

Brooke Group and predatory buying by a monopsonist

The Antitrust Practice Group

Sullivan & Cromwell LLP

At the urging of the United States Department of Justice, among others, the United States Supreme Court granted review of *Confederated Tribes of Siletz Indians of Oregon v Weyerhaeuser Co*¹ to consider whether the standard established in *Brooke Group Ltd v Brown & Williamson Tobacco Corp*² to judge predatory pricing by a monopolist should also apply to predatory buying by a monopsonist³ in an input market.⁴ Predatory buying refers to the overbuying of an input of production or otherwise artificially increasing the price of the input so as to increase competitors' input costs or to deny competitors the input altogether. Before *Weyerhaeuser*, this issue had received little attention in the lower courts or from legal and economic scholars.⁵ Indeed, the 'Weyerhaeuser case' is the first to deal extensively with the proper standards for predatory buying.

As discussed in this chapter, the Brooke Group standard cannot, however, be applied to predatory buying in the straightforward, mirror image manner that appears to be expected by *Weyerhaeuser* and others. Instead, it must be adapted even to be workable for predatory buying. And those adaptations are likely to decrease its precision and certainty in analysing, and increase the degree of difficulty for a plaintiff seeking to establish, predatory buying in comparison to its application to predatory selling.⁶

The Supreme Court has a challenging task to construct a useful, objective and well-balanced shortcut approach to judging predatory buying from the Brooke Group standard. Indeed, until more lower courts and scholars have analysed the issues inherent in predatory buying, which Herbert Hovenkamp describes as "even harder to evaluate" than predatory pricing claims,⁷ it is possible that the best approach may be simply to outline the specific kinds of proof expected under a rule of reason analysis of predatory buying without creating a determinative shortcut rule as the court did in *Brooke Group*.

The Brooke Group standard

In *Brooke Group*,⁸ the Supreme Court established a reasonably objective test for determining when low selling prices harm competition and can support a finding of monopolisation under section 2 of the Sherman Act. In doing so, the court contemplated that a predatory pricing strategy would consist of a period of predation, during which an alleged monopolist would lower prices to consumers in order to drive competitors from the market, and a subsequent recoupment period, during which the predator – facing no or at least less competition – would raise prices to consumers on the same product and more than recoup the losses it had incurred during the predation period.

The Brooke Group test has two prongs, one for each of these two periods. The first prong requires a plaintiff to establish that, during the predation phase, its rival's allegedly predatory low prices "are below an appropriate measure of its rival's costs".⁹ The second prong focuses on the subsequent recoupment phase and requires the plaintiff to establish that its allegedly predatory rival had "a dangerous probability [...] of recouping its investment in below-cost prices."¹⁰

The Supreme Court also identified two further necessary elements of the recoupment prong. It required proof both that the

below-cost pricing strategy would be likely to reduce the number of competitors or otherwise reduce their competitive vigour and, once successful in doing so, that a sustained period of supracompetitive prices would likely follow and would be "sufficient to compensate [the predator] for the amounts expended on the predation, including the current value of money invested in it."¹¹

The court explained that a substantial quantity of proof was necessary to establish the likelihood of recoupment, including the extent and duration and, thus, cost of the alleged predation to the predator and to its competitors, the relative financial strength of the predator and its intended victims, their respective incentives and willpower, and whether the aggregate losses caused by the below-cost pricing strategy were likely to cause the intended target of the predation to succumb. To demonstrate a likely net gain by the predator, the court instructed that necessary proof also included an estimation of the costs of the alleged predation to the predator and an analysis of market structure and other market conditions to determine whether the predator would likely be able to raise prices for the same product high enough and for a long enough period to recover the cost to it of its earlier below-cost pricing predation.

The Supreme Court recognised that these "prerequisites to recovery [would] not [be] easy to establish,"¹² but justified the rigorous standard on the ground that lower prices, although potentially a predatory weapon, were also the crucial pro-competitive mechanism by which firms increase sales and stimulate competition. Given the central role of lower prices in competition and their facial ambiguity, the court concluded that "the costs of an erroneous finding of liability are high"¹³ and chose to favour the risk of false negatives (ie, that some predators would escape liability due to the rigorous standard) rather than risk false positives that could chill consumer-benefiting low-price strategies. In specifically justifying the below-cost requirement, the court observed that lowered, but above-cost, prices that harmed competitors were beneficial to consumers and should be encouraged because those prices were likely "as a general rule" to reflect "competition on the merits" by a more efficient, lower-cost competitor and, in any event, were incapable of judicial evaluation without undue risk of deterring legitimate price cutting.¹⁴

