Antitrust Writing Awards 2018

Washington, DC April 10, 2018
The Jury is comprised of the Board, the Academic and Business Steering Committees, the Editorial Committee and the Readers. Each of these contributed to the selection process of academic and business articles as well as soft laws.

The Editorial Committee of Concurrences Review selected a pool of 220 articles out of more than 500 submissions from the two Steering Committees and the Readers. Then, the Steering Committees and the Readers voted for their favorite articles, resulting in a short list of 40 finalists (20 Academic and 20 Business). Finally, the Board nominated 20 award-winning articles.

As for soft law, the Editorial Committee invited competition agencies to submit their soft law documents. The Steering Committees members and the Readers then voted for the 5 best documents.

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- Andrea COSCELLI, Competition and Markets Authority UK
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- Frédéric JENNY, OECD Competition Committee
- William KOVACIC, George Washington University Law School
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- Camilla HOLTSE, Maersk
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- Dina KALLAY, Ericsson
- Gail LEVINE, Uber
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- James MURRAY, Intel
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- Gary ZANFAGNA, Honeywell International
The Antitrust Writing Awards have become, over the years, an exclusive platform for antitrust writers and thinkers to share their ideas on the global stage. Again this year, these Awards provided the best articles published in 2017 with a unique readership while rewarding antitrust excellence.

The 2018 Antitrust Writing Awards consisted of:

> “Best Articles”: Awards for the best academic publications (peer-reviewed journals) and for the best business publications (non-peer-reviewed journals, briefs, memoranda, blogs, etc.) published by individual authors.

> “Best Soft Law”: Selection of the best non-enforcement tools published by National Competition Agencies such as guidelines, market studies, white papers, etc.

> “Best Newsletters”: Ranking and Awards of the best antitrust newsletters by law firms.

The articles and soft law were selected by the Jury. The 2018 Jury consisted of a Board - Andrea Coscelli, Douglas Ginsburg, Frédéric Jenny, William Kovacic, Johannes Laitenberger, Maureen Ohlhausen, John Pecman, Alejandra Palacios Prieto, and Brent Snyder - and Academic and Business Steering Committees composed of leading academics and in-house counsels. Readers contributed to the selection process by voting for competing articles and soft laws. We are most thankful to the jury members who spent valuable time reading and reviewing the selected articles and soft laws, as well as to our sponsors who made these Awards possible.

The “Best Newsletters” Ranking & Awards rewards antitrust professional publications considered overall, as opposed to the Articles Awards which reward individual articles. Out of more than 80 law firms’ publications reviewed, the Editorial Board selected 30 professional antitrust publications to provide practitioners with a useful description and ranking. Such publications include newsletters, blogs, but also client briefs and memoranda. The Ranking is based on the publications freely made available between January to December 2017 on the websites of law firms reviewed.

We will continue putting our best efforts to ensure the greatest circulation of academic and professional expertise through quality articles as well as innovative soft laws in the antitrust field.
WILLIAM KOVACIC
PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL,
COMPETITION AND MARKETS AUTHORITY, NON-EXECUTIVE DIRECTOR

Bill Kovacic - Professor, The George Washington University
Competition Law Center and Non-Executive Director, UK Competition and Markets Authority - welcomed the
enforcers, academics and private practitioners by first underlining
the importance of the Antitrust Writing Awards. Professor Kovacic
remarked that by recognizing superior writing in academia and
practice, the Awards celebrates and enhances the indispensable
intellectual infrastructure of the antitrust field.

Professor Kovacic looked back at the six previous editions of the
Antitrust Writing Awards and expressed how pleased he was to
see the continued and growing enthusiasm that antitrust practi-
tioners show in this annual celebration of new antitrust ideas and
practices. The Awards provides an opportunity for all the bright
minds in the antitrust field to meet and exchange ideas.

The international aspect of the Awards should also be emphasized,
Professor Kovacic remarked. Antitrust law is relatively new and
less developed than many other areas of law. Even for US and
Europe, where antitrust law has a comparatively longer history,
the law is still constantly undergoing significant developments and changes.
In some other parts of the world where antitrust law is
a fairly new concept, there is
even more work that needs
to be done. This background,
Professor Kovacic said,
highlights the importance of
international conversation in
the antitrust community.

Platforms such as the Antitrust Writing Awards, where practitio-
ners from around the world gather to exchange ideas and talk,
are becoming more and more indispensable to the advancement
of antitrust law.

Professor Kovacic concluded his remark by extending an invita-
tion to all antitrust practitioners worldwide to keep sharing their
ideas and insights through their writings.
Andrew Finch, Principal Deputy Assistant Attorney General, Antitrust Division, US DOJ, opened his remarks by highlighting the value of good writing and its role in antitrust law.

Stating that while clear and effective writing is essential to all branches of the legal profession, he emphasized that it is especially important to the domain of antitrust law. As it is a common-law field, it presents opportunities for persuasive lawyers and judges to make their case for the proper interpretation or application of short statutory phrases. Moreover, it relies heavily on economics. He stated that “the ability to explain complex and technical economics concepts with clarity and precision has become one of the most important skills in our corner of the legal profession. In that regard I should note that, as the legal profession becomes more and more specialized, effective legal advocacy requires writers to resist an over-reliance on jargon…”

He continued by giving examples of how clear and lively writing has shaped antitrust jurisprudence by providing guidance and explanation when the sparse nature of statutes requires it. Drawing on one such example, he noted how Justice Brandeis’ description of the rule of reason in the seminal Chicago Board of Trade decision “is the essence of the test we still apply to the vast majority of challenged conduct, weighing procompetitive benefits against anticompetitive effects.” Similarly, he used Judge Learned Hand’s Alcoa opinion, written in 1945, as an important lesson for enforcers, stating that “it continues to teach us not to punish a firm due to its size or natural commercial success…”

Mr. Finch also took a moment to acknowledge how much Justice Scalia contributed to U.S. antitrust jurisprudence and, perhaps more importantly, to the art of persuasive writing itself.

Finally, commenting on the current state of affairs, Mr. Finch noted that “our nation appears to be in the midst of what some have called an “antitrust moment.” Antitrust law makes national and global headlines on a weekly—if not daily—basis. Last Friday morning, I saw a puzzled anchor on CNBC ask a guest whether “monopsony” is a real word. In this environment, good antitrust writing takes on an increased significance. The wide range of topics covered in the works being honored this evening will contribute to this important conversation.”

*Check against delivery*
ANDREA COSCELLI
CHIEF EXECUTIVE OFFICER, UK COMPETITION AND MARKETS AUTHORITY

Andrea Coscelli - Chief Executive Officer, Competition and Markets Authority, UK - presented the Soft Law Awards. Explaining that the category is a recent addition, he clarified that “the ‘Best Soft Laws’ is neither an award nor a ranking, but rather highlights a selection of the best publications...Eligible publications are non-enforcement tools such as guidelines, market studies and white papers that have been published by competition authorities in 2017.”

He noted that the category “recognises the role that soft law can play in raising awareness of competition and developing competitive markets. Soft law – such as public guidance – can supplement and clarify competition law, whether contained in statute or case law. In doing this, it increases transparency and enables legal certainty. It can also provide a valuable narrative, explaining a competition authority’s thinking – or what may sometimes be its emerging thinking – on a particular important issue or area. Equally soft law can help the public to understand when the authority has done something, what it has done or why it has done it. Soft law is closely linked to a competition authority’s advocacy role. It is vital that a competition authority can be an advocate for competition, whether that is to government – and indeed, to government at all levels – or to participants in markets and their professional advisers.”

He emphasized also the importance of advocacy for policy-makers, and its role as a “powerful complement to an agency’s enforcement work, particularly in creating a compliance culture.”

Finally, Mr. Coscelli highlighted how the category “is intended to contribute to developing antitrust culture and awareness. Alongside the work of the ICN, it looks to support international antitrust advocacy by drawing attention to the work of competition authorities in this area.” With competition enforcement increasing globally, he noted that “the soft law we create is also useful to other competition authorities around the world in enabling us to learn from each other. Authorities often look at the same or similar issues. What is thought to be a novel issue for one enforcer may be something on which another authority has developed a particular level of expertise... As competition enforcers, we are continually striving to improve ourselves and learn from each other, whether it’s our understanding of particular issues that arise in our work, or indeed the ways we do our work.”

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In September 2017, the Administrative Council for Economic Defense’s General Superintendence launched a guidance document regarding dawn raids conducted by the authority. The document was elaborated based on CADE’s best practices and intends to give transparency to the activities of the institution. Although it is non-binding, the document “Dawn Raids Proceedings: General Information about Operationalization” aims to keep track of the institutional memory and to serve as a reference to public servants during the proceedings related to this important activity in the implementation of competition policy and defense, consolidating CADE’s experience on this matter.

The National Institute for the Defense of Free Competition and the Protection of Intellectual Property released these Guidelines in August 2017 in accordance with Section 26 of the Peruvian Competition Act. The Guidelines set terms, rules and conditions or restrictions for the sake of the effectiveness of the Leniency Program. The Commission issued these as an orienting tool for citizens and companies in their eventual applications for benefits. The Guidelines, in line with international best practices on leniency programs, develop the requirements that economic agents must fulfill in order to request for immunity or reduction of fines for its participation in a hard-core cartel, as well as the procedure applicable to such applicants.

