Index

Abbreviations
DOJ Department of Justice
FTC Federal Trade Commission

Abbreviated New Drug Application (ANDA) 373–6
advertising, expenditure on
marginal cost modeling, and 50
airlines
mergers
American Airlines 144, 157–9, 161–2, 164–9
competitors, presence in 5, 110–112
enforcement bias, in 307
international antitrust conflicts 299
merger simulation 38
potential competition, and 107–112
pricing studies 107–10
‘Southwest effect’ 111–12
predatory pricing 154–5
Alcoa see United States v. Aluminum Co. of America
ALM see antitrust logit model
American Airlines case
Court findings in 165–6
equally efficient competitor test, and 161–2, 166
marginal cost comparison, in 157–9
price freeze theory, and 144, 168–9
profit sacrifice test, and 165–6
American Banana Co. v. United Fruit Co. 287–8
American Bar Association
multijurisdictional mergers, compliance costs study 296–8
American Tobacco Co. v. U.S. 154, 211–12
Antitrust Guidelines for the Licensing of Intellectual Property 1995 351
antitrust immunity
competition regulation, and
antitrust savings clauses 331–2, 334–7, 342–3
assessment, difficulties with 341–2
cases going to trial, probability of 344
Congress, role in clarification 348–50
Credit Suisse ruling 18, 327, 333–5
discretion, relevance of 345
essential facilities claims 338, 344–5
established v. novel antitrust claims 338–40, 343, 347–8
false negatives / positives, concerns over 341–5
group boycott claims 329
implication of immunity, basis of 330–31
public v. private actions, and 346–8
refusal to deal presumptions, and 330–32, 338–41
repugnancy, between 328–31, 333
simultaneous operation of 18, 327–8
patent license refusals, and 356–63
antitrust law
antitrust authorities
Court rulings, influence on 346–8
powers, relevance of 346–8
regulatory force necessary 348
competition regulation
differences between 18, 310–311
domestic laws
economic development, and 286–7, 290, 293–5, 325–6
economic policy and 285–6, 289–90
effects doctrine 287–9
enforcement bias, and 302–4, 306–8
EU and US policies, compared 155–6, 190–93, 290–93, 298–9
jurisdictional differences in 289–95
jurisdictional reach, of 287–9
motivations, for adopting 285–7, 289–90
proliferation of 284–5
protectionism, and 285–7, 293–4, 301–8
trade-flow bias, and 302–4
under- or overregulation
global impact of 308–11
reasons for 302–4
international / multijurisdictional issues
agency problems, mitigation of 322–3
compliance costs 295–8
conflicting/ inconsistent decisions 298–301, 308–9
enforcement bias, and 306–8
export cartels 305–6
General Electric / Honeywell case 292, 298–301
global overregulation, and 308–11
multijurisdictional merger reviews, costs of 295–8
net-importers/net-exporters, differing focus of 302–5, 319–20
optimal antitrust standards, variations in 302–5, 319–20
prisoner’s dilemma, and 302–5, 317
protectionism, emergence of 301–8
rational choice theory, and 302–5
strictest regime, superiority of 308–11
trade-flow bias, and 302–4
international regime for agency costs 322–5
bilateral cooperation agreements 312–15, 321–2
bonding and monitoring 322–4
compliance costs 319–25
as coordination game with distributional consequences (CGDC) 317–20
failure of, reasons for 317–25
implementation costs 322
institutional limitations 322–5
International Competition network 313
lack of, reasons for 17–18, 320–22, 324–5
multilateral cooperation agreements 312–13, 315–17, 321–2
net benefits, limitations of 320–22
optimal rules, disagreements over 317–20
proposals for 284, 311–17
world welfare, as basis for 16, 319
WTO policies on 314, 316, 319–20, 322, 324
principles of 354
intellectual property law, compared 354–6
antitrust logit model (ALM) 32–3, 47
Antitrust Modernization Commission
loyalty discount attribution tests, on 136–41
overdeterrence and underdeterrence, on 343–4
_Apex Oil Co. v. Si Mauro_ 224–5, 230
_Areeda, Phillip_ 10, 157, 160–61, 214
Armstrong, Mark 274–5
_Ashcroft v. Iqbal_ 203, 238
Athey, Orley 51–2
_Aspen Skiing v. Aspen Highlands_ 338–40
auction models
unilateral effects, identifying 44–5
_Automobile Manufacturers Association, U.S. v._ 370
_Baker, Jonathan B._ 38–9, 69, 164, 271–2
_Barnett, Tom_ 301
_Barry Wright Corp. v. ITT Grinnell Corp._ 146
_Baumol, W._ 7–9, 145–6, 160–61, 167–70
_Bell Atlantic. Corp. v. Twombly_ see also horizontal agreements
criticism of 203–4
importance of 201–4, 341
motion to dismiss, standard of proof for 206–9
evidentiary sufficiency and legal sufficiency 209
lower court conflicts over 228–31
parallel conduct, on 232
plausibility of conspiracy, and 209, 230–31, 233–5, 240–45
plus factors, relevance 232–5, 238, 241–3
plus factors, relevance of 228–9
Second Circuit ruling on 229–31
summary judgment standard, and 231–4, 238–40, 244–5
Supreme Court ruling on 231–5, 233–5, 240–45
tends to exclude concept, and 231–5, 240–41
benchmarks
damages, as measurement of 19–20, 381–5
merger simulation, in 34–6
Bergman, Mats 114
Bertrand competition model
differentiated products, for 44, 104
merger simulations, in 35–6
oligopolies, and 35–8
oligopsony, and 251, 253–4
potential competition, and 104
Besanko, David 272, 275, 278–9
‘bird-in-the-hand’ theory 146
_Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan_ 226–7
_Bolton, Patrick_ 154
Bork, Robert 147, 150–51, 153
_Bradford, Anu_ 304–5, 317, 319
brand locations, unilateral effects of mergers on 41–2
brand-pushing rationale, in vertical price-fixing 10
Bresnahan, Timothy F. 38–9
