

INTERNATIONAL COMPETITION NETWORK

Unilateral Conduct Working Group



ICN Unilateral Conduct Workshop
Day 1 Breakout Session Guide

December 2-3, 2010
Brussels

Overview of Breakout Sessions

Structure of Breakout Sessions

For the breakout sessions, delegates will be split into six groups, one for each breakout room. Each delegate will be pre-assigned a breakout room, which will not change throughout the workshop.

Following the plenary sessions on the analytical framework for assessing unilateral conduct cases, analyzing competitive effects and crafting remedies, delegates will move to their assigned breakout room for small group discussions. Delegates in three of the rooms will discuss a hypothetical loyalty discount program instituted by a beer manufacturer and the other three rooms will discuss a margin squeeze claim in the telecom sector. Approximately 25 participants are expected in each room.

Key Roles in the Breakout Session

In each room there will be team of three or four ICN members and NGAs in charge of leading the sessions. The main task of the moderator and resource persons is to engage the participants into the discussion or the exercise, to facilitate the process, and to instigate and stimulate participants to intervene and reflect. The moderator also should ensure that each breakout sessions is run according to the timing and modalities set in the corresponding moderator guide. If the guide calls for splitting the group into sub-groups, the moderator should instruct delegates to do so and assign a resource person to each group.

The following guide is a suggestion; the intent of the session is to get participants comfortable with the breakout format and thinking about the hypotheticals. If there is an active and free-flowing discussion, there is no need to cover every detail here.

Throughout this guide are possible or suggested questions for moderators to ask the participants. **Italics indicate possible responses to elicit based on the facts of the hypotheticals.** It is not intended to be conclusive or foreclose other responses. When prompting discussions, keep in mind that each room will include a number of non-governmental advisors; moderators should consider directing questions to solicit the perspective of NGAs. Moderators should feel free to make the sessions their own – modifying/adding to the suggested questions and exercises as they determine appropriate.

The Report Back

At the end of the first day (5:30 p.m.), the Moderators should meet with James Rill in the red breakout room (Room C) to prepare a summary of the breakout session discussions for use in the report back panel the following morning. Questions to consider for the report back, include:

- Are some types of rebates potentially more anticompetitive than others: e.g. retroactive, aggregate, individualized, linear/non-linear?
- Can there be harm to consumers if prices do not go up or sales do not go down?

- How does one establish which part of demand is contestable because customers are willing to switch away from the dominant firm and for which rivals compete? Does it matter if the discount scheme over that part of demand leads to effective prices below some measure of cost? If so, what is the appropriate measure of cost to take into account? Is predation required?
- What is the role of efficiencies in assessing the rebate arrangement?

Moderator and Resource Person Room Assignments

SESSION #1: OPENING THE INVESTIGATION

	Room C: Loyalty Discounts	Room D: Loyalty Discounts	Room E: Loyalty Discounts	Room F: Margin Squeeze	Room G: Margin Squeeze	Room H: Margin Squeeze
Moderator	Anne Purcell White (US)	Allessandra Tonazzi (Italy)	Luc Peeperkorn (EC)	Rob Van der Laan (Jersey)	Lars Kjolbye (EC)	Ed Smith (UK)
Resource Persons	David Anderson (EC)	Chuck Webb (Jersey/US)	Jim O'Connell (US)	Anita Banicevic (Canada)	Matthias Freund (Germany)	Junior Khumalo (South Africa)
Resource Persons	Brice Allibert (EC)	Catherine Hariton (Canada)	Marcel Balz (Germany)	Christian Alhborn (UK)	Jiri Novotny (Czech Republic)	Pamela Hansson (EC)
Resource Persons	Makis Komninos (Greece)	Wolfgang Deselaers (Germany)	Adrian Majumdar (UK)	Katja Viertö (EC)	Russel Miller (Australia)	Don Baker (US)

