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**COMPETITION AND EFFICIENCY AS ORGANISING PRINCIPLES**  
**FOR ALL ECONOMIC AND REGULATORY POLICYMAKING**

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## *Introduction*

In conceptualising the agenda for the first Latin American Competition Forum, a consensus quickly emerged among those involved on behalf of the Organisation for Economic Cooperation and Development (OECD) and the Inter-American Development Bank (IDB) that we should begin with first principles. In the context of a forum on competition in a developing region of the world where competition has been significantly limited by a plethora of laws, regulations, administrative measures and other institutional restraints to competition (for convenience, collectively referred to as “regulations” hereinafter), it was agreed that the first session should focus on the benefits of orienting all economic and regulatory policy-making towards maximizing competition and efficiency. Accordingly, that will be the principal focus of this paper.

Another way of putting this basic principle of market reform, which lies at the heart of the OECD’s 1997 Policy Recommendations on Regulatory Reform<sup>1</sup> and the 1999 APEC Competition Principles,<sup>2</sup> is that competition and efficiency ought to provide policy coherence to all economic and regulatory policy decisions. That is to say, competition and efficiency should be the policy “glue” that links and binds all economic and regulatory decision-making into a coherent framework. This implies bringing competition and efficiency dimensions to all such decision-making, and being guided by the general principle that competition should be stimulated and maximized except in cases of market failure or where other legitimate public interest objectives give rise to a need for continued or even new regulation. In such cases, the regulation ought to be designed in an efficient way that provides incentives to reduce costs and innovate, that is generally efficient, and that stimulates competition in respect of activities within the sector that do not need to be regulated, or that only require partial regulation. This requires a framework for assisting policy-makers to strike the optimal balance between competition and regulation -- an important theme within the overall focus of the paper.

The need to pay close attention to striking the right balance between competition and regulation is particularly strong in Latin America, where there are troubling signs that various economic problems are being blamed on market liberalisation initiatives of the 1990s that may not have been pursued in an optimal manner. To some extent, this may be attributable to misunderstandings regarding the reasons for the sub-optimal outcomes. This underscores the need not only to exercise prudence in striking the right balance between competition and regulation, but also to make every effort to fully address misperceptions and explain the true reasons why market reform efforts to date have not yielded anticipated benefits. In this context, it makes good sense to have a slight bias towards minimising the risk of failure during this particularly fragile political climate,

The remainder of this paper will be divided into five sections. Part 1 will briefly address why OECD countries are placing increased reliance on competition and, where necessary, flexible and efficient regulation. Part 2 will then explain how competition and efficiency can provide a coherent policy framework for all economic and regulatory policy making. Part 3 will follow with a brief summary of the principal justifications for regulation. This will facilitate a discussion, in Part 4, of various suggestions for striking the right balance between competition and regulation, including by reforming necessary regulatory frameworks to support effective competition and to achieve greater efficiency. Finally, Part 5 of the paper will offer a three-pronged strategy for building capacity to pursue a strong competition policy.

## 1. Why OECD Countries are Embracing Increased Competition and, Where Necessary, More Efficient and Flexible Regulation

1. Within OECD countries, competition is now broadly accepted as the best available mechanism for maximising the things that one can demand from an economic system in most circumstances.<sup>3</sup> Economic regulation is increasingly perceived to be at the opposite end of the spectrum - it tends to leave a larger number of people with a reduced real income and a lower standard of living. In addition, economic regulation imposes costs on society in terms of its establishment and administration, its adverse impact on economic efficiency (including dynamic efficiency) and the significant time, effort and expense associated with its removal.

2. Studies consistently demonstrate that deregulation and regulatory reform in OECD countries have been accompanied by large price reductions to consumers and substantial improvements in quality and service.<sup>4</sup> As noted in a publication summarising the OECD's 1997 Regulatory Reform Report:

“More heavily regulated countries can expect to see increases in real GDP levels on the order of 3 to 6 percent after ambitious reform programmes, according to OECD models. Countries well-advanced on the path of regulatory reform already have reaped some of those benefits and so stand to gain less from further reform.

Australia assesses its gains from reform to be around 5.5 per cent of DGP. The European Single Market increased EU income by an estimated 1.5 percent from 1987 to 1993; and the Commission projects even greater future gains. Japan estimates that reducing price and productivity gaps with the United States, primarily through regulatory reform, should increase GDP by several percentage points.”<sup>5</sup>

3. In a contemporaneous review of a number of similar studies relating to the deregulation of the natural gas, long distance telecommunications, airlines, trucking and rail industries in the U.S., it was reported that real prices dropped at least 25% and sometimes close to 50% within ten years of deregulation in those industries.<sup>6</sup> The annual value of consumer benefits from such deregulation was estimated to be approximately US\$5 billion in the long distance telecom industry, US\$19.4 billion in the airline industry, US\$19.6 billion in the trucking industry, and US\$9.10 billion in the railroad industry. At the same time, consumers were able to benefit from improvements in the quality of service. Moreover, “[c]rucial social goals like airline safety, reliability of gas service, and reliability of the telecommunications network were maintained or improved by deregulation and customer choice”.<sup>7</sup>

4. A more recent OECD study on product market competition and economic performance has found that multi-factor productivity (MFP) improved markedly following regulatory reforms in previously sheltered industries.<sup>8</sup> Based on the empirical data reviewed, the study estimates that Japan and the large continental European countries could increase productivity levels by between 2 and 6 percent if they were to align their product market regulations with those in countries with the most competition-friendly environments.<sup>9</sup> In Greece and Portugal, the increase was estimated to be at least 10 percent, reflecting comparatively strict regulations in product markets and relatively large distances from the technological frontier of the most pro-competitive stance. To put these results into context, the study observes that “the estimated potential gains in MFP would correspond to several years of growth at the average rate of MFP growth over the 1981-2000 period”.<sup>10</sup>

5. The study also estimates that regulatory reforms undertaken in OECD countries between the late 1970s and the late 1990s increased individual countries' employment rates by an average of 1 ½ percent and up to approximately 2.5% in countries where reforms were pursued most vigorously.<sup>11</sup> This is consistent with previous OECD work that suggested long term employment gains from regulatory

reform.<sup>12</sup> This puts into serious question the myth that regulatory reform leads to employment losses in the domestic economy.

6. In another recent study, Dutz and Vagliasindi assessed the effectiveness of competition policy across 20 transition economies in central and Eastern Europe, in terms of enforcement, competition advocacy and institutional effectiveness. The survey sampled over 3,000 firms in the first half of 1999. It found a strong link between implementation effectiveness and ease of expansion of productive enterprises, as well as “a robust positive relationship between more effective competition policy implementation and intensity of competition as captured by economy-wide enterprise mobility”.<sup>13</sup> It added:

“Merely having a competition law on the books, or having an up-and running competition agency, is not a sufficient condition for effective implementation. The stronger and statistically more significant impact of institutional dimensions of implementation independence, transparency and effectiveness of appeals suggests that in order to help foster the [entry] and growth of enterprises, competition authorities should be more accountable to civil society, and build additional safeguards to protect against undue influence from pressure groups in government and elsewhere.”<sup>14</sup>

7. Turning to Latin America, a study of liberalisation of the trucking, container and cargo handling businesses in Mexico over the period 1989-1993 by Dutz, Hayri and Ibarra found that reforms led to increases in quantities and distances of freight hauled, increases in reliability (timeliness, transit losses) and overall benefits estimated at 10% of operating margin of a representative user company.<sup>15</sup>

8. In addition, it has been reported that reform in the telecommunications sector in Chile in the late 1980s resulted in a quadrupling of the number of telephone lines by 1997 and “brought about rapid network modernization, new services, and prices that are among the world’s lowest”.<sup>16</sup> Indeed, competition also played a key role in accelerating the deployment of facilities in rural areas.<sup>17</sup>

9. In addition, a 1999 World Bank study of reform in the telecoms industry in 30 African and Latin American countries over the period 1984 – 1997 found increased competition to be associated with lower prices for local calls, increased mainline penetration and connection capacity, more payphones and a higher connection capacity.<sup>18</sup> By contrast, merely privatising an incumbent monopolist without introducing greater competition and establishing a regulatory framework with an independent regulator was negatively correlated with mainline penetration and connection capacity.<sup>19</sup> These findings led to the conclusion that “competition is the most effective agent of change, privatization without regulation may not improve service, and regulation is especially important when privatizing a monopoly incumbent”.<sup>20</sup> The study also stated: “One important policy implication of these results is that granting exclusivity periods to an incumbent may seriously delay the real benefits that seem to come with competition”.<sup>21</sup>

10. Turning to the impact of international cartels on developing economies, two recent related studies of cases reported by OECD competition authorities found that 39 cartels had impacted developing countries; cartel participants included companies from 31 different economies (including 8 developing economies); 24 of the cartels had lasted at least 4 years; price falls after cartels had been broken up were in the order of 20-40 percent; the initial cartel formation had been triggered by substantial price falls; 16 cartels alone accounted for at least US\$81 billion of developing countries’ imports; and the cartelised products represented approximately 6.7% of imports and 1.2% of the GDP of developing countries.<sup>22</sup>

11. It cannot be over-emphasised that, over the longer run, innovation accounts for most of the improvements in average living standards that flow from greater competition. This applies in both developed and developing economies. A recent OECD study estimated that procompetitive reform explained more than one third of the excess R&D intensity in the U.S., Japan, German and Sweden relative

to the OECD average and provided a large positive contribution in the U.K., Canada and Ireland. Conversely, excessive regulatory restrictions to competition in Italy and Greece were estimated to account for one third and two thirds, respectively, of the shortfall in R&D intensity relative to the OECD average.<sup>23</sup>

12. A related way in which competition is superior to regulation as an organising force in market development is in helping firms to “deal with the unexpected.” One needs only to consider the success of the Internet. Initially created in the US, the Internet has now spread around the globe. It is based on an open architecture that provides for competitive innovation between web sites. This competition is not just between commercial web sites, but also between sites of non-commercial providers of information such as the OECD, which has to continue to strive to make its web site more user-friendly and useful to its target audience. Otherwise that audience will go elsewhere in search of comparable information, and the OECD’s work will become less relevant. What is noteworthy for this discussion is that the Internet was not the first such network of its kind. A decade before it was born, the Minitel system was in wide use in France. Among other things, one could bank, book air tickets and obtain a significant range of information through that network. But Minitel floundered, largely because it was a closed system with a monopoly core service run by France Telecom using a “locked in” technology. It was unable to innovate past its slow and graphics free architecture and was unable to respond in a timely fashion to unexpected innovations which arose elsewhere.

