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OECD Global Forum on Competition

THE OBJECTIVES OF COMPETITION LAW AND POLICY

-- Note by the Secretariat --

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THE OBJECTIVES OF COMPETITION LAW AND POLICY

Note by the Secretariat

I. Introduction

1. The subject of the objectives of competition law and policy was included in the agenda for the third meeting of the Global Forum on Competition on 10-11 February, 2003 to complement the discussion of the optimal design of competition institutions within the overall apparatus of government. Accordingly, this note is oriented towards discussing competition law and policy objectives as they relate, or may relate, to design of competition enforcement institutions within the broader government. As such, it will not fully explore the pros and cons of specific objectives that may be included in the competition law and policy objectives of one or more jurisdictions, although this topic is discussed to a degree.

2. In preparation for this meeting of the Forum, participants were asked to respond to questionnaires concerning the objectives of competition policy and the optimal design of a competition agency. In addition, they were invited to submit written contributions on these two topics, to stimulate discussion and debate at the meeting. This note analyses the responses to the questionnaire on objectives as well as the written contributions on that subject that were received prior to January 28, 2003.¹ In addition, it suggests a number of issues that participants in the meeting may wish to discuss. Where feasible, those issues are directed towards exploring whether there are any best practices that can be identified in respect of various matters discussed in the note.

3. By way of background, the topic of the objectives of competition policy was the subject of a roundtable discussion of the Competition Committee at its meeting in May 1992. The Secretariat note that was prepared to provide a framework for that discussion (DAFFE/CLP (92)2/REV1), and that was revised to reflect the discussion and the various written contributions that were made at that time, focused primarily upon identifying the primary and secondary objectives of competition law and policy in OECD economies, discussing the extent to which they can conflict, reviewing the basic instruments of competition policy and addressing the interface between competition policy and other policy objectives. The link between these objectives and the institutional design of enforcement agencies was not addressed. The information provided in the recent questionnaire responses and written contributions suggest that the following basic conclusions of that previous note remain as true today as they were in 1992:

51. This *overview* of the objectives of competition policy across different countries indicates that in most jurisdictions, the basic objectives are to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants. Competition policy has been generally viewed to achieve or preserve a number of other objectives as well: pluralism, de-centralisation of economic decision-making, preventing abuses of economic power, promoting small business, fairness and equity and other socio-political values. It has been noted that these “supplementary” objectives tend to vary across jurisdictions and over time. The latter reflects the changing nature and adaptability of competition policy so as to address current concerns of society while remaining steadfast to the basic objectives.

52. The inclusion of multiple objectives, however, increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and

¹ The note also draws, in a relatively minor way, upon the material in the recent Secretariat note prepared for the Roundtable on the Substantive Test in Merger Review, DAF/COMP/WD(2002)96 (2 Dec. 2002).

compromise and, adversely affect one of the major benefits of the competitive process namely, economic efficiency. In most cases, the conflict between the economic efficiency and other policy objectives may not be significant or can be reasonably balanced. Nevertheless, the rank ordering and weights attached to the multiple objectives of competition policy remain largely ambiguous and need to be delineated. This is required for ensuring both business certainty and public accountability.

53. There is also the issue of the relationship between competition and the other government framework policies. The latter set of policies, more often than not, can inject market distortions which impede the competitive process. It is the view of this paper that competition authorities need to be more pro-actively involved in government policy formulation in order to ensure markets remain open, free, flexible and adaptable ...

II. Principal Themes Emerging from Questionnaire

4. **Among OECD countries, there appears to be a shift away from use of competition laws to promote what might be characterised as broad public interest objectives**, and use of public-interest based authorisation procedures, exemptions or political over-rides (collectively, “public interest objectives”)² in competition laws, that contemplate a consideration of factors which extend well beyond what appear to be the generally accepted “core” competition policy objectives of promoting and protecting the competitive process, and attaining greater economic efficiency (the “core competition objectives”).³ This shift is reflected either in an elimination of, or less frequent or more restricted use of, legal tests or political over-rides in domestic competition laws that would permit (i) an anti-competitive merger or restrictive trade practice to proceed on the basis of broader public interest considerations; or (ii) a pro-competitive merger or trade practice to be blocked or remedied on the basis of such considerations.⁴ Also, it appears that virtually no jurisdiction that has a competition law or policy which does not include public interest objectives has changed that law or policy to incorporate such objectives.⁵ It may be noted that when asked whether any additional objectives ought to be included in the competition policy objectives of their jurisdiction, none of the jurisdictions that do not promote public interest objectives through their competition laws stated that such objectives ought to be embraced.

5. **It was not possible to identify a similar shift away from objectives that fall in the “grey zone” between public interest objectives and core competition objectives.** These include ensuring fair

² These might include, for example, the promotion of employment, regional development, national champions (sometimes couched in terms such as promoting an export-led economy or external competitiveness), national ownership, economic stability, anti-inflation policies, social progress or welfare, poverty alleviation, the spread of ownership stakes of historically disadvantaged persons, security interests and the “national” interest. In addition, a number of domestic competition laws in Europe include the *Treaty of Rome* objective of market integration within the European Union.

