponsoring customers or potential customers. The IRB should not adopt the blanket approach of categorising such expenses as entertainment expenses. For taxpayers, proper tax planning and documentations are vital to establish that the expenses incurred by them in providing promotional items or sponsorships were for the sole purpose of promoting their business. **LH-AG**

Datuk D P Naban
dpn@lh-ag.com

S Saravana Kumar
sks@lh-ag.com

About the authors

Datuk D P Naban and **S Saravana Kumar** are members of the firm's Taxation & Private Clients Practice Group. They regularly represent taxpayers in various tax and customs disputes. They also actively advise businesses on tax advisory & planning, tax audit & investigation, transfer pricing, double taxation issues in cross-border transactions, indirect tax and stamp duty matters.

Datuk Naban and **Saravana** can be contacted at tax@lh-ag.com

Competition Law in Malaysia — 'Just' Another Compliance Issue or a Matter for the Board?

by Choong Kien and Ooi Bee Hong

Who does this affect?

Malaysia's business community, particularly firms operating in relatively concentrated industries.

What do you need to do?

Review all arrangements — whether written or unwritten — with rivals, customers and suppliers to identify arrangements that are deemed to be anti-competitive under the Competition Act. Implement a compliance programme to ensure that the firm's senior executives understand the implications of the Act.

Brief the firm's board of directors and review the firm's business strategy as appropriate.

Malaysia's Competition Act 2010 [*Act 712*] ("the Competition Act"), which Parliament passed in June, is expected to come into force in January 2012. What is "competition law", and what are its implications for Malaysia's business community? Why have competition laws?

Competition law is not "just" another issue for the compliance officer. It has had a fundamental impact on corporate behaviour in Europe, North America and (more recently) China, in a way that often requires board level attention.

Competition law in Malaysia has the potential to have the same impact, but in a way that reflects the priorities of the local regulator and the policies of the government of the day.

What is 'competition law'?

The short answer to that it is a law promoting "competition" — that is, the degree in which a firm's behaviour is constrained by its competitors, its customers and its suppliers.

Rather than regulate a firm's behaviour directly — for example, by controlling the price of petrol — competition law relies on "market forces" to constrain the firm's behaviour. Not just pricing behaviour, but also customer service, product quality, innovation and a range of other non-price behaviours.

Firms competing to win customers end up delivering lower prices and better products (and services) over time; competitive firms are sensitive to changes in customer needs and alert to innovations that develop over time.

How does competition law promote competition?

Generally, competition legislation promotes competition by:

(i) regulating mergers and acquisitions ("merger regulation");

(ii) regulating arrangements between firms and their rivals, suppliers and customers ("cooperative conduct"); and

(iii) regulating abuses of market power ("unilateral conduct").

In Malaysia, the Competition Act regulates cooperative conduct and unilateral conduct. It does not currently regulate mergers and acquisitions. Nonetheless, structural regulation merits a brief mention as its absence under the Act is significant to competition policy in this country.

(i) Merger regulation

Merger regulation is based on the broad premise that market structure affects behaviour and outcomes. The number of competitors (taking into account their relative market shares) is an important influence on competition in a market if there are significant barriers to entering the market.

Mergers between competitors ("horizontal mergers") can significantly affect competition if the merged entity faces little competition from elsewhere. "Vertical mergers" between firms and their suppliers or customers may also lead to lower competition over time by, for example, making new entry more difficult.

Merger regulation gives competition authorities an opportunity to review mergers and acquisitions that fundamentally alter market structure, having regard to the efficiencies (for example, from scale and scope) that may be realised from the merger or acquisition as well as any effect the merger or acquisition may have on competition.

The absence of merger regulation in Malaysia implies greater reliance on regulating ongoing behaviour to promote competitive outcomes.

(ii) Cooperative conduct

Cooperative conduct, such as arrangements between firms and their rivals ("horizontal arrangements"), or between firms and their customers or suppliers ("vertical arrangements") can also have a significant effect on competition. Cooperative conduct need not be limited to actual agreements or express arrangements. Implicit arrangements or even an "understanding" can facilitate cooperative conduct.

Cooperative conduct, even among rivals, is not necessarily anti-competitive. Joint ventures that reduce production costs can be pro-competitive. Such arrangements tend to be reviewed by competition regulators on a case-by-case "rule of reason" basis, taking into account the commercial rationale for the arrangement before forming a view on whether the arrangement is anti-competitive and should be prohibited.

