



CRA Insights: Competition

CRA Charles River
Associates

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A look back

The Competition Practice summarizes some highlights from 2016. We appreciate the opportunity to continue to assist our clients with many of the most important government and private antitrust suits on record.

Selected client work

We advised clients on a range of private and public antitrust and merger matters last year, several involving teams from Europe and the US, such as the supermarket merger of **Royal Ahold** and **Delhaize** and **Microsoft's** acquisition of **LinkedIn**. The testimony of CRA economists and academic affiliates was a critical component in several matters including the [Staples/Office Depot merger](#) challenge and the **Oracle v. Google** litigation. To follow are selected highlights from the year.

Mergers – across regions

We advised on **Weyerhaeuser's** \$2.2 billion sale of its five Cellulose Fibers pulp mills and two converting facilities to **International Paper**. CRA advised both parties throughout a review by the Department of Justice (DOJ) and the European Commission (EC). Fluff pulp has several consumer applications such as diapers. CRA's team included [Peter Boberg](#), [Andrew Dick](#), and [Courtney Stoddard](#) in the US, and [Diana Jackson](#) and [Uğur Akgün](#) in Europe.

For **Microsoft**, CRA economists advised on the \$26 billion acquisition of **LinkedIn** in Europe and the US. The Federal Trade Commission (FTC) cleared the transaction and the EC cleared the deal subject to conditions to address potential concerns in "professional social networking" (PSN). Our analysis considered the parties' ability and incentive to foreclose third-party suppliers of CRM solutions by restricting the availability of LinkedIn's (sales intelligence) products, or tying/bundling them with Microsoft's productivity assets. The CRA team was led by [Cristina Caffarra](#) and included [Professor Fiona Scott Morton](#) in the US, and [Lars Wiethaus](#), and [Alessandro Kadner-Graziano](#) in Europe.

Economists in Europe and the US advised on the \$28 billion merger of Belgian and Dutch supermarket operators **Delhaize** and **Royal Ahold**. In Europe, our economists analyzed local competition between the parties and their competitors, based on disaggregated sales, price and loyalty card data, and on econometric analysis of the impact of Ahold's recent entry. Our analysis was key to confirm that competition took place locally while identifying the distance threshold at which the

competitive pressure between two given stores faded away. Following a referral from the European Commission, the Belgian Competition Authority cleared the merger under the condition that the parties divest eight Ahold stores and five Delhaize franchised stores (plus some future projects). CRA's team was led by [Raphaël De Coninck](#) and included [Nitika Bagaria](#), [Riemer Faber](#), [Roman Fischer](#), [Mikaël Hervé](#), and [Chris Csiszár](#). In the US, CRA advised counsel to Ahold and Delhaize on areas of overlap where the two firms operate US grocery chains such as Food Lion, Hannaford, Stop & Shop, and Giant. The FTC approved the merger subject to some geographical divestitures. [Professor Steven Salop](#), [Joanna Tsai](#), and [Gregory Vistnes](#) led the team in the US.

We advised and provided economic support to both parties during the European Commission's proceedings on the merger of **Abbott** and **Alere**. The Commission approved the transaction subject to divestments in point-of-care testing of blood gases and cardiac markers. Both Abbott and Alere supply clinical test systems. The merger was also reviewed by the US Federal Trade Commission and the Canadian Competition Bureau. [Raphaël De Coninck](#) led the team that included [Simon Chisholm](#), [Elina Koustoumpardi](#), [Sam Brown](#), [James Andrews](#), and [Emily Silcock](#). [Gary Roberts](#) led the team in the US that also included [Stephanie Riche](#) and [Michael Wither](#).

Mergers – North America

CRA economists assisted clients in the technology, cement, airline, and retail industries, among others.

We advised counsel to **Virgin America** throughout the DOJ review of its acquisition by **Alaska Airlines**. The DOJ approved the merger requiring some restrictions on the ongoing code share relationship between Alaska Airlines and American Airlines. Code sharing allows partner airlines to sell seats on each other's flights. [David Reitman](#) led the team which included [Isabel Tecu](#) and [Omeed Alerasool](#). That team also supported [Professor Carl Shapiro](#) as the expert in a follow-on class action lawsuit that settled.

