Pricing abuses after the *Tomra*, *Telefonica* and *Post Danmark* Judgments

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Outline

The effects-based approach to pricing abuses

- Equally-efficient competitor test
- Application:
- Measuring costs

Do the European Courts use an effects-based approach?

- Predation
- Rebates
- Margin squeeze

Conclusions

Commission guidance: Equally-efficient competitor test

Commission guidance paper on Article 102 enforcement priorities refers to the “equally-efficient competitor test”

Test for whether behaviour leads to anticompetitive foreclosure

Assume that a competitor charges the same prices as the dominant firm

Would the a competitor that has the same costs as the dominant firm (“equally-efficient”) be able to cover its costs at this price?

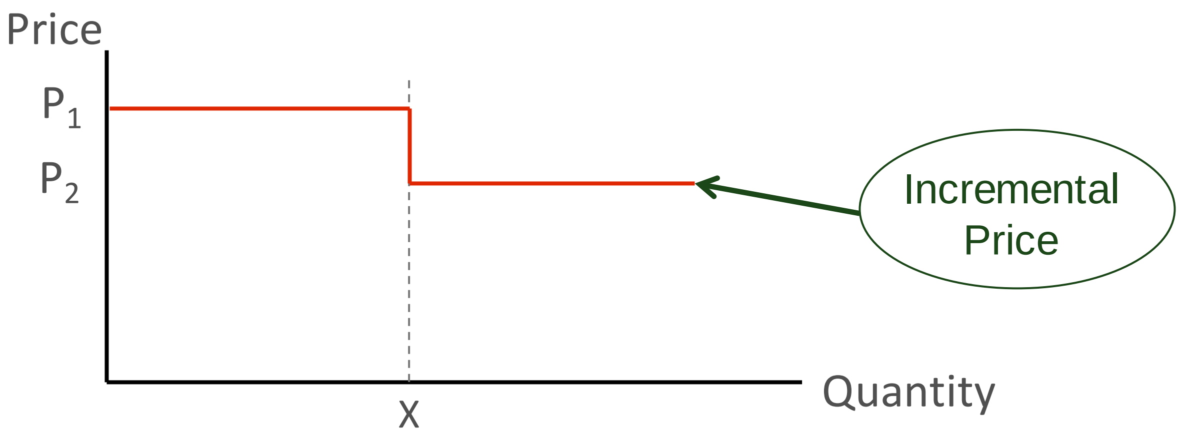
If not, efficient competitors may be excluded from the market

Test this by comparing price with dominant firm’s costs

Application

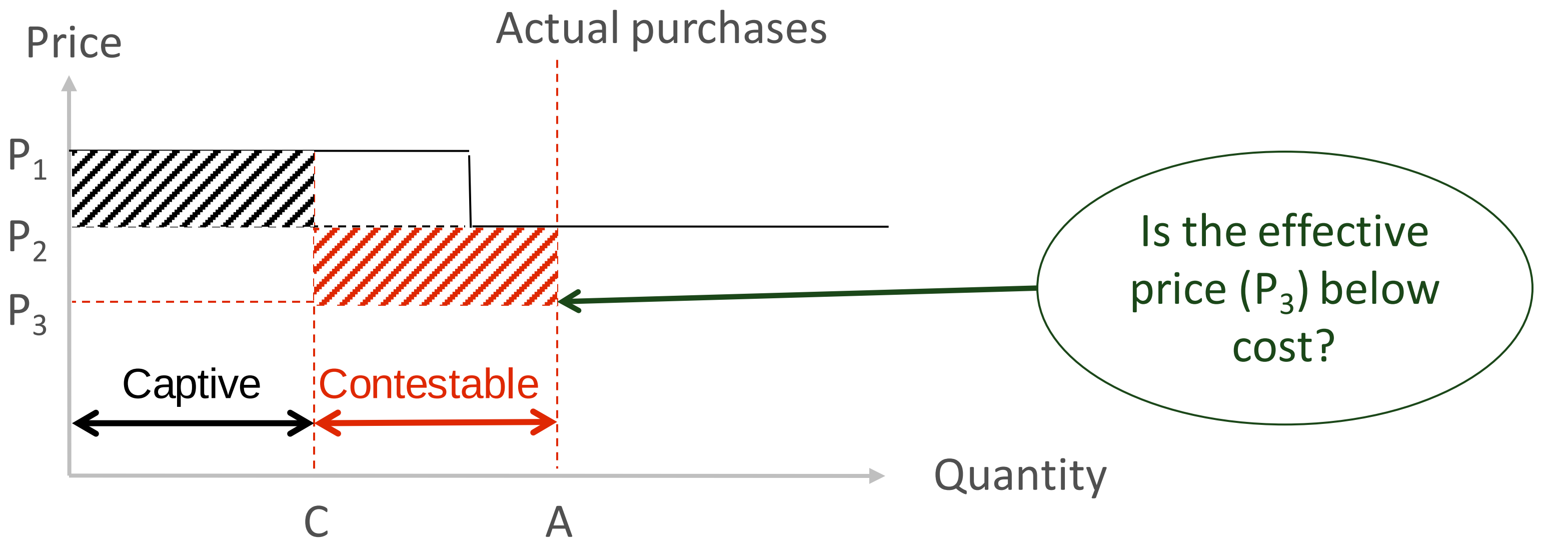
1. Predatory pricing
   - Relatively easiest concept
   - Is price above cost?

