Index

Abbot, AF  207
abuse of market dominance see under market
abuse of regulatory procedure  190–91
Acheson, Dean  261–2
Africa  250
  Common Market for Eastern and Southern Africa see COMESA
  West Africa Economic and Monetary Union see WAEMU
Akerlof, Professor GA  17
ALCOA (1945)  244–5
Algeria  265
  competition rules  268–9
American Antitrust Institute (AAI)  84, 279–94
  AAI and international competition NGOs  293–4
  about the AAI  280–83
   competition advocacy NGO  279–80, 290–91
   foundations  280–81
   funding  282, 284, 290–93
   role and activities  281–3, 284, 288, 290–91, 293
   structure  282–3, 289–90
  need for similar NGOs see role of NGOs in the development of competition law
American Banana (1909)  243–4
American Bar Association  290
  Antitrust Section  281, 288
Anti Monopoly Law see under antitrust
  competition law control of SOEs and government in China
  United States see under United States (US)
see also competition
Antitrust Modernization Commission, US  142, 195
and American Antitrust Institute  281–2
Ariely, Dan  17, 20
Armenia  265
  competition rules  269–70
Asher, Alan  288
Asian Development Bank  292
Aspen (1985)  26
AstraZeneca (2010)  190–91, 227
Australia
  cartels see Australia’s criminalization of cartels
  DPP  155–8, 165–8, 170
  government and state-owned enterprises  143–4
Australian Competition and Consumer Commission  150–52, 154–8, 162, 165–8, 170–71
Australian Law Reform Commission  155, 173
Australian Securities and Investments Commission  165
Australia’s criminalization of cartels  148–73
  conclusion  168–73
  criminalization of serious cartel conduct  148–9
  enforcement bifurcation and excessive discretion  164–8
  enforcement agency roles and relationship  165–6
  enforcement decision-making  167–8
  legislative overreach and undue complexity  159–64
  legislative style  162–4
  legislative substance  159–62
  new cartel regime  150–53
  civil prohibitions on cartel conduct  150–51
  dual civil/criminal regime  152

295
More common ground for international competition law?

enforcement by agencies  152–3
exemptions or immunity  151–2, 160–61
individuals and corporations, liability of  153
introduction of cartel offences  151
jurisdiction to hear cases  153
Azerbaijan  265
competition rules  270–71

Barcelona Process  264, 269, 271, 272, 275, 276
*Bates v State Bar of Arizona* (1977)  27

behavioural economics
approach of behavioural economics  6–7
behavioural experiments  7–10, 17–18, 19
wider implications of  19
individuals not always pursuing self-interest  7–9, 10
when financial rewards/penalties decrease motivation  17–18
social/ethical/moral norms promoting desirable conduct  20

behavioural economics on competition policy, implications of  3–20
and Chicago School  3–6, 15
do people actually behave like self-interested rational agents?  6–10
should self-interested behaviour be the desired norm?  10–15
what are the risks if the government promotes self-interested behaviour?  15–20
Belarus  265
competition rules  271
*Boletin Latinoamericano de Competencia*  279–80
Bowen, Christopher  156–7
Bowles, Samuel  8
Bowman, Ward  71
Brazil  287
Breyer, Justice  64, 73, 79, 82
*Broadcast Music, Incorporated* (1979)  26

bundling see under related markets under EU competition law

Canada  165
Caribbean region
CARICOM  251, 253
Organisation of Eastern Caribbean States  253
cartels  82, 91, 128
in Australia see Australia’s criminalization of cartels
costs of proving existence of international cartels  241
criminal sanctions for serious conduct  148, 168
design and enforcement of criminal cartel regimes  171–3
effects of cartels  284–5
Egypt  272
in Europe, historically  261–2
extra-territorial application of competition law  243–4
joint enforcement against international cartels increasing welfare  249
and market power  71–3
sanctions disproportional to benefits  241–2
standard-setting  180
single and continuous
infringement and complex cartels  191
unilateral enforcement creating under-deterrence of international cartels  249–50
vitamins cartel  240, 254
and WTO agreement  247–8
see also international antitrust solutions
Chicago School  3–6, 280–81
basis of theories  6
capture of antitrust  280–81
economic approach under attack  4–5
and resale price maintenance  62
self-interested rational agents  4, 6–10, 15
testing Chicago School assumptions  7–8
Index