13. Notwithstanding the persuasive evidence of the benefits of greater competition and more efficient, flexible regulation, Latin American countries continue to be highly regulated, in some cases with large state-owned sectors and oligopolies or inefficient firms operating in markets insulated by various types of barriers. In addition to the above-mentioned economic gains that citizens in these countries could receive from a strong competition policy, such a policy also likely would help to create better conditions for democratic institutions. This is because the democratisation of political systems and the decentralisation of economic decision making are mutually reinforcing processes.

## **2. Competition and Efficiency as a Coherent Framework for All Economic and Regulatory Policy Making**

14. Some of the ways in which regulations can and do distort competition and efficiency across the developed and developing world are discussed in Part 3 below. However, as the saying goes, these are just the tip of the iceberg. In virtually every country today, competition and efficiency continue to be distorted at all levels of government, across a large number of sectors of the economy and in a vast array of different ways. In aggregate, these competition and efficiency distorting measures create an enormous impediment to economic growth and development.

15. Given the pervasiveness of competition and efficiency distorting regulations, the creation of a strong competition culture and the realisation of the full potential of competition policy cannot be achieved unless all economic and regulatory policy making includes competition and efficiency dimensions and is guided by the general principle that efficiency should be promoted and that competition should be stimulated and maximised except in cases of market failure or where other legitimate public interest objectives give rise to a need for continued or even new regulation. This is consistent with the view, expressed in the OECD’s 1997 Regulatory Reform Report, that “reform should be built on a foundation of competition policy”.<sup>24</sup> It is also consistent with the APEC Competition Principles, which were intended to “provide a framework that links all aspects of economic policy that affect the functioning of markets”.<sup>25</sup>

16. Indeed, the comprehensiveness principle in the APEC Competition Principles advocates “[b]road application of competition and regulatory principles to economic activity including goods and services, and private and public business activities”, as well as the “recognition of the competition dimension of policy development and reform which affects the efficient functioning of markets”.<sup>26</sup> To implement this

comprehensiveness principle, the Competition Principles encourage APEC Member Economies (which include several Latin American economies), to, among other things:

- (i) identify and/or review regulations and measures that impede the ability and opportunity of businesses (including SMEs) to compete on the basis of efficiency and innovation; and
- (ii) ensure that measures to achieve desired objectives are adopted and/or maintained with the minimum distortion to competition.

17. Further insight into this comprehensiveness principle is provided by the PECC Competition Principles,<sup>27</sup> from which the APEC Competition Principles were distilled. The PECC principles were in part a response to the Asian crisis, which was in full swing at the time the Competition Principles project was launched in 1997.<sup>28</sup> A fact that may be particularly relevant to a number of Latin American countries is that it was envisaged that adoption by APEC economies of a set of competition principles would help to counter the risk of increasing protectionism.<sup>29</sup>

18. The PECC Competition Principles “are based on competition and efficiency as the preferred means for sustaining overall economic growth and development”.<sup>30</sup> They stress the unifying role that competition and efficiency should play in achieving an integrated, coherent and transparent paradigm for the assessment and refinement of all existing policies and the development of future policies that impact upon markets. This approach was conceived as likely to “provide a powerful mechanism for achieving the APEC strategy of more open and competitive markets, in order to attain greater economic efficiency and overall economic welfare”.<sup>31</sup>

19. As with the OECD’s approach to regulatory reform, the PECC approach is premised on bringing a competition and efficiency dimension to all economic and regulatory policymaking, by assessing the extent to which existing and future policies distort, or are likely to distort, competition. By giving predominance to competition and efficiency, the OECD and PECC approaches provide a framework for resolving policy conflict with non-efficiency goals in, or underlying, existing or proposed regulations. In the OECD approach, this predominance is achieved by reforming economic regulations in all sectors to stimulate competition and eliminate competition distorting impacts except where clear evidence demonstrates that they are the best way to serve broad public interests.<sup>32</sup> In such cases, it is advocated that any required regulation be designed to promote efficiency. In the PECC and APEC approaches, this predominance is achieved by promoting competition and efficiency in cases of conflict with non-efficiency goals, except where application of this principle is simply not practicable or politically feasible, in which case the competition distorting impact of the regulations is minimised.<sup>33</sup> Moreover in the latter circumstances, it is recommended that reasons for divergence from the principle of fully promoting competition and efficiency “should be compelling and transparent”.<sup>34</sup>

20. Embracing competition and efficiency as the “glue” that links and binds all economic and regulatory policy-making implies making a commitment to the following multi-step process:

First, the full range of regulations that affect markets should be revisited with a view to making an assessment of the extent to which they distort competition and efficiency in the pursuit of their objectives.

Second, where a competition or efficiency distorting effect is identified, an assessment should be made of whether the continued existence of the regulation as a whole is consistent with market-oriented reform.

Third, if the answer to this question is negative, an evaluation should be made of whether there is clear evidence that the regulation is the best way to promote any legitimate public interest objectives that the government wants to continue to pursue.

Fourth, if such clear evidence does not exist, or if the government no longer wishes to pursue the public interest objectives in question, the regulation should be eliminated

Fifth, if, on the other hand, clear evidence demonstrates that a regulatory approach is the best way to achieve the public interest objectives, the regulation should be amended with a view to minimising the extent to which competition and efficiency are distorted in the pursuit of such other objectives. In this regard, competition principles should be drawn upon to help inform both the appropriate type and extent of regulation that should be embraced to achieve the objectives.

21. In conducting this exercise, particular attention needs to be paid to shifting the systemic bias. The onus should be to demonstrate the continued need for regulation, or at least the competition and efficiency distorting aspects of desirable public interest regulation. The onus should not be to demonstrate the benefits of competition.

22. It bears emphasising that the scope of this competition and efficiency driven economic and regulatory policy-making process should extend to all national and sub-national (e.g., state/provincial and municipal) regulations that affect markets for goods and services. This includes those relating to tariff and non-tariff barriers to trade, foreign direct investment, government procurement, the professions, intellectual property rights, infrastructure sectors (e.g., financial services (banking, securities), energy (electricity, natural gas, oil), telecommunications and transportation (airlines, railroads, shipping, trucking, ports, courier services)), agriculture, health & safety, product standards, SMEs and labour.

23. In assessing how best to stimulate competition and efficiency enhancing behaviour in these and other areas, a key focus should be upon eliminating or at least lowering to the extent possible regulatory barriers and impediments to entry, expansion and market access.<sup>35</sup>

24. A good example of how competition can be fostered in particular segments within an industry is provided by the electricity sector. It is now generally accepted, at least in OECD countries, that the generation stage of the electricity sector is capable of supporting vigorous competition. However, it is less well known that various steps can be taken to stimulate competition at that stage, over and above splitting a former generation monopolist into several competing components, or allowing for new entry. For instance, changes to the manner in which electricity is metered can affect purchasing behaviour and the overall efficiency of the industry. More specifically, if electricity use is measured minute-by-minute, as opposed to the month-to-month way that is conventional in some countries, then it can be priced minute-by-minute. This provides purchasers, such as large customers with flexible demand, an incentive to reduce their load at peak times and perhaps even resell contracted electricity back into the market. If time-of-use metering applies to enough customers, the peaks in electricity demand can be blunted. In turn, this implies that capacity, and therefore the overall costs of the electricity system, can be lower. Moreover, a further constraint on the potential exercise of market power by generators can be created because at least some customers will be able to respond to high prices by reducing their demand immediately.

25. The point is that this competition stimulating and efficiency enhancing innovation may not have been conceived if it had not first been made possible by eliminating all competition distorting aspects of the regime regulating the electricity sector that were not essential to prevent monopolistic behaviour at the natural monopoly stages of the industry (transmission and distribution) and to achieve other public interest objectives (such as universal service or recovering sunk costs).

26. Even if a segment of an industry or market continues to display natural monopoly characteristics, competition can have an important role to play in helping to increase the overall efficiency of the regulatory regime. This can be achieved by creating competition *for* the market, for example, by auctioning off the right to be the monopolist supplier.

### **3. Principal Justifications for Regulation**

27. Implicit in the proposition that competition is superior to regulation in most circumstances, is the notion that there are some circumstances in which free and unrestricted competition is not optimal and therefore some form of regulation may be preferable. These circumstances are fairly limited, and can be grouped as follows:

- to address market failure
- to advance the "public interest"
- to advance special interests
- to assist in the transition to a competitive market

#### **3.1 Market Failure Regulation**

28. Market failure can be defined as an inability of the market to deliver goods and services to consumers in an efficient manner, i.e. because unrestricted competition cannot be sustained in the industry in question. In such situations, some form of market-oriented, efficiency-enhancing, regulation may be efficient and appropriate. Each situation needs to be assessed individually, as regulation will not be efficient if it costs more than the harm that it seeks to address.<sup>36</sup>

29. One of the classic and generally recognised examples of market failure is public goods. Examples include national defence, parks, public schools, flood control protection, lighthouses, and road construction and maintenance (although toll highways that are constructed and operated by the private sector are increasingly appearing). These are goods or services for which it likely would be difficult to establish an efficient payment mechanism, and for which the cost of extending the service to an additional person is virtually zero. The form of "regulation" typically adopted in respect of public goods is for the government to assume responsibility for deciding what is to be produced.

30. Another form of market failure may arise when it is less costly, due to the presence of economies of scale or scope, for a single entity to supply the entire market than to have competition between multiple entities. Regulation of the natural monopoly – either its prices or conduct - is then necessary to ensure that the market power of the monopoly is not abused. An example is electrical transmission.

