Preface

This book assembles 17 contributions based on talks given at the fourth conference of the Academic Society for Competition Law (ASCOLA) which was held at the Competition Law Center of the George Washington University Law School in Washington DC on 16–17 June 2009. All the contributions take account of the legal development until the end of 2010.

The choices of conference venue and topic were very timely. After the collapse of the financial markets in the fall of 2008, scepticism toward what economic theory can explain and predict has increased enormously, also in the field of competition law. The beginning of the financial crisis coincided with the election of a new US president and the coming into office of new decision-makers at the US antitrust agencies, which raised the question whether the new administration would turn away from its former lenient approach in the field of unilateral conduct, with regard to intellectual property in particular, and increase its enforcement activities. In this regard, the conference, above all, aimed to investigate whether those changes would increase the potential for consensus across competition jurisdictions. Of course, potential for more transatlantic convergence between the US and the EU was in the forefront of the debate. Yet, given the global outreach of ASCOLA, it was important also to take account of new interesting developments in other jurisdictions that may and will have an impact on the global landscape of competition law and enforcement.

This book is divided into four parts: the first part takes a fresh look at economics by discussing alternative approaches to the classical industrial organization theories. The second part brings together a variety of specific developments that have recently taken place in individual jurisdictions and deserve international attention for assessing global trends in competition law. Part 3 concentrates on the specific interface of intellectual property and competition law. In particular, it addresses patent ambush cases and so-called pay-for-delay settlements in the pharmaceutical industry, both of which recently attracted most attention by the agencies and courts in the US and Europe. Finally, Part 4 brings together some contributions that deal with approaches on how to promote competition policy nationally and across borders.

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Part 1 starts with a contribution by Maurice E. Stucke where, in the light of the financial crisis, he questions the main assumptions of rational behaviour underlying industrial organization theories, especially of the Chicago School, using recent insights from behavioural economics. He strongly argues against a competition policy that is based on the assumption of self-interested behaviour of individuals and that promotes such behaviour even as a virtue in the public interest. This is followed by a contribution by Robert H. Lande on how competition law could be reformed by taking ‘consumer choice’ as a benchmark for assessing cases as an alternative to the efficiency criterion. By arguing that consumers want options rather than just lower prices, he seeks to bring a variety of factors that are important to consumers from the footnotes to the text of the case evaluation. Moreover, he argues that the consumer choice approach would not only better explain the benefits of competition law for society; it could also be used for building more consensus between different jurisdictions. Neil W. Averitt joins Robert H. Lande in supporting a consumer choice approach by combining competition policy and consumer protection law in an integrated legal framework. This triggers Paul L. Nihoul to critically consider whether competition law should be integrated as part of consumer law from the perspective of the EU, where the concept of informed choice has been developed as the core concept of consumer policy.

Part 2 starts with a transatlantic debate on how to assess resale price maintenance cases after the recent US Supreme Court decision in Leegin. In her contribution, Marina Lao does not only criticize this decision; she also most broadly reviews the pro- and anti-competitive effects of RPM, criticizes the rule-of-reason approach as applied by the US Supreme Court as a de facto legality rule and finally recommends a rebuttable presumption of illegality. Her ideas find full support from Josef Bejček from across the Atlantic. Just like Marina Lao, he is very sceptical about whether pro-competitive effects can actually justify RPM in individual cases and encourages enforcers to work with a presumption of illegality. This seems in line with the new European regime on vertical agreements as reformed in 2010, according to which RPM remains a blacklisted restraint, whilst the potentially pro-competitive effects are now mentioned in the Guidelines on Vertical Agreements and may therefore be considered for an exemption under Article 101(3) TFEU (Treaty on the Functioning of the European Union). Then, Thomas Eilmansberger discusses tying arrangements and strategies, including those relating to aftermarket,s as a most complex competition law issue from the perspective of EU law. By bringing in more differentiation between different sets of cases, he seeks to better capture the competition concerns at stake.
Deborah Healey then takes the reader to the People’s Republic of China, where the recent adoption of Anti-Monopoly Law has also considerably changed the global landscape of competition law. Using a thorough historical, sociopolitical as well as comparative analysis, she reviews the application of the new law to state-owned enterprises (SOEs) and government bodies, which is, given the persisting role of large state-owned conglomerates in the Chinese market and the potentially distorting influence of local governments on the economic integration of the country, one of the big challenges in enforcing the new law. Finally, Caron Beaton-Wells presents a most comprehensive picture of the political debate and the most problematic issues at stake surrounding the recent introduction of criminal sanctions in the field of cartel enforcement in Australia in 2009. Her analysis should interest researchers from any other jurisdictions, including those in Europe, where nowadays criminal sanctions are discussed as a further move to make cartel enforcement more effective.

Part 3 starts with a contribution by Andreas Fuchs in which he reviews the application of US antitrust law and EU competition law to patent ambush cases, with a particular focus on the recent Rambus case. In his comparison, he highlights the weaknesses of both jurisdictions in using competition policy for guaranteeing that a standard-setting process is not distorted by the deceptive conduct of individual members of SSOs. According to him, patent ambush cases should be assessed as cases on excessive pricing, in which price control is justified in light of the entry barriers created by the network and lock-in effects in markets characterized by technological standards. Rudolph J.R. Peritz then draws attention to the US debate on so-called pay-for-delay settlements of patent infringement cases with reverse payments, where originator pharmaceutical companies pay off generics producers for delaying the market entry of generics. His contribution presents the topic as a story of a political battle fought by the administration and the US Federal Trade Commission in particular against the courts that still uphold a presumption of legality of such settlements in applying a rule-of-reason approach. In light of the high proportion of patent invalidations in cases where courts actually make a final decision, Rudolph Peritz argues in favour of reversing the rule of reason in the sense of presumption of illegality. In his comments, Gustavo Ghidini agrees with the preceding contributions and highlights that in both patent ambush and pay-for-delay cases no credit should be given to the fact that patents are involved. In the first case distortion of competition arises from deceptive conduct and in the second case from the agreement and not the patent itself. Josef Drexl then highlights that the assessment of both patent ambush and pay-for-delay cases should take into account the
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dynamic aspects of competition in particular. For patent ambush cases, he recommends applying unilateral conduct rules on excessive pricing based on an incentives balance approach. Price control is needed for decreasing the incentives of the patent holder to distort the pro-competition, innovation-enhancing standard-setting process. Pay-for-delay settlements should not solely be banned in view of promoting price competition with generics, but also with the aim of preventing originator companies from distorting dynamic competition with other originator companies based on profit from unjustified patents. Finally, Steven Anderman goes beyond the problems of patent ambush, by analysing the different stages of organizing a patent pool and the licensing out of patents by such pools after the stage of standard setting.

In Part 4, Michal S. Gal presents a five-step model of international cooperation for solving competition law problems in the context of international trade. These steps range from extraterritoriality at the lowest level over bilateral agreements, regional agreements, international enforcement and cooperation to the creation of a supranational authority. This model is then discussed and applied to the most recently witnessed ‘new wave of regionalism’ in view of giving policy recommendations for the modelling of regional competition agreements, which the author sees as a useful tool for more effectively addressing a number of the problems caused by the internationalization of trade. Then, Clifford A. Jones reviews the EU policy of exporting its competition policy approach to other countries in the framework of its so-called European Neighbourhood Policy, which includes a considerable number of countries in the Balkans, Eastern Europe, South Caucasus, North Africa and the Middle East. Finally, as president of the American Antitrust Institute and with personal experience, Albert A. Foer is the perfect person for explaining the role that non-governmental organizations can play in promoting competition policy both on the domestic level and internationally.

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