

INDEX

Absolute territorial protection, 124, rules versus standards, 174 130 - 1unstructured tests, 173-4 Abuse exclusionary conduct and, 152-3, overview, 15, 16 154-6, 174 exclusive dealing (See Exclusive annulment proceedings administrative action, 161 dealing) mergers compared, 161-2 exploitative conduct and, 152, other decisions, 166-7 156-7, 174 prohibition decisions, 162-6 General Court and Areeda-Turner test, 155 annulment proceedings, 166-7 "as efficient competitor" test, 155-6 case selection, 177-8 bundling, 211, 253, 295-8 consistency of competition law in, case selection, 177-8 312 - 13consistency of competition law and, enforcement principles, 175-6 prohibition decisions, 162-6 312 - 13variation in behaviour in EU ECI and annulment proceedings, 166-7 Courts, 305, 310, 311 horizontal issues, 157-8 case selection, 177-8 consistency of competition law in, intellectual property and, 160 312-13 joint analysis, 171-3 enforcement principles, 175-6 leveraging horizontal issues, 157-8 bundling, 211 joint analysis, 171-3 legal tests for, 211-12 preliminary references, 168-70 mixed bundling, 211 prohibition decisions, 162-6 refusal to deal (See Refusal to deal) resilience of case law and, 308, 309 tying, 211, 212 variation in behaviour in EU margin squeeze practices, 160 Courts, 305, 310, 311 margin squeeze practices as, 160, 172-3, 174, 300, 301-2, 305 European Commission and annulment proceedings, 161-2, mixed bundling, 211 166 - 7"no economic sense" test, 155 case selection, 177-8 predatory pricing (See Predatory economic principles and, 176 pricing) exclusionary versus exploitative preliminary references, 168-71 conduct, 174 preliminary rulings, 215-18 expansive authority of, 173, 175 prima facie cases, 153-4, 158-60 joint analysis, 171-3 prohibition decisions, 162-6, 212-15 preliminary references, 168 rebates, 158-60 prohibition decisions, 162-6 refusal to deal (See Refusal to deal)



> 342 institutional framework (See Abuse (cont.) Regulation 1/2003 and, 161-2 Institutional framework of rules and competition law) mergers (See Mergers) overview, 154 research questions, 79-80 predatory pricing, 159-60 rebates, 158-60 restriction of competition (See standards versus, 174 Restriction of competition) scope of analysis, 79 scope of analysis, 79 scope of TFEU, 152-3 structure of study, 80-1 "soft trigger" in, 173-4, 175 substantive law (See Substantive standards and competition law) overview, 160-1 Ancillary restraints, 117-22 ECJ and, 117-18, 119-22 rules versus, 174 European Commission and, substantive choices 117-19 overview, 153-4 exclusionary conduct and, franchising agreements and, 120 freedom of action and, 118, 121-2 154 - 6goodwill and, 118 exploitative conduct and, 156-7 tying, 211, 212, 295-8, 313 prima facie cases, 117-18, 120 Accuracy versus administrability Annulment proceedings balance between, 29 abuse administrative action, 161 rules versus standards, 29-32 Administrative action mergers compared, 161-2 overview, 11 other decisions, 166-7 abuse and, 161 prohibition decisions, 162-6 collective dominance, 245 mergers overview, 229-32 endogenous constraints and, 71-2 refusal to deal, 203-7 abuse compared, 161–2 Regulation 139/2004, 231 repeated interactions and, 71-2 Regulation 4064/89, 231 Agreements restriction of competition overview, 15-16 commitment decisions, 101-2 distribution agreements (See Distribution agreements) exemption decisions, 98-102 future research agenda, 331-2 negative clearance decisions, horizontal agreements (See 98 - 102Horizontal agreements) prohibition decisions, 94-8 Appeals. See Judicial review joint purchasing agreements, 135-6 licensing agreements (See Licensing Areeda, Phillip, 155, 202 agreements) Areeda-Turner test, 155, 179, 187 pay-for-delay agreements, 282-3 "As efficient competitor" test, 155–6 restriction of competition by, 91-4 specialisation agreements, Bias. See Prosecutorial bias 132 - 3, 139Block Exemption Regulation, 127-8, Analytical framework of 139, 263, 276-7 competition law Bork, Robert, 48 overview, 21 Briones, Juan, 242-3 abuse (See Abuse) Bundling, 211, 253, 295-8



Cartels	Regulation 4064/89 and, 237-42
fact-intensive cases, 64, 89-90	applicability of, 241
fines, 333-4	interpretation of, 239–41
future research agenda, 333-4	tacit collusion and, 237-8, 239,
horizontal agreements and, 141-2	241-3, 244-5
prohibition decisions and, 94	Collusion
restriction of competition by	explicit collusion, 32-3
object, 16	non-collusive oligopolies (See Non-
single continuous infringement,	collusive oligopolies)
333	restriction of competition and, 89
Case-by-case assessment	tacit collusion (See Tacit collusion)
collective dominance, 240-1, 243	Commitment decisions
in ECJ, 314–16	in ECJ, 98–102
economic analysis and, 44	energy markets and, 299
in European Commission, 261, 275	in European Commission
exclusive dealing, 314-15	overview, 70–1, 98–102,
in General Court, 314–16	287–8, 299
horizontal agreements, 141-2	analysis of, 291–8
non-collusive oligopolies, 261	context of, 298-9
predatory pricing, 315–16	contradiction of Guidance Paper,
under Regulation 139/2004, 35	295–8
standard-based analysis and, 38-40	controversy regarding, 288–90
territorial licensing, 127	departure from case law, 290-1,
Categorisation of practice, 34–5	293-4
Checklist approach. See Case-by-case	expansion of case law, 295
assessment	institutional consequences of,
"Chicago School,"43	289–90
Chief Competition Economist, 246	prevalence of, 288
Collective dominance	refusal to deal, 291-3
administrative practice, 245	reviewability of, 290-1, 330
Airtours, 242–5, 322	substantive law and, 288–9
assessment of, 239	table, 325–7
case-by-case assessment, 240–1, 243	in General Court, 98–102
ECJ and, 238–9, 241, 245	horizontal agreements and, 143-4
economic analysis and, 242–6	prosecutorial bias and, 53-4
effective competition, impeding, 238	Regulation 1/2003 and, 101-2,
European Commission and, 237–42	287–8, 289–90
Airtours, 242–3, 322	restriction of competition,
discretion of, 241–2	101-2
interpretation of Regulation 4064/	tying and, 295–8
89, 239–41	Competition and Markets Authority
scope of powers, 239	(UK), 335
General Court and, 238–9, 241–2,	Competition Appeal Tribunal
244–5	(UK), 335
institutional developments, 245–6	Comprehensive approach of study,
market position and, 238–9	19-21
probability of anticompetitive	Concerted practice, future research
effects, 243	agenda, 331–3



