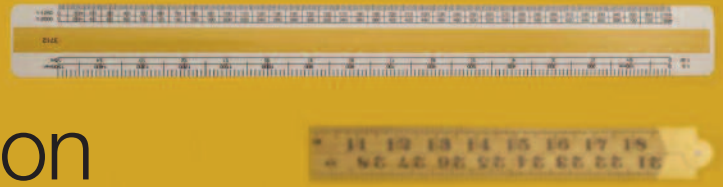


CRA Insights: European Competition



SEPTEMBER 2009

CRA's Annual Brussels Conference: 9 December 2009

Confirmed speakers include:

- **Philip Lowe** – Director General, DG Competition
- **Damien Neven** – Chief Economist, DG Competition
- **John Fingleton** – Chief Executive, UK Office of Fair Trading
- **Joe Farrell** – Director, Bureau of Economics, FTC
- **Nadia Calviño** – Deputy Director General for Mergers and Antitrust, DG Competition
- **Justus Haucap** – Chairman, Monopolkommission
- **Anne Perrot** – Vice-Présidente, Autorité de la concurrence
- **Olivier Guersent** – Director of Cartels, DG Competition
- **David Lewis** – former Chair, South African Competition Tribunal
- **Melanie Aitken** – Commissioner of Competition, Canada
- **Joseph Harrington** – Professor of Economics, John Hopkins University
- **Steven Salop** – Professor of Economics & Law, Georgetown University Law Centre
- **Massimo Motta** – Professor, ICREA-Universitat Pompeu Fabra and Università di Bologna
- **John Van Reenen** – Director, Centre for Economic Performance, London School of Economics
- **Mathias Dewatripont** – Professor of Economics, Université Libre de Bruxelles

This conference has no registration fee. To reserve a place, please email Victoria Goddard at vgoddard@crai.com



CRA's European news

European airline consolidation

Lufthansa/Austrian Airlines – August 2009

Following a Phase II review, the European Commission cleared the acquisition of Austrian Airlines by Lufthansa. The Commission's Phase I investigation found that the proposed transaction would lead to competition concerns with respect to *inter alia* the routes from Vienna to Frankfurt, Munich, Stuttgart, Cologne, Zurich, Geneva and Brussels. During the Phase II investigation the European Commission reduced the number of routes where it had competition concerns. The European Commission cleared the transaction subject to conditions on five of the overlap routes (Vienna-Frankfurt, Vienna-Munich, Vienna-Stuttgart, Vienna-Cologne and Vienna-Brussels).

Lufthansa/Brussels Airlines – June 2009

The European Commission cleared the acquisition of Brussels Airlines by Lufthansa following a Phase II review. During the Phase II investigation the European Commission examined potential competition issues on six routes between Belgium and Germany and between Belgium and Switzerland. The European Commission cleared the transaction subject to conditions on four of the overlap routes (Brussels-Frankfurt, Brussels-Munich, Brussels-Hamburg and Brussels-Zurich).

CRA advised Lufthansa during the European Commission's review of both transactions. The CRA team was led by **Matthias Pflanz** and included **Rameet Sangha**, **Katharina Sailer** and **Andrew Parkinson**.

Centrica acquisition of British Energy stake cleared by OFT – August 2009

The Office of Fair Trading unconditionally cleared Centrica's acquisition of a 20% stake in British Energy – the UK's largest electricity generator with eight nuclear power stations. The transaction raised a number of potential competition issues. Complaints from industry participants focused in particular on the potential for effects on market liquidity and coordination between Centrica and EDF (which retains the other 80% of BE). However, these concerns were rejected by the OFT, which concluded that the transaction would not result in any anti-competitive effects.

CRA provided economic analysis on a number of issues raised by the transaction, including detailed modelling of the potential for unilateral effects in the generation market, and the possible impact of the transaction on market liquidity. These analyses drew on

CRA's extensive experience in electricity market modelling as well as our expertise in the empirical assessment of horizontal and vertical merger effects.

A team from CRA's London and Boston offices advised Centrica throughout the pre-notification and OFT stages. The team, led by **Diana Jackson** and **Giulio Federico**, drew on CRA's experience in both competition and energy matters, and included **Ugur Akgün**, **Rosalind Hunter** and **Clara Ruiz Prada** in London, and **Aleksandr Rudkevich** and **John Goldis** in Boston.

