Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

08-Feb-2007

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2007)8
Unclassified

Cancels & replaces the same document of 12 January 2007

INTEGRATING COMPETITION ASSESSMENT INTO REGULATORY IMPACT ANALYSIS

-- Note by the Secretariat --

This document has been approved by the Competition Committee.

The document explains how competition assessment can be incorporated into regulatory impact analysis and is part of the Competition Assessment Toolkit. The Toolkit is designed to help government officials assess whether laws or regulations unduly restrict competition and provides guidance on how to achieve policy objectives in ways consistent with competition.

For further information, please contact Sean Ennis at Tel: +33 (0) 1 45 24 96 55,
e-mail: sean.ennis@oecd.org.

JT03221472

English - Or. English

INTEGRATING COMPETITION ASSESSMENT INTO REGULATORY IMPACT ANALYSIS[1]

by the Secretariat

1. Introduction

1. Regulatory Impact Analysis (RIA) is now applied to most or all new regulation[2] in the majority of OECD Member countries. The use of RIA has expanded rapidly throughout the OECD membership in the last decade in particular. Explaining this rapid expansion in the use of RIA as part of the regulatory decision-making process, the OECD has commented:

> *High-quality regulation is increasingly seen as that which produces the desired results as cost effectively as possible. 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 increasingly being explicitly stated and accepted*[3].

RIA is based on benefit/cost analysis disciplines, applied in a comparative context that weighs the relative performance of all feasible policy interventions identified as being capable of achieving the underlying policy objective.

2. As RIA has expanded, much of the OECD membership has moved toward broadening the scope of competition policy and general competition law, with increasingly effective enforcement undertaken in this area. This trend arises from an increasing recognition that maximising the degree of effective competition throughout the economy is fundamental to the achievement of the broad objectives of maximising economic growth and, consequently, of social welfare.

3. Clearly, there are very strong links between competition policy analysis and RIA: the objectives of the two policy instruments reflect a high degree of congruence. The OECD Guiding Principles for Regulatory Quality and Performance state that consideration of the impacts on competition should be incorporated within the process of reviewing new and existing regulations. However, in practice, responsibility for the conduct of RIA and of competition policy analysis often resides in different parts of the government administration. As a result, there is often insufficient coordination in the conduct of these two, interconnected forms of analysis.

4. In a few countries, attempts are underway to integrate RIA and competition policy analysis. For example, in the United Kingdom, assessment of competition impacts has been a mandatory part of RIA

---

1 This paper has been prepared by Rex Deighton-Smith.

2 In this paper of the term "regulation" is used generically to refer to all kinds of legislative instruments, including both primary and subordinate legislation.

3 *Regulatory Policies in OECD Countries*: *from Interventionism to Regulatory Governance.* OECD (2002), p44.

since 2002. In the European Commission, competition assessment has been part of the RIA process since 2005. In the United States, RIA guidance documents explicitly require consideration of market impacts. Similarly, the Australian National Competition Policy requires that all RIA documents state whether the proposed regulation complies with the terms of the National Competition Policy agreements, and include analysis to support this conclusion. Mechanisms such as these can help to ensure that competition policy principles are considered at early stages of the broader policy development process.

5. This paper aims to provide an understanding of the key concepts and issues involved in competition policy analysis to policy officials who have responsibility for the conduct of RIA. In so doing, its objective is to assist policy officials to use competition policy analysis as one component of RIA. In most cases, competition analysis would be a minor component of RIA. In some cases, however, it would be more significant and this paper seeks to identify key situations that may merit a thorough competition assessment.

6. The paper proceeds by, first, contrasting in general terms the different features of RIA and competition policy approaches, to identify the potential benefit for RIA from explicit inclusion of competition assessment as an element of RIA. Second, the paper proposes a competition checklist to help identify the types of regulations that are most likely to involve unnecessary restrictions on competition. Third, the paper discusses negative impacts on competition that regulation often imposes. Fourth, the paper identifies the broad outlines of a potentially useful approach to the process of competition assessment.

2. RIA and competition policy analysis

7. The benefit/cost analyses undertaken within RIA generally compare likely outcomes based on the existing economic and regulatory environment and may not make an allowance for changes in the major parameters affecting these environments. In comparison, the focus of competition policy analysis is often more future-oriented. Competition policy analysis is concerned with the impact of particular changes to market conditions on the intensity of competition and, hence, on the likely outcomes for economic efficiency and consumer welfare.

8. While the above points to general differences in approach, the increasing trend for RIA guidance materials to require assessment of competition impacts to be undertaken as part of RIA is inevitably narrowing these differences in many countries. This paper is intended to contribute to this process.

9. It is the focus on dynamic market efficiency[4] that makes competition assessment most useful as an element of overall regulatory assessment. This element can help to avoid regulations that unduly restrict market activity. A further benefit of competition assessment is that it assists in identification of all parties likely to be affected by regulatory proposals, especially those that will be affected indirectly. This can assist in ensuring that RIA-based consultation is sufficiently inclusive and, thus, more effective.

10. One practical approach for implementing competition assessment is through a set of threshold questions (or a "checklist") that helps identify when proposed regulations may have the most potential to unduly reduce competitive pressures. In those situations where reductions in competitive pressures are most likely, an in-depth competition assessment would be justified. However, for most regulations, an in-depth competition assessment would not be needed.

[4] Dynamic efficiency focuses on efficiency over time, with changes in efficiency resulting potentially from innovation, technological developments, the ability of firms to respond flexibly to new market conditions and of successful suppliers growing.

3. Conducting competition policy analysis as one element of RIA

11. As the following section will demonstrate, a number of the key issues in terms of potential anti-competitive impacts of regulation arise at the level of the design of the broad regulatory structure being considered. This suggests that policy officials should attempt to undertake competition policy analysis at an early stage in regulatory development. Similarly, long-standing OECD advice is that "*RIA should be integrated with the policy-making process, beginning as early as possible*"[5]. Thus, there is a consistent message that both of these forms of analysis should be seen by policy makers as integral components of the policy development process, rather than being "add-ons" or tasks that can be considered in isolation from the larger issues of policy development.

12. Of course, while at times there is a significant likelihood that a given regulatory intervention could yield anti-competitive impacts, it is equally true that much regulation has little, if any effect on competition within a given sector or market. Thus, a fundamental task is to determine via a "Competition Checklist" whether there is a strong likelihood that a particular regulation under consideration could have a significant anti-competitive impact and, as a result, require a more detailed and technical analysis to be undertaken.

