

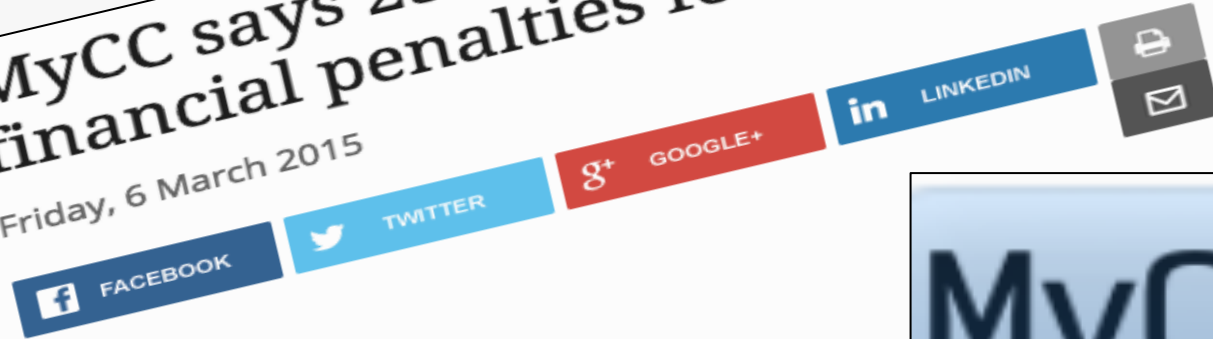
Competition Law : An Update

May 2015



MyCC says 25 ice makers pay financial penalties for price fixing

Friday, 6 March 2015



A A
KUALA LUMPUR: Twenty-five ice manufacturers and RM106,000 by the Malaysia Competition Commission (MyCC) for price rigging, have paid their financial penalties.

MyCC said on Friday it had issued a decision against 25 manufacturers, which agreed to increase the price of edible tube ice and block ice by RM100,000 per bag and the price of block ice by RM100,000 in January 2014.

It said the enterprises were found to have violated the Competition Act 2010 by agreeing to fix, distort or manipulate the price of edible tube ice and block ice in Kuala Lumpur.

MyCC probes 51 cases

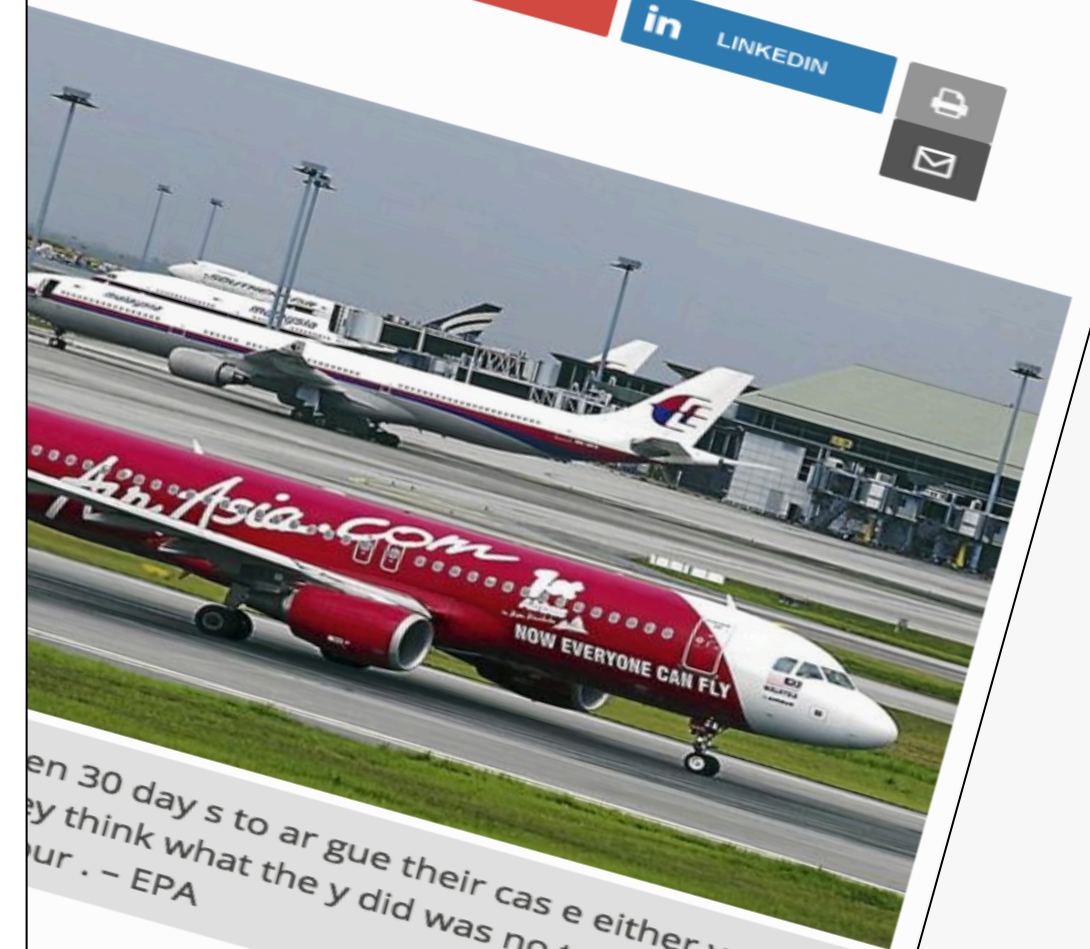
KUALA LUMPUR: Since its inception on Jan 1, 2012, the Malaysia Competition Commission (MyCC) has investigated 51 cases involving various sectors and companies under the Competition Commission Act 2010.