CRA advised counsel to **McKesson Corporation** and **Change Healthcare** on the formation of a new health care information technology company. CRA's team, including [Andrew Dick](#), [Josh Lustig](#), and [Courtney Stoddard](#), provided analyses and assistance to the parties throughout a Second Request review of the joint venture by the DOJ. The DOJ cleared the deal without conditions. McKesson is a health care services and information technology company that distributes health care systems, medical supplies, and pharmaceutical products. Change Healthcare provides technology-related services to health care companies.

For the US subsidiaries of merging cement producers **HeidelbergCement AG** and **Italcementi S.p.A.**, CRA economists supported counsel through the FTC's Second Request process and developed economic analyses to support the parties' affirmative arguments that the transaction should not raise competitive effects concerns in certain metropolitan areas. Later in the investigation, the CRA team helped develop arguments in favor of the viability of a proposed divestiture package, which was eventually approved by the FTC as a condition of the merger. [Yianis Sarafidis](#), [Andrew Dick](#), and [Jeff Prisbrey](#) co-led CRA's team which included [Paul Labys](#), [Powell Dixon](#), [Jack Anderson](#), [Trevor Graney](#), and [Ioana Tesliuc](#).

[Steven Tenn](#) testified for the **FTC** in its challenge to the merger of Chicago-area hospital systems, **Advocate Health Care Network** and **NorthShore University HealthSystem**. Notably, the Seventh Circuit reversed a lower court ruling that would have denied the FTC's request for a preliminary injunction, hinging on the definition of geographic markets which the FTC sees as local in the case of health care services. On remand, Judge Jorge Alonso of the US District Court for the Northern District of Illinois granted the preliminary injunction, extensively citing Dr. Tenn's testimony in the 37-page opinion and the parties abandoned the merger. [Josh Lustig](#) also supported the FTC in its review.

CRA economists advised counsel to parties in the \$1.65 billion merger of event management technology providers **Cvent** and **Lanyon Solutions**. CRA economists provided economic analyses and support throughout the DOJ's extensive Second Request investigation. In the end, the DOJ cleared the merger with no remedies. Lanyon is owned by Vista Equity Partners. The combined firm will operate under the Cvent brand. CRA's team included **Jeff Prisbrey**, [Gary Roberts](#), [Michael Salinger](#), **Paul Labys**, and **Michael Smith**.

[Professor Carl Shapiro](#) and a CRA team supported the FTC throughout its review of the proposed \$6.3 billion merger of Staples and Office Depot. Professor Shapiro analyzed the competitive issues around the sale and distribution of consumable office supplies and provided expert testimony. Following a May 10, 2016 ruling granting the FTC's preliminary injunction to block the merger, the parties abandoned the deal. In reaching a decision, the Court relied heavily on the contributions of Professor Shapiro and the CRA team. This resulted in a decision that helps clarify how regulators and the courts may evaluate future merger transactions. In particular, it helps cement the targeted customer and cluster markets approaches to market definition and evaluation of harm. The CRA team was led by [Bharati Mandapati](#) and included [Matthew Johnson](#), Tina Lee, [Marissa Beck](#), Andrew Goldstein, Duke Shao, Phil Taylor, and Hitesh Makhija.

In Canada, we advised counsel to [Lowe's](#) on its acquisition of **RONA** throughout the Competition Bureau's review of the transaction. CRA's main econometric analyses focused on product and geographic market definition and competition in local markets. The Bureau issued a "No Action Letter" and concluded the transaction is unlikely to lessen or prevent competition substantially. CRA's team was led by [Margaret Sanderson](#) and included [Ioana Dan](#), [Isabel Tecu](#), and **Mark Schneider**.

Mergers – Europe

In Europe we assisted clients with projects relating to gaming, retail, energy trading, health care, and electronic learning toys, among others. Click [here](#) to learn more about our work in Europe.

