

OECD

APEC-OECD INTEGRATED CHECKLIST ON REGULATORY REFORM

A POLICY INSTRUMENT FOR REGULATORY QUALITY, COMPETITION POLICY AND MARKET OPENNESS

OECD MEMBER COUNTRIES

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AUSTRIA
BELGIUM
CANADA
CZECH REPUBLIC
DENMARK
FINLAND
FRANCE
GERMANY
GREECE
HUNGARY
ICELAND
IRELAND
ITALY
JAPAN
KOREA
LUXEMBOURG
MEXICO
NETHERLANDS
NEW ZEALAND
NORWAY
POLAND
PORTUGAL
SLOVAK REPUBLIC
SPAIN
SWEDEN
SWITZERLAND
TURKEY
UNITED KINGDOM
UNITED STATES

APEC MEMBER ECONOMIES

APEC has 21 members. The word "economies" is used to describe APEC members because the APEC co-operative process is predominantly concerned with trade and economic issues, with members engaging with one another as economic entities.

AUSTRALIA
BRUNEI DARUSSALAM
CANADA
CHILE
PEOPLE'S REPUBLIC OF CHINA
HONG KONG, CHINA
INDONESIA
JAPAN
REPUBLIC OF KOREA
MALAYSIA
MEXICO
NEW ZEALAND
PAPUA NEW GUINEA
PERU
PHILIPPINES
RUSSIA
SINGAPORE
CHINESE TAIPEI
THAILAND
UNITED STATES
VIET NAM

THE APEC-OECD CO-OPERATIVE INITIATIVE ON REGULATORY REFORM is a Joint Activity of the OECD Regulatory Reform Programme (Directorate for Public Governance and Territorial Development) and the APEC Competition Policy and Deregulation Group (CPDG) convened by the Federal Competition Commission of Mexico.

PREAMBLE

MEMBER ECONOMIES OF APEC AND THE OECD have recognized that regulatory reform is a central element in the promotion of open and competitive markets, and a key driver of economic efficiency and consumer welfare. As a result, agreement for an *APEC-OECD Co-operative Initiative on Regulatory Reform* was reached in June 2000 and was endorsed at the APEC Ministerial Meeting on 12-13 November 2000 in Brunei Darussalam, in order to promote the implementation of the APEC and the OECD principles by building domestic capacities for quality regulation.

MANY ECONOMIES WITHIN APEC AND THE OECD have individually embarked on ambitious programmes to reduce regulatory burdens and improve the quality and cost-effectiveness of regulations. They have collectively endorsed regulatory reform principles and policy recommendations at the highest political levels, specifically through:

- The *1999 APEC Economic Leader's Declaration*, containing the *APEC Principles to Enhance Competition and Regulatory Reform,*
- The *1997 OECD Policy Recommendations on Regulatory Reform,* and
- The *1995 OECD Recommendation on Improving the Quality of Government Regulation.*

The preparation of the *Checklist* represented close co-operation between the APEC Competition Policy and Deregulation Group, and the OECD Horizontal Programme on Regulatory Reform.

A FIRST PHASE OF THE APEC-OECD INITIATIVE was completed in October 2002, at the High level Conference in Jeju, Korea, where economies agreed on the need to elaborate an APEC-OECD Integrated Checklist for self-assessment on regulatory, competition and market openness policies, to implement the APEC and OECD principles. The second phase of the initiative focused on the development of the integrated checklist which has been presented for approval to the respective Executive Bodies of the APEC and the OECD in 2005.

THE CHECKLIST IS A VOLUNTARY TOOL that member economies may use to evaluate their respective regulatory reform efforts. There is no single model of regulatory reform, but this does not mean that standards, goals and well-structured institutions do not matter. Based on the accumulated knowledge of APEC and the OECD, the Checklist highlights key issues that should be considered during the process of development and implementation of regulatory policy, while recognizing that the diversity of economic, social, and political environments and values of member economies require flexibility in the methods through which the checklist shall be applied, and in the uses given to the information compiled. There is little risk that self-assessment will be an exercise in self-satisfaction. Even countries that are well-advanced can find room for improvement.

WHILE THE CHECKLIST WILL NOT BE USED FOR COMPARATIVE PURPOSES, it can provide useful information for those economies interested in (i) moving closer to good international practices; and (ii) reducing the uncertainty regarding the implementation of regulatory reform principles and institutions, particularly in relation to the dynamic and interrelated effects of competition, market openness and regulatory policies. The checklist creates an orderly framework for decision making that sets out key concepts to guide administrators through the complexities of the design and implementation of an effective and high quality regulatory reform policy. This can greatly assist policy makers in identifying options and targeting priorities.

THE CHECKLIST IS COMPRISED OF FOUR SECTIONS. The first is a horizontal questionnaire on **REGULATORY REFORM** across levels of government that invites reflection on the degree of integration of regulatory, competition and market openness policies across levels of government, and on the accountability and transparency mechanisms needed to ensure their success. Regulatory reform refers to changes that improve regulatory quality to enhance the economic performance, cost-effectiveness, or legal quality of regulations and related government formalities. Reform can mean revision of a single regulation, the scrapping and rebuilding of an entire regulatory regime and its institutions, or improvement of processes for making regulations and managing reform. Deregulation is a subset of regulatory reform and refers to complete or partial elimination of regulation in a sector to improve economic performance.

THE OTHER THREE SECTIONS OF THE QUESTIONNAIRES FOCUS ON INDIVIDUAL POLICY AREAS, and the factors that may be considered to improve their specific design and implementation. The policy areas are defined as follows:

- **REGULATORY POLICIES:**
  those designed to maximise the efficiency, transparency and accountability of regulations based on an integrated rule-making approach and the application of regulatory tools and institutions.
- **COMPETITION POLICIES:**
  those that promote economic growth and efficiency by eliminating or minimising the distorting impact of laws, regulations and administrative policies, practices and procedures on competition; and by preventing and deterring private anti-competitive practices through effective enforcement of competition laws.
- **MARKET OPENNESS POLICIES:**
  those that aim to ensure that a country can reap the benefits of globalisation and international competition by eliminating or minimising the distorting effects of border as well as behind-the-border regulations and practices. These policies influence the range of opportunities open to foreign suppliers of goods and services to compete with domestic counterparts in a particular national market (*e.g.*, through trade and investment).

IN A CHANGING WORLD, government action remains essential to protect and promote important social objectives, such as safety, health, and environmental quality, and the international community has taken commitments to several social and environmental agreements in the past decade. Indeed, as economies develop, public expectations in such areas tend to increase. More efficient and dynamic economies will help governments serve these public interests. Experience shows that reform, if properly carried out, should not adversely affect, and can often promote, such objectives. There is scope to consider further how regulatory quality affects social and environmental policy objectives.

THE CHECKLIST IS THEREFORE AN INTEGRATED SELF-ASSESSMENT TOOL, IN THREE SENSES. First, it integrates the APEC and OECD principles on regulatory reform. Second, it integrates the three policy areas – competition, rule-making and market openness – to provide a coherent whole-of-government view. Third, it integrates governance perspectives – transparency, accountability and performance.

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HORIZONTAL CRITERIA CONCERNING REGULATORY REFORM

Regulatory reform *refers to changes that improve regulatory quality to enhance the economic performance, cost-effectiveness, or legal quality of regulations and related government formalities. Reform can mean revision of a single regulation, the scrapping and rebuilding of an entire regulatory regime and its institutions, or improvement of processes for making regulations and managing reform. Deregulation is a subset of regulatory reform and refers to complete or partial elimination of regulation in a sector to improve economic performance.*

Regulatory, competition and market openness policies are key drivers for a successful and coherent regulatory reform.

A1 ***To what extent is there an integrated policy for regulatory reform that sets out principles dealing with regulatory, competition and market openness policies?***

COMMENTS: The checklist begins with an assessment of the status of the regulatory reform process.

The point of departure is to ask whether a regulatory reform policy exists. Such a policy often takes the form of a statement setting out principles to govern regulatory reform which provides strong guidance and benchmarks for action by officials, and also sets out what the public can expect from government regarding regulation. Thus both domestic and foreign stakeholders would have a statement of government policy for reference, in addition to other obligations that may govern regulatory action. The integrated policy can become a touchstone for government action.

An integrated policy is essential in ensuring that policies for all concerned areas are mutually supportive. It would include key elements, such as transparency, non-discrimination, and minimal interference with competition and open markets, consistent with obtaining these policy objectives. It may set out principles for communication and analysis, including substantive areas to be considered in analysis. An integrated policy is closely tied to Question A2 since it provides an opportunity for political leaders and senior officials to express their support for regulatory reform.

