

Exclusive Dealing in Sports after ESL and ISU

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Disclaimer

Oxera is involved in various sports competition cases, including a similar case in padel, but not in the *ESL* or *ISU* cases.

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Any opinions or errors are my own.

European Super League

- Early 2021: FIFA/UEFA threatened to ban ESL clubs
- May 2021: Madrid Commercial Court asked CJEU on incompatibility with 101/102, pointing to:
 - (i) conflict of interest
 - (ii) absence objective, transparent, non-discriminatory approval criteria



EUROPEAN
SUPER LEAGUE



International Skating Union

- Lifetime ban when participating in unauthorised event + large degree of discretion over authorisation
 - To protect its 'economic interests'
- Dec 2017: EC concluded on Art. 101 'by object'
 - Also found harm by effect, but did not rely on this
- Dec 2022: largely confirmed by General Court

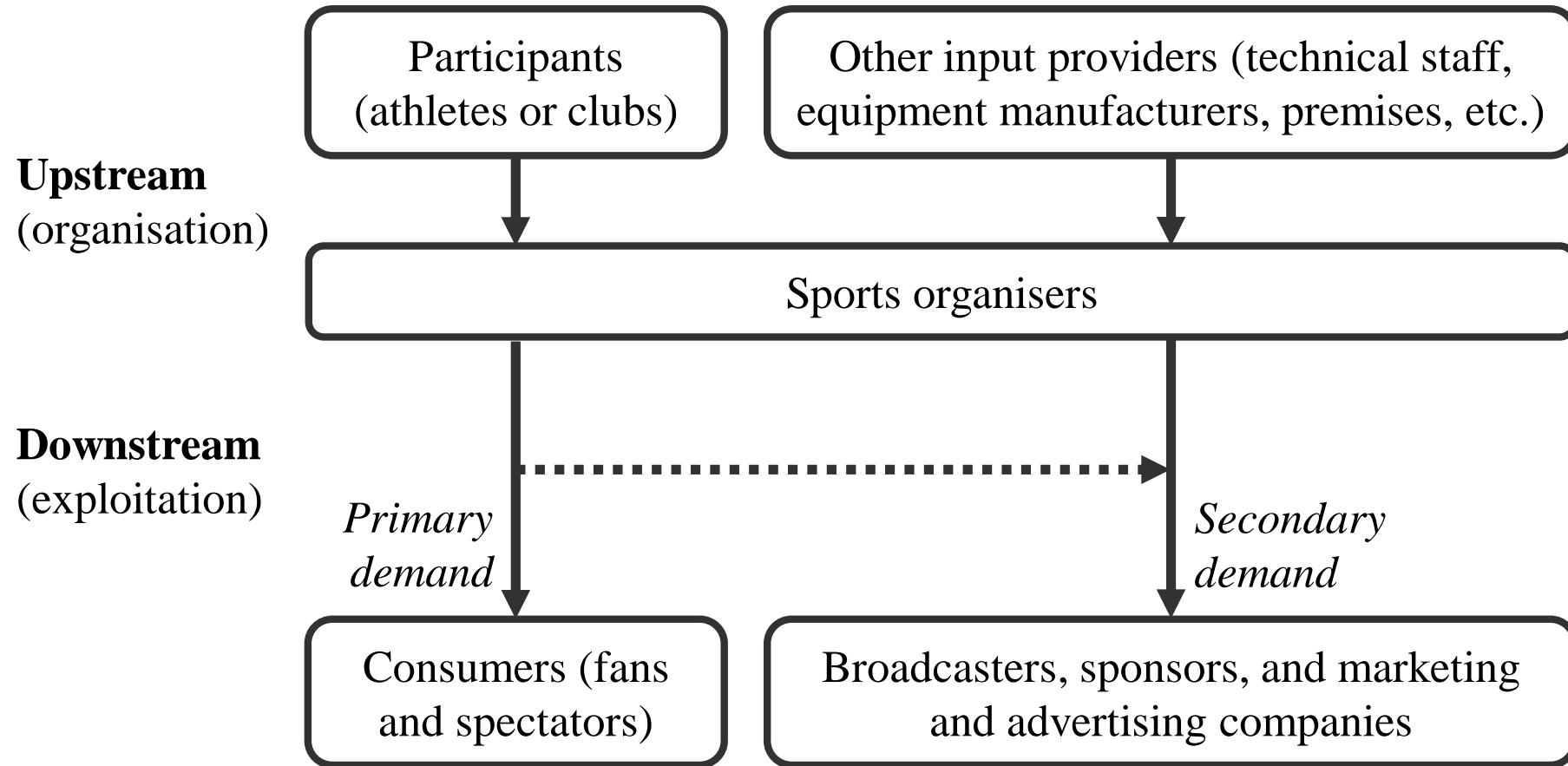
Opinion AG Rantos (15 Dec 2022)