China see competition law control of SOEs and government in China
coercion see under related markets under EU competition law
Colgate (1919) 62, 87–8
Comanor, William 79
Common Market for Eastern and Southern Africa (COMESA) 251
companies
drug companies and settlement agreements see three statutory regimes at impasse
high performing 19–20
competition 51–2
in China see competition law control of SOEs and government in China
competition law and choice see consumer choice as the best way to recenter competition law and consumer law see competition and consumer protection law together
enforcement see enforcement
EU law see related markets under EU competition law
harmonization see harmonization
innovation see innovation
markets see markets
NGOs’ role in see role of NGOs in the development of competition law
as part of consumer law see competition law as part of consumer law
patent ambushes see under patent ambush strategies and Article 102 TFEU
prices see prices
technology pools see under industrial standards and technology pools
competition law purposes 21–2, 34–5, 39
economic efficiency 21, 34
promoting small businesses 21
protecting consumers’ property from market power theft 22
competition policy
cell of competition see under competition law as part of consumer law
drivers of behaviour 20
empirical failings 20
goal to eliminate practices that artificially restrict choices 24
and the public 285
intellectual property in competition see intellectual property in competition and internationalization of trade see international antitrust solutions
related markets in the EU see related markets under EU competition law
state action doctrine 42
competition and consumer protection law together 36–45
other administrative benefits of the choice model 44–5
choice underlying anti-trust and consumer protection law 36
how does consumer protection law relate to competition law? 39–40
what is consumer protection law? 37–9
aim of consumer protection enforcement 37, 38–9
unified theory of choice will help to bring better cases 40–42
unified theory of choice will help to design better remedies 43–4
competition law control of SOEs and government in China 122–47
abuse of administrative powers: ‘administrative monopoly’ 136–8
and enforcement 139–40, 147
application of the Anti Monopoly Law 128–9
cases under the Anti Monopoly Law involving SOEs and government 145–6
settlement outside the courtroom 146
More common ground for international competition law?

consumer choice as the best way to recenter competition law 21–35
advantages of incorporating choice consideration 33
implementation issues 30–32
Merger Guidelines 30–32
purposes of competition law 21–2
what is the ‘consumer choice’ approach to competition law? 23–4
violations restricting consumer choice 23, 24
when would consumer choice formulation make a difference? 25–30
choice approach compared to price approach 25
conduct increasing search costs/impairing decision-making ability 27–8
markets competing with independent product development/creativity 28–30
markets lacking serious price competition 25–6

see also competition and consumer protection law together
Consumer Unity and Trust Society 287, 288
consumers
businesses/companies as 41, 50–52
choice and the competitive process 46–7, 48
see also competition law as part of consumer law
and competition law see consumer choice as the best way to recenter competition law
concept of consumer 50–54
competition law 51–2, 53, 54
consumer law 50–51, 53
consumer organizations 287–8, 293
consumer protection
protecting choice see competition and consumer protection law together
purposes 39
remedies 43–4
consumer welfare 33, 53–4
and monopolies 285
and resale price maintenance 73, 78–9, 91–4
and standard-setting 208
decision-making 37–8
decision impairing decision-making ability 27–8, 38
as market failures 39, 42
deployment 38, 39, 43, 50–51
increasing search costs 27–8
information 50–51, 54–5
tied products and consumer perception and preferences 102–4, 120–21
withholding information 38
NGOs providing a voice for protection from exploitation 286
Consumers Association, UK 287
Cooper, J 83–4
Court of First Instance (General Court) 88, 111, 118, 222
CUTS 287, 288

Dawson Committee 154, 173
Deneckere, R 78
Department of Justice, US 5, 63
Antitrust Division 165, 195
Section 2 Report 5
Deringer, A 262–3
Detroit Auto Dealers (1989) 27
developing countries
costs of regional agreements 256
funding 293
increased cooperation/enforcement increasing domestic welfare 249
joint enforcement agreements assisting 254–5
prohibiting cartels
global anti-cartel policy interfering with industrial policy 259
problem of limited enforcement capacity 248, 259
and WTO rules 247–8, 259
regulatory capture 286
Dictator Game 9
Douglas, Justice 70