31. A related type of market failure can occur when prospective entrants into a market must incur high costs that they would not be able to recoup if they were subsequently to exit from the market. Putting wires and pipes in the ground are examples of sunk costs, but so are the costs of learning and dealing with a regulatory regime. If a country wishes to attract private investment into markets with high sunk costs, ensuring a stable regulatory regime that promotes confidence and predictability is a key prerequisite.

32. Fortunately, the forces of globalisation and innovation are opening up many markets formerly thought to constitute natural monopolies, e.g., electricity generation, electricity retailing, natural gas retailing, local and long distance telecommunications, rail transportation, postal services and even public highways. This experience suggests that assumptions regarding sectors thought to be natural monopolies should be revisited periodically to test their continued validity.



33. However, these same forces are giving rise to new natural monopolies resulting from network externalities. Demand side network externalities can occur where there are enormous benefits to being a member of a network or standard. As the network or standard is embraced by more people or organisations, its value to existing members rises. Supply side network externalities can occur when the expenditures associated with providing services to additional consumers reduces the overall cost of the network. As an existing network grows, potential suppliers of rival networks are often unable to generate or maintain enough sales to compete with the "first mover" or the growing network. The dominance of VHS over Beta is the most cited example of this type of externality. In emerging network industries, policy-makers are still wrestling with how to approach this problem - i.e., through competition law or by leaving the market to decide winners and losers.

34. Other types of externalities can also give rise to market failure. Environmental legislation is the most obvious example of regulation dealing with pollution-related externalities. A less obvious example is zoning regulation, which prohibits activities that may generate noise, traffic or other externalities from taking place in close proximity to certain types of land uses.

35. Market failure also can exist as a result of information asymmetries. Such asymmetries can lead consumers to under or over consume. In addition, where incumbent suppliers are able to exploit informational asymmetries between themselves and potential new entrants, they may effectively increase barriers to entry, thereby putting themselves in a position to exercise market power.<sup>37</sup> To enable the market to function efficiently, protect the public from providers of poor or sub-standard services, and even prevent against fraud, laws relating to matters such as professional standards, product labelling, deceptive marketing practices and securities trading need to be enacted.

36. A final type of market failure can occur when the government attempts to promote competition between state-owned enterprises. This type of a situation is difficult to sustain over the long run because the implicit or explicit guarantee against bankruptcy, together with the mandate to maintain employment, create incentives to predate that are much stronger than for profit-seeking privately owned enterprises. Thus, a market in which an SOE competes faces a high risk of descending into inefficient competition and generating huge losses for taxpayers, particularly if there are multiple SOEs competing against each other. Accordingly, creating competition between SOEs should only be considered as a short term step in a longer process of privatisation and deregulation.

### **3.2 Public Interest Regulation**

37. Another rationale for regulation that is somewhat analogous to the market failure justification is to promote what is perceived to be the public interest. Regulations related to health and safety, the environment, labour, food and drugs, transportation (e.g., airline, trucking and rail services), securities, insurance, health care and investment often are supported by reference to "public interest" considerations. These types of regulations can be effected through a variety of instruments, including legislation that establishes a licensing regime, prevents or requires certain types of behaviour, imposes foreign ownership restrictions, or imposes product or technical standards. Unfortunately, in the pursuit of legitimate public interest objectives, this type of regulation often distorts competition to a far greater degree than necessary.

38. For example, in the financial sector, regulation generally is recognised to be required for prudential reasons - that is to say, to prevent systemic instability. Systemic failures in financial systems have proven to be very costly, with official "rescue" packages for failed financial institutions costing upwards of 20 per cent of GDP in some cases. Additionally, large failures of financial institutions, such as those that occurred in the post-1997 Asian crisis, helped to fuel economic disruptions with extremely high economic and social costs. Thus systemic stability clearly is a legitimate public interest objective that warrants regulatory intervention. However, regulatory frameworks designed primarily to promote public

interest in systemic stability often have distorted competition to a greater degree than necessary. For example, they have prevented foreign financial institutions from competing in various segments of the financial services industry, and/or have prevented competition between participants in two or more parts of the financial services industry, e.g., between banks and insurance companies; or between banks and investment dealers.

39. Similarly, the telecommunications industry has been pervasively regulated despite the fact that only the local loop was arguably naturally monopolistic. Even this assumption is now questionable, as cable companies and suppliers of wireless technologies are entering or are poised to enter local telecommunications markets in several jurisdictions.

### **3.3 *Special Interest Regulation***

40. Often, regulatory regimes are established to advance the interests of certain groups in society that have succeeded in persuading political authorities that they are worthy of what essentially amounts to protection from competition. This form of regulation typically is simply a means by which the regulatory process is used to protect the interests of some participants in the economy at the expense of others. Examples of this include supply management schemes (which are common in the agricultural sector - for example, the dairy, poultry, pork, grain and fruit industries), labour codes, licensing regimes which make it difficult for foreign and other firms or professionals to enter markets (these types of restrictions are common in the transportation and financial services sectors as well as in the professions), product and technical standards which have a similar effect (these types of restrictions are common in the construction sector) and foreign ownership restrictions. These latter restraints fall in the grey zone between public interest and special interest based regulation, as they can promote both of these types of interest, e.g., the desire to promote a national champion or local employment can coincide with the private interest in protection from competition.

41. Unfortunately, political realities are such that competition-distorting, special interest based regulations often cannot simply be eliminated by a government that is keen on market reform. Where such decisive action is not politically feasible, an alternative course of action that can yield significant benefits would be to amend the regulatory regimes in question in a way that minimises, or at least significantly lessens, their adverse impact on competition.

### **3.4 *Transitional Regulation***

42. An increasingly common rationale for regulation is to facilitate the transition of industries from regulation to competition. The process of regulatory reform sometimes involves complicated issues that require very careful consideration to ensure that the benefits of deregulation are not lost, for example by inadvertently enabling deregulated entities to establish private restraints in the place of the public restraints that have been removed. In addition, during the transition to open markets, the situation can be politically fragile -- if the transitory framework fails to produce expected benefits on a timely basis or produces short-term harm to stakeholders with political influence, policy makers may be pressured to re-regulate or to limit deregulation. The experience with deregulation of electrical power generation in California provides a noteworthy example. Sorting out the roles to be played by competition and by regulatory authorities during the transition requires striking a balance between sending appropriate investment signals to potential entrants, mitigating the exercise of market power of incumbent entities, and minimising the disruption to consumers. Where to draw the line depends in large measure on the speed with which new rivals can gain a foothold in the deregulated industry, and their incentives to do so. A number of suggestions for expediting the introduction of competition in transition industries are provided in Section 4 (ii) below.

#### **4. Striking the Right Balance between Competition and Regulation**

43. It is often forgotten that competition and regulation have the same ultimate goals, namely, to prevent the illegitimate acquisition and exercise of market power and to facilitate the efficient allocation of resources. Where free and unrestricted competition is unlikely to produce this result, it is generally recognised that some sort of regulation is appropriate, either as (i) a full substitute for competition, (ii) a means for establishing a sustainable framework within which effective competition can take place, or (iii) a means of "holding the fort" until the anticipated arrival of competition.

44. This gives rise to a need manage the interface between competition policy (broadly defined) and regulatory policy in a way that recognises their mutually reinforcing nature and optimises economic welfare. In this regard, there are a number of general steps that can be taken, which are addressed immediately below. In addition, it is important to address the three key pillars of successful regulatory reform: establishing the right industry structures, the right industry rules and the right institutions to stimulate competition and efficiency-enhancing behaviour where possible. This is addressed in Sections 4 (ii), 4(iii) and 4 (iv) below.

##### ***i) General Suggestions***

45. The most important ingredient for successful reform is strong and consistent support at the highest political level. This means that the "buy-in" and active support of ministers and other political actors in the economy must be obtained. In short, it is critical that there be sufficient supportive political energy to drive regulatory reform efforts throughout the administration and overcome vested interests in both the private and public sectors which benefit from the *status quo*.<sup>38</sup>

46. It is also crucial to establish clear objectives for the regulatory reform exercise as well as in any legislation or regulations that may be implemented to effect the reform. In this regard, the legal instruments establishing the regulatory regime should include, as one of their objectives, the promotion of economic efficiency, and, if possible, competition in areas not subject to regulation.

47. Furthermore, steps should be taken to ensure that these legal instruments, as well as the regulator's policies, practices and procedures, are highly transparent and predictable. These steps should include actions and measures designed to give relevant domestic stakeholders and foreign investors confidence that the rules will not be arbitrarily changed.

##### ***ii) Getting the Right Structure***

48. For competition to work in a market, there need to be competitors. A monopoly is not a good starting point and therefore privatising a monopoly is usually a poor policy. It is clear from experience that it normally takes a very long time for monopolies to be eroded, and not much time at all for privatised monopolists to establish private restraints that take the place of the former institutional restraints to competition.

49. Accordingly, it generally is better to break up a monopoly into a number of competing firms before it is privatised and/or deregulated. This is consistent with the general principle that regulatory reform should not just allow competition but it should foster it. For example, Hungary established a good foundation for its reform of the generation stage of the electricity industry by creating several new firms to compete against each other.<sup>39</sup>

50. Where markets that are good candidates for deregulation are characterised by significant economies of scale or scope, one cannot expect a large number of competitors. In such cases, the

appropriate way to create the right structural conditions for competition is to remove regulatory impediments to entry by foreign or other potential competitors.

51. In addition to creating the right horizontal structure, it is important to address other structural considerations.<sup>40</sup> For example, as recommended in the 2001 OECD *Council Recommendation Concerning Structural Separation in Regulated Industries*,<sup>41</sup> serious consideration should be given separating the regulated and non-regulated activities of any entity that will continue to be regulated. At a minimum, this means creating separate affiliates for the purposes of conducting regulated and non-regulated activities, and establishing a number of complementary measures to ensure that structural separation is in fact maintained. Structural separation is required to address potential discrimination by the regulated entity in favour of its unregulated affiliate, and to protect against anti-competitive cross subsidisation. Accounting and costing rules simply are not sufficient to ensure that costs are properly allocated between competitive and regulated activities. Although this may result in some loss of economies of scope, this cost probably is well worth incurring in order to achieve the benefits that competition has to offer in fragile, emerging markets.