_Brooke Group Ltd. v. Brown & Williamson Tobacco Corp._ 77, 161, 170–73
_Brown Shoe Co. Inc., v. U.S._ 75
Budzinski, Oliver 323–4
_Bunch, David_ 154
bundling see tying and bundling
Burns, Malcolm 154
buyers
power of (see monopolies)
‘prisoner’s dilemma’ (see under loyalty discounts)
C-O-Two Fire Equipment Co. v. U.S. 213–14
cable TV mergers
  potential competition, studies of 112–13
capacity constraints
  developing countries, and 318
  unilateral effects, identification 45–6, 49–50
  unilateral effects, identifying 45–6, 49–50
Cardizem CD Antitrust Litigation, In re. 375–6
Carlton, Dennis 147–51
cartels
  collusive monopsony 249–50
  export cartels 305–6
  manufacturer cartels 190–91, 193–4
  patent pooling, as 370–72
  private v. public enforcement, relevance to 271–2
  protectionism, as 305–6
  resale price maintenance, and 190–91, 193–4
  vertical price-fixing, and 11
Cascade Health Solutions v. PeaceHealth 137
‘cellophane fallacy’ 67
Chamberlin, Edward 255
Chicago School
  ‘one surplus theory’ 122–5
  predatory pricing, plausibility of 147, 150–51
  criticism of 151–3
China, antitrust law in
  adoption of 294
  Coca Cola acquisition, and 289, 294–5, 308
  focus of, differences in 295
  purpose of 294
Citric Acid Litigation, In re. 227
Colgate & Co., U.S. v. 217
  collusion
    collusive monopsony 249–50, 261–2
    duopsony, and 255
    oligopsony, and 255, 262–3
    reporting, advantages of 278–90
    tacit collusion 255, 262–3
Comanor, William 198–9
Communications Act 1934 330–31
competition regulation
  antitrust immunity, and
    antitrust savings clauses 331–2, 334–7, 342–3
  assessment, difficulties with 341–2
  cases going to trial, probability of 344
  Congress, role in clarification 348–50
  Credit Suisse ruling 18, 327, 333–5
discretion, relevance of 345
esential facilities claims 338, 344–5
established v. novel antitrust claims 338–40, 343, 347–8
false negatives / positives, concerns over 341–5
  group boycott claims 329
  implication of immunity, basis of 330–31
  public v. private actions, and 346–8
  refusal to deal presumptions, and 330–32, 338–41
  repugnancy, between 328–31, 333
  simultaneous operation of 18, 327–8
antitrust law, overlap and differences between 18, 310–311
  competitive constraints, and 64
  competitive constraints 58
  complementary products 63
  emphasis on, disadvantages 88–9
  entry, role of 63
  error cost framework 78–9
  indirect network effects 63
  market power, and 59–67
  market share, and 67–8, 78–9
  meaning 60–64
  multi-sided markets 64
  product repositioning 62–3
  regulatory constraints 64
  substitutes
    demand, role in 61–2
    entry, impact on products 63
    error costs in 78–9
    suppliers of, role 62–3
Conley v. Gibson 206, 230, 238
  conscious parallelism, doctrine of 211–12, 214–15, 224–6, 236
  conspiracy
    consumer-betterment test
      American Airlines case, and 144, 164, 166–9
      predatory pricing, and 7–9, 144–6, 162–7
      price freeze theory, and 9, 167–70
  consumer harm see consumer welfare
  consumer surplus
    definition 124
    detrimental to consumer 129
    extraction of 124–30
    foreclosure of entry, for 130
    intra-consumer price discrimination 127–9
    intra-product price discrimination 125–7
loyalty discount attribution tests, and 140
total welfare v. 15–16, 272–3
consumer welfare
‘one surplus theory’ 122–5
total welfare v. 15–16, 272–3
antitrust damages, and 390–91
consumer welfare
potential competition, and 102–3
patent law, in 352–6, 360–61, 366–7
potential competition, and 102–3
predatory pricing 7–8
total welfare v. 15–16, 272–3
price-cost tests, efficiency of 7–8
antitrust damages, and 390–91
resale price maintenance, and 198–200
direct purchaser cases 20, 378–9, 388–91
resale price maintenance, and 198–200
consumer welfare
market-share approach 20, 387–8
optimal deterrence, and 385–6
overcharges 378–85
direct purchaser cases 20, 378–9, 388–91
pass-through, and 388–91
reduced-form analysis 389–90
yardsticks 19–20, 380
private actions, obtaining in 378–9
**Data General Corp. v. Grumman Systems Support Corp.** 357
**De Haviland / ATR case** 299, 301
**Delaware Valley Marine Supply Co. v. American Tobacco Co.** 213–14
demand
competitive constraints, and 61–2
elasticity of 31–2
loss analysis, and 81
significance of non-transitory increase in price (SSNIP), and 31–2
substitutes, role of 61–2
unilateral effects, identifying 46–8
Department of Justice (US)
market definition, de-emphasis on 72–4
courts, conflict with over 74–5
deterrence **see also** entry barriers
antitrust enforcement as
cartel price fixing, and 271–2
damages, as optimal deterrence 385–6
overdeterrence / underdeterrence, balance between 211, 343–4
private v. public enforcement methods 268–71
developing countries
antitrust laws, in 286–7, 290, 293–5, 315
growing influence of 325–6
international regime, conflicts over 318–20
capacity constraints, and 318
competitive constraints, and 318
differentiated products
discount attribution tests 138–40
hard market boundaries, and 56–8
loyalty discounts 138–40
potential competition, and 44, 104
Director, Aaron 122–3
discourts 20–21, 391–3
discounts
**see also** loyalty discounts
discount coupons 20–21, 391–3
downstream customers, and 385–91
dummy variable approach 19–21, 382–3
forecasting method 19–21, 381, 383–5
indirect purchaser cases 20, 378–9, 388–91
lost profits damages 20, 385–8
market-share approach 20, 387–8
optimal deterrence, and 385–6