1. **Ancillary restraints doctrine:** no 101/102 if inherent in and proportionate to legitimate objectives
 - Sporting objectives: merit-based competition, financial solidarity, pyramid structure
2. ED **not by its very nature anticompetitive**; and disproportionality does not imply 'by object'
3. **Conflict of interest** not in itself an abuse of dominance

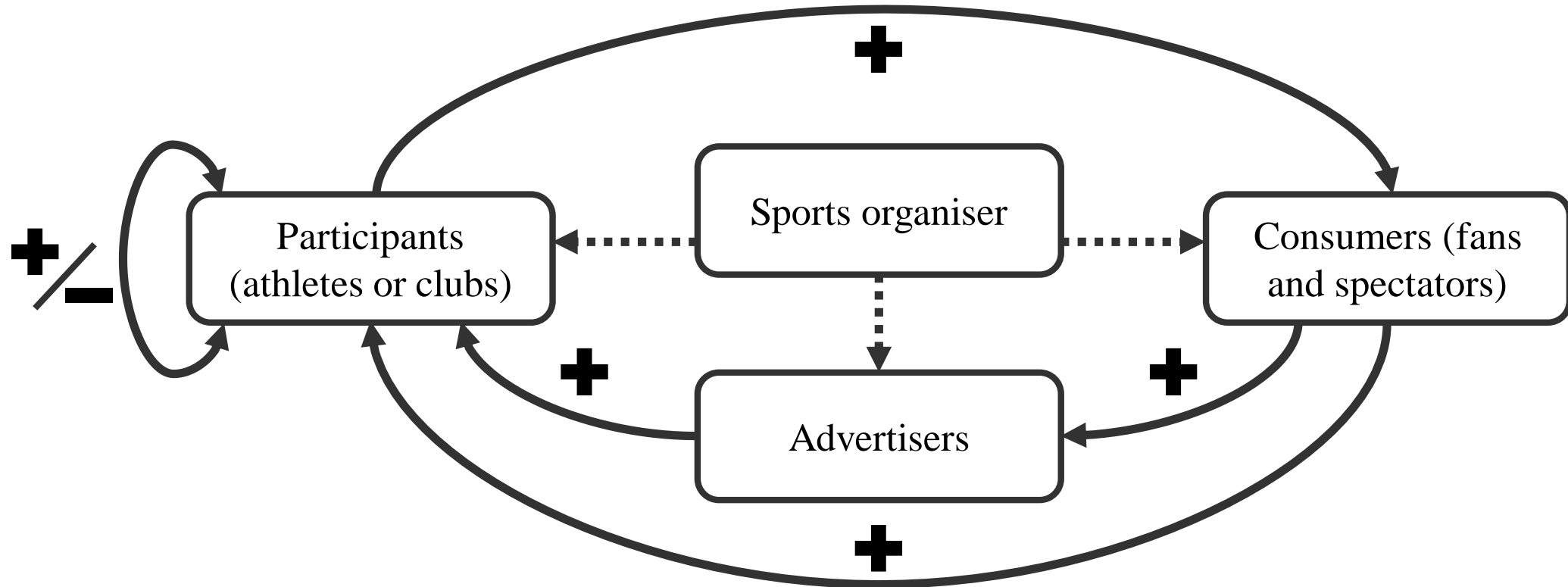
Outline

- Central role 'sporting' objectives, politically legitimised (Art. 165 TFEU, declarations on sport)
- Key areas of economic assessments in ED in sports:
 1. Market definition and dominance
 2. Theory and quantification of harmful effects
 3. Procompetitive justifications

