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CONFERENCE THEME

**REGULATORY NON-DISCRIMINATION, PROMOTION OF COMPETITION AND
PROTECTION OF INVESTORS**

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Note: This “keynote” paper is largely a compilation of widely published work in the field of regulatory governance and lessons learned coupled with the authors’ own experiences in working with many utility and industry regulators worldwide. The keynote paper is prepared expressly for the purpose of provoking a thought process and dialogue in regulatory reform among the delegates at the Fifth AFUR Annual Conference in Accra, Ghana.

1. Introduction

The theme of the Fifth AFUR Annual Conference has three key phrases – regulatory non-discrimination, promotion of competition, and protection of investors. Embedded in these concepts is the belief that they together, in some optimal combination, achieve an important goal that we are all striving for as we move forward in guiding economic development. From the perspective of governments and regulators this goal is to provide the consumers an acceptable to high quality of service at an affordable price. Much of the discussion in this paper, therefore, centers around this goal and the role of various models used to implement regulatory non-discrimination, promotion of competition, and investor protection. The paper does not recommend or prescribe an approach, as that will vary from situation to situation. Rather, it compiles a summary of the experience around the world and draws inferences that may offer important lessons as the process moves forward in Africa. The impressive delegates at this Conference bring with them hands-on expertise and insights into the challenges facing their respective countries and societies. We hope, that the discussion in this paper will promote an active dialogue and spark a creative thought process among the delegates to address these rather inter-related and complex approaches.

Throughout the world, countries after countries are striving to provide a better and better quality of life to their urban and rural citizens. This means sustained economic growth and ever increasing per capita income so that the citizens can live a richer and higher quality life. Sustained growth is possible only when investments flow in continuously into the developing economies from both domestic and foreign sources. In order to make this flow of investment un-hindered, the investor must feel that the investment is protected and there is ample opportunity to make profit. This is not new to any of us. It looks so simple, still we find that it is very difficult to achieve. Governments, regulators, planners, and development experts all over the world know this magic formula but, in reality, we find that it is not working. **“What is missing?”** We will come back to this **“missing item”** later. First, let us proceed with the discussion on how to attract investment and provide adequate protection to the investors that they often require,

In other words, the investor has faith in policies and regulations that his investment is safe and will make profit. In this regard, the governments and the regulators cannot lose sight of the ultimate objective of **“customer service and satisfaction”**. At no stage, can we afford to overlook this right of customers if we are to progress on a sustainable approach to economic development.

How can we ensure the investors' faith? We can do so by providing a regulatory regime, which adheres to the following basic principles:

1. Transparency
2. Non-discrimination,
3. Level Playing Competition
4. Investor Protection

In this context, it is important to note that despite the same goals, regulatory models to achieve investor confidence are not transferrable from one setting to another. In fact, experience indicates that tailor-made models based on indigenous social, political, economic, and cultural setting are needed in order for them to be successful. Many of us may feel that the most successful regulation in another country (for example, the deregulation of many industries in one of the most developed countries, viz., USA) may not be suited to my country. While transparency is a minimum condition for regulatory regimes in all countries, not all of them may be prepared for non-discrimination. The existing domestic industry may need protection. If they are not protected, the existing work force may become unemployed. Further, the domestic industry closure in a country may lead to an erosion of the purchasing capacity of its citizens. Those with little or no means of income will not be able to afford better products and services. Therefore, it may be pragmatic from a policy standpoint to ensure that the growth in personal income and economy must go hand in hand with the level of non-discrimination that can be sustained. In spite of encouraging transparency in regulatory regimes, countries with political instability may not be perceived to be safe environments for either domestic or foreign investment.

This makes me believe that the pace of regulatory reforms having features of transparency, non-discrimination, and level-playing competition must be in harmony with present and prospective purchasing capacity of the customers/citizens, political environment, social and cultural setting, existing infrastructure conditions, and maturity of the domestic industry. Therefore, each country must adopt its own pace of regulatory reform. The customers/citizens must be involved in the process at each and every stage of reforms. The regulators have the

burden to educate the customers on the need for minimum reforms to attract investment. Otherwise, it will become a “Chicken and Egg” problem.

The customers may have to initially bear the pains of reforms, as has been the case in many countries. However, the customers may mitigate this pain, by increasing their purchasing power as new investments will provide ample opportunities and competition will lead to more efficiency and quality and a reduction in price for consumer products and services. This will require efforts from the customers to acquire new skills to reap the benefits of the new economic bonanza. One of the best examples of this is the post-World War II industrial revolution in the U.S. More recently; the best examples are the economies of India and China, neither of which practices full regulatory non-discrimination policies. Nonetheless, their story is a reality and not a fairy- tale.

