



## **Competition Act 2010: Policy and Regulatory Implication on Innovative Entrepreneurship**

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### **Abstract**

Entrepreneurship, specifically innovative entrepreneurship is a key element for enriching economic growth, competitive edge and trade development of a nation. In Malaysia innovative entrepreneurship has contributed largely in various sector and industry. An economically effective competition policy is believed, would ultimately protect the interests of consumers. The Competition Act 2010 (CA 2010) in Malaysia although focused to protect consumer market, but ultimately aimed to benefit the economic development and the competitive edge of the national business market at the regional and international level. Thus competition law and policy enforcements is an important element to improve local market economy and in serves as a tool to stimulate economic growth in many of Asia's developing countries. The paper explores the co-relationship and the impacts of the anti-competition regulation and prohibitions and the innovative entrepreneurship business sector. The discussion will uncover the related anti-competition activities and challenges on the innovative entrepreneurship business community's compliance with anti- competition law in Malaysia. The paper highlights the measures and recommendations to face up the challenges surfaced by the anti-competition prohibition regulation with respect to fair marketing, retail pricing agreement, information exchange and cartel related issues with respect to innovative entrepreneurship business market in Malaysia

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### **INTRODUCTION TO COMPETITION, INNOVATIVE ENTREPRENEURSHIP ON AND COMPETITION LAW**

Competition in domestic, as well as global business market plays a critical role in ensuring efficiency in the economic system. In the commercial world competition means struggle or contention for superiority, striving for customers and business of people in the respective industry market. Thus it involves activities in pursuance of rivalry between enterprises to win customers and business overtime. Competition drives innovation. Firstly, because it forces companies to cut their costs, and that requires innovation. Secondly, it prompts them to produce better products and services than their competitors and this also calls for innovation (Alexander 2012). So its contribution in furtherance of innovation and enhancement of economic welfare is well established.

Competition law, on the other hand mainly consist of rules that intended to protect the process of competition in order to maximise consumer welfare (Whish 2012). Competition law and related policy, aims primarily at the promotion and sustenance of competition in markets and prevents practices that may have adverse effect on competition. Thus process of competition law generally concerns with prohibiting and restricting activities or conducts which, may be considered harmful to competition process. In particular it regulates anti-competitive agreement, abusive behaviour by monopolist, harmful mergers and public restrictions on competition process. Competition law, must be emphasized at his point, although fundamentally enacted with an objective to protect the interest of consumers and ensure freedom of trade in the market, in its process it prevents all forms of anti-competition conducts. These process curtails all forms and nature of collusive agreements which distorts free market, market dominance or cartelization in which innovative ideas and entrepreneurship often disrupted and hindered to flourish naturally.

Entrepreneurship and innovation, although considered to be closely linked but may involve two different things. Entrepreneurship is commercialisation or exploitation of innovation. Entrepreneurship and innovation are central to the creative process in the economy. Entrepreneurs sense opportunities and take risks in the face of uncertainty to open new markets, design or improve products and develop innovative processes or services. Innovation has been defined as “the introduction of a new or significantly improved product or service to the market or the introduction of a new or improved process within a business”. Innovation can be the result of the introduction, adaptation or adoption of new knowledge or technological developments. It can also be the combination of existing technologies presented in a novel way. These activities can occur within a business, or be acquired from other businesses. (Franceen, Helmut, Mihipeka 2006)

### ***Co-relationship between Competition, Innovation and Entrepreneurship***

Innovation, today is the key mantra to innovate entrepreneurship business. Innovation can be described as the process of translating an idea or invention into goods or services that creates value or for which customers will pay (Business Dictionary.com). In business context, innovation blooms out when ideas are applied by the organization in order to further satisfy the needs and expectations of the customers. Thus innovation has become the industrial religion of the late 20<sup>th</sup> century. Business players see it as the key survival element to increase profit and market shares. Governments on the other hand, encourage and reach out for it when trying to fix the economy by supporting them with various attractive incentives such tax deductions and financial assistance. So innovation undeniably today is the driving force in all business, including innovative entrepreneurship business.

An innovation, however must represent an idea replicable at an economical cost and must satisfy a specific need. Innovation involves deliberate application of information, imagination and initiative in deriving greater or different values from resources, and includes all processes by which new ideas are generated and converted into useful products. In business, innovation often results when ideas are applied by the company in order to further satisfy the needs and expectations of the customers.. Innovations are divided into two broad categories:

1. Evolutionary innovations(continuous or dynamic evolutionary innovation) that are brought about by many incremental advances in technology or processes and
2. Revolutionary innovations (also called discontinuous) which are often disruptive and new.