The Competition Council of Lithuania released Guidelines on Anti-competitive Agreements and Bid-Rigging in Public Procurement for Business. The document lays out anti-competitive behavior and provides guidance as to how to avoid it in concise language. The Guidelines are accompanied by a video on bid rigging, in order to reach business audiences more effectively.
The Federal Competition Authority released this Guidance Paper on Dawn Raids in October 2017. It corresponds to the applicable law, to the most recent court judgements made by the courts, and also to national and European best practices. In order to improve legal certainty and transparency for companies and their employees, this Guidance Paper describes the whole process of conducting a dawn raid from beginning to end, listing the rights and obligations of BWB staff as well as the rights and obligations of the company and its employees. As electronic data is a big factor nowadays, this Guidance Paper also explains how the BWB collects electronic data.

The Competition Bureau, Canada released a discussion paper titled “Big data and Innovation: Implications for Competition Policy in Canada” in September 2017, with the goal of prompting discussion on how the Bureau should strike a balance in enforcing the Competition Act in cases involving big data. To facilitate this discussion, the Bureau solicited public comments on its website and engaged with stakeholders in a variety of international and domestic fora. The Bureau released a final report synthesising key themes revealed in its review of this important topic informed by this feedback in February 2018.
Alejandra Palacios Prieto - Chairwoman, Federal Competition Commission of Mexico - introduced the Antitrust Writing Awards for the Academic Category.

Chairwoman Prieto began by noting that the Antitrust Writing Awards represent an important opportunity to contribute to competition advocacy, and to recognize academic institutions and economic and legal scholars on their efforts in reviewing state of the art concepts and building theoretical foundations that will have an important impact on the success of competition policy implementation.

She praised the nominated articles, and mentioning some of the articles that caught her attention, she remarked "it is not news to say that technological change represents a major challenge for competition policy. This poses the question of how the approach of competition authorities should be modified when analyzing technological markets, without competition policy being too strict nor becoming a burden on innovation". Another issue raised in the nominated articles this year is whether competition policy should focus its analysis on the effects of behaviors on price and output levels or switch towards the structural and behavioral elements that affect market power. Finally, she discussed the growth of market concentration, and how it translates into political power to influence the decisions of public policy makers.

She ended by congratulating all finalists and winners and lauded their contribution to improvement of competition policy understanding.

*Check against delivery*
1. BEST ACADEMIC ARTICLE FOR GENERAL ANTITRUST
ANTITRUST IN A TIME OF POPULISM
CARL SHAPIRO, International Journal of Industrial Organization, Forthcoming 2018

This article discusses how to move antitrust enforcement forward in a constructive manner during a time of widespread and growing concern over the political and economic power of large corporations in the United States. Three themes are emphasized. First, a body of economic evidence supports more vigorous merger enforcement in the United States. This can and should be done in a manner consistent with sound economic principles. Tighter merger control can be achieved by utilizing the existing legal presumption against highly concentrating mergers and by reinvigorating the potential competition doctrine to block mergers between firms that may well become important direct rivals in the foreseeable future. Second, close antitrust scrutiny is appropriate for today’s largest and most powerful firms, including those in the tech sector. However, the coherence and integrity of antitrust require that successful firms not be attacked simply because they obtain dominant positions. Proper antitrust enforcement regarding unilateral conduct by dominant firms should continue to focus on identifying specific conduct that harms customers or disrupts the competitive process, especially conduct that excludes pesky, disruptive rivals. Third, while antitrust enforcement has a vital role to play in keeping markets competitive, antitrust law and antitrust institutions are ill suited to directly address concerns associated with the political power of large corporations or other public policy goals such as income inequality or job creation. Campaign finance reform, tax policy, labor, education, and other policies are far better suited to address those critical public policy goals.

2. BEST ACADEMIC ARTICLE FOR CONCERTED PRACTICES
A PROPOSAL FOR A STRUCTURAL REMEDY FOR ILLEGAL COLLUSION
JOSEPH E. HARRINGTON, JR, Antitrust Law Journal, Forthcoming 2018

It is proposed that, in some cases, a competition authority impose a structural remedy on a convicted cartel. The remedy would have cartel member(s) sell productive assets, such as capacity, to an entrant (e.g., a foreign supplier that is not currently in the market), a non-cartel member (if the cartel was not all-inclusive), or even another cartel member. The asset reallocation would be designed to make the market more competitive. After assessing the benefits and costs of a structural remedy, the paper offers some guidance for when and how to use it. It concludes by presenting some cases for which a structural remedy may have been viable.

These cases concern documented or suspected episodes of collusion in the markets for gypsum (US), cement (Brazil, Germany), retail pharmacies (Chile), hospitals (UK), and airlines (US).
3. BEST ACADEMIC ARTICLE FOR UNILATERAL CONDUCT
AMAZON’S ANTITRUST PARADOX


This article argues that the current framework in antitrust — specifically its pegging competition to "consumer welfare," defined as short-term price effects — is unequipped to capture the architecture of market power in the modern economy. We cannot recognize the potential harms to competition posed by Amazon’s dominance if we measure competition primarily through price and output. Specifically, current doctrine under-appreciates the risk of predatory pricing and how integration across distinct business lines may prove anticompetitive. These concerns are heightened in the context of online platforms for two reasons. First, the economics of platform markets create incentives for a company to pursue growth over profits, a strategy that investors have rewarded. Under these conditions, predatory pricing becomes highly rational — even as existing doctrine treats it as irrational and therefore implausible. Second, because online platforms serve as critical intermediaries, integrating across business lines positions these platforms to control the essential infrastructure on which their rivals depend. This dual role also enables a platform to exploit information collected on companies using its services to undermine them as competitors. The author maps out facets of Amazon’s dominance and concludes by considering two potential regimes for addressing Amazon’s power: restoring traditional antitrust and competition policy principles or applying common carrier obligations and duties.

4. BEST ACADEMIC ARTICLE FOR MERGERS
HORIZONTAL MERGERS, INNOVATION AND THE COMPETITIVE PROCESS

GIULIO FEDERICO, Journal of European Competition Law & Practice, November 2017

This article reviews some of the insights from the economic literature on the relationship between horizontal mergers and competition for future, innovative, products. Economic principles suggest that a merger between rival innovators may harm consumers not only through its adverse impact on static competition on existing products, but also because of possible negative effects on future competition (i.e. competition on future, innovative, products). A reduction in competition on future innovative products may be the result of both lower innovation efforts by the merging firms and higher future prices, relative to the counterfactual without the merger.

Contrary to the interpretation that is sometimes put forward in debates on competition policy, this article argues that economic principles can provide a useful framework for merger control in the area of innovation, highlighting factors that make an innovation theory of harm more likely to be relevant, and guiding the identification and assessment of the relevant factual evidence. The article also offers some policy implications, suggesting that to capture the full competitive impact of a merger, a competition assessment may need to look beyond the current product overlaps between the merging firms, and consider the likelihood and nature of future competition between the merging parties, on the basis of their underlying innovation capabilities and those of their rivals.
Private enforcement of competition law is on the rise worldwide. However, while customer damage claims against price-cartels receive much attention, it is unresolved to what extent other groups that are negatively affected may claim compensation. In this article we focus on a particularly important group, suppliers to a downstream sellers’ cartel.

Our analysis starts from the premise that actions for damages by suppliers to a sellers’ cartel require, first, that suppliers are worse off economically due to the cartel, and, second, that this comports with the law on damages and the law on standing in the legal system at issue. Building on our results, we discuss the case for and against cartel supplier damage claims in Europe, examining whether lessons can be drawn from the US. We argue that a more generous approach to supplier standing is justified in the EU as compared to the US in view of the different institutional context and the goals ascribed to the right to damages in the EU.

Refuting the objection that supplier claims would not be viable as a practical matter, we sketch an econometric approach based on residual demand estimation that allows the quantification of all determinants of cartel suppliers’ damages. We thereby also provide policy advice for the future development of UK competition law post-Brexit.
7. BEST ACADEMIC ARTICLE FOR CROSS-BORDER ISSUES
COMITY’S ENDURING VITALITY IN A GLOBALIZED WORLD
DOUGLAS H. GINSBURG & JOHN M. TALADAY, GEORGE MASON LAW REVIEW, Forthcoming 2018

Consideration of comity in antitrust cases is more important than ever. The global proliferation of competition law enforcement agencies has produced profound effects. Most are highly beneficial for consumers at a local level, but these many agencies create significant difficulties because they apply different legal standards, procedures and approaches to identifying and redressing perceived antitrust violations. One inescapable consequence is a much greater risk of conflict.

This conflict can take various forms. In the extreme case, it can mean that different jurisdictions impose conflicting remedies for the same conduct irrespective of the effect in another jurisdiction, making it impossible for a party to comply with both remedies. But there are more subtle tensions, equally problematic, that can result in the regulation of a party’s conduct by one or more agencies that affect market conduct far beyond the enforcing agency’s own borders. These risks are particularly high when an agency applies the “effects” doctrine, which often results in remedies that necessarily have an effect beyond that jurisdiction’s own borders.