This is the “missing item”, i.e., the welfare of the customer/citizen and the opportunity for increasing their purchasing power. Thus, regulators must ensure that the regulated industry provides ample opportunity to local employees and workforce capacity development becomes a cornerstone of both domestic and foreign investors in a country. One of the main objections to non-discrimination and opening of markets is the fear that foreign investors will relocate jobs outside of the countries where they are investing through outsourcing. While there are cases in point where such objections are valid, regulators can fashion appropriate remedies that will protect local jobs while encouraging foreign investments.

This reminds me what Henry Ford of Ford Motor Company did a long time back in the U.S. He increased the salaries of his employees with the hope that his employees themselves would, with increased salaries, buy his motorcars – a rather revolutionary approach at the time. This way he generated an instant market for the Ford automobiles. He also created excellent ambassadors for his product. Both, Mr. Ford and his employees gained and the market for automobiles took off making Ford the leader in the automobile industry for decades.

Let us come back to the three focus areas of this conference. These are:

1. Non-discrimination in Regulatory Regimes
2. Level Playing Field – Fair Competition
3. Investor Protection

We have not left out the “transparency”; it is integrated with “non-discrimination”. In the same manner, we would propose that customer/citizen’s purchasing power be integrated with “investor protection”.

2. The Stakeholders in the Regulatory System

It is very important to understand who the stakeholders are and what are their roles in the regulatory process. The following are the key stakeholders in any regulatory process:

1. Government/Legislature
2. Regulators
3. Regulated Industry and Investors
4. Customers/Citizens

The regulator has the burden to ensure that all the stakeholders are a party to the process of making regulations. This will ensure confidence in the regulation and result in a buy-in and better compliance. It will also avoid/reduce disputes and litigation once the regulation comes into effect. This area has been adequately addressed by many regulators worldwide and a general consensus has emerged on the role of the stakeholders.

3. Non-discrimination in Regulatory Regime

Transparency in regulatory governance is the hallmark of the non-discrimination. If there is no transparency, there is no “non-discrimination”.

Transparency

Transparency in regulation means everything is open to the public -- the process of regulation, all information about the regulated industry, and any new proposed legislation. Above all, any stakeholder has the right to have access to such information. In addition to access to information, regulatory regimes should promote public participation in the regulatory process. Regulatory transparency can be ensured by simple practices including the following:

- Engaging in public consultations prior to deciding on issues of general interest,
- Allowing sufficient time to the stakeholders to usefully comment on the documents open for consultation,
- Encouraging stakeholders to discuss the issues open for consultation early in the decision-making process in an open, transparent, and non-discriminatory forum,
- Providing the stakeholders detailed explanation on the underlying regulatory decisions and the expected impacts of these decisions,
- Publishing decisions upon their adoption,
- Consulting on and disclosing its action plan on a regular basis,
- Presenting the costs of operation in a transparent fashion and made available through audited accounts.

The above list can be expanded as required to mitigate any perceptions that the stakeholders in a particular setting may have depending upon local factors. **The litmus test of regulatory transparency is that no Stakeholder feels left out and that all stakeholders are provided an opportunity to participate in the regulatory process.**

Let us consider an example of how regulatory transparency was measured on the effectiveness of regulatory frameworks in the electronic communications industry in Europe. A report on the relative effectiveness of the regulatory frameworks for electronic communications in Austria, Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, The Netherlands, Poland, Portugal, Spain, Sweden and the United Kingdom (titled “Regulatory Score Card 2005: <http://www.ictregulationtoolkit.org/en/Document.2356.pdf>) used the criteria in Table 1 to assess regulatory transparency. Table 2 provides the scores for the various countries studied as part of the report.

Results in Table 2 show that Germany gets the lowest score whereas Ireland and Poland are on the top of the scale in regulatory transparency. Individual countries may disagree with this largely subjective ranking. Nonetheless it provides a useful regulatory benchmarking for regulatory transparency based on a selected set of criteria that are generally agreed to by most analysts.

TABLE 1
CRITERIA FOR ASSESSING THE TRANSPARENCY IN TELECOMMUNICATIONS IN AUSTRIA, BELGIUM, CZECH REPUBLIC, DENMARK, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, THE NETHERLANDS, POLAND, PORTUGAL, SPAIN, SWEDEN AND THE UNITED KINGDOM