### **iii) *Establishing the Right Rules***

52. The second critical component of any regulatory reform program is to establish the right rules. This includes adopting an effective domestic competition law, minimising the number of exemptions from that law and making a commitment to its vigorous enforcement. An effective competition law is critical to ensuring that the benefits of deregulation are not undermined by private anti-competitive conduct, and anything less than strong enforcement of that law by an independent competition law enforcement authority can leave significant scope for anti-competitive behaviour to flourish, thereby seriously impeding the development of competition. Where it is considered desirable to exempt a sector from the application of the domestic competition law, the rationale for such exemption should be revisited from time to time, the exemption should be no broader than necessary, and the sectoral regulation should contain provisions that effectively prevent and sanction anti-competitive behaviour.

53. Although some have suggested that there may be some merit in delaying the introduction of a domestic competition law until a country reaches a certain stage of economic development, this would simply give former state enterprises and other deregulated firms the opportunity to engage in a broad range of anti-competitive conduct that would seriously impair the development of competition and push back the point in time at which competition is able to deliver the benefits discussed above. To minimise the scope for this to occur, domestic competition laws should be enacted as early as possible in the market opening process and contain as few industry and other exemptions as possible. This is an important sequencing issue.

54. Where the regulated entity will continue to control network or bottleneck facilities to which third parties must have access in order to compete effectively, non-discriminatory access rules should be established and the access price should be based on the cost of providing the service. In most cases, to ensure a level playing field, this should be the long-run incremental costs associated with the provision of the services, although there may be situations in which other definitions of "cost" would be appropriate. In addition, there should be a procedure for resolving disputes between the regulated entity and third parties regarding issues related to access, and that procedure should ensure swift resolution of disputes. Measures also should be adopted to protect the confidentiality of any competitively sensitive information that the regulated entity might otherwise be in a position to learn about its rivals in upstream, downstream or adjacent markets. In addition, provision should be made to ensure that rivals have adequate notice of changes to essential facilities that may adversely impact upon their competitiveness.

55. Where prices in one part of an industry (for example, long distance telephone services) have artificially subsidised prices in another part of the industry (for example, local telephone services), it also is important to adjust prices in the subsidised part of the industry to reflect their underlying costs. In short, suppliers should recover the costs of each product through the prices charged for that product. This will have the salutary effect of eliminating a strong disincentive to efficient entry by new competitors in the market for the supply of the subsidised product.

56. A more general pricing-related issue is how prices will be established. Alternative approaches can be grouped into two broad categories, (i) cost of service or rate of return regulation, which permits the regulated entity to obtain a predetermined rate of return on its capital (as defined by its rate base), and (ii) performance based regulation, such as price caps, which set a maximum price that a regulated entity can charge, while permitting the entity to retain any profits that can be realised through cost reduction initiatives. The latter approach is designed to decouple costs and rates so that carriers have a strong incentive to minimise costs and have no incentive to inflate their costs or to shift them between regulated and unregulated activities. For this reason, it is now generally considered to be superior to cost of service or rate of return regulation. Revenue sharing is somewhat of a hybrid of rate of return regulation and performance based regulation, in that it permits the regulated entity to retain a share of the returns that exceed its allowed rate of return, thereby providing a greater incentive to pay greater attention to costs.

57. In addition, consideration also should be given to the extent to which a voluntary code of conduct can eliminate, reduce the need for, or reduce the scope of the regulatory regime. In most cases, an important component of such a code would be oversight by an independent party.

58. Another important aspect of the rules framework is to ensure that it is sufficiently flexible to accommodate changing market conditions. For example, if technological advances occur more quickly than anticipated, the timetable for the transition can be reduced. Conversely, if competition is not developing as quickly as hoped, it should be possible to adjust the transition process to take account of that fact.

59. Where the experience in other jurisdictions has demonstrated that all or part of an industry previously thought to be a natural monopoly is no longer a natural monopoly, a plan should be developed to deregulate the industry or the part of it that is no longer a natural monopoly. If some parts of the industry (for example the production of equipment) do not display any natural monopoly characteristics, consideration should be given to removing all artificial barriers to competition into, and otherwise deregulating those aspects of, the industry immediately, or in any event as quickly as possible.

60. In this regard, if immediate deregulation is unlikely to spawn effective competition within a short period of time, consideration should be given to placing a clear time limit, in the form of a sunset clause in the enabling legislation or regulations of the regime, on the transition period as a whole or on certain aspects of it. Where clear time limits are not appropriate, clear milestones should be established in the legislation or regulations for either the termination of the transition, the termination of certain aspects of the transition, or the obligatory (as opposed to the permissive) forbearance of the regulator when such milestones are reached. In this regard, consideration should be given to including "carrots and sticks" in the transitory regime, to provide incentives for the incumbent firm(s) to reach the milestones as quickly as possible.

61. The guiding principle that ought to be embraced in considering the appropriate temporal parameters of a transitory regime is to minimise the transition period. In some situations, impediments to competition can be removed virtually overnight, whereas in other situations it will be entirely appropriate to move more slowly in order to avoid undermining the paramount objective of achieving conditions that are conducive to the maintenance of long-term competition. In any event, reliance on market forces should

be maximised at every stage of the transition process. Restrictions or other limitations on competition should be removed as soon as they are no longer required. In short, every effort should be made to avoid "over managing" the transition to competition.

62. One of the most potentially serious shortcomings associated with leaving a regulator broad scope to "manage" a transition to competition is that the regulator has a basic conflict of interest: the sooner the transition is complete, the sooner the regulator and staff at the regulatory agency must look for new work. This is why it is desirable to have someone other than the regulator determine whether any tests that have been established for the termination of the transitory regime have been met.

63. Moreover, it should be recognized that most regulators do not have a competition mind set. Their natural instincts often are to carefully manage and control, rather than to leave things to uncertain market forces. This can colour the entire transition process, with the result that their "management" of the transition has the ironic result of delaying that transition. Indeed, regulation also winds up occupying a larger portion of field, at the expense of competition. In short, not enough of the industry gets deregulated on a timely basis. This is in part attributable to the fact that, regulators have a tendency not only to want to set the rules of the game, but to referee it in a fashion that all participants come out as winners.

64. The fundamental problem with such an approach is that it is antithetical to competition, which has winners and losers. In this sense, competition is not a "fair" process, at least not from the perspective of the losers. In short, the only "fairness" issue that is relevant in a transition to competition is to ensure that there is a level playing field for all competitors and potential competitors, in the sense that competitors of the deregulated entity (or entities) do not face anti-competitive vertical or horizontal restraints, including exclusionary or predatory behaviour by incumbent dominant firms, or discriminatory conditions with respect to access to essential bottleneck facilities, such as local telecommunications switching networks, electricity transmission grids or distribution networks, slots at airports, rail lines, automated teller networks and pipelines.

#### *iv) Creating the Right Institutions*

65. Regulatory institutions are extremely important for the success of efficient and effective regulation. It is not possible to anticipate all the problems and all the ways in which enterprises can act to exclude or otherwise harm their rivals, or evade the objectives of regulation. Thus, regulatory institutions need to be established. However, this alone is not sufficient. A commitment must be made to ensuring that these institutions are well-staffed and well-resourced. Moreover, serious consideration should be given to providing the institutions with budgetary independence, to insulate them from the types of real or perceived pressures that can exist when a regulator recognises or is made aware that a certain course of action may have adverse future budgetary implications.

66. In addition to budgetary independence, regulatory institutions need to be independent of the enterprises they regulate, and, in a broad range of circumstances, government, in both structural and practical terms. Their optimal relationship with government will vary according to the objectives of the regulatory regime and the local domestic realities. For example, if the key objective is to maximise competition and efficiency, there is a strong case to be made that complete independence from government would be appropriate. In this regard, it may be noted that responses prepared to a questionnaire circulated to participants in the recent Global Forum on Competition identified greater independence as the single step/measure that would likely lead to better promotion and attainment of the objectives of the respondents' domestic competition law and policy.<sup>42</sup>

67. However, if the enabling legislation requires the regulator to make decisions based on a broad "public interest" test, then some mechanism for obtaining government input might be desirable. Between

these two ends of the spectrum, a sober assessment must be made at the outset regarding the costs and benefits of complete independence versus varying degrees of government involvement in the regulatory process. For example, if, in addition to promoting competition and efficiency, other objectives of the regulatory regime were to ensure system stability, non discrimination and universal service, one would have to ask how preserving a role for political influence in the decision-making process would advance these goals and outweigh the adverse implications for certainty, predictability and transparency. In any event, the key is for the regulator not to be subject to political influence beyond that which may be contemplated by the legal instruments establishing the regulatory regime.

68. Regardless of the degree of independence given to the regulator, it is critical that laws and regulations creating the regulatory regime provide for a high degree of transparency in respect of the tests that will be used by the regulator in making its decisions, the factors that will be considered in ascertaining whether the tests have been met, the procedures that will be followed by the regulator and the procedures that should be followed by persons whose conduct might be the subject of investigation or who might want to make representations and be given an opportunity to be heard. The same is true of the mechanism by which the government or relevant minister might input into the decision-making process. In the absence of such transparency, public confidence in the regulatory regime may be compromised.

69. Furthermore, regulators must be given sufficient powers to obtain the information they require to make their decisions. This includes not only powers to compel oral testimony or representations, but also written submissions and paper or computer records or other documents.

70. Moreover, consideration must be given to how best to address the interface between the competition law enforcement agency and the sectoral regulator. In this regard, one particularly valuable and basic step that can be taken is to enshrine in either the domestic competition law or the enabling sectoral law a right of intervention by the competition authority in the sectoral regulator's proceedings. This would provide a legal mechanism to ensure that the competition agency can make written or oral submissions regarding key matters such as the industry structure (e.g., how to break up a former regulated entity into several competing firms, or how competition can be promoted through vertical separation); the formulation of industry-specific competition rules; how best to prevent cross-subsidisation between the regulated and unregulated activities of an entity; how to prevent against the anti-competitive use of sensitive customer information; and alternative approaches to issues such as stranded costs, universal access, deceptive marketing practices and price regulation.