³ These core competition objectives are essentially the same as those identified in a similar survey by the WTO Working Group on the Interaction between Trade and Competition Policy. See WTO, *The Fundamental Principles of Competition Policy*, WT/WGTCP/W/127 (7 June 1999), at 5.

⁴ Examples of OECD jurisdictions that have moved away from public interest oriented tests or political over-rides include Canada, the Czech Republic, Ireland, Sweden and the U.K.. Regarding other countries, see *infra*, note 8, in relation to the proposed new competition law in Kenya which would create an autonomous competition authority and abolish the Ministerial over-ride. Note also that in connection with the recent OECD Roundtable on the Substantive Test in Merger Review [DAFFE/COMP/WD(2002)96, at § 4] it was found that while “[m]any countries have non-competition elements in their merger law ... public enforcement bodies apply de facto a standard that is closer to a competition standard”.

⁵ Sri Lanka may be one exception.

competition or an equitable opportunity for small and medium-sized enterprises to compete and preventing against an undue concentration of economic power. These types of “grey zone” objectives continue to be embraced by many countries.

6. **The gradual shift away from use of competition laws in OECD countries to promote public interest objectives suggests that a consensus may be emerging that it is sub-optimal, at least once a country has reached a certain level of development, to use competition law and policy to promote such goals.**⁶ Indeed, this specific point was made by several respondents, perhaps most eloquently in the written contribution by Ireland, which stated:

Policy makers may seek to use competition policy to further other (broader) policy objectives, such as industrial policy, regional development or the “public interest”, as for example in a public interest test for mergers. There are two reasons why it is best not to use competition policy as a wider policy instrument. Firstly, broadly specified policy objectives can be ambiguous and as such are subject to “capture” or “hijack” by the politically strongest private interests, usually those of producers or workers. Thus *de jure* public interest objectives may *de facto* serve private interests. Secondly, non-competition policy mechanisms are generally superior for achieving non-competition policy objectives. To elaborate, restricting competition in an attempt to achieve a broader policy objective will have inevitable anti-competition side effects, e.g. granting protected monopoly profit to a firm or firms. There is no reason to suppose that the State will have the capacity, even if it has the will, to control the extent and distribution of such side effects. In summary, restrictions on competition may be both ineffective and socially wasteful.⁷

7. **Public interest objectives continue to be embraced on a fairly widespread basis by developing and transitioning countries, particularly in the area of merger control.**⁸ Possible explanations include greater influence of vested business interests in such countries and a more pressing need to promote one or more public interest objectives given the stage of economic development in such countries.

⁶ Note that a 1995 UNCTAD study entitled “The basic objectives and main provisions of competition laws and policies”(UNCTAD/ITD/15, at 6) concluded: “There has in fact been an increasing convergence in the provisions or the application of competition laws over the last two decades. Competition systems in many countries are now placing relatively greater emphasis upon the protection of competition, as well as upon efficiency and competitiveness criteria, rather than upon other public interest goals.

⁷ CCNM/GF/COMP/WD(2003)17, at §1.2. A similar point was made in the questionnaire responses provided by Mexico, Morocco and Spain. Indeed, this point also was made by a respondent from a developing country that has public interest objectives in its competition law and policy objectives. Specifically, the South African Competition Tribunal, observed that “competition law is not the optimal vehicle, nor is it the only instrument, for advancing each of the public interest objectives”, and that other laws and policies “constitute sharper instruments for the advancement of [such] objectives”.

⁸ Virtually all non-Member countries outside Central Europe that responded to the questionnaire stated that public interest objectives are included in the law or promoted in at least some cases. These countries include Brazil Cameroon, Gabon, Jamaica, Kenya, Macedonia (no objectives actually defined in law, but Minister authorised to take broad public interest into account in appeals from decisions of the Monopoly Authority), Morocco, Pakistan, Romania, Russia, Sri Lanka, Chinese Taipei, Tunisia, Ukraine and Zambia. (However, a new law that has been proposed in Kenya would abolish the role of the Minister in substantive decisions and create an autonomous competition authority.) In addition, Ivory Coast noted in its written contribution that final decisions under its competition law are made by the Minister of Commerce; and China stated in its written contribution that an objective of its current *Countering Unfair Competition Law* contains public interest objectives, and that the same is true of its proposed draft Antitrust Law.

8. **Very few⁹ jurisdictions have had more than one or two cases per year on average in which public interest objectives have been invoked to permit an anti-competitive merger or restrictive trade practice to proceed; or to block or remedy a pro-competitive merger or restrictive trade practice.** This is consistent with the broader trend away from the use of competition law and policy to promote public interest objectives. Similarly, the vast majority of respondents to the questionnaire reported that considerations relating to industrial or social policy or other objectives not officially recognised as part of the competition law and policy objectives are not considered even in close cases.