Innovation often involves risk-taking organizations that creates revolutionary products or technologies which takes on the greatest risk, because they create new markets. Imitators take less risk because they will start with an innovator's product and take a more effective approach. Examples are IBM with its PC against Apple Computer, Compaq with its cheaper PC's against IBM, and Dell with its still-cheaper clones against Compaq.

Thus, Research and Development (R&D) is an essential process of innovation and a major factor in commercial enterprise. Intellectual property rights (IPR) are designed to protect innovation for a limited time to give creators and innovators time to make a return on their investment. For patents, in return for protection, patent owners are required to disclose details of the invention to encourage other inventors to build on the innovation. All creations cultural or otherwise are covered under the legal framework which includes copyright, patents, trademarks, designs and plant variety rights. Ownership is normally exclusive private individual rights.

Competition law promotes healthy business and prohibits anti-competitive conducts such as cartel and monopoly in the business market. The researchers studying on ‘The Causal Effects of Competition on Innovation: Experimental Evidence’ found that, as competition increases, sectors become less likely to be neck and neck, and the average technology level of the leading firm increases(Philippe 2014).

Entrepreneurship on the other hand, in the business context refers to ones capacity and willingness of to develop, organize and manage a business venture along with any of its risks in order to make a profit (Business Dictionary.com). An ‘entrepreneurship’ according to Onuoha (2007)’... is the practice of starting new

organization or realizing mature organizations, particularly new business generally in response to identified opportunities'. Schumpeter (1965) defined 'entrepreneurs' as individuals who exploit market opportunity through technical and /or organizational innovation'. Bolton and Thompson (2000) have defined an 'entrepreneur' 'as a person who habitually creates and innovates to build something of recognized value around perceived opportunities'.

In a capitalist economy needs entrepreneurs to exist because 'Capitalism, then, is by nature a form or a method of economic change and not only never is but never can be stationary' (Schumpeter 1942). The creation of enterprises by individuals is a way to develop new innovations which will feed the economic growth. But, all these new entrepreneurs are not innovators; some of them (or a large part of them) are 'reproducers'. The reproducers create organizations 'whose routines and competencies vary imperceptibly from those of existing organizations in established populations'. The 'innovators' create organizations started 'by entrepreneurs whose routine and competences vary significantly from those of existing organizations' (Aldrich and Martinez 2001). The reproducers even if they are not heroic entrepreneurs (in the sense of Schumpeter), however, contribute to the reproduction of the economic activity on an expanded scale, since they create wealth and jobs (Alina).

The most prominent kind of entrepreneurship is the starting of new businesses venture or improving the current business with innovative ideas. In economics, entrepreneurship combined with land, labour, natural resources and capital can produce profit. Entrepreneurial spirit is characterized by innovation and risk-taking, and is an essential part of a nation's ability to succeed in an ever changing and increasingly competitive global marketplace.

Therefore entrepreneurship in simple term could be described as willingness to take risk, organize and manage a business venture that is constantly evolving and an entrepreneur as a pioneer, leader or an inventor who march in the forefront of their fields with passion to push forward. Competition therefore, is an essential ingredient in the entrepreneurial process and a mantra for the entrepreneur's survival.

This paper seeks to address and discusses the challenges as well as the pro-active measures and recommendations to face up the issues related to the anti-competition regulation under the CA2010 with respect to fair marketing, retail pricing agreement, information exchange and cartel related issues with respect to innovative entrepreneurship business market in Malaysia

### ***Introduction to the Malaysian Competition Act 2010***

The Malaysian Competition Act 2010 (CA 2010) was passed by Malaysian Parliament in April 2010. The CA 2010 although gazetted on 10 June 2010 but only came into force on 1 January 2012. In the Act's first recital of the preamble it states that it aims '... to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith'. The second recital, of the preamble states that '...the process of Competition itself aimed to encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers' by prohibiting anticompetitive conduct in business environment in Malaysia. So promotion of the innovation and entrepreneurship was very much intended by the legislatures through the implementation of the competition law as it could be considered as one of the key objectives in the national policy.