We advised cable network operator **Liberty Global Ziggo** on its joint venture with **Vodafone** in the Netherlands. The EC cleared the transaction at Phase I, subject to Vodafone's divestment of its consumer fixed line business in the country. The divestment addressed the Commission's initial concern that the transaction "would have removed Vodafone as a player with the potential to exercise a strong competitive constraint" in the markets for fixed and fixed-mobile multiple play services. The CRA team included [Cristina Caffarra](#), [Kai-Uwe Kühn](#), [Pierre Regibeau](#), and [Valter Sorana](#).

CRA economists advised both parties on **Tullet Prebon's** acquisition of **ICAP's** voice and hybrid broking and information businesses to create a £1.5bn global broking business. We advised on the transaction globally with clearances obtained in the UK, US, Australia, and Singapore. CRA's economic evidence showed that voice broking faced substantial "out of market" constraints from electronic broking and exchange-based trading. CRA's team was led by [Matthew Bennett](#) and included [Simon Chisholm](#), [Gerhard Dijkstra](#), and [Kotryna Drasutyte](#).

CRA advised interveners in the [Intercontinental Exchange \(ICE\)/Trayport merger](#). The UK Competition and Markets Authority (CMA) ordered ICE to divest Trayport, the energy and commodities trading platform it purchased, to preserve competition in wholesale energy trading. It is the first prohibition by the CMA since its inception and the first full divestment ordered in a vertical merger in the UK. ICE appealed the decision but the UK's Competition Appeal Tribunal upheld the CMA's decision. [Simon Chisholm](#) led CRA's team.

We advised both parties on **VTech's** acquisition of **LeapFrog**. After an in-depth Phase II investigation, the CMA signaled its provisional intention to unconditionally clear the merger. The parties' products overlap

within “toddler electronic learning toys” and “child tablets” in the UK. A survey commissioned by CRA showed that consumers consider a wide range of toys when making purchasing decisions. This, coupled with CRA evidence of the dynamic nature of the toy business, the large number of toy manufacturers, and the considerable choice and bargaining power that retailers had in choosing from suppliers, made it clear that the merger would not lead to a reduction in competition. The CRA team was led by **Matthew Bennett** and included [Vicki Mertzani](#), [Sam Brown](#), and [Angelos Stenimachitis](#). The same team of consultants advised parties to the **Ladbroke** and **Gala Coral Group** merger. The merger was previously blocked when it was attempted in 1998. The CMA accepted that online gambling was a significant and growing constraint and cleared the merger, subject to the sale of 350 to 400 licensed betting offices to preserve competition in local markets where the betting products of the two firms overlapped.

CRA economists provided economic analyses during the CMA investigation of the **Celesio/Sainsbury's** pharmacy merger. Celesio owns the Lloyds Pharmacy chain. The merger was cleared subject to the divestment of 12 Lloyds pharmacies. [Diana Jackson](#) and [Ian Small](#) led the project and were supported by a team including [Gerhard Dijkstra](#), [Charlie Sabine](#), **Chris Csiszar**, and **Stephen Lee**.

CRA advised parties to the merger of **Hammerson** and **Grand Central Shopping Centre**, two adjoining shopping centers in Birmingham. The CMA cleared the merger unconditionally at Phase 1, finding other retailers in Birmingham City Centre would provide sufficient competitive restraint post-merger. CRA economists provided economic assistance to support the merger, including an analysis of the two-sided (tenants and shoppers) nature of the market and the design of a customer survey. CRA's team was led by [Alan Overd](#) and included **Vicki Mertzani** and [Angelos Stenimachitis](#).

CRA economists advised **Danone** during proceedings before the EC on its \$10.4 billion acquisition of **WhiteWave** in Phase I, subject to a commitment regarding “growing-up” milk (for children aged 1 to 3) in Belgium. The Commission concluded that Danone's dairy yoghurts and desserts would not compete with WhiteWave's plant-based yoghurts and desserts, finding the parties' products are largely complementary. CRA's team was led by [Raphaël De Coninck](#) and included [Roman Fischer](#), [Mikaël Hervé](#), [Hendrik Meder](#), and **Alessandro Kadner-Graziano**.

