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NHH



YANNIS KATSOULACOS: CHOOSING LEGAL STANDARDS

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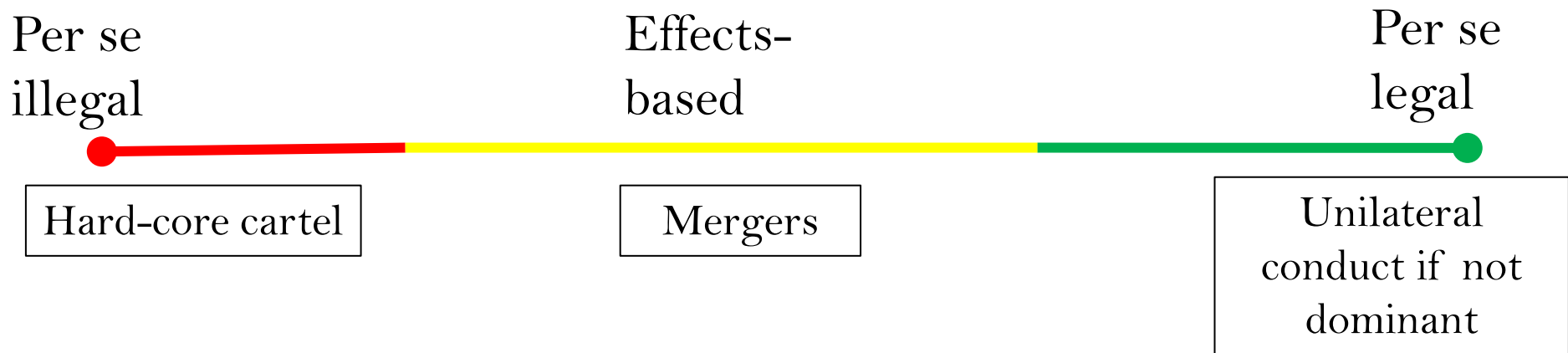
CRESSE Conference 2023, June 30





