Unclassified **TD/TC/WP(2002)25/FINAL**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **17-Feb-2003**

English - Or. English

TRADE DIRECTORATE
TRADE COMMITTEE

TD/TC/WP(2002)25/FINAL
Unclassified

Working Party of the Trade Committee

INTEGRATING MARKET OPENNESS INTO THE REGULATORY PROCESS: EMERGING PATTERNS IN OECD COUNTRIES.

English - Or. English

JT00139392

Acknowledgements

This study has been prepared by Vera Nicholas-Gervais with the assistance of Evdokia Moïsé and under the supervision of Anthony Kleitz. It is declassified under the responsibility of the Secretary-General and is available on the OECD webiste at the following address: http//www.oecd.org/trade

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Since 1998, sixteen country reviews have been completed under the multidisciplinary OECD Regulatory Reform Programme in response to a Ministerial mandate. As the basis for its analysis of the market openness aspects of regulatory reform for these reviews, the OECD used the six efficient regulation principles which it had previously identified -- transparency and openness of decision-making; non-discrimination; avoidance of unnecessary trade restrictiveness; use of internationally harmonized measures; recognition of equivalence of other countries' regulatory measures; and application of competition principles. These principles have served as a useful framework for assessing how domestic regulatory regimes, processes, and practices contribute to and enhance market openness on the ground. OECD Member countries can now look to a growing body of documented practice and analysis as they consider past lessons and new opportunities for continuing regulatory reform.

As the trade liberalization agenda reaches behind-the-border measures and governments face increasing calls to regulate – particularly in areas such as health, safety, and the environment – the ability to draw on state-of-the-art tools and proven approaches to sound regulatory management will become increasingly important. The cumulative experience of OECD Member countries with regulatory reform to date – including valuable insights on what works best and where further improvements may still be required – holds important keys to the next phase of regulatory reform. This paper takes stock of emerging patterns in trade-relevant best regulatory practices and suggests a way forward. Part 1 reviews the evolution to date of the Regulatory Reform Programme from the perspective of market openness and maps out the directions taken in this paper. Part 2 examines experience and insights gained from the country reviews conducted so far. Part 3 looks ahead, offering some closing observations about the collective experience of reviewed countries to date.

As will be seen in the analysis that follows, it is now possible to identify what may be considered trade-relevant patterns in regulatory practices. Systematic publication of existing and planned rules, rigorous approaches to public consultation including prior notice and comment procedures, groundbreaking use of the Internet to disseminate information and consolidate service delivery are just some of the practices in use today to ensure transparency and openness of decision-making. While it is rare for regulators to be overtly discriminatory, attention is needed to ensure that their application does not entail *de facto* discrimination. Moreover, certain approaches can help reduce discriminatory effects, such as commitment to open regionalism and establishment of liberal investment regimes. Some countries have made significant progress in avoiding unnecessary trade restrictiveness in domestic regulation, relying on rigorous regulatory impact analysis, growing trade advocacy, and greater attention to regulatory design features to achieve trade and investment-friendly rules. Innovative approaches to widening use of internationally harmonized measures and streamlining conformity assessment procedures are yielding important benefits in limiting the adverse effects on trade of divergent regulations. And finally, advances in effective application of competition principles are enhancing market openness for foreign and domestic players alike.

Despite these significant advances, challenges remain in ensuring overall coherence between open market policies and regulatory approaches. The paper thus seeks to strike a suitable balance in showcasing emerging best practices while pointing to areas where further improvements are required. "Best" practices in this context means discernable patterns in regulatory decision-making informed by the collective experience across OECD countries reviewed to date, but should not be taken to imply a one-size-fits-all approach to trade-friendly regulatory approaches. Rather, "best practice" should be understood as an intellectually flexible concept that can accommodate and inform each country's particular regulatory challenges, legislative and political systems, while respecting decision-makers' ultimate discretion to balance the complexities and trade-offs between market openness and achievement of legitimate regulatory objectives.

Finally, this paper provides illustrative best practices in ANNEX I summarizing elements of this analysis, main features of which are indicated in the box below. This paper itself could be developed into a checklist of trade friendly design features and pitfalls to be avoided in drafting new regulations.

Box 1. ILLUSTRATIVE BEST REGULATORY PRACTICES FOR FOSTERING MARKET OPENNESS PRINCIPLES, AS OBSERVED IN REVIEWED COUNTRIES

(See ANNEX I for more detail)

Transparency and Openness of Decision-Making

1. Systematic public availability of information
2. Clear, simple procedures for making and implementing rules
3. Systematic reliance on public consultation
4. Clear, open, effective appeals procedures
5. Efforts to ensure transparency in particular areas

Non-Discrimination

1. Narrow exceptions in practice (overt discrimination such as nationality-based restrictions)
2. Contestable markets for government procurement
3. Explicit lead responsibility for ensuring implementation of non-discrimination and other WTO obligations
4. Extent of awareness and efforts to avoid discriminatory effects in regulation (de facto discrimination)
5. Demonstrated commitment to open regionalism
6. Liberal policies towards foreign ownership and investment

Avoidance of Unnecessary Trade Restrictiveness

1. Use of RIAs with due attention to trade effects when making regulations

2. Demonstrated efforts to favour trade-friendly regulatory approaches

3. Simplification of administrative requirements

Use of Internationally Harmonised Measures

1. Reference to international standards as the basis of national standards and domestic regulations

2. Systematic monitoring of efforts to use international standards

3. Acceptance of foreign measures as functionally equivalent

Streamlining Conformity Assessment Processes

1. Demonstrated flexibility towards use of alternative approaches for avoiding duplicative conformity assessment procedures

2. Establishing market confidence through accreditation mechanisms

3. Efficient functioning of conformity assessment bodies, possibly on a competitive basis

Application of Competition Principles

1. Open, accessible complaint procedures for challenging regulatory or private actions which may impair market openness:

1. INTRODUCTION

1.1 Background

1. Since 1998, sixteen country reviews have been completed under the multidisciplinary OECD Regulatory Reform Programme in response to a Ministerial mandate. As the basis for its analysis of the market openness aspects of regulatory reform for these reviews, the Trade Committee used the six efficient regulation principles which it had previously identified: a) transparency and openness of decision-making; b) non-discrimination; c) avoidance of unnecessary trade restrictiveness; d) use of internationally harmonised measures; e) recognition of equivalence of other countries' regulatory measures, and f) application of competition principles. These principles have served to focus and inform the discussion on trade and investment-friendly regulatory processes and practices, while at the same time revealing and clarifying areas where further work may be required. As noted in each review, the intention has been not to judge the extent to which reviewed countries have undertaken and met international commitments relating directly or indirectly to the efficient regulation principles, but rather to assess whether and how domestic rule-making procedures and practices give effect to the principles in practice and successfully contribute to market openness. Similarly, the OECD market openness reviews have not been concerned with an assessment of trade policies and practices in Member countries.

2. As this work has progressed, efforts have been made to draw insights from country experiences with trade and regulatory reform. A workshop on the theme "Regulatory Reform and the Multilateral Trading System: Insights from Country Experience" was held on 7-8 December 2000, and there is now a growing body of related analysis undertaken in OECD in the context of regulatory transparency and trade in services (Box 2). The present paper is the newest contribution to the wealth of country experience represented by this past work, and should be read in conjunction with it. Finally, while the paper draws on the extensive information collected during the country reviews conducted to date in discerning patterns, the picture across the OECD area remains incomplete as a number of Member countries have not so far been reviewed.

2bis In this light, the present report is in no way intended to be the final word; rather, it should be revisited in the future as additional national experiences in OECD and non-OECD countries are collected and studied, in order to make any adjustments that may seem called for. In the meantime it is hoped that the current preliminary attempt to identify patterns in national practices of selected OECD countries that are viewed as relatively successful can attain a wider readership and can facilitate further reflection and dialogue.

Box 2. A Growing Body of OECD Analysis Relating to Regulatory Reform & Market Openness

The OECD Report on Regulatory Reform Volume I & II (OECD 1997).

OECD Reviews of Regulatory Reform: Canada (2002), the Czech Republic (2001), Denmark (2000), Greece (2001), Hungary (2000), Ireland (2001), Italy (2001), Japan (1999), Korea (2000), Mexico (1999), the Netherlands (1999), Poland (2002), Spain (2000), Turkey(2002), the United Kingdom (2002), and the United States (1999).

Strengthening Regulatory Transparency: Insights for the GATS from the Regulatory Reform Country Reviews [TD/TC/WP(99)43/FINAL]

Trade in Services: Transparency in Domestic Regulation: Prior Consultation [TD/TC/WP(2000)31/FINAL].

Trade and Regulatory Reform: Insights from Country Experience: Proceedings of a Workshop (OECD 2001).

Transparency in Domestic Regulation: Practices and Possibilities [TD/TC/WP(2001)31/FINAL]

Policies to Enhance Sustainable Development (OECD, 2001).

1.2 Purpose of this paper

3. This paper will examine the lessons and insights gained from the market openness reviews to date and clarify options for the way ahead. Taken together, the OECD market openness reviews reveal a wealth of experience with regulatory reform, emerging patterns in trade-relevant regulatory practices, and areas where continued efforts will be required to ensure coherence between regulatory and open market policies. **Part 2** examines lessons and insights gained from the market openness reviews to date, principle by principle – an attempt to identify best practices and areas where uneven or inadequate regulatory approaches continue to directly or indirectly undermine optimal market openness. Annex I provides practical illustrations of regulatory approaches followed in reviewed OECD countries that are felt to have been particularly successful in fostering market openness objectives. In this sense, it may be considered a list of "best practices" although this should not be taken to imply that one size fits all. In other words, the particular situation of each country needs careful consideration in determining how best to achieve the goals of efficient regulation that will support open markets.

4. Country-specific examples are used throughout the analysis to illustrate, substantiate and distil the essential experience of the market openness reviews to date and clarify the way forward. Building on this analysis, **Part 3** looks ahead, offering some closing observations about the collective experience of reviewed countries to date.

5. Regulatory reform is first and foremost in the interest of the domestic economy, but from a market openness perspective yields significant benefits for national and foreign stakeholders alike. Moreover, high-quality regulation can be achieved without compromising market openness, and open market policies enhanced through strong regulatory underpinnings. This paper therefore seeks to draw out

best regulatory practices from the trade policy perspective, with a view to ensuring greater coherence and mutual complementarity between the two policy areas.

2. LESSONS AND INSIGHTS GAINED FROM THE MARKET OPENNESS REVIEWS TO DATE

2.1 Transparency and Openness of Decision-Making

6. Transparency in domestic regulatory processes is a fundamental determinant of market openness for both domestic and foreign participants. The ability of market participants to fully understand the regulatory environment in which they are operating as well as have a voice in regulatory decision-making go hand in hand in ensuring effective quality of market access. While WTO commitments on transparency (such as notification procedures set out in the TBT and SPS Agreements) have broken new ground in promoting wider transparency of regulations, the OECD country reviews have provided valuable insights about the range of mechanisms and approaches for giving effect to transparency commitments in practice. The collective OECD experience now points to emerging best practices and remaining challenges around transparency, offering Member and non-Member countries alike a toolbox for designing or refining transparent regulatory regimes as appropriate and greater understanding of the foundations and building blocks of best regulatory practice.

7. **Five key areas** have emerged in the OECD enquiry into regulatory transparency and open decision-making:

a) systematic availability of information using various channels;

b) clear, open and simple procedures to ensure predictability in the making and implementing of rules;

c) systematic and rigorous reliance on public consultation (prior notice and comment procedures);

d) clear, open and effective appeals procedures; and

e) ensuring transparency in particular areas, such as government procurement and self-regulation. Each theme is discussed in more detail below with a view to outlining observed patterns and practices in reviewed countries.

2.1.1 Systematic public availability of information through various channels

8. Transparency in its most fundamental expression means knowing what the rules are and where to find them. This is critical for domestic and foreign players alike, but particularly relevant for new market entrants who may be confronted not only with different regulatory content, but a different regulatory culture and administrative framework. Effective accessibility of existing rules must therefore begin with systematic availability of such information through widely accessible channels. Gaining access to such information should not be an obstacle in itself; information also needs to be widely available at no or minimal cost to interested stakeholders. As seen below, this can be achieved through various leading edge approaches, notably publication of information through various channels, enquiry points, and the Internet.

i) Regular publication of information

9. To provide a complete picture of a given regulatory environment, both existing rules and regulations in the making need to be transparent. Best practice in this area is being achieved through systematic publication of detailed information using both online and traditional print media.

