OUTREACH

APEC-OECD CO-OPERATIVE INITIATIVE ON REGULATORY REFORM

ENHANCING MARKET OPENNESS THROUGH REGULATORY REFORM

PROCEEDINGS OF THE SIXTH WORKSHOP
PUCON, CHILE, MAY 2004

second phase
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APEC

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PROCEEDINGS OF

THE SIXTH WORKSHOP OF

THE APEC-OECD CO-OPERATIVE INITIATIVE

ON REGULATORY REFORM

PUCÓN, CHILE

24-25 May, 2004

TABLE OF CONTENTS

I. PROCEEDINGS OF THE PUCÓN WORKSHOP 5

II. AGENDA OF THE PUCÓN WORKSHOP 11

III. SUMMARY OF THE PRESENTATIONS 17

APPENDIX 1: ELEMENTS OF THE PROTOTYPE INTEGRATED CHECKLIST PARTICULARLY RELEVANT TO THIS WORKSHOP 51

APPENDIX 2: FINAL DRAFT – APEC-OECD INTEGRATED CHECKLIST ON REGULATORY REFORM 53

APPENDIX 3: APEC PRINCIPLES TO ENHANCE COMPETITION AND REGULATORY REFORM 85

APPENDIX 4: THE 1997 OECD POLICY RECOMMENDATIONS ON REGULATORY REFORM 89

APPENDIX 5: SUBMITTED PAPERS 91

APPENDIX 6: LIST OF PARTICIPANTS 135

I. PROCEEDINGS OF THE PUCÓN WORKSHOP

"ENHANCING MARKET OPENNESS THROUGH REGULATORY REFORM"

THIRD WORKSHOP OF THE SECOND PHASE OF THE APEC-OECD CO-OPERATIVE INITIATIVE ON REGULATORY REFORM

24-25 MAY 2004, PUCÓN, CHILE

The APEC-OECD Co-operative Initiative on Regulatory Reform provides a forum for exchange of experiences on good regulatory concepts, policies and practices. It aims to facilitate the implementation of similar principles on regulatory reform in their respective member economies. The workshop in Pucón, Chile was the third in a series dedicated to the preparation of an Integrated Checklist for Regulatory Policy.

At the launch conference of this initiative, held in Singapore in February 2001, APEC and OECD representatives agreed upon a series of three workshops. Co-organised over 18 months together with the Governments of China, Mexico and Korea, these workshops generated the basis for a further, second phase of the Co-operative Initiative, to deepen the dialogue.

A central element of this second phase has been the elaboration of an APEC-OECD *Integrated Checklist* for self-assessment on regulatory, competition and market openness policies, aimed at implementing the APEC and OECD principles embodied in the APEC 1999 declaration of *Principles to Enhance Competition and Regulatory Reform* and the OECD *Policy Recommendations for Regulatory Reform* contained in the *Report on Regulatory Reform* presented to OECD Ministers in 1997. The first workshop of the new phase was held in Vancouver, Canada in October 2003. This launched the work on the *Integrated Checklist* and focused specifically on the questions covering regulatory policy. In the Paris workshop held in December 2003, participants discussed the competition component of the Checklist and shared policy experiences and practices in this field in APEC and OECD member economies. The third workshop, held in May 2004 in Pucón, Chile, was devoted to market openness considerations. It was agreed that a fourth workshop, the final one in this second phase of the Co-operative Initiative, be held in November 2004 in Bangkok, Thailand to discuss a common presentation and communication format for the Integrated Checklist. In Vancouver, Paris and Pucón, representatives of all three policy areas (regulatory, competition and market openness) have participated in discussions and exchanges of proposed revisions, thus assuring a proper integration of these areas over time and an open flow of information among APEC and OECD participants at the workshops. The Bangkok meeting will bring the three policy areas together, and is expected to generate preliminary approval of the Checklist. The *Integrated Checklist* can then be presented to the respective Executive Bodies of the APEC and OECD in 2005. The Bangkok meeting will also provide an opportunity to explore the follow-up and implementation of the Checklist.

The Pucón workshop was opened by Mr. Rolf Alter, Deputy Director of the OECD Directorate for Public Governance and Territorial Development. Sessions were chaired by Mr. Ernesto Estrada, General Director for International Affairs, Federal Competition Commission of Mexico and Convenor of the APEC Competition Policy and Deregulation Group, the Hon. Arne Rodin, Swedish Ambassador to Chile, and Mr. Alan Bowman, Deputy Director (APEC) of the Canadian Department of Foreign Affairs and International Trade and Chair of the APEC Committee on Trade and Investment. The Director of the OECD Trade Directorate, Mr. Jean-Marie Metzger, addressed the workshop with a presentation on challenges for policy coherence when enhancing market openness through a whole of government approach. The Workshop brought together more than 60 participants from 20 economies, the European Commission and the Organisation of American States.

Developing the Integrated Checklist

The Checklist is emerging as a policy tool for achieving economic growth, increased employment and greater economic development. In the previous workshops, discussion focused on the potential uses of the Checklist, the linkages among regulatory, competition and market openness policies, and on how the needs of different economies could be accommodated within a common framework. The Checklist is intended to be a flexible, user-friendly tool for ongoing self-assessment. Regulatory reform is a dynamic process. A static instrument containing items that can be checked off and dismissed once a certain level of progress has been achieved misses the point. The Checklist is performance-oriented and forward-looking, which together with its thematic integration, is its added value. The Checklist, which rests on existing APEC and OECD principles, should be used on a voluntary basis as a guide to achieving "good" as opposed to "best" practices. In addition, the Checklist should promote basic governance principles of increased transparency, accountability and performance, and encourage governments to adopt more pro-competitive economic, trade and regulatory policies. The real test will lie in how the results of a self-assessment exercise based on the Checklist are used to improve decision-making.

The informal Co-ordination Group, whose members are drawn from among the economy representatives, have welcomed a preamble that describes the purpose of the Checklist explicitly. The members of the Group help ensure that all relevant information and issues are brought to the Secretariat's attention, and that the final content of the Checklist reflects the balance of the comments received.

Market openness – the topic of this workshop – is particularly important in view of the increasing trade and flows among the APEC and OECD economies. Regulatory reform helps to put domestic and foreign firms on an equal, competitive footing, to open markets for government procurement, to improve levels of transparency and of other aspects of good governance that are essential to the confidence not only of investors and the business community but also of the public. It also encourages the use of sound tools for regulatory management such as regulatory impact analysis (RIA) which can help clarify the extent to which regulations, when drafted, take account of and help promote market openness.

Policy coherence for efficient regulation: Enhancing market openness through a whole of government approach

This session focused on the importance of coherence between regulatory objectives and practices in different policy areas and on concrete ways for achieving it, based on economies' experience. It was observed that good regulatory policies and market openness are increasingly linked due to the globalisation of production and marketing and to the importance of ensuring that domestic regulations do not impede cross-border corporate activities. These links can generate positive interaction between policies, or, on the contrary, may lead to conflict and protectionism. An efficient regulatory framework constitutes an important factor in the attractiveness of an economy for foreign direct investment and enhances the ability of domestic businesses to reinforce their competitiveness and better place themselves in the global marketplace. At the same time, the gradual reduction of tariff barriers has not only increased the visibility of non-tariff barriers but also fuelled calls from previously sheltered industries for protection by means of regulatory barriers. Trade distortions in the form of non-trade barriers are frequently the result of domestic institutional and regulatory malfunctions: insufficient awareness of the economy's commitments among regulators, or insufficient scrutiny of proposed regulations on such commitments. It was also observed that some of the recent, well publicized, market failure cases (electricity, rail) were not linked to liberalisation but rather to the lack of appropriate and well-designed regulation to underpin liberalisation, which can be addressed by pooling together policy makers' expertise through a whole-of-government approach.

Economy experiences show that disciplines negotiated in the context of free trade agreements can not only enhance regulatory policy at the domestic level but also complement international provisions and encourage further developments at the multilateral level. This is particularly clear in the case of services regulation, for which transparency is particularly important because of the prevalence of regulations that may act as barriers. Transparency in the regulation of natural monopolies helps to correct information asymmetries, especially in technical areas like the network industries, and enhances consumer/user protection. The experiences of Chile were taken as an example. It was reported that multilateral and regional transparency disciplines in the area of telecommunications services have allowed Chile to strengthen technical and reduce political considerations, decrease regulator-company asymmetries and have led to more efficient pricing. This in turn has been seen to encourage investment and stability in the regulation of the sector. Trade negotiators and regulators have worked in close co-operation in order to harness developments in the international arena so as to contribute to more efficient and less burdensome regulation at home. On the other hand, the question of market size was raised as a variable in regulatory reform, e.g. in the case of unbundling telecommunications services. At the same time, while implementation of reform should be envisaged as a technical and non-political operation, participants were reminded that it is only realistic to take due account of the political setting when planning such reform.

Market openness and the business environment: Ensuring regulatory efficiency and the confidence of the private sector

This session addressed the mechanisms used by governments to foster greater confidence among the private sector in the elaboration and implementation of regulatory policy. One example discussed was China, where recent legal changes are seen as improving the business climate and contributing to market openness.

The confidence of economic actors depends on the predictability and accountability of the regulatory system, which can be greatly enhanced through mechanisms of transparency and public consultation. Such mechanisms give the possibility to adjust proposed policy to feedback received by policy-makers and allow interested parties to gain greater understanding of the purpose and content of the regulations. It is important to gear consultations towards an all-inclusive definition of “stakeholders”, even if inclusiveness increases the costs of consultation, because this brings a sense of ownership and increases confidence in the system. The example of consultations on the EU Chemicals REACH programme shows that transparency mechanisms can bring a better balance between the economic, social and environmental aspects of a regulation and allow a much wider public appreciation of the importance of certain economic activities for domestic welfare. At the same time, it is important to acknowledge that the ultimate responsibility for policy decisions is not shared with stakeholders, but rests with the administration. Engaging in public consultations does not imply that all participating audiences will be satisfied by the final outcome.

Economies may try to counter prevailing traditions of preferring “inner circle” oriented consultations by consolidating requirements for public hearings before setting up or modifying legislation and for foreign participation in advisory councils of ministries. It is noteworthy that Korea has appointed a foreign head to the recently launched Invest Korea, aimed at enhancing the one-stop service system and improving the investment environment by responding to investors' concerns. “Single windows” are an important tool for enhancing transparency and coherence, and the support of modern technology in establishing electronic portals may help overcome in part poor co-ordination between involved administrations.

Domestic regulation in a globalised economy: the impact on international competitiveness

1. Improving international competitiveness through the reduction of unnecessary regulatory burdens

This sub-session discussed the effects of unnecessary regulatory burdens on competitiveness of goods and services and explored approaches aiming at reducing such burdens. The discussion began by addressing regulatory disciplines for services. It was stressed that WTO disciplines do not regulate the domestic supply of a service, neither in terms of content nor in terms of the policy objective pursued. Conflicts arise from the unnecessarily burdensome or inefficient application of regulations that impact negatively on services trade and services suppliers.

Complementarity between good domestic governance and market openness in the area of services is an issue that has not yet been fully explored. Many service sectors and in particular social services (health, education) raise acute regulatory issues, including the issue of the universal service obligation. Because of political sensitivities, there has been limited discussion of these issues, even in terms of the policy objectives pursued; in fact service sectors are generally not scheduled under the GATS. On the other hand, the increasing tendency to offer electronic cross-border provision of services raises the possibility to implement consumer protection measures (for instance prudential regulations for financial services) with clear jurisdictional implications.

Regulatory Impact Analysis (RIA) is a valuable tool for identifying regulatory alternatives that can efficiently achieve domestic policy objectives in the least trade-restrictive way. Accounting for the impact of proposed regulation on trade and investment is gradually gaining ground. In Australia such mechanisms address the impact on business or the restriction on competition, including any bearing on export performance, and also cover the approval for the government to commence negotiations of and ratify a treaty. An important aspect of RIAs or other monitoring mechanisms is that they filter not only barriers that result from illegal acts or policies but also economically irrational acts or policies which bear costs which are excessive relative to the objective pursued, or which are discriminatory. The example of a rationality assessment performed by the Market Access Commission of Indecopi, Peru, showed how a proposed measure could lead to results that were opposite from the stated objective and identified more cost-effective policy instruments for achieving the same objective.

2. Improving competitiveness by minimising the cost impacts of regulatory diversity across borders

This sub-session discussed the impact of international regulatory diversity and of potential approaches to minimise it. Participants raised the question of the pace of reform in particular for developing economies and whether expected the benefits could justify major regulatory overhauls. It was observed that in the area of services, provisions at the multilateral level, such as the WTO reference paper on basic telecommunications, have not yet been widely adopted by developing economies. Nevertheless, a number of them envisage important commitments at the bilateral or regional level, which may be quite costly to implement, especially in the absence of a strong sectoral regulator. It was stressed that the adoption of international standards is not sufficient to reduce regulatory diversity; it has to be accompanied by appropriate training of the regulator.

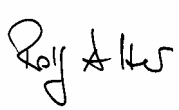
The discussion also focussed on the need to avoid regulations becoming obsolete or leading to social costs greater than their expected benefits. This can often be achieved by the use of performance-based regulations, geared towards objectives and not towards specific designs. It can also be based on the use of alternative mechanisms, such as liability laws and insurance schemes, self-regulation, or codes of practice.

Refining the APEC-OECD Integrated Checklist for Regulatory Reform

This last session of the workshop aimed at translating the discussion in previous sessions into concrete implications for the drafting of the APEC-OECD Integrated Checklist for Regulatory Reform. Discussants noted that the questions in the checklist usefully reduce the role of politics through objective criteria. They also recognized that politics has a useful role to play to ensure a broad acceptance of proposed reform. In particular, political opposition to reform needs to be addressed not only by identifying opponents, engaging in reform advocacy, but also by accompanying policies to ease the transition. The difference between large and small economies in the political process, given the sized domestic markets as a variable, added an important, new perspective. The issue of timing and sequencing of reforms is particularly important, as every aspect of reform cannot be undertaken simultaneously but needs to be prioritized. This is especially true for economies that have not yet developed a complete, integrative institutional framework (such as most developing economies). While the Checklist is a valuable tool for steering reform, attention should also be paid to the appropriate step for launching reform.



Ernesto Estrada
General Director for International Affairs
Federal Competition Commission, Mexico
Convenor of the APEC Competition Policy and Deregulation Group (CPDG)



Rolf Alter
Deputy Director
Public Governance and Territorial Development Directorate
OECD

II. AGENDA OF THE PUCON WORKSHOP

ENHANCING MARKET OPENNESS THROUGH REGULATORY REFORM

General objective: To refine the *APEC-OECD Integrated Checklist on Regulatory Reform* (especially the sections on "market openness policies" as well as on "horizontal criteria") by sharing ideas and experiences with trade-and-investment-related aspects of regulatory reform and building on discussions in the earlier APEC-OECD workshops.

MONDAY 24 MAY 2004

9:30 – 10:15

Welcome and opening remarks

- **Alan Bowman,** Deputy Director, International Economic Relations & Summit Division, Department of Foreign Affairs and International Trade, Canada
  Chair of the APEC Committee on Trade and Investment

- **Rolf Alter**, Deputy Director and Head of Programme (Regulatory Reform), Public Governance and Territorial Development Directorate, OECD

Introduction to the APEC-OECD Integrated Checklist on Regulatory Reform.

10:15 – 10:30

Coffee break

10:30 – 12:30

Session 1: Policy coherence for efficient regulation: Enhancing market openness through a whole of government approach

- **Chair: Alan Bowman,** Deputy Director, International Economic Relations & Summit Division, Department of Foreign Affairs and International Trade, Canada **and Chair of the APEC Committee on Trade and Investment**

Regulatory efficiency can be compromised when there is a lack of coherence between regulatory objectives and practices in different policy areas. The *Integrated Checklist* is designed as an instrument to highlight the need for and to foster policy coherence.

A major approach for strengthening policy coherence in the design and implementation of regulatory measures is formally or informally to consider the mutual impacts of regulations arising in different policy areas, including both synergies and frictions.

Early attention to trade impacts, particularly in the consideration of alternative policy instruments, can help prevent unnecessary restrictions to market openness. Policy synergies can be ensured through strengthened co-ordination and co-operation between trade, competition and regulatory officials, for instance in the context of regulatory impact assessment or through the creation of appropriate intra-governmental consultation mechanisms.

The aim of this session is to discuss why coherence between regulatory, competition and trade policies is an important objective and to explore possible government approaches and instruments for increasing coherence in these policy areas. It will showcase how market openness components are related to other components of the *Integrated Checklist.* Issues to be discussed include:

- In what ways do regulatory policies affect market openness?
- Which policy makers and private actors are most affected and what can be done to enhance their understanding of the issue?
- How can market openness considerations best be integrated in the mainstream of domestic policy-making and implementation? What frictions might arise and how can they be avoided or overcome?
- How can co-ordination with regulatory officials best be organised in the negotiation of international trade agreements, so that their expertise is usefully drawn on in the design as well as in the implementation of regulatory aspects of these agreements?

The topic of this session relates especially to item C1, as well as items H1, H2, H5, H8, H9 and H10 of the prototype Integrated Checklist.

(Speakers)

- **Ignacio Fernandez**, Trade on Services Negotiator, Ministry of Foreign Affairs, Chile
- **Alejandro Drexler,** Division on Regulations, Ministry of Economy, Chile
- **Jean-Marie Metzger**, Director, Trade Directorate, OECD

12:30 – 14:30

Lunch

14:30 – 18:00

Session 2: Market openness and the business environment: Ensuring regulatory efficiency and the confidence of the private sector

- **Chair: Arne Rodin***,* Swedish Ambassador to Chile, Sweden

Governments typically pursue a range of regulatory policy objectives, seeking successful outcomes on all of them in a context of strong economic performance. Regulatory reform can improve the prospects for achieving such outcomes, *e.g.* by lightening the regulatory burden for business. An important element in this can come through the reduction of unnecessary government intervention in trade and economic activities and the fostering of greater confidence in the role of the private sector (both national and foreign) in the implementation of regulatory policy or through self-regulation.

As an example, the private sector already plays a recognized role in areas such as standards (*e.g.* for conformity assessment). It may also contribute to a competitive environment in cases of deregulation of public services, where well-designed regulatory reform aims to increase economic efficiency while ensuring adequate supply and quality.

The confidence of economic actors in the regulatory system depends on the predictability and accountability of that system, which can be greatly enhanced through mechanisms of transparency and public consultation.

This session will address two elements – efficiency and confidence – that are important for a healthy business environment and open markets. The discussion will focus on how governments, through transparency and non-discriminatory consultation procedures, can increase regulatory efficiency and the confidence of business actors in the regulatory system. Issues to be discussed include:

- How to define optimal levels of government intervention in the economic activity and how to ensure the accountability of related policy decisions?

- How to ensure sufficient inclusiveness of public consultation mechanisms, in particular with respect to foreign stakeholders?

- How best to harness transparency in government procurement mechanisms to the pursuit of cost-effective public purchasing?

- How to ensure non-discriminatory protection of fundamental due process rights of economic actors? How to ensure the accessibility of appeal systems?

The topic of this session relates especially to items C1, C4, C5, as well as H3, H6 and H11 of the prototype *Integrated Checklist*.

[16:00 16:15 Coffee break]

(Speakers)

- **Maria-Francesca Spatolisano**, Deputy Permanent Representative of the EC to the OECD

- **DoHoon Kim**, Senior Research Fellow, Korea Institute for Industrial Economics and Trade, Korea

- **Liu Hong**, Division Deputy Director, Department of Treaty and Law, Ministry of Commerce, China

TUESDAY 25 MAY 2004

9:15 – 11:00

Session 3: Domestic regulation in a globalised economy: the impact on international competitiveness

- **Chair: Ernesto Estrada,** General Director for International Affairs, Federal Competition Commission, Mexico and Convenor of the APEC Competition Policy and Deregulation Group (CPDG)

Unnecessarily burdensome regulation and regulatory processes can distort decisions relating to production and marketing, including those made through trade and investment in goods and services, thus limiting the ability of economic actors to participate effectively in international competition. At the national level, this promotes the emergence of informal market mechanisms and could slow economic growth. At the international level, excessive regulations could handicap an economy when reaping the benefits of globalisation and international competition. Ultimately, such regulations represent a drag on the growth of world economic efficiency and welfare.

Regulatory reform, by reducing unnecessary regulatory burdens and minimising the cost of regulatory diversity across borders, can contribute to the ability of firms to compete internationally and to take better advantage of global markets.

This session will address how domestic regulations affect the international competitiveness of economies and how regulatory reform can improve the ability of enterprises to compete in international markets.

Sub-session 1: Improving international competitiveness through the reduction of unnecessary regulatory burdens

This sub-session will discuss the effects of unnecessary regulatory burdens on competitiveness of goods and services and will explore approaches that aim at reducing such burdens. Issues to be discussed include:

- What are the challenges posed by unnecessarily burdensome regulatory frameworks on the export competitiveness of domestic economic actors? On the foreign investment attractiveness of host economies?

- How can the search for least trade-restrictive regulatory alternatives best be integrated into the efficient pursuit of legitimate domestic policy objectives?

- How can governments minimise the duplicative effects of regulatory and administrative requirements imposed by different authorities on the same economic activity?

The topic of this sub-session relates especially to items C2, C3, C6 and H4 of the prototype Integrated Checklist.

(Speakers)

- **Sherry Stephenson**, Deputy Director, Trade Unit, Organisation of American States (OAS)
- **Louise Seeber**, Senior Adviser, Department of Treasury, Australia
- **Gonzalo Ruiz**, Chief Economist of INDECOPI, Peru

11:00 – 11:15

Coffee break

11:15 – 13:00

Sub-session 2: Improving competitiveness by minimising the cost impacts of regulatory diversity across borders

This sub-session will discuss the cost impacts of regulatory diversity and approaches to minimising them. Issues to be discussed include:

- What are the challenges for achieving *internationally harmonised standards* without impeding technological development and innovation?
- What are the challenges for ensuring the regulatory confidence needed for recognition of equivalence and how can they be successfully addressed?
- How can the involvement of the private sector in mutual recognition activities be further enhanced?

The topic of this sub-session relates especially to items C7, C8 and C9 of the prototype *Integrated Checklist*.

(Speakers)

- **Raldi Hendro Koestoer**, Deputy Assistant to the Coordinating Minister for Economic Affairs, Republic of Indonesia
- **Somkiat Tangkitvanich**, Research Director, Thailand Development Research Institute (TDRI), Thailand
- **Rodolfo Consuegra**, Director, General Direction for Standards, Ministry of Economy, Mexico

13:00 – 14:30

Lunch

14:30 – 17:00

Session 4: Refining the APEC-OECD Integrated Checklist for Regulatory Reform

- Chairman: **Rolf Alter** (OECD)

The development of an *Integrated Checklist on Regulatory Reform* is a central element of the APEC and OECD joint programme in 2003-4. The Vancouver Workshop agreed to the basic architecture of the *Checklist:* three pillars focusing on regulatory, competition and market openness policies surmounted by a horizontal pediment applying to the three policy areas. Furthermore, it agreed the *Checklist* should be performance-oriented and applied on a voluntary basis. It was also agreed to establish a steering group to help guide the APEC and OECD Secretariat in the management of the project.

- In light of the discussions in the previous sessions, and drawing on any reflections on related issues, workshop participants will want to consider the implications for the draft *Integrated Checklist* in particular on the market openness aspects of the *Checklist*, as expressed both in Part C ("Market Openness Policies) and in Part H ("Horizontal Criteria Concerning Regulatory Reform").

- Participants will discuss the revised version of the Checklist that reflects the comments from member economies on the horizontal, regulatory reform and competition parts of the Integrated Checklist.

[15:45 – 16:00 Coffee break]

(Panel discussants)

- **Joanna R. Shelton**, Senior Fellow, Montana World Affairs Council, USA

- **Rory McLeod**, Manager, Competition Policy, Ministry of Economic Development, New Zealand

- **Jose Poblano**, Director General for Negotiations and Services, Ministry of Economics, Mexico

III. SUMMARY OF THE PRESENTATIONS

SERVICES REGULATION AND MARKET OPENNESS – THE CASE OF CHILE

Ignacio Fernandez, Ministry of Foreign Affairs, Chile

1. This presentation will focus on the recent improvements achieved in the Chilean regulation of services.

2. Two major topics are discussed; first we will talk about how the Free Trade Agreements (FTAs) subscribed by Chile can support our regulatory policy regarding services. Secondly, we will explain the Chilean policy related to the regulation of natural monopolies. The latter issue is analyzed focusing on its consequences for market openness.