13. The "Competition Checklist" presented below has been developed as a tool for aiding officials with an initial assessment. The checklist provides a simple test that can be applied to proposed regulations to determine whether an analysis of their impact on competition is likely to be required. If one or more of the three basic types of restriction on competition identified in the checklist exists, a full competition assessment is warranted. The details of the full assessment may be in proportion to the size of the potential competitive harm. Thus, a judgment may be warranted to determine the apparent scale of the identified restriction on competition and thus inform decision-making on the scale and scope of the full competition assessment that is required. If, considering the circumstances and past experience, there is little likelihood of a significant restriction of competition resulting from the regulatory proposal, the full competitive effects assessment can be short and concise.

Competition Checklist
for the conduct of competition assessments

A competition assessment should be conducted if the proposal has any of the following 3 effects:

(1) Limits the number or range of suppliers

This is likely to be the case if the proposal:

- Grants exclusive rights for a supplier to provide goods or services
- Establishes a license, permit or authorisation process as a requirement of operation
- Limits the ability of some types of suppliers to provide a good or service
- Significantly raises cost of entry or exit by a supplier
- Creates a geographical barrier to the ability of companies to supply goods or services, invest capital or supply labour

(2) Limits the ability of suppliers to compete

This is likely to be the case if the proposal:

- Controls or substantially influences the prices for goods or services
- Limits freedom of suppliers to advertise or market their goods or services

[5] See *Regulatory Impact Analysis*: *Best Practices in OECD Countries.* (OECD, Paris, 1997), p215.

- Sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that many well-informed customers would choose
- Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)

(3) Reduces the incentive of suppliers to compete vigorously

This may be the case if the proposal:

- Creates a self-regulatory or co-regulatory regime
- Requires or encourages information on supplier outputs, prices, sales or costs to be published
- Exempts the activity of a particular industry or group of suppliers from the operation of general competition law
- Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers

4. Review of major forms of restrictions on competition

14. The following section provides further detail on the importance of each of the main types of restriction on competition identified in the Checklist. It is intended to provide guidance to policy officials on undertaking an initial "competition assessment" should the "Competition Checklist" indicate that is necessary. An important focus of the discussion is on identifying the policy objectives governments usually seek to achieve via each of the identified types of anti-competitive regulation. In general, a range of policy alternatives which are likely to achieve these objectives while being less restrictive is identified. Cases in which regulations with particular types of anti-competitive effects may be justifiable are also identified and guidance included on how these anti-competitive effects may be minimised.

15. The checklist organises the range of specific restrictions on competition identified under three broad headings that reflect the main general categories of restriction on competition. However, it should be recognised that some of the specific restrictions can relate to more than one of these broad categories. For example, the creation of a self-regulatory or co-regulatory regime may lead to limits on the number or range of suppliers or limit the ability of suppliers to compete. Thus, the placement of each type of restriction on competition under a particular category heading has been made according to the most common result of the use of that restriction. Analysts nevertheless need to consider all of the possible anti-competitive impacts associated with each type of restriction.

16. This section of the paper identifies a range of common regulatory provisions that have the potential to result in major anti-competitive impacts on a given market. It discusses the nature and extent of these likely anti-competitive impacts and considers their acceptability and potential alternative means of achieving the regulatory objectives that often underlie their use. The discussion included here is a general one that is intended to introduce these concepts to generalist policy officers. Further guidance is available in a longer companion paper.

4.1 Limits on the number or range of suppliers

17. Regulation that limits the number of producers that can supply a market creates a risk that market power[6] will be created and the strength of competitive forces will be reduced. Where numbers of suppliers decline, the possibility of co-operation (or collusion) between them is increased. The resulting decline in competitive pressures will tend to reduce innovation and incentives to meet consumer demands effectively.

[6] Market power of suppliers is the ability to profitably increase price, decrease quality, or decrease innovation relative to the levels that would prevail in a competitive market.

Thus, there is a detriment to economic efficiency in the dynamic sense. As well, reduced price competition results in transfers from consumers to producers. Grants of exclusive rights, the establishment of licence and permit schemes and restrictions on participation in public procurement schemes constitute three very common forms of regulatory limitations on the number of suppliers. Regulations that significantly raise the cost of entering or leaving a market and those that geographically restrict the flow of goods or services can also effectively limit the number or range of suppliers of a given market. Moreover, other forms of limitation on supplier numbers also exist and, where identified, should lead to a competition review. Where a restriction reduces competition in one market, it may also have "flow-on" effects in markets for complementary goods, as well as those for substitutes. Competition analysis must also attempt to identify these flow-on effects.

4.1.1. Grants of exclusive rights

Expected benefits of these provisions

18. The grant of an exclusive right frequently occurs in the context of a "natural monopoly". That is, the situation in which the marginal cost of producing an additional unit of the good continues to decline right up to the point at which the scale of production is such that an individual supplier can meet the entire demand arising from the relevant market. In such cases, governments have sometimes provided exclusive rights in order to ensure that consumers are supplied at the lowest possible cost while regulating the behaviour of the supplier granted this exclusive right in order to prevent the exploitation of its market power, so far as possible. However, the scope of natural monopoly, which tended to be defined broadly in the past, has been refined in recent times and is now often defined much more narrowly.

19. The grant of exclusive rights, particularly if it extends over a long period, has also frequently been considered a means of underwriting, or encouraging, substantial and/or strategic investments in infrastructure areas. Governments have frequently reached the view that such investments will be unlikely to occur without the incentives provided by the guaranteed market access that the grant of an exclusive right provides. However, at times the result of these policies has been over-investment.

Nature and extent of anti-competitive impacts

20. A grant of an exclusive right to produce a certain good or provide a certain service obviously constitutes the extreme case of a "barrier to entry". In effect, the grant of an exclusive right represents the establishment of a regulated private monopoly. This form of regulation necessarily has a substantial anti-competitive impact. Recent technological developments have significantly altered the nature of some previously monopolistic activities and potentially allow formerly regulated monopolies to be disaggregated into competitive and monopolistic elements.

Indications for use and potential policy alternatives

21. A fundamental problem with long-term grants of exclusive rights is that technological change can render the initial rationale for the granting of the right redundant long before the right itself has lapsed. Moreover, a State-sanctioned monopolist is likely to find itself in a strong position vis-à-vis the regulator that seeks to prevent it from exercising its market power. This, plus the need for a highly sophisticated regulatory approach to be taken in such contexts, often means that regulators experience a relatively low level of success in preventing the abuse of market power and in protecting consumers.

22. That said, there may be circumstances in which the grant of an exclusive right constitutes the only means of ensuring that a particular service will be brought to market. However, regulators should satisfy themselves that other alternatives that are less restrictive of competition are impracticable before

considering the grant of such a right. If there are no other alternatives, regulators may wish to consider auctioning the exclusive right. Where such a right is granted, particular attention needs to be paid to regulatory design. For example, issues need to be addressed such as the relative appropriateness of "cost plus" pricing regulation versus "rate of return regulation" versus "price cap" regulation. Moreover, in many cases, the splitting of the exclusive right between two or three parties can conserve competitive dynamics to some degree while reaping the benefits sought.