344 INDEX

Consistency of competition law Darmon, Marco, 129 overview, 11-12, 25 Deference abuse and, 312-13 overview, 7-8, 10-11 dynamic dimension of, 27-8 in CIEU, 55, 61 in ECI defined, 62 abuse and, 312-13 due process and, 7-8 case-by-case assessment, 315-16 in ECI exclusive dealing and, 314 overview, 61 frictions in case law, 311-14 legal tests and, 306 indirect or implicit approach, 317 variation in behaviour of EC individual outcomes versus, 317 Courts, 304, 307-8, 310, 311 mergers and, 313-14 erroneous decision-making resulting rules versus standards, 312 from, 58-60 in specialised cases, 318 in European Commission, 61 stability and, 316 in General Court static inconsistency, 312-13 overview, 57, 61 legal tests and, 306 tving and, 313 in European Commission, 277-9 variation in behaviour of EC in General Court Courts, 304, 307-8, 310, 311 abuse and, 312-13 institutional framework of case-by-case assessment, 315-16 competition law and, 54-7 exclusive dealing and, 314 interplay with substantive law, frictions in case law, 311-14 58-61 indirect or implicit approach, as substantive matter, 60-1 Delgado, Juan, 338 individual outcomes versus, 317 Dethmers, Frances, 254 Díaz, González, 242 mergers and, 313-14 Digital Single Market, 51, 298 rules versus standards, 312 Directorate General for in specialised cases, 318 stability and, 316 Competition, 51 static inconsistency, 312-13 Distribution agreements tying and, 313 ancillary restraints, 117-22 incoherence, 25 ECJ and, 117-18, 119-22 European Commission and, intertemporal dimension of, 27–8 mergers and, 313-14 117-19 opportunistic behaviour and, 28 franchising agreements and, pre-commitment devices and, 28 120 Regulation 1/2003 and, 12 freedom of action and, 118, static dimension of, 25-7 121 - 2substantive inconsistencies, 329-30 goodwill and, 118 prima facie cases, 117-18, 120 tying and, 313 in US, 337 exclusive dealing, 112-17 Constructive refusal to deal, 207-10 ECJ and, 114-15, 308-9 Cour d'appel de Paris (France), 335 European Commission and, Court-agency relationship, 339-40 112-14, 115-17 freedom of action and, 112-13, Court of Justice of the European Union (CJEU), 44, 55 114, 115-17 Curial deference. See Deference General Court and, 117



INDEX 345

market access and, 114-15, 117 prima facie cases, 114 exclusive distribution, 109-12 ECI and, 109-12 European Commission and, 109 - 12exemptions, 111-12 intra-brand competition, 109-10 parallel trade, 110-12 restriction by effect, 110 restriction by object, 109-10 "severity of clauses, "110 Dodoo, Ninette, 254 Dominant position overview, 15-16 mergers and, 234-5 predatory pricing and, 178-80, 181-2, 183-4, 185 refusal to deal and, 198-203 Regulation 4064/89 and, 234-5 Due process overview, 6-8 deference and, 7-8 fundamental rights analysis, 7 prosecutorial bias and, 7-8, 49-54 substantive law, effect on, 7 EC. See European Commission (EC) ECHR. See European Convention on Human Rights (ECHR) ECJ. See European Court of Justice (ECJ) Economic Advisory Group on Competition Policy, 246 Economic analysis in competition law overview, 13 case-by-case assessment and, 44 collective dominance and, 242-6 in ECJ, 321-4 in European Commission, 72-3, 195-6, 236, 279-80, 321-4 evolution of law and, 328-9 exclusive dealing and, 195-6 as exogenous constraint, 72-3, 77-8, 330

mergers and, 236 non-horizontal mergers and, 255-6 rules versus standards, 41-4 scepticism toward, 329 ECtHR. See European Court of Human Rights (ECtHR) Efficiency offenses, non-horizontal mergers and, 249-51 Electricity markets, commitment decisions and, 299 Endogenous constraints overview, 18-19 administrative action and, 71-2 in European Commission, 61-2, 72, 279 exogenous constraints versus, 330 prima facie cases and, 18-19 Energy markets, commitment decisions and, 299 EU Courts. See European Court of Justice (ECJ); General Court (GC) European Broadcasting Union (EBU), 137 - 8European Commission (EC) overview, 4, 9-10 abuse and annulment proceedings, 161-2, 166 - 7case selection, 177-8 economic principles and, 176 exclusionary versus exploitative conduct, 174 expansive authority of, 173, 175 joint analysis, 171-3 preliminary references, 168 prohibition decisions, 162–6 rules versus standards, 174 unstructured tests, 173-4 behaviour generally, 273, 280 Block Exemption Regulation, 127-8, 139, 263, 276-7 collective dominance and, 237-42 Airtours, 242-3, 322 discretion of, 241-2 interpretation of Regulation 4064/ 89, 239-41 scope of powers, 239