Dr Miles (1911) 59, 60, 62–4, 71, 80, 86–8
drug companies and settlement agreements see three statutory regimes at impasse
eBay (2006) 201, 228
effects doctrine 241, 245, 264
EFTA 264, 268–9
Egypt 265
competition rules 271–2
EnergyWatch 288
enforcement
in Australia see under Australia’s criminalization of cartels
in China see under competition law control of SOEs and government in China
coordination between agencies enforcing antitrust and consumer protection law 44
cost of legal action 51
and internationalization of trade see international antitrust solutions
monopoly of government 285
private enforcement of competition law 286
resale price maintenance cases 63
resale price maintenance as contract enforcement mechanism 77
unified theory of choice will help to bring better cases 40–42
business corporations as consumers 41
coerced purchase of a license 41–2
deception of standard-setting organisations 40–41
unified theory of choice will help to design better remedies 43–4
essential facility doctrine see under related markets under EU competition law
European Coal and Steel Community 261–2, 278
European Commission 51–2, 88–9
ENP 266–7
Horizontal Cooperation Guidelines 188
patent ambush
cases 185–7, 218–23, 230
market dominance 188
pay-for-delay 225–8
Pharma Sector Inquiry Report 225, 227
price misuses 192
reasonable royalty, meaning of 193
role of competition law 263
single and continuous infringement and complex cartels 191
see also patent ambush strategies and Article 102 TFEU
European Court of Justice (ECJ) 111, 118, 191, 193, 225–6
barriers to free trade 263
courting innovation 225
excessive prices, meaning of 193
meaning of dominant position 187
restrictive agreements 225–6
single and continuous infringement and complex cartels 191
European Economic Area Agreement 264
European Neighbourhood Policy see under penumbras of European Union competition law
European Telecommunications Standards Institute 185, 230, 234, 235
European Union (EU) 292
association agreements 266, 268–76
competition 53–4
abuse of dominance 44, 99, 181
assessing Rambus under EU law 218–21
consumer choice approach to competition law 22, 34, 99
consumer interests, representation of 287, 288
enforcement of competition law 250, 251, 253, 257
exploitation of licensees 179
external governance see penumbras of European Union competition law
extraterritoriality see penumbras of European Union competition law
interventions 53
patent ambush see patent ambush strategies and Article 102 TFEU
public monopolies 53
related markets in the EU see related markets under EU competition law
role of competition policy in EU 261–5
consumers
concept of 50, 51–2
unfair conduct towards 181
corrections of European and US approaches to trade regulation 44–5
ECJ see European Court of Justice (ECJ)
enlargement 264, 265
ENP see under penumbras of European Union competition law
Euro-Med Association Agreement 268–9, 271, 272, 273, 275, 276
European Coal and Steel Community 261–2, 278
European Commission see European Commission
European Economic Area Agreement 264
External Action Service 266
free trade agreements 263, 265, 266
deep and comprehensive 270, 276–7, 277–8
Horizontal Guidelines 231, 232
Lisbon Treaty 266
partnership and cooperation agreements 266, 269–70, 272
R & D Block Exemption Regulation 232
R & D Joint Venture Block Exemption 231
resale price maintenance 61, 85, 88–90, 93–5
burden of proof 89
de minimis notice 93
Guidelines on vertical restraints 102, 112–13, 114–15
minimum and maximum (recommended) RPM 89–90
role of competition policy in EU 261–5
c consumer choice approach to competition law 22, 34, 99
European Economic Area Agreement 264
extraterritoriality rules, adoption of 264
promotion of effective competition 263–4
single market integration 262–3, 264
restricting access to markets, preventing 262
Rome Treaty 261, 263
single market 261–3, 266
and state-owned enterprises and Member States 141–2
Technology Transfer Block Exemption 231
Technology Transfer Guidelines 210–11, 227, 231, 235
TEU 266
TFEU see Treaty on the Functioning of the European Union (TFEU)
unfair trade practices 196
Vertical Agreements Block Exemption Regulation 90, 94, 112, 115

