

# **BOOK ON LEGAL STRATEGIES**

## **CALL FOR SUBMISSIONS**

In order to optimize competitiveness, companies/corporations frequently contemplate and incorporate aspects of legal systems, legal processes and legal resources, such as lawyers and litigation, into their long-term strategic decision making processes. These types of strategies, i.e. ones that incorporate law and legal resources, are the subject of increased focus and scrutiny in current legal literature and scholarly analysis.

The term “strategy” in its historical and/or traditional sense, is associated with the organized movement of armies in war. Today, the term has also come to encompass a broader perspective, denoting the art of devising and implementing a skilled and systematic plan of action in order to reach a given objective. Hence, plans of action by corporations that involve the evaluation, incorporation and manipulation of law, legal frameworks, and legal players in order to increase the bottom line can be described as “corporate legal strategies”.

Notwithstanding the foregoing however, not every corporate strategy related to law can or should be regarded as a “true” legal strategy.

Current academic literature defines legal strategy as a strategy rooted in the perception that the law, the court, legal rules and procedure, etc. can be readily manipulated so as to achieve a specific outcome. This strategic perception of the constraint and role of law is perhaps most readily illustrated by the methods and tactics employed in the area of litigation, whereby parties and their lawyers will construct a specific legal outcome through strategies involving, for example, forum shopping and procedural delay.

Conversely, corporate economic planning that integrates the legal environment into business strategy is rejected as a true legal strategy on the basis of what appears to be a widely accepted premise that corporations perceive the law as static and supreme. This viewpoint therefore observes the corporation as regarding the law as a necessary restriction in respect of firm business such that all it can do is try to make the best out of a bad situation and seek advantage from within the superior legal framework.

Certainly, economic strategy within a legal framework premised on the view that the law is supreme will not amount to a “true” legal strategy. However, it is clear that not all corporations view the law so simplistically i.e. as a necessary facet of the business environment. Rather, many companies adopt what can be described as a “legal management approach” whereby long term business strategies are formulated through active assessment of the interaction of legal frameworks, processes, and players. Hence, while there has been some academic resistance to the existence of true corporate legal strategy, perhaps in part due to the lack of precise definition of legal strategy in the first place, it is clear that corporations are engaging in legal strategy premised on the view that the law is malleable. A current example which challenges traditional academic resistance to true corporate legal strategy is evidenced in apparent recent applications to protect

newly developed corporate legal strategies by way of patent protection<sup>1</sup>.

The first challenge of this book is to identify, describe and critique current theories of legal strategy in order to define it more precisely. To this end, two relevant tracks should be followed: a) litigation and/or the adversarial process; and b) corporate practice with respect to long term economic/business planning.

The second challenge is to identify, by reference to concrete examples, legal strategies that pertain to the mobilization and allocation of legal resources within a corporation.

The third challenge is to identify and evaluate the legitimacy of regulatory responses (and potential responses), if any, which attempt to minimize the impact of a particular legal strategy on the business market. Hence, this book will also explore regulatory competition law from the corporate perspective by comparing the legal opportunities available to corporations in both harmonized and non-harmonized matters.

Rather than leveling the playing field so to speak, global harmonization efforts have simply created greater potential and new possibilities for legal strategy with respect to international business transactions. The objective of this book is therefore less concerned with an exploration of the effect or impact of legal norms on corporate business environment and more focused on an exploration of the increased opportunities and legal resources to assist in the implementation of *vertical strategies* (i.e. those between the corporation and regulatory bodies) and *horizontal strategies* (i.e. those between competitors outside or inside the same legal system). Evaluating corporate strategies from this vantage point should assist in not only clarifying the definition of legal strategy but should also serve as a basis for identifying which legal strategies are likely to be more advantageous.

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### **Themes and Topics for Consideration**

The following themes and topics should be regarded as guidelines for the kinds of issues the editors wish to see addressed in papers submitted for consideration. This is not an exhaustive list.

#### **Assessing Legal Strategies**

- Legal strategies as an element of “law and management”;
- The representation of the law in legal strategy;
- Defining legal advantage;
- Litigation/trial tactics: shaping the issues and the constraint of judges;
- Legal strategies involving evidence, burdens and presumptions; and

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<sup>1</sup> Steve Seidenberg, “Crisis Pending: Can a Patent on a Legal Strategy Prevent a Client from Taking Your Advice? The Courts May Soon Decide.” ABA Journal, May 2007 issue. Available online at: [http://www.abajournal.com/magazine/crisis\\_pending/](http://www.abajournal.com/magazine/crisis_pending/)

**The Mobilization of  
Legal Resources –  
How, When and Why?**

- Comparative analysis of litigation and lobbying strategies.
- Evaluation of corporate legal performance;
- Protection of legal innovation;
- Investment in legal resources and optimizing legal strategy; and
- The impact of legal strategy on corporate valuation.

**Regulatory Responses  
to Legal Strategies**

- Corporate legal strategies and regulatory remedies; and
- Navigating regulatory authority networks: constraints versus opportunities.

**Legal Strategies and  
Regulatory  
Competition**

- Local culture and global strategies: weapon or shield?;
- How to manage legal opportunities and globalization;
- Regulatory competition and legal opportunism in a non-harmonized field (for example, European Intellectual Property Law);
- Regulatory competition and legal opportunism in a harmonized field (for example, European Merger and Acquisition Law); and
- Regulatory competition and legal strategies: cross-benefits or cross-restrictions?

