

## MALAYSIA



## The dawn of a new era



By David Lee

Recently, the Malaysian Parliament passed the *Competition Act 2010 (CA)* and the *Competition Commission Act 2010 (CCA)*. Having received Royal Assent, it is believed that both statutes will most likely be in force from 1 January 2012 onwards. Whilst the CCA governs the establishment of a Competition Commission (the Commission) and its powers and functions, the CA is aimed at the promotion of economic development by promoting and protecting the process of competition and the interest of consumers.

Comprising between seven to eight members – four will be representatives of the Government, with the balance being persons with relevant experience and knowledge in business, industry, commerce, law, economics, competition and consumer protection – the Commission will be responsible for, inter alia, advising the Minister or any other public or regulatory authority on competition; implementing and enforcing the provisions of competition laws; and issuing guidelines in relation to the implementation and enforcement of competition laws.

The CA prohibits enterprises from indulging in specified trade practices, one being the making of horizontal or vertical agreements and the other being engaging, whether independently or collectively, in conduct which amounts to an abuse of dominant position in any market for goods or services. If an agreement is made with the objective of fixing prices or trading conditions; or sharing market or sources of supply; or limiting or controlling production, market access, technical development or investment, then that agreement will be deemed to be preventing, distorting and restricting competition and liability will be imposed on the enterprise involved. Meanwhile, an enterprise is deemed to abuse its dominant position if that enterprise, directly or indirectly, imposes unfair prices or other trade conditions; or limits or controls production, market outlets or market access; or applies different conditions to equivalent transactions with other trading parties to an extent that may discourage new market entry or harm competition in any market.

An “enterprise” is defined to mean “any entity carrying on commercial activities relating to goods and services”. The definition

also provides that “a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.” It is observed with interest that the definition of “enterprise” seems to include Government linked companies and national champions such as PROTON.

Unlike competition law regimes in other jurisdictions, mergers and acquisitions were omitted from the application of the CA. There are no provisions relating to the right of the Commission to review and examine any proposed mergers and acquisitions, or the obligation of enterprises to procure and secure prior approval from the Commission.

Three categories of activities are excluded from the CA: agreements or conduct made or carried out to comply with a legislative requirement; collective bargaining activities or collective agreements in respect of employment terms and conditions made between employers and employees or organisations representing the interests of employers or employees; and an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly in so far as the prohibitions contained in the CA would obstruct the performance, in law or in fact, of particular tasks assigned to that enterprise.

The CA also provides relief from liability, and for block and individual exemptions. Relief is granted for entering into horizontal or vertical agreements if any of the following criteria apply: there are significant identifiable technological, efficiency or social benefits emanating from the agreements; the benefits could not reasonably have been provided by the parties without the agreement having the effect of preventing, restricting or distorting competition; the detrimental effect of the agreement on competition is proportionate to the benefit provided; and the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

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