



# The New Areas of Risks

Competition Law issues in Mergers, Collaborations and Exclusive Arrangements

*How can companies use economic reasoning to mitigate risks?*



# Agenda



Setting the Scene



Role of Economics



Efficiency Analysis



Mergers



Compliance



# Setting the Scene

- WTO/ASEAN
- 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> Malaysia Plan
- NEAC

*Why? External & Internal Pressure*

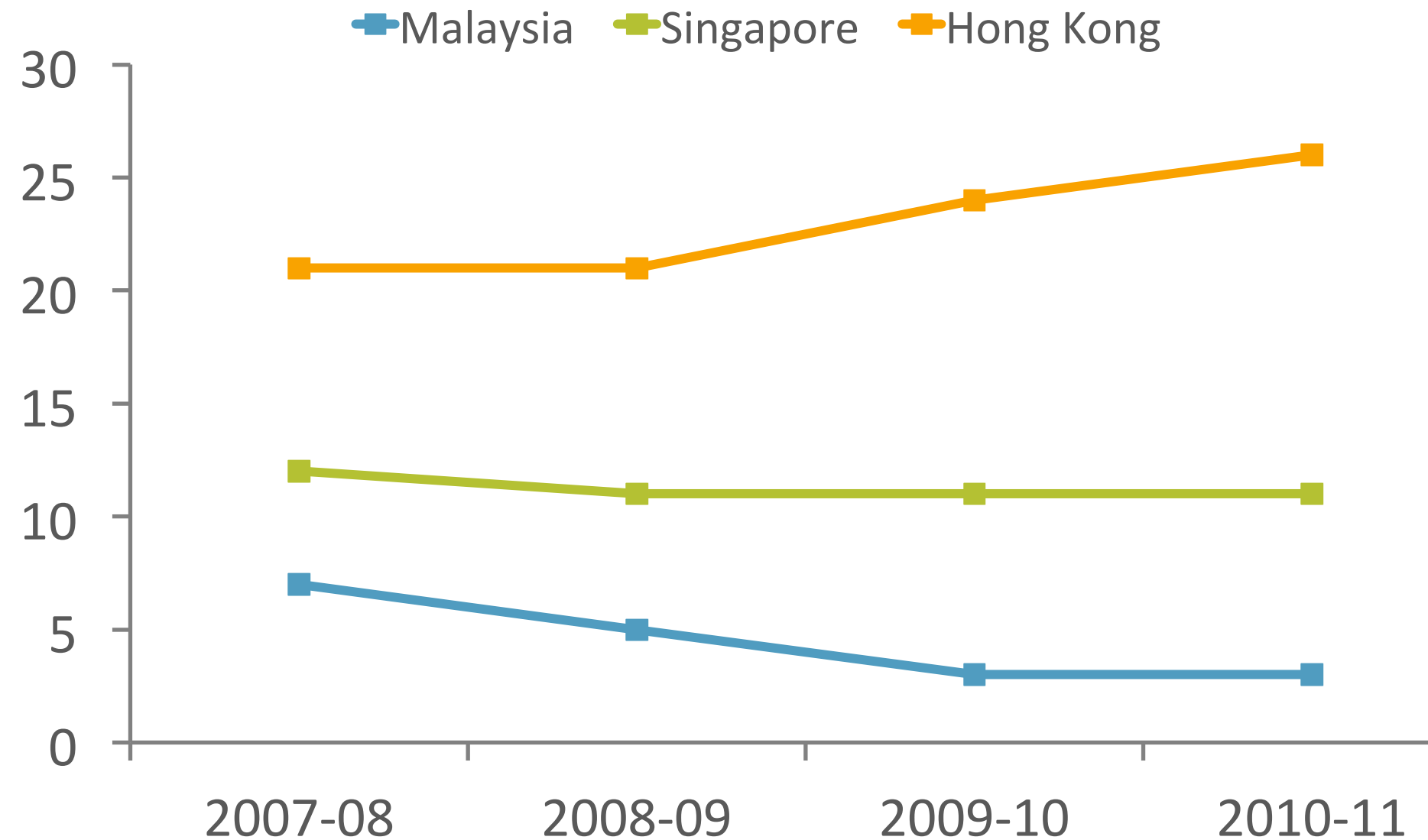
Competition Act 2010  
came into force 1 Jan  
2012