### ***Relevance of the preamble to Innovation and Entrepreneurship***

The preamble, although considered often as a mere introductory statement accompanying a regulation but indeed a statement which reflects the objective and explains the purpose of the enactment. Preamble serves as a useful guide to discover the intention of the Parliament. Thus with that knowledge, in its interpretation may detain the mischief to which the Act is directed; where it explains the reason, purpose, object or scope of the Act and details out the facts or values which are relevant to the Act. In the context of statutory interpretation, preambles have both a contextual and a constructive role in the interpretation of the law. The contextual role is where the preamble assists with confirming the ordinary meaning of the enactments, and assists with determining if there is any ambiguity in the Act. The constructive role is where the preamble is effectual in clarifying or modifying the meaning of ambiguous enactments (Winckel 1999). However, is worth noting at this point that even though there are undeniably differing opinions in this contextual role's existence but there is also evidence to suggest that a preamble is referred if there is an ambiguity independently identified in the statute.

In the Malaysian, preamble is much sorted resource by the judges and in the CA's context, the relevant authorities concern to reflect the intention of the legislature in their interpretation of the law in the statute. As such, preamble are although non-binding nevertheless stands to reflect the spirit as well as the goal of the government and fundamental purposes of the CA 2010. Indeed, the preamble serves as a guiding principle,

source of inspiration for the court's and the relevant authorities in the task of interpreting and application of the CA 2010 itself.

The Malaysian competition law so could be celebrated to not only liberalize market to encourage market efficiency but also aims to encapsulate innovation and entrepreneurship by way of prohibiting anti-competitive conduct in business environment in Malaysia which believed on the downstream to improve price, services and choices of the consumer.

### ***Scope and application of The Competition Act 2010***

The Malaysian competition law comprises of two generic legislation which is comprised of mainly the Competition Act 2010 (CA 2010) and Competition Commission Act 2010 which establishes the Malaysia Competition Commission ("MyCC"). The MyCC is made up of the Chairman and nine other Commissioners. The MyCC generally empowered to carry out functions in the implementation and enforcement of the CA 2010 which includes the :Advocacy, Investigation and Enforcement, Market Review, Exemption & Compliance and Leniency. The Commission is under the purview of the Ministry of Domestic Trade, Cooperatives & Consumerism but functions as an independent body in its decision-making process. Its main role is to protect competitive process for the benefit of the businesses, consumers and economy of the country (New Economic Model 2010, Malaysia).

The MyCC has jurisdiction to receive complaint and investigate, and authority to impose financial penalty for the infringement under the Act and impose fees or charges for services provided by the commission. The MyCC can require enterprise to provide information to assist the Commission and co-operate with any corporate body or government agency for the purpose of performing its function. However to ensure successful implementation of the CA2010 its role-play and empowerment must be clearly and efficiently advocated in the light of promoting a competitive domestic economy as prescribed under the Strategic Reform Initiates New Economic Model 2010, Malaysia.

The Competition Act mainly prohibits two main categories of anti-competitive conducts; Firstly, the Competition Act prohibits the anti-competitive agreements under Chapter 1, Sec 4 of the Competition Act 2010. Section 4(1) of the Act provides that "Section 4(1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services."

According to the interpretation section (Sec 2) "horizontal " refers to any agreement between enterprises, which operates at the same level in the production or distribution chain; which normally means competitors in the same market. This provision prohibits any anti-competitive agreements which operated at the same level in production or distribution. On the hand "vertical" means agreements made between enterprises operating at different levels that is to say any agreement or consensus between buyers and sellers at different stages of the production and distribution chain. These agreements are prohibited if they have an anti-competitive object or effect which is significant on the market.

These prohibitions apply to such agreements which have the objects of amongst others intention to price fixing as to purchase or selling price whether directly or indirectly. Prohibition extends also to fixing of any trade condition, sharing market access, technical or technological development, investment or to perform an act of bid rigging. However this prohibition does not apply to certain conducts or agreement such as an agreement or conduct that complies with the law, collective bargaining or collective agreement between employers and trade unions on behalf of employees and services of general economic interest, which cover public utilities, or having the character of a revenue-producing monopoly.

The Act applies to all commercial activities within Malaysia, as well as commercial activities undertaken outside Malaysia that have an effect on competition in any market in the country. Commercial activity means for the purpose of this Act, any activity of commercial nature but does not include certain categories of activities. The activities that are not included, covers: any activity, directly or indirectly carried out in the exercise of governmental authority; such as provision of medical services in hospitals; any activity conducted based on the principle of solidarity, such as EPF and SOCSO; or any purchase of goods or services done not for the purposes of offering goods and services as part of an economic activity such as Government procurement activities.

