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OECD Global Forum on Competition

REGULATORY REFORM: STOCK-TAKING OF EXPERIENCE WITH REVIEWS OF COMPETITION LAW AND POLICY IN OECD COUNTRIES - AND THE RELEVANCE OF SUCH EXPERIENCE FOR DEVELOPING COUNTRIES

-- Note by the Secretariat --

This note by the Secretariat is submitted FOR DISCUSSION under Session I of the Global Forum on Competition to be held on 12-13 February 2004.

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STOCK-TAKING OF EXPERIENCE WITH REVIEWS OF COMPETITION LAW AND POLICY

-- Suggested Issues and Questions for Discussion --

1. Introduction

1. The competition policies and institutions of more than 20 countries¹ have been subject to in-depth peer review since 1998. Nearly all of those reviews were done in connection with the OECD's horizontal program on regulatory reform. That project now provides an occasion for examining what has been learned through this process. The annex to this paper summarises and discusses some of the key findings of those reviews. It is based on a paper that is being prepared for the OECD's Special Group on Regulatory Policy (SGRP), which is preparing to re-examine the general recommendations about regulatory reform and regulatory policy from the OECD's 1997 *Report on Regulatory Reform*². That 1997 Report provided the framework for the reviews in the Competition Committee.

2. Several perspectives were taken in these reviews. In addition to discussing the reviewed country's competition law and the institutions that apply it, the reviews examined the foundations of competition policy and institutions in the context of the country's business, economic, political, and legal traditions. The reviews also dealt with the relationship between regulatory institutions and competition and with policy advocacy. At one level, the interaction of competition policy with regulation is a matter of process and technique. But at another level, it calls for assessing the importance of competition and markets in economic policy, compared to other goals and policies. Substantive competition laws and enforcement procedures have been of considerable interest in the peer review process; however, recommendations at that level of detail would be impracticable in the regulatory reform context, so the background paper contains less about those topics. In any event, differences in laws and procedures appear less important than differences in economic and policy cultures in explaining variations in enforcement effectiveness.

3. Despite those differences, the reviews showed broad areas of similarity. Substantive laws generally apply similar rules to the same kinds of conduct, and enforcement institutions follow generally similar forms. To a surprising degree, the scope of competition policy was revealed to be similar too, as most of the same sectors or activities are subject to exemptions or special treatment, or present the same problems of enforcement and advocacy, in all of the countries reviewed. The similarities are due in part to similarities of legal context and economic development in the Member countries reviewed. But even for countries that differ more from OECD Members in those respects than the Members differ from each other, much of the experience from the reviews may nonetheless be useful and instructive.

4. Notably, many of the reviewed countries have undergone wide-ranging programs of administrative, economic, or political reform. Thorough competition-based reform programs have aimed to stimulate development and improve economic performance. Several reviewed countries have undergone major regime changes from central planning to market economies. How competition policy was able to contribute to changes of that magnitude should be of interest to other countries that face challenges of a similar scale.

2. Suggested Issues and Questions for Discussion

5. The 1997 recommendations and their supporting explanations imply that competition policy should enjoy a privileged position in regulation. The questions set out below explore what that might mean. Should there be a presumption in favour of competitive-market solutions to problems? How strong should that presumption be? Is it realistic to require that other policies should be pursued only through means that distort competition as little as is necessary to achieve them? If not, how much distortion should be permitted? And who should decide?

2.1 *The scope of competition policy: exclusions, exemptions, and special treatment*

6. The premise of competition-based reform is that competition is a general principle for organising the economy. It follows that the first reform recommendation about competition law is that it should apply as broadly as possible: “Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways.” This does not mean that only competition matters. Rather, tolerating monopoly or collusion instead of competition calls for justification. Regulations may encourage, or even require, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may permit price co-ordination, prevent advertising or other avenues of competition, or require territorial market division. The principal object of concern is legislation or other official, general action that confers special treatment. But claims that competition law and policy must be balanced against other laws and policies can come up in other contexts, including the application of competition law itself.

- The scope and nature of exclusions and special regimes are broadly similar: that is, they are found for most of the same sectors and types of conduct in most of the countries reviewed. The common examples include agriculture and co-operatives, labour, intellectual property and performing rights, infrastructure industries, financial services, media, and self-regulation of professional services. What can we conclude from the similarities? Which ones demonstrate that the same problems of anti-competitive protection need to be reformed everywhere? Which imply that the same other goals and values are considered more important in these sectors everywhere?
- *De minimis* rules, to exempt small firms or small transactions, may be a useful and transparent way to economise on enforcement resources. But definitions and boundaries may be drawn to protect favoured interests. Does special treatment compromise the principle that competition law applies to all? Or does exempting the small and weak assure the public that the law will be applied instead to control abuses by the large and powerful?
- Nearly everywhere, there is a general rule that exempts conduct that is authorised or required by some other law or regulation. Only some of those rules give a priority to competition policy. Should there be a clear general rule that favours competition policy in the event of a conflict between different laws or regulations?
- What is the process for considering exemption from competition law based on other policy considerations? Is that done best by the same institutions and process that apply competition law, or by something or someone outside it?
- Some exclusions, including some that reverse particular law enforcement efforts, look like special deals for sectors with political power. How can competition policy become a general, horizontal principle if its scope is subject to that degree of political interference?

- Where government interests or actions are involved, application of competition policy commonly encounters problems. Government operations may provoke complaints from users about monopoly or from private sector providers about unfair competition. Local officials may encourage non-competitive private conduct or deny licences and thus prevent entry. How can competition law correct gaps in the scope of competition policy that result from government conduct in the marketplace? What is the experience in applying legal prohibitions to official action or government entities? How much must be left to advocacy and structural reform?

2.2 *Sector regulation and deregulation*

7. Some special treatments and related regulatory programs may be fully consistent with a broadly-applicable competition policy, of course. They may represent a more efficient way to apply general competition principles, by adapting them to recurring fact patterns. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. The need for reform arises when changes in technology or in other institutions lead to reconsideration of the basic premise, that competition policy and institutions would be inadequate to discipline market power. Regulators may try to prevent co-ordination or abuse in an industry, just as competition policy does. Different regulators may apply different standards, though, and policies which appeared similar may have led to different outcomes.

- What considerations enter into the relationships between institutions for competition law enforcement and competition-policy regulation? Is it feasible for a sector-specific regulatory authority to apply competition laws that are custom-built for that sector? Or is it better, if the functions are separated, for sectoral institutions to apply the same substantive law and analysis?
- Where is it best to combine the administrative institutions that apply laws affecting competition, including economic regulation of natural monopolies, into one? Particularly in smaller countries, this can economise on the use of expert resources. But the functions of sector oversight differ from those of *ex post* enforcement and may call for different procedures and rules.
- Where regulatory intervention is premised on market power in the regulated industry, the competition authority may be responsible for defining the market and determining whether a firm has market power in it. Is it enough to require that sector regulators consult with competition experts before reaching these decisions? Should the competition agency have legal control over these determinations? Or should consistency be promoted by subjecting them to a common appeal authority?
- In infrastructure sectors, promoting investment and development may be important concerns, along with supporting competition and efficiency. Those considerations need not be inconsistent. But priorities and sequencing matter, and reforms must take account of institutional capacities. What is the appropriate role of the competition agency in considering these issues and in designing and implementing infrastructure reforms and privatisation?

2.3 *Policy and advocacy*

8. Competition problems from regulation often begin where enforcement jurisdiction stops. In nearly all reviewed countries, competition policy offices are active in advocacy to reform anti-competitive regulations. This function is particularly important where competitive market institutions are unfamiliar. In

that setting, advocacy involves educating the public and other parts of the government as well as providing views about official policies and decisions affecting competition. But advocacy is not always done by the enforcement agency. Where there is a ministerial policy office separate from the enforcement agency, the ministry office typically participates in policy debate within the government.

- When does an enforcement agency have standing and authority to advise about policies that are outside of its law enforcement ambit? How important is having statutory authorisation to engage in advocacy?
- Does an independent competition agency make a more credible contribution to public debate, because of its stance and expertise? Or does participation in public debate undermine the independence needed for effective enforcement?
- For relatively new or uncertain competition agencies, is advocacy a good way to bring the importance of competition to public attention? Or is it more important to establish an enforcement record?
- What resources are needed for effective advocacy? What are the appropriate roles of agency staff and officials and of outside expert consultants or advisors?
- The process of regulatory impact analysis (RIA) is related to the advocacy and policy work of competition officials. If there is there a systematic process for assessing and correcting the regulatory stock or for improving the quality of the regulatory flow, how does it take account of competition? What has been the role of competition policy officials in these processes? How does RIA apply a principle of “least anti-competitive means”?

2.4 *Competition policy institutions and enforcement*

9. The recommendation for vigorous law enforcement against collusive behaviour, abuse of dominant position, and anticompetitive mergers implies the need for vigorous and effective enforcement institutions. The enforcer’s stature, credibility, and independence from political influence are important considerations, particularly if decisions are to be based on competition impacts rather than balanced against other policies. Competition policy is challenged by rent-seeking: the greater the potential for monopoly profit, the greater the incentive to try to influence decision-makers to obtain or protect that profit. Thus it may be particularly important for a body that is responsible for preventing monopoly to be shielded from rent-seeking influence.

