

A reformed approach to exclusionary conduct

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*The views expressed are those of the author and do not necessarily reflect those of DG COMP or the European Commission

Outline



- n On the design of guidelines
- n On the implementation of an effects based approach

Guidelines



- n Explain how we understand the pro competitive aspects, the theories of harm and explain the factors that we will take into account in the context of an integrated assessment. Say little about priors but still provide some guidance about the theories of competitive harm that we are likely to focus attention on
- n This is exactly the approach of the NHMG
- n Guidelines acts mostly as an intellectual discipline – and limited commitment value

Guidelines



- n Express the objective of enforcement without ambiguity (consumer harm ?)
- n Explain how we understand the pro competitive aspects and the mechanisms of exclusion, in conformity with economic theory and reliable evidence – and provide indication about the theories of competitive harm that we are likely to focus attention on
- n Explain the factors that we will take into account
- n Provide safe harbors and presumptions
- n Guidelines acts mostly as an intellectual discipline – and have a commitment value

Guidelines



- n This is exactly what the NHMG do
- n NHMG outline general approach: ability, incentives and effects on the final consumers. Integrated evaluation of efficiency benefits and potential anti-competitive effects
- n Distinguish between input and customer foreclosure – describe how anti competitive effects would come about (in line with economic theory)
- n Identify the main sources of efficiencies – again refer to mechanism and provide a non exhaustive list

Guidelines



- n Avoid deceptive semantics
 - Competition on the merits ?
 - Behavior is anti-competitive if it only makes sense because it is anti-competitive
- n Priors and ideological capture
- n The weight given to type I is defined by the standard of proof – ultimately the ECJ
- n The emphasis on type I errors is often justified by the presumption that markets correct the exercise of market power but not government failures





- n If the cost of making type errors is important, it may be worth considering explicitly the weighted sum of the utility that will accrue in both outcome - that is if the practice is anti-competitive and if it is not – where weights are ex ante probabilities
- n Such an approach also allows for considering systemic effects

Investigating effects

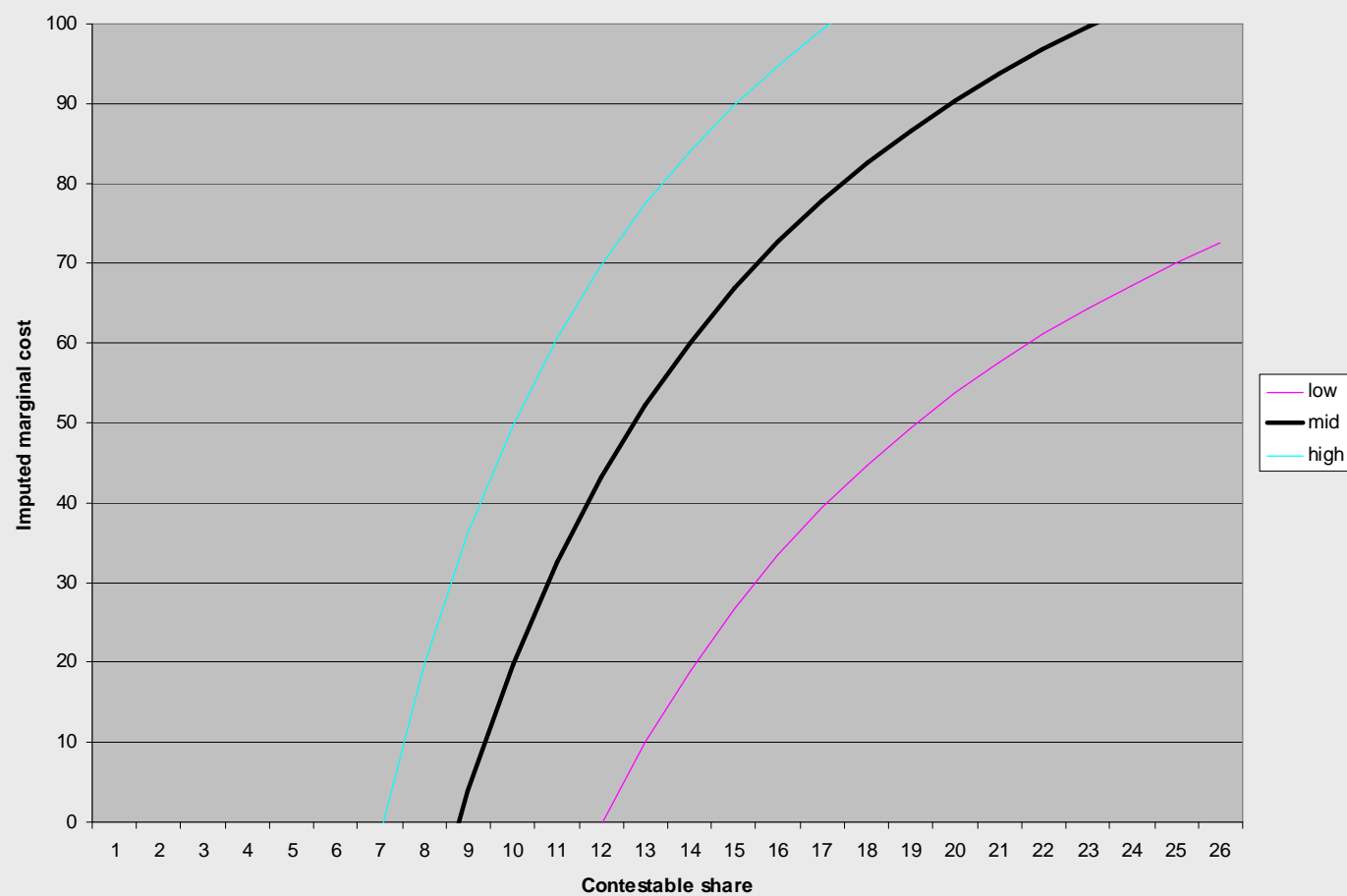


1. Spell out a logically consistent theory of consumer harm
2. Validate that theory empirically
 - Check the realism of the underlying assumptions (ex-ante validation)
 - Check whether observed market outcomes are consistent with the predictions of the theory (ex-post validation)
3. Identify alternative pro-competitive motivations for the practice (validate ex-ante and ex-post)
4. One test : Market power (Anti-competitive effects, efficiencies) < Market power without the practice
5. Experience in the area of merger control – in both instances there is a counterfactual which is unobserved (what happens with merger, what would have happened without the practice)

Illustration : rebates



- n A safe harbor : the effective price for a range of output such that exclusion could take place should exceed average avoidable cost
- n If not, consider whether consumers are likely to be harmed. Scale economies, network effect, economies of learning (tipping)
- n Consider hypothetical example :
 - Retroactive rebate of 30 M (contingent on target)
 - Average selling price : 150
 - Volume : 2.5 M
- n Look at effective price as a function of the share which is contested (say 10 %)
 - Effective price = $150 - (30 \text{ M} / 250\,000) = 30$





- n Assessing the contestable share precisely is more important than assessing marginal cost
- n Sources for the contestable share : business plans (projected penetration under different scenarios), experience in similar markets
- n Sources for the marginal cost. Profit and loss accounts.
- n Sensitivity analysis
- n Consumer harm

Conclusion



- n We have developed methods to evaluate effects in mergers
- n Even more important to apply them to 82 (given that theories are possibly less robust in this area)
- n It involves looking at competitive constraints (capacity constraints, substitution, entry, incentives to enter) in a structured way
- n Thinking that simple imprecise rules offer more legal security than sound principles would be an offence to the legal profession