4.1.2. Establishment of a licence or permit system as a requirement of operation

Expected benefits of these provisions

23. Licences are generally used as a means of ensuring with a high degree of certainty that only suppliers who meet set standards are able to enter an industry. Licence conditions typically include minimum qualifications requirements, for example minimum standards for formal education and/or practical experience applied to members of certain occupational groups, such as various health professionals. They are often implemented in pursuit of well-founded consumer protection objectives. In particular, where consumers are not easily able to make judgements as to the competence of practitioners, qualifications requirements can help prevent harms due to incompetent practice. Other common requirements include minimum insurance requirements, which may have important consumer protection benefits where there is the possibility of substantial consumer losses in the event of business failures, incompetence or fraud (e.g. property transfers, travel agencies).

Nature and extent of anti-competitive impacts

24. Where regulation results in barriers to entry that are more restrictive than necessary to adequately achieve the regulatory objectives, it can have the effect of promoting "producer protection" and will often be sought by existing producers on grounds of the need to promote "market stability". In the context of a requirement for a licence to practise, the extent of the restriction effectively imposed on entry is likely to be high, as qualifications requirements are often supplemented by additional elements, such as character assessments. These character tests can also be applied to the directors of a company where the licence requirement applies to corporations, rather than individual practitioners. Common corporate licensing requirements include the need for certain insurances to be held or minimum working capital requirements to be met. Commonly there are "soft limits" on the number of firms or practitioners allowed to participate in the industry. These may be implemented through the application of "public interest" tests, which require that potential entrants demonstrate the "need" for an additional service to be provided and, in some cases, even that their entry would have no negative impact on the businesses of existing industry participants.

25. Some regulatory requirements may have the effect of increasing pressure on some suppliers to leave the industry due to the suppliers' being in a relatively poor position to comply and may thereby have a negative impact on competition if there are already significant barriers to new entry in place. Exit restrictions are less readily identifiable and are arguably less prevalent than entry restrictions. Exit restrictions may include overly onerous requirements to pay separation benefits to former staff or the loss of certain non-refundable performance bonds.

Indications for use and potential policy alternatives

26. The pursuit of "market stability" generally constitutes a poor reason for imposing regulatory restrictions on entry to an industry, as effective competition is a dynamic concept that necessarily encompasses the possibility of suppliers failing and, equally, requires that there be a steady flow of new

entrants to an industry (or at least the possibility of new entry) if high standards of innovation and responsiveness to consumer demand are to be maintained.

27. As suggested above, qualifications requirements for professionals are likely to be legitimate in cases in which consumers are ill placed to make their own judgments as to practitioner competence and where the consequences (i.e. the potential harms to consumers) of making a poor choice are serious and irreversible. As in numerous areas of regulation, a fundamental principle is to ensure that the restrictions applied are no more restrictive than necessary to achieve the regulatory objectives. Ever higher qualifications requirements can substantially benefit producers, at the expense of consumers, by reducing entry and, therefore, competition. Product quality standards should be set no higher than necessary to ensure consumer safety. Restrictions on, for example, supplier size should not be set a level that creates substantial anti-competitive impacts.

28. When considering the need for compulsory insurance requirements, performance bonds and the like, consideration should be given to the nature and extent of the consumer harms that can potentially result from either poor practice or from the failure of a service provider. Furthermore the ability of consumers to inform themselves of these potential harms and to protect themselves by making informed choices of providers is also a relevant consideration, while policies that can enhance consumer capacities in this area need to be considered as an alternative approach.

4.1.3. Limits on the ability of some types of suppliers to provide a good or service

29. Policies limiting the ability of some types of suppliers to participate in public procurement often require that a certain degree of preference (which may, or may not, be stated explicitly) be accorded to suppliers established in a certain region, state or country. Alternatively, they may give preference to suppliers that exhibit other characteristics held to be desirable, for example establishing a quota on procurement participation for small suppliers, or those that implement particular employment policies. In extreme cases, these policies may completely preclude suppliers other than those conforming with the favoured characteristics from any participation in government procurement.

Expected benefits of these provisions

30. The objectives sought via limitations on what types of suppliers may participate in government procurement can be several. Perhaps the most common kinds are national and/or State preference schemes, which seek to encourage economic activity in the favoured area, often in respect of particular industries thought to be of "strategic" significance. Thus, preference schemes can be used to support general protectionist policies, or as an element of regional policy, industry policy or small business policy, among others. Their effectiveness derives from the powerful market position of governments as major purchasers of many kinds of goods and services.

Nature and extent of anti-competitive impacts

31. Limiting participation in procurement tends to increase the costs of government purchasing by limiting competition in that market. Given the overall size of government procurement budgets, the importance of such restrictions in relative terms is likely to be high. Moreover, there is significant potential for conflict between these preference arrangements and other areas of policy. For example, preference given to suppliers from a particular region may conflict with other policies favouring small business.

Indications for use and potential policy alternatives

32. Preference schemes can have significant impacts due to the powerful position of governments as purchasers. However, there is substantial potential for such policies to conflict with other objectives of government policy. Perhaps in recognition of this, over time many preference schemes have shifted from absolute exclusion of non-favoured groups to relative preferences for favoured groups. Moreover, many have disappeared as a result of conflict with obligations under international trade agreements.

33. Alternative means of pursuing the underlying objective sought via preference schemes exist in many areas. For example, where regional policy objectives are sought to be promoted, alternatives include a range of direct subsidies and/or tax expenditures, provision of a more favourable regulatory environment in key areas, or the use of publicity/educational campaigns. Where the promotion of small businesses is an objective, temporary tax/subsidy options and more flexible regulatory approaches may also constitute appropriate alternatives.

4.1.4. Significantly raises the costs of entry or exit

Expected benefits of these provisions

34. One common example of regulations that raise entry costs is that of regulations that impose more stringent product testing standards. Another example is the imposition of minimum capital requirements or, more generally, requirements to demonstrate "financial capacity". Regulations that raise exit costs include those that set more stringent cleanup requirements in relation to former industrial sites. These forms of regulation may be used to pursue several regulatory objectives. These include consumer and environmental protection goals. In many cases, there may be few feasible alternative means of pursuing these objectives. For this reason, governments have sometimes acted to minimise the competitive impacts of such provisions by providing targeted exemptions or assistance to suppliers to help bring them into compliance. For example, low-volume car manufacturers are often exempted from aspects of vehicle testing regulations, or are subject to less onerous testing protocols.