1. Sports markets: vertical structure



1. Sports markets: multisided structure



1. Sports markets

- Vertical frame useful, though case-specific analysis needed
- Multisided frame accounts for indirect network effects
 1. Participants are just as much 'customers'
 2. Informs market definition exercise
 - Barriers to substitution, increased market power
 - 'Single market' versus 'multi-market' approach
 - Challenges assessing demand substitution (SSNIP)

2. Theories and quantification of harm

- “ED deprives competing organisers of a necessary input, which reduces customer choice + competitive pressure”
 - However:
 1. Then why do participants accept ‘freely and voluntarily’?
 2. ED unlikely to be harmful by its very nature
- Need a theory and (potentially) quantification of harm

2. Theories and quantification of harm

- **Chicago benchmark:** benefit to incumbent less than loss to seller, cannot convince seller to accept ED absent efficiency
- *Example:* upstream single seller, downstream perfectly competitive duopoly, $D(p) = 1 - p$, and $c_I > c_E = 0$

	Incumbent buyer	Upstream seller
Profit absent exclusivity	0	$(1 - c_I)^2 / 4$
Profit under exclusivity	$(1 - c_I)^2 / 16$	$(1 - c_I)^2 / 8$
Change	$(1 - c_I)^2 / 16$	$-(1 - c_I)^2 / 8$

- Intuition: double margins + productive inefficiency under ED

2. Theories and quantification of harm

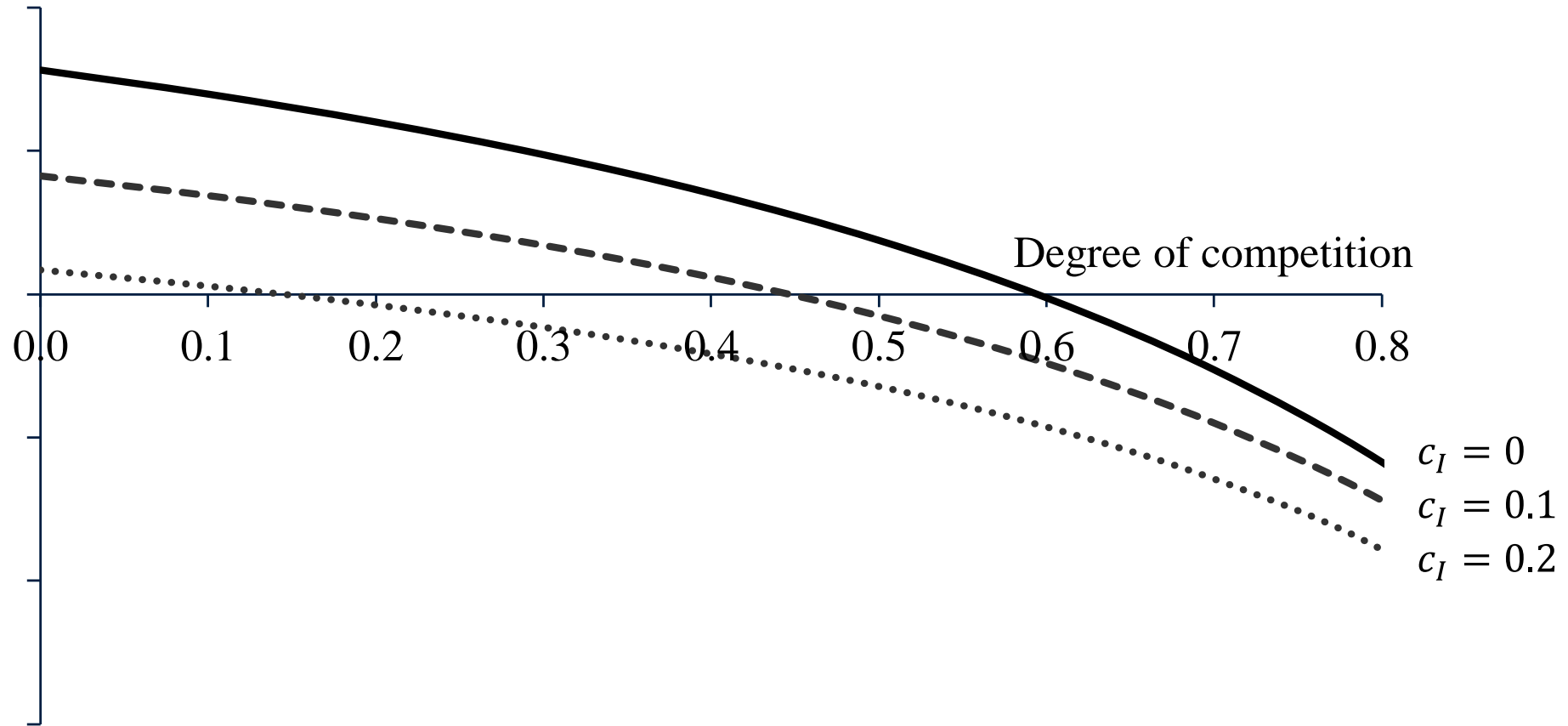
When may the Chicago school benchmark fail to hold?

