Preface

In today's society, innovation has become a key driver for economic policymaking. When trying to shape an innovative market environment, competition law can intervene in various ways. Approaching the subject from multiple angles and disciplines, the different chapters in this volume all focus in one way or another on the complex and varied relationship between competition law and innovation.

Part I, entitled 'Innovation throughout competition law analysis', focuses on the appearance and relevance of innovation as an instrument throughout competition law analysis. The part contains four chapters, which explore to what extent references to innovation feature and are granted room within existing competition law analytical frameworks. Chapter 1 by Pieter Van Cleynenbreugel demonstrates that innovation appears at different stages throughout competition law analysis. Both as a phenomenon exogenous to competition law analysis and as a tool embedded in competition analysis, references have been made to innovation. The author therefore calls for a more explicit differentiation between different types of competition law and innovation analysis, in order better to structure and understand academic debates in this context. Subsequent chapters within Part I deal with how innovation concerns have appeared throughout specific subtypes of competition law analysis. In the context of mergers, Chapter 2 by John Kwoka successfully shows that, within the context of pharmaceutical industry mergers, the scope for innovative business practices and research and development investments has diminished. That analysis concludes that the current analytical frameworks in place in the context of merger control do not necessarily and sufficiently take innovation into account. The author therefore calls for a more explicit attention to innovation in this regard. That sentiment is confirmed by Francisco Marcos in Chapter 3, who highlights the inherent tensions that dominant firms face both to innovate and to refrain from innovating. The current setup of competition law frameworks does not necessarily and automatically allow pro-innovation arguments to enter the realm of abuse regulation enforcement. Therefore, the author calls upon considering dynamic efficiency as the parameter for analysing firms' behaviour. Taking up this challenge, Juha Vesala, in Chapter 4,

argues that certain theories of harm informing antitrust authorities have seemingly considered antitrust harm to be present when other firms are deprived of innovation opportunities as a result of other than exclusionary conduct. Given that it is difficult to establish clearly and unambiguously when this is the case, the author calls for caution. He therefore proposes, in order to avoid deterring practices that overall promote innovation and consumer welfare, an enforcer's assessment framework under which anti-competitive effects on innovation have to be established as likely and the conduct either as not reasonably necessary for attaining redeeming or pro-competitive benefits or as unlikely to produce pro-competitive benefits that outweigh the anti-competitive effects. Proposing a test to that extent, the author argues, would allow better integration of innovation-oriented arguments in a competition law framework focused on tackling abusive practices.

Part II of the book, entitled 'Innovation and regulation: challenges for competition law and policy', complements Part I in exploring the relationship between competition law analysis on the one hand and regulation adopted in an attempt to structure, guide and promote technological innovation on the other hand. It is the case indeed that innovations are not only left to the market, but also become the object of specific regulatory instruments. The regulation of innovation poses new challenges for competition law and policy, as Part II demonstrates. In the field of the new economy, data and data protection regulation have been playing a major role in that regard. In Chapter 5, Nicolo Zingales explores the intricate relationship between data protection regulation and competition law. Focusing predominantly on the regulatory initiatives taken at European Union level, Zingales shows that both regulatory frameworks do not operate in a sufficiently coordinated fashion in order to avoid different approaches towards law and innovation to subsist in this regard. He therefore proposes interinstitutional coordination mechanisms to better streamline the application and enforcement of both types of regulation. A similar conclusion can be drawn in the context of health care services, where innovations tend also to be subject to significant degrees of regulation. As Claudia Seitz demonstrates in Chapter 6, attention to the streamlining health care regulation and competition law could also be improved. In Chapter 7, Shuya Hayashi and co-authors show that similar problems may also require more explicit attention in the context of the regulation of artificial intelligence. In that field, the use of data is a necessity in order for firms to innovate. Calling for a regulatory framework on data portability and standardisation that is more reflective of competition law concerns, the authors show that more reflection is needed on how to attune artificial intelligence and big data

policies and proposed regulations in that field to the framework set up by antitrust law.