in General Court, 321-4

judicial review and, 321-4

intervention and, 42-3



346 INDEX

European Commission (cont.) efficiency, 48-9 commitment decisions in (See institutional design, 45-7 investigative and adjudicatory Commitment decisions) consistency of competition law in, roles, combination of, 45-7 277 - 9public enforcement. court-agency relationship, 339-40 predominance of, 45 deference in, 61 regulatory powers, 47-8 intervention, rationale for, 66-7 distribution agreements and ancillary restraints, 117-19 joint analysis involving, 105-6 exclusive dealing, 112-14, 115-17 law-intensive cases in, 65-6 exclusive distribution, 109-12 legal evolution of, 61-3 ECI, interaction with, 300-1 licensing agreements and economic analysis in, 72-3, 195-6, overview, 122-3 236, 279-80, 321-4 absolute territorial protection, effects, analysis of, 284-7 130 - 1endogenous constraints in, 61-2, export prohibitions, 130 72, 279 no-challenge clauses, 128-9 territorial licensing, 124, 127-8 enforcement instruments, 68-71 enforcement powers, 330-1 mapping behaviour of, 64-6 exclusive dealing and, 279 margin squeeze practices and, 274 in distribution agreements, mergers and 112-14, 115-17 overview, 69 economic analysis, 195-6 annulment proceedings, 229-32 Hoffmann-La Roche, 188-90 decisions, 69 rebates, 191, 196-7 dominant position, 234-5 economic analysis, 236 exemption decisions, 98-102 expansion of scope of, 233-4 exogenous constraints in, 61-2, institutional context, 227-9 72 - 3,279expansion of scope, 24 legal qualification of facts, 235-6 fact-intensive cases in, 64-5 legal tests, 235-6 Green Paper on the Review of measure of anticompetitive effects, Regulation 4064/89, 222 - 3257-9, 261 probability of anticompetitive Guidance Paper, contradiction of, effects, 223-4 295-8, 301-2 rules versus standards, 219 horizontal agreements and threshold of appreciability, 219-20 overview, 132-4, 136 national competition authorities post-modernisation practice, (NCAs), interaction with, 140 - 4300, 302 - 3pre-modernisation practice, 136-8 negative clearance decisions, 98-102 transition period, 139-40 negotiated outcomes, 70-1, 288 Horizontal Merger Guidelines, 223, 1962 Notice, 122-3 238, 259 non-collusive oligopolies and individual enforcement case-by-case assessment, 261 instruments, 70 Regulation 139/2004, practice institutional framework of under, 260-5 Non-Horizontal Merger Guidelines, competition law, centrality in, 44-9 245, 247



non-horizontal mergers and	modern approach to enforcement
efficiency offenses, 249-51	108-9
GE/Honeywell, 252–3	traditional approach to
market structure, 255	enforcement, 107-8
standard of proof, 254	risk-averse strategies, 72
Tetra Laval/Sidel, 251–2, 253–4	risk-prone strategies, 72
non-individual enforcement	rules in, 67-8, 273-4, 277-9
instruments, 70	"soft trigger" versus "hard
one-shot interactions	trigger, "67–8
case-by-case assessment, 275	standards in, 67-8, 273-4, 277-9
counterfactuals, 274–5	European Convention on Human
formal analysis, 275–6	Rights (ECHR)
qualified rules, 274	compatibility of competition law
in repeated interactions	with, 12–13
versus, 62–3	deference under, 54–5
rules versus standards, 273–4	due process and, 6–7
unstructured legal tests, 275	prosecutorial bias and, 52–4
ordoliberalism and, 279–80	European Council, mergers and, 232–4
predatory pricing and	European Court of Human Rights
AKZO, 178–80	(ECtHR)
dominant position, 178–80 expansion of <i>AKZO</i> rule, 181–5	case law as exogenous
	constraint, 78–9
Post Danmark I, 186–7	deference in, 54–5
preliminary references in, 168, 280,	due process and, 6–7
283-4, 285-6, 300-1	prosecutorial bias and, 52–4
private enforcement, encouragement	European Court of Justice (ECJ)
of, 45	overview, 20
prohibition decisions, 70–1, 97, 98	abuse and
prosecutorial bias in, 61	annulment proceedings, 166–7
refusal to deal and	case selection, 177–8
Commercial Solvents, 200	consistency of competition law in
discretion of, 205–6	312-13
dominant position, 198–201	enforcement principles, 175–6
Magill, 200–1	horizontal issues, 157–8
margin squeeze practices, 207–10	joint analysis, 171–3
post-Magill law, 203–5	preliminary references, 168-70
Regulation 1/2003 and	prohibition decisions, 162-6
overview, 280	resilience of case law and, 308, 309
centrality of, 46-7	variation in behaviour in EU
national competition authorities	Courts, 305, 310, 311
(NCAs) and, 302-3	behaviour generally, 303-4
repeated interactions in	case-by-case assessment in, 314-16
one-shot interactions versus, 62–3	collective dominance and, 238-9,
scope of Commission powers and,	241, 245
276–7	commitment decisions, 101-2
restriction of competition and	consistency of competition law in
case selection, 109	abuse and, 312-13
effect versus object, 281-4	case-by-case assessment, 315-16



348 INDEX

institutional framework and, European Court of Justice (cont.) exclusive dealing and, 314 318-19 issues of law, 318 frictions in case law, 311-14 lack of discretion, 74-5 indirect or implicit approach, 317 individual outcomes versus, 317 legal tests in, 320 mergers and, 313-14 procedural context, 75-6 rules versus standards, 312 legal evolution of, 61-3 in specialised cases, 318 licensing agreements and stability and, 316 overview, 123 static inconsistency, 312-13 absolute territorial protection, tying and, 313 130 - 1court-agency relationship, 339-40 export prohibitions, 130 deference in no-challenge clauses, 128-30, 309 overview, 61 territorial licensing, 124-7 legal tests and, 306 mapping behaviour of, 73-4 variation in behaviour of EC mergers and Courts, 304, 307-8, 310, 311 annulment proceedings, 231 consistency of competition law in, distribution agreements and ancillary restraints, 117-18, 313 - 14119 - 22dominant position, 234-5 exclusive dealing, 114-15 exogenous constraints, 236 exclusive distribution, 109-12 institutional context, 227-9 economic analysis in, 321-4 legal qualification of facts, 235-6 European Commission, interaction legal tests, 235-6 probability of anticompetitive with, 300-1 exclusive dealing and effects, 223-5 consistency of competition law temporal dimension, 226–7 in, 314 negative clearance decisions, 98-102 in distribution agreements, non-horizontal mergers and, 251-2 114 - 15one-shot interactions in, 62–3, 306–7 Hoffmann-La Roche, 188-90 predatory pricing and rebates, 191-5, 197-8 AKZO, 181 exemption decisions, 98-102 expansion of AKZO rule, 183-4 exogenous constraints in formal analysis in, 306-7 Post Danmark I, 187-8 economic analysis as, 77-8 ECtHR case law as, 78-9 rules, 159 formal analysis in, 306-7 preliminary references, 102-5, "gravity effect" and, 308-9 168-70, 308-9 horizontal agreements and prohibition decisions, 94-8 overview, 134-6 prosecutorial bias in, 61 post-modernisation period, 142-3 reasonableness versus correctness joint analysis involving, 105-6 in, 62 refusal to deal and judicial review in Bronner, 202-3 clarity in, 320-1 dynamic perspective on evolution dominant position, 201-2 of case law, 76-7 formal analysis in, 307 economic analysis and, 321-4 Magill, 201-2 fundamental principles in, 319-20 margin squeeze practices, 207-10