No.	Criteria	Weight	Comments
1.	Recourse to public consultation	0 to 5	Maximum score if general obligation to use public consultation; Intermediate score if occasional recourse to public consultations on ad hoc basis; Minimum score if no practice of recourse to public consultations and no legal requirement for same.
2.	Timeframe allowed to the parties to comment on documents open for consultation	0 to 5	Maximum score if deadline for comments between 3 and 6 weeks, including the possibility for the national regulatory agency of reducing or increasing timeframe as the case may be. Minimum score if less or more than this time window.
3.	Opportunity for stakeholders to provide early input on a non-discriminatory basis	0 to 5	Maximum score if such opportunity exists in practice; Intermediate score if occasional recourse; Minimum score if no practice of recourse to informal consultations or if the possibility of ex parte contacts on a non-transparent and discriminatory basis.
4.	Explanation of details underlying decisions and effectiveness of appeal in the event of failure to provide detailed explanation	0 to 5	Scoring dependent on the scope of the obligation to issue reasoned decisions and the quality of the arguments developed and disclosed.
5.	General obligation to publish all decisions	0 to 5	Maximum score if obligation exists as a matter of general administrative law or legislative requirement; Intermediate score if self-imposed obligation which is generally complied with; Minimum score if no such obligation exists.
6.	Obligation to consult and disclose on an action plan	0 to 5	Maximum score if obligation exists; Intermediate score if self-imposed obligation which is generally complied with; Minimum score if no such action plan exists.
7.	Obligation to present costs of operation in a transparent manner	0 to 5	Maximum score if obligation exists; Intermediate score if self-imposed obligation which is generally complied with; Minimum score if no such obligation exists or if costs are not disclosed in a transparent manner in practice.

Source: Regulatory Score card 2005: <http://www.ictregulationtoolkit.org/en/Document.2356.pdf>

Non-discrimination

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 favor 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, etc.). An example of “positive” discrimination could be with respect to domestic firms considered to be “national champions” and given a special preference.

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 officials from regulatory agencies, competition authorities, and trade authorities may help to avoid such unintended effects.

In general non-discrimination requires that the significant market power (SMP) undertaking applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. This shows that the scope of the non-discrimination obligation clearly covers a firm’s internal processes. The general non-discrimination obligation requires that third party access seekers be treated no less favorably than the operator’s internal divisions.

Non-discrimination is again an obligation that could be imposed by itself as a strategic choice to promote investment. But in order to be an effective approach, it is likely that it needs to be combined with a number of other obligations. Transparency is a natural complement to this obligation as the ability to identify behavior, which could be detrimental through the use of discriminatory practices, depends on the ability to detect such behavior.

Assessment of the non-discrimination obligation is often undertaken on the basis of the criteria provided in Table 3. In the example considered earlier – transparency in regulatory agencies in the communications industry in selected European countries, the criteria used for measuring non-discrimination are shown in Table 3. Table 4 provides the scores for non-discrimination for the countries studied; UK leads the list in non-discriminatory regulatory policies where as Czech Republic fared the worst.

4. Competition in Regulatory Regime

Transparency and non-discrimination must provide for a level playing field and healthy competition among industry players. That is, all the players must have equal opportunity to succeed in the market. Globalization has made it incumbent on the players to be consistently efficient, innovative, and responsive to the customers, otherwise they may not be able to survive. In fact, globalization has made the markets very competitive and individual countries are finding it difficult to provide protection to their domestic firms. This is where the developing countries are facing the biggest dilemma. On one hand, governments and regulators are under pressure from the local industry and investors to protect them from foreign investors and imports. On the other hand, the consumers want to avail of the benefits of higher quality and cost-effective products and services resulting from globalization. This issue ultimately leads to trade policies of various countries and the constant battles at the WTO are a testimony to the complexity of the issue.

TABLE 2

ACTUAL SCORES FOR THE TRANSPARENCY IN TELECOMMUNICATIONS IN AUSTRIA, BELGIUM, CZECH REPUBLIC, DENMARK, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, THE NETHERLANDS, POLAND, PORTUGAL, SPAIN, SWEDEN AND THE UNITED KINGDOM

Question Number		Weight	Austria	Belgium	Czech Republic	Denmark	France	Germany	Greece	Hungary	Ireland	Italy	Netherlands	Poland	Portugal	Spain	Sweden	UK
1	Recourse to public consultation	5	5	5	5	2.5	2.5	2.5	2.5	2.5	5	5	2.5	5	5	2.5	5	5
2	Timeframe allowed to the parties to usefully comment on documents open for consultation	5	5	2.5	2.5	5	5	2.5	5	5	5	5	2.5	5	5	2.5	5	0
3	Hosting of an open, transparent and non-discriminatory forum throughout decision making process	5	5	5	2.5	5	5	0	5	2.5	5	5	2.5	5	0	5	5	5
4	Explanation of details underlying decisions and effectiveness of appeal in event of failure to provide detailed explanation	5	5	2.5	5	5	2.5	5	2.5	5	5	5	5	5	5	5	5	5
5	General obligation to publish all decisions	5	5	2.5	5	2.5	5	0	5	5	5	5	5	5	5	2.5	5	5
6	Obligation to disclose and consult on an action plan	5	0	2.5	2.5	0	2.5	0	2.5	5	5	2.5	5	5	2.5	0	2.5	5
7	Obligation to present costs of operation in a transparent manner	5	0	0	5	5	0	2.5	5	5	5	5	5	5	2.5	5	5	5
	TOTAL COUNTRY	35	25	20	27.5	25	22.5	12.5	27.5	30	35	32.5	27.5	35	25	22.5	32.5	30