1. Imperfect competition
2. Coordination failure
3. Divide-and-conquer

2. Theories and quantification of harm

1. Imperfect competition may cause supplier to have enough less to lose from ED such that it can be compensated

- Intuition: seller loses less from ED (also double margins without ED), while incumbent still benefits from exclusion
- *Example:* same as before, but now with downstream demand given by $D_I(p_I, p_E) = 1 - p_I + d(\bar{p} - p_I)$
- Combined gain from ED for incumbent and seller is positive if (i) d is sufficiently small and (ii) c_I not too big



2. Theories and quantification of harm

- However, this supposes sufficient imperfect competition downstream; and supplier in the end not harmed

2. **Coordination failure:** players may be stuck in a bad equilibrium with everyone accepting ED for minimal pay

- *Example:* two players and entry requires both to be non-exclusive; payoffs are 10 without entry and 20 with entry
- Equilibria when incumbents pays $x > 0$ for ED?

2. Theories and quantification of harm

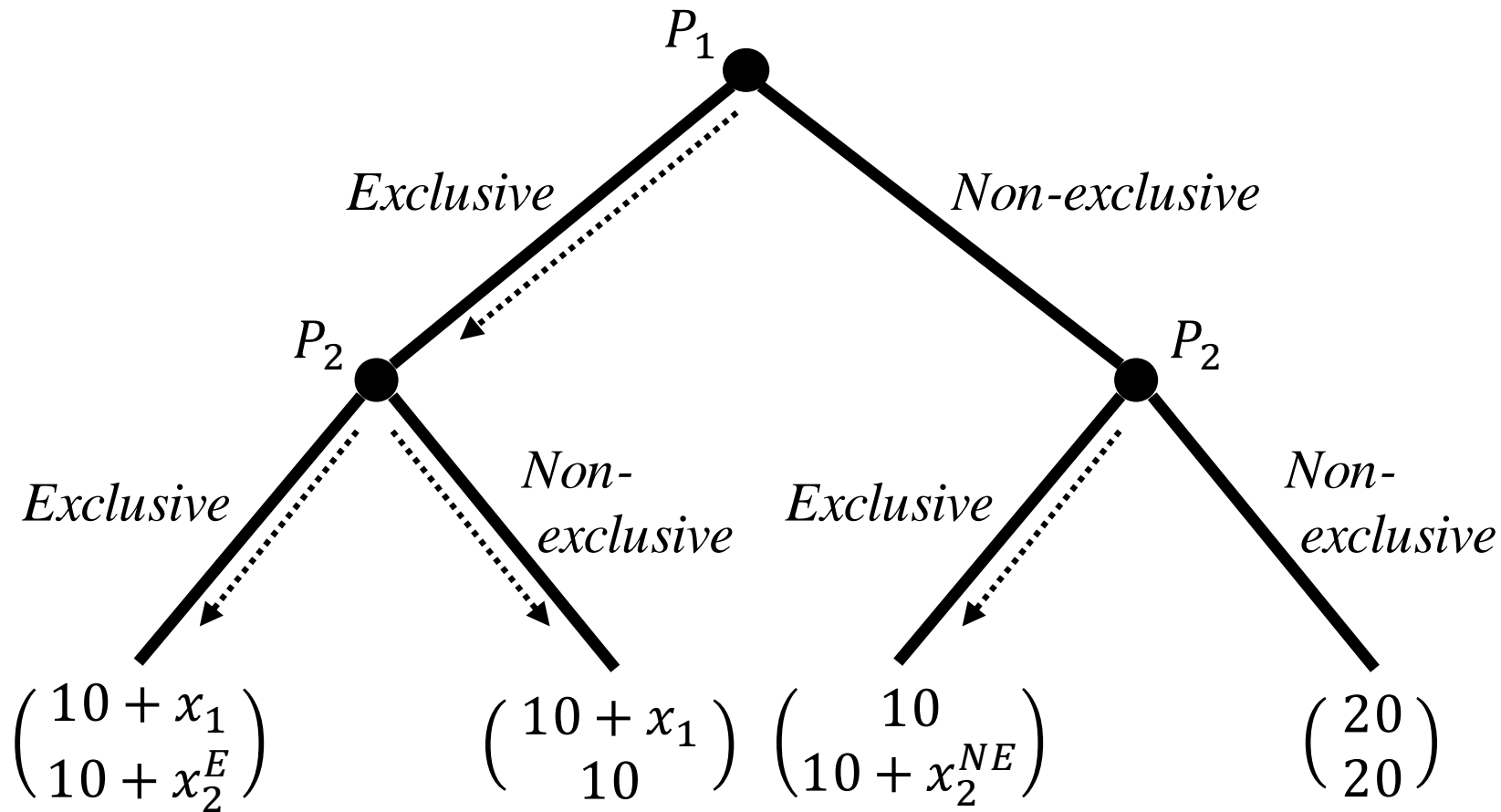
		P_2	
		Exclusive	Non-exclusive
P_1	Exclusive	<u>$10 + x$</u> ; <u>$10 + x$</u>	$10 + x$; 10
	Non-exclusive	10 ; $10 + x$	<u>20</u> ; <u>20</u>