A2 ***How strongly do political leaders and senior officials express support for regulatory reform to both the public and officials, including the explicit fostering of competition and open markets?***

How is this support translated in practice into reform and how have businesspeople, consumers and other interested groups reacted to these actions and to the reforms in concrete terms?

COMMENTS: Support and interest in reform activities are key elements for their success. Reforms often confront powerful interest groups outside or inside the government. Often the benefits of reforms are masked by transition costs. But failure to overcome short-term costs and eliminate the economic distortions brought by inefficient regulations nurtures complacency and maintains the *status quo*, which further increases the costs of reforms. Strong and clear messages and a showing of commitment are needed to build public consensus for reform. How this support is translated in practice is important, all the more so as this affects how businesspeople, consumers and other interested groups react to reforms. This is particularly true with respect to the enhancement of competition and open markets which, while benefiting the economy and consumers at large, may face opposition from particular interests. Political leadership in policy setting helps to balance, when warranted, social and environmental factors with economic, competitive and market-openness objectives in regulatory initiatives. While a broad integrated policy as recommended in A1 is key, high-level commitment also needs to be sustained through time, as often the beneficial impacts of the reforms and enhanced competition and open markets will need months and years to improve the economic structures and processes. This is even more important as time and effort will be required to change the culture of economic actors and regulators.

A3 *What are the accountability mechanisms that assure the effective implementation of regulatory, competition and market openness policies?*

COMMENTS: The assignment of specific responsibilities for aspects of reform and the creation of a framework for accountability are essential for the success of the programme. To be effective, reform will have to be co-ordinated across a number of areas, with clear roles to be played by departmental/ministry officials, front-line regulators, senior officials, oversight bodies (if any), the courts, stakeholders, the public, and political leaders.

A4 *To what extent do regulation, competition and market openness policies avoid discrimination between like goods, services, or service suppliers in like circumstances, whether foreign or domestic?*

If elements of discrimination exist, what is their rationale?

What consideration has been given to eliminating or minimising them?

COMMENTS: Non-discrimination means that laws and policies should refrain from applying different requirements or procedures to different firms, goods, services or countries. This includes discrimination either against or in favour of a particular firm or category of firms (firms, for example, operating in a particular sector of economic activities or foreign-owned firms in general, firms from a particular country). An example of "positive" discrimination could be with respect to domestic firms considered to be "national champions", etc.

Sometimes regulation is ostensibly non-discriminatory but is nevertheless perceived to discriminate *de facto*. Such discrimination can occur in various ways, *e.g.,* the use of "grandfather" clauses that exempt incumbent firms from more onerous requirements that may apply to new market entrants; or imposing on foreign firms requirements that they have already satisfied in their home country under a different form (as when different regulatory approaches are applied for the same objective). New and proposed regulation should be examined to ensure that it does not have avoidable *de facto* discriminatory effects. Some *de facto* discrimination may be the result of inadequate vetting of regulatory proposals from the market openness perspective. Effective consultation and co-ordination among regulatory, competition and trade officials may help to avoid such unintended effects (see also Question A8 on the inter-ministerial consultation).

This principle is also examined in Question D6.

A5 ***To what extent has regulatory reform, including policies dealing with regulatory quality, competition and market openness, been encouraged and co-ordinated at all levels of government (e.g., Federal, state, local, supranational)?***

COMMENTS: The regulatory environment where citizens and business operate is composed of complex layers of regulation stemming from subnational, national and international levels of government. Historic, political, cultural and administrative reasons account for the divergences. These variations can contribute to a lack of coherence and consistency among central, regional and local regulations reducing the quality of the "national" regulatory environment in which citizens and businesses operate, and thus compromising competitiveness and market openness of the country. Where regulatory powers are shared between levels of government, co-ordination may be an essential element of successful reform. Formal policies or mechanisms for co-ordination within and between governments on regulation and its reform can be set up to maximise the benefits of reforms and reduce internal regulatory barriers to trade and investment.

A6 ***Are the policies, laws, regulations, practices, procedures and decision making transparent, consistent, comprehensible and accessible to users both inside and outside government, and to domestic as well as foreign parties? And is effectiveness regularly assessed?***

COMMENTS: To build public support for regulatory, competition and market openness policies, consumers, businesses, investors, lenders, and other stakeholders must be able to ascertain clearly the content of the policies, as well as that of related laws, regulations, guidelines, practices and procedures. In addition, other types of rules, including "soft" regulation (or "grey" or "quasi" regulation) should be transparent to those who are affected. Thus, administrative guidance, documents, directives, interpretation bulletins or other rules that do not have the force of law but will have a practical impact on stakeholders must also be clear and easily and comprehensively available for domestic and foreign businesses and service suppliers.

Transparent, consistent, comprehensible, and accessible laws are necessary to ensure compliance and achieve public policy objectives (*see also, Question C6 on transparency within government on competition law*). Among other things, this promotes predictability, fairness and public confidence. Transparency also contributes positively to the attractiveness of the investment climate. Both domestic and foreign players require transparency, but it is particularly important to new market entrants as well as SMEs.

Transparency also relates to the regulatory process, how decisions are made and how they are applied. A clear system for rule making that is known to stakeholders and policies governing the enforcement of laws can ensure that stakeholders know and understand how the law affects them; furthermore, it ensures consistent application of laws. It is important to limit conflicts of interest in regulation between the regulated company and the regulator.

Transparency must also extend to forthcoming regulatory actions, as this is necessary for stakeholder involvement in regulatory decision making (*see also Question B5 and D4 on public consultation*) and for predictability, an important element in business planning.

Transparency requires the timely publication, or at least the public availability of all relevant laws, regulations and decisions, as well as information about the decision-making process. Channels for information dissemination and notification should be widely accessible, including those for dissemination and notification to international bodies. The internet has proven to be an invaluable resource for access to laws, government services, electronic filings, and identification of single inquiry points. Other approaches such as public registries of all regulations and "one stop" access to regulatory permits and service centres can be particularly valuable in federal states where rules from multiple levels of government may apply to a new market entrant.

Because government is increasingly "partnering" with the private sector to achieve public policy objectives, transparency of at least some private sector rules may be an important element of good regulation. Self-regulatory schemes, whether or not backed by government, may need enhanced clarity and transparency. Similarly, standards development regimes are often poorly understood by those who may be affected. A greater effort should be made to make the standards development process and the standards themselves more transparent, and to ensure the transparency of qualification and licensing requirements and procedures.

A7 *Are the reform of regulation, the establishment of appropriate regulatory authorities, and the introduction of competition coherent in timing and sequencing?*

COMMENTS: Comprehensive reform works better than piecemeal reform. But comprehensiveness does not mean that all changes must occur at the same time. Thus, it may not be appropriate to initiate major sectoral reform in all areas simultaneously. A successful reform policy will need a strategy establishing transitional steps. These transitional phases should only be temporary, as should regulatory strategies developed to deal with transitions to more competitive economies. In that respect, it may be necessary to develop mechanisms for monitoring implementation to evaluate progress and identify obstacles to further reform. Furthermore, the necessary regulatory authorities should be established before structural changes and technical regulatory decisions have been made in order to make use of and improve the authorities' expertise. The introduction of regulatory reform, including creation of appropriate regulatory authorities prior to market opening in certain service sectors, can be important in ensuring competition and the effectiveness of regulation to meet public policy objectives.

A8 ***To what extent are there effective inter-ministerial mechanisms for managing and co-ordinating regulatory reform and integrating competition and market openness considerations into regulatory management systems?***

COMMENTS: To avoid unnecessary duplications and contradictions, all appropriate official bodies should be informed and consulted when preparing a new measure or planning a reform. It is particularly important to involve trade and competition officials who can provide valuable advice and anticipate trade frictions or anticompetitive impacts that might inadvertently follow from proposed rules. They can also be invaluable allies in the reform process and can ensure that the benefits of reform are not dissipated in a difficult sectoral transition to a more competitive environment. Given their role in regulating services, independent regulators and private sector bodies with regulatory responsibilities (*e.g.,* for some professional services) should be included as appropriate.

It is important in particular to ensure that competition, efficiency and market openness are considered in the assessment of all regulations and their alternatives that may have an impact upon markets. This assessment of instrument choice 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. In such a case, the competition distorting impact of the regulation ought to be minimised and the regulatory regime as a whole ought to be oriented towards promoting efficiency.

If competition and market openness considerations are to be more closely integrated into the regulatory management system, including both primary and secondary rule-making and reviews of the stock of existing regulatory legislation, then this needs to be reflected in institutional structures, policy development processes, administrative procedures, official responsibilities, and accountability arrangements.