Nature and extent of anti-competitive impacts

35. Regulations that raise the costs of entry to, or exit from, a market will tend to reduce the number of participants in that market. Higher gross revenues are required, in such circumstances, in order to achieve a given rate of return on entry. Moreover, higher exit costs will increase the risks involved in entry. Consequently, there is a high risk that less vigorous competition will be observed in the market.

Indications for use and potential policy alternatives

36. Regulations that set strict product-testing standards are likely to be justified where significant risks of serious consumer harms associated with the use of the product exist. Similarly, other regulations that raise entry costs by requiring certain insurances or the demonstration of financial capacity are likely to be justifiable where substantial financial risks to consumers may result from business failure, incompetence or fraud on the part of suppliers.

37. In some circumstances alternatives such as greater information provision or product disclosure requirements can be considered. In other cases, regulation may be required even though it raises entry costs and the focus should be on minimising anti-competitive potential by ensuring that the requirements set are the minimum necessary to achieve an adequate degree of consumer protection.

4.1.5. Restrictions on the inter-state (or intra-national) flow of goods, services, capital and labour

Expected benefits of these provisions

38. Many regulations have historically limited the flow of goods, services, capital and/or labour across jurisdictional boundaries. These limitations can be considered to be a specific subset of the general category of "restrictions on entry" discussed above. Regulatory restrictions on the flow of goods and services, or capital and labour, have often been implemented as a tool of regional policy. That is, governments have implemented these restrictions in an attempt to maintain or enhance the viability of regional economies. Other related goals that may be pursued via such policies (particularly when considered at the national level) are those of self-sufficiency or the protection of "national champions", whether for prestige or other reasons.

39. A particular context in which such protective restrictions may be proposed is that of "infant industries"[7]. That is, these restrictions may be promoted as being a temporary necessity in order to ensure the development of local industry in the context of relative under-development. However, the risk is that such "temporary" protections develop into quasi-permanent arrangements due to substantial lobbying by the local suppliers that benefit from the continued existence of the protections.

Nature and extent of anti-competitive impacts

40. Limitations on the geographical flow of goods and services, imposed where trade would otherwise be technically and economically feasible, have the effect of artificially reducing the effective size of the market for the good or service in question. By reducing market size, several potential anti-competitive effects arise. First, the probability that the degree of concentration in the market may rise to a point at which market power can be exercised by producers necessarily rises. Second, a smaller and more isolated market is likely to be associated with lower levels of innovation, product differentiation and the like. Thus, consumers are likely to be less well served. It is also likely that the rate of entry may be slowed, to the extent that potential new entrants face greater difficulties in establishing themselves in what has become, due to regulatory factors, geographically and economically smaller markets.

Indications for use and potential policy alternatives

41. In recent years, there has been increasing recognition of the potential harms to competition of restricting flows of goods, services, capital and labour. Indeed, in the European context, the free movement of goods, services, capital and labour have been described as "the four freedoms" which constitute a pillar of the Single Market Program, pursued since 1992.

42. In general, there are relatively few contexts in which such restrictions are likely to pass a benefit/cost test. Therefore, policymakers should adopt the generally sceptical view of proposed regulation that includes such restrictions. Where restrictions are imposed they should be assessed in terms of a number of factors including whether there is a clear link between the restriction in question and the achievement of a specific, identified public policy goal, whether the restrictions are no more restrictive than necessary for achievement of the goal, whether a rational analysis supports the probability that the policy goal will be achieved by means of the restriction and whether the restrictions are restricted to a definite and limited time span via explicit regulatory provisions.

4.2 Limits on the ability of suppliers to compete

43. The existence of large number of competitors is not a sufficient condition for the development of strongly competitive markets. There must also be strong incentives for competition between suppliers of goods and services. Regulation, in the form of the general competition law, has a significant role to play by outlawing a range of anti-competitive conduct (e.g. price-fixing, market sharing). However, regulation

[7] Infant industries are industries that may not be strong enough to survive open competition.

can also substantially reduce the ability of suppliers to compete. Most obviously, such restrictions can take the form of price controls. Alternatively, regulation may restrict the way that products can be sold or advertised or it may set product standards that are difficult for some suppliers to meet. A wide range of other regulations restricting the ability to compete has also been observed, including restrictions on profits, or market share, production quotas and the like.

4.2.1. Controls on the prices at which goods or services are sold

Expected benefits of these provisions

44. Maximum price regulations are frequently introduced as a necessary corollary of restrictions on entry to the market. For example, entry to the taxi market is highly restricted in most countries, leading to substantial excess demand for taxi services developing over time. In a market characterised by significant excess demand, substantial price increases would be expected to result. In this context, maximum price regulation is generally introduced with the intention of protecting consumers. Conversely, when minimum price regulation has been used, it has sometimes been a response to extremely vigorous price competition and concerns that "predatory pricing"[8] has been employed. In these cases, minimum price regulation is generally seen as a means of protecting small producers, or local producers, and/or less efficient producers from "unfair" competition.

Nature and extent of anti-competitive impacts

45. Controls on the prices at which goods are sold directly impede the operation of normal market forces and disciplines. When minimum prices are set, lowest cost suppliers are prevented from winning market share by providing better value offerings to consumers. Similarly, where maximum prices exist, incentives to innovate by providing new and/or high-quality products can be substantially reduced. Again, the dynamic ability of the market to respond to consumer preferences is substantially limited. Minimum price laws may also allow inefficient producers to remain in the market, thus preventing the redeployment of resources to alternative, more productive uses. In this way price controls reduce economic efficiency.

Indications for use and potential policy alternatives

46. Price regulation rarely constitutes the most effective or efficient means of achieving the above objectives. For example, in the case of the taxi market, a better means of protecting consumers is to address the restrictions on supply in the market. In the case of "predatory pricing" concerns, the use of the general competition law is also likely to be a superior alternative. Thus, regulation proposing to control prices should be subject to especially rigorous scrutiny.