9. **Jurisdictions that do not use their competition laws to promote public interest objectives appear to focus on promoting consumer welfare.** While several respondents reported that their domestic competition laws also are concerned with promoting total welfare,¹⁰ it seems that it is extremely rare, if not unheard of, in those jurisdictions to allow an anti-competitive merger or restrictive trade-practice to proceed on the basis that it is likely to increase total welfare, unless gains in efficiency are likely to be shared with consumers. In this regard, one respondent highlighted the evidentiary difficulties associated with proving the likelihood of future efficiency gains as one reason why so few cases are permitted to proceed solely on the basis of arguments related to claimed efficiency gains.

10. **Only slightly more than one-half of the respondents to the questionnaire reported that the competition law and policy objectives in their jurisdiction had influenced the institutional design of the domestic competition agency (the "competition authority")¹¹.** However, even in those jurisdictions, there does not appear to be a strong correlation between competition law and policy objectives (broadly defined) and institutional design. For example, among those jurisdictions that promote or retain the possibility of using their competition laws to promote public interest objectives,¹² some have made a conscious decision to structure their competition authority as legally independent from and outside the executive branch government,¹³ others have attempted to create a legally independent or quasi-independent agency within the executive branch of government (such as within a ministry or accountable directly to the president),¹⁴ and one country has structured its competition authority as a

⁹ One of the questions in the questionnaire asked: "If the competition policy objectives include any non-competition objectives, in how many cases per year do such objectives lead to a decision that is different from the decision that would have been taken if the competition policy objectives were limited to promoting competition objectives?" No respondent, apart from Zambia, affirmatively reported more than one case per year in this regard, although the responses to this question sometimes were not clear.

¹⁰ Brazil, Denmark, Hungary, Mexico, New Zealand, Norway, Romania, South Africa, Venezuela and, possibly, Zambia. It may be noted that there has been an active debate in Canada regarding whether the objectives of that country's *Competition Act* include the maximisation of total surplus, at least in relation to the merger provisions in the legislation.

¹¹ The term "competition authority", as used in the questionnaire and in this note, means any non-judicial authority or body independent of or incorporated in governmental bodies, which is the primary responsible body of the country for the enforcement of competition law and other activities in the competition policy area, regardless of its name. Bodies with more limited tasks in the competition policy area, or at a lower administrative level, are not understood as 'the competition authority' although their activities are touched upon in some parts of the description.

¹² In many of these jurisdictions, the adjudicative function is performed by an independent body.

¹³ For example, New Zealand, Romania and South Africa. Australia and Switzerland also appear to have established independent agencies to facilitate the pursuit of the competition law and policy objectives in their jurisdiction, although they did not explicitly state so in their responses.

¹⁴ For example, Germany, Jamaica and the Netherlands. The Norwegian Competition Authority was structured as a "subordinated body to the Ministry of Labour and Government Administration". Similarly, Taiwan's CTFTC apparently is a ministerial level government agency, and the Antimonopoly Committee of Ukraine reports directly subordinate to the President of the country and is accountable to the Supreme

ministry, headed by a minister.¹⁵ Likewise, among those countries that do not promote or retain the possibility of promoting public interest objectives through their competition laws, but reported that the competition law and policy objectives had influenced the design of the competition authority, some structured their competition authority as legally independent from and outside the executive branch government,¹⁶ while others created a legally independent administrative agency that is incorporated into a government ministry.¹⁷ It may be noted that other jurisdictions that do not promote, or retain the possibility of promoting public interest objectives through their competition laws also have attempted to create a legally independent competition authority within the executive branch (e.g., within a ministry),¹⁸ and in one noteworthy case (the Antitrust Division of the U.S. Department of Justice) the head of the competition authority is a Deputy Attorney General, although as a practical matter enjoys a high degree of independence.

11. Among those jurisdictions that continue to promote or at least retain the possibility of promoting public interest objectives, it appears that developed countries tend to confine the consideration of such objectives to a minister or other political decision making body;¹⁹ whereas developing and transitioning countries tend to take the opposite approach, i.e., the competition authority or adjudicative body usually is able to consider public interest objectives in reaching its decisions.²⁰

12. Of those respondents reporting that the competition law and policy objectives influenced the design of the domestic competition agency, more than one-half (and almost one-third of all those who responded to the questionnaire) identified independence of the competition authority as being something that had been sought in order to facilitate the attainment of the competition law and policy objectives. However, the competition law and policy objectives and the institutional design of competition institutions in these countries spans a broad spectrum, including:

- A competition authority subordinated to the government, situated within the executive branch (e.g., within a ministry), with a legally autonomous adjudicative body adjudicating non-

Rada (Parliament). See also the discussion of Kenya's proposed competition law, supra, note 8. It is not clear whether that law will contain public interest objectives. Note that Gabon, Macedonia, Pakistan and Sri Lanka all have competition authorities that are structured within a ministry or as part of the broader government, although none of these countries reported that the competition objectives had influenced the design of the competition authority.

¹⁵ Russia.

¹⁶ Italy and Lithuania.

¹⁷ Mexico (only for budgetary reasons) and Spain.

¹⁸ For example, Canada, although its response to the questionnaire does not suggest that the decision to structure the Competition Bureau was related to the competition law and policy objectives in that country.