Source: Regulatory Score card 2005: <http://www.ictregulationtoolkit.org/en/Document.2356.pdf>

TABLE 3
CRITERIA FOR ASSESSING THE NON-DISCRIMINATION IN
TELECOMMUNICATIONS IN AUSTRIA, BELGIUM, CZECH REPUBLIC, DENMARK,
FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, THE NETHERLANDS,
POLAND, PORTUGAL, SPAIN, SWEDEN AND THE UNITED KINGDOM

No.	Criteria	Weight	Comments
1.	Regular imposition of non discrimination obligations	0 to 5	Maximum score if non discrimination obligation commonly imposed as a remedy; Minimum score if no such obligation ever imposed or applied by the NRA since July 2003 under the transitory regime.
2.	Application of the non discrimination obligation across the value chain	0 to 5	Maximum score if non discrimination obligation commonly applied across the value chain (even if this is as a result of the application for the old regulatory framework); Minimum score if no application of such obligation across the value chain.
3.	Rules against price squeeze	0 to 2.5	Maximum score if existence of such rules; Minimum score if absence of such rules.
4.	Availability and application of price squeeze test	0 to 2.5	Maximum score if availability of such test; Minimum score if absence of such test.
5.	Ability to apply non discrimination obligations on non-price related terms	0 to 5	Maximum score if such obligation exists and effectively applied; Intermediate score if obligation exists, but not effectively applied; Minimum score if no such obligation.

Source: Regulatory Score card 2005: <http://www.ictregulationtoolkit.org/en/Document.2356.pdf>

Notwithstanding the dilemma pointed out earlier, experience confirms that healthy competition not only serves economic, social, and political goals in a country but is also beneficial to the consumers – better product or service, more choices, and a fair and competitive price.

The competitive market never stands still as the market participants devise new products, new technologies, more efficient service or product, and reduced prices. Competition is a dynamic process, but that process is generated by market pressure from alternative sources of supply and the desire to keep ahead. If the competitive process is working properly, there will be a constant quest for static and dynamic efficiency and, generally, efficient production and consumption decisions are made.

New entrants to in a market may find it difficult to compete with the incumbent players. However, this is not true for all the sectors. For example, the civil aviation sector, petroleum products, which are not supplied by pipelines, and to some extent, the telecommunications sector do not have the same barriers as electricity, water, sanitation, and gas supply through pipelines. Nevertheless, new entrants, even in sectors with somewhat reduced barriers, will have to work hard to wean away customers form incumbent service providers. The airline industry worldwide is a fascinating example of this market dynamics between the consumer and the service providers. The recent “Open Skies Agreement” between the EU and the United States, stalled for almost three decades, will offer some interesting case studies in competition.

TABLE 4
ACTUAL SCORES FOR THE NON-DISCRIMINATION IN TELECOMMUNICATIONS IN AUSTRIA, BELGIUM, CZECH REPUBLIC, DENMARK, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, THE NETHERLANDS, POLAND, PORTUGAL, SPAIN, SWEDEN AND THE UNITED KINGDOM

Question Number	Criteria	Weight	Austria	Belgium	Czech Republic	Denmark	France	Germany	Greece	Hungary	Ireland	Italy	Netherlands	Poland	Portugal	Spain	Sweden	UK
1	Regular imposition of non-discrimination obligations	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5
2.	Application of the non-discrimination obligation across the value chain	5	5	2.5	0	5	2.5	0	0	2.5	0	5	5	0	5	2.5	5	5
3.	Rules against price squeeze	2.5	0	0	0	1.25	1.25	1.25	1.25	0	1.25	1.25	1.25	2.5	2.5	1.25	0	1.25
4.	Availability of price squeeze tests	2.5	2.5	0	0	2.5	2.5	1.25	1.25	0	0	1.25	2.5	0	2.5	2.5	0	2.5
5.	Ability to apply non-discrimination obligations on non price related terms	5	2.5	0	0	0	5	0	0	0	2.5	5	0	5	0	2.5	2.5	5
	TOTAL COUNTRY	20	15	7.5	5	14	16.5	7.5	7.5	7.5	8.75	17.5	13.75	12.5	15	14	12.5	19

Source: Regulatory Score card 2005: <http://www.ictregulationtoolkit.org/en/Document.2356.pdf>

Since the nature of competition is sector dependent, the regulators need to ensure that the regulation does not lead to any disadvantage to new entrants. Thus the regulation must have provision for using the existing networks of other market players at a reasonable cost. Competitive markets are constantly adjusting to the ebb and flow of information and innovation; to changes in government policy; to entry and exit conditions; to each firm making its own decisions independently, free from coercion or predation; but in the face of interactive rivalry in the light of available levels of information on consumer demand and the availability of resources.

