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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.