¹⁹ In Germany, Ireland (media mergers only), the Netherlands, Norway and Switzerland the public interest determination is made by the relevant minister or government council. By contrast, Australia and New Zealand allow their competition authority to consider public interest objectives, albeit only in the context of whether to issue an "authorisation" of an anti-competitive merger or trade practice.

²⁰ In approximately ten countries (Brazil, Cameroon, China, Gabon, Macedonia, Pakistan, Russia, South Africa, Sri Lanka and Chinese Taipei) the competition authority is able to public interest objectives into account; whereas only approximately five countries (Ivory Coast, Jamaica, Kenya, Romania, and Ukraine) appear to reserve the consideration of public interest objectives to a Minister or other government body. It is not clear how the public interest determination is made in Morocco.

public interest objectives and a minister or other government body able to make the ultimate decision, taking into account public interest objectives;²¹

- A quasi-judicial competition authority subordinated to the government, situated within the executive branch and able to consider public interest objectives, with a minister able to make the ultimate decision taking into account public interest objectives;²²
- A legally independent competition authority with quasi-judicial functions, structured outside the executive branch of government and able to consider public interest objectives, but a ministerial body able to make the ultimate decision on case;²³
- A legally independent competition authority with quasi-judicial functions structured outside the executive branch of government and unable to consider public interest objectives, but a ministerial body able to consider such objectives in making ultimate decision on case;²⁴
- A legally independent competition authority with quasi-judicial functions structured within the executive branch, but public interest objectives considered only by a minister;²⁵
- A legally independent competition agency and separate adjudicative body structured outside the executive branch, with the adjudicative agency having sole jurisdiction to consider public interest objectives, subject to appeal to a higher independent adjudicative body;²⁶ and
- A structure similar to that described in previous paragraph, except that the competition law does not contain public interest objectives.²⁷

13. **It is noteworthy that several transitioning countries include among the objectives of their competition law the goal of ensuring that government actions are consistent with the promotion of competition.**²⁸ To this end, some of them are able to challenge proposed measures that may have an anti-competitive effect, while others can avail themselves of a formal mechanism for providing advice regarding proposed policies that may adversely impact upon competition. In other jurisdictions where the competition law does not contain such provisions, government restrictions of competition are addressed by advocacy efforts engaged in by the competition authority.

14. This variation in approaches, particularly when considered in the context of the additional variations that exist in countries that did not respond to the questionnaire, at least in part reflects a divergence of views regarding the optimal approach to key issues such as how to approach independence and what functions that ought to be allocated to an agency, given the competition law and policy objectives sought to be pursued. For example, in jurisdictions that use, or at least retain the possibility of using, competition laws to pursue public interest objectives, some jurisdictions such as Switzerland and Germany

²¹ Romania.

²² Cameroon and Zambia.

²³ Chinese Taipei.

²⁴ Switzerland.

²⁵ Germany, Ukraine

²⁶ New Zealand, South Africa.

²⁷ Bulgaria, Hungary, Italy and Lithuania.

²⁸ Bulgaria, Lithuania, Romania, Ukraine and Russia.

believe that the competition law and policy objectives as a whole are best preserved by combining investigative and adjudicative functions into a single quasi-judicial agency, while reserving the consideration of public interest objectives to a ministerial level decision-maker. By contrast, South Africa believes that it is better to create separate investigative and adjudicative agencies, while allowing each of them to balance public interest objectives against other competition law and policy objectives. Countries such as New Zealand decided that the optimal approach to pursuing the objectives set forth in the domestic competition law would be to take a hybrid approach, by combining the investigative and adjudicative function into a single agency, and allowing that agency to balance public interest objectives against other objectives when deciding whether to grant authorisations for anti-competitive mergers or restrictive trade practices that otherwise would be subject to challenge. As with South Africa, New Zealand also has created a mechanism for the government to transmit policy views (as opposed to instructions) its policy views to the enforcement agency, so that they may be taken into account in the agency's decisions. This approach was thought to have the advantage of ensuring that any trade-offs with government policy objectives would be transparent and explicit.

15. **Greater independence also was the step/measure most frequently identified as being likely to lead to better promotion/attainment of the embraced objectives.** This response was provided by approximately one third of the respondents, once again, on behalf of jurisdictions having a wide variety of competition law and policy objectives and institutional structures. One possible interpretation is that it may be difficult to ensure total independence unless the domestic competition agency is structured outside the executive branch of government and also has budgetary autonomy. It may be noted the frequent identification of greater independence as being necessary or helpful to facilitate better pursuit of the jurisdiction's competition law and policy objectives appears to be somewhat inconsistent with the responses provided to the questionnaire on the optimal design of a competition agency, as 50% of the respondents to that questionnaire reported that they consider themselves to be totally independent from political influence, while a further 45% reported that they consider themselves to be highly independent from such influence.

16. **The absence of a strong correlation between objectives and the institutional design of competition institutions suggests that there may be no one optimal design given the competition law and policy objectives that have been adopted** in the jurisdiction and, as observed in the Secretariat note on Optimal Design of Competition Institutions [CCNM/GF/COMP(2003)2], given the functions that have been allocated to the agency. One possible explanation for this that is worthy of further study may be that that other factors, such as domestic legal or institutional traditions, or level of institutional development, may have a greater influence over organisational design.