4.2.2. Restrictions on advertising and marketing

Expected benefits of these provisions

47. Regulations sometimes restrict the ability to advertise or market goods and services. Such regulations often exist to prevent false or misleading advertising, while at the same time recognizing the positive role that advertising and marketing play in conveying information to consumers and helping them to make choices in the marketplace. Prohibition of misleading or deceptive advertising ensures that the choices that a competitive market creates will not be undermined by deception and maintains consumer

[8] Predatory pricing occurs when a supplier temporarily sets prices that are substantially below its costs with an expectation that other suppliers will then exit or change their behaviour. The supplier would then later recoup its lost profits.

confidence in the market. Certain ancillary restrictions, such as requirements that sellers possess competent and reliable substantiation for claims that they make, are necessary to effectively prevent deception, especially in cases where evidence of falsity may be difficult to obtain. In a few cases, where products or services may be harmful under certain circumstances, general disclosure requirements are helpful in order to educate consumers about the potential harm. Common examples include the disclosure of the linkage between cigarette smoking and cancer in tobacco advertisements and detailed disclosures that accompany pharmaceutical advertising in most countries that permit such advertising. While some have advocated advertising restrictions as an indirect means of seeking to limit consumption of goods or services that are deemed to have a socially negative value or which are subject to excess consumption, these restrictions have generally been ineffective in reducing the use of these products. In such cases, advertising restrictions simply reduce information available to consumers, reduce choice, reduce competition, and increase price and profits.

48. At other times, advertising targeting certain groups (e.g. children) may be restricted in recognition that advertising may be perceived differently by members of those groups than by others. A common approach is to judge deception through the eyes of members of the group to whom advertising is directed. In some cases, such as advertising of tobacco and alcohol directed towards children, especially where the sale of alcohol or tobacco to minors is prohibited, the harm to public health may completely outweigh any consumer benefit to advertising, and such advertising may be prohibited altogether. Restrictions of this nature, when circumscribed to ensure they are not overly broad, can have significant social benefits.

Nature and extent of anti-competitive impacts

49. In many cases, advertising and marketing restrictions are too broad and have the impact of unduly restricting competition. Restrictions on advertising and marketing are likely to be particularly onerous in their impact on potential entrants to markets, as they restrict substantially an entrant's ability to inform potential customers of their presence in the market and of the nature and quality of the goods and services that they are able to offer.

50. A particular area of concern is that of restrictions on comparative advertising, particularly in relation to the making of price comparisons. As price is a substantial element in the consumer choice equation, restrictions on the ability of consumers to inform themselves of relative pricing at minimal cost have the clear potential to reduce market efficiency.

51. Many sectors have successfully shielded themselves from competition by restrictions on advertising and marketing. This has particularly been the case with the liberal professions. With regulation of the professions traditionally resting with members of the profession themselves, members of these sectors have claimed that advertising can be seen as "unethical" and that members of the professions are motivated by altruism in large part, with financial gain a secondary consideration. These claims have not withstood scrutiny. Studies have shown that restrictions on the commercial practices of professions do little or nothing to protect consumers, but act to significantly reduce consumer choice and access, and significantly increase costs.

Indications for use and potential policy alternatives

52. General consumer protection laws almost invariably contain prohibitions on misleading and deceptive advertising practices. These promote efficient markets and are effectively pro-competitive. There may also be limited circumstances in which additional restrictions are justified in relation to specific goods or services. However, these need to be carefully considered on benefit/cost grounds. The potential for advertising restrictions to contribute to the continuation of information asymmetry problems that

disadvantage consumers and reduce economic efficiency must also be weighed. Alternative policy tools where there is a need to discourage "over-consumption" include information campaigns and consumption taxes. These constitute more direct means of treating the identified policy issue.

4.2.3. Setting product standards that provide an advantage to some suppliers over others or that are above the level that many fully informed customers would choose

Expected benefits of these provisions

53. Minimum product standards are usually set to achieve consumer protection objectives in the presence of market failures, notably information asymmetry. However, if set at an excessively high level, they can reduce consumer welfare by preventing consumers from choosing a cheaper (but lower quality) market offering. Thus, product quality standards should not be set at a level above that which is required to ensure a necessary minimum level of consumer safety. Emission standards in relation to productive processes clearly aim to pursue broad social objectives. Such objectives are clearly legitimate goals of regulation. However, the potential for anti-competitive impacts identified above highlights the need for a careful balance between regulatory costs and benefits in this area as well.

Nature and extent of anti-competitive impacts

54. Regulations setting standards that are significantly different from current practices can significantly restrict the ability of suppliers in the market to compete. A common example is environmental regulations that set limits on the allowable levels of emissions of various kinds of toxic substances. While such regulations are often entirely appropriate and necessary as a means of providing highly valued protections to public health and amenity, they can be set at levels that unfairly advantage small numbers of incumbent suppliers that have proprietary access to certain kinds of technologies.

55. Another area in which standard setting can have significant anti-competitive impact is setting minimum quality standards for particular product types. Again, there can be sound regulatory objectives underlying such standard setting, commonly protection of consumers from risks associated with the use of the product. However, where the standard is set at a level that is very much higher than current market practice, some market players may find it difficult or impossible to meet the standard. This may occur, for example, where only certain productive technologies (which may be subject to patient protection) are capable of meeting the new minimum quality standards.

56. Where other suppliers are unable, technologically, to meet the legislative requirement, significant exit from the industry may result and important anti-competitive impacts may occur. Where the only feasible means of reaching the standards are patent protected, patent holders may have incentives to refuse licences to potential competitors, in order to obtain competitive advantages in the market. Alternatively, even where patent protection is not an issue, smaller suppliers, or those that are less well resourced, may not be able to afford the major capital investment that may be required in order to install new technology to enable them to meet new product standards.

Indications for use and potential policy alternatives

57. Movements in regulatory standards relating to products, or productive processes, tend to occur in incremental steps over time, reflecting progressive changes in social preferences and in the wealth of the society. Very substantial one-off changes in the standards are far more likely to have anti-competitive impacts than are more moderate changes.

58. It may often be the case that alternative instruments can achieve the benefits sought through the implementation of minimum standards. For example, when minimum standards are pursued for consumer

protection reasons, it may be possible to act instead by providing information directly to consumers regarding product risks or by requiring disclosure of certain product characteristics. Where major changes in emissions standards are contemplated, governments have sometimes sought to minimise possible anti-competitive impact by providing financial, technical or other assistance to smaller suppliers in particular, to make them better able to meet the proposed new requirements.

4.2.4. Raising the costs of some suppliers relative to others

Expected benefits of these provisions

59. Perhaps the most common form of regulation that raises the costs of some suppliers relative to others is that which includes "grandfather clauses". These are arrangements that require new entrants to the industry to comply with the new, higher standards, while incumbents continue to be subjected to the lower, pre-existing standards. Several arguments are made in favour of the need to impose grandfather clauses in particular circumstances. In relation to occupational qualifications, it is often argued that the extensive practical experience of long established practitioners is an adequate substitute for a higher level of formal qualification. In relation to productive technologies, it may be argued that adequate time must be granted to amortise the sunk costs of investments made in plant that complied with relevant environmental and other standards at the time that it was commissioned.