SESSION #2: CONTINUING THE INVESTIGATION/ANALYZING COMPETITIVE EFFECTS

	Room C: Loyalty Discounts	Room D: Loyalty Discounts	Room E: Loyalty Discounts	Room F: Margin Squeeze	Room G: Margin Squeeze	Room H: Margin Squeeze
Moderator	Makis Komninos (Greece)	Wolfgang Deselaers (Germany)	Adrian Majumdar (UK)	Katja Viertö (EC)	Russel Miller (Australia)	Don Baker (US)
Resource Persons	Brice Allibert (EC)	Catherine Hariton (Canada)	Marcel Balz (Germany)	Christian Alhborn (UK)	Jiri Novotny (Czech Republic)	Pamela Hansson (EC)
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Breakout Session 1: Opening the Investigation

Overview

A complaint has been lodged before the competition authority regarding an alleged abuse of dominance. In this 11:15 a.m. to 12:45 p.m. breakout session, participants should assume that they are all members of the case team meeting to construct a plan for gathering and assessing the information they will need to evaluate the alleged conduct.

The goal of the breakout session is to develop a working theory of the case, define the relevant market and determine whether Cerveja is dominant/has substantial market power. Delegates should consider the likely harm to competition and consumers in the discussion, but defer an in-depth analysis of competitive effects, efficiency justifications, and determination of whether there is a violation of the law to the afternoon's breakout session following panel 2 on analyzing competitive effects.

Participants have received the following handouts which will be used during this breakout session.

- Loyalty Discount Hypothetical Case Study
- ICN Recommended Practices on Assessing Dominance / Substantial Market Power

Structure of Session

Part 1 – Opening the Investigation (75 minutes). Moderator begins discussion of the hypothetical case study, guiding delegates through the steps of the investigation – what are loyalty discounts and rebates? How may they create anticompetitive effects? Is Cerveja dominant? What efficiency/pro-competitive arguments are there? For some stages of the discussion, delegates will be further divided into three subgroups.

Part 2 – Developing a Theory of the Case (15 minutes). Delegates will conclude the session by developing and articulating a working legal theory of the case.

Part 1

In this session we will outline the steps that typically need to be performed when conducting an investigation of an alleged violation of competition law. By way of overview, the typical steps in conducting an investigation are: (1) develop a working legal theory of the case; (2) evaluate economic issues that need to be resolved/analyzed; (3) identify sources of information; (4) interview witnesses; (5) request and review documents, data, and other materials; (6) organize, assess, and analyze the evidence; and, (7) determine whether there is a violation of the law.

While the specifics of how to plan, organize, and execute an investigation must be tailored to the special circumstances of each case, the goal of every investigation is the same: to find the facts necessary to support or reject a conclusion that the competition law has been, or is being, violated. Early identification of potentially dispositive issues can be very helpful to streamlining the preliminary investigative process.

Exercise 1 – Assess the Conduct that Gives Rise to Concern (15 minutes)

In order to develop a working theory of your case, staff will first want to review the preliminary information obtained by the competition agency. Ask for volunteers to provide a brief synopsis of the information in the complaints and other available information.

- Individual complaints from over 70 small retailers in ICNland that Cerveja has dropped them from the So Hoppy Together program. Many of these complaints share a common theme: that Cerveja isn't providing adequate marketing and financial support to allow them to qualify for rebates.
- A group complaint from 17 small local breweries that the So Hoppy Together program is an abuse of dominance having the effect of eliminating small local breweries that meet customer needs and preferences.

Questions to address include:

- 1. Based on the known facts, what conduct might we be concerned about from a competition perspective?**
 - a. What is a loyalty discount?
 - b. Are the discounts retroactive?
 - c. Are they linear or non-linear?
 - d. Does the program require exclusivity in practice?
 - e. Does it target key customers?

What is the competitive significance of each of these types of discounts? Are some types of rebates potentially more anticompetitive than others?

Loyalty discounts and rebates are defined the [ICN Report](#) as discounts or rebates on units purchased of a single product, conditioned on the level or share of purchases. In the report, some agencies highlighted that loyalty discounts and rebates condition discounts on loyal purchasing behavior; in other words, customers receive the discount only if their purchases exceed a certain threshold. A few agencies defined the term to cover only discounts or rebates that apply to all units of the customer's purchases of the product.

The discounts here appear to be retroactive discounts since they are based on the previous quarter sales, and facet 2 of the program gives the retroactive rebates at the end of the year.

They are non-linear, which means that the discounts are not the same on a per unit basis, but only take effect after meeting certain thresholds. Thus, it creates a stronger incentive than volume discounts to purchase additional units from the dominant firm.