17. Interestingly, only Switzerland mentioned more severe sanctions as being something that would help to better facilitate the attainment of the competition law and policy objectives of the jurisdiction.

III. Responses to Questionnaire

18. The purpose of this section is to supplement the information provided in the previous section. Accordingly, where the responses to a particular question have already been reported in Section II above, they will not be repeated here.

19. The questionnaire was answered by 35 jurisdictions, split almost equally between OECD countries (16) and non-OECD countries (19). In addition, three non-OECD countries that did not reply to

the questionnaire provided written contributions addressing at least some of the questions in the questionnaire.²⁹

(a) *The Competition law and policy objectives*

20. The competition law and policy objectives in virtually all of the jurisdictions responding to the questionnaire include one or both of the core competition objectives, i.e., (i) promoting and protecting the competitive process, and (ii) attaining greater economic efficiency.³⁰ Not surprisingly, the manner in which these objectives are expressed varies across jurisdictions. Sometimes, it is stated that competition should be promoted in order to achieve greater economic efficiency, economic welfare or the welfare of society and/or to provide consumers with competitive prices and product choices. In other jurisdictions, it is stated that the objective is to promote efficient resource allocation by means of workable or effective competition. Elsewhere, the emphasis is placed on protecting consumers, consumer interests, free enterprise, free competition, competition, a free market environment or “competition in markets for the long term benefit of consumers”, by restraining or preventing anti-competitive practices or the abuse of economic power. An alternative approach adopted in certain jurisdictions is to phrase the objectives in terms of improving the competitiveness of enterprises in order to promote economic development or to lower the monopolisation level in the economy. Finally, in a few jurisdictions, the focus is upon preventing, restricting or terminating “monopolistic activity” or “obstacles to effective competition”. A related, but subtly different, objective that appears to have emanated from Germany is protecting competition in the sense of an open and free decision-making process.

21. In addition to the core competition objectives, approximately two thirds of respondents (23), mostly whom were from transitioning or developing countries (16), stated that the competition law and policy objectives in their jurisdiction included one or more public interest objectives.³¹ In the seven developed economy jurisdictions, these public interest objectives took the form of either a general “public interest” test in an authorisation procedure for anti-competitive mergers or restrictive trade practices (Australia and New Zealand), a general “public interest” ministerial over-ride (Norway), a general “public interest” ministerial over-ride limited to mergers (Netherlands, Switzerland), or just media mergers (Ireland), and a general “public interest” ministerial over-ride for mergers and cartels (Germany). By comparison, in 11 transitioning and developing countries, public interest objectives are considered in the first instance by the competition authority, although the ultimate determination is made by a political decision-maker in most of these jurisdictions.

22. As briefly mentioned earlier, many respondents also indicated that the competition law and policy objectives in their jurisdictions include objectives that fall somewhere in the “grey zone” between core competition objectives and public interest objectives. The most commonly embraced objective in this category is ensuring “fair” competition, which was identified by eight countries, five of which are transitioning economies in central/eastern Europe. The only other “grey zone” objectives identified by two or more respondents included promoting an equitable opportunity to compete (three countries, two of which phrase this objective in terms of an equitable opportunity for small and medium sized businesses to

²⁹. As of 28 January 2003, a total of 15 written contributions on objectives of competition law and policy had been received by the Secretariat.

³⁰ For the purposes of this note, the types of objectives promoted in Article 81(3) of the *Treaty of Rome* (i.e., improving the production or distribution of goods or promoting technical or economic progress) are considered to fall into the category of core competition objectives.

³¹ See note 2 above for description of the principal types of public interest objectives that were identified. The “market integration” objective embraced by European countries was not included in determining the number of jurisdictions that promote public interest objectives through their competition law and policy.

compete); promoting more broadly the development of small and medium sized businesses (two countries); and preventing against undue concentrations of economic power (two countries).

23. The overwhelming majority of respondents reported that the competition law and policy objectives in their jurisdiction are contained in the domestic competition law. In eight of those jurisdictions, respondents indicated that some of the objectives are also contained in the constitution, e.g., in terms of a recognition of the freedom of competition and/or the right of entrepreneurship. Three countries in larger group also identified the jurisprudence as a source of some objectives, or clarification of their meaning. Three other countries identified the jurisprudence as the sole source of objectives, while one respondent identified the constitution as the sole source of the objectives, one respondent identified the “Motivation to Legislative Proposal” as the source of the objectives, one respondent identified the Government Green Paper and the competition authority’s Mission Statement as the source of the competition law and policy objectives, one respondent identified agency guidelines and speeches by officials of the agency as sources of additional clarification of objectives, and one written contribution (from Australia) stated that its competition law is only one of six elements of its National Competition Policy Framework, which is overseen by the National Competition Council.

24. Regarding the ranking of objectives, most respondents from jurisdictions with multiple objectives replied that there is no system of ranking in their jurisdiction or that each of the objectives are given equal weight. In terms of how the trade-off between potentially conflicting objectives is made, many respondents stated that evaluation of the objectives is largely or relatively subjective, although many others did not answer the question. In the vast majority of jurisdictions covered by the responses, the source of the competition law and policy objectives does not identify any factors to be taken into account in the determination of whether the objectives have been or are likely to be met in a particular case.