However three sectors are excluded from the application of the Act. That includes the competition matters relating to communications and energy are enforced by sector regulators, namely the Malaysian Communications and Multimedia Commission in relation to communications and multimedia industries (Communications and Multimedia Act 1998) and the Energy Commission in relation to the energy sector (Energy Commission Act 2001). Commercial activities regulated under the Petroleum Development Act 1974

and the Petroleum Regulations 1974 (directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia) are also excluded from the application of the Act.

In addition, it also excludes: (1) Agreement or conduct that comply with any legislative requirement; (2) Collective bargaining for employment; and (3) Services of general economic interest or having the character of a revenue-producing monopoly

Under the Chapter 1, Sec 4(1) CA 2010 prohibits horizontal or vertical anti-competition agreement between enterprises with an 'object' or 'effect' of significantly preventing, restricting or distorting competition in any market for goods or services. The term "object" although not defined in the CA2010 but the guideline to Sec 4 CA2010 reflects the spirit of words in the preamble that is "to promote economic development by promoting and protecting the process of competition". Thus, MyCC will not just examine the actual common intentions of the parties to an agreement but would also assess the aims pursued by the agreement in light of the agreement's economic context. If the "object" of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive "object." On the same note, once an anti-competitive "object" is shown, MyCC will not examine the anti-competitive effect of the agreement. If an anti-competitive "object" is not found, the agreement may still breach the Act if there is an anti-competitive effect.

Sec 2 CA2010 the word 'agreement' defined in includes any form of contract, arrangement or understanding, whether or not agreement. That means any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices; legally enforceable, between enterprises, and includes a decision by an association and concerted practices. Concerted practice defined as any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition, and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either

- (a) To influence the conduct of one or more enterprises in a market; or
- (b) To disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition.

In practice concerted practice could arise where parties knowingly enter into an informal arrangement involving some practical co-operation or where their conduct is influenced in some way following contact or communication between them. This could involve, for example, an informal arrangement where one competitor sets the price and other competitors follow without any reasonable justification. Competitors should be wary of simply following the prices of competitors unless the decision was made completely independently from all other competitors and there is a reasonable explanation for following each other.

Sharing of any information with the aroma of price information falls within the conduct deemed to have the object of "significantly preventing, restricting or distorting competition in the market" as stated in Section 4(2) of the Competition Act. As such exchanging current price information among enterprises in industry may facilitate price fixing and thus would be deemed to be significantly anti-competitive. In general, the MyCC will not just examine the actual common intentions of the parties to an agreement, but also assess the aims pursued by the agreement in the light of the agreement's economic context. If the "object" of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive "object"

Sometimes competitors may also share non-price information such as on standards, new technologies or other information that can improve their product competition in the market. Information sharing can reduce the uncertainty that competitors will face and therefore considered also to reduce competition significantly. Evidentially it is also, undeniably true the better informed the consumers are, the more competitive the market. However, whether non-price information-sharing significantly reduces competition is usually assessed on a case by case basis with reference to their market share. In general, the frequent exchange of confidential information among all competitors in a market with few competitors is more likely to have a significant effect on competition. In addition, the exchange of information between competitors that is not provided to consumers is also likely to have a significant adverse effect on competition itself.

Secondly, the Competition Act prohibits the anti-competitive agreements under Chapter 2, Section 10 of the Competition Act for any abuse of dominant position by an enterprise in any market for goods or services. Briefly the Section 10 (1) of the Act provides that "An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market

for goods or services”. An enterprise is considered to be in a dominant position in the market if it possesses such significant power in market to adjust prices and outputs or trading terms, without any restraint from competitors or potential competitors, regardless of their level or percentage of market share of the enterprise.

However the CA 2010 does not at the moment have any regulation to control merger mergers and acquisition are excluded as they are not in the Competition Act 2010 yet.

Any violation of any of the prohibition described in the above discussion is termed as an infringement under the Competition Act. The Competition Act empowers the Competition Commission (MyCC) to conduct market reviews, to carry out the investigations and the enforcement of the Act. Section 61 (a) Competition Act stipulates that if a body corporate commits an offence is liable to pay a fine not exceeding five million ringgit for the first time and for the second or subsequent offence, liable to a fine not exceeding ten million ringgit. If case of an individual offender, Section 61(b) Competition Act stipulates the individual can be subjected to an imprisonment sentence for a term of not exceeding five years or to a fine not exceeding one million ringgit or to both for the first time offence and for second and subsequent offence to a fine not exceeding two million and subjected to an imprisonment sentence term of not exceeding five years or both

An enterprise can also be subjected to a private action by the relevant parties under Section 64 of the Competition Act. A private action can be pursued by any person who suffers loss or damage directly as a result of any prohibitory conduct under Chapter 1 and/or Chapter 2 of the Competition Act based on the finding of infringement by the MyCC.