Federal Trade Commission, US 4, 33
enforcement cases 40–41, 63, 82, 281
Franchise rule 44
patent ambush cases 182–5
price fixing 195
pay-for-delay agreements 203, 206
R-Value rule 44
Federal Trade Commission Act (US) 38
patent ambush 181, 182–5, 196, 218–19,
pay-for-delay agreements 203
Fels, Allan 154
financial crises
re-examination of assumptions underlying economic policies 20
response to bankers’ behaviour 20
and self-interested behaviour 16–17
notion that self-interested behaviour was virtuous 20
FIPRA Group 288
Food and Drug Administration, US 199–202
Food, Drug and Cosmetic Act (US) 199–200, 202, 206
amended see Hatch-Waxman Act (US)
France 276
FRAND/RAND terms
patent ambush 178, 185, 190, 194–5, 197, 209, 217, 219, 230
technology pools 232–4, 235–6
free-riding
punishing 7–8
and RPM see under resale price maintenance: competitive harms and benefits
Friedman, Milton 10
Fuchs, Andreas 221–2, 224
General Court 88, 111, 118, 222
Georgia 265
competition rules 272
and Russia 278
Germany
cartels historically 261
German Act against Unfair Competition 196
GlaxoSmithKline (2009) 225
global commerce
AAI’s role 284
see also American Antitrust Institute (AAI)
broadening social relationships and interdependence 19
competition problems see international antitrust solutions
Greece 287
Grimes, Warren 75, 88
happiness
  and money 11–14
  focusing illusion 13
  increased by giving 12
  relative wealth 13–14, 49
  resale price maintenance and
  consumer happiness 92
  and self-interested behaviour
  10–14, 17
  sources of happiness 14–15
Harding, C 261
harmonization
  ICN 247, 287
  international cooperation and
  harmonization efforts 247–8,
  250
  proposals for harmonized
  antitrust rules 247
Hatch-Waxman Act (US) 199–200,
  201–2
Hong Kong 144
Howard, John 156
IBRAC 287
Iceland 264
India 287
industrial standards and technology
  pools 213, 230–36
  FRAND commitments 235–6
  innovation and technology pools
  230–31
  role of competition law,
  interventionist and non-
  interventionist 231
  stage one: preliminary meeting 232
  stage two: creation of the standard
  and selection of essential
  patents 233–4
  obligation to license on FRAND
  terms/disclose patents 233
  SSO standard-setting 233
  stage three: licensing out 234–5
  degree of market power of the
  standard 234
Info-Lab/Ricoh (1999) 106
innovation 33
  bringing long term consumer choices
  24, 30, 32
  competing through product
  development 28, 30, 199, 210
incentives balance approach
  222–3
  restrictive agreements encouraging
  innovation 225–6
  and supra-competitive pricing
  220–21, 223
  evaluation of mergers in markets
  needing innovation 30–32
  inquiry into innovation effects of
  mergers 31–2
  and monopolies 285
  protecting
  patent law promoting competition
  by innovation 199, 222–3
  protecting innovation by IPR
  210
  see also intellectual property in
  competition
SSO discussions producing
  innovation gains 216–17
  and technology pools 230–31
  intellectual property in competition
  210–29
‘ideal world’ of Schumpeterian
  competition 210–14
  one patent = one product
  assumption not true 211
  patents as pro-competitive 210,
  213
  standardized technology 211–13
  theory of complementarity
  210–11, 213
  tragedy of the anti-commons
  213
patent ambush 214–24
  assessing Rambus under US and
  EU law 218–21
  in favour of an ‘incentives-
  balancing’ approach 221–3
  looking beyond competition law
  223–4
  why does patent ambush occur?
  217–18
  why SSO standard-setting should
  be preferred to de facto
  standards 214–17
reverse payments for settling patent
  infringement cases 224–8
  settlements among originator
  companies 227–8
settlements between originator companies and generics producers 224–6

see also patent ambush

Inter American Bank 292–3
international antitrust solutions 239–60
enforcement issues 239
five international antitrust regulatory tools 243–50
bilateral or multilateral agreements 245–6, 250
cooporation, increasing 248, 249
domestic welfare, increasing 249–50
five international antitrust regulatory tools 243–50
global welfare, increasing 248–9, 250
international cooperation and harmonization efforts 247–8, 250
interrelation between the regulatory tools 250–51
problems with extra-territorial application of laws 245
regional agreements 246–7
supra-national antitrust authority, establishing 248, 249–50
unilateral application of domestic competition law 243–5
unilateral enforcement coupled with extra-territoriality 244–5, 250
joint enforcement agreements, potential benefits of 253–6
certainty and compatibility 255
common market 255
costs reduced 255
credible commitments 255–6
educational efforts 255
empowerment 254–5
enforcement 254
evidence 254
expertise 253–4
externalities 255
scale economies in enforcement 253–5
levels of antitrust cooperation 240–51
international antitrust solutions 243–51
setting the stage: international antitrust challenges 240–43
unilateral enforcement leading to antitrust problems 240–42
unilateral enforcement leading to clashing remedies 242–3, 245
regional antitrust agreements/regional competition law agreements 247, 250, 251–7
costs and limitations 256–7
new wave of regionalism 251–2
potential benefits of joint enforcement agreements 253–6
potential to increase regulatory measures 249
types of regional competition law agreements 252–3
regional competition law agreements: catalysts for supra-national authority 257–9
aggregate bargaining power 258–9
agreement can be carried over to larger scale of cooperation 257–8
geographic proximity/similarity of trade patterns 258
joint authority must increase welfare of members 257
see also role of NGOs in the development of competition law

International Competition Network (ICN) 251
harmonization work 247, 287
International Network of Civil Society Organisations on Competition (INSOC) 288–9
Internet 54–5
broadening social relationships and interdependence 19
and NGOs 287, 292
More common ground for international competition law?