Generally, the benefits of increased competition extend to all participants in an economy:

- **To consumers** – through lower prices, more product choice, and better service;
- **To businesses** – through cheaper inputs, better service from input suppliers, greater choice of suppliers and access to improved technology, all of which lead to greater competitiveness both in its domestic market and internationally (a business not exposed to international competition is unlikely to be innovative and internationally competitive);
- **To governments** – through increased revenue from expanding the economy, lower expenditure and improvements in government services; and
- **To the economy as a whole** – through lower inflation, increased growth, improved international competitiveness, greater investment, a greater choice of jobs and enhanced employment opportunities, and improved standards of living.

In many countries, there are competition authorities and competition laws. Jurisdictional conflicts occur as a result of ambiguities in the laws as to whether sector regulation or competition law has precedence with regard to specific competition issues. In many instances sector regulators' existence preceded that of the competition authority and they were given the responsibility for competition issues in their respective sectors. Even in cases where new sector regulators have been created in recent times, for example after deregulation and privatization have taken place, governments have chosen to assign competition responsibilities to sector regulators as a means of infusing and diffusing competition principles in the sector-regulatory regime and thus supporting a consistent application of competition policy across the economy. Table 5 provides some generally accepted characteristics of sector regulators and competition authorities.

**TABLE 5
INSTITUTIONAL CHARACTERISTICS OF SECTOR REGULATORS AND COMPETITION
AUTHORITIES**

	Sector Regulator	Competition Authority
Mandate	Substitute for lack of competition; broad range of socio-economic goals	Protect and enhance process of competition; emphasis on efficiency goals
Approach	- attenuate effects of market power wielded by natural or network monopoly - impose and monitor behavioral conditions - <i>ex ante</i> prescriptive approach	- reduce market power whenever possible - impose structural (and behavioral) remedies - <i>ex post</i> enforcement (except with merger review)

	- frequent interventions requiring continual flow of information	- information gathered in case of investigation; more reliant on complaints
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Source: Adapted from OECD, *Relationship between regulators and competition authorities*, 1999. DAFPE/CLP(99)8.

Competition authorities and sector regulators can coexist under various conditions. Different countries have chosen different institutional models to ensure coordination and policy coherence between the sector regulators and the competition authorities. These models can generally be classified into five types:

- I. To combine technical and economic regulation in a sector regulator and leave competition enforcement exclusively in the hands of the competition authority;
- II. To combine technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions;
- III. To combine technical and economic regulation in a sector regulator and give it competition law enforcement functions which are to be performed in coordination with the competition authority;
- IV. To organize technical regulation as a stand-alone function for the sector regulator and include economic regulation within the competition authority; and
- V. Rely solely on competition law enforced by the competition authority.

Table 6 provides a comparative assessment of the models used by various countries for instituting sector regulator and competition based on the five models listed above.

**TABLE 6
COUNTRY APPROACH TO SECTOR REGULATION AND COMPETITION**

COUNTRY	TYPE	COMMENTS
Australia	IV, V	The Australian Competition and Consumer Commission's regulatory role covers access regulation, regulation of prices of public utilities and a variety of other regulatory tasks. Australia has tended to favor general rather than industry-specific regulation, but where State Regulators exist; these bodies have technical and economic regulatory responsibilities across a range of industries and have a close association with the ACCC.
Brazil	I	The competition law is fully applicable to regulated sectors and the competition authorities are in charge of its enforcement in cooperation with sector regulators.
Canada	II, III	There is no formal separation of jurisdiction. Apparent or possible areas of statutory conflict are resolved through recourse to the doctrine of "regulated conduct". A second approach has been for the competition authority and the sector regulator to sign a Memorandum of Understanding, which effectively sets out the respective roles of the agencies. However, this approach has not proved a lasting solution in the case of the MOU with the Canadian Radio and Television Commission, where changes in top management have resulted in the MOU being abandoned.
France	II, III	Sector regulator mandates in some sectors extend beyond enhancing competition and lead to an overlap with no formal separation of jurisdiction. In most cases, particularly where the