On the other hand, agreements to fix prices or to share a market are typically thought to be devoid of any legitimate commercial rationale that they are

deemed to be anti-competitive and often prohibited outright on a "per se" basis. Lastly, competition regulators may issue "block exemptions" or individual exemptions for arrangements that have a legitimate commercial rationale or are unlikely to be anti-competitive.

Whether an arrangement is prohibited "per se", subject to a "block exemption" or individual exemption, or to be assessed on a case-by-case "rule of reason" basis is not always straightforward to establish. This should be discussed with a competition lawyer familiar with the thinking of the competition regulator and legal precedent of that country and of other jurisdictions.

(iii) Unilateral conduct

Unilateral conduct is rarely anti-competitive. A firm, acting alone, is unlikely to be in a position to significantly affect competition unless it already has a dominant position in a market. Having a dominant position is a necessary — but not sufficient — condition for abusing that dominant position. A substantial market share is a relevant consideration, but not conclusive of the matter.

"Dominance" and "abuse" of dominance are not the same thing. Whether a firm's conduct actually amounts to an "abuse" is an additional matter for inquiry separate from whether the firm has a dominant position. The fact that a rival firm is injured in some way is neither conclusive nor even necessary.

Competition law seeks to protect the competitive process rather than individual competitors.

Competition is a rigorous process. Firms may "injure" one another in the process of competing. It is rarely straightforward to determine if a dominant firm is simply acting competitively (and injuring a rival in that process) or is in fact "abusing" its dominant position.

Competition law seeks to protect the competitive process rather than individual competitors. Determining whether conduct is an "abuse" is a complex topic even for experienced competition lawyers.

Is competition promoted for its own sake?

While the public policy goal of promoting competition occupies a central position in every jurisdiction having competition laws, most jurisdictions (including Malaysia) acknowledge that there are many public policy reasons for competition to be restricted. Public health, occupational safety, social welfare and environmental protection are examples

of legitimate reasons for having rules and regulations that restrict competition in some way, for example, by making entry into a market conditional on satisfying a minimum technical standard.

Similarly, arrangements between firms may justifiably restrict or distort competition to promote other public policy goals. These goals include achieving certain efficiency or technological benefits, for example, through production joint ventures.

In principle, the benefits claimed must have a public dimension, and not flow only to the parties to the arrangement. It is important to demonstrate that those public benefits cannot be achieved any other way. Further, restricting competition to achieve another public policy goal entails comparing alternative public policy goals and deciding whether there is good reason to prefer one public policy goal at the expense of another.

The Competition Act expressly allows firms to justify restrictions on competition through a formal process of applying for an individual or block exemption.

Implications for Malaysia's business community

The implications of the Competition Act for Malaysia's business community are broadly twofold: compliance and business strategy.

- *Compliance*

While not "just" a compliance issue, the Competition Act does require consideration from a compliance perspective. Firms should review all arrangements (whether or not in writing) with their rivals (if any), suppliers and customers to ensure that they comply with the Competition Act when it comes into force (see **Fig 1**).

While many of the arrangements that firms already have in place may, at first blush, raise issues under the Competition Act, most of those issues will generally be resolved without having to substantially alter those arrangements. However, resolution of those issues may entail applying for an individual exemption or seeking a block exemption from the Competition Commission.

Fig 1: Managing compliance risk under the Competition Act

A useful approach for managing compliance risk is to categorise arrangements in the following way:

Arrangements (written or unwritten) with:	Indicative risk level
competitors or potential competitors;	High
suppliers or customers that: (a) (irrelevant restrictions on customers/suppliers) restrict who the suppliers or customers may deal with or impose conditions on how they conduct their own business where the restriction or conditions are not directly relevant to goods or services acquired from the supplier or provided to the customer;	Moderate
(b) (irrelevant restrictions on the firm itself) restrict who the firm itself may deal with or impose conditions on how it conducts its own business where the restriction or conditions are not directly relevant to goods or services acquired from the supplier or provided to the customer.	Moderate

Firms should also put in place a compliance programme that includes training for the firm's senior executives and senior management (see **Fig 2**). The experience overseas is that firms with a poor compliance culture are at greater risk of offending competition laws.

Under pressure to meet key performance measures, even senior executives have been found to make unwritten arrangements with executives from rival firms concerning the prices they will charge customers ("price fixing") or on which customers "belong" to a firm ("market sharing").

Sophisticated competition regulators have put in place a "leniency policy" designed to elicit whistleblowing in return for substantially reduced penalties for individuals who are the first to provide information on unlawful cartel activities to the competition regulator.

