Through the Legal Looking Glass: Exploring the Concept of Corporate Legal Strategy

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I. Introduction

The concept of “legal strategies” has become a very popular topic in legal and business circles. Generally speaking, when the term is utilized, it is often referring to a novel or unexpected use of law or legal process. What however does this expression precisely mean? What differentiates legal strategies from other strategies or practices that involve the law? How can legal strategies be analyzed?

The surfacing of these questions demonstrates the emergence of “legal strategy” as a promising new field of research in the areas of law, business and management sciences. Indeed, the analysis of legal strategies is a multi-/inter-disciplinary field of research that can lead to enrichment of knowledge by the cross-fertilization of differing points of view, experiences and theories. It also implicates profession-specific considerations – a lawyer can improve competence by taking into account the problems faced by the managerial sphere, whereas, an entrepreneur can increase the chance of business success by becoming aware of the relevance of the legal function as a potential centre of profits capable of creating value. Gaining an appreciation of legal strategy theory is thus critical to a pro-active understanding of the role that law plays in advancing or defining business activities and vice versa.

Accordingly, this paper sets out to illustrate and discuss various forms of legal strategy and legal strategy theory emerging from the areas of litigation, corporate management and competition. The discussion here is not meant to be exhaustive. Rather, the goal of this paper is to attempt a classification of current approaches to legal strategy theory in order to advance the understanding of legal strategy as a dis-
crete area of legal study. This in turn should assist with the illumination of the nature of the relationship between law and business.

It is the authors’ position that such classification can also assist in the development of a comprehensive and integrated definition of “corporate legal strategy” from a law perspective.¹ Achieving a definition of legal strategy is arguably useful to advancing the study, development and application of legal strategies generally but such a definition may also improve the understanding of legal strategy from an ethical perspective thus allowing for better efficiency in management and a reduction of negative impacts on the integrity of the legal system. Thus, in addition to suggesting a definition of “corporate legal strategy”, the paper concludes by summarizing broadly, certain elements that the authors believe ought to be included in any critical study of law and legal strategy which also has as its aim, the development of an integrated theory of “legal strategy”. It is hoped these suggestions and the review of the forms of strategy that precedes them, will assist in expanding debate and discussion regarding the true definition of legal strategy and further assist in advancing the understanding of legal strategy with a view to bringing its formal study and acceptance into professional and academic mainstreams.

II. Approaches Towards Legal Strategy Study

A. Overview

In the media, the term “legal strategy” is often utilized but its meaning is rarely given.² However, from law and management literature, two broad perspectives on the fundamental nature of legal strategies have respectively emerged. The first perspective (and also one of the earliest assertions of “legal strategy theory”) is that a legal strategy is a strategy constructed in order to achieve a desired legal result.³ The second perspective is that a legal strategy is simply an extension or continuation of an economic strategy advanced in a legal form.

The first perspective on legal strategy appears to be grounded on the idea that law and its processes are utilized in order to produce a consequence with legal impact. While this would include the more obvious examples of litigation tactics, it would also include the use of the law in the construction of social policy. For example, activists for minority interests will bring actions to court solely for the purpose of changing the law. Because economic gain is not necessarily the primary motivator, this perspective of the strategic use of law does not appear to apply as readily to companies, who, by their very nature, are primarily focussed on the maximization of returns. If a firm however (particularly one not interested in shaping social value) consciously perceives legal strategies as subordinate to its business objectives, the numerous possibilities offered by the firm’s legal environment are less likely to be obscured.

Before the duality of the nature of legal strategies as described above had been fully contextualized, the concept of legal strategy was primarily explored in the litigation context, that is, in the pursuit of the best strategies for winning lawsuits. Depending on the jurisdiction, this approach has also been described as the “judicial” approach. However, as one French author stated in 1989, “Law is also a science of organization.” Thus, the adoption of an organizational approach and methodology allows for “the creation of better legal organization.” Consequently, “legal strategy”, understood here in the context of the legal policies of a firm, has also been explored from the perspective of the management sciences. Utilizing methods concerned with risk or resource management, the management sciences perspective seeks out the optimal organization that should be assumed by the firm’s legal function.

Thus, the judicial and managerial approaches concern themselves with how firms use the law to either enhance litigation results or maximize organization, perfor-
mance and profits, respectively. In addition to these approaches, a third, more recent approach has also emerged but it differs in the sense that it is not advanced on the basis of how the law is used. Rather, the “normative” approach, explores the underlying conditions or circumstances that create the opportunity for legal strategy development. Uncovering or understanding the origins of legal strategy, should, in theory, increase the ability to develop legal strategies, increase the opportunities for legal strategies and further enable the construction of more aggressive legal strategies.

Rather than being in conflict, the three basic approaches to legal strategy—judicial, managerial and normative—when juxtaposed, complement each other. For example, the managerial approach is aimed at determining which legal choices will be the most efficient at improving firm performance but is also concerned with aggressive strategies such as strategies that use a trial as an instrument of destabilization. The judicial approach applies this latter idea in the litigation arena. The normative approach attempts to improve our understanding of the origin of legal strategies in order to detect the legal opportunities that exist in a given legal framework. Thus, the relationship between these three approaches to legal strategy study might be conceptualized as follows:

Figure 2. Three Approaches to the Study of Legal Strategy

Consequently, although these three approaches to the study of legal strategy appear to diverge with respect to their immediate objectives, it is important to point out that when examined collectively, a broader concept of legal strategy theory begins to be illuminated. This observation should in turn assist in the development of the theory of legal strategy as well as the development of its comprehensive definition.