- Virtually every jurisdiction makes some effort to separate applications of competition policy from political pressures, either by the legislature or the government. On the other hand, institutional designs may try bring in a non-expert and potentially political perspective, in the appointment process or in the structure of decision-making institutions. How effective are commonly used measures such as administrative separation from ministries or the government, separate budgeting, fixed terms and tenure protection? What is the experience with entrusting decisions to bodies that include representatives from interest groups?
- The most commonly encountered obstacle to effective, vigorous enforcement is the unwillingness of courts to support sanctions that are strong enough to deter anti-competitive conduct. There has been a clear trend toward stronger financial penalties against hard-core cartels, but much remains to be done. What can be done to educate and persuade judges and policy-makers about the importance of protecting competition by deterring and if necessary

punishing conduct that undermines it? How can other remedies such as damages or private suits supplement public enforcement effectively?

2.5 *Linkages to other market-related policies*

10. Policies that are frequently linked to competition policy and institutions, and that have thus been discussed in many of the reviews, include consumer protection, unfair competition, public procurement, subsidies and state aids, and international trade. Most, but not all, of the goals and effects of these policies are typically considered to be complementary to or consistent with those of competition policy.

- What are the advantages, and disadvantages, of combining these complementary functions with competition policy and law enforcement, particularly where resources and expertise are constrained?

2.6 *The role of competition policy in large-scale reform*

11. In different conditions, the scope of reform will differ. In some cases, the need may be to establish institutions in the first place, not just to reform ones that are not working as intended. Or, the object of reform may be the structure of ownership, governance, intervention, and protection, rather than the methods for devising and applying regulation. The reviews have shown that successful reform efforts include strong competition policy elements. An early review offered an insight that explains the linkage between competition-based reform and long-term economic improvement: “healthy competition trains an economy in adaptive capacities.” That observation was made by an official of a Member country which implemented in the 1990s a broad-based, long-term reform program based on competition principles and established for the first time in its history a credible competition enforcement system.

- Whether the competition culture is strong enough to support durable reform is an issue that came up in several reviews. What are the conditions in which the links between competition, reform, and development are persuasive to policy makers and to the public?
- Where the commitment to competition is uncertain or untested, what is the best way to create broader support and acceptance? Is it prudent, or necessary, to give other agencies and ministries a responsibility and mission to protect and promote competition? There is a risk of inconsistency and capture by interest groups; on the other hand, spreading the competition culture helps overcome the notion that competition is just a technical specialty, rather than a fundamental principle.

NOTES

- ¹ Countries reviewed under the OECD regulatory reform programme are: Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Norway, Netherlands, Poland, Spain, Turkey, United Kingdom and the United States. Most of these country reports are available at www.oecd.org/comp. South Africa and Chile as well were reviewed under the OECD programme of cooperation with non members. These reports are also available at www.oecd.org/comp.
- ² The 1997 Report on Regulatory Reform is available at www.oecd.org.

ANNEX

1. The OECD's horizontal program on regulatory reform has generated in-depth peer reviews of the competition policies and institutions of 20 Member countries. The Special Group on Regulatory Policy (SGRP) is taking stock of what has been learned in this process, in preparation for a report to the Council in 2005.

2. The recommendations of the 1997 *OECD Report on Regulatory Reform* are the framework for this overview. The major themes that emerge from the general recommendations of the 1997 *Report* involve the regulatory process, sectoral reforms, enforcement, and advocacy. The 20 country studies have examined the history and context of competition policy, the basic norms, the institutional structures and powers for enforcement, exclusions and special sectoral problems, and policy studies and advocacy. Those studies followed a standard format, which was motivated in part by a set of analytical questions that underlay the 1998 project to develop indicators about regulatory quality.

3. This review will concentrate on issues related most closely to regulation and the regulatory process. It concludes that competition policies are stronger and more coherent, and regulatory policies recognise more clearly the value of market competition, where they have supported each other to motivate reform and independent enforcement defends competition principles from opportunistic intervention. The basic recommendations of the 1997 *Report* are still sound, but expectations about their implementation should be realistic. Although the value of competition is widely acknowledged, only a weak consensus requires that other policies be promoted by the least anticompetitive means.

4. The country studies presented to the Competition Committee examined substantive laws, enforcement processes, and institutional forms in a level of detail that will not be directly relevant to the SGRP's work. Because of variations in institutions among the members, it is difficult to distill general prescriptions that would be useful in that context. The level of enforcement effectiveness across the Member countries is broadly similar. In a few countries, the system seems particularly effective, and in a few others, particularly ineffective—but the variations are probably due more to differences in their economic and political cultures than to differences in institutional forms or practices.

The 1997 report recommendations

5. Competition policy is prominent in the 7 basic recommendations of the 1997 OECD Report on Regulatory Reform. These call for formal reform programs, systematic review of regulations, transparency and non-discriminatory application, effective competition policy and enforcement, reform of anti-competitive economic regulation, reduction of regulatory barriers to trade and investment, and support of reform in linkages to other policy objectives. Five of the 1997 recommendations deal in whole or in part with competition policy or enforcement.¹ Taken together, the 1997 recommendations and their supporting explanations imply that competition policy should enjoy a privileged position in regulation, by combining a strong presumption in favour of competitive-market solutions to problems with the principle that other policies should be pursued only through means that distort competition as little as is necessary to achieve them.

Principal recommendations of the 1997 Report

1. Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.
2. Review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively.
3. Ensure that regulations and regulatory processes are transparent, non-discriminatory and efficiently applied.
4. Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.
5. Reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests.
6. Eliminate unnecessary regulatory barriers to trade and investment by enhancing implementation of international agreements and strengthening international principles.
7. Identify important links with other policy objectives and develop policies to achieve those objectives in ways that support reform.

Source: OECD Report on Regulatory Reform, 1997

6. The recommendations about regulatory quality and process recognise the priority of supporting market competition. The first recommendation's criteria of good regulation include minimising costs and market distortions and being compatible, as far as possible, with competition and open trade and investment.² Much depends on how much is "possible," of course. The 1997 Report calls on governments to establish reform institutions which will adopt and apply the explicit principle that regulation should not impair competition, trade, and investment any more than is necessary to achieve other, legitimate purposes. The second recommendation, about systematic review, reinforces the special importance of competition and trade,³ by noting that reviewing regulations that restrict competition and trade would be "particularly" likely to yield significant, visible benefits.

7. One recommendation deals solely with the scope of competition law and the powers and performance of the enforcement institutions:

4. Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy:

- Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways.
- Enforce competition law vigorously where collusive behaviour, abuse of dominant position, or anticompetitive mergers risk frustrating reform.
- Provide competition authorities with the authority and capacity to advocate reform.

The first point is a particular concern in the regulatory context. It repeats the claim that competition has some priority over other policies. Examining sectors and practices that are exempted from the coverage of competition law involves asking why policy should tolerate or prefer monopoly or collusion. Special treatment through limited exemptions or special enforcement structures may respond to other policies or other political forces. Are there institutional methods for applying special treatment in a sector that achieve the desired balance better than others? In general, what is the nature of the exemption for conduct that is authorised or required by some other law or regulation? Virtually every jurisdiction has such a rule, but only some of those rules give a priority to competition policy. What is the process for considering exemption from the otherwise-applicable rules of competition law based on other policy considerations? Is that done by the same institutions and process that apply competition law, or by something or someone outside it?

8. The second point could cover nearly all of competition law and enforcement. The recommendation concentrates on how competition law protection substitutes for regulatory protection. Although the country reports tried to highlight the connection between competition law and regulation, the Committee's interest during the reviews was often broader. The call for vigorous and effective enforcement implies the need for vigorous and effective enforcement institutions. Institutional structure and resources and law enforcement powers and processes were of great interest to the Committee. The enforcer's stature, credibility, and independence from political considerations test the balance between competition and other policies. The third point highlights advocacy because enforcement jurisdiction often stops where problems from regulation begin. The relevant issues include the agency's standing and authority to advice about policies that are outside of its law enforcement ambit, the resources that are devoted to this function, and its experience and record of effectiveness. It is related to two other recommendations, about deregulation and about linkage to other policies.

9. The separate recommendation about the process of economic deregulation is also directly relevant to competition policy.⁴ The implications of this recommendation are the subject of the stocktaking of the sectoral chapters in the Working Party on Competition and Regulation of the Competition Committee. The final recommendation is about linkages to other goals and policies, but it nonetheless continues to imply a priority for competition, notably in the first two of its sub-paragraphs.⁵ Policies that are frequently linked to competition policy and institutions and that have thus been discussed in many of the country reports include consumer protection, unfair competition, public procurement, subsidies and state aids, and international trade. Most, but not all, of the goals and effects of these policies are typically considered to be complementary to or consistent with those of competition policy.

Competition policy in reform programs

10. The recommendations about the regulatory process test the competition culture. Each of the competition policy reviews has begun by examining how competition policy has been grounded in the country's business, economic, political, and legal traditions. By assessing how the policy-making system understands and appreciates the principles of competition, the reviews have asked how those principles have motivated the process of regulatory reform.