overcharges 378–85
reduced-form analysis 389–90
yardsticks 19–20, 380
private actions, obtaining in 378–9
**Data General Corp. v. Grumman Systems Support Corp.** 357
**De Haviland / ATR case** 299, 301
**Delaware Valley Marine Supply Co. v. American Tobacco Co.** 213–14
demand
competitive constraints, and 61–2
elasticity of 31–2
loss analysis, and 81
significance of non-transitory increase in price (SSNIP), and 31–2
substitutes, role of 61–2
unilateral effects, identifying 46–8
Department of Justice (US)
market definition, de-emphasis on 72–4
courts, conflict with over 74–5
deterrence **see also** entry barriers
antitrust enforcement as
cartel price fixing, and 271–2
damages, as optimal deterrence 385–6
overdeterrence / underdeterrence, balance between 211, 343–4
private v. public enforcement methods 268–71
developing countries
antitrust laws, in 286–7, 290, 293–5, 315
growing influence of 325–6
international regime, conflicts over 318–20
capacity constraints, and 318
competitive constraints, and 318
differentiated products
discount attribution tests 138–40
hard market boundaries, and 56–8
loyalty discounts 138–40
potential competition, and 44, 104
Director, Aaron 122–3
discourts 20–21, 391–3
discounts
**see also** loyalty discounts
discount coupons 20–21, 391–3
downstream customers, and 385–91
dummy variable approach 19–21, 382–3
forecasting method 19–21, 381, 383–5
indirect purchaser cases 20, 378–9, 388–91
lost profits damages 20, 385–8
market-share approach 20, 387–8
optimal deterrence, and 385–6
overcharges 378–85
pass-through, and 388–91
reduced-form analysis 389–90
yardsticks 19–20, 380
private actions, obtaining in 378–9
**Data General Corp. v. Grumman Systems Support Corp.** 357
**De Haviland / ATR case** 299, 301
**Delaware Valley Marine Supply Co. v. American Tobacco Co.** 213–14
demand
competitive constraints, and 61–2
elasticity of 31–2
loss analysis, and 81
significance of non-transitory increase in price (SSNIP), and 31–2
substitutes, role of 61–2
unilateral effects, identifying 46–8
Department of Justice (US)
market definition, de-emphasis on 72–4
courts, conflict with over 74–5
deterrence **see also** entry barriers
antitrust enforcement as
cartel price fixing, and 271–2
damages, as optimal deterrence 385–6
overdeterrence / underdeterrence, balance between 211, 343–4
private v. public enforcement methods 268–71
developing countries
antitrust laws, in 286–7, 290, 293–5, 315
growing influence of 325–6
international regime, conflicts over 318–20
capacity constraints, and 318
competitive constraints, and 318
differentiated products
discount attribution tests 138–40
hard market boundaries, and 56–8
loyalty discounts 138–40
potential competition, and 44, 104
Director, Aaron 122–3
discoun
Index

duopsony 253–5
DVD patent pools 371–2

Easterbrook, Frank 147, 153, 155
eBay Inc. v. MercExchange, L.L.C. 358
economics, antitrust law, and 1, 87–8
Edlin, Aaron 145–6, 152–3, 164, 167–70, 172
efficiency see equally efficient competitor test
Elhauge, Einer 169–70, 276, 304, 360–63
Ellison, Glenn 114
Elzinga, Kenneth 153–4, 172
enforcement see also antitrust immunity; damages
domestic laws
bias 302–4, 306–8
effects doctrine 287–9
extra territoriality 287–9
under- or overregulation 302–4, 308–11
international / multijurisdictional
agency problems 281, 322–3
compliance costs 295–8
concurrent jurisdiction, influence of
17–18, 280–82
conflicting/ inconsistent decisions
298–301, 308–9
consequences of 16–17, 280
correlated values auction problem,
compared with 280–81
enforcement bias, and 306–8
expansion of 284–5
export cartels 305–6
General Electric / Honeywell case 292, 298–301
global overregulation, and 308–11
international regime
calls for 284
reasons for lack of 17–18
merger reviews, costs of 295–8
net-importers / net-exporters, differing
focus of 302–5, 319–20
optimal antitrust standards, variations in
302–5, 319–20
overenforcement, and 17–18, 280, 283
prisoner’s dilemma, and 302–5, 317
problems with 13–14, 16–18, 280–82
protectionism, and 17, 301–8
rational choice theory, and 302–5
strictest regime, superiority of 308–11
trade-flow bias, and 302–4
uncertainty, and 16–17
private enforcement v. public enforcement
13–14, 267–72
antitrust immunity, and regulation 346–8
derterminacy, as cartel price fixing, and 271–2
need to consider 268–9
relevance of 270–71
differences between 268–9, 272
distortion, eliminating 269–70
motives behind 268–71
trends, in EU 268
trends, in US 267–8
regulation, overlap between
evolution of 327–9
self-regulation, and 327–8
strategies
asymmetric information, influence of
278–80
filing fees, advantages of 278–80
timing of 13–14, 276–8
prospective v. retrospective, advantages of
276–8
regulators, undermining 14
welfare, optimal standards of 272–6
consumer welfare v. total welfare 15–16,
272–3
international / multijurisdictional 16, 319
mergers, reasons for rejection of 273–5
monopoly cases, in 275–6
problems with 273
total consumer surplus standard 273–6
entry barriers see also potential competition
competitors, impact of elimination 5–6
predatory pricing, and 144
equally efficient competitor test, and 164
presumption of 146
re-entry, delays to 148–50
profitability, calculating 4–5
resale price maintenance, by retailers
192–3
Stackelberg leadership model 4–5, 96,
98–100, 102–3
tying and bundling, and 130, 133–5
Epstein, Roy J. 32–3
equally efficient competitor test
American Airlines case, in 161–2, 166