It is unclear if the program requires exclusivity in practice. A retailer could still purchase the same amount of Cerveja beer and add beers from Hollandia, negating any implication that these are defacto exclusive agreements. However, depending on shelf space and other factors, it could cause the retailer to only buy the Cerveja beer in order to qualify for the rebate. This is an issue we would need to investigate further. It does not appear that the program targets key customers; rather it targets a key distribution channel. In order to expand its beer offerings, Hollandia first needs to get its new beers distributed by the small retailers in order to build up a reputation to then sell the new beers in the supermarkets.

2. What information do we already have? What information do we need to get?

Identifying needed information is an iterative process. As we develop legal and economic theories, we may realize that there is new information we need to find out. Information gathering can focus on: (1) contextual facts to develop an understanding of the market in order to assess the impact of the conduct under investigation and (2) operative facts and evidence that we need to support a case on the merits.

- a. What do we know about the beer market?
- b. What contextual facts do we need to develop?
- c. What are possible sources of information (documents, witnesses, etc.) and best methods for obtaining it (what investigation tools are available?)
- d. What potentially relevant information might be in the hands of the complainant (or the source of the alleged violation)?
- e. In addition to the complainant, who might have relevant information?
- f. What public sources of information may provide additional facts that may be relevant to the investigation?

Responses to elicit: We know the basic market structure includes the beer market, with distribution through small retailers and through supermarkets. However, we need more industry information, information on barriers to entry, effects if any on Hollandia from Cerveja's conduct (we need to speak to Hollandia); and we need to speak with retailers that are still part of Cerveja's program to see what if any effect it has on their sales of Hollandia.

To better understand the market, need to gather background facts about the parties, the industry at issue, the business practice at issue, the reasons why the firm under investigation may have behaved the way it has, and any other facts necessary to put the operative facts into their proper context.

The investigators would probably want to contact other breweries, small retailers, large supermarkets, companies that aid in distribution of beer, and possibly consumer groups that represent beer drinkers. Investigators would also want to speak with Hollandia.

Sources of public information include:

- *Internet – target’s website, industry websites*
- *Newspapers, magazines, and other periodicals*
- *Trade press and business and financial journals*
- *Economic, academic, and professional journals*
- *Industry and standard references*
- *Government publications and reports*
- *Records of previous investigations in the industry*

The hypothetical case study contains more information than an agency might have at the start of the investigation. Time permitting, ask delegates to consider the sources of the information provided in the hypothetical, how and when it might be obtained by the competition authority.

Exercises 2 through 5

For the following set of exercises, the moderator should divide delegates into 3 teams and assign a resource person to work with each team. At the beginning of each exercise, the moderator briefly introduces the topic and poses questions for discussion within the smaller groups. At the end of the allotted discussion time, the moderator asks each group to report on the substance of the discussions. The Resource Person for each group selects a volunteer to report to the larger group after each exercise.

Exercise 2 –Consider the Likely Economic Harm to Competition and Consumers (25 minutes)

Based on the available information, delegates should begin developing a working theory (or theories) of harm stemming from the alleged violation. In small groups, delegates will seek to answer -- What is the effect of the So Hoppy Together program? Moderators should assign each group a different aspect to consider – 1) harm to Cerveja’s customers, 2) harm to Cerveja’s competitors, and 3) harm to consumers.

After 10 or so minutes have elapsed, ask each subgroup to report back to the larger group – what is your story of harm? Ask some of the sub-questions. Is the harm to competitors or competition -- Does the So Hoppy Together program harm competition or the competitive process in some way, or does it simply reflect aggressive price competition on the merits? Can there be harm to consumers if prices do not go up or sales do not go down? Based on your story of harm, what is your working legal theory?

The moderator should point out that the working legal theory, in turn, will suggest additional information to look for during the course of the investigation. Indeed, information learned during the investigation becomes “relevant” only when viewed from the standpoint of the theory. Without a working legal theory there cannot be a coherent investigation. Thus, the development and explicit articulation of the working legal theory is a crucial part of investigative planning.