11. Virtually every Member country now has some formal program about the reform of its regulations. The occasions, motivations, and justifications for these reform programs vary. The immediate stimulus for a reform program may be a fiscal or financial crisis, prolonged stagnation or recession, or a major challenge such as market opening or regime change. Reform may be promoted to enhance efficiency, productivity, and growth, or to simplify administration and reduce compliance burdens and red tape. These goals are neither exhaustive nor mutually exclusive, of course. And programs to attack red tape can incorporate economic performance issues, too. Thoroughgoing reform efforts are likely to include strong competition policy elements. The most vivid examples are the large-scale projects to overhaul a

centralised economic system, sometimes conjoined with the replacement of a non-democratic political system. In some of these total-reform experiences, competition policy and institutions have been central.

12. The link between competition policy and major reform was apparent long before the deregulation movement that began in the late 1970s. The US competition policy institutions are a product of the “Progressive” reforms of the early 20th century. The German competition law and the *Bundeskartellamt* were centrepieces of the post-WWII reforms that created the social market economy (and its Cartel Regulation had been a key element of the reform program to tame runaway inflation in 1923). In both countries, broad political and public support for a conception of competition affects the prospects for reform and the shape that reform typically takes. As the US study observed, because of the cultural acceptance of a competition norm in the US economic “constitution,” reforms that emphasise competition can be justified as a return to political and policy roots. Germany’s conception of competition policy also explains its reform path, as the reputation of the *Bundeskartellamt* encouraged policymakers to rely on competition law in settings where most other countries have relied on sectoral regulatory intervention. A more recent example of competition policy leading economic reform is Hungary. In 1984 and again in 1990 a general competition law was the first product of a wave of reform effort, implying recognition that competition was fundamental. When the freely elected government enacted the competition law in November 1990, the Prime Minister called it the “constitution” of economic life. In the Netherlands, the comprehensive competition law, which became effective in 1998, was developed along with (though not formally as a part of) the broad competition-based MDW reform program, which was launched originally in 1994 and continued after the 1998 elections. Several reports called attention to the model of comprehensive competition-based reform underway in Australia.

The Australian competition policy review

Australian governments have undertaken a comprehensive review of federal and state-level laws and regulations in order to eliminate unjustified anti-competitive effects. This review is unprecedented in its scope and ambition in OECD countries. The programme derived from the 1993 Report on National Competition Policy. Following nearly two decades of declining economic performance, that Report to the heads of Australian governments found that “Australia is facing major challenges in reforming its economy to enhance national living standards...” One of the challenges was “the reform of regulation which unjustifiably restricts competition.”¹

Because competition law could not itself correct regulatory barriers to competition that stemmed from other laws, the report called for “a new mechanism”: the adoption by all Australian governments of a set of principles aimed at ensuring that statutes or regulations do not restrict competition unless it is in the public interest. This would involve:

Acceptance of the principle that any restriction of public competition must be clearly demonstrated to be in the public interest.

Subjecting new regulatory proposals to increased scrutiny, with a requirement that any significant restrictions on competition lapse after a set period, unless re-enacted after scrutiny through a public review process.

Subjecting existing regulations imposing a significant restriction on competition to systematic review to determine if they conform with the first principle, and thereafter lapsing within no more than five years unless re-enacted after scrutiny through a further review process.

Ensuring that reviews of regulations take an economy-wide perspective to the extent practicable.

In April 1995, the Council of Australian Governments signed the Competition Principles Agreement embodying these recommendations, and review schedules were agreed to in 1996. A substantial proportion of the process has been completed. Larger government enterprises must now apply competitive neutrality principles, which means fairer competition with the private sector. Most of the 1,700 pieces of legislation identified as containing competition restraints have been reviewed. This policy appears to have established a culture of rigorous justification for new business regulation, too.²

Thorough reform, of labour and financial markets and tax policy as well as competition policy, has strengthened Australia's economic performance. The limited impact of the 1997 Asian financial crisis on Australia showed that its economy was becoming more resilient. The OECD's economic surveys of Australia link the program of structural reform to growth in output, income, employment, and productivity. The most recent noted that the structural reforms over the last 2 decades were the principal factors underpinning the pick-up in productivity growth, finding that the programme had improved multifactor productivity growth by about 1 percentage point. Australia's GDP is now about 2½ per cent higher than it would otherwise have been, and Australian households' annual incomes are about A\$7 000 higher, as a result of reforms.³

1. Hilmer, F., Raynor, M. and Taperell, G. (The Independent Committee of Inquiry) (1993), *National Competition Policy*, Australian Government Publishing Service, Canberra.

2. OECD (2001) Economic Survey of Australia.

3. OECD (2003) Economic Survey of Australia.

13. Whether the competition culture is strong enough to support durable reform is an issue that came up in several reviews. For example, the report on Mexico observed that its reforms have been the product of experts in the government, and the competition law and policy lacked a clear base of support in the public at large, the constituency for competition policy was not well identified, and there had been little visible effort to develop a public constituency yet. The report on Japan observed that calls for stronger antitrust enforcement have traditionally come from labour and consumer groups, which are often somewhat suspicious of other aspects of reform. Thus, it was not clear that the interests supporting reform appreciate how competition should be part of that process. In some countries, notably Korea and the Czech Republic, the key problem for economic reform has been to correct serious weaknesses in corporate finance and governance. The philosophical and political motivation of competition policy fully supports those financial and corporate reforms, but the tools of competition law enforcement may not be best suited for the necessary tasks. Nonetheless, where economic reform includes such structural changes, competition policy institutions can be prominent. Korea's FTC has made regulation of the *chaebol* a high priority, applying special laws for that purpose. Mexico's sweeping reform program in the early 1990s assigned critical tasks to the CFC, to make analytically consistent judgements about the presence of market power in privatisation transactions.

14. The recommendation for systematic review and regulatory impact analysis (RIA) is related to the advocacy and policy work of appropriate competition officials. It also addresses in an operational way the priority of competition among other policy goals. If there is there a systematic process for assessing and correcting the regulatory stock or for improving the quality of the regulatory flow, how does it take account of competition? In RIA, how is a principle of "least anti-competitive means" applied? What has been the role of competition policy officials in these processes?

15. Some process for reviewing proposed laws and regulations is virtually universal. Where the functions of competition policy and enforcement are in separate bodies, the policy office is more likely to be responsible for examining proposals to determine whether they might affect competition, while the enforcement office may look only at proposals that directly affect how the competition law is applied. The enforcement office might deal with the stock of regulations, as well as the flow of new ones, but in a non-

systematic way. That is, the office may receive and investigate complaints about constraints on competition that result from the existing regulatory structure and advocate changing them.

16. Some agencies have played particularly key roles in reformed processes for reviewing regulations and proposals. The chairman of Korea's Fair Trade Commission was the president of Korea's Committee of Economic Regulatory Reform in the late 1990's, and he is still a member of it, while other KFTC officials serve on its working subcommittees. For Mexico, the report recommended that the CFC take a similar position, on Mexico's Economic Deregulation Council. For Italy, the report linked the role of the agency to RIA by recommending that competition impacts should be made an explicit RIA criterion and that the Authority should participate in the RIA process routinely. By the time the report was issued, these recommendations had been implemented, so that a representative of the Authority was involved in the *Observatorio* on simplification of rules and procedures, and the guide about RIA supported a market-competition criterion for assessing new regulations. Competition enforcement agencies usually participate in economic restructuring programs, but it is less common for them to be actively involved or responsible for the formal process of regulatory review and evaluation, either in preparing standards or in performing actual evaluations. Whether they should be involved would depend on the institutional structure. In Italy, where the report recommended formal involvement, there is no competition policy office in a ministry to serve that function.

17. Including competition in RIA is the essence of the regulatory process recommendations. This would not involve having the competition policy office or enforcement agency review and clear every proposal. Rather, a well-designed RIA process should include criteria to identify those that might have significant competitive effects, for referral to the competition policy experts who would then do a more thorough assessment. The process should describe explicitly the role and power of the competition enforcement agency or policy office. If the assessment concludes that the proposal or regulation indeed would constrain competition significantly, the proponent or the government should be required to respond to that finding, either to correct the proposal to eliminate those effects or to explain, publicly, why it is required in the public interest.

18. The 1997 recommendations imply that RIA should include a principle of "least anti-competitive means" to accomplish the regulation's purpose. This is a stringent test. The stocktaking for the regulatory quality chapters by the Public Management Committee shows that some consideration of effects on competition is common where RIA standards are formalised. That review did not focus on the use of a "least anti-competitive means" test, though, because it emphasised the 1995 Council Recommendation rather than the 1997 recommendations. Only a few of the competition reviews in this Committee addressed the details of RIA screening. In Ireland, for example, the report was concerned that the RIA competition policy criteria might have been too general to guide non-expert bureaucrats, and it suggested additional guidance or training to make them more practical and specific. Although the reports did not examine this question systematically, it is fair to conclude that a clear principle of "least anti-competitive means" is not yet prevalent.

19. The phrasing of the 1997 recommendation, that regulations should be compatible with competition "as far as possible," probably cannot be made any more precise. It would be unwise to recommend a specific RIA checklist or standard as a general prescription, because what is appropriate and feasible will depend on who is actually doing it and on the economic and political context. The criteria would likely vary among countries. For example, if screening criteria include structural tests such as the number or relative size of firms in an industry affected, suitable levels might vary with the volume of trade and the scale of the local economy. It could also be counter-productive to propose making a "least harm to competition" standard even more explicit. It could not mean that only competition counts. Rather, among different possible solutions to a problem that have about the same net impact, it holds that the choice should be one that has the least impact on competition. Similar claims might be advanced, though, that the

choice should be the one with the least impact on some other value, such as personal privacy or protection of the environment. And it might also be argued that the quantitative aspects of an assessment of economic impacts will necessarily include an assessment of net competitive effects, so that this principle would amount to counting the benefits of competition twice. That only a few countries have a clear “least anti-competition means” criterion implies that counter-arguments could be substantial.