predatory pricing, in 7–8, 145, 160–62, 164,
172–3
principles of 7–8, 160–64
Erickson v. Pardus 238
error cost framework
Court emphasis on 76–9
false negatives / positives, and 76–7, 79
market definition, in 76–9
market share, and 78–9
European Union
antitrust policy
compared with US 290–93, 298–9
enforcement bias, in 307–8
international conflicts 292, 298–301, 315, 317–18
motivations behind 291–2
overenforcement, and 292–3
antitrust policy, compared with US 290–93
extra territoriality, of EU antitrust laws 288–9
loyalty discount attribution tests, on 136, 138–9, 141
predatory pricing, on 155–6
private enforcement suits, in 268
United States antitrust policy, generally compared with EU 155–6, 190–93, 298–9
false negatives / positives antitrust immunity, and regulation 341–5
error costs, and 76–7, 79
hard market boundaries 87–8
horizontal agreements 210–212, 216–22
Falstaff Brewing Corp, U.S. v. 93–4
Farrell, Joe 2–4, 73–5, 272–3, 275
Federal Power Act 1920 328, 330
Federal Trade Commission (US) market definition, de-emphasis on 72–5
Fisher Ellison, Sara 114
foreclosure market percentage 135
patent law, and antitrust law, differences between 359–60
tyying and bundling discounts 130, 133–5
‘within’ and ‘beyond’ scope, distinguishing between 359–60
Fox, Eleanor 319
fraud, enforcement of patents obtained by 376–7
free-riding inapplicability of 178–9
principles of 175–6
resale price maintenance, and absence of 178–89, 198
economic emphasis on 174–5
Internet retailing, and 188–9
prevention, by 175–8
retailer incentives for 175–7
services, on 9
vertical price-fixing, as justification for 9–11
Fridolfsson, Sven 273
Froeb, Luke M. 32–3
FTC v. Procter & Gamble Co. 91–2
FTC v. Staples 73, 115
FTC v. Whole Foods Mkt., Inc. 74–5, 84
game theory 149–50, 255, 317–20, 326
General Electric / Honeywell case 292, 298–301, 309, 315
General Foods, In re. 154
Genesove, David 154–5
Gerardin, Damien 304, 309–10
global markets, antitrust law in see international/ multijurisdictional under enforcement
Goldwasser v. Ameritech 331–2
Goolsbee, Austan 112
Gordon v. New York Stock Exchange 329–30, 333, 335, 343
Gould, J.R. 185–6
Guzman, Andrew 302–4, 319
hard market boundaries Court use of 53–6, 68
error costs 76–9
limiting 84–9
Critical Loss Analysis 2, 31–2, 80–81
economists’ views on 53–5
emphasis on Horizontal Merger Guidelines, in 1, 4–5, 67–8, 72, 85
ers, ability to avoid 83
false negatives / positives 87–8
homogeneous product industry, in 56
Hypothetical Monopolist Test 70–72, 79–83, 87
marginal competitive constraints, and 4 meaning 53
difficulties with 56–7
‘the market,’ and 55–8
product heterogeneity/ differentiation 56–8
traditional approach 55–6
soft boundaries, compared 85–6
Hartford Fire Insurance Co. v. California 288
Hatch-Waxman Act 1984 373–6
High Fructose Corn Syrup Antitrust Legislation, In re. 215
F. Hoff man La Roche Ltd. v. Empagran S.A. 288
horizontal agreements see also Horizontal Merger Guidelines conscious parallelism, doctrine of 211–12, 214–15, 224–6
definition illegal agreements, and 205
statutory 201, 204
false negatives / positives 210–212, 216–22
Matsushita ruling 77, 155, 201–2, 216–23, 231–4, 239–41
Index 401

monopsony, and 263–4
Monsanto ruling 197, 201–2, 216–23, 222–8, 263
plausibility of 206, 236–7
Lorain Journal Co. v. U.S. 339
loss, estimating see damages
LOVEFiLM International Ltd. (UK, OFT) 86–9
loyalty discounts 6
‘buyer’s ‘prisoner’s’ dilemma over 132, 140–41
discount attribution tests 140–41
Antitrust Modernization Commission, on 136–41
background to 136–8
consumer surplus, and 140
costs compared in 139
differentiated products, and 138–40
European Union, on 136, 138–9, 141
higher cost rivals, and 140
recoupment, and 141
transparency, impact on 140
disloyalty penalty, as 130–31
first unit discounts 132
foreclosure, and 133–5
illusory discounts 131
incontestable and contestable goods, on 135–6, 138–9
individualized discounts 132–3
lump sum discounts 132
‘most favored nation clause,’ as 136
profit sacrifices, and 131, 141
retroactive discounts 132–5
single-product loyalty discounts 6, 135–6
types of 132–3
Lyons, Bruce R. 273
McAfee, R. Preston 268–70
McGee, J.S. 154–5
McGinnis, John 304, 323
McCrary, Justin 383–4
Mandeville Island Farms v. American Crystal Sugar Co. 262
marginal costs
modeling
American Airlines, in 157–9
predatory pricing 157–9
unilateral effects, identifying 49–51
Upward Pricing Pressure model, and 2–3, 30–31
monopsony, in 260
Marine Bancorporation, U.S. v. 105–6
market definition see also competitive constraints; hard market boundaries; market power
accuracy of 76–83
Critical Loss Analysis 2, 31–2, 80–81
economists’ views on 53–5
emphasis on
changes, benefits of 54–5
conflicts over 53–5, 74–5
Courts, by 53–6, 68–70, 76–9, 84–9
DOJ/ FTC, by 72–5
Horizontal Merger Guidelines, by 1, 4–5, 67–8, 72, 85
limiting 84–9
errors
avoidance of 83
costs of 76–9
false negatives/ positives 87–8
evidence, availability of 72–4
expansion, of concept 84–5
as first stage in investigations 84–5, 89
homogeneous product industry, in 56
Hypothetical Monopolist Test 70–72, 79–83, 87
importance of 54–5, 75, 83–4
marginal competitive constraints, and 4
meaning 53
difficulties with 56–7
‘the market,’ and 55–8
product heterogeneity/ differentiation 56–8
traditional approach 55–6
multi-sided markets 64
purpose of 3, 58–9
soft market boundaries
advantages of 85–7
Courts’ approach to, suggestions for 84–9
substitutes, comparing 86–7