retailers and resale price maintenance 68
sources of information about quality 74–5
Ippolito, Pauline 82–3
Israel 265, 275
competition rules 272–3
Jacobs, Advocate General 226
Japan 126, 292
Jordan 265
competition rules 273
Joshua, J 261
Kahneman, Daniel 7
Khan (1997) 62
Klein, B 77, 79–80, 81
Kodak (1992) 104–5, 106
Lafontaine, F 84
Lebanon 265
competition rules 273–4
Leegin case: chief event versus a storm in a teacup 86–99
comments on anticompetitive arguments against minimum RPM 92–4
comments on procompetitive arguments on favour of minimum RPM 90–91
hypocrisy of the Colgate policy as hidden RPM 87–8
minimum and maximum (recommended) RPM 89–90
per se illegality versus hardcore ban 88–9
see also resale price maintenance: competitive harms and benefits
Libya 265
competition rules 275
licensing fees, control of excessive 192–4
Liechtenstein 264
Lisbon treaty 266
lock-in effect see patent ambush strategies and Article 102 TFEU
Malaysia 246
markets
abuse of market dominance 189–90
exclusionary abuse 190–92
exploitative abuse 192–4
superdominance 193
see also patent ambush strategies and Article 102 TFEU
barriers to entry 193, 221
effective competition on markets as choice for consumers 46–7
financial markets see financial crisis
firms competing through independent product development and creativity 28–30
media businesses 28–9
free markets not presumed to reach satisfactory social results 53–4
market competition norm in advanced industrialized economies 85
market dominance 187–9
superdominance 193
market economy requirements 39
market failures 39
market power and cartels 71–3
network effects 214–15, 221, 224
new market entry 75–6
orderly markets in China 128
prices
excessive pricing 192–4, 219
intervention in pricing mechanism of markets 219
lacking serious price competition 25–6
market power of standards 234–5
related markets in the EU see related markets under EU competition law
Mass Board of Optometry (1988) 27
McKinsey & Co 19–20
media businesses and competition 28–9
perspective competition 29, 31, 33
evaluation of mergers in markets needing perspective competition, 30–31
Index

Mehta, Pradeep 288
Mencken, HL 14
Merger Guidelines, US see under mergers
mergers 249, 258
burdensome regulatory costs of international mergers 241
in China 133–5
Merger Guidelines, US 30–32
choice analysis as separate explicit factor 31
choice considerations as implicit factor 31
choice considerations as tie-breaker 31
price competition and non-price competition 30–31
Merger Regulation 269
veto power of jurisdictions, effects of 242, 248
Michel, ST 207
Microsoft (1998) 24, 240, 242
Miller-Tydings Act (US) 62, 63, 67, 82
Mills, John 17
Moldava 265
competition rules 274
money
inefficient mechanism to motivate 20
and happiness see under happiness
monopolies
charging of monopoly prices not unlawful in itself 192
effects of monopoly 285
in China see competition law control of SOEs and government in China
monopoly power and deception 181
natural monopoly 215
private monopolies 285
and privatization 285
Monsanto (1984) 62
Morocco 265
competition rules 275
Murphy, KM 77, 81
National Society of Professional Engineers (1978) 27
neo-classical economic theories see Chicago School
New Zealand 170
Policy to the 44th President, The (AAI) 282
non-governmental advisers 287
non-governmental organisations see role of NGOs in the development of competition law
non-price competition 36, 37
competition through quality, service and variety 25–6, 28–30, 33
innovation see innovation
markets competing through independent product development and creativity 28–30
media businesses 28–9
US Merger Guidelines see under mergers
see also consumer choice as the best way to recenter competition law
Norway 264
Nudge (Sunstein and Thaler) 32
Obama administration 5, 22, 198, 281
Occupied Palestinian territory 265
competition rules 275
OECD 151, 247, 292
cartels 241–2
proposals for harmonized antitrust rules 247
Recommendation of the Council concerning Effective Action against Hard-Core Cartels 151
Overstreet, Thomas 82–3
Palestinian Authority 265, 275
Patent Act (US) 199, 201
patent ambush 214–24, 233
assessing Rambus under US and EU law 218–21
avoided by de facto standardization 215
in favour of an ‘incentives-balancing’ approach 221–3
looking beyond competition law 223–4