Exclusions, exemptions, and special regimes

20. The 1997 Recommendations called for extending competition policy as widely as possible across the economy, and thus for reducing or eliminating exemptions from coverage. The Recommendation called particular attention to sectoral gaps. Those may result from deliberate decisions and compromises in the design of the competition law itself, but more often they result from other legislation. Each gap or exclusion means in effect that some other policy is considered more important than competition.

Regulatory authorisation

21. The scope of competition policy cannot usually be determined from the texts of the competition laws. General principles of construction may create exclusions based on other laws or official actions, which may not refer explicitly to the competition laws at all. The laws or practices of all Members examined include some general principle of regulatory compulsion or authorisation, which exempts conduct that is required or authorised by other government authority. This may be in the competition law itself, or it may result from the practice of the courts. Under a common principle of interpreting statutes, a competition law is considered a law of general application, but particular laws or special laws that are inconsistent with the general law create exclusions from it. Cataloguing these exclusions is difficult because the acts which exclude are not necessarily collected in one place. Moreover, a *de facto* exclusion or exemption may result from a restriction on available remedies or even simply a policy or practice of non-enforcement in some sectors or situations, and these can be almost impossible to identify reliably.

22. In a few jurisdictions, the competition law contains a rule for dealing with claims of conflict with it. The effect is usually the same as under the common general principle: the competition law has no priority, and other regulations or programs are likely to supersede it, at least in situations where complying with both would not be possible. The scope of the exclusion could depend on how it is crafted. The report on the Netherlands called attention to the potential effects of broadly-phrased statutory deference:

[This] exemption ... casts doubt on the strength of the commitment to reform based on competition principles. The law's prohibitions do not apply to agreements that are subject to the approval of an administrative agency pursuant to other legislation, that could be declared invalid or prohibited by another agency, or that have arisen pursuant to another statutory requirement. Competition law thus stands at the end of the priority line. Even the mere potential for conflict, such as the possibility that another agency could approve, or even disapprove, the conduct, could mean that the competition law does not apply. ... Even without the statutory exemption, a court might not accord the competition law precedence over a potentially conflicting regulatory system. But if that indeed happened, the decision could presumably be corrected by legislation. The blanket exemption decides all those conflicts in advance, and decides them contrary to the interests of competition policy.

Court decisions in the US have created a rule that appears to favour competition policy. As the report noted, the US courts say that “‘repeal by implication’ from another regulatory statute is disfavoured and will be found only ‘in cases of plain repugnancy between the antitrust and regulatory provisions.’ This

doctrine evidences the primacy of competition principles, and it means that, if Congress wants to exclude conduct from competition law or apply special rules to it, it must say so clearly.” In practice, though, the US courts have inferred some exemptions in the absence of clear legislative intent, for aspects of securities regulation and for common carrier tariffs. The practical effect of the US rule does not differ greatly from the effect of competition-neutral rules in other jurisdictions.

23. The legislative efforts to control anti-competitive government actions and regulations in the Czech Republic and Hungary are instructive. The Hungarian Competition Office can challenge anticompetitive government actions in court. It has never done so, but the threat has occasionally been persuasive. The competition law of the Czech Republic prohibited action by government authorities that restricts or eliminates economic competition. The report concluded that having the principle in the law was valuable even without a mandatory sanction for violating it. Harmonisation was considered more important, though, and this provision was replaced by language taken from EU law concerning the conduct of firms providing public services or granted special and exclusive rights.

24. Federal countries that defer to local government authority may permit wide-ranging exemptions as a result. In Germany, where local governments cannot confer exemption from national law, deference is achieved by having officials in the *Länder* apply national law to local problems. By contrast, the “state action” doctrine in the US permits anti-competitive private conduct if it is pursuant to a state policy to displace competition, and that policy is clearly articulated, affirmatively expressed, and actively supervised. Canada’s general doctrine about regulatory authorisation is applied most often in the context of provincial marketing boards and price-setting commissions. Because these exemption doctrines risk “holding ... national competition policy hostage to local legislative relief,” and local governments, just like national ones, may choose to protect their producers rather than their consumers, the US and Canada reports called for a thorough review of the actual effects. But the reports admitted that the doctrines were unlikely to be modified, because competition was considered less important in each country than constitutional principles of federalism and respect for provincial prerogatives.

Government entities

25. Applying national competition policy to local regulatory action requires sensitivity even in non-federal countries. Local decisions may authorise non-competitive private conduct, or actions such as denying licences may prevent entry. Local government operations may displace more efficient private sector providers and provoke complaints about unfair competition.

26. In nearly all countries, the competition law applies to commercial operations of entities related to the government. In Mexico, the constitution defines some state-connected monopolies, but they are still subject to the law’s requirements, and they have been sanctioned for exclusionary behaviour affecting other markets. That is the usual pattern. Even where government entities have some protection or authorised monopoly, government-related corporations are still subject to the normal rules and sanctions of the competition law. This coverage is usually of particular importance concerning abuse of dominance. Only in one country reviewed, the US, are government-related entities as such, even government-owned corporations, immune from antitrust liability. The anomalous US exemption is explained by the unusually fierce enforcement system, as the exemption is probably intended to protect the public treasury from private suits for treble damages.

27. Application of competition law to government operations depends to some extent on their legal form. Where the law applies to “undertakings,” then a government operation might be exempted if it is determined, whether in fact or by fiat, that it is not an “undertaking.” Application depends also on process and will. The law may prescribe competition in government operations, but decisions about what that actually means may be made by ministries or officials other than the national competition agency.

Denmark's complex provisions about applying competition law to local officials illustrate the difficulty. Unusually, the ostensible rule includes a "least anti-competitive effect" principle:

Business activity of central or local government administrations is also covered, in theory, if the activity affects competitive conditions; however, the Act evidently does not apply to in-house production by government authorities. Although the Council cannot intervene against anti-competitive practices that are undertaken by a government authority if those are necessary to tasks it is assigned by law, a municipal authority is obliged to choose solutions with the least anti-competitive effects. And a municipality cannot impair competition in areas that are not subject to its legal authority to act, or condone anti-competitive conduct where that is not necessary for fulfilling its legal obligations. The difficulty in applying this principle, of course, is that the "competent authority", whether the ministry or the local council, decides whether its action is necessary or otherwise properly overrides competition policy. There is no evident means of judicial appeal and decision.

28. Unfair competition is easiest to identify where the government operation is an ordinary commercial service. In the more typical setting, where the government operation is connected with some public service or policy, the usual advice is to separate, where possible, the elements that are principally commercial and subject them to market discipline. The Netherlands considered this subject in depth:

Unfair competition from entities related to the government has received considerable attention. ... [A] 1997 report by a panel of appointed experts ... outlines a conceptual framework for (semi-) government organisations that compete in the market with private companies. ... The report concluded that market operations by these entities are undesirable, because it is not possible to prevent distortion of competition. The report concluded that in principle, commercial activities should be segregated and divested, although some exceptions to this rule of structural separation might be admitted: commercial activities intrinsic to [their] public duties, commercial activities relating to scientific research, activities to support maintaining a minimum physical plant capacity, or a situation of competition for the public duties, such as for electricity distribution. Even for these exceptions, the report called for rules of conduct applied by a new, independent supervisory authority to achieve equal competitive conditions.

29. Oversight of state aids is also aimed at preventing or correcting market distortions that result from subsidised unfair competition. This is an increasingly important topic in Europe, where countries are following the EU model or example and adding the subject to their national laws. The report on the Czech Republic noted its major commitment of resources to ensuring that subsidies or preferences provided by the local or national governments at all levels may not distort competition by favouring some firms or products. The OPEC has the authority to order firms to return the aid provided or to order the agency providing the aid to eliminate the competitive distortion. Other countries where the competition agency plays a similar role include Poland and Spain, and the report on Turkey recommended adopting it there.

30. A few competition agencies oversee compliance with rules about public procurement and tendering. This role reinforces a goal of reform, to make government operations more efficient by relying where possible on market mechanisms. It may also buttress enforcement against the common competition policy problem of collusive bid rigging.

Sectors with special treatment

31. The ability of competition policy to provide a suitable framework for broad-based regulatory reform is partly determined by the extent and justification for general exemptions or special treatment for types of enterprises or actions. This treatment may represent efficient application of competition principles, by adapting rules to common industry fact patterns. A frequent example is regulatory oversight of infrastructure monopolies. Special treatment can also, however, represent redistributive legislative choices.