Fig 2: Tips on managing compliance risk

Tips on compliance for general counsel

- An efficient way to deliver compliance training is to ask the firm's executives to complete an electronic questionnaire aimed at testing their knowledge of the requirements of the Competition Act under various scenarios.
- Compliance programmes should be delivered regularly, including as part of an orientation programme for new staff.
- General counsel should review not only written agreements, but any unwritten arrangements that a firm may have in place with other firms. General counsel should also review any unwritten conditions that the firm may impose on prospective dealings. This includes any reasons given for not dealing with another firm.
- General counsel should review the firm's whistle blowing policy.

- *Business strategy*

The relevance of competition law to business strategy varies by firm and industry. Firms that operate in competitive markets are unlikely to be affected by competition law, provided they do not participate in unlawful cartel behaviour.

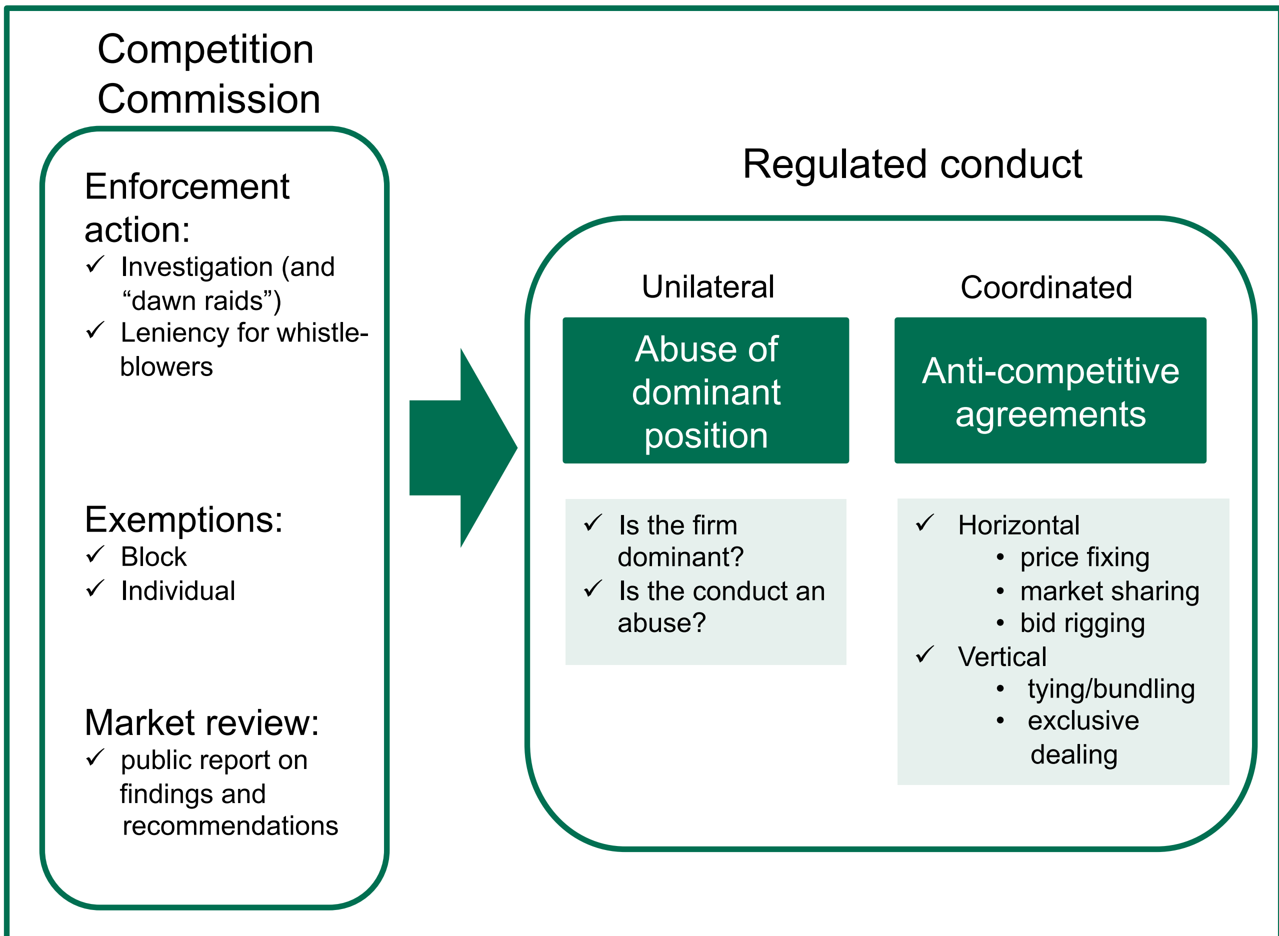
Firms enjoying positions of dominance in a market are most likely to require a fundamental review of their business strategy. Such firms very likely have the capacity to engage in activities and practices — whether unilaterally or in cooperation with other firms — that have the effect of restricting or distorting competition. While it does not follow that firms in a dominant position will "abuse" their position in this way, the Competition Act implies that certain business practices that some firms may previously have regarded as legitimate will no longer be permitted.