10. Consolidated information about **existing rules** is increasingly available online in the form of comprehensive e-compendiums (see related discussion on Use of the Internet below). **Informal information** on existing laws and regulations is also increasingly accessible on the individual websites or publications of regulatory departments and agencies across national governments, as well as often extensive commentary available through unofficial sources such as trade, sectoral, or professional publications. **Publication of prospective regulations** is much less common among reviewed countries. Where this does occur, proposed regulations are often communicated in a dedicated government publication such as the US *Federal Register*. Such publications are typically widely available in print (for a nominal fee) and as free online editions featuring extensive **search and archive capabilities**. Governments may also use paper-based and electronic support systems developed in the context of notice-and-comment procedures, such as in the Netherlands and the United Kingdom. Individual regulatory authorities in some countries also publish information about planned regulatory initiatives in departmental publications or on their websites, often providing early notice to the public about planned regulatory initiatives (see section 2.1.3.). Such information may also be published on a periodic basis in the context of annual budget and planning activities. Interested stakeholders thus have a range of resources at their disposal for accessing information about regulations in the making.

11. Some but not all countries have parallel processes in place for disseminating information about existing and prospective rules at subcentral and local levels. In general, however, comprehensive, consolidated databases of subcentral regulations across reviewed countries remain rare.

ii) Enquiry points

12. The **availability of central enquiry points** to facilitate clarification of rules and their manner of implementation is another important tool for ensuring optimal transparency for new and established market players alike. Notable features of well-functioning enquiry points include highly-skilled response teams, fast turnaround times where further information may be required, optimal use of existing technology where appropriate (e.g. e-mail auto-responders or fax-on-demand services), and available in-person assistance whenever required. The use of central contact points with a view to facilitating trade procedures can also be understood from the perspective of least trade restrictiveness, as discussed in Section 2.3 below.

iii) Use of the Internet

13. **Increasing reliance on the Internet** as the publishing venue of choice has clearly emerged as a best practice. **Centralised online compendiums of all laws and related regulations** in force (e.g. Canada, Mexico), often equipped with search engines, offer users rapid and unabridged access to the full legal texts of laws and related regulations. While such compendiums do not offer definitive interpretations of regulatory measures, they do provide a one-stop electronic portal for accessing key information, sparing a user the task of piecing together needed information from disparate sources. State-of-the-art online compendiums are frequently updated and often feature built-in hyperlinks to closely related websites such as sponsoring Ministries. Even the best e-compendiums have yet to be fully integrated with fuller information, however, such as laws and regulations of sub-central authorities and clear delineations of the interrelationships between the two.

14. Many reviewed countries have now started going even further in exploiting Internet technology to enhance transparency and accessibility of government services and information. The creation of **comprehensive e-gateways** such as the UK Site (www.ukonline.gov.uk), the Canada Site (www.canada.gc.ca), and the "Greek-citizen Site" (www.polites.gr) has not only contributed to greater transparency about the operations and offerings of the federal government, but (as will be seen later) has also facilitated the delivery of a new generation of online business transaction possibilities. The "gateway" approach – so-named because it opens the door to vast amounts of information on a wide range of subjects – can be seen as a breakthrough in harnessing the Internet in support of greater transparency. Gateway approaches also make extensive use of embedded hyperlinks to take the user directly to the information required, enabling visitors to the site to locate and download needed information quickly and easily.

15. Despite these advances, **some reviewed countries have yet to fully exploit the full potential of the Internet**, both in terms of getting content online in a user-friendly manner and making it available in English where the home language is not widely understood outside national borders (e.g. Italy). Some of these same countries have however moved quickly to address this technological lag. As noted over the course of its review, Italy has engaged in an active policy to make available online information on both existing and draft regulations, including an action plan for development of comprehensive e-government that would include an e-information gateway and a *Norme in Rete* (regulations online) website complete with search engine.

2.1.2 Clear, open and simple procedures to ensure predictability in making and implementing rules

i) Clear rule-making procedures

16. Predictability and clarity of the rule-making process provide domestic and foreign stakeholders alike with enhanced transparency and certainty about how the regulatory process can be expected to unfold, allowing them to make informed decisions about when and where to participate in the process. Simplicity and specificity of the steps involved in the making of regulations allow interested stakeholders to fully understand the evolution of a regulatory proposal, enabling them to participate in the rule-making process at appropriate junctures in the process. Depending on the urgency of the circumstances under which it may be formulated, the life span of a given regulatory proposal may often stretch into weeks or months as it advances through the system. A clear, detailed, and freely available description of the regulatory process – as well as any clearly identified exceptions to its coverage – is thus a fundamental guarantor of transparent, open rule-making systems.

17. Clear **codification of rule-making procedures through overarching statute** or other instrument has emerged as another foundation of good regulatory practice. Most of the sixteen Member countries reviewed to date have specific laws setting out rule-making procedures. The US Administrative Procedures Act, Mexico's Federal Administrative Procedure Law, and Spain's Administrative Procedure Law are just some examples of this "first tier" of administrative rigor. Some countries have further **supplemented legislative frameworks with standing policies relating to regulatory activity** and **detailed written guidance on the regulatory process.**

18. Questions have nonetheless arisen regarding the practical implementation of rule-making requirements under certain circumstances. While Japan has an Administrative Procedure Law in place, for example, the country's more traditional reliance on the inherently opaque "administrative guidance" has raised doubts about the real impact of the Law on day-to-day regulatory management. Similarly, the mere existence of rule-making procedures may not always be enough to ensure optimal transparency. Ensuring

effective adherence to such procedures each step of the way – through an oversight mechanism or suitably established lines of accountability -- is equally important in achieving this result.

19. A small number of reviewed countries do not have specific laws in place setting out procedures to be followed in legislative or regulatory processes, but approach administrative procedural issues from other, sometimes dual perspectives. Ireland, for example, has recently reformed its administrative procedures pursuant to the broader Strategic Management Initiative launched in 1994, and the preparation of regulations (secondary legislation) follows principles set out in the Cabinet Handbook.

ii) Clearly written rules which can be easily and consistently implemented

20. Regulatory content across reviewed countries varies in complexity and the style in which it is drafted. Calls for simpler, more user-friendly language have often found their way onto the regulatory reform agenda, with limited results. The challenges are double-edged; on the one hand, regulations may be drafted so tightly as to exclude all but a few regulated parties from meeting their requirements – the prescriptive versus performance-based formulations that have generated trade frictions in the past and formed the basis of new best efforts obligations in world trade agreements. On the other hand, regulations may also be so loosely framed that they invite difficulties in interpretation, possibly leading to inconsistent interpretation and unpredictable application or even discretionary abuses by regulatory officials. Either scenario ultimately undermines compliance by regulated parties.

21. Regulatory complexity was found to be problematic in a range of reviewed countries. Greece's labyrinth of complex rules and inefficient administration has played out in a frequent need for interpretative statements by the Parliament (for laws) or interpretative Ministerial circulars (for decrees), a situation which has been exacerbated by business claims of inefficient bureaucracy and insufficient contacts with central and local authorities. Complex rules, particularly if they are allowed to proliferate in an environment of regulatory inflation, can also undo what systematic publication might otherwise contribute to enhanced transparency. In Italy, for example, where over 35,000 frequently lengthy and detailed national and regional laws are in place, even the administration has faced interpretation challenges, leaving scope for wide discretion in application of rules. The Bassanini Reforms of 1997 addressed this issue, aiming to simplify the system by streamlining the existing stock of laws and regulations, examining the quality of new regulations, and pursuing ongoing simplification of the administration. Indeed, the Italian experience and others like it may point to emerging best practices in this area: periodic commitments to **review the existing stock of laws and regulations** with a view to confirming ongoing relevance and **rigorous vetting of draft regulations** against established criteria for clarity and simplicity.

22. Challenges remain on this front, however, and carry potent risks for market openness. Lack of transparency in regulation and perceptions about rigid implementation in particular areas such as labelling and marking requirements continue to attract the attention of trading parties in some countries. In Korea, for example, lack of clarity in food-related codes has resulted in wide discretion in their interpretation and application, leading to trade frictions. In response, Korea launched a program to review the codes and provide clearer guidance for customs inspectors. Frequent ambiguities in regulations and inconsistent implementation have also proven problematic in some other countries. While additional ad hoc guidance may well alleviate the problem, the preparation of efficient regulation in the first instance could help avoid such problems later on. Regulations in the making need to strike a balance between flexibility ease of interpretation and application, and achievement of the desired policy objective.

2.1.3 Systematic and rigorous reliance on public consultation, including prior notice and comment procedures

23. Public consultation and the use of prior notice and comment procedures (sometimes referred to as "pre-publication") are longstanding practice in some of the countries reviewed to date (e.g. the United States, the United Kingdom, the Netherlands, and Canada). Specific written guidance to regulators describing how public consultations are to be conducted is widely available in these countries. Some reviewed countries may involve the public well before drafting of a regulatory proposal has begun, a kind of early notice designed to pave the way for better acceptance of regulations by interested stakeholders. This early notification is typically carried out through a range of official vehicles, such as annual reports outlining upcoming regulatory initiatives, forward-looking departmental regulatory plans, or Notices of Intent designed to solicit public views in the early stages of problem definition.

24. Even where such regulatory practices are well-established, however, the quality and nature of public consultation can vary widely from country to country. In some countries, the process of making a regulation is essentially an open book, open to participation and comment by any and all interested stakeholders. **Well-publicised, well-organised, highly accessible, and well-timed opportunities for public comment** as well as **clear lines of accountability** for explaining how public comments have been handled are some of the features of this high-level commitment to public consultation. In addition, some independent regulators have integrated these concepts into their day-to-day operations and rely extensively on public inputs to shape sectoral regulation (e.g. the "Public Process" used by the Canadian Radio-Television and Communications Commission or the online consultations of the Greek National Telecommunications and Postal Commission). **Use of the Internet to solicit and gather public comments** in addition to traditional avenues of communication also enhances the potential reach of public consultations in real time, and has the added advantage of universal availability to all (online) stakeholders, national and non-nationals alike, regardless of geographic location.

25. In other countries, a formal commitment to public consultation may exist on the books but be less rigorously applied in practice. Wide discretion amongst regulators on who is to be consulted and how on given regulatory proposals may in effect dilute the intended benefits of broad-based public consultation. In Spain, for example, where **public consultations on regulatory matters are a constitutional requirement**, regulators must provide a "reasonable period" for public consultations, generally defined as not less than 15 working days. Regulatory authorities must prepare a written statement to be included in the *Normative Dossier* summarising public consultations and documenting how the consultation was conducted. Although Spanish regulators are required by law to consult citizens if a proposed regulation affects their "legitimate rights and interests", in practice they exercise wide discretion in deciding who will be consulted and the extent of information made available to consulted parties to evaluate regulatory proposals.

26. Best practice in this area may be encouraged by clear guidance to regulators on how consultations are to be conducted. Moreover, the availability of such guidance in written form (e.g. the United Kingdom's *Code of Good Practice on Written Consultation*) help ensure consistency of message and standard of consultation undertaken by regulatory authorities. UK policy makers are further provided with "Guidance on government research into public attitudes and opinions," which covers all policy investigations that are not conducted through a formal consultation exercise.

27. Informal consultations with interested stakeholders may still occur even in the absence of a formal requirement to do so, but with limited and uneven results. In Hungary, for example, while no formal mechanisms are in place for consulting concerned stakeholders during the preparation or review of regulations, this dialogue tends to happen informally through existing mechanisms such as the Council of Investors and Council of Foreign Economic Operators. In addition, each Ministry and the Prime Minister's

Office have an **information and complaints office** which is receptive to public inputs by Internet or mail. Foreign business associations have expressed general satisfaction with this "back door approach" to consultation. At the same time, the absence of clear, common guidelines for the consultation effort mean that related complaints are quick to surface. Charges of tight timeframes for the elaboration and finalisation of new regulations, for example, suggest that interested stakeholders feel cut out of a process in which they might otherwise actively participate.

