

INTERNATIONAL COMPETITION NETWORK

Unilateral Conduct Working Group



ICN Unilateral Conduct Workshop
Remedies Breakout Session Guide

December 2-3, 2010
Brussels

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 in 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 groups 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 have participants share their experience with remedies in unilateral conduct cases. 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. Moderators should feel free to make the sessions their own – modifying/adding to the suggested questions and exercises as they determine appropriate. 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.

Breakout Session 3: Designing & Implementing Remedies

Overview

For purposes of this breakout session, which will be held on Friday, December 3, from 12 noon to 1 p.m., we will assume the case teams concluded their investigation and Cerveja and AlphaTelecoms were found to have abused their dominant position in violation of the competition laws of ICNland and Highlands, respectively. In this session, delegates meet to craft an appropriate remedy.

Structure of Remedies Session

Part 1 – Designing and Implementing Remedies (45 minutes)

Delegates are asked to craft a remedy for the abuse of a dominant position by Cerveja (rooms C, D, and E) and AlphaTelecoms (F, G, and H), drawing on their experience with remedies in unilateral conduct cases. Moderator may pose questions to the entire group or divide delegates into smaller groups for some or all of the discussion.

Part 2 – Finalizing the Remedy (15 minutes)

Delegates decide on a remedy and the reasons for choosing it and rejecting other alternatives.

Room Assignments

	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	Ricardo Horta (Portugal)	Luc Gyselen (EC)	Dan Ducore(US)	Freek Bruggert (Netherlands)	Konrad Schumm (EC)	Staffan Martinsson (Sweden)
Resource Persons	Jim Murray (US)	Paul Lugard (Netherlands)	Vicente Bagnoli (Brazil)	Renata Hesse (US)	Liberty Mncube (SA)	Marcel Meinhardt (Switzerland)
Resource Persons	Hiroshi Yamada (Japan)	Eve Cinnirella (UK)	Julia Holtz (Germany)	Jan Lohrberg (Germany)	Yonatan Cwikel (Israel)	Leslie Neubecker (UK)

Part 1: Designing and Implementing remedies (45 minutes)

The goal of this BOS is for the delegates to discuss and come up with an appropriate remedy. Assuming that the delegates concluded their investigation and found Cerveja and AlphaTelecom guilty to have abused their dominant positions, we have provided a set of questions that you may find helpful in leading and facilitating a discussion. The moderator could begin the session by reviewing with the group the introductory remarks from the plenary discussion on the main objectives for relief.

- Is the unlawful conduct still ongoing? If so, how best should it be terminated?
- Whether or not the conduct is ongoing, in addition to terminating it, can and should it be prevented going forward?
- Did (or does) the unlawful conduct create ongoing harm, or lingering effects? How best can those anticompetitive effects be eliminated?

The moderator may also wish to ask delegates, by a show of hands, what remedial authority is available in their jurisdiction: 1) monetary relief; 2) prohibitory conduct remedies; 3) affirmative conduct remedies; and/or 4) structural relief.

Moderator could begin discussion of the hypothetical by asking either a resource person or a volunteer to summarize the basis for liability. Moderator can either pose questions to the entire group, or break into teams to craft an appropriate remedy – assigning each team a resource person. In discussing the various remedial options, Moderator and Resource Persons should ask the team members to consider whether each type of remedy is appropriate to address the violation found, and why or why not, with reference to any particular experience.

Please note, that the questions provided are meant to help facilitating a discussion among and with the delegates and by no means need to be addressed in their entirety.

Part 2: Finalizing the Remedy (15 minutes)

In any event the group(s) should agree on and finalize a remedy which will bring the infringement effectively to an end. If delegates were divided into smaller subgroups, ask each team to report back on the remedy it crafted and how it was determined. Have a leader for each team or the resource person summarize the remedy the team selected as well as why it rejected other options, including reference to reasons for rejecting those options if it is worthwhile to discuss. If teams selected different remedies, ask for discussion as to the merits of each team's approach.

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Possible Questions for the Margin Squeeze Hypothetical

Cease and Desist / Prohibition

Prohibitory conduct remedies typically enjoin either the continuance or repetition of conduct found to be illegal, or conduct having similar effect realized through similar means (“fencing in” relief).