MyCC chief executive officer Dr Mohd Khalid Abdul Samad said 18 of the 51 cases have been solved or closed.

"A majority of the cases investigated involved cartel price fixing by companies or associations."

MyCC acts tough on airlines

Saturday, 7 September 2013
By: [B.K. SIDHU](#)



...en 30 days to argue their case either verbally or in writing. They think what they did was not seen to be an abuse of power. - EPA

...the Malaysia Competition Commission (MyCC) has investigated 51 cases involving various sectors and companies under the Competition Commission Act 2010.



Agenda



Recap



Enforcement News



Common Issues - Agreements



MCMC News



What Next?



Setting the Scene

Competition Act 2010 (CA) in force since Jan 2012

- Malaysian Competition Commission (MyCC)
- Competition Appeals Tribunal
- Judicial Review – Courts
- Private litigation

Sector Regulators

- Malaysian Communications and Multimedia Commission (Communications & Multimedia Act 1998)
- Energy Commission (Energy Commission Act 2001)



3 Pillars of Competition Law

1st Rule

Prohibits restrictive agreements and concerted practices

Horizontal and vertical (e.g. cartels, RPM, exclusive arrangements)

2nd Rule

Prohibits the abuse of dominance (significant market power)

Only applies to businesses with market power (60%) (e.g. predatory pricing, tying – exclusionary & exploitative)

3rd Rule*

Prohibits M&A activity that restricts competition

Merger control procedures

** Not under CA 2010. However Merger Control expected for Telco&Mul timedia sector by year end. Also companies doing business globally are exposed to this.*



Agenda



Recap



Enforcement News



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MCMC News



What Next?



Recent Enforcement Action

Entity	Anti Competitive Agreements	Abuse of Dominance	Action Taken
Air Asia/MAS	✓ (Cartel)		Fine : RM 10 mn each (on appeal)
Megasteel		✓ (Margin Squeeze)	Proposed Fine: RM4.5mn
Sibu Confectionery and Bakery Association	✓ (Cartel)		Proposed Fine: RM439k Final Fine: RM248k
Ice Tube Manufacturers	✓ (Cartel)		Proposed Fine: RM284k Final Fine: RM252k
PMLOA	✓ (Cartel)		Undertaking in lieu of fine
Giga/Nexus	✓ (Exclusive Arrangements)		Undertaking in lieu of fine
Association of Indian Barbers	✓ (Cartel)		Undertaking in lieu of fine
School Bus Association CH Floriculturalist Association	✓ (Cartel)		Warning