Nature and extent of anti-competitive impacts

60. "Grandfather clauses" have substantial potential to distort competitive relations within the industry by raising costs to some suppliers (i.e. new entrants to the market, or those implementing new processes) to a substantially greater extent than others. This is likely to impede entry and thereby reduce innovation as well as the intensity of competitive pressure in the market.

Indications for use and potential policy alternatives

61. The anti-competitive impact of grandfather clauses can be minimised by ensuring that they are time-limited, rather than permanent, and that the duration of the exemption given is strictly proportionate to the underlying rationale for its being granted in the first place. More generally, however, a sceptical approach needs to be taken to arguments in favour of the need for grandfather clauses, as they are frequently a reflection of attempts to defend vested interests from potential competition.

4.3 Reductions in the incentives for suppliers to compete vigorously

62. The previous section highlights the ability of regulation to reduce the *opportunities* for suppliers to compete. Regulation can also act to reduce the *incentives* for competition. In general, suppliers of a product or service who can coordinate amongst themselves to share a given market are able collectively to maximise potential monopoly profits. Thus, regulation that facilitates or encourages cooperation between producers will reduce incentives for vigorous competition. This is most likely to occur where regulation facilitates the sharing of information on market sensitive variables such as prices, costs and outputs. Moreover, regulation that reduces the effective ability of customers to switch between competing suppliers also reduces competitive pressures. The danger of regulation developing with this effect is greatest when producer groups have a significant role in the development and implementation of regulation.

4.3.1. Self-regulation and Co-regulation

Expected benefits of these provisions

63. Governments may choose to take full responsibility for designing and implementating a regulatory structure or, alternatively, they may choose to involve an industry or professional association in aspects of the design or implementation of the regulatory structure. Where an industry association takes full responsibility for regulating the conduct of its members, without government legislative backing (often at the urging of government) the term "self-regulation" is used. However, where government provides legislative backing to rules that are either developed by the industry/professional association, or else jointly developed with government, then the results can be considered to be an example of "co-regulation".

64. Co-regulatory structures can have substantial benefits for governments seeking to regulate behaviour, particularly in the context of an industry or profession that has not previously been subject to regulation. The involvement of the industry or professional association can tend to lend credibility to the regulatory structure in the eyes of those who will be regulated. This credibility derives in part from the fact that the government is seen as utilising the high level of specific expertise and understanding of the industry in question that the practitioners undoubtedly possess. This can be attractive from the point of view of government, avoiding the necessity of developing internally a high level of specific expertise in issues relating to the market involved and the qualifications and duties of the relevant practitioners.

65. Governments may be able to develop co-regulatory structures at substantially lower cost than would be required to develop a fully government-based solution. This may occur to the extent that members of the profession can be persuaded to constitute regulatory and disciplinary bodies that undertake important aspects of the regulatory function but receive limited, if any, funding from government.

Nature and extent of anti-competitive impacts

66. Regulation that is established by those being regulated can yield substantial benefits from ensuring that technical standards are appropriate and that standards advance with technology. However, there is a strong risk that rules developed by industry or professional associations will have anti-competitive impacts. In many cases, these will be unanticipated effects arising from attempts to pursue legitimate policy goals. For example, strict qualifications requirements may be introduced for consumer protection reasons but may (especially where incumbent practitioners are exempted) indirectly reduce entry to the market. Some "ethics based" rules, such as restrictions on advertising prices, may reduce the ability of producers to compete. Thus, there may be an intention to benefit the members of the profession or industry, with public interest arguments being used to cloak the underlying purpose of the regulation.

67. The fundamental requirement when conducting competition assessment in these circumstances is to assess the regulation according to its expected effects, rather than focusing solely on its stated purpose or on judgements about the motives of its proponents. When evaluating barriers to competition, a careful analytical approach that considers costs and benefits to consumers and relies on empirical evidence is appropriate. Three questions can assist in the process: (1) What specific harm to consumers is the barrier designed to address?; (2) Is the proposed restriction appropriately tailored to address that harm?; and (3) Does the consumer harm that the restriction seeks to prevent exceed the consumer loss from the restriction on competition? The third question is an essential part of the analysis in evaluating self-regulatory or co-regulatory restrictions.

68. Concerns regarding the development of anti-competitive regulations are likely to be particularly significant where the industry/professional association in question has a dominant role in developing the rules of conduct that must be followed. For example, rules governing the operation of the legal profession have historically banned "price cutting", "touting for business", incorporation by specialist advocates or employment of specialist advocates, as well as most forms of advertising. In many cases, such restrictions have been removed following reforms that have led to the government taking a greater role in the regulation of the profession.

Indications for use and potential policy alternatives

69. A successful co-regulatory structure requires the existence of an industry/professional association with wide membership among the regulated group. The association must be seen by its members as having a relatively high level of prestige if it is to be able to impose effective sanctions (including exclusion from the association) on those who do not comply with regulatory requirements. The existence of effective sanctions is, in turn, necessary to convince consumers of the credibility of the regulatory structure.

70. Government should act to prevent attempts by the industry/professional association to use co-regulatory powers in an anti-competitive manner. This may include ensuring that the relevant Minister has the right to approve, or refuse to approve, codes of conduct and, as required, to substitute government regulations should the industry body continue to propose unacceptable versions.

4.3.2. Requirements to publish information on company prices, outputs or sales

Expected benefits of these provisions

71. Regulation requiring the publication of information such as price and output levels is usually adopted as a means of reducing consumer search costs by making this information more readily available. In some circumstances, reducing transactions costs in this way can improve the efficiency of markets by increasing the actual degree of understanding of market offers by consumers in the marketplace.

Nature and extent of anti-competitive impacts

72. Regulations that require market participants to publish information on their prices or output levels can significantly assist in the formation of cartels, since a key requirement for cartel operation is for participants in the cartel to monitor effectively their competitors' (or co-conspirators') market behaviour. These possible anti-competitive impacts are evidently more likely to arise where there are fewer participants in the market, where entry barriers are high and where products are relatively undifferentiated.

73. Publication of price information is also more likely to have an anti-competitive effect in industries in which it is common practice to offer or negotiate private discounts on advertised, or "recommended" prices. This is so because competitors would otherwise have substantial difficulty in obtaining information on the actual prices paid to other competing suppliers. In a context in which actual price information is required to be published, cartel members are able to identify circumstances in which other members are not maintaining the "agreed" price or quantity.

Indications for use and potential policy alternatives

74. As suggested above, concerns about possible cartel behaviour are unlikely to be relevant in situations in which there are large numbers of competitors and/or relatively low barriers to entry. In these circumstances, the positive effects of such publication requirements in reducing markets search costs may well justify their use. However, in more concentrated markets, such requirements are more likely to have a net negative impact. In markets with few suppliers and a standardized product, the cost of searching among different suppliers may be smaller than when many suppliers are present while the risks of cartel agreements are higher. Thus, the potential benefits of such publication requirements are commensurately lower.