25. With respect to the steps that are taken to provide the public with a degree of predictability and certainty in relation to the manner in which trade-offs will be made among objectives that may conflict, respondents identified a broad variety of practices. The most frequently identified practices were the publication of enforcement guidelines (eight countries), the publication of decisions or summaries thereof (six countries), and building greater public awareness of the law and the competition authority’s policies (five countries – all from the developing world). Respondents from a few countries also reported making use of the competition authority’s web-site, issuing regular notices or publications, and establishing a public register.

26. When asked if the competition authority had ever been subjected to government influence to take industrial or social policy considerations or other factors into account, slightly more than half of the respondents replied in the negative. In a few cases, respondents reported that attempts had been made to influence the competition authority but that those attempts had been resisted successfully. In four other cases, respondents reported that there is a specific legal mechanism pursuant to which the relevant minister or the government can provide input to the competition authority. These mechanisms were designed to provide a transparent mechanism for such political input. However, in three of those jurisdictions, it appears that the government or minister cannot provide binding instructions in respect of a case specific matter, while in the fourth such case-specific instructions are theoretically possible but have never been provided.³²

³²

In Australia, pursuant to s. 29(1) of the *Trade Practices Act of 1974*, the relevant minister may give the ACCC directions connected with the performance of certain functions or the exercise of certain powers under the Act. Similarly, Section 26 of New Zealand’s *Commerce Act* creates a mechanism for the government to transmit a policy statement to the Commerce Commission, which the Commission may weigh in its own discretion. In South Africa, the Minister of Trade and Industry may make submissions on industrial and social policy pursuant to a mechanism established in that country’s *Competition Act* and the

(b) The Relationship Between Objectives and the Design of the Competition authority

27. The principal conclusions that can be drawn from the responses to the questionnaire in respect of this subject have been provided in Part II above. The information in this sub-section is merely intended to supplement that information.

28. As noted above, only slightly more than one-half of the respondents to the questionnaire reported that the competition law and policy objectives in their jurisdiction had influenced the institutional design of the domestic competition authority. **However, the responses provided indicate that this influence manifested itself in such a broad variety of ways that there does not appear to be a strong correlation between objectives and institutional design.** The most frequently mentioned way in which objectives were said to have influenced the institutional design of the domestic competition authority was to achieve an independent agency. This was mentioned by nine countries. Another country stated that although an initial decision had been made to strongly position the competition authority within a ministry, this design subsequently was recognised to be less than optimal and therefore an independent commission likely will be established. No other aspect of institutional design was specifically identified by more than two respondents as having been influenced by the competition law and policy objectives in the jurisdiction.

29. However, it appears that in two jurisdictions the competition law and policy objectives led to a decision to confer high level (e.g., cabinet ranking) status on the competition authority in order to effectively enforce the competition law.³³

30. In two other jurisdictions, the competition law and policy objectives influenced the decision to insulate the competition authority from political influence by reserving the consideration of public interest objectives to a political decision-maker.³⁴ However, it may be noted that the opposite decision was reached in two other jurisdictions, i.e., it was thought better to confine the assessment of public interest objectives to the competition authority and the autonomous adjudicative bodies.³⁵

31. In another two jurisdictions, it appears that the competition law and policy objectives influenced at least to some degree the decision to integrate investigative and adjudicative functions within a single agency,³⁶ although one of those countries (Mexico) observed in its written contribution that there may not be a strong link between the principal objective of the competition law (the promotion of economic efficiency) and the institutional design of its competition authority. This is because a change to promoting another objective, such as consumer welfare, likely would not lead to a change in the structure of the competition authority. Based on other information provided in Mexico's written contribution, it seems that the principal reason why the investigative and adjudicative functions were combined within a single agency was because "heavy reliance upon the Judicial System for purposes of adjudication of competition cases in a country where most judges are unfamiliar with competition principles doesn't seem realistic".

Rules of the Commission and the Tribunal. In the Netherlands, the Minister of Economics apparently has the power to issue general or specific instructions in writing to the NMa, including in respect of particular cases, although this power has never been exercised.

³³ Bulgaria and Chinese Taipei. This consideration also may explain why Russia created the Ministry for Antimonopoly Policy and Support of Entrepreneurship.

³⁴ Germany and Switzerland.

³⁵ Russia and South Africa (although the decision to allocate this task to MAP may not have flowed directly from Russia's competition law and policy objectives).

³⁶ Germany and Mexico.