Questions for each group to consider include:

For Group 1:

1. How are Cerveja's customers likely to be affected by the So Hoppy Together program?

- a. How, if at all, might **small retailers** change their behavior in response to the program? Purchasing, promotion, pricing, product placement in the store?
- b. How, if at all, might **large supermarkets** change their behavior, given that they cannot participate in the program? Does this matter?

Small retailers will have to choose between joining the program, or forgoing it. The loyalty program becomes more and more attractive as the year goes by. Once a small retailer has met the first facet for three quarters, the rebate at stake in the fourth quarter is not only the 4% for that quarter, but the additional second facet rebate of 3% for the entire year – this could be 12% of a single quarter's sales. For this reason, we would expect to see small retailers that have achieved the first facet in previous quarters increase their efforts to sell Cerveja as the year goes on. The closer a retailer gets to the second facet rebate, the more efforts it will make to qualify for the rebate.

There are a number of ways that small retailers could increase their sales of Cerveja. They could do so by lowering prices, offering promotions to customers, increasing advertising, or devoting more shelf space to Cerveja. Some of these approaches might divert customers from other brands to Cerveja, but some of these programs might cause Cerveja customers to buy more Cerveja. Small retailers that do not participate in the program will have to compete with those that do. This could mean increasing promotion of non-Cerveja beers, or focusing on products other than beer altogether.

Large supermarkets seem to be a channel of distribution that is for smaller brewers less easy to penetrate, but actually easier to enter for an international player like Holandia, partly because of the interface between the brand identity, types of customers, and distribution economies.

Cerveja's loyalty program targets only the smaller retailers, which might corroborate the difference between the two distribution channels. Depending on the theory of consumer harm, the large supermarket reaction may be irrelevant. Even if large supermarkets lower their prices on Cerveja to compete with the small retailers, new beers may have a difficult time entering the market.

For Group 2:

2. How are Cerveja's competitors likely to be affected by the So Hoppy Together program?

- a. How, if at all, might **Holandia** respond to the So Hoppy Together program?
- b. How, if at all, are **other breweries** likely to respond to the So Hoppy Together program?

To make sales, Cerveja's competitors will have to compensate small retailers for forgoing the possibility of the So Hoppy Together rebate. The small retailers cannot be sure they will get the Cerveja rebate each quarter, and, at the beginning of the year, achieving the Second Facet rebate may be quite speculative. Competitors may be able to offer smaller discounts with greater certainty than the program Cerveja offers. On the other hand, towards the end of the year small retailers might be

very close to achieving the large Second Facet rebate, and Cerveja's competitors would have to come up with significant counter-offers to win preferential treatment at the store.

Most of Hollandia's share growth has been in large supermarkets, and that was before Cerveja started the loyalty program. The loyalty program will likely make it more difficult for Hollandia to increase sales to small retailers. Hollandia could continue to focus on large supermarkets, or it could devise a loyalty program similar to Cerveja's. However since Hollandia has a much lower market share, if Hollandia offered the exact same rebate percentages as Cerveja, the dollar amount would be much lower for the small retailer.

Hollandia could, however, use profits from its increasing grocery store sales to subsidize a small retailer program. Short-term promotional programs, even when they result in temporary below-cost prices, are good for consumers. We know Hollandia is well financed because (1) large supermarket sales are growing, (2) the company recently made investments in brewery renovation and expansion, (3) the parent company has global revenue over 10 times that of Cerveja, and (4) Hollandia has announced it is looking for new brands to grow its portfolio.

The smaller breweries cannot likely finance a discount program that will compete with Cerveja's. However, smaller breweries have advantages other than low cost. Smaller breweries could make different styles of beer, thus differentiating themselves from Cerveja and hopefully developing a loyal customer base.

For Group 3:

3. Do the effects of the So Hoppy Together program threaten consumer harm?

- a. Overall, what are the likely short-term effects of the So Hoppy Together program?**
- b. Overall, what are the likely long-term effects of the So Hoppy Together program?**

The Short-term effects of the program appear to benefit consumers. Cerveja prices will be lower, and its competitors will have to respond with price reductions of their own, or find other creative ways to make their products more attractive to small retailers and consumers.

Some small retailers have complained about being cut-off from Cerveja's program. This does not establish consumer harm. To the contrary, this suggests that Hollandia and the other breweries have stores to which they can sell their products without having to match Cerveja's rebate program.