market power
business practices, and 59–60
‘cellophane fallacy’ 67
competitive constraints, and 60–64
consumers, causing harm to 59–60
elimination, importance of 59–60
problems with 66–7
definition 64–5, 67–8
economic treatment, problems with 65–6
Lerner Index, role in 65–6
maintenance
resale price maintenance, and 191–2
rule of reason framework, in 191–2
market share, and
Courts’ emphasis on 67–8
indicator of, reliability 3
presumption of
tying and bundling, in 366–7
market share
competitive constraints, and 67–9, 78–9
Courts’ emphasis on 78–9, 85–6
damages, measurement of 20, 387–8
error costs framework 78–9
market power, and
Courts’ emphasis on 67–8
indicator of, reliability 3
monopsony power, and 258–9
Masimo Corporation v. Tyco Health Care Group 137–8
Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp. 77, 155, 216–23
dissenting judgments 240–41
influence on Supreme Court ruling in
Twombly 231–4, 239–41
Merck-Medeo Managed Care v. Rite Aid Corp. 225–6
Merger Guidelines 1982 (US) 90–91
merger simulations
advantages 35–9
airline mergers 38
auction models 44–5
benchmarks, for 34–6
demand modeling, and 46–8
dynamic behavior, relevance of 47–8
marginal cost measurements 49–51
nonprice dimensions of competition 51
out-of-sample predictions, and 48
PCAIDS model 32–3, 47
principles 34, 36–7
supply-side, importance of 37–9
mergers, generally see also potential
competition doctrine; unilateral effects analysis, historical development of 90–91
multijurisdictional, compliance costs 295–8
patents, involving 372–3
rejection of, reasons for 273–5
results of 2, 81–2
Microsoft cases 299–301, 368
Mills, David 154, 172
monopolies, generally
definition 163–4
existence of, reasons for 152–3
second monopolies, and 122–5
monopsony
‘all-or-none’ variant 248–9
antitrust policy regarding 259–62
consumers, impact on 261
economic rationale for 259–61
buyers, dominant, power of 250–51
cartels, and 249–50
collusive monopsony 249–50, 261–2
definition 246
duopsony 253–5
horizontal mergers, and 263–4
Lerner Index, for analysis of 257–9
monopsony
models for 251–5
tacit collusion, and 255, 262–3
pure monopsony 246–8
monopsony power 13
dominant buyer 257–8
elasticity of demand 259
elasticity of supply 259
Lerner Index, and 256–9
market share 258–9
Monsanto Co. v. Spray-Rite Serv. Corp. 197, 201–2, 216–28, 263
Morrison, Steven 111
Morton Salt Co. v. G.S. Suppiger Co. 363
‘most favored nation clauses’ 136
motion to dismiss, standard of proof for
Twombly ruling on 206–9
evidentiary sufficiency and legal sufficiency 209
lower court conflicts over 228–31, 230–31
parallel conduct, on 232
plausibility of conspiracy, and 209, 230–31, 233–5, 240–45
plus factors, relevance 228–9, 232–5, 238, 241–3
Second Circuit ruling on 229–31
summary judgment standard, and 231–4, 238–40, 244–5
Supreme Court ruling on 231–4, 233–5, 240–45
tends to exclude concept, and 231–5, 240–41
Mullen, Wallace 154
multiple jurisdictions, issues affecting see international under enforcement
Mumford, M. 153
Nash equilibrium models
unilateral effects, identification limitations of 39–43
National Association of Securities Dealers (NASD), U.S. v. 330, 333, 335
Nobelpharma AB v. Implant Innovations, Inc. 377
Office of Fair Trading (UK)
LOVEFiLM International Ltd. 86–9
soft market boundaries, decisions based on 86–7
oligopolies
predatory pricing, in 170–72
oligopsony 251–5
Bertrand competition model, and 251, 253–4
Chamberlin model 255
Cournot oligopsony model 252–4
Stackelberg duopsony model 253–5
tacit collusion, and 255, 262–3

Einer R. Elhauge - 9780857938091
Downloaded from Elgar Online at 12/30/2018 10:48:17PM
via free access
‘one surplus theory’ 122–5
O’Neill, Paul 300
Oracle Corp., U.S. v. 44–5
Ordover, J.A. 157
Organisation for Economic Co-operation and Development (OECD)
antitrust regime, role in developing 315–16
Ottaviani, M. 276–8
Otter Tail Power, U.S. v. 330, 339–40

Pacific Bell v. Linkline 341
pass-through, identifying unilateral effects 45
patent law
antitrust law, and
conflicts between 354–63
consumer welfare, focus on 352–6, 360–61, 366–7
cross-licensing 370
developing policy on 351–2
exclusive licensing agreements 368
foreclosure ‘within’ and ‘beyond’ scope, distinguishing between 359–60
fraud, patents obtained by 376–7
‘grantback’ clauses 368–9
immunity from 358–63
IP law principles 352–6
IP licensing, Guidelines on 351, 364–5
market harm, presumption of 363–7
mergers and acquisitions involving 372–3
overlap between 19, 352–4
patent cut-off, benefits of 360–63
patent licensing 367–70
patent pooling 370–72
permanent injunctions 358
pharmaceuticals litigation 373–6
presumptive rights 352
refusal to deal, and 356–63
rule of reason, and 367–70
sham patent litigation 377
tying, and 352, 363–7
vertical licensing arrangements 369–70
incentives theory 353, 359–60
principles of 351, 362–3
remedies
innovation policy, as 358–9, 362–3
rights to exclude 356–63
PC-AIDS merger simulation model 32–3, 47
Penn-Olin Chem. Co., U.S. v. 92
Perloff, Jeffrey 147–51
Peters, Craig 38
pharmaceuticals
patent litigation involving 373–6
potential competition, studies of 113–14
Phonotele v. AT&T 330–31
Picker, Randal 207
Pitofsky, Robert 178
plausibility
conspiracy, of, and motion to dismiss 209, 230–31, 233–5, 240–45
horizontal agreements 206, 236–7
Hypothetical Monopolist Test 81–3
predatory pricing, of 147, 150–51, 171–3
Twombly ruling, after 209, 230–31, 233–5, 240–45
Polinsky, A. Mitchell 390–91
