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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

JUDICIAL PERSPECTIVES ON COMPETITION LAW

-- Session II -- Call for country contributions

This document is a call for country contributions for Session II of the Global Forum on Competition to be held on 7-8 December 2017. GFC participants are invited to submit their contributions by 13 November 2017 at the latest.

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TO ALL GLOBAL FORUM PARTICIPANTS

RE: Roundtable on “Judicial Perspectives on Competition Law”

16th Global Forum on Competition (7 and 8 December 2017)

Dear GFC participant,

In December 2017, the OECD Global Forum on Competition will hold a roundtable on *Judicial Perspectives on Competition Law*. I am writing to you in order to provide you with some background about the topic, and to invite you to submit a written contribution, if possible with relevant case examples.

The Roundtable will address various dimensions of judicial adjudication of competition law. It will try to elicit the main challenges that judges face when applying competition law, and find ways to address them. The Roundtable will be led by a panel of senior members of the judiciary from around the world. Since the audience will comprise not only judges but also representatives of competition agencies, the Roundtable will provide a venue for an exchange of views regarding the interaction between competition agencies and courts.

While the discussion will be wide-ranging, I would like to explore the following themes in particular:

1. Standard of proof and the use of economic and indirect evidence in judicial proceedings related to competition
2. Interactions between judges and competition authorities
3. Experiences and lessons regarding the use of generalist and specialized competition courts

If you wish to submit a contribution, I suggest that it focuses on the following practical questions, with a particular focus on developments in your jurisdiction:

1. Evidentiary Matters in Competition Cases before Courts

The evaluation of evidence in competition cases – both the amount of evidence and the expertise required to assess it – poses particular challenges for courts. Very often specialised competition agencies are in a better position to evaluate that evidence. However, the rule of law rightly requires courts’ decisions to prevail over competition agencies’ administrative decisions despite the greater expertise of those agencies and the difficulties that courts may have in dealing with complex economic matters.

- Does lack of economic expertise on the part of judges create obstacles to the effective enforcement of competition law? If so, how can those obstacles be addressed?
- What mechanisms are there to ensure that economic matters are adequately taken into account in the context of the legal doctrines that courts must apply?

- Are procedural or institutional solutions to the evidentiary difficulties faced by courts in place, and are these solutions adequate? For example: (i) do courts rely on rules (of thumb) which are easier to apply than detailed economic assessments? (ii) do the rules on burden and standard of proof provide an adequate mechanism to evaluate the aptness of economic assessments? (iii) what tools can be deployed to deal with conflicting sets of economic evidence (e.g. hot-tubing, court-appointed experts, specialised courts, etc.)?
- Do standards of review of decisions by competition agencies vary depending on the level of expertise of courts? Should they?

2. Interactions between Courts and Competition Authorities

The interaction of competition agencies and courts is a sensitive one. Nonetheless, the assessment of whether such interactions are appropriate will often depend on the specificities of a case. If a case concerns the judicial review of a decision by a competition agency, a court will have to assess that decision and make up its own mind about it. In private disputes, on the other hand, courts may want to rely on the expertise of the competition agency instead. Further, in the context of advocacy, courts and competition agencies may want to actively cooperate.

- Can you provide examples of occasions and projects when the competition authority sought to engage with the judiciary? Regarding which topics (e.g. the handling of competition evidence, confidential information, technical support, etc.) have these engagements taken place?
- Does the interaction between courts and competition agencies raise concerns regarding the separation of powers? What areas of tension are there in this respect? How can these tensions be softened?
- Is cooperation between competition agencies and courts to improve competition law enforcement and awareness appropriate? If so, are there or should there be limits to this cooperation?
- Are there formal or informal mechanisms for interaction between competition agencies and the judiciary outside the scope of judicial cases (e.g. joint workshops, academic or professional conferences, etc.)?
- Does competition law play a role in the initial or on-going education and courses attended by judges in your jurisdiction? Have you conducted any previous work aimed at enhancing the capacity of judges in dealing with competition matters?

3. Experiences and Lessons Regarding the Use of Specialised and Generalist Courts

A commonly adopted solution to address the difficulties that courts face when addressing competition law cases is to concentrate these cases in a judicial body with a certain amount of competition expertise. Whilst experience across countries demonstrates that effective judicial enforcement of competition law does not necessarily require either specialised or generalist courts or judges, there are advantages to specialisation. Specialist judges – either in the context of specialist courts or as part of a “competition list or chamber” of judges belonging to a generalist court – will, after some training and faced with a more regular stream of cases, become familiar with the economic concepts at the root of the competition law. On the other hand, competition law is applied in the context of a wider legal system, and it is often thought desirable that competition cases be subject

to the same generic principles and practices that govern law in a certain jurisdiction, and that the risks of capture of specialist bodies be minimised.

- Do you have experience with generalised or specialised judicial bodies? Have there been developments in this regard in your jurisdiction? Can you provide examples of advantages and drawbacks from your current regime, and/or from past reforms affecting the specialisation of courts in competition matters?
- Have you considered the advantages and disadvantages of judicial specialisation in competition law? If there has been a judicial reform in this regard in your jurisdiction, what was your role in it? Do you have a view on the ideal level of specialisation of courts in competition law matters: (i) concerning the review of administrative decisions; and (ii) concerning private disputes involving competition law matters?
- Can the advantages of judicial specialisation be reduced by appeals' mechanisms to generalist courts? Or are such mechanisms beneficial?

The questions listed above are not exhaustive, and participants are encouraged to raise any other relevant issues in their submissions or during the discussion. I also strongly encourage you to discuss and comment on your relevant enforcement experience in this area.

The OECD webpage on Judicial Perspectives on Competition Law (<http://www.oecd.org/competition/globalforum/judicial-perspectives-competition-law.htm>) will be the primary vehicle for conveying documentation and related links on this subject. Unless explicitly requested not to do so, we will reproduce all written contributions on the site.

I would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. I invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively the Secretariat will produce a summary, but given the time constraints you might not be in a position to check it before distribution on O.N.E.

In order to ensure an effective preparation of the roundtable discussion, I would be grateful if you could advise the Secretariat **by 13 October 2017** at the latest if you are planning to make a written contribution on the topic. Written submissions are due **by 13 November 2017** and failure to meet this deadline may result in your contribution not being distributed to delegates via O.N.E. in a timely fashion in advance of the meeting.

All communications regarding the documentation for this roundtable should be sent to Ms Angelique Servin (Email: Angelique.SERVIN@oecd.org). Please address all substantive queries relating to this discussion to Ms Lynn Robertson (Email: Lynn.ROBERTSON@oecd.org) and Mr Pedro Caro de Sousa (Email: Pedro.CARODESOUSA@oecd.org).