For the merger of satellite launch manufacturers, we provided extensive competitive analyses to demonstrate that the merged firm would not be able to use pricing strategies to foreclose rivals. The EC cleared the acquisition of **Arianespace** by **ASL**, a 50/50 joint venture controlled by Airbus and Safran, without requiring remedies. CRA's team advising the parties was led by [Laurent Flochel](#) and included [Uğur Akgün](#) and **Guillaume Débarbat**.

Mergers – South America

For a multinational with a presence in Brazil, [Joanna Tsai](#) was retained by counsel in connection with a **credit bureau joint venture** that was proposed by five key banks in Brazil. Dr. Tsai submitted an opinion to CADE's (Administrative Council for Economic Defense) Tribunal on the competitive effects of the joint venture and met with CADE's commissioners to discuss the key conclusions from the economic analysis.

Litigation

[Cristina Caffarra](#) testified as an expert witness for **Visa Europe** in the damages action brought by a number of retailers in the UK High Court. The case involved allegations that by setting the merchant interchange fees (MIF) for its debit and credit cards, Visa had restricted competition and this resulted in retailers paying higher charges to process debit and credit card payments. CRA's analysis demonstrated that given the two-sided nature of the market, Visa's role in setting the MIF was not a restriction of competition compared with the counterfactuals of either a zero MIF or MIF set by bilateral negotiation. Moreover, CRA's analysis

showed that the MIFs set by Visa during the claim period were less than the monetary value of the externalities arising from Visa's debit and credit cards, therefore Visa's MIFs were justified under Article 101(3). Dr. Caffarra was supported by a CRA team including Ian Small, [Bob Stillman](#), [Oliver Latham](#), [Richard Havell](#), [Rikke Rasmussen](#), and [Charlie Sabine](#), among others.

CRA provided testimony in support of **Masimo** in its successful effort to refute monopolization, tying, and other antitrust counterclaims following a competitor's infringement of its medical device patents. The team was led by [Tim Snail](#) and included [Sharon Pang](#), [Eyal Dvir](#), **Omeed Alerasool**, **Ryne Belliston**, **Carl Hayden**, **Daniel Ladd**, **Joseph Marin**, **Flore Nouvel**, and **Sarah Black**.

[Anne Layne-Farrar](#) provided economic analyses to support **Finjan**'s claim of infringement of eight antivirus product patents in a lawsuit against **Sophos**. We assisted in determining damages. The jury found Sophos had infringed all eight patents and awarded Finjan \$15 million in damages, the maximum amount presented by CRA. Our work was led by Anne Layne-Farrar and included **Mensur Muhamedagic**, **Saimit Sahi**, and **Tuba Sahiti**.

[James Burrows](#) provided testimony for Freeport-McMoRan on issues related to piercing the corporate veil for a zinc operation owned by New Jersey Zinc. Dr. Burrows' testimony was relied on by the trial judge to dismiss the case. [Charles Trozzo](#), [Michael Loreth](#), and **George Rainville** assisted in this work.

CRA assisted counsel to **Valmet Inc.**, a global developer and supplier of technologies, automation, and services for the pulp, paper, and energy industries, in a contract dispute wherein it won dismissal on liability grounds. The team was led by **Tim Snail** and [Geoff Senogles](#), and included [Trevor Slack](#), [Selina Luu](#), **James Dunning**, **Gregory Kozemchak**, and **Daniel Ladd**.

[David Reitman](#) provided [expert reports and testimony](#) in two separate hearings before the Copyright Board of Canada, on behalf of several radio stations. We advised counsel on whether copies of digital recordings made for evaluation, backup, and certain types of ephemeral reproductions, could qualify for a discounted royalty tariff. The Board endorsed the method of computing tariffs preferred by the radio stations, represented by the Canadian Association of Broadcasters. CRA's team also included [Adriana de la Huerta](#) and **Albert Hergenroeder**.