# Setting the Scene - *Why?*

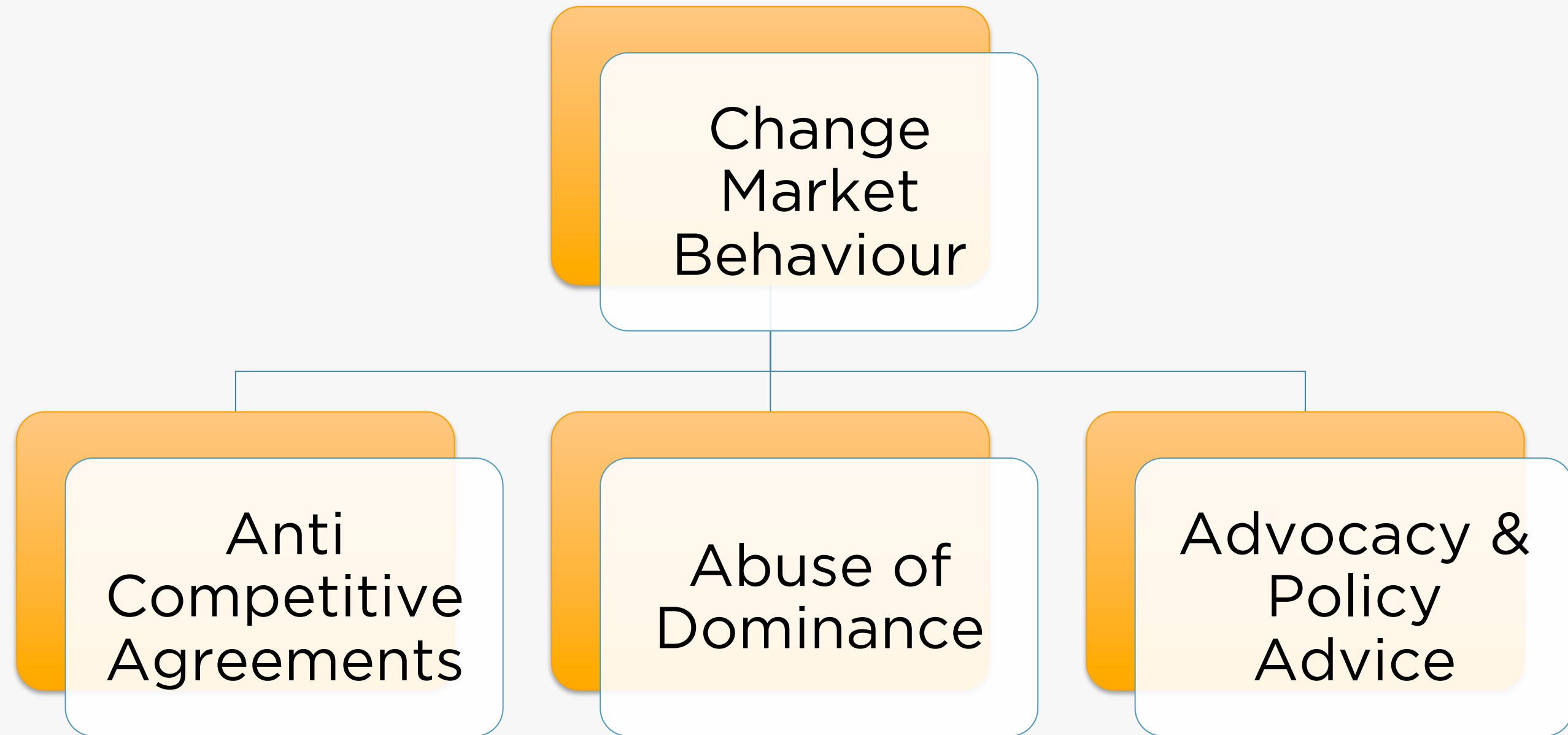
Malaysia's  
competitiveness  
is on the decline



Source: Global Competitiveness Report



# Setting the Scene - *Prohibitions*



# Setting the Scene – *the Law*

Prohibition on Anti-Competitive Agreements	Abuse of Dominance S10 (1)
Horizontal and Vertical Agreements <ul style="list-style-type: none"><li>• Agreement with the object/effect of preventing, restricting, distorting competition</li></ul>	<ul style="list-style-type: none"><li>• Predatory pricing</li><li>• Abusive rebates</li><li>• Tying and bundling</li><li>• Refusals to supply</li></ul>
Deemed Anti-Competitive Practices - S4(2) <ul style="list-style-type: none"><li>• Price fixing, Market sharing, Limiting output, Bid Rigging</li></ul>	60% market share –threshold for dominance