repeated interactions in, 62-3	rebates, 191-5, 197-8
resilience of case law in, 304–5,	European Commission and
307-9, 310-11	in distribution agreements,
restriction of competition and	112–14, 115–17
case selection, 109	economic analysis, 195-6
object versus effect, 35	Hoffmann-La Roche, 188–90
resilience of case law and, 308	rebates, 191, 196-7
traditional approach to	General Court and, 117, 197-8, 314
enforcement, 107-8	Hoffmann-La Roche, 188–90
variation in behaviour in EU	Intel, 195–8
Courts, 304–5, 310–11	Post Danmark II, 195-8
rules in, 312	prima facie cases, 188-90, 191,
standards in, 314	193–4
variation in behaviour in EU Courts	prohibition rule, expansion of,
abuse and, 310, 311	191–5
deference and, 304, 307-8,	rebates and, 188-90, 191-8
310, 311	"soft trigger" in, 191
formal analysis, 306-7	standards and, 197–8
frequency of litigation, 311	Exclusive distribution, 109–12
mergers and, 304	ECJ and, 109-12
one-shot interactions, 306–7	European Commission and, 109-12
path dependence, 307-9	exemptions, 111-12
repeated interactions, 307-9	intra-brand competition and,
resilience of case law and, 307-9,	109–10
310–11	parallel trade and, 110–12
restriction of competition and,	restriction by effect, 110
304-5, 310-11	restriction by object, 109-10
Exclusionary conduct	"severity of clauses, "110
abuse and, 152-3, 154-6, 174	Exclusivity obligations, 57
prima facie cases, 154-6	Exemption decisions, restriction of
restriction of competition and, 89	competition, 98–102, 147
Exclusive dealing	Exogenous constraints
case-by-case assessment, 314-15	overview, 18-19
in distribution agreements, 112–17	in CJEU, 77–9
ECJ and, 114–15, 308–9	in ECJ
European Commission and,	economic analysis as, 77–8
112–14, 115–17	ECtHR case law as, 78–9
freedom of action and, 112-13,	economic analysis as, 72-3,
114, 115–17	77–8, 330
General Court and, 117	ECtHR case law as, 78–9
market access and, 114-15, 117	endogenous constraints versus, 330
prima facie cases, 114	in European Commission, 61–2,
ECJ and	72–3, 279
consistency of competition law	in General Court
in, 314	economic analysis as, 77–8
in distribution agreements,	ECtHR case law as, 78–9
114–15	mergers and, 236
Hoffmann-La Roche, 188–90	Explicit collusion, 32–3



350

Cambridge University Press 978-1-108-42942-9 — The Shaping of EU Competition Law Pablo Ibáñez Colomo Index More Information

> Exploitative conduct Gari, Gabriel, 230 abuse and, 152, 156-7, 174 Gas markets, commitment decisions prima facie cases, 156-7 and, 299 General Court (GC) Export prohibitions, 130 overview, 20 Fact-intensive cases abuse and overview, 17 annulment proceedings, 166-7 cartels, 64, 89-90 case selection, 177-8 consistency of competition law in, in European Commission, 64 horizontal agreements, 141-2 312 - 13"Fighting ships, "182-3, 184-5, enforcement principles, 175-6 prohibition decisions, 162-6 186 variation in behaviour in EU Focus of study, 14-17 Foreclosure, non-horizontal mergers Courts, 305, 310, 311 and, 247-51, 252, 255-6 behaviour generally, 303-4 Formal analysis, 306-7 case-by-case assessment in, 314-16 Formalism, 279-80, 328-9 collective dominance and, 238-9, 241-2, 244-5 France, Cour d'appel de Paris, commitment decisions, 101-2 Franchising agreements, ancillary consistency of competition law in restraints and, 120 abuse and, 312-13 Freedom of action case-by-case assessment, 315-16 distribution agreements and exclusive dealing and, 314 ancillary restraints, 118 frictions in case law, 311-14 exclusive dealing, 112-13, 114, indirect or implicit approach, 317 individual outcomes versus, 317 115 - 17horizontal agreements and, 133, mergers and, 313-14 135 - 6rules versus standards, 312 licensing agreements and, 122-3 in specialised cases, 318 territorial licensing and, 124, stability and, 316 125 static inconsistency, 312–13 Future research agenda tying and, 313 overview, 331 court-agency relationship, 339-40 agreements, 331-2 deference in overview, 57, 61 cartels, 333-4 concerted practice, 331-3 legal tests and, 306 generalist courts, 335 variation in behaviour of EC Courts, 304, 307-8, 310, 311 institutional framework of competition law, 334-5 distribution agreements and, 117 national competition authorities economic analysis in, 321-4 (NCAs), 334-5 exclusive dealing and, 117, 197-8, 314 specialised courts, 335 substantive competition law, exemption decisions, 98-102 331 - 4exogenous constraints in tacit collusion, 332-3 economic analysis as, 77-8 ECtHR case law as, 78-9 transnational competition law, formal analysis in, 306-7 338 - 9