3. In the case of the FTAs subscribed by Chile, there are many disciplines related to regulation in services. As starting point, "national treatment", "most favored nation", "local presence", etc. establish the principle that nationals and foreigners must be treated in the same way by the national legislation. Furthermore, in all FTAs subscribed by Chile we have maintained a provision based on GATS Article VI. 4 (Domestic Regulation) which essentially prescribes that regulation in services should be "no more burdensome that necessary" in order to regulate international trade in services. Finally, most of our FTAs contain a Telecommunication chapter that refers "*to measures associated to access to, and use of, any public telecommunication network or service imposing obligations concerning the major suppliers of public telecommunication services and supply of information services*".

4. With regard to Monopoly regulation, transparency policy is the main topic under analysis. We analyze its scope and implications for investments stability and access to information. The other two issues under analyzed are unbundling and price regulation.

5. Unbundling is analyzed as an example of regulation that can improve market openness. By preventing the generation of inefficient entry barriers, and forcing a comprehensive use of the incumbent network, stakeholders had efficient incentives to engage in new investments.

6. Traditional monopoly regulation is given as an example of excessive regulation. In Chile the local telephony incumbent, besides the regulated tariff available for all the consumers, is allowed to offer alternative price schemes. The only restriction is that each alternative scheme should be available for all the consumers with similar characteristics. The last restriction was set to prevent possible predatory practices. A single price scheme is not only unnecessary but also harmful for the incumbent and the consumer welfare.

CHALLENGES FOR POLICY COHERENCE: ENHANCING MARKET OPENNESS THROUGH A WHOLE OF GOVERNMENT APPROACH

Jean-Marie Metzger, Director, Trade Directorate, OECD

The OECD program on regulatory reform was launched in 1997, based on a plan for action endorsed by the OECD Ministers and aiming to support governments seeking to design domestic policies (including with respect to environmental quality, health, and safety) in a way that boosts economic efficiency, stimulates innovation and improves the ability to adapt to change and remain competitive, and to address the unavoidable disruptions which can accompany reform through appropriate complementary policies and actions. The 1997 Action Plan stressed that *comprehensive reform works better than piecemeal reform* and that *international co-operation and co-ordination can promote reform.* It recommended to *eliminate unnecessary regulatory barriers to trade and investment* and to *identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.*

Country reviews undertaken following the 1997 Action Plan systematically included an assessment of the impact of the domestic regulatory framework on the openness of the reviewed country market. The OECD Trade Committee developed six principles of efficient regulation which served as a basis for this assessment. They are:

- Transparency an openness of decision making
- Non-discrimination
- Avoidance of unnecessary trade restrictiveness
- Use of internationally harmonised measures
- Streamlining of conformity assessment procedures
- Application of competition principles

Good regulatory policies aim to enhance the economic performance, cost-effectiveness or legal quality of regulations and related government formalities. 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. The two are linked and increasingly so *due to globalisation:* Companies try to optimise their corporate strategy and management resource allocation from a global perspective; *i.e.* a company can choose a country based on the efficiency of its regulatory framework. As globalisation evolves, active use of global resources (goods, money, people, technology, information, etc.) becomes increasingly important for economic growth. Therefore countries need to ensure that their domestic regulations do not impede cross-border corporate activities.

The link between market openness and good regulatory practices is *per se neutral*: it can either generate positive interaction and momentum, or, on the contrary, be harnessed to protectionism and conflict. Which way will it go depends on the impulse given to it by government policy. The OECD country reviews on regulatory reform have shown that improvements in the regulatory framework constitute an important factor of foreign investment attractiveness of a country. An efficient and market-enhancing regulatory framework also provides optimal conditions for domestic businesses to reinforce their competitiveness and better place themselves in the global marketplace. There are several examples of OECD countries which stepped up their efforts to deregulate (and re-regulate, so as to better regulate) following or in support of commitments they have undertaken internationally and in particular in the WTO. International commitments not only give momentum to, and help shape domestic reform endeavours, but most importantly they tie reforms down and shield from pressures to backtrack.

At the same time, the gradual lowering of tariff barriers has not only increased the visibility of non-tariff barriers but also fuelled calls from previously sheltered industries for protection by means of regulatory barriers. Constituencies calling for protection tend to be more vocal than the (more numerous) constituencies in favour of trade liberalisation. Inefficiencies in the domestic regulatory framework increase the potential for unintended (and reduce the possibility to scrutinize intended) violations of international commitments.

The movement from "traditional" trade issues to regulation-related issues is now well underway in the WTO and irreversible. There is already significant experience (including some well publicized disputes) of WTO involvement in TBT and SPS issues. Services work is continuously expanding, although there is no absence of serious and vocal criticism about the perceived threats on national sovereignty and the pursuit of public policy objectives. On the other hand, attention is increasingly drawn on measures primarily designed with a domestic focus and how these can impair the benefits the country's trading partners were hoping to enjoy under the international commitments this country has undertaken. The incidence of behind-the-border disputes relating to non-discriminatory measures has increased. Experience from the OECD country reviews shows that trade irritants are frequently due to domestic institutional and regulatory malfunctions: insufficient awareness of the country's commitments among regulators, or insufficient scrutiny of proposed regulations on such commitments.

Recent years have seen the proliferation of criticisms to the multilateral trading system in general and to a perceived democratic deficit of the WTO process in particular: liberalisation is perceived as entailing the abandonment of important policy objectives, such as environment protection, consumer protection or universal service, or at least as seriously undermining the ability of governments to pursue such objectives. Yet, some of the recent, well publicized, market failure cases (electricity, rail) were not linked to liberalisation but to the lack of appropriate and well-designed regulation to underpin liberalisation. It is forgetting that regulatory reform is NOT de-regulation, but BETTER, more efficient regulation. Governments are still able to regulate and to achieve public policy objectives in liberalised markets. Is inefficient regulatory design, generating undue restrictions to the economic activity and the openness of the domestic market, due to protectionist capture? to lack of sufficient regulatory information and expertise? to both? Both risks can be addressed by pooling together policy makers' expertise through a whole-of-government approach.

The integration of domestic and external economic policy implies seeking to pursue domestic policy objectives in the most cost-efficient way, choosing among equally effective regulatory approaches the ones that do not generate undue restrictions to the domestic and international economic activity. This means seeking to identify the implications of the proposed regulatory approaches on the domestic and international economic activity; and reviewing available alternative approaches so as to opt for the one that better balances effectiveness and avoidance of unnecessary restrictiveness. This can be done through efficient co-ordination among government agencies and through the use of impact analysis mechanisms.

Efforts to foster awareness of the trade and investment implications of regulations are primarily based on intra-governmental co-ordination. Trade policy bodies may weigh in during the early policy development phase of regulatory proposals, for instance at the elaboration of the annual regulatory action plan of the government. These early warning mechanisms may avoid having to tackle with potentially problematic aspects of regulatory proposals late in the process. Intra-governmental consultation and co-ordination mechanisms, such as regular Ministers or high officials meetings can offer valuable opportunities for market openness advocacy and for vetting the market friendliness of specific proposals. The seeds for policy coherence can also be sown when preparing government positions in view of upcoming negotiations. How efficiently government agencies talk to each other at that time will not only affect the quality of negotiated policies but also the prospects for smooth and efficient compliance. However, all the above can be compromised by lingering interagency rivalry. Improving working level relationships between trade and regulatory authorities, competition authorities, and including sub-central regulatory authorities, on a daily basis can be key for achieving policy coherence.

A valuable tool for identifying potential trade and investment effects of proposed regulation is Regulatory Impact Analysis (RIA). RIA is an important mechanism for enhancing regulatory quality and helping inform regulatory decision-making and is increasingly adopted among OECD countries. Although not expressly conceived or formulated in terms of market openness considerations *per se*, it does provide a systematic approach for assessing the impacts of a proposed regulation on the overall economic activity. Some OECD countries already include analysis of anticipated impacts on the business activity in general, or even specifically on trade and investment. Trade effects often figure among the criteria to be used by regulatory authorities in assessing the anticipated costs and benefits of regulatory proposals. The OECD has been advocating generalisation of this practice to all countries undertaking RIAs. The involvement of trade policy makers in the "quality control" of RIAs can further enhance the usefulness of these mechanisms in promoting least trade restrictive regulatory alternatives.

Session 2: Market openness and the business environment: Ensuring regulatory efficiency and the confidence of the private sector

TRADE POLICY NEGOTIATIONS AND DECISION-MAKING, THE EC EVOLUTION TOWARDS MORE OPENNESS AND TRANSPARENCY

Maria-Francesca Spatolisano, Deputy Permanent Representative of the EC to the OECD

After explaining the uniqueness of the European trade policy decision-making system, Ms Spatolisano will present three main points which illustrate the EC approach to regulatory transparency in the trade field.

How: transparency is accomplished through contacts with Member States, the European Parliament, and stakeholders.

What impact: transparency in the regulatory process has a two-directional impact. EU proposed policy is affected by what policy-makers hear and interested parties gain greater understanding of the purpose and content of the regulations. Ms Spatolisano will give a recent chemical industry regulatory framework proposal (REACH) as an illustrative example of this omni-directional impact.

Lessons learned: Ms Spatolisano will posit conclusions about the relevance of the OECD/APEC checklist based on EC experience.

KOREA'S EFFORTS TO ENHANCE REGULATORY TRANSPARENCY INTERNATIONALLY

DoHoon Kim, Senior Research Fellow, Korea Institute for Industrial Economics and Trade, Korea

1. Introduction: policy environment in Korea in relation to market openness and regulation

First, as Korea has pursued so-called outward-oriented economic policies, people easily admit the importance of trade and foreign investment. However, there still is a mercantilist approach among government officials and the general public. They feel that doing something to increase exportation is a good thing and limiting importation up to “a necessary level” is also a policy that should be respected.

Second, there has been also a continuous trend of market opening or globalization as Korea has actively participated in international organizations such as WTO, OECD, APEC etc. When the notorious "import diversification system" which had been discriminating Japanese products was abolished in 1999, the Korean market could be called a "completely liberalized market", at least at the border regulation level.

Third, since the Korean economy was hit harshly by the financial crisis in 1997 and suffered from a shortage of foreign exchange, the Korean government has issued policy packages for attracting more foreign direct investment. But there still remains a patriotic preference of domestic companies to foreign ones.

Fourth, as the Korean government has pursued economic reform including government reform, public alertness about the necessity of increasing the transparency of government administration as well as that of corporate governance is continuously increasing. However, business people, including foreigners, still complain about the slow pace and a certain inertia among government officials implementing those reforms.

Fifth, as Korea has successfully established a world-class Internet infrastructure, the government has been able to move actively toward informatising government administration.

2. Efforts for enhancing regulatory transparency and market openness at the government-wide level

In order to improve people's (including foreigners') access to administrative information, Korea adopted two important laws in 1996. According to the Administrative Procedures Act, all laws and regulations should be made public before their entry into force. The Information Disclosure Act requires that information about government administrative actions should be released to the public upon request. However, special consideration with regard to market openness was not explicitly taken in those two laws related to administrative transparency.

There are several specific measures for enhancing foreigners' access to administrative and regulatory information. Firstly, the Consolidated Public Notice on Guidelines of Exports and Imports publishes twice a year all the content of regulations related to foreign trade. Secondly, the English version of all laws and regulations can be found on the government Internet site, although the translated version does not have legal power. Thirdly, a summary in English is open to the public on the Internet for the delivery of products and services covered by the WTO GPA.

There have been also a variety of efforts to improve the public consultation system before and during government's administrative actions. First, according to the Basic Act on Administrative Regulations which was adopted in 1997, public hearings, notice of legislation or any other means are requested before setting up or modifying a regulation. Second, there is an increasing tendency of foreign participation in advisory councils of many ministries. For example, a former representative of AMCHAM Korea has been named as a member of the regulatory reform committee since 2003. However, there still exists a prevailing tradition of preferring “inner circle” - oriented consultation.

3. Efforts to attract more foreign direct investment

As a means of enhancing a one-stop service system for foreign direct investment, the Korean government recently launched "Invest Korea", with appointment of a foreign head in December 2003. This symbolizes the willingness of the Korean government to eliminate any possibilities of discrimination against foreign companies.

The Korean government has issued several conventional measures to attract more foreign investment by enlarging incentive systems, by improving the investment environment and by establishing a strategy for selecting target industries.

According to a survey made by Invest Korea on business environment grievances, foreign investors in Korea seem to suffer from four major reasons: labour relations (30.1%), taxation/customs clearance (30.1%), finance/foreign exchange problems (9.7%) and others (30.1%). We can remark that the issue of complicated procedures is included in the taxation/customs clearance problem and the issue of administrative restrictions is raised in the category of others in which the issues of high production costs and human resource difficulties are also mentioned.

In order to deal with those grievances, the Korean government has selected 16 tasks for improving labour relations, 14 tasks related to taxation problems, 8 tasks for finance/foreign exchange problems and 11 tasks in relation with administrative procedures. In the last category, selected tasks are related to company merger reporting, construction approval, bidding, investigation on electronic wave hindrance, and trademark investigation, etc.

4. Efforts for enhancing regulatory transparency through electronic technology

Taking advantage of the very good environment in terms of IT industries and Internet related infrastructure, the Korean government has put a lot of effort in enhancing regulatory transparency through electronic technology. These efforts are called "creating e-Government".

The government has put forward six following strategies for creating e-Government: reforming administrative procedures in relation with government reform, improving laws and regulations in line with e-Government, promoting use of analysis on the economic impact of government actions, providing a user-friendly electronic system, encouraging the exchange of good practices between government bodies and enhancing spill-over effects on private businesses.

The government is implementing 11 key projects for creating e-Government under the slogan of “The World's Best and Most Transparent e-Government”. The first category of these projects is for upgrading government-wide services for citizens and businesses. This category includes the following four projects: the Government for Citizens (G4C) system to establish a government-wide electronic service system; the Social Insurance Information Sharing System (SIIS) for health, pension, employment and industrial accident compensation; the Home Tax Service System based on the Internet; and Government e-Procurement System. The second category is related to improving the effectiveness of administration. This category includes the following four projects: the National Finance Information System (NAFIS), the

National Education Information System, the Local Government Network System Project (connecting 232 local governments), and the Personnel Policy Support System (SPSS). The third category is related to establishing an infrastructure for e-Government. This category includes the following three projects: e-Approval and e-Document systems, the e-Signature and the e-Seal System and a government-wide integrated computer network.

In order to increase public awareness and public accessibility to the government administrative actions and services, the Korean government has established a so-called "Single Window for e-Government" (*www.egov.go.kr*). First, as a means of providing information service, it provides a comprehensive information search function and offers guides to government administration and related laws and regulations of public services. Second, this system also provides 24-hour non-stop services for online application, status checking, and document delivery. Third, through this system, the government manages a public consultation system under the title of "Policy Forum and Cyber Survey of Public Opinion". Fourth, this system also provides convenient private pages for personal services and information, and individual notification through e-mail.

As an exemplary case of enhancing administrative transparency, the Government e-Procurement System (GEPS) under the name of "National Market (*www.g2b.go.kr*)" is remarkable. The GEPS is a one-stop shop for all the procurement businesses of central and local government and public organizations, because the entire process for procurement (registering as a contractor → bidding on a public project → signing a contract agreement → receiving payment for services) can be done through the Internet. As a result, the revenues collected through the GEPS are rapidly increasing.

G2B revenues (10 billion Won, %)

	3/4 2001	3/4 2002	growth rate
Central Government	1 438	1 800	25.2
Procurement Service	1 100	1 406	27.8
Others	338	394	16.6
Local Government	9	1 190	13 122.2
Total	1 447	2 990	106.6

One should note that the information about GEPS is not yet given in English, apart from the procurement threshold under the obligation to the WTO GPA.

5. Conclusion: Assessment

One can easily recognize that Korea has established a good infrastructure to improve regulatory transparency internationally in terms of both hardware systems (especially the Internet) and the legal system.

However, there is also further progress needed in the following areas: changing the public consultation system in order to enhance foreigners' access to it, enhancing people's consciousness about the benefit of market openness and connecting efforts to improve the FDI environment and efforts to enhance regulatory transparency.

ADJUSTING THE FOREIGN ECONOMIC AND TRADE LEGAL SYSTEM TO PROMOTE THE OPENING OF MARKET

Liu Hong, Division Deputy Director, Department of Treaty and Law, Ministry of Commerce, China

Perfect legal system is the important guarantee and also a significant criterion to weigh the degree of the market opening of an economy.

There are four parts in my presentation. They are as follows:

First, I will introduce the history of the market Opening of China. Since China's reform and opening policy in 1979, great changes have taken place in legal construction. After China's entry into the WTO in 2001, the legal construction has entered into a new phase. Chinese government has adjusted relevant legal system and done a lot of work especially in the improvement of foreign economic and trade law system.

Second, I will generally introduce the amendments of the laws and regulations on foreign economic and trade. Up to the end of December 2003, the central level and local level has made, modified and abolished more that 1500 relevant laws and rules.

Third, I will play emphasis on the amendments of foreign trade law. In order to open the market further and fulfil China's WTO commitments the new law expands the scope of foreign trade operators. Individuals are allowed to engage in foreign trade activities. The new law also changes the examinations and approvals of the foreign trade rights to filing.

Fourth, I will introduce the amendments of the laws and regulations in the foreign investment field. In order to fulfil China's commitments to the WTO, China has amended its three basic laws in the foreign investment field. In the financial sector, audiovisual and the publication sectors, tourism sector, maritime transportation sector and many other fields China amend many relevant laws and regulations. Chinese Market becomes more and more open.

While enacting or amending relevant laws and regulations and further opening up, China is also on the way to amend Company Law and promulgate such laws as Electric Signature Law, Bankruptcy Law and Anti-monopoly Law.

Conclusion: Through the adjustment of the legal system on foreign economic and trade, the Chinese market will become more and more open, transparent and will provide more trade and investment opportunities to all over the world countries.

Session 3: Domestic regulation in a globalised economy: the impact on international competitiveness

Sub-session 1: Improving international competitiveness through the reduction of unnecessary regulatory burdens

REDUCING UNNECESSARY REGULATORY BARRIERS TO TRADE IN SERVICES: THE MULTILATERAL AND REGIONAL CONTEXT

Sherry Stephenson, Deputy Director, Trade Unit, Organisation of American States (OAS) and Pacific Economic Co-operation Council (PECC)

Trade agreements, whether at the multilateral level or the regional level, do not interfere with the right of governments to regulate in order to fulfil domestic policy objectives. The WTO does not regulate the domestic supply of a service and the right to regulate remains sovereign under all trade agreements. However, problems may nonetheless arise in the trade area from tension arising between the design and application of regulations and their possible negative impact on services trade and services suppliers when these regulations contain unnecessarily burdensome or implicitly discriminatory requirements. The challenge for trade negotiators in crafting trade rules and disciplines, therefore, is to find the right balance between the degree of restrictiveness of regulations and the need to fulfil legitimate policy objectives.

The presentation covers the multilateral and regional disciplines currently in place for dealing with domestic regulation in order to ensure that such regulations do not create unnecessarily burdensome requirements for service providers. WTO disciplines in the form of Article VI on Domestic Regulation of the WTO General Agreement on Trade in Services (GATS) are reviewed. These disciplines, which seek to ensure that domestic regulations are "… based on objective and transparent criteria, such as competence and the ability to supply the services, and are not more burdensome than necessary to ensure the quality of the service" are limited in their scope because they currently apply only to scheduled service sectors and are not of generalized application. The presentation questions whether these current WTO disciplines should be deepened or not and if it might be possible to move towards a stronger or broader formulation of the 'necessity test' such as that found in the GATS Disciplines on Accountancy or in the WTO TBT Agreement.

The experience of regional agreements in the Western Hemisphere in dealing with the question of domestic regulation is examined, along with suggestions as to what lessons might be drawn from the regional experience for the WTO process. These regional agreements have gone farther than the WTO in making disciplines on domestic regulation of generalized application and of a permanent character. Many regional agreements have also included an Annex on Professional Services with provisions to ensure that licensing procedures and qualification requirements do not act as a restriction on the supply of such services.

Lastly, some alternatives to deepening GATS Article VI disciplines on Domestic Regulation are considered, including the possibility of: strengthened national treatment; promotion of transparency; harmonization of norms; mutual recognition; adoption of international standards, where available; and/or the negotiation of specific sectoral disciplines.

AUSTRALIA'S EXPERIENCE WITH REGULATION IMPACT STATEMENTS.

Louise Seeber, Senior Adviser, Department of Treasury, Australia

Since 1995 Australian Government regulation has been subjected to a regulatory impact analysis. Preparation of a Regulation Impact Statement (RIS) has been mandatory since 1997 for each proposed new or amended Australian Government regulation and proposed treaty which directly or indirectly affects business or restricts competition. The RIS process takes into account consistency with Australia's international trade obligations.

Annual reporting of the Australian Government's performance in regulatory impact analysis is summarised in the Productivity Commission Annual Report and detailed in the Office of Regulation Review's annual publication "Regulation and its Review". (Both are available online at *www.pc.gov.au*).

Australia's eight States and Territories have their own arrangements for assessing the impact of regulation.

REGULATORY REVIEW AND BUREAUCRATIC BARRIERS: THE ELIMINATION OF REGULATION OF MINIMUM FREIGHTS FOR ROAD TRANSPORT IN PERU

Gonzalo Ruiz, Chief Economist of INDECOPI, Peru

The presentation described the main results of a case by which the Market Access Commission (CAM) of Indecopi (the National Institute for the Defense of Competition and Intellectual Property Protection, of Peru), declared a measure approved by Transport and Communications Ministry (MTC) as an illegal and irrational bureaucratic barrier to market access.

A bureaucratic barrier is any act or decision adopted by the Public Administration that could impede or restrict the access or presence of an economic agent in the market. A bureaucratic barrier may be either illegal or irrational. Is considered **illegal** when the act or decision is adopted in contravention of a Law and ***irrational*** when the cost of the act or decision is considered excessive regarding the objectives pursued, or when the measure is considered discriminatory.

The presentation showed how a measure adopted by MTC, the establishment of minimum freights for road transport regime, was analyzed by CAM. Legality assessment showed that the measure was adopted partially in contravention of the Law, and, therefore was declared illegal. That was because while the Law permitted to establish a minimum freight regime only on a transitory basis, the measure approved by the MTC was a permanent one.

Rationality assessment was based in the analysis of the arguments used for justifying the measure. It was argued that minimum freights will contribute to reduce the presence of informal transport in the market. CAM analysis showed that was foreseen that the effect of the measure would be the opposite: to switch demand from formal to informal transport and thereby to increase the quantity supplied of informal transport. Also was argued that the minimum freights regime will contribute to improve safety and quality of the road transport service. In this case, CAM analysis was based on international experience of OECD countries. The deregulation and liberalization process of road transport implemented in this economy during the 80s and 90s, shows how more competition and liberalization of services could improve efficiency and reduce prices without a decline in safety and quality standards. CAM concluded that other policy instruments like quality controls, and the enforcement of the tax rules, could be more cost–effective in order taking into account the objectives pursued by the MTC.

One of the main lessons of this case is how an ex post mechanism of control of Public Administration's decisions could be useful to guarantee the quality and cost-effectiveness of regulations.

Sub-session 2: Improving competitiveness by minimising the cost impacts of regulatory diversity across borders

IMPROVING COMPETITIVENESS OF REGULATORY DIVERSITY IN INDONESIA

- **Raldi Hendro Koestoer**, Deputy Assistant to the Coordinating Ministry for Economic Affairs, Republic of Indonesia

Summary

There are several similarities in terms of principles and recommendations between the APEC and the OECD, *e.g*. non-discrimination, transparency and systematic implementation. What seems particularly important for APEC economies are the steps for implementing regulatory policies. As mentioned in an earlier workshop of the APEC – OECD Co-operative Initiative on Regulatory Reform, Indonesia has changed a lot in terms of regulatory reforms. After Indonesia overcame the crisis, a dynamic trend has occurred in response to internal and external influences, including political and economic situations.

This paper reviews the existing challenges in the development process, while Indonesia is striving to achieve targeted improvements to encourage competitiveness. Strategic steps on policy reforms will be developed to minimize the impact on economic development caused by the monetary crisis. The following sections summarise discussions relating mainly to the progress in implementing policy co-ordinated by the Co-ordinating Ministry for Economic Affairs, Republic of Indonesia.

