

Legal TAPS

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ESG IN MALAYSIA AND LEGAL RISKS

What is ESG?

If there is one buzzword that encapsulates the zeitgeist of today, it is ESG.

With growing ethical awareness on the economic, environmental and social footprint that we leave behind, the emphasis on ESG (short form for “**Environmental, Social and Governance**”) by corporations, stakeholders including investors and customers, and even governments alike has been gaining traction globally and locally.

The concept first made headway in a report prepared by the United Nation’s Environment Programme Finance Initiative (UNEP FI).¹ The report, which recognises the severe environmental and social impact due to the reluctance of markets to embrace sustainability, promulgated the urgent need to account for and integrate ESG governance into market, investment and board room considerations for long-term value creation.

However, while the concept of ESG is a lofty one, to date, there is no internationally accepted definition of ESG. With the lack of standardization of baseline or criteria on ESG, ESG remains a nebulous concept, the ambiguity of which may pose a challenge for compliance.

¹2004 report commissioned by the UNEP Asset Management Working Group titled ‘*The Materiality of Social, Environmental and Corporate Governance Issues to Equity Pricing*’



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How is Malaysia faring so far?

Bursa's Sustainability Reporting Guide

On the local front, having recognized the shift in global policy making and growing investor appetite for sustainable development and investments, the Malaysian Securities Commission (“**SC**”) has launched a sustainable and responsible investment roadmap for the Malaysian capital market in the bid to posit Malaysia as a regional sustainable and responsible investment as well as green financing centre.

Under the Listing Requirements of Bursa Malaysia Securities Berhad (“**Bursa**”), Main Market and ACE Market listed issuers are required to include in their annual reports, a Sustainability Statement,² comprising a narrative statement of the listed corporation’s management of material economic,

² Main Market Listing Requirements, paragraphs 9.45(2) and paragraph (29), Part A of Appendix 9C, supplemented by Practice Note 9. See also the ACE Market Listing Requirements, paragraph (30) of Appendix 9C, supplemented by Guidance Note 11

environmental and social risks and opportunities by taking into consideration the themes set out in the Bursa’s Sustainability Reporting Guide (“**Guide**”).³ Listed issuers under the Main Market are subject to additional obligations, including disclosure on its governance structure in place to manage ESG risks and opportunities, scope of the Sustainability Statement and basis for the scope, and material sustainability matters and their management.⁴

The Guide sets to explain economic, environmental, and social themes to assist corporations to, among others, improve awareness of risks and opportunities, identify, evaluate, and manage material sustainability risks and opportunities, and improve the quality and depth of sustainability information.

It further provides toolkits on reporting and disclosure obligations which ought to be considered by the issuer. For example, on anti-corruption, organisations are required to report the total number and percentage of operations assessed for corruption risks and significant identified risks, anti-corruption policies and procedures, communications to employees, business partners and governance body members as well as the total number and nature of confirmed incidents and action taken.⁵

Bursa FTSE4Good Bursa Malaysia Index

In addition, in July 2021, Bursa, in partnership with FTSE Russell launched the FTSE4Good Index (“**Index**”) to identify and recognise Malaysian companies who demonstrates a leading approach to addressing ESG risks.⁶

On top of being used by mainstream institutional investors looking to meet an ESG mandate, many corporations use their inclusion in the Index as a show of commitment to strong ESG performance.

Based upon a globally consistent methodology and globally comparable ratings,⁷ each company is given

³ Bursa’s Sustainability Reporting Guide, 2nd Edition issued by the Bursa

⁴ Guide, Section 5.2

⁵ Guide, page 84, read together with the Bursa’s Toolkit, Themes and Indicators, Disclosure standards issued by the Global Sustainability Standards Board and Sustainable Development Goal 16

⁶ FTSE4Good Bursa Malaysia Index FAQ dated December 2021 published by Bursa

⁷ Ibid.

an ESG rating ranging from 0 to 5 (5 being highest). Depending on the classification of country, the minimal rating for Index inclusion differs. As Malaysia is an emerging market, Malaysian companies need to achieve a rating of 2.9 or higher to be included in the Index.

