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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



UNCTAD

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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 *v* 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?

Concluding Remarks



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.