Downloaded from Elgar Online at 04/27/2019 03:40:11AM
via free access
further reaching legislative options 224
protecting dynamic competition 223
non-disclosure of IP rights in standard-setting 177, 213
leading to high royalty claims 177–8
payment of high royalties to avoid severe losses/lock-in effect 178, 196
pooling facilitated in standard-setting 213
and reverse payments see patent ambush and reverse payments standard-setting creating 213, 214–15
strategies see patent ambush strategies and Article 102 TFEU
why does patent ambush occur? 217–18
why standard-setting through SSOs should be preferred to de facto standards 214–17
see also three statutory regimes at impasse
patent ambush strategies and Article 102 TFEU 40–41, 177–97, 209, 213
abuse of market power 189–94
control of excessive licensing fees (exploitative abuse) 192–4
laying a patent ambush as an exclusionary abuse 190–92
single and continuous infringement 191
additional means to discourage patent ambush strategies 194–6
disclosure ex ante of patent owner’s maximum royalty 195, 197
shifting burden of proving royalties are reasonable to patent holder 194, 196
strengthening enforceability of IPR policy of SSOs 194–5
assessment of patent ambush strategies under Article 102 TFEU 187–94
abuse of market power 189–94
market dominance 187–9
competition law tools for coping with a patent ambush scenario 181–2
causal link between dominance/abusive conduct not required 182, 190, 196
competitive concerns in a patent ambush scenario 178–81
abuse of market power 179–81
manipulation of standard-setting process 178–9
use of lock-in effect to acquire/maintain market dominance 180–81
in favour of an ‘incentives-balancing’ approach 221–3
patent ambush and reverse payments see patent ambush and reverse payments
relevant patent ambush cases – an overview 182–7
European Union 185–7
United States 182–5
patents and innovation see under innovation intellectual property in competition see intellectual property in competition
patent ambush see patent ambush pay-for-delay agreements as horizontal agreement in restraint of competition 207
challenges to 203–5
and common interest of branded/generic producers 202
harming dynamic competition among originator companies 214, 224–8
settlements among originator companies 227–8
settlements between originator companies and generics producers 224–6
need for legislative amendment 202
Index

patent ambush and reverse payments 207–9
deception harming competition by distorting standard-setting 208
pay-for-delay agreement as horizontal agreement restraining competition 207
suppression of information about competition 209
and price competition 214, 224
rule of reason analysis amounting to de facto legality 205–6
Pelikan/Kyocera (1995) 106
penumbras of European Union competition law 261–78
competition rules of ENP participant states 268–77
Algeria 268–9
Armenia 269–70
Azerbaijan 270–71
Belarus 271
Egypt 271–2
Georgia 272
Israel 272–3
Jordan 273
Lebanon 273–4
Libya 274
Moldova 274
Morocco 275
Occupied Palestinian Territory 275
Syria 275–6
Tunisia 276
Ukraine 276–7
European Neighbourhood Policy (ENP) 264–5
deeper economic integration 277–8
overview of competition policy in ENP 265–7
proximity policy 265–6
as ‘shadow of enlargement’ 265
overview of competition policy in ENP 265–7
Action plans 266–7
approximation of legislation 266
and Lisbon Treaty 266
TFEU competition rules 267
role of competition policy in EU 261–5
consumer choice approach to competition law 22, 34, 99
European Economic Area Agreement 264
ENP 264–5
extraterritoriality rules, adoption of 264
promotion of effective competition 263–4
single market integration 262–3, 264
restricting access to markets, preventing 262
Posner, Judge R A 10–11, 16
Pratt, Richard, 156
prices 23, 24, 25, 37
control of excessive licensing fees 192–4, 220–21, 224
charging of monopoly prices not unlawful in itself 192
limited control of excessive prices in exceptional situations 192–3
excessive pricing as competition law violation 219, 221
and industry-wide joint ventures 26
and innovation see under innovation
intervention in pricing mechanism of markets 219
market lacking price competition 25–6
and monopolies 285
patent ambush 192–4, 218
patents restricting price 210, 218
price fixing and disclosure ex ante of patent owner’s maximum royalty 195–6
pay-for-delay agreements 214, 224
price as important dimension of competition 85, 91
regulated prices, effect of 25–6
resale price maintenance see resale price maintenance: competitive harms and benefits
third party payers 26
US Merger Guidelines see under mergers
Prodi, Romano 265