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9 See generally discussion in Antoine Masson, ‘The Origin of Legal Opportunities’ in Legal Strategies (n 3) at 27–39; see also Mary J Shariff, Marlene Pomrenke and Vivian Hilder, ‘Perspectives on Legal Strategy Through Alternative Dispute Resolution’ in Legal Strategies (n 3) at 201 and examples of strategies including cataloguing, positioning, oppositioning, flipping and appropriation.
B. The Judicial Approach

1. The LoPucki-Weyrauch Model
The trial environment is the place where legal strategies are the most obvious. Indeed, when litigation commences, each party develops and implements strategies to obtain the most advantageous outcome. Litigation tactics include various methods, some of which involve the manipulation of the judge or jury.10

Following this theme, Lynn LoPucki and Walter O. Weyrauch, provide one definition of judicial strategies in their article entitled, “A Theory of Legal Strategy”.11 In this article, LoPucki and Weyrauch state that the law is not just a simple game of written rules involving the ability to foresee solutions for each possible situation. These authors infer that the implementation of norms in a locus necessarily provides for certain latitude within which legal actors interact to decide how the written law should be applied. Any trial is therefore the result of strategies aimed at softening the rules that govern the interactions between the parties in order to orientate the application of the law in a way that is favourable to them – rather than as a result of the written law.12

In order to achieve the best outcome, an efficient judicial strategy must, according to LoPucki and Weyrauch, target four components: the legal decision-makers; the facts; the legal culture; and, as a subsidiary matter, the content of the law i.e. the written rules. Indeed, the factors external to the written rules, including culture, modes of perception and social norms, are at least as important as the actual legal rules themselves, since external factors can directly influence their content and application.

Building on this premise then, LoPucki and Weyrauch suggest a taxonomy of existing judicial strategies which distinguishes between: a) strategies that require the ‘willing acceptance’ of judges; b) strategies that aim to force or constrain judges; and c) strategies that tend to counter the opposing party generally.

a) Strategies that Require the ‘Willing Acceptance’ of Judges
In this first category, the strategies attempt to have the judge adopt a particular line of reasoning. For instance, the strategic party will try to demonstrate the ambiguities of the law and of the opposing party’s conclusions in order to challenge the applicability of the rule advanced or to invoke another rule of law superior to the one used by the opposing party in order to dismiss or remove some of its arguments.13

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11 See LoPucki and Weyrauch (n 3).
12 Ibid 1427 (Parties invest resources in a trial, such as argument development in order to attempt to modify the prevailing representation of what the solution should be and thus gain the acceptance of the judge).
13 Here, the use of the phrase “rule of law” is used loosely and is to be distinguished from the concept of the “Rule of Law”.
A strategic party may also try to persuade the judge to add conditions, some apparently implicit, to his or her ruling in order to render the legal principles arising therefrom inapplicable to a pending case.

b) Strategies that Force or Constrain Judges
In the second category, the strategies attempt to force or constrain the judge by reducing the leeway or scope available to him or her. Four types of constraint activities can be elaborated: the selection of cases used in argument (which can also be advanced through the doctrine of precedent if available); the selection of facts; the implementation of preventive actions prior to the main court proceeding (for example, at an evidentiary hearing) to organize facts more favourable to one of the parties (a technique also known as legal planning); and the use of the media to pressurize judges (a technique also commonly described as “media spin”).

c) Strategies that Tend to Counter the Opposing Party
In this last category, the strategies aim at preventing the opposing party from winning its case or from choosing the presiding judge. More precisely, the strategies are directed at: increasing the costs of the opposing party by requiring the appointment of an expert or obtaining the choice of a court more distant from the domicile of the other party; extra-legal strategies that allow for, for example, the prevention of dissatisfied customers from referring an issue to court; delaying the trial in order to play on the weariness of the opposing party; or preventing the creation of precedents by settling the dispute through an amicable resolution. Contractual strategies, which also fall into this last category, include: using arbitration to prevent the submission of the dispute to a public judge; drafting provisions to minimize a firm’s liability or to locate potential litigation in the most favourable jurisdiction.

2. The Role of Legal Perceptions and Mental Models
In order for judicial strategies to be successful, LoPucki, in a previous article, emphasized the role of legal perceptions. Indeed, according to LoPucki, it is critical for legal practitioners to take local legal culture and representations into account because these are what ultimately determine the outcome of a trial. LoPucki believes that in their daily practice, legal actors comprehend the law according to their own views – “mental models” – and rarely resort to written law. Furthermore, the mental models relied upon by legal actors are simplified and thus contain different versions of written law because the human mind is simply incapable of ingesting and fully storing the colossal details of the law. Accordingly, mental models contain errors, including

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14 LoPucki and Weyrauch (n 3) at 1457.
15 Ibid at 1461.
16 Ibid at 1468.
errors that can persist, because once legal representations are established, they are often very difficult to correct.

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Indeed, mental models are comprised of legal categories. Thus, mental models can perhaps be described as the most straightforward form of legal strategy – categorization – where a dispute is given its most favourable categorization, even though the category itself may be remote from the written law. Furthermore, it would be even more advantageous to modify or correct these mental models in a way favourable to the plaintiff. Such manipulation is however difficult because legal actors will only accept modification of their own models of the existing rules when a new mental model is presented with sufficient argument and strength at trial. Additionally, strategies for modifying mental models are ultimately vulnerable to legislative change.

Nevertheless, if a mental model is successfully modified, it is exceptionally burdensome for a legislative power to counter its effects since the new model tends to become absorbed into the legal culture. It will even be considered retrospectively, as a modernization of the law resulting in the underlying strategy being considered normal.

3. Procedural Strategies

a) Exploiting the Side-Effects of a Trial
The typology suggested by LoPucki and Weyrauch is not exhaustive. Indeed, there are numerous strategies aimed at exploiting the corollary effects engendered by a trial situation, particularly those that misuse certain procedural rules. One frequently observed example is the use of “discovery” procedures to obtain a rival’s economic information.20

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18 Ibid at 1522–8.
19 According to LoPucki, the judges’ awareness of the existence of strategic manipulation would reduce its impact. “For example, provisions of Chapter 13 of the bankruptcy code require that debtors pay all of their disposable income to unsecured creditors. The requirement is however, vulnerable to the debtor strategy of buying expensive consumer goods on secured credit before filing and proposing a plan that devotes the bulk of the debtor’s disposable income to payment of this new debt. The effect is to avoid the necessity of making payments to unsecured creditors. As courts became aware of this strategy, they began to inquire into such prepetition purchases and employ the “good faith filing” doctrine to combat it.” (n 17) at 1522 [n 119].
20 Robert G Bone, ‘Who Decides? A Critical Look at Procedural Discretion’ (2007) 28 Cardozo L. Rev. 1961; Compare Charles Sablon, ‘Stupid Lawyer Tricks: an Essay on Discovery Abuse’ (1996) 96 Colum L. Rev. 1618 describing a situation where Philip Morris, forced to comply with a discovery procedure, produced 25 boxes containing approximately one million documents. These documents were printed on dark red paper, making them difficult to read and photocopy. They also gave off a nauseating odour, which, according to the lawyers of the opposing party caused headaches, thus making them even more difficult to read in detail.
that concern cost management because of delays, limitation periods or emergency proceedings that limit actions. Similarly, procedural strategies can be used to stall transactions. For example, they might be aimed at freezing stock exchange transactions as the speed required by certain transactions here is hardly reconcilable with lethargic legal deadlines.

