
Predatory bidding for Limburg rail concession

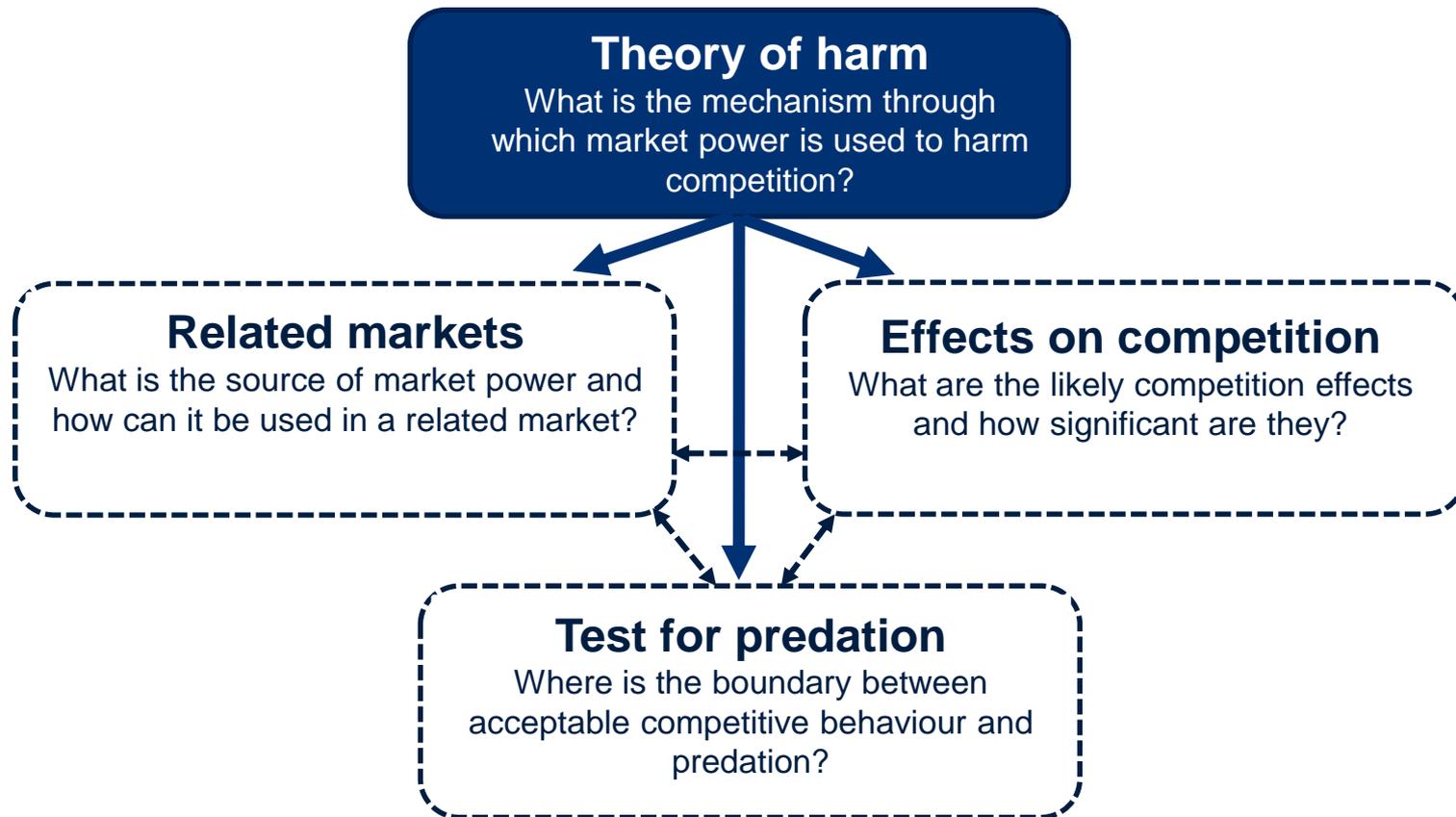
Dr Gunnar Niels

Association of Competition Economics

14 and 15 November 2019

Outline

Inter-related economic aspects of the case



ACM's theory of harm



NS is dominant on the main railway network (HRN)