*SC's Malaysian Code on Corporate Governance ("MCCG")*⁸

The imperative role of boards and senior management in delivering sustainability value and ESG ethos is also recognised in the recently updated MCCG.⁹

As a guidance, the MCCG provides, among others, that:

- Effective board leadership requires the integration of sustainability considerations in corporate strategy, governance and decision-making, as well as sustainability and underlying ESG issues. The board should have sufficient understanding and knowledge of sustainability issues and the capacity and competency to tackle such issues;¹⁰
- The board should take proactive measures to address material ESG risks and opportunities;¹¹
- Senior management should integrate sustainability considerations in the day-to-day operations of the company to ensure effective implementation;¹²
- The views of internal and external stakeholders should be continuously sought and considered and the company's sustainability strategies, priorities, targets and performance should also be communicated to its stakeholders;¹³ and
- Performance evaluations of the board and senior management should include a review of

their performance in addressing the company's material sustainability risks and opportunities.¹⁴

More importantly, the MCCG recognises that many institutional investors consider integration of ESG factors in their investment decision-making process as part of their fiduciary responsibility and several have committed to using their votes to hold boards and senior management accountable for the management and oversight of sustainability.¹⁵

In this regard, it is not farfetched to argue that the failure to give due regard to ESG factors may attract personal liability on the part of directors/officers arising from a potential breach of a director's fiduciary duties under the Companies Act 2016.

Further Advancement of the ESG agenda

The efforts by the SC and Bursa to advance the ESG agenda are not standalone. For one, Bursa has started collaborating with the Ministry of Environment and Water and Ministry of Finance to create a voluntary carbon market for trading of carbon credits. Further, the Ministry of Environment and Water has also announced recently that it would implement a domestic emission trading scheme to execute domestic carbon credit transactions.¹⁶

ESG-related Legal Risks

Non-Adherence to ESG

Lest ESG is perceived as just a passing fad, the risks of non-compliance, to name a few, are real, and costly. For example, Top Glove, the world's biggest rubber glove manufacturer saw its share prices taking a fall and faced import bans from the US after it was discovered to have engaged in forced labor.¹⁷

⁸ SC's MCCG as on 28 April 2021

⁹ Media release by the SC titled '*SC Updates the Malaysian Code on Corporate Governance to Promote Board Leadership and Oversight of Sustainability*' dated 28 April 2021 available for access at: <https://www.sc.com.my/resources/media/media-release/sc-updates-the-malaysian-code-on-corporate-governance-to-promote-board-leadership-and-oversight-of-sustainability>

¹⁰ MCCG, paragraph G4.3

¹¹ MCCG, paragraph G4.1

¹² Ibid.

¹³ MCCG, paragraph 4.2

¹⁴ MCCG, paragraph G4.4

¹⁵ MCCG, paragraph G4.1

¹⁶ The Edge article titled '*Domestic Carbon Trading to be Implemented in Phases from End of Next Year- Minister*' dated 1 December 2021, available for access at: <https://www.theedgemarkets.com/article/domestic-carbon-trading-be-implemented-phases-end-next-year-%E2%80%94-minister>

¹⁷ Business Times's report titled '*Top Glove reiterates commitment to labour practices after US customs seizure order*' dated 30 March 2021, available for access at: <https://www.businesstimes.com.sg/>

In fact, the impact of ESG issues may also be more far-reaching than one may expect. A notable example would be representation of the world's biggest fossil fuel companies by PR companies. On top of accusations that fossil fuel companies have been using PR firms to “greenwash” their contribution to the climate crisis,¹⁸ PR firms have lost clients by trying to play both sides and being unwilling to take a concrete stance on the climate debate.¹⁹

Greenwashing

Some stakeholders want to see real action and not just lip service to ESG. Stakeholders are increasingly aware of greenwashing and are intolerant of such deception.