32. **Regarding the current institutional design of the competition authority and whether it is optimal to facilitate the attainment of the competition law and policy objectives, once again, the comment most frequently made was that the objectives could be better pursued by giving the competition authority greater independence or by creating an appellate body independent from government.** This point was made by five countries. One further country (Brazil) noted that its three competition institutions, two of which are situated within a ministry, likely will be restructured in the near future into a single legally independent agency situated completely outside the executive branch of government. The only other point that was made by two or more respondents was that it is not clear that the competition authority is the optimal body to promote the objectives in certain sectors, and that additional specialised sectoral regulators might be helpful.³⁷

33. **When asked to identify structural or non-structural measures or steps that could be taken to facilitate the attainment of the competition law and policy objectives,** a broad range of factors were mentioned. As previously noted, **by far the most frequently identified measure was greater independence (including financial autonomy),** which was identified by approximately one third of the respondents. The next most commonly identified measure was providing the competition authority with additional financial resources to do its job. This was mentioned by nine respondents, some of whom noted the increase in the competition authority's workload, for example due to de-regulation of certain sectors. Eight respondents also mentioned the need for training courses/skills development for enforcement officials and/or judges. A further six respondents stated that the establishment of a specialised appellate body or group of judges within the domestic appeals court would assist to promote the competition law and policy objectives of the jurisdiction.

34. Other particularly noteworthy suggestions for measures to improve the pursuit of the competition law and policy objectives in the jurisdiction included providing better tools for obtaining information/investigating cases (five respondents); actions to promote the development of a competition culture (two responses); ensuring a high degree of transparency and accountability of the competition policy framework as well as having provisions to ensure due process, (two respondents); having the ability to influence laws and other executive branch decisions before they are finalised (one respondent); and the elimination of the obligation to investigate every complaint (one respondent). In addition, one respondent from a developing country stated that the pursuit of that country's competition law and policy objectives would have been improved by (i) establishing the competition authority before privatising various state enterprises and (ii) providing it with an opportunity to input into the design of the privatisation process.

IV. Discussion Issues

Use of Competition Law and Policy to Promote Public Interest Objectives and Other Potentially Conflicting Objectives

- Why has there been a shift away from use of competition laws and policies to promote public interest objectives in the developed world? Is the rationale underlying this shift applicable to the developing world?
- Why do many developing countries continue to embrace public interest objectives on a fairly widespread basis?

³⁷ This observation was made by Cameroon, Germany (which suggested that alternatively structured authorities with ex ante powers in certain sectors might be a better approach) and South Africa.

- If there is a legitimate role for competition law and policy to play in promoting public interest objectives in less developed economies, what is that role?
- Is there a “right mix” between industrial/social policy oriented objectives and more conventional competition objectives that can be identified for less developed countries, and should this mix change as an economy evolves?
- Are there any best practices that can be identified in this regard, such as in relation to:
 - the degree of transparency that is provided regarding the factors that are considered in the assessment of public interest objectives (and any other objectives that may conflict from time to time), as well as their relative weighting
 - the balancing of conflicting assessment criteria, including when competition and efficiency conflict
- What has been the experience of those transition countries that include among their competition law and policy objectives the goal of ensuring that government actions are consistent with the promotion of competition?

The Linkage between Competition Law and Policy Objectives and Institutional Design

- How important is independence in facilitating the attainment of competition law and policy objectives?
- What, if any, any best practices can be identified for achieving and preserving independence?
- Can the pursuit of core competition objectives, public interest objectives, or objectives falling within the “grey zone” be facilitated by the involvement of political decision-makers in competition law matters? What about in relation to broader competition policy matters, such as regulatory reform?
- In any event, are there any best practices that can be identified regarding how to structure the role of political level input, for example, regarding:
 - the manner in which such input is provided to a competition authority
 - the structuring of the consideration of public interest objectives, as between the competition authority, the relevant court/tribunal and the government?
- What other aspects of institutional design, if any, ought to be influenced by competition law and policy objectives?
- What are the most important non-structural measures that ought to be taken to optimise the pursuit of competition law and policy objectives? Are there any best practices that can be identified in this regard?

- Is there an optimal institutional design for jurisdictions that confine their objectives to core competition objectives? What about for jurisdictions that include public interest objectives among their competition law and policy objectives?

Annex 1**QUESTIONNAIRE ON THE OBJECTIVES OF COMPETITION POLICY**

The following questionnaire is directed towards obtaining information regarding the objectives of competition policy in the recipient's jurisdiction, especially as they may be relevant to the design of the agency that is responsible for competition law enforcement within the jurisdiction. Based on the replies to the questionnaire, a note will be prepared by the OECD Secretariat to serve as a basis for the discussions at the Forum meeting.

For the purposes of questionnaire, the term "Competition Legislation" means the principal competition law or laws in the jurisdiction, i.e., those that proscribe anticompetitive practices, including, if applicable, mergers, and that are of general application in the jurisdiction. This includes any regulations enacted under the Competition Legislation. However, sectoral laws and regulations that may include provisions directed towards one or more anticompetitive practices or mergers are not intended to fall within the meaning of the term "Competition Legislation".

The term "Competition Authority" means the person(s) or agency that is officially responsible for administering and enforcing the Competition Legislation.

The term "Competition Law" means the Competition Legislation, together with any jurisprudence that has developed thereunder.

The term "Competition Policy Objectives" means those objectives or purposes that are identified in the Competition Law, as well as any objectives in the competition policy field that may be identified in the Constitution of the jurisdiction.