A9 ***Do the authorities responsible for the quality of regulation and the openness of markets to foreign firms and the competition authorities have adequate human and technical resources, to fulfil their responsibilities in a timely manner?***

COMMENTS: Strong and effective institutions require expert staff and resources to provide all core functions. For instance, in the case of the Competition Authority, a sufficient staff of professional experts, including economists and lawyers, is needed to carry out the enforcement and advocacy work. If the regulatory management system includes the involvement of the Competition Authority and trade and investment officials in key rule-making activities, then that needs to be reflected in the capacities and resources of these bodies. In addition, resources, including expertise, must be available for the development of regulatory processes according to principles of high quality regulation (*see for example, Questions B2 and B3 on the analysis of new and existing regulation*).

A10 ***Are there training and capacity building programmes for rule-makers and regulators to ensure that they are aware of high quality regulatory, competition and market openness considerations?***

COMMENTS: Building and maintaining capacity must be seen as a crucial element for a successful regulatory management system. Capacity building involves more than resources. Expertise and experience need to be developed and maintained over time so that officials responsible for policy development and institutional design are more aware and better able to identify what is necessary for high quality regulation, competition and market openness issues.

Trade issues and obligations to maintain market openness, as well as complementary pro-competition approaches, may not be familiar to some regulatory policy makers, particularly in areas of social regulation. Officials may require training in the identification of issues, and even more importantly, on the approaches (including instrument choice) that might allow them to regulate effectively while restricting the openness of markets no more than necessary. Specifically, officials may require training on the use of alternative forms of regulation (*see Question B7 on regulatory alternatives*).

At the same time, education and co-operation among competition, trade and regulatory officials may be required to promote greater coherence in the attainment of legitimate policy objectives in such areas as health, safety and the environment. It is also important to find mechanisms to maintain the institutional memories of bodies in charge of regulatory, competition and market openness policies to compensate for personnel changes. The mobility of officials however, can disseminate regulatory, competition and market openness policies.

Ongoing training and information exchange amongst regulators will be particularly important in sectors where technological change is placing new demands upon regulators, or where experimentation about the appropriate regulatory frameworks to underpin liberalisation, especially in some service sectors, is underway.

A11 *Does the legal framework have in place or strive to establish credible mechanisms to ensure the fundamental due process rights of persons subject to the law, in particular concerning the appeal system?*

COMMENTS: The fundamental due process rights of persons subject to the law ought to be safeguarded not only by provisions that articulate those rights, but also by clear mechanisms designed to ensure the enforceability of those rights. These steps are necessary to ensure procedural fairness. Due process rights include the right to appeal final decisions in a timely manner before an independent third party arbiter; the right to be informed, prior to and immediately following any such adverse decision, of the concerns that form the basis of the decision; and the right to make representations after being informed of such concerns and prior to the point in time at which a final decision is reached. Providing a fair system that respects the due process rights of individuals and firms is key to credible and respected regulatory actions.

It is also important that foreign stakeholders and participants should not be disadvantaged in their access to the appeal systems. The appeal process should be accessible, transparent and accountable. This can be enhanced by clear rule of procedure and practice directives, according to each economy's technological and budgetary feasibilities, the use of the internet to provide guidance for those wishing to appeal, and processes that improve accessibility (*e.g.*, use of electronic filings). Appeals should be handled on a timely basis for, as has been said, "justice delayed is justice denied."

MATRIX: THE APEC-OECD INTEGRATED CHECKLIST ON REGULATORY REFORM

A INTEGRATED POLICIES (HORIZONTAL DIMENSION)

A1 To what extent is there an integrated policy for regulatory reform that sets out principles dealing with regulatory, competition and market openness policies?

A2 How strongly do political leaders and senior officials express support for regulatory reform to both the public and officials, including the explicit fostering of competition and open markets?
How is this support translated in practice into reform and how have businesspeople, consumers and other interested groups reacted to these actions and to the reforms in concrete terms?

A3 What are the accountability mechanisms that assure the effective implementation of regulatory, competition and market openness policies?

A4 To what extent do regulation, competition and market openness policies avoid discrimination between like goods, services, or service suppliers in like circumstances, whether foreign or domestic? If elements of discrimination exist, what is their rationale? What consideration has been given to eliminating or minimising them?

A5 To what extent has regulatory reform, including policies dealing with regulatory quality, competition and market openness, been encouraged and co-ordinated at all levels of government (*e.g.*, Federal, state, local, supranational)?

B REGULATORY POLICY

B1 To what extent are capacities created that ensure consistent and coherent application of principles of quality regulation?

B2 Are the legal basis and the economic and social impacts of drafts of new regulations reviewed? What performance measurements are being envisaged for reviewing the economic and social impacts of new regulations?

B3 Are the legal basis and the economic and social impacts of existing regulations reviewed, and if so, what use is made of performance measurements?

B4 To what extent are rules, regulatory institutions, and the regulatory management process itself transparent, clear and predictable to users both inside and outside the goverment?

B5 Are there effective public consultation mechanisms and procedures including prior notification open to regulated parties and other stakeholders, non-governmental organisations, the private sector, advisory bodies, accreditation bodies, standards-development organisations and other governments?

B6 To what extent are clear and transparent methodologies and criteria used to analyse the regulatory impact when developing new regulations and reviewing existing regulations?

B7 How are alternatives to regulation assessed?

B8 To what extent have measures been taken to assure compliance with and enforcement of regulations?

C COMPETITION POLICY

C1 To what extent has a policy been embraced in the jurisdiction that is directed towards promoting efficiency and eliminating or minimising the material competition-distorting aspects of all existing and future laws, regulations, administrative practices and other institutional measures (collectively "regulations") that have an impact upon markets?

C2 To what extent do the objectives of the competition law and policy include, and only include, promoting and protecting the competitive process and enhancing economic efficiency including consumer surplus?

C3 To what extent does the Competition Authority or another body have (i) a clear mandate to advocate actively in order to promote competition and efficiency throughout the economy and raise general awareness of the benefits of competition, and (ii) sufficient resources to carry out any advocacy functions included in its mandate?

C4 To what extent are measures taken to neutralise the advantages accruing to government business activities as a consequence of their public ownership?

C5 To what extent does the agency responsible for the administration and enforcement of the competition law (the "Competition Authority") operate autonomously, and to what extent are its human and financial resources sufficient to enable it to do its job?

C6 To what extent is the role of enforcement decision-makers transparent, especially when there are multiple government bodies involved in decision making, for example, regarding who the decision maker was, factors taken into account by such a decision maker, and their relative weighting?

C7 To what extent is there a transparent policy and practice that addresses the relationship between the Competition Authority and sectoral regulatory authorities?

The Integrated Checklist can be visualised as a structure whose "pediment" on integrated policies is supported by three pillars covering regulatory policy, competition and market openness. The whole edifice is made of 39 normative, open-ended questions that national authorities should answer when considering the adoption or revision of regulatory, competition or market openness policies.

A6 Are the policies, laws, regulations, practices, procedures and decision making transparent, consistent, comprehensible and accessible to users both inside and outside government, and to domestic as well as foreign parties? And is effectiveness regularly assessed?

A7 Are the reform of regulation, the establishment of appropriate regulatory authorities, and the introduction of competition coherent in timing and sequencing?

A8 To what extent are there effective inter-ministerial mechanisms for managing and co-ordinating regulatory reform and integrating competition and market openness considerations into regulatory management systems?

A9 Do the authorities responsible for the quality of regulation and the openness of markets to foreign firms and the competition authorities have adequate human and technical resources, to fulfil their responsibilities in a timely manner?

A10 Are there training and capacity building programmes for rule makers and regulators to ensure that they are aware of high quality regulatory, competition and market openness considerations?

A11 Does the legal framework have in place or strive to establish credible mechanisms to ensure the fundamental due process rights of persons subject to the law, in particular concerning the appeal system?

C8 To what extent does the competition law contain provisions to deter effectively and prevent hard-core cartel conduct, abuses of dominant position or unlawful monopolistic conduct, and contain provisions to address anti-competitive mergers effectively? To what extent does the broader competition policy strive to ensure that this type of conduct is not facilitated by government regulation?

C9 To what extent does the competition law apply broadly to all activities in the economy, including both goods and services, as well as to both public and private activities, except for those excluded?

C10 To what extent does the competition law provide for effective investigative powers and sanctions to detect, investigate, punish and deter anti-competitive behaviour?

C11 To what extent do firms and individuals have access to (i) the Competition Authority to become apprised of the case against them and to make their views known, and (ii) to the relevant court(s) or tribunal(s) to appeal decisions of the Competition Authority or seek compensation for damages suffered as a result of conduct contrary to the domestic competition law?

C12 In the absence of a competition law, to what extent is there an effective framework or mechanism for deterring and addressing private anti-competitive conduct?

D MARKET OPENNESS POLICIES

D1 To what extent are there mechanisms in regulatory decision making to foster awareness of trade and investment implications?