Qualcomm (2009) 230

Rambus (2010) 185–6, 230, 234
assessing under EU law 218–21, 221–3

assessing under US law 218–21
RAND terms see FRAND/RAND terms
regional competition law agreements see under international antitrust solutions
related markets under EU competition law 97–121
abusive ‘system competition’ 118–20
aftermarkets and the essential facility doctrine 100, 115–18
application of the essential facility doctrine 115–16
assessment under Article 102 TFEU 116–18
basic legal framework 99–100
coercion 107–10
bundling 108–9, 120
contractual tying 107–8
technical tying 109–10
contractual/other ties by firms not dominating tying product’s market 112–15
applicability of Article 101 TFEU 113–15
applicability of Article 102 TFEU 112–13
main conclusions 120–21
secondary products/compatibility requirements and interface control 97–9, 116–17
separate product requirement 102–7
is tied product a separate product or a constitutive component? 102–4
do the two products belong to two different relevant markets? 104–5
tying prohibition in Art 102(2) lit d) TFEU 100–115
abuse of a dominant position and tying 100
coercion 107–10
contractual/other ties by firms not dominating tying product’s market 112–15
defences 110–11
first conclusion 111–12
separate product requirement 102–7
resale price maintenance: competitive harms and benefits 43, 59–85
anticompetitive theories and their effects 61, 67–73
comments on 92–5
effects on retail sector 61, 70–71
facilitating dealer/manufacturer cartel; market power 71–3
price effects/higher prices 67–70, 85
background 62–6
history of RPM leading to Leegin 62–3
post Leegin developments 65–6
synopsis of Leegin 63–4
competitive assessment 66–84
anticompetitive theories and their effects 61, 67–73, 92–4
lack of strong empirical evidence 82–4, 85
procompetitive theories 61, 73–84, 90–91, 94
critique of non free-rider theories 78–82
less restrictive alternatives 81–2
private efficiency versus social efficiency 78–8
whether retailer competition provides appropriate price/service mix 79–81
free rider explanation 73–6, 90
classic theory 73–4
new market entry 75–6, 90–91
‘quality-certification’ free-riding 74–5, 91
Index

non free-rider explanations 76–82

critique of non free-rider theories 78–82

RPM as contract enforcement mechanism 77

RPM for correcting retailer bias towards price competition 77–8

RPM as incentive to increase inventory when demand is uncertain 77, 90

procompetitive theories 61, 73–84

comments on 90–91, 94

free rider explanation 73–6, 90

non free-rider explanations 76–82

proposal and conclusion 84–5

rebuttable presumption of illegality 85

rule of reason operating as de lecto legality rule 65, 84

rule of reason 59, 62, 64–6, 70, 84, 87, 89, 94–6

support for per se illegality rule 59–61

see also Leegin Creative Products Inc (2007)

reverse payments see pay-for-delay agreements

role of NGOs in the development of competition law 279–94

AAI and international competition NGOs 293–4

about the AAI 280–83

belief in more activist role for antitrust 281

and Chicago School capture of antitrust 28–81

competition advocacy NGO 279–80, 290–91

foundations 280–81

funding 282, 284, 290–93

role and activities 281–3, 284, 288, 290–91, 293

structure 282–3, 289–90

conclusion 294

foreseeable questions and responses 289–93

how much advocacy should the organization undertake? 290–91

how can experts be enticed to participate? 289–90

how can a new foreign NGO raise money? 291–3

how large an office and staff are needed? 289

should there be an ideological test for members/supporters? 291

what qualifications are needed for staffing? 289

need for similar NGOs worldwide 283–9

identifying and bringing together an antitrust community 285–6

international developments, driving 286–7

strengthening local antitrust enterprise 286

see also international antitrust solutions

Rosch, Commissioner J Thomas 4–5

Russia 264, 278

Scherer, Frederic M 83–4

Schuman Plan 261–2

Schumpeter, Joseph 210

search costs 27–8

self-interested behaviour and competition policies 20

empathy 18

not inherently virtuous 17, 20

regulation of financial institutions 16–17

risks if the government promotes self-interested behaviour 15–20

self-interest as a private virtue and public vice 16–17

and ‘Middle or Revival Period’ and ‘Speculative Period’ 17

selfish behaviour promoting selfish behaviour 18–19

societies internalizing moral norms 18
survival dependent upon cooperation and beyond self-interest 19–20
whether people actually behave like self-interested rational agents 6–10
whether self-interested behaviour should be the desired norm 10–15

Sherman Act (US) 86, 100, 180, 199, 203, 262
section 2, 181, 184–5, 196, 218–19, 221, 228, 233

