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Newly Issued MyCC Guidelines on Intellectual Property Rights

After much anticipation since the release of the draft Malaysia Competition Commission (**MyCC**) Guidelines on Intellectual Property Rights and Competition Law (**Guidelines**) in April 2018, the Guidelines have now come into force (beginning 6 April 2019).

Although it is recognised that intellectual property (**IP**) rights and competition law both play important roles in achieving a dynamic market, some believe that the two are at odds with each other. The former grants temporary monopolies to its holders whereas the latter aims to break monopolies in the market. Sometimes, the conduct of an IP rights holder may make it difficult for rival companies to make substitute products and technology in the market, which may distort competition. Considering these perceived conflicts, the Guidelines serve to address specifically the issue of how these IP rights holders should behave in line with the Competition Act 2010 (**Act**).

Apart from the earlier guidelines issued by MyCC, [1] businesses should refer to this set of Guidelines to determine whether their IP-related agreements or arrangements comply with Malaysian competition law.

As a general rule, the mere fact of ownership of IP would not be regarded as anti-competitive *per se*. It is noteworthy that the MyCC considers IP licensing to be pro-competitive. However, like other agreements, IP-related agreements may be restricted by the Act if:

- An IP-owning enterprise enters into an anti-competitive agreement (section 4 of the Act); or
- Any dominance created by the IP right is abused by the IP-owning enterprise (section 10).

The Guidelines provide explanations and useful illustrations on how certain IP-related agreements would be treated and how ~~it~~ they may invoke the application of section 4 or section 10 of the Act:

- Similar to other non-IP agreements, MyCC reiterates that it will take a serious stance against horizontal agreements which **are deemed** to be anti-competitive even though the parties to the

agreement have a small market share.[2] For instance, cross-licensing may not be allowed if the licence is restricted to only certain members, which may create a barrier to access certain technologies.

- Other types of agreements that do not fall under the deeming provision above, including minimum Resale Price Maintenance or tying, may be prohibited if they have the object or effect of significantly preventing, restricting or distorting competition.[3] Each situation needs to be examined on its own particular facts.
- In certain circumstances, IP may confer some market power by creating barriers to entry. That said, dominance in the relevant market due to the IP is not an offence unless the enterprise abuses its dominant position by engaging in exploitative or exclusionary conduct, *among others*, by imposing excessive pricing, post-expiration royalty, non-competition clauses, product hopping or predatory pricing or refusing to license IP rights.[4]

An enterprise that has contravened section 4 or section 10 of the Act may be subject to a financial penalty of 10% of its worldwide turnover over the period during which the infringement occurred. Due to the technical nature of the Guidelines and the repercussions of non-compliance with the Act, it is necessary for IP-owning enterprises to assess and determine whether their existing or upcoming IP-related agreements and arrangements would infringe the Act.

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[1] These include the Guidelines on Market Definition, the Guidelines on Chapter 1 Prohibitions (Anti-Competitive Agreements) and the Guidelines on Chapter 2 Prohibitions (Abuse of Dominant Position), the Guidelines on Leniency Regime

[2] Section 4(2) of the Act

[3] Section 4(1) of the Act. That said, anti-competitive agreements will not be considered "significant" and may not be investigated by MyCC if:
(a) the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%; or
(b) the parties to the agreement are not competitors and all of the parties individually has less than 25% in any relevant market.

[4]

Section 10 of the Act