D2 To what extent does the government promote approaches to regulation and its implementation that are trade-friendly and avoid unnecessary burdens on economic actors?

D3 To what extent are customs and border procedures designed and implemented to provide consistency, predictability, simplicity and transparency so as to avoid unnecessary burdens on the flow of goods? To what extent are migration procedures related to the temporary movement of people to supply services transparent and consistent with the market access offered?

D4 To what extent has the government established effective public consultation mechanisms and procedures (including prior notification, as appropriate) and do such mechanisms allow sufficient access for all interested parties, including foreign stakeholders?

D5 To what extent are government procurement processes open and transparent to potential suppliers, both domestic and foreign?

D6 Do regulatory requirements discriminate against or otherwise impede foreign investment and foreign ownership or foreign supply of services? If elements of discrimination exist, what is their rationale? What consideration has been given to eliminating or minimising them, to ensure equivalent treatment with domestic investors?

D7 To what extent are harmonised international standards being used as the basis for primary and secondary domestic regulation?

D8 To what extent are measures implemented in other countries accepted as being equivalent to domestic measures?

D9 To what extent are procedures to ensure conformity developed in a transparent manner and with due consideration as to whether they are effective, feasible and implemented in ways that do not create unnecessary barriers to the free flow of goods or provision of services?

REGULATORY POLICY

Regulatory policies *are designed to maximise the efficiency, transparency, and accountability of regulations based on an integrated rule-making approach and the application of regulatory tools and institutions.*

B1 *To what extent are capacities created that ensure consistent and coherent application of principles of quality regulation?*

COMMENTS: Quality regulation needs a strong involvement and a sense of "ownership" by regulators in charge of their design and implementation who are committed to the regulation's objectives and have information on the sector history and situation. It is important also that a means exists for the co-ordination of regulatory reform or initiatives, if not by a central body then by institutions or co-ordinating mechanisms. There are several reasons for this. It is often difficult for regulators to reform themselves. Special interests, close identification with the objectives of outdated regulation, and countervailing pressures from different parts of society make such self-reform even more complex. In addition, modern regulations and regimes apply across multiple areas. Regulatory quality control and consistency may benefit when responsibility is shared between regulators and a central quality control entity. For example, specific responsibilities for aspects of a regulatory management system may be assigned to a body that can help balance the pressures and at the same time ensure accountability for the success of the reform across a number of areas. Similarly, the rule-making process must provide for priority setting, co-ordination of regulatory activities, and the involvement of competition and trade officials in policy development or review where appropriate.

B2 *Are the legal basis and the economic and social impacts of drafts of new regulations reviewed?*

What performance measurements are being envisaged for reviewing the economic and social impacts of new regulations?

COMMENTS: The Rule of Law means that all properly functioning regulatory systems and every regulatory action (which by definition intrudes on the activities of the others) must be based in law. Every well functioning rule-making process will have a procedure for examining the proposed regulatory action for legality and compliance with other requirements, such as adherence to WTO obligations. These procedures may be the responsibility of a central body (*referred to above in B1*) or may be assigned elsewhere and may involve legislative bodies.

In addition, decision makers and stakeholders should be provided with information about the effects of new regulation. These requirements are important for the analytical process of developing new regulation and for informing decision makers and stakeholders. Consideration of impacts should include close analysis of the problem to be solved and alternative solutions, as well as the impacts of the proposed regulatory solution. Performance measurement initiatives can be included when reviewing the economic impact of new regulations. This analytical process ties in closely with transparency and consultation considerations (*see Questions A6, B5 and D4*), and with the need to avoid discrimination between domestic and foreign stakeholders in regulation (*see Questions A4 and D6 on non-discrimination*).

The requirement for analysis can apply broadly to both primary and secondary regulation. Similar considerations should be taken into account by independent or quasi-independent regulators.

Reviews of regulatory measures (primary laws or secondary regulations) should be conducted in a fashion that does not discriminate between domestic and foreign stakeholder by, for example, limiting opportunity for comment or participation.

B3 ***Are the legal basis and the economic and social impacts of existing regulations reviewed, and if so, what use is made of performance measurements?***

COMMENTS: Most governments have large stocks of regulations and administrative formalities that have accumulated over years or decades without adequate review and revision. Regulations that are efficient today may become inefficient tomorrow due to social, economic, or technological change. Overall, the constant accumulation of measures often creates duplication and contradiction in the legal framework, creating unnecessary costs for business and citizens. This *de facto* lack of transparency is particularly burdensome for "outsiders" (*see Question D1 on trade and investment possible implications of regulation*). Complexity due to poor management of the stock of regulation facilitates non-compliance, leads to loss of credibility, and even corruption.

Various tools, initiatives and triggers can maintain the stock in optimal shape. They include periodic reviews and deregulation programmes, "sunsetting" or legislative periodic reviews, as well as codification and use of plain language reforms. Such reviews, as in most regulatory policies, need to incorporate a mechanism for input by affected stakeholders, to build public support and to consult interest groups. These appraisals also need clear focus to avoid creating unnecessary instability in the regulatory environment. Policy makers should ask how performance measurement instruments are used to review existing regulations.

The credibility of these reviews can be further enhanced if they are undertaken by bodies other than the regulator responsible for the regulation. This may be the central regulatory oversight body (*see Question B1*), the Competition Authority (*see Question C1*) or another body with the expertise to examine regulatory legislation and programmes. In some jurisdictions, the legislature plays a role in reviewing major regulatory legislation.

In addition to reviewing the economic impacts of regulation, other matters should be considered. These include the continuing need to assess alternative policy instruments or alternative types of regulation in a more maturing regulatory climate, to develop additional provisions including new enforcement tools, different and imaginative sanctions, and to identify unexpected impacts other than economic.

B4 ***To what extent are rules, regulatory institutions, and the regulatory management process itself transparent, clear and predictable to users both inside and outside the government?***

COMMENTS: Transparency of the regulatory system is essential to establishing a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps ensure against undue influence by special interests. Transparency in rule making also reinforces legitimacy and fairness of regulatory processes. Regulatory transparency also involves a wide range of practices, including standardised processes for making and changing regulations; consultation with interested parties; plain language in drafting; publication, codification, and other ways of making rules easy to find and understand; controls on administrative discretion; and implementation and appeals processes that are predictable and consistent (*see also Question A6 on transparency*).

B5 ***Are there effective public consultation mechanisms and procedures including prior notification open to regulated parties and other stakeholders, non-governmental organisations, the private sector, advisory bodies, accreditation bodies, standards-development organisations and other governments?***

COMMENTS: Regulations should be developed in an open and transparent fashion, with appropriate and well-publicised procedures for effective and timely inputs from interested national and foreign parties, such as affected business, trade unions, wider interest groups such as consumer or environmental organisations, or other levels of government. Public consultation should not be limited to insiders, such as already established businesses, but should be open to all interested parties. Consultation works in both directions and educates both stakeholders and officials. It improves the quality of rules and programmes and also improves compliance and reduces enforcement costs for both governments and citizens subject to rules. Good practice may be encouraged by clear guidance on how consultations should be conducted. When collecting information, and to reduce administrative burdens, a register can be established identifying routine questions addressed by government to business, perhaps co-ordinated by a central unit. This should help avoid duplicating efforts and promote the diffusion of information.

Public notices at various stages of rule making and consultation with stakeholders are considered to be fundamentally important for a well-managed regulatory system. A well-developed set of procedures for notice and comment may even be codified. In any event, regulators should be provided with written guidance on consultation requirements and an exchange of "best practices" on consultation techniques may also be helpful. The opportunities for comment by stakeholders should be timed so that there is genuine dialogue and potential to affect policy development. Regulators should be held accountable for the consultation and how comments are handled so that the credibility of the consultation process is maintained (*see also Question D4 which develops these points with a trade focus*).

B6 ***To what extent are clear and transparent methodologies and criteria used to analyse the regulatory impact when developing new regulations and reviewing existing regulations?***

COMMENTS: High quality regulation is increasingly seen as a prerequisite for governments to produce the desired results of a public policy as cost effectively as possible. This includes the goal of growth, to reduce the frequency and intensity of crises, and their medium and long-term costs. There is a developing understanding that all government policy action involves trade-offs between different uses of resources, while the underlying goal of policy action – including regulation – of maximising social welfare is being explicitly stated and accepted. In a rule-based society, these trade-offs need to be assessed and discussed in a transparent and accountable manner. That is, a policy is needed to justify when a governmental regulator establishes a regulation.