Indonesia has been relatively successful in recovering from the crisis, and is ready to promote investment and export development with refreshed policy reforms. The Government has continued to place priority on strategies to minimize the impact of regulatory diversity. Several challenges that can be reviewed revive development e include, among others, the effects of low economic growth, limited low share of investment in GDP, poverty and unemployment issues and the IMF programme.

Various challenges emerged during the stabilisation of the economy and the 2004 election and while the Government was attempting to boost the economy through structural and directive policy reforms, such as the 'White Paper' and the Presidential Decree No. 87 of 2003. This decree relates to policy reforms and is in line with formulation of a policy designed to achieve international harmonized standards.

The National Team of Export Development and Investment Promotion set up in Presidential Decree No 87 of 2003, supports stronger performance in international markets. Indonesia is attempting to promote legal and institutional reforms in order to avoid economic difficulties in setting up structural and systematic ways to minimise negative impacts. Dialogues with the private sector and business circles often help to identify difficulties, and their input is e valuable to improve relevant regulations. This shows how the involvement of the private sector can be drawn upon.

Throughout the entire period of implementation, synchronized systems were introduced among ASEAN economies, but also among wider regions, such as APEC as dictated by international dynamics. Customs and clearance procedures are simpler thanks to input from the international business community. The e-procurement system was initiated and public and private activities are increasingly transparent. Law No. 5 of 1999, which deals with Prohibition of Monopoly Practices and Unfair Business Competition has implemented fairness in competition among the actors involved. Equal treatment of investment is promoted. One roof licensing service through the Coordinating Investment Board has been accommodated in the Presidential Decree No 29 of 2004, setting forth provisions on investment by domestic and foreign groups. Unavoidably, some decline in performance has occurred in the implementation of some measures, but this relates more to the question of the time required for completion. Through laws and related decrees, business and workers, both in the domestic and international networks, can look forward to an increasingly harmonious relationship as they all aim at improving competitiveness.

AGREEMENTS ON TELECOMMUNICATIONS IN RECENT FTAS

Somkiat Tangkitvanich, Research Director, Thailand Development Research Institute (TDRI), Thailand

The presentation will discuss provisions on telecommunications in recent free trade agreements (FTAs). Firstly it will compare and contrast telecom agreements in the GATS and recent FTAs. The focus will be on the innovations introduced by the US "template agreement", which is used as a model for negotiations between the US and its trading partners, including Singapore, Australia, Chile and CAFTA. As an attempt to address the problems faced by US operators in accessing foreign telecom markets, the template agreement elaborates a detailed implementation of the regulatory principles stated in the GATS' Telecom Reference Paper. It also introduces a number of new regulatory principles such as privatization of state operators, regulatory forbearance, flexibility, in the choice of technologies and transparency in the rule-making process. The template agreement is then assessed from a developing economy perspective, using Thailand as a case study. It is argued that while such new regulatory principles can bring about a reform to the telecom regulatory regime and promote transparency, it can be costly to implement. As a result, developing economies negotiating with the US or other trading partners based on the template agreement need to carefully assess their institutional capacities in implementing the regulatory principles.

GOOD REGULATORY PRACTICES

Rodolfo Consuegra, Director, General Direction for Standards, Ministry of Economy, Mexico

Regulations have permitted Governments to obtain very important advances in economic and social protections, but this capability is being reduced by globalisation, unemployment, cultural diversity and new technologies.

In that sense, today there is a profound demand in changes of the type and content of the regulations, therefore, we must react with efficiency to such demands, in a way governments may *anticipate* the probable demand.

Governments must direct their regulations to secure human and animal life, safety, environment and communications throughout laws and administrative orders, particularly by Technical Regulations and Standards.

How can we maintain and increment the regulation effectiveness in the social dynamism that is changing every day with great speed? How can we avoid that regulations become obsolete and generate superior social costs than the expected benefits?

1) The use of *performance-based* regulations will permit us to regulate by objectives, and not by sectors. This way innovation is accelerated and trade will find no restrictions. Therefore we must focus in Regulatory Process Management and take into account the "APEC Guidelines for the preparation, adoption and review of technical regulations"

2) Alignment with international standards

Achieve such by participating in international fora, working in differences or incompatibility in technical development or lack of infrastructure and by the surveillance by the competent authority that harmonization, where available, is taken into place

3) Review process

A constant review process will allow determining if a regulation is obsolete, should be ratified or if it may need modifications. Creating this obligation to public and private standardization agents will allow having a modern and efficient standardization system. Public consultation and international harmonisation are fundamental for this purpose.

4) Use of international conformity assessment systems to approve goods for consumer protections

Throughout the use of IECEE – CB Scheme, APLAC MRA, ILAC MRA, Registration of products., investigation of accidents= sanctions and public education.

5) Mutual recognition arrangements

Very important tool, promotes and facilitates trade, enhances cooperation and provides product and services liability.

6) Public consultation

Fundamental for the standardization systems, provides transparency, provides the participation of all interested sectors, must allow international comments, and must answer all the received comments and publish them.

7) Regulatory Impact Assessment

Provides information to authorities and particulars on the impact that certain regulations will create. Such impact can be economical, social or administrative. It must content the reason to regulate, alternatives, regulatory history, costs, benefits affected and benefited sectors

8) Risk assessment

Very important to provide security for consumers. We have to ask what is the hazard? What is the risk? How widespread is the risk? In what circumstances will the risk arise? Who or what is most at risk? Level of harm or injury liable to occur?

Conclusions

Before implementing mandatory requirements alternative mechanisms should be considered.

Good regulatory practices will transform and improve the rules and organisations that determine the peoples' actions.

Session 4: Refining the APEC-OECD Integrated Checklist for Regulatory Reform

Remarks of Joanna R. Shelton, Senior Fellow, Montana World Affairs Council, Former Deputy Secretary General, OECD

In his remarks yesterday opening this workshop, Rolf Alter of the OECD Secretariat asked the following question:

"Are the questions in the Integrated Checklist the right ones? Are they confronting reality in economies – addressing the constraints and the situation when things go wrong?"

This is a good question. Most discussion on regulatory reform within the OECD and between the OECD and APEC focuses on the positive aspects of reform:

- The positive effects on economic growth and efficiency
- The positive effects on an economy's international competitiveness
- And other positive effects spelled out amply in the OECD's and APEC's work on this important topic.

There *are* benefits to be gained from regulatory reform, to be sure. But mistakes are also made, and we can learn from those, just as we learn from successes. I will take a moment to tell about a failed experiment in regulatory reform and the lessons that can be drawn from it.

I live now in Montana, a state in the upper northwest of the United States. Montana has abundant natural resources, such as coal, natural gas, water and oil. It had a public utility supplying stable, low-cost energy for nearly a century, until the mid-1990s. At that time, the information technology/telecommunications boom led the utility's managers to feel it would be much more exciting – and profitable – to run a telecommunications company instead of a power company.

In 1997, Montana Power Company convinced state legislators to support a deregulation bill, allowing Montana Power to sell off parts of its business to other companies and to diversify into other businesses. Montana Power and supporters of "deregulation" (as it was being called) promised that a new competitive environment would bring about lower energy prices, more choice for consumers, and benefit Montana's struggling economy. Montana is one of the poorest states in the United States, so it is always looking for ways to improve its competitive standing and economic growth.

There was just one problem with this scenario – Montana Power evidently was not being truthful about its intentions. Shortly after the state legislature changed the law and allowed Montana Power to alter its business approach:

- Montana Power sold its *energy generation* capacity to an out-of-state company, based on the east coast of the United States.
- Then the company shocked the state when it also sold its *energy distribution* capacity to a company in a neighbouring state.

So within a few short years, Montana Power was out of the energy business entirely. It reinvented itself as a purely telecommunications company and invested the billions of dollars it had gained from the sale of its energy assets into new fibber optic communications lines to provide broadband and other IT services throughout the state.

Then the telecom/IT bubble burst; and the new telecommunications company went bankrupt. Little remains of that company's assets, which were subsequently bought by a Canadian company.

In the meantime, energy prices in Montana rose sharply, and prices became very unpredictable – never a good situation for individual homeowners (in a state with very cold winters) or for businesses. One of Montana's then-largest manufacturing employers – an aluminium company, a big user of electricity – closed its production facility in Montana due to the high cost of electricity. Other, smaller companies also closed down for the same reason.

The last blow came just a few months ago, when the company that owns the power distribution network in Montana also declared bankruptcy (due to financial losses in its non-energy affiliates). So now Montana finds itself with high and unpredictable energy prices, a bankrupt owner of its energy distribution network, and no sense of what the future may bring.

Lessons learned

How did this happen, and what lessons can be learned? I believe there are a number of factors that can be cited.

First, this was an example of hasty deregulation. The legislature apparently did not seek expert advice from other jurisdictions where deregulation had been done successfully, nor did it seem to consider the potential for problems.

The head of Montana's Public Service Commission (the regulator) said: "One lesson is that deregulation or restructuring requires a very active and vigilant regulator." The regulators are *only now* – seven years after deregulation – taking steps to regulate the bankrupt distribution company in a way that protects Montana's energy consumers.

What are some of the results of this bad experience? I am reminded of Jean-Marie Metzger's comment yesterday that market openness and regulatory quality are interrelated; and that mutual supportiveness can turn into antagonism – meaning that a bad experience in one of these areas can raise doubts and concerns in the other area. And this is exactly what is happening in Montana.

Deregulation now has a bad name, making it very unlikely that regulatory reform will be tried in other areas, despite the potential benefits if done well. In addition, the prospect that a foreign company could buy the bankrupt distribution company is raising new concerns in legislators' minds about how international trade agreements – especially NAFTA and GATS in the WTO – may limit the state's ability to regulate in the public interest. (I should add, however, that no one is blaming trade agreements for Montana's problems with deregulation in the energy sector.) This is a clear case where the interaction between two policy areas – regulatory quality and trade – has led to a downward spiral, with some legislators now concerned about both areas.

APEC-OECD Integrated Checklist and Future Work

What does this experience mean for the Integrated Checklist and the focus of APEC-OECD work in this area? I come back to Rolf Alter's question of yesterday – does the Integrated Checklist ask the right questions? Are there questions that should be added?

Before reform begins

I believe the Integrated Checklist offers a good roadmap to follow *after* the decision to deregulate or reform has been made. However, I believe a useful area for future work would be to develop a list of questions policymakers and regulators should ask *before* they embark on a path of reform. For example:

- What is the likelihood that our market will attract competition? In a sparsely populated state like Montana – with roughly 980,000 people in an area the size of France – it is not likely you will see many new companies wanting to enter into a market like energy, with high fixed costs and relatively low returns.

- Are there potential benefits we can identify from deregulation even if new competition does not come into the market, which still would make reform worthwhile?

- What are the risks and the potential costs we can identify if we do deregulate?

This sort of cost-benefit analysis would have been very helpful in Montana's case. And this is a good area for future work by the OECD and APEC.

Role of politics

A second observation about regulatory reform relates to the role of politics in the process. Politics is a reality of life in all countries, which needs to be recognized and dealt with. I do not believe the Integrated Checklist adequately addresses this reality.

I believe we can identify two stages when politics is a factor in regulatory reform:

A. As countries embark on reform or deregulation

B. After reform is completed, when countries are implementing the new policy.

As Alejandro Drexler of Chile usefully noted yesterday, it is important to reduce the role of politics in the *implementation* of policy. One way to do this is to use objective, transparent criteria for making regulatory decisions. This helps ensure fairness and non-discrimination among market participants – and that, in turn, increases the credibility of and public support for the new policy.

However, I believe that politics must be taken into account when the decision is being made as to whether or not to deregulate and as the new regulatory regime is being shaped. The reason for that is simple. "Politics" reflects the interests of those who will be most affected by regulatory reform. Not only do you need political *support* to ensure successful reform, but you also need to reduce political *opposition.* How can you do that?

As policy makers embark on the path of reform, it is important to identify likely opponents, and the nature of their concern or opposition; and plan ways to address or respond to those concerns. This means developing a strategy as part of your reform program to help blunt the opposition. For example:

- Unions may oppose reform for fear of job losses. What policies or programs could accompany reform to ease (though not likely eliminate) their concern? Examples could include enhanced unemployment insurance; worker retraining programs; a requirement that the restructured company try to find jobs for as many current workers as possible (while keeping an eye on cost containment and efficiency).

- Industries benefiting from the current regulated or closed market may oppose reform. Their concerns might be eased by "cushioning" their transition to a more competitive market through a phase-in of the market opening or regulatory reform under a specific timetable, thus giving them time to adjust and prepare for a new market environment.

The bottom line, however, is that policy makers ultimately have to make a decision; and not everyone will be happy with it. But we should not let the few who are benefiting from the status quo block useful change that can benefit far ore people and companies.

Developing Economies and the Need to Prioritize

My last major point relates to developing economies, or economies without fully developed institutions or legal systems as they are found in other, more developed economies. Here again, my observations relate to considerations that apply *before* governments actually embark on a path of reform. This is an area that is not really covered by the Integrated Checklist, although Horizontal Item #7 touches on the issue. It asks:

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

This question, in my view, merits more elaboration, with examples of the sorts of considerations that might enter into a decision about the timing and sequencing of reform. For example, in Montana's case, an appropriate question might have been whether it made sense – given conditions within Montana's energy market and the national or even international energy market – to embark on deregulation; or whether a less ambitious alternative approach could be found to achieve greater efficiency but without the negative downside risks of reform.

For developing economies, this question seems even more critical. I recall Alejandro Drexler's hypothetical scenario in which an economy might point proudly to its leading-edge regulatory regime and industry performance in telecommunications – while its public water and sewerage systems fail to meet even basic public needs.

This suggests that in economies at a very early stage of reform, there may be an even greater need to *prioritize* – to determine which areas are more important for early reform. Some relevant questions to consider in this context might be:

- In which sectors will reform provide the greatest public good? An example might be health-related areas, such as water and sewerage.

- If the sectors being considered for reform are internationally traded ones, in which sector might early reform result in the greatest increase in the economy's international competitive position, be the largest foreign exchange earner, or be the most attractive sector for increased foreign direct investment within the economy?

There undoubtedly are other questions of this nature that could be asked, but it seems to me that questions of this nature – and the questions I noted earlier – should be asked before an economy embarks on a path of reform.

Why is this important? As we have seen in economy after economy, successful and beneficial reform in one area will build public and political support for future reform in other important sectors – and well-crafted reform can have important benefits for the economy's overall economic performance and international competitiveness. But failed reform – or reform seen as benefiting just a few well-connected companies or individuals, but not the public at large – is likely to undermine public and political support for future reform.

Conclusions

In sum, bad deregulation can happen; and it not only can hurt states' or economies' consumers and businesses, but it also can poison the atmosphere for future beneficial reform.

The APEC/OECD Integrated Checklist offers a good roadmap to follow after an economy has embarked on a path of reform. But I believe a useful area of future work could be pursued, focusing more on questions to be asked before reform gets underway. Such work could:

- Help economies decide whether, and to what extent, reform in a particular sector is appropriate

- Guide economies in ways to account for the sources and nature of political opposition to reform, and help them develop strategies aimed at reducing such opposition and building political support for reform; and

- Help economies prioritize reform efforts, focusing first on those sectors likely to bring the greatest economic and social benefits to the economy at large.

COMPETITION, REGULATORY AND TRADE POLICIES IN SMALL ECONOMIES: ISSUES ARISING FOR NEW ZEALAND

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INTRODUCTION

This paper examines the nature of competition, regulatory and trade policies in small economies, with special reference to New Zealand. It draws heavily on the work of Michal Gal on competition policy in small economies.[2] As Gal notes, many of the principles and doctrines that apply to large economies, apply equally to small ones. In both, competition policy has the goal of creating workable competition in markets and thereby seeks to improve efficiency and ultimately social welfare.[3] However, the purpose of this paper is to examine the differences of market structures between the two and the implications that these differences have for competition, regulatory and trade policies in small economies. The paper finds that there is an inherent tension in small economies between the presence of small numbers of firms in many industries and the fact that these firms are often of sub-optimal size.

The paper is structured as follows:

- Part I examines the key features of small economies and their implications for competition policy in small economies;
- Part II outlines issues that arise for New Zealand from this analysis.

PART I: COMPETITION POLICY IN SMALL ECONOMIES

A. Features of Small Economies

Smallness is a relative concept. Australians sometimes describe the Australian economy as small, yet it looks large when viewed from the perspective of New Zealand. Canadians, on the other hand, will very often view their own economy as small given that their first point of comparison is generally the United States. For the purposes of this report, small economies are defined as those economies that are approaching the minimum size needed to operate a full set of regulatory and competition policies and institutions. This group includes New Zealand, Singapore, Hong Kong, Israel and Ireland. Economies that fall below this threshold, such as the micro-states of the South Pacific and the Caribbean, are faced by a different set of issues. Somewhat larger economies, such as Australia and Canada, may face similar issues to small economies but often to a lesser degree.

From the standpoint of competition policy, a small economy can be described as combining two key features:

- It can support only a small number of competing firms in many of its industries;
- Many of its firms will struggle to achieve minimum efficient scale when catering to domestic demand only.

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1. The views expressed in this paper do not necessarily represent the position of the Ministry of Economic Development.
2. Gal (2001).
3. Gal p. 1442.

In small economies, there is a tension between these factors that their competition policies must address. While many of their industries have very few firms, these firms tend to be small and often inefficient by world standards. This tension can be aggravated by geographic isolation, as is the case for New Zealand, and considerably alleviated by geographic proximity to much larger economies as occurs for Singapore, Hong Kong and Ireland. The tension can be further aggravated to the extent that economies are geographically dispersed within national borders. This can lead to the presence of even smaller geographically distinct markets within the smaller economy. This is an issue for New Zealand and, to some extent, Ireland.

Each of the factors that contribute to this tension is examined briefly below before the nature of this tension is explored further.

Industrial Concentration

It is well established in the literature that small economies are characterised by relatively high industrial concentration levels and the presence of monopoly and oligopoly. An example of this is provided by the 1975 study conducted by FM Scherer et al of concentration levels in 12 selected manufacturing industries. Table 1 presents their findings that industrial concentration in manufacturing tends to increase as the size of an economy's population decreases. For the United States, only one industry (refrigerators) was characterised by an oligopoly. Sweden, on the other hand, had three natural monopolies (brewing, refrigerators and cigarettes) and four more natural duopolies.

Table 1. Industrial concentration and the size of the market[1]

Economy	Market Share of the three leading firms		Population	
	%	Index*	Millions	Index**
USA	41.1	100	204	100
West Germany	56.1	136	61	129
Britain	60.4	147	55	133
France	66.3	161	51	135
Canada	70.8	172	21	175
Sweden	83.4	203	8	256
Israel	91.0	221	3	480

1. Reproduced from Gal p. 1447. Gal's data were derived primarily from F.M Scherer, Alan Beckenstein, Eric Kaufer And Dennis Murphy, *The Economics of Multiplant Operations* (1975).

*. USA = 100.

**. The index of the inverted logarithm of the population.

CRA (2002) have set out from a small economy perspective, the potential economic costs of monopoly (as drawn from conventional industrial organization literature using strict assumptions). These include:

(a) Reduced allocative efficiency due to monopoly pricing – in a situation where there are very high barriers to entry, a monopolist is faced with incentives to raise price in inverse proportion to the elasticity of demand;

(b) The possible loss of locational advantages – if monopolists are located abroad, the literature indicates that they are faced by incentives to delay investments in small economies necessary to establish a meaningful market presence (*e.g.* a local brand, local plant or local distribution infrastructure). The reason for this is that the monopolist earns monopoly profits from exports in any case;

(c) Losses in non-price competition – the presence of a monopolist can impact adversely on incentives to provide the optimal level of quality;

(d) The effect on the incentive to innovate – a monopolist may have less incentive to innovate either because it is able to maintain a customer base without innovation or because it is unable to fully appropriate the benefits of innovation (*i.e.* they largely flow to the public rather than the firm).

These costs will also potentially be present under oligopoly. Conventional industrial organisation theory suggests that the vigour of competition is related to the number of firms in an industry, their relative size and the magnitude of barriers to entry. Under oligopoly, firms can recognize that their decisions are interdependent and seek to pursue co-operative strategies that entail the same or similar approaches to a monopolist to such factors as price, quality or innovation. Co-operative approaches do not necessarily entail explicit collusion. Rather they may simply reflect recognition by one firm that any attempt to increase competition on its part may quickly be matched by similar actions by other firms and may not be worth undertaking as a result.

Competition amongst firms in small economies may be inhibited by the presence of relatively high entry barriers. In addition to the problems of achieving economies of scale and scope (see below), entry may be inhibited by shortages of skilled labour, limited supplies of natural resources and difficulties in accessing efficient technologies.

Sub-optimal Levels of Production

Gal points out that a recurring observation in studies of manufacturing industries in small economies is that a considerably larger fraction of all output is produced in sub-optimal volumes and in sub-optimal plants *vis a vis* the volumes and plant sizes that would be indicated by minimum efficient scale.[4] Such small scale operations can have a significant impact on the efficiency and international competitiveness of small firms operating out of small economies. It can lead to pressures for small firms to seek, to grow, or to enter into co-operative arrangements with other firms in order to seek improvements in productive efficiency. In small economies, however, the extent to which such efficiencies can be achieved may be limited, meaning that firms are at a relative disadvantage in terms of achieving:

(a) Economies of scale – when the unit cost of production decreases as the scale of output increases. These may be plant and/or product specific;

(b) Economies of scope – where complementarities of production processes lead to the costs of producing two or more products jointly being less than the costs of producing them separately;

(c) Transaction costs reductions – where there are savings associated with production within the firm as opposed to external purchases.

Failure to achieve productive efficiencies can also have implications for the dynamic efficiency of firms in small economies. Such firms may limit the amount they spend on R&D, technology acquisition and technical progress. This in turn may mean they are forced to rely on less efficient production technologies than firms in larger economies.

4. Gal, p. 22.

As noted above, there is an inherent tension in small economies between the presence of small numbers of firms in many industries and the fact that these firms are often of sub-optimal size. Gal describes this as the "basic conflict created by smallness".[5] In a static situation, this may entail a conflict between the achievement of allocative and productive efficiencies. In a dynamic situation, there may be a conflict between the achievement of static, particularly productive, efficiencies and the attainment of dynamic efficiencies.

Competition authorities in small economies, therefore, are confronted by a conundrum. On the one hand, an overly aggressive approach to their role may prevent efficiency enhancing outcomes from taking place. On the other, an overly permissive approach may lead to the entrenchment of market power.[6] Furthermore, they will often be faced by the requirement to make tradeoffs between market power and firm efficiency considerations.

These judgements can be sensitive and complex and they tend to vary from case to case. For example, increased concentration should not be taken as a proxy for increased market power. The presence of small numbers of firms does not necessarily indicate a lack of competitive rivalry. Vigorous rivalry can exist with as few as two firms in a market and in the absence of barriers to entry, a monopolist may be severely constrained by potential entrants. Even if a market transaction does slightly increase market power, the benefits that accrue from improvements to efficiency might significantly outweigh the detriments.

Where increased concentration does increase market power, any efficiency improvements resulting from the increase can be very difficult to judge. Private sector companies will often overstate the efficiency benefits that are likely to accrue. In particular, projected gains to dynamic efficiency resulting from the adoption of improved technology can be notoriously difficult to measure. Competition authorities also need to ensure that while efficiency improvements may theoretically result from increased concentration, the increased market power that results will not remove the incentive to carry out such improvements.

Given the circumstances, the relative margins of error faced by competition policy authorities in small economies are significantly larger than those faced by competition authorities in large economies. In particular, the latter are able to pay relatively less attention to the efficiency aspects of competition policy. This is because in larger economies most productive efficiencies in many industries have been exhausted and many, if not most, firms should be operating at minimum efficient scale. Accordingly, any economies that arose from specific transactions would normally arise from firm specific rather than industry specific factors.[7]

B. Competition Policy in Small Economies

As noted earlier, the basic objectives of competition policy are similar for large and small economies. In both, competition policy is designed to protect and promote the competitive process. The competitive process is not an end in itself but a means to an end as it promotes improvements in efficiency which in turn lead to welfare gains for society. However, the above analysis points to small economies facing an inherent tension in many industries between the presence of market power resulting from firm concentration and of firms of sub-optimal scale. This tension has a number of implications for the design of competition policy in small economies which are set out below.

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5. *Ibid,* p. 1449.

6. Khemani (1991) p. 219.

7. Ibid p. 217.

A. Clear and Integrated Approach to Competition Policy

Gal argues that it is vital for small economies that "the goals of competition policy be clearly, deliberately and unambiguously defined, and that economic efficiency be given primacy over other goals".[8] Because relatively fewer impediments to the process of competition exist in larger economies, these economies may have more scope to pursue a mix of objectives, including social, equity and regional as well as efficiency objectives within the context of their competition policy. (Canada, for example, lists the promotion of small business as one of the objectives of its competition law.)