## **RELEVANCE OF COMPETITION LAW AND POLICY TO INNOVATIVE ENTREPRENEURSHIP MARKET**

### ***Impact and challenges of competition law on innovative market***

Economists have long been interested in the relationship between competition and innovation, although economic theory contradicts by the evidence. Although free market performs better through competition, however since the time of Schumpeter, a monopolistic market is seen as more desirable for innovation than a competitive market. Whereby market power is required to make investments and take risks in research and development (R&D). Furthermore, profit isolated from competition after successful innovation is necessary for investment incentives. The opposing view, often associated with Arrow, suggest that competitive market better facilitates innovation because innovation incentives for monopolistic firms decline due to the replacement of existing products, and active competition leads to enhanced incentives for innovation in order to exit the competition (Kawahma2011). Although diverse studies have been made, an inverted-U relationship is generally assumed, as represented by the study by Aghion, which shows that such a relationship exists between product market competition, as measured by the price cost margin, and innovation using data from the UK market. A variety of patterns are conceivable for the relationship between the intensity of product market competition (whether measured by concentration or price cost margin) and innovation, depending on the situation of the competition in the market in question (asymmetric or not) and the type of R&D assumed (drastic or not).

The complicated relationship described above caused a major problem in competition policy. Competition policy often takes the formation, maintenance, and reinforcement of static market power as the criteria for intervention. Doesn't take into account dynamic competition which is more important to the national economy. As such the competition policy pursue short-term efficiency at the cost of greater efficiency.

The tension between competition policy and dynamic competition arises only where the formation of market power via an act harming the competition process is identified necessary for innovation. For instance, the formation of market power by a price cartel is unlikely to promote innovation. A merger that brings about static market power is unlikely to be helpful to innovation unless efficiency through Research and Development (R&D) is clearly indicated. Of course, it is not impossible that a concerted action taken for facilitating R&D has a short-term effect of competition avoidance on one hand and an efficiency-improving effect on the other, but cases in which hard-core restraint of competition is necessary for successful R&D are rare.

Competition law was defined by A Jones and B Sufirin as being ‘concerned with ensuring firms operating in the free market economy do not restrict or distort competition in a way that prevents the market from functioning optimally’. CA 2010 generally enacted to regulate trade and commerce by preventing unlawful restraints, concerted practice, and price –fixing agreements and market domination or monopolization. Competition law liberates market and encourages the production of quality goods and services at the lowest price. It means competition law could help businesses to be more innovative by preventing any anti-competitive conduct and

monopoly. Generally business markets are most conducive to innovation when they are made open and accessible to all. It should be reminded at this point that: competition is a driver of innovation and competitiveness, and therefore it is seen as the key to well-functioning markets where businesses can grow. Evidently, at a times economic crisis, when there is a need to grow out of the crisis, competition more needed than ever (Alexander 2012). Competition authorities in European and United States have offered innovators protection against action by traditional competitors or any unfair regulatory restrictions which placed on their business.

This commitment is further reflected in established competition regimes. At the American Bar Associations antitrust conference, Lord David Currie the chairman of the United Kingdom's Competition and Markets Authority (CMA) stated very explicitly that the CMA "instinctively in support of innovation and disruption of the competitive advantage" and it is "absolutely" has the role to play in ensuring new entrants to markets are protected from any anti-competitive behaviour from the incumbents. (At the Enforcers Roundtable Session of the 63rd ABA Section of Antitrust Law Spring Meeting 17<sup>th</sup> April 2015) This statement is a real boost to show the role competition authorities to support innovative business to entry and survival in the consumer market. However it is also worth noting that on the same note they (from the established regimes as in European Union and United States), also acknowledged that the regulators or authorities have problem in understanding how to apply regulations that were written with the conventional suppliers in mind to start up competitors (innovative entrepreneurs) using peer to peer business models. So there is slight grey area in understanding and applying competition law regulatory model on these innovative entrepreneurs business model, as well, as their interactions with the existing regulatory frameworks.