28. Informal consultation may however provide needed experience as countries transition to more rigorous public notice and comment procedures. Informal approaches may also provide needed flexibility in some scenarios or usefully inform reform efforts. In Ireland, where institutional reforms have been introduced to formalise the consultations process, departments are now required to carry out public consultations with interested parties in accordance with a relevant provision of the *Quality Regulation Checklist*, and notice of regulations in the making is published in the Irish *Official Journal* and often through other media such as national newspapers. Prior to these reforms, public consultations on regulatory matters were carried out on an informal basis, and were in fact seen to be working well. Indeed, informality was perceived in this small economy as facilitating the emergence of social consensus, bolstered by easy access to government decision-makers. However, as aptly noted in Ireland's country review, "informality underpins flexibility and quick responsiveness but is often mirrored by procedures lacking in transparency with inevitable risks of regulatory capture." A similar experience has been observed in the Netherlands' policymaking framework. In this sense, best practice regarding public consultation can be understood as a careful balance between flexibility and responsiveness on the one hand, and consistency and transparency of modalities for formal consultation on the other.

29. Overall, there are **encouraging signs of a broad-based, ongoing evolution** towards more rigorous efforts to conduct public consultations prior to enacting regulatory measures, even in the absence of a generalised obligation on government to consult. In Poland, for example, an increasing number of legislative or subordinate measures require consultation with specific groups, whose right to be consulted is guaranteed by law. Rules of Procedure of the Council of Ministers also stipulate that the regulatory authority may consult non-governmental organisations if a proposed measure is relevant to their scope of activity. This trend can also be observed in non-OECD countries. Brazil, Argentina, Chile, India, and Hong Kong all have growing experience with enhancing transparency through the use of public notice, prior consultation and comment procedures.

2.1.4 Clear, open and effective appeals procedures

30. Appeals procedures can be understood in two broad contexts: appeal of an existing rule in the sense of an advocacy effort to alter its content, or appeal of an administrative ruling or formal or informal interpretation of an existing rule. Formal avenues for appeal of regulatory decisions or actions seem to be fairly well established across the OECD countries reviewed to date, though actual user satisfaction varies from country to country.

31. Most countries have **formal legislation** in place setting out procedures to be followed in the context of an appeal of an existing rule. Such procedures are sometimes included in statutory provisions on rule-making. The US Administrative Procedures Act, for example, requires federal agencies to afford interested parties the right to petition for the issuance, amendment, or repeal of a rule. There is **little evidence of overt discrimination** between national and non-national parties in terms of their standing under such laws: wherever codified, appeals procedures are available and accessible to all parties without any formal distinction on the basis of nationality. In addition, most national regulatory systems offer more than one avenue for appeal tailored to the issue at hand.

32. Formal avenues for appeal tend to be further supplemented by **informal channels for lodging and advancing complaints**, suggesting that possible disadvantages associated with the former may be dampening reliance on these mechanisms. The existence of informal avenues may also reflect cultural preferences or an expression of good will and general openness to dialogue with disaffected parties. Or, it may simply indicate a lack of appropriate official venues for certain types of regulatory decisions or actions – a legal vacuum filled with alternative approaches.

33. Some national legal systems build in **explicit assurances that foreign parties may effectively access appeals procedures**, an approach sometimes observed in countries with highly proactive investment promotion policy stances. Hungary's *Act on General Rules of Public Administration Procedures* provides that parties whose rights or interests are affected by an administrative decision or action can appeal irrespective of citizenship or domicile, and may do so in the mother tongue of the complainant party. Additional, more informal avenues for appeal also exist in Hungary: any party may lodge complaints about perceived trade and investment restrictions directly with the regulatory authority concerned the Ministry of Economic Affairs, or **through Chambers of Commerce or professional associations.**

34. Despite the widespread existence of established procedures for appealing administrative actions or decisions across the OECD Member countries reviewed to date, formal appeals processes are frequently viewed as cumbersome, time-consuming, and inefficient. A recurrent theme that comes up in this context is the **need for clearly defined time limits** for treatment of an appeal as it advances through the system. Certain types of appeals processes were running over four years on average in one review country. In others, the mere perception of a burdensome, slow-moving appeals system has been shown to seriously undermine business confidence, constraining the ability of domestic and foreign firms alike to react quickly to developments on the ground.

35. Finally, while informal avenues of appeal may be a welcome complement to the system in principle, **lack of transparency around accepted practice, cultural attitudes, and procedural disparities across regulatory authorities** within the same country (let alone as between countries) lower a veil of inscrutability and uncertainty on firms which may be new to the market or lack the resources or knowledge to use such avenues in the same way as more seasoned interlocutors might do. Again, as argued with respect to informal avenues for public consultation, informal avenues make sense in principle, but in practice run the risk of skewing the system in favour of those most knowledgeable about its inner workings. Whether or not foreign firms can effectively hold their own in such an environment vis-à-vis domestic parties, where cultural familiarity and established consultation patterns may already be working in their favour, is an open question.

36. In some cases, **particular avenues of appeal exist for specific areas of regulatory activity**. Reviewed countries in the EU, for example, abide by EU rules on public procurement which require Member States to provide **appropriate judicial review procedures of decisions** taken by procurement authorities. In addition, they must provide for the **possibility of interim measures**, including the **suspension of procedures for the award of contracts**, for **setting aside unlawfully taken decisions**, and for **awarding damages** to parties affected by the infringement. However, actual modalities relating to burden of proof, effectiveness and speed of such proceedings vary widely by national judicial system, and some Member states require that appeals be directed at the responsible Ministry before they may be addressed by the judicial system.

2.1.5 Ensuring transparency in particular areas

i) Gray regulation

37. "Gray" regulation – non-regulatory **measures which may have regulatory effect** on market participants – represents an ongoing transparency challenge. Though gray regulation varies in potential impact and importance across OECD countries, it is a striking feature of some regulatory regimes. In Japan, for example, at least six different forms of regulations and administrative conduct may have regulatory effect, including some which appear to have no systemic or functional parallel elsewhere in the OECD area. Thus *tsutatsu* (internal orders used as a communication tool between high-level officials and their subordinates), *gyosei shido* (administrative guidance, or actions without legal binding force intended to influence specific actions of other parties in order to realise an administrative aim) and *jimu renraku* (communication tool used by and between bureaucrats) may offer little possibility in practice for meaningful scrutiny and understanding from a market openness perspective by potential new entrants, whether domestic or foreign.

ii) Self-regulation

38. The cumulative OECD record to date on ensuring **transparency of self-regulatory schemes** is uneven and does not mirror more sophisticated efforts to improve transparency of government regulation. Indeed, the absence of consolidated information sources on self-regulatory schemes has been observed in most review countries, with possible de facto exclusion of foreign interests in the development of such measures identified as a concern in the context of given entities (e.g. self-regulatory activities undertaken by statutory industrial organisation bodies in the Netherlands). The risk of such outcomes tends to be higher where rules of representation are rigid or outdated, and further compounded in cases where government has delegated regulatory powers to the entity in question.

39. Although information about self-regulatory measures may always be sought out on an ad hoc basis, there seem to be few if any controls in place across countries reviewed to date that would hold responsible entities accountable to a high transparency standard. This situation seems more acute in some countries, where demandeurs are essentially left to their own devices to glean what information they can from the relevant association. Evidence from the country reviews suggests that this can be a real problem, sometimes far outstripping concerns about transparency of government regulation itself. Concerns about transparency can also be compounded by alleged discriminatory conduct of some self-regulatory associations, an issue revisited in Section 2.2.

iii) Standards development

40. Transparent standards development processes are another key indicator of commitment to market openness. Most reviewed countries have delegated responsibility for standards development to private or pseudo-public standards development organisations (SDOs). Though typically not engaged in standards development themselves, independent government entities in most OECD countries may oversee national standards systems and policies, accredit SDOs, approve national standards, and represent the country in international standardisation activities.

41. International disciplines relating to transparency in standards development are often explicitly transposed in domestic instruments. Canada's Procedural Document on Accreditation of SDOs, for example, incorporates both ISO/IEC Guide 59 (Code of Good Practice for Standardisation) and the WTO TBT Annex 3 Code of Good Practice for the Preparation, Adoption and Application of Standards, adopting

the more onerous of commitments in case of overlap between the two instruments. This is common practice in most reviewed countries.

42. Standards development processes appear to be broadly open and transparent in most review countries, with wide SDO adherence to the Code of Good Practice. Best practices in this area reflect a rigorous approach to standards development, including the establishment of appropriately-qualified technical committees of volunteers; **effective balancing of interests across** industry, consumer, regulators, and other interested groups; **opportunities for public comment on draft standards prior to finalisation s (including availability of draft standards online); adequate timeframes for submission of comment**(at least 60 days according to the TBT Annex 3 Code, although this period may be shortened for urgent matters involving health, safety or the environment); and **clear lines of accountability on handling of comments**.

43. Official adherence to the Code of Good Practice can be further enhanced by appropriate implementation and follow-up mechanisms. The Canadian example of implementation guidelines to be developed in an "assessment checklist" with specific audit points may offer a useful model for ensuring wider adherence to international best practice for standards development.

iv) Government procurement

44. Transparency of procedures and practices relating to government procurement is another critical determinant of market openness. Government procurement encompasses an array of sequenced activities, each of which provides important opportunities for ensuring transparency and openness of decision-making. The initial announcement and dissemination of information about a tender, adequacy of timeframes for its consideration, communication of clearly defined criteria for prospective bidders, clarity of timeliness and guidelines for preparation and submission of bids, clear delineation of the type of award procedure being used, criteria used to evaluate the quality and competitiveness of a given bid, and existence of avenues for challenging given awards are all potential flashpoints on the road from an initial call for tenders to eventual award of a project to the successful bidder. All of this combines to provide a rich area of enquiry on emerging best practices in an area representing huge opportunities for international trade – purchases by central and local governments represent around 14% of total EU GDP, for example.

45. The track record across OECD countries reviewed to date is uneven, offering an insightful look at emerging best practices as well as areas where further improvements are required. EU Member states provide an interesting test case for understanding promising approaches and remaining obstacles to the pursuit of a trade-friendly government procurement regime. Reviewed countries in the EU have benefited from the adoption of EU-wide rules aimed at securing enhanced competition in the area of public works, supplies and services, including a special framework for utilities (energy, water, telecommunications and transport) which has contributed to enhanced transparency by providing a clear and uniform standard for implementation. As documented in the relevant country reviews, major requirements relating to information provision, remedies, non-discrimination, and use of international standards together form a coherent framework for achieving market openness in this area. With respect to information, for example, procurement authorities must prepare **annual projections of total procurement by product area** and **publish the list** and any contract whose estimated value exceeds specific thresholds in the Official Journal of the European Communities. Tenders must also **disclose which of three permitted award procedures (open, restricted, or negotiated) will be used** and **clearly specify objective selection and award criteria**. This commitment to transparency runs through the various stages of the bidding process, at the end of which procurement authorities must also **place a notice in the Official Journal making known the results of individual tender procedures**. Additional provisions set **minimum periods for the bidding process** to ensure opportunities for effective participation by all interested parties.

46. Implementation of these rules has played out differently across EU Member states, however. In some countries such as Spain, transposition of EU procurement rules into domestic regulatory systems has proceeded relatively smoothly. Others have encountered obstacles to doing so, as in Greece, where the persistence of loosely written bid specifications subject to varying interpretations and inadequate technical preparation of tenders has muddied results. Importantly, the Greek administration has acted to redress some of these shortcomings, including through increased reliance on internationally harmonised technical standards and **tightening of procedures for drafting pre-selection and award criteria**. Italy has addressed similar systemic shortcomings (lack of clear specifications and award criteria, imbalance between restricted and open tenders) through the so-called Merloni Laws and further adjustments to align the domestic regulatory system with the EU Directive.

47. Other countries preparing for EU accession through association agreements have undertaken wide-ranging reform in the area of government procurement. Turkey and Poland, for example, have both made significant progress in introducing new legal frameworks for procurement which would bring regulatory practices into line with international standards for transparency in this area.

48. **Use of the Internet to disseminate information and facilitate bidding processes** has also emerged as a best practice in the area of government procurements. Mexico's innovative approach to organising government procurement through the Internet (COMPRANET) has yielded important gains in terms of transparency as well as ensuring respect for other efficient regulation principles. Canada's MERX, an internationally accessible electronic tendering service and Contracts Canada, an e-database of registered suppliers, also models best practice in this area. **Online publication of all public tenders and awards on the Internet** has also been introduced in the Czech Republic, and across the EU (SIMAP).

49. Passage of specific legislation on procurement appears to be a necessary but not always sufficient condition for ensuring that public procurement unfolds in a consistently transparent way. Enactment of the 1994 Act on Public Procurement and subsequent amendments thereto have increased transparency of government procurement in the Czech Republic, but pursuit of market openness cannot stop there. Significant **implementation challenges** remain, sometimes arising from a lack of familiarity with procurement rules within the administration itself. The Czech Republic has moved to address such shortcomings through **additional on-the-ground training where required**. Sustaining these efforts will be particularly important in countries pursuing decentralisation initiatives, as local authorities are delegated more scope and authority for the conduct of procurement activities.