1. Will a cease and desist order be sufficient in order to prevent the dominant firm from engaging in margin squeeze also in the future? If so, how should the order be drafted – what, specifically, should AlphaTelecoms be ordered to stop doing?
 - What prohibition obligations should be imposed?
 - Should the prohibition be limited to the actual unlawful conduct that was challenged?
2. In what relevant market or markets should an appropriate remedy be focused? Is it possible to address all of the alleged harms indicated by the documents with a single behavioral prohibition?
3. How can compliance with the remedy monitored?
4. Ask if any delegates have ordered a prohibition remedy that might be instructive of this case – ask them to briefly describe the violation. Ask some of the questions above (What prohibitions were imposed? How did the agency determine the remedy. Was the prohibition limited to the actual unlawful conduct? How did the agency monitor the conduct of the parties under the remedy?)
5. Any reaction from the business or legal community to prohibition remedies?

Sanctions / Monetary Relief

6. Would a fine be an appropriate remedy in this case? If so, why? If not, why not?
7. How should the fine be calculated?
 - Tied to the actual harm? How was that determined?
 - Tied to benefit to the violator? How was that amount determined?
 - Based on turnover? In the jurisdiction? Worldwide? Adjusted?
8. Ask if anyone has imposed fines. How were the fines calculated? Was it paid? Appealed? What was the outcome?
9. Any reaction from the business or legal community?

Behavioral Remedies / Affirmative Relief

Affirmative conduct remedies require competition authorities or courts to themselves identify the conduct necessary to restore the possibility of competition.

10. If a cease and desist order will not be sufficient, would affirmative obligations provide a suitable remedy?
11. For example, must AlphaTelecoms supply at a certain price or ensure that its wholesale rates do not create negative spreads between its wholesale customers' prices/costs and what they charge at the retail level? How would you specify that requirement?
12. Is there a way to create an internal "transfer price" that would assure an appropriate margin is maintained? Would that be inefficient? How would you monitor that?
13. Would you require a minimum margin or spread?
 - Would such a requirement necessitate an information exchange between AlphaTelecoms and its wholesale customers, thereby increasing the risk of collusion?
 - What is the risk that minimum margins protect other inefficient firms? Would protecting inefficient firms from vigorous competition benefit, or hurt, customers and consumers?
14. Would the remedy include minimum service requirements?
 - How would they be determined? Are there other contemporaneous dealings that might provide a guidepost for pricing?
15. Has anyone had a case where they had to specify specific pricing term – minimum pricing or minimum margins – or terms of service? How were the prices or service terms determined?
16. Has anyone had a case where they had to specify royalties and other terms for mandatory licensing? How did you derive "Fair Reasonable and Non-Discriminatory" (FRAND) terms for licenses?
17. Based on experience with previous pricing or royalty remedies, did you face difficulties in supervising an ongoing commercial relationship mandated by such a remedy?
18. Should the remedy prevent anticompetitive conduct going forward or should it also "repair" the damage that has been done? How should the agency "repair" damage?
19. When is it appropriate for the antitrust agency to require ongoing antitrust supervision of wholesale and/or retail rates by Alpha? If so, how is it to actually carry out this function?

- What are the respective roles and the respective strengths and weaknesses of ex ante regulatory intervention and ex post competition law enforcement?
- If the alternative is to have a regulator monitor AlphaTelecom's wholesale pricing, would that over time hinder vigorous competition and raise problems due to regulatory error or capture?

20. Any reaction from the business or legal community to affirmative remedies?

Structural Remedies

Structural remedies require the violator to sell a business in order to create a new competitor, or to break the link between two activities that were coordinated to create competitive harm (a vertical divestiture).

21. Is a structural remedy a suitable remedy in this case?

22. Would vertical separation of AlphaTelecom benefit consumers?

23. Has anyone ordered a structural remedy? Briefly describe the violation. How did the agency determine a structural remedy? Was it challenged? Has that remedy prevented a repeat of the unlawful conduct? Has it deterred others from engaging in the prohibited conduct? Were other remedies also imposed (fines, behavioral)?

Possible Questions for the Loyalty Discounts Hypothetical

1. What is the main problem/effect you are trying to solve? Is it price? Or, is it exclusivity? How is that conduct affecting competition?
 - Is Hollandia having trouble being carried by the smaller retailers? Why? Why can't Hollandia just lower its wholesale price to the small retailers?
 - Why won't smaller retailers carry Hollandia? What is it about Cerveja's pricing practice that makes it hard for Hollandia to compete?