Many firms neither operate in highly competitive markets nor enjoy positions of dominance. The markets that they operate in are often concentrated but also competitive at varying degrees. Importantly, market structure evolves over time as industries consolidate, as new firms enter the market, and as previously successful firms face declining market share and eventually exit the market.

The relevance of competition law to firms operating in this environment is less straightforward and likely to change over time. Nonetheless, competition law gives the Malaysian competition regulator a powerful tool for intervening in favour of changes that promote competitive markets. Some firms will be better placed than their rivals to anticipate and adapt to these changes.

Why have competition laws?

There are many different reasons for having competition laws. In the US, anti-trust legislation was originally motivated by a public policy goal of breaking up powerful monopolies. In Europe, competition law is a powerful instrument for realising



a European common market. In Australia, competition law has had a strong consumer orientation. China's new anti-monopoly legislation serves as an important tool for transforming its state-dominated economy into a more competitive market structure.

Malaysia's Competition Act has strong connections with consumer policy. The Ministry of Domestic Trade has had a long involvement preparing the ground for introducing competition law in this country. However, "competition policy", which is broader than competition law, also has strong connections with Malaysia's future long-term economic growth.

Malaysia is rightly celebrated as only one of 13 countries to have recorded an average growth rate of 7% per annum since World War II.[1] However, this rate has fallen to 5.5% per annum since the Asian financial crisis, raising fears that it is caught in a "middle-income trap".[2]

Innovation-led growth is thought to be critical to Malaysia's long-term prosperity; the World Bank notes that "competition is a fundamental driver of innovation".[3]

In Malaysia's New Economic Model, Strategic Reform Initiative 3 ("creating a competitive domestic economy"), or SRI 3, highlights the importance of competition policy to innovation and Malaysia's long-term prosperity. SRI 3 not only calls for competition laws to be introduced in Malaysia, but also for the removal of market distortions such as price controls and subsidies.

Malaysia's business community have good reason to embrace the Competition Act as an important policy measure for lifting our economy to a high-growth path, driven by innovation and competition. As part of the process of promoting competitive markets and industries, business practices will change and firms become more efficient.

For some firms, adapting to more competitive environments will entail making fundamental decisions about business strategy, including difficult entry or exit decisions. Some firms will be more successful than others at adapting to more competitive environments. Nonetheless, the country as a whole will be better able to sustain higher living standards in the long run. **LH-AG**

Chong Kien
ck@lh-ag.com

Ooi Bee Hong
obh@lh-ag.com

About the authors

Choong Kien has over 10 years' experience in competition law and practice at an Australian law firm and with the Australian competition regulatory body. He recently completed a Master's degree in Economics at the Australian National University.

Ooi Bee Hong is the partner who heads the Foreign Investment Practice Group at Messrs Lee Hishammuddin Allen & Gledhill, Advocates & Solicitors, Kuala Lumpur.

1 Growth Commission Report (2008)
2 NEAC 2010, New Economic Model for Malaysia, at pp 44 and 60
3 World Bank 2010, Malaysia Economic Monitor — Growth through Innovation, at p 105

Partner Profile

Dato' Thavalingam Thavarajah

Dato' Thavalingam Thavarajah, who was admitted to the Malaysian Bar in 1990, has many years of experience in industrial relations and employment law.

He was a member of the Industrial Court Practice Committee of the Bar Council, on which he served for a decade. In 2008, he was appointed to a two-year term on the National Labour Advisory Council. He is currently honorary secretary of the Malaysian Employers Federation.

In addition to writing *Constructive Dismissal — Commentaries and Cases* (2008) and co-authoring *Retrenchment Law and Procedure in Malaysia* (2009), Dato' Thava's other literary accomplishments include such roles as:

- contributing editor for the volume on the Employment Act 1955, the Industrial Relations Act 1967 and the Trade Unions Act 1959 in the *Annotated Statutes of Malaysia* series (2002);
- panel author for *Employment Law Asia* (Malaysian Chapter) (2002); and
- principal author of *Employment Termination Law & Practice Malaysia* (2001).