Other procedural strategies may be implemented to manipulate the outcome of a dispute. Notably, litigation or the threat of litigation can be used as a tool of communication or intimidation. Furthermore, even when the outcome is negative, a harsh judgment can still be utilized by a firm to its advantage. For example, it might be used to illustrate the inadequacy or unfairness of an existing legal norm and the necessity for its reform.

b) Strategic Positioning and Planning
Aside from tactics adopted for a trial and strategies that try to take advantage of the complex effects of trial procedures, it must be noted that legal strategies can also be implemented well in advance of a trial. These types of strategies anticipate potential law-suits and create, for example, legal structures that can be used as a “legal shield” against possible later demands from an opposing party. Examples here include: strategic planning that passes on legal risks to a specific subsidiary within a group of

21 See Harris (n 3); see also Diarmuid Rossa Phelan, ‘The Effect of Complexity of Law on Litigation Strategy’ in Legal Strategies (n 3).
22 Time is critical to legal strategists. For example, it can be used to delay a deadline; to create a debarment or foreclosure; or to void the character of an action. See J-C Woog, La Stratégie du Créancier (Paris: Dalloz, 1997). Moreover, a debtor may benefit from a negotiation period by organizing its bankruptcy, blurring evidence, or introducing a subversive action in order to paralyze the recovery of a debt. According to J-C Woog, this is what Karl Von Clausewitz named the “strategy of annihilation” or Hans de Delbrück, “the strategy of rampant wearing-out”. Time can also be a weapon to lower the vigilance of the opposing party and then used to better develop a subsequent attack – notably when the opposing party has accumulated debts which can allow it, as debtor, to be better controlled. Conversely, anticipation can allow for the prevention of these types of situations, for example, through the collection of evidence before a dispute has even begun.
26 Ibid; see also C Champaud and D Danet, ‘Stratégies judiciaires des entreprises’ (Dalloz-Sirey 2006).
companies; mechanisms of delegation of powers to protect corporate executives in their activities; and the technique of passing liability to another person, via, for example, insurance contracts.

Other strategies can be put in place in order to improve the possibility of arriving at trial in an already dominant position. Notable examples here include the use of particular contractual provisions related to jurisdiction or limitation of liability.

Notwithstanding the foregoing however, in order to actually prevent a trial in the first place, the best method remains efficient management of legal risk.

C. The Managerial Approach: Legal Strategy as Legal Policy

As described above, the second approach to emerge with respect to the study of legal strategies comes from the management sciences. The management approach tends to appreciate legal strategy as the legal policy of the firm. The analysis here therefore involves looking at how legal resources are mobilized by firms to achieve their business objectives. Indeed, according to this approach, a firm can acquire a competitive advantage if it has the capacity to reduce legal risks and maximize value by unpacking the legal resources at its disposal.

1. The Concept of Legal Resources

Under this view, the conception of resources is very broad. It includes all resources at the firm’s disposal that can be mobilized to achieve its economic objectives. In the context of legal strategies, resources can be identified as either legal or technical.

For example, C. Roquilly in an article related to Apple’s iPhone strategies, pointed out that when Apple decided to implement a selective distribution strategy for its iPhone, a business risk emerged – the development of an international parallel mar-

31 The term “Law & Management” is not used but it seems to the authors to be completely appropriate to indicate the whole of work using the tools of management to analyze the legal performance of the companies.
ket for unofficially unlocked iPhones. In addressing the risk, Apple mobilized both legal and technical resources. In this case, the legal resource was the implementation of a clear contractual policy regarding exclusive distribution, permitting the company to sue any parallel retailers for unfair competition and counterfeiting. The technical resource involved the development and use of certain technologies to re-block the unlocked iPhone. Apple then also became faced with a legal risk; the possibility of a class action lawsuit by consumers for Apple’s refusal to honour contractual guarantees if the iPhone was unlocked unofficially. Its legal resource response to this risk involved the design and implementation of a clear contractual consumer policy – one which identified to the consumer that the company would reject the guarantee for an iPhone that had been unofficially unlocked. Its technical resource response was to begin selling unlocked iPhones for a different price. This gave the firm the ability to claim that consumers have been given the option of buying an officially unlocked phone.

Because of their broad construction, legal resources can be grouped or classified in a number of different ways. For example, legal resources might be classified according to their origin. For instance, resources can emerge from the external legal environment in the form of a regulation (for example, the economic rules of public order or the law allowing selective distribution provisions), or can emerge from the internal company environment through its actions, contracts, or engineering of legal constructs (for example the use of the trust or other legal structure).

Alternatively, legal resources might be classified from the perspective of how firms gain access to them. For example, is the resource placed at the firm’s disposal by the legislator in the form of a legal instrument or option (“direct”) or is it the result of the firm diverting certain legal rules (“diversionary”). It is important to point out that accessibility as a resource is directly connected to the firm’s “capability” which is discussed in more detail below.

It is also possible to distinguish legal resources according to their overall business objectives, namely, according to whether they are aimed at preserving value (for example, a patent), developing value (for example, a selective network or distribu-

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34 Ibid.
35 On the notion of resource, see Wernerfelt (n 32); see also J Boddewyn, ‘Developing A ‘Political Organizational Economics’ View of Strategy Management’ research paper, Zicklin School of Business, Baruch College, City University of New York, presented at the “Management Strategy and Business Environment” conference, Wharton, 15 and 16 September 2000.
37 See DL MacPherson, ‘A Legal Strategy Case, Trusts in Securitization’ in Legal Strategies (n 3) at 267.
38 See Masson (n 9).
tion) or capture\textsuperscript{39} (for example, the phenomenon of patent sharks which involves the collecting of patents from, for example, bankruptcy proceedings and research and development followed by a suit for patent infringement).\textsuperscript{40}

Legal resources might also be grouped according to their particular nature, pattern, or activity. For example:

- \textit{object} resources: for example, to directly generate economic advantage;\textsuperscript{41}
- \textit{knowledge or know-how} resources: for example, to identify threats and opportunities arising out of the legal sphere;\textsuperscript{42} or
- \textit{generative} resources: for example, to produce or generate new "object" resources.\textsuperscript{43}

Again, the actual existence and ability to realize the potential of these resources, depends to a lesser or greater degree on the legal capability of the firm discussed in more detail immediately below.