8. BEST ACADEMIC ARTICLE FOR PROCEDURE
THE EU COMPETITION LAW FINING SYSTEM: A QUANTITATIVE REVIEW OF THE COMMISSION DECISIONS BETWEEN 2000 AND 2017

There is a large amount of legal and economic literature on the fining policy of the European Commission for breaches of EU competition law. This paper takes a quantitative approach as it analyses the factors that have been considered by the Commission in establishing the level of the fine imposed on infringing undertakings in 110 cartel decisions, as well as 11 abuse of dominance decisions, adopted between January 2000 and March 2017. The factors included in our analysis, comprise inter alia the gravity of the infringement, the presence of aggravating and mitigating circumstances, the adoption of an entry fee, whether inability to pay was invoked, and in the case of cartels the presence of some form of leniency and/or the use of the settlement procedure. We also looked at whether these Commission decisions have been appealed to the General Court of the EU.

Our analysis shows that the Commission has made significant use of the aggravating and mitigating circumstances listed in the Fining Guidelines to adjust the basic amount of the fine. It also shows that the vast majority of cartel decisions (i.e., 88%) adopted by the Commission during the period analysed involved some form of leniency (immunity from fines and/or fines reduction).

Our analysis also shows that the cartel settlement procedure, even though it only provides for a 10% reduction of the level of the fines, has been a significant success with the Commission concluding 22 settlements since 2010.
10. BEST ACADEMIC ARTICLE FOR ECONOMICS
THE COMPETITIVE EFFECTS OF COMMON OWNERSHIP: WE KNOW LESS THAN WE THINK
DANIEL P. O’BRIEN AND KEITH WAEHRER, 81 Antitrust Law Journal 729, 2017

Recent empirical research purports to show that common ownership of horizontal competitors by institutional investors harms competition even when all financial holdings are minority interests. This research has received a great deal of attention, leading to both calls for and actual changes in antitrust policy.

Our paper examines the research behind these proposals and finds that its conclusions regarding the effects of minority shareholdings on competition are not well established. Without prejudging what more rigorous empirical work might show, we conclude that researchers and policy authorities are getting well ahead of themselves in drawing policy conclusions from the research to date.

Our analysis focuses on three problems with the research claiming to identify anticompetitive effects: (i) the empirical methodology, (ii) the linkage between ownership and control, and (iii) the incentives of institutional investors. In summary, it is not controversial that some forms of common ownership can cause anticompetitive effects. A complete merger, for example, is a special case. However, recent empirical work motivating calls for changes in antitrust policy has not established that common ownership involving minority shareholders has caused anticompetitive effects.
Brent Snyder - Chief Executive Officer, Hong Kong Competition Commission - presented the Business Awards. Speaking about his experience on the Board of the Antitrust Writing Awards, Mr. Snyder began by complimenting the calibre and timeliness of the articles nominated. He noted the important roles that different categories of competition professionals play in the development and implementation of competition law around the world.

While academic discourse helps provide enforcers with the ideas and arguments to shape the direction of competition law jurisprudence and make the forward-looking a reality, he stated that, ultimately, it is private sector competition experts who likely play the most direct role in ensuring that the policies and enforcement actions of competition agencies have the desired effect on real life business and competitive practices. “As the goal of competition law is to promote and safeguard competition, it is the private sector that represents and advises the businesses that must make the choice to compete. Those professionals must take fact-based and often complicated policy announcements, administrative rulings, and court decisions and distill and extrapolate from them in a way that will inform, persuade and guide the actual practice of the business of community. This is perhaps the most important and useful role of all because that is where the rubber of business conduct hits the road of competition. And, in doing so, the private sector professionals often play their own important role in suggesting and shaping the future development of competition law.”

Mr. Snyder remarked that the authors of the Business Articles nominated exemplified these roles. The articles ranged from topics such as online markets, algorithmic pricing, and intellectual property and antitrust issues to merger remedies, excessive pricing, attorney-client privilege and antitrust developments in China. While not all entries came from individuals who directly represent and advise clients on competition law, all of the entries provide guidance that is understandable and useful for those either engaged in business or advising businesses.

He concluded by expressing his belief in the ability of the these articles to inform and shape conduct in the business community.

*Check against delivery*
1. BEST BUSINESS ARTICLE FOR GENERAL ANTITRUST

PANDORA’S BOX OF ONLINE ILLS: WE SHOULD TURN TO TECHNOLOGY AND MARKET-DRIVEN SOLUTIONS BEFORE IMPOSING REGULATION OR USING COMPETITION LAW

MAURITS DOLMANS, RICARDO ZIMBRON & JACOB TURNER, Concurrences N°3-2017

The Internet is blamed for all manner of social and economic ills, including fake news, loss of privacy, discriminatory pricing, consumer exploitation, the increasing gap between rich and poor, robots and AI replacing employees. There is a tendency for politicians and the press to blame consolidation and global online firms for these problems, and to suggest that the solution is to use competition law to break up these global businesses.

We think that reduction of competition is neither the cause nor the effect of these problems, and that breaking up these firms is not the solution. Consolidation is not the same as loss of competition. The emergence of large online firms may have the effect of disrupting offline businesses, but it is leading to more competition, not less. We see intense “innovation competition” and “attention rivalry” at a global level, and the development of multi-sided markets, which have made a host of new services available for free to consumers who could not afford them otherwise. Structural remedies or aggressive intervention based on competition law would only slow down innovation, create inefficiencies, and reduce consumer welfare.

Instead, we should focus on market- and technology-driven solutions to deal with specific problems. We should encourage these initiatives, and allow experimentation, before turning to competition law, merger control, or regulation as a measure of last resort. That is not to say we should leave it all to the market. In the longer run, other remedies for the painful side-effects of disruption may be required. Because regulation tends to stifle or slow down innovation, we should impose regulatory measures only if they meet a proportionality test. Top-down regulation by the state does not meet this “necessity” test when there are reasonable technology-based or market-based alternatives.

Finally, if regulation and government intervention are needed, they should be based on evidence, not ideology or fear, or a desire to protect offline incumbents. Because regulation tends to stifle or slow down innovation, we should impose regulatory measures only if they meet a proportionality test. Top-down regulation by the state does not meet this “necessity” test when there are reasonable technology-based or market-based alternatives.

2. BEST BUSINESS ARTICLE FOR CONCERTED PRACTICES

THE IMPLICATIONS OF ALGORITHMIC PRICING FOR COORDINATED EFFECTS ANALYSIS AND PRICE DISCRIMINATION MARKETS IN ANTITRUST ENFORCEMENT

TERRELL MCSWEENY, BRIAN O’DEA, Antitrust, Vol. 32, No.1, Fall 2017

When Congress enacted the Sherman and Clayton Acts over a century ago, the term “robot” did not exist. The framers of our antitrust laws would likely be amazed by the increasingly powerful and autonomous technologies, such as algorithms, machine learning, and artificial intelligence (AI) that have come to play a significant role in many firms’ competitive behavior. These technologies have the potential to deliver meaningful consumer benefits. For example, algorithms may enable firms to become more efficient and to provide consumers with personalized product recommendations. Big data and algorithms may also provide companies with insights that help them design better products and services.

We must understand the potential effects of intelligent, high-velocity pricing technologies on competition and adapt our enforcement approach to keep pace. For example, algorithmic pricing might contribute to overt collusion or facilitate tacit collusion. It is also possible, as we show in this article, that increasingly sophisticated price discrimination may lead to narrower relevant product markets, potentially increasing the chances that a merger will harm consumers in some relevant market.
3. BEST BUSINESS ARTICLE FOR UNILATERAL CONDUCT
DISTRICT COURT DENIES MOTION TO DISMISS FTC SECTION 5 COMPLAINT AGAINST QUALCOMM

GREG SIVINSKI, Competition Policy International, August 16, 2017

In 2017, the FTC sued Qualcomm for “unfair methods of competition” under Section 5 of the FTC Act. Underlying the FTC’s lawsuit is the premise that Qualcomm was never forced into negotiating a true “fair, reasonable and non-discriminatory” (FRAND) rate for its standard essential patents (SEPs).

Some key takeaways:

- A SEP-holder’s FRAND commitment constitutes an exception to the general antitrust rule that there is no duty to deal with competitors.
- Adjudicating a breach of FRAND may not involve a complicated rate-setting exercise. Judge Koh found Qualcomm’s royalty rate stayed constant over time despite (a) an increasing royalty base due to the introduction of additional technology in high-end smartphones apart from Qualcomm’s SEPs, and (b) the decreasing number of Qualcomm SEPs relative to the total SEPs necessary to make a wireless device. This suggests that the FTC may be able to prove a violation of FRAND without the need for complicated technical valuation evidence.
- The FTC stated a claim under Sections 1 and 2 of the Sherman Act, even though the FTC never expressly alleged such violations (or amended the complaint to do so).