Predatory conduct (loss-making bid in 2014) took place on a related market, i.e. the Limburg concession for 2016-2031

Aim of this conduct was to prevent future competition on the HRN

- Specifically by influencing government's decision-making on introducing competition on more parts of HRN post 2024

Related markets

Starting point: Limburg concession

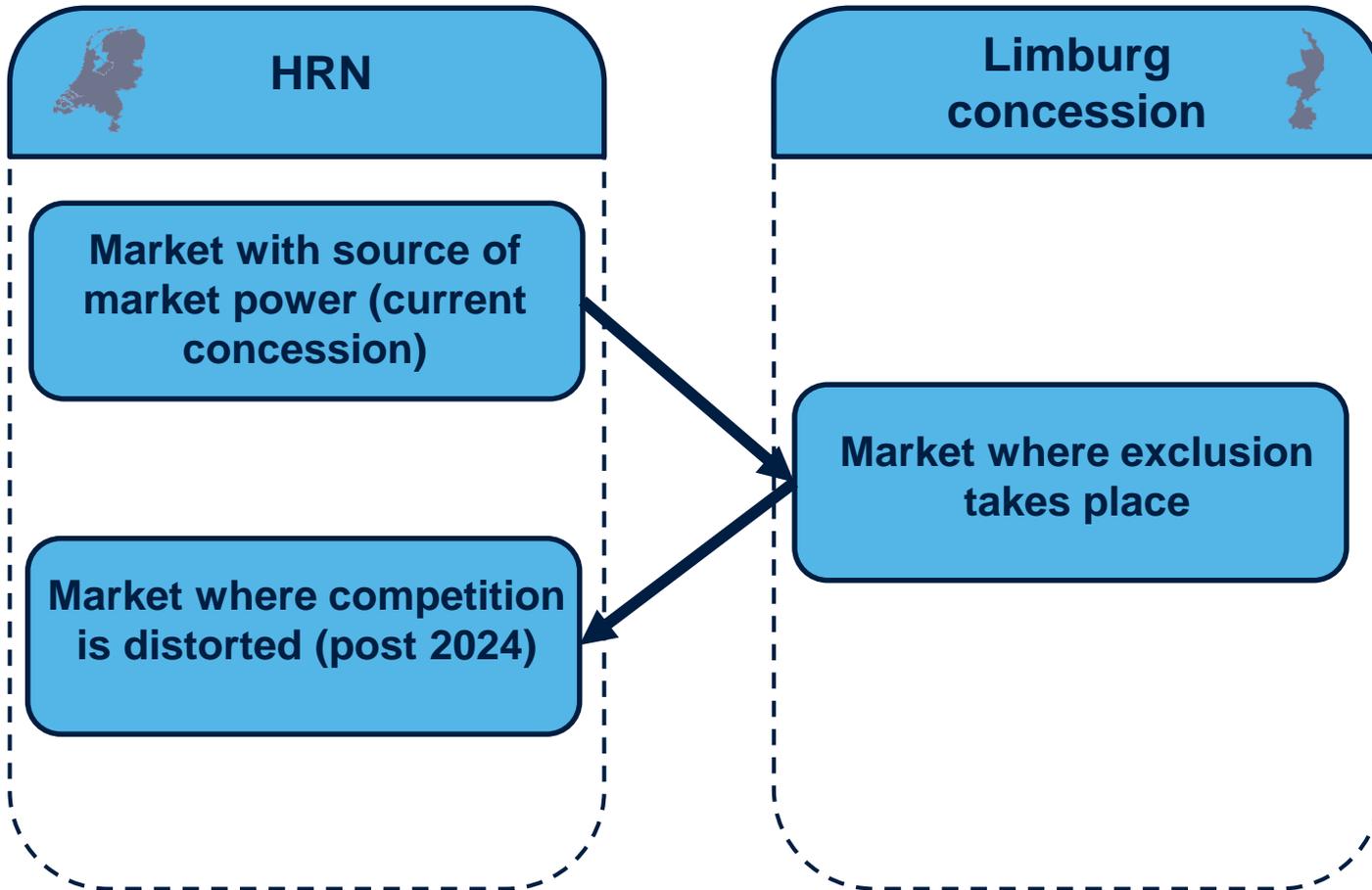
- three bidders: NS, Arriva/Deutsche Bahn, Veolia
- who is dominant?
- source of market power in related market?