<table>
<thead>
<tr>
<th>Legal Resource</th>
<th>Examples</th>
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<tbody>
<tr>
<td>Origin-based</td>
<td>- External legal environment</td>
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<td></td>
<td>- Internal firm environment</td>
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<td>Access-based</td>
<td>- Direct</td>
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<td>- Diversionary</td>
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<tr>
<td>Objective-based</td>
<td>- to generate economic advantage for firm</td>
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<td></td>
<td>- to develop/preserve the firm’s economic resources</td>
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<tr>
<td>Nature-based</td>
<td>- Object</td>
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<td></td>
<td>- Knowledge or know-how</td>
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<td>- Generative</td>
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\textit{Figure 3. Classification of Legal Resources}

\textsuperscript{39} See discussion in Boualem Aliouat, ‘Patents and Trademarks: From Business Law to Legal Astuteness’ in \textit{Legal Strategies} (n 3) at 295–6.

\textsuperscript{40} See Joachim Henkel and Markus Reitzig, ‘Patent Sharks’ in Harvard Business Review (2008) at <http://www.exed.hbs.edu/assets/intellectual-property.pdf>; see also Case C-306/96 Javico International and Javico AG v Yves Saint Laurent Parfums SA 1998 ECR I-01983, involving the bringing of a court action for competition infringement by a firm in order to avoid fulfilling contractual obligations based on the argument that the contract allowing it to be a distributor of a certain product in a certain area, violated the EC law, and that consequently, it should be able to sell the product everywhere.

\textsuperscript{41} C Roquilly, ‘From Legal Monitoring to Legal Core Competency: How to Integrate the Legal Dimension into Strategic Management’ in \textit{Legal Strategies} (n 3) at 7; see also Gary Pisano and David Teece, ‘The Dynamic Capabilities of Firms: an Introduction’ (1994) 3 Indus. Corp. Change 337.

\textsuperscript{42} Roquilly (n 41).

\textsuperscript{43} Masson (n 9). Indeed, the mobilization of certain standards is at times an attempt to fulfill certain conditions. Consequently, to exploit these legal resources, a firm should create a legal situation or place itself in a factual situation that will allow it to access these resources. For example, in order to invoke the free movement of goods or a company in EU law to prevent the application of a national law, a firm must rely on elements external to its business.
2. Legal Capability

The mere accumulation of legal resources is not sufficient to achieve competitive advantage. A firm that wants to draw advantage out of the legal environment must not only be able to identify legal resources but must also be able to deploy its resources in such a way as to achieve its economic objectives. Thus, in order to efficiently and successfully mobilize its resources in accordance with its economic objectives, the firm has to possess certain aptitudes, such as expertise.44

The Resource-Based View theory, from which the above considerations have been taken, advances the idea of “legal capability” (also described as “legal capacity”)45 to indicate whether a company has the aptitude and ability to:

- detect threats arising out of the legal environment (via evolution paths adopted or inherited46 by the firm that take into account the local legal culture as well as the formation and flexibility of cognitive structures involving trial, feedback and evaluation);47
- manage internal and external flow of legal information (the ability to transfer any legal problems to the best-placed decision level – which is not always the legal department – and the dissemination of legal solutions) through the creation of integrated process and routines;48
- accumulate all legal and non-legal resources along with an ability to deploy and co-ordinate them.

Hence, legal “capability” will differ from firm to firm even when firms are in the same sector. Indeed, the existence of different legal capabilities within firms of a

45 See Constance E Bagley, ‘Winning Legally: the Value of Legal Astuteness’ (2008) 33 Acad. Mgmt. Rev. 378. Recent advances in the evolution of the idea of “legal capacity”/“legal capability” can be directly attributed to Bagley’s work and her conception of the notion “legal astuteness” which she describes as, “the ability of a management team to communicate effectively with counsel and to work together to solve complex problems and to protect and leverage firm resources.”.
47 In order to follow legal evolution, evaluate the existing legal obstacles or incitements, companies can set up a legal watch program, that is to say a research, processing and broadcasting system of information as regards the current legislation and rules. The knowledge of the law, as a creative force in the implementation of the firm’s strategy, has to be used. Therefore, legal awareness, not being a sole purpose, is a first step towards more sophisticated approaches. Indeed, legal awareness “precisely allows lawyers to improve intelligence in situations in which the company finds itself. This intelligence, when it integrates the constraints and opportunities perceived by the legal environment in the decision-making process, is resolutely offensive.” B Aliouat and C Roquilly, ‘La veille juridique pour une intelligence des situations stratégiques’ (1994) 148 LPA 6.
given sector explains why a legal strategy cannot be easily copied by a competing firm and further explains how legal capability can confer economic advantage.49

Constance E. Bagley points out that a legal strategy is the fruit of a kind of legal-entrepreneurial “astuteness”50 rather than the result of the mere mobilization of legal or economic expertise. According to Bagley, several elements are key to legal astuteness. These include: the managers’ behaviour regarding the legal dimension of business; the managers’ involvement in legal issues (for example, contract negotiation and dispute resolution); the ability developed by non-lawyers to handle legal questions; the frequency of communication between the legal department and the head office; as well as the directors’ roles in the firm.51

The corporate legal identity also plays a central role in the setting up of a legal strategy. Indeed, in order for the firm to address each legal risk with an adequate level of competency, it is important that the firm’s agents are aware of the existence of the legal risks and that their vision – their mental model according to Lynn LoPucki – is aligned with that of the judges or, at the very least, are conscious of the existence of a more dominant interpretation that differs from their own. Consequently, the concept of the “legal culture” of a firm can also be defined as being comprised of the set of legal representations that are shared by the company’s personnel.