The development of a Regulatory Impact Analysis (RIA) helps to organise and consolidate all the possible impacts and elements for the decision at various stages of policy development. In particular, RIA can become the main vehicle to systematically review the legal basis and economic impacts of existing or new regulations and to structure the adjoining decision-making process (*see Questions B2 and B3*). Indeed, a RIA should not be thought of as an after-the-fact exercise when the regulatory decision has been made. Rather, a RIA should help form the policy investigation and analysis carried out through the development of the rules. The analytical approach underlying the rules should always be considered to be proportional to the situation, but consistent guidance should be developed to deal with the appropriate complexity and level of analysis.

Efforts are often needed to develop the capacity to carry out and make use of RIA; in their absence, other practices should be adopted to assess regulatory impacts.

In the case of regulations approved for emergency reasons without prior assessment (health, environmental safety, security, etc.), an *ex post* evaluation of their cost-effectiveness should be made according to criteria and procedures established for that purpose.

B7 ***How are alternatives to regulation assessed?***

COMMENTS: A core element of a good regulatory policy is to help the policy maker to choose the most efficient and effective policy tool, whether regulatory or non-regulatory. The range of policy tools and their uses is expanding as experimentation occurs, learning is shared and understanding of the potential role of markets increases. At the same time, regulators often face risks in using relatively untried tools, as bureaucracies are highly conservative, and there are typically strong disincentives for public servants to be innovative. A clear leading role – supportive of innovation and policy learning – must be taken by reform authorities if alternatives to traditional regulation are to make serious headway into the policy system. In particular, awareness of competition and market openness implications of regulation should lead regulators and policy makers to consider alternative forms of regulation to achieve their regulatory objective, such as use of performance rather than design criteria.

B8 ***To what extent have measures been taken to assure compliance with and enforcement of regulations?***

COMMENTS: Adoption and communication of a regulation is only part of the regulatory policy. To achieve policy objectives through regulations, citizens and business must comply with them and the government must enforce them. A compliance friendly regulation requires governments to pay attention to compliance considerations in the decision-making process. Regulations should be designed, implemented and enforced in a way to ensure that the highest appropriate level of compliance is achieved. Commonly used tools to increase the level of compliance are *ex ante* evaluation of compliance factors, development of alternative ways for compliance, compliance assistance, compliance incentives, or providing for a range of enforcement responses.

Regulators should have sufficient capacity to enforce regulations: “empty” regulation undermines the entire system’s credibility and leaves governments open to criticism and other negative consequences. An appeal mechanism against regulatory abuse must also be in place.

COMPETITION POLICY AND LAW

Competition policy *promotes economic growth and efficiency by eliminating or minimising the distorting impact on competition of laws, regulations and administrative policies, practices and procedures; and by preventing and deterring private anti-competitive practices through vigorous enforcement of competition laws.*

C1 ***To what extent has a policy been embraced in the jurisdiction that is directed towards promoting efficiency and eliminating or minimising the material competition distorting aspects of all existing and future laws, regulations, administrative practices and other institutional measures (collectively "regulations") that have an impact upon markets?***

COMMENTS: Economies are invited to ensure that competition and efficiency dimensions are brought to the assessment of regulations that may have an impact upon markets. This exercise 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. In such cases, the competition distorting impact of the regulation ought to be minimised and the regulatory regime as a whole ought to be oriented towards promoting efficiency. These elements should be part of a general policy on regulatory reform (*see Question A1*), as well as in the drafting of new regulation and the evaluation of the stock of existing regulation.

C2 ***To what extent do the objectives of the competition law and policy include, and only include, promoting and protecting the competitive process and enhancing economic efficiency including consumer surplus?***

COMMENTS: An effective competition law and policy requires clear objectives. This helps to guide decision makers, avoid potentially inconsistent treatment of issues, and resolve ambiguities in the text of the law. "Core" competition objectives sometimes are expressed in terms of promoting consumer welfare, innovation, the efficiency and adaptability of the economy, and international competitiveness. These are all aspects of protecting the competitive process, and are not aimed at protecting individual competitors such as national champions.

If the objectives of competition law or policy include other non-"core" goals, economies are invited to reassess whether the competition law or policy is the optimal instrument for pursuing such goals, given the availability of other industrial policy tools that may facilitate the attainment of such objectives in a more efficient manner. This reassessment should include provisions in competition laws that explicitly refer to non-"core" competition objectives, as well as "political override" clauses and undefined "public interest" tests. In addition, economies are invited to reassess the manner in which trade-offs are made between the "core" competition objectives and such other goals to increase transparency and predictability (*see also Questions A8 and B6*).

C3 ***To what extent does the Competition Authority or another body have (i) a clear mandate to advocate actively in order to promote competition and efficiency throughout the economy and raise general awareness of the benefits of competition, and (ii) sufficient resources to carry out any advocacy functions included in its mandate?***

COMMENTS: A clear mandate for the Competition Authority to engage in such advocacy activities can be very helpful in ensuring that any position it promotes (*e.g.*, within government circles, to regulators, to business organisations and other constituencies) is carefully considered. In some economies competition advocacy has been a primary engine in the revision of existing regulations and regulatory regimes. Providing the Competition Authority with an explicit mandate in the competition law to engage in such advocacy has proven to be particularly effective (*see also Question B3 on reviewing existing regulations*).

C4 ***To what extent are measures taken to neutralise the advantages accruing to government business activities as a consequence of their public ownership?***

COMMENTS: Under the principle of competitive neutrality, government business undertaking business activities should not have competitive advantages or disadvantages relative to their private sector competitors simply by virtue of their government ownership. Competitive neutrality reduces resource allocation distortions and improves competitive processes. Both effects promote economic efficiency. A competitive neutrality policy prescribes a range of measures, including neutralising advantages that may accrue to public business in the areas of debt financing, preventing anti-competitive cross-subsidisation between regulated and competitive activities, regulation and taxation and requiring these businesses to earn a commercial rate of return. Competitive neutrality does not imply that government businesses cannot be successful in competition with private businesses, nor that government has no role in fulfilling public service needs or other special responsibilities. Government businesses may achieve success as a result of their own merits and intrinsic strengths, but not as a consequence of unfair advantages flowing from government ownership.

C5 ***To what extent does the agency responsible for the administration and enforcement of the competition law (the "Competition Authority") operate autonomously, and to what extent are its human and financial resources sufficient to enable it to do its job?***

COMMENTS: The Authority charged with enforcing the competition law should be able to make its enforcement decisions in an autonomous manner. Actual and perceived autonomy in regard to decision making, advocacy and other activities are necessary to cultivate public confidence that objective legal standards are being applied without political interference. Where the law provides for input in certain circumstances from other entities within the government, potentially adverse implications for certainty and predictability can be minimised by establishing transparent mechanisms for the transmission of such input. Government or ministerial budgetary decisions that impact upon the Competition Authority also ought to be transparent.

C6 ***To what extent is the role of enforcement decision makers transparent, especially when there are multiple government bodies involved in decision making, for example, regarding who the decision maker was, factors taken into account by such a decision maker, and their relative weighting?***

COMMENTS: Transparency in decision making enhances the predictability of enforcement decisions which in turn helps to ensure the effectiveness of competition law. Competition law cannot reach its full potential in terms of promoting pro-competitive conduct and investment in new products, technology or entry if it does not offer a minimum degree of certainty and predictability to persons whose interests may be affected by governmental involvement in the enforcement process. (*Note that the role of appellate bodies is dealt with separately in C11*). Reducing overlapping legal jurisdiction can help to increase efficient use of public resources and increase certainty for the general public and private sector.

C7 ***To what extent is there a transparent policy and practice that addresses the relationship between the Competition Authority and sectoral regulatory authorities?***

COMMENTS: Overlapping jurisdiction between a competition authority and a sectoral or multi-sectoral regulator creates potential uncertainty for businesses that must organise their actions in compliance with the law. Statutory provisions that clearly articulate the respective jurisdictions of these authorities, as well as protocols and Memoranda of Understanding have proven to be effective vehicles for clarifying respective roles and responsibilities. To ensure that the Competition Authority has an ability to advocate for pro-competitive or efficiency enhancing policies, explicit statutory provisions that create a mechanism for such views to be conveyed to other regulatory authorities can be particularly helpful. Informal contacts between agency staff members and between decision makers in the authorities can help to minimise the risk of inconsistent approaches being taken by authorities with overlapping authority.

C8 ***To what extent does the competition law contain provisions to deter effectively and prevent hard-core cartel conduct, abuses of dominant position or unlawful monopolistic conduct, and contain provisions to address anti-competitive mergers effectively?***

To what extent does the broader competition policy strive to ensure that this type of conduct is not facilitated by government regulation?

COMMENTS: These provisions arguably constitute the essential components of an effective competition law. A "hard core cartel" is an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. The category of "hard core cartel" does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws. Hard core cartels are

the most egregious violations of competition law and they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.