Posner, Richard A. 160–61, 163, 275–6
potential competition doctrine
airline mergers, in 107–12
application criteria, establishment of 105–6
cable TV mergers 112–13
cases establishing 91–4, 105–6
difficulties with evidence of potential competition concerning 107–10
economic basis 94–5
actual and potential competition, effects of 95–8
assumptions of 103–4
Bertrand model, on 104
Cournot model, on 97–104
differentiated products, and 44, 104
entry deterrence models 98–100
joint profit maximization model 96–8
merger models 100–103
increase in allocative inefficiency, and 102–3
increase in consumer harm, and 102–3
incumbent’s profits, increase in 100–101
multiple entrants, and 103–4
‘shared monopoly’ case 97
Stackelberg leadership model 98–100, 102–3
evidence, of mergers concerning 107–10
evidence of
difficulties with 107
market-specific studies 106–7
airlines 110–112
cable TV 112–13
pharmaceuticals 113–14
railroads 112
merger-specific studies 106–7
presence of potential competitors 110–114
standards, judicial basis for 105–6
types of 106
Horizontal Merger Guidelines 2010 (US)
5–6, 90–91, 116
judicial basis
application criteria, establishment 105–6
cases amending 105–6
cases establishing 91–4
challenges, standards for 91–2
evidentiary standards 105–6
intention, relevance of 93–4
joint ventures, and 92–3
railroad mergers, in 112

_Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co._ 376

predatory pricing
above-cost predation, and 169–70
_American Airlines_ case 144, 157–9, 161–2, 164–9
antitrust law, whether relevant to 144
asymmetric fundamental models, of 151–3
asymmetric information models, of 151–2
‘bird-in-the-hand’ theory 146, 156
Chicago School view on 147, 150–53
cost-based tests 155–6
consumer-betterment test 7–9, 144–6, 162–7, 169–70
credibility of threat, and 148–50
definition 153
empirical evidence, of 153–5
equally efficient competitor tests 7–8, 145, 160–62, 164, 172–3
European Union on 155–6
fixed costs, problems with 162
frequency, of 147–51
game theory equilibria, and 149–50
high-cost incumbents, behavior of 152–3
interventionist policies, and 146
limit pricing, 8, 154
low prices, and 148–9
marginal revenue, relevance of 158–60
market entry, and
as barrier to 144
presumption of 146
re-entry, delays to 148–50
oligopoly industries, in 170–72
paradox, as 144
plausibility of 147, 150–51, 171–3
price-cost tests 7–8, 156–60
price freeze theory, and 144–6, 167–70
reactive price cuts 144–5
recoupment requirement 172–3
sacrifice theories 7–9, 145, 156–60, 163, 165–6
success criteria for 147–51
US position on
conflicts with EU policy 155–6
cost-based tests 155–6
Supreme Court views on 155–6

Preston, L. E. 185–6
price-cost margin
incremental margin, estimating 80
operating margin, use of 80
predatory pricing, and 7–8, 158–60
test, efficiency of 7–8
price fixing _see_ predatory pricing; vertical price-fixing
price freeze theory 145–6, 172
_American Airlines_, in 144, 168–9
cost-based tests, and 9, 167–70
prices _see also_ predatory pricing; resale price maintenance
compensating cost reduction, and 32
discrimination
tying/ bundling, in 124–7
significant nontransitory increase in price (SSNIP)
assumptions based on 82–3
critical loss analysis, and 31–2, 80–81
prisoner’s dilemma
antitrust enforcement 302–5, 317
loyalty discounts, in 132, 140–41
trade-flow bias, of antitrust law provision 302–4
tyling and bundling, in 132, 140–41
_Private Securities Litigation Reform Act 1995_ (PSLRA) 237–8
product repositioning
addition brands or line extensions 41–2
competitive constraints 62–3
product substitutability 69
unilateral effects modeling, in 40–42
products _see_ differentiated products; product repositioning
proof, of anticompetitive behavior
conflicts over 201–2
horizontal agreements, in
evidentiary sufficiency and legal sufficiency 209, 219–22
independent and interdependent behavior, and 204–9, 218–23, 235, 245
Lerner Index, and 13
plus-factor pleading requirement, and 207–9, 212–15, 222–8
summary judgment test 222–8, 244
tends to exclude, concept 216–23, 225–8, 231–5, 240–41
protectionism
domestic laws, of 285–7, 293–4, 301–8
enforcement bias, and 17, 306–8
export cartels, as 305–6
railroads, potential competition studies 112
refusal to deal presumptions
antitrust immunity, and 330–32, 338–41
patent licenses, and 356–63
regulation see competition regulation
remedies see damages
requirement programs see loyalty discounts
resale price maintenance
distortion of 174–5
efficient competition mechanism, as 182–4
free-riding
in absence of 178–89, 198
economic emphasis on 174–5
Internet retailing, and 188–9
prevention of 175–8
manufacturer intervention in 174–5
market imperfection, as 175
motivations behind 174–5, 177–8, 186–7
principles of 176–7
procompetitive role of 199–200
retailers, and
compensation for 180–84
incentives for 175–7, 180–84
incompatibility 180–82
inter-retailer demand, and 180–82
Internet retailing 188–9
manufacturers’ compensation of 180–84
manufacturers’ retail distribution network, and 184–9
network disruption, caused by 184–9
outlets hypothesis 185–9
promotional discretion, of 179–80
promotional services, provision of 180–84
quality certification, and 187–9
rule of reason framework
anticompetitive theories 189–93
antitrust policy standard, after Leegin 197–200
coelection 194–7
customer welfare, and 198–200
discouraging retailers, termination of 197
economic conditions, for anticompetitive effects 193–7
entry prevention 192–3
