Preface

This book brings together the 17 contributions to the second conference of the Academic Society for Competition Law (ASCOLA) which was held at the University of Paris Dauphine and the University of Paris I-Panthéon Sorbonne on 8 to 9 December 2006.

Economic theory has always been the basis of competition law. No competition law can be applied without a clear understanding by the enforcer or the judge of the economics of the market. Yet, economic theory is winning even more ground in competition law. In the European Union, this is mostly due to the policy decision of the Commission, taken under former Competition Commissioner Mario Monti, to implement the so-called ‘more economic approach’. This approach abandons the form-based approach and advocates an assessment of the legality of certain behaviour in the light of its impact on the relevant market. The more economic approach has so far been implemented by a new generation of block-exemption regulations, a fundamental reform of the Merger Control Regulation and is planned to be continued for the control of abuses of market dominance. Even control of State aid is not immune from economic reconsideration. In this brave new world, competition lawyers often have to cooperate with economists, for instance with regard to defining the relevant market and assessing market shares. Apart from a different approach to the application of competition law, the question is also whether the more economic approach changes the goals of competition law.

Given this development, it is no wonder that ASCOLA has chosen the topic of economic theory for its second conference. The ASCOLA conference differed from a conference that concentrates on how the application of the law changes in times of a more economic approach in two respects. First, as a truly international association, ASCOLA took a global and comparative approach by investigating the status of economic reasoning in different jurisdictions. Second, the conference followed a critical approach. It did not take the soundness of the current move towards ‘more economics’ for granted, but discussed the role economic theory should play in competition law more fundamentally.

In conformity with the structure of the conference, this book is divided into three main parts: the first part brings together five contributions written against the background of different jurisdictions. In the second
part, the book confronts the tricky questions of whether economic efficiency should be recognized as the ultimate goal of competition law, whether on the contrary economic analysis should only serve as a tool to better promote legal objectives and whether additional goals in conflict with efficiency should be accepted in competition law. In the third part, the book finally addresses more concrete issues of competition law application concerning restrictive agreements, mergers and finally enforcement.

The first part starts with a contribution from European practice. Hans Friederiszick, who worked on the staff of the European Commission’s Chief Economist for some years, provides insights into how the Commission uses economics to improve existing rules, to analyse individual cases and for ex-post analysis of the effectiveness of its enforcement policies. David J Gerber enriches the debate by questioning the assumption that the economic approach to competition law will bring Europe closer to the US. He argues that the economic approach may well play out differently in different institutional settings. Therefore he warns policy makers in Europe against simply transferring economic concepts used under US law without taking into account the specific embeddedness of economics in US institutions. Shuya Hayashi provides a very rich account of the Japanese development of competition policy and the goals it pursues. Japan, a country which has only recently attained significant levels of enforcement, has been successful in implementing a competition culture based on a concept of ‘fair’ competition and the conviction that protecting the competitive process is the best device for promoting prosperity. In this regard, he takes Japan as an example for the newly globalized world and explains that an approach to competition law like the one in Japan does not at all exclude taking into account modern economic reasoning for better identifying procompetitive, efficiency-enhancing conduct. Luboš Tichý looks at the experience of former socialist countries in Central Europe, which have become EU Member States only recently, in introducing competition law and adjusting to a more economic approach. Finally, more and more developing countries are managing to establish robust competition law systems, but have to face specific economic, social and cultural challenges. Mostly in the form of a case study, Geoff Parr analyses how merger control practice in South Africa is dealing with a conflict between efficiency and the interest in maintaining jobs.

Most economists would agree that efficiency should be recognized as the ultimate goal of competition policy. In the second part of the book, Wolfgang Kerber questions this assumption – most interestingly – from within economic theory. His starting point is that the neoclassical price theory of industrial organisation economics is not able to integrate normative values like economic freedom, legal certainty or distributive justice.
In order to build a bridge between economists and lawyers, he proposes to include other disciplines of economics, in particular constitutional economics. In what was initially meant as a comment on Wolfgang Kerber, Roger Zäch makes a strong statement against accepting consumer welfare and efficiency as the ultimate goals of competition law. Since competition lawyers cannot predict future economic outcomes, protecting the competitive process and the freedom to compete should remain the very purpose of competition law. Yet nobody will doubt that, for instance in the framework of Article 81(3) EC and other competition law provisions, the pro-competitive effects of certain behaviour have to be taken into account. Anne Perrot defends a clear-cut economic assessment of such behaviour that focuses on short-term consumer surplus, including innovation, and excludes conflicting goals like saving jobs or protecting the environment. On the same topic, Heike Schweitzer discusses the possibilities to consider conflicting goals in the legal framework of the EC Treaty. Here, obviously, arguments will need to be reconsidered after the coming into force of the Lisbourne Reform Treaty that moves the protection of undistorted competition – current Article 3(1)(g) EC – from the introductory list of objectives of the Community (Union) to a mere protocol annexed to the Treaty. Most importantly, however, the author reviews and discusses the possibilities for an exemption under Article 81(3) EC in view of public interest arguments as they are known from the case-law on the fundamental freedoms.

In the third part, Thomas Eilmansberger discusses whether an increased role for economic analysis would lead to a convergence of the application of Articles 81 and 82 EC. In so doing, he makes an assessment of a number of specific forms of conduct at the interface of the two provisions and comes up with highly differentiated results. In her comments, Michal Gal goes far beyond a reaction to Thomas Eilmansberger by making a strong statement that the concept of fairness has always been and remains a part of Community competition law. Thomas L Greaney then turns our attention to the assessment of efficiencies in US merger control law. The efficiency defence in US merger control law has undeniably been one of the first big successes of economic theory in modern competition law. However, it is also the field where we best see that making assumptions about future economic outcomes can be most difficult. This is why the author advocates very cautious legal rules on the efficiency defence. Daniel Zimmer, in his comments, defends a concept of protecting the competitive market structure against the efficiency defence. The last three contributions deal with enforcement issues. Marie-Anne Frison-Roche analyses the recent trend to more private enforcement of EC competition law as an expression of a more economic approach to the enforcement system, which transcends the traditional borderline between public and private law. Antoine Louvaris
takes a look at the relationship between the competition law goal of promoting efficient economic outcomes, the effectiveness of the procedural arrangements and the ‘efficacy’ of such arrangements in the sense of the fitness of legal process to promote efficiency. Of course, procedural rules are based on many normative considerations that diverge from the efficiency goal. Such divergence may lead, as the author explains, to two types of conflicts, namely failure conflicts – that is, when the procedure is effective but conflicts with the efficiency goal – and structural conflicts – when procedural rules ‘efficaciously’ promote goals other than efficiency. Finally, Muriel Chagny picks up the distinction introduced by Antoine Louvaris and provides interesting insights into the practice of for the most part, the French jurisdiction regarding these two types of errors.

The book closes with the guest speech delivered by Bruno Lasserre, the president of the French Conseil de la concurrence, on efficiency in the agency’s enforcement policy.

Many other people were involved in the preparation of this book. A number of students helped to organise the conference in Paris. Jessica Ploß and Lorenz Marx ensured that the incoming contributions conformed to the style of the book. Delia Zirilli and Dr Rupprecht Podszun played an essential role in managing the constantly changing versions sent around the digital world. Most important and time consuming was the work done by Allison Felmy. She reviewed all the contributions, especially those of the non-native speakers, from a linguistic point of view. Last but not least, the editors are very grateful to the staff of Edward Elgar, especially to Luke Adams and Nep Elverd, who strongly supported the book throughout the time of its coming into existence.

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