32. The typical source of an exclusion is a law authorising or requiring conduct that limits competition. This can take the form of legal monopoly, price control, or entry regulation to limit competition. It might permit conduct that would otherwise be forbidden, such as resale price maintenance, or empower an administrator or an incumbent to control entry in order to prevent competition. In most cases, special treatment does not confer complete exemption from all competition oversight whatsoever. In the following table, an “x” indicates that there is some kind of exclusion, exemption, or special competition rules for the sector or subject. An “o” indicates that there is some other law or agency involved with issues in the sector affecting competition, by controlling price or entry or sometimes by applying competition rules.⁶ Because exclusion is rarely total, and because existence of a separate law or agency does not necessarily mean that competition is suppressed, it would not be sound to draw significant quantitative conclusions or correlations about the effect or the extent of “exemptions” based on the general information in this table. The table shows which sectors or situations are commonly thought to deserve special attention or dispensation.

Table 1: Exclusions, special rules, enforcers, and regulators

	AUSTRALIA	BELGIUM	CANADA	CZECH REP.	DENMARK	EU	FINLAND	FRANCE	GERMANY	GREECE	HUNGARY	IRELAND	ITALY	JAPAN	KOREA	MEXICO	NETHERLANDS	NEW ZEALAND	NORWAY	POLAND	PORTUGAL	SLOVAK REP.	SPAIN	SWEDEN	SWITZERLAND	TURKEY	UNITED KINGDOM	UNITED STATES	TOTAL
General																													
Labour			x	x	x	x					x					x		x						x			x	10	
SMEs	x							x	x					x														4	
R&D JVs		x		x	x													x									x	5	
Standards		x		x					x									x										4	
Primary production																													
Agriculture, co-ops	x	xo			xo	x	x	x	x	xo				x	x		x	x	x					x	x		x	xo	17
Sugar																												1	
Fishing		x								x									x									3	
Mining																												1	
Nuclear energy																x												1	
Oil & gas	x	o		o								o				xo			o									6	
Petrochemicals																x												1	
Infrastructure																													
Electricity	x	xo	o			o	o			o	o	o	o	o	x	o		o	o	xo	o	o		o	o	o	o	18	
Natural gas	x							o		o						xo		o		xo	o	o				o	o	10	
Water	x								x											xo	o					o	o	5	
Telecoms	o	o	xo	o	o		o	o		o	o	o	o	o	xo	xo		o	o	xo	o			o	o	o	o	19	
Postal service				o								o			x			o		xo	o		x	o		o	o	7	
Transport																													
Railways					xo			x	x	o	o					o	o				o			o	o	xo		11	
Air transport, mergers		o		xo					x					x		o	o	x		o						o	x	10	
Water transport		xo		xo					x			o	x	x	o		x					x					xo	10	
Road transport				o	xo	o				o	o	o	x			o	o					o			o	o	xo	11	
Taxis					o						o	o						o					x	o				6	
Business																													
Finance, insurance		xo	o		x	o		x			o	x		xo	xo	x				xo							xo	12	
Bank mergers		o	o				x							o											x			5	
Commercial agents										x																		1	
Distribution co-ops				x												x												2	
Export cartels		x												x	x												x	4	
Motor vehicle distribution						x																						1	
Services, health, culture, morals																													
Services, professions	o	x							x	x	o	x	x	o	o		x					o			x			12	
Health care								x									x							x				3	
Pharmacies, drug prices				o	o	o					o	o									x		o	o				8	
IP, performing rights		x						x						x	x	x		x	x					x				8	
Performing ass'ns		x																										1	
Sports		x						x																			x	3	
Media, broadcasting	x	o	o								o	o						o							o	o		8	
Movie theatres																		o										1	
Publications (RPM)				x			x	x	x			x	x			x	x				x							9	
Publishing		o										o														o	x	4	
Alcoholic beverages						o								x	o			o							o			5	
Pubs											o																	1	
Tobacco				x						x													x					3	

Source: OECD Secretariat country reports, annual reports and other submissions to the Competition Committee.

33. Full evaluation of these special provisions would apply an analysis like RIA, examining their purposes and effects and asking whether they serve a compelling public interest that could not be achieved in a less anticompetitive way. Such detailed analyses were rarely found in the countries reviewed. It was beyond the scope of the regulatory reform project to undertake such analyses for all of these items in all of the countries reviewed. The reports took note of studies that were available, which were often found in conjunction with competition agency research and advocacy programs.

34. The most common general exclusions incorporate obvious public policy choices or permit joint ventures that are likely to be efficient and even pro-competitive. The most common general exemption avoids inappropriate literal prohibition of restraints and monopolies in the labour market. Labour exemptions typically do not extend to agreements to restrain competition in product markets. Exemptions for intellectual property avoid conflicts with those property rights where public policy to reward innovation and creativity permits a degree of “monopoly.” Exemptions for standards-setting organisations, research and development, and intellectual property and performing rights societies permit classes of joint ventures that are likely to be efficient. There is no reason to question the principles underlying these exemptions, although care and attention may be needed in assessing particular cases to be sure that in application they do not extend further than necessary to achieve their purposes.

35. Some competition laws include special *de minimis* or *bagatelle* provisions for the benefit of small and medium sized businesses. This treatment can permit small firms to achieve efficiencies together, and it can save resources by permitting the enforcer to ignore conduct that is unlikely to impair competition significantly. Designing these rules to be neither too broad nor too narrow is a difficult task. In small markets or in combination with other firms, even small enterprises can have market power. Basing an exemption on the size of the firm means market power in small markets is overlooked. But basing an exemption on criteria that might be more relevant to effects, such as market share, increases uncertainty for business. To minimise the risk of harm if the coverage is imprecise, and to maintain consistency in dealing with the most important problems, these exemptions do not usually extend to “hard core” conduct such as fixing minimum prices.

36. Agriculture receives special treatment nearly everywhere. Exemptions or special rules permit co-operative arrangements in primary processing and distribution, and they often extend to functionally similar sectors such as fisheries and forestry. The principal purpose is to insure against vagaries of weather, to overcome externalities due to the public goods nature of some of these resources, and to compensate for the producers’ allegedly weaker bargaining position against downstream buyers. Another explanation for special treatment is to permit co-ordination in the context of subsidy programs based on price supports. To the extent that primary production is structurally atomised, special treatment here might be analogous to the exemption for labour. But where a co-operative can monopolise an important end product market, the analogy breaks down. Monopolies in processing dairy products are common points of contention about the legitimacy and permissible scope of these exemptions.

37. The only other primary or industrial product that frequently gets special attention is oil and gas. National politics and resource management goals probably explain monopoly or control on primary production. Special rules about distribution and importation are more often obviously intended to limit competition. Some are rationalised in terms of preserving small competitors, by implication disciplining or handicapping distribution controlled by larger international oil companies. More likely, though, these constraints sustain or mimic market division and collusion.

38. Special treatment for the financial sector is common, especially for mergers. Banking regulators examine mergers for compliance with prudential standards, and they may also be responsible for assessing effects on competition, either under banking legislation or under the competition law. In the Netherlands, the banking regulator retained both roles as a transition measure after the introduction of the new competition law. In Turkey, bank mergers were removed from competition law oversight because the national financial emergency demanded immediate action to deal with prudential and system issues. More commonly, there may be concurrent or consecutive powers of review. The most unusual division of responsibility is in Italy, where banks are subject to the general competition law, but the law is enforced in this sector by the bank regulator, which is the Bank of Italy. The report on Italy observed that giving the bank regulator the responsibility to take enforcement action, not just offer views to the competition agency about it, may have encouraged it to be more vigorous.

39. In distribution and trade, several countries give specific recognition and exemption to co-operative arrangements, subject to compliance with conditions. Only 2 countries mentioned this in describing their exemptions and special regimes, though. Similar groups probably get equivalent treatment in most countries, through case-by-case exemption or exercise of discretion about setting enforcement priorities. Exporting cartels are specifically exempted in some laws, but even without explicit exemptions they are usually tolerated. Few jurisdictions claim competence to sanction anti-competitive conduct if the adverse effect is only felt beyond their borders. (By contrast, an inward “effects” test is now common, and countries claim the power to enforce their laws against conduct outside their borders that harm competition within them).

40. Services and professions are often permitted to exercise some form of self-regulation, through a trade or professional organisation that is equivalent to a large-scale horizontal agreement. Agreements of that scope would inevitably draw the attention of the competition authorities. Legislative protection may remove the process from antitrust oversight. Such protection is a common object of reform efforts, which seek to introduce competition to the extent that is consistent with consumer protections in situations of asymmetric information. Competition law enforcement also pays close attention to the borderlines of exemptions and special treatment for self-regulation.

41. Health care occasionally receives special treatment. Providers themselves are typically covered by exemption for self-regulated professions. The motivation for special treatment is often the government’s desire to regulate costs and service quality, because the government is paying for it. For the same reason, pharmaceutical prices are often subject to elaborate controls. More problematic is the common practice of controlling entry into retail pharmacy services based on a finding of economic need, rather than just a showing of sufficient professional qualifications. This too is typically rationalised, unconvincingly, in terms of controlling reimbursement costs and ensuring accessible service.

42. Many countries have special laws about tobacco and alcoholic beverages. These follow the opportunity to profit from, control, or tax the inelastic demand for these products. The most notorious competition policy problem in Ireland was the regulations that prevented opening new pubs, originally enacted a century ago to curb excessive drinking, and probably also to prevent excessive competition. Many countries control or monopolise retail or wholesale trade in alcoholic beverages, and a few retain state control over the tobacco industry or impose rules such as fixed prices or permit resale price maintenance. Some of these policies are tied to excise laws; that is, they regularise the sector’s structure and practices in order to simplify and monitor tax collection. The effect of these policies on competition is revealed by how much consumers cross borders where possible to shop in countries without similar controls.