4. BEST BUSINESS ARTICLE FOR MERGERS
EU MERGER CONTROL: THE DOW/DUPONT THEORY OF INNOVATION HARM

FIONA CARLIN, BILL BATCHELOR & GAVIN BUSHELL, Baker McKenzie Client Alert, October 2017

The European Commission’s innovation theory of harm in the Dow/DuPont decision appears to be a regulatory carte blanche. By virtue of this theory, any merger in concentrated IP-reliant, innovative sectors is open to challenge on the basis that it will impair innovation competition. The theory assumes that innovation competition will be harmed in “innovation spaces” or indeed sector wide. The decision relegated pro-innovation influences to a category of “efficiencies”, placing an impossible burden on the parties to prove the unknowable – how would innovation develop for as-yet-unknown future products absent the merger?

Despite a limited number of actual product overlaps, Dow/DuPont reportedly came within a hair’s breadth of prohibition. The price of clearance was high. The Commission demanded that DuPont’s global R&D function be divested.

But both legal and economic theory, as well as common sense, suggest that a negative presumption on innovation is untenable. The European Court of Justice has warned of the evidential burden that faces novel theories of harm where cause and effect is “dilulty discernible.” The Court has ruled against prior innovation-harm claims of the Commission precisely for lack of evidence. And a review of past authority decisional practice (Axalto/Gemplus, Navitaire/Amadeus, Tokyo Electron/Applied Materials (Germany), and indeed the high water mark US case, Genzyme/Novozyme (US FTC)) shows that regulators have been just as ready to find positive effects on innovation as negative ones.

Dow/DuPont, like so many EU merger cases, will not be tested in court as the parties settled rather than spend years in litigation. Absent judicial scrutiny, it is all the more important that the theory’s economic underpinnings are robustly debated. Any theory must be based on rigorous economic analysis grounded in an administrable legal framework. It should respect the need for legal certainty, fair appraisal of evidence and justiciability outcomes.
he past year has continued to see an increase in US case law developments in the area of pharmaceutical antitrust. This article focuses on the three types of pharmaceutical antitrust cases that have been most active. White & Case LLP has been active in defending clients in each of the three areas of pharmaceutical antitrust litigation.

First, the article addresses recent case law adjudicating reverse payment or pay-for-delay claims where an innovator pharmaceutical company allegedly provides financial inducement to a potential generic competitor to settle patent litigation concerning the innovator’s drug product.

Second, the article addresses so-called product-hopping antitrust claims against innovator pharmaceutical companies that introduce new versions of brand-name drugs facing generic competition.

Finally, the article addresses various challenges to pharmaceutical manufacturers’ pricing practices. Over the past year, enforcement agencies, private plaintiffs and legislators—with help from the media—have continued to pressure brand and generic pharma-

erecovery of damages from global cartel activity may not show up on the radar of many corporate counsel, but there are significant reasons that it should. From a business perspective, such offenses can be considered potential theft of hard-earned margin. Damages from price fixing, bid rigging, or other coordinated anticompetitive conduct—even at only a 10–12 percent overcharge—can add up quickly and constitute serious business harm that affects a business unit’s or company’s bottom line.

This article, co-authored by seasoned in-house counsel and outside plaintiffs’ antitrust litigators, provides a roadmap to these and other strategic decisions for in-house counsel to consider and discuss in finding the best approach for their companies.
Cross-border corporate transactions often require merger clearance by several competition authorities before they can be implemented. Most merger regimes are globally suspensory, i.e. the transaction may not be implemented internationally until all required national approvals have been obtained.

This may cause significant delays. In some cases, where it is crucial for the parties that at least parts of the overall transaction (e.g. relating to a particular country) are implemented by a particular date, the parties may try to resolve the situation by temporarily carving out from the overall transaction the part of the transaction in the country which has yet to issue clearance and having it held separately by the seller pending clearance. Unfortunately, only very few jurisdictions have specific legal requirements covering such carve-outs. Additionally, only a very limited number of published decisions by competition authorities deal with the subject.

The article outlines the possibilities for carve-outs in cross-border corporate transactions. It opens with a brief description of the suspension obligation and possible alternatives that may be worth considering before pursuing a sometimes complex carve-out. The article then outlines potential provisions to be included in a share (or asset) purchase agreement to cover a carve-out, before exploring the worldwide framework for carve-outs based on selected merger control regimes. The article demonstrates that, while competition authorities generally adopt a critical stance on the issue, a carve-out may be a real solution in certain circumstances.

Legal Professional Privilege stems from both the right to be “advised, defended and represented” and the right of defence. However, the scope of this right, as interpreted by the European Court of Justice, the European Commission and National Competition Authorities, has at times been controversial.

On a narrow interpretation of the jurisprudence concerning LPP, only certain categories of documents would be protected from disclosure during antitrust proceedings. The corollary of this narrow reading of the case law would be that the following documents would, allegedly, not be covered by LPP under EU law and could therefore be inspected and used by the European Commission and/or NCAs:

1. legal advice rendered by non-EU qualified counsel, regardless of the rules governing those communications in the jurisdiction in which they are made;
2. requests for legal advice made by a business person to their in-house lawyer, even where the in-house lawyer elects to convey that request for legal advice directly to outside counsel, in circumstances where the same request for legal advice, if made directly to the outside counsel, would undoubtedly be covered by LPP; and
3. legal advice provided by an in-house lawyer without the input of an external counsel.

As submitted in this contribution, properly assessed, including by reference to the principles of international law that govern the EC in the exercise of its powers, at a minimum, the first two of these categories of documents and arguably the third can and should be protected by LPP under EU law, consistent with the case law on which the EC relies.
Recent antitrust enforcement activity in China signals continued aggressive enforcement against "single firm" conduct—that is, actions by a single business, not in coordination with others.

On November 9, 2016, the State Administration of Industry and Commerce ("SAIC"), the Chinese antitrust agency responsible for enforcement against non-price-related anti-monopoly conduct, imposed a RMB 667.7 million fine (US$100 million) on Tetra Pak and its Chinese subsidiaries ("Company") (the SAIC penalty decision on the Company hereinafter "Decision"). According to SAIC, the Company abused its dominant position by means of tying, exclusive dealing, and loyalty discounts, violating China’s Anti-Monopoly Law. The conduct found to be abuses of dominance included incentives the Company employed—performance testing, liability of warranty, accumulative volume discount, and customized purchase requirement—to encourage customers that owned or leased the Company’s packaging equipment to use the Company’s own packaging materials and aftermarket service.

The Decision indicates that Chinese enforcement will continue in the area of single firm conduct, following on a record fine for price-related conduct, unfairly high licensing fees, and bundling imposed on another company by the National Development and Reform Commission, a Chinese enforcement agency, and another Chinese antitrust agency.

Concern is growing that the novel use of data and algorithms by business poses an existential threat to the competitive process. This article argues for a less categorical and alarmist view. While there certainly are theories that predict a softening of competition from an increased use of data and algorithms, other theories predict a sharpening of competition. We are currently in the middle of a “messy process” where, until an empirical consensus develops about the effects of data and algorithms on competition, many contradictory theories can be posited. It will likely take some time for that process to play out.
WHY A RANKING?

The quality and usefulness of antitrust newsletters and other professional publications vary greatly. Even though all this is going in the right direction due to increased competition among firms as well as among university competition law centers, users’ ability to read or browse such publications is indeed limited. There are just too many of these publications and too many similarities among them for users to be able to effectively assess what is worth reading or watching.

Ranking such publications is intended to guide users on which publications they should read or view first, depending on what they are looking for.

WHAT ARE THE CRITERIA USED TO RANK?

Antitrust professional publications are ranked according to 10 criteria:

Readership
Counsel Choice
Country Coverage
Case Coverage
Cartels
Mergers
Intellectual Property
Private Enforcement
Asian Antitrust
Website’s Accessibility

The assessment of the above categories is based on a combination of objective and subjective criteria.
antitrust client alerts and other antitrust professional publications (such as newsletters, blogs, memoranda, etc.) have been reviewed by Concurrences in order to make it easier for practitioners to select and read only those publications that are more interesting and relevant to their practice.

The Global Ranking below is based on the 10 sub-rankings mentioned on the next page.
There are 10 Rankings by category: In-house Counsel's Choice, Readership, Country Coverage, Case Coverage, Cartels, Mergers, IP & Antitrust, Private Enforcement, Asian Antitrust, and Accessibility. All Rankings results are available on the Awards website at awards.concurrences.com.
### CARTELS

This ranking is based on the number of articles concerning cartels in 2017 publications made available on each firm’s website.