INDEX

US antitrust law, 336-8

horizontal agreements and



post-modernisation period, 142-3	prosecutorial bias in, 61
pre-modernisation practice, 136–8	reasonableness versus correctness
transition period, 139-40	in, 62
judicial review in	refusal to deal and, 205-7
clarity in, 320-1	repeated interactions in, 62-3, 307-9
dynamic perspective on evolution	resilience of case law in, 304-5,
of case law, 76–7	307-9, 310-11
economic analysis and, 321-4	restriction of competition and
fundamental principles in, 319-20	case selection, 109
institutional framework and,	traditional approach to
318–19	enforcement, 107–8
issues of law, 318	variation in behaviour in EU
lack of discretion, 74–5	Courts, 304–5, 310–11
legal tests in, 320	rules in, 312
procedural context, 75–6	standards in, 314
legal evolution of, 61–3	variation in behaviour in EU Courts
mapping behaviour of, 73–4	abuse and, 305, 310, 311
mergers and	deference and, 304, 306, 307–8,
annulment proceedings, 231–2	310, 311
consistency of competition law in,	formal analysis, 306–7
313–14	frequency of litigation, 311
dominant position, 234–5	mergers and, 304
exogenous constraints, 236	one-shot interactions, 306–7
formal analysis in, 307	path dependence, 307–9
institutional context, 227–9	repeated interactions, 307–9
legal qualification of facts, 235–6	resilience of case law and, 304–5,
legal tests, 235–6	307-9, 310-11
measure of anticompetitive effects,	restriction of competition and,
222–3	
	304-5, 310-11
probability of anticompetitive	Generalist courts, 335
effects, 223–5	Gerard, Damien, 141
temporal dimension, 226–7	Germany, territorial licensing in, 125–6
variation in behaviour in EU	
Courts, 304	Ginsburg, Douglas H., 335
negative clearance decisions, 98–102	Goodwill, ancillary restraints and, 118
non-horizontal mergers and	"Gravity effect, "308–9
GE/Honeywell, 252–3	Green Paper on the Review of Regulation
market structure, 255	4064/89, 257–9, 261
standard of proof, 254	TT : 1
Tetra Laval/Sidel, 251-2, 253-4	Horizontal agreements
one-shot interactions in, 62–3, 306–7	Block Exemption Regulation
path dependence in, 307–9	and, 139
predatory pricing and	cartels and, 141–2
overview, 186	case-by-case assessment, 141-2
expansion of AKZO rule,	commitment decisions and, 143-4
183–4, 185	ECJ and
preliminary references, 102–5	overview, 134–6
prohibition decisions, 94-8	post-modernisation period, 142–3



352 INDEX

Horizontal agreements (cont.) interplay with substantive law, European Commission and 58-61 overview, 132-4, 136 due process and, 6-8 deference and, 7-8 post-modernisation practice, fundamental rights analysis, 7 prosecutorial bias and, 7-8, pre-modernisation practice, 136-8 transition period, 139-40 49 - 54fact-intensive cases, 141-2 substantive law, effect on, 7 freedom of action and, 133, 135-6 effect on substantive law, 5-6 General Court and due process and, 7 lack of research on, 5-6 post-modernisation period, 142-3 pre-modernisation practice, 136-8 methodology of study, 6 transition period, 139-40 US compared, 5 intellectual property and, 134-5 EU enforcement model and, 4-5 joint purchasing agreements and, European Commission, centrality 135 - 6of, 44-9 negative clearance decisions and, efficiency, 48-9 institutional design, 45-7 non-compete obligations and, 134 investigative and adjudicatory post-modernisation practice, 140-4 roles, combination of, 45-7 pre-modernisation practice, 136-8 public enforcement, Regulation 1/2003 and, 140-1, 143-4 predominance of, 45 regulatory powers, 47-8 research and development and, evolution of, 8-9 132 - 3, 139restriction of competition and evolution of law and, 328-9 by effect, 140-1 future research agenda, 334-5 interplay with substantive law by object, 141-2 deference and, 58-60 specialisation agreements and, prosecutorial bias and, 58-60 132 - 3, 139welfare analysis, 59-60 trade marks and, 134-5 transition period, 139–40 iudicial review and, 319 Horizontal Merger Guidelines, 223, non-collusive oligopolies and, 264 238, 259 prosecutorial bias and, 49-54 Hovenkamp, Herbert, 297 overview, 10 in CIEU, 61 Iacobucci, Edward, 338 commitment decisions and, Ideology of competition law, 53 - 413 - 14concept of, 51 Implications of study, 21-2 due process and, 7-8, 49-54 Institutional framework of ECHR and, 52-4 competition law ECtHR and, 52-4 overview, 3 erroneous decision-making context of, 8 resulting from, 51-2, 58-60 deference and, 54-7 in European Commission, 61 overview, 7-8, 10-11 in General Court, 61 interplay with substantive law, erroneous decision-making resulting from, 58-60 58-60



INDEX 353

investigative and adjudicatory	lack of discretion, 74-5
roles, combination of, 49-51	legal tests in, 320
manifestations of, 51	procedural context, 75-6
sources of, 51	Regulation 1/2003 and, 319
as substantive matter, 60-1	
restriction of competition (See	Kokkoris, Ioannis, 257
Restriction of competition)	Korah, Valentine, 117, 126
US antitrust law and, 3–4	,
Intellectual property	Law-intensive cases
abuse and, 160	overview, 16–17
horizontal agreements and, 134–5	in European Commission, 65–6
licensing agreements (See Licensing	restriction of competition, 94–7
agreements)	Leveraging
preliminary references and, 105	bundling, 211
trade marks, horizontal agreements	legal tests for, 211–12
and, 134-5	mixed bundling, 211
Inter-brand competition	prima facie cases, 211
intervention and, 33	refusal to deal (See Refusal to deal)
restriction of competition and, 87	tying, 211, 212
Intervention	Licensing agreements
collusion and, 32–3	overview, 122–3
economic analysis and, 42–3	absolute territorial protection, 124,
inter-brand versus intra-brand	130–1
competition, 33	Coditel II, 130–1
rationale for, 32–3, 66–7	ECJ and
rules versus standards in, 67–8	overview, 123
Intra-brand competition	absolute territorial protection,
exclusive distribution and, 109–10	130–1
intervention and, 33	export prohibitions, 130
restriction of competition and,	no-challenge clauses, 128–30, 309
88–9	territorial licensing, 124–7
00-7	Erauw-Jacquery, 130
Ioint analysis	European Commission and
Joint analysis abuse, 171–3	overview, 122–3
restriction of competition, 105–6	absolute territorial protection,
Joint purchasing agreements, 135–6	130–1
Joliet, René, 109	export prohibitions, 130
Judicial review	
	no-challenge clauses, 128–9
clarity in, 320–1	territorial licensing, 124, 127–8
of commitment decisions,	export prohibitions, 130
290–1, 330	freedom of action and, 122–3
dynamic perspective on evolution of	no-challenge clauses, 128–30
case law, 76–7	ECJ and, 128–30, 309
economic analysis and, 321–4	European Commission and,
fundamental principles in, 319–20	128-9
institutional framework of	territorial licensing, 124–8