The long-term effects seem to be that Hollandia and the other breweries would lose market share in the small retailers. Hollandia, however, has been growing in the large supermarkets and is financed by a large global corporation. Even if it were to exit the small retailers altogether, Hollandia would not likely go out of business. On the other hand, the other breweries do not sell into the large supermarkets. If the other breweries lose access to the small retailers, they might be forced to exit the market.

If Hollandia and the other breweries exit the small retailer market, but Hollandia stays in the large supermarkets, would Cerveja be able to raise prices to consumers? Presumably, if Cerveja raised prices, Hollandia would be able to re-enter the small retailer segment and restore competition.

BUT: Are two firms enough for vigorous competition? With only two firms, it would be easier for them to coordinate prices. Even if the two firms did not coordinate prices, would the loss of the other breweries constitute consumer harm?

Exercise 3 – Assessment of Dominance (20 minutes)

To support a finding that Cerveja has violated unilateral conduct laws, we must show that Cerveja is, or threatens to become, dominant in a relevant market. For this session, the focus of discussion should be on defining the relevant market and assessing the firm's dominance.

Before breaking delegates into smaller groups, the moderator should introduce the key elements of the ICN Recommended Practices on Assessing Dominance / Substantial Market Power.

After 10 to 15 minutes of discussion in smaller groups, ask each group to report back – what is the relevant market? Can ask second group, do you agree? Is Cerveja dominant? What more information do we need?

1. What is the appropriate relevant market for your analysis? What facts do you need to know to make that determination?

Is the relevant product beer or something broader or narrower? Discuss whether there is a nation-wide geographic market, or smaller markets.

2. Are there separate markets based on size of retail outlets or any other differentiating factors? How will you plan your investigation to answer this question?

Do consumers that shop for beer at the large supermarkets also shop for beer at the small retailers? Investigators would likely want to know how price competition works between large supermarkets and small retailers. We know that Hollandia has been increasing its share in large supermarket sales, but not in small retailers. That supports the idea that (1) there is probably a difference between the distribution channels and (2) Cerveja may be dominant in the small retailer channel even if it is not dominant in the large supermarkets.

We need to look at costs that breweries incur when selling into each distribution channel. Even if the large supermarkets and small retailers are in the same market, Cerveja could be forcing its competitors to use a less preferred channel of distribution. We also need to focus on whether there is a link between being an effective competitor in the small retail channel and being an effective competitor in the supermarket channel.

What are ways to test the “separate market” hypothesis? 1) gathering information necessary to do a cross-elasticity analysis? 2) asking the interviewees that are knowledgeable about the small retail / bar segment (and the supermarket interviewees) whether they perceive cross-elasticity between the two channels? 3) Are there natural experiments (for example, relative pricing of Cerveja in the two different channels in geographic markets where supermarkets and small retail compete versus where they do not) that might provide additional evidence of whether the two distribution channels should be considered separate relevant markets for antitrust purposes?

3. What are Cerveja's market shares?

4. What impact did Hollandia's acquisition of Pappabeer have on Cerveja's market shares?

- a. **Is Hollandia a possible threat to Cerveja's large market share in any given relevant market?**

b. How does Hollandia’s growing market share affect your assessment of dominance?

When Hollandia entered the market through acquisition, it gained market share in 2 years at the expense of Cerveja’s market share. Hollandia was selling beers that had already been established through the small retail market and was successful. Now Hollandia wants to expand and needs the small retail market in order to do that. On the other hand, Hollandia’s increasing market share may show Cerveja is not dominant.

In 2 years, Hollandia has taken market share away from Cerveja, so it is clear that Hollandia is a possible threat to Cerveja in the supermarket channel. In order to grow, Hollandia needs to be successful in the small retail market channel as well, so it appears that Hollandia is a threat to Cerveja in that market as well.

Hollandia’s growing market share is relevant but not dispositive. Hollandia has been increasing sales of an established brand, but has said that it intends to introduce more brands as well.

5. Beyond market shares, what other factors should we look at?

Duration of shares? Barriers to Entry - branding, regulatory, distribution network?