A prime example would be the high profile “diesel dupe” scandal by Volkswagen (“**VW**”), which resulted in the company recalling millions of cars worldwide. VW claimed that its cars are equipped with groundbreaking clean diesel engine which could meet the US's tailpipe emission standards. VW was subsequently found to have rigged its engines to reduce emissions when it detects testing regimens. Fast forward five years from when the scandal broke, VW is still reeling from the gargantuan financial damage cause by the scandal, not to mention legal costs, reputational damage, and plummeting stock value.²⁰

Other than financial and reputational damage, it should also be noted that any misleading conduct or false or misleading representation to the public is an offence under the Malaysia Consumer Protection Act 1999. If found liable, the offender may be exposed to fines and/or imprisonment.²¹

[companies-markets/top-glove-reiterates-commitment-to-labour-practices-after-us-customs-seizure-order](#)

¹⁸ CNBC's report titled 'PR firms are Facing a Backlash for 'Greenwashing' Big Oil – and the pressure on them is growing' dated 16 February 2022, available for access at: <https://www.cnbc.com/2022/02/16/big-oil-and-the-climate-crisis-the-fight-to-hold-pr-firms-accountable.html>

¹⁹ The Guardian's report titled 'Edelman Loses Executives and Clients Over Climate Change Stance' dated 7 July 2015, available for access at: <https://www.theguardian.com/sustainable-business/2015/jul/07/pr-edelman-climate-change-lost-executives-clients>

²⁰ Fortune article titled '5 years in, Damages from the VW Emissions Cheating Scandal are still Rolling In' dated 6 October 2020, available for access at: <https://fortune.com/2020/10/06/volkswagen-vw-emissions-scandal-damages/>

²¹ Consumer Protection Act 1999, Sections 10 and 25



Image by andreas160578 from Pixabay

Besides, environmental claims that are vague or unspecific or that generally imply that a product is environmentally friendly or beneficial to the environment which may convey a range of meanings to consumers, should only be made if they are valid, without qualification, under all reasonably foreseeable circumstances. Such claims have a high potential to be misunderstood by consumers.

Competition

Amid the discourse on ESG efforts, corporations should not lose sight of other areas of law. Even though the importance of ESG cannot be undermined, it is crucial for organizations to be mindful of their ability to cooperate with other organizations to attain ESG goals. While the time is ripe for industry players to take the opportunity to collaborate on their ESG agenda,²² equally important is the need to ensure that competitors who work together avoid competition pitfalls (e.g. sensitive information sharing, limiting technological development or investment).

²² See, for example, the collaboration between MSM Malaysia and Wilmar Sugar to build a sustainable sugar supply chain, New Straits Time report titled 'MSM Malaysia, Wilmar Sugar Collaborate to Build a Sustainable Sugar Supply Chain' dated 15 February 2022, available for access at: <https://www.nst.com.my/business/2022/02/771584/msm-malaysia-wilmar-sugar-collaborate-build-sustainable-sugar-supply-chain>



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Concluding Remarks

With ESG gaining traction in the corporate arena, we can see that businesses are amping up their gears in shifting towards sustainability and ESG goals. Nonetheless, while such efforts are laudable, this new arena is replete with risks of its own. Thus, businesses should proceed with caution to minimize the legal risks that may arise from their ESG practices, disclosures, and other ancillary efforts.

The article is authored by our Partner, Ms Nicole Leong and Associate, Ms Heng Jia. The views and opinions expressed in this article are those of the authors alone and do not constitute any legal advice. For further information or advice on ESG, kindly contact our Partner, Ms Nicole Leong.

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THE PASSING OF THE EMPLOYMENT (AMENDMENT) BILL 2021: THREATS TO LABOUR DEMAND IN MALAYSIA?

To be in tandem with international labour standards and practices, the Dewan Rakyat passed the Employment (Amendment) Bill 2021 on 21 March 2022, welcoming the significant increase of maternity leave from 60 days to 98 days and introduction of 7 days paid paternity leave.

The amendment also saw the prohibition to dismiss a pregnant employee, except on the grounds of wilful breach of a condition of the contract of service, misconduct or closure of the employer's business. It will therefore be incumbent on employers to prove that the termination was not due to pregnancy. The Bill also introduced an express prohibition against forced labour and the presumptions as to who is engaged under a contract of service or a contract for services i.e. employee or independent contractor.

The Bill also requires employers to post up a notice to raise awareness on sexual harassment and has increased the fine for employers who do not comply with sexual harassment provisions. However, these new sexual harassment provisions introduced under the Bill may still be rather limited in scope to better address sexual harassment.

Extend Scope of Application for The Employment Act 1955 and Statutory Minimum Wage

To extend application to all employees regardless of salary earned, the ministry will issue an order to amend the First Schedule of the Employment Act 1955 and assured that the order will be enforced simultaneously on the effective date of the Bill. The upcoming ministerial order would determine the group of employees who will benefit from the passing of the Bill but currently there is no detail on this order and its contents.

