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## **Annex 1 - APEC–OECD Framework on Competition Assessment**

Purpose: Information  
Submitted by: EC Chair



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# APEC – OECD Framework on Competition Assessment

## *What is competition assessment?*

The competition assessment of laws and regulations is a process that helps identify regulatory restraints to competition and develop alternative, less restrictive policies that still achieve government objectives.

Laws and regulations<sup>1</sup> are crucial for achieving public policy objectives, such as consumer protection, public health and environmental protection, as well as for preventing companies from taking advantage of market power or resolving market failures. When regulations are overly restrictive, however, they can hinder competition and have negative economic repercussions. For example, domestically, restrictive regulations may hamper business entry, meaning that new startups would otherwise fail to materialize in an otherwise stagnant market.

The benefits of competition for consumers and for the overall economy are significant. A large number of studies confirm that more competitive industries experience faster productivity growth leading, in turn, to economy-wide growth. Other benefits from competition are also important, including lower consumer prices, greater consumer choice and better quality of products and services, higher employment, greater investment in R&D and faster adoption of innovation.

To prevent unduly restrictive regulations and ensure that regulations help to achieve the benefits of competition, a useful technique is competition assessment of regulations. This technique ensures that regulations do not unduly restrict competition and is the focus of this framework.

A competition assessment can be performed at different stages of making regulations. It can be embedded in the very process of developing new legislation and policies, which APEC addresses under the various Good Regulatory Practices workstreams, by ensuring that new regulations do not unduly restrict competition. This is called the *ex ante* approach. An alternative or complementary practice is an *ex post* assessment, which analyses the legislation in force and can take account of the market outcomes resulting from the implementation of a given policy. Each approach has its advantages; they can be implemented separately, or both at the same time.

## *Rationale*

Competition policy has been an important priority of APEC since the Osaka Action Agenda (adopted in 1995, amended in 2002) and contributes to achieving the Bogor Goals of economic integration and trade liberalization. Competition assessment was featured as a component of the *APEC-OECD Integrated Checklist on Regulatory Reform*, published in 2005. The adoption of sound competition policies, laws and rules coupled with their effective implementation and enforcement helps to realize these APEC objectives. In addition, promoting free market competition helps bring about open, well-functioning, transparent and competitive markets - which is one of three priority areas for structural reforms under the Renewed APEC Agenda for Structural Reform (RAASR) for 2016-2020.

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<sup>1</sup> Henceforth, we refer to government laws and regulations as regulations, while recognizing that regulatory review may have a different role in primary and secondary legislation, particularly when the primary legislation is proposed and drafted by legislators.

Currently, experience among competition authorities in the APEC region remains uneven in terms of scoping and assessing issues that potentially hamper competition. More recently established, or younger, competition authorities among APEC developing economies encounter the continuing need to build capacity for conducting economic analyses of existing and proposed regulations in particular. Among the needs to foster and enhance competition policy in APEC, therefore, is to build capacity to systematically, justifiably and consistently identify and assess the implications of regulations –both existing and proposed—on sound market competition.

The *APEC - OECD Framework on Competition Assessment* provides a clear and structured framework to help identify laws and regulations that potentially restrict competition with a view to then establishing areas to focus on for regulatory change. The framework has been designed so that it can be usefully applied by government officials with no prior knowledge of competition policy. In the latter case, training sessions and hands-on experience alongside competition professionals can make the competition assessment process more effective. The framework builds on the OECD's *Competition Assessment Toolkit*, which was introduced to APEC member economies on the margin of APEC SOM1 in Nha Trang, Vietnam, in February 2017.

### *Objectives*

The APEC – OECD Framework on Competition Assessment serves the below objectives:

- Set out non-binding principles and approaches to implement systematic and consistent competition assessment in APEC member economies;
- Identify needs and build capacity to APEC member economies to implement competition assessment;
- Introduce principles of competition assessment into APEC's ongoing work in Good Regulatory Practices;
- Promote APEC-wide and APEC-OECD cooperation on competition assessment.

### *Principles*

The APEC – OECD Framework on Competition Assessment adheres to the below principles:

- Non-binding;
- Transparent and effective communication;
- Collaboration and engagement with various stakeholders; and
- Ensure meaningful efforts to build human and institutional capacity and to increase participation of developing member economies.

### *How the checklist works*

The *APEC - OECD Framework on Competition Assessment* is organised around a list of questions (the so-called Competition Checklist). The Checklist addresses four main types of regulations, i.e. regulations that: (i) limit the number or range of suppliers; (ii) limit the ability of suppliers to compete; (iii) reduce the incentive of suppliers to compete; or (iv) limit the choices and information available to customers.

### *In-depth review and proposals for regulatory change*

An in-depth analysis is necessary to assess whether the potential restrictions identified based on the checklist are indeed harmful. Occasionally, restrictions that have been put in place to fulfill a policy objective go beyond what is necessary to achieve the objective. Competition assessment does not aim at the removal of all regulations. It is a careful review of existing or draft policies to ask whether they *unduly* restrict competition, given the ultimate policy objectives.