Small economies are much less able to pursue such a mix of objectives as there is a greater relative likelihood that such an approach will lead to the preservation of inefficient firms within the economy. Given that small economies have many industries that are relatively concentrated, there is also a greater likelihood that the pursuit of objectives other than efficiency will lead to rent seeking behaviours by firms (such as lobbying) in the name of these objectives. Furthermore, the pursuit of these objectives on behalf of producers may lead to significant costs for consumers within the economy, thus mitigating the social, equity and even regional advantages of such an approach.

While efficiency should be the sole objective of competition policy in small economies, it is important that this objective is not pursued through competition law alone. Trade, investment and regulatory policies also offer opportunities for the removal of barriers to competition and it is necessary for these to be closely integrated with competition law. Various country studies show that those economies that have pursued an integrated policy approach to improving the functioning of markets have been most successful in raising growth rates.[9] Given that the potential impediments to the competitive process are greater in small economies, the need for an integrated approach to policy is correspondingly greater.

A useful strategy for small economies in this respect is to ensure that regulatory barriers to competition are minimised as these have the potential to significantly compound the existing disadvantages of small size. On the other hand, in sectors where competition is severely limited, regulation may be needed to limit the potential costs imposed by the presence of market power. Examples of both approaches occurred recently in the New Zealand dairy industry where statutory barriers to competition were removed but where the behaviour of the single remaining purchaser of milk of any significant size was subject to new regulations designed to minimise potentially anti-competitive behaviour by this purchaser.

Open Trade and Investment Policies

Open trade and investment policies have the potential to significantly mitigate the disadvantages of small size in the area of competition policy. Overall, such policies can significantly enlarge the scope of the market in which firms operate. As markets are opened, domestic firms that would otherwise have significant market power are exposed to foreign competition and thus price and cost margins are squeezed without the need to break firms into uneconomically small entities. On the other hand, access to export markets provides opportunities for domestic producers to achieve productive efficiencies that would not be possible if they had to rely on the home market alone.

Trebilcock goes as far as to say that a liberal trade policy is a far more potent pro-competition, entry inducing force than domestic competition or antitrust laws in most industries. He goes on to say "a liberal trade policy and a sensitively designed and applied competition policy may be productive complements and would seem to be the optimal pro-competitive mix of policies, especially for a small, relatively open

8. Gal p. 1451.

9. OECD (2001) p. 11.

economy…".[10] The conclusion that open trade and investment policies are relatively more important for small economies is supported by the empirical work conducted by Hoekman, Kee and Olarreaga. Their work shows that imports have a relatively greater impact on competition in small economies whereas domestic entry regulation (achieved through competition law and/or regulatory policies) have a relatively greater impact on competition in large economies.[11]

Some small economies, such as Singapore and Hong Kong, have drawn the conclusion that they do not require competition law at all and can rely on open trade and investment policies as well as sectoral regulation to promote competition in markets. Other small economies, such as New Zealand, maintain a comprehensive competition law in addition to such policies. Part of the difference may be explained by much higher transport costs to New Zealand, which can mute the advantages of trade in some areas. The Singapore and Hong Kong economies are also located next to much larger economies which in effect form markets for many of their firms. That being said, the need for competition law is under active discussion in both economies given that the non-tradeable sector of both economies is growing rapidly, particularly in the area of services.

As small economies have liberalised trade and investment policies, they have also sought increasing convergence of competition and regulatory policies with larger economies. For example, many of the key thresholds in competition law have now been largely standardised between large and small economies. Such convergence has a number of advantages for smaller economies. When regulations are similar, it can lower the costs faced by firms operating across several countries. Regulatory agencies, such as competition authorities, can make use of the analysis carried out by their counterparts from larger economies while courts can take account of the case law emanating from these jurisdictions.

At the same time, it is important that small economies maintain a degree of flexibility in the implementation of competition and regulatory policies as their approach in the implantation of these policies may differ from large economies, particularly in the area of competition law (see below). For example, while many small economies may employ the same threshold tests as large economies, their approach to deciding whether these tests have or can be breached can differ considerably. In terms of any exercise to co-ordinate competition policy at the international level therefore (*e.g.* through the World Trade Organisation), small economies have a significant interest in ensuring that a "principles based" approach is pursued that preserves this flexibility of approach. Any attempt to develop a single set of rules at the global level has the potential to work against their interests.

Competition Law in Small Economies

As discussed above, a key feature of small economies is that high levels of concentration may be necessary in many industries in order to achieve productive efficiencies. In some cases, the degree of concentration present will limit the rivalry that occurs between firms. This tension will arise far more frequently than it does in large economies. Competition law in small economies needs to be structured in a manner that allows both sides of this equation to be fully considered. This would suggest that competition law needs to comprise a flexible set of instruments that can be applied on a case-by-case basis to reduce competition concerns while promoting economic efficiency.[12]

10. Trebilcock, p. 29.

11. Hoekman, Kee and Olarreaga, pp. 21-22.

12. Khemani (1991), p. 219.

This situation has several implications for competition law in small economies. First, greater scope is needed than in larger economies to ensure that efficiency considerations are fully considered. This applies to consideration of both mergers and of co-operative agreements amongst rivals as both may be means for firms to achieve significant productive efficiencies. In the first instance, it may be useful for the law to allow competition authorities to assess efficiency considerations at the point of considering whether various transactions have the potential to breach competition thresholds (as occurs under New Zealand's merger clearance procedures).

Once a problem with competition thresholds has been identified, it is just as important to allow firms the opportunity to put a case to show that gains from improved efficiency will outweigh losses from a lessening of competition. This may be achieved through inclusion in the law of an explicit efficiency defence in legislation (as occurs in Canada) or through an authorisation procedure based on "public benefit" (as occurs in Australia and New Zealand). If these provisions are structured properly, practice by competition authorities in small economies should naturally evolve in the direction of giving greater weight to efficiency considerations. For example, Berry and Pickford, citing the number of cases in which New Zealand mergers have been authorised on public benefit grounds, argue that New Zealand competition authorities have developed a more tolerant approach to mergers claiming efficiencies than is the case in the United States or Canada.[13]

Second, competition laws in small economies need to avoid adopting simple rules of thumb as indicators of market power as occurs in larger economies. For example, the US merger guidelines use the Herfindahl-Hirschman Index (HHI) to measure the level of concentration in a market based on the number of firms operating in a market and their relative market shares. The index uses a numeric methodology based on very specific assumptions. Although the HHI is only a prima facie indicator of the anti-competitive effects of a merger, its thresholds have had the effect of creating a presumption of illegality.[14] Gal argues that this approach is not appropriate for small economies as many if not most mergers in small economies would cross the HHI thresholds. In a small economy situation, such an approach would create unwarranted barriers to firms seeking to realise productive efficiencies from mergers.

Third, small economies need to minimise the inclusion of rigid per se rules in competition law. In small concentrated markets, firms may seek to work with each other to overcome the disadvantages of small size and to realise scale economies. In a situation where the market is characterised by oligopoly, they may seek to compete with other firms through price discrimination rather than through direct price competition. In larger economies, such behaviours might be the subject of per se prohibitions. However, in smaller economies they could be either welfare enhancing or reducing, depending on the balance of competition and efficiency considerations. Accordingly, they should be considered by competition authorities on a case-by-case basis.

Most small economies with competition laws maintain a per se prohibition on price fixing. Some commentators have questioned the wisdom of this approach on the grounds that agreements by firms to fix prices can be welfare enhancing as the prices set tend to form price ceilings rather than price floors.[15] However, there is a strong body of opinion that a per se prohibition in this area provides certainty and clarity for business as to the nature of the law. Furthermore, price fixing is easy to sustain in oligopolistic markets with homogeneous products and high entry barriers (*e.g.* cement). If price fixing arrangements do have welfare enhancing properties, then the law can be structured to allow participating firms to apply for exemptions from the per se prohibition (as occurs in Australia and New Zealand where firms can apply for an authorization for such an arrangement).

13. Berry and Pickford, p. 8.

14. Gal, p. 1466.

15. Charles River (9 September 2002), p. 58.

Fourth, small economies should be cautious in the application of both structural remedies and behavioural undertakings. Applied crudely, structural remedies may do little to enhance competition in small economies while they can act to significantly impede productive efficiencies. For example, if a market has an oligopolistic structure and two firms seek to merge, seeking to achieve extensive divestments from one or both of the firms may do little to improve competition while significantly inhibiting efficiency gains. Nonetheless, Gal argues that there is a role for structural remedies in small economies if applied in a sophisticated fashion. For example, in the case of a merger it may be possible to overcome most competition concerns with a relatively limited divestment while maintaining most of the efficiency gains. Furthermore, Gal suggests that structural remedies of this kind are normally a superior solution to behavioural undertakings which are notoriously difficult to enforce in small economies.[16]

Implications for the Resourcing of Competition Authorities

The above analysis has some obvious implications for how competition authorities are set up and resourced in small economies. In particular, competition authorities need the capacity to be able to weigh up competition and efficiency issues for any given case. Often, the issues involved will be complex and the analysis required will be highly sophisticated. The nature of this challenge is illustrated by the suggested set of questions drawn up by CRA for competition authorities in small economies to consider the potentially adverse effects of monopoly. In the context of specific investigations, the questions in each of the areas covered – increased monopoly mark-ups, loss of locational advantages, effects on non-price competition and effects on the incentives to innovate – would often be challenging to answer, requiring both analytical sophistication and significant data sets.

Small economies, therefore, may need to devote proportionately more resources than large economies on competition law enforcement if they wish to achieve good competition policy outcomes. At the same time, they can seek to minimise these costs in certain key respects. One is to seek to make use of the analysis and techniques developed in larger economies, adapting these to the extent possible to the conditions faced by small economies. A second means is to seek to concentrate all regulatory functions concerned with the promotion of competition into a single agency in order to achieve both cost savings and analytical synergies. This trend is already evident is several economies. In New Zealand, for example, the Commerce Commission is responsible for enforcing legislation on general competition, consumer protection, telecommunications, electricity and competition in the dairy sector.

However, Goddard and Carlton emphasise that limits in the institutional capacity of small economies will put limits on what can be achieved under competition law. They state:

> "The theoretical possibility of harm to competition from a practice is not sufficient to justify the prohibition of that practice, unless we can be reasonably confident that we can in practice, without too many false positives and without excessive cost and delay, distinguish the goats from the sheep. If the evidence needed to draw such distinctions with reasonable confidence is likely to be unobtainable, or extraordinarily costly to obtain, or beyond the ability of the court system to evaluate and apply, then it is preferable for the law to avoid the need to draw such distinctions."[17]

16. Gal, p. 1468.

17. Goddard and Carlton, p. 7.

PART II: CURRENT ISSUES FOR NEW ZEALAND

New Zealand represents the classic case of a small economy. A recent brief survey by Lew Evans compared New Zealand's market structure and firm performance with the rest of the world.[18] This found that:

- Markets in New Zealand have very few firms of reasonable size and are therefore relatively concentrated;
- Firms are tiny on a world scale;
- When compared to the rest of the world, New Zealand firms use relatively more capital, have a relatively high operating profit and relatively high total costs per unit of revenue.

Evans suggests that firms in New Zealand need higher profits in order to cover the higher costs of capital. While it may seem surprising that firms are more capital intensive in a small economy such as New Zealand, this can probably be explained by the absence of economies of scale and the need for higher capital intensity as a result.

A number of issues currently facing New Zealand competition policy are set out briefly below. This list is not intended to be exhaustive but rather to serve as illustrations of the types of issues that emerge from the analysis set out in this paper.

Competition, Regulatory and Trade Policies

New Zealand has, for many years, recognised the drawbacks of relying on competition law alone to provide for competitive conditions in small concentrated markets. The Commerce Act was introduced in 1986 and its presence has been accompanied since by extensive programmes of regulatory reform and (often unilateral) trade liberalisation. Regulatory reform has been based on a set of commonly understood competition principles that have been employed throughout Government. (As noted previously, the dairy sector was recently reformed along these lines – one of the last "traditional" sectors in the New Zealand economy to be opened to greater competition.) Trade liberalisation has been recognised as a fundamental means of exposing New Zealand industries to greater competition at the same time as mitigating some of the scale disadvantages they face. The process of trade liberalisation has led to comparatively low industrial tariffs, liberal services markets and open conditions for foreign investment.

A key focus of regulatory policy in New Zealand in coming years is likely to be on developing appropriate regulation for new economy industries, network industries and government regulated monopolies. A major challenge in this area will be to ensure that regulation allows both dynamic competition and co-operation between firms to take place. It will also be important to ensure that regulation itself is not imposing barriers to entry. In this respect, the recently passed Electronic Transactions Act is a useful step forward. This allows for statutory legal requirements for writing, signing, and retaining and producing documents to be met using electronic methods.

As the scope for further reduction of border barriers has now been largely exhausted, New Zealand's external economic policy has increasingly focused on "regulatory" co-ordination" with other economies. This has the objectives of regulatory co-ordination including ensuring that costs for businesses operating across economies are minimised and seeking to adopt "regulatory best practice" within New Zealand based on knowledge of the experience of other economies. In the area of competition law, for example, the key

18. Evans L., p. 8.

thresholds under the Commerce Act are the same as those that prevail in Australia and many other jurisdictions. A key challenge for New Zealand will be to seek to further co-ordinate its approach to competition law with Australia, as Australia examines its competition legislation over the coming year.

Competition Law

An in-depth analysis of New Zealand's Commerce Act is beyond the scope of this paper. However, a key feature of the Act is that it permits the Commerce Commission and the Courts a good deal of flexibility in terms of how they approach individual cases. Per se provisions have been kept to a minimum (limited to price fixing and certain forms of exclusionary conduct) and there is a strong rule of reason flavour running through the Act's provisions. In addition, companies themselves can apply for authorisations under the Act both for mergers and for certain forms of co-ordinated conduct (such as joint ventures). The Commerce Commission can grant authorisations if it is satisfied that the public benefits set out in the application outweigh the detriments. Efficiency considerations are a key factor taken into account in assessing the public benefits of an application. The Commission can also take efficiency considerations into account (but to a much more limited extent) when assessing applications for clearances for mergers.

However, efficiency issues will need to be the subject of ongoing consideration. For example, an assessment is perhaps needed of why so little use is made of the Act's authorisation provisions. Over the last three years, the Commerce Commission has received only one to three business acquisition and restrictive business practices authorisation applications per year. Some consideration may be needed as to whether cost and/or time considerations inhibit applications. Potential applicants may also be influenced by the fact that their competitors have legal standing under the processes that are followed to consider applications. (Ironically, competitors are most likely to oppose an authorisation in situations where vigorous competition would remain in the market if it were granted.)

CONCLUSION

This paper argues that there is an inherent tension in many small economy industries between the potential for market power based on concentration and sub-optimal firm size. Gal describes this as the "basic conflict created by smallness". This tension is likely to mean that small economies will need to pay relatively greater attention to specific efficiency considerations in the context of competition policy.

This tension entails a number of specific policy implications for small economies vis-à-vis large economies. Small economies may need

- To place relatively greater emphasis on trade and regulatory policies than on competition law. There is a need for an integrated approach to all three policy fields in small economies. In particular, open trade and investment policies offer small economies the potential to overcome some of the disadvantages of smallness;

- To maintain relatively greater flexibility in their competition law to allow for the assessment of efficiency. This should entail minimal use of per se rules and rules of thumb allowing each case to be assessed on its merits;

- To spend relatively more resources on the enforcement of competition law given the flexibility required under the law and the need to examine each case on its own merits.

New Zealand is an example of a classic small economy and its competition policy frameworks reflect most of the features that should be present in a small economy. In the future, New Zealand faces the challenges of:

- Building on the gains provided by open trade and investment policies through the improved co-ordination of competition and regulatory policies with key trading partners;

- Ensuring that provisions within competition law designed for the consideration of efficiency factors are workable in practice. This applies particularly to authorisation provision for both mergers and restrictive business practices;

- Developing its competition policy, law and institutions to take account of the features of new economy industries.

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APPENDIX 1: ELEMENTS OF THE PROTOTYPE INTEGRATED CHECKLIST PARTICULARLY RELEVANT TO THIS WORKSHOP

Session 1: Policy coherence for efficient regulation: Enhancing market openness through a whole of government approach

- C1. To what extent are there mechanisms in regulatory decision-making to foster awareness of trade and investment implications?
- H1. To what extent is there an integrated policy for regulatory reform that sets out principles dealing with regulatory, competition and market openness policies?
- H2. 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?
- H5. 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?
- H8. 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?
- H9. 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?
- H10. 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?

Session 2: Market openness and the business environment: Ensuring regulatory efficiency and the confidence of the private sector

- C1. To what extent are there mechanisms in regulatory decision-making to foster awareness of trade and investment implications?
- C4. 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?
- C5. To what extent are government procurement processes open and transparent to potential suppliers, both domestic and foreign?
- H3. What are the accountability mechanisms that assure the effective implementation of regulatory, competition and market openness policies?

- H6. 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?
- H11. 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?

Session 3: Domestic regulation in a globalised economy: the impact on international competitiveness

Sub-session 1: Improving international competitiveness through the reduction of unnecessary regulatory burdens

- C2. To what extent does the government promote approaches to regulation and its implementation that are trade-friendly and avoid unnecessary burdens on economic actors?
- C3. 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?
- C6. 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?
- H4. 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?

Sub-session 2: Improving competitiveness by minimising the cost impacts of regulatory diversity across borders

- C7. To what extent are harmonised international standards being used as the basis for primary and secondary domestic legislation?
- C8. To what extent are measures implemented in other economies accepted as being equivalent to domestic measures?
- C9. To what extent are conformity assessment procedures designed and implemented so as not to create unnecessary barriers to the free flow of goods or provision of services?

APPENDIX 2: FINAL DRAFT (AS OF 2 SEPTEMBER 2004)

APEC-OECD INTEGRATED CHECKLIST ON REGULATORY REFORM

ADDRESSING REGULATORY, COMPETITION POLICY, AND MARKET OPENNESS POLICY ISSUES

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.

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 has focused on the development of the integrated checklist that will be presented for approval to the respective Executive Bodies of the APEC and the OECD in 2005.

The checklist is a strictly voluntary tool that member economies may use to evaluate their respective regulatory reform efforts. Based on the accumulated knowledge of APEC and the OECD, it 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.

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).

The Checklist is therefore an integrated self-assessment tool, in two 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.

H. 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.

H1. 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 H2 since it provides an opportunity for political leaders and senior officials to express their support for regulatory reform.

H2. 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 long-term benefits of reforms are masked by short-term transition costs. But failure to overcome these 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 H1 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 efforts will be required to change the culture of economic actors and regulators.

H3. What are the accountability mechanisms that assure the effective implementation of regulatory, competition and market openness policies?

Comment:

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.

H4. 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 H8 on the inter-ministerial consultation).

This principle is also examined in Question C6.

H5. 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)?

Comment:

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 'nation' 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.

H6. 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?

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 B6 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. Transparency must also extend to forthcoming regulatory actions, as this is necessary for stakeholder involvement in regulatory decision-making (see also Question A5 and C4 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.

H7. Are the reform of regulation, the establishment of appropriate regulatory authorities, and the introduction of competition coherent in timing and sequencing?

Comment:

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. The degree of independence of regulatory bodies should be assessed.

H8. 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.

H9. 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?

Comment:

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 the Principles of High Quality Regulation (See for example, Questions A2 and A3 on the analysis of new and existing regulation).

H10. 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. Expertise and experience need to be developed and maintained over time so that officials responsible for policy development and institutional design are more aware of 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 A7 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.

H11. 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."

A. 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.

A1. 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.

A2. 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 A1) 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 H6, A5 and C4), and with the need to avoid discrimination between domestic and foreign stakeholders in regulation (see Questions H4 and C6 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.

A3. 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 C1 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, initiative 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 confront 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 A1), the Competition Authority (see Question B1) or another body with the expertise to examine regulatory legislation and programs. 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.

A4. 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?

Comment:

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 H6 on transparency).

A5. 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-publicized 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 C4 which develops these points with a trade focus.)

A6. 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 A2 and A3). 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.

A7. 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.

A8. 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.

B. 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.

B1. 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?

Comment:

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 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. These elements should be part of a general policy on regulatory reform (see Question H1), as well as in the drafting of new regulation and the evaluation of the stock of existing regulation.

B2. 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 H8 and A6).

B3. 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?

Comment:

A clear mandate for the Competition Authority to engage in such advocacy activities can be very helpful in ensuring that any positions it promotes (e.g., within government circles, to regulators, to business organisations and other constituencies) are 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 A3 on reviewing existing regulations).

B4. 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 businesses 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. 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.

B5. To what extent is the agency responsible for the administration and enforcement of the competition law (the "Competition Authority") independent and free from political influence, and to what extent are its human and financial resources sufficient to enable it to do its job?

Comment:

The Authority charged with enforcing the competition law should be able to make its enforcement decisions free from political influence 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.

B6. 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?

Comment:

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 B11).

B7. 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.

B8. To what extent does the competition law contain provisions to deter effectively and prevent hard-core cartel conduct, abuses of dominant position or attempts to monopolise, and contain provisions to address effectively anti-competitive mergers? 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.

B9. 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 the economy, and should apply to the activities of individuals, companies, joint ventures, state enterprises 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 H4).

B10. To what extent does the competition law provide for effective investigative powers and sanctions to detect, investigate, punish and deter anti-competitive behaviour?

Comment:

Experience in several jurisdictions around the world has demonstrated that it is difficult to enforce credibly a competition law 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.

B11. 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?

Comment:

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 H11 on the implementation of regulatory reform policies)

B12. 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?

Comment:

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).

C. 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.

C1. 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 H8); 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 H5), 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.

C2. 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 A7 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 C7). 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 H6 and A5). Periodic reviews of regulations ensure that applicable requirements are relevant and proportional to the regulatory objectives (See Question A3). 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 A7).

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.

C3. 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.

C4. 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 A5). 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.

C5. To what extent are government procurement processes open and transparent to potential suppliers, both domestic and foreign?

Comment:

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 H6 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.

C6. 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?

Comment:

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 H4 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 A6 on RIA). Similarly, independent regulators, such as sectoral regulators, should be required to make comparable assessments.

C7. To what extent are harmonised international standards being used as the basis for primary and secondary domestic legislation?

Comments:

Internationally harmonised 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. Internationally harmonised standards (developed by such bodies as ISO or Codex Alimentarius, or aligned regionally or bilaterally between trading partners or among businesses) offer a solution to fragmented regulatory systems. Reliance on international standards, where they exist, as the basis of domestic regulation is supported within several WTO agreements and should be a prominent feature of regulatory reform.

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 policy may require that full explanations be provided when national standards-setting groups bypass existing international standards.

C8. To what extent are measures implemented in other countries accepted as being equivalent to domestic measures?

Comment:

In some areas, international standards have not been developed or are not considered appropriate for application. 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 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 country, 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 invaluable 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.

C9. To what extent are conformity assessment procedures designed and implemented so as not to create unnecessary barriers to the free flow of goods or provision of services?

Comments:

Rigorous conformity assessment procedures are necessary to achieve certain public objectives like health, safety, environmental and consumer protection. When done without the outlay of excessive costs and time, these procedures can facilitate market openness by increasing consumer confidence in products or service providers. On the other hand, conformity assessment procedures 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 country.

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 countries, or through voluntary arrangements between conformity assessment bodies in different countries. 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.

ANNEX 1: MATRIX

The Draft APEC-OECD Integrated Checklist on Regulatory Reform

(Note: the place of the cells has no relation to the order of the rows. That is, questions H4, A4, B4 and C4 are not related)

H. INTEGRATED POLICIES (HORIZONTAL DIMENSION)	A. REGULATORY POLICY	B. COMPETITION POLICY	C. MARKET OPENNESS POLICIES
H1. To what extent is there an integrated policy for regulatory reform that sets out principles dealing with regulatory, competition and market openness policies?	A1. To what extent are capacities created that ensure consistent and coherent application of principles of quality regulation?	B1. 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?	C1. To what extent are there mechanisms in regulatory decision-making to foster awareness of trade and investment implications?
H2. 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?	A2. Are the legal basis and the economic and social impacts of drafts of new regulations reviewed? What performance measurement instruments are being envisaged for reviewing the economic and social impacts of new regulations?	B2. 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?	C2. To what extent does the government promote approaches to regulation and its implementation that are trade-friendly and avoid unnecessary burdens on economic actors?