It is interesting to note that the legal culture will also determine the success with which a third party is able to exert pressure on a firm.52 Similarly, commonly shared legal perceptions can also provide a company with the opportunity to pressurize others. For example, a firm could attempt to exploit the fact that malleable law (such as a code of conduct for example) might be perceived by other companies as a hard line.53

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49 The normative approach refers to the notion of legal capital. Legal capacity cannot fully explain a firm’s capability to efficiently deploy its resources or to misuse some rules. It is indeed necessary to take into account the tools’ resources, which the firms have to exploit the ‘object’ normative resources.
50 Bagley (n 45).
51 Ibid.
53 A good example here is when a party invokes a foreign legal concept in order to give its argument the appearance of legality whereas the concept is unknown in the local legal system. For example, in France eBay invoked the “Good Samaritan” doctrine, even though the doctrine is unknown in France in order to convince the judge that it should not be held responsible for counter faking. See Bruce Crumley, ‘France Fines eBay over Fake Vuitton’ Time (30 June 2008); see also Davey Winder, ‘French Fakes Land eBay with AUD $65.8 million Fine’ (30 June 2008) <http://www.itwire.com/information-technology-news/e-commerce/19126-french-fakes-land-ebay-with-aud-658-million-fine>; see also discussion in I Hillel. Parness, ‘eBay Victorious (Again), Yahoo Attacked (Again), as the Auction Wars Continue’ Cyberspace Lawyer, (March 2001) <http://www.morganlewis.com/pubs/3276DFA9-655B-4E4E-ACCA56E50D7A5328_Publication.pdf>.
Moreover, the simple threat of a legal action for illicit collusion can make the re-negotiation of a contract easier when the other party is doubtful about its own compliance with the law.54

3. From Legal Resources to Competitive Advantage

From an organizational perspective, the mobilization of legal resources can only be effectively achieved by having regard to the nature of the legal activity that is engaged in by the company. This legal activity, from a management perspective, can be divided into four areas, namely: a) the legal management of risks; b) the management of legal risks; c) the management of structural legal constraints; and d) political activities.

a) The Legal Management of Risks

The legal management of risks concerns itself with the idea that law is primarily an instrument that can be used by the firm to manage its non-legal risks such as unpaid debt or breach of commercial relationship, for example. The legal management of risks is therefore focused on using the law to prevent economic hazards.

For example, a producer (P) and a distributor (D) agree to share the marketing costs of a product. These marketing services have a cost that distributor D will incorporate into his retail price. However, if there is no restrictive clause in the agreement between (P) and (D), a competing distributor (Z) may sell P’s product. Because distributor (Z) does not bear the same marketing costs, (Z) will be able to sell the product at the lowest price. Here (Z) will be acting in a parasitic fashion; Z is benefiting from the commercial investment of the first distributor (D) without bearing the marketing cost. Consequently, because of the lower price, the consumer will tend to buy the product from distributor (Z). In order to align its prices with Z, D will abandon bearing all the marketing costs (exhibition, care instructions, customer service etc.). However, if the product requires that it be sold for example, with certain information, now not available, some customers might withdraw from buying the product. In order to prevent this type of economic hazard when launching the product, the use of restrictive distribution clauses is necessary for producer P as well as for the distributor(s) or the consumer, the latter being able to benefit from the innovation only when the product reaches its full development.55

b) The Management of Legal Risks

The management of legal risks deals with risk related to the substance and the structure of the firm’s environment. Two types of legal risks can be identified. The first involves risks that are related to the legal effects of a choice or non-legal event, for

55 Henri Lepage, La nouvelle économie industrielle (Hachette Littérature 1998).
example a fraud or an accident. Litigation risks are thus implicated here along with risks of *legal sub-optimization*, that is, the choice of a legal construct or a set of legal options that will not give the best results and the possibility of a firm becoming a target of another firm’s legal strategy. The second addresses risks that originate from the law. These will include the risk that law (statutes, precedents) might change, the risk that a firm isn’t in compliance with legal requirements, or the risk that some of the legal resources owned by a firm are not valid (for example an unenforceable contract).

Several other typologies of legal risks have been suggested. For example, negative legal risks might be distinguished according to their:

- **Consequences**: for example, criminal risk, indemnity risk, activity risk (when the activity of the firm itself is at stake because of the possibility of having one of its products banned for example), the risk of *legal sub-optimization*;
- **Source**: for example, criminal law, corporate law, environment law;
- **Seriousness**; and
- **Causes**: for example, external risks resulting from the intrinsic behaviour of a firm, risks resulting from a malfunction of the legal department.

It is also possible to classify legal risk solely according to its trigger event, which can be internal or external. For example, legal risk can arise as a result of: unlawful behaviour (intentional or not); or a change, a trespass or unexpected application of a rule.

Whatever the nature of the risks, the management of legal risks attempt to examine potential sources of risks in the external legal sphere, evaluate how internal firm resources can be used to reduce risks or allocate these risks to third parties, and incorporate these factors into firm management and policy. Identification of the legal risks faced by the firm allows the firm to control negative risks through the implementation of an appropriate management strategy aimed at preventing or limiting the impact of these risks. For example, where there is a possibility that one party to a contract may have paid an illegal commission to an intermediary (unbeknownst

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56 The examination here should always involve looking at the risk of potential litigation which also carries with it a risk of losing due to a failure to consider other elements (independent of the substance of the litigation) that can be decisive in the outcome.


58 H Bidaud, P Bignon and J-P Cailloux, *Quelle fonction juridique pour votre entreprise?* (Esker 1995).

59 Collard (n 57) This last situation deals with the problems of compliance or conformity of the firm.

60 It is important to appreciate that external legal rules do not necessarily impact firms uniformly, even when the firms are in the same economic sector, and furthermore, that the content of legal rules can vary over time. Consequently, the appreciation of potential legal risks will differ from firm to firm as well as over time.