43. Publishing, media, and performing arts commonly receive special treatment, although sometimes the intention is closer scrutiny, rather than exemption. Some exemptions prevent formalistic challenges to efficient joint ventures. Examples include societies for collecting royalties and performing rights fees and sports leagues. But the “monopoly” of broadcast rights for the most popular events may be regulated. There are often special rules about ownership and concentration in media. These might be construed as consistent with competition values of free entry and consumer choice, but they are usually explained in other terms, of viewpoint diversity and balance. The media merger and concentration rules appear intended to be more stringent than competition law would be in the same setting, although whether that is the actual effect would depend on how the competition law analysis would actually characterise the effects on markets and competition. Another common special provision permits or even requires fixed prices for books or periodicals. Maximum resale price maintenance might protect consumers from dealer market power, but these rules usually extend to minimum resale price maintenance too. The effects of these rules are contested. Eliminating these rules in some countries has not impaired book sales, although it may change distribution methods. The rules probably increase average prices. In Spain, the Tribunal estimated

that annual consumer savings from permitting deeper discounts would total more than 10% of sales. Anomalous treatment of cultural goods calls for justification, to show that there are special characteristics of cultural products, considered in a market context, that would explain differences in how they should be treated. They are “experience” goods, whose quality is often unknown before consumption. Consumers demand both familiarity and novelty, a combination that makes it difficult for producers to predict the market. The combination implies a rapid rate of innovation and a high risk of failure. Like some other sectors that challenge basic analysis, cultural goods such as books are produced at relatively high fixed cost but nearly trivial marginal cost. Co-ordination along the distribution chain may well be justified, to spread the risks and support the innovation that consumers demand. But a formal, explicit exemption, unless carefully crafted, may increase prices or curtail output more than is necessary for that purpose.

44. Many of the other particular exclusions or practices in granting special treatment look like historical relics or responses to pressure from interest groups that faced enforcement action. Norway permits municipal monopolies of movie theatres, a leftover from a century ago when movies were a novelty. Korea authorises territorial constraints on a national specialty, rice wine. The pattern of special treatment often reveals basic presuppositions of longstanding national policies. In Japan, a principal target of reform has been the habit of controlling entry through administrators’ judgements about the likely balance of supply and demand, which was characteristic of its industrial policy tradition. In Germany, reform efforts have criticised practices and requirements from its master crafts tradition that now increase the costs of entry and constrain flexibility in doing business. In Canada, controversies involving major national firms that arose over particular transactions in banking and airlines led the legislature to set up special procedures and rules; these rules do not necessarily give the relevant industries more lenient treatment, though. In the US, parties to enforcement actions have sometimes persuaded Congress to step in and correct the enforcers, for example, to permit restrictive distribution contracts for soft drinks. When the legislature balances other interests and values against competition law and policy, traditions and industry interests often prevail. By creating special rules for an industry after it has been under scrutiny from the competition enforcer, the legislature appears to be signalling the enforcer to look elsewhere. Legislators appear loath to reject competition principles out of hand, though. Few of these special treatments create complete exemptions for blatant monopolies or price fixing. They are more likely to tailor rules for the industry setting, and sometimes the special rules are about as exacting as the general competition rules would be.

Sectoral competition regulation

45. Infrastructure is the most common setting for special competition policy regimes. Competition law was irrelevant to state-owned natural monopoly utilities until competition began to appear for some of their services or functions. Most are now subject to regulation to control exploitation of the natural monopoly element of the grid or network. Special regimes and exemptions for transport are more difficult to justify, except for aspects that also involve a network-grid infrastructure. Controls on prices and entry (or exemptions to authorise price fixing cartels) for trucks, airplanes, and ships have been rationalised in terms of preventing excessive competition. Trucking and air transport have been substantially deregulated (although there are some international service problems that remain to be solved), but exemptions or special treatments remain common for ocean shipping, buses, and taxicabs. In theory, a sector regime could be a means of applying general competition principles more efficiently to common problems in an industry. But a special regime may just be less demanding, rather than more efficient. At least, the claim of greater efficiency should be checked carefully, especially where the special rules or regime appear in situations other than regulation of natural-monopoly infrastructure.

46. Most aspects of sector regulation to promote or protect competition are being covered in the stocktaking of the sector chapters. This review will focus on relationships among institutions that are charged with promoting or protection policies that affect competition. The competition agency and the

sector agency may not always conceive of similar problems in the same terms. The Italy report outlined the common issues:

The strength of commitment to competition policies in the various parts of the regulatory state varies. In principle, a reasonable structure of consultation is in place among the Authority and the sectoral agencies that share some responsibilities with it. In practice, it remains possible for the Authority and another regulator to deal with the same conduct, applying rules drawn from different sources. A common conceptual problem, of who regulates access to a monopoly facility when access is controlled by price, remains in jurisdictional limbo. Pricing above cost for an essential facility can be an abuse of dominance, just as pricing below cost to exclude competition can be predatory, but these are difficult judgements to make, for a regulator and for an antitrust enforcer, because it is difficult to determine economic costs. Information is not maintained on the same basis at different agencies, and it cannot always be exchanged with others, because of differences in the legal constraints and protections that apply to the ways information is obtained.

47. Reviews revealed some consistent patterns of institutional variation, in similarities between laws and agencies and in systems for co-ordination and checks and balances. The most common pattern is for regulators to be responsible for the prices and services of natural monopolies, while dealing with disputes about network access in co-ordination with competition authorities, who apply general rules about abuses by dominant firms that could cover the same conduct. That is, jurisdiction over access disputes is shared. In some countries, the sector law acknowledges explicitly that each might apply, and it sets out a protocol or assigns responsibility for consultation between the enforcers. Where the relationships are not clear, and problems arose as a result, the reports sometimes recommended improvement. In Ireland, the report supported

... a structured process of co-ordination and a legal basis for the agencies to defer to each other without risk and without diluting or compromising the application of competition policy. The Authority and sectoral regulators should advise each other about matters that may come under the others' jurisdiction, and consult when they find they are both pursuing the same matter. To do this meaningfully, they must have the right to exchange information with each other. Having someone from the Authority sit on appeal panels for sectoral regulator decisions is an excellent idea for integrating policy perspectives.

But formal protocols are much less important than shared policy conceptions. If agencies disagree about what should be done or why, a formal protocol just structures their dispute.

48. The formal protocol may give the competition authority a controlling role. Notably, where regulatory intervention premised on market power in the regulated industry, the competition authority may be responsible for defining the market and determining whether a firm has market power in it. The most extensive and systematic structure of this kind is in Mexico. There, the CFC is directly concerned with competition aspects of sector-specific regulation and the allocation of licenses and permits. The CFC can determine which economic agents may participate in auctions for public enterprises, concessions, licenses and permits. And the CFC may determine whether effective competition exists, or whether one of the agents has substantial market power, as a condition for a sector regulator to impose regulation such as price caps. In that connection, the CFC may also determine that competition has been restored, because of changes in market conditions, so the regulation should be terminated. Application of the same standards by

the same expert body in all of these settings helps integrate competition policy into regulatory policy. But the formal structure does not prevent disagreement, which can arise in connection with the sector regulators' power to implement remedies.

49. In a few countries, a sector-specific authority applies competition laws that are custom-built for that sector. The principal example of this pattern is the US. This structure can create serious inconsistencies. Because of their limited experience with competition analysis, and in some cases because of their responsibility to promote industry well-being, sector regulators may have systematic bias in favour of seeing the world the same way the regulated industry has. Sector regulators approved mergers—against the advice of the Antitrust Division—that led to market power at airline hubs and to monopoly problems in railroad service. Other special regimes cover ocean shipping, agricultural co-operatives, fisheries, and meat packing. Financial institutions are subject to special competition rules, particularly about mergers, applied by 4 different regulators and the Antitrust Division too, who use the same formal guidelines but may reach different results by applying different presumptions about product and geographic markets. The report on the US called for eliminating the remaining vestiges of this balkanisation of analysis and enforcement.

50. Having sectoral institutions that apply the same substantive law and analysis appears to work better than having special rules for each sector. “One law-many regulators” is the basic model used in the UK, and Italy uses it in banking, while the US uses a version of it in some sectors. Applying the same basic law evidently encourages convergence and reduces conflicts between policies and agencies, particularly where the statutes make clear that the general principles govern. The US telecoms and energy statutes explicitly do not displace the antitrust laws, so the regulators in those sectors have to achieve their goals in ways that are consistent with competition law. The US report described how this was happening in the energy sector:

The regulatory structure did not displace the competition law completely, but coexisted with it. The courts have instructed the regulator to include competition policy in its understanding and application of broader “public interest” criteria, and the regulator has followed that instruction. Congress has clearly supported the move toward deregulation, taking actions in the late 1970s that began to eliminate price controls for gas and to introduce competitive alternatives for electric power generation. And the competition agencies have encouraged these moves at every stage, offering informal and formal advice and assistance.