The different chapters throughout the first two parts of the book conclude preliminarily that, on a more abstract level, innovation concerns are present yet not necessarily fully and directly taken into consideration within the framework of antitrust analysis itself. That lack of direct consideration could be explained partially by the fact that innovation as a generally applicable notion is relatively difficult to grasp in all its varieties. Parts III and IV of the edited volume therefore explore two more specific contexts in which innovation-related arguments come most explicitly to the foreground: the intersection between competition law and intellectual property law on the one hand and the application of competition law to digital platforms on the other hand. Both topics have gained relevance in recent years, although many open questions remain at this stage. The contributions in Parts II and III frame those questions and offer some tentative answers to them.

Part III, entitled ‘Competition law and intellectual property law: making innovation work?’, focuses on the relationship between competition law and intellectual property law and the room granted for innovation-related arguments in that context. On the one hand, intellectual property law is meant to protect the fruits of one’s innovative practices. On the other hand, competition law aims to guarantee that markets continue to foster and stimulate innovation. It goes without saying that the confrontations between both fields of law make sense of the role of innovation in competition law analysis. Part III contains four chapters that deal with the thorny relationship between competition law and intellectual property law. In Chapter 8, Björn Lundqvist explores the issue of joint research and development agreements and their treatment under competition law. Criticising the all-too-often backward-looking focus of antitrust agencies in relation to such agreements, the author explores ways in which a forward looking perception, targeted towards what will happen when two firms collaborate in R&D, can take shape. In Chapter 9, Severin Frank and Wolfgang Kerber focus on patent settlements and their impact on antitrust analysis from an economic point of view. Identifying several gaps in the current analytical framework, the authors propose a way forward in fine-tuning patent law and antitrust analysis. Within the same realm, Viktoria Robertson and Marco Botta in Chapter 10 deal with the vexed topic of so-called standard-essential patents and their treatment under competition law. Those patents, the use of which is necessary in order to guarantee the safety of a new product relying on patented technology, in a certain way limit the possibilities to engage in innovative techniques and features, all the more when patent

holders engage in litigation with potential and willing licensees. Focusing on litigation in both the United States and, above all, the European Union, both authors argue that the different tests applicable on both sides of the Atlantic result in different approaches towards the subject-matter. Without calling for a complete streamlining of tests, the authors at the very least look at ways to harmonise in some ways the treatment of standard-essential patents under competition law. The final chapter of this part, Chapter 11, touches upon the more general issue of abuse of rights in antitrust law. The different innovations and protective mechanisms put in place may have as a consequence seemingly to stimulate abusive exercises of rights conferred by antitrust law. Against the background of the previous chapters, Mariateresa Maggiolino and Maria Lillà Montagnani analyse what law can do to prevent and avoid such abusive applications of rights aimed at addressing anticompetitive behavior.

Part IV of the edited volume focuses on the challenges raised by digital platforms as a matter of competition law. Entitled ‘The platform economy – innovation and competition law at crossroads?’, it contains three chapters. In Chapter 12, Daniel Zimmer offers a general analysis as to whether competition law is ready to deal with the challenges of the platform economy. Building upon his work within the German Monopolies Commission and the report prepared by it, Zimmer offers a set of strategies that would enable competition law better to deal with the challenges of digital platforms. In Chapter 13, Petri Kuoppamäki, focuses specifically on the practice of tying in the context of two-sided digital platforms. Kuoppamäki analyses when tying by digital platforms is considered problematic from a competition law point of view. Identifying the difficulties in establishing competition law infringements, the author also reflects on what is possible within the legal frameworks currently in place. Chapter 14, by Simonetta Vezzoso, discusses yet another innovation-triggered and potentially anticompetitive phenomenon online platforms engage in: so-called online rate parity clauses prohibiting hotels from charging lower prices for reservations made directly on their websites and not via the intermediary of a platform such as booking.com. Dissecting the approaches national competition authorities have taken on the subject-matter, Vezzoso analyses the possibilities and limits of competition law enforcement against that background.

The different chapters aim to offer an overview of the varieties of competition law and innovation analysis currently in place, simultaneously hoping to stimulate debates on how the legal framework can be adapted or improved in this regard. For assistance during the preparation stages of the book, we would like to acknowledge the much appreciated help of Ms Audrey Zians, Ms Nathalie Defossé and Mr Brieuc Geuzaine,

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