Shiller, Professor RJ 17
Singapore administrative monopoly 144
adoption of competition laws as result of US trade pressure 246
Slade, M 84
standard-setting see patent ambush and cartels
state action doctrine 42, 142–3
state-owned enterprises see competition law control of SOEs and government in China
Steiner, Robert 69
StopCartel 287
Sunstein, C 32
Syfait (2005) 226
Sylvania (1977) 62, 65
Syria 265
competition rules 275–6
Switzerland 93, 264

technology pools see industrial standards and technology pools
Thaler, R 32
three statutory regimes at impasse 198–206, 224–5
adoption of FTC approach of presumptive illegality 206
patent ambush and reverse payments 207–9
deception harming competition by distorting standard-setting 208
pay-for-delay agreement as horizontal agreement restraining competition 207

suppression of information about competition 209
patent law promoting competition by innovation 199
pay-for-delay agreements challenges to 203–5
and common interest of branded/generic producers 202
harming dynamic competition among originator companies 214, 224–8
need for legislative amendment 202
and price competition 214
rule of reason analysis amounting to de facto legality 205–6
unlicensed experimental use of patented inventions prohibited 199–202
delaying market entry by generic producers 200
passing of Hatch-Waxman Act 200
responsive infringement suits 201–2

Trade Practices Act (Aus) see Australia’s criminalization of cartels
Treaty on European Union (TEU) Art 8 266
Treaty on the Functioning of the European Union (TFEU) 141–2, 267, 273
Art 101 99, 100, 114–15, 142, 180, 185, 195, 268–9
Art 101(1) 90, 95, 114, 191, 227
Art 101(1) lit e) 113–14
Art 101(3) 52, 89, 92, 94, 95, 114, 195, 225–6
and patents see patent ambush strategies and Article 102 TFEU
Art 102(a) 219, 221–2, 234
Art 102(1) 100, 101, 111, 112
Art 102(2) lit a) 192–3
Art 102(2) lit d) 99–115, 120
Treaty of Rome 261, 263
Index

Trinko (2004) 192
Tunisia 265
competition rules 276
Tversky, Amos 7
Twombly (2007) 65
tying practices see related markets
under EU competition law

Ukraine 265, 278
competition rules 276–7
deep and comprehensive free trade
agreement 278
Ultimatum Game 8–9, 19
UNCTAD 292
unified theory of choice 40–42
Union for the Mediterranean 264–5, 269
United Kingdom 272–3, 292
Consumers Association 287
personal control as predictor of
happiness in life satisfaction
survey 11
United States 273
advertising restrictions cases 27, 33–4
airline competition 25–6
antitrust laws
consumer choice approach 24, 35, 44–5, 99
effects doctrine 241, 245, 264
extra-territorial application of
competition law 243–4
pay-for-delay agreements see
three statutory regimes at
impasse
private enforcement of
competition law 286
purposes of 21–2, 44–5, 99, 263
state action doctrine 42, 142–3
unilateral enforcement coupled
with extra-territoriality
244–5
Antitrust Modernization
Commission 142, 195, 281–2
Bush administration 5, 21, 22, 34, 63, 281–2
cartels 148, 157, 180
Clinton administration 21–2, 63, 281
consumer associations 287
consumer protection laws 38
deception of standard-setting
organisations 40–41
convergence of European and US
approaches to trade regulation
44–5
exploitation of licensees 179
Federal Trade Commission see
Federal Trade Commission, US
Food and Drug Administration
199–202
Food, Drug and Cosmetic Act
199–200, 202, 206
government and state-owned
enterprises 142–3
happiness of individuals and
money 11–12
industries of national importance
132
Hatch-Waxman Act 199–200, 201–2
mergers
media businesses 29
Merger Guidelines see under
mergers
and non-price competition 26, 30–31
monopolies 221
charging of monopoly prices not
unlawful in itself 192, 219
monopoly power and deception
181
Patent Act 199, 201
patent ambush 181, 182, 209, 228
assessing Rambus under law
218–21
cases on patent ambush 182–5
causal link between standard’s
adoption and deceptive
conduct 181, 185, 196
fair trading 233
patents see three statutory regimes
at impasse
pay-for-delay agreements see three
statutory regimes at impasse
prices as important element of free
market system 192
price fixing and disclosure ex ante of
patent owner’s maximum
royalty 195
More common ground for international competition law?

Reagan administration 21, 63, 281
resale price maintenance see resale price maintenance: competitive harms and benefits
Sherman Act see Sherman Act (US)
and Singapore 246
ty ing 100–101
unfair competition and practices 181, 196
US AID 292
universities’ antitrust centers 287–8, 293
US AID 292

Visy Limited 156, 169
Vizard, Steve 166
WAEMU 251, 253
Wall Street Journal 65
Which? 287
Winter, Ralph 77–80
World Bank 292
World Trade Organization (WTO) 247, 263
discussions on prohibition of cartels 247–8, 259
regional competition law agreements and competition law provisions 259