50. **Ongoing improvements to existing laws** may also be necessary to achieve and maintain optimal market openness. In Hungary, where a first piece of legislation on public procurement passed in 1995 was designed in accordance with existing state-of-the art disciplines, new challenges led to a new Act (in 1999) with additional amendments scheduled for 2002, this time to align the legislation with the EU Public Procurement Directive. Although lack of transparency and perceived procedural irregularities have prompted some firms to take legal action against the state, evidence of a **sustained political commitment** to address the situation provides a fertile policy environment for further reforms to take hold. As in the Czech Republic, additional training will be key to ensuring the long-term success of even the latest innovations in law.

51. Other significant concerns identified in certain country reviews included allegations of bid "rigging," absence of avenues of recourse against procurement entities that fail to respect publication requirements, and the continuing lack of discipline on sub-central procurement authorities with respect to any of the efficient regulation principles, including transparency. While a lasting solution to this latter issue is likely to remain elusive before greater scope and coverage of the WTO GPA Agreement is achieved, domestic regulatory regimes can prepare the way for eventual acceptance of greater liberalisation commitments in this area. A clear and ongoing challenge at this stage is to ensure that new or improved

rules on government procurement demonstrate respect for transparency and are effectively implemented and enforced.

2.2 Non-discrimination

2.2.1 Formal commitment to the principle and extent of exceptions in practice

52. Explicit references to economic discrimination in national legislation and overarching requirements to incorporate the principle into domestic regulatory processes are relatively rare amongst the sixteen countries reviewed to date, although the Constitutions of certain countries (e.g. Spain, Hungary) include a general prohibition of discrimination, and specific provisions contained in some national instruments (as in Italy's Civil Code) expressly promote national treatment. In addition, treaties duly concluded and promulgated overrule or have the same force as domestic laws in all reviewed countries, although express references to this effect do not necessarily reflect a greater respect in practice for non-discrimination.

53. In most review countries, specific commitment to the MFN and National Treatment (NT) principles **flows from WTO membership**, so that respect for both is broadly though indirectly ensured through adherence to international trade obligations. Countries tend to be generally vigilant in ensuring effective implementation of this efficient regulation principle, as disrespect for either principle can be, and has been, frequently caught by the WTO dispute settlement system. As a result, overtly discriminatory (nationality-based) content in domestic regulation tends to be fairly exceptional and mainly concentrated in service and "cultural" sectors. Under the "bottom-up" approach taken in the GATS, exceptions to the principle of non-discrimination (MFN exemptions and exceptions to NT) tend to be narrowly defined and, in the case of MFN exemptions, subject to removal by a date certain. Exceptions to NT, on the other hand, are subject to the progressive liberalisation commitment built into the GATS. Accordingly, though overtly discriminatory measures continue to be maintained in all countries, they are at least disciplined by transparency via notification and subject to removal in future negotiations.

54. **Discriminatory practices in the area of government procurement** also provide an insightful look at the extent of reviewed countries' commitment to the principle of non-discrimination in practice. Although most countries reviewed to date are signatories to the plurilateral WTO GPA the quality of effective market access may vary widely. This may be particularly true in countries where highly significant amounts of public procurement take place through subcentral or local authorities not covered by GPA commitments. Moreover, some countries still maintain expressly discriminatory elements in their government procurement regimes. The 1994 Polish law on public procurement establishes a general principle of equal treatment, but a national preference clause applies under some circumstances, while local content requirements limit the scope of competition. Under current Turkish law, the Council of Ministers may authorise procuring entities to award contracts without competition and may also grant a price advantage to domestic suppliers. Such provisions are likely to be eliminated upon accession to the EU.

55. **Responsibility for ensuring implementation of WTO commitments, including on non-discrimination, typically lies with the trade or economic Ministry of each country**, sometimes with additional intergovernmental consultation mechanisms in place for supporting this result. In the United States, for example, USTR plays the lead role in trade policy development, while an interagency trade policy mechanism established under the Trade Expansion Act of 1962 assists USTR with the fulfilment of its mandate. As described in the US review, the interagency trade policy mechanism features three tiers of committees which work to develop official positions on international trade and trade-related investment

issues. In other countries (e.g. Denmark), each Ministry may be delegated responsibility for ensuring respect for the principle of non-discrimination in its respective legislation. However, there is no central oversight body in Denmark to monitor implementation of these commitments. In still other cases, respect for the principle may be expressly extended to the regulatory sphere. Japan "encourages" regulatory bodies to respect non-discrimination in the making and application of domestic regulations. While it may be tempting to dismiss purely exhortatory undertakings as lacking in any real impact on regulators, they may still be valuable in terms of raising awareness about the need to build this (or any other) principle of efficient regulation into domestic regulatory processes. This is undoubtedly a step in the right direction, and superior to the complete silence on the subject observed in some other countries.

56. While overtly discriminating regulation seems to be rare, there are often perceptions of **de facto discrimination**, or rules which may have a discriminatory effect on foreign parties. Specific features of given regulations may effectively place foreign traders, at a competitive disadvantage, though on their face appear to apply to national and non-national interests alike. In several of the OECD countries reviewed to date, some complaints stem from alleged discriminatory elements in subordinate laws, primary legislation, or in the self-regulatory actions of industrial associations. Other complaints reveal suspicions about subtly protectionist vested interests, while still others suggest that de facto discriminatory effects may simply be the result of inadequate vetting of regulatory proposals from the market openness perspective or a lack of awareness, expertise, or commitment on the part of regulatory officials to develop trade-friendly regulation. Such issues will be revisited in Section 2.3 on Avoidance of Unnecessary Trade Restrictiveness.

2.2.2 Commitment to open regionalism

57. A commitment to open regionalism in principle must be backed by effective implementation to be meaningful in practice. The OECD countries reviewed to date all express support for the principle, but not all share the same level of commitment to the active pursuit of and participation in regional trade arrangements. Some countries have been enthusiastic proponents of regionalism, while others (e.g. Korea and Japan) have only recently moved away from their traditional, long held preference for further market opening on the basis of multilateral trade liberalisation. Although there has been a sustained trend towards regionalism in recent years, many such initiatives have taken on added complexity as the scope and coverage of existing and sought-after agreements broadens with changing priorities and new developments on the ground. Therefore, while the basic complementarity of regional and multilateral trade liberalisation has gone essentially unchallenged, the actual manner of implementation of a country's stated commitment to open regionalism remains a critical determinant of market openness.

58. How exactly do countries give expression to this commitment? Several best practices have emerged from the collective experience of OECD Member countries reviewed to date: first, a **high-level political commitment** to open regionalism, sometimes backed by related policy statements or supporting language in the actual text of a regional agreement; second and relatedly, **evidence of willingness to multilateralise all or some preferences granted in the context of a regional arrangement**; third, **active and sustained participation in multilateral trade liberalisation initiatives**, including adequate delegation of negotiating resources to both; fourth, **transparent management and administration of regional agreements**, including through publication and the use of enquiry points; and fifth, **availability of avenues for third parties to pursue complaints** arising from possible trade-diverting effects of a given Agreement.

59. Actual adherence to such practices varies by country, but specific examples help illustrate what has been achieved in such contexts. Mexico, an active participant in FTAs and bilateral investment agreements, earned praise in its review for good faith efforts to share information on the operation of the

regional agreements to which it is party, and has multilateralised FTA preferences in areas such as investment, customs procedures, and intellectual property. Mexico has also demonstrated willingness to go beyond its WTO obligations in certain (services) areas, which has the potential to generate trade-creating effects down the road even for third countries, and sooner than multilateral agreements may be able to deliver. Hungary, too, has also sought to multilateralise certain regional commitments undertaken in the framework of its preferential agreements, and has extended to all WTO Members a commitment undertaken in the context of the Europe Agreement to progressively abolish all remaining quantitative restrictions on industrial products. In addition, as part of its OECD accession commitments, Hungary committed to extend to all OECD Members the benefits of the Europe Agreement relating to operations covered by the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations.

60. Transparency of preferential agreements has also been greatly advanced through the use of the Internet. The authentic legal texts of virtually all agreements can be easily found online and through a variety of authoritative sources, including regional organisations such as the OAS's excellent SICES service, at the individual websites of trade ministries, and through the WTO and related accounts of the proceedings of Article XXIV Working Parties. Reviewed countries generally maintain open attitudes to third countries when considering or implementing preferential agreements. In the United States, for example, third countries may respond to public requests for comment published in the *Federal Register* or on an ad hoc basis to the relevant US government agency. Finally, extensive interpretative comment on many existing arrangements (as for NAFTA) can often be found on the websites of many trade law firms and industry associations.

61. For all these advances, weaknesses remain. The sheer proliferation of regional trade and investment agreements and variety of approaches taken therein mean that practices by agreement may vary widely, leaving third parties to navigate an ever **more complex web of lengthy and increasingly sophisticated agreements**. While most countries make good efforts to ensure the transparency of such agreements and answer questions about its implementation in practice, avenues for doing so are typically highly dispersed, with no dedicated information services in place to help third country parties understand the nuances of the day-to-day operation of the agreement. The complexity of given rules often defies ready interpretation by interested stakeholders in foreign government and business alike, in some cases inviting adverse speculation about intended effects. Regional undertakings with respect to particular issues such as standards-related activities and regulatory co-operation may also carry inherent risks for non-parties, underlining the continuing need to design approaches which offer useful models at the multilateral level and can be easily multilateralised in practice.

2.2.3 Attitudes towards foreign direct investment and foreign ownership

62. Policy stances towards foreign investment and foreign ownership in particular also provide useful insights into the extent of a country's commitment to non-discrimination. **Most OECD Member countries reviewed to date maintain some nationality-based restrictions** on foreign investment, typically in the form of foreign ownership limitations. These are most commonly observed in certain key sectors such as telecommunications services, financial services, air transport, and the so-called cultural industries (e.g. broadcasting, book publishing and distribution, and film distribution). Restrictive regulatory measures in the latter sector are often tied to longstanding political sensitivities as in Canada, where ownership limitations have long been justified on the grounds of maintaining cultural sovereignty.

63. Beyond specific limitations on ownership, some countries also regulate investment through the use of **notification and review provisions**. However, the once heavy scrutiny of inward investment that prevailed for years in some countries has given way to more liberal policies seeking to *attract* investment in an era marked by relative scarcity of global investment resources. Countries now tend to compete for

investment to the point of intense rivalry based on investment incentive and related attraction schemes, and record amounts of FDI stocks in some countries are extolled as pillars of strong economic growth.

64. In some countries, foreign direct investment has been recognised as a **crucial factor in supporting transition to a market economy**. Czech policy towards FDI has as a result evolved rapidly in recent years, with abandonment of the case-by-case study of inward investment projects and the introduction in 1998 of a first programme of investment incentives. This experience has been repeated throughout the region. Even in the absence of explicit provisions encouraging or requiring regulatory measures to be trade and investment-friendly, the drive to attract foreign direct investment often helps ensure this result. So intent are some countries in attracting foreign investment that regulatory approaches may actually reflect **"reverse" discrimination**, whereby foreign parties enjoy additional advantages over domestic firms (not to be necessarily understood as a best practice, as resulting large gaps in profitability between some domestic and foreign firms may introduce a new set of sustainability issues).

65. However, **liberal attitudes to foreign investment are not always matched by the requisite capacity to welcome investors**, and may be heavily undermined by inadequate or inefficient management of regulatory processes and practices. Such is the case in Greece, for example, where a notoriously poor record of attracting FDI has been partly attributed to the poor quality of public administration. Lengthy and sometimes unpredictable administrative procedures, extensive red tape, gaps in regulation, and unpredictable and lengthy judicial enforcement have also been identified as barriers to investment in Turkey despite that country's formally non-discriminatory treatment of foreign investors, and these situations in fact recently have motivated Turkey to issue a new decree establishing Committees to work on the reduction of such administrative barriers for FDI.

66. The generally liberal attitudes towards foreign investment observed across countries reviewed to date should not however tempt complacency on the need for further progress in instilling the principle of non-discrimination in domestic regulation. Beyond formal restrictions, **less visible but burdensome regulatory practices** can effectively frustrate market openness even where formal limitations may not apply – perhaps even undermining the achievement of stated investment policy objectives. **Long approval periods**, sometimes **onerous conditions attached to initial establishment**, and **real or perceived regulatory barriers** encountered by some new market entrants (which they argue place them at a competitive disadvantage vis-à-vis domestic firms) observed during the course of the sixteen country reviews are some of the ongoing challenges which have surfaced in this context.

