

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 breakout 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 small 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. 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 from both breakout sessions should meet with Alexandre Verheyden in breakout room E to prepare a summary of the breakout session discussions for use in the report back panel the following morning. The following are some of the key issues to keep in mind for the report back:

- Definition of margin squeeze
- Should competition authorities be concerned with the exclusion of less efficient competitors?
- Possible anti-competitive effects of margin squeeze

- Should the presence of regulation create immunity for antitrust liability or otherwise influence the antitrust procedure?
- How should justifications relating to consumer benefit/lack of consumer harm be treated?

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 Peepkorn (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 Ahlborn (UK)	Jiri Novotny (Czech Republic)	Pamela Hansson (EC)
Resource Persons	Makis Komninos (Greece)	Wolfgang Deselaers (Germany)	Adrian Majumdar (UK)	Katja Viertiö (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 Viertiö (EC)	Russel Miller (Australia)	Don Baker (US)
Resource Persons	Brice Allibert (EC)	Catherine Hariton (Canada)	Marcel Balz (Germany)	Christian Ahlborn (UK)	Jiri Novotny (Czech Republic)	Pamela Hansson (EC)
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Breakout Session 1: Opening the Investigation

11:15-12:45 PM

**BREAKOUT SESSIONS: CONTINUING THE INVESTIGATION/ANALYZING
COMPETITIVE EFFECTS**

Overview

A complaint has been lodged before the competition authority regarding an alleged abuse of dominance through an allegation of a margin squeeze. 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 define the relevant market and determine whether AlphaTelecoms is dominant/has substantial market power and to develop a working theory of the case. 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.

- Margin Squeeze Hypothetical Case Study
- ICN Recommended Practices on Assessing Dominance / Substantial Market Power

Structure of Session

Part 1 – Opening the Investigation (70 minutes). Moderator begins discussion of the hypothetical case study, guiding delegates through the steps of the investigation – What is the relevant market? Does AlphaTelecoms hold a dominant position on that market? What is a margin squeeze? How might a margin squeeze create anticompetitive effects? How do you assess the defences raised by AlphaTelecoms?

Part 2 – Developing a Theory of the Case (20 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 (15-20 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.

- The Authority has received a complaint from e-Entrant, alleging that AlphaTelecoms has abused a dominant position by engaging in a margin squeeze from 2007-2010.
- AlphaTelecoms had a retail market share of 90% in the provision of fixed voice call services, which has been steadily falling (after liberalisation) to 50%.
- AlphaTelecoms has also invested in up-grading its network so that the latter enables the provision of broadband services (based on xDSL) and has a market share of 67% in the national market for the provision of retail broadband services. AlphaTelecoms applies the same retail broadband tariffs in the whole territory of Highlands.
- E-Entrant and Innovator are competitors, who make use of AlphaTelecoms' fixed network to provide retail broadband services, and have market shares of 12% and 6% respectively.
- There are also a number of cable operators, who use their own regional cable networks to supply retail broadband services, with a market share of approximately 15% overall. They do not offer access to their networks, and are not subject to access regulation.
- In 2007-2008, AlphaTelecoms' offer of unbundled access to its network was voluntary; only on 1 January 2009 did the regulator, TelReg, impose an obligation for AlphaTelecoms to give unbundled access to the local loop and set a price cap for this wholesale access.
- An investigation has shown that for the entire period, the spread between retail and wholesale prices would have been insufficient to cover AlphaTelecoms' product-specific retail costs. Moreover, the spread was actually negative during 2007-2008. There is evidence that TelReg's price cap was too high, due to flawed accounting methodology applied by TelReg.

- AlphaTelecoms argues that:
 - i. There can have been no abuse during 2007-2008, since AlphaTelecoms had no duty to supply.
 - ii. It was pricing from 1 January 2009 in accordance with TelReg's directions;
 - iii. Highcomp's analysis of broadband costs is flawed, due to misallocation of common costs;
 - iv. Broadband is a new market, and it is reasonable to expect losses in its broadband division during the early years, as investments will yield profits over time;
 - v. There was no effect on customers - retail prices continued to fall.

Questions to address include:

1. Based on the known facts, what conduct might we be concerned about from a competition perspective?

2. What is a margin squeeze?

- Vertically integrated firm "squeezes" the margins of downstream competitors by:
 - Increasing the input price and or
 - Reducing the final good price
- Downstream competitors cannot cover costs and forced to exit
- *ICN Refusal to Deal report* - survey results on general margin squeeze definition: "when a dominant firm charges a price for an input in an upstream market that, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival in the downstream market to compete" (p. 26)
- *European Commission's Art 82(now 102) Guidelines* definition of margin squeeze: "...a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow an equally efficient competitor to trade profitably in the downstream market on a lasting basis." (para. 80).
- Does the firm need to be dominant in both the upstream and downstream markets?
- Does access to the product need to be essential in order to be able to compete in the downstream market, or just useful?
- How is a margin squeeze case different from a standard 'refusal to deal' case?
- How is a margin squeeze case different from a predatory pricing case?