Futhermore, the government had also announced that the country's minimum wage will be increased to RM1,500 with effect from 1 May 2022. However, micro, small and medium-sized enterprises (SMEs) will be exempted from applying the RM1,500 minimum wage rate from 1 May 2022, for now.

Adjusting Employment Benefits and Protection When You Cannot Adjust Capital

Businesses are still recovering from the financial impact of the pandemic and the passing of the Bill and the increase in minimum wage may herald both challenges and repercussions. The substantial increase in employment benefits signals substantial increase in the cost of doing business in Malaysia, which may eventually shun foreign investors from the country. Labour costs are rising, and business leaders will be on the desperate lookout for any

business where they can reduce spending. To maintain competitive advantage in the upcoming years against regional competitors, businesses are forced to evolve their business model to incorporate such higher labour costs.

Whenever there is an increase in labour cost or cost for an hour of work, employers face a dilemma to reduce the number of employees hired and to spread heavy workloads among smaller number of employees. The choice matters to the society. Businesses may feel the pinch and pressure to do even more with less—fewer employees, fewer resources and smaller budgets.

Knowing how employers would react to higher labour costs is essential to understanding the future labour demand in Malaysia and for predicting the underlying economic impacts of the new legislation and minimum wage. In first-world or developed countries, the impact of changes in labour costs on demand for labour may not be very apparent. They practise “At-will” employment where employees can be terminated for any reason. This is less true in developing economies like Malaysia. The direct increasing of labour cost may be easy to measure but their indirect repercussions to the overall future employment landscape and labour demand in Malaysia may be difficult to ascertain. While it is certainly a robust and plausible move to enhance protection and benefits for employees but are better days ahead for employees in Malaysia?



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Patents (Amendment) Act 2022 – A Summary

The Patents (Amendment) Act 2022 together with the Patents (Amendment) Regulations 2022 have come into force on 18 March 2022, with the exception of some provisions. The amendments incorporated Malaysia's commitments in various international agreements and treaties, including the Agreement of Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure ("Budapest Treaty"). Below are the following key amendments introduced by the said Act and Regulations:

1. Definition of resident

Section 3 of the Patents Act 1983 (“Act”) has been amended to include the definition of “resident”, which covers Malaysian citizens residing in Malaysia as well as non-Malaysian citizens who are residing in Malaysia whether by virtue of a permanent resident status or a valid pass lawfully issued under the Immigration Act 1959. The definition of resident also extends to any body corporate incorporated or any unincorporated body established or registered under any written law in Malaysia.

The above amendment would mean that persons falling within the definition of “resident” will be subject to section 23A of the Act which requires residents to first apply for a patent application in Malaysia.

2. New and revised timeframes

New and/or revised timeframes for certain applications and/or procedures have been introduced by virtue of the amended Act and/or Patents Regulations 1983 (“Regulations”):

(a) Conversion of applications

Section 17B(4) of the Act has been amended to require a request for conversion of applications to be filed within the prescribed period of three months as provided under the new Regulation 33C(1A) of the Regulations. This is a significantly shorter period compared to the previously prescribed period of six months. Further, the Act provides that the newly prescribed period of three months shall not be extended by the Registrar.

(b) Judicial assignment

The time limitation for commencing an application for judicial assignment of a patent application or patent under section 19 of the Act has been extended from five years to six years.

(c) Reinstatement of lapsed patent

An application for the reinstatement of a lapsed patent must now be made within twelve months from the date of the notice pursuant to section 35A(1) of the Act instead of two years previously.

(d) Infringement proceedings

The time limit for commencing infringement proceedings has been extended from five years to six years from the act of infringement.

(e) Observations on the report of substantive examination and modified substantive examination

The time limit for an applicant to make observations pursuant to section 30(3) of the Act has been extended from two months to three months.

(f) Request for conversion of application

A new time limit for making a request for conversion of applications has been introduced by Regulation 33C(1A) of the





Photo by Girl with red hat on Unsplash

Regulations, where such requests must now be made within three months from the date of the report made by the Examiner pursuant to substantive examination or modified substantive examination.