75. If publishing price or output information is viewed as supportive of cartel formation, alternatives exist that are less supportive of cartels. When the information is gathered primarily for government policy making, there may be no need to publish it at all. When the purpose is to aid consumers or provide general statistics, aggregate statistics are less supportive of cartels than company-specific statistics and historical

statistics are less supportive than contemporaneous information. Statistics aggregated across companies will not help cartel members to identify a supplier that is violating the cartel agreement, while company-specific statistics could clearly identify a company that deviated from a cartel agreement over pricing or quantity. Historical statistics provide less useful information for cartels because cartels often need to share current information to decide how allocate output and set price targets and historical information would not help them substantially in this task.

4.3.3. Exemptions from general competition laws

Expected benefits of these provisions

76. In many countries, particular economic sectors benefit from exemptions from the general competition law. In some cases, these sectors are subject to their own, sector-specific competition laws. In other cases, there may be no restrictions on anti-competitive conduct undertaken in these sectors.

77. Numerous rationales for such exemptions have been advanced. In some cases, suppliers are permitted to cooperate in order to improve their ability to establish themselves and compete in export markets. In other cases, a market characterised by atomistic producers may be permitted to cooperate due to the existence of monopsonistic power on the part of the purchasers of its products and the consequent desire by government to create a degree of countervailing power (examples include a number agricultural commodities). Many relatively highly regulated companies have also been exempted from general competition law. In these cases, the view appears to be that the sector-specific regulatory structure constitutes an appropriate substitute for the general competition law.

Nature and extent of anti-competitive impacts

78. Where a substantial derogation from the general application of competition law exists there is a clear risk of cartels, pricing abuses and anticompetitive mergers resulting. Moreover, there is obviously a significant potential for economic distortions to arise, as different sectors are subject to what may be substantially different regulatory environments. Such distortions can have a major negative impact on economic welfare by distorting consumer decisions as to which products and services they purchase.

Indications for use and potential policy alternatives

79. The OECD has generally argued that exemptions from the general competition law should be minimised or eliminated:

> *As a general reform strategy, governments should* ***expand the scope and effectiveness of competition policy.*** *The scope and effectiveness of competition law and competition authorities should be reviewed, and strengthened where necessary. Exemptions to competition law should be eliminated, absent evidence of compelling public interests that cannot be served in better ways.*

80. Where a specific rationale for the continued existence of exemptions has been identified, consideration should be given to the means by which its scope can be minimised. For example, a legislated monopoly requiring all producers of a particular commodity to sell to a particular, licensed export marketer may be an inferior substitute to a system that allows producers to engage in cooperative export selling arrangements, but does not compel them to do so.

4.3.4. Reducing the mobility of customers by increasing the costs of changing suppliers

Expected benefits of these provisions

81. "Switching costs" can be defined as the costs borne by a consumer in changing suppliers of a product or service.

Examples of switching costs include:

- The use of long-term contracts that "lock in" consumers for lengthy periods and impose significant financial penalties in the event that they choose to change suppliers prior to the end of the period; and

- The absence of telephone number portability, which can make switching service providers relatively unattractive by imposing convenience/administrative costs on the consumer.

82. Legislative provisions for switching costs to be charged may reflect the existence of real and substantial costs, borne by suppliers, in the event of consumer switching occurring. To this extent, provisions allowing for some switching costs to be charged can be consistent with the application of equitable contract terms. For example, penalties associated with early termination of a fixed-term contract may reflect product "bundling" and the need for the supplier to recover the costs of capital items (e.g. mobile phone handsets) for which only partial payment has been received. Alternatively, some switching costs may be established in an attempt to reduce transactions costs.

Nature and extent of anti-competitive impacts

83. By raising the costs of changing suppliers, switching costs can substantially reduce the ability of suppliers to compete. Switching costs are likely to be of considerable importance in the context of newly competitive industries, where they can frequently constitute an important barrier to the reduction, over time, of the incumbent supplier's strong position in the marketplace. An example is given by the Nordic electricity markets, which demonstrate substantially different levels of consumer switching activity in different countries. Review of the regulatory arrangements in place indicates the extent to which these observed differences in the level of switching activity are highly correlated with the nature and extent of various switching costs applicable in each country.

84. In Finland, distribution system operators can charge fees if the customer changes supplier more than once a year. In Finland, Sweden and Norway a consumer can enter into a new supply contract orally or electronically, whereas in Denmark the consumer must physically sign the contract.

85. Where significant real costs to suppliers are associated with switching, allowing suppliers to pass these costs on to consumers may be unavoidable. However, in the case of switching costs imposed in an attempt to reduce transactions costs, consideration should be given to whether the reduction in transactions costs that may result from introducing the switching cost justifies its likely anti-competitive impact in reducing the actual incidence of switching.

86. The above is a case in which switching costs are actually set out in regulation. However, another possibility is that regulation may not explicitly impose switching costs but, rather, may fail to take account of either existing switching costs in the industry or those the incumbent suppliers may seek to impose in a newly competitive industry context. The objective of achieving enhanced competition may be substantially compromised if regulation is silent on these issues and allows new or increased switching costs to be imposed by suppliers over time.

Indications for use and potential policy alternatives

87. Particularly in the case of newly restructured industries, characterised by a dominant incumbent facing competition for the first time from new entrants, ensuring that switching costs remain low is a necessary condition for the development of effective competition. While other conditions must also be in place (e.g. access on fair terms to a monopoly network) the switching costs issue remains fundamental to the competitive outcome.

88. It follows that, in reviewing proposed regulation that seeks to implement pro-competitive reform within an industry, any provisions explicitly allowing for the imposition of switching costs should receive careful scrutiny and should be regarded as acceptable only where there are strong arguments for their use. These might exist if it can be shown that there are significant costs associated with the particular activities that suppliers are required to undertake as part of the switching process. However, such circumstances are likely to be rare. Moreover, even in such cases, it may be that the pro-competitive impact of reducing or eliminating the switching costs is sufficiently large that the regulator will wish to prevent suppliers from explicitly recovering such switching costs from consumers.

89. As well, consideration is necessary of the potential for new or increased switching costs to be imposed by current incumbents in response to new competitive pressures. Where there is a clear risk of switching costs being imposed, the inclusion of provisions in the regulatory structure that will limit or prohibit the use of such devices may be required.