H. INTEGRATED POLICIES (HORIZONTAL DIMENSION)	A. REGULATORY POLICY	B. COMPETITION POLICY	C. MARKET OPENNESS POLICIES
H3. What are the accountability mechanisms that assure the effective implementation of regulatory, competition and market openness policies?	A3. Are the legal basis and the economic and social impacts of existing regulations reviewed, and if so, what use is made of performance measurement instruments?	B3. 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?	C3. 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?
H4. 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?	A4. 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?	B4. To what extent are measures taken to neutralise the advantages accruing to government business activities as a consequence of their public ownership?	C4. 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?*

*. This Question could be further integrated, in particular with elements of Question H6 and Question A5.

H. INTEGRATED POLICIES (HORIZONTAL DIMENSION)	A. REGULATORY POLICY	B. COMPETITION POLICY	C. MARKET OPENNESS POLICIES
H5. 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?	A5. Are there effective public consultation mechanisms and procedures including prior notification open to regulated parties and other stakeholders, including non-governmental organisations, the private sector, advisory bodies, accreditation bodies, standards-development organisations and other governments? *	B5. To what extent is the agency responsible for the administration and enforcement of the competition law (the "Competition Authority") independent and free from political influence, and to what extent are its human and financial resources sufficient to enable it to do its job?	C5. To what extent are government procurement processes open and transparent to potential suppliers, both domestic and foreign?
H6. 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?	A6. To what extent are clear and transparent methodologies and criteria used to analyse the regulatory impact when developing new regulations and reviewing existing regulations?	B6. If the competition law reserves a role for governmental bodies other than the Competition Authority under the competition law, to what extent is this role transparent, for example, regarding factors taken into account by such decision-maker, and their relative weighting?	C6. 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?
H7. Are the reform of regulation, the establishment of appropriate regulatory authorities, and the introduction of competition coherent in timing and sequencing?	A7. How are alternatives to regulation assessed?	B7. To what extent is there a transparent policy and practice that addresses the relationship between the Competition Authority and sectoral regulatory authorities?	C7. To what extent are harmonised international standards being used as the basis for primary and secondary domestic legislation?

*. This Question could be further integrated for instance moving it to the Horizontal section and merging it with Question C4.

*. This Question could be further integrated, in particular with elements of Question H4.

H. INTEGRATED POLICIES (HORIZONTAL DIMENSION)	A. REGULATORY POLICY	B. COMPETITION POLICY	C. MARKET OPENNESS POLICIES
H8. 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?	A8. To what extent have measures been taken to assure compliance with and enforcement of regulations?	B8. To what extent does the competition law contain provisions to deter effectively and prevent hard-core cartel conduct, abuses of dominant position or attempts to monopolise, and contain provisions to address effectively anti-competitive mergers? To what extent does the broader competition policy strive to ensure that this type of conduct is not facilitated by government regulation?	C8. To what extent are measures implemented in other countries accepted as being equivalent to domestic measures?
H9. 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?		B9. 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?	C9. To what extent are conformity assessment procedures designed and implemented so as not to create unnecessary barriers to the free flow of goods or provision of services?
H10. 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?		B10. To what extent does the competition law provide for effective investigative powers and sanctions to detect, investigate, punish and deter anti-competitive behaviour?	

H. INTEGRATED POLICIES (HORIZONTAL DIMENSION)	A. REGULATORY POLICY	B. COMPETITION POLICY	C. MARKET OPENNESS POLICIES
H11. 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?		B11. 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?	
		B12. 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?	

ANNEX 2. DISCUSSION NOTE

DEVELOPING THE APEC-OECD INTEGRATED CHECKLIST ON REGULATORY REFORM

ADDRESSING REGULATORY, COMPETITION POLICY, AND MARKET OPENNESS POLICY ISSUES

I. THE APEC-OECD INTEGRATED CHECKLIST

Project objective and outputs

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.[19]

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 Action Plan on Regulatory Reform* and the APEC *Principles to Enhance Competition and Regulatory Reform* to promote the individual and collective implementation of regulatory reform.[20]

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.[21] A central proposal for the Second Phase (2003-2004) is 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".[22] The goal is to foster as far as possible and feasible, and without compromising the policy objectives, a double integration of regulatory practices: an integration of both sets of principles and an integration of the main policy areas

19. 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.

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

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

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

constituting regulatory reform. The APEC-OECD Co-operative Initiative would act as a catalyst in developing this new integrated tool by bringing together the expertise of Member governments and relevant individuals and institutions.

The aim of this annex is to explain how the *Integrated Checklist* was prepared. Previous versions of this checklist served as a basis for the discussions at 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* (see below). 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 1-2 November 2004 in Thailand will finalise the Checklist. These events have provided an opportunity to discuss a multidisciplinary instrument that can be put to practical use to implement APEC and OECD principles as a dynamic process.

The output of this project is a draft *Integrated Checklist* on Implementing Regulatory Reform in APEC and OECD economies. The draft would be presented for endorsement to APEC and OECD official executive bodies in 2005.

II. ISSUES FOR DISCUSSION

Proposed nature and objectives of the Integrated Checklist

The *Integrated Checklist* is a unique and major effort for international development of good regulatory governance practices. The intention is that the *Integrated Checklist* will 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). 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. The *Integrated Checklist* should also work as a repository of APEC and OECD members' experience, knowledge and best practices leading to further reforms.

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.

The *Integrated Checklist* should flesh out the general statements found in the already agreed-upon APEC and OECD Principles. Because of the complexity of the issues involved and the synergies and occasional trade-offs between competing objectives, the *Integrated Checklist* should provide clear guidance and explicit criteria to make evaluation easier.

Initiatives to implement the APEC and OECD Principles also stress the need for an integrated instrument which would maximise 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 would be to provide an integrated whole-of-the-government tool to manage and monitor regulatory reform, providing coherence while serving the different policy areas.

Comparison of the APEC and OECD Principles

To become a practical instrument to assess existing regulatory policies according to their compliance with the APEC and OECD Principles and to guide authorities to continue furthering regulatory reform, the *Integrated Checklist* needs first to bring together the logic and essence of the two sets of principles.

Both lists of 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.

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.[23]

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.

23. 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.

Elements of the Draft Integrated Checklist

In addition to drawing directly from the APEC and OECD Principles, the *Draft Integrated Checklist* incorporates the results of previous discussions of past APEC-OECD events as well as recent material developed by the organisations.[24]

Schematically, the *Draft 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 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. They are drafted in the form of simple questions. Under each question, one or two paragraphs provide further explanatory elements and criteria to help ensure a correct interpretation. A Matrix view of the Draft Integrated Checklist providing a synthesis of questions can be found in Annex 1.

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 this draft 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 them.

24. 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 stock taking 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].

APPENDIX 3: APEC PRINCIPLES TO ENHANCE COMPETITION AND REGULATORY REFORM

- Open and Competitive Markets are the Key Drivers of Economic Efficiency and Consumer Welfare;

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

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

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

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

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

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

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

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

APEC endorses the following principles:

1. Non Discrimination

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

2. Comprehensiveness

(ii) Broad application of competition and regulatory principles to economic activity including goods and services, and private and public business activities.

(iii) The recognition of the competition dimension of policy development and reform which affects the efficient functioning of markets.

(iv) The protection of the competitive process and the creation and maintenance of an environment for free and fair competition.

(v) The recognition that competitive markets require a good overall legal framework, clear property rights, and non discriminatory, efficient and effective enforcement.

3. Transparency

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

4. Accountability

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

5. Implementation

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

1) Identify and/or review regulations and measures that impede the ability and opportunity of businesses (including SMEs) to compete on the basis of efficiency and innovation.

2) Ensure that measures to achieve desired objectives are adopted and/or maintained with the minimum distortion to competition.

3) Address anti-competitive behaviour by implementing competition policy to protect the competitive process.

4) Consider issues of timing and sequencing involved in introducing competition mechanisms and reform measures, taking into account the circumstances of individual economies.

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

5) Take practical steps to:

   - Promote consistent application of policies and rules;
   - Eliminate unnecessary rules and regulatory procedures; and
   - Improve the transparency of policy objectives and the way rules are administered.

6) Foster confidence and build capability in the application of competition and regulatory policy. This will be achieved, *inter alia*, by:

   - Promoting advocacy of competition policy and regulatory reform;
   - Building expertise in competition and regulatory authorities, the courts and the private sector; and
   - Adequately resourcing regulatory institutions, including competition institutions.

7) Provide economic and technical co-operation and assistance and build capability in developing economies by better utilising the accumulated APEC knowledge and expertise on competition policy and regulatory reform, including by developing closer links with non APEC sources of technical expertise.

8) Build on existing efforts in APEC to help specify approaches to regulatory reform and ensure that such approaches are consistent with these principles.

9) Develop programmes, including capacity building and technical assistance, to support the voluntary implementation of the approaches to regulatory reform developed by relevant APEC fora.

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

APPENDIX 4: THE 1997 OECD POLICY RECOMMENDATIONS ON REGULATORY REFORM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX 5: SUBMITTED PAPERS

REFORM OF REGULATION AND MARKET OPENNESS, TRENDS AND PROSPECTS IN ITALY

Maddalena Filippi, Presidency of the Council of Ministers

During the last ten years, in Italy just as in various other countries, reform of the regulations for the purposes of safeguarding competition has begun to play a primary part, and with significant outcomes, in terms of both quantitative reduction of constraints imposed by regulations and better quality of the regulations.

An undoubtedly a decisive part in stimulating remeditation of the overall regulations applicable to economic activity has to be attributed to the technological evolution that in various sectors, telecommunications and electric energy being two cases in point, changed the characteristics of the markets in such a radical manner as to render no longer valid the traditional justifications underlying particularly invasive forms of regulation. Whenever they are associated with durable monopoly conditions, technological complexities always call for extensive regulation, but do not admit disciplines that have an excessive incidence on the operational management of the enterprises.

It is against this general context of promoting competitive mechanisms that one has to see the progress that Italy has made in recent years in the direction of simplification and revision of the complex of rules that discipline economic activity: by means of an action of reducing, coordinating and harmonizing regulations and administrative procedures, a start was made with an effective simplification of the relationship of citizens and enterprises with the public administration.

In particular – following the introduction in 1990[25] of some new instruments that aimed at reducing the times in which administrative procedures were concluded and, more generally, improving the quality of the administration – a start was made in 1993[26] with the simplification process in the proper sense of the term, subsequently consolidated with the reforms approved in the years 1997-99[27] and concerning a substantial number of administrative procedures.

In the course of this reform season for strengthening the measures of simplification and liberalization, the year 1995 saw the legislator amplify the mechanisms of independent market regulation, instituting appropriate authorities for disciplining the public services[28].

25. See Law 241 of 7 August 1990, which for the first time laid down the general principles of administrative procedure and access to documents.

26. See Law 537 of 24 December 1993 ("*Interventi correttivi di finanza pubblica*" – Corrective measures of public finance).

27. See Law 59 of 15 March 1997 and Law No.50 of 8 March 1999.

28. See Law 481 of 14 November 1995.

A further step in the direction of reform of the regulations was recently taken with the approval of Law No.229 ("*Interventi in materia di qualità della regolazione, riassetto normativo e codificazione"* – measures in matters of regulation quality, regulation reorganization and codification) on 29 July 2003: this law contains decidedly innovative aspects, because – for the first time in such an express manner – the measures of regulatory and procedural rationalization were oriented towards the pursuit of liberalization policies.

It should also be remembered that "competition" has become a value enjoying constitutional protection for the first time: by means of the amendments recently introduced into Title V of the second part of the Constitution[29], "protection of competition" has in fact been included among the matters in which the State enjoys "exclusive legislation".

Another profile to be underscored is the awareness that such a reform process calls for systematic monitoring of the regulations to avoid maintenance of obsolete, inefficient and braking mechanisms in markets in continuous evolution; on the other hand, a continuous revision of the regulations in a pro-competitive sense calls for a clear and certain reference frame capable of supplying the necessary technical support at both the juridical and the economic level.

The measures that – not least on the basis of the reports of the *Autorità Garante della Concorrenza e del Mercato* (Antitrust Authority)[30] – are considered to be necessary in order to continue along this road in a coherent manner, further strengthening the results already obtained, are aimed not only at improving the regulation procedures, but also at modifying the structure and the discipline of the enterprises.[31]

Measures concerning the ends and the procedures of regulations

First of all, it is considered important to introduce general rules regarding participation in the adoption procedures of regulatory measures that introduce a mechanism of the Notice and Comment type (envisaged in the United States by the Administrative Procedure Act of 1946), based on a sequence that would be articulated as follows: communication that the regulation process is being got under way, publication of the regulation scheme, fixing of a deadline for the submission of comments, adoption of the measure. The aforementioned consultation criterion should be applied to procedures for the adoption of technical rules by ministries, agencies and independent authorities.

It is however deemed to be desirable that the new regulatory measures should be made the object of an impact analysis, this in order to render possible a comparative valuation of the costs for the Administration and the benefits for citizens and businesses. Upon implementation of the aforesaid simplification law No.229/2003, this analysis is to be extended also to some general regulatory measures of the independent authorities, with reference, above all, to regulations liable to produce an important impact on entrepreneurial activity.

As regards the recent constitutional amendment in a quasi-federal sense, on the other hand, there is clear awareness that the attribution of more extensive powers for regulating economic activities could lead to forms of hyper-regulation and reintroduction at the local level of restrictions and constraints abolished by simplification measures at the state level. It should in any case be noted that various Regions have already got under way the application – within the more limited regional ambit - of consultation process and the activation of instruments for valuing the impact of regulations.

29. See Constitutional Law No.3 of 18October 2001.

30. See Recommendation *("segnalazione")* AS 226/2002.

31. C. Wilcox, *Public policy toward business*, 1966.

A measure that could well make it possible to render the choices of regional and local governments more efficient has to be seen in the in the introduction of mechanisms for the systematic comparison of the measures adopted by regulators at the decentralized level (by regional governments, for example), which would have the effect of providing incentives for the adoption of best regulatory practices.

As far as relations between regulator subject (Independent Authority or other public body) and regulated subjects are concerned, it is deemed appropriate to pinpoint measures that, on the one hand, seek to avoid the regulator suffering undue interference (so-called "capture" of the regulator by the regulated subject) and, on the other, filling to the greatest possible extent the information asymmetries that place the regulator in a position of *de facto* inferiority with respect to the regulated subjects.

With reference to this last profile, it is thought that inequality of direct experience and knowledge of the activity to be regulates (for example, structure and cost of enterprises, technology, risks connected with the performed activity and, more generally, the so-called externalities) may be overcome by making provision for formal and informal contacts between regulator and regulated subjects, with attribution to the regulator of powers of inquiry and acquisition of data and information, facilitating not only the participative processes, but also forms of self-regulation.

As regards the danger of "capture" of the regulator, on the other hand, a danger particularly acute when the regulated subjects are represented by economically strong enterprises, it is deemed that the most appropriate measures should be seen in strengthening the position of autonomy and independence of the regulator (who, whenever an Authority is involved, would like to find himself in a position of independence vis-à-vis not only the political powers, but also vis-à-vis the regulated subjects).

COMPETITION ADVOCACY PROVISIONS IN MEXICO: THEIR IMPORTANCE IN REGULATORY REFORM AND TRADE OPENNESS

María del Carmen Dircio Palacios Macedo, Director, Federal Competition Commission of Mexico *

Introduction

It is the purpose of this paper to describe the different types of competition advocacy provisions by means of which the Mexican Federal Competition Commission (FCC) undertakes its advocacy role. Furthermore I want to highlight the importance that these provisions have had for regulatory reform and trade openness.

Since its creation in 1993, the FCC has been very active in its advocacy role, by promoting a competition culture and especially by encouraging competition in regulated sectors, through numerous initiatives. Part of the advocacy activities of the FCC are institutionalized to a certain extent, but they are also undertaken on an informal ad-hoc basis.

More specifically, the FCC has undertaken its advocacy role mainly by the following activities:

1) raising competition issues in the divestiture of state-owned companies;
2) giving opinions on competitive aspects of laws, regulations, and administrative rulings;
3) deciding on competitive aspects of concessions, permits and authorizations to participate in regulated activities;
4) determining the existence or nonexistence of market power or conditions of effective competition in regulated markets, as a requisite for sector authorities to issue regulations;
5) several actions to raise competition culture in the public.

The main instruments by which the FCC has undertaken these activities are the following:

6) the power granted to the FCC to undertake several advocacy activities provided in the Federal Law for Economic Competition (FLEC) and the Code of Regulations to the FLEC;
7) the requisite established in sector legislation that the FCC must decide on competition matters;
8) participation of the FCC in interministerial commissions established by law;
9) participation of the FCC in commissions established ad-hoc;
10) the powers granted to the FCC to authorize participants in biddings, provided in Public Bidding Conditions;
11) the publication of reports and decisions of the FCC, as well as the organization of seminars on competition directed to several kinds of public.

The advocacy role of the FCC has comprised a big number of sectors, including telecommunications, satellites, railroads, aviation, airports, navigation, ports, roads, natural gas, electricity, the financial sector, foreign trade, etc. It has not been an easy task, due to the complexity of the analysis of very diverse sectors. Additionally, the competition authority has frequently promoted competition values with other government

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∗. The opinions expressed in this paper are those of the author and do not necessarily reflect the formal opinion of the FCC.

authorities that have different objectives. An important characteristic of the FCC is that it is the only authority in charge of evaluating competition matters. Unlike in other economies, in Mexico sector regulators do not have expressly the faculty to evaluate competition aspects related to the sectors they regulate. This and other aspects of institutional design have facilitated the advocacy role of the FCC.

The advocacy role of the FCC can be considered successful because its efforts have often been decisive for the introduction of competition criteria in laws and regulations, for helping to define the boundaries of regulation, for preventing market concentration and anticompetitive practices in regulated sectors, and for making clear the costs of protectionist measures, among the most important achievements. Furthermore, amongst public officials and the general public there has been an increasing knowledge and awareness of the importance of competition.

At early stages of competition policy implementation in Mexico, the advocacy activities were undertaken on the basis of the powers established in the Federal Law for Economic Competition (FLEC). Later on, the Code of Regulations to the FLEC was promulgated providing clearer procedures for the FCC in certain competition advocacy activities. Furthermore, since the beginning of its operations the FCC has promoted the inclusion of several advocacy provisions in sector legislation.

I am considering as advocacy provisions those that grant powers to the competition authority to undertake advocacy activities. I am also including those provisions that support the advocacy activities of the competition authority.

Competition advocacy provisions can be of different types. The following is a classification of provisions according to its level of hierarchy and formality:

1) Provisions established in the competition and sector laws;
2) provisions established in the competition and sector regulations;
3) provisions established in decrees and agreements;
4) other provisions of a more informal character, like circular letters and administrative acts.

In general terms, it is considered that the most important advocacy activities of a competition authority should be established by the competition law. Regarding some activities that support the advocacy role, like the collaboration and coordination of the competition authority with regulators, provisions of a more informal character could be workable.

First I will address the advocacy provisions established in the FLEC; second the provisions established in the Code of Regulations to the FLEC; third, sector legislation advocacy provisions; fourth, other advocacy formal provisions, among them those included in foreign trade and standardization legislation; fifth, informal advocacy provisions. The background, importance and possible drawbacks of the different types of advocacy provisions are explained. Finally, some conclusions are presented.

1. Provisions in the FLEC

1.1. Faculty of the FCC to issue opinions

First of all, article 24 of the FLEC gives the faculty to the FCC of being involved in several activities of advocacy, namely to comment on the adjustments of federal public administration programs, to give its opinion regarding the laws, regulations, agreements, circular letters and administrative acts and about the amendments of laws and regulations, as regards competition and free market access. In issuing its opinions and comments, the FCC is empowered by the FLEC to act ex officio or upon request by policymakers.

The reason for the establishment of the advocacy faculties by the FCC in the FLEC is the recognition that Mexico's competitive environment depends largely on the laws and regulations which govern the activities of economic agents, as well as on the programs and actions of federal agencies. Furthermore, it was recognized that the advocacy activities should be undertaken by the FCC since the beginning of its operations. Since the beginning, it is also necessary both for the enforcement and for the advocacy role of the competition authority to give powers to this institution to request information, and provide for protections of confidential information. Articles 28 and 31 of the FLEC, provide for such powers.

Importance of the provision

Article 24 of the FLEC is of utmost importance because it establishes by law that the FCC has the faculty to advocate with other governmental agencies, and the legal terms of its opinions. The exercise of this power allows the FCC to contribute to create a favorable environment for the functioning of markets and the efficiency of economic activities.

It is very important that the competition authority be the one who has the faculty to issue specialized opinions on competition matters, because it is this authority that has the expertise to advise in these matters. In case of a competition authority recently created, it is this authority who can develop such expertise. Also, because it could be designed so as to have no other objectives besides enhancing competition. Giving sector authorities the faculty of evaluating competition matters of their sector does not ensure that competition objectives are clearly envisaged, because these authorities often have other priorities over competition.

Possible drawbacks

In terms of article 24 of the FLEC, opinions issued by the FCC are not legally binding. In general terms, the legal status of the opinions is not considered as an important limitation to the advocacy activities of the FCC. Laws, regulations, and administrative acts generally have multiple objectives, and protecting competition could only be one of their objectives. The competition authority can not be given the ultimate word in this respect because it is the sector authorities, the legislative or the executive authorities in each case, who must balance the several objectives in order to take a decision. The role of the competition authority in issuing its specialized opinion is to make clear the benefits of preserving and promoting competition, and the costs of maintaining anticompetitive structures or measures. Furthermore, the specialized opinions that the FCC issues enhance the awareness of the importance of competition criteria in the activities of the public sector.

Nevertheless, there are cases in which the status of the opinions of the FCC as not legally binding could be seen as a limitation. For example, this is the case of some recommendations that the FCC has given to state authorities. Some of these authorities have not complied with the recommendations of the FCC, in this way impeding competition. As it has been mentioned, the FCC does not have faculties to sanction local authorities, or to interfere directly with the measures adopted by them.

The non binding status of the opinions of the FCC directed to sector authorities can also be seen as a limitation for its advocacy role. To overcome this limitation, the FCC has promoted the establishment of provisions that stipulate the compulsory request for its opinion on competition issues, in sector legislation in which it is deemed to be necessary. The establishment of this kind of provisions strengthens the advocacy activities of a competition authority. The process has generated new challenges and fields of action for the FCC and the regulatory authorities, together with new opportunities for combined efforts.

1.2. Interstate barriers to commerce

The FLEC also establishes in articles 14 and 15 the power of the FCC of investigating, either ex-officio or upon request, on acts of state authorities which could impede the entrance into or exit from their territory of goods or services. This applies both to Mexican or foreign goods or services. These acts are stipulated as prohibited by the Mexican Constitution. The reason for legislating provisions 14 and 15 of the FLEC is the recognition of the need for an integral competition policy, that also includes barriers to competition at the state and municipal levels. Another reason was the aim of promoting integration of the Mexican market.

Article 14 establishes that these acts shall not have legal effects. But the FCC does not have power to sanction them, neither to directly interfere upon the measures that a state government could adopt. The FCC can only declare the existence of an act that constitute an interstate barrier to commerce and issue a recommendation to the state authority. Even though the FLEC establishes that this kind of acts will not have legal effects, we consider the role of the FCC in this regard as part of its advocacy activities, because of the lack of powers of the FCC to sanction them. Also, because in some cases state authorities do not even know they are incurring in an act forbidden by the law when they issue this kind of measures, so the role of the competition authority in this respect is to make the competition law known, and promote the importance of competition at all levels of government.

Importance of the provision

Interstate barriers to commerce are often established by state authorities regarding basic products, like agricultural and livestock products at a low level of processing. The state authorities frequently argue that these measures are established because of zoo-sanitary risks, but the real reason could be the aim to limit competition. The role of the FCC in this regard is ruling out the possibility of zoo-sanitarian reasons for its imposition, when it is the case according to the federal sanitary authority, and promoting the opening of these markets. This kind of limitations to competition can have an important negative impact as they are directed to basic products for the population.

Possible drawbacks

In some cases State authorities have not complied with the recommendations issued by the FCC in this regard, and have challenged the declaration of the FCC before the Supreme Court of Justice of the Nation. The legal status of the declarations of the FCC as non sanctionable could be seen as a limitation, but it was established this way to give respect to the different spheres of powers of the federation.