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### ASIAN ANTITRUST

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### ACCESSIBILITY

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<td>21</td>
<td>SIDLEY AUSTIN</td>
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<td>22</td>
<td>SHEPPARD &amp; STERLING</td>
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<td>23</td>
<td>SKADDEN ARPS</td>
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<td>24</td>
<td>WINSTON &amp; STRAWN</td>
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<td>DECHERT</td>
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<td>ASHURST</td>
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<td>BAKER MCKENZIE</td>
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<td>29</td>
<td>SIDLEY AUSTIN</td>
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<td>30</td>
<td>HAUSFELD</td>
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</table>
RECEPTION
& DINNER

1 BILL KOVACIC (GWU LAW), MAUREEN OHLHAUSEN (FTC)
2 DANIEL SOKOL (UNIVERSITY OF FLORIDA), DANIEL RUBINFELD (NYU LAW)
3 JAMES MURRAY (INTEL), LIZ KRAUS (FTC), DANIEL BITTON (AXINN)
4 ROSIE LIPSCOMB (GOOGLE)
5 NIKHIL SHANBHAG (FACEBOOK)
6 NICOLAS CHARBIT (CONCURRENCES), JOHANNE PEYRE (PEARSON)
7 TIMOTHY LAMB (FACEBOOK)
8 BILL KOVACIC (GWU LAW), CAROLINA MALHADO (CONCURRENCES)
1 CRA
2 BAKER MCKENZIE
3 CONCURRENCES
4 CONCURRENCES
5 DOUGLAS GINSBURG (US COURT OF APPEALS)
6 RAINER WESSELY (DG COMP)
7 ANNA WU HUNG-YUK (COMPETITION COMMISSION, HONG KONG)
8 GAIL LEVINE (UBER)
9 TIMOTHY BOYLE (EATON)
10 BEAU BUFFIER (NYS OFFICE OF THE ATTORNEY GENERAL)
**TESTIMONIALS**

**BOARD**

"This year’s winning articles were the best crop ever; I think the Awards have increased the quality of antitrust writing."


"I am glad that this new knowledge is recognized by the Antitrust Writing Awards, because these pieces of work help us enforcers be our best."

**Alejandra Palacios Prieto**, Federal Competition Commission of Mexico (2018)

"It was an honor to be able to participate in recognizing so many worthy candidates for their outstanding contributions advising the business community on key recent developments in antitrust law."

**Brent Snyder**, Hong Kong Competition Commission (2018)

"With their outstanding contributions the authors play a key role in helping the antitrust community to keep ahead of global developments. The Antitrust Writing Awards are a great forum that pays tribute to their excellent work."

**Andreas Mundt**, Bundeskartellamt (2016)

"By recognizing superior writing in academia and practice, the Antitrust Writing Awards enhance the indispensable intellectual infrastructure of our field."


"The Antitrust Writing Awards are the right event, on the right issue, at the right time. I thank George Washington University Law School and the Institute of Competition Law for launching this initiative."

**Frédéric Jenny**, OECD Competition Committee (2015)

"The Antitrust Writing Awards are a unique opportunity to read some of the best academic and business articles of the year. I thoroughly enjoyed the different perspectives on antitrust that each article provided, as well as the well-crafted arguments put forward by their talented writers."


"I truly enjoyed taking part in the 2013 Antitrust Writing Awards, which serves an important function in helping promote quality articles in the antitrust field. It is also an illustration of the cooperation at play between antitrust publications to ensure the greatest circulation of academic and professional expertise."

**Bruno Lasserre**, French Competition Authority (2013)
ACADEMIC STEERING COMMITTEE

"This is a wonderful event that celebrates diverse and important writing about a wide range of competition law matters and in that way increases the influence of thoughtful scholarship on the development of competition law in the US and elsewhere. My work on the editorial committee has given me access to many articles that I would not otherwise have read and from which I have learned a great deal."


"The Antitrust Writing Awards are a fantastic means of disseminating and encouraging the best competition law and policy research globally. They are one of a kind in recognising and awarding excellence in competition law and economics scholarship."

Pinar Akman, University of Leeds (2018)

"The Antitrust Writing Awards mark and celebrate the vibrancy of the international antitrust community. They promote shared discourse and learning and help to foster excellence in research and writing by academics, practitioners and competition authorities. Judging the award submissions is a pleasurably invidious task given their consistently high calibre. I congratulate the steering committee, Concurrences and the George Washington Centre on this ongoing initiative."

Caron Beaton-Wells, University of Melbourne Law School (2014)

"Year after year, the Antitrust Writing Awards shed light on the top quality antitrust scholarship. The nominations serve as a guide to the most recent must-reads for those interested in competition law developments."

Sandra Marco Colino, The Chinese University of Hong Kong (2018)

"The Antitrust Writing Awards is an opportunity to connect thought leaders with a wider antitrust community to better impact policy."

Daniel Sokol, University of Florida (2018)

"The awards process is a tremendous undertaking, and it is of real value for the participants and for the development of competition law around the world."

David Gerber, Chicago-Kent College of Law (2016)

"The Antitrust Writing Awards are a great service to the antitrust community. By collecting the best writing in the field of both practitioners and academics, the Writing Awards create a one-stop shop that saves tremendous amounts of time, keeps readers fully cognizant of the best new work, and provides recognition to those who make the effort to share their expertise with antitrust lawyers across the globe."

Clifford A. Jones, University of Florida Levin College of Law (2014)

"The awards ceremony was a rewarding event in more ways than one. It was a pleasure to see these outstanding authors from all over the world and to hear a synthesis of their work which has contributed so much to the law and its practice."

Eleanor Fox, New York University School of Law (2013)

"There is a great deal of writing in the area of antitrust, ranging from lengthy scholarly articles to short, timely notes on key cases. The Antitrust Writing Awards uniquely embrace and celebrate that scope for the benefit of all workers in the field."

Janusz A. Ordover, New York University (2012)
The Antitrust Writing Awards promote valuable interaction among antitrust experts bringing the best possible selection of antitrust writings to the reader. As in-house counsel and member of the Business Steering Committee I truly value the useful insights and guidance offered by the articles I had the honor and pleasure to evaluate.

Anna Rosa Cosi, SanDisk (2016)

The Antitrust Writing Awards bring together practical and theoretical scholarship that benefits everyone in the field. The focus on both scholars and practitioners from all over the world realizes economies of both scope and scale when addressing antitrust concerns. It was a pleasure to be involved in this year’s activities.

Timothy Boyle, Eaton (2016)

I commend the organisers for recognizing professional writing as a specific category. This initiative will, I hope, increase the quality and depth of such writing to provide the practical complement to academic articles.

Mathew Heim, Qualcomm (2015)

The quality and conciseness of the Business Articles, as well as the experience and knowledge which their authors are sharing, are of great use to corporate lawyers.

Jean-Yves Art, Microsoft (2013)

The Antitrust Writing Awards bring together the Academic and the Business world from many countries, contribute to a better understanding of other legal cultures and thereby promote the global development of Competition law.

Olaf Christiansen, Bertelsmann (2013)

Healthy competition doesn’t end with private businesses. Awards and rankings drive innovation at agency level, because they make achievements in the area of antitrust enforce- ment transparent. The Antitrust Writing Awards have reached international recognition and reach a wide audience of business, academia and agencies allowing for a fruitful contest of ideas, initiatives and best practices.

Natalie Harsdorf, Federal Competition Authority (Austria) (2018)

Thank you for a putting together such a lovely evening. It was great to connect with old colleagues and make new acquaintances, especially across the ocean.

Ceren Canal Aruoba, Cornerstone Research (2018)

The 2018 Antitrust Writing Awards put on be Concurrences was a wonderful way to celebrate great writing in antitrust as well as connect with old a new friends alike.

Emma Kelly, TransPerfect Legal Solutions (2018)

The Concurrences Awards Dinner is an annual opportunity to recognize superb writing and analysis in the global competition law sphere. With first-rate organization and planning by the Concurrences team and GWU Law School, this premier event brings practitioners, academics and senior agency officials together in a lively social setting. The dinner and awards ceremony have become an essential part of the competition community calendar.

Mel Marquis, European University Institute (2018)
It was a pleasure to participate at a prestigious Antitrust Writing Award Gala Dinner.”


I was honored to receive an award for my article with Carl Minniti on citizen petitions. Our empirical study showed that there is a concern that the activity, which is designed to raise safety concerns, has been used by brand drug companies to delay generic entry. It is a true honor to receive such an award, which will hopefully raise awareness of this conduct. And I am grateful to Concurrences and GW for their creation of these awards and all of the work they do every year to run the competition and host a delightful dinner. In highlighting scholarship that is particularly deserving of attention, Concurrences and GW provide a real service to the antitrust community.”

Michael Carrier, Rutgers School of Law (2017)

The Antitrust Writing Awards not only brings well deserved recognition to those who have a true passion for competition law but more importantly, provides the priceless benefit of challenging our intellect with their theories, knowledge, expertise and talent.”


The Competition Bureau was honoured to receive the “Best Innovative Soft Law” distinction for its Intellectual Property Enforcement Guidelines. Thank you to the Antitrust Writing Awards for increasing knowledge and promoting a shared understanding of the best, most forward-thinking and innovative practices within the antitrust community.”

Vicky Eatrides, Deputy Commissioner of Competition, Competition Bureau of Canada (2017)

As a 2018 academic writing winner for my work with Michal Gal and a former member of the Academic Steering Committee I am appreciative of the highly successful effort that Concurrences and GW Law have made to encourage and to reward writing efforts by incredible area of academics and practitioners.”

Daniel Rubinfeld, NYU Law (2017)

The jury reviewed and selected a great number of publications with real diligence. This not only rewards the authors, but also is very helpful for practitioners, because it highlights the most interesting and influential papers from an increasing flood of publications that is more and more difficult to follow. We were honoured to receive an award for our firm’s alert memoranda and for several articles authored by lawyers from our firm, and we are grateful to Concurrences for this excellent initiative.”