- Exclusivity as a bad equilibrium when $0 < x < 10$
- However, equilibrium is not unique: problem solved if players can somehow coordinate on non-exclusivity

2. Theories and quantification of harm

3. **Divide-and-conquer:** may exploit sequential offering to convince players to accept ED now for minimal pay

- *Example:* same as before, but now the organiser first makes an offer to one player, and then to another player
- Unique exclusionary equilibrium if organisers offers high compensation to second player if first player does not accept



- However, assumes sequential offers and a sufficiently high x_2^{NE} that is incentive competitive (despite off-equilibrium)

2. Theories and quantification of harm

When may the Chicago school benchmark fail to hold?

1. **Imperfect competition**, however: seller also better off
2. **Coordination failure**, however: bad equilibrium not unique
3. **Divide-and-conquer**, however: assumes sequential offering + credible (off-equilibrium) high compensation

2. Theories and quantification of harm

- Need to consider which theory applies in a specific context
- **Relevant qualitative factors:**
 - Degree of incumbent market power (upstream + downstream)
 - Possibility of participant coordination on ED
 - Share of participants needed for entry
 - Other entry barriers (including network effects)

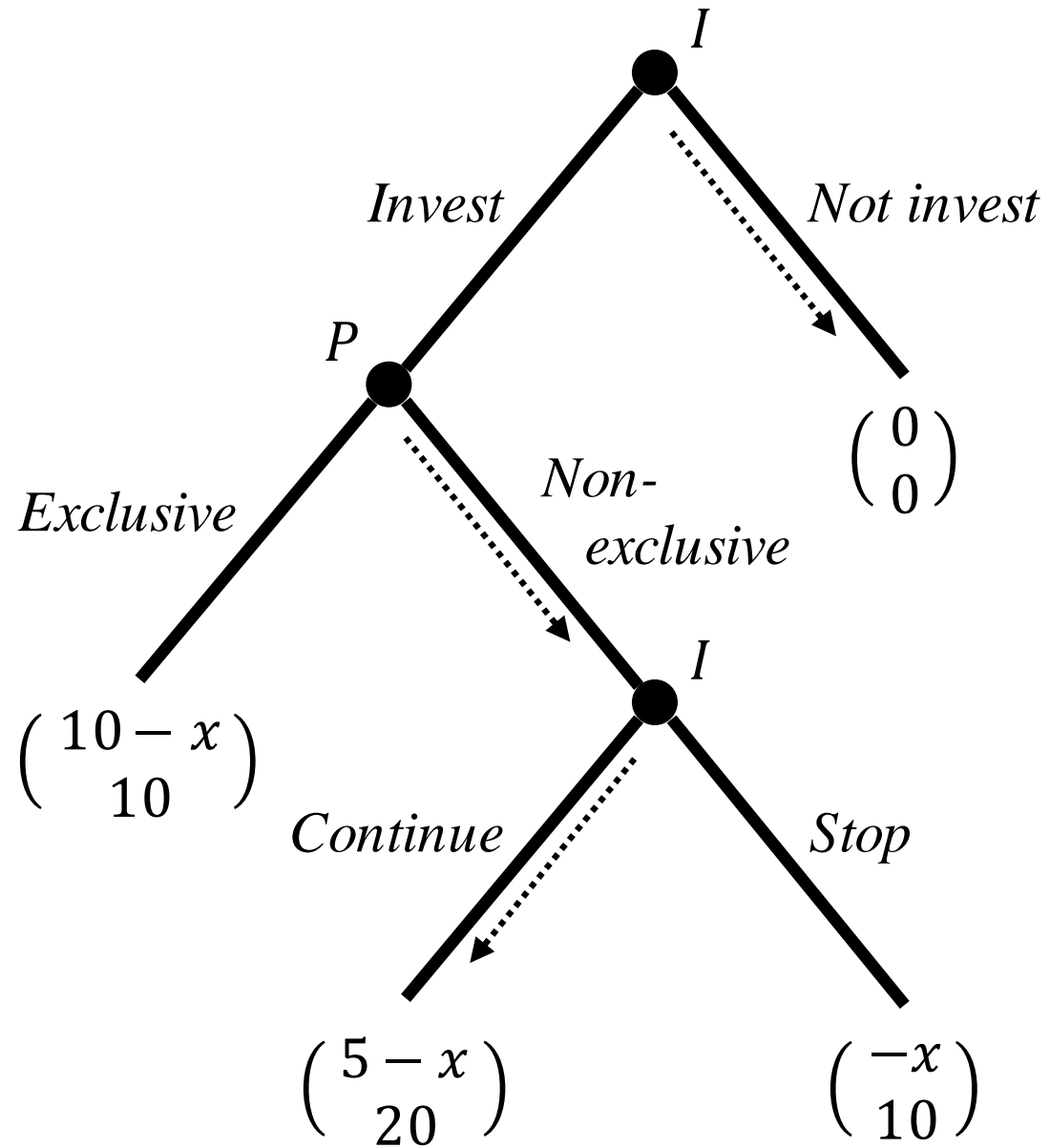
2. Theories and quantification of harm

- **Relevant quantitative metrics:** price, output, choice, innovation, geographic spread, growth, satisfaction, ...
- **Comparator approach:** cross-sectional, time series, diff-in-diff
- May be challenging to find good comparators in sports: fundamental differences, lack of temporal variation
- Alternative: **profitability analysis** of sports organisers, as a direct measure of market power

3. Economic theories of benefit

1. Freeriding or hold-up: participants may face *ex post* incentive to switch to a more lucrative option or demand better terms

- Undermines the *ex ante* incentives of the original sports organiser to invest, harming also participants
- Conditions for hold-up:
 1. Ex ante investment is relationship-specific
 2. Not recouped in the short run
 3. Investment is asymmetric