(g) Extension of time

Any request for an extension of time after the expiration of a prescribed period must now be made not later than six months from the expiration of the prescribed period.

3. Conditions for divisional application

The new subsection 26B(1A) of the Act prohibits any application for division if the initial application had been granted a patent, refused, withdrawn or deemed to be withdrawn. Further, no extension of time is allowed for an applicant to make a divisional application.

4. Restoration of right of priority

Section 27(1B) of the Act provides for an applicant's right to make a request for restoration of right of priority after the expiry of the period of twelve months from the priority date.

The mechanism for such request is provided under the new Regulation 23A of the Regulations. For patent applications filed at the Patent Registration Office, the request for restoration must be made within the period of two months from the expiry date of the right of priority. The request may be made on the ground that the failure to file the application within the right of priority period is unintentional, which shall be accompanied by a statement of the reasons and evidence in support by way of a statutory declaration. If the Registrar is of the view that the conditions have not been satisfied, the applicant will be given an opportunity to make observations.

Requests for restoration of right of priority may also be made in relation to international applications entering the national phase under section 78O or 78OA of the Act, where the request must be made within the period of one month from the expiration of thirty months from the priority date.

5. Sequence listing as filing requirement

Section 28(1)(c) of the Act and Regulations 5(1)(b) and 18(1A) of the Regulations have been amended to require an applicant to include a sequence listing (if any) in their patent applications. Regulations 12A, 18(7A) and 18(12) of the Regulations further provide for the form for the submission of sequence listing to the Patent Registration Office.

6. Additional fees for applications containing more than ten claims

Patent applications containing more than ten claims would be subjected to an additional fee for each subsequent claim. Where the applicant fails to make payment of such fees or fails to comply with the Registrar's request to make such payments, the date of receipt of the application shall be recorded as the filing date for the first ten claims only.



Photo by Omar Flores on Unsplash

6. No deferment of substantive examination

Request for deferment of substantive examination is no longer available and only requests for deferment of modified substantive examination may be made on the ground that the corresponding patent to be used for the modified substantive examination has not been granted or is not available by the expiration of eighteen months from the date of the patent application.

7. Notice of express trust may be accepted

A notice of an express trust or a beneficiary of an express trust may now be accepted and entered in the Register. Notice of any implied or constructive trust still could not be accepted or entered in the Register.

8. Right of third party to make observations

Section 34A of the Act introduces a right for third parties to make observations on any matter relating to the patentability of a patent application. Such observations may be made within three months from the date of the publication of the patent application or three months from the date of the international application entering the national phase. The observations shall be limited

to the ground of novelty or inventive step and must be accompanied by an explanation on the grounds as well as documentary evidence by way of statutory declaration.

9. Recognition of patent applications and patents as objects of property

The heading of Part VIII of the Act as well as section 39 have been amended to recognise patent applications and patents as objects of property which may be transmitted in the same way as other personal or moveable property. A patent may also be the subject of a security interest transaction which may be recorded in the Register.

10. Compulsory licensing for pharmaceutical products

Several amendments have been introduced in Part X of the Act to provide for compulsory licensing for the production, importation and exportation of patented pharmaceutical products in compliance with Article 31bis of the TRIPS Agreement.

11. Re-examination for post-grant amendments

When an owner of a patent makes a request to amend the patent, the Registrar may require the patent owner to file a request for re-examination or the applicant may file such a request on his own volition.

12. Procedure for the opportunity to be heard

Where a person has an opportunity to be heard pursuant to section 81 of the Act, there is an additional step before the Registrar may issue a notice of the hearing date. Regulation 47 of the Regulations now provide that the Registrar must first issue a notification of an opportunity of being heard, to which the person must make a request for a hearing within the period of 3 months. Only upon the request shall the Registrar issue a notice of the date of hearing.

The following amendments have been incorporated but they are not yet in force:

1. Deposit of micro-organisms

The new section 26C of the Act ensures compliance with the Budapest Treaty by allowing deposit of micro-organisms with any National or International Depository Authority for satisfying the disclosure requirement in patent applications.

2. Opposition proceedings

Under the new section 55A of the Act, opposition proceedings may be commenced by any interested person after the publication of the grant of a patent on the same grounds as applicable to invalidation proceedings under section 56 of the Act. The opposition proceeding may only be commenced if there is no invalidation proceeding or any other proceeding that has been instituted in Court by the interested person in relation to the relevant patent.