3. 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.

- What are the elements of a margin squeeze? Note: the elements of a margin squeeze claim are discussed in greater detail in Part II of the session.
- What do we know about the upstream and downstream markets?
- What cost information do we have and what will we need to develop?
 - Upstream firm's cost base?
 - How do you identify efficient downstream costs and how do you select the appropriate cost measure? Costs of actual competitors? Costs of the vertically-integrated monopolist?
 - As an incumbent provider is AlphaTelecoms legally required to provide universal broadband coverage. Are its costs therefore higher than those of its competitors who are not legally required to provide national coverage?
- What contextual facts do we need to develop?
- What are possible sources of information (documents, witnesses, etc.) and best methods for obtaining it (what investigation tools are available?)
- What potentially relevant information might be in the hands of the complainant (or the source of the alleged violation)?
- In addition to the complainant, who might have relevant information?
- What public sources of information may provide additional facts that may be relevant to the investigation?
 - 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 contain 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 2 or 3 teams (depending on the number of delegates in each room) 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 (15-20 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 AlphaTelecoms' conduct? Moderators should assign each group a different aspect to consider – 1) harm to AlphaTelecoms' competitors, and 2) 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? Is the harm to competitors or competition - does AlphaTelecoms' conduct harm competition or the competitive process in some way? 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 were/are AlphaTelecoms' competitors affected by its pricing of wholesale access?**
 - If e-Entrant and Innovator are making losses on the product, but their retail-specific costs are higher than AlphaTelecoms' retail-specific costs due to economies of scale, would their market shares have been any higher if the wholesale price was lower?
 - Note that e-Entrant and Innovator's market shares have been increasing during this period.
 - What about the cable firms - how are they affected? Does it matter?

For Group 2:

2. Do the effects of AlphaTelecoms' conduct threaten consumer harm?

- Overall, what are the likely short-term effects of AlphaTelecoms' conduct?
- Are consumers benefitting short term?
- Note that retail prices were falling during the relevant period; all operators (including AlphaTelecoms) were apparently making losses during some or all of the period; cable operators' prices are slightly higher than those of AlphaTelecoms, e-Entrant and Innovator.
- Overall, what are the likely long-term effects of AlphaTelecoms' conduct?
- Likelihood of e-Entrant and Innovator exiting? Or cable companies?
- Effects on innovation - due a reduced number of competitors?
- What if competitors remain in the market due to intervention by competition authority but the incentive to invest in upgrading infrastructure is reduced due to a lack of return. Note in this case AlphaTelecom had invested in upgrading its network.

Exercise 3 – Assessment of Dominance (15 minutes)

To support a finding that AlphaTelecoms has violated unilateral conduct laws, we must show that AlphaTelecoms is dominant in a relevant market. For this session, the focus of discussion should be on defining the relevant market(s) and assessing AlphaTelecom'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. <http://www.internationalcompetitionnetwork.org/uploads/library/doc616.pdf>

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

1. What is the appropriate relevant product markets for your analysis?

Do we need to analyse both the upstream and downstream markets? Do we need dominance in both markets? What facts do you need to know to make that determination? Any potential new entrants or changes in technology (mobile broadband) that may alter your analysis?

2. Are there separate regional markets based on the presence of the cable operators in certain cities, or any other differentiating factors? How will you plan your investigation to answer this question?

3. What about other possible competing services like fibre-optics, wireless local-loops, satellite, power line delivery? Should these services be in the relevant market? Or are they just competitive constraints?

4. **What is AlphaTelecoms' market share in the upstream and downstream markets?**
How static is AlphaTelecoms' market share. If it was declining more rapidly would this alter your analysis? Is duration an important feature for establishing dominance here?
5. **Beyond market shares, what other factors should we look at?**
Duration of shares? Entry?
What about entry question often used in a dominance analysis - is it problematic here given that AlphaTelecoms' substantive behavior and position as infrastructure owner is so linked to entry?
6. **Do the facts establish dominance by AlphaTelecoms in the upstream market? Why or why not?**
7. **Do the facts establish dominance by AlphaTelecoms in the downstream market? Why or why not?**
Evidence that AlphaTelecoms' retail prices "are normally aligned to those of its competitors": is this relevant? What about the lack of effect of the promotional activities of e-Entrant and Innovator?