71. To further reinforce the ability of the competition agency to be an effective advocate for change, serious consideration also should be given to giving the agency, or its head, a statutory mandate to engage in advocacy to promote competition throughout the economy and to help build a competition culture. In any event, a genuine effort should be made to include senior representatives of the competition agency at an early stage of the regulatory reform process within various branches of government, including in any interdepartmental meetings within government at which issues related to regulatory reform may be discussed.

72. Also, it is important to minimise duplication and overlap as between the regulators. This could be addressed in the sectoral legislation, for example, by making it clear that nothing in the legislation affects the operation of the domestic competition law. Alternatively, the legislation could state specifically that nothing in it precludes the operation of certain sections of the competition law (for example the sections dealing with abuse of dominance or hard core cartels), while leaving dual jurisdiction over matters such as vertical mergers, deceptive marketing practices or price discrimination. Another way that regulators have attempted to minimise duplication and overlap, is through an informal protocol which sets out in a clear and transparent way who will assume responsibility for what. An advantage of this approach is that it is more flexible and can be adapted to reflect changes in resources or evolving areas of expertise of the

competition agency and sectoral regulator. An informal protocol also can be used to provide an important framework for co-operation between the competition agency and the sectoral regulator.

73. Broadly speaking, it typically makes sense to give the competition agency responsibility to protect the public from anti-competitive conduct and to review at least horizontal mergers while giving the sectoral regulator responsibility to control pricing by natural monopolists or former monopolists that are still dominant. However, there are some grey areas, such as vertical mergers, price discrimination and the terms of access to essential facilities. While competition agencies have more experience dealing with abuse of dominant behaviour, sectoral regulators ordinarily are better suited to reviewing the large volume of cost data that can be required to make an informed decision in discrimination or access cases. They are also better suited to monitoring the industry to ensure compliance with regulatory decisions. Nevertheless, if regulation over the terms of access is only required for a short transitional period, it may make sense to give this responsibility to the competition regulator.

74. Finally, in thinking about the optimal design of regulatory agencies, some thought should be given to the relative merits of creating several specialised single sector regulators versus combining responsibility for two or more sectors (e.g., telecom and broadcast; or gas and electricity) under a single multi-sectoral regulator.<sup>43</sup> Clearly, a key trade-off to be evaluated in this analysis is the higher up-front cost of establishing several regulators versus the ongoing efficiency losses that may be incurred by forcing affected parties to deal with a larger, more cumbersome and less nimble multi-sectoral regulator. Additional considerations that should be factored into this assessment include the economies of scope that might be realised by creating a multi-sectoral regulator, the reduced probability of regulatory capture that would be associated with a multi-sectoral regulator, the availability of sufficient skilled people in the country to spread across several agencies, and the greater expertise and specialisation that would be associated with establishing specialist agencies.

## **5. Building Capacity to Pursue a Strong Competition Policy**

75. Establishing a competition and efficiency driven economic policy involves a three pronged strategy: (i) building a competition culture among key constituencies in the economy; (ii) eliminating or reducing the competition distorting effects of all regulations that impact upon markets; and (iii) creating an effective competition law enforcement regime to address private anticompetitive conduct.

76. In developing this strategy, an extremely helpful first step is to conduct an assessment of the country's most basic needs and priorities in relation to each of these areas. This will also help to prepare a coherent and mutually reinforcing strategy across each of the three areas. Many of the various factors that should be considered in conducting the needs assessment are identified in the following summary of key areas that should be addressed in any strategy for establishing and cultivating a competition and efficiency driven economic policy.

### ***i) Building a Competition Culture***

77. Even in developing countries that have already embraced a competition and efficiency driven approach to economic and regulatory policy-making, there is clearly a long way to go in building a competition culture.<sup>44</sup>

78. The exercise of building a competition culture should begin with an evaluation of the level of understanding of the benefits of competition, its strong links to other policy areas, and the level of commitment to competition among key constituencies in the country. In most developing countries, there is a poor understanding of the benefits of competition and the links between competition policy and other basic pillars of economic development.



79. Regarding the benefits of competition, policy-makers and the intellectual elite often make the mistake of focusing solely on concepts such as enhanced efficiency, aggregate welfare or average living standards, which are abstract concepts to the average business person, consumer or press reporter. To build support for competition among these constituencies, it is necessary to address things that are important to them in their everyday lives, such as the fact that competition and efficient regulatory reform generally leads to:

- dramatic reductions in the prices of products at all levels of the production chain including the final consumer – examples can be provided of basic consumer commodities (e.g., milk, rice, flour, salt, gasoline, beer, electricity, long distance telephone services, airline travel) and business inputs (e.g., trucking, rail, telecommunications, energy, financial services, office supplies, machinery, computer products, agricultural seeds, farm equipment)
- the elimination of buying cartels that depress prices paid to subsistence farmers and others for their products
- substantially improved service – (e.g., quicker turn-around times for new orders, requests for repairs and warranty claims; longer banking or shopping hours; better quality service in dealing with former state enterprises or monopolists)
- new products (consider giving the example of the explosion of new telephone products in OECD countries as reform of the telecom sector has spread over the last 20 years)
- greater product variety (e.g., increased availability of products manufactured in other parts of the country or abroad – this can be particularly significant for local businesses sourcing inputs for their products)
- a dramatic increase of innovative entrepreneurial activity by SMEs that are able to compete on a level playing field based on economic merit

80. Regarding the links between competition policy and other key pillars of economic development, these include:

- Governance -A strong political and institutional commitment to a transparent competition and efficiency driven economic policy makes it much more difficult for elected and non-elected officials to engage in corrupt behaviour in support of policies or measures that benefit private interests at the expense of competition and efficiency.
- Privatisation – As previously noted, merely substituting public ownership for private ownership will accomplish very little, if anything, unless former SOEs are broken up into several competitive pieces and barriers to entry and expansion in the relevant market(s) are eliminated or substantially reduced. Where the presence of economies of scale or scope weigh in favour of keeping an SOE intact, policies aimed at eliminating barriers to entry and expansion are absolutely critical.
- Deregulation/regulatory reform – As emphasised throughout this paper, deregulation and regulatory reform will fall far short of their potential, and perhaps fail altogether, unless they are guided by the basic principle of maximising competition and efficiency except in cases of market failure or where other legitimate public interest objectives give rise to a need for continued or new regulation. Even in such cases, every effort ought to be made to minimise the competition distorting impact on competition and efficiency.
- Trade liberalisation - Competition was included in the Doha Ministerial Declaration precisely because there are strong links between competition and trade. To the extent that trade liberalisation typically results in lower prices and increased product variety, consumers and business purchasers will be unambiguously better off. While some domestic businesses may be forced to exit their markets in the face of intense competition from abroad, other businesses will expand as domestic comparative advantage is exploited in foreign markets and leads to increased exports. Also, businesses can be expected to expand as they become

more competitive in domestic markets that already are subject to foreign competition. Moreover, short-to mid-term disruptions caused by competition-induced local business failures can be minimized or at least lessened significantly by transitional policies designed to foster domestic competition and efficiency before the doors are swung fully open to foreign competitors.

- The attraction of private risk capital – Deregulation and other market liberalisation initiatives inevitably lead to substantial private sector investment in new and existing enterprises from domestic and foreign sources.
- The creation of a strong entrepreneurial class of SMEs - Fuelled by expanded sources of private financing, and unrestrained by unnecessary government impediments to competition and private anti-competitive conduct, the growth of SMEs can be expected to follow the European experience, where SMEs had accounted for almost all net job creation in the years leading up to the OECD's 1997 Report on Regulatory Reform.<sup>45</sup>
- Sectoral policies – The experience with pro-competitive regulatory reform over the last two decades in key sectors such as telecoms, financial services, energy, transportation, agriculture and health demonstrates the strong linkages between competition and these policies.
- Innovation - Once again, as discussed previously, experience has unequivocally established that pro-competitive regulatory reform has been followed by an explosion of new products and processes, and an increase in overall innovation activity.
- Education - Around the developing world poor families are forced to take their children out of school to help pay for the family's basic needs. As the prices of families' basic basket of goods decreases with competition, the pressures to take children out of school at an early age are significantly alleviated.
- Poverty alleviation – All of the foregoing contributes to alleviating the overall goal of poverty alleviation.

81. Experience strongly suggests that the building of a competition culture within a developing or transitioning country is likely to be slow and tenuous at best unless key stakeholders understand the above-noted benefits of competition, are aware of at least some of the aforementioned links between competition policy and other important policy areas, and believe that greater competition in the economy will in fact improve their own well-being as well as the well being of others in their constituency. In this regard, the key stakeholders include politicians, public servants, the business and legal communities, sectoral and other regulators, academics and the press. If any of these stakeholders does not understand the benefits that typically are associated with greater competition, or if they are sceptical about the prospects for those benefits to materialize within an acceptable timeframe, the process of transitioning to more competitive markets may be difficult and characterised by regressive periods along the way.

82. Accordingly, it is important to adopt a comprehensive strategy for building support and enthusiasm for competition, as well as confidence in competition institutions, among these stakeholders, as well as among the general public. This is where the press, non-governmental organisations and educational institutions can be particularly helpful. By sensitising journalists, professors and students to the benefits of competition and the various ways in which competition can be distorted, advocates of competition can cultivate important allies who are capable of galvanizing public opinion in support of pro-competitive reform in various sectors. In turn, public support for greater competition can make it much more difficult for politicians to abandon, undermine or resist market reform efforts.

83. These “bottom up” efforts at building broad public support ought to be complemented by efforts directed towards other important stakeholders such as the business and legal communities. Unfortunately, it is often assumed that the business community is likely to resist pro-competitive reform. This may be true for the elite representatives of those entrenched entities currently benefiting from competition-distorting regulations. However, the SME community, exporters, importers and, depending on the circumstances,

MNEs can be strategically important allies. Therefore, it is important to establish contacts with these groups and to work with them to increase support for pro-competitive reform.