CRA assisted counsel to **Teva**, a major pharmaceutical manufacturer, in responding to a preliminary injunction sought by a competitor. The team was led by **Tim Snail** and included **Duke Shao** and others.

In 2011, [Professor Jim Kearl](#) was appointed to be a Rule 706 testifying damages expert for the court in the **Oracle v. Google** litigation. Dr. Kearl filed reports critiquing the damages experts for Oracle and Google for the first trial in 2012. However, the damages phase of the trial was mooted by both jury and court decisions. In the second trial in 2016, Dr. Kearl, as directed by the Court, provided additional reports critiquing the parties' damages experts, and provided oral testimony in preliminary hearings. In May 2016, the jury decided that Google's use of Java APIs (application program interfaces) in its Android operating system constituted "fair use" under copyright law. That decision is now under appeal at the Federal Circuit. CRA economists, led by [Gregory Adams](#), provided support to Kearl's court-directed work in both trials. CRA's team also included [Steven Waters](#) and **Leslie Koyle**.

Regulatory

CRA advised **Centrica** on the CMA's [energy market investigation](#) of tariffs. Energy suppliers will be required to provide Ofgem, the UK's energy regulator, with usage information to help customers switch to less expensive deals. CRA's team was led by [Diana Jackson](#) and [Alan Overd](#) and included [Ian Small](#), [Sam Brown](#), [Gerhard Dijkstra](#), and [Angelos Stenimachitis](#).

Class certification

CRA advised counsel to **Visionworks**, a national prescription eyeglasses retailer, in its successful defeat of class certification in a matter alleging false advertising. The team was led by **Tim Snail** and included [Jarrod Welch](#), **Chris Barr**, and **Mira Venkatesh**.

[Darrell Williams](#) was the expert in a multidistrict class action lawsuit alleging price fixing by several electronics manufacturers of cathode ray tubes. Dr. Williams advised counsel to **Panasonic** and provided economic analyses on liability and damages for cases heard in California, Illinois, and Japan. CRA's team also included [Hristina Dantcheva](#).

Selected publications

CRA economists and affiliated academics continue to publish research and articles in academic and industry journals as well as trade publications. Click [here](#) and [here](#) for a selection of articles, papers, and newsletters from 2016. Below we highlight several publications.

[Why Royalties for Standard Essential Patents Should Not Be Set by the Courts](#)

Stanley Besen, *Chicago-Kent Journal of Intellectual Property*

[Review of “Modifying Merger Consent Decrees to Improve Merger Enforcement Policy” and “The Costs and Benefits of Antitrust Consents”](#)

John Woodbury, *The Antitrust Source*

[Theory versus Evidence: A Cautionary Tale for Interpreting the FTC's 6\(b\) PAE Study](#)

Anne Layne-Farrar, *ABA Antitrust IP Committee newsletter, Public Domain*

[Roundtable: Current Substantive and Procedural Issues Facing Merger Practitioners](#)

Carl Shapiro, *The Antitrust Source*

[Innovation in EU merger control: in need of a consistent framework](#)

Raphaël De Coninck, *Competition Law and Policy Debate*

[Information technology clusters and regional growth in America, 1970–1980](#)

Daniel Garcia-Swartz, *Small Business Economics*

[Price-cost analysis of retroactive rebates: One clarification and three propositions in line with Post Danmark II](#)

Lars Wiethaus, *NZKart*

[“The Economics of Internet Standards”](#)

Stan Besen, in Handbook on the Economics of the Internet, Edward Elgar Publishing, Johannes M. Bauer and Michael Latzer (editors), (with G. Sadowsky)

[Why Some Consumers Benefit From False Advertising](#)

Sean Durkin, *Law360*

[Responding To Second Requests In The Era Of Big Data](#)

Matthew List, *Law360*

[Bundling of RAND-committed patents](#)

Anne Layne-Farrar and Michael Salinger, *Research Policy*

[Evaluating Joint Ventures: Economic Analysis Checklist](#)