61 See Roquilly (n 41) at 20.
to the other party), the contracting parties can limit the risk of being accused of collusion by inserting a clause into their contract that expressly stipulates that none of the parties have paid any commission to an intermediary. This pre-emptive strategy can allow, should the case arise, a party to allege a contractual wrong on the part of the other party (assuming the absence of evidence of complicity).62

Not all risks are negative. Positive risks can also occur.63 For example, a change in the law can open up a market to competition. There are many examples of reforms in the telecommunications sector aimed at varying objectives which have resulted in the opening up of the telecommunications market to increased competition.64 Changes in the law can also create a new market. For example, the new profession of electricity trader in the EU was created in 2003 with the passing of a new EU directive.65 Thus, the identification of legal risks also provides the firm with opportunities to increase its competitive edge through the development of management strategies that can take advantage of and optimize positive risks. The ability to identify and utilize positive risks is more fully explored below in d) political activities.

c) The Management of Structural Legal Constraints
The management of structural legal constraints pertains to both conformity and compliance issues. The term conformity is used here to refer to the necessity that a firm behave adequately within the prescription of the legal environment. The term compliance is used to relate to the obligations that enjoin companies to adopt internal mechanisms to facilitate the prevention and control of certain risks (primarily financial or industrial), while leaving firms to decide on the precise form that these mechanisms will take in order to achieve their specific objectives. Within both of these constraints, the company is confronted with uncertainty. In the case of conformity, the firm must determine which behaviour to adopt in order to conform to its legal obligations. In the case of compliance, the firm must determine which of its internal resources should be deployed in order to comply with the regulation(s).

These uncertainties, if they are carrying risk, also provide firms with a further opportunity to differentiate themselves.66 A company can acquire an advantage if it adopts behaviour or deploys resources that have fewer negative consequences to its business but which at the same time enables it to comply with its legal requirements. This can be described as a strategy of compliance/conformity minimum.

A strategy of compliance/conformity minimum is however, not the only source of competitive advantage. A strategy that works towards maximizing compliance and

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62 J F Prat, ‘Pénalisation de la vie économique et choix de solutions juridiques’ in Marie-Anne Frison-Roche (ed), Les enjeux de la penalisation de la vie économique (Dalloz 1997).
63 F Verdun, La gestion des risques juridiques (Editions d’Organisation 2006).
66 The exposition of a firm to legal risks (or its doubt concerning its legal compliance) can be exploited by a third firm by threatening it with legal action.
conformity – compliance/conformity maximum – can provide strikingly different and/or additional forms of advantage.

First, a compliance/conformity maximum strategy can, for example, lead a firm to build legitimacy and predispose the firm to becoming a contributor to the construction of legal standards\(^{67}\) as well as improve the image of the firm in the opinion of consumers or judges.\(^ {68}\) Secondly, it can support the establishment of a strong corporate-legal culture within the company which can be instrumental in preventing certain internal risks related to fraud, for example.\(^ {69}\) Thirdly, a compliance/conformity maximum strategy is equivalent to a form of organizational learning, which in turn, can enable firms to improve their legal processes.\(^ {70}\) Fourthly, such a strategy can confer a margin of error within which to apply a regulation or where a hardening of an obligation can be anticipated, thus serving to reduce the risks attached to potential changes in the substantive law.\(^ {71}\) Indeed, by being able to point out that the firm has taken all possible measures to fulfil its obligations, a firm may be able to persuade a judge or regulator that an “obligation of result” is truly only an “obligation of means” and thus avoid liability. However, this kind of strategy is not easy to conduct. For example, in European competition law, several companies have tried, though without much success, to obtain a reduction of fines by asserting that they have set up programs of compliance.\(^ {72}\)

A company may also decide to walk the edge and voluntarily place itself in a situation of uncertainty by not complying with the law because the benefits of withdrawal from a situation appear to be higher than the benefits of compliance. This can be viewed as an applied form of efficient breach theory.\(^ {73}\) In contract law, the theory

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\(^{72}\) See case T-329/01 Archer Daniels Midland v Commission [2006] ECR II-3255; There exists here an important difference between the US and most European laws concerning the obligation related to counterfeiting. Whereas in the US, ebusiness companies only have the obligation to do something against it (an obligation of means), under French law, for example, they have the obligation to not sell any counterfeit goods (obligation of result). This was at the origin of a lot of case law concerning eBay, its VeRO program being only a means but not a guarantee of result; see also William S Laufer, ‘Corporate Liability, Risk Shifting and the Paradox of Compliance’ (1999) 52 Vand. L. Rev. 1343.

\(^{73}\) Efficiency theory suggests that promisors who breach, increase society’s welfare if their benefits exceed the losses of the promisees. See R Posner, Economic Analysis of Law, § 4.9 at 89–90, (2d ed. 1977).
of the *efficient breach* has underscored that this behaviour is relatively common.\(^{74}\) However in practice, such a strategy is difficult to set up because of a firm’s limited ability to rationalize, making it difficult for it to anticipate the possibilities for control as well as the potential consequences (legal, reputational, organizational) that could result from a breach of its obligations.\(^{75}\)

d) Political Activities

Because the law is not fixed, public participation and political mechanisms like lobbying can be mobilized to provoke change in the legal environment.\(^{76}\) Indeed, the legal environment can itself be viewed as an asset capable of generating profitable situations at the firm or sector level.\(^{77}\) For example, the influence exercised by Dutch auditing firms on sector regulations allowed auditing firms to force the legislator to reinforce companies’ obligations in respect of account certifications which then in turn, increased demand for auditing firm services.\(^{78}\)

It should also be pointed out here, that similar to the management of positive legal risks, being able to anticipate evolutions in the legal environment is also likely to

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\(^{76}\) Currently, a legal optimization strategy is being played out on a global scale under the auspices of climate change regulation. Numerous examples are being cited whereby companies and states in the business of or with access to cleaner energy resources are publicly demanding higher emissions reductions. Many commentators are pointing out, directly and indirectly, that the motivation here may not be altruism but rather is about gaining a competitive edge. That is, companies who stand to gain from a new market of clean energy are using the environmental regulation to force out competitors. See Mary J Shariff & Kevin Marechal de Carteret, ‘Regulating Climate Change: Legal Strategy in Action’ (forthcoming); see also eg. Anita McGahn, ‘Confronting the World’s Most Important Strategic Challenges: The End of Oil’ in Rotman Magazine: Wicked Problems (Winter 2009) at 22; see also Lawrence Demase and others, ‘United States: Turning your GHG Emission Reductions into an Asset’ Mondaq, (19 Jan 2010) <http://www.mondaq.com/unitedstates/article.asp?articleid=92496>; see also the emissions reductions debate in Canada particularly as framed by Alberta, Ontario and Quebec, Kelly Cryderman, ‘Ontario, Quebec Say They Won’t Shoulder Oilsands Burden’ Calgary Herald (14 Dec. 2009) <http://www.calgaryherald.com/business/Ontario+Quebec+they+shoulder+oilsands+burden/2336565/story.html>; see also Jason Fekete, <Alberta Fires Back at Ontario, Quebec, Over Oilsands Emissions>, Calgary Herald (17 Dec. 2009) <http://www.calgaryherald.com/entertainment/movie-guide/Alberta+fires+back+Ontario+Quebec+over+oilsands+emissions/2353591/story.html>.


confer an economic advantage upon certain firms. For instance, some firms, anticipating the end of the French gambling monopoly owned by *la Française des Jeux*\(^79\) and *PMU*\(^80\), have created websites in countries outside the European Union in order to penetrate the gambling market without waiting for complete liberalization.