6. Do the facts establish dominance by Cerveja in any of the markets we have discussed? Why or why not?

Is 70% market share enough to show dominance in the market? We would need additional information regarding the small retail distribution market to determine whether Cerveja had dominance in that market, including market share information. While participants might find dominance based on market share -based presumptions, they should remember that they are (typically) just presumptions, and not dispositive. There is still room for (and a need for) a more complete analysis including durability of market power and ease of entry.

Exercise 4 - Identify Possible Efficiencies (5-10 minutes)

The moderator should point out that it is important to try to identify possible efficiencies for the conduct early in the investigation – even before they are raised by the target of the investigation. This can help to determine whether the investigation should be conducted at all. These issues will be discussed in greater detail in the next breakout session, so discussion should be brief. The focus should be on encouraging delegates to begin thinking of justifications and defenses early in the investigation.

Depending on the dynamics of the group, the moderator may either break delegates into smaller groups or address all delegates together.

- 1. What efficiency justifications might the firm allege?**
- 2. What is the role of efficiencies in assessing the rebate scheme?**

Creating efficiencies (for example, economies of scale or scope in manufacturing, marketing, research & development, purchasing, or distribution); Lowering transaction costs; Preventing “free riding”; Promoting greater retailer service efforts; Eliminating negative externalities.

Conclude this exercise by noting that if an efficiency justification or defense may be legitimate, staff should develop the evidence concerning the justification or defense necessary to incorporate into the analysis and/or reach a confident conclusion to close the investigation. If the efficiency justification or defense lacks merit, staff should develop the facts and evidence necessary to prove this.

Exercise 5 – Articulate the Theory of the Case (20 minutes)

Ask delegates -- either in small groups or all together -- in light of your analysis of the conduct, your assessment of dominance and story of harm, what is your legal theory of the case? What elements do you need to prove? See ICN Report on Loyalty Discounts & Rebates at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc357.pdf>

- What , if any, foreclosure effect are the loyalty rebates having?
- Does the loyalty program lead to exclusivity, either functionally or in fact?
- Is it appropriate to use a price cost test? If so, what is the relevant cost measure? How is it applied (e.g., is Cerveja pricing below cost if we allocate the rebate on the range for which its rivals can compete)?
- Is recoupment relevant in this situation?
- Will the conduct drive out an equally efficient competitor? Is the relative efficiency of the competitor an important element of the analysis?

Note, remedies will be discussed on the second day of the workshop. Moderators could mention that it also can be useful to also think about possible remedies at the outset of an investigation. Delegates should consider (1) whether there would be a plausible, administrable remedy in the event of a violation; and (2) what information should we be seeking in our investigation that will assist us in the remedy.

Conclude by asking delegates to vote whether to continue the investigation or close the file (and *Grab a Cerveja and have fun today*).

Breakout Session 2

Continuing the Investigation / Analyzing Competitive Effects

Overview

The structure of the 3:30-5:30 pm Breakout Sessions is to replicate, as closely as possible, a real meeting or hearing before ICNland's Competition Authority concerning the alleged abuse of dominance by Cerveja concerning its "So Hoppy Together" program and the sale of beer to small retailers in ICNland. These Breakout Sessions immediately follow a plenary panel that focused on theories of competitive harm and evidence for assessing competitive effects.

During the morning Breakout Sessions, ICNland's Competition Authority decided to commence an investigation into Cerveja's alleged abusive conduct involving beer distribution to small retailers. Therefore, for the purpose of the current Breakout Sessions, questions concerning relevant market definition and Cerveja's dominance have largely been settled and need not be considered in detail. The central goal of the current Breakout Sessions is to consider the competitive effects of the "So Hoppy Together" program and determine whether it constitutes an abuse of dominance or fair competition on the merits. Cerveja's justifications and defenses for the program should be fully considered as part of this discussion. This consideration should take place in light of the documents gathered during the investigation.