ACM

- 'HRN is logical starting point for the analysis' (para 122)
- 'does not see why it would be necessary to determine that the Limburg concession is a separate market' (para 215)

Related markets

Illustrated



Related markets

The required link

Leveraging requires explicit link between the markets: mechanism through which market power in one market is used in another

- deep pockets? (DB has them too)
- information advantage? (Veolia incumbent; two-thirds of concession is bus)

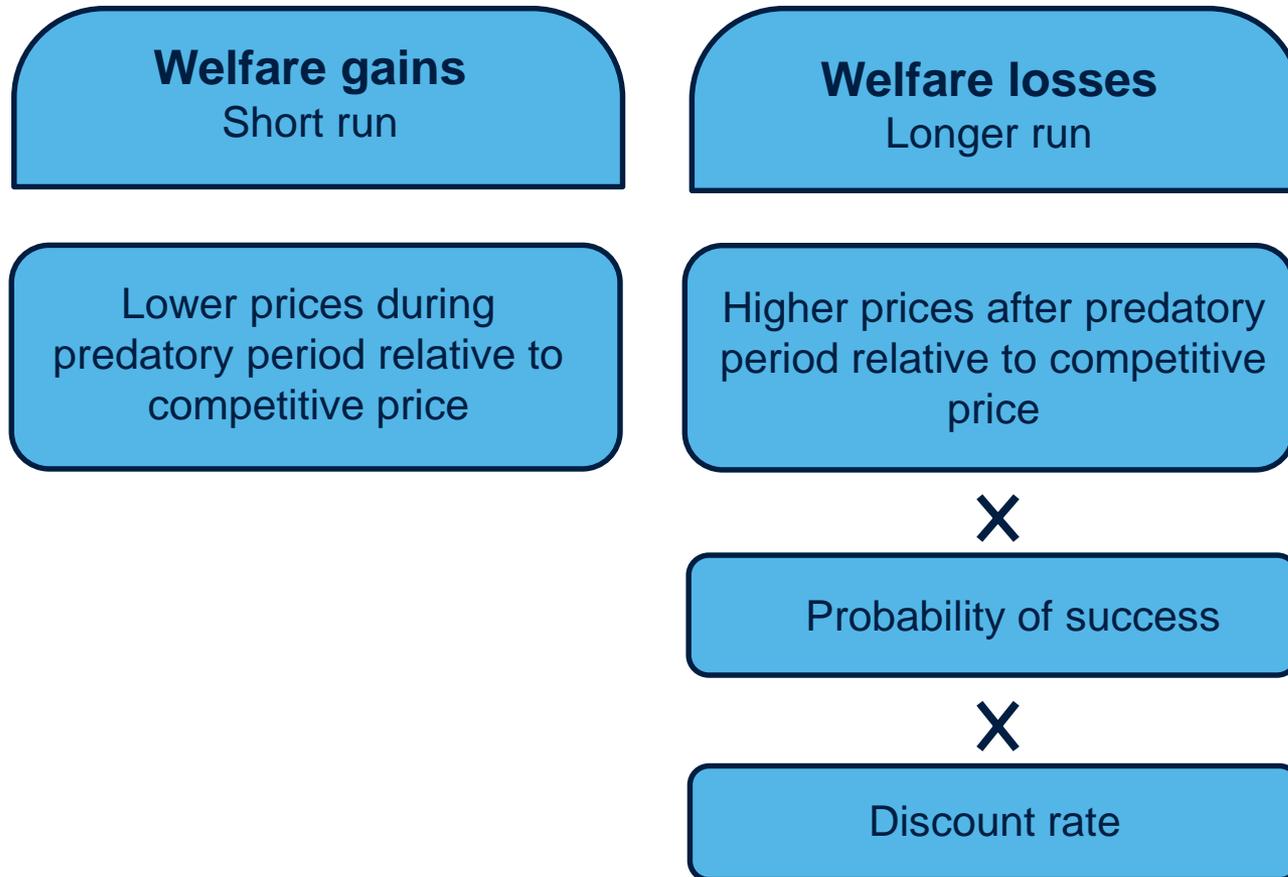
ACM: relevant link is overlap of services and ‘example’ function of Limburg for future competitive tenders of parts of HRN post 2024

- but this goes to motive, not leveraging mechanism

Case law: bad economics?