# Setting the Scene – *Who?*

## Enforced by

- Malaysian Competition Commission (MyCC) – a Specialist Regulator
- Competition Appeals Tribunal – (Hear appeals of decisions of MyCC –s35,s39 & s40)
- Malaysian Courts – Judicial Review

OR

- Private litigation – (Courts have jurisdiction)

# Setting the Scene – *Wide Powers*

- Power to fine (10% worldwide turnover)
- Power to issue interim measures
- Power to publish findings (reputational damage)
- Power to take enforcement action (to enforce decisions and directives)
- Power to require the provision of information
- Power to retain documents
- Power to access records
- Search and seizure powers



# Setting the Scene - *Criminal Offences*

## Offences

- To provide false information or destroy evidence
- Offence of Tipping off in relation to potential investigation by MyCC
- Note also section 30 – (Release of record, book, account seized) which leaves open the possibility that a thing seized under this law may be used for prosecution under another law



# Setting the Scene – *Where we are at*

- Since its inception, MyCC has taken the following actions:
  - Fines
    - MAS/Air Asia (10 mill each) – on appeal
    - Proposed decision - Megasteel (4.5 mill)
    - Proposed decision - Sibu Confectionery and Bakery Association (436k)
    - Proposed decision - Ice Tube Manufacturers
  - Interim measures
    - Cease & desist
      - Ice Tube Manufacturers
      - PMLOA
  - Recent warning
    - School Bus Association may be fined



# Setting the Scene - *Responses by Entities*

Entities have responded to potential non-compliance/investigations

- Giving undertakings
  - PMLOA
  - Logistics and services
  - Association of Indian Barbers
- Seeking relief
  - Individual - Nestle
  - Block exemption - Liners
  - Self assess
- Revision of policy
  - Ministry of Education – insurance for foreign students





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# Role of Economics (Q)

The preamble of CA2010 clearly sets the stage for the application of economics in enforcing the law



# Economic Concept in Preamble (I)

Clear consumer protection mandate

*“An act 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”*



# Economic Concept in Preamble (II)

Protecting the process of competition and not  
“competitors”

*Whereas the process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in quality of products and services and wider choices for consumers*



# Scope of Economic Assessment

- Cartels
- Anti-competitive agreements
- Mergers
- Abuse
- Efficiency claims
- Setting fines
- Calculating damages



# Scope for Economic Assessment

Commission to Establish <i>Elements of case</i>	Parties to Establish <i>Justification</i>
<ul style="list-style-type: none"><li>• Market</li><li>• Conduct</li><li>• Agreement</li><li>• Type of relationship (H or V)</li><li>• Effect/object</li><li>• Significance</li><li>• Dominance</li><li>• Abuse</li></ul>	<ul style="list-style-type: none"><li>• Efficiency</li><li>• Objective justification</li></ul>



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Mergers



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# MyCC on effects-based analysis

**3.6.** Exclusionary conduct shall be assessed in terms of its *effects* on competition - which means its impact on the competitive process and not its effects on competitors. Effective competition drives inefficient enterprises out of the market. So even if an enterprise is dominant it should not be stopped from engaging in competitive conduct that benefits consumers even if inefficient competitors are harmed.

**3.7.** The MyCC will use an *effects-based* approach as used elsewhere in assessing a potential abuse of a dominant position. By adopting this approach, the MyCC shall ensure that conduct that benefits consumers will not be prohibited and therefore ensure that enterprises have the incentives to compete on merits.





# Intel - Introduction

Intel, a supplier of microprocessors, fined €1.06bn by EU Commission for anti-competitive foreclosure

“Naked restrictions” – channel restrictions for AMD sales, postponed launches of AMD-based desktops and laptops (HP, Acer, Lenovo)