### D. The Normative Approach

A third approach to legal strategy theorizing concerns itself with the ways in which companies misuse or exploit certain legal provisions. Indeed, since a company is typically among the first to exploit pathologies or weaknesses in law (for example, gaps, conflicts in standards, and so forth), a company may draw from these, certain advantages.\(^81\)

Although it is questionable whether this type of advantage will be durable over the long term, it can nonetheless enable a firm, particularly if the firm has built a reputation of aggressiveness, to restrict competitors from entering a market.

#### 1. Origin of Legal Strategies

In order to be able to implement legal strategies generally, companies have potential recourse to: (i) rules that provide latitude for firms to act; or (ii) resources derived from the misuse of legal norms, instruments or rules.

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\(^79\) Literally the “French company for games”.

\(^80\) PMU: Paris Mutuel Urbain is a French horse-racing betting firm.

\(^81\) This advantage is rarely durable over the long term with the exception of firms that develop a reputation of aggressiveness. See eg. Masson (n 9).
In situation (i), the resources can only lead to a competitive advantage if the manner in which they are deployed is consistent with the economic aims of the firm. Thus in this case we are talking about legal performance. For example, the development of a portfolio of key patents and the implementation of an appropriate distribution network through contractual arrangements can be instrumental in the marketing of a new product (Note: these resources have also been analyzed under the managerial approach discussed above). Under situation (ii), the resources can lead directly lead to a competitive advantage even though the advantage is unlikely to last.

Expanding on this, under the normative approach to legal strategy theory, in order to prevent the law from being misused for strategic purposes, all norms should possess the following neutral characteristics:

- clear, comprehensible, realistic and well-known to all;
- coherent;
- applied objectively, predictably, in a uniform and efficient way;
- impersonal, general and organized into a hierarchy according to interests which can be organized in such a manner. \(^{82}\)

In practice, however, these norms or characteristics are almost never met because of legislative imperfections caused by legislative “inflation” or by the fluctuation of political aims. As a result, there are unavoidable zones of opportunity in any given democratic legal framework which might then be mobilized by firms to develop legal strategies. These opportunities (which complete the possibilities offered by the legal resources described under the managerial approach) can be classified into four categories of origin which come to light upon a consideration of the characteristics that the rule should have assumed in order to ensure its neutrality. These categories are:

- **Hazy Law**: undetermined law because of its imprecision;
- **Crazy Law**: legal incoherence, contradictory or conflicting law;
- **Accidental Law**: law that produces an effect different from that wanted; this could mean either that it has not been implemented as it should have been (whatever its theoretical coercive force is) or it has produced results unexpected in law;
- **Malleable Law**: law whose substance can be easily altered. \(^{83}\)

In consideration of these areas of opportunities, the following different types of legal strategies can be implemented:

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82 See Masson (n 9) at 28.
a) Interpretative and Cognitive Strategies
The existence of an area of hazy law allows the construction of a particular interpretation of law to prevent the application of the law or allow the law to be used for a purpose different from that for which the law had been designed.84

For example, in their article entitled “Revisiting the Battle of the Forms: a Case Study Approach to Legal Strategy Development”, M.J. Shariff and K. Marechal de Carteret describe how a firm can use the common law approach to the law of contracts to take advantage of the performance doctrine in contractual negotiations by enhancing the chance that a “first blow” or a “last shot” will be considered as the binding term.85

b) Strategies of Law Shopping
The existence of situations where several rules might be applicable86 that is to say areas of crazy law, allows a firm, through a legal framework, to use one rule to avoid the application of another. Examples of these include resorting to an alternative mode of dispute resolution in order to avoid certain national courts87 or the creation of a dummy company in order to avoid liability rules.88

c) Instrumentalization Strategies
Some rules can be instrumentalized through the existence of malleable law. The instrumentalization is due to the fact that rules often do not take into account certain realities or are not applied, consciously or otherwise, as they should be thus engendering other effects than those predicted by the legislator. For example, because the Food and Drug Administration was not entitled to authorize as long as there were outstanding unresolved legal issues relating to the original producer, legal proceed-

84 In sum, vagueness is not only caused by the legislator but also by private entities and here again, whether voluntarily or not. For example, some finance companies intentionally commercialize complex contracts. They offer credit cards conferring advantages, which can also be converted into an interest-bearing loan. In the case of payment by card, the owner is not immediately debited but neither can he reimburse the finance company. He has to wait to receive a payment request, with which he will have to promptly comply, by completing several formalities, such as sending a recorded delivery letter. Otherwise, the right to the differed payment will become a loan, subject to a high interest rate, the aim being that the owner’s negligence will lead him to involuntarily take out a loan. It seems that mobile phones’ companies also use similar techniques, by imposing voluntarily complex tariff conditions, in order to limit the opportunity for customers to compare prices.

85 A battle of the forms arises when a buyer and a seller exchange conflicting standard forms and commence performance of the contract. Each party thinks that have a contract with the other but the question is on what terms. See Mary J Shariff & Kevin Marechal de Carteret, ‘Revisiting the Battle of the Forms: A Case Study Approach to Legal Strategy Development’, (2009) IX Asper Review of International Business and Trade Law 21 <http://works.bepress.com/mary_shariff/1/>.

86 Even although each legal system provides for jurisdiction or conflict rules which, in principle, prevent the use of crazy law, there will remain for persons subject to the rules, to either make a factual choice which will determine the application of the conditions of competence for each rule or to interpret the operation planned as attached to one rule or the other.