Maurits Dolmans, Cleary Gottlieb Steen & Hamilton (2016)
Many thanks to Concurrence and its distinguished board for recognizing practical pieces as well academic articles on competition law and policy. I was very pleased and surprised that my article on global antitrust compliance was selected in the Cross Border business category. In this particularly challenging and ever changing area, we all have much to learn as we seek to understand and comply with the competition laws of other countries entering the global arena.”


The Awards celebrate excellence in an area that clients find important and where most competition lawyers practice every day: explaining in plain language what the law is and where it is—or should be—heading.”

Steve Cernak, Schiff Hardin (2014)

We are pleased with the significant contribution that the Antitrust Writing Awards program makes to the development and promotion of antitrust scholarship and practical business literature.”

J. Mark Gidley, White & Case (2013)

It was an honor to have our paper reviewed and considered by such a distinguished panel of luminaries, with such leading thinkers in both Europe and the United States. The concept of encouraging excellence in both academic and more practical writings on competition is an excellent one, and Concurrences has done a remarkable job in creating a process for doing so.”


The Antitrust Writing Awards represent a unique initiative to reward pure and applied research in antitrust. Academics and practitioners making valuable contributions to the literature see their names recognised and their work publicized. On a personal front, I have enjoyed reading some of the papers that were selected this year, most of which I would have overlooked absent this initiative.”

Jorge Padilla, Compass Lexecon (2013)
RULES

A. AIM

The aim of the Antitrust Writing Awards is to promote competition scholarship and to contribute to competition advocacy. Each year, the Antitrust Writing Awards Jury contributes to this achievement by selecting the best writings published. A Board and two Steering Committees, composed of leading enforcement, academics and counselors, participate impartially in this selection and seek to reward the most meaningful antitrust publications of the past year.

The Antitrust Writing Awards consist of:

> “Best Articles”: Awards for the best academic publications (peer-reviewed or student journals) and best business publications (non-peer-reviewed journals, briefs, memoranda, posts etc.) published by individual authors.

> “Most Innovative Soft Law”: Selection of the most innovative non-enforcement tools published by enforcement agencies such as guidelines, market studies, white papers, etc.

> “Best Newsletters”: Ranking of the best antitrust newsletters published by law firms.

B. BEST ARTICLES

1. ELIGIBILITY

Articles eligible must have been accepted for publication, published or released in print or electronic format in English between January 1st and December 31st, 2017. Articles can be co-authored. Authors eligible are individuals. Articles must be made freely available on the Internet (SSRN, academic websites...) or on the Awards website for the purpose of the Awards in order to allow the Jury to vote. Articles are classified in Academic and Business categories. The Academic category comprises long articles published or accepted for publication in academic peer-reviewed journals, chapters of academic books or student journals, etc. whereas the Business category comprises short articles published in professional publications, such as non-peer reviewed journals, briefs, memoranda, blogs, etc. Each of these categories is sub-divided as follow:

- General Issues
- Concerted Practices: including criminal cartel enforcement, civil federal, state, and private enforcement, treatment of joint ventures, vertical restrictions
- Monopolization/Unilateral Conduct: including attempted monopolization and invitations to collude
- Mergers: substantive merger analysis, merger enforcement and guidelines
- Intellectual Property: issues relating to antitrust and intellectual property
- Private Enforcement: issues relating to antitrust private enforcement
- Cross-border Issues
- Procedural Issues
- Asian Antitrust: issues relating to antitrust enforcement in Asia (China, Japan, India...)
- Economics: including economic theories, models, and statistical tools used in the antitrust field

2. SELECTION & VOTING PROCEDURE

The Editorial Committee selects two pools of eligible academic and business articles based on Concurrences readers’ submissions and the Steering Committees’ suggestions. The readers and the Steering Committees will vote on their favorite articles, resulting in a short list of 40 finalists (20 Academic and 20 Business). Finally, the Board votes for the 20 award-winning articles.

Articles are judged on writing, scholarship, originality, practical relevance and the contribution they make to competition advocacy. There is a winning-award article for each of the sub-categories mentioned in 1. above, for each of the Academic and Business categories. However, the Board reserves the right to award fewer Awards than planned if the articles under consideration do not meet the high standards of the Awards.

C. BEST SOFT LAW

The “Best Soft Law” selection aims to contribute to developing antitrust culture and awareness. Alongside the IGN work, it seeks to support international antitrust advocacy by drawing attention towards the most meaningful competition agency practices. It aims at singling out some of the most interesting administration practices that could be usefully applied more generally. The “Best Soft Law” is neither an award nor a ranking but a mere selection of some of the soft laws.

1. ELIGIBILITY

Eligible publications are non-enforcement tools such as guidelines, market studies, white papers, etc. issued by competition agencies between January 1st and December 31st, 2017. Publications are judged according to practical relevance, innovation and the contribution they make to competition advocacy. English versions or detailed English summaries are required.

2. SELECTION & VOTING PROCEDURE

The Editorial Committee invites competition agencies to submit their best soft law documents. The Steering Committees and Readers then vote for the 5 best documents.

D. BEST NEWSLETTERS

Whereas the Best Articles Awards reward individual articles, the Best Newsletters Awards and Ranking rewards antitrust newsletters and related free access professional publications considered overall. The Best Newsletters Awards and Ranking’s goal is to promote competition advocacy by selecting the best of these publications in order for counsels to know what they should read first, depending what they are looking for.

1. ELIGIBILITY

Antitrust professional publications include newsletters, client briefs, memoranda, blogs etc. made freely available on websites of law firms. Publications eligible must have been released in English between January 1st and December 31st, 2017. Authors eligible are corporate entities. Publications are ranked according to 10 categories.

> Readership: Award and Ranking based on number of counsels who acknowledge receiving the surveyed publications (based on a questionnaire sent to over 6,500 in-house counsel)

> Intellectual Property: Ranking of the best antitrust newsletters published in the publications of each firm

E. TERMS

1. PUBLICATION

The 2018 Antitrust Writing Awards results were made public at the Gala Dinner which took place on April 10th, 2018, the day before the ABA Antitrust Spring Meeting in Washington, DC. The Antitrust Writing Awards results were announced via social media and emails to subscribers to Concurrences Review and e-Competitions Bulletin. Any in-house counsel or general counsel dealing with antitrust law is eligible to vote. Firms considered in the ranking can direct their clients to the online questionnaire in order to include in the survey their own contacts’ votes. A business email is requested in order to make sure only counsels vote.

2. TERMS OF USE AND PRIVACY POLICY

Individual votes remain confidential. Visit our website to read the Terms of Use and our Privacy Policy.

3. MISCELLANEOUS

The Antitrust Writing Awards are managed by Concurrences Review. Concurrences Review, acting as the event manager, works to ensure that a sufficient number of quality articles and publications are submitted and surveyed, checks eligibility and organizes the Awards ceremony. Any unexpected issues will be dealt with by the Editorial Committee of the Antitrust Writing Awards.
Established in 1865, The George Washington University Law School is the oldest law school in Washington, DC. The school is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. The George Washington University Law School founded the Competition Law Center (CLC) in March 2008 with a generous cy pres award from the United States District Court for the District of Columbia. The CLC promotes the effective design and implementation of competition law systems in the United States and abroad.

Concurrences is a print and online quarterly peer-reviewed journal dedicated to EU and national competitions laws. Launched in 2004 as the flagship of the Institute of Competition Law, the journal provides a forum for both practitioners and academics to shape national and EU competitions policy. Its articles and research programs have influenced legal theory and practice, occasionally effecting change in public policy or specific cases.

In addition to the journal, Concurrences publishes e-Competitions, an online resource that provides consistent coverage of antitrust cases from 55 jurisdictions, organized into a searchable database structure. Concurrences is also the publisher of several antitrust books inter alia, “Douglas H. Ginsburg Liber Amicorum: An Antitrust Professor on the Bench” and “2018 Competition Law Digest - A Synthesis of EU and National Leading Cases”

The Survey was sent from November 14, 2017 to December 4, 2017 to 6,500 in-house counsels. The counsels interviewed cover more than 15 industries. Among these counsels, 25% are General Counsels and 75% Antitrust Counsels. Individual answers are kept confidential; only aggregated data are provided herein.

Survey Coverage per Geographical Area

Survey Coverage per Industry

Survey Coverage: Represented Corporations (excerpt)

Aerospace/Defense
- Airbus, Boeing, Dassault, EADS, Safran, Sncma, Thales...

Agriculture/Food Products
- AB-InBev, Coca-Cola, Baccardi, Kraft, Nestle, Panzani, PepsiCo, Saint Louis Sucre...

Automobile
- Ford, General Motors, Nissan, PSA, Renault, Toyota, Volkswagen, Volvo...

Energy
- American Electric Power, BP, E-On, EDF, Exxon, Framatome, GDF Suez, IIP, Powernext, RTE, Shell, Suez Tractebel, Total...