Exercise 4 - Considering Efficiencies and Defences (20 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. Consider briefly raising the key efficiencies/defences discussed in the ICN's Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws (p. 31 et seq):

<http://www.internationalcompetitionnetwork.org/uploads/library/doc616.pdf>

1. **Ask a delegate to summarize the efficiency justifications/defences raised by AlphaTelecom**

From the facts: AlphaTelecoms argued that even if Highcomp had established a margin squeeze (quid non), in any event (i) it was legally allowed to charge the wholesale price set by TelReg, (ii) was forced to align its retail prices on those used by its downstream competitors ("meeting competition defence"), and (iii) that its retail pricing conduct contributed to its competitors having to enhance their efficiency to the benefit of consumers.

2. **How do we assess these defences? What weight in the analysis?**
3. **How should justifications relating to consumer benefit/lack of consumer harm be treated and in what order (as a preliminary issue or after dealing with the efficiency defences)?**

4. **Is 'meeting the competition' a legitimate business justification? What do you make of the argument that AlphaTelecoms' conduct drove efficiency improvements in its competitors?**
5. **Can a margin squeeze arise if the dominant firm has no duty to supply the product?**
6. **Can there be a finding of abuse of dominance if AlphaTelecoms' wholesale price was in accordance with the price cap ordered by TelReg? Should the presence of regulation as a general rule create immunity for antitrust liability or otherwise influence the antitrust procedure?**
7. **Should any immunity of this sort apply if, (a) the prices are fixed by the Regulator and AlfaTelecoms cannot even file a request asking for the setting of lower wholesale access prices or a higher retail access price; (b) the wholesale access price set by the regulator is just a maximum price cap and no retail regulation exists?**

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.

Part 2

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?

- 1. What elements do you need to prove?**
- 2. What tests do you use to establish a margin squeeze (equally efficient competitor test or other)?**
- 3. Should the competition authority be concerned with the exclusion of less efficient competitors and for example carry out a reasonably efficient competitor test?**
 - a. How high does the retail price need to be (i.e., what test are we applying to the cost-price spread)? What if the incumbent's retail/wholesale spread is sufficient to cover its own retail-specific costs, but that is not true of its actual competitors (equally efficient competitor test)? Should the test be one of a "reasonably efficient" downstream operator?
 - b. If the spread is sufficient to make an accounting profit (i.e., to cover actual costs, but not deliver a return on capital), can an abuse arise? Is it appropriate to base the margin on Long Run Incremental Costs or is another approach more appropriate?

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.

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Breakout Session 2

Continuing the Investigation / Analyzing Competitive Effects

3:30-5:30 PM

**BREAKOUT SESSIONS: 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 Highcomp (the Highlands Competition Authority) concerning the alleged margin squeeze in wholesale broadband access by AlphaTelecoms. 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, Highcomp decided to commence an investigation into the alleged margin squeeze. Therefore, for the purpose of the current Breakout Sessions, questions concerning relevant market definition and AlphaTelecom'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 alleged margin squeeze and determine whether it constitutes an abuse of dominance or fair competition on the merits. AlphaTelecom's justifications and defenses for the conduct should be fully considered as part of this discussion. This consideration should take place in light of the evidence gathered during the investigation and the arguments presented by the parties.

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 Highcomp's Head of Unit or Front Office)

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 AlphaTelecom'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 Highcomp'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 hearing at Highcomp. 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 AlphaTelecom'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 AlphaTelecom'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 Highcomp'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 Highcomp'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 Highcomp's Front Office) should challenge assumptions and ask questions during this presentation.
- **Front Office cross-examination (Resource Person 3/Group 3) (20 minutes)** – Highcomp'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) (25 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):