Implementing the Bank Restructuring Communication – August 2009

CRA wrote a report on behalf of the Dutch Central Bank commenting on the European Commission's Communication: *The return to viability and the assessment under the State aid rules of restructuring measures in the financial sector in the current crisis under the State aid rules* (the "Restructuring Communication"). The CRA report identifies the need to apply the Restructuring Communication by distinguishing "good aid" from "bad aid". The former is given to structurally sound banks whose difficulties stem exclusively from turbulent market conditions (a "serious disturbance in the economy"). The latter is given to rescue unsound banks that overstretched themselves and would not survive even under normal market conditions. This distinction is important because the compensatory measures for "good aid" should be less exacting than those for "bad aid". In particular, mandatory asset sales should be contemplated only with regard to the portion of "bad aid" received, and even in that case they should be tempered by considerations of financial stability and in light of the limited distortions of competition arising from the aid.

The CRA Report was authored by **Lorenzo Coppi** and **Jenny Haydock**, and benefited from legal input from Prof. Piet Jan Slot of the University of Leiden, the Netherlands.

Pharmaceutical merger Pfizer/Wyeth cleared in Europe – July 2009

The European Commission cleared the proposed acquisition of Wyeth by Pfizer in Phase I, subject to conditions. Both companies are active in the fields of human pharmaceuticals and animal health products. The proposed merger gave rise to well over 200 national affected markets, the majority of which were subject to some further investigation by the Commission. In the human health area, the main issues investigated by the Commission related to the parties' current and future positions in therapies for kidney cancer (mRCC) and Alzheimer's disease, as well as the appropriate market definition for certain antibiotics products. In animal health, the Commission's investigation involved a detailed examination of a significant number of national markets for various existing and pipeline products. The Commission cleared the transaction without requiring any remedies in the area of human health; while in the area of animal health, Pfizer offered to divest a number of products in several national markets in animal health vaccines, pharmaceuticals and medicinal feed additives, as well as a manufacturing facility.

Publications by CRA consultants

The Approach to State Aid in the Restructuring of the Financial Sector by **Lorenzo Coppi** and **Jenny Haydock** is forthcoming in the Autumn 2009 issue of the *Competition Policy International Journal*. The paper discusses the European Commission's approach to State aid given to the financial sector in the midst of the financial crisis, and suggests ways in which compensatory measures such as asset sales and other behavioural remedies (on governance and executive pay) can be tailored to the actual market effects of the State aid granted.

Selective Distribution by Luxury Goods Suppliers: a Response to Kinsella *et al* appears in the August 2009 issue of the *European Competition Journal* and responds to published comments on a previous CRA paper on selective distribution that appeared in the March issue of the same journal. Both the original CRA paper and this response were co-authored by **Thomas Buettner**, **Andrea Coscelli**, **Thibaud Vergé** and **Ralph Winter**. Both papers are available from: http://www.crai.com/ecp/publications/full_list.htm

The Use of Economics in Merger Cases in the EC and in the US by **Lorenzo Coppi** appears as a chapter in *The International Comparative Legal Guide to: Merger Control 2009*. The article discusses some recent developments in the economic assessment of transatlantic mergers by the US agencies and the European Commission, as well as some more "traditional" differences in the economic approach taken by the regulators in the two jurisdictions. The article is available from <http://www.iclg.co.uk/khadmin/Publications/pdf/2430.pdf>

Foreclosures Test: A Unified Conceptual Framework by **Laurent Flochel** was published in *Concurrences: Revue des droits de la concurrence* (No. 3-2009). The article presents in a unified conceptual framework the anticompetitive foreclosure tests, including predatory prices, margin squeeze, loyalty rebates or bundling and tying rebates. The article (in French) is available from http://www.crai.com/ecp/assets/Article_Flochel_Prix.pdf

Econometric Analyses of Unilateral Effects in Merger Cases by **Ian Small** was published in *Concurrences: Revue des droits de la concurrence* (No. 2-2009). With increased use of demand estimation and reduced form price analysis in Europe, Small examines how these analyses are now used to provide direct evidence on the unilateral effects of mergers. The article is available from http://www.crai.com/ecp/assets/Law_Economics.pdf

Standards, Intellectual Property Disclosure, and Patent Royalties After Rambus by **Stanley Besen** and **Robert Levinson** appears in the June 2009 issue of the *North Carolina Journal of Law & Technology*. The paper examines the Federal Trade Commission and US Court of Appeals decisions in the landmark *Rambus* case and considers, in that context, whether disclosure of patent holdings by participants of standard setting organisations, together with collective negotiations of licence fees, are necessary to exploit fully the benefits of *ex ante* competition among technology sponsors. The paper also considers the complexities that may arise in implementing such collective negotiations. The paper is available from: <http://jolt.unc.edu/abstracts/volume-10/ncjlttech/p233>

A team from CRA's London and Brussels offices advised Pfizer during the Commission's investigation. The CRA team, led by **Matthias Pflanz**, included **Hristina Dantcheva**, **Rameet Sangha**, **Elina Koustoumpardi**, **Andrew Parkinson** and **Jonathan Raggett**.