2.3 Avoidance of unnecessary trade restrictiveness

67. OECD Member countries reviewed to date exhibit some discernible patterns with regard to formalised commitments to the efficient regulation principle of least trade restrictiveness. Approaches and practices vary across countries. To illustrate, Korea's Foreign Trade Act specifically requires administrative procedures to be trade and investment-friendly. Japan maintains no such general provisions, though individual ministries and agencies are responsible for applying regulations and administrative procedures in a least trade-restrictive way. Additional progress has been made in Japan's implementation of this principle in specific areas, notably through the Office of Market Access's adoption of a set of policy actions on market access issues concerning standards, certification, and other issues. That instrument stipulated that government bodies should "avoid the use of standards, technical regulations and conformity assessment procedures including sanitary and phyto-sanitary regulations which are unnecessary obstacles to trade." Domestic policy instruments such as these provide examples of the legal transposition of WTO rules into domestic law and reinforce awareness of existing international obligations.

68. Stated policy objectives need to be underwritten by strong mechanisms to ensure effective implementation in practice. Nevertheless, recognising the importance of considering trade effects when developing regulations and other measures does not mean that it is appropriate or possible to develop prescriptive norms in comprehensive trade agreements or enforceable in commercial arbitral tribunals. The remainder of this section sets out the key lessons of the market openness reviews to date in elucidating and encouraging trade-relevant best regulatory practice.

2.3.1 Efforts to foster awareness of the trade and investment implications of regulations, including when undertaking RIAs

i) Requirement to Conduct a Regulatory Impact Assessment, With Due Attention to the Trade Dimension

69. Many OECD countries reviewed to date rely on regulatory impact analysis to avoid unnecessary trade restrictiveness. Though not expressly conceived or formulated in terms of market openness considerations per se, the RIA process does provide a systematic approach for assessing the impacts of a proposed regulation and helps inform regulatory decision-making. Where appropriate, therefore, trade impacts would normally be assessed in the mix of other factors deemed relevant in a given regulatory scenario. In the absence of a broader requirement to assess the anticipated impacts of a regulatory proposal on market openness (or indeed an explicit requirement to select a regulatory approach based on market openness considerations), regulatory impact assessment thus emerges in many OECD countries reviewed to date as an available tool for considering trade impacts as appropriate.

70. While regulatory impact analysis is a firmly entrenched practice in many OECD countries, it is still absent or in relatively early stages of development in others. Several of the reviewed countries – among them the Netherlands, the United States, Canada, and the United Kingdom – are highly experienced practitioners of regulatory impact analysis and have long experience with the introduction and refinement of this tool as part of broader regulatory reform initiatives. Though exact presentation and requirements vary, the leaders in regulatory impact assessment have espoused broadly similar approaches. In the US, federal regulatory authorities must submit a Regulatory Impact Analysis (RIA) with each regulatory proposal (with the exception of federal regulations deemed minor), and for "significant" regulatory actions must generally provide additional information which goes beyond the underlying analysis to include an assessment of anticipated benefits of the regulatory action, quantified where possible; an assessment of anticipated costs associated with the regulatory action, quantified where possible; and an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the proposed regulation, with an explanation why the planned regulatory action is the preferred alternative.

71. In the United Kingdom, Regulatory Impact Assessments and related guidance explicitly call for an analysis of anticipated impacts on trade and investment. In Canada, a Regulatory Impact Analysis Statement (RIAS) must accompany a regulatory proposal throughout its consideration both inside government and in the public domain (as part of public consultation and pre-publication requirements). Extensive written guidance is available to RIAS writers in preparing a document designed to address the core elements of the overarching federal Regulatory Policy. Dutch rules also include an explicit requirement to assess trade impacts, and in Ireland a Quality Regulation Checklist accompanies final draft legislation together with a six-point impact assessment statement.

72. Certain other reviewed countries have established procedures providing for impact assessments of new regulations, including an analysis of costs and benefits, but may not consistently consider trade impacts if at all. Korea's Basic Act on Administration Regulations requires such assessments, but as noted

in its review, potential impacts on market openness are *unlikely* to be examined unless the proposed regulations relate directly to trade and investment. The linkage is still weak but appears to be at least indirectly acknowledged in some other countries. In Mexico, although unnecessary trade restrictiveness is not included amongst guiding principles for regulatory impact assessments, consideration of trade impacts is implied in other regulatory instruments and may therefore be considered. Potential effects of proposed Spanish regulations are assessed in a largely qualitative "Evaluation Questionnaire" in the absence of specific guidance on economic impacts. The principle of avoiding unnecessary trade restrictiveness may be informally taken into account by bodies such as the Inter-Ministerial Commission for WTO regulations, but nothing codifies consideration of trade impacts in the day-to-day preparation of draft regulations. Such linkages appear tenuous at best, leaving due consideration of possible trade impacts an uncertain prospect in all but the most egregious cases.

73. Still other countries are engaged in **ongoing efforts to establish or strengthen regulatory impact assessment**, some in response to OECD recommendations. A new law in Italy has added more rigor to that country's procedures, and RIAs for both primary and secondary legislation will now consider trade and investment as part of the underlying economic analysis. Improving the quality and efficiency of RIA procedures is among the central objectives of ongoing regulatory reform in reviewed countries such as Hungary and the Czech Republic, where impact assessments of potential trade impacts have tended to be loosely conducted through interdepartmental co-ordination mechanisms. And development of a rigorous RIA approach remains critical to ensuring market openness in countries like Greece and Japan, where such systems have yet to be established.

74. Certain patterns can therefore be discerned regarding the use of regulatory impact assessment across OECD countries reviewed to date. A number of countries rely on **direct or indirect requirements to assess the anticipated impacts of a regulatory proposal on trade and investment**, relatively few countries require that **regulatory impact analyses be conducted for both primary and secondary (subordinate) legislation.** Countries with long experience in regulatory impact analysis typically have in place rigorous **quality-control standards** for the preparation of thorough, well-done impact assessments, though actual enforcement efforts may vary, and typically **publish impact analyses in the public domain at least once and sometimes twice before a regulation becomes final. During this public comment period**, both domestic and foreign stakeholders are free to comment on both the substantive proposal and its supporting analysis. Submission of such comments has been greatly facilitated in some countries through the use of the Internet.

75. Regulatory impact analysis is generally not required of independent regulators. While many such entities are trade-relevant, an enquiry into the possible merits of identifying and encouraging best practices in this area with a view to ensuring consistent quality and transparency of regulatory activities not disciplined by broader policy requirements is beyond the scope of this paper since resources of reviewed countries in the context of market openness are limited.

ii) Rigorous, systematic quality control of RIAs

76. Clear rules for the preparation of RIAs with appropriate attention to the trade dimension must also be backed by strong implementation mechanisms. Effective "quality control" approaches must be in place to ensure that regulatory impact analyses have in fact been prepared according to established rules, and, if found to be sub-standard, turned back to drafters for further improvement before advancing any further in the system. Most of the reviewed countries have established vetting mechanisms of this kind, although their effectiveness in ensuring consistently high output from regulatory authorities is sometimes unclear: inadequate quality control of regulatory impact assessments was found to be problematic in some

reviewed countries, sometimes resulting in situations where poorly prepared regulations move unchallenged through the system.

77. Best practice in this context thus requires introduction of a challenge function that is appropriate to each country's legislative system or improved implementation of existing challenge functions where they already exist. Effective quality control may also be encouraged at all stages of a regulatory proposal, from the sponsoring regulatory authority all the way up through the system.

78. Why are some regulatory proposals escaping needed scrutiny, including from the market openness perspective? Closer analysis reveals a Pandora's Box of possible explanations. Substandard regulatory impact assessment may reflect **inadequate training** of regulatory officials charged with their preparation in the first instance, followed by **insufficient vetting of assessments by senior managers** before the work is exposed to a wider government audience. Although trade effects often figure in the range of criteria to be used by regulatory authorities in assessing the anticipated costs and benefits of regulatory proposals, they are but one element competing for a regulator's attention and may well be outweighed by more immediate considerations. Substandard regulatory impact assessments may also advance unscathed through the system based on a subtle expectation that any deficiencies will be "caught" and corrected in the public comment stage. Still other explanations may arise from **interagency rivalry** and insufficient co-ordination with trade agencies.

79. Yet even seemingly intractable issues such as these may be overcome with better training, tighter quality controls at the departmental or agency level, improved awareness that regulation can be trade-neutral or trade-friendly without compromising the fulfilment of legitimate policy objectives, and forging more constructive dialogue and working relationships between trade and regulatory authorities. An additional challenge lies in securing sufficient quality control of regulatory proposals from the market openness (and possibly other) perspectives generally. Filling this crack in the regulatory edifice is a job for the most senior levels of government and political leadership itself.

iii) Better communication between trade and regulatory officials: a pressing governance issue

80. Trade policy bodies across OECD Member countries reviewed to date tend not to be systematically involved in the day-to-day business of regulation-making. Rather, they are more likely to weigh in during the earlier policy development phase of a regulatory proposal and would only become involved in the design details of specific regulations on an ad hoc basis, either at the request of a regulatory authority (not often the case in practice) or if potentially problematic aspects of a regulatory proposal become known through other channels.

81. More proactive involvement in all stages of regulation-making may be a key to more effective advocacy efforts through all available channels, notably during regulatory impact assessment. Although observers in some countries have expressed scepticism in the past regarding the actual impact of regulatory impact analysis in ultimately informing political decision-makers, trade policy communities seem to be generally successful in advocating trade-friendly positions. Even where trade policy views may go unheeded or overruled by other considerations, instances of wilful neglect that would invite adverse trade effects seem to be rare in practice. More often, the challenge is to ensure the effective involvement of the trade policy community in regulatory decision-making within the limits of existing resources and better use of existing internal consultation mechanisms to ensure this result.

82. There also appears to be significant scope for improved working level relationships between trade and regulatory authorities, including competition authorities, and improved co-ordination and communication between trade policy bodies and subcentral regulatory authorities where relevant. Part of

the answer to achieving this may lie in **better use of existing intragovernmental consultation mechanisms or creation of new fora where appropriate venues** do not already exist. However, other largely informal challenges remain in encouraging more open dialogue across government and dismantling real or perceived barriers to more effective co-operation. One avenue may lie in **more focused training efforts** aimed at sharpening regulators' awareness and expertise in recognising problematic features of planned regulations and designing trade and investment-friendly rules. Governments also need to do more to encourage greater understanding that **legitimate policy objectives relating to such areas as health, safety and the environment can be fully achieved without unduly compromising market openness**, and may in fact be facilitated by trade-friendly regulation. This meeting of regulatory and trade policy minds – and the design of mutually supportive policies that should flow from it -- has yet to occur in most OECD countries, and reflects the kind of deep shift in regulatory culture that can only come with sustained efforts to achieve better governance and embrace new ways of looking at today's regulatory challenges and opportunities.

2.3.2 Favouring Trade-Friendly Approaches to Regulation and its Implementation

83. All OECD countries reviewed to date express commitment in principle to the concept of trade-friendly regulation, but as revealed over the course of the country reviews, **the actual capacity to ensure this result may be hampered by certain provisions in existing legislation**. Two main issues have emerged in this regard; first, the **capacity to design performance-based regulation** in accordance with WTO TBT obligations on this issue; and second, the **capacity of regulators to embrace regulatory alternatives** where appropriate. The following discussion of these issues should be read in conjunction with the OECD sustainable development Ministerial background reports which underlined key points regarding regulatory choice of instruments, including the importance of case-by-case decision-making to determine what mix of regulatory instruments may be appropriate; the continuing role of conventional regulatory instruments; and the need for regulatory back-up for self-regulation.

i) Capacity for basing regulation on performance rather than design criteria

84. Article 2.8 of the WTO TBT Agreement states that "wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics." This provision is based on an underlying recognition that parties should have the flexibility to meet a regulatory objective in any way that achieves the result without being told exactly how they have to do it. In practice, however, **existing legislative frameworks in some countries may not include the necessary authority to embrace performance-based rules**. This can result in a situation where major pieces of legislation constrain regulators to adhere to a command-and-control, prescriptive style of regulation, perpetuating an old-style approach ill-suited to the dynamics of good regulatory practice in general and trade and investment-friendliness in particular.

ii) Capacity for embracing regulatory alternatives

85. The capacity of regulators to explore alternatives to regulation more generally, or the capacity to explore and exercise "instrument choice," also carries significant potential to shape trade-friendly regulatory outcomes. **Reliance on alternatives to regulation (e.g. self-regulation) may be appropriate in some cases, but regulators must have the scope and authority (and perhaps, the incentive) to do so**. In some reviewed countries, enabling legislation sometimes explicitly prescribes that particular issues are to be addressed through regulation so that even if alternatives exist, regulators do not have the authority to consider them. Whether this is due to outdated legislation or other agendas is unclear, but the end result is the same.