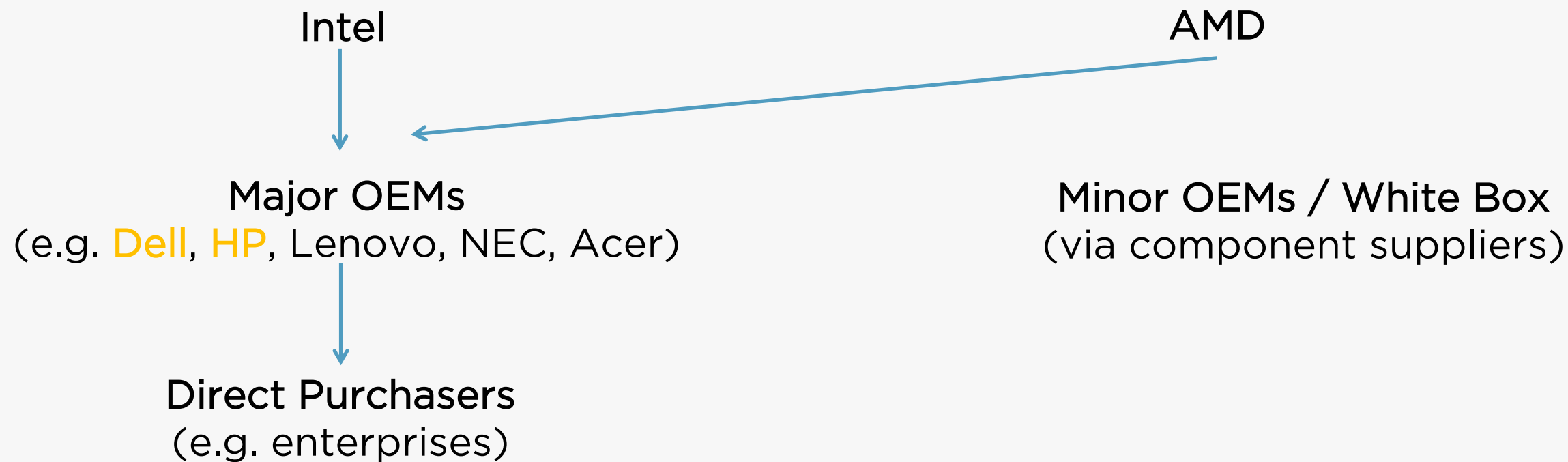
“Exclusivity rebates” – payments to major OEMs and a key distributor (MSH)  
**conditional on (near) exclusivity**

Commission’s findings recently upheld by EU General Court

On appeal to the EU Court of Justice



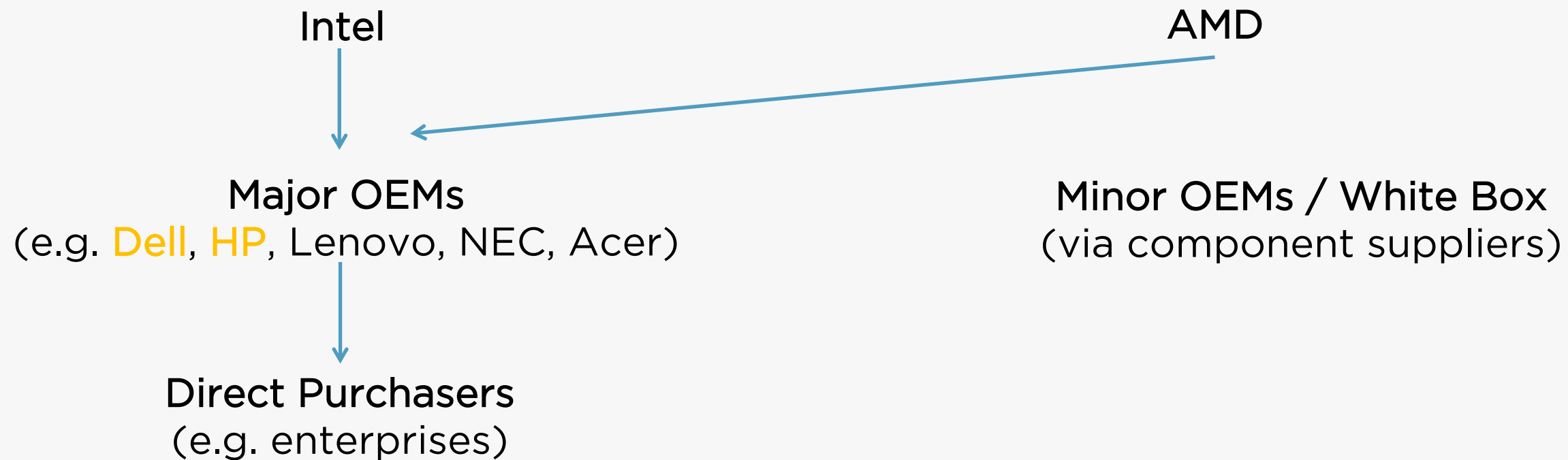
# Intel case: Commission stage



Commission ran **effects-based** analysis (as well as a purely formal analysis based on precedent). It found that:

- Intel (very) dominant (70%+ share)
- Dell and HP were of particular strategic importance (“gateway buyers”).
- Dell and HP understood certain payments to be **conditional on (near) exclusivity** to Intel.
- An **as efficient competitor** could not compete due to the size of the discounts on offer, i.e. if the discount was allocated entirely to “contestable units” (those that would not in any event have been purchased from Intel) then Intel’s prices were below cost (for those “contestable” units).

# Intel case: General Court



The General Court found that:

- Intel was dominant and employed an “exclusivity rebate”. This **form of rebate** is presumptively abusive and no objective justification was provided.
- There is no need to consider the **share of the market foreclosed** or the **size of the discount**.
- Such rebates are **capable** of harming competition. An analysis of **economic effect** was not required.



# EU position post *Intel* decision?

- A conditional rebate is a discount that applies when a target is met.
- “Type 1” rebates presumed **legitimate** (i.e. rebate applies only on units beyond the target, applies in the same way to all buyers, target set in absolute terms)
- “Type 2” rebates presumed **abusive** (i.e. where the target is conditional on (near) exclusivity, e.g. discount conditional on a certain share of buyer’s needs sourced from supplier)
  - Objective justification not likely? Only in “exceptional circumstances”.
- “Type 3” rebates assessed on a “**case-by-case**” approach:
  - Abusive if “loyalty inducing”
  - Abusive if rival’s access to a buyer is “made more difficult”?!



# Relevance for Malaysia?

## Hypothetical Scenario

Long term supply agreement, gives better prices, which in turn leads to lower prices for the consumer. Risk of foreclosure exists. How would the regulators react to this?



# Legal certainty?

- *I don't care if the test does not make economic sense. I just want to know what I can do. And what I can't do.*
- *Do you agree?*



# Legal uncertainty?

- *Am I dominant? Could I plausibly be found to be dominant?*
- *Oh, and tell me, **what is a loyalty rebate?***
- Can I incentivise under-performing distributors?
- Can I share risk with my distributors by flexing my targets according to how strong demand is in any given quarter?
- Can I establish a framework for investing in my distributors by stopping them using my investments to sell my rivals products?



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# Efficiency Analysis – The Law

Relief - Cumulative Criteria (Section 5)	Objective Justification (Section 10(3))
<ul style="list-style-type: none"><li>• Significant <i>identifiable technological, efficiency or social benefits</i> <u>directly</u> arising from the agreement</li><li>• The restriction to competition is <i>indispensable</i> to achieve the benefits – no less anti-competitive alternatives</li><li>• The detrimental effect of the agreement on competition is <i>proportionate</i> to the benefits provided</li><li>• <i>Elimination of competition is not complete</i><ul style="list-style-type: none"><li>- by removing all or most existing sources of actual/potential competition</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Dominant enterprise may take any step that has <i>reasonable commercial justification</i> or represents a commercial response to market entry or market conduct of a competitor</li></ul>



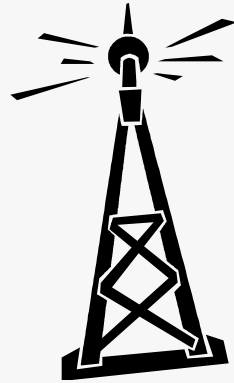
# Issues with Assessing Efficiencies

- What is the welfare standard? Consumer/Producer?
- Are efficiencies an integral factor of overall assessment an anti-competitive effect/abuse? (e.g. Turkey or South Africa)



# T-Mobile Deutschland/O2 Germany

*“horizontal cooperation agreement between two competitors that also involves certain vertical aspects”*