The main ideas

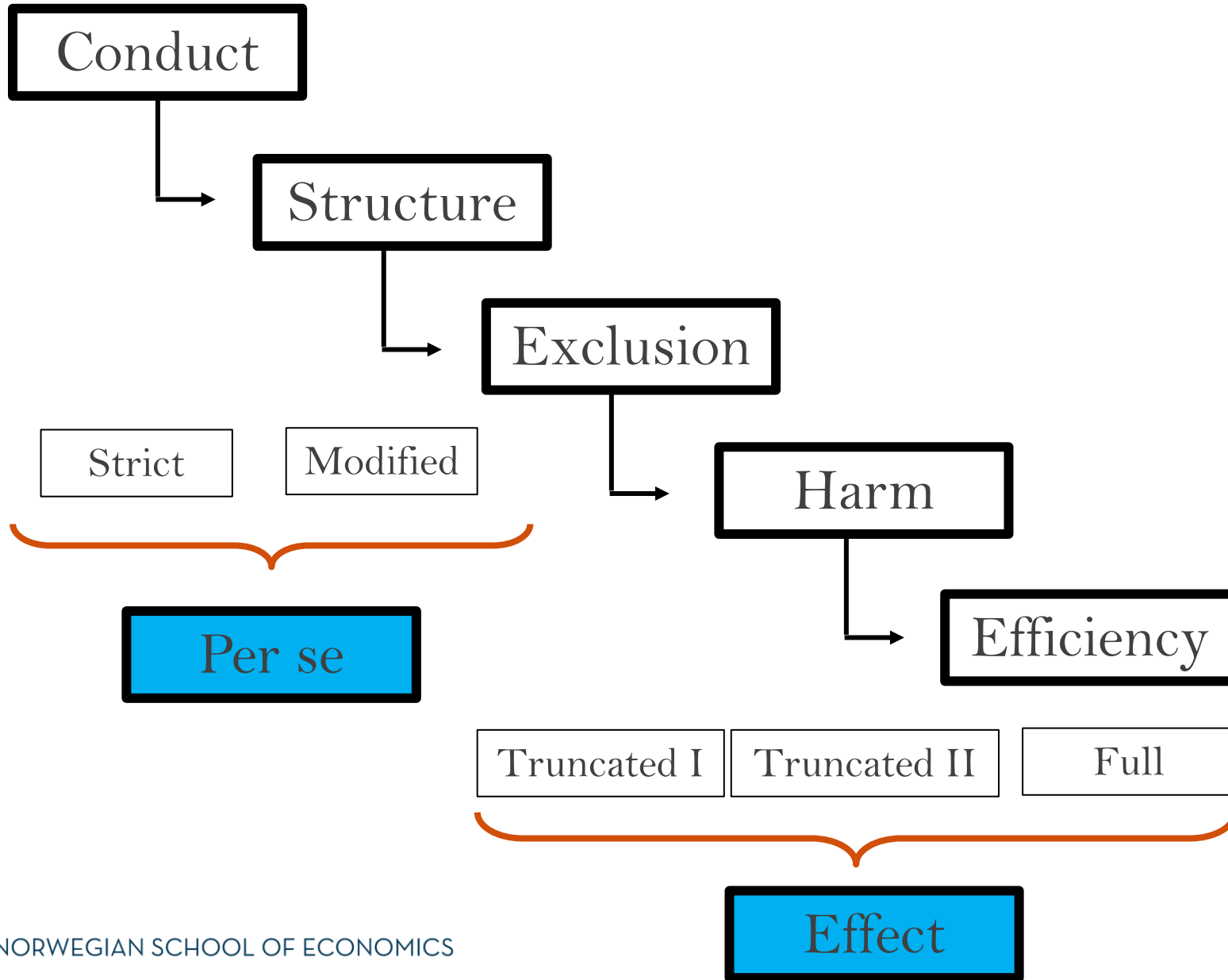
- Legal standard as a continuum



- When should we have
 - Presumptions (in extreme **safe harbour** or **ban**)
 - Effects-based approach
- Large debate in Europe and the US
 - Referring in particular to abuse of dominance
 - But could have also referred to merger control?



Optimal stop rule





CONDUCT and category shopping

- Numerous ways a dominant firm can abuse its dominance
- Then a firm can behave strategically if we try to impose stricter presumptions on one type of conduct
 - If the goal is to exclude a rival, there are many different ways that can be done
- Example: Exclusionary contracts
 - If strict presumption on exclusionary contracts, then why not try retroactive rebate?
 - If strict presumption on retroactive rebates, then ..
- Guidance paper in 2009 was a response to the challenges with some 'boxes' of categories
 - Category shopping as a potential problem
- In the framework of this paper:
 - Category shopping leads to many false acquittals, and then limited scope for stopping at stage 0?



STRUCTURE – which structure?

- If we move the debate to structure, then we risk a debate on the wrong issues?
 - Ex. :The debate we have had in the US in court on market definition
- Is size a good measure of structure, as in the DMA?
 - At least, then we avoid the market definition which can be difficult in digital two-sided markets
- What can we learn from the debate on DMA in EU and the similar debate in the UK?
 - EU: One size fits all (conduct and structure) – presumptions?
 - UK: tailormake it to each firm- more elements of effects-based?



Legal standard vs sliding scale

- An effects-based approach combines all elements
 - The more market power, the more likely that conduct is harmful
- A stepwise approach as proposed here does not capture that in an optimal way?
 - The likelihood of harmful CONDUCT depends of the STRUCTURE – more concerned when high market share
 - The fewer rivals, the more likely that EXCLUSION leads to HARM
- The proposed method underestimates the value of a full effects-based approach?
- Important to think about shifting the burden of proof as such, an alternative approach to this method?



Application to mergers?

- You are referring mostly to abuse of dominance
- But even more relevant for merger control?
 - CONDUCT not relevant as a stage?
- Ongoing debate in EU and UK
 - CK Telecom – presumption of efficiency (!)
 - Valletti and others
 - Presumptions of no efficiency
 - Presumptions of size (or market share)
 - Arguing that they can make not buy (in a way an argument for conduct being flexible)