86. Both scenarios point to a need for the increased vigilance of trade policy bodies during the preparation of new legislation and conduct of reviews or updates to existing legislation so that regulators will have room to pursue both trade-friendly rules and creative alternatives to regulation wherever appropriate. This in turn shifts responsibility back to improved communication between regulatory and trade officials.

2.3.3 Simplification of administrative requirements and streamlined service delivery, including customs procedures

i) Reducing administrative burden on business

87. Simplification initiatives aimed at **reducing administrative burden on business** is one area where governments can move decisively to reduce scope for unnecessary trade restrictiveness while at the same time encouraging greater efficiency within government. Consolidation of service delivery, including through the Internet and "one-stop" service programs, improved overall dialogue between government and business communities, and sustained efforts to streamline customs procedures have together transformed the nature of the regulatory environment in many OECD countries. This section draws on particular country experiences with a view to identifying best practices observed to date.

88. Several review countries, notably Canada, the United Kingdom, and the United States, have a long history of regulatory reform aimed at **serving business needs and reducing administrative burden**. Many such initiatives have been traditionally aimed at easing regulatory and "paper" burden for small and medium-sized enterprises, an endeavour which has gained new momentum with the growing trend towards **e-government and electronic service delivery**. Commitments to comprehensive online information and service delivery are now common features of official policy in such countries, benefiting domestic and foreign firms alike.

89. A brief description of the kinds of approaches being taken in leading countries serves to illustrate emerging best practices in this area. The United Kingdom, reputed to have one of the lowest regulatory burdens on business start-ups in the OECD area, has long sought to reduce administrative burden on small business as a matter of policy. Its "Think Small First" strategy, Small Business Service (an agency of DTI) and participation in broader EU simplification initiatives (notably the SLIM, BEST, and European Business Test Panel projects) have together yielded lasting improvements on an already open business environment. In the UK example, high-level policy commitments appear to have translated into tangible results on the ground.

90. The same kind of focused commitment can be expressed through ongoing improvements in program delivery, including through **skilful harnessing of the Internet**. As documented in its country report, Canada has introduced services that will streamline the business environment in three main ways: by **simplifying and accelerating certain business procedures, notably through the use of "one-stop" online facilities allowing businesses to meet a series of regulatory requirements in one, integrated process instead of securing necessary authorisations from different regulatory authorities**; by **facilitating access to business-related information** (including through a cross-country network of Canada Business Service Centres); and through the introduction of **transaction-based services for the importing community** (e.g. the Canadian Food Inspection Agency's Automated Import Reference System). Canada Customs and Revenue Agency's Business Registration Online service, which allows businesses to undertake a succession of required start-up procedures in a single online transaction, boasts client satisfaction, increased regulatory compliance, a highly significant drop in overall processing time per business, and extended service hours amongst results achieved since introduction of its program. The

program is also offered in collaboration with some provinces – an important consideration wherever subcentral authorities wield regulatory authority -- providing a seamless, one-stop service for doing business in the country.

91. Leading edge efforts such as these are not yet common practice throughout the OECD area. At the same time, improved awareness of the challenges and opportunities around administrative burden has translated into concerted reform efforts in some countries. Simplification of administrative procedures has emerged as a core objective of reforms in countries such as Italy, where Parliament now authorises government to present a draft **simplification law each year setting out administrative procedures to be reviewed and streamlined**. Other innovative approaches to achieving improved competitiveness of the Italian business environment have included the creation of one-stop shops for business (*sportelli unici)*, the use of financial incentives to accelerate the establishment of such services, the advent of a Public Administration Unified Net web service, active encouragement to municipalities to use notification, self-certification, "silence equals consent" mechanisms, (whereby a given regulatory requirement will be deemed to be met if regulatory authorities have not responded to a request by a given time) and co-ordinated efforts to process complex authorisations on a timely basis. While additional scope for improvement remains, the Italian experience shows how **a recognition that burdensome administrative regulation hurts competitiveness can drive far-reaching reforms to the system**. Such an acknowledgement seems altogether lacking or inadequately reflected in policy in some other OECD countries.

ii) Simplification and automation of customs procedures

92. Simplified, automated customs procedures offer another important avenue for minimising scope for unnecessary trade restrictiveness, and the extent of automation in border operations has emerged as a key indicator of capacity and commitment to market openness. Here again, some OECD countries are established leaders in this area, while others have yet to achieve widespread implementation of state-of-the-art technology for streamlining border procedures. Still, automation alone is not enough to ensure optimal customs administration: in order to achieve effectively "paperless" border transactions, customs requirements themselves (type of information requested, forms used to submit the information) may need to be re-thought and simplified. Customs procedures may also need to be rationalised through development of integrated approaches obviating the need for multiple submissions of information to several different authorities.

93. Certain countries have made excellent inroads towards **fully automated systems** featuring **pre-arrival review systems** (allowing importers to electronically transmit their release information to customs officials before the goods even arrive at the border), **online access to all relevant laws and administrative bulletins**, specific support to business through mechanisms such as **customs information services** (which sometimes include overarching policy statements as well as detailed information on standards of service to be expected from customs officials), and clear appeal provisions. Concepts such as self-assessment, advance information and pre-arrival documentation, and risk assessment are being increasingly deployed in support of **faster movement of low risk goods**, allowing a greater concentration of resources on goods with higher or unknown risk. To date, the collective experience points to early successes in implementing wide-ranging customs reform and appropriately training of Customs officials has been among the essential tools for achieving such success. In reviewed countries such as Mexico, for example, comprehensive simplification and automation of customs procedures has resulted in a drop in clearance times, improved efficiency in duty collection, and the reduction of discretionary powers of customs officials.

94. Existing and aspiring EU Member states have pursued simplification of border procedures in the context of harmonisation with the EU Common Customs Code. This framework of rules calls for the establishment of simplified and harmonised procedures such as Single Administrative Documents, Simplified Declaration Procedures, and Local Clearance Procedures. Certain rules, for example, **facilitate the entry of goods on the basis of minimum information only**, with fuller fiscal and statistical documentation to be supplied electronically at a later stage. Introduction of **electronic data interchange (EDI) systems** enable firms and customs to communicate electronically for all documentation and decision/permission actions.

95. Despite impressive progress by some OECD countries in streamlining customs procedures, challenges remain on the road to trade facilitation. Persistent shortcomings include **non-interoperability or geographic exclusivity of certain computer systems,** which compromise the value of EDI systems; **lack of "single window", integrated approaches to customs clearance** which would allow traders to communicate with a single clearance authority rather than targeting submissions to relevant regulatory authorities, **lack of interface with license delivery or other permit networks**, and **lack of transparency** with regard to issues such as expected time lags for cargo release and available avenues for appeal and dispute settlement. More broadly, lack of multilateral trade rules to guide development of transparent and predictable custom procedures contribute to **uneven implementation of rules** at different border crossings **and discretionary abuses by customs officials** in certain reviewed countries.

2.3.4 Avoiding unnecessary trade restrictiveness in particular areas

96. While many of the substantive issues addressed in the country reviews were, for the sake of order and clarity, routinely dealt with in the context of a particular efficient regulation principle, some issues can be (and in some cases were) discussed in relation to more than one principle. An example of this is standards related issues, which were treated in several country reviews in the discussion on Transparency and Openness of Decision-Making as well as under the principle of avoiding unnecessary trade restrictiveness.

97. Specific experiences demonstrate how countries are giving effect to this latter principle in given areas. Mexico's approach to standards-related issues is a case in point. In response to complaints by trading partners about the rigidity of labelling and marking requirements and short lead times for traders to respond to modifications in standards-related requirements, Mexico used the so-called "fast track procedure" of its Federal Metrology and Standardisation Law to provide more flexibility for traders to meet labelling and marking requirements. The fast track provision bypasses the normal public consultation process in order to rapidly modify standards that are causing unforeseen harmful consequences. Importantly, in order to offset the absence of open public consultation in such instances, the revised standards cannot impose new or stricter requirements. Reliance on this approach improved market openness in the two cases discussed in the review. Significant efforts have also been made across other review countries to avoid unnecessary trade restrictiveness in particular areas such as government procurement, customs procedures, trade facilitation and reducing administrative burdens on business. Greater transparency, often achieved through enhanced use of the Internet, better integration and co-ordination of government services and administrative requirements relating to trade, and greater reliance on automated processing of administrative transactions where appropriate seem to emerge as prominent keys to success in these areas.

2.4 Use of Harmonised Measures

98. For the purposes of this paper, the concept of internationally harmonised measures refers to two distinct scenarios: reliance on international standards as the basis of domestic regulations (where this is feasible and appropriate) and acceptance of foreign measures as equivalent to domestic measures, even where these may differ, as long as such measures meet the underlying regulatory objective. Both approaches provide important avenues for achieving progressive harmonisation of regulations on as wide a basis as possible, and are discussed separately below.

2.4.1 Commitment to use of international standards

i) Reference to international standards as the basis of domestic regulation

99. WTO rules (Article 2.4 of the TBT Agreement, Article 3 of the SPS Agreement) clearly exhort Members to rely on relevant international standards as the basis of domestic regulations wherever possible and appropriate. As set out in the TBT Annex 3 Code of Good Practice for the Preparation, Adoption and Application of Standards, standardising bodies within the territory of a WTO Member are also encouraged to use international standards, or relevant parts of them, as a basis for the standards they develop, except where doing so would be ineffective or inappropriate.

100. As illustrated by the Italian example, national standardising bodies may, in the first instance, emit standards that are direct transpositions of EU (CEN, CENELEC, and ESTI) standards, where the latter standards are often themselves closely mirrored in ISO/IEC standards. As pointed out in the Spanish review, the EU standardising bodies also sign co-operation agreements with international standards bodies with a view to avoiding duplication and achieving a high level of convergence between European and international standards.

ii) …And systematic monitoring of efforts to use international standards

101. Some EU countries have created **special agencies to oversee use of internationally harmonised standards**. A lack of systematic data collection and monitoring in this area is a recognised challenge across most OECD countries, making overall progress towards increased reliance on internationally harmonised measures difficult to assess, and the collective experience with these kinds of oversight functions remains limited to date. Some EU countries – particularly small, trade-dependent economies such as the Netherlands – have developed a **strong tradition of reliance on European and internationally harmonised standards** wherever possible, coupled with prompt withdrawal of purely national standards as appropriate. In addition, some countries have introduced **regulatory innovations designed to speed adoption of EU harmonised standards** in domestic systems. Hungary's "endorsement notice" practice, for example, allows direct reliance on English-language EU standards under certain circumstances without prior translation into Hungarian..

102. More generally, reliance on internationally harmonised measures is variable, ranging from excellent to fair, and the **dual (mandatory and voluntary) structure of standardisation activities** is a continuing feature of some regulatory systems (e.g. Mexico, Japan, and Korea). Partly in response to requests of trading partners, some countries such as Japan and Korea have engaged in **efforts to improve reliance on internationally harmonised measures**. In Korea, where frequent departures from international standards have been observed, **existing standards are now periodically reviewed** with a view to achieving complete harmonisation of Korean standards with relevant international standards over the next five years. Policy actions endorsed by Japan's Office of Market Access include express

encouragement to ministries and agencies to use internationally harmonised standards as the basis of domestic rules. All countries reviewed to date are also **active participants in the further development of international standards** where such measures do not yet exist. Ongoing commitment of resources to international standards-setting fora will be a fundamental indicator of the will to respect and implement this efficient regulation principle. Ultimately, however, each government authority must determine whether a relevant international standard exists when proposing a new regulation, and if so, whether it would be an effective and appropriate basis for the new regulation.