2. Provisions in the Code of Regulations to the Federal Law for Economic Competition

The Code of Regulations to the FLEC was issued on March 4, 1998. In general, the provisions in the Code of Regulations have been designed taking advantage of the experience of the FCC in its four years of work. The provisions related to the advocacy role of the FCC are the following.

In general terms, the advocacy provisions on the Code of Regulations to the FLEC were established to clarify the application of the FLEC in this respect and to stipulate procedures for the most important advocacy activities of the FCC.

2.1. Consultations on the subject of competition

Chapter VI of the Code of Regulations to the FLEC provides for procedures related to opinions and consultations. Throughout the four years of operations of the FCC before the adoption of the Code of Regulation, consultations have been brought before the FCC by private and public parties on many occasions. Consultations include those regarding clarification of criteria for the interpretation of the FLEC, and those concerning certain conducts, for the FCC to clarify whether they could be considered as infringements to the FLEC.

The Code of Regulations to the FLEC establishes rules for the consulting mechanism, formalizing what has been done in practice, focusing on guaranteeing prompt and appropriate response. In this effort, article 49 provides for the possibility that any economic agent, both of the public sector or private agents, may approach the FCC to resolve any doubts that arise regarding the application of the FLEC and the powers of the FCC.

The provision formalizes the process of consultation establishing that the economic agent must present all pertinent information to support the consultation put forth, so that the FCC can have enough background for an adequate answer. A period of thirty days has been established within which the FCC is to resolve issues raised, following the presentation of the request, or the delivery of the information, according to the case.

2.2. Judgment on questions of effective competition or existence of substantial power provided on legal or regulatory provisions

In this regard, article 50 of the FLEC expressly stipulates that the proceedings may be initiated by the FCC ex-officio, except when a ruling is made to the contrary or if the request is already filed by an interested party or the corresponding regulatory authority. Once the FCC has analyzed the necessary information, it shall issue a preliminary ruling and notify all economic agents involved in the market in question so that they may respond as serves their interests. Later, the FCC shall emit its definitive resolution and shall deliver it to the competent authority so that within the latter's corresponding sphere of authority it may impose the necessary regulatory measures.

2.3. Favorable opinion in public bidding processes

The reason for legislating article 51 of the Code of Regulations to the FLEC is to clarify the procedure and timing for the opinion that the FCC must issue in public bidding processes. It is specified that this opinion must be issued within the procedures and periods established by the corresponding terms of reference of the public bidding.

Importance of the provisions

The importance of the advocacy provisions established in the Code of Regulations to the FLEC is that they contribute to a more effective role of the FCC regarding advocacy activities, establishing simple and quick procedures, and that they provide greater legal certainty to economic agents.

Drawbacks of the provisions

Not precisely a drawback of the provisions, but a difficulty often encountered in the application of provisions regarding judgments on matters of effective competition is the adequate coordination of the FCC with the sector regulators. To resolve this difficulty, coordination mechanisms between the FCC and several sector regulators have been created.

Another aspect that could be considered as a drawback is that the term "effective competition" that is stated in the Code of Regulation to the FLEC, is not defined neither in the FLEC, nor in its Code of Regulations. As we will mention in next section, it is defined in some sector legislation.

3. Provisions in sector legislation

Categorization of the advocacy sector legislation provisions, importance and possible drawbacks

Advocacy provisions in sector legislation in Mexico can be categorized in three main types, that relate with the following aspects:

I. Concessions and permits

II. Imposition of regulation subject to an evaluation of *effective competition*

III. Imposition of specific obligations to agents with *substantial power*

Some sector provisions are very specific regarding competition advocacy, assigning precise roles for the FCC or mentioning the FLEC. There are also other provisions in several sector legislation that only establish in general terms the importance of competition in certain aspects of the legislation, but do not provide for a specific role of the FCC. Because of the fact that in Mexico the FCC is the only authority in charge of evaluating competition matters, in principle, all provisions that establish in general terms the importance of competition in certain respect could give a competition advocacy role to the FCC. But the list could be very long, and we will only consider as competition advocacy provisions the former type of specific provisions, as the most important advocacy activities of the FCC relate to them.

The different issues covered by the three types of advocacy provisions in sector legislation, the importance, possible drawbacks, and examples of each category are described next.

I. Concessions and permits

Before the emission of the Code of Regulations to the FLEC in 1998, the FCC had the faculty of issuing opinions on concessions by virtue of article 24 of the FLEC. But more formally, provisions in sector legislation gave the power to the FCC to issue opinions in this regard. The process was improved by the emission of the Code of Regulations to the FLEC.

The opinions of the FCC on participants in public biddings of concessions have the purpose of avoiding market concentration which impedes the development of competition. The analysis of the FCC for the emission of these opinions considers the characteristics of the assets subject to the public bidding, the structure of the market and the possibility to broaden the entry to more participants.

The provisions in sector legislation deal with the following issues:

(i) Granting of concessions, authorizations and permits taking into account criteria that foster competition

Some sector legislation establishes in general terms that the granting of concessions, authorizations and permits should take into account criteria that foster effective competition, or that should be adjusted to the provisions on matters of economic competition. Examples of this kind of provision are article 25 of the Aviation Law, article 36 of the Navigation Law, article 29 of the Law on Ports and article 10 of the Law on Roads, Bridges and Federal Road Transportation.

(ii) Authorization of participants in the public bidding of concessions

In some laws it is provided that among the requirements for participating in the public bidding of concessions it is necessary to obtain the authorization or favourable opinion of the FCC. Examples of this kind of provisions are article 9 and 15 of the Regulatory Law on the Railroad Service, articles 8 and 21 of the Regulations on Satellite Communication, articles 18 and 43 of the Natural Gas Regulations.

(iii) Requirement that the Conditions for the Public bidding of concessions include the favourable opinion of the FCC

More specific provisions establish that the Conditions for the Public Bidding of concessions should require a favourable opinion from the FCC. Examples of this kind of provision are articles 16 and 29 of the Federal Telecommunications Law, and article 4 of the Regulations on Satellite Communication.

(iv) Transfer of rights in concessions or permits

Some sector legislation provides that the parties must notify the FCC in case of a transfer of the rights of concessions or permits. Examples of this kind of provisions are article 18 of the Regulatory Law of the Railroad Service, article 35 of the Federal Telecommunications Law and article 49 of the Natural Gas Regulations.

It can be considered as a better approach that the concession provisions not only consist of a general requirement that concession granting should take into account criteria that foster competition, but that it also includes more specific stipulations. The provisions could establish the requirement that the participants of the public auctions need the favourable opinion of the FCC, and that the Public Auction Conditions include the favourable opinion of the FCC as a requirement for participating. Specific provisions relating to the notice to the competition authority of transfers of concessions or permits are also very relevant, they ensure the preventive action of the competition authority.

In the FCC a specific Directorate-General is in charge, among other duties, of evaluating participants in public biddings.

II. Imposition of regulation subject to an evaluation of *effective competition*

Several sector legislation requires explicitly the opinion of the FCC regarding whether *effective competition* conditions prevail or not, in the latter case for the establishment of regulation by the Ministry in charge. The concept of *effective competition* is different from the concept of *substantial power in the relevant market*, the latter defined in the FLEC.

In general terms, an agent is considered to have *substantial power in the relevant market* when he can unilaterally set the prices or restrict the supply without the competitors being able to counteract that power. Article 13 of the FLEC considers as criteria for determining *substantial power*, the market share of the firm, the barriers to entry, the existence and power of its competitors, their access to inputs.

The evaluation of the existence of *substantial power in the relevant market* is required by the FLEC as an element in the analysis of relative monopolistic practices and mergers. It is also required in some sector legislation for the establishment of specific obligations to only one of the concession holders of the market (*i.e.* asymmetric regulation).

On the other hand, the non-existence of effective competition in a market can be defined as a situation in which any market participant in particular is considered to have substantial power, but the conditions in the market are such that they only allow for the existence of few competitors. Competition can not develop under these conditions due to the existence of entry barriers and specific characteristics of the sector such as the importance of economies of scale and network economies.

Thus an important difference between the concept of *effective competition* and *substantial power* is that the former refers to conditions of a market in which *substantial power* is not imputed to any agent, and the latter concerns the establishment that one particular agent in the market holds that power.

In Mexican sector legislation, several provisions establish that when conditions of *effective competition* do not prevail, the Ministry in charge will be empowered to establish regulation on prices or rates. That regulation would then apply to all market players symmetrically. Other provisions state that the sector authority could impose specific obligations to a holder of a concession if he has *substantial power* in the relevant market (asymmetric regulation). Specific obligations are broader than price regulation, including service quality and information.

So in general terms the provisions establish that conditions of *effective competition* are assessed in order to determine the imposition of regulation, and the evaluation of whether an agent holds *substantial power* is required for the imposition of specific obligations by the sector authority.

In this subsection we will consider provisions concerning the imposition of regulation when *effective competition* conditions do not prevail, and in the next subsection, provisions regarding the imposition of specific obligations. The different types of provisions establishing the requirement for the opinion of the FCC in order to impose regulation are the following.

(i) Opinion on the existence of *effective competition* as a requirement for the establishment of regulation

Several sector legislation provide for the requirement of the opinion of the FCC on the non-existence of *effective competition* for the establishment of regulation by the Ministry in charge. Examples of this type of provisions are article 47 of the Regulatory Law of the Railroad Service, article 43 of the Aviation Law, article 68 of the Law on Airports, article 19 of the Law on Roads, Bridges and Federal Road Transportation, article 64 of the Regulations on Federal Road Transportation and Auxiliary Services, article 14 of the Regulatory Law of Article 27 of the Constitution in the Petroleum Sector, article 3 (VII) of the Law of the Energy Regulating Commission and articles 12 and 81 of the Natural Gas Regulations.

Effective competition is not defined as such in FLEC, the FCC undertakes the analysis of effective competition considering the criteria established in article 13 of the FLEC, regarding the determination of substantial power. Some sector legislation provides for a definition of *effective competition* applicable to them.

(ii) Definition of *effective competition*

The definition of the term *effective competition* is included in several legislations, for example in article 47 of the Regulatory Law of the Railroad Service and article 64 of the Regulations on Federal Road Transportation and Auxiliary Services.
These provisions define *effective competition* similarly, considering that effective competition exists in general terms when there are at least two providers of the same service or viable substitutes of it on the same route or along alternative routes.

(iii) User's request to concession or permit holders to adjust rates

In some sector legislation it is provided that users can request to concession or permit holders to adjust rates when they consider there is no *effective competition*. As part of the procedure for resolving requests for the establishment of regulation, an opinion of the FCC regarding conditions of *effective competition* is required. For example in articles 171, 172 and 173 of the Regulations of the Railroad Service. More specifically, the timing for the emission of the opinion of the FCC is established in Article 173 of the Regulations of the Railroad Service.

(iv) Possibility of the FCC of requesting rate bases

In some sector legislation the possibility is established for the FCC to request rate bases from the Ministry when it considers that there is no *effective competition*. For example, in article 174 of the Regulations of the Railroad Service.

(v) Methodology for setting rate bases

More specifically, some sector legislation requires that the Ministry request the opinion of the FCC on the methodology of setting rate bases. For example, article 175 of the Regulations of the Railroad service.

(vi) Possibility of the agents subject to regulation to request the opinion on the persistence of conditions that motivated its imposition

Some legislation provides for the possibility that holders of concessions and permits, or providers of services subject to regulation request the opinion of the FCC on the persistence of conditions of no *effective competition*, so that the regulation could be eliminated or modified. For example, article 43 of Aviation Law, article 70 of Law on Airports, article 62 of the Law on Ports, article 21 of the Law on Roads, Bridges and Federal Road Transportation, and article 81 of the Natural Gas Regulations.

(vii) Re-establishment of regulation if the FCC determines the existence of anti-competitive practices

Specifically regarding first hand sales of natural gas and liquefied petroleum gas, article 3 of the Law of the Energy Regulating Commission and article 12 of the Natural Gas Regulations provide for the possibility that the sector authority re-establishes regulation if the FCC determines the existence of anti-competitive practices.

We consider advisable that sector advocacy provisions include not only a statement that provides for the requirement of the competition authority opinion before the establishment of regulation, but also, when necessary, that the legislation includes more specific provisions. These specific provisions could address users' requests to concession or permit holders to adjust rates, the possibility that the competition authority requests rate bases, opinion of the competition authority in the preparation of the methodology for setting rate bases, and the possibility that agents subject to regulation request the opinion of the competition authority on the persistence of conditions that motivated regulation.

III. Imposition of specific obligations to agents with *substantial power*

As mentioned before, some sector provisions require the determination of the FCC regarding whether an agent has *substantial power in the relevant market*, in order to impose specific obligations to this agent in particular (asymmetric regulation). Specific obligations are broader than price regulation, including service quality and information. The establishment of specific obligations to concession holders of essential inputs could be very important for preserving competition in vertically related components of a sector.

The different types of provisions regarding specific obligations deal with similar issues as for regulation, they are the following:

(i) Specific obligations that could be imposed if the existence of *substantial power* is determined.

Some provisions stipulate that specific obligations could be imposed when operators or concession holders have *substantial market powe*r in the opinion of the FCC. For example, in article 63 of the Federal Telecommunication Law, article 23 of the Regulations on Satellite Communication, article 2 of the Decree by which the Federal Commission on Telecommunications is created, article 15 of the Rules of Procedure of the Federal commission on Telecommunications, and thirty first rule of the Rules for Local Service.
Specifically, the thirty first rule of the Rules for Local Service provides that the FCC should listen to the licensee for its determination of *substantial power.*

(ii) Possibility that the FCC requests for the establishment of specific obligations.

For example, this is established in article 23 of the Regulations on Satellite Communication.

(iii) Possibility of the agent subject to specific obligations to request the opinion on the persistence of circumstances that motivated their imposition.

Some legislation provides for the possibility that the concession holder or licensee could request the FCC to issue an opinion on the persistence of circumstances for which it was considered to have *substantial power in the relevant market*, so as to annul the specific obligations imposed by the regulator. For example, in article 23 of the Regulations on Satellite Communication and thirty first rule of the Rules for Local Service.

As in the case of provisions on regulation precise provisions are advisable regarding specific obligations, for example for the possibility of the competition authority to request for the establishment of specific obligations, and the possibility of the agent to request the competition authority opinion on the persistence of circumstances that motivated the imposition of specific obligations.

4. Other advocacy formal provisions

Besides the advocacy activities of the FCC provided in competition and sector legislation, the FCC also undertakes advocacy roles by virtue of other types of formal provisions, concerning public policies that could have an adverse impact on competition.

For example, by virtue of Foreign Trade Law and its Code of Regulations, the FCC participates in the Commission on Foreign Trade. It also participates in other interministerial commissions, regarding standardization, privatization, regulatory reform, etc. Additionally, several Bidding Conditions, both concerning public and private assets, require for the favorable opinion of the FCC on participants, without this requirement being established in sector or other legislation.

The advocacy provisions establishing these advocacy activities can be categorized in the following types:

I. Provisions in foreign trade legislation

II. Provisions concerning standardization

III. Provisions concerning privatization

IV. Participation in other interministerial commissions

V. Provisions in Bidding Conditions

VI. Collaboration agreements with sector authorities

Like provisions in sector legislation, some provisions cited in this section only refer in general terms to the importance of competition in certain respect. We will only focus on provisions assigning a specific role to the FCC.

I. Provisions in foreign trade legislation

Most measures restricting foreign trade have anticompetitive effects. This is the case of transfers of certificates of quota beneficiaries, and the imposition of antidumping and safeguards, among others. For this reason it is relevant to include an evaluation of competition aspects in the establishment of such measures.

The FCC issues its opinion on foreign trade measures that could affect competition in the Commission on Foreign Trade (CFT). This Commission is established by the Foreign Trade Law as a body of compulsory consultation before specific trade-restrictive measures, such as antidumping quota, tariffs, etc. are put into place. It is a collegiate body in which six different Ministries plus the FCC and the Bank of Mexico are represented. The Commission has no veto power over such measures but can issue opinions about them, which in principle are publicly available. Thus, the Commission enhances transparency and the accountability of the Ministry of Economy in giving shape to its foreign trade policy. The role of the Commission is limited to measures of implementation of foreign-trade policy. Amendments of *e.g.* the Foreign-Trade Law or proposals for Free Trade Agreements are not submitted to the Commission. There is an explicit list of measures that must be submitted to the Commission and at what stage. The Commission on Foreign Trade is probably the most institutionalized model of competition advocacy provisions in Mexico.

In general terms, the participation of the FCC in the Commission on Foreign Trade faces difficulties due to the objectives envisaged by the proponents of foreign trade measures, that are usually different from the competition objectives promoted by the FCC.

II. Provisions concerning standardization

Regarding standardization, it could be important to include a provision related to cases in which there is substantial power of accreditation agencies. Official standards can have pro-competitive effects, but when accreditation agencies have substantial market power, they can incur in discrimination among companies that require accrediting, thus lessening competition in the market.

The FCC undertakes its advocacy role regarding standardization by its participation in the National Standards Commission (NSC). This Commission is responsible for elaborating and promoting observance of Mexican Official Norms (Standards). Technical staff from specialized agencies conform this Commission, which is arranged in committees according to the issues analyzed. The role of the FCC in this body is to strengthen aspects of standardization that favour competition, and to avoid that Mexican standards act as artificial barriers for enterprises that could enter the market and displace established enterprises.

III. Provisions concerning privatization

Regarding the Interministerial Commission on Divestiture (ICD), it is this body in which the FCC is informed on proposals of privatization of public enterprises. Once the FCC is made part of a reform process it participates at the formulation stage when laws and regulations are discussed, then when the enterprises are privatized and finally when public properties tendering takes place.

With respect to competition issues raised by privatization processes, it is often important whether State assets are sold as a single package or be split up in sub packages so as to allow competition between them after privatization or to impose a vertical separation from the outset. Furthermore the FCC has advocated in the ICD for the reporting to the FCC of participants in bidding processes of public enterprises and assets. Since 1993, the Commission has worked closely with the ICD and those responsible of the divestiture process to ensure that the process concludes promptly and in accordance with the provisions on concentrations of the FLEC.

IV. Participation in other interministerial commissions

Other commissions in which the FCC participates formally are the Public Expenditure and Financing Inter-ministerial Commission (CIGF), and the Federal Regulatory Reform Commission (COFEMER).

The participation of the FCC in the Inter-ministerial Public Expenditure and Financing Commission (CIGF) in general terms concerns the issuing of opinions regarding government policies and decisions affecting competition.

The functions of COFEMER include assessing the federal regulatory framework to make a diagnosis of its application. In the COFEMER, the FCC promotes enhanced market functioning and advocates for adequate legal and administrative reforms that eliminate unnecessary discretion regarding the decisions of authorities and provide legal certainty for economic agents in order to increase market competitiveness. The FCC also has the function of preventing any Mexican official regulation from having the objective or effect of establishing artificial entry barriers or unduly displacing actual or potential competitors.

V. Provisions in Bidding Conditions

Not provided by any law, but established in Bidding Conditions, the FCC undertakes the advocacy role of evaluating participants in order to issue a favorable opinion in the auction of public or private assets. The analysis of the FCC in this respect is very similar to that of mergers.

Here the important advocacy activity is stressing the importance of competition, so that the favorable opinion is required for participating in the auctions.

VI. Collaboration agreements with sector authorities

The FCC has several collaboration agreements with sector and other authorities. These agreements support the advocacy role of the competition authority, because they can establish mechanisms for obtaining information, and clarify the roles of the competition and the sector authorities, in order to ensure that there are no overlaps.

5. Informal Advocacy Provisions

The FCC undertakes several important advocacy activities by means of provisions of a more informal nature. This is the case for example, of the FCC's participation regarding proposals for the reform of laws and regulations. Other examples are collaboration agreements of an informal character between the FCC and several sector regulators.

For the purpose of designing new laws or amending existing ones, or for the elaboration of regulatory reform proposals, ad-hoc commissions may be installed with the participation of the Congress, representatives of involved private parties and the public authorities in charge. The FCC has participated in several such commissions. However, the formation of such commissions is not mandated by any code nor are there clear rules as to the procedures within such commissions. They are rather of a consultative nature and the final decision making is either in the hands of Congress (laws) or in those of public authorities (regulations). Also the degree of public access to the findings of such commissions is hardly regulated.

The specialized opinion of the FCC about proposals to reform national laws can be requested by the Federal Executive or by the Legislative power. There is no rule that establishes in which moment of a reform procedure the opinion of the FCC has to be requested. Thus far, the criterion has been adopted by the Federal Government or the Legislative of inviting the FCC to issue its specialized judgment since the early stages of a reform proposal.

In addition, the FCC is in contact with other government agencies and participates in several forums in order to verify the observance of the provisions of the FLEC and to prevent its infringement in time, as well as to enhance coordination with other areas of the public administration in order to enforce competition policy effectively. The goal of this participation is to promote a competition culture among policy-makers, as well as to assess trends on several sector policies, to acquire technical knowledge, and to promote competition policy on a regular basis. This participation is not in all cases formalized.

6. Conclusions

All types of advocacy provisions identified are very important for the advocacy role of the FCC. Of utmost importance is article 24 of the FLEC giving the faculty to the FCC of issuing opinions on competition to other government agencies and the federal Executive. The provisions of the Code of Regulation to the FLEC are also important because they provide clear procedures for some relevant advocacy activities of the FCC. Sector legislation provisions are also very important, because they ensure the compulsory consultation to the FCC regarding matters that could have a serious adverse effect on competition, like concession granting, or the imposition of regulation or of specific obligations. We have argued not only for general provisions in these matters, but also for more specific provisions.

The participation of the FCC in interministerial commissions is also discussed. It is in these bodies in which the FCC undertakes its advocacy activities concerning public policies that could have important adverse effects on competition, like foreign trade, standardization, privatization, etc.

Finally, an important advocacy effort is made in commissions for the drafting and amendment of laws and regulations, this activity is currently not formally institutionalized and until now it has developed well, but in the near future it could be necessary to establish more formal procedures for the consultation of the FCC in these matters.

Challenges of advocacy activities in Mexico

The inclusion of several competition advocacy provisions in sector legislation in Mexico proves that over time there has been a growing awareness of the benefits of competition among the federal government. Advocacy efforts of the FCC have been crucial for ensuring competition in privatization processes and in regulated sectors in Mexico.

Nevertheless there are some challenges. The objectives of other government agencies sometimes differ from the objective of the FCC of enhancing competition. In this circumstances, the FCC must make an effort to make clear the costs and benefits of policy measures that affect competition, so that decision makers take them in to account.

Provisions that ensure more transparency of the opinions of the FCC could also be necessary regarding advocacy work done by rather informal mechanisms. It could be established that if policy-makers decide not to take in to account the opinion of the FCC, they must publicly state their reasons.

Another challenge is enhancing competition culture at the local levels of government, in which unlike at the federal level, there is not a broad use of the market mechanism to deliver public services. Furthermore, on many occasions local governments impose measures that constitute interstate barriers to commerce. This indicates that in some cases state or local authorities do not accept or understand the benefits brought by competitive markets. The lack of faculty to sanction interstate barriers to commerce, enhances the importance of arguing for the benefits of competition in these markets.

PAPUA NEW GUINEA'S EFFORTS TO PROMOTE MARKET OPENNESS

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Executive Summary

Papua New Guinea is a small economy with its Gross Domestic Product (GDP) and Trade accounting for 3% and 1% of the world total. Apart from the absolute smallness, PNG yet appears to exploit its full potential in the trade expansion and income generations, as it shares in the world total is far smaller in trade and GDP than that of the population of 0.4% of the world total. Yet trade plays an important role in PNG economy as her economy really depends on external trade even its relatively high openness to international trade. In 1999, merchandise exports and imports of PNG accounted for 50% and 30% GDP.

The Government of PNG has recognized the importance of Market Openness and has taken a whole of Government approach to remove the impediments to trade and investment by making significant changes to cross – border and regulatory framework to open up its markets to promote international trade and investment. These changes will be discussed separately.

1. Tariff Reduction Program (TRP)

The Tariff Reduction Program (TRP) began in 1999 purposely to encourage a more efficient and productive private sector through greater exposure to international competition and reduce the burden of tariffs on consumer and businesses. The tax reform package also replaced tariffs with the Goods and Services Tax (GST) as a major source of Government revenue. The TRP has seen a reduction in tariff assistance for the manufacturing sector, however assistance from some manufacturers remain at very high levels. The TRP led to considerable declines in negative rates of assistance for most agricultural, natural resource and service industries. These industries are no longer disadvantaged by the tariff regime.