I. The Competition Policy Objectives in your Jurisdiction

1. What are the Competition Policy Objectives in your jurisdiction? (If there are different or additional objectives for some sectors, please specify.)
2. Where are those Objectives identified, e.g., in the Competition Legislation, regulations, jurisprudence, or constitution? Please specify. For example, if the Objectives are identified in the Competition Legislation, are they contained in a purpose clause, in the preamble, or elsewhere?
3. Are those Objectives given equal weight by the Competition Authority and the relevant courts tribunals or other decision-maker? If not, how is the ranking among the various objectives determined, and what is that ranking?
4. In practice, how are trade-offs made between conflicting objectives, e.g., is the decision purely subjective?

5. Is anyone other than the Competition Authority and the courts/tribunals involved in the assessment of the Objectives? If so, who, and at what stage?
6. Does the Competition Law or constitution specify any factors that should or may be taken into consideration in determining whether the Objectives, in aggregate or individually, have been or are likely to be met in a particular case? If so, are those factors given equal weight? If they are not given equal weight, please explain the weighting.
7. What steps have been taken to provide the public with a degree of predictability and certainty regarding the manner in which trade-offs will be made among objectives that may conflict?
8. Have the Objectives changed over time? If so, please explain why, and describe the process and the extent of consultation that was undertaken with the Competition Authority, the business community, consumer groups and other stakeholders.
9. In exercising its enforcement or prosecutorial discretion, or in otherwise reaching its decisions, does the Competition Authority ever take into account, either generally or in “close” cases, any industrial, social policy or other objectives that are not officially recognised in the Competition Law, e.g., employment, regional development, international competitiveness (e.g., the promotion of a “national champion”), “fairness” in the market, domestic control/national security, concentration of economic decision-making, the balance of trade, trade among Member States, inflation, environmental or gender goals, etc.? Please explain.
10. Is the Competition Authority ever subjected to government influence to take such other industrial, social policy or other objectives into account? Please explain.
11. Would you consider the Competition Law to be the optimal vehicle for advancing each of the Competition Policy Objectives or any other objectives that may be taken into account in specific cases from time to time? Please explain, drawing on experience to date with the Competition Law, including any difficulties that may have been encountered in attempting to advance one or more Competition Policy Objectives or other objectives through the Competition Law. If the answer to this question is negative, please explain why the Competition Law is not the optimal tool for advancing those Competition Policy Objectives or other objectives that could better be promoted through other policy instruments.
12. Are there any objectives not specified in the Competition Law or constitution that you believe should be included in the Competition Policy Objectives of your jurisdiction? Please explain.
13. If the Competition Policy Objectives include any non-competition objectives, in how many cases per year do such objectives lead to a decision that is different from the decision that would have been taken if the Competition Policy Objectives were limited to promoting competition objectives? Is there a trend that can be discerned in this regard? (Note: For the purposes of this question, please consider competition objectives to include the protecting the “process” of competition, protecting consumers, and promoting competitive prices, product choices, innovation and efficiency.)
14. Regarding the competition objectives described in the immediately preceding question, please explain whether those objectives are directed towards protecting consumers (whether by maximising consumers’ surplus -- e.g., preventing wealth transfers from consumers to producers – or otherwise), maximising total surplus (i.e., the sum of consumers’ surplus and total surplus) or achieving another goal. If the paramount objective is the maximisation of total surplus, please describe how trade-offs are conducted between competition and efficiency in those cases where

there is a conflict, e.g., a case involving an anti-competitive merger that is likely to result in efficiency gains that will be greater than the anti-competitive effects of the merger. In addition, please describe any difficulties that have been encountered and any discuss implications that these difficulties may have for the choice of ultimate goals, as well as for the design of the Competition Authority and the courts/tribunals.

II. Relationship between the Competition Policy Objectives and the Design of the Competition Authority

1. How did the Competition Policy Objectives influence the design of the Competition Authority and other competition institutions in your jurisdiction?
2. Why were alternative approaches rejected?
3. In retrospect, would any of those alternative approaches, or another approach that was not considered previously, (for example, an approach that may have been developed in the interim in another jurisdiction), be superior, in terms of facilitating the achievement of the Competition Policy Objectives? In responding to this question, please take into account any difficulties or limitations that the existing institutional design of the Competition Authority may have presented for the attainment of the Competition Policy Objectives.
4. Is the Competition Authority as presently structured within the broader government apparatus the optimal body to facilitate the attainment of the Competition Policy Objectives? If not, please identify what other bodies (existing or that should be created) would be better able to achieve certain Competition Policy Objectives.
5. How could the existing structure of the Competition Authority be modified to better facilitate the attainment of the Competition Policy Objectives?
6. Are there any specific steps or measures, short of a change to the structure of the Competition Authority, that could be taken to assist the Competition Authority and the relevant courts or tribunals to achieve and promote the Competition Policy Objectives?
7. Would any of the approaches described in question #3 of this section of the questionnaire better insulate the Competition Authority or the relevant courts/tribunals from political or other external influence, particularly in respect of the attainment of the Competition Policy Objectives and the use of Competition Law to promote other, unofficial objectives?