2.4.2 Acceptance of foreign measures as equivalent to domestic measures

103. Article 2.7 of the WTO TBT Agreement requires Members to give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations. In a similar vein, Article 4 of the WTO SPS Agreement requires Members to accept the sanitary or phytosanitary measures of other Members as equivalent, even if these differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary of phytosanitary protection. Article 4 further stipulates that "reasonable access" shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

104. Although cumulative on-the-ground experience with this approach remains limited across the OECD countries reviewed to date, some countries have in place specific procedures and mechanisms for facilitating acceptance of foreign measures where circumstances permit. Such determinations are generally made at the level of the regulatory authority concerned. In the United States, for example, although USTR has overall responsibility for monitoring US compliance with international trade obligations, determinations of equivalence with other countries' regulatory measures rest with the relevant US regulatory authority. Individual regulators generally have wide discretion in deciding this issue and are not held to any broad-based criteria on how such determinations are to be made.

105. Existing and aspiring EU Member states approach regulatory equivalence pursuant to the requirements of the EU New Approach and the Global Approach as alternatives to strict intra-EU harmonization. Although EU-level rules have to date not been subjected to a market openness review, the essence of the two Approaches (consistently discussed in each of the EU Member states reviewed to date) rests on fulfillment by manufacturers of certain "essential requirements" as the basis for meeting EU technical specifications. Thus the European experience has been marked by a categorical shift away from the earlier need to harmonize divergent rules of individual Member states towards an approach which approximates acceptance of foreign (in this case intra-EU) measures as equivalent based on the essential requirements test. Here, the concept of "essential requirements" aims to facilitate a determination of equivalence. Irrespective of operational or interpretative challenges on the ground, such an approach may serve to inform other countries as they seek ways to give effect to WTO obligations in this area – practical and predictable tools for ascertaining equivalence, however formulated, seem a helpful stepping stone to achieving an actual determination of equivalence. Confidence and ease in working relationships between international regulatory communities and broad underlying systemic compatibility also seem important indicators for assessing the chances for success in this area.

106. International government-business dialogue has also helped pave the way for further regulatory co-operation of this nature, particularly in sectors where broadly complementary regulatory systems already exist. Calls by the Transatlantic Business Dialogue (TABD) for the development of functionally equivalent standards in the automotive sector, for example, helped create momentum for a new UN-ECE

Agreement on global technical regulations for wheeled vehicles Achieving effective recognition of equivalency will require ongoing international co-operation at the implementation phase.

2.5 Streamlining conformity assessment processes

107. A variety of approaches to streamlining conformity assessment process are in use across OECD countries reviewed to date. Avoiding duplicative requirements in this area may be achieved through different means, among them **mutual recognition** and **reliance on supplier's declarations of conformity.** However, regulatory decision-making in this area is probably best guided by the particular regulatory objective and how to achieve it. Patterns are therefore difficult to discern and, even where they exist, may not necessarily inform best practice in this area. Nonetheless, an overview of selected experiences to date may serve to map out alternative approaches as possible models, while illuminating the strengths and weaknesses of each as revealed by the collective experience to date. Broad alternative policy orientations are discussed below, followed by a closer look at mutual recognition and suppliers' declarations of conformity – two approaches which have yielded some useful insights to date on streamlining conformity assessment procedures.

2.5.1 Diverse policy orientations across some review countries

108. Approaches to streamlining conformity assessment in use across OECD countries include highly specific and comprehensive rules-based systems. The European "Global Approach" discussed in each of the relevant OECD country reviews, for example, sets out detailed conformity assessment procedures to be used in establishing conformity with the "essential requirements", including criteria relating to the independence and quality of certification bodies and modalities for mutual recognition and accreditation. In an effort to build in flexibility for regulated parties, the Global Approach establishes a range of alternative procedures for recognising fulfilment of the essential requirements test. These alternative procedures (called "modules"), seen as responding to different needs and situations, include **suppliers' declarations of conformity** (self-declaration), **verification by an independent third party**, and **full product quality assurance**.

109. In practice, national public authorities in EU Member states are responsible for identifying and notifying those bodies which are competent to carry out conformity assessment or even in some cases assuming responsibility for accreditation of those bodies, but do not themselves intervene in the task of conformity assessment and certification. Suppliers may use any notified body within the EU to carry out the conformity assessment, which introduces competition to the conformity assessment market and potentially reduces the costs borne by manufacturers in certifying their products. Once found to be in conformity, a product carries the CE marking and can be freely marketed throughout the Single Market without having to undergo additional compliance testing – although on the basis of full producer liability for the product. This test-once, EU-wide access also carries implicit benefits for EU and non-EU countries alike, as products successfully tested once benefit from the "**multiplier effect**" of access throughout all EU Member states.

110. The European approach to achieving conformity assessment – essentially prescriptive and applicable on a comprehensive, across-the-board basis – illustrates how a degree of flexibility can be built into a highly specific rules-based system. At the same time, the experience of some non-European review countries shows that a closely specified approach to conformity assessment may not always be necessary. In the United States, for example, a regulator must decide as part of the regulatory decision-making process whether some sort of attestation of product conformity (e.g. test data or a certification) is necessary at all. Alternatively, and as is more frequently the case in the United States, regulators may rely on a range

of policy instruments such as spot checks of product on the market, compliance penalties (criminal, civil), supplier's declarations, or market deterrents based on producer liability.

111. More generally, most reviewed countries have sought to enhance the market confidence necessary for conformity assessment mechanisms to operate efficiently through the establishment of accreditation mechanisms. Domestic or foreign bodies wishing to perform testing, conformity assessment, quality control and certification of products marketed in a country have to seek accreditation from an accreditation institution operating in that country. Accreditation institutions which usually operate under the supervision of the public authorities inspect and acknowledge the competency and reliability of conformity assessment bodies. They are very active in establishing international networks (such as the International Accreditation Federation – IAF) that allow them to share inspection results and avoid duplicative efforts. Domestic capacity for accreditation, ease of access to the accreditation processes, and a parallel commitment to international co-operation in this area are thus key elements to success of this approach.

2.5.2. Mutual recognition

112. Mutual recognition of the results of conformity assessment procedures has been a high-growth area and the subject of heavy commitments of negotiating resources in many OECD countries reviewed to date. Several trade agreements contain exhortatory language on the pursuit of mutual recognition, and a large web of mutual recognition agreements remain under negotiation or in the implementation phases. Experience with mutual recognition to date has shown that this approach can work well in particular sectors where a broad complementarity in regulatory approaches already exists, but may in fact be unattainable where this basic ingredient is absent. In addition, negotiating MRAs has proven only part of the challenge; implementation, which typically involves lengthy confidence-building and information exchange phases, can be a long-term undertaking in itself. As a result, MRAs are now often seen pragmatically as but one of a range of tools available to policymakers to avoid duplicative conformity assessment procedures that are apt to be more successful in some circumstances than in others.

113. The Europe Agreements have provided one framework for actively pursuing mutual recognition. Protocols on conformity assessment between the EU and some acceding countries are in place. A protocol on conformity assessment between the Czech Republic and the European Union, for example, sets out general principles and procedures for the mutual recognition of results of conformity assessment procedures and mutual acceptance of industrial products. The Agreement will allow EU exporters to test and certify their industrial products to EU harmonised requirements and gain access to the Czech market without further conformity assessment, reducing costs and delays. A similar initiative with Hungary was launched on mutual recognition of product certification testing data and marks of conformity. Existing EU Member states already adhere to the principle of intra-EU mutual recognition (as established by the landmark *Cassis de Dijon* ruling) and also participate in the negotiation of EU-level MRAs with third countries. Member states are also subject to monitoring requirements to track their implementation of intra-EU mutual recognition commitments.

2.5.3 Supplier's declarations of conformity

114. The use of suppliers' declarations of conformity (SDOCs) seems to be emerging as a particularly promising approach for ensuring greater flexibility in meeting conformity assessment requirements. Rather than having conformity assessment procedures set in government regulation, the SDOC approach leaves firms free to choose how they will demonstrate conformity with technical requirements. For example, a manufacturer may rely on in-house facilities to "self-declare" conformity with technical requirements (with

a, presumption of liability for any defective product) or rely on third parties to certify compliance. As the firm-level expression of a wider self-regulatory scheme, the SDOC approach therefore relies heavily on a mix of professional integrity, mutual trust between regulator, regulatee, and end-user of the product, and a willingness on the part of the manufacturer to stand by the product and accept full risk for any later evidence of non-conformity.

115. While providing greater flexibility for firms in deciding how to demonstrate conformity, SDOCs do not release manufacturers from the obligation to do so or lower the integrity of the process. However a firm decides to demonstrate conformity with regulatory requirements, some form of testing is still required. SDOC approaches in use today thus include self-declarations by a supplier or manufacturer following a test for regulatory compliance prepared in-house or by a private, unaccredited lab (with a presumption of liability for any product later found to be defective) to a more rigorous approach requiring testing to be carried out by an accredited or government-recognised lab.

116. Declarations of conformity also seem to be gaining currency in particular sectors, but are typically limited to a narrow product area. As noted in its review, for example, the United States recognises a declaration of conformity by manufacturers (or importers) of motor vehicles and motor vehicle equipment certifying that their products comply with all applicable Federal Motor Vehicle Safety Standards, backed by appropriate enforcement provisions.

2.6 Application of Competition Principles

117. The extent to which competition principles are embedded in domestic regulatory practices and procedures – the sixth and final principle of efficient regulation – is another key determinant of market openness. The sixteen country reviews have revealed two main perspectives from which a country's commitment to vigorous application of competition principles from an international perspective can be assessed; **overall commitment to the principles** in law and policy, in particular through the existence of **open, effective complaint procedures**; and, as an outcome of the former; **effective access to domestic economic activities.**

2.6.1 Open, accessible complaint procedures for challenging regulatory or private actions which may impair market openness

118. **Effective procedures for pursuing complaints** about regulatory actions that condone anti-competitive conduct or fail to correct anti-competitive private actions are fundamental determinants of market openness. Most of the sixteen OECD countries reviewed to date have clearly established channels for handling complaints of this nature on a non-discriminatory basis. Broadly similar approaches prevail. In certain countries (e.g. Korea), firms may first **take complaints directly to the regulatory authority concerned or to the competition authority, the decisions of which may be appealed in administrative courts.** In other countries, disaffected firms have no formal recourse at the level of a specific regulatory authority (though informal avenues for doing so may be available) and must take complaints about regulatory or private action to the national competition authority. Heads of national authorities may have exclusive statutory authority for administering a country's competition legislation, serving as the chief antitrust enforcement official with respect to both civil and criminal investigations. In some review countries, including the United States, private rights of action also allow firms to bring antitrust complaints directly to the courts, and law enforcement agencies enjoy broad prosecutorial discretion.

119. While they may explore the merits of a given complaint, national competition authorities are usually not legally bound to launch full investigations unless their preliminary findings support this (though decisions not to conduct full investigations may themselves be subject to appeal). Affirmative

findings on civil reviewable matters are typically referred to an independent, quasi-judicial competition tribunal for decision. Most decision-making bodies can issue orders to cease and desist, eliminate the effects of infringing conduct, and impose fines. Moreover, since such decisions are administrative, they may also be appealed to appropriate administrative courts. Finally, firms may also use private rights of action to obtain redress for alleged anti-competitive conduct in the courts. Key features in terms of best practices in this area include the **ability to appeal a preliminary substantive finding by regulatory and antitrust agencies alike; the existence of independent tribunals for review of competition decisions; the availability of alternative avenues for redress, such as the right to file an independent private action in the courts or administrative tribunals; and the availability of enforceable remedies**.

120. Certain other design features of national competition regimes also point to what may be considered emerging best practice in this area: **National treatment obligations are sometimes expressly built into national competition legislation**, although discriminatory treatment as between domestic and foreign firms does not seem to be problematic in practice. **Independence of decision-making authorities** from regulatory authorities offers considerable guarantees for application of competition principles from an international perspective. **Timely treatment of complaints**, in accordance with appropriate statutory or internal deadlines, helps to ensure confidence in the system. **Proceedings of competition tribunals should also be widely available** to interested stakeholders, including through the use of regular bulletins, online publication, and annual reports. Finally, **wide-ranging scope and coverage of competition laws in the first instance**, including strong investigatory powers and narrowly defined exemptions (e.g. the "regulated conduct" defense) and **strong competition policy oversight and enforcement mechanisms** set a seamless base for thorough scrutiny of regulatory and private conduct, including "gray area" practices wherever these exist. Shortcomings remain in some OECD countries, however, with respect to some or all of the above practices, with particular efforts needed in certain sectors.