84. Of course, the overall strategy also must include a top-down component, directed towards cultivating the enthusiasm of elected and unelected government officials for pro-competitive reform.

*ii) Eliminating or Reducing the Competition Distorting Effects of all Regulations that Impact upon Markets*

85. Even in the most advanced industrialized countries, institutional restraints are likely continue to have a far greater aggregate distorting impact on competition than all private restraints combined. This is in part because distortions of competition brought about by laws, regulations, licensing regimes, administrative measures, other institutional restraints and “red tape” typically exist in markets accounting for a substantial proportion of overall economic activity in the economy, including basic infrastructure industries such as transportation (air, rail, truck, shipping), telecommunications, financial services, energy as well as other key industries such as agriculture, health, and many professional services. Accordingly, any serious attempt to establish a competition and efficiency driven economic policy should begin with a review of the extent to which competition currently is being distorted by laws, regulations, supply management schemes, licensing regimes, procurement policies, investment restrictions, product standards and other institutional measures or practices. The key initial focus of this exercise should be to identify those sectors that have the greatest distorting impact on competition and in respect of which there is the greatest potential for eliminating or reducing the adverse impact of the institutional restrictions on competition.

86. In considering how to approach this task, it may be helpful to refer to the OECD’s work in the regulatory reform area, much of which is available on the OECD’s website.<sup>46</sup> Readers may wish to pay particular interest to the previously mentioned 1997 Report on Regulatory Reform.<sup>47</sup> Additional sources that should be consulted are the previously mentioned APEC Competition Principles<sup>48</sup> and the PECC Competition Principles.<sup>49</sup>

87. The more important areas of focus for capacity building efforts in this regard include:

- Helping to build public and political confidence in market reform initiatives
- Helping key decision-makers to understand the linkages between competition policy and the aforementioned policy areas
- Promoting, within government and other regulatory policy-making circles, a commitment to adopting a competition and efficiency driven approach to all domestic economic and regulatory policy making
- Helping to bring this approach to the review of existing and potential future regulations, i.e., by identifying any potential competition distorting implications of such regulations and helping to develop alternatives which eliminate or at least minimise their potential adverse impact upon competition and efficiency
- Training politicians, heads of agencies, senior civil servants, legislative drafters, as well as more junior political, agency and government staff members, to identify how competition can be distorted by government/regulatory action and how to minimise such outcomes

- Assessing timing issues and the optimal policy sequencing for the various stages of the establishment of a competition and efficiency driven approach to all economic policy-making
- Redesigning regulatory regimes and agencies
- Assisting regulatory agencies and government departments to establish and maintain helpful linkages with other domestic, foreign and international institutions

*iii) Creating an Effective Competition Law Enforcement Regime to Address Private Anticompetitive Conduct*

88. The third essential prong of any strategy for building a strong competition policy is to establish an effective competition law regime to ensure that private anti-competitive restraints on competition do not eliminate or reduce the benefits of pro-competitive market reform efforts. In approaching this element of the strategy, it can be particularly helpful to begin by conducting an assessment of the strengths and weaknesses of any competition law regime that may exist. If no such regime exists, the assessment should focus on what would be required to establish an effective regime.

89. In addition to ensuring that the benefits of liberalisation and market reform are not undermined or completely lost due to the establishment of private anticompetitive restraints in the place of former institutional distortions of competition, an effective competition law regime is critical to encouraging competition and preventing anticompetitive conduct in new industries and other markets that may not be directly affected by liberalisation or market reform initiatives.

90. Although some have argued that the establishment of an effective competition law regime is unnecessary where barriers to external and internal trade are eliminated,<sup>50</sup> this view fails to recognise that many markets are local in nature, e.g., due to transportation costs, the perishable or fragile nature of particular products, local preferences or other factors. Moreover, liberalisation initiatives alone cannot address exclusionary conduct by local dominant firms, mergers to create monopolies, or anticompetitive behaviour by international cartels.

91. The more important areas on which an assessment of a competition law regime should focus include:

- the effectiveness of the provisions in the domestic competition law
- the paramount objectives of that law – is the law being used to advance non-competition objectives, and if so, are there better instruments for advancing those objectives?<sup>51</sup>
- the skills and training of staff in the enforcement agency, prosecutors, litigators and judges
- the level of political support for the law
- the level of funding for the agency
- the extent of independence from political or other influence enjoyed by the enforcement agency
- the effectiveness of the agency's advocacy competition policy advocacy efforts<sup>52</sup>

- the effectiveness of mechanisms, protocols or practices for reducing duplication and uncertainty in respect of the jurisdiction of the agency and sectoral regulators
- the strength of the agency's commitment to vigorous enforcement
- the degree of transparency of the agency's policies, practices and procedures
- the degree of predictability and certainty associated with agency decisions, practise, policies and procedures
- the extent of due process afforded to persons whose conduct may be subject to challenge under the competition law
- the agency's record in maintaining the confidentiality of information provided by business persons
- the timeliness of agency decision-making
- the efficacy of the agency's case screening criteria, investigative techniques, case-building methods, communications and compliance tools and alternative case resolution techniques
- the extent to which the agency makes use of computerisation to improve its efficiency
- the extent of co-ordination and co-operation between the agency and other competition authorities

*iv) Cooperation*

92. Co-operation with enforcement authorities in other jurisdictions can be a very helpful mechanism for expediting the time it takes for an enforcement agency to move up the learning curve. In this regard, there are a broad range of potential modalities. These include:

- case specific co-operation pursuant to bi-lateral co-operation agreements
- informal and ad hoc high level or staff level meetings to discuss general analytical approaches, policies, practices or procedures
- regular bilateral meetings with specific countries
- regional plurilateral meetings
- staff exchanges and secondments
- participation in international conferences or meetings

93. The OECD has a long history with facilitating co-operation between competition law enforcement authorities. For many years, this co-operation was limited to the authorities of OECD Member countries. The principal vehicle for that co-operation was and continues to be the regular meetings of the Competition Committee. During these meetings, high-level officials from different countries share their experiences, seek advice, and receive feedback and recommendations. Sometimes, the "roundtable" and

other exchanges in the Committee have led to the identification of voluntary “best practices” for dealing with a particular issue.

94. In recent years, the OECD in general, and the Competition Division in particular, have increasingly reached out to non-Members. Indeed, the Competition Committee now has six regular non-Member Observers,<sup>53</sup> and meetings of the OECD Global Forum on Competition – organised under the auspices of the Centre for Co-operation with Non-Members (“CCNM”) – each have included representatives from about 25 other countries. Moreover, non-Members have made use of the Committee’s *Framework for Notification of Transnational Mergers*, and have been invited to associate themselves with the OECD’s Recommendation concerning hard core cartel conduct.

95. In 1967, the OECD issued the first of a series of Recommendations on voluntary co-operation as a means of reducing conflict and promoting mutual assistance in competition law enforcement. The current version is the 1995 Recommendation concerning *Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade*.<sup>54</sup> The 1998 Recommendation on hard core cartels expands on some of the 1995 Recommendation’s provisions in the context of cartel investigations (and addresses the kind of legislation that is important for individual jurisdiction’s enforcement activities and international co-operation).<sup>55</sup>

96. Although the most well known benefit of the 1995 Recommendation – for both Members and non-Members – has been its availability as a model for bilateral co-operation agreements,<sup>56</sup> the Recommendation is far more than a model. It is, in fact, an operational international agreement on voluntary co-operation that may be invoked by any Member country and actually provides the basis for most OECD Members’ existing co-operation. Most OECD countries have no bilateral co-operation agreements, and few have more than one or two. Thus, co-operation among most OECD Members is based solely on the Recommendation, under which any OECD Member may request co-operation by any other.

97. A detailed summary of the provisions of the 1995 Recommendation is beyond the scope of this note. For the present purposes, it suffices to state that Part A of the document, which deals with notification, the exchange of information and co-ordination of action, articulates three general principles:

- when a Member country undertakes under its competition laws an investigation or proceeding that may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations;
- where two or more Member countries proceed against an anticompetitive practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;
- through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with anticompetitive practices in international trade -- in this connection, the Recommendation specifies certain types of co-operation, including investigatory assistance.

98. Part B of the Recommendation contains various provisions designed to encourage consultation and conciliation in various circumstances, including by giving full and sympathetic consideration to the views expressed by the other Member country.

99. In practice, OECD Member countries regularly notify each other when their investigations may affect each other's important interests, and they sometimes ask for and provide assistance subject to their applicable laws and important interests, including resource limits. For additional information regarding how this co-operation operates, readers are referred to a wealth of material that can be found on the websites of Competition Division and the OECD Global Forum on Competition. In this regard, readers may wish to take particular note of the materials prepared by the Secretariat on co-operation in cartel and merger cases for the October 2001 and February 2002 meetings of the OECD Global Forum.<sup>57</sup>

v) *Peer Review*

100. Peer review can be another very helpful tool for helping to build a competition culture in developing and transitioning economies. Indeed, the OECD's Competition Division has found that competition enforcement agencies are enthusiastic supporters of peer reviews, in part because they provide an opportunity to obtain valuable input from their peers regarding their practices, policies and procedures, and in part because all or parts of the final report can be used to effect change back in their home jurisdiction.

101. Rigorous peer reviews have been a feature of the Competition Committee's activities for several years. These reviews are based on a comprehensive report by the OECD Secretariat on a Member country's competition regime, which then serves as the basis for an examination by other Members and a subsequent exchange of views within the Committee. The report includes specific recommendations to strengthen the competition law and policy of the country under review.