Abuse of dominant position or unlawful monopolistic conduct also negatively affect consumers and businesses who buy goods and services, for example by exclusionary or predatory conduct that results in higher prices than otherwise would have prevailed in the absence of such conduct. In some circumstances the competition law is the most appropriate instrument to control such conduct, *e.g.*, through a prohibition order or an order guaranteeing access to essential network facilities to all market participants on a transparent and non-discriminatory basis; in other circumstances a better response may be to separate vertically potentially competitive activities from regulated utility networks and otherwise restructure as needed to reduce the market power of incumbents. In yet other circumstances, *i.e.,* where the dominant firm does not face effective actual or potential competition, the better response may be to use price caps and other mechanisms to encourage efficiency gains when price controls are needed.

Anti-competitive mergers result in higher prices, lower availability, slower innovation, reduced service or lower quality of products, relative to what would have prevailed in the absence of the merger. It is normally easier to prevent these negative effects by preventing such mergers than to try to address them later, after the mergers, with other provisions of the competition law or with regulatory instruments.

C9 ***To what extent does the competition law apply broadly to all activities in the economy, including both goods and services, as well as to both public and private activities, except for those excluded?***

COMMENTS: Generally speaking, and subject to exclusions in the statute or jurisprudence (including exemptions and defences), an effective competition law should have general application throughout potentially competitive sectors of the economy, and should apply to the activities of individuals, companies, joint ventures, government businesses and other economic undertakings. This item encourages a reassessment of exclusions or other limitations on the application of the competition law, with a view to ensuring that they are no broader than necessary to achieve their underlying public policy objective.

When exclusions from competition law exist, they need to be narrowly targeted and no broader than necessary to achieve other legitimate public policy objectives that cannot be better served in other ways (*see also Question A4*).

C10 ***To what extent does the competition law provide for effective investigative powers and sanctions to detect, investigate, punish and deter anti-competitive behaviour?***

COMMENTS: Experience in several jurisdictions around the world has demonstrated that it is difficult to enforce a competition law credibly without effective investigatory powers. These powers are necessary to provide competition authorities with the means to obtain the information they require to do their jobs. This information can include documents, oral testimony, written responses to questions, computer records and other evidence as may be reasonably required to enforce the law.

In addition, it is difficult to induce compliance with the competition law without effective sanctions for violation of the law. If the sanctions are too low, or the probability of their being applied is too low, then subjects to the law may find it preferable to violate the law and face the possible consequences.

Finally, leniency policies have proven to be a very effective tool in discovering cartel activity, obtaining strong evidence and sanctions, and deterring similar conduct from occurring in the future.

C11 ***To what extent do firms and individuals have access to (i) the Competition Authority to become apprised of the case against them and to make their views known, and (ii) to the relevant court(s) or tribunal(s) to appeal decisions of the Competition Authority or seek compensation for damages suffered as a result of conduct contrary to the domestic competition law?***

COMMENTS: This item addresses due process. It is important that firms and individuals whose conduct is being investigated, or who may have been adversely affected by anti-competitive conduct, have an opportunity to make their views known to the Competition Authority in a timely fashion. Direct access to the judicial system also can provide an important safeguard by exercising a disciplining influence on competition authorities who will be aware that their decisions may be scrutinised in a public forum. To be effective, appeal procedures and rights of private access to the courts have to permit decisions to be made in a timely manner. Rights of private access also can provide parties to a dispute that is largely private in nature with an opportunity to settle their dispute where the competition authority cannot justify allocating scarce enforcement resources to the matter (*see also Question A11 on the implementation of regulatory reform policies*).

C12 ***In the absence of a competition law, to what extent is there an effective framework or mechanism for deterring and addressing private anti-competitive conduct?***

COMMENTS: Economies that do not have a competition law need to consider adopting some other framework or mechanism to deter future anti-competitive conduct such as hard core cartel behaviour, abuse of dominant position and mergers that harm competition. Where such conduct is not deterred, and occurs, a need arises for a means to address the conduct. In some jurisdictions, this may be at least partially addressed judicially (such as through a "restraint of trade" doctrine that renders anti-competitive contracts unenforceable).

MARKET OPENNESS POLICIES

Market openness policies *aim to ensure that a country can reap the benefits of globalisation and international competition by eliminating or minimising the distorting impact that may result from border as well as behind-the-border measures, including measures at different levels of government.*

These policies influence the range of opportunities open to suppliers of goods and services to compete in a particular national market (e.g., *through trade and investment), irrespective of whether these suppliers are domestic or foreign.*

D1 ***To what extent are there mechanisms in regulatory decision making to foster awareness of trade and investment implications?***

COMMENTS: Narrowly-defined and discriminatory regulation can, explicitly or indirectly, impede the flow of trade and investment to the detriment of domestic economic efficiency and of consumers. Early consideration of trade issues, particularly in the development and examination of alternative policy instruments, can prevent unnecessary restrictions on market openness.

It is as important to seek approaches to reduce restrictions on market openness in new legislation, as to review the existing stock of legislation periodically in order to address problems generated by unnecessary restrictions, cumbersome procedures, and time-consuming processes. Placing market openness clearly within the terms of reference for reviews of both primary and secondary legislation would provide a focus for trade officials' participation during the design and implementation of the regulation. Systems of regulatory impact analysis should take sufficient account of market openness considerations.

A key element for fostering such awareness is to ensure that regulatory, competition and trade authorities work closely together on a regular basis. Improved co-ordination should also include subnational regulatory authorities, independent regulators and professional bodies with regulatory responsibilities where appropriate. Integrating market openness considerations into regulatory decision making may require: the creation of appropriate intra-governmental consultation mechanisms (*see also Question A8*); better focussed efforts for training regulators; and enhanced assessment, understanding and application of regulatory alternatives. Co-ordination between regulatory and trade officials, including at different levels of government (*see also Question A5*), should be organised in the context of negotiating international trade agreements as well, so as to draw on all useful expertise in the design as well as in the implementation of regulatory aspects of these agreements. Implementation reviews, in addition to ensuring that policies are still relevant and efficient, could provide an opportunity for identifying and sharing best practices from the market openness perspective and contribute to the ability of regulators to recognise and address trade-related regulatory issues. Trade authorities should be closely involved in such reviews.

D2 ***To what extent does the government promote approaches to regulation and its implementation that are trade-friendly and avoid unnecessary burdens on economic actors?***

COMMENTS: Approaches to regulation that are trade-friendly and avoid unnecessary burdens on economic actors can be achieved in various ways, for instance by assessing whether a proposed measure is the least restrictive option reasonably available for efficiently achieving a regulatory objective; by basing regulation on performance rather than design criteria; by taking account of the equivalence of other countries' regulatory systems in meeting a given regulatory objective; by doing away with duplicative or outdated requirements; and by embracing regulatory alternatives where appropriate (*see also Question B7 on assessing alternatives to regulation*).

Assessing the impact of proposed regulation on market openness can facilitate the pursuit of social objectives in the most cost-efficient way for the economy. Regulations that allow flexibility in the way their objectives are met and avoid defining specifically how this should be done will facilitate the development of new, innovative and cost-efficient solutions (*see Question D7*). Efficient co-ordination between involved departments, including by way of central registries of formalities, helps streamline demands put on businesses by government administrations (*see Questions A6 and B5*). Periodic reviews of regulations ensure that applicable requirements are relevant and proportional to the regulatory objectives (*see Question B3*). Regulatory efficiency may be strengthened by systematic consideration of regulatory alternatives. This requires that regulators have the scope, authority and incentive, as well as the capacity, through improved communication with trade officials and, where appropriate prior consultation with other relevant stakeholders, to identify the most trade-friendly among various, equally effective, alternatives (*see also Question B7*).

Continuity in pursuing trade-friendliness from one administration to another is also important, as only medium- to long-term public policies can establish trade-friendly regulations that last through the useful life of investments.

D3 *To what extent are customs and border procedures designed and implemented to provide consistency, predictability, simplicity and transparency so as to avoid unnecessary burdens on the flow of goods?*

To what extent are migration procedures related to the temporary movement of people to supply services transparent and consistent with the market access offered?

COMMENTS: Measures to simplify border procedures and to avoid unnecessary burdens on the flow of goods include doing away with unnecessary or outdated requirements, such as requesting information that is already available to the authorities, or requesting information more than once for different departments. This objective also involves updating regulations to take account of changed contexts, technologies and markets and ensuring that the implementation process is proportional to the desired result, for instance that it does not cost more to implement than is actually gained in Customs revenue. The simplification of border procedures further implies that applicable controls will take place in a way that does not add unnecessary costs to traders or generate undue delays at the border, for instance through the implementation of risk-based and targeted operations and the replacement of some border controls by post-clearance audits.

The ability of natural persons to supply services in a market, either as an employee of a firm or as an individual, can be affected by the ease of use of the system for managing temporary entry. Information on all relevant temporary entry requirements and procedures should be transparent and readily available to service suppliers. Relevant schemes should also take account of the needs of business to move people in a timely and cost-effective manner.