2a. Incremental rebates
   - Very similar to predation



Application

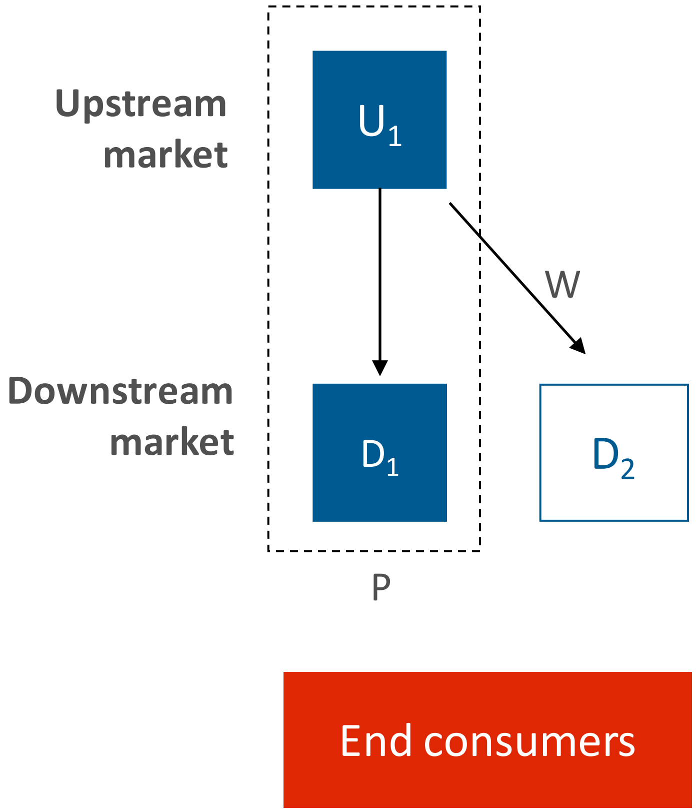
2b. Retroactive rebates



- Note that an efficient competitor could be foreclosed even if P_2 is above cost
- Might be no effect if only a small proportion of customers are covered by the rebates