Panel

Moderator (overall responsibility for introduction, conclusion, time keeping and reporting back)

Resource Person 1 (Playing the role as the leader of the Case Team)

Resource Person 2 (Playing the role as the leader of the Devil's Advocate Panel)

Resource Person 3 (Playing the role as the Competition Authority's Head of Unit or Front Office)

Structure of Panel

Part 1 – Moderator Introduction (5 minutes)

Moderator opens the Breakout Session by reviewing the procedural posture of the hypothetical case and the goal of this Breakout Session, which is to analyze theories of competitive harm and defenses/justifications to determine whether or not Cerveja's conduct is abusive. The Moderator will then separate the room into three groups:

- Group 1, led by Resource Person 1, plays the role of the Case Team, tasked with building the strongest case possible for an abuse of dominance
- Group 2, led by Resource Person 2, plays the role of the Devil's Advocate Panel, tasked with considering weaknesses in the case for abuse and also the consideration of justification/defenses

- Group 3, led by Resource Person 3, plays the role of the Competition Authority's Front Office, which must decide whether or not an abuse of dominance exists

Part 2 – Case Preparation in Small Groups (30 minutes).

Each group, playing their allotted roles, prepares for the upcoming Agency hearing. Specifically:

- Group 1 considers the essential elements of the case and prepares the strongest case possible, based on the evidence gathered, to show that these elements are satisfied and that anticompetitive effects arise from Cerveja's conduct
- Group 2 considers the essential elements of the case and prepares the strongest case possible, based on the evidence gathered, to show that these elements are not satisfied and that Cerveja's conduct is justified and/or is not anticompetitive
- Group 3 considers the essential elements of the case and what is needed from both sides (i.e., Groups 1 and 2) to decide whether or not the conduct constitutes an abuse of dominance

The Moderator is not within any single group, but floats around the three groups to stimulate discussion and to keep track of timing

Part 3 – The Agency Meeting (60 minutes).

This is the central focus of the Breakout Session. It is intended to be a mock Agency meeting at which the Case Handlers (Group 1) presents the strongest case for abuse, the Devil's Advocate Panel (Group 2) presents the strongest defense, and the Agency's Front Office (Group 3) challenges both sides. It should be a free-flowing, interactive discussion, structured along the following lines:

- **Case for Abuse (Resource Person 1/Group 1) (20 minutes)** – The Case Handling Team presents the strongest case possible for anticompetitive effects and an abuse of dominance. This should focus on competitive effects and theories of harm, and also why no possible justification or defense for the conduct exists. This presentation should be led by Resource Person 1 (playing the lead role); although parts of the presentation should be presented by others in Group 1 (organization should be worked out in the small group discussion). Resource Person 3 (playing the role as the Agency's Front Office) should challenge assumptions and ask questions during this presentation.
- **Case for Defense (Resource Person 2/Group 2) (20 minutes)** – The Devil's Advocate Panel presents the strongest case possible for defense/justification/no anticompetitive effects. This presentation should be led by Resource Person 2 (playing the lead role); although parts of the presentation should be presented by others in Group 2 (organization should be worked out in the small group discussion). Resource Person 3 (playing the role as the Agency's Front Office) should challenge assumptions and ask questions during this presentation.

- **Front Office cross-examination (Resource Person 3/Group 3) (20 minutes)**
 - The Agency’s Front Office should ask questions and clarify issues, both to the Case Team and to the Devil’s Advocate Panel. The Front Office should challenge both sides of key aspects of their cases. This discussion should be led by Resource Person 3, but others within Group 3 should take the lead role on certain issues (organization should be worked out in the small group discussion).

During this discussion the Moderator should act as an impartial observer, intervening if necessary to stimulate discussion, and also keeping track of time.

Part 4 – Wrap-up (Moderator) (30 minutes)

Moderator then wraps up the session. Key topics to discuss include whether or not the room concludes the conduct is an abuse of dominance, or what additional information is necessary to make such a determination.

Key Points

Key points that could be addressed in the different presentations and ensuing discussion include the following:

1. Case Team (Resource Person 1, Group 1)

- Cerveja’s SHT programme requires exclusivity in fact, especially in the fourth quarter when retailers need to satisfy their sales targets to qualify for both facets of the discount. Cerveja’s historic market share and the perceived need of small retailers to maintain good relations with Cerveja contribute to the SHT programme’s exclusive effect.
- Because their volume sales are lower than Cerveja, Hollandia and the small brewers would need to offer a much higher discount/rebate to small retailers to compete effectively against Cerveja’s SHT programme
- The SHT programme, along with other evidence collected in the investigation, shows a clear anticompetitive intent to keep Hollandia from growing its sales
- Cerveja’s SHT programme will drive small brewers out of the market, thereby harm consumers by decreasing choice
- While the SHT programme was only targeted at the small retailer channel, that channel is key for innovation and new competition emerging in the market
- Cerveja’s SHT programme also harms consumer welfare by raising barriers to entry, expansion and innovation by Hollandia and others
- When allocated to the “contestable share” of the market, as they properly should be, Cerveja’s prices under the SHT programme are below cost and therefore are foreclosing as efficient competitors.