		question of <i>service public</i> ² arises, the Conseil d'Etat or the Minister of Economic Affairs, Finance and Industry makes decisions on a case-by-case basis and the Conseil de la Concurrence has an advocacy function. Decisions on mergers and acquisitions are made by the Minister and are outside the jurisdiction of the Conseil de la Concurrence. Competition law generally defers to other laws and regulations if they are inconsistent.
Indonesia	I, III	The telecommunications regulatory body, the Badan Regulasi Telekomunikasi (BRTI), is charged with regulating service quality standards, licensing, interconnection costs and competition in the sector. In addition, the Competition Authority has an advocacy mandate, which extends to making recommendations and giving opinions on sector regulations (including for other sectors (e.g. air and land transportation, the pharmaceutical industry) relevant to competition.
Kenya	II	The Competition Authority has neither jurisdiction over regulated sectors nor advocacy powers. However, sector regulators increasingly coordinate with the competition authority, although they are not obliged to do so.
Malawi	II	The competition law does not exempt regulated sectors. Sector regulators have the mandate to promote efficiency and competition. The separation of jurisdiction and clarification of the respective roles of the agencies may become an issue when the competition law is enforced (although in existence since 1998, the law has yet to be enforced).
Mauritius	II	Some sector regulators have competition competencies.
New Zealand	V	New Zealand has a policy of "light-handed" regulation and relies on a generic competition law. However, in recent years this approach has been questioned.
Portugal	III	Sector regulators have been given competition competencies, and the competition authority and sector regulators are obliged to coordinate on competition matters. There is no specific provision in the event of conflict.
Republic of Korea	I, III, IV	As a result of regulatory reform, the Republic of Korea is moving towards type III; however, in some instances types II and I apply.
South Africa	III	Sector regulators have concurrent jurisdiction. However, the Competition Act neither explicitly defers to other regulation nor explicitly claims precedence over it. The competition authority is required to negotiate agreements with sector regulators to coordinate the exercise of jurisdiction over competition matters in regulated sectors (in those sectors where the regulator has an explicit mandate over competition matters in their sector – i.e. this does not imply agreements with every sector regulator). At present, the competition authority has agreements with regulators in the broadcasting and electricity sectors, and under these agreements the Competition Authority is the lead investigator in concurrent jurisdiction matters. The competition authority also has an advocacy function.
Namibia	III	The Competition Act 2003 replicates the South African model.
United Kingdom	III	Sector regulators have concurrent jurisdiction. The Concurrence

		Regulations 2000 spell out the procedure by which it is decided which authority is better/best placed to deal with a case, and settlement procedures in the event of a dispute.
United Republic of Tanzania	I	Article 96 of the Fair Competition Act, 2003 excludes conduct that is provided for in sector legislation (which legislation is specified in the Act).
United States of America	I, II	Sector regulators do not have a formal antitrust enforcement role; however, the mandate in some sectors extends beyond enhancing competition, thus leading to an overlap. In such cases the Congress makes decisions on a case-by-case basis and the competition authority has an advocacy function.
Zambia	II	Sector regulators have concurrent jurisdiction (equivalent powers). The competition authority also exercises an advocacy role. There is no formal system for resolving disputes.
Zimbabwe	I, II	The Competition Act gives primacy to the Competition Authority on competition issues in regulated sectors. Section 3 of the Act requires all sector regulators to apply for clearance from the Competition Authority for all mergers in regulated sectors.

At the domestic level, a number of factors – not the least of which are history, legal and constitutional frameworks, and inherited institutions – will influence the choices made by the governments in defining the respective competences of competition authorities and regulatory bodies and managing joint actions by these entities where such a necessity arises. OECD has provided guidelines for apportioning tasks between the competition agency and the regulator. These guidelines are as follows:

OECD guidelines for apportioning competition-enhancing tasks between competition agencies and regulators

1. It might not always be necessary to employ economic regulation to address problems arising from alleged market power either because such power could be too transitional to be worth worrying about or because light-handed regulation may possibly be a superior alternative.
2. Technical regulation will not likely fit well within competition agencies.
3. Since there are advantages in combining economic regulation with technical regulation, economic regulation should probably not be organized as a stand-alone function.
4. Given what has been said about technical and economic regulation, there seem to be three practical alternatives:
 - combine technical and economic regulation in a sector-specific regulator and leave competition law enforcement entirely in the hands of the competition agency;
 - organize technical regulation as a stand-alone function and include economic regulation within the competition agency;
 - combine technical and economic regulation in a sector-specific regulator and give it all or some competition law enforcement functions.