3G infrastructure sharing (masts, base stations): did not restrict competition

Roaming agreement: found by Commission to restrict competition

O2 Germany



3G roaming



T-Mobile



# Roaming agreement

<b>Restrictions to competition</b> <i>Hence fall within A101(1)</i>	<b>Efficiency benefits</b> <i>Hence exempt under A101(3)</i>
<p>National roaming between operators licensed to roll-out competing networks <i>by definition</i> restricts competition:</p> <ul style="list-style-type: none"> <li>• Slower pace of rolling out</li> <li>• Slower quality growth due to reliance on quality of host operator</li> <li>• Particularly harmful in dense areas where roll-out would anyway have occurred</li> <li>• Problematic given only two other rival network operators and high entry barriers</li> </ul>	<ul style="list-style-type: none"> <li>• O2 smallest operator and roaming at the outset would allow O2 to launch its 3G services <b>earlier</b></li> <li>• Better coverage, quality and transmission <b>at the outset</b></li> <li>• Dense areas are quite spread out which may act to deter rapid roll-out by a small operator due to high investment costs</li> <li>• The competition arising from at least two other operators at network level will ensure that the Parties' <b>incentive to realise greater density and a more extended footprint</b></li> </ul>
<p>Dampened retail competition as well:</p> <ul style="list-style-type: none"> <li>• Host network must give prior approval before resale permitted to virtual (or other) network operators</li> <li>• Host network must pay wholesale mark up</li> </ul>	<ul style="list-style-type: none"> <li>• Resale restrictions protect host network's ability to roll-out by <b>safeguarding its investment</b></li> <li>• Mark up generates revenue for host network to invest in 3G</li> </ul>

# An interesting twist...

T-Mobile/O2 appealed claiming that the agreement was pro-competitive and so not even caught by A101(1)

(<http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060038en.pdf>)

The General Court agreed:

- The Commission's general assessment that national roaming restricts competition was not based on **concrete evidence** specific to the agreement and contained in the decision.
- The Commission failed to provide an **objective discussion of the “counterfactual”**, i.e. what the competitive situation would have been in the absence of the agreement, which distorted the assessment of the actual and potential effects of the agreement of competition.
- O2's dependence on T-Mobile had been designed to be temporary and to diminish over the lifetime of the agreement.
- It could not be ruled out that the agreement had actually **promoted competition**



# Take-away points

- Decisions should rely on concrete evidence
- Intervention requires a clear theory of harm against a well-established counterfactual
- Authorities should not be too quick to find restrictions (even if they are then exempted)!
- Where one dimension of competition is restricted, an even more important dimension of competition may benefit such that the overall impact is pro-competitive.



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# Merger (I)

The absence of merger control was intentional

- No pre-merger notification requirement under CA. But no specific exclusion from mergers being seen as an anti-competitive horizontal agreement ex-post facto or an abuse of dominance (Continental Can)
- But note position under the Communications and Multimedia Act 1998
- Securities Commission – No Mandate to address competition concerns





# Mergers (II)

Why do businesses enter into mergers and acquisitions transactions?

- Growth: expand into new products or services or territories, foreign company entering a Market through mergers and acquisitions. Facilitate FDI
- Cut Costs: through synergies or vertical integration
- Diversify: acquire another company in an unrelated business
- Crisis: company or business division may fail and exit the market



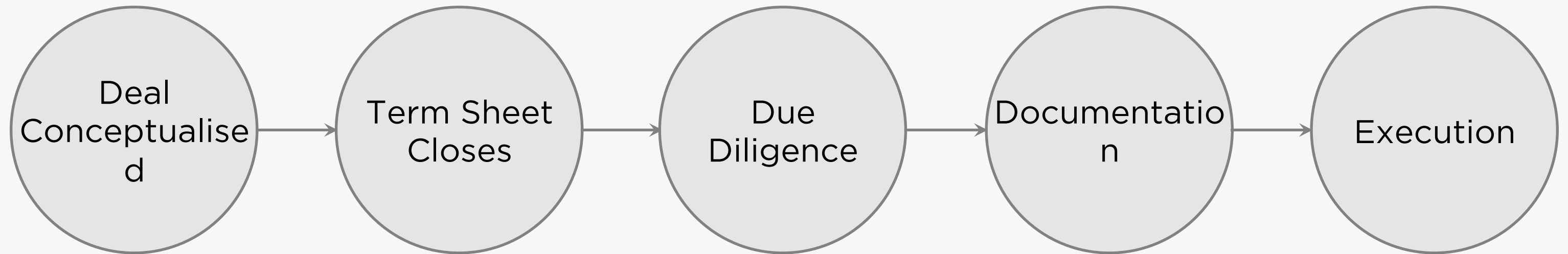
# Mergers (III)