One of the first steps to understanding a regulation is to investigate its policy objective. This is important for various reasons. Even if the analysis finds that the regulation leads to a restriction of competition, this harm may be justified in light of the public policy objective. In addition, when the regulation is indeed found to be restrictive, understanding its objective is essential in order to develop suitable alternatives.

The in-depth analysis of the harm to competition can be conducted by drawing on the economic and legal literature, identifying relevant case law, and researching regulations applied in comparable economies. When suitable data are available, a quantitative analysis can also be performed.

When a regulation is found to harm competition, the next step of the competition assessment process is to develop alternative policy options and to identify the benefits of each of the alternatives with respect to the *status quo*. One good way to do this is to look at other regulations in other comparable businesses or in the same business in other economies. Following the identification and comparisons of the options, a policy options for change can be identified and presented to policymakers, explaining the reasons for the suggested change to the regulation.

### *The Way Forward*

- Conduct pilot competition assessments in APEC member economies;
- Promote economy-level attempts to build capacity for competition assessments using the APEC-OECD Framework on Competition Assessment (i.e. the checklist);
- Organize policy dialogues and workshops to share experiences on practical competition assessment in APEC member economies;
- Encourage member economies to update to CPLG about framework implementation; and
- Build on experiences in the region to develop APEC casebook on competition assessment.

### *Desired Outcomes*

- Enhanced capacity for APEC member economies to conduct competition assessments using the Checklist;
- Contribution to Good Regulatory Practices; and effective competition policy;
- Greater regulatory quality and ease of doing business in the APEC region thanks to competition-friendly regulations; and
- Support the pursuit of economic, financial and social inclusion in the APEC region.

## Annex: Checklist on Competition Assessment

Further competition assessment should be conducted if the existing or proposed regulation has any of the following four effects:

- A. **Limits the number or range of suppliers.** This is likely to be the case if the proposal:
1. Grants exclusive rights for a supplier to provide goods or services
  2. Establishes a license, permit or authorisation process as a requirement of operation
  3. Limits the ability of some types of suppliers to provide a good or service
  4. Significantly raises cost of entry or exit by a supplier
  5. Creates a geographical barrier to the ability of companies to supply goods services or labour, or invest capital
- B. **Limits the ability of suppliers to compete.** This is likely to be the case if the proposal:
1. Limits sellers' ability to set the prices for goods or services
  2. Limits freedom of suppliers to advertise or market their goods or services
  3. Sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that some well-informed customers would choose  
Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)
- C. **Reduces the incentive of suppliers to compete.** This may be the case if the proposal:
1. Creates a self-regulatory or co-regulatory regime
  2. Requires or encourages information on supplier outputs, prices, sales or costs to be published
  3. Exempts the activity of a particular industry or group of suppliers from the operation of general competition law
- D. **Limits the choices and information available to customers.** This may be the case if the proposal:
1. Limits the ability of consumers to decide from whom they purchase
  2. Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers
  3. Fundamentally changes information required by buyers to shop effectively

Examples of types of regulations that fall under each of these broad headings are provided through more specific questions. The fact that a regulation meets one of the headings does not necessarily mean the regulation is unjustified.

- The first group of questions addresses, for instance, regulations granting exclusive rights to businesses. Such regulations have applied to public utilities sectors, such as electricity and railways, as well as to professions or guilds. For instance, local governments often restrict entry into the taxi services market by setting the number of licences, sometimes in combination with price controls on taxi fares. Restrictions on the retail channels that can sell certain products, such as the requirement to sell vitamins and over the counter medicines only in pharmacies, also fall within the first category identified by the Checklist.
- In the second group of questions, the Checklist identifies regulations that limit businesses' ability to compete, e.g., through their pricing decisions or the freedom to advertise and market products. For instance, many professions restrict comparative or any advertising in some countries (e.g. medical services, pharmacies and auditing services). Price regulation,

such as price caps, notifications or approvals, and requirements to keep prices stable for a given period, limit firms' flexibility to set prices in line with market conditions. Grandfather clauses are other examples of regulations that limit the ability to compete: when a regulatory framework changes and becomes more restrictive, existing firms are often "grandfathered", and do not have to comply with the new stricter regulations at all or are treated in a more favourable way than newcomers. This differential treatment places at a disadvantage the firms that have entered the market at a later stage.

- The third group of questions addresses, for instance, mechanisms that facilitate the sharing of information among competitors and that allow them to co-operate in specific activities. Allowing co-operation in some areas, such as research and development, has the potential to bring substantial benefits to society. This is also the case for self-regulation. For instance, a standard setting organisation provides a forum for the industry to define standards. However, at times, these mechanisms might have the unintended effect of leading to information exchange on sensitive business matters that could facilitate co-ordination of prices and production.
- In the fourth group of questions, the Checklist includes selected demand-side factors. These are restrictions that limit consumer choices or reduce consumer mobility by creating switching costs. While in some cases switching costs are monetary (e.g. a fee charged to close a banking current account), there are also important non-monetary factors (e.g. arranging for pre-arranged bank payments to be moved from one account to another). If consumers possess insufficient, confusing or misleading information about products, they may find it difficult to properly evaluate them. In these cases, the market is unlikely to deliver the best outcomes for consumers and therefore a review of the existing regulations becomes necessary.