issues of law, 318

competition law and, 318-19

absolute territorial protection,

124, 130-1



Licensing agreements (cont.) Block Exemption Regulation and,	legal tests, 235-6 probability of anticompetitive
127-8	effects, 223-5
broad interpretation of, 126	temporal dimension, 226-7
case-by-case assessment, 127	economic analysis and, 236
ECJ and, 124–7	effective competition, impeding,
European Commission and, 124,	233
127-8	effects, 221
freedom of action and, 124, 125	European Commission and
in Germany, 125-6	overview, 69
"hard trigger" in, 126	annulment proceedings, 229-32
narrow interpretation of, 126-7	decisions, 69
open versus closed licences, 125	dominant position, 234-5
prima facie cases, 126-7	economic analysis, 236
"soft trigger" in, 127	expansion of powers, 233-4
Loyalty rebates, 191, 192-3, 197-8, 275	institutional context, 227-9
	legal qualification of facts, 235-6
Margin squeeze practices	legal tests, 235-6
as abuse, 160, 172-3, 174, 300,	measure of anticompetitive effects
301–2, 305	222–3
anticompetitive effects, 35, 285	probability of anticompetitive
as constructive refusal to deal,	effects, 223–4
207-10	rules versus standards, 219
defined, 207	threshold of appreciability,
European Commission and, 274	219–20
Market access, distribution agreements	European Council and, 232-4
and, 114–15, 117	exogenous constraints and, 236
Merger Regulation. See Regulation 139/	General Court and
2004	annulment proceedings, 231-2
Mergers	consistency of competition law in
annulment proceedings	313–14
overview, 229–32	dominant position, 234-5
abuse compared, 161-2	exogenous constraints, 236
case selection, 236–7	formal analysis in, 307
challenged decisions, 266-9	institutional context, 227–9
collective dominance (See Collective	legal qualification of facts,
dominance)	235-6
consistency of competition law and,	legal tests, 235–6
313–14	measure of anticompetitive effects
dominant position and, 234–5	222–3
ECJ and	probability of anticompetitive
annulment proceedings, 231	effects, 223–5
consistency of competition law in,	temporal dimension, 226-7
313-14	variation in behaviour in EU
dominant position, 234–5	Courts, 304
exogenous constraints, 236	Horizontal Merger Guidelines, 223,
institutional context, 227–9	238, 259
legal qualification of facts, 235–6	institutional context, 227–9



legal qualification of facts, 235-6

INDEX 355
6 efficiency defence and, 260–5

legal tests, 235-6 measure of anticompetitive effects, 221 - 3non-collusive oligopolies (See Noncollusive oligopolies) non-horizontal mergers (See Nonhorizontal mergers) prima facie cases, 219 probability of anticompetitive effects, 223 - 5rules versus standards, 219 scope of analysis, 79 secondary legislation and, 232-3 substantive choices effects, 221 rules versus standards, 219 threshold of appreciability, 219 - 20temporal dimension, 226-7 threshold of appreciability, 219-20 Methodology of study research questions, 79-80 scope of analysis, 79 structure of study, 80-1 Mixed bundling, 211 Monti, Mario, 41-2, 246, 248 "More economic approach,"41-2 "More economics-based approach,"41-2 Morfey, Anna, 254 Motta, Massimo, 195 National competition authorities (NCAs), 46-7, 169-70, 300, 302-3, 334-5 Negative clearance decisions horizontal agreements and, 133-4 restriction of competition, 98-102, 147 Negotiated outcomes, 70-1, 288 No-challenge clauses, 128-30 ECJ and, 128-30, 309

European Commission and case-by-case assessment, 261 Regulation 139/2004, practice under, 260-5 Green Paper on the Review of Regulation 4064/89, 257-9, 261 institutional framework and, 264 "oligopoly gap" overview, 256-7 closing of, 257-9 prima facie cases, 263-4 pro-competitive versus anticompetitive effects, 262, 263-4 proxies and, 265 Regulation 1/2003 and, 262-3 Regulation 139/2004 and closing of "oligopoly gap," 257-9 European Commission practice under, 260-5 Regulation 4064/89 and, 256-7 restriction of competition and, 262-3 safe harbours, lack of, 261-4 "significant impediment to effective competition" test, 259, 260 "substantial lessening of competition" test, 257 Non-compete obligations, 118, 120, 134 Non-horizontal mergers bundling and, 253 ECI and, 251-2 economic analysis and, 255-6 efficiency offenses and, 249-51 European Commission and efficiency offenses, 249-51 GE/Honeywell, 252-3 market structure, 255 standard of proof, 254 Tetra Laval/Sidel, 251-2, 253-4 foreclosure and, 247-51, 252, 255-6 General Court and GE/Honeywell, 252-3 market structure, 255 standard of proof, 254 Tetra Laval/Sidel, 251-2, 253-4 market structure and, 247, 251-2, 253-4, 255

European Commission and, 128-9

Block Exemption Regulation and, 263

"No economic sense" test, 155

econometric tools and, 264

Non-collusive oligopolies



356 INDEX

Non-horizontal mergers (cont.) Non-Horizontal Merger Guidelines, 245, 247 prima facie cases, 253 pro-competitive versus anticompetitive effects, 247-9, 251-2, 255-6 Regulation 139/2004 and, 255 Regulation 4064/89 and, 249-52, 254 - 5scope of control, 246-9 standard of proof and, 254 Objective justification, 40-1 Oligopolies. See Non-collusive oligopolies Operational benchmarks, 17-19 Opportunistic behaviour, 28 Ordoliberalism, 279-80 Otero, Héctor, 338 Padilla, Jorge, 242–3 Parallel trade, exclusive distribution and, 110-12 Patents, licensing agreements. See Licensing agreements Path dependence, 307-9 Pay-for-delay agreements, 282-3 Pérez-Asenjo, Eduardo, 338 Plausibility, 36 Pre-commitment devices, 28, 48 Predatory pricing AKZO, 178-81 Areeda-Turner test, 179 in ECJ, 181 in European Commission, 178 - 80"hard trigger" in, 181 "soft trigger" in, 180 unstructured tests in, 180 Areeda-Turner test, 179, 187 case-by-case assessment, 315-16 dominant position and, 178-80, 181-2, 183-4, 185 ECJ and AKZO, 181 expansion of AKZO rule, 183-4