D4 *To what extent has the government established effective public consultation mechanisms and procedures (including prior notification, as appropriate) and do such mechanisms allow sufficient access for all interested parties, including foreign stakeholders?*

COMMENTS: Well publicised, well-organised, highly accessible and well-timed opportunities for public comment, as well as clear lines of accountability for explaining how public comments have been handled are important features of a high-level commitment to public consultation (*see also Question B5*). Public consultation should not be limited to insiders, such as already established businesses, but should be open to all interested parties. Good practice in this area may be encouraged by clear guidance to regulators on how consultations are to be conducted.

Wide discretion on who is to be consulted and how on given regulatory proposals may dilute the intended benefits of broad based consultation. In particular, new entrants, SMEs or foreign stakeholders may be at a disadvantage in informal consultations. Maintaining balance between open consultation procedures and the flexibility of informal procedures is important, with the understanding that specific consideration of access possibilities by new foreign stakeholders may be required in certain circumstances. Although responsibility for policy decisions rests with the government, transparency in the way comments are handled enhances the credibility of the process and the prospects of regulatory compliance by the economic actors.

D5 ***To what extent are government procurement processes open and transparent to potential suppliers, both domestic and foreign?***

COMMENTS: Transparency of practices relating to government procurement is another critical determinant of market openness. In many jurisdictions, government procurement is a significant portion of the economy and open access to procurement can introduce innovative, efficient players or cost savings, thus promoting efficiency within the economy (*see Question A6 on transparency*). Transparency for government procurement can mean easily available and centralised information regarding procurement opportunities; this may be done via the internet through the use of e-gateways, for example. Fair and transparent processes for procurement decisions means that those seeking contracts know what are the requirements and criteria for awarding contacts. In a fair process, the criteria and requirements are the same for all. A fully developed procurement process would include opportunities to appeal decisions to an independent body where participants consider that the process was flawed or unfair.

D6 ***Do regulatory requirements discriminate against or otherwise impede foreign investment and foreign ownership or foreign supply of services?***

If elements of discrimination exist, what is their rationale? What consideration has been given to eliminating or minimising them, to ensure equivalent treatment with domestic investors?

COMMENTS: Limits to foreign investment or ownership in key sectors or for other essential reasons (*e.g.*, cultural sovereignty) have significant negative impacts on the attractiveness of an economy for investment and on prospects for economic development and growth. As countries compete for new investments, a good quality regulatory environment that is transparent, non-discriminatory, efficient, timely, based and embedded in law becomes a powerful tool for countries to attract and maintain investors. (*see also Question A4 on non-discrimination of regulatory policies and reforms*).

Equally, discrimination against foreign services or service suppliers limits the potential for gains from competition and market openness, including access to higher quality services, lower prices and technology transfer. Where important public policy objectives can be safeguarded by non-discriminatory regulation, the rationale for discrimination should be carefully considered and weighed against the gains from greater openness.

Creating a regulatory culture in which officials are sensitive to and consider the effects of regulatory actions on foreign investment or foreign supply of services should be one of the goals of a programme of regulatory reform. This can be done through, among other means, requiring that the impact analyses for new regulation and the terms of reference for reviews of existing regulation pay due attention to anticipated effects on trade and investment (*see Question B6 on RIA*). Similarly, independent regulators, such as sectoral regulators, should be required to make comparable assessments.

D7 ***To what extent are harmonised international standards being used as the basis for primary and secondary domestic regulation?***

COMMENTS: International standards play a vital role in improving market openness. Compliance with differing national regulations and standards significantly increases the cost of operating in different markets. Standards developed internationally may offer a solution to fragmented regulatory systems. Reliance on international standards is encouraged within several WTO agreements as the basis of domestic regulation when such standards exist and are judged to be relevant, effective and appropriate for achieving regulatory objectives. Such reliance should be a prominent feature of regulatory reform in all policy areas.

The use of international standards may be considerably strengthened through the systematic monitoring of related regulatory initiatives. Provisions that depart from existing international standards should be based on genuine differences in regulatory objectives or in available means to achieve them. Regulatory authorities should use open and transparent procedures when considering to base domestic regulations on international standards.

D8 ***To what extent are measures implemented in other countries accepted as being equivalent to domestic measures?***

COMMENTS: Where foreign regulatory measures differ from those developed domestically, but nonetheless adequately fulfil the domestic policy objectives, acceptance of these measures as functionally equivalent to the domestic measures, where possible, will encourage market openness and stimulate competition. On the contrary, requiring firms to meet domestic regulations in circumstances where they have appropriately met regulatory requirements for the same regulatory objective in their home economy, will increase the costs of production or doing business. It may also introduce *de facto* discrimination against foreign goods. Clearly defined criteria for the acceptance of foreign standards, measures and qualifications and clear avenues for demonstrating equivalence should be available. Foreign producers and service suppliers should have an open, transparent and accessible process available to them if they want to make a case for equivalence. Clear and thorough regulatory impact statements for new regulation can be useful in determining the objectives and effects of regulation in order to demonstrate equivalence. Recognition of equivalence can also be facilitated through the adoption of mutual recognition agreements.

D9 *To what extent are procedures to ensure conformity developed in a transparent manner and with due consideration as to whether they are effective, feasible and implemented in ways that do not create unnecessary barriers to the free flow of goods or provision of services?*

COMMENTS: Conformity to regulations is necessary to achieve public objectives such as health, safety, environmental and consumer protection. When done without the outlay of excessive costs and time, procedures to ensure conformity can facilitate market openness by increasing consumer confidence in products or service providers. On the other hand, they can negatively affect market openness when they are duplicative, poorly implemented or when they are designed in a way that the high cost of meeting them and their complexity does not contribute to the achievement of regulatory objectives. Governments should work towards a system that is proportionate, streamlined and well implemented.

Recognising the equivalence of the results of an assessment performed elsewhere can greatly contribute to reducing costs associated to conformity assessment procedures. Mutual recognition agreements (MRAs) signed by two or more countries on the acceptance of conformity assessment procedures is one approach to formalise this process. MRAs in the area of conformity assessment avoid costs to exporting producers by allowing them to attest to their conformity with applicable requirements through certification by their own country's conformity assessment procedures. They would then be deemed to be in compliance with the procedures of the importing economy.

Progress towards a more efficient system can also be made through the recognition of supplier's declaration of conformity, unilateral recognition of conformity assessment results reported in other economies, or through voluntary arrangements between conformity assessment bodies in different economies. At the same time, governments should encourage the development of domestic capacity for accreditation and ensure ease of access to the accreditation process for both foreign and domestic producers.

Developing the APEC-OECD Integrated Checklist on Regulatory Reform: A Policy Instrument for Regulatory Quality, Competition Policy, and Market Openness

I. *THE APEC-OECD INTEGRATED CHECKLIST*

PROJECT OBJECTIVE AND OUTPUT

The APEC-OECD Co-operative Initiative has played an important role since December 2000 in raising awareness about the importance of regulatory reform in the 46 economies that are members of these two organisations.[1] Regulatory reform is accelerating throughout the APEC and OECD economies as market liberalisation deepens in many sectors, markets open wider to trade and investment, and reform of public sector institutions enables more transparent and efficient regulatory regimes to function. These developments, which are interconnected, help boost sectoral performance, enhance economy-wide efficiency, innovation and growth, increase consumer choice and welfare, and help government to maintain high standards of environmental quality, consumer welfare and safety. The regulatory reform agenda is based on ideas of "regulatory quality", or the appropriate use of regulation to support markets and foster public interests. As a result, supply-side structural reforms that stimulate investment and competition and reduce regulatory inefficiencies have become central to effective economic policy.

As the First Phase of the APEC-OECD Co-operative Initiative demonstrated, there is no "one-size-fits-all" model of regulatory reform. However, member economies of the two organisations have identified crucial common elements of reform. It is in this spirit that in 1997 and in 2000 they endorsed respectively the *OECD Policy Recommendations on Regulatory Reform* and the *APEC Principles to Enhance Competition and Regulatory Reform* to promote the individual and collective implementation of regulatory reform.[2]

In October 2002, APEC and OECD agreed at the International Conference on Regulatory Reform in Jeju Island, Korea, to pursue the APEC-OECD Co-operative Initiative.[3] A central proposal for the Second Phase (2003-2004) has been to work collectively on the creation of an *Integrated Checklist* to help countries self-assess their progress in terms of implementing the common principles on regulatory reform.