- A margin squeeze exists if a dominant firm charges a price for an input in an upstream market that, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival in the downstream market to compete (ICN Report on Refusals to Deal)
- AlphaTelecoms is dominant in the upstream market – access to its fixed-line national telecoms network.
- Access to AlphaTelecoms’ national fixed-line telecoms network is essential or objectively necessary for E-entrant and Innovator to compete against AlphaTelecoms in the provision of retail broadband services. Cable operators are not an alternative supplier of access as they are only regionally present and as technology is not yet available which would allow the cable companies to provide wholesale access to their networks. Thus, AlphaTelecoms has a duty under competition law to provide access.
- For the period of 2007 to the end of 2008, a clear margin squeeze existed, as the spread between AlphaTelecom’s wholesale network access charge and its retail broadband price was negative. This foreclosed rivals from competing profitably with AlphaTelecoms in the downstream retail broadband market.
- While a negative spread between the wholesale access charge and retail price does not exist for the period of 2008 to present, a margin squeeze still exists because the spread between the wholesale access charge and retail broadband price is insufficient to cover AlphaTelecom’s own retail costs associated with providing broadband services. Thus, a competitor equally efficient to AlphaTelecoms could not profitably compete in the downstream market, if it faced the same wholesale access charges as those offered by AlphaTelecoms.
- The evidence collected during the investigation shows that AlphaTelecoms could have charged a lower wholesale access price, but knowingly did not. The regulator, TelReg, set a price cap, but this did not prevent AlphaTelecom’s discretion from charging a lower wholesale access price. The fact that it knowingly did not shows AlphaTelecom’s anticompetitive intent.

- Consumers were harmed by the margin squeeze because, although retail prices decreased during the period of abuse, both e-Entrant and Innovator would have had the discretion to lower their retail prices even further, if they would have had a lower wholesale price for network access from AlphaTelecoms. The lack of available margin also increased barriers to additional entry into the provision of broadband services in Highland. Finally, the fact that AlphaTelecoms did not match promotional offers of its competitors shows that it still had the power to act notwithstanding the actions of its competitors. Long-term, consumers are harmed by an inability of an equally efficient competitor to compete profitably against AlphaTelecoms in the provision of broadband services.
- There is no objective justification or efficiency related argument to support AlphaTelecom's conduct.

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

- Prior to 2009, AlphaTelecoms did not have a duty to deal and provide access to its competitors. Its national fixed-line network is not an essential facility. e-Entrant and/or Innovator could have invested in rolling out their own networks. Alternatively, e-Entrant and Innovator could have gained access through cooperation with one or more of the cable operators. There can be no abuse during this period if AlphaTelecoms did not have a duty to deal with its competitors under Highland's Competition Law.
- For the period after 2009, AlphaTelecoms did have a regulatory duty to provide network access to e-Entrant and Innovator. However, this is a regulatory obligation, not a competition law obligation. Any complaints on network access should therefore be handled by the regulator, TelReg, and not the competition authority, Highcomp.
- As for the level of AlphaTelecom's retail broadband price, AlphaTelecom's disputes both Highcomp's allocation of common costs across its network, and also the time-frame in which it is assessing whether or not its downstream operation is profitable. It is normal for a broadband operator to incur short-run losses to attract additional users to its network – consumers benefit from such actions and it is still profitable for AlphaTelecoms in the long-run.
- Both e-Entrant and Innovator have higher costs than AlphaTelecoms. Thus neither is as efficient as AlphaTelecoms.
- There is no evidence that AlphaTelecom's retail broadband charges are predatory.
- The market shares of both e-Entrant and Innovator increased during the period of the alleged abuse and retail prices fell. Thus, there is no evidence of exclusion or consumer harm.
- AlphaTelecom's retail broadband prices are objectively justified because it was simply meeting the retail prices charged by its competitors. For the period after

2009, AlphaTelecom's wholesale access charge is objectively justified by TelReg's price cap.

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

- Is this a matter properly addressed under competition law, or should it be left to the regulator, TelReg? Does the possible remedy force Highcomp to itself become a telecommunications regulator?
- Does AlphaTelecoms have a duty to deal with e-Entrant and Innovator under Highland's competition law, independent of any regulatory obligations set by TelReg?
- Was access through the regional cable networks a realistic option for e-Entrant and Innovator?
- Efficiency – how should Highcomp view the relative efficiency of e-Entrant and Innovator compared to AlphaTelecoms? Should this be viewed now or in the future? Should first-mover advantages and economies of sale and scope be considered?
- Is AlphaTelecom's data on downstream retail costs reliable? If not, should Highcomp use the costs of e-Entrant and Innovator?
- Is the fact that AlphaTelecoms inherited its national network from a government monopoly relevant to the analysis under competition law?
- If retail prices did not increase during the period of alleged abuse, could there still be an abuse?
- Can there be an abuse if AlphaTelecom's retail prices are not predatory?
- What is the relevant time-frame to assess the possible consumer welfare effects arising from the conduct? Can an abuse be based on long-term risks to consumer welfare even if there are no noticeable short-term negative effects?
- Does AlphaTelecom's compliance with TelReg's wholesale price cap provide a defense or justification? Is there a meeting competition defense at the retail level?
- Could AlphaTelecom's conduct be seen as contributing to increased efficiencies, either at AlphaTelecoms itself and/or with its competitors?

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