102. At the recent Global Forum on Competition, the first such peer review of the competition law and policy of a non-OECD country (South Africa) was conducted. The review was marked by intense interest on the part of participants and the large number and diversity of questions. The discussion at the meeting reflected that it was generally considered to have been a success. This first meeting of the Latin American Competition Forum will feature, tomorrow, the second peer review of the competition law and policy of a non-OECD country, Chile. We hope that each future annual meeting of the Latin American Competition Forum will include the peer review of another Latin American country.

vi) *Paragraph 24 of the Doha Declaration*

103. A discussion of competition culture building and technical assistance would not be complete without noting that paragraph 24 of the Doha Declaration explicitly describes a type of assistance and capacity building that is different from the reinforcement of competition institutions that is discussed above and in paragraph 25 of the Doha Declaration. The unique type of technical assistance and capacity building described in paragraph 24 relates to helping developing and least developed countries "to better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development". The upcoming Joint Global Forum on Trade and Competition on 15-16 May 2003 will be the principal event held under the auspices of the OECD to address this type of capacity building need. While it was not possible to invite representatives from each country in the world to this event, the written materials will be available on our website soon after the event. We also intend to circulate widely a summary of the proceedings. This initiative is intended to complement and build upon efforts in this area by UNCTAD and the WTO's Working Group on the Interaction between Trade and Competition Policy.

## CONCLUSION

104. There is a growing body of empirical evidence that demonstrates that a competition and efficiency driven economic policy can be expected to fuel increases in productivity, employment, international competitiveness, innovation, overall economic growth and average living standards.

105. To realise the full potential of such a policy, it ought to be guided by the general principle that competition should be stimulated and maximised except in cases of market failure or where other legitimate public interest objectives give rise to a need for continued or even new regulation. When presented with situations falling into one of these types of exceptional cases, the regulation ought to be designed in an efficient way that provides incentives to reduce costs and innovate, and that stimulates competition in respect of activities within the sector which do not need to be regulated, or which only require partial regulation.

106. By embracing a broad and comprehensive framework designed to stimulate competition and efficiency throughout the economy, Latin American countries can cultivate a dynamic process capable of freeing up tremendous energy, creativity and innovation in all areas of economic activity. By shifting away from restrictive policies that attempt to design market outcomes, and by instead fostering a competitive process based on economic merit and limited only by the bounds of human ingenuity, the foundation can be laid for the growth of an entrepreneurial driven SME sector, greater investment, increased international competitiveness, reduced inflation and other economic rewards. Moreover, improved governance can be achieved, in no small part because a strong competition policy helps to achieve more inclusive participation in the economy and helps to address non-transparent, discriminatory and other policies or conditions that help to facilitate corrupt practices. In turn, this will help to reinforce efforts to cultivate stronger democratic institutions in the region.

107. In the current delicate political and economic environment in Latin America, which has been characterised by some setbacks in the competition policy area in a number of countries, it is essential for those among us who have faith in a competition and efficiency driven economic policy to take active steps to help cultivate a renewed commitment to market reform. This should include addressing misunderstandings about the likely results of pro-competitive reform and the true causes of problems that have occurred at home or abroad.

108. This paper describes a number of steps that should be taken to implement a competition and efficiency driven policy. It also offers a number of suggestions for striking the right balance between competition and regulation where a sector or market cannot support full deregulation and liberalisation. After making a number of general suggestions, the paper offers some specific proposals for getting the right market structure, creating the right rules and establishing the right institutions. These suggestions can help significantly to avoid so called “failures” of market or regulatory reform initiatives that have occurred in Latin America or elsewhere.

109. The paper then describes a three prong strategy for building capacity to pursue a competition and efficiency driven policy. This strategy involves: : (i) building a competition culture among key constituencies in the economy; (ii) eliminating or minimising the competition distorting effects of all regulations that impact upon markets; and (iii) creating an effective competition law enforcement regime to address private anticompetitive conduct. Given the OECD’s long history as a pioneer in fostering



cooperation between enforcement agencies in different jurisdictions and in conducting peer review exercises of OECD countries, and more recently non-OECD countries, these topics also have been addressed, together with the capacity building provisions in the Doha Development Declaration.

## NOTES

- <sup>1</sup> OECD, *Report on Regulatory Reform* (Paris: 1997). In May 1997 OECD Ministers welcomed this Report and agreed to work to implement its recommendations in their countries. The key recommendations that evolved from this report are attached at Appendix 1 hereto. Unless otherwise indicated, subsequent references to this report are to Volume II.
- <sup>2</sup> APEC, *Principles to Enhance Competition and Regulatory Reform* (1999). (See Appendix 2 hereto.) These principles were specifically endorsed in the 1999 APEC Leaders' Declaration. (See <http://www.apecsec.org.sg/virtualib/econlead/nz.html>.)
- <sup>3</sup> See generally, Gal, M. and Trebilcock, M., "Traditional Natural Monopolies in Transition: The Comparative Roles of Competition Policy and Economic Regulation in Preventing the Leveraging of Monopoly Power in Network Industries", in Canadian Bar Association, *Competition Law for the 21st Century*, (1997) at 204.
- <sup>4</sup> See generally, OECD, *supra*, note 1, Volume I. The findings of various studies are summarised at Volume II, p. 252.
- <sup>5</sup> *The OECD Report on Regulatory Reform, Summary* (June 1997), at 6.
- <sup>6</sup> Crandall, R. and Ellig, J., *Economic Deregulation and Customer Choice: Lessons for the Electricity Industry*, George Mason University, Center for Market Processes, (1997), at 2-3.
- <sup>7</sup> *Ibid.*
- <sup>8</sup> The relevant parts of this study are reproduced in OECD *Economic Outlook*, [2002/2] (No.72, December).
- <sup>9</sup> *Ibid.*, at 157-158.
- <sup>10</sup> *Ibid.*
- <sup>11</sup> *Ibid.* at 161.
- <sup>12</sup> OECD, *supra*, note 1, at 10.
- <sup>13</sup> M. Dutz and M. Vagliasindi, "Competition Policy Implementation in Transition Economies: An Empirical Assessment". Paper submitted to the OECD's Global Forum on Competition, (CCNM/GF/COMP/WD(2002)13 at 9), 14-15 February, 2002.
- <sup>14</sup> *Ibid.*
- <sup>15</sup> Cited in M. Dutz, "Competition Policy Issues in Developing and Transition Markets", presentation submitted to the OECD's Global Forum on Competition (CCNM/GF/COMP/WD (2002)35 at 4).
- <sup>16</sup> B. Wellenius, *Extending Telecommunications Service to Rural Areas- The Chilean Experience*" (The World Bank Group, Public Policies for the Private Sector, Note No. 105, Feb. 1997).
- <sup>17</sup> *Ibid.*

18 S. Wallensten, “An Empirical Analysis of Competition, Privatization and Regulation in  
Telecommunications Markets in Africa and Latin America”, (The World Bank Policy Research Working  
Paper 2136 – June 1999).

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*, at 2.

22 S. Evenett, M. Levenstein and V. Suslow, “International Cartel Enforcement: Lessons from the 1990s”,  
paper presented to the OECD’s February 2002 Global Forum on Competition,  
(CCNM/GF/COMP/WD(2002)25, at 6); and M. Levenstein and V. Suslow, “Private International Cartels  
and Their Effect on Developing Countries” Background Paper for the World Bank’s World Development  
Report 2001, at 12. See also S. Evenett, “Private International Cartels and Developing Economies”,  
presentation to the OECD’s February 2002 Global Forum on Competition,  
(CCNM/GF/COMP/WD(2002)34.

23 G. Nicoletti, “The Economy-wide Effects of Product Market Policies”, paper presented at the OECD-  
World Bank Services Experts Meeting, OECD Headquarters, Paris, 4-5 March 2002, at paragraph 18.

24 *Supra*, note 1, at 253.

25 *Supra*, note 2, Preamble.

26 *Supra*, note 2.

27 Pacific Economic Cooperation Council (PECC), *Principles for Guiding the Development of a  
Competition-Driven Policy Framework for APEC Economies* (Auckland: 1999)

28 *Ibid.*, at 1. In the interest of full disclosure, the author was a member of the Core Working Group of  
PECC’s Competition Principles Project. (It may be noted that a number of Latin Americans also  
contributed to this project.)

29 *Ibid.*, at 2.

30 *Ibid.*, at 1, 5 and 17.

31 *Ibid.*, at 5.

32 See Appendix 2 (Recommendation 5); as well as the OECD’s Regulatory Reform Report, *supra*, note 1, at  
14-15 and 270-271. See also pp. 262-264, dealing with how to address industries in which there are both  
monopoly and potentially competitive activities.

33 *Op. cit.*, at 6 and 10.

34 *Ibid.*, at 18.

35 See generally, A. Heimler, “Competition Oriented Reform and Antitrust Authority, Are There General  
Principles to Follow?” paper presented to the Global Forum on Competition  
(CCNM/GF/COMP/WD(2003)41 at 5-7.

36 See Kaplow, L., "The Value of Accuracy in Adjudication" (1994), 23 *Journal of Legal Studies*, 307-402; and Posner, R., "An Economic Approach to Legal Procedure and Judicial Administration" (1973), 2 *Journal of Legal Studies*, at 399.

37 For example, in *Canada (Director of Investigation & Research) v. Air Canada* (1989), 27 C.P.R. (3d) 476, the Canadian Competition Tribunal was required to consider a request for a Consent Order by the Competition Commissioner which, among other things, sought to remove the "bias" that existed in the display of information to travel agents on the merging parties' computer reservation system. This bias tended to advantage the merging parties' airline affiliates over other "participating" airlines, when travel agents sought to make bookings on flights. Ultimately, the Tribunal endorsed the Consent Order requested by the Commissioner.

38 OECD, *supra*, note 5, at 1. Note that PECC's Competition Principles document emphasises that "[a]ctive and visible 'competition advocacy' at [the level of APEC Economic Leaders and relevant Ministers] is a prerequisite for bringing a competition dimension to bear on all policy-making that impacts on the efficient functioning of globalizing markets." Among other things, this would "serve as an important signal that incumbents benefiting from the protections of the old system cannot be assured of the *status quo*". *Supra*, note 27, at 23.