Financial Services/Insurance

Entertainment
- 21st Century Fox, Clear Channel, Time Warner, Viacom, Walt Disney, Warner Music...

Information Technology
- Amazon, Apple, Ericsson, Google, Hewlett-Packard, IBM, Iliad, LD Com, Microsoft, Nexans, Oracle, Qualcomm, Rim, Samsung, Sony, Spot, Sun Microsystems, Symantec...

Luxury
- Burberry, Chanel, Coach, Hermes, Lacoste, L’Oreal, LVHM, PPR...

Media

Other Industry

Pharmaceuticals/Chemical Industry
- Abbott, Aventis, AstraZeneca, Bayer, BASF, Biogen, Colgate, Glaxo, Dufour de Neuville, Ecolab, GlaxoSmithKline, IMS, Ipsen, Johnson and Johnson, Monsanto, Novartis, Pfizer, Procter & Gamble, Rhodia, Sanofi, Servier, Solvay, Unilever...

Telecommunications/Postal Services
- Alcatel, AT&T, Belgacom, British Telecom, Bouygues Telecom, Cegetel, Chronopost, Ermel, Etnotel, Geopost, La Poste, Neopost, Orange, SFR, Rom Telecom, Sita Aeria, TDF, Telecom Italia, T-Mobile, Verizon...

Transports
- ADP, Air France, American Airline, British Airways, Chargeurs Interlining, Eurotunnel, SNCF, Thalys, Virgin, United Airlines...

Other Services
- Altran, ASF, Auchan, Aviva, Bouygues, Brinks, Bwin, Capgemini, Carrefour, Carlson Wagonlit, Club Med, FFF, Fnac, ILEC, Ivesco, JC Decaux, Manpower, Mangas Gamin, MEDEF, LFP, Partouche, Pressatalis, Price Minister, PMU, Publicis, Saur, Sanef, Sodebo, Sothebys, Vedotits, Veolia, Vivendi, SAP, Sodexo, Suez, Walmart...
> This Report summarizes the results of the Survey designed by Concurrences Review for the 2018 Antitrust Writing Awards.

> The Aim of the Survey is to assess in-house counsel's readership and choices when it comes to antitrust client alerts released by law firms and related professional publications such as newsletters, briefs, memoranda, etc.

> This Survey was sent from November 14, 2017 to December 4, 2017 to 6,500 general counsels and antitrust counsels in the US, Europe, and abroad, covering more than 15 industries.

**> The Survey leads to 6 key findings:**

- **97%** of in-house counsels receive antitrust client alerts (see p. 5).
- **95%** of in-house counsels link the quality of the client alerts to their opinion of law firms (see p. 9).
- **42%** of in-house counsels have contacted a given lawyer at least once after reading his/her client alerts. 45 % have retained him/her (see p. 9).

**The shortcoming most commonly cited is the insufficiency of practical orientation and relevance** (see p. 9).

**71%** of in-house counsels find client alerts relevant—to some extent—to their practice (see p. 8).

**33%** of client alerts are just browsed (and not read); carefully crafting titles is key (see p. 6).

> An Appendix lists 14 recommendations on format and content expressed by in-house counsels (see pp. 42).
WHY A SURVEY?

This is the first survey and ranking of Antitrust Professional Publications of its kind, i.e., publications such as client alerts, newsletters, briefs, memoranda, etc., released by law firms. While the number of these publications is constantly increasing, their quality and worth vary greatly. At the same time, clients have limited time to search, browse, and read such publications.

This Survey report is meant to achieve a two-pronged result.

> First, it may serve as a guide for recipients of Antitrust Professional Publications (i.e., in-house counsels) in order to make it easier for them to select and read only those publications that are more interesting and relevant to their practice.

> Second, this report also provides feedback for authors of Antitrust Professional Publications (i.e., law firms) as it includes qualities, shortcomings, and other comments made by in-house counsels on how newsletters and alerts should be written.

The complete results of this Survey are summarized in the following pages.

There are around 80 Antitrust Professional Publications published on a weekly, monthly, or quarterly basis. The Survey limits itself to the most 30 important ones viewed on a global scale.

List of Law Firm Publications Reviewed

- Allen & Overy
- Arnold & Porter
- Ashurst
- Baker McKenzie
- Cleary Gottlieb
- Clifford Chance
- Covington & Burling
- Davis Polk
- Dechert
- Freshfields
- Gibson Dunn
- Hausfeld
- Herbert Smith Freehills
- Hogan Lovells
- Jones Day
- Kirkland & Ellis
- Linklaters
- Mayer Brown
- McDermott
- Norton Rose Fulbright
- Proskauer
- Shearman & Sterling
- Sheppard Mullin
- Sidley Austin
- Simmons & Simmons
- Skadden Arps
- Slaughter and May
- Weil Gotshal & Manges
- White & Case
- Winston & Strawn

CONTACT

If you want to learn more about this Survey Report and the Newsletters Ranking, contact awards@concurrences.com
INTERPRETATION OF RESULTS

The Survey included 26 questions aimed at assessing the in-house counsels’ opinion of Antitrust Professional Publications in relation to their features, qualities and defects, and practical usage. The Survey is divided in 2 parts: Part 1 deals with Facts, Part 2 deals with Assessment.

1. FACTS

> QUANTITY

The Survey first asked how many Antitrust Professional Publications are received by each responding in-house counsel. The most striking result is that all interviewed in-house counsels receive at least one Antitrust Professional Publication.

> FREQUENCY

The Survey then focused on how often Antitrust Professional Publications are released, sent out and thus received by in-house counsels. 20.3% Antitrust Professional Publications are released on a weekly basis, 3.4% are released on a monthly basis, which differ from 2016, when 18.4% were weekly and 14.3% were monthly.

> CATEGORIES: GENERAL VS. SPECIALIZED

As to the type of Antitrust Professional Publications, as shown by the chart at the right, 22% are general antitrust (i.e., covering various antitrust issues), while only 32.2% are specialized (i.e., dealing only with specific issues such as Antitrust & IP or Antitrust in Asia, etc.), which represents a shift from 2016 when 18% were general and 24.5% specialized.

> In-house counsels are subject to intense marketing from numerous law firms. 35.7% of respondents get between 5 and 8+ Antitrust Professional Publications. This number is lower than in 2016, when 42.5% of the respondents received 5 or more Antitrust Publications. Consequently, the number of people who receive between 1 and 4 antitrust alerts has increased from 57.4% to 60.9%.

> The option of not publishing - or not sending - any type of Antitrust Professional Publications should be carefully assessed by law firms as their clients or prospects will be reached by other firms in any case.

How many different Antitrust Professional Publications do you receive?

How often do you receive Antitrust Professional Publications?

Are these publications general - i.e., covering various business law issues - or specialized in antitrust issues?
> TIME OF READING

When asked when they usually read the publication, a large majority of the in-house counsels try to read it either the same day (16.9%) or during the week they receive it (64.4%). Both these numbers are lower than in 2016, when 24.5% read it on the same day and 61.2% during the week they receive it.

> USAGE: READING VS. SAVING / PRINTING

The Survey explored more practical habits of the interviewed pool when it comes to Antitrust Professional Publications. Readers were asked what they usually do when receive the alert: 81% of respondents either read it or browse titles (an increase from 2016’s 72%), while 11% and 7.5% save or print it respectively (in 2016, 17% and 11% saved or printed it, respectively).

> BROWSING

The Survey also questioned if in-house counsels would visit law firms’ websites to browse their publication without having received them. 35.6% of respondents admit to never going spontaneously to firms’ websites to look for articles, similarly to 2016’s 38.8%.

> FORWARDING

When asked whether readers forward the alerts received, the majority of the respondents (78%) state that they may forward it to other colleagues, should the alerts be relevant in terms of content and quality. In 2016, 71% of respondents forwarded the publications, which means there has been an increase in interest.

> Antitrust Professional Publications are read within a maximum of a week and then forgotten or disposed of.

> Over 30% of articles are just browsed. Crafting perfect titles is of key importance.

> Antitrust Professional Publications are the most common way – with lawyer profiles – of bringing in-house counsels to visit firms’ websites.

> The Survey shows that almost 80% of Antitrust Professional Publications are forwarded within the recipient’s network. Swifter dissemination could be achieved via social media share buttons such as «Tweet This» or «Like This».

> Do you forward the Antitrust Professional Publications?

> Do you visit law firm websites to browse their publications without having actually received them?

> What do you generally do with these publications?
> **BENEFITS**

Interviewed in-house counsels highlight the fact that the benefits most appreciated in Antitrust Professional Publications are that they attract readers’ attention to new points of law (+60%) as well as providing a general update on relevant legal issues (+65%). These numbers are very similar to the previous year, when both replies were also higher than 60%.

> In-house counsels mainly use Antitrust Professional Publications to keep abreast of new legal developments in their field of expertise.

> In-house counsels also find substantial benefits in learning about other areas of antitrust law. These publications are also used to bring basic knowledge to non-specialists in a particular field of antitrust law.

> What are the benefits of Antitrust Professional Publications?