- Continental Can (1973): ‘causal link’ between markets not necessary
- AstraZeneca (2010): abusive behaviour does not necessarily have to follow from, or made possible by, a dominant position
- but Intel (2017): assessment of effects depends on degree of market power

Classic framework for predatory pricing



Theory of harm

Effects of conduct on government policy

ACM

Predatory bid on Limburg concession



No 'example' function on overlapping services



Government less likely to open more parts of HRN to competition from 2024

Court of Rotterdam

Experience with overlapping services just one factor in government decision-making

Effects only post 2024 and uncertain



No abuse

Economic theories of harm not pursued by ACM

Signalling effect on rivals (DB, Veolia)

Test market predation

Role of incentives and intent

ACM places significant weight on internal NS documents

- what about intent of DB and Veolia?

US court in *AA Poultry* (1989):

‘Firms “intend” to do all the business they can, to crush their rivals if they can . . . Entrepreneurs who work hardest to cut their price will do the most damage to their rivals, and they will see good in it . . . If courts use the vigorous, nasty pursuit of sales as evidence of forbidden “intent”, they run the risk of penalizing the motive forces of competition.’

Aggressive bidding and the winner’s curse

Thaler (1988): ‘The winner's curse cannot occur if all the bidders are rational . . . , so evidence of a winner's curse in market settings would constitute an anomaly. However, acting rationally in a common value auction can be difficult . . . I will present some evidence, both from experimental and field studies, suggesting that the winner's curse may be a common phenomenon.’

Testing for predation

As-efficient competitor test

ACM started from NS internal business case

- internal rate of return (IRR) for long-term concession
- compared against WACC (weighted average cost of capital)
- adjustment for 'unrealistic' passenger growth assumptions

As-efficient competitor or 'as-optimistic competitor'?

Consistency in business case adjustments

- either take NS own case ($IRR > WACC$)
- or make adjustments consistently
 - e.g. non-incremental costs; lease versus buy model

Accounting for uncertainty

Conclusion: the use of economics

- 1 Thinking through the case from first economic principles
- 2 Providing an analytical framework to the Court
- 3 Court recognises the importance of economic evidence
- 4 Court interacts with economists at hearing

Contact:
gunnar.niels@oxera.com

www.oxera.com
Follow us on Twitter [@OxeraConsulting](https://twitter.com/OxeraConsulting)

Oxera Consulting LLP is a limited liability partnership registered in England no. OC392464, registered office: Park Central, 40/41 Park End Street, Oxford, OX1 1JD, UK; in Belgium, no. 0651 990 151, registered office: Avenue Louise 81, 1050 Brussels, Belgium; and in Italy, REA no. RM - 1530473, registered office: Via delle Quattro Fontane 15, 00184 Rome, Italy. Oxera Consulting GmbH is registered in Germany, no. HRB 148781 B (Local Court of Charlottenburg), registered office: Rahel-Hirsch-Straße 10, Berlin 10557, Germany. Oxera Consulting (Netherlands) LLP is registered in Amsterdam, no. KVK: 72446218, registered office: Strawinskylaan 3051, 1077 ZX Amsterdam, The Netherlands.

Although every effort has been made to ensure the accuracy of the material and the integrity of the analysis presented herein, Oxera accepts no liability for any actions taken on the basis of its contents.

No Oxera entity is either authorised or regulated by the Financial Conduct Authority or the Prudential Regulation Authority within the UK or any other financial authority applicable in other countries. Anyone considering a specific investment should consult their own broker or other investment adviser. Oxera accepts no liability for any specific investment decision, which must be at the investor's own risk.

© Oxera 2018. All rights reserved. Except for the quotation of short passages for the purposes of criticism or review, no part may be used or reproduced without permission.

oxera
compelling economics