39 OECD, *supra*, note 1, at 254.

40 See OECD, *supra*, note 1, at 253-254.

41 This recommendation is available at [www.oecd.org/pdf/M00017000/M00017015.pdf](http://www.oecd.org/pdf/M00017000/M00017015.pdf), and also can be accessed from the Competition Division's website [www.oecd.org/competition](http://www.oecd.org/competition). See also the OECD's February 2002 Policy Brief entitled "Restructuring Public Utilities for Competition".

42 See OECD, *The Objectives of Competition Law and Policy*, CCNM/GF/COMP(2003)3, at 5, 8 and 12.

43 In considering how to design a competition agency, readers may wish to review the OECD Secretariat note entitled Optimal Design of a Competition Agency, that was prepared for the recent Global Forum on Competition (CCNM/GF/COMP(2003)2). This document can be obtained at [www.oecd.org/pdf/M00038000/M00038298.pdf](http://www.oecd.org/pdf/M00038000/M00038298.pdf), or through the Competition Division's website [www.oecd.org/competition](http://www.oecd.org/competition).

44 See for example, K.M. Vautier, "The Competition Agenda for APEC, Regional Trading Arrangements and the WTO", paper presented to the PECC Trade Forum Meeting, 17-19 May 2002, Lima Peru, at 7.

45 *Supra*, note 5, at 6. The report also states: "Reform is particularly important for small and medium-sized enterprises (SMEs), which account for between 40 and 80 percent of employment in OECD economies (depending on the country); provide a large share of new jobs; and are the source of much technological change and innovation". *Ibid.* The report proceeds to note: "In Australia, small businesses accounted for almost all of 1.2 million net new jobs in the decade to 1994-95, though accounting for less than half of total employment". *Ibid.*

46 <http://www.oecd.org/competition>

47 *Supra*, note 1.

48 Appendix 1. See in particular principles 5,6,7,8,9 and 10.

49 *Supra*, note 27 .

50 In the past, Hong Kong and Singapore have advanced this view. However, it appears that both are now seriously considering adopting a competition law. It may be noted that during the session on competition

policy in small economies at the recent OECD Global Forum on Competition, there appeared to be a consensus that even small economies should have a competition law, regardless of their size, although it was recognized that some form of regional competition law might be an appropriate substitute for a domestic law where a group of small countries do not have sufficient economic or human resources to establish their own domestic regimes. No one suggested that it might not be necessary to have some type of competition law to address private restraints.

51 In preparing for the session on objectives of competition law that was held at the recent Global Forum on Competition, the OECD Secretariat sent participating economies a questionnaire. One of the principal themes emerging from the responses to the questionnaire is that there appears to be a shift away from the use of competition laws to promote what might be characterised as broad public interest objectives, such as 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. There seemed to be a general consensus that the “core” objectives of competition law and policy are promoting and protecting the competitive process (as opposed to specific competitors), and attaining greater economic efficiency. See OECD, *The Objectives of Competition Law and Policy*, CCNM/GF/COMP(2003)3, at 3.

52 A second questionnaire that was sent to participants in the recent Global Forum on Competition addressed the issue of the optimal design of a competition law enforcement agency within the broader government apparatus. The responses to that questionnaire revealed that agencies not having competition advocacy as one of their tasks perceive their influence on the government as low or non-existent. See OECD, *Optimal Design of a Competition Agency*, CCNM/GF/COMP(2003)3, at 7.

53 Argentina, Brazil, Israel, Lithuania, Russian Federation and Chinese Taipei.

54 [(C)95(130)]. Available at: <http://www.oecd.org/competition>.

55 Available on the OECD’s website. See *ibid.*.

56 The co-operation among the three Baltic countries -- Estonia, Latvia, and Lithuania -- is modelled on the OECD Recommendation.

57 *Merger Enforcement and International Co-operation*, CCNM/GF/COMP(2001)1 and CCNM/GF/COMP/WD(2001)1; *Information Sharing in Cartel Investigations*, CCNM/GF/COMP(2002)1; *Information Sharing in Cartel Cases –Suggested Issues for Discussion and Background Material*, CCNM/GF/COMP(2002)2; *International Co-operation in Mergers – Summary of Responses to a Questionnaire to Invitees and Suggested Issues for Discussion*, CCNM/GF/COMP(2002)6. Available at: <http://www.oecd.org/competition>

## Appendix 1

### APEC Principles to Enhance Competition and Regulatory Reform

#### *Open and Competitive Markets are the Key Drivers of Economic Efficiency and Consumer Welfare*

Recognising the strategic importance of developing competition principles to support the strengthening of markets to ensure and sustain growth in the region and that these principles provide a framework that links all aspects of economic policy that affect the functioning of markets;

Recognising that these principles are non-binding and will be implemented by each member economy voluntarily, consistent with the way APEC operates;

Recognising that the adoption of these principles for policy development needs to take account of, and encompass the diverse circumstances of economies in the region and the different priorities that arise from these circumstances;

Recognising that member economies will have flexibility to take into account their diverse circumstances in implementing this framework;

Recognising that policy and regulation in APEC economies may properly have objectives other than promoting competition;

Recognising that exemptions and exceptions from a competition driven regulatory framework may be necessary and that these will be implemented in a way that minimises economic distortions, giving consideration to this framework;

Recognising that an improved competitive environment is beneficial to small and medium sized enterprises, and that extensive consultation has occurred with the business community in developing these principles; and

Drawing upon relevant inputs from various APEC fora and the Pacific Economic Cooperation Council's "*Principles for Guiding the Development of a Competition-Driven Policy Framework for APEC Economies*";

APEC endorses the following principles:

#### **Non Discrimination**

- (i) Application of competition and regulatory principles in a manner that does not discriminate between or among economic entities in like circumstances, whether these entities are foreign or domestic.

#### **Comprehensiveness**

- (ii) Broad application of competition and regulatory principles to economic activity including goods and services, and private and public business activities.
- (iii) The recognition of the competition dimension of policy development and reform which affects the efficient functioning of markets.

- (iv) The protection of the competitive process and the creation and maintenance of an environment for free and fair competition.
- (v) The recognition that competitive markets require a good overall legal framework, clear property rights, and non discriminatory, efficient and effective enforcement.

### **Transparency**

- (vi) Transparency in policies and rules, and their implementation.

### **Accountability**

- (vii) Clear responsibility within domestic administrations for the implementation of the competition and efficiency dimension in the development of policies and rules, and their administration.

### **Implementation**

To achieve this\*, APEC Member Economies will make efforts to:

1. Identify and/or review regulations and measures that impede the ability and opportunity of businesses (including SMEs) to compete on the basis of efficiency and innovation.
2. Ensure that measures to achieve desired objectives are adopted and/or maintained with the minimum distortion to competition.
3. Address anti-competitive behaviour by implementing competition policy to protect the competitive process.
4. Consider issues of timing and sequencing involved in introducing competition mechanisms and reform measures, taking into account the circumstances of individual economies.
5. Take practical steps to:
  - Promote consistent application of policies and rules;
  - Eliminate unnecessary rules and regulatory procedures; and
  - Improve the transparency of policy objectives and the way rules are administered.
6. Foster confidence and build capability in the application of competition and regulatory policy. This will be achieved, inter alia, by:
  - Promoting advocacy of competition policy and regulatory reform;
  - Building expertise in competition and regulatory authorities, the courts and the private sector; and
  - Adequately resourcing regulatory institutions, including competition institutions.
7. Provide economic and technical co-operation and assistance and build capability in developing economies by better utilising the accumulated APEC knowledge and expertise on competition policy and regulatory reform, including by developing closer links with non APEC sources of technical expertise.
8. Build on existing efforts in APEC to help specify approaches to regulatory reform and ensure that such approaches are consistent with these principles.
9. Develop programmes, including capacity building and technical assistance, to support the voluntary implementation of the approaches to regulatory reform developed by relevant APEC fora.

10. Develop effective means of co-operation between APEC economy regulatory agencies, including competition authorities, and ensure that these are adequately resourced.

\* Recognising that efforts will seek to avoid the duplication of work of other fora, as appropriate.



## Appendix 2

### OECD Policy Recommendations on Regulatory Reform:

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

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

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

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

#### **3. Ensure that regulations and regulatory processes are transparent, non-discriminatory and efficiently applied.**

- Ensure that reform goals and strategies are articulated clearly to the public.
- Consult with affected parties, whether domestic or foreign, while developing or reviewing regulations, ensuring that the consultation itself is transparent.
- Create and update on a continuing basis public registries of regulations and business formalities, or use other means of ensuring that domestic and foreign businesses can easily identify all requirements applicable to them.
- Ensure that procedures for applying regulations are transparent, non-discriminatory, contain an appeals process, and do not unduly delay business decisions.

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

- Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways.

- Enforce competition law vigorously where collusive behaviour, abuse of dominant position, or anticompetitive mergers risk frustrating reform.
- Provide competition authorities with the authority and capacity to advocate reform.

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

- Review as a high priority those aspects of economic regulations that restrict entry, exit, pricing, output, normal commercial practices, and forms of business organisation.
- Promote efficiency and the transition to effective competition where economic regulations continue to be needed because of potential for abuse of market power. In particular: (i) separate potentially competitive activities from regulated utility networks, and otherwise restructure as needed to reduce the market power of incumbents; (ii) guarantee access to essential network facilities to all market entrants on a transparent and non-discriminatory basis; (iii) use price caps and other mechanisms to encourage efficiency gains when price controls are needed during the transition to competition.

**6. Eliminate unnecessary regulatory barriers to trade and investment by enhancing implementation of international agreements and strengthening international principles.**

- Implement, and work with other countries to strengthen, international rules and principles to liberalise trade and investment (such as transparency, non-discrimination, avoidance of unnecessary trade restrictiveness, and attention to competition principles), as contained in WTO agreements, OECD recommendations and policy guidelines, and other agreements.
- Reduce as a priority matter those regulatory barriers to trade and investment arising from divergent and duplicative requirements by countries.
- Develop and use whenever possible internationally harmonised standards as a basis for domestic regulations, while collaborating with other countries to review and improve international standards to assure they continue to achieve the intended policy goals efficiently and effectively.
- Expand recognition of other countries' conformity assessment procedures and results through, for example, mutual recognition agreements (MRAs) or other means.

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

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