For example this problem was evidently seen in Europe in the case of the innovative taxi ride-sharing booking company 'Uber' in taxi service industry as a rival to traditional taxi operating companies. Uber is a technology company that offers a free software platform available on a mobile device for those wishing to request a ride. At its core, Uber seeks to match passengers to drivers. Uber case reflected the regulatory struggle faced by a new innovative technology business model when seeking to break into the regulated traditional business settings. The company consumer (passengers) who prefer booking and paying for taxi journeys through new technology, had encountered resistance from local regulators around the world, including in France, the Netherlands and Australia. Incumbent operators are often opposed to the use of peer-to-peer platforms in their markets. In Germany Uber has been accused of operating a business without ensuring its drivers have the necessary permits for transporting passengers. It has been called a "locust" by Taxi Deutschland, a body which operates a rival taxi-booking application to Uber's, and it has been accused of offering passengers less protection than traditional taxi companies. Incumbent operators who dominate the market often oppose such new models which may pose a challenge without solution unless the relevant authority recognise such innovative ideas to improve service and realise products are evolving faster than the legislation that is needed to govern its use. Although Uber had some internal problems to be dealt with such as safety and reliability but the case reflects the potential problems to be faced by an independent innovative service or products entrepreneur in a conventional market.

A dominant could refuse to provide supply to the new entrant (entrepreneur) or in some incidence impose unnecessary condition to safeguard the market. Refusal to supply by a dominant firm is considered abusive conduct under section 10 (2) (c) of the CA. Refusal to supply has been reported as a response to a potential threat to dominant firms' commercial interests. The prohibition of abusive conduct can also be extended to the area of intellectual property. A firm may have market power due to its intellectual property rights (IPRs). The exclusive right under the IPR enables the holder to generate profits which gives opportunity to expand, innovate and invest in R&D. The dominant firms should be given the right to refuse to license IPRs except in extraordinary circumstances such as when the refusal would prevent emergence of a new product that is not directly in competition with that of the IPR owner. In the EU, the ECJ in Magill was held that the IPR will be reviewed under Article 82 only in interpreted 'exceptional circumstance[s]'. The ECJ interpreted 'exceptional circumstance' in light of the 'new product' criteria; that is, whether the refusal 'prevented the appearance of a new product', where there was potential demand for such a product. The law banning refusal to grant IPRs allows the new entrepreneurs to exploit the IPRs or patent right to produce new products and establish a new market. Since more than 98 per cent of patents in Malaysia are granted to foreign firms. Foreign patent owners may impose a range of anti-competitive conditions on licensees, which will become a barrier for Malaysians seeking access to new technology. A study indicates that licensors who have incurred substantial cost for R&D tend to impose RBPs in technology transfer agreements to protect their interest in the investment. Among the common practices are tying arrangements, grant backs clauses, price fixing and restrictions on export.

Innovation usually results from some level of costly R&D investments and technology oriented. Thus competition is inversely measured by the ex post rents for firms that operate at the same technological level, i.e. for neck and neck firms. Means the two competitors are level with each other and have an equal chance of winning. So increased competition leads to a significant increase in Research and Development (R&D) investments by neck and neck firms. Following which, increased competition decreases R&D investments by firms that are lagging behind, in particular if the time horizon is short. Ultimately, increased competition affects industry composition by reducing the fraction of sectors where firms are neck and neck. All these results are consistent with the predictions of step-by-step innovation models (Philippe 2014).

Innovators, such as taxi ride-sharing booking company Uber, have faced pressure to conform to existing regulations. Traditional companies have also acted to protect their businesses amidst the threat of new entrants to their market. However, competition authorities in Europe and the US have said that competition law can offer innovators protection against action by traditional competitors or from unfair regulatory restrictions placed on their business. Thus it is an important issue to promote dynamic competition through competition policy for innovation.

Thus it is asserted as important for competition law and policy to address cases where certain type of action suppresses competition in terms of innovation. For instance, among the practices that were condemned in the Microsoft antitrust case in the US, the one against JAVA hindered the development of JAVA-related technology which was likely to have grown as a multi-platform technology. Prolonged monopolisation of the operating system market can suppress innovation. In the US, the innovation market had been considered to have an important regulatory role since the Antitrust Guidelines for the Licensing of Intellectual Property in 1995. The guidelines assume an evaluative space apart from product and technology markets in order to assess competitive activities at the stage of R&D. In Japan also, laws reducing free competition by lowering R&D incentives, as observed in the Microsoft Non-Assertion of Patents provision or the Qualcomm case, regarded as problematic in recent years. These examples show the laws that directly exclude competitive actions in innovation. For instance, the Horizontal Merger Guidelines of the US, revised in 2010, clearly state that such a merger is problematic and results in the acquired firm's reduced incentive for R&D. There is a question of whether the concept of an innovation market often employed in US merger regulations falls under the "particular field of trade" in Japan. It is possible, however, that if the number of innovations identifiable without using the concept is small, incentives that stagnate innovation may occur depending on the given situation. It is certain that merger regulations in Japan tend to concentrate on short-term effects, and some work is required to examine whether there was any oversight in this regard (Kawahama 2012).