5. Separating competition law enforcement from regulation means sacrificing certain synergies and having to adopt measures ensuring firms that are not subjected to inconsistent demands, but it also ensures that both policies are administered by agencies thoroughly understanding them and having cultures suited to their implementation.
6. If a decision is made to combine competition law enforcement and economic regulation, serious attention should be paid to differences in how competition agencies and regulators conduct their principal functions because this could significantly influence how they would carry out a combined mandate.
7. In sectors expected to evolve reasonably quickly to being workably competitive (i.e. transition sectors), assuming a decision has been made to combine economic regulation with competition law enforcement, it would probably be better to locate these functions within the competition agency than within a sector-specific regulator.
8. In non-transition sectors, if it is decided to combine economic regulation with responsibility for ensuring non-discriminatory access to necessary inputs, this is probably better done within a regulator than within the competition agency.
9. Because competition agencies appear to have a comparative advantage over regulators when it comes to enforcing prohibitions of anti-competitive behavior and reviewing mergers, such agencies should have exclusive jurisdiction in those domains, or at least retain concurrent jurisdiction along with a regulator.
10. There seem to be good reasons for organizing regulators as general rather than sector-specific agencies (moreover, some of the difference in performance expected from competition agencies and regulators would likely disappear if the regulator were general instead of being sector-specific in nature).
11. Economic regulation, especially that being applied to markets in the process of liberalization, should be subject to sun setting and should not be renewed unless the competition agency believes that is justified by continued market power; thought should also be given to requiring regulatory forbearance in any market which is workably competitive, and once again the competition agency could usefully be involved in that determination.

Source: OECD, Relationship between regulators and competition authorities, 1999. DAFPE/CLP(99)8.

Even in developing countries that have already embraced a competition and efficiency driven approach to economic and regulatory policy-making, there is clearly a long way to go in building a competition culture. The exercise of building a competition culture should begin with an evaluation of the level of understanding of the benefits of competition, its strong links to other policy areas, and the level of commitment to competition among key constituencies in the countries. In most developing countries, there is a need for better understanding of the benefits of competition and the links between competition policy and other basic pillars of economic development and regulatory governance.

5. Investor Protection in Regulatory Regime

Water, energy, communications, transport, and local utilities — access to these vital services helps determine the quality of life for hundreds of millions of urban and rural people who live in poverty. In fact, electricity plays a vital role in all round growth and development of any economy. These services are the “backbone” of both the old and new economies. Efficient infrastructure and services have powerful upstream and downstream effects throughout the economy, expanding and deepening markets, opening up new opportunities to domestic and foreign investors, reducing the costs of products and services, and promoting innovation.

The shortage of public funds for the much-needed infrastructure projects in developing countries led to a strong drive towards restructuring of the infrastructure sectors in order to establish an enabling environment for private investments as a key strategy for financing infrastructure development. The drive followed trends in deregulation of developed economies and was led by the World Bank advocating unbundling and privatization of public utilities throughout the developing countries and emerging economies. This approach has produced mixed results and even the World Bank has retreated from its aggressive approach of recommending unbundling and privatization as the fastest way to addressing the challenges faced by many economies. The new focus is on governance reform as policy reform, regulatory reform, and enterprise reform are seen as instruments for a more sustained development and growth.

Virtually every “emerging market” country has liberalized its economy to some extent in recent years. To varying degrees, attention has been focused on areas such as: (i) creating a more stable macroeconomic environment; (ii) liberalization of controls on foreign exchange transactions; (iii) trade liberalization; (iv) rationalizing tax structures; (v) liberalizing investment laws and reducing restrictions; and (vi) actively promoting foreign investment and exports. Despite these and other policy reforms, the formal investment response in many countries that have been competing fiercely for new investment has been disappointing. As a result, skepticism over the effectiveness of economic liberalization is becoming more widespread. One important clue for this disappointing result may be that while good policies have been enacted; governance remains a challenge in many developing countries and emerging economies.

In countries that have addressed many obvious constraints to private investment and exports, significant deterrents often still remain. In particular, countries with a long history of government intervention and administrative direction in economic decisions typically have complex and overlapping controls beyond those easily identified as constraints on investment. The maintenance of overly complex registration procedures system, combined with a lack of institutional capacity, often translates into a situation where these mere procedural tasks become major obstacles to investment. These difficulties can only be overcome by extraordinary payments or long delays, and become a serious deterrent to potential investors who may have made a preliminary decision to commit to a country. This situation, all too common in emerging markets, has raised the need for more comprehensive reform efforts, combined with radical overhauls of how government agencies operate.