Intel appeals European Commission's abuse of dominance decision – July 2009

In May 2009 the European Commission found that Intel had violated Article 82 of the EC Treaty by abusing its dominant position in the market for x86 central processing unit (CPU) computer chips. Intel appealed the decision in July.

The Intel matter is the first Article 82 case to be decided since the Commission issued its Guidance on Article 82 Enforcement Priorities last December. The Commission found that Intel had given hidden rebates to computer manufacturers on the condition that they bought all, or almost all, of their x86 CPUs from Intel; it also found that Intel had made direct payments to a retailer conditional on it stocking only computers with Intel x86 CPUs. In addition, Intel has been found to have made direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs and to limit the sales channels available to these products. Intel admits that it offered discounts but denies that it sold its products below cost.

A CRA team led by **John Hayes** and **Bharati Mandapati** of CRA's Oakland, California office advised Intel during the Commission's investigation. A CRA team including **John Hayes** and **Steven Salop** are advising Intel on its appeal in Europe.

Ryanair appeal heard before the CFI – July 2009

On 6 July 2009 the Court of First Instance heard the appeal of the European Commission's decision to prohibit the hostile takeover of Aer Lingus by Ryanair. The Commission had prohibited the deal in 2007 on grounds that the acquisition would have created a quasi-monopolist on a large number of short-haul routes out of Ireland. Ryanair had appealed the decision on grounds that the Commission's analysis, including its econometric assessment of the competitive interaction between the two carriers, was flawed. The hearing was attended by the Commission's Chief Economist, Damien Neven, who outlined the econometric analysis performed by the Commission and defended its robustness.

Cristina Caffarra of CRA presented at the CFI hearing in Luxembourg on behalf of Aer Lingus, explaining how CRA's analyses supported the Commission's findings. The CRA team at the hearing also included **Giulio Federico** and **Hugh Wills**.

Jury acquits defendants of cartel allegations in waste collection market in County Mayo – July 2009

A jury in the Central Criminal Court in Galway acquitted all five defendants in an alleged cartel case in the waste collection market in County Mayo, Republic of Ireland. Despite three and a half years of investigation, it became apparent during the trial that the Competition Authority did not have a theory of harm. The

prosecution's own witnesses stated that the defendants did not compete with each other and that there were efficiency benefits to the cooperation between the defendants. It was never alleged that the defendants expected to be able to raise prices as a result of the cooperation between them or that they sought to hide the cooperation. The jury took 15 minutes to dismiss all charges.

Mike Walker acted as economic advisor to the defence team.

First merger of European incumbent postal operators cleared – April 2009

The European Commission cleared the merger between the Swedish postal operator Posten and Post Danmark – the first merger between European incumbent postal operators. The merger was cleared subject to remedies to resolve a horizontal overlap in the Danish domestic standard business-to-business parcel market – where not only Post Danmark but also Posten (through its DPD franchise) are active. The divestment package was constructed from a combination of physical assets and customer contracts derived from the parties, designed to ensure a replacement for the competition to Post Danmark provided by Posten's DPD service.

The Commission also investigated the possibility of conglomerate effects arising from the combination of Post Danmark's position in bulk mail markets in Denmark and Posten's ownership of Strålfors, a significant printing and enveloping company active in Denmark. However, analysis of these markets indicated that the proposed transaction could not be expected to result in foreclosure. In particular, existing competition and further entry into bulk mail markets after liberalisation was not threatened by the combination, and neither was there a risk of exclusionary effects in the printing and enveloping market.

A CRA team including **Diana Jackson**, **Geoff Edwards**, **Ugur Akgün** and **Matt Tavantzis** advised the parties throughout the pre-notification period and the Commission investigation.