If the Registrar decides to maintain the patent at the end of the opposition proceedings, the interested person may not commence invalidation proceedings in Court, but may choose to appeal to the Court against the Registrar's decision pursuant to section 88 of the Act.



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Photo by Nikita Grishin from Pexels

Competition Case Update on the Federal Court Decision in **MAS/AirAsia v MyCC**

Last November, we wrote an update¹ on some of the important principles laid down by the Court of Appeal in its written judgment in favor of airlines, AirAsia and MAS. Following the decision of the Court of Appeal, Malaysia Competition Commission (“MyCC”) subsequently filed an application for leave to appeal to the Federal Court.

Today, the Federal Court (“Court”), presided by the Right Honorable Dato’ Rohana Binti Yusof (President of the Court of Appeal) and hearing together with Justices Dato Mary Lim Thiam Suan and Dato Abdul Rahman Bin Sebli unanimously decided in favour of AirAsia and MAS and dismissed MyCC’s application for leave to appeal.

AirAsia and MAS successfully argued that the questions of law raised by MyCC do not satisfy the requirements for leave to appeal to the Federal Court on the following grounds:

(a) The law is clear that MyCC is a quasi-judicial body which decides in an impartial fashion and thus has no personal interest in the confirmation or reversal of its decision. If its decision is reversed, a quasi-judicial body cannot be ‘adversely affected’. Thus,

MyCC is not entitled to file an application for judicial review against decision of the Competition Appeal Tribunal. Otherwise, quasi-judicial bodies will be at risk of abandoning the core principle of fair adjudication;

- (b) The purported infringement took place in late 2011 prior to the Competition Act 2010 (“Act”) coming into force on 1.1.2012. The Act does not have a provision which expressly states that it has retrospective effect;
- (c) MyCC took conflicting positions regarding definition of market. It initially took the position that it was not required to define the relevant market in a finding of market sharing, yet conceded before the Court of Appeal that it was necessary to define the relevant market and proceeded to submit that the Commission had in fact defined the relevant market;
- (d) MyCC failed to identify the relevant market before invoking the deeming provision under Section 4(2)(b) of the Act. It further failed to consider that AirAsia and MAS continued to compete on the 4 routes averred to be shared between parties;

¹ See our article dated 5 November 2021 which is accessible at: <https://taypartners.com.my/competition-case-update-appeal-decision-mas-airasia-v-mycc/>

- (e) The matter is fact specific: in this case, the collaboration agreement between MAS and AirAsia was entirely conditional upon anti-trust compliance. The Court of Appeal also finding of fact that, even assuming that the Collaboration Agreement had infringed Section 4, it would be exempt from liability under Section 5 as it yielded a net economic benefit to consumers;
- (f) When MAVCOM took over jurisdiction from the Commission in relation to regulation of competition matters within the civil aviation industry in 1.3.2016, MyCC no longer has jurisdiction to file a judicial review application to the High Court. The facts of this case are peculiar and a decision by the Court on the questions posed by MyCC would not benefit the general public since future cases would not have the issue of jurisdiction over competition issues concerning the aviation industry.

The Court unanimously decided that MyCC's application did not meet the threshold for leave to

appeal further and dismissed MyCC's application with costs of RM 30,000 awarded to the airlines respectively.

AirAsia's team was led by counsel, Dato' Ambiga Sreenevasan (together with Ms. Janini Rajeswaran and Mr. Lim Wei Jiet) whilst Tay & Partners team comprised Ms. Nicole Leong (Partner), Mr. Wong Weng Yew (Partner) and Ms. Heng Jia (Associate).

MAS was represented by Mr. Logan Sabapathy and Cheah Yi Huan from Messrs. Logan Sabapathy & Co., while Datuk Seri Gopal Sri Ram, Datuk Lim Chee Wee and Mr. Kwan Will Sen of Lim Chee Wee Partnership appeared for MyCC.

This article is authored by our Partner, Ms. Nicole Leong and Associate, Ms. Heng Jia. The views and opinions expressed in this article are those of the authors alone and do not constitute any legal advice. For further information or advice on Competition Law and Antitrust, kindly contact Ms. Nicole Leong.



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