The Weyerhaeuser Decision

In *Weyerhaeuser*, plaintiff Ross-Simmons Hardwood Lumber Company, a sawmill in the Pacific north-west that had purchased alder logs and processed them into alder lumber, alleged that its competitor, *Weyerhaeuser*, had driven it out of business and had monopolised the alder sawlog market by buying too many logs and by paying too much for the logs that it had purchased. Ross-Simmons and *Weyerhaeuser* competed in two vertically connected markets: (i) the acquisition of logs from timberland owners and loggers in the alder sawlog market in the Pacific north-west, in which *Weyerhaeuser* purchased around 65 per cent of the alder logs offered for sale; and (ii) the sale of finished lumber in a national market for finished hardwood lumber.¹⁵

At the conclusion of trial, a jury found that *Weyerhaeuser* had monopsonised the sawlog input market in violation of section 2 of the Sherman Act. This verdict followed the trial court's refusal

to give a jury instruction that required the plaintiff to satisfy the rigorous Brooke Group standard for predatory pricing. Instead, the district court gave the following jury instruction: “One of Plaintiffs’ contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.”¹⁶

On appeal, the Ninth Circuit also refused to apply *Brooke Group*, stating that predatory buying was less likely than predatory pricing to benefit consumers and stimulate competition, especially in a relatively inelastic supply market, such as the alder sawlog market, and so the “high standard of liability in *Brooke Group*” was not needed to minimise the risk of chilling potentially beneficial, pro-competitive conduct. Despite the Ninth Circuit’s affirmation, there seems to be near universal agreement that the ‘paid-too-much and bought-too-much’ sort of jury instruction invites a jury merely to decide subjectively that Weyerhaeuser was behaving unfairly rather than anti-competitively.¹⁷

There also seems to be growing support for the idea that the Supreme Court’s policy justifications for establishing the rigorous Brooke Group standard for predatory selling prices are equally applicable to predatory buying.¹⁸ Since *Weyerhaeuser* was decided, various case participants and some commentators have suggested that, analogous to predatory pricing, higher input prices are ambiguous: higher prices can be a weapon of predation or a pro-competitive driver of increased competition by which a buyer could seek to increase its input purchases, for example, to satisfy a larger demand for its output.¹⁹ Similarly analogous to predatory pricing, higher input prices that place a financial strain on a rival input purchaser nonetheless do benefit the input sellers just as, in a selling market, lower selling prices benefit consumers while disadvantaging competitors. Despite these similarities, as discussed in the next section, the *Brooke Group* standard does not fit predatory buying situations as comfortably as it does predatory selling scenarios.

Applying *Brooke Group* to predatory buying is neither straightforward nor precisely calibrated to the task

The Supreme Court in *Brooke Group* created a carefully calibrated standard that succeeds in judging whether an alleged monopolist’s price conduct is predatory by reference to the conduct in, characteristics of and impact on consumers and other participants solely in the market that the alleged predator is accused of monopolising in violation of section 2 of the Sherman Act. Thus, the Brooke Group standard identifies a price selected by the alleged monopolist for its own product offering in the allegedly monopolised market and tests it against the variable costs of that precise product. The test then judges whether recoupment will be likely through higher subsequent prices on that same product, based upon the likely impact of the alleged predation on rivals in the allegedly monopolised market, the cost of predation in that market, the overall scheme’s potential for increasing the predator’s market power in that market and the structure and entry conditions of that market. Furthermore, a finding of harm to competition is based on an expected net harm to the buyers (consumers) of the product supposedly monopolised (and indirectly to equally efficient competitors supplying that product). Thus, a monopolisation violation of section 2 with respect to that market is squarely based on market conditions and behaviour in the one market found to have been monopolised.