- The market share of small brewers decreased during the period of alleged abuse. Also, Hollandia's share decreased at small retailers. This is despite overall market growth. This evidences the exclusionary effect arising from the SHT programme.
- Even if retail prices did not rise during the period of alleged abuse, there is evidence that they would have fallen further without the SHT programme
- Even if retail prices did not rise in the short-term during the period of alleged abuse, in the longer-term the SHT programme will drive small brewers out of the market and thereby place Cerveja in a position to increase prices
- Cerveja's wholesale prices to small retailers did increase during the programme, which is itself an anticompetitive effect
- Even if the SHT programme may not have had appreciable anticompetitive effects in larger cities where supermarkets predominate, it has had an anticompetitive effect in the states of Mineralia and Agrilandia and the rural areas of Urbania, where smaller outlets predominant.
- The SHT programme did not produce efficiencies that Cerveja could not otherwise have achieved through less anticompetitive means

2. **Devil's Advocate Panel (Resource Person 2, Group 2)**

- Cerveja's SHT programme is not exclusive and is open to all small retailers on a nondiscriminatory basis.
- Cerveja's SHT programme is volume based only and does not require participating retailers to maintain a certain share of Cerveja brand beer. A retailer could satisfy the SHT programme's requirements in a non-exclusionary manner by maintaining or growing its sales of Cerveja and other competing brands of beer.
- Cerveja's intent is to compete vigorously, which is procompetitive
- The SHT programme is not below cost for Cerveja
- Even if Cerveja's prices through the SHT programme are below the costs of the small brewers, they are less efficient than Cerveja
- Retail prices did not rise during the period of abuse, therefore no anticompetitive effect
- Even if wholesale prices increased during the SHT programme, consumers were still protected by Cerveja's recommended maximum retail prices. While this may have squeezed the margin available to some small retailers, that encourages them to increase their efficiency.

- Hollandia has very deep pockets and has the ability to introduce its own discount and advertising programmes, which would be competition on the merits and benefit consumers. It's already done this with supermarkets and can do the same with small retailers.
- Hollandia has expanded its production facilities during the period of the alleged abuse; i.e., supply and potential supply to the market has not contracted, but expanded. Hollandia's overall market share has also expanded during this time.
- Even if small brewers can't offer similar levels of discount, they can compete in other ways, such as product differentiation
- The SHT programme targeted only the small retailer channel and ignored the larger distribution channel, supermarkets
- Even if the market shares of small brewers decreased, there is a lack of causation with the SHT programme (i.e., it happened for other reasons)
- The SHT programme helped Cerveja improve its efficiencies

3. Competition Authority's Head of Unit or Front Office (Resource Person 3, Group 3)

- De facto versus de jure exclusivity – can the SHT programme be exclusive in effect, even if it does not strictly require exclusivity?
- Is Cerveja's intent relevant?
- Efficiency – should the Authority seek to protect smaller brewers that may not be as efficient as Cerveja and Hollandia? Over what time-frame should efficiency be measured? Does the SHT programme prevent (or facilitate) them from improving their own efficiency?
- What is the relevant range to measure Cerveja's effective price with which its rivals must compete?
- If retail prices did not increase during the period of alleged abuse, could there still be an abuse? What about wholesale prices increasing?
- What is the relevant time-frame to assess the possible consumer welfare effects arising from the programme? Can an abuse be based on long-term risks to consumer welfare even if there are no noticeable short-term negative effects?
- Even if Hollandia can withstand and respond to the SHT programme, is consumer welfare protected by leaving only 2 viable competitors in the market in the longer term?

- What efficiencies might Cerveja have achieved through its loyalty program – reduction in uncertainty about inventories or production volumes, scale economies, other economies? Was there any effort made to measure or verify such efficiencies? To what extent might such efficiencies have reduced Cerveja's costs and been passed on partially to consumers?