Steven C. Salop, *Georgetown Law Journal*

[Why Patent Holdout is Not Just a Fancy Name for Plain Old Patent Infringement](#)

Anne Layne-Farrar, *Competition Policy International*

Selected speaking engagements and conferences

CRA economists and academic affiliates spoke at more than 20 conferences and seminars in 2016, including ABA webinars on topics such as: [generic drug pricing](#), [European Antitrust-IP interface issues](#), [market definition](#), [unilateral effects](#), [loyalty discount cases](#), [detecting collusion](#), the [Amex Decision and its relationship to the DOJ's suit against Carolinas Health Care System](#), and on [product hopping](#) to bar associations in Houston and Dallas.

Our academic affiliates and economists featured prominently at the 64th Antitrust Spring Meeting in Washington, DC. Speaking at the conference were: **Joanna Tsai**, **Fiona Scott Morton**, **Steven Salop**, **Carl Shapiro**, and **Darrell Williams**, who was a participant in the Mock Trial. Click [here](#) for a list of our 2017 speakers.

At the Fordham Competition Law Institute's Annual International Antitrust Law and Policy Conference, [Peter Boberg](#) moderated and [Michelle Burtis](#) was a panelist on the session "Preparing for Deposition and Dealing with Daubert Challenges." [Andrew Dick](#) moderated "Prepping an Economic Expert for Trial" with panelists including [Peter Boberg](#) and [Sean May](#).

[Monica Noether](#) spoke about "Regulating Competition in Health Care" at the 2016 Symposium on Reconciling Competition and Consumer Protection in Health Care. [Joanna Tsai](#) was a panelist on "Merger Review in Asia" at the ABA's Antitrust in Asia: Hong Kong conference. [Sharon Pang](#) was a panelist at the *GCR Live 2nd Annual Hong Kong: Focus on China*, and spoke to the Hong Kong Bar Association on the economic aspects of the Hong Kong Competition Ordinance. **Cristina Caffarra**, **Kai Uwe-Kühn**, **Diana Jackson**, **Matthew Bennett**, and **Raphaël De Coninck** spoke at the Association of Competition Economics Conference in Amsterdam. **Kai Uwe-Kühn** and **Carl Shapiro** discussed "Developing Trends and Theories in Merger Enforcement" and "EU and US Antitrust Enforcement in the (Single) Digital Market" at the annual technology conference, Antitrust in the Technology Sector: Policy Perspectives and Insights from the Enforcers. Professor **Steven Salop** was one of three keynote teachers at the ABA Antitrust Masters Course VIII. **Darrell Williams** also spoke at the Masters Course.

In December, our European Competition Practice hosted its annual Economic Developments in European Competition Policy conference in Brussels with more than 600 attendees, including lawyers, regulators, in-house counsel, and academics. The conference focused on nonstandard cases where dynamic effects and regulation play a key role. Click [here](#) for a summary with video.

We also hosted the GCR Live 5th [Antitrust Law Leaders Forum](#), an annual event bringing together government representatives, practitioners, and corporate counsel.

Click [here](#) for more events.

New colleagues

[Gopal Das Varma](#) rejoined CRA from the Antitrust Division of the US Department of Justice (DOJ), where he investigated proposed mergers and potential anti-competitive conduct in a wide variety of industries. Dr. Das Varma was with CRA from 2005 to 2011. [Dan Donath](#) rejoined the firm from CEZ, the Czech energy incumbent. He specializes in providing expert economic advice in merger investigations, abuse of dominance and cartel investigations, disputes and state aid cases. Dr. Donath was also previously a member of the Chief Economist's Team at the European Commission. [Christopher Pleatsikas](#) has extensive expertise in a variety of network industries including financial services, energy transportation and distribution, telecommunications and computer services, and transportation. He has testified in courts and before administrative agencies in the US, Australia, New Zealand, and the Republic of Singapore. In Brussels, [Lars Wiethaus](#) brings expertise in mergers and a variety of Article 102 cases, with a particular focus on network industries and platform markets. He is co-editor of the *Journal of European Competition Law and Practice*.

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