This project is a joint effort of OECD and APEC member countries and economies, with contributions from the private and social sectors and other relevant international organisations. Its central proposal is to "work collectively… on the creation of an integrated checklist to help countries to self-assess their progress in terms of implementing the common principles on regulatory reform".[4] The goal is to foster as far as possible and feasible, and without compromising the policy objectives, a triple integration of regulatory practices: an integration of both sets of principles, of the main policy areas constituting regulatory reform and of governance perspectives. The APEC-OECD Co-operative Initiative would act as a catalyst in developing this new integrated tool by bringing together the expertise of member economies and relevant individuals and institutions.

1 Australia, Austria, Belgium, Brunei Darussalam, Canada, Chile, People's Republic of China, Czech Republic, Denmark, European Commission, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Italy, Japan, Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Portugal, Russia, Singapore, Slovak Republic, Spain, Sweden, Switzerland, Chinese Taipei, Thailand, Turkey, United Kingdom, United States of America, Viet Nam.

2 The principles can be found on *www.oecd.org/regreform* or as annexes in the agenda of the Vancouver Workshop.

3 See Work Programme 2003-2004 of the OECD-APEC Co-operative Initiative on Regulatory Reform, *www.oecd.org/regreform*

4 *Idem.*

Previous versions of this Checklist served as a basis for the Fourth Workshop of the APEC-OECD Co-operative Initiative, held in Vancouver, Canada on 8-9 October 2003 where participants discussed the framework, the horizontal aspects and the regulatory policy dimension of the *Integrated Checklist*. At the Fifth Workshop held in Paris on 2-3 December 2003, participants discussed the competition aspects. Market openness was the focus of discussions at the Sixth Workshop which was held in Pucon, Chile, on 24-25 May 2004. A conference on 1 November 2004 in Thailand concluded the preparation of the Checklist and elicited the comments and support of stakeholders. These events have provided an opportunity to discuss a multidisciplinary instrument that can be put to practical use to implement APEC and OECD principles.

II. THE INTEGRATED CHECKLIST

COMPARISON OF THE APEC AND OECD PRINCIPLES

The Integrated Checklist has been designed to be used as an indicative tool for the relevant government agencies, departments and ministries to self-assess country implementation of regulatory reform and in particular the three key policies that support it: regulatory, competition and market openness policies (*see Box 1*).

Both sets of OECD and APEC principles share not only the importance given to the need for further regulatory reform but also basic elements and principles such as the importance of regulatory quality, competition and the avoidance of unnecessary economic distortions. They also share key core values such as transparency, non-discrimination, and accountability. Both aim at establishing a policy framework and developing capacities to create a regulatory environment conductive to a well-functioning market economy.

BOX 1. CENTRAL DEFINITIONS

Regulatory reform refers to changes that improve regulatory quality to enhance the economic performance, cost-effectiveness, or legal quality of regulations and related government formalities.

Reform can mean revision of a single regulation, the scrapping and rebuilding of an entire regulatory regime and its institutions, or improvement of processes for making regulations and managing reform.

Deregulation is a subset of regulatory reform and refers to complete or partial elimination of regulation in a sector to improve economic performance.

Regulatory, competition and market openness policies are key drivers for a successful and coherent regulatory reform.

Regulatory policies are designed to maximise the efficiency, transparency, and accountability of regulations based on an integrated rule-making approach and the application of regulatory tools and institutions.

Competition policies promote economic growth and efficiency by eliminating or minimising the distorting impact on competition of laws, regulations and administrative policies, practices and procedures; and by preventing and deterring private anti-competitive practices through effective enforcement of competition laws.

Market openness policies aim to ensure that a country can reap the benefits of globalisation and international competition by eliminating or minimising the distorting effects of border as well as behind-the-border regulations and practices. These policies influence the range of opportunities open to suppliers of goods and services to compete in a particular national market (*e.g.*, through trade and investment), irrespective of whether the suppliers are domestic or foreign.

Some aspects of the OECD and APEC Principles differ, and implicit gaps in one or another can be noted. The seven key OECD policy principles are built around the need to improve rule-making processes, competition policy and market openness capacities. The APEC Principles support "open and competitive markets" as key drivers of economic efficiency and consumer welfare. They promote competition and market openness (such as through non-discrimination and the avoidance of distortions), which include dealing with new and existing regulatory programmes and rules that may hinder competition or otherwise introduce inefficiencies into the marketplace. The APEC Principles also give a major importance to implementation, stressing for instance the need for capacity building, resources endowment and recognising the role of the private sector. Importantly, both sets of Principles address substantive issues that concern the core and outcome of the reform policy, as well as the process, institutions and capacities to implement the reform policy.[5]

Nevertheless, there appear to be no major inconsistencies between the two sets of principles; most of the differences are of emphasis. For instance, some "process" elements of the OECD list can be derived from the thrust given to "accountability" and "implementation" in the APEC Principles. In sum, the two sets can be seen as mutually supportive and consistent and their integration should serve to strengthen their accessibility and implementation. Moreover, any guidelines on these matters will be most effective to the extent that they are seen as flexible and evolutionary and allow scope for improvement and refinement.

THE STRUCTURE OF THE INTEGRATED CHECKLIST

In addition to drawing directly from the APEC and OECD Principles, the *Integrated Checklist* incorporates the results of previous discussions of past APEC-OECD events as well as recent material developed by the organisations.[6]

Schematically, the *Integrated Checklist* can be seen as an edifice in which a "pediment" is supported by three pillars. The whole edifice is made of 39 normative, open-ended questions (11 on "integrated" policies; 8 on regulatory policy; 12 on competition policy, and 9 on market openness policy) that national authorities should answer when considering the adoption or revision of regulatory, competition or market openness policies. Under each question, one or more paragraphs provide further explanatory elements and criteria. A matrix view of the Integrated Checklist providing a synthesis of questions can be found on pages 12-13.

The "pediment" includes all "shared" and general issues concerning the three policy areas that most support regulatory reform (regulatory, competition and market openness); these include such issues as political commitment, transparency, public consultation, etc. It is recognised that the specific means of effective implementation may vary in the different policy areas, although the amount of detail given in the Checklist varies according to the issue. As such, these questions can be seen as horizontal and already integrated. The three other sections address specific aspects of each of the policy areas. To further help in the integration, some cross references to individual questions have been added.

It should be noted, however, that the "pediment" and each of the pillars do not differentiate "substantive" questions focusing on the core elements of the policy, and "capacity" questions addressing the existence of institutions, processes and other matters needed to implement the APEC and OECD Principles. Also, no attempt has been made to impose a hierarchy on the questions appearing in the Matrix or to weight or assign importance to them.

5 For example, the APEC Principles include substantive matters such as the basic content of competition laws (*i.e.,* broad application of the competition principles) but also important framework conditions such as non-discrimination and transparency in the design of the competition agency.

6 In particular the *1995 Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*; the *1997 OECD Report to Ministers*, which set up a comprehensive plan for action on Regulatory Reform; the *2000 Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, and the *2001 Recommendation of the Council Concerning Structural Separation in Regulated Industries* and two major stocktaking exercises : *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*, Paris, 2002, and *Integrating Market Openness into the Regulatory Process: Emerging Patterns in OECD Countries*, Paris [TD/TC/WP(2002)25/Final].

TOWARDS THE FUTURE

The *Integrated Checklist* translates the general statements found in the already agreed-upon APEC and OECD Principles into concrete, practical terms that can be applied in different contexts, and does so in ways that integrate governance perspectives – transparency, accountability and performance. Because of the complexity of the issues involved and the synergies and occasional trade-offs among competing objectives, the *Integrated Checklist* should provide clear guidance and explicit criteria to make evaluation easier, while helping create a framework in which priorities can be set, capacities enlarged, and awareness raised.

An integrated instrument maximises the synergies among the three policy areas and the coherence of the reform efforts, while recognising the political reality confronting many decision makers in setting regulatory objectives and establishing modalities. Indeed, a number of issues in the three categories and some concepts behind "good practices" in each category are similar. The goal is to provide an integrated whole-of-the-government tool to manage and monitor regulatory reform, providing coherence while serving the different policy areas.

The *Integrated Checklist* is a unique and major effort for international development of good regulatory governance practices. It should include the most relevant and action-oriented questions to indicate whether countries have in place effective approaches to designing, implementing and building domestic capacities to ensure that national policies in these three areas are supportive of regulatory reform. Regulatory reform does not simply happen when a policy or law is adopted to that end; effective institutions, policies and tools must be in place, and embedded in an organisational and political culture, to implement it. The *Integrated Checklist* should also function as a repository of APEC and OECD members' experience, knowledge and best practices leading to further reforms. This is inherently an open process, one in which it is as possible and desirable to learn from failure as from success.

Development of the *Integrated Checklist* is only the beginning. Ahead lies the work of implementing regulatory reform, which the *Checklist*, used as a self-assessment tool initially and thereafter at intervals, can make easier.