Responses by Companies

Case

Details

Undertakings

Giga/Nexus – Logistics Services

Address MyCC's concerns without finding of infringement. To remove exclusive arrangements within 3 months & embark on compliance programme

"Cooperation"

Ice Tube Manufacturers
Sibu Confectioners

Finding of infringement. Lower fine

Seeking Relief

Nestle/ Shipping Liners Association

Individual/Block Exemptions - Need to demonstrate net benefits to consumers (stringent test)

Revisions to Policy

Ministry of Education

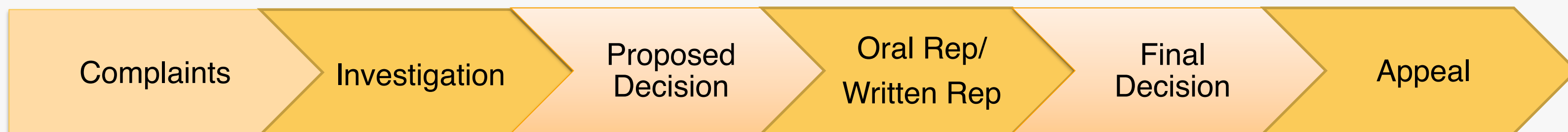
Revision to Policy in response to MYCC views – Led to restoration of competition in market for insurance for foreign students

Leniency

No known cases

To incentivise whistleblowing on cartels. 100% immunity for first applicant. No immunity from private actions.

Some Practical Insights



- Every complaint looked at
- But not every complaint leads to a file being opened

- *First contact for enforcement action – section 18 notice*
- *In some cases first contact could be unannounced visit to premises*
- *Mark confidential info*

- *The term implies a decision*
- *But really an allegation of infringement*
- *Consider media plan to address reputational risk*

- *Enterprise decides whether to pursue oral or written rep*
- *Can access MyCC files to respond to their case*

- *Finding of Infringement/ non infringement*
- *MyCC to Publish Findings*
- *Appealable*

- *Also opportunity for merit review*



Priority Sectors

- Health
- Bid Rigging
- Transportation
- SMEs
- Professional Bodies



Agenda



Recap



Enforcement News



Common Issues - Agreements



MCMC News



What Next?



Common Issue Clauses

Clause

Issue

Retail Price Maintenance (RPM)

“... the retail price of the Product X (and changes to it) shall be mutually agreed by the Parties prior to its launch.”

- *RPM not allowed*
- *Genuine agency?*

Right Of First Refusal

“Customer has the first option to utilise and take the supply of capacity...whenever Provider intends to supply capacity to a third party”

- *Problematic when you have market power*
- *Made worse by language - trigger references 3rd party rather than customer need*

Rebates

“Loyalty Bonus – if you channel 90% of Customers purchases through Supplier”

- *An issue if dominant and has the effect of foreclosing competitors*
- *Made worse by language – references “loyalty”.*
- *Consider pro-competitive language like “productivity”*



Common Issue Clauses

Clause

Possible Strategies/Justification

Exclusivity Arrangements

“The Company agrees to supply this product on an exclusive basis within Malaysia for a period of 3 years.”

- Exclusivity to Incentivise higher service levels
- Duration relevant
- % of exclusive to non-exclusive
- Commonality of practices

Anti-Trust Warranty

“The Company has not at any time prior to the date of this Agreement been a party to any agreement, arrangement or concerted practice which infringes the applicable competition laws.”

- Limit scope of clause to hard core prohibitions
- Disclosure (perform audit to disclose risks)
- Having a formal compliance programme helps

Non-Compete

“The Vendor shall ensure (that it shall not compete with the target, directly or indirectly, for a period of forty eight (48) months from the Completion Date of the sale of asset.”

- Intended to facilitate sale of business which would not take place if vendor competes with business post sale.
- Clause needs to be reasonable
- Duration and scope relevant



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Recap



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What Next?