Under the TRP, most goods can be imported into PNG duty free. The only goods that are subject to import tariffs are goods produced or which could be produced potentially in Papua New Guinea. The TRP saw an immediate reduction in tariffs and provided for three rates of tariff (intermediate,[32] protective[33] and prohibitive[34] rates). These rates are scheduled to be reduced over the next eight (8) years. Below is a table which shows the different rates:

Table 1.1. Time table for Tariff Reduction Program (1 January basis) 1998 - 2006

Rate	1999 – 2000	2001 - 2002	2003 - 2005	2006
Intermediate	30%	25%	20%	15%
Protective	40%	35%	30%	25%
Prohibitive	55%	50%	45%	40%

In 2003, the Government of PNG undertook a review of the program. The TRP has promoted efficiency among firms and that were previously highly assisted. Efficiency improving measures were frequently mentioned such as improving management and distribution.

32. The Intermediate rate applies to goods that constitute “intermediate goods” in the production process that is they are utilized by other businesses or manufacturing companies.

33. The Protective rate is the principal duty rate. Goods in this category include most fish, coffee and tea.

34. The Prohibitive rate applies to products such as fruit and vegetables, tinned mackerel, cigarettes, veneer and sugar.

Since the TRP began, both exports and imports have increased. Trade surplus has increased to around K1.5 billion (USD 0.5 billion) in 1998 to around K2.6 billion (USD 0.8 billion) in 2002, representing a 73% increase in the trade surplus. The TRP has benefited consumers, particularly the poor by reducing the tariffs on basic items.

2. Foreign exchange review

One of the key pillars of the Government's Structural Reform Program is to remove impediments to investment. The review of the existing regulations pertinent to exchange control, with the view to liberalize exchange controls on the inflow and outflow of foreign exchange in Papua New Guinea is in line with attracting investments thus opening the market for investments. The review intends to recommend substantial removal of foreign exchange controls, except those necessary to guard against balance of payments crises. The assessment of inflows and outflows, contractual agreements and other legal documents will be transferred to commercial banks by the Central Bank of Papua New Guinea.

The PNG Government recommended for a well-developed contingency plan to be put in place to counter risks of economic or political shocks that may destabilize capital flows.

3. Consumer and competitive markets

In Papua New Guinea, there is no specific law relating to competition. A regulatory approach has been adopted by the Government to promote competition. The Independent Consumer & Competition Commission (ICCC) is the agency that is promoting competitive market conducts, behaviours and trade practices. The ICCC has been established to promote competition and fair trading, the regulation of prices of certain goods and services, the protection of consumers' interests, to promote economic efficiency in industry structure, investment and conduct and to promote the long term interests of the people of Papua New Guinea with regard to price, quality, and reliability of significant goods and services.

The ICCC Act provides Competitive Market Conduct Rules that apply to commercial dealings by individuals, businesses and even the Government and its agencies where they are involved in business. The rules are designed to protect competition in the market place to the benefit of consumers through lower prices and access to more and better services than would otherwise be available.

The ICCC ensures that there is competition in the market and any market behaviour or conduct must conform to competitive market conduct rules under the Act. The competitive market rules that will help the Government identify anti-competitive market behaviour or conduct that are likely to lessen competition in a market place are as follows:

- **Anti-competitive arrangements**

The ICCC Act prohibits contracts, arrangements or understandings that have the purpose or effect of substantially lessening competition in a market.

- **Exclusionary provisions**

These provisions are known as primary boycotts are agreements between competitors that will prevent or limit their dealings with a particular person or class of persons, where the person is the target of the boycott is the competitor of one or both of those who agree not to deal with him.

- **Anticompetitive covenants**

Covenants over land that have the purpose or effect or likely effect of substantially lessening competition in the market are prohibited by the Act. The prohibition extends to requiring someone to give a covenant, giving one yourself or seeking to enforce that covenant.

- **Price fixing**

An agreement between competitors to fix price is an example of anti-competition market behavior. Accordingly, price fixing agreements between competitors are absolutely prohibited under the Act because they are deemed to have the purpose or effect or likely effect of substantially lessening competition. Price fixing agreements are defined broadly to include contracts, arrangements or understandings that have the purpose or effect or likely effect of fixing, controlling or maintaining the price of goods or services or any discount, allowance, rebate or credit.

- **Taking advantage of market power**

Where a person or a company has substantial degree of power in a market, they are prohibited from taking advantage of that power for anti- competitive purposes which are to restrict entry of a competitor into the market or another to prevent or deter someone from engaging in competitive conduct or to eliminate a competitor. An example of someone taking advantage of their market power may be where a new competitor enters the market which is dominated by one large company, which immediately and drastically reduces its price for the product which a new competitor is selling, to a price below production cost, with the intention of forcing the new competitor out of the market, at which stage the dominant market player can again raise its price to the higher level.

- **Resale price maintenance**

Resale price maintenance, the practice of a supplier requiring its retail customers not to sell its products below a certain price, is also prohibited. Thus a manufacturer cannot insist that its retailers do not sell the manufacturing products for less than a certain price. Resale price maintenance would also apply where a manufacturer threatens to refuse to support a retailer who was discounting the manufacturers' products where other retailers were not.

- **Mergers and acquisitions**

The acquisition of assets of a business or shares that would have the effect of substantially lessening competition in the market is also prohibited. While this prohibition relates to the structure of the market rather than to behaviour in that market, it is nevertheless prohibited by the Act. This is because the mergers between competitors or the acquisition of one competitor by another can have just a serious anti-competitive consequence as can price fixing arrangements or arrangements that substantially lessen competition. Thus, those anti-competition acquisitions are also prohibited.

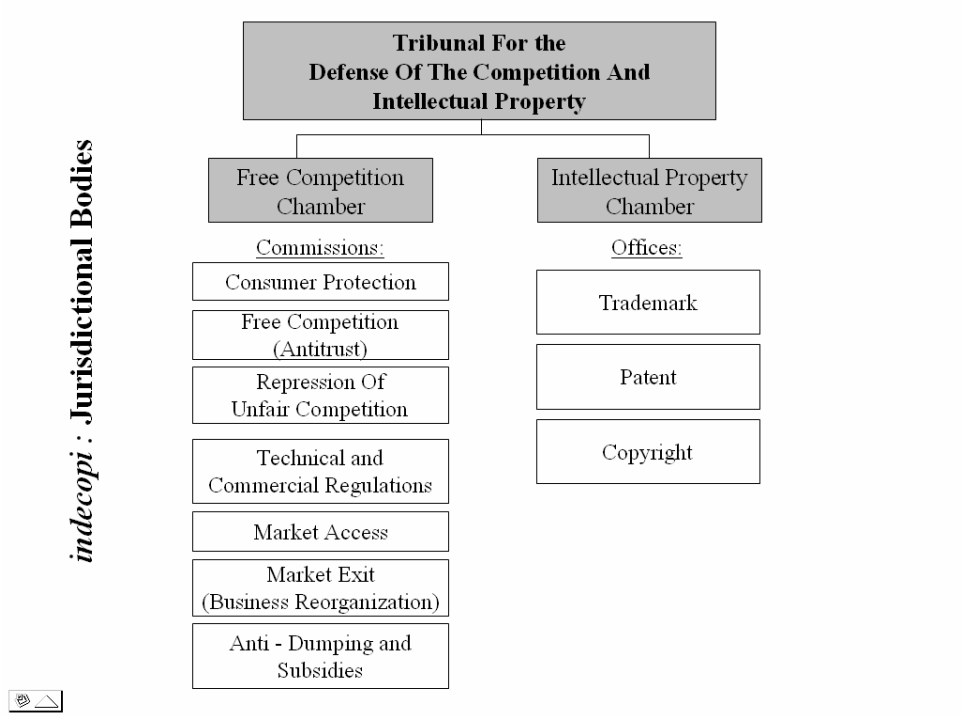
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COMPETITION POLICIES IN PERU

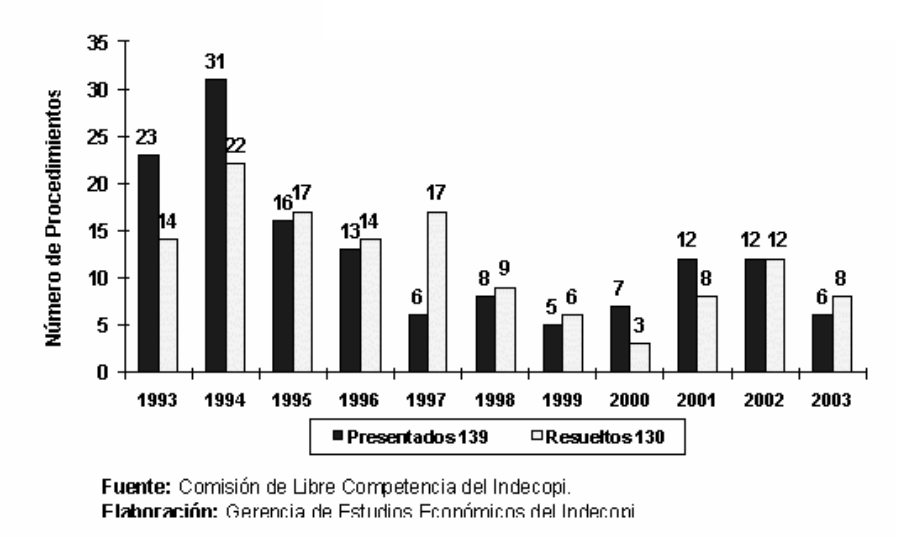
In 1990 the Peruvian economy began its opening, lengthwise these ten years Indecopi has been the principal office government to implement the policies competition in Peru.



The Commissions and Offices of Indecopi have development different functions, although property their function is to apply penalties, these offices have development other activities to reach the person and the companies in Peru understand benefits the free trade. Indecopi can do it, because its organization includes all matters about competition and that help it integrate property their actions.

In matter free competition, antitrust, Indecopi apply penalties to the companies' agreements practices that affect the marketplace, although there isn't a control corporate merger, the prohibition of practices that restrain trade, such as price-fixing conspiracies and predatory acts designed to achieve or maintain monopoly power, have had good results. The message to the trade has been effective, although there aren't many processes in Peru, is known the effects and penalties for these practices.

Procedures – Free Competition



Fuente: Comisión de Libre Competencia del Indecopi.
Elaboración: Gerencia de Estudios Económicos del Indecopi

Indecopi has participated too in the elaboration the rules and laws in others matters for example on Government Procurement. Step by step in Peru are many offices publics and people in general that are integrating the concept the free competition in their functions and activities.

This is very important in matter the technical barriers to trade, because there are many publics offices that fix rules about the characteristics or quality level of products and services to protect the health the people, animals and vegetables, the public security and the environmental. Here Indecopi, through the Technical and Commercial Regulations Commission - CRT, has development an important function too to avoid these regulations became technical barriers to trade. In some cases, Indecopi can stop a measure or technical regulation if consider it's excessive to protect the health, security, etc. in Peru. All Peruvian authority must to can explain the technical fundaments their regulations and all citizen and company in Peru have right to know these fundaments when are affected by them.

Behind these practices Indecopi protect the free trade that is a principal security the economics polices in Peru, and try to get balance between the consumer protection and the free trade, because Indecopi understand each more time the competition polices are a system integrated for rules to protect the trade but the consumer too, so that its important the participate the State to correct the negative practices that broke the balance between theses objectives.

Likewise, it's necessary to indicate that the balance in the trade involve too the international practices, in these cases Indecopi can to apply anti-dumping measures. At last time, Indecopi has increased in this matter.

Finally, the protection the intellectual property is other key in the competition politics in Peru, Indecopi is doing great efforts to protect the copyrights, one more time the measures are taken in two directions, first to apply penalties and second to try the people understand why its necessary protect this rights.

TRADE POLICY AND RELATED ISSUES IN THE PHILIPPINES*

Margarita R. Songco, National Economic and Development Authority, Philippines

The Philippines has been undertaking macroeconomic policy reforms particularly trade policy reforms since the 1980s. Such initiative was pursued in line with a conclusion of a number of past studies on trade and industrial policies "that a reform toward a more liberal, and neutral trade policy is necessary to propel the economy to a higher level of industrialization". Thus, the trade policy reforms were aimed at accelerating the growth of industries, generating productive employment opportunities for the rapidly growing labor force, improving the efficiency of investments, sustaining the growth performance of exports and distributing the benefits of industrialization through the dispersal of industries. The reforms included the tariff reform program, liberalization of import restrictions, realignment of indirect taxes and rationalization of export promotion measures.

The tariff reform program was geared towards reducing or phasing out tariff protection which were deemed excessive, obsolete or for which the burden of protection outweighed returns. To ensure that the full effects of the tariff reform program in fostering competitiveness, efficiency, dynamic growth in industrial output, employment and exports will be realized, a phased and gradual lifting of all import licensing procedures was implemented. Export taxes, except on logs, were eliminated. Foreign exchange controls were totally removed in the early1990s while most trade and non-trade transactions were lifted.

A study conducted under the auspices of the Philippine Institute for Development Studies on the impact of the trade policy reforms shows the following results, among others: there has been an increase in the availability of imports and lower domestic prices; diversification of export products; improved efficiency in the use of domestic resources; deconcentration of manufacturing industries and dispersal of industries. It has also been observed that while these show positive results, these do not necessarily mean that the implementation of the trade policy reforms were bereft of difficulties and/or results thereof sustained. Sectors left to be liberalized are either politically sensitive or have been highly protected in the past. Thus, there would always be pressures for delay or for an extension of the status quo of the protection on said sectors. Moreover, the positive results cannot all be attributed to implementation of trade policy reforms nor are trade policy reforms sufficient to realize expected benefits.

Cognizant of the impacts of macroeconomic reforms, including trade policy reforms; the role of private enterprise and markets in the drive for equitable growth; and the integration of the Philippines in the world economy, the Medium-Term Philippine Development Plan, 2001-2004 provides that "the government remains fundamentally committed to free enterprise and market reliance and ensuring market-friendly regulations". Further, "government's task will increasingly be to make markets work by simplifying bureaucratic procedures and promoting market-friendly regulations to reduce cost of doing business, and protect the interest of consumers and sectors vulnerable to global integration".

The above notwithstanding, some issues still remain: when will the impact of the reforms be felt; have the policies been enough, are these the right ones; any other areas for reform; is the sequencing appropriate; have there been consistency and sustainability of the policies.

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*. Prepared by Assistant Director-General Margarita R. Songco of the National Economic and Development Authority, Philippines for the Sixth Workshop of the APEC-OECD Cooperative Initiative on Regulatory Reform, 24-25 May 2004, Pucón, Chile.

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SPANISH INITIATIVE ON REGULATORY REFORM

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Abstract

APEC and OECD economies have recognized that regulatory reform is a useful element to build a fair, competitive and productive economic system based on a competitive market. In light of this, this presentation examines awareness on the part of Spain to promote legal quality of regulations by revising the traditional thoughts and rules of economic sectors such as telecommunications, postal and electricity among others. Spain has been a member of the European Union since 1985, which is tantamount to respect for market economy notwithstanding public responsibilities in economic systems.

1. Regulatory reform: openness to free market

APEC and OECD member economies have promoted regulatory reform in order to enhance competitive markets that ensure an efficient economy and consumer welfare. To speak about regulatory reform is to enhance the economic performance, cost-effectiveness and legal quality of regulations by improving regulation-making processes. It therefore also implies considering deregulation, that is to say, the elimination of over-regulation in a sector in order to improve economic performance. The aim therein is to achieve successful economic improvement by enhancing regulatory reform.

These challenges embraced by member countries and economies of OECD and APEC have likewise been embraced by Spain as a member of OECD and European Community, with the shared conviction that the orientation of the Spanish economy had to coincide with developments in Europe and with the forming of the new globalised world economy.

On an economic and commercial level, globalization expands markets, making it possible to reduce production cost and to open doors to new business opportunities. At the same time, it facilitates the movement of capital and establishes strong connections among remote markets and systems of production. All of the aforementioned stimulate competitiveness among national economies and require individuals, business and public administrations to act with the highest degree of clear-sightedness when it comes to activities that may have repercussions on economic life or may influence economic productivity.

The globalization of economic activity has given rise to radical changes in the way in which competitiveness is conceived. In effect, the appearance of supra-national markets and the fact that the majority of western states have joined free trade organisations, have had the effect of concentrating competitiveness in business and in the productive framework. In this regard, the public administration will be responsible for providing the stimulus for the competitive capacity of business through the improvement of regulations, as well as for the effectiveness and efficiency thereof.

In addition, the emergence on the international scene of new competitors with underdeveloped systems of social protection results in important changes with regard to traditional factors of competitiveness. Given that these factors are strongly linked to cost and price, competitiveness is becoming ever more strongly dependent upon the ability to differentiate products and processes.

In this international context, knowledge has become a decisive factor in economy growth, given that it gives rise to a sustainable competitive advantage Undoubtedly, internal technological innovation may generate more employment than the use of external patents but the added value that flows from knowledge is not only centered in the areas in which the added value is generated. Such added value extends to all areas in which the knowledge is applied, transferred, distributed or administered.

Hence, the global competitive economy is based on knowledge–intensive processes and will become much more so in the future. For this reason, it has become necessary to implement policies at macro, micro and intermediate levels that will provide stimulation for the generation, improvement and exploitation of knowledge in all areas that are linked, whether directly or indirectly, with the productive world.

At this point, as mentioned above, the Public Administration operates within this network by defining taxes, developing mechanisms, laying down regulations and providing services to the citizens.

The trend of these economic considerations is to ensure that the function of economic policy is the creation of optimum conditions for private initiative and the fruitful interaction between economic agents, thus stimulating the incorporation of idle resources. The optimum conditions called for are a balanced market, based on low inflation and low interest rates. Such a line of thinking holds competitiveness to be defined as productivity, effectiveness and profitability and that the Administration can and should exercise an influence on the improvement by acting within basic sectors as a facilitator, but not as an entrepreneur.

Such were the theories expounded in Europe in the 80´, portraying the role of the State at its minimum, by allowing private companies to provide services under market rules and taking advantage of globalization. The State is not seen as necessary to provide economical services.

The Bangeman Report of 1994 follows much the same lines and indicates the lack of competitiveness of the European economy in comparison to those EEUU and Japan, neither of which support the welfare state.

2. The new framework. The universal services

However, those theories have been refuted by those who believed that the State or public services have an important function to achieve, namely to provide security services that guarantee public order. Such a function cannot be denied.

But if the building of public services is in fact necessary, the results of the arguments have important consequences on regulatory reform. The very idea of public services must change. That is to say, if public services usually meant an economic sector closed to competition by building for the Administration, it should now mean sectors able to enhance competitiveness, even though public administrations may place obligation on entrepreneurs.

This is an entirely new concept by which public services are now called “universal service “,which means an economic sector that provides services able to be used by all citizens opened to a market system where public and private enterprises worked jointly.

And that is tantamount to changing the regulatory framework, by adapting traditional public services to the new “universal service” such as telecommunications or postal services.

The importance of this impact on regulatory reform is most noticeable among European countries who must transform long-standing ideas into new forms of regulations.

This same attitude is reflected in the European Parliament document “Public Enterprises and Public Services in European Community “

A similar aim was pursued by the European Commission in 1994 in the document “Public Services Charter”, which supported the idea of public services opened to market law.

These opinions are defended by the Supreme Court of European Community in the "Corbeau case" of 1994, whereby the Court accepted the exceptional financing of a public service if justified by the necessity to provide public services to all citizens.

The aforementioned signifies that market law and competition which are necessary given that citizens have become accustomed to doing business under a free market, must respect other values such as solidarity, social cohesion or equity. Market rules therefore need a complement in order to provide a fair system.

3. Spain: adapting to a new situation

Spanish entry in the European Union implied, among other things, the application of liberalization and structural reform measures to different economic sectors. This has become an important economic policy instrument. Within this framework, structural measure reforms are an essential mechanism for ensuring the reallocation of resources in the Spanish economy. Accordingly, the greater the flexibility of supply, the greater the capacity to deal with unforeseen events without high cost to competitiveness, growth or employment.

This aim inspires the new framework in many sectors, an example being the following section (industry). It likewise means benefits for consumers insomuch as the new economic measures enhance competition and produce greater wider choice and better service quality.

3.1. Industry

The main step in the industry framework reform was the creation of SEPI (Industrial holding company) in order to deal with shares of public enterprises such as gas (Enagas), electric and oil (Repsol) companies belonging to the State.

The purpose of SEPI is to privatize companies which have been rationalized to meet the established public deficit established by European Community demands on Spain to converge into the European Monetary System (Euro). The Spanish government thereby obtains an open market by eliminating monopoles (energy, oil and communications companies,), implying the elimination of exceptional and privileged positions so as to enhance competitiveness.

As a result of that process, firms such as Telefonica de España (Communications sector), Repsol (Oil), Endesa (electric) or Argentaria (bank and credit sector) were privatized.

3.2. Regulations on trade

Liberalization measures were implemented in retail distribution and remote sales, a sector within which small and medium-size enterprises are most usual in trade, and which form a basic pillar of Spain's productive system as well as a key factor for stability.

Spain has liberalized this sector and authorization is solely required of supermarket companies of more than 2500 square meters set up by the Public authorities (Autonomous Communities or regional authorities sharing competences with State).

3.3. Price regulations

Spain has liberalized prices, implying the reduction of controls over production or prices. The sole sectors subject to public price intervention since the 1996 reform (by Royal Decree (a legal disposition passed by Parliament - 7/1996) are the electric sector, gas, pharmaceutical items, agricultural insurance, and telephone and public transport fees.

The only prices to be fully intervened were those referring to the agricultural and health sectors

The Treaty Establishing the European Community prohibits all restrictions on movement of capital between Member States but also between Member States and third countries. However the Member States may retain certain restrictions in relation with countries outside the EU.

As from 1 January 1994, which corresponds to the start of the *second stage of economic and monetary union*, Articles 56 to 60 of the Treaty establishing the European Community (EC Treaty) introduced new arrangements for capital movements

The Treaty of Amsterdam renumbered the articles of the treaties and removed certain provisions which had become obsolete.

At present, all the Member States enjoy full freedom of capital movements and payment. Spain passed 44/2002 law to enhance liberalization in this area.

4. The beginning of new framework to openness to market: telecommunications sector

Regulatory reform to enhance competitiveness has been significant in telecommunications, providing a case within which European Commission has been very active in changing the current framework to a new approach in order to liberalize the sector, leading to a new framework of service known as “universal service “, as previously mentioned.

The liberalization of Europe's telecommunications market reached its peak on 1 January 1998 with the complete liberalization of all telecommunications networks and services in all Member States

The developments in technology, innovation in the services being offered, price reductions and improvements in quality brought about by the introduction of competition provided the basis for Europe's transition to the Information Society

In this context, a review is needed of the current regulatory framework for communications, responding to the need for a more horizontal approach to regulation of communications infrastructure.

Several principles will underpin the new regulatory framework and govern regulatory action at European Community and national level. Future regulation should namely:

- be based on clearly defined policy objectives,
- be the minimum necessary to meet those objectives (for example by introducing mechanisms to reduce regulation further where policy objectives are achieved by competition),
- further enhance legal certainty in a dynamic market,
- aim to be technologically neutral (not to impose, nor discriminate in favor of the use of a particular type of technology,

At this point Europe defines this new framework as a universal service, within which the Commission recognizes the importance of universal service and proposes:

- maintaining the current definition and scope of universal service at this stage (but proposes to define criteria for its possible extension, as well as mechanisms for periodic review),

- developing pricing principles at EU level to ensure the affordability of universal service.

The European Community approved several directives that built the new framework. Among them are Directive ***2002/58/EC*** of the European Parliament and of the Council of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and Directive ***2002/21/EC*** of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)**.**

These directives have been the basis of the new Spanish regulation system, which incorporated these principles. Therefore the new law regulating telecommunication (Law 32/2003, law of telecommunication passed by Parliament) defines principles such as:

- The separation between the public agent regulating market and the agents providing services

- To enhance free market by reducing administrative barriers to market entry with a view to promoting a competitive market for telecommunications services. In particular it follows the European market by:

  - using general authorizations as the basis for licensing communication networks and services, with specific authorizations reserved for the assignment of radio spectrum and numbers,

  - applying a complete and coherent policy framework to communications infrastructure, including broadcasting networks,

  - ensuring that the fees for authorizations cover only justifiable and relevant administrative costs,

  - continuing to authorize the communications services provided via the Internet in an equivalent manner to other communications services

In conclusion we must admit the new Spanish framework changes to the new European regulation by approaching the regulatory reform to enhance market openness

5. The progressive liberalization of Postal services

Yet another main example of regulatory reform to open market to competition is the progressive liberalization of Postal services.