## Anti-competitive mergers

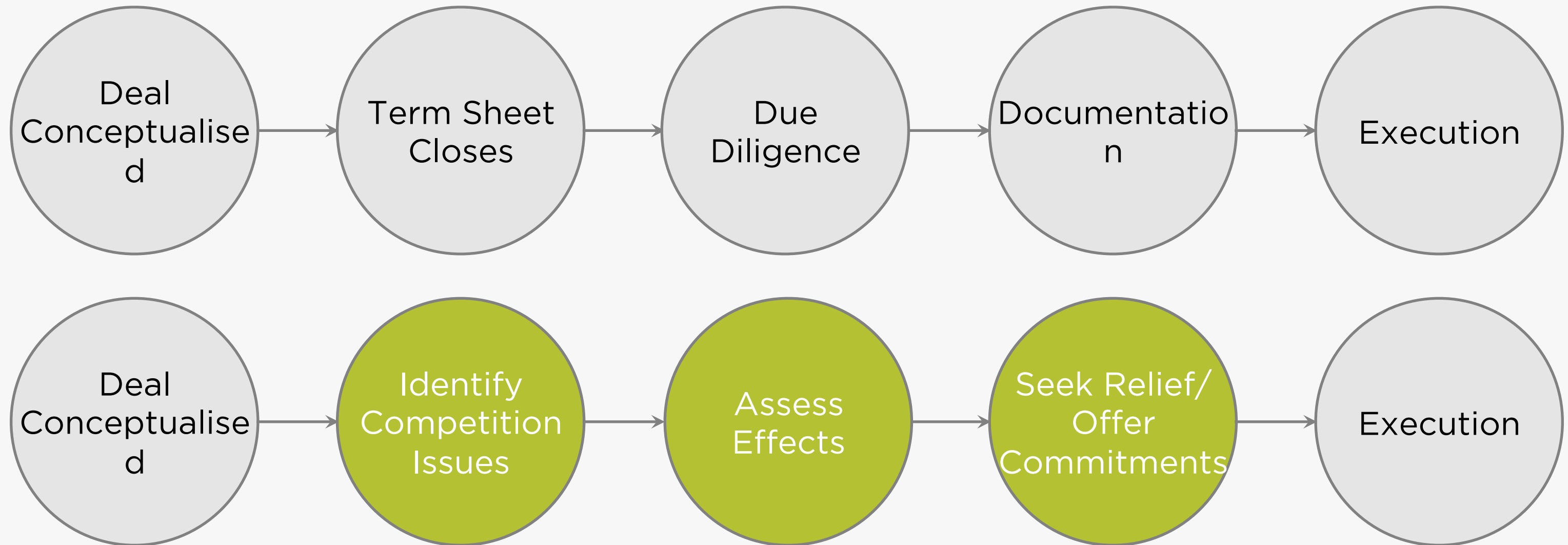
- Remove a viable or “non-conforming” competitor
- Acquire market power
- Formalize an existing cartel arrangement
- Facilitate material influence over a significant close competitor



# When should these be taken into account?



# When should these be taken into account?



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# Compliance Assessment

## Dominance

1. Do you have market power/are you dominant?
2. If you do, is this practice anti-competitive/abusive?

## Mergers

1. What is the probability of this going through?
2. What would I have to divest?

## Agreements

1. Is this a hard core agreement?
2. If so, any compelling efficiencies?



# Risks Faced by Businesses (I)

## Don'ts

- Get involved in collusive activities that infringe the Act; price fixing, market sharing; collective boycotts or other anti-competitive agreements
- Communicate, directly or indirectly, with competitors your business intentions. For example, do not attend meetings with competitors where you discuss your costs and prices to be charged
- Enter into merger arrangements that go beyond what is required for the implementation of the merger and involve restrictions prohibited under the law
- Engage in conduct that does not make economic/business sense but for exclusion; cannot be commercially justified and hence be found to an abusive dominant position
- Accept off the internet compliance programs



# Risks Faced by Businesses (II)

## DOs

- Reduce your company's risk of becoming a party that infringes the Act
- Carryout a proper compliance program which involves your staff and a proper investigation of your market position and practices
- Utilise the leniency regime by being the first to report anti-competitive agreements or practices to the Malaysia Competition Commission
- Fully cooperate with and assist the MyCC with its investigation





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# Thank you

COMPANY NAME (SK CHAMBERS?)