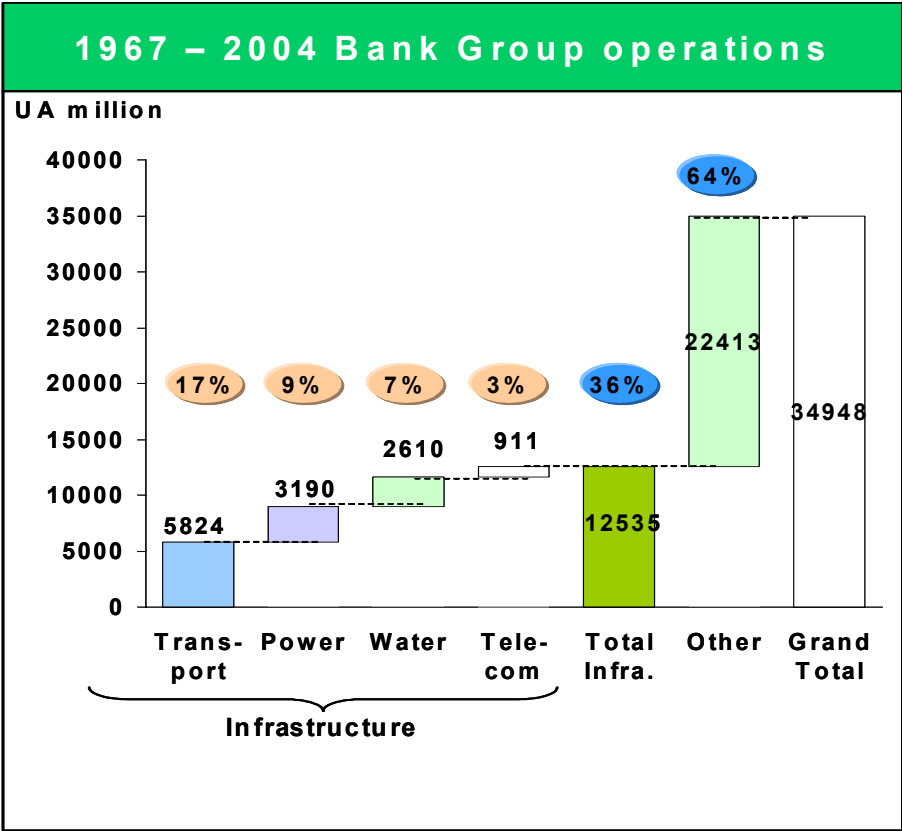
Similarly, in countries that have taken steps to liberalize trade and promote exports, there still persist obstacles at an operational level for potential investors. Ending import licensing, liberalizing foreign exchange, and reducing tariffs are all necessary steps to improving the policy environment for exports. Their impact can be easily blunted, however, by cumbersome procedures for duty-free importation, the persistence of second-tier licensing requirements, ineffective Customs and VAT administration, etc., once again pointing to the need for improved governance.

At the implementation level, government officials are often still distrustful of private businessmen. Alternatively, they are simply viewed as a source of supplemental income generation. Both motivations can mean the persistence of otherwise lower-level irritants to business formation and operation, often elevating them to the point of constraints in an overall investment climate that remains only partially reformed. These factors can be particularly negative for foreign investors, who (i) may not be politically connected, (ii) operate under rules of their respective countries and strict internal corporate guidelines, or (iii) do not have local partners to handle a multitude of procedural obstacles and associated payments. Accordingly, countries may lose the "good" foreign investors they all attempt to attract.

Investment Pattern in Africa

A good synopsis of investment patterns in Africa is found in a Concept Paper issued by the African Development Bank (AfDB) at its 2006 Annual Meeting. The breakdown of loans and grants consummated by the AfDB during the period 1967 – 2004 in terms of the sub-sectors of infrastructure is shown in Table 7 and Figure 1. Despite this massive investment infrastructure deficiency is still prevalent in most African Countries. The combined impact of the negative trends has been to retard and, in many instances, reverse the economic and social gains that African countries had begun to make.

**TABLE 7
BANK GROUP OPERATION BY SECTOR FROM 1967 - 2004**



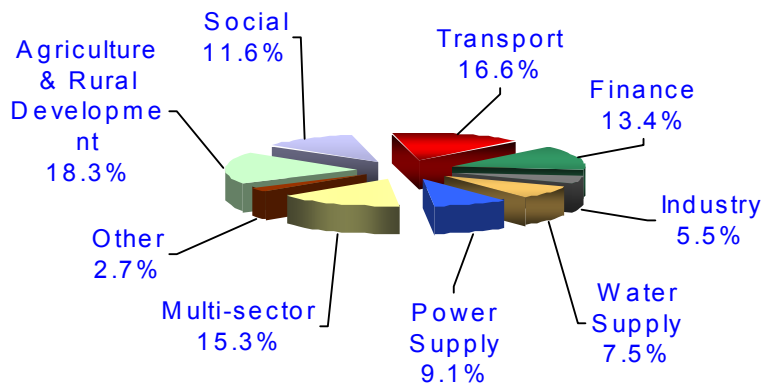


FIGURE 1: CUMULATIVE BANK GROUP LOAN AND GRANT APPROVALS BY SECTOR, 1967-2004 (PERCENTAGES)

The African economies are too small to generate the