Contents

Part I  Introduction to Part I: Basic Concepts and Approaches

1  The "Correct" Definition of "the Impact of a Choice on Economic Efficiency"   ................................................................. 7
   1. The Correct Definition of Economic Efficiency .............................. 7
   2. Why My Definition Is Correct .................................................... 11

   1. The Price-Competition Conceptual Scheme .................................. 16
      A. The Price-Competition Conceptual Scheme for Individualized- Pricing Situations ......................................................... 18
      B. The Price-Competition Conceptual Scheme for Across-the-Board- Pricing Situations .................................................... 26
   2. The QV-Investment-Competition Conceptual Scheme ................. 40
      A. The Intermediate Determinants of the Intensity of QV- Investment Competition ...................................................... 43
      B. The Three Different Types of QV-Investment Equilibria and the Conditions for Their Generation ................................. 49

3  How "Monopolizing Conduct," "Attempts to Monopolize," and "Exclusionary or Foreclosing Conduct" Should Be Defined by Economists ................................................................. 69

   1. The Actor-Coverage of, Conduct-Coverage of, Tests of Illegality Promulgated by, and Defenses Recognized by U.S. Antitrust Law ....... 73
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4-6</td>
</tr>
</tbody>
</table>

A. The Sherman Antitrust Act ........................................... 74
B. The Clayton Antitrust Act ............................................. 86

   A. Article 101 of the 2009 Lisbon Treaty ............................ 99
   B. Article 102 of the 2009 Lisbon Treaty ............................ 128
   C. The E.C./E.U. Merger Control Regulation (EMCR) ............... 140

3. The Differences Between the Actor-Coverage of, Conduct-Coverage of, Tests of Illegality Promulgated by, and Defenses Recognized by U.S. and E.C./E.U. Competition Law ........................................... 143

5 Categories of Economic-Efficiency Gains That Are and Are Not Relevant to Conduct's Antitrust Legality ........................................... 155
1. Categories of Economic Inefficiency That Business Conduct and Antitrust Policies Can Affect ........................................... 155

6 The Inevitable Arbitrariness of Market Definitions and the Unjustifiability of Market-Oriented Antitrust Analyses ........................................... 165
1. The Inevitable Arbitrariness of Classical (Ideal-Type) Market Definitions ........................................... 167
2. The Inevitable Arbitrariness of Antitrust (Functional) Market Definitions ........................................... 171

7 Economic (Classical) and Antitrust Markets: Official and Scholarly Proposals ........................................... 183
1. The Definition of "Economic Markets" and "Antitrust Markets" ..... 184
   A. The Poor Draftsmanship of the 1992 Guidelines' Abstract Definition of an Antitrust Market ........................................... 193
   B. The Protocol's Assumption That No Market Outsider Will React to Any Hypothetical-Combinant-Group Price-Increases ........................................... 199
   C. Peculiarity of the 1992 Guidelines' Abstract-Market-Definition-Generated Market Definitions ........................................... 200
   D. The Inconsistency of the 1992 Guidelines' Concrete-Market-Definition Protocol and Abstract Definition of an Antitrust Market ........................................... 201
   E. The Cost-Ineffectiveness of the 1992 Guidelines' Abstract Definition of an Antitrust Market ........................................... 204
3. Various Economist-Proposals for Delineating Concrete Classical or Antitrust Markets ........................................... 210
4. The U.S. Courts’ Handling of the Task of Delimiting Relevant Antitrust Markets ........................................ 220
5. The EC’s and the E.C./E.U. Courts’ Approaches to Delimiting Relevant Antitrust Markets ........................................ 235

8 The Operational Definition of a Firm’s Monopoly, Oligopoly, and Total Economic (Market) Power in a Given ARDEPPS ........................................ 249
1. The Definition of a Firm’s Monopoly, Oligopoly, and Total Power Over Price, QV Investment, and Price and QV Investment Combined in a Given ARDEPPS .................................................................................. 250
   A. The Definition of a Firm’s Monopoly, Oligopoly, and Total Power Over Price in a Given ARDEPPS ........................................ 252
   B. The Definition of a Firm’s Monopoly, Oligopoly, and Total Power over QV Investment in a Given ARDEPPS ........................................ 259
   C. The Definition of a Firm’s Monopoly, Oligopoly, and Total Power Over Price and QV Investment Combined in a Given ARDEPPS ........................................ 263
   A. The U.S. Courts’ Abstract and Operational Definitions of a Firm’s Market Power ........................................................................ 265
   B. The EC’s and the E.C./E.U. Courts’ Abstract and Operational Definitions of a Firm’s Market Dominance ........................................ 267
3. The Connection Between a Firm’s Market Share and Its Various Types of Economic (Market) Power ........................................................................................................ 275
   A. The Inaccuracy of Any Market-Share-Oriented Approach to Estimating a Firm’s Power Over Price ........................................ 275
   B. The Inaccuracy of any Market-Share-Oriented Approach to Estimating a Firm’s Power Over QV Investment ........................................ 288
4. Conclusion ........................................................................................................ 299

9 The Need to Analyze Separately the Monopolizing Character, “Abusiveness,” Competitive Impact, and Economic Efficiency of Business Choices ........................................ 301
1. The Need to Analyze Separately the Monopolizing Character, Competitive Impact, and Economic Efficiency of a Business Choice ........................................ 301
2. The Need to Analyze Separately the Abusiveness of the Conduct of a Dominant Firm ........................................................................................................ 306

Conclusion to Part I ........................................................................................................ 309

Part II Introduction to Part II: Applications
A. The Roles, Remedial Powers, and Entitlements of U.S. Antitrust-Law-Enforcement Actors.......................... 311
2. A Chapter-by-Chapter (Section-by-Section) Summary of Chaps. 10, 11, 12, 13, 14, and 15 ....................... 321

10 Oligopolistic Conduct .................................................. 343
2. The Determinants of the Feasibility of Natural Oligopolistic Pricing and the Profitability of Contrived Oligopolistic Pricing .... 349
   A. The Determinants of the Feasibility of Natural Oligopolistic Pricing and of the Size of the NOM a Seller Can Secure ...... 349
   B. The Determinants of the Profitability of Contrived Oligopolistic Pricing and the Magnitude of the COM That Is Most Profitable for a Firm to Attempt to Contrive .......................... 352
   A. The Types of Evidence That Can Help Prove Contrived Oligopolistic Pricing ........................................ 367
   B. The Types of Evidence That Richard Posner and Other Scholars Argue Can Establish Illegal Oligopolistic Pricing .......... 387
   C. The U.S. Courts’, the EC’s, and the E.C./E.U. Courts’ Positions on Oligopolistic Pricing, Horizontal Oligopolistic Output-Restricting Conduct, and “Market”-Dividing Conduct ................. 414
4. Oligopolistic Decisionmaking on Non-Price Terms in Contracts of Sale or Product-Attributes Whose Alteration Should Not Be Said to Entail the Creation of a QV Investment .................. 460
   A. The Non-Price Contract Terms That Oligopolistic Interactions Can Affect and the Actual and Buyer-Perceived Product-Attributes That Can Be Affected by Oligopolistic Interactions That Do Not Alter Any QV-Investment-Creating Decision .................. 460
   B. Seven Functional Categories of Oligopolistic Conduct That Affect Terms and Conditions of Sale or Product-Attributes, Buyer-Perceived Product-Attributes, or Product Images Without Altering Any QV-Investment-Creation Decision .................. 461
   C. The Legality of Oligopolistic Conduct of the Types This Section Considers That Perform the Seven Functions Just Described Under U.S. Antitrust Law and E.C./E.U. Competition Law, Correctly Interpreted and Applied .................. 466
D. The U.S. and E.C./E.U. Case-Law on Oligopolistic Conduct That Is Directed at Non-Price Contract-of-Sale Terms, Product-Attributes That Can Be Changed Without Making a QV Investment, or Image-Creating or Educative Advertising ........................................ 470

5. QV-Investment-Focused Natural and Contrived Oligopolistic Conduct ........................................ 472
   A. The Economic Analysis of QV-Investment-Focused Natural and Contrived Oligopolistic Conduct ........................................ 472
   C. The U.S. and E.C./E.U. Case-Law on QV-Investment-Focused Oligopolistic Conduct ........................................ 481

6. PPR-Related Oligopolistic Conduct ........................................ 483
   A. The Similarity of and Differences Between Economic Analyses of PPR-Related and QV-Investment-Related Oligopolistic Conduct ........................................ 484
   C. The Legality of PPR-Focused Oligopolistic Conduct Under U.S. and E.C/E.U. Antitrust Law ........................................ 488

7. Contrived Oligopolistic Pricing by Economic Actors in Their Capacities as Buyers: Buyer “Price-Fixing” ........................................ 488
   A. The Determinants of the Profitability of Contrived Oligopolistic Pricing by Buyers ........................................ 489
   C. The U.S. Case-Law and DOJ/FTC Position on Buyer Price-Fixing and the EC Position and E.C./E.U. Case-Law on Buyer Price-Fixing ........................................ 495

11 Predatory Conduct ........................................ 501


2. Predatory Pricing ........................................ 503
   A. The Determinants of the Profitability of Predatory Pricing ........................................ 503
   B. The Argument That, at Least in Some Circumstances, Established Firms Will Find It Profitable to Practice Predation by Reducing Their Prices to Deter Entry ........................................ 517
   C. Arguments That Economists or Economically-Literate Legal Academics Have Made for the Unprofitability of Predatory Pricing: Statements and Critiques ........................................ 519
D. The Evidence That Can and Cannot Be Used to Prove Predatory Pricing ......................................................... 531
3. Predatory QV Investments .................................................. 582
   A. The Definition of a Predatory QV Investment ........................................... 582
   C. The Evidence That the State or a Private Plaintiff Should Be Required to Introduce to Establish a Prima Facie Predatory-QV-Investment Claim and the Evidence That a Defendant Should Be Allowed to Use to Exonerate Itself ........................................... 596
4. Predatory Cost-Reducing Investments ........................................... 605
   A. The Definition of a Predatory Cost-Reducing Investment ................. 605
   C. The Evidence That the State or a Private Plaintiff Should Be Required to Introduce to Establish a Prima Facie Predatory-Cost-Reducing-Investment Claim and the Evidence That a Defendant Should Be Allowed to Use to Exonerate Itself ........................................... 610
5. Predatory Buying .................................................. 611
   A. The Definition of Predatory Buying ........................................... 611
   C. The U.S. Case-Law, EC Pronouncements, and E.C./E.U. Case-Law ........................................... 613
6. Predatory Advertising .................................................. 614
   A. The Definition of Predatory Advertising and the Conditions Under Which Advertising Is Predatory ................. 614
   C. The U.S. Case-Law, EC Pronouncements, and E.C./E.U. Case-Law ........................................... 615
7. Predatory “Unfair Competition” and Predatory Unfair or Improper Participation in Government Decision-Processes ..................... 616
   A. Predatory “Unfair Competition” ........................................... 616
   B. Predatory Participation in Legislative, Administrative, and Adjudicative Decisionmaking ........................................... 621
8. Predatory Efforts to Raise Rivals' Costs (in Various Ways Not Yet Covered) ................................................................................................................. 633
   A. The Definition of Predatory Efforts to Raise Rivals' Costs and Some Additional Variants of This Type of Conduct ................................................................................. 633
   B. U.S. and E.C./E.U. Law, Correctly Interpreted and Applied .............................................................................................................................. 634
   C. The U.S. Case-Law, EC Position, and E.C./E.U. Case-Law on These Variants of Rival-Cost-Raising Conduct ................................................................................. 635
9. Predatory "Refusals to Deal," Broadly Understood ................................................................................................................................. 636
   A. Two Categories and Numerous Subcategories of Predatory and Non-Predatory Refusals to Deal ........................................................................................................ 637
   C. The Way in Which Predatory Refusal-to-Deal Cases Should Be Structured ................................................................................................................ 654
   D. The U.S. Case-Law, EC Position, and E.C./E.U. Case-Law on Refusals to Deal ................................................................................................................ 655
10. Allegedly-Predatory Systems Rivalry and Functionally-Identical Types of Aftermarket Conduct ................................................................................................ 694
    A. The Functions of Systems Rivalry ......................................................................................................................................................... 695
    C. The U.S. Case-Law, the EC Position, and the E.C./E.U. Case-Law on Systems Rivalry ............................................................................................................. 710
Index ......................................................................................................................... 723