inter-retailer competition, limits on 192–3
manufacturer cartels, and 190–91, 193–4
manufacturer-motivated 190–94
market power maintenance, and 191–2
retailer-motivated 192–7
safe harbors 193–4
Russell Stover Candies, Inc. 181–2
sacrifice theories
cost-based tests for 6–7
equally efficient competitor tests, and 7–8
loyalty discounts, and 131, 141
predatory pricing, for 7–9, 145, 156–60, 163, 165–6, 172–3
tying and bundling 6–7, 131, 141
Sagers, Chris 154–5
Salant, Steven W. 271–2
Savage, Scott 112–13
Scherer, Frederic 198–9
Schwartz, Warren F. 270–71
Scott Morton, Fiona 154
Selten, R. 152
Shapiro, Carl 2–4, 34–6, 64–5, 73–5
Shavell, Steven 268–9
Sherman Antitrust Act 1890
adoption 284
Section 1, horizontal agreements
collusive monopsony 261–2
conscious parallelism, doctrine of 211–12, 214–15, 224–6, 236
false positives/ negatives, concerns over 210–212, 216–22
independent and interdependent behavior 204–9, 218–23, 235, 245
Matsushita ruling 77, 155, 201–2, 216–23, 231–4, 239–41
monopsony power, and 261–3
Monsanto ruling 197, 201–2, 216–23, 263
Rubinfeld, Daniel L. 32–3, 382–4, 390–91
Rudholm, Niklas 114
rule of reason
antitrust law, and patent law, overlap 340, 367–70
resale price maintenance, and anticompetitive theories 189–93
antitrust policy standard, after Leegin 197–200
coelection 194–7
customer welfare, and 198–200
discouraging retailers, termination of 197
economic conditions, for anticompetitive effects 193–7
entry prevention 192–3
inter-retailer competition, limits on 192–3
manufacturer cartels, and 190–91, 193–4
manufacturer-motivated 190–94
market power maintenance, and 191–2
retailer-motivated 192–7
safe harbors 193–4
Rey, Patrick 278–9
Rice Growers Association of California, U.S. v. 264
Richards, Krista 111–12
Robinson, Glen 344–5
Richardson, Krista 111–12
Rubinfeld, Daniel L. 32–3, 382–4, 390–91
Rudholm, Niklas 114
rule of reason
antitrust law, and patent law, overlap 340, 367–70
resale price maintenance, and anticompetitive theories 189–93
antitrust policy standard, after Leegin 197–200
coelection 194–7
customer welfare, and 198–200
discouraging retailers, termination of 197
economic conditions, for anticompetitive effects 193–7
entry prevention 192–3
inter-retailer competition, limits on 192–3
manufacturer cartels, and 190–91, 193–4
manufacturer-motivated 190–94
market power maintenance, and 191–2
retailer-motivated 192–7
safe harbors 193–4
Russell Stover Candies, Inc. 181–2
sacrifice theories
cost-based tests for 6–7
equally efficient competitor tests, and 7–8
loyalty discounts, and 131, 141
predatory pricing, for 7–9, 145, 156–60, 163, 165–6, 172–3
tying and bundling 6–7, 131, 141
Sagers, Chris 154–5
Salant, Steven W. 271–2
Savage, Scott 112–13
Scherer, Frederic 198–9
Schwartz, Warren F. 270–71
Scott Morton, Fiona 154
Selten, R. 152
Shapiro, Carl 2–4, 34–6, 64–5, 73–5
Shavell, Steven 268–9
Sherman Antitrust Act 1890
adoption 284
Section 1, horizontal agreements
collusive monopsony 261–2
conscious parallelism, doctrine of 211–12, 214–15, 224–6, 236
false positives/ negatives, concerns over 210–212, 216–22
independent and interdependent behavior 204–9, 218–23, 235, 245
Matsushita ruling 77, 155, 201–2, 216–23, 231–4, 239–41
monopsony power, and 261–3
Monsanto ruling 197, 201–2, 216–23, 263
Einer R. Elhauge - 9780857938091
Downloaded from Elgar Online at 12/30/2018 10:48:17PM
via free access
Index

oligopsony 262–3
overdeterrence and underdeterrence, balance between 211
plausibility of 206, 236–7
prohibitions 201, 210
proof, standards of
lower court interpretations of 222–8
plus-factor pleading requirement, and 207–9, 212–15, 222–8
tends to exclude concept 216–23, 225–8
self-regulation of regulatory bodies, and 328
summary judgment test 222–8, 244
tacit collusion 262–3
Twombly ruling, concerns over 206–9
Section 2, monopolies
patents obtained by fraud, enforcement of 376–7
refusal to deal presumptions, and 330–32, 338–41
regulation, and antitrust immunity 330–32, 342–3
Section 7, and hard boundaries 54–5
Shumilkina, Evgenia 107–10
significant nontransitory increase in price see Hypothetical Monopolist test
Simple Price effect model 2
Smiley, Robert 154
Socony-Vacuum Oil Co., Inc., U.S. v. 261–2
soft market boundaries
advantages of 85–7
Courts' approach to, suggestions for 84–9
substitutes, comparing 86–7
Southwestern Airlines 111–12
Spirit Airlines, Inc. v. Northwest Airlines, Inc. 162, 164
Spulber, Daniel F. 272, 275, 278–9
SSNIP test see Hypothetical Monopolist Test
Stackelberg, Heinrich Freiherr von
duopsony model 253–5
leadership model 4–5, 41, 96, 98–100, 102–3
Standard Oil Co. v. U.S. 371
Steiner, Peter O. 382
Stephan, Paul 322–3
substitutes
competitive constraints
demand, role in 61–2
entry, impact on products 63
error costs, in 78–9
suppliers, role of 62–3
soft market boundaries 86–7
Sullivan, Lawrence 214
Summit Technology/ VISX patent pool case 372
suppliers, substitute products, and 62–3
Suslow, Valerie 326
Syverson, Chad 112
Telecommunications Act 1996 331–2, 335–6, 342
Tellabs, Inc. v. Makor Issues & Rights, Ltd. 237–8, 240
Theatre Enterprises, Inc. v. Paramount Film Distributing Corp. 212
total welfare see under consumer welfare
trade-flow bias 302–5
trade secrets see also patent law
antitrust law, and 353–6
trademark law see also patent law
antitrust law, and compared with 354
conflicts between 355–6
principles 353–4
Trebilcock, Michael 304, 319
Trinko case see Verizon Communications, Inc.