This will not be the case if *Brooke Group* is applied to a monopolist’s alleged predatory overbidding. Indeed, the Brooke Group standard cannot even be applied ‘as is’. Although little discussed so far, there are four unavoidable differences between the application of *Brooke Group* in the predatory selling context and its

proposed application in the predatory buying context. As a result of these differences, the Brooke Group standard would be a more indirect and less finely tuned test of monopsonising pricing conduct and the predatory buying version of *Brooke Group* would be more complicated, more uncertain and perhaps even more demanding of plaintiffs than the already-demanding predatory selling version of the Brooke Group standard.²⁰

The first difference in the two applications of *Brooke Group* relates to the locus of the test’s application. As discussed above, the Brooke Group predatory selling standard is applied entirely within the single selling market allegedly monopolised. In contrast, alleged predatory overbidding in a particular input market cannot be tested solely on the basis of the characteristics of and conduct within that single input market. Instead, as both *Weyerhaeuser* and the Department of Justice clearly contemplate,²¹ the application of the two prongs of the Brooke Group standard must be spread over the input market, which is allegedly being monopsonised, and the separate market in which the output that uses the monopsonised input is sold. Thus, an alleged monopolist’s overbidding in an input market will be judged in major part in the context of the characteristics and structure of the output market – which the predator is not claimed to be monopolising²² and in which the predator may even be a price taker as was apparently the case in *Weyerhaeuser*.²³

This difference arises for a very practical reason. Although the predator sets an allegedly ‘excessive’ price in the input market in the course of purchasing that input, there are no meaningful efficiency-testing costs in that input market to which the buyer’s allegedly predatory buying price can be compared.²⁴ Therefore, in order to recreate the price-cost comparison of the first prong of *Brooke Group*, *Weyerhaeuser* and the Department of Justice contemplate that the comparison would be moved to the output market where the alleged input market predator is selling the product that it has produced using the input. As a result, *Brooke Group*’s first prong, when applied to predatory buying in the input market, is actually just the original price-cost comparison that would be made if the allegation being tested were that the predator was engaging in predatory pricing in the output market rather than predatory buying in the input market. The outcome of this comparison will depend as much, if not more, upon conditions in the output market rather than in the input market, the supposed focus of a monopsonisation claim. Consequently, a *Brooke Group* application to predatory buying is neither straightforward nor a simple mirror image of its application to predatory selling.

The second difference arises in the actual mechanics of the price-cost comparison, which no longer focuses on the predator’s price weapon. The price-cost comparison in *Brooke Group* predatory selling situations focuses on the actual predator’s weapon – the price at which the predator chose to sell its products allegedly to harm its rivals. When *Brooke Group* is applied to predatory buying, however, the price inserted in the comparison is still the price that the alleged predator receives for its output in the output market. Depending on the alleged predator’s position in the output market, this price may be set by the marketplace or may be set by the alleged predator, if it has market power and pricing flexibility. Either way, the price-cost comparison does not focus on the ‘too high’ price being paid in the input market, which is the ‘price weapon’ in the alleged monopsonisation of the input market. Instead, when applied to predatory buying, the alleged predator’s price weapon is included as a cost in this price-cost comparison.

Because the allegedly monopsonised input would typically not be the only cost in the price-cost comparison, an element of causation must be added in predatory buying situations that is not necessary when *Brooke Group* is applied to predatory selling prices. In other words, it is necessary to ensure that the price in the output

market is less than “an appropriate measure of costs” because of the higher prices paid by the predator for the one input for which the alleged monopolist is supposedly overbidding.²⁵ If the input being monopsonised is a very substantial portion of the costs of the output, this causal link may be easily satisfied and will not be a material issue. If the allegedly monopsonised input is essential to production of the output but represents a small percentage of the costs of the output, or if various other costs are volatile in different directions at the same time, the alleged monopolist could outbid its input market rivals consistently and still potentially keep its variable costs below prices in the output market. In any event, this difference makes clear that the first prong of *Brooke Group* must be applied to predatory buying with great precision. General discussions of losses or profitability²⁶ are no substitute for a test as to whether the alleged monopolist’s output price is below an appropriate measure of costs, solely because the cost of the predatorily purchased input was too high.

The recoupment element raises a third difference between the *Brooke Group* standard’s application to predatory selling and its application to predatory buying. In the predatory selling context, *Brooke Group* contemplates a recoupment period of higher prices during which consumers’ benefits from the predation period’s lower prices are more than offset by higher prices to the same consumers (or at least to the same category of consumers). The expectation of a subsequent recoupment period flows naturally from the fact that, in the predatory pricing context, *Brooke Group* is applied to the predator’s conduct in only one market and its price cannot simultaneously be both high and low to the same consumers.

In contrast, with predatory buying, a monopsonist who pays too much in the input market can ‘recoup’ the presumably unnecessary overpayment either in a later period in the input market through lower input prices or through higher prices in the output market.²⁷ The United States’ amicus curiae brief at one point contemplates only that recoupment will occur in the input market in a subsequent period by a then more-powerful monopsonist who would force input prices downward and, thus, offset its investment in ‘too high’ prices during the predatory period.²⁸ This particular recoupment formulation is the appropriate mirror image application of *Brooke Group* that would focus on impact to input suppliers and competition in the input market.