In evaluating laws reducing competition in innovation, there is a need to evaluate the effect as well as the object of such acts influence the ability and incentives for innovation in a specific context. This may be a complicated job, but worth addressing to help theoretical developments in the complicated relationship between innovation and competition. If there is a large spill over effect, concerted research activities are needed to enhance incentives for R&D activities. Normally, the hard-core avoidance of competition is not required, however if the concerted R&D has the effect of avoiding competition in the product market, than it poses a problem. This, however, is a problem with non-hard-core cartels in general. This realisation requires further study on the policy related to fair marketing, retail pricing agreement, information exchange and cartel related issues with respect to innovative ideas based business to enhance innovative entrepreneurship business market in Malaysia with more defensive shield.

#### ***Benefit of competition law on innovative entrepreneurship market***

Innovative entrepreneurship today are often related to the application of new technologies such as in energy (e.g. solar), manufacturing (3D printing), health (imaging and robotics) and changing institutions (e.g. investment institutions, market policies EU) may change whole industries. Google, Facebook and before that Microsoft completely changed the industry, and for example an internet based spin-off like Booking.com is disrupting the hotel industry.

It is worth mentioning here at this point that, although there were various views on the collapse of the Soviet Union as a socialist economy, the stagnation in innovation was strongly viewed as one of the fundamental reasons. Their failure to allow opportunities to cultivate consumer demand or use profit opportunities as leverage to utilise technology, innovation to develop was considered the root of their problem. Under a free market economy, profit incentives can entice firms to discover consumer demands and to attempt various experiments to provide products that meet such demands at lower prices. The free market economy thus functions as an 'innovation machine' (Baumol 2002).



Thus, innovative entrepreneurship is about managing start-ups that may upset existing industries but also something that the existing organizations depends for their survival on entrepreneurial mind-sets and skills in dealing with ever increasing dynamic and uncertain environments. In business, innovation often results when ideas are applied by the organization in order to further satisfy the needs and expectations of the customers. Business sees it as the key to increase profit and market shares. Governments on the other hand reach for it when trying to fix the economy and encourage them with various attractive incentives. So innovation undeniably today is the driving force in all business, including innovative entrepreneurship.

A dominant enterprise in a sector, in normal situation can control production, market outlets or market access or in some cases the technical or technological development, or investment. Abuse of the dominant position happens when they refuse to supply to a particular enterprise or group of enterprises, engage in discriminatory practices for equivalent transactions, makes a contract conditional upon the acceptance by the other party on the basis of extraneous terms. Regulation on market dominance which leads to cartelization under Sec 10 CA 2010 prohibits an enterprise to abuse its dominant position. This provision prohibits a dominant enterprise in an industry or trade (dominant position) to impose unfair prices or unfair trading conditions on any supplier or customer.

The enterprises also considered to abuse their dominant position if engaged in predatory behavior towards competitors or buy up, without justification, scarce supply of immediate goods or resources needed by competitor. Predatory conduct is committed under the regulation if competitor among others set predatory price (set price below cost price to drive other efficient competitors out of the market), cause price discrimination (same product sold at different prices where the difference is unrelated to the cost of the products). Predatory conduct is also assumed when they enter into exclusive dealings( dominant seller and buyer control and foreclose the market ), by providing loyalty rebates and discounts to foreclose the market( by using selective discounts and rebates) or refuse to supply and share the essential products, intellectual property license or facilities.

The prohibitions also applies to any agreements at horizontal or vertical level which have any form of consensus or agreement which has any flavour towards price fixing such as to whether fixed price or a minimum price at which the product must be resold or known as Resale Price Maintenance (RPM) or between a buyer or seller asking for an exclusive agreement with the seller or buyer who controls certain geographic area.

Such practices will undermine the entry and survival of the innovative entrepreneurship. Such competition rules would prohibit the dominant enterprises from abusing their position of power by attempting to block innovators to enter the market or their survival through price element as described above. Thus market incumbents that co-ordinate efforts to preserve their market share against the innovators run the risk of infringing the CA 2010.