He also sits on the editorial advisory board of the *Industrial Law Reports*, currently the only journal in the country dedicated to employment cases heard in the Industrial Court.

In 2004, the Attorney General's Chambers invited him for a discussion on proposed amendments to labour law in Malaysia, in particular the Industrial Relations Act 1967; and, more recently, to review, revise and propose new legislation relating to business efficacy and promotion of commerce and trade in the country.

Dato' Thava won the "Employment & Labour" category of the International Law Office's Client Choice Awards 2010.

He was honorary secretary of the Squash Racquets Association of Malaysia in 2008, and now serves on its Disciplinary Board as well as the Disciplinary Board of the Malaysian Hockey Federation. He also sits on the Doping Committee of the Olympic Council of Malaysia.

Dato' Thava joined Lee Hishammuddin Allen & Gledhill as a partner in its Employment department on 1 September 2010. **LH-AG**

About Lee Hishammuddin Allen & Gledhill

The firm has more than 80 lawyers in Kuala Lumpur, Penang and Johor Bahru. Our areas of practice include the following specialist practice groups, each led by an experienced partner:

Banking & Insolvency

Construction

Corporate Disputes

Employment

Financial Services

Foreign Investment

Insurance

Intellectual Property

Mergers & Acquisitions

Projects

Real Property Disputes

Taxation & Private Clients

If we can be of service to you, please contact us at:

Lee Hishammuddin Allen & Gledhill
Level 16, Menara Tokio Marine Life,
189, Jalan Tun Razak, 50400 Kuala Lumpur, Malaysia
Tel : +603 2161 2330
Fax : +603 2161 3933, 2161 1661
E-mail : enquiry@lh-ag.com

Editorial Consultant Dato' K C Vohrah

LEGAL HERALD

Published by the Knowledge Department
Lee Hishammuddin Allen & Gledhill

For further information about the *Legal Herald*, please contact knowledge@lh-ag.com or the person whom you normally consult.

Opinions, comments and suggestions are welcome.

Practice	Name	Email	Phone
Consultant	**Dato' K C Vohrah**	kcv@lh-ag.com	+603 2165 8408
Senior Partners	**Dato' Thomas M L Lee**	tl@lh-ag.com	+603 2165 8411
	Datuk D P Naban	dpn@lh-ag.com	+603 2165 8448
Managing Partner	**Muthanna Abdullah**	ma@lh-ag.com	+603 2165 8497

Practice	Name	Email	Phone
Head of Dispute Resolution	**Lambert Rasa-Ratnam**	lr@lh-ag.com	+603 2165 8459
Head of Corporate	**Iain Sedgley**	is@lh-ag.com	+603 2165 8420

Practice	Name	Email	Phone
Banking & Insolvency	**Kumar Kanagasingam**	kk@lh-ag.com	+603 2170 5803
	Sean Yeow Huang-Meng	yhm@lh-ag.com	+603 2165 8472
	Andrew Chiew	ac@lh-ag.com	+603 2165 8497
	Mong Chung Seng	mcs@lh-ag.com	+603 2165 8511
Construction	**Nitin V Nadkarni**	nn@lh-ag.com	+603 2165 8445
Corporate Disputes	**Rosli Dahlan**	rd@lh-ag.com	+603 2170 5804
	G Vijay Kumar	vkg@lh-ag.com	+603 2165 8434
	S M Shanmugam	ssm@lh-ag.com	+603 2165 8493
Employment	**Lim Heng Seng**	lhs@lh-ag.com	+603 2165 8501
	Dato' Thavalingam Thavarajah	tt@lh-ag.com	+603 2165 8435
Financial Services	**Tay Weng Hwee**	twh@lh-ag.com	+603 2165 8431
Foreign Investment	**Ooi Bee Hong**	obh@lh-ag.com	+603 2170 5805
Insurance	**G Vijay Kumar**	vkg@lh-ag.com	+603 2165 8434
Intellectual Property	**Bahari Yeow Tien Hong**	yth@lh-ag.com	+603 2165 8450
Knowledge	**Koh Kek Hoe**	kkh@lh-ag.com	+603 2165 8582
Mergers & Acquisitions	**Ng Leong Huat**	nlh@lh-ag.com	+603 2165 8430
Projects	**Iain Sedgley**	is@lh-ag.com	+603 2165 8420
Real Property Disputes	**Rosli Dahlan**	rd@lh-ag.com	+603 2170 5804
Taxation & Private Clients	**Datuk D P Naban**	dpn@lh-ag.com	+603 2165 8448