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Percentage</th>
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<tr>
<td>They provide general updates</td>
<td>72%</td>
</tr>
<tr>
<td>They provide new insights on risks relevant to my business</td>
<td>62%</td>
</tr>
<tr>
<td>They attract my attention to new issues</td>
<td>62%</td>
</tr>
<tr>
<td>They inform me about specialized areas of legal practice</td>
<td>38%</td>
</tr>
</tbody>
</table>

> **SENDERS: TOP 30 LAW FIRMS**

The Survey also looked at the most common Antitrust Professional Publications received. The chart below lists the 30 most popular ones.

> The Baker McKenzie Client Alert is the most commonly received antitrust professional publications by respondents’ in-house counsels (47%), maintaining its leadership from last year.

> Clifford Chance (45%), Freshfields (30%), and Allen & Overy (27%) are close behind.

From which firms do you receive Antitrust Professional Publications?

<table>
<thead>
<tr>
<th>Firm</th>
<th>Percentage</th>
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<tr>
<td>Baker McKenzie</td>
<td>48%</td>
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<tr>
<td>Clifford Chance</td>
<td>36%</td>
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<tr>
<td>Freshfields</td>
<td>30%</td>
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<tr>
<td>Allen &amp; Overy</td>
<td>28%</td>
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<tr>
<td>Hogan Lovells</td>
<td>24%</td>
</tr>
<tr>
<td>Cleary Gottlieb</td>
<td>22%</td>
</tr>
<tr>
<td>White &amp; Case</td>
<td>22%</td>
</tr>
<tr>
<td>Herbert Smith Freehills</td>
<td>22%</td>
</tr>
<tr>
<td>Jones Day</td>
<td>19%</td>
</tr>
<tr>
<td>Linklaters</td>
<td>18%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Firm</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Norton Rose Fulfright</td>
<td>15%</td>
</tr>
<tr>
<td>Covington &amp; Burling</td>
<td>15%</td>
</tr>
<tr>
<td>Skadden Arps</td>
<td>13%</td>
</tr>
<tr>
<td>Ashurst</td>
<td>12%</td>
</tr>
<tr>
<td>Simmons &amp; Simmons</td>
<td>10%</td>
</tr>
<tr>
<td>McDermott</td>
<td>10%</td>
</tr>
<tr>
<td>Mayer Brown</td>
<td>7%</td>
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<tr>
<td>Shearman &amp; Sterling</td>
<td>7%</td>
</tr>
<tr>
<td>Sidley Austin</td>
<td>7%</td>
</tr>
<tr>
<td>Gibson Dunn</td>
<td>6%</td>
</tr>
<tr>
<td>Dechert</td>
<td>6%</td>
</tr>
<tr>
<td>Weil Gotshal &amp; Manges</td>
<td>6%</td>
</tr>
<tr>
<td>Arnold &amp; Porter</td>
<td>5%</td>
</tr>
<tr>
<td>Kirkland &amp; Ellis</td>
<td>3%</td>
</tr>
<tr>
<td>Sheppard Mullin</td>
<td>3%</td>
</tr>
<tr>
<td>Slaughter and May</td>
<td>2%</td>
</tr>
<tr>
<td>Hausfield</td>
<td>2%</td>
</tr>
<tr>
<td>Proskauer</td>
<td>2%</td>
</tr>
<tr>
<td>Winston &amp; Strawman</td>
<td>2%</td>
</tr>
<tr>
<td>Davis Polk</td>
<td>1%</td>
</tr>
</tbody>
</table>
2. ASSESSMENT

> QUALITY

A large majority of in-house respondents (69.5%) consider the Antitrust Professional Publications they receive "good", and 16.9% "excellent". This shows that there has been some improvement in the publications since only 2% of respondents in 2016 had qualified them as "excellent".

> Over 85% of in-house counsels claim to be satisfied with the quality of the law firms’ publications, a surprisingly high percentage in view of the sometimes low consideration shown by lawyers themselves for their own production.

> RELEVANCE

The Survey inquired whether Antitrust Professional Publications were relevant to in-house counsels’ practice. Although a majority of in-house counsels acknowledged that Antitrust Professional Publications were relevant to their practice (71.2%), nearly 30% claimed that their relevance varies.

> Although the relevance rate is fairly high, there is substantial room for improvement. An Appendix to this Report provides 15 in-house counsels’ recommendations on how to improve relevance.

> Data shows that for some law firms there is a strong connection between the readership rate and the relevance rate.

The charts below lists 30 law firms’ Antitrust Professional Publications sorted by order of relevance according to the respondents.
> **SHORTCOMINGS**

The Survey then offered a list of possible shortcomings of antitrust professional Publications as perceived by in-house counsels: Practical orientation, Length (mainly too long), Jurisdictions, Quality, and Promptness. Results are as follows:

- **Practical orientation is the issue.**
- **Quality is not the most significant issue where alerts are concerned. It is listed only as 4th.**
- **More prompt publication would be welcome.**
- **Opinions diverge on length, with many respondents saying they wish the publications were shorter and more to the point.**
- **A greater variety of jurisdictions covered is expected.**

What are the shortcomings of Antitrust Professional Publications?

- **Practical orientation**
  - Excellent: 55%
  - Good: 28.8%
  - Average: 16.2%
  - Not at all: 3%

- **Length**
  - Excellent: 57.6%
  - Good: 23.1%
  - Average: 5.1%
  - Not at all: 3%

- **Jurisdiction coverage**
  - Excellent: 32.20%
  - Good: 44.1%
  - Average: 18.8%
  - Not at all: 3%

- **Quality**
  - Excellent: 40.7%
  - Good: 22%
  - Average: 10.1%
  - Not at all: 1.7%

- **Promptness**
  - Excellent: 45.8%
  - Good: 44.1%
  - Average: 10.1%
  - Not at all: 1.7%

Other
- 1%

> **LAW FIRMS’ REPUTATION**

In connection to quality, it was also asked whether Antitrust Professional Publications contribute to the reputation of law firms. A leading trend (95%) confirms that in-house counsels link the quality of the publications to their opinion of law firms, which is higher than last year, when 87% of respondents claimed the quality of publications was related to their opinions of the law firms.

According to the vast majority of in-house counsels, the quality and relevance of Antitrust Professional Publications directly affect the opinion they have of the law firms.

What do publications from a given firm contribute to your opinion of that firm?

- **A lot**: 51%
- **Somewhat**: 32.20%
- **A little bit**: 10.1%
- **Not at all**: 6.8%
- **Other**: 1%

> **BUSINESS CONTACT / HIRING**

Furthermore, the Survey asked about what happens after the alert is sent and read. Has the reader ever contacted the author of the publication?

- **Have you ever contacted the author of a publication after reading it?**
  - Never: 40.7%
  - Often: 32.20%
  - Sometimes: 18.8%
  - 1.7%: 3%

- **Have you ever retained such author after reading his publication?**
  - Never: 10.1%
  - Sometimes: 46.8%
  - Often: 44.1%
14 RECOMMENDATIONS
BY IN-HOUSE COUNSELS

1. Advertise more the newsletters so in-house counsels are more aware about them.
2. Focus on important cases; breaking news is sufficiently covered in other outlets.
3. Be more straightforward; point out the takeaways upfront, short and clear.
4. Have more practical advice: how might a new decision be applied in the future? What consequences does a new decision have?
5. Include recommendations aimed at Compliance Officer where relevant.
6. Have a great Executive Summary, emphasizing the essential information.
7. Compare analyses amongst key jurisdictions.
8. Consider writing on general issues, not only case summaries.
9. Cover covering more jurisdictions outside the OECD markets such as China and Korea.
10. Propose coverage by business sectors (such as chemical sector and environmental issues, i.e. energy, extraction etc.).
11. Have a given section dedicated to M&As.
12. Diversify contributors: consider having outside contributors.
13. Have more opinions about recent cases and not only news coverage. Improve readability on hand-held devices.
14. Include graphs to better illustrate some points.

1 Some in-house counsels mentioned they were not aware of the existence of many of the newsletters surveyed.
CONCURRENCES BOOKS

Choice: A New Standard for Competition Law Analysis?

L’Union européenne et le droit international des subventions

William E. Kovacic: An Antitrust Tribute

Competition Case Law Digest: A synthesis of EU and national leading cases

Competition Law on the Global Stage: David Groeger’s Global Competition Law in Perspective

Global Antitrust Economics: Current Issues in Antitrust and Law & Economics

Antitrust in Emerging and Developing Countries: Asia, Brazil, China, India, Mexico...

Buyer Power in EU Competition Law

Les pratiques restrictives

A Scot without Borders

Google, la presse et les journalistes

Grands arrêts du droit de la concurrence

EU Law and Life Sciences

WWW.CONCURRENCES.COM
Douglas H. Ginsburg

An Antitrust Professor on the Bench

Liber Amicorum

Volume I

2019 AWARDS: NOW OPEN FOR SUBMISSIONS

The Antitrust Writing Awards Editorial Committee is currently selecting papers for the 2019 Awards. Eligible papers need to be published or accepted for publication in 2018. To submit a paper, email a pdf version or a link to the article to awards@concurrences.com. Results will be announced at the occasion of the Gala Dinner to take place on March 26, 2019 in Washington, DC.