Spain begins to liberalize its postal services in 1998 in keeping with EC directive 97/67/CE referring to the progressive deregulation of domestic postal services markets and raising service quality while maintaining part of the postal services within the public sector in keeping with the peculiarities of each country.

Today, of all European Community member states, this liberalization has been taken to the furthest extent by Spain and Austria. Only 60%of Spanish postal services remain within the public sector while public monopoles have been maintained in Portugal, United Kingdom, Greece, France etc

During the liberalization process, the European Commission also guaranteed the achievement of a positive impact on economic activity and the economic and social cohesion of the European Union and the maintenance of a universal postal service with a local operator assigned by each country

In Spain the public agency that by legal mandate guarantees the rights of all citizens and companies to regular postal services at affordable prices and adequate levels of quality is the public postal operator Correos y Telégrafos (Post and Telegraphs)

Correos has undertaken a modernization process and now operates as a state enterprise. In fact it is today the largest company in the country, distributing more than 5 billion pieces of mail each year.

This modernization will continue through the implementation of a 2001 –2003 strategic plan, which in line with the plans of all major European postal service operators, pursues four main objectives:

- To strengthen traditional postal activities in the domestic market where Correos holds a leading position
- To strengthen its market position in other sectors such as parcel deliveries and banking services
- To devise new products and services, availing itself of its large network of offices and distribution facilities.
- To enter the business and services derived from the new information technologies

In this vision of a future based on competitiveness in a free market, the profitability sought by Correos does not lose sight of its principal objective: the provision of comprehensive postal services. Accordingly the strategic plan includes the following measures:

- To improve access to the postal network with longer hours and improved management of postal offices
- To improve service quality, which means speeding up delivery until it surpasses European standards
- In order to modernize the public operator, in 2002 Correos invested 243 million, 49% more than in the previous year and total investments planned for the 2001-2004 period reach 963 euros, a 164% increase over investment spending in the 1996-1999 period. This is to be achieved by means of several programs, such as infrastructures plan 2001-2004, automation plan 2001-2004 (intending to raise the proportion of automatic mail) and systems plan 2001-2003, enlarging investment to define the new scenario of information technologies system.

6. Regulatory reform in electricity

Directive ***96/92/EC*** of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity establish the framework of the new electric market

Spain has incorporated this new regulation by defining new principles in its domestic regulations under law 54/1997.

The Directive establishes common rules for the production, transmission and distribution of electricity, these same principles being followed by Spanish regulation.

As a consequence, Electricity enterprises must be operated on a commercial basis and may not be the object of discrimination as regards their rights or obligations. Just as other Member States of Europe, Spain may impose public service obligations on them as regards the safety, regularity, quality and price of supplies.

The construction of new production installations is subject to a licensing procedure. The granting of licenses is subject to compliance with criteria relating to the security and safety of electric power systems, the environment, land use, public ground use, energy efficiency, the nature of primary energy sources and the technical, economic and financial capacity of the applicant. Reasons must be given for any refusal to grant a license and an appeal procedure is established

A system operator designated by the State is responsible for operation, maintenance and development of the transmission system and its interconnectors. The system operator controls the energy flows so as to maintain a secure, reliable and efficient electricity system and a distribution system operator designated by the Member States or by the enterprises responsible for the distribution systems is responsible for operation, maintenance and development of the distribution system.

In Spain this system operator is a public agent, REDESA, which is responsible for maintaining the electric system in working order.

The distribution system operator must maintain a secure, reliable and efficient distribution system whereas the State is responsible for several obligations for maintaining electric service, such as planning and prices.

The access to the electric system is allowed in fair conditions. The State must take whatever measures are necessary to guarantee that their electricity markets are kept open.

Protective measures may be taken in the event of a sudden crisis in the energy market or where the physical safety or security of persons, apparatus or installations or system integrity is threatened.

In conclusion, despite the public competences over the sector, new regulation in Spain has enabled the opening of the electric market to private companies.

7. Regulatory reform: the harmonization of regulations

Europe: the building of an internal market

When discussing regulatory reform it is necessary to note that domestic regulations may set up barriers which impose unnecessary burdens and might, for instance, hinder the free circulation of goods.

According to the European Treaty, free circulation of goods can be banned by member states. For this reason Europe has undertaken the harmonization of disposition measures. This is likewise the aim of European Supreme Court, which does not allow the imposition of measures that may serve as instrument for restricting the free market

If a Member State takes steps to prevent the free movement or the placing on the market of a particular model or type of product lawfully produced or marketed in another Member State, it must notify the Commission accordingly where the direct or indirect effect of the measure

This kind of measures reinforces the building of a free market and enhances competitiveness. Spain consequently assumed these principles upon joining the Europe Community.

As a consequence, the mutual recognition principle is established and guarantees the free movement of goods and services without the need to harmonize Member States' national legislation. Goods which are lawfully produced in one Member State cannot be banned from sale on the territory of another Member State, even if they are produced to technical or quality specifications different from those applied to its own products. The only exception allowed - overriding general interest such as health, consumer or environment protection- is subject to strict conditions

However, there are still some obstacles regarding technical standards and regulations. The service sector estimates that in general the obstacles to free movement of goods remained practically unchanged between 1996 and 1998. Other problematic issues have been identified:

- on *consumer* protection grounds, controls that are not always necessary are imposed in the countries of destination;
- in the internal administrative organization, better management is hampered by administrative delays, costs of procedures and inability to deal with complex issues (for example innovative products and services);
- a lack of mutual confidence in the acts of other Member States continues.

These problems have prompted some operators to adapt their products to local requirements or even, in extreme cases, to forgo marketing their products or services in another Member State.

As Member States are the main actors in the implementation of the mutual recognition principle, the Commission proposes that they undertake the following;

- to apply the judgments of the Court of Justice on including mutual recognition clauses in national legislation;
- to reply within a reasonable time to requests for the application of mutual recognition, except in particularly sensitive cases;

- to strengthen cooperation between national administrations of the Member States with the new telematics contact network, meetings of heads of coordination centers, and more systematic use of contact points and national coordinators in the area of regulated professions;

- to prepare regular reports on problems with application along with their potential solutions.

All of the above proves the maintenance of barriers which hinder free markets and even shows the necessity of continuing to pursue regulatory reform.

In Council Resolution of 28 October 1999 on mutual recognition the Council stresses the importance of mutual recognition for proper functioning of the single market.

The Council urges Member States to:

- review and simplify relevant national legislation and application procedures and to step up the effectiveness and speed of these procedures and strengthen administrative cooperation;

- make economic operators and the general public aware of their rights;

- keep the Commission informed about the problems with application and ensure that obligations relating to exchange of information are honored.

The Council welcomes the conclusion of mutual recognition agreements between the European Community (EC) and Australia, Canada, New Zealand and the United States of America aiming at ensuring effective market access across the whole territory of the parties to all products covered by the agreements

8. General provisions of rule making: Spanish legal framework of administrative procedure.

Regulatory reform includes rule making proceedings and at this point we can discuss regulation of guiding principles of administrative action, guaranteeing that the Public Administrative action is fully subject to the Legislation and law.

As called for by Spanish 30/1992 Act of legal regime of Public Administration and the common administrative procedure act is ruling.

This act contains regulates the common administrative procedure applying to all Public Administrations, defining the minimum guarantees of citizens in relation to administrative activity.

This Act is the legal framework for citizens who can turn to any administrative authority in the certainty that they all operate with consistent criteria by establishing rules of reviewing administrative actions or rules to use remedies against administrative decisions.

But the most important achievement of this act is to establish principles of administrative procedure such as a public hearing in order to allow citizens to submit considerations relating to an administrative decision. This act imposes the obligation of Public power to respond to all considerations submitted by citizens to Public Administration.

This act is based on jurisprudencial principles established by Supreme Court of Europe such as the obligation of Public Administrations to respond to the citizen´s demands (Chomel case 21-9-1989) or the citizen´s rights to be heard in sanction procedure (Musique diffusion Française act 7-6-1984).

Those principles are examples of the legal principle to submit Public Administration to Law, in order to guarantee citizens rights.

In conclusion, Spanish regulatory reform must be aware of legal formalities to submit Public Administration to Law in order to provide fair, transparent and respectful public decision for all citizens

9. Conclusion

Spanish main achievements on regulatory reform strengthened many economical sectors by improving home rules in order to adapt to Europe and to the other important international economical organization such as OCDE of which Spain forms a part.

Although defects may be observed in its economic system, by revising its rule making, Spain is improving its economy by converging with the main economical principles established, such as openness to free market.

KEY TRADE POLICIES OF VIETNAM

Ms. Pham Quynh Mai, APEC-ASEM Division, Multilateral Trade Policy Department, Ministry of Trade

I. Tariff

Since Vietnam has embarked on its renovation, Viet Nam's tariff schedule had been modified several times since then in response to the economy's development needs. The number of tariff bands had been reduced, as well as the number of tariff lines subject to zero tariff.

The Harmonized System Convention had come into force in Viet Nam on 1 January 2000, making Viet Nam's tariff nomenclature in full compliance with the HS 1996 nomenclature at the six-digit level. New tariff nomenclature had been issued by virtue of Decision No. 82/2003/QD-BTC of 13 June 2003 in accordance with ASEAN Harmonized Tariff Nomenclature (AHTN) at eight-digit level which was in full consistency with HS 2002.

Viet Nam's trading partners were subject to tariff treatment at the preferential, MFN or standard rate (also referred to as normal or non-MFN rate). The Standing Committee of the National Assembly had adopted the Ordinance on Most Favoured Nation and National Treatment on 22 May 2002, which required Viet Nam to comply with MFN and national treatment provisions of international treaties.

Vietnam is under the accession process to WTO and considering its plans of bound tariffs for market access negotiations with its WTO counterparts. Current preferential import list of Vietnam comprises of 97 chapters and 6521 items (up to March 2003).

II. Non-tariff measures

Vietnam is prohibiting the import of the following goods:

- Arms and ammunition, explosives (except for industrial explosives as separately stipulated by the Prime Minister in the Document No 1535/CP-KTTH dated 28 December 1998), military equipment.
- Drugs
- Toxic chemicals
- Depraved and reactionary cultural products, children toys that may have negative effects on their dignity and social order and safety.
- Firecracker of all kinds (except for signal fires used for marine safety and other needs specified in the documents No 1383/CP-KTTH dated 23 November 1999 by the Prime Minister)
- Cigarettes, cigar and other tobacco products
- Second-hand consumer goods, including:
  - Clothing, foot wares, garments.
  - Electronic goods

  - Electric refrigeration products
  - Electric appliances
  - Interior decoration

- Household equipments made from china, ceramics, porcelain, glass, metal, plastic, rubber, resin and other materials.
- Right steering-wheel vehicles (including those disassembled and converted into left steering wheel before being imported into Vietnam), except for some self-propelled and special purpose right steering-wheel motor vehicles operating in short distance including: crane lorries, channel and gutter diggers, road cleaning lories, dumpers, road-building lorries, airport passenger carriers, cargo-lifting vehicles.
- Second-hand materials and vehicles
- Articles and materials of asbestos of the amphibole group.
- Professional machines and softwares used within the Government secret.

The prohibition of import of those commodities aims to protect national security, social order and safety, traditional culture, fine customs, health of human beings and animals and environment.

Vietnam *prohibits the exports* of the following goods:

- Arms and ammunition, explosives (except for industrial explosives), military equipment.
- Antique
- Narcotic (drug) of all kinds
- Toxic chemicals
- Log and chipped wood coming from domestic natural forests, fire wood, charcoal made from wood or fire wood coming from domestic natural forests
- Wild animals, scarce and precious natural animals and plants.
- Professional machines and softwares used within the Government secret.
- Goods prohibited from export under the list of goods subject to professional control of the Ministry of Agriculture and Rural Development, Ministry of Fishery, Ministry of Culture and Information under Decision No 46/2001/QD-TTg dated 4 April 2001 on controlling export and import in the 2001-2005 period.

For wood coming from domestic natural forests, the prohibition of export aims to reserve the natural forest and the environment.

The prohibition of export of toxic chemicals aims to reserve the human and animal health.

The prohibition of antique, things of museums and historical and cultural places, statues of Buddha and worshipping objects made of all materials coming from worshipping places of all religions (pagodas, temples, churches...) aims to protect national cultural heritages and national religious heritages.

The prohibition of export of books, films, movies, video films, recorded objects or other visual audio data (CD, VCD, DVD, cassettes...) and other cultural publications aims to protect social safety and order.

Vietnam is maintaining the import surcharges/fees on the following goods:

- DOP
- PVC
- Welded and zinc-galvanized pipes and tubes in steel
- Paperboards and flat cartons used for packing, having a maximum horizontal pressure resistance of 3 kgf/cm2 and vertical pressure resistance of 14 kgf
- Sanitary ceramic wares
- Drinking glasses, cups and kitchenware of porcelain or china
- Drinking glasses, cups and kitchenware of glass other than of lead crystal.
- Table, floor, ceiling, wall and roof fans of a power below 100W
- Glass inners for commonly-used vacuum flasks of a capacity not exceeding 2.5 litre
- Commonly-used vacuum flasks of a capacity not exceeding 2.5 litre, (other than piston vacuum flasks and self-boiling vacuum flasks)
- Uncoated printing paper, writing paper
- Ceramic and granite flooring tiles

Goods subject to import licensing by the Ministry of Trade in the 2001-2005 period:

- Goods subject to import control under regulations of international treaties to which Vietnam is a signatory, declared by the Ministry of Trade for each period.
- Some kinds of glass
- Some kinds of steel.
- Some kinds of liquid vegetable oil
- Refined sugar, raw sugar
- Petroleum
- Clinker

- Fertilizer
- Paper
- Motors/engines
- Motorbikes and accessories
- Tiles
- Some kind of materials

Vietnam imposes discretionary export licensing on garments according to quotas that Vietnam has negotiated with foreign partners, declared by the Ministry of Trade for each period.

Based on annual agreement with international organizations and foreign partners on quotas and conditions to export garments, the Ministry of Trade cooperates with relevant Ministries and Agencies to formulate and issue common regulations on the use of garments quotas.

Vietnam does not impose voluntary export restraint arrangements.

1. Focal point mechanism for exporting and importing:

- Petroleum

Goods subject to professional management include:

The State Bank assigns enterprises to allow import of some goods under Decision No 46/2001/QD-TTg.

Goods subject to management of the State Bank include:

- Special cars for carrying money.
- Multi-functional devices for counting, classifying, bundling and shredding money.
- Treasury door.
- Ink for printing money.
- Machines for printing hard-to-forge money, payment vouchers, certificates and other valuable paper to be issued and managed by the banking industry.
- Money printers (technical specifications announced by the State Bank)

2. Conformance certification:

Some goods under the control of the Ministry of Post and Telecommunication (General Department of Post in the past) are subject to conformity certification. The conformity certification is valid for minimum of 2 years. During the effective period of the conformity certificates, goods are imported in line of the certificates without any limitations of quantities or values. (Circular no. 02/2001/TT-TCBD dated 25 April 2001 guiding the Decision no. 46/2001/QD-TTg dated 4 April 2001 of the Prime Minister on the export import management over goods subject to line management of General Department of Post for the 2001-2005 period)

3. Line management:

To ensure product safety and sanitary requirements, technical standards, product dimensions and export/import conditions. Ministries of line management of goods include:

Ministry of Agriculture and Rural Development (MARD): applies testing licence, to base on the testing results to allow or not allow the use of the goods in Vietnam. Once allowed by the MARD to be used in Vietnam, the goods are imported according to the demand without any limitation in quantity, values or import licences.

III. Trade in Services

The Law on Foreign Investment was amended in 2000, making a contribution to enhance and synchronize the investment encouraging and guaranteeing mechanism and policies of current legal system; to create common legal surface between domestic and foreign investment; to increase the transparency and predictability of legal framework for foreign investment...

Foreign managers, executive directors and experts of foreign service-providing organizations establishing representative offices, branches or subsidiaries in Vietnamese territory, who can't be Vietnamese by nationality instead, are allowed to immigrate and reside in Vietnam in the first 3 year period. The duration may be prolonged due to the operation requirements of the subjects (enterprises)

Foreign managers, executive directors and experts of foreign service-providing organizations who can't be Vietnamese by nationality instead, engaging in foreign directly invested enterprises allowed to immigrate and reside in Vietnam in a proper time period in conformity with regulations of investment contracts or in the first 3 year period, due to the shorter time. The duration may be prolonged subject to the employment contract between these individuals and the subjects (enterprises).

Business visitors: Those who work for service-providers without establishments (trade representatives) in Vietnamese territory, don't receive salaries from any Vietnamese source and engage in activities related to the representative of a service-provider aiming at service-selling negotiations, or business opportunity research are allowed to immigrate and reside within 90 days provided that they don't (i) directly provide services for public sector; and (ii) directly involve service providing.

Service providers: Those who work for service-providers without establishments (trade representatives) in Vietnamese territory, don't receive salaries from any Vietnamese source, engage in service-providing under service-providing contracts between their enterprises and Vietnamese one, don't directly collect money for their service-providing, don't work for any other foreign enterprise which has a trade representative are allowed to immigrate and reside in Vietnam in a specific time in conformity with the contract' s regulations and not in excess of 90 days.

Foreigners working in Vietnam are allowed to meet such requirements as follows:

- High professional knowledge in excess of Vietnamese capacity

- 18 years old at least, enough health, no police record.

Government Decree No. 63/1998/ND-CP dated 17 August 1998 on foreign exchange controls and Government Decree No. 05/2001/ND-CP dated 17 January, 2001 amending some regulations of Decree No. 63/1998/ND-CP, provide regulations on foreign exchange controls as follows:

- Opening accounts: Residents and non- residents who are organizations currently operating in Vietnam are allowed to open and remain a foreign currency account at an allowed bank; use the foreign currency balance for making payments overseas for imported goods and services and making payments to domestic organizations and individuals who are allowed to invoice in foreign currency for goods purchased and services rendered.

- Residents and non-residents: who are individuals receiving foreign currency notes on entering into Vietnam with a confirmation of a custom office or have other legitimate foreign currency income in Vietnam are allowed to: (i) store and keep; (ii) deposit into banks in forms of opening an individual foreign currency accounts.

- Residents who are individuals having foreign currency where its source is not mentioned above are permitted to deposit that foreign currency at banks in the form of foreign currency savings accounts and not in the form of individual foreign currency accounts.

- Foreign investors are allowed to remit outward foreign currencies to service overseas debts including principal, interest, charges stated in the loan contract signed with the foreign lenders as well as investment and reinvestment capitals, profits and other legal income in conformity with regulations of the Law on Investment of Vietnam.

- Vietnamese investors are permitted to remit outward foreign currencies from exported goods and services to make investment.

- Vietnamese investors abroad are permitted to annually remit their profits and other legal income back to Vietnam within 6 months since the end of the financial year of foreign invested economies in accordance with legal regulations.

- Residents who are Vietnamese economic organizations, foreign invested enterprises and foreign parties involved in Business Cooperation Contract ... must sell foreign currencies from current income sources for allowed banks in accordance with the regulation of the Prime Minister; to buy foreign currencies at allowed banks with a view to meet current transactions on a basis of submitting legitimate documents

- Non- residents who are foreigners receiving legal income in foreign currencies are permitted to remit outward, or to buy foreign currencies at allowed banks in the case of the income in VND.

- Individuals on exiting Vietnam carrying foreign currencies in cash exceeding the specified level, must declare to the Custom or must have a foreign currency carrying license issued by the State Bank in a case the amount carried exceeds the limit subject to frontier-pass declaration.

- Residents who are Vietnamese economic organizations, foreign invested enterprises and foreign parties involved in Business Cooperation Contract... guaranteed for foreign currency balancing support by the Government, must sell at least 80% of total foreign currencies from current income sources for allowed banks.

Overseas repayment and profits remittance are required a license for transferring foreign currency overseas of the State Bank.

Tax rate on overseas profits remittance are specified as follows:

- 5% in case of registered capital more than USD 10.000.000
- 7% in case of registered capital between USD 5.000.000 and USD 10.000.000
- 10% in case of registered capital less than USD 5.000.000

Trade representatives of foreign service-providing organizations in Vietnam are established in such following forms:

- Business Cooperation Contract (BCC);
- Representative office;
- Joint venture enterprise;
- 100% foreign invested enterprise.

Representative offices of service-providing organizations in Vietnam are not permitted to do business activities for profit earnings in Vietnam.

The share of the foreign counterpart or counterparts shall not be below 30% of the total registered capital of a joint venture except other cases in accordance with the Government's regulations. The operation duration of foreign invested enterprises and BCCs are regulated in investment licenses on a case basis in accordance with the Government's regulations but not in excess of 50 years. Based on regulations of Standing Committee of National Assembly, the Government may decide to prolong the operational duration on a project case basis, but not in excess of 70 years.

Foreign invested enterprises and foreigners are only allowed to hire land and to own real estates (except land), but not to receive the collateral of land use rights in specified duration in licenses.

Under the Law on Investment, General Directors or the 1st Deputy General Directors of a joint venture enterprises must be a Vietnamese citizen foreign invested enterprises and foreign parties participating in BCCs are allowed to make recruitment on the basis of business requirements provided that the recruitment priority is granted for Vietnamese citizens. They are only to employ foreigners to do high professional knowledge and management work exceeding the Vietnamese capacity to do. However, they have to train instead Vietnamese staff.

The number of foreign staff is not allowed to exceed 18% of the total technological experts in foreign service-providing organization in Vietnam.

Foreign service-providing organizations in Vietnam have to comply with specific regulations of Vietnam law for foreigners including regulations on taxes, prices of some service provision.

Value added tax rate popularly applied in the service sector is 5% (except the case of duty free and fulfilment of special consumption tax obligations)

IV. Investment

Foreign investor may invest in any of the forms: Business cooperation on the basis of a business cooperation contract (BBC) or Joint venture enterprise or 100% foreign owned enterprise, except some fields not allowed to have 100% foreign capital such as telecommunication services, investigation and exploitation of oil and gas, minerals, rare and precious metals, consulting services, transport services, production of explosive, afforestation, travelling and culture.

Foreign invested enterprises have the right to reorganize their business (division, merger, demerger, consolidation). Joint-venture with foreign investment is not yet applied, however the equitization of existing enterprises is under consideration (Menu1.01&02).

Field and area subject to encouragement or investment restrictions:

Vietnam promulgate the following lists:

1. List of special projects subject to investment encouragement;
2. List of projects subject to investment encouragement;
3. List of areas subject to investment encouragement;
4. List of investment areas with conditionality;
5. List of areas not subject to investment license

Depending on the field of investment, foreign investors are granted investment preferences or obliged to meet all investment conditions. The above list can be found in Decree 27/2000/ND-CP dated March 19, 2003 at website: *www.mpi.gov.vn/fdi*

Ensuring investment and term of investment:

Vietnam gives investors many investment safeguard measures such as equal treatment among investors on the principle of MFN, ensuring rights in terms of capital and property of investors not to be nationalized by administrative means (except for public interests) on a non-discriminatory basis and timely and appropriate compensation; protecting the rights of investors against changes in Vietnam's law as well as the rights to transfer benefits and legal properties of investors.

Term of the project is decided by the investor but it is at 50 years or 70 years at maximum (in special cases approved by the Standing Committee of the National Assembly).

On prior authorization requirement:

Vietnam still maintains the assessment on issuing Investment License with foreign investment project with the term of 30 to 45 working days depending on the project's nature. However, some foreign investment projects meet one of the following conditions: (i) attain the exporting rate of 80% and above; (ii) invest in Industrial zone not belonging to Group A and belonging to the list of investment encouragement; (iii) belong to the production field with investment capital up to USD 5 billion.

Involving other economies:

By the end of 2002, Vietnam has signed the Investment Protection and Encouragement Agreement with 46 countries and territories, including 11 APEC member economies, participating in the framework agreement on ASEAN Investment Area (AIA) and still under the process of negotiation for WTO accession.

The State of the Socialist Republic of Vietnam shall guarantee that foreign investors investing in Vietnam are treated fairly and equitably.

The MFN treatment has been provided for in the Law on Foreign Investment in Vietnam and in all Vietnam's IPPAs (Menu 3.01).

Vietnam is carrying out the commitments under the ASEAN Framework Agreement on Investment Area with a view to opening industries and providing national treatment to Asean’s investors in 2013 and non-Asean's investors in 2020.

Vietnam is in the process of gradually narrowing down the sectors and matters which are exceptions to NT treatment for domestic and foreign investors.

APPENDIX 6

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