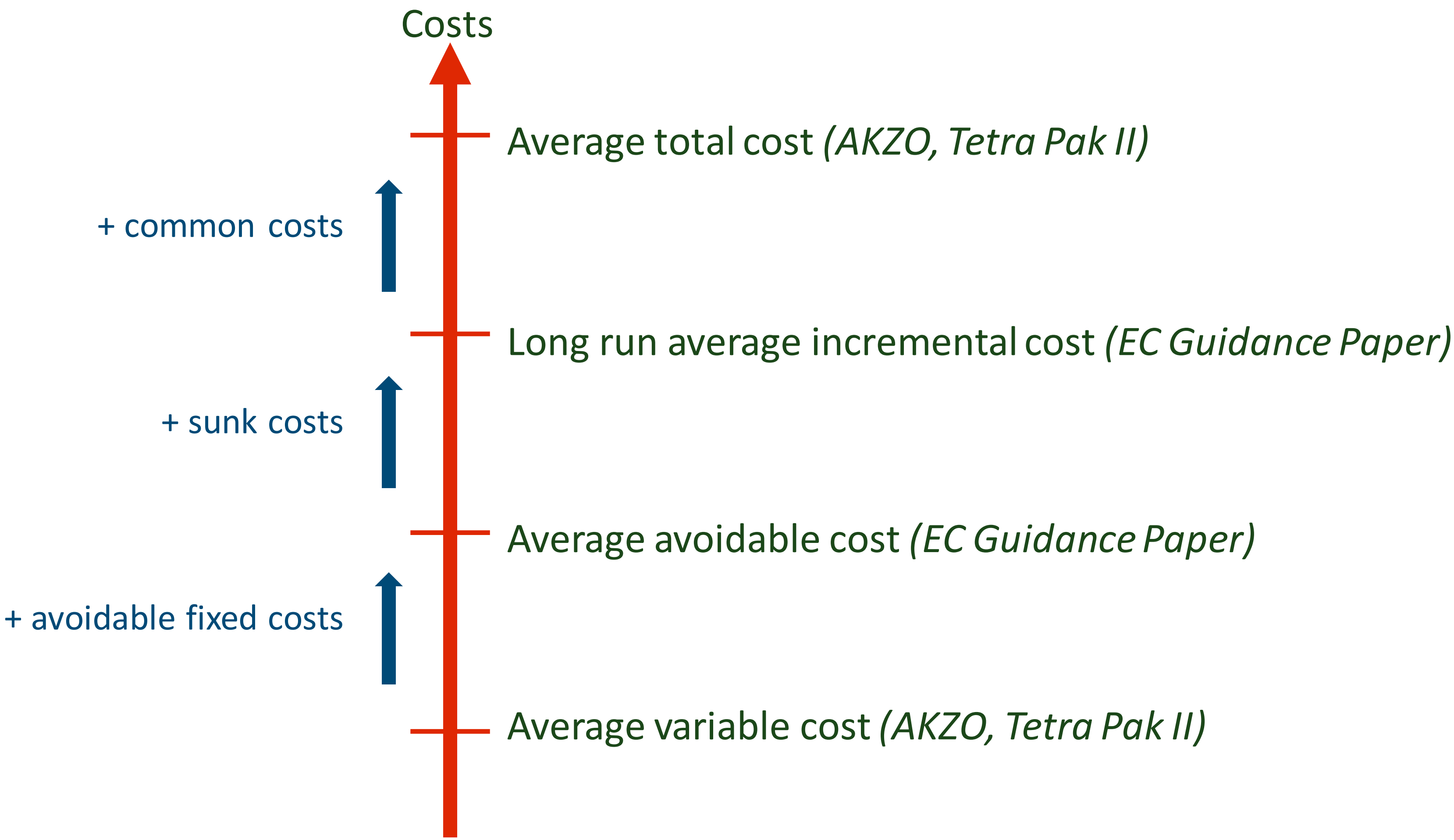
Application

3. Margin squeeze



- Vertically-integrated firms sets two prices: W and P
- In a margin squeeze, the margin between W and P is too small to allow downstream rivals to compete

How do we measure costs?



Do the European Courts use an effects-based approach?

Predation: *Post Danmark*	Margin squeeze: *Telefonica*	Rebates: *Tomra*
▪ Yes ▪ Established case law requires comparing prices and costs ▪ Dominant firms can reduce price to compete provided price is above ATC ▪ Can reduce price below ATC provided it is above (AVC/AAC/LRIAC) and no intent to exclude ▪ Price discrimination is not in itself an abuse	▪ Mostly yes ▪ Prices are compared to costs ▪ Although Commission enjoys wide discretion in how it implements the test (e.g. Time periods over which analysis conducted) ▪ And Court rejects the (correct) approach in the Guidance which analyses margin squeeze as a form of refusal to supply	▪ ***No!*** (See next slide)

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Do the European Courts use an effects-based approach?

Rebates:
Tomra

- ***No!***
- Tomra's rebate schemes were an abuse of dominance because
  - Retroactive
  - Individualised, with targets based on customers' expected total demand
  - Applied to Tomra's largest customers
- Capability of rebate to exclude is analysed at a purely theoretical level
  - Focus on structure (form) of the rebates not their likely effects in the market context
  - Courts rejected any comparison between prices and costs
- Also rejected the need to demonstrate any risk of market foreclosure
  - All customers should have:
    "the opportunity to benefit from competition";
  - And:
    "competitors should be able to compete on the merits for the <u>entire market</u>"
  - Compare to case law on exclusive dealing under Article 101?

Conclusions

Taken together these Judgments leave us with some inconsistencies

- Use of price-cost tests
  - Predation and margin squeeze require a comparison of prices and costs, but
  - Retroactive rebates by a dominant firm appear to be *per se* prohibited by the Courts
- Courts are willing to find a margin squeeze where the dominant firm could instead refuse to supply without infringing Article 102
- Dominant firms are prohibited from having exclusive contracts with any customer – in contrast to case law under Article 101

In practice, we might expect the Commission (and hopefully NCAs) to follow the Guidance paper rather than the Courts on these issues – but there may then be a lack of effective oversight of its application (unless we have a big surprise in *Intel*)

Thank you!

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