The UK has set up a complex sharing of functions among the many institutions that are responsible for both competition policy and enforcement and sectoral regulation. The numerous regulators generally share the objective of protecting and promoting competition, which is consistent with regulatory tasks that include controlling aspects of the industry that may be subject to monopoly power. Not only do they share objectives, but the sector regulators for gas, electricity, telecoms, water, and rail have full power to apply the Competition Act along with OFT. Several features of the UK approach try to prevent divergent applications of the law by the different authorities. All use the same procedures, including a “single notification point” at OFT. The sector regulators' guidelines about compliance with the competition law are developed in conjunction with OFT. Most importantly, appeals from all Competition Act decisions, whether by OFT or by sectoral regulators, follow the same path to what is now called the Competition Appeal Tribunal, which can ensure consistency among them.

51. Another model is to combine all of the administrative institutions that apply laws affecting competition, including economic regulation of natural monopolies, into one. This could mean having all of these functions done by the competition authority. Some competition authorities have used the provisions of general competition laws that prohibit exploitative abuse of a dominant position to regulate the prices of infrastructure monopolies. But the functions of sector oversight differ from those of *ex post* enforcement

and may call for different procedures and rules. The Netherlands recognises the differences by using a variant of this model: when the report was prepared, the electric power regulator was being set up as a chamber within NMa.

52. Oversight from the courts can encourage consistency and correct conflicts. Some countries have set up specialist appellate bodies deliberately to deal with both sector regulators and competition law. In the UK, the Competition Appeal Tribunal serves this function; in addition, the Competition Commission plays an integrating role, as it both reviews regulatory decisions and investigates and decides about competition matters. The Antimonopoly Court in Poland demonstrates the policy-integrating role of such an institution. Established as an independent judicial check on the state administration, this Court is becoming a force in the development of policy. One reason to establish a specialist court, within the judicial system and composed of judges with commercial law experience, was to shift away from the formalist approach that is usually encountered in administrative courts. Its broader jurisdiction, now including cases from the competition office and regulators for energy, telecoms, and railways, as well as consumer issues such as contracts of adhesion, promises to ensure that policies are applied consistently in competition cases and in sector regulation. A common appeal path for issues related to competition may be created as a deliberate departure from standard practice. In Germany and France, for example, the private law courts that are familiar with business and commercial disputes, rather than the administrative courts that oversee public officials, decide appeals from decisions applying the competition law and from actions by sector regulators resolving disputes about network access.

53. Co-ordination and even centralisation is recommended to avoid inconsistency. Nonetheless, in some countries where the competition culture elsewhere in the government was weak, the reviews suggested giving explicit competition policy roles to ministries. Such roles would not involve law enforcement, though. Rather, making them responsible for eliminating constraints on competition within their own jurisdictions would extend the scope of competition policy and emphasise its broad, horizontal importance. The reviews noted that ministries and sector regulators could establish antitrust offices to work with the competition enforcement agency and to advise industries about their compliance obligations.

54. Exclusions and special institutional regimes incorporate a balance between competition policy and other policies or goals. The same balancing might be done case by case, rather than through generally applicable rules. A few competition law regimes even provide for this explicitly. Unusually, the laws might permit the enforcer to base its decision on considerations other than competition policy.⁷ The process of granting or denying exemptions from statutory prohibitions, which is common for many enforcers, usually amounts to a “rule of reason” balance of net economic effects, but the permitted criteria might include other considerations such as employment.⁸ Competition enforcers do not usually take responsibility themselves for balancing other policies. The decision process may produce a balance anyway, if first-instance decisions are made by non-expert tribunals whose members represent interest groups or by non-expert judges with discretion about interpreting evidence of effects or imposing sanctions or remedies. In a few countries, competition law processes authorise the government or a minister to invoke other policies in order to override enforcement decisions. This kind of intervention is especially common concerning mergers. Such seemingly *ad hoc* interventions raise concerns about transparency, predictability, and fairness.

55. The extent of exclusions or special rules for particular sectors is now fairly consistent. Countries that once had long lists of explicitly exempted cartels have repealed most of them. Correlation between the extent of sector-specific treatment and policy effectiveness is not obvious. Active enforcement may stimulate legislative correction: the US, with a reputation for aggressive enforcement, has more exemptions and special regimes than most. The 1997 Recommendation, to fill gaps in coverage unless compelling public interests cannot be served in better ways, remains sound. But expectations should be realistic about how much remains to be done to comply with it. For the most common special regimes or exclusions, the

gaps are not wide and public interest considerations for some degree of special treatment are plausible. In applying this recommendation, attention should focus on those differences in rules or enforcement that protect monopolies and clearly anti-competitive conditions or practices.

Competition law and enforcement institutions

Independence

56. Competition policy is challenged by rent-seeking: the greater the potential for monopoly profit, the greater the incentive to try to influence decision-makers to obtain or protect that profit. Thus it may be particularly important for a body that is responsible for preventing monopoly to be shielded from rent-seeking influence. Virtually every jurisdiction makes some effort to separate applications of competition policy from political decisions by the legislature or the government. The abstract promise of independence is usually backed up with other institutional guarantees.

57. Some competition agencies are deliberately placed outside the structure of ministries, to be self-sufficient administratively and substantively. A few competition bodies have had the status or rank of ministries themselves. That status can reinforce decisional independence. Several agencies or officials which are described as independent are nonetheless connected to a ministry. In some places where the deciding official or body has a special status, the supporting bureaucracy is part of a ministry. But even where the competition policy body or official is fully part of a ministry, there may be some special recognition of the need for independent, non-political decision. Often the Minister is barred from issuing instructions about action or decision in particular cases.

58. To recognize both the need for independence and the desire for functional control, enforcement may require action by several bodies in different positions. These may include a ministry secretariat responsible for initiating investigations and recommending action, an expert or representative council or tribunal outside the government that acts as the independent decision-maker, and perhaps a separate specialized tribunal or court to decide appeals from those decisions. Complex institutions tend to increase costs and lengthen the enforcement process, and disagreements among them about the proper course of policy can create uncertainty. The opportunity for correction, on the other hand, can improve analysis and outcomes.

59. The power to appoint the decision-maker is the principal political check on decision-making independence. In countries with presidential systems, the president typically makes the appointment. Where the head of state makes the appointment, the nomination typically comes from the government or is subject to legislative approval. In some countries, though, appointment power is exercised at the ministerial level. Strong ministerial influence on appointment tends to correlate with a perception of less independence. Recognizing that politics in the appointment process could lead to indirect political control, several countries try to set obstacles to excessive politicization. Some countries encourage professionalism by soliciting applications for the top positions and subjecting them to a pre-screening personnel evaluation. Others prescribe professional qualifications and experience in order to ensure an expert, technocratic body. A few reserve places for career officials on the decision-making panel. But for some larger decision-making bodies, the system takes the opposite approach, even designating members to represent particular interest groups. Representation mandated by law assures those interests that their concerns are heard, but it makes the body appear to be a political one, deciding matters based on negotiation and bargaining about economic interests. Protected tenure is as important as transparent appointment. The strongest tenure protections for top officials are probably those of Mexico's CFC, whose members serve a single, non-renewable 10 year term. In most multi-member bodies, terms are staggered to provide continuity.

60. The functional virtues of independent decision-making may be duplicated in structures within agencies themselves. Hungary's HCO is substantially independent of the government, but in addition, the HCO includes a separate decision-making body, the Competition Council, which is substantially independent of the rest of HCO. Its civil-servant members enjoy what amounts to lifetime tenure protection, somewhat like the decision divisions of Germany's Bundeskartellamt.

61. Control over resources, of budget or personnel, confers indirect control over policy and action. Few agencies are entirely free of this influence. For some, the competition agency's budget is a separate item for the legislature to see and approve. For many, the budget and other resource policies are in the hands of a ministry, either the ministry with which the agency is affiliated or the treasury or finance ministry that writes the whole budget. A few countries have tried to provide a source of funds that would not depend on legislative appropriation. Relying on fees or retaining proportion of fines imposed can create perverse enforcement incentives, though.

62. The appropriate degree of independence differs for policy making, investigation and prosecution, and decision-making. It is rare that all of these functions are assigned to one body. Policy making is typically a ministerial responsibility, although separate competition policy bodies usually have at least an advisory role about policy. Setting priorities and initiating enforcement action are "executive" functions, but the officials who are responsible are usually in career or tenure-protected positions. Decision-making is the function for which independence is most important, and which is most often done by a body outside the government.

63. Where there is no such independent body dealing specifically in competition issues, the courts tend to become key decision-makers. Specialised bodies that were established to decide appeals from administrative decisions may serve increasingly as first-instance decision-makers. Where the principal decision-maker is an independent court, there is less reason for concern about the independence of the agency. Reliance on courts may make it difficult to establish enforcement priorities, though. Courts in some Member countries have been slow to warm to the importance of competition issues.

64. Concerns and controversies about independence have arisen principally with respect to complex structural cases, of monopoly, privatisation, and mergers. For law enforcement against naked cartels and abuse, there is likely to be greater independence in fact and less need for means to guarantee it. For the structural matters that have industrial policy implications, enforcement and intervention co-exist in most jurisdictions. Many jurisdictions provide explicitly for ministerial intervention in merger cases. In a few countries, decisions about mergers are the government's responsibility. In some countries, a minister may have discretion about whether to refer a proposed merger to the competition authority for study and review. If the minister is determined to permit it, it will not be referred, and thus the minister will avoid the embarrassment of authorizing a transaction that the independent competition authority says is contrary to the public interest. The minister or the government may have the power to reverse the competition authority's decision on appeal or to invoke other policy goals in order to override competition-based decisions or recommendations. Publicity is an important check on abuse of discretion. Concerns that the settlement of a major US merger case in the 1970s was motivated by political considerations led to legislation that now requires a public notice-and-comment process before a court can approve the negotiated resolution of government antitrust cases.