Innovative entrepreneurs, have provisional right to file complaints with MyCC against any anti-competitive conduct by their rival firms that distorts their market share. The complaints procedure to the competition Commissions are simple and user friendly it should be utilized by the innovative entrepreneurs to protect their rights through use of the correct complaints procedure. However presently most of the case in Malaysia have been initiated by MyCC itself rather than public filing complaints which implies the lack of response from the business community which either not concerned or not educated of its benefit.

CA2010 would be able to prevent the predatory behavior such as predatory pricing whereby the larger/powerful enterprises from adopting abusive or other anti-competitive practice by way of agreement or pricing techniques. Prohibition on such abusive pricing techniques would benefit entrepreneurs start up, revenue growth and enable them to compete freely in the open market. However this prohibition of abusive conduct must also be extended to area of intellectual property. An enterprise often the bigger ones as a holder intellectual property rights enjoy exclusive right which enables them to generate profits which allows them to further prosper to innovate and invest in R&D. Dominant firms should be arguably refused licence.

The application of the competition regulation fosters innovation. Competition is not only the basis of protection to consumers, but it is the incentive to progress. When businesses compete with one another, they have constantly embraced new ideas. This is particularly truest with respect to new entry in an established market where their product does not stand a chance unless it is novel.

New entrepreneurs also find it easier to enter open market in the absence of anti-competition agreements and market dominance (with prohibitions under Sec 4 and Sec 10 which prohibits enterprises dominant and free from any abusive agreement or anti-competitive conduct) to challenge up with other competitors who are old or

bigger in the market. As a resulting effect innovative businesses are spurred to be more dynamic and innovative, becoming more sustainable naturally.

Market incumbents who coordinate efforts to preserve their market share against innovators run the risk of breaching CA 2010. This include activities such as collective boycotts aimed at placing new entrants to a market at a competitive disadvantage. In cases where an incumbent who is dominant in a market being disrupted by a new entrant, competition rules prohibits the dominant enterprise in a market from abusing that position of power, for example by attempting to block innovators from the market.

The rules applicable to dominant incumbents seem particularly relevant to certain innovative technology based sectors where it is applied to replace the traditional setting in the product or services. Alternatively an innovative entrepreneurship may apply for a relief of liability under grounds provided under Section 5 CA2010 for individual exemption (Section 6) or block exemption (Section 8). This relief from infringement is given to an agreement where, ‘... there are significant identifiable technological, efficiency or social benefits directly arising from the agreement...’ Innovative business which can be proven to have such social effect outweighing market liberation such as agreement to control the price of a product to promote safe energy, benefiting human/preventing disease or protect environment could fall within this category for exemption. However it must reminded such exemption can also be utilized by bigger enterprises to control e.g. supply of any raw materials or price vertically or horizontally.

The individual exemption is given normally on case by case basis by MyCC. MyCC also can cancel/vary or remove it when there is material change of circumstances or if the obligation imposed on the applicant had been breached. The application and rules for these exemptions are very technical and only granted in genuine cases and enterprises must do self –assessment before they apply and subjected to costly application fees and charges.

Performance of the enterprises innovation and capacity to implement the process of innovation determines how well they can achieve superior performance. Innovative service and products by itself create new demand. In this perspective, enterprises may leverage their capability and competency to stand above the rest or ‘stand out’ by continuous stream of innovation. This competitive edge drives them to be more innovative and innovation makes them a better competitor in their industry.

## **CONCLUSION**

The Malaysian Competition Act 2010 aimed primarily to promote the concept of an open competition system where the market is liberated and made accessible to all economic actors irrespective of their size or market share and also irrespective of whether novel or old ideas. Business players under this concept deserve to have an equal opportunity to enter the business market of that sector. This concept dismisses anti-competitive practices such as monopoly, oligopoly or protected market in which entry is limited and controlled. The Competition Act regime therefore should ideally provide equal opportunity for new, innovative ideas, entrepreneurship. It allows more efficient enterprises to succeed on their own independent merits and removes inefficient operators. Competition regulation may provide free and fair trading environments where ample of opportunity will be created for new entrepreneurs and particularly small business to explore the trade /market without any undesirable hindrance or business practices from the bigger counterparts to undermine their competitiveness in a particular industry or trade. This process would also as desired by the legislators ultimately benefit the consumer and protect their welfare by providing more choice, better service and price.

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