MCMC News

1

CMA
Amendments

2

Merger
Control

*Merger Guidelines to be introduced in the latter part
of the year*



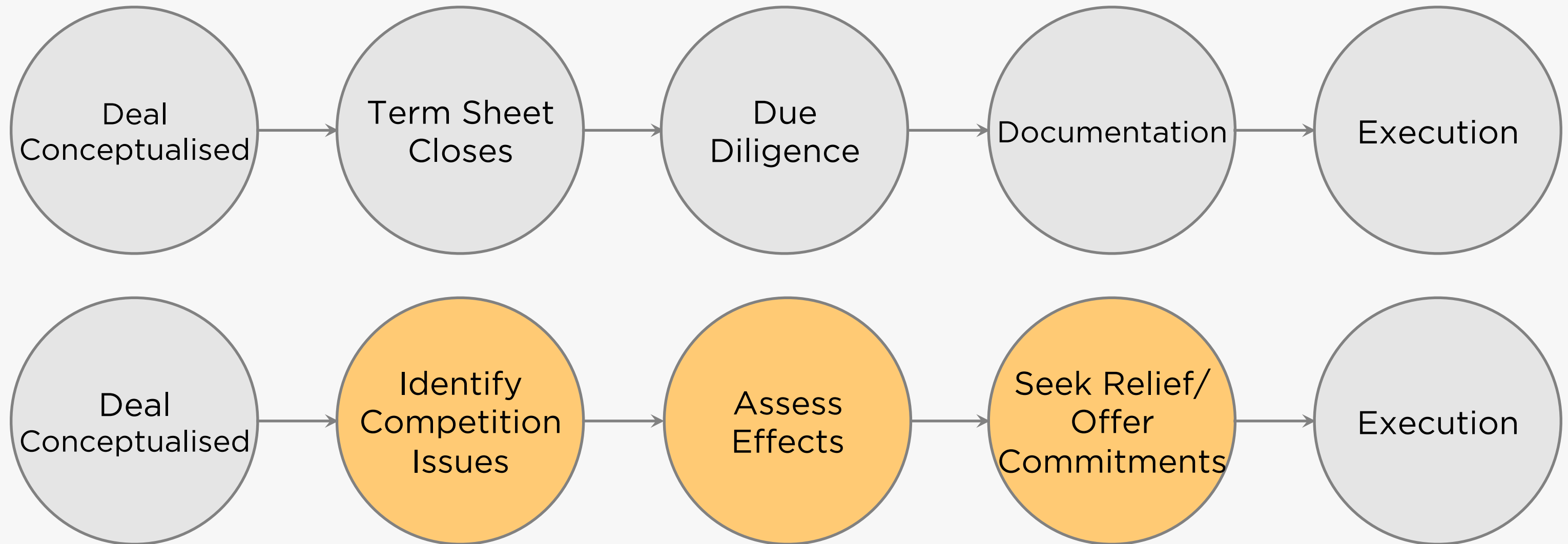
Mergers

When will a merger pose issues?

- Eliminates competition between rivals – effect is substantial
- Unification may create substantial market power – ability to reduce output and raise prices
- Increasing concentration – strengthening the ability of remaining market participants to coordinate activity



When should competition issues be taken into account?



Mergers

Internal Documents

- Hugely influential to the views and conclusions of regulator
- Board documents, confidential information memoranda, planning documents, *etc.* are scrutinized very carefully
- Key is to pre-empt the problem by exercising caution in the creation of potentially problematic documents.



Agenda



Recap



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What Next?



Compliance Assessment

Dominance

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

Mergers

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

What should companies know to construct legally defensible activities?