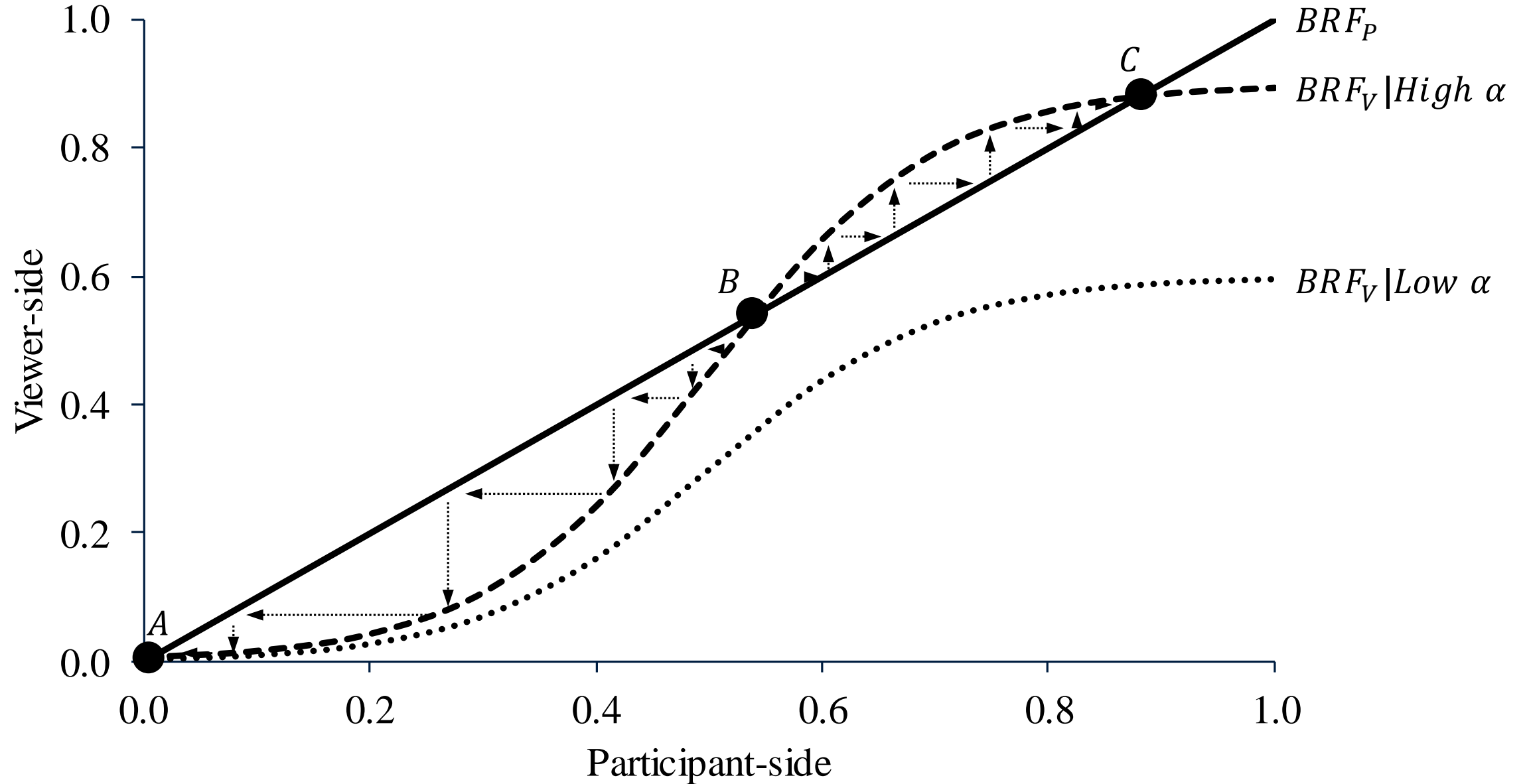


3. Economic theories of benefit

2. **Minimum viable scale:** ED may help secure a critical mass in the context of network effects if exclusivity is valued

- ED may ensure good equilibrium exists, critical mass small if:
 - (i) more viewers tune in when participants are exclusive;
 - (ii) viewer interest initially accelerates, eventually fades out
- *Example:* share of participants increases linearly in share of viewers, while share of viewers increases following a logistic function

Participation rates



4. Some reflections

- Is ED in sports legal? Depends on (i) effects; (ii) objectives ...
 - Growing relevance of effects analysis in sports
 - Need theory and quantification of harm
 - Countervailing efficiency defence
 - However, also relevance ancillary restraints
 - Including legitimate 'sporting' objectives
 - (But then what about other 'legitimate' non-economic objectives? ...)
- } More scope for *more* economics
- } More scope for *less* economics



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