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**Selected Bibliography**

For further reading, please see:

Lynn M. Lopucki and Walter O. Weyrauch “A Theory of Legal Strategy” Duke Law Journal, Vol. 49, No. 6, April 2000. Available online at: the Social Science Research Network, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=203491](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=203491)

Lynn M. Lopucki, “Legal Culture, Legal Strategy and the Law in Lawyers’ Heads”, 90 NW. U. L. REV. 1498, 1527 (1996).

Doreen McBarnet and Christopher Whelan, “The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control”, The Modern Law Review, Vol. 54, No. 6, Law and Accountancy. (Nov., 1991), pp. 848-873. Available online at: <http://www.jstor.org/view/00267961/ap030291/03a00060/0>

Charles Yablon, “Stupid Lawyer Tricks : An Essay on Discovery Abuse”, 96 Colum. L. Rev. 1618, 1642-43 (1996). Available online at: <http://www.jstor.org/view/00101958/ap030758/03a00050/0>

R. Preston McAfee and Nicholas Vakkur, "The Strategic Abuse of the Antitrust Laws"(January 27, 2004) Journal of Strategic Management Education 1(3). Available online at: <http://ssrn.com/abstract=594581> or <http://vita.mcafee.cc/PDF/strategicantitrust.pdf>

Mounir Snoussi, "Les strategies juridiques des sociétés transnationales: L'exemple des prix de transfert", Revue Internationale de Droit Économique 2003, pp. 443-469. Available online at: [http://www.cairn.info/load\\_pdf.php?ID\\_ARTICLE=RIDE\\_173\\_0443](http://www.cairn.info/load_pdf.php?ID_ARTICLE=RIDE_173_0443)

Atelier de la Concurrence (collectif): "Les strategies des entreprises vis-à-vis du droit de la concurrence : adaptation, evasion, organisation", Revue de la concurrence et de la consommation, juillet-septembre 2005, n° 143, Available online at: [http://www10.finances.gouv.fr/fonds\\_documentaire/dgccrf/02\\_actualite/ateliers\\_concu/strategie.htm](http://www10.finances.gouv.fr/fonds_documentaire/dgccrf/02_actualite/ateliers_concu/strategie.htm)

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### **Editors Biography**

Antoine Masson is currently working at the University of Luxembourg and collaborating with the CEPRISCA at the University of Picardie (France). He has been a part-time lecturer at Trinity College, University of Dublin and a researcher at HEC-Paris.

Mary J. Shariff is currently an Assistant Professor of Law at the University of Manitoba, Canada and has practiced law in the areas of Construction Law, Commercial Litigation and Tax.

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**Deadline for Proposed Submissions:** February 1, 2008

Please e-mail one electronic copy (in Microsoft Word format) of your proposed submission to: [antoinemasson@uni.lu](mailto:antoinemasson@uni.lu).

**Deadline for Final Submissions:** June 30, 2008.

**Proposed Length of Final Submission:** Between 4000-8000 words.

**Contact:** Antoine Masson, Université du Luxembourg, Campus Limpertsberg, 148 av de la faïencerie, L-1511 Luxembourg, [antoinemasson@uni.lu](mailto:antoinemasson@uni.lu).

## **Proposed Timeframe:**

At this stage of the project, a two (2) paragraph description of your proposed submission will be sufficient for us to provide you with preliminary informal comment as to its suitability for the proposed book. This informal comment will be sent to you within three (3) weeks of our receipt of your description. Please be advised that because we are still accepting and assessing submission proposals for this innovative and challenging subject matter, we strongly recommend waiting for our *confirmation and request* to submit a completed manuscript for consideration prior to commencement of writing your proposed paper. We anticipate sending out the *confirmation and requests to submit* by the end of February 2008 and depending on the quality of submissions received, reserve the right to organize a second round of calls for proposals if necessary.

In light of the foregoing, while the deadline for final submission has been identified as June 30, 2008, that deadline could be extended to permit an author a full four (4) months from the date of receipt of a *confirmation and request* within which to submit a completed manuscript for consideration.

Please be further advised that once you have submitted a completed manuscript for consideration, it will then be subject to an editorial review as well as a blind peer review, the details of which are more particularly described below.

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## **Peer Review Policy**

As submissions are received, one of the Editor(s) will conduct a preliminary review to determine whether the submission meets minimal publication standards and quality. After a submission passes this editorial review, it will be sent for a single blind peer review, where the reviewer(s) will remain anonymous throughout the process. The peer review will be conducted by senior practitioners and/or academics with expertise that matches the field identified by the submission. Please note that authors of manuscripts that are rejected at the preliminary editorial review will be notified within four (4) weeks of receipt of the submission.

After the blind peer review, there are three possible outcomes:

- 1) *acceptance*;
- 2) *conditional acceptance* with request for revisions as recommended by the peer reviewer(s); or
- 3) *rejection*.

The peer review stage should take between six to twelve (6-12) weeks to complete. Following this stage, the author will be notified of the *acceptance*, *conditional acceptance* or *rejection* by way of letter along with any recommendations/comments made by the reviewer(s). Final versions of submissions will be expected by no later than six (6) weeks from the date of the notification of a *conditional acceptance*. Regrettably we will not be able to return manuscripts after consideration.