87 See discussion in Shariff, Pomrenke and Hilder (n 9) at 205–11.

88 See Hofstetter (n 27).
ings were frequently used by patent holder to the delay the commercialization of generic drugs.89

d) Normative Tailoring Strategies
The existence of information asymmetry or even mere political considerations makes the legislator or even the judge, susceptible to influential strategies. As a result, the law itself is soft. Hence, a firm can resort to lobbying90 for example, in order to gain economic advantage or more subtly, to create hazy, crazy or malleable law, which can possibly be mobilized at a later stage.91

2. Offensive Strategies
Within these zones of opportunity, two specific types of offensive strategies can be distinguished: vertical strategies and horizontal strategies.

Vertical strategies are strategies involving the company and its regulatory environment. These strategies are aimed at evading the rules that have been developed and imposed by the state in order to protect a common interest (in financial or social matters for example). If successful, a vertical strategy can allow a competitive advantage to be gained over rivals.

Tax avoidance schemes are a typical example of vertical strategies in action. For example, a company can gain a significant competitive edge by reducing global taxes payable through the utilization of offshore subsidiaries and the minimization of its asset base in the domestic jurisdiction.92 In the case of offensive vertical strategies, it is important to keep in mind that they can remain largely undiscovered for lengthy periods of time because they are often cloaked with legitimacy through the involvement of a number of players including banks, lawyers and accountancy firms. A good


example here is the role played by accounting firms which frequently market tax avoidance schemes as tax products to corporations and individuals. 93

Horizontal strategies, on the other hand, are aimed at causing direct harm to rivals. For example, a firm might commence a court action in order to increase costs for a competitor, or to interfere with or break a contract of cooperation between two competitors. 94 A firm can also use a court case to invite itself into a relationship between other firms on the basis that a refusal to include it will be discriminatory. 95 Similarly, a firm may rely on the concept of “essential facility” under EC competition law, to permit it to gain access to and take advantage of another company’s technology developments without itself having to incur the cost of investing in its own research and development. 96

Take for example two firms, A and B, where A invests in research and development to develop a new technology but B uses its profit for something else. When A becomes dominant because of its investments, B claims that it should get access to the Technology developed by A because the Technology should be considered as an “essential facility” under EC competition law to which access is required in order to compete with A. Consequently, although B will pay A for access to its Technology, the cost will generally be less than the investment that A made to develop the Technology in the first place and even more significantly, A will have lost its technological leadership. 97

Horizontal strategies are not restricted to dispute-oriented strategies. Indeed, they can be developed through a number of means, including through the use of intellectual property regimes as a general resource and a tool for value capture. 98 A good example here is the use of intellectual property regimes to support rent seeking behaviour. 99

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95 See joined cases T-185/00, T-216/00, T-299/00 and T-300/00, Métropole Télévision, Antena 3 de Televisión, Gestevisión Telecinco, Sociedade Independente de Comunicação, v. Commission of the European Communities [2002] ECR II-03805.


98 See eg. discussion in Aliouat (n 39).

99 For further discussion see Daryl Lim, ‘Innovation and Access: Legal Strategies at the Intellectual Property Rights and Competition Law Interface’ in Legal Strategies (n 3) at 403.
V. Conclusion

At least three principal approaches to theorizing legal strategy have emerged: the judicial, managerial and normative. Their aims appear to be complementary rather than conflicting. For example, the judicial approaches to legal strategy focus primarily on litigation-related strategies and intersect with the objectives of the managerial approach. Additionally, the normative approach to legal strategy appears to be primarily interested in the one-shot aggressive strategies whereas the managerial approach concentrates more on the development of long-term competitive advantage. Furthermore, the normative approach focuses on the misuse of norms whereas management concerns itself with the mobilization of legal resources that have been put at the company’s disposal by the legislator. The judicial approach is concerned with both. Consequently, despite their differences, these approaches can be seen to underlie the existence of various strategies based on legal resources arising from both normal uses and misuses of the Law.

To summarize, firms can deploy their legal resources from within the legal activity of a firm to: reduce non-legal risks (business, technology risks); anticipate and prevent legal risks; reduce negative economic impacts on the business from compliance and conformity requirements; and take advantage of the legal environment. Furthermore, if the resource mobilized exists simply as a result of the legal environment which has arisen out of lawmaker’s will, the resource can be viewed as “conceded”. On the other hand, if the resource arises because of the misuse of a norm it might be considered as “polluted”. However, a firm can only ever utilize these potential resources (conceded or polluted) if it has a sufficient legal capability to efficiently deploy these resources in accordance with its business objectives.

The foregoing discussion on legal strategy can be comprehensively conceptualized in at least two different ways. Figure 6 sets out a resource-based focus on legal
Figure 6. Legal Strategy Theory: Resource-Based View combined with the Normative Approach
strategy theory, while Figure 7 proposes a perspective on legal strategy theory based on its intersections.

In accordance with both perspectives, the authors propose the following definitions:

**Legal Strategy**: An intentional use or misuse of legal latitude to improve firm performance by minimizing risk, maximizing opportunity and controlling outcomes.

**Legal Latitude**: A locus for freedom of action derived from the law, its instruments, norms, perceptions and evolution.

As well as working towards an integrated definition and theory of corporate legal strategy, the above overview of legal strategies, while concise, can also be seen to emphasize the importance of four particular elements to the development of a proactive economic approach to law.

First and foremost, there cannot be legal strategies unless the firm also has the ability to identify legal opportunities. This requires *sufficient and efficient legal awareness*.

Secondly, firms must be able to *assess their legal capacity* and increase *their expertise*.
Third, in order to improve the quality of the legal flow circulating within a firm, the firm should work towards developing a corporate legal culture within the firm among its lawyers as well as its non-lawyers (operational, managerial).

Fourth, it is important for any company to be proactive, that is, a company must act before an issue arises in order to be able to: a) mobilize the necessary legal resources at the earliest stage possible; and/or b) put itself into a situation where it will be able to exploit legal opportunities.

In addition to these elements being significant to a firm’s ability to increase its competitive edge, these elements are obvious targets for future study in corporate legal strategy theory. Indeed, the more that the law can be understood by its capacity for economic influence, the more transparent legal strategy will become, thereby increasing its accessibility and in turn, its legal legitimacy.