CRA's North American news

CRA expert testifies in record fine setting case heard before the Korean antitrust regulator

John Hayes advised Texas Instruments in a matter before the Korea Fair Trade Commission involving unfair competition in the mobile phone chip market. Texas Instruments and co-complainant Ericsson AB argued that Qualcomm hindered competition by charging higher royalties for customers who bought CDMA and WCDMA chips from rivals and by offering discriminatory rebates to handset makers. The regulator agreed, fining Qualcomm, Inc. a record \$208 million for discriminatory licensing and ordering it to stop offering preferential rebates to handset makers who purchase a majority of their products from Qualcomm. Hayes' testimony explained how Qualcomm's conduct raised costs for chipset rivals and why downstream competition from handsets that use other wireless technologies did not prevent Qualcomm

from exercising substantial market power over its CDMA and WCDMA technologies. Qualcomm has indicated it will appeal the KFTC's decision.

The European Commission is currently considering whether to file a similar complaint against Qualcomm. In the context of this EC investigation, **John Hayes**, **Lorenzo Coppi**, **Robert Levinson**, **Steven Salop** and **Robert Stillman** have advised parties that have raised competitive concerns regarding Qualcomm's conduct.

CRA Senior Consultants named to top US antitrust positions

On 22 July 2009 the US Federal Communications Commission announced the appointment of **Jonathan Baker** as Chief Economist. Baker is a Professor at the Washington College of Law, American University, and previously served as the Director of the Bureau of Economics at the Federal Trade Commission, as a Senior Economist at the President's Council of Economic Advisers, and as Special Assistant to the Deputy Assistant Attorney General for Economics in the Antitrust Division of the Department of Justice. Prior to taking up his post at the FCC Baker was also a Senior Consultant at CRA.

On 22 April 2009 the Antitrust Division of the US Department of Justice announced the appointment of **Carl Shapiro** as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division. Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business and Professor of Economics in the Economics Department at the University of California at Berkeley. Prior to taking up this post at the Department of Justice, Shapiro was also a Senior Consultant at CRA.

On 14 April 2009 the US Federal Trade Commission announced the appointment of **Joseph Farrell** as Director of the Bureau of Economics. Farrell is a Professor of Economics at the University of California at Berkeley, and prior to joining the Federal Trade Commission was also a Senior Consultant at CRA.

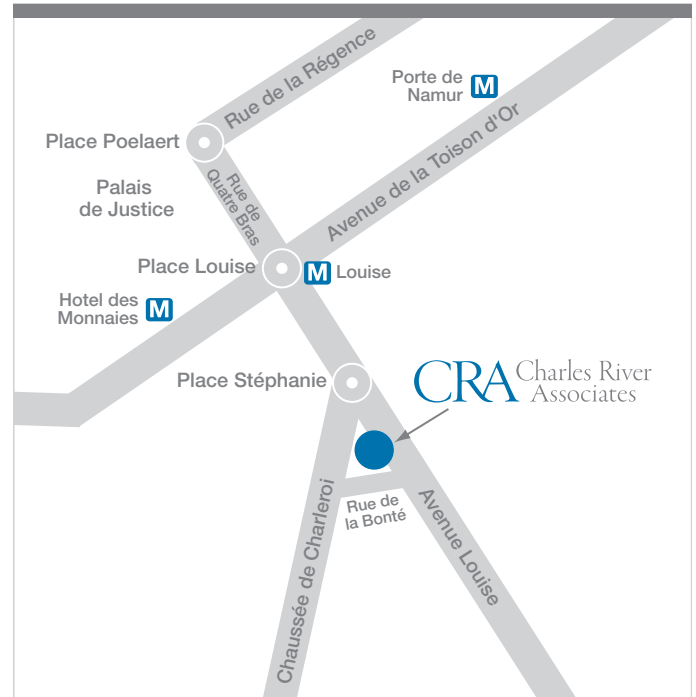
CRA Brussels office – new contact details

CRA's Brussels office moved earlier this year – please update your contact details.

Address: 81 Avenue Louise, B-1050 Brussels

Telephone: +32 (0)2 627 1400

Location map:



About CRA's European Competition Practice

CRA's European Competition Practice specialises in providing economic advice to businesses on matters of competition policy and regulatory affairs. Our reputation is for rigorous and innovative economic analysis, careful attention to detail, and the ability to work effectively as part of a wider team of advisors.

CRA's European Competition Practice has over forty staff in London, Brussels and Paris. Our economists have extensive experience working before DG Competition and the national competition and regulatory authorities of the Member States. We also work closely with our network of internationally renowned academic associates and CRA colleagues in North America. We have native speakers of all the major European languages.

Contacts

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