Post Danmark I, 187-8 rules, 159 European Commission and AKZO, 178-80 dominant position, 178-80 expansion of AKZO rule, 181-5 Post Danmark I, 186-7 expansion of AKZO rule, 181-5 "fighting ships, "182-3, 184-5, 186 General Court and overview, 186 expansion of AKZO rule, 183-4, 185 Post Danmark I, 185-8 prima facie cases, 179-80 rebates and, 185 recalibration of principles, 185-8 rules and, 159-60 standards and, 160 Preliminary references abuse, 168-71 in ECJ, 102-5, 168-70, 308-9 in European Commission, 168, 280, 283-4, 285-6, 300-1 in General Court, 102-5 intellectual property and, 105 restriction of competition, 101-2 Presumptions, 36-7 Price fixing, 90-1 Prima facie cases overview, 17-18 abuse, 153-4, 158-60 ancillary restraints, 117-18, 120 dynamic dimension of, 27–8 endogenous constraints and, 18 - 19exclusionary conduct, 154-6 exclusive dealing, 114, 188-90, 191, 193 - 4exclusivity obligations, 57 exploitative conduct, 156-7 intertemporal dimension of, 27-8 leveraging, 211 mergers, 219 non-collusive oligopolies, 263-4 non-horizontal mergers, 253 predatory pricing, 179-80 refusal to deal, 200, 203

formal analysis in, 306-7



restriction of competition, 85-7	commitment decisions, 291-3
rules and, 30, 35, 67	constructive refusal to deal, 207-10
standards and, 35	dominant position and, 198-203
territorial licensing, 126-7	ECJ and
Prohibition decisions	Bronner, 202-3
abuse, 162-6, 212-15	dominant position, 201-2
cartels and, 94	formal analysis in, 307
in ECJ, 94–8	Magill, 201–2
in European Commission, 70-1,	margin squeeze practices, 207–10
97, 98	European Commission and
in General Court, 94-8	Commercial Solvents, 200
restriction of competition, 94-8,	discretion of, 205-6
144-6	dominant position, 198-201
Prosecutorial bias	Magill, 200–1
overview, 10	margin squeeze practices, 207–10
in CJEU, 61	post-Magill law, 203-5
commitment decisions and, 53-4	evolution of law, 198-203
concept of, 51	General Court and, 205-7
due process and, 7-8, 49-54	indispensability and, 206
ECHR and, 52-4	margin squeeze practices, 207-10
in ECJ, 61	new products and, 205-7
erroneous decision-making resulting	post- <i>Magill</i> law, 203–7
from, 51–2, 58–60	prima facie cases, 200, 203
in European Commission, 61	Regulation 1/2003
in General Court, 61	abuse and, 161-2
interplay between substantive law	commitment decisions and, 101-2,
and institutional framework,	287-8, 289-90
58-61	consistency of competition law
investigative and adjudicatory roles,	and, 12
combination of, 49-51	European Commission and
manifestations of, 51	overview, 280
sources of, 51	centrality of, 46–7
as substantive matter, 60-1	national competition authorities
Purpose of study, 9–11	(NCAs) and, 302-3
	horizontal agreements and, 140-1,
Qualified rules, 30, 274	143-4
Quantity rebates, 191, 193-4, 196-7	judicial review and, 319
•	negotiated outcomes and, 71, 288
Rebates	non-collusive oligopolies and, 262-3
exclusive dealing and, 188-90, 191-8	restriction of competition and,
loyalty rebates, 191, 192-3,	281-2
197–8, 275	Regulation 139/2004
predatory pricing and, 185	overview, 15, 21
quantity rebates, 191, 193-4, 196-7	annulment proceedings, 231
rules and, 158–60	breadth of, 23–5
standards and, 160–1	case-by-case assessment under, 35
Refusal to deal	expansion of scope of, 234
administrative action, 203–7	institutional context, 227–8



358 INDEX

by effect Regulation 139/2004 (cont.) non-collusive oligopolies and overview, 18, 85 closing of "oligopoly gap," 257-9 distribution agreements and, 110 European Commission practice effects defined, 18, 39-40 under, 260-5 in European Commission, 281-4 non-horizontal mergers and, 255 horizontal agreements and, 140-1 threshold of appreciability, 219-20 market power and, 281 vagueness of, 23-5 object versus, 35, 281-4 Regulation 4064/89 rules versus standards, 35-8, 281 overview, 15, 21 scope of analysis, 79 annulment proceedings, 231 threshold of effects, 18 European Commission and collective dominance and, 237-42 applicability of, 241 case selection, 109 interpretation of, 239-41 effect versus object, 281-4 dominant position and, 234-5 modern approach to enforcement, Green Paper on the Review of 108 - 9Regulation 4064/89, traditional approach to 257-9, 261 enforcement, 107-8 institutional context, 227-8 exclusionary conduct and, 89 legal qualification of facts and, 235-6 exemption decisions, 98-102, 147 legal tests and, 235-6 formalism and, 329 General Court and non-collusive oligopolies and, 256-7 non-horizontal mergers and, case selection, 109 249-52, 254-5 traditional approach to Research and development, horizontal enforcement, 107-8 agreements and, 132-3, 139 variation in behaviour in EU Restriction of competition Courts, 304-5, 310-11 by agreements, 91-4 growth in litigation involving, 107-8 annulment proceedings horizontal agreements (See commitment decisions, 101-2 Horizontal agreements) exemption decisions, 98-102 inter-brand competition and, 87 negative clearance decisions, intra-brand competition and, 88-9 98 - 102joint analysis, 105-6 prohibition decisions, 94-8 law-intensive cases, 94–7 bifurcated structure of TFEU, 85 licensing agreements (See case selection, 109 Licensing agreements) collusion and, 89 modern approach to enforcement, commitment decisions, 101-2 108 - 9distribution agreements (See negative clearance decisions, Distribution agreements) 98-102, 147 ECI and non-collusive oligopolies and, 262-3 by object case selection, 109 object versus effect, 35 overview, 16, 85 resilience of case law and, 308 cartels, 89-90 traditional approach to distribution agreements and, enforcement, 107-8 109 - 10variation in behaviour in EU effect versus, 35, 281-4 Courts, 304-5, 310-11 in European Commission, 281-4