The United States’ brief appears, however, to contemplate, in addition, that recoupment can also occur in the output market: it states that both prongs of the *Brooke Group* test as applied to predatory buying require consideration of “the revenues that the defendant receives for its finished product” and that it will thereby take into consideration any price impact to consumers.²⁹ Professor Steven Salop, a noted economist, also recognises that recoupment of some or all of the predator’s buying losses can be made through higher prices in the output market either simultaneously with or subsequent to the predatory buying period.³⁰ This difference could have the effect of complicating the nature and increasing the quantity of proof demanded of a plaintiff to prove recoupment, which will require development of evidence in two markets rather than one and the establishment of the relationship between the two markets.

The fourth difference in the predatory buying version of *Brooke Group* is the degree of focus on consumer welfare rather than input supplier welfare. The touchstone used in *Brooke Group* to test harm to competition was consumer welfare, with the court expressing concern about the risk of chilling a firm’s incentive to lower prices to the benefit of consumers in the short term.³¹ As a result, the *Brooke Group* standard, when applied to predatory pricing, focused directly on the potential for long-term harm to consumers by requiring that recoupment through sustained supracompetitive pricing is likely to occur and likely to outweigh the benefit to the consumers of lower

prices and higher output in the predatory period.³²

If *Brooke Group* were to be applied as a simple, mirror image to predatory buying, one would expect the welfare of the seller of the allegedly monopsonised input – the sawlog seller in *Weyerhaeuser* – to be the sole focus. The currently proposed application of *Brooke Group* to predatory buying does not, however, focus on supplier welfare in the upstream market. Indeed, depending upon the particular recoupment formulation that is applied, the focus may be almost entirely on consumer welfare rather than supplier welfare and virtually any formulation of *Brooke Group* will at least require supplier welfare to share the focus with consumer welfare. Professor John Kirkwood argues that monopsony buying power typically hurts both consumers and suppliers or at least that consumer injury and supplier injury is likely to be linked, permitting reliance on a general likelihood of consumer injury to examine monopsony buying and presumably to protect both consumers and suppliers simultaneously.³³ The United States amicus curiae brief emphasises that the Sherman Act does not limit its protection to “consumers” and also protects “purchasers”, “competitors” and “sellers”.³⁴ Nonetheless, the Department of Justice also argues that spreading the application of the *Brooke Group* standard across the input and output markets has the advantage of protecting both consumer and supplier interests.³⁵ This dual focus on consumer and supplier welfare, which may even be tipped somewhat toward consumer welfare, could at least theoretically ignore harm to competition in the input market merely because market conditions in the output market do not happen to result in injury to consumers.

Symmetrical tests may be appropriate in some circumstances and necessary to avoid weakening *Brooke Group*

The differences identified in the previous section, the importance and impact of which require further analysis beyond the scope of this small paper, illuminate the need to consider whether *Brooke Group* should be applied to predatory buying only when it occurs in conjunction with predatory pricing in the output market. In that context, where the alleged predator would presumably have market power in both the input and output markets, a test that was interwoven into and dependent upon both markets and their interrelation might make good sense – even if it did not elsewhere.

Indeed, if the integrity and strength of the application of the *Brooke Group* standard to predatory pricing is to be maintained, it may be necessary to apply the *Brooke Group* standard to predatory buying as well, at least when predatory pricing and predatory buying are both present or alleged. Because predatory pricing typically involves an expansion of output by the alleged predator, the alleged predator may also radically increase the volume of input that it is purchasing in the input market. This may naturally or intentionally increase prices in the input market and provide a factual basis for a predatory buying claim. This situation is most likely to occur when the alleged predator has significant market power in both the output and input markets, which was apparently not the case in *Weyerhaeuser*.

If the standard for predatory pricing remains as the tough *Brooke Group* test but a less rigorous standard is applied to predatory buying, plaintiffs may seek to avoid the *Brooke Group* standard by bringing a predatory buying case instead of a predatory pricing (selling) case. As a result, predatory pricing that is integrated with predatory buying may be indirectly judged by a more lenient standard than the Supreme Court intended in *Brooke Group*.