2.6.2 Ease of Access to Domestic Economic Activities

121. **Effective access to domestic economic activities** is a key factor in giving effect to the competition principle. Here, long-established but little-contested private practices may present particular difficulties to foreign firms seeking to sell into new markets. The Danish report, for example, found that many sectors in that country have been sheltered by traditional private co-operative arrangements and cartels, creating a high level of horizontal concentration which may threaten effective competition by foreign parties in key areas such as retail distribution. Difficulties encountered by foreign trading partners in accessing distribution channels for other important sectors such as autos and auto parts have also been documented (e.g. in Japan). And in the Netherlands, strong corporatist traditions and lack of enforcement have earned that country a reputation as a "cartel paradise", with suggestions that this may be seriously undermining efforts by new foreign entrants to access the Dutch market.

122. **Industrial or trade associations** can also be key players from the perspective of competition and market openness. This is especially true where **government may delegate certain regulatory powers to an industrial association**. The risk that such associations may use their regulatory powers to distort competition and limit import competition in particular argues for greater scrutiny of association activities and submission to a higher standard of openness. The Korean case offers the example of *chaebols* ("enterprise groups") which have been the target of many competition-related complaints from foreign partners. Reforms aimed at improving corporate governance of chaebols have been introduced, but their ultimate impact on disciplining chaebol behaviour remains to be seen.

3. THE WAY AHEAD

3.1 Encouraging Wider Adoption of Emerging Best Practices: Some Closing Observations

123. The collective experience of the sixteen OECD countries reviewed to date points to emerging best practices across all six efficient regulation principles, with leading approaches in some countries serving as useful general models for others. The main lessons of the reviews point to a range of key factors for ensuring trade-friendly regulation, including **length of experience with regulatory reform**, strength of underlying **political commitment**, **awareness and requisite expertise** of regulatory authorities, **effective trade advocacy** in shaping regulatory outcomes, and commitment to **rigorous oversight and implementation**.

124. While the reviews have clearly reaffirmed the importance of all six efficient regulation principles as determinants of market openness, some of the principles may be more easily implemented in practice than others. Giving greater expression to certain principles such as openness of decision-making through public consultation may also be easier when driven by primarily domestic interests, even though outcomes benefit foreign parties as well. **All principles are therefore not equal** in terms of perceived ease of implementation and expected benefits to domestic stakeholders. For example, challenges associated with ensuring greater reliance on recognition of equivalence or internationally harmonised measures may be perceived as a tougher "sell" than the introduction of "benign" best practices such as prior notice and comment. As a result, certain principles may by their very nature attract politically charged debate around issues such as regulatory sovereignty, while others remain relatively removed from such arenas.

125. Many of the reviews suggest considerable **scope for the pursuit of expressly pro-competitive regulation**. In several countries reviewed to date, regulatory philosophies seem aimed at ensuring respect for international trade obligations, but stop short of going further to ensure an "obligation-plus" regulatory climate wherever possible. This seems to be the case even where domestic firms are pressing for change, whether in the form of less or more efficient regulation.

126. The **quality and consistency of consultation and collaboration between trade policy officials and domestic regulatory authorities** appears to be problematic in several reviewed countries. While existing intra-governmental mechanisms are being used to vet concerns about the trade and investment-friendliness of some regulations to some extent, there is little evidence that this is happening in a systematic way. High-profile regulatory initiatives may also tend to dominate such exchanges, resulting in a de facto absence of scrutiny for lesser-known but potentially restrictive regulatory measures. This shortcoming, together with uneasy relationships between trade and regulatory authorities and the failure of regulatory impact analysis (where it exists) to adequately assess the trade dimension of proposed regulations, combine to highlight a widespread weakness in national regulatory regimes.

127. **Implementation of stated regulatory policy objectives remains a key challenge** in some review countries – even those boasting years of experience and sophisticated improvements to regulatory systems. Poor implementation of otherwise irreproachable regulatory policies appears to result from a combination of inadequate training of regulatory officials and quality control at source to weaknesses in challenge and oversight functions higher in the system. As documented in some country reviews, regulatory proposals often move virtually unchallenged through the system, with attendant adverse consequences on market openness. Market openness cannot be ensured by default.

128. Regulation – particularly social regulation – is likely to be a growth industry in many OECD countries in coming years. Many OECD governments are under enormous **pressure to regulate** in areas such as health, safety, and the environment, and to do so in a manner which will keep pace with ever-

changing needs and technological advances on the ground. Even as governments monitor the stock and flow of domestic regulations in such a dynamic environment, there will be a **heightened need to reassess regulatory inventories for continued relevance and efficiency**. Now more than ever, attention to the market openness dimension in domestic regulation will be a decisive element in establishing global capacity for implementing existing international trade obligations and undertaking a new Round.

3.2 Refining the Analytical Toolbox and Verifying Information

129. To date, experience with the review process as a paradigm for assessing a country's commitment to market openness has **reaffirmed the validity of the six efficient regulation principles** as originally formulated. As noted above however, the principles are **best assessed on their own merits** without seeking to attach equal weight to each in arriving at conclusions about individual country performance. Moreover, it has become clear that it is **not always possible or even useful to analyse application of the various principles in isolation**, as some of them are in fact inter-related. For example, regulatory impact analysis may be appropriately discussed in the context of transparency, although the country reviews have tended to treat this in terms of unnecessary trade restrictiveness. Similarly, regulatory practices in key areas such as government procurement may be usefully highlighted in discussions on a range of principles, including transparency, non-discrimination, and avoidance of unnecessary trade restrictiveness. Finally, analysis has revealed that **there remains scope for refining the principles** to better capture the essence of good regulatory practice in targeted areas. As seen earlier in this paper, a slightly reformulated approach was taken in the discussion of internationally harmonised measures (broadened to include recognition of equivalent foreign measures, wherever and however this occurs) and recognition of equivalence of other countries' measures (recast as a discussion on streamlining conformity assessment procedures).

3.3 Closing the Gap Between Current Practices and New Possibilities in Regulatory Reform

130. Detailed exploration of each of the efficient regulation principles across the sixteen reviewed countries has revealed strengths and weaknesses in each area as well as overlap and linkages across regulatory regimes, practices, and procedures.

131. OECD Member countries now have at their disposal a growing body of knowledge on trade-relevant best practices for enhancing market openness through regulatory reform. **A central issue now is how to build on these insights and provide impetus for the next phase of regulatory reform**. The goal of this next phase should be "smart" regulation informed by past lessons and proven strategies designed to ensure mutual coherence and complementarity between regulatory and trade policy regimes.

132. Achieving a new age in regulatory reform and market openness will require **changes in regulatory culture, intra and inter-governmental co-operation** as well as increased reliance on the kinds of specific tools and approaches examined over the course of the country reviews. How best, however, to move from recognition to action in addressing revealed challenges and opportunities?

133. The next phase of regulatory reform may require attention to **broader institutional and systemic issues** relating to effective regulatory management. Possible issues that could be generally explored in this context might include:

i) Building links between domestic regulation and open markets

a) *Domestic Regulation as Pro-Competitive Tool*: Avenues for going beyond implementation of international trade obligations to create an expressly pro-competitive regulatory regime.

b) *Improved Training for Regulators*: Approaches to achieve greater awareness that legitimate policy objectives may be achieved without compromising market openness and improve quality of proposed regulations through greater attention to the market openness dimension. Is there a need to introduce greater accountability or incentives for regulators? Would they benefit from more targeted guidance on how to achieve trade and investment-friendly regulation? A case-study inventory demonstrating how this has been achieved in practice?

c) *Better Regulation of the Regulators*: Approaches to improve scrutiny and quality control of proposed regulations and accompanying impact assessments from a market openness perspective as they advance through the system, potentially through enhanced challenge and oversight functions. Approaches for stemming abuses of regulatory discretion by regulators.

ii) Leveraging resources to achieve greater coherence between trade and regulatory policies

a) *Improved Monitoring of Existing Regulation:* Approaches for monitoring the stock and flow of existing regulation for continued relevance and efficiency, including attention to performance-based regulation and pursuit of regulatory alternatives where possible.

b) *Improved Co-operation between Regulatory and Trade Officials:* Approaches for breaking down remaining institutional barriers to more effective trade advocacy and strengthening collaboration between regulatory and trade policy authorities.

c) *Improved Capacity for Ensuring Trade and Investment-Friendly Regulatory Outcomes*: Approaches to strengthening capacity for trade-friendly regimes in areas such as trade facilitation, government procurement, and monitoring use of international standards.

iii) Maintaining support for further trade-friendly regulatory reform

a) *Building Public Awareness:* Is there a need to strengthen regulatory reform efforts with greater outreach activities designed to educate the public and regulatees alike of the benefits of market openness? Does more need to be done to achieve greater understanding that trade-friendly regulation need not compromise (and may even enhance) the fulfilment of legitimate policy objectives?

b) *Reinvigorating Political Will:* What are the risks that institutional "fatigue" and fears in some circles about the effects of liberalisation will erode commitment to pursue the work of trade-friendly regulatory reform? What can be done to revitalise high-level political commitment to further enhancing market openness through regulatory reform?

ANNEX I

ILLUSTRATIVE BEST REGULATORY PRACTICES FOR FOSTERING MARKET OPENNESS PRINCIPLES, AS OBSERVED IN REVIEWED COUNTRIES

(By Principle)

Transparency and Openness of Decision-Making

1. Systematic public availability of information, including through:

   a) regular publication of information about existing and forthcoming rules;
   b) enquiry points;
   c) efficient use of the Internet (e.g. online compendiums and e-gateways)

2. Clear, simple procedures for making and implementing rules

   a) clearly-defined rule-making procedures;
   b) clearly written rules backed by consistent implementation
   c) overarching policy commitment

3. Systematic reliance on public consultation, including through:

   a) codified procedures
   b) written guidance to regulators
   c) well-developed notice and comment procedures
   d) well-timed opportunities for comment and accountability on how comments handled
   e) use of the Internet to solicit public comment

4. Clear, open, effective appeals procedures

5. Efforts to ensure transparency in particular areas, such as:

   a) gray regulation
   b) self-regulation
   c) standards development
   d) government procurement

Non-Discrimination

1. Narrow exceptions in practice (overt discrimination such as nationality-based restrictions)

2. Contestable markets for government procurement

3. Explicit lead responsibility for ensuring implementation of non-discrimination and other WTO obligations

4. Extent of awareness and efforts to avoid discriminatory effects in regulation (de facto discrimination)

5. Demonstrated commitment to open regionalism, including through:

   a) multilateralized regional preferences;
   b) transparent management and administration of regional agreements vis-à-vis third parties

6. Liberal policies towards foreign ownership and investment, as evidenced by:

   a) ease of entry and establishment;
   b) absence of regulatory barriers to effective competition between domestic and foreign firms

Avoidance of Unnecessary Trade Restrictiveness

1. Demonstrated efforts to encourage awareness of market openness considerations when making regulations, including through:

   a) mandatory regulatory impact analysis with due attention to anticipated effects on trade and investment;
   b) RIA requirement for both primary and secondary legislation;
   c) comparable assessments by independent regulators
   d) rigorous, systematic quality control of RIAs;
   e) effective, sustained trade advocacy efforts

2. Demonstrated efforts to favour trade-friendly regulatory approaches, including through:

   a) use of performance rather than design criteria;
   b) capacity for embracing regulatory alternatives

3. Simplification of administrative requirements, including through:

   a) reduced paper burden on business;
   b) simplified, automated customs procedures (e.g. integrated online service delivery and "Single Window" approaches to customs clearance)

Use of Internationally Harmonised Measures

1. Reference to international standards as the basis of national standards and domestic regulations

2. Systematic monitoring of efforts to use international standards

3. Acceptance of foreign measures as functionally equivalent, including:

   a) clearly-defined criteria for ascertaining equivalence, and;
   b) clearly-defined avenues for demonstrating equivalence

Streamlining Conformity Assessment Processes

1. Demonstrated flexibility towards use of alternative approaches for avoiding duplicative conformity assessment procedures, such as:

   a) mutual recognition;
   b) unilateral recognition;
   c) SDOCs

2. Establishing market confidence through accreditation mechanisms

   a) domestic capacity for accreditation;
   b) ease of access to the accreditation processes;
   c) active participation in international co-operation in accreditation.

3. Efficient functioning of conformity assessment bodies, possibly on a competitive basis

Application of Competition Principles

1. Open, accessible complaint procedures for challenging regulatory or private actions which may impair market openness:

   a) clear, non-discriminatory avenues for complaints;
   b) transparent and reasonably timely proceedings;
   c) ability to appeal preliminary findings of the competition authority or the right to bring private antitrust actions before the courts;
   d) independent tribunals for review of competition decisions;
   e) availability of enforceable remedies.