Cease and Desist / Prohibition

Prohibitory conduct remedies typically enjoin either the continuance or repetition of conduct found to be illegal, or conduct having similar effect realized through similar means ("fencing in" relief).

2. What do you want to prohibit Cerveja from doing with its pricing?
 - If you prohibit simple volume discounting, what does that do?
 - Do small retailers lose their incentive to carry Cerveja?
 - Do beer customers pay higher prices?
3. Is there a way to allow volume discounts but still leave room for Hollandia to compete?
 - Can you think of another way to allow for volume discounts?
 - Is there a difference between volume discounts that apply backwards (retroactively) and discounts that apply forwards?
 - If Cerveja can offer its retailers a price reduction for additional purchases, once certain volume targets are met, does that allow for volume discounts without making it virtually impossible for Hollandia to compete?
4. Is this the outcome you want? Doesn't this put of a price regulator?
5. In addition to pricing, is there any other relief you think may be needed?
 - Can you think of things that Cerveja might demand from the retailers, and that would make it harder for Hollandia to "compete on the merits?"
 - What about the in-store displays?

- Would it be appropriate to prohibit Cerveja from requiring its small retailers to remove Hollandia's displays?
 - Other things like that:
 - Location on shelves – prohibit demands for best location, or for all the shelf space!
 - If store has coolers, prohibit demands that only Cerveja beer be kept cold.
 - Anything else – what might you want to know about how beer is displayed, advertised, and sold in the smaller stores?
5. How can compliance with the remedy monitored?
6. Ask if any delegates have ordered a prohibition remedy that might be instructive of this case – ask them to briefly describe the violation. Ask some of the questions above (What prohibitions were imposed? How did the agency determine the remedy. Was the prohibition limited to the actual unlawful conduct? How did the agency monitor the conduct of the parties under the remedy?)
7. Any reaction from the business or legal community to prohibition remedies?

Sanctions / Monetary Relief

8. Would a fine be an appropriate remedy in this case? If so, why? If not, why not?
9. How should the fine be calculated?
- Tied to the actual harm? How was that determined?
 - Tied to benefit to the violator? How was that amount determined?
 - Based on turnover? In the jurisdiction? Worldwide? Adjusted?
10. Ask if anyone has imposed fines. How were the fines calculated? Was it paid? Appealed? What was the outcome?
11. Any reaction from the business or legal community?

Behavioral Remedies / Affirmative Relief

Affirmative conduct remedies requires competition authorities or courts to themselves identify the conduct necessary to restore the possibility of competition.

12. Beyond the specific things Cerveja has done, what else might you worry about?
- Would it be wise to prohibit outright exclusivity agreements between Cerveja and the stores?
 - Does it matter that Cerveja had not had such express agreements (as far as you know)?
13. Can you think of things you want Cerveja to do, so you can assure that they don't violate the remedy provisions?
- Should they have to report to you from time to time?
 - What information do you think you would want?
 - Description of their pricing to the largest of the small retailers?
 - Communications between Cerveja and its small retailers?
 - Do you think Hollandia would know what's going on in the stores, so it can complain to you if Cerveja returns to its prohibited conduct?
14. Has anyone had a case where they had to specify specific pricing term – minimum pricing or minimum margins – or terms of service? How were the prices or service terms determined?
15. Has anyone had a case where they had to specify royalties and other terms for mandatory licensing? How did you derive "Fair Reasonable and Non-Discriminatory" (FRAND) terms for licenses?
16. Based on experience with previous pricing or royalty remedies, did you face difficulties in supervising an ongoing commercial relationship mandated by such a remedy?

Structural Remedies

Structural remedies require the violator to sell a business in order to create a new competitor, or to break the link between two activities that were coordinated to create competitive harm (a vertical divestiture).

17. Is a structural remedy a suitable remedy in this case? Any reaction from the business or legal community?
18. Has anyone ordered a structural remedy? Briefly describe the violation. How did the agency determine a structural remedy? Was it challenged? Has that remedy prevented a repeat of the unlawful conduct? Were other remedies also imposed (fines, behavioral)? Has it deterred others from engaging in the prohibited conduct?