65. Access to decision-makers is important to the advocacy role of competition agencies, and thus for this function the virtues of independence might be disabilities. But this turns out not to be true in practice. In Hungary and Korea, direct personal access for high-ranking but independent competition policy officials in the ministerial decision process has supported effective policy advocacy. Advocacy from an outside position raises public consciousness, and a reputation for probity and freedom from influence based on an enforcement record makes an agency's policy advice credible. But being outside the government structure

in some countries means there is no assurance that the advice will be heard. In some countries where other agencies are admonished to consult with the independent competition office about policy proposals, the admonition is often disregarded.

66. In nearly all members reviewed, competition policy offices are active in advocacy to reform or prevent anti-competitive regulations. But this is not always done by the enforcement agency. Where there is a ministerial policy office separate from the enforcement agency, the ministry office typically participates in policy debate within the government. An independent agency has a better opportunity to contribute to public debate, though. In some countries, there has been a concern that involvement in policy and regulatory issues will undermine the independence needed for effective enforcement. The reviews nonetheless urged a broader role for the enforcement body even in those settings, because of the unique contribution it can make to policy debate based on its hands-on experience and its independent position. Where the enforcement structure was still very weak and the agency's status and independence were not well established, the reviews recognised that shoring up enforcement was a higher priority. Several well-established enforcement agencies report devoting 10% or more of their resources to analysis and advocacy aimed at problems that cannot be solved by law enforcement alone.

Enforcement issues

67. Examination of substantive laws revealed some technical issues that affect applications where regulation is important. "Self-regulation" is a common problem, if competitors in a sector use it to control competition. Associations are the usual vehicle for this regulation and thus the usual target of enforcement. Some laws contain rules specifically prohibiting anti-competitive actions by an association, obviating the need to prove or infer particular agreement among the members concerning each such action. Applying meaningful sanctions to deter this conduct can require special rules, too, such as making members liable for the associations' actions or attributing the members' turnover to the association and using that total as the basis for calculating the fine. In a few countries, horizontal co-operation in industry has been supported by "administrative guidance" from officials. Such instructions are not quite as strong as regulatory authorisation or compulsion, yet they have historically had similar effects. Reforms to regularise administrative practices and increase transparency can help reduce this abuse. The task is challenging, though. Other agencies or ministries may try to reduce the evidence of their guidance, by delivering it only orally—just as price fixers learn not to write down their agreements as enforcement becomes more serious. And firms that might prefer to disregard the guidance and inform the competition agency about the problem may be reluctant to risk crossing an important ministry official. Where such problems can be overcome, and formal doctrines of regulatory authorisation or state action are not a bar, competition law intervention has been used to reform self-regulatory restraints, most notably in professional and other services, that were supported by regulatory authorities.

68. Competition law has also been an important reform tool in the process of controlling and restructuring infrastructure monopolies. The reviews have reported on commonly encountered situations and problems. In a few countries, the competition law prohibition of abusive exploitation of a dominant position has been used directly to regulate monopoly prices. In the process of deregulation and reform, typically of opening up previously monopolised sectors to new entry and controlling abuse by the historic incumbent, competition law has often led the way or served as a backup to sector rules about access and discrimination. General competition principles and sector doctrines sometimes diverge, though. A notable example is the common market share thresholds for identifying market power. A lower, inflexible threshold might be an efficient transitional application of general principles to a particularly thorny sector problem, erring on the side of zeal in order to correct the behaviour of a stubborn historic monopolist. But wooden application to new entrants just as they achieve a significant market position themselves is self-defeating. Infrequently, competition law enforcement has been used to separate monopoly and competitive elements in a deregulating industry. The principal example of this application was the US antitrust suit that

broke up the national telephone monopoly. Few laws give the competition law and enforcement process this much power, and analogous powers in other countries have never been used for this purpose. Rather, restructuring on this scale is typically done through specific legislative action.

69. Aspects of the quasi-regulatory process of merger review and control drew attention in many reviews. The balance with other policies was often at issue, explicitly or implicitly, in assessing divisions of responsibility among competition enforcers, independent decision-making tribunals, and ministries with other portfolios. The scope of review, and hence the cost-benefit balance of merger enforcement rules and processes, drew attention in one country, Greece, where a “reform” which required the agency to spend all of its resources reviewing and approving mergers was preventing it from taking any action about other, more important problems. And in a few countries, the reviews recommended revising the regulations about merger review to facilitate compliance, notably by eliminating the use of market share as a requirement for notification.

70. The 1997 Recommendations call for vigorous and effective enforcement. Enforcement effectiveness depends upon technical legal issues that are specialised within jurisdictions, about which generalized recommendations would not be helpful. There is a general concern that combines those legal issues with economic principle, though, and that is whether sanctions are strong enough to deter anti-competitive conduct, and whether other remedies such as damages or private suits are sufficient to correct its consequences. What matters are the sanctions and remedies that are applied in practice, more than what is provided in the statutes, and actual practice depends on the courts. In some countries, only a court can impose sanctions or award other relief. Even where an agency can impose a fine, the courts’ treatment of the appeal that follows indicates whether competition issues are taken seriously. There has been a clear trend toward stronger financial penalties against hard-core cartels, but much remains to be done. Frequently, fines against price-fixing and bid-rigging are said to be the largest ever against white-collar violations; however, in some countries, the actual fines are still a very small fraction of the likely economic gain from the violations. Very few countries impose sanctions on individual decision-makers. Where sanctions are too low to deter violations, enforcement is not yet effective enough for competition policy to prevent anti-competitive conduct that could frustrate reform.

NOTES

¹ The 1997 recommendations pay more attention to competition than does the 1995 Recommendation of the Council on Improving the Quality of Government Regulation. The 1995 Council Recommendation and accompanying checklist focus principally on administrative process, although they do note the importance of removing barriers to competition in order to speed structural reform and adaptation to globalisation. The Competition Committee was active in the process that produced the 1997 Report, and the Committee's sustained interest no doubt explains why competition policy has a more prominent place there.

² The full text of Recommendation 1:

1. Adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation.

- Establish principles of “good regulation” to guide reform, drawing on the 1995 OECD Recommendation on Improving the Quality of Government Regulation. Good regulation should: (i) be needed to serve clearly identified policy goals, and effective in achieving those goals; (ii) have a sound legal basis; (iii) produce benefits that justify costs, considering the distribution of effects across society; (iv) minimise costs and market distortions; (v) promote innovation through market incentives and goal-based approaches; (vi) be clear, simple, and practical for users; (vii) be consistent with other regulations and policies; and (viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.
- Create effective and credible mechanisms inside the government for managing and co-ordinating regulation and its reform; avoid overlapping or duplicative responsibilities among regulatory authorities and levels of government.
- Encourage reform at all levels of government and in private bodies such as standards setting organisations.

³ The full text of Recommendation 2:

2. Review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively.

- Review regulations (economic, social, and administrative) against the principles of good regulation and from the point of view of the user rather than of the regulator. Target reviews at regulations where change will yield the highest and most visible benefits, particularly regulations restricting competition and trade, and affecting enterprises, including SMEs.
- Review proposals for new regulations, as well as existing regulations.
- Integrate regulatory impact analysis into the development, review, and reform of regulations.
- Update regulations through automatic review methods, such as sunseting.

⁴ The full text of Recommendation 5:

5. Reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests:

- Review as a high priority those aspects of economic regulations that restrict entry, exit, pricing, output, normal commercial practices and forms of business organisation.
- Promote efficiency and the transition to effective competition where economic regulations continue to be needed because of potential for abuse of market power. In particular: (i) separate potentially competitive activities from regulated utility networks, and otherwise restructure as needed to reduce

the market power of incumbents; (ii) guarantee access to essential network facilities to all market entrants on a transparent and non-discriminatory basis; (iii) use price caps and other mechanisms to encourage efficiency gains when price controls are needed during the transition to competition.

⁵ The full text of Recommendation 7:

7. Identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform:

- Adapt as necessary prudential and other public policies in areas such as safety, health, consumer protection, and energy security so that they remain effective, and as efficient as possible within competitive market environments.
- Review non-regulatory policies, including subsidies, taxes, procurement policies, trade instruments such as tariffs, and other support policies, and reform them where they unnecessarily distort competition.
- Ensure that programmes designed to ease the potential costs of regulatory reform are focused, transitional, and facilitate, rather than delay, reform.
- Implement the full range of recommendations of the OECD Jobs Study to improve the capacity of workers and enterprises to adjust and take advantage of new job and business opportunities.

⁶ The information on this table about countries that have not been reviewed in the regulatory reform program comes from submissions in connection with the regulatory indicators project and from annual reports.

⁷ A non-Member country with such a system is South Africa.

⁸ One seemingly broad criterion for exemption that is often found in Europe, the promotion of technical or economic progress, is usually interpreted narrowly, that is, in terms of efficiency.