horizontal agreements and, 141–2	economic analysis and, 41–4
market power and, 281	in European Commission, 273–4
price fixing, 90–1	in General Court, 312
principles from case law, 89–91	mergers, 219
rules versus standards, 35–8, 281	restriction of competition, 35–8,
scope of analysis, 79	67–8, 85, 106–7, 281
pay-for-delay agreements, 282–3	in substantive competition law, 35–8
preliminary references, 101-2	under TFEU, 30
preliminary rulings, 148–51	unqualified rules, 30
prima facie cases, 85-7	in US, 336–7
prohibition decisions, 94-8, 144-6	
Regulation 1/2003 and, 281-2	Schlag, Pierre, 67
rules versus standards, 35–8, 67–8,	Single continuous infringement, 333
85, 106–7, 281	Siragusa, Mario, 127
substantive choices, 85–7	Specialisation agreements, 132–3, 139
traditional approach to	Specialised courts, 335
	Standards
enforcement, 106–8	
vertical restraints, 108–9	overview, 30
Ridyard, Derek, 256	abuse and
Rules	overview, 160–1
overview, 30	rules versus, 174
abuse and	case-by-case assessment and, 38-40
overview, 154	in ECJ, 312
predatory pricing, 159–60	economic analysis and, 41-4
rebates, 158–60	in European Commission, 67-8,
standards versus, 174	273-4, 277-9
accuracy versus administrability,	exclusive dealing and, 197–8
29–32	in General Court, 314
in ECJ, 312	mergers and, 219
economic analysis and, 41–4	predatory pricing and, 160
in European Commission, 67–8,	prima facie cases and, 35
273-4, 277-9	rebates and, 160–1
in General Court, 312	restriction of competition and
mergers and, 219	effect versus object, 35–8, 281
predatory pricing and, 159–60	rules versus, 35-8, 67-8, 85,
prima facie cases and, 30, 35, 67	106-7, 281
qualified rules, 30, 274	rules versus
rebates and, 158–60	overview, 17-18
restriction of competition and	abuse, 174
effect versus object, 35–8, 281	accuracy versus administrability,
standards versus, 35–8, 67–8, 85,	29–32
106–7, 281	in ECJ, 312
standards versus	economic analysis and, 41-4
overview, 17–18	in European Commission, 273–4
abuse, 174	in General Court, 312
accuracy versus administrability,	mergers, 219
29-32	restriction of competition, 35-8,
in ECJ, 312	67-8, 85, 106-7, 281
**	



360 INDEX

Standards (cont.) as substantive matter, 60-1 standard-based analysis, 38-40 restriction of competition (See Restriction of competition) structured standards, 31 in substantive competition law, 35-8 rules versus standards, 35-8 standard-based analysis, 38-40 under TFEU, 31 unstructured standards, 31 vagueness of, 23-5 in US, 336-7 Tacit collusion Stone, Judd, 336 collective dominance and, 237-8, Structured standards, 31 239, 241-3, 244-5 Substantive competition law (See Abuse) explicit collusion versus, 32-3 accuracy versus administrability future research agenda, 332-3 balance between, 29 Territorial licensing, 124-8 rules versus standards, 29-32 absolute territorial protection, 124, breadth of, 23-5 130 - 1case-by-case assessment and, 38-40 Block Exemption Regulation and, categorisation of practice, 34-5 127 - 8consistency of (See also Consistency broad interpretation of, 126 of competition law) case-by-case assessment, 127 overview, 11-12, 25 ECJ and, 124-7 dynamic dimension of, 27-8 European Commission and, 124, incoherence, 25 127 - 8intertemporal dimension of, 27-8 freedom of action and, 124, 125 opportunistic behaviour and, 28 in Germany, 125-6 pre-commitment devices and, 28 "hard trigger" in, 126 static dimension of, 25-7 narrow interpretation of, 126-7 deference and open versus closed licences, 125 interplay with institutional prima facie cases, 126-7 framework, 58-61 "soft trigger" in, 127 as substantive matter, 60-1 Theoretical framework, 21 effect of institutional framework, 5-6 Trade marks, horizontal agreements due process and, 7 and, 134-5 lack of research on, 5-6 Transnational competition law, 338-9 methodology of study, 6 Treaty of Rome, 180 US compared, 5 Treaty on the Functioning of the future research agenda, 331-4 European Union (TFEU) inconsistencies in, 329-30 abuse under (See Abuse) interplay with institutional administrative action and, 11 framework analytical framework and, 21 deference and, 58-61 breadth of, 23-5 prosecutorial bias and, 58-61 cartels under, 64 CIEU and, 44, 55 welfare analysis, 59-60 intervention, rationale for, 32-3 commitment decisions and, 53-4 mergers (See Mergers) distribution agreements under (See objective justification, 40-1 Distribution agreements) prosecutorial bias and ECJ and, 20 interplay with institutional enforcement instruments, 68–71 framework, 58-61 exclusivity obligations and, 57



INDEX 361

focus of study and, 14-17 licensing agreements under (See Licensing agreements) mergers under (See Mergers) practices under, 23 procedural context of judicial review under, 75-6 regulatory powers under, 47-8 restriction of competition under (See Restriction of competition) rules under, 30 standards under, 31 static inconsistency under, 25-7 vagueness of, 23-5 Trebilcock, Michael, 338 Tridimas, Takis, 230 Turner, Donald F., 155 Tying, 211, 212, 295-8, 313 Type I errors, 4

Undue deference. See Deference
United Kingdom
Competition and Markets
Authority, 335
Competition Appeal Tribunal,
335

United States administrability of rules and standards, 336-7 antitrust law in, 3-4, 336-8 Clayton Act, 257 consistency of competition law in, 337 divergence from European competition law, 337-8 Federal Trade Commission (FTC), institutional framework of competition law, effect on substantive law, 5 private enforcement in, 45, 336-7 Unqualified rules, 30 Unstructured standards, 31

Values of competition law, 13 Veltrop, James, 117 Verouden, Vincent, 87 Vertical restraints, 65–6, 87, 103–5, 108–9, 284 Vesterdorf, Bo, 206, 207

Wils, Wouter, 50, 51, 288 Wright, Joshua D., 335, 336