Agreements

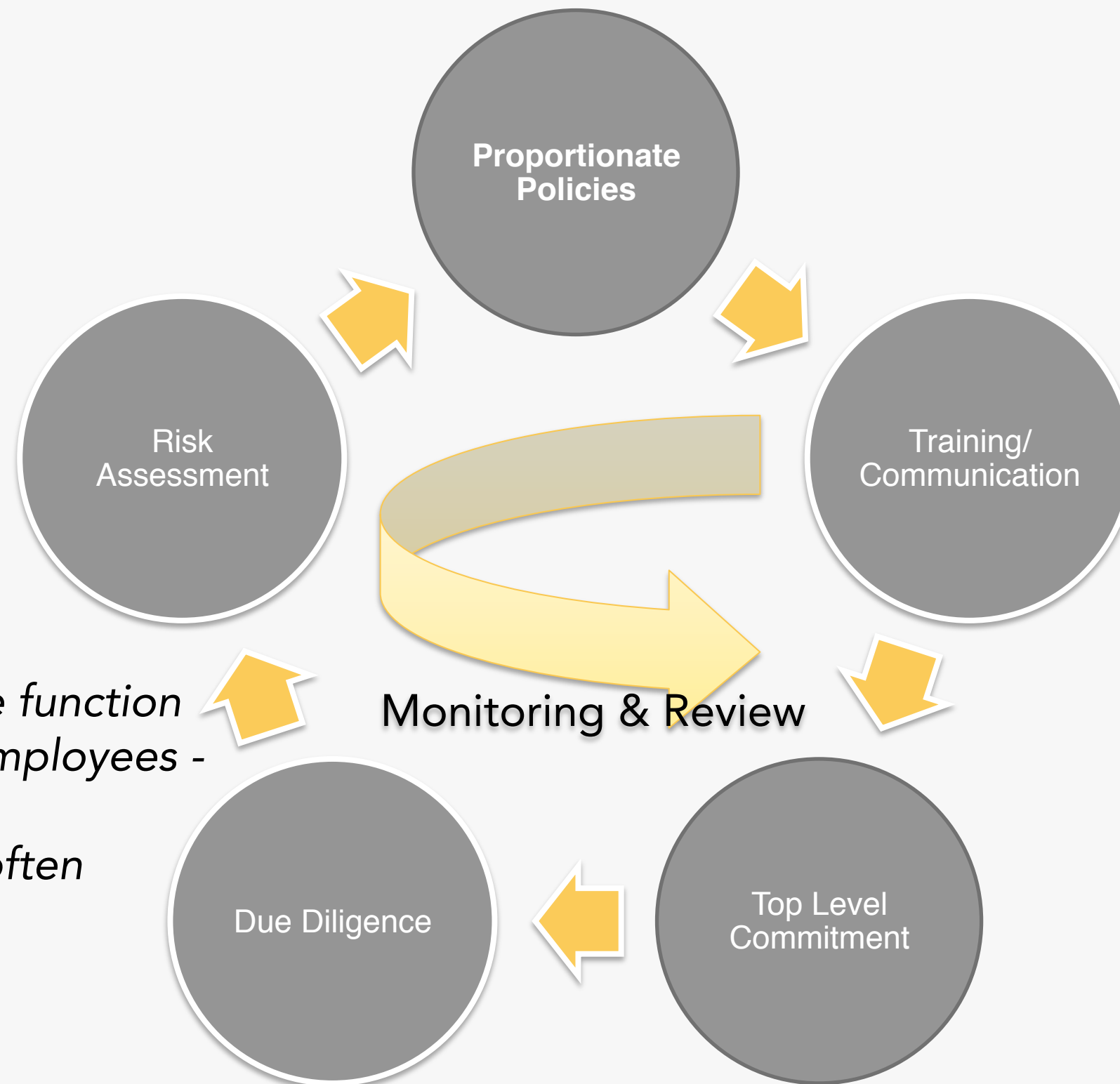
1. Is this a hard core agreement?
2. If so, any compelling efficiencies?



Regulators look for...

...Incentives for compliance within the system

- *Anonymous reporting*
- *Messaging from Board*
- *Importance of compliance function*
- *Treatment of infringing employees - Sanction or Salute*
- *Static or Dynamic – how often reviewed*



Extra-territoriality poses issues

The law applies to *restrictive effects* on a market

Irrelevant	Relevant
<ul style="list-style-type: none">• Governing law of the contract• Place where business domiciled• Place of signature and negotiation	<ul style="list-style-type: none">• Place of delivery of goods/service• Place goods/service consumed• Territories covered by contract



Global Compliance Strategy

- Determine Risk Avoidance & Risk Management strategies
- Policy must prohibit behaviour that violates **the most stringent** of competition laws e.g. cartels (a global common denominator). In contrast consider risk management strategy for effects based restraints
- Important to “think locally” while adopting global compliance strategy
- The compliance programme should carry mileage with regulators



This presentation is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this presentation.



Thank You