Turner, D. 157, 160–61
Twombly case see Bell Atlantic Corp.
tying and bundling
consumer surplus
definition 124
detrimental to consumer 129
extraction of 124–30
foreclosure of entry, for 130
intra-consumer price discrimination 127–9
intra-product price discrimination 125–7
‘one surplus theory’ 122–5
definitions 6, 121–2
effects of 122, 142–3
illegality of 122–3
incentives for 127–30
liability criteria for, identifying 141–3
loyalty discounts 6
‘buyer’s prisoner’s dilemma over 132, 140–41
disloyalty penalty, as 130–31
foreclosure, and 133–5
illusory discounts 131
incontestable and contestable goods,
bundling together 135–6
‘most favored nation clause,’ as 136
profit sacrifices, and 131, 141
retroactive discounts 132–5
types of 132–3
patent law, and antitrust
overlap between 352, 363–7
presumption of market power 366–7
price discrimination, and 365–6
social welfare, and 366–7
profit sacrifice test 6–7, 131, 141
single monopoly theory 6, 135–6
strategic reasons for 125–30

UNCTAD, role in developing antitrust regime 315–16
unilateral effects
creation by merger, principles of 26–9
Horizontal Merger Guidelines 2010 (US) emphasis on 1–2
presumptions of 29–30
identification 2–3, 29–34
additional brands or line extensions 41–2
advantages and disadvantages of 33–4
analysis testing 51–2
antitrust logit model (ALM) 32–3, 47
auction models 44–5
capacity constraints, and 45–6, 49–50
compensating cost reduction 32
Critical Loss Analysis 2, 31–2, 80–81
demand modeling 46–8
dynamic models 42–4
extensions, to models 39–46
marginal cost modeling 49–51
measurement issues 46–51
model exclusions and limitations 3
Nash equilibrium models 39–43
pass-through, and 45
PCAIDS model 32–3, 47
product repositioning, and 40–42
Simple Price effect model 2
Upward Pricing Pressure model 2–3, 30–31
importance of 25
merger simulation, and 34
advantages 35–9
airline mergers 38
auction models 44–5
benchmark calculations 34–6
demand modeling, and 46–8
dynamic behavior, relevance of 47–8
marginal cost measurements 49–51
nonprice dimensions of competition 51
out-of-sample predictions, and 48
supply-side, importance of 37–9

United Nations Conference on Trade and Employment (Havana Charter, 1948) 313
United States antitrust policy, generally compared with EU 155–6, 190–93, 298–9
enforcement bias, in 307–8
international conflicts 292, 298–301, 315, 317–18
underenforcement, and 292–3

United States v. Aluminum Co. of America 53, 67–8
United States v. El Paso Natural Gas Co. 91–2
Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc. 376–7
Upward Pricing Pressure model 2–3, 30–31
Valley Drug Co. v. Geneva Pharmaceuticals, Inc. 375–6
Varney, Christine
rule of reason, in resale price maintenance anticompetitive effects, economic conditions likely to establish 193–7
anticompetitive theories 189–93
antitrust policy standard, after Leegin 197–200
coercion in 194–7
customer welfare, and 198–200
discounting retailers, termination of 192–3
manufacturer cartels, and 190–91, 193–4
manufacturer-motivated 190–94
market power maintenance, and 191–2
retailer-motivated 192–7
safe harbors 193–4
Verizon Communications, Inc., v. Trinko 18, 327
antitrust enforcement risks, after 337–8
antitrust savings clauses, and 331–2, 335–7
Credit Suisse v. Billing, compared 335, 337
criticism of 343
essential facilities claims 338, 344–5
false negatives / positives, concerns over 343–4
implications of 340–41, 347–50
refusal to deal presumptions, and 330–32, 338–41
rule of reason, and 340
vertical licensing arrangements, for patents 369–70
vertical price-fixing anticompetitive or procompetitive, whether 11–13
brand-pushing rationale 10
cartels, and 11
free-rider justifications 9–11
initiator of, relevance of 12
inter-retailer demand effects 10–11
Leegin ruling on 9–12
manufacturer-motivated theories for 11–13
use of, reasons for 9–10
wholesale prices, reducing 10–11
Vickers, John 274–5
Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp. 376–7
Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp. 376–7
Ward, Ettie 207
Washington, U.S. v. 263
welfare see consumer welfare
Werden, Gregory J. 32–3
Weyerhauser v. Ross-Simmons Hardwood Lumber 13, 261
Whish, Richard 296
wholesale prices
vertical price-fixing, and 10–11
Wickelgren, Abraham L. 270–71, 276–80
Willig, R.D. 157
Winston, Clifford 111
Wirth, Michael 112–13
Wood, Diane 296, 320, 324
Wood Pulp cases (Ahlström Osakeyhtiö v. Commission) 288
World Trade Organisation, international antitrust role 314, 316, 319–20, 322, 324
yardsticks, for damages assessment 19–20, 380
Zerbe, R. 153