5. Proportionality in undertaking competition impact assessments

90. The checklist proposed in this paper provides a reliable basis for identifying regulations that will give rise to an anti-competitive impact. However, the relative importance of different anti-competitive impacts varies substantially. The extent of the competitive effects analysis to be undertaken should be commensurate with an initial assessment of the likely extent of the anti-competitive impact identified. Conducting extensive competitive effects assessment is costly and such costs should only be incurred where an initial assessment indicates the potential costs of the anti-competitive aspects of a regulatory proposal are large enough to justify such an assessment.

91. A key contextual factor is the nature of the current competitive environment in the industries that are being regulated. Competition concerns will generally be less pressing where industries are vigorously competitive, characterised by large numbers of competing suppliers, significant rates of entry and exit and high levels of product and service innovation. Conversely, in relatively static markets, characterised by significant levels of concentration and limited entry, anti-competitive regulatory impacts are likely to be more important.

92. In assessing the likely importance of anti-competitive regulatory provisions, the focus should be on the likely extent of the regulatory proposal's impact in relation to the main determinants of the strength of competitive pressures in a market. In particular:

- Is it likely that the impact on the number of suppliers in the market will be large enough to reduce the number of market participants to a level at which coordination, or more extensive cartel-like behaviour, becomes feasible?

- Is the proposed regulation likely to have a significant impact on the dynamic aspects of competitive behaviour in the market, for example by significantly reducing entry or incentives for innovation?

- Is the proposed regulation likely to limit the ability of, or incentives for, suppliers to compete vigorously?

93. In producing an assessment, a clear view needs to be developed of the nature and extent of the market under consideration. A primary issue is the determination of the geographical dimension of the market. Is it local, regional, national, or international? Second, what products constitute the market? To what extent is there substitutability between the product or service that would be regulated and other products and services? Is the market a relatively static market, or is it characterised by high rates of technological change and the frequent implementation of new product types?

6. A Simplified Procedure for Completing a Full Competition Assessment

94. This section outlines an approach for performing competition assessments within the broader framework of RIA, to provide the analytical framework for competition assessments. As there are various ways that competition assessment could be incorporated within the RIA process, this is only one of various approaches that could be adopted. A full assessment would generally be conducted only if an initial assessment (based on the Competition Checklist) identified the potential for harm to the competitive process.

95. The first step in conducting a full competition assessment is to identify from the broader RIA process the underlying objective of the new regulation and ensure its appropriateness. Second, existing restrictions on competition should be identified and analysed as a precursor to the conduct of competition policy analysis of the new regulatory proposal. This necessarily entails the process of "market definition", whereby the relevant market is identified by reference to the degree of substitutability between related products, including the determination of the relevant geographic market. Third, the competitive effects of alternative policy options should be assessed and compared.

6.1 Identifying Competitive Effects

96. Regulations that restrict competition in order to achieve a public policy objective should first be assessed to ensure that they constitute the least restrictive means of achieving that objective. The expected degree of restriction on competition can be measured by posing the following set of questions and conducting further analysis wherever there is a "yes" response:

6.1.1 Will the proposed regulation affect competition between incumbent businesses?

97. Will the proposed regulation affect different incumbent suppliers differently and will it, as a consequence, alter competitive relations between these suppliers in a way that would reduce the intensity of competition in the market as a whole?

6.1.2 Would the regulation be likely to discourage the entry of new businesses?

98. Will the proposed regulation restrict entry for all types of new businesses, or for particular types of businesses? What is the likely degree of this restriction and is it likely to significantly reduce competitive pressures in the industry in the longer term?

6.1.3 Would the regulation have a significant impact on prices or production?

99. Will the regulation raise prices by imposing new costs on producers? Will it facilitate information exchange among producers, raising the prospect of collusion and increasing prices? Is it likely to lead to the exit of some incumbent suppliers, reducing output and increasing prices?

6.1.4 Would the regulation be likely to affect the quality and variety of goods and services in the market?

100. Does the regulation include minimum standards requirements that will reduce the range of price/quality combinations available in the market? Is it likely to reduce product variety by restricting the entry of new suppliers?

6.1.5 Would the regulation be likely to have a negative effect on innovation?

101. Innovation, and therefore responsiveness to consumer needs, can be restricted by regulation in various ways. Regulation may restrict entry by new suppliers, or it may restrict advertising of new products and so diminish pressures on incumbents to innovate. Restrictions on the movement of goods and/or services over borders may reduce the entry of innovative products originating in other markets.

6.1.6 Is the regulation likely to limit market growth?

102. Regulation may have a negative impact on market growth, if it increases costs to all producers or limits the possibility of entry by new suppliers.

6.1.7 Would the regulation be likely to have a materia effect on related markets?

103. Reductions in competition in a given market may also have anti-competitive effects in upstream markets (those that supply inputs to the market in question), or in downstream markets (those in respect of which the product of the market in question constitutes an input, or intermediate good).

6.1.8 What is the expected total impact of the regulation?

104. Where any of the above questions have been answered in the affirmative, a summary of the likely effects of the regulation on competition should be prepared, highlighting any impacts on prices, production, product variety and quality, and efficiency and innovation. These impacts should be summarised for both the primary market and for relevant related markets.

6.1.9 What are the available alternatives to the proposed regulation?

105. As indicated at the outset, the regulation or other policy tool that is able to achieve the objective in the manner least restrictive of competition should generally be employed. Following the completion of competition assessments of feasible alternative policy options, the effects of each option should be compared. Regulators should be satisfied that the policy alternative that is least restrictive of competition has been chosen, or that other benefits to society justify the choice of an alternative that is more restrictive of competition.

7. Integrating the outcomes

106. Integrating competition assessment into RIA can be particularly valuable in improving the dynamic component of the analysis. In rapidly changing economic and social contexts, the dynamic aspects of a regulation's likely impact can easily constitute the key determinant of its overall effect, considered over the course of the entire effective life of the regulation.

107. Only a minority of potential regulations is likely to have substantial anti-competitive impacts. However, where competition assessment identifies significant potential for a weakening of competition in the affected industry or related industries, the key elements of the regulatory design should be reconsidered

in a comparative context in which alternative means of achieving the regulatory objective that are less restrictive of competition are identified and assessed.

108. Where such alternatives cannot be identified, the benefits and costs of the anti-competitive regulation must be compared systematically. Only if the adoption of the anti-competitive regulatory approach would yield net benefits, taking into account the costs of the anti-competitive impact identified – should the analysis conclude that the regulation is justified[9].

[9] This approach is already explicitly in use in Australia. The "Guiding Legislative Principle", adopted under the National Competition Policy agreements states that legislation that restricts competition should not be adopted unless it can be shown both that the benefits of the restriction to the community as a whole outweigh the costs **and** that the objectives of the regulation cannot be achieved by any other means that is less restrictive of competition. See Competition Principles Agreement, clause 5 (1).