Round Table on:

"Enhancing legal certainty in the relationship between competition authorities and judiciaries"

Contribution

by

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Legal Certainty in the Relationship Between the Competition Authorities and Judiciaries

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Key Goals

- Enhance the effectiveness of competition law enforcement – at Court and Agency levels
- Introduce legal certainty to the analysis of competition law
- Improve collaboration between Competition Authorities and Courts
- Achieve an optimal level of intervention – promote consumer welfare, safeguard innovation, investment and competition
Challenges – Sponge

• Competition law as a national creation -

○ Different levels of economic development, market realities, government and enforcement structure

○ The scope and limits of competition law are not always clear: Public Interest, Fairness, Market Structure, Economic Stability, Employment, Prosperity, Social Protection, Foreign Trade...

• The ideal of purity is not internal to the law – one needs to ‘impose it’ to maintain a stable analytical environment
Challenges – Economic Analysis

• Ranging levels of analytical capacity...

• But, even when capacity is present -
  ○ Beyond hard core: complex modelling vs reality
  ○ Assumptions of rationality and utility maximisation
  ○ Not a value-free science
  ○ Accuracy not always present

• Beyond hard core restrictions, inherent inconsistency is present

• *Risk* of over simplification, formal analysis or procedural focus
Framing the Quest for Optimal Intervention

The law *(political creation)*
‘constrained’ by economic thinking *(context dependant)*

Purity and stability imposed on this framework
to create a workable legal system

International collaboration and discussion set to align
these efforts and their extent
Legal Environment – Agency

- Clear guidelines on key issues
- Clear communications with stakeholders
- Continuous ‘self-policing’
  - Prioritising of cases
  - Signal to market
  - The adequate level of intervention
Certainty in Decision Making – Agency and Court

- Transparency and detailed reasoning

- When possible, conformity to agreed international benchmarks

- Clarity in Economic Analysis –
  - Appointed experts, expert evidence and ‘hot tub’
  - Application of models to reality
  - Market tests
  - Invited submissions

- Capacity building & training
Effective Collaboration – Agency and Court

- Maintain the actual and perceived independence of the Court

- **Framework for cooperation:** Relationship between Entities, Exchange of Information, Invited Submissions, Case by Case Opinion, Training, Guidelines

- **Context:** Private litigation, Court as Decision Maker (following prosecution by agency), Appeal Court, General or Specialised Courts?

- Network for exchange of information and capacity building – Courts and Agency
Effective Judicial Review

- Clear decision making as key for effective judicial review

- Independent analysis

- Effective collaboration does not imply complete agreement - Important to *affect* the level of intervention, rather than observe

- Should the court engage in complex economic analysis or rely on the agency?
Competition law is not a ‘given framework’ with absolute truths, but rather a dynamic creation, affected constantly by decision making at agency and court levels.

Effective collaboration is essential for safeguarding the integrity of the law.