Conclusion

As this brief paper has shown, a number of issues deserve extensive and in-depth discussion and analysis to determine whether

the Supreme Court should establish a potentially litigation-ending shortcut standard for predatory buying as it did in *Brooke Group*, or whether it should merely provide guidance as to a broader and more generalised rule of reason analysis until predatory buying analysis is more fully developed. This development should include careful study of the available scholarly analysis and careful consideration of the advantages and disadvantages of other shortcut alternatives, as well as the full-blown rule of reason analysis, all of which are beyond the scope of this short paper.

Notes

- 1 411 F 3d 1030 (9th Cir 2005) cert granted sub nom, *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co*, 126 S Ct 2695 (2006).
- 2 509 US 209 (1993).
- 3 On the buying side of a market, a monopsonist is the same as a monopolist on the selling side of a market.
- 4 Weyerhaeuser stated the question in its petition as whether the plaintiff must "satisfy what the Ninth Circuit terms the 'higher' Brooke Group standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses." Petition for a Writ of Certiorari, at 1, *Confederated Tribes of Siletz Indians of Oregon v Weyerhaeuser Co*, 126 S Ct 2965 (2006) (No 05-381) ('Weyerhaeuser Brief').
- 5 Very few cases or articles have focused on unilateral predatory buying as was at issue in *Weyerhaeuser*. See John B Kirkwood, 'Buyer Power and Exclusionary Conduct: Should *Brooke Group* Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?', 72 Antitrust LJ 625, 656 (2005) (noting that no leading antitrust treatise has analysed predatory bidding and that only three reported judicial decisions – *Am Tobacco Co v United States*, 328 US 781 (1946); *In re Beef Indus Antitrust Litig*, 907 F 2d 510 (5th Cir 1990); and *Reid Bros Logging Co v Ketchikan Pulp Co*, 699 F 2d 1292 (9th Cir 1983) – have involved a claim of predatory bidding). Most cases have focused on illegal joint exercise of monopsony power. See, eg, *Mandeville Island Farms Inc v Am Crystal Sugar Co*, 334 US 219 (1948) (holding that price fixing by a buyer's cartel violates the Sherman Act).
- 6 None of Herbert Hovenkamp, John B Kirkwood, Steven C Salop or Richard O Zerbe, who have commented recently, give unqualified support for the application of the Brooke Group standard 'as is' to predatory buying. See generally Herbert Hovenkamp, 'The Law of Exclusionary Pricing', January 2006, The University of Iowa Legal Studies Research Paper No. 05-34, available at SSRN: <http://ssrn.com/abstract=876968>; John B Kirkwood, 'Buyer Power and Exclusionary Conduct: Should *Brooke Group* Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?', 72 Antitrust LJ 625 (2004-2005); Steven C Salop, 'Anticompetitive Overbuying by Power Buyers', 72 Antitrust LJ 669 (2004-2005); and Richard O Zerbe, 'Monopsonary and the Ross-Simmons Case: A Comment on Salop and Kirkwood', 72 Antitrust LJ 717 (2005).
- 7 Hovenkamp at 22.
- 8 *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993).
- 9 *Brooke Group*, 509 US at 222. The Supreme Court expressly declined to define "the appropriate measure" of costs, but lower courts have generally concluded that the most practical and defensible measure is average variable costs. See, eg, *International Travel Arrangers v Northwest Airlines*, 991 F 2d 1389, 1396 (8th Cir); *Morgan v Ponder*, 892 F 2d 1355 (8th Cir 1989); *Arthur S Langenderfer v SE Johnson Co*, 729 F 2d 1050 (6th Cir); *Barry Wright Corp v ITT Grinnell Corp*, 724 F 2d 227, 233-236 (1st Cir 1983); *MCI Communications Corp v AT&T*, 708 F 2d 1081 (7th Cir); *Northeastern Tel Co v AT&T*, 651 F 2d 76, 87-88 (2d Cir 1981); and *Jays Foods v Frito-Lay*, 614 F Supp 1073 (ND Ill 1985). See also *Southern Pac Communications Co v AT&T*, 740 F 2d 980, 1005 (DC Cir 1984) (conclusive legality of prices above average cost "relatively uncontroversial").
- 10 *Brooke Group*, 509 US at 224.
- 11 Id at 225.
- 12 Id at 226.
- 13 Id.
- 14 Id at 223.
- 15 The jury was not asked to find a national finished hardwood lumber market, and did not. It did, however, reject plaintiff's proposed regional market for finished alder lumber and so many commentators presume a national hardwood market. See, eg, Brief for the United States as Amicus Curiae Supporting Petitioner, at 3, No. 1, *Confederated Tribes of Siletz Indians of Oregon v Weyerhaeuser Co*, 126 S Ct 2965 (2006) (No. 05-381) (US Brief).
- 16 *Weyerhaeuser*, 411 F 3d 1030, 1037; see also Ross-Simmons Hardwood Lumber Co, Inc Opposition to Petition for a Writ of Certiorari, at 11, *Confederated Tribes of Siletz Indians of Oregon v Weyerhaeuser Co*, 126 S Ct 2965 (2006) (No. 05-381).
- 17 See, eg, Hovenkamp at 26 ("The jury instruction that the Ninth Circuit approved is an antitrust disaster of enormous proportions"); US Brief at 17; and Janet L McDavid and Jessica L Ellsworth, 'Antitrust Law: Predatory Purchasing?', *The National Law Journal* (14 November 2005). Numerous companies filed amicus curiae briefs in support of Weyerhaeuser's petition, including BellSouth Corporation, Dow Chemical Co, Dunn Lumber Co, Microsoft, SBC Communications, Verizon Communications, the Campbell Group, Forest Systems, LLC, Global Forest Partners LP, Hancock Natural Resource Group, Menasha

Sullivan & Cromwell LLP

125 Broad Street
New York, NY 10004-2498
Tel: +1 212 558 4000
Fax: +1 212 558 3588

Contact: Yvonne S Quinn
quinnys@sullcrom.com

Website: www.sullcrom.com

Other offices: London, Paris, Frankfurt, Washington DC, Los Angeles, Palo Alto, Melbourne, Sydney, Hong Kong, Beijing, Tokyo.

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- Forest Products, Plum Creek Timber Company, Resource Management Service, LLC, the Coca-Cola Company, Caterpillar, Apple Computer, Black & Decker, the Chamber of Commerce of the United States of America, and even the American Forest and Paper Association.
- 18 US Brief at 12; Kirkwood at 653; Hovenkamp at 21-22; Weyerhaeuser Brief at 20-21.
- 19 See, eg, Salop at 682-3.
- 20 See, eg, *Brooke Group*, 509 US at 226; *Zerbe* at 717.
- 21 The Department of Justice indirectly acknowledges this anomaly but champions it as a positive characteristic that will capture the potential effects of predatory bidding in the input market on both consumers in the output market and suppliers in the input market. See US Brief at 14; Weyerhaeuser Brief at 16-17.
- 22 See, eg, US Brief at 13.
- 23 Because the jury rejected an output market definition of a regional alder lumber market, the output market was apparently a national market for all hardwood lumber, in which Weyerhaeuser held only a 3 per cent share. Weyerhaeuser Brief at 5, No. 2. Although not expressly discussed, a 3 per cent share presumably did not give Weyerhaeuser any freedom to set prices for finished lumber.
- 24 The allegedly monopsonising buyer could, of course, incur transaction costs in connection with its buying activities in the input market but those costs have no independently meaningful role in analysing predatory bidding.
- 25 Both *Weyerhaeuser* and the Department of Justice have recognised this issue, but did not discuss it in the papers filed to date. *Weyerhaeuser* accommodated this issue in its reformulation of the Brooke Group standard in its statement of the question presented in its certiorari petition by saying plaintiff must prove defendant “paid so much for raw materials that the price at which it sold its products did not cover its costs [...]” Weyerhaeuser Brief at 1. (Note also that *Weyerhaeuser* is not as precise as necessary in isolating the cause of below-cost prices to overpayment on the allegedly monopsonised input.) Similarly, the Department of Justice in one place in its amicus curiae brief described the first prong of the test as “short-term losses as a result of its alleged higher [input] bid prices.” US Brief at 10.
- 26 Compare US Brief at 1, 6 with US Brief at 10, 14 (sometimes referring simply to losses and sometimes being appropriately specific as to the cause of losses); see also Weyerhaeuser Brief at 5 with non-specific discussion of profitable operations.
- 27 See Salop at 706.
- 28 US Brief at 11-12 (“the theory of predatory bidding is that recoupment will occur primarily through the exercise of monopsony power in the input market to lower prices of inputs in the long run”).
- 29 *Id* at 14.
- 30 See Salop at 706.
- 31 *Brooke Group*, 509 US at 223-226.
- 32 *Id* at 226.
- 33 Kirkwood at 663-664; Professor Steven Salop also argues that consumer welfare should be the sole touchstone of analysis of predatory buying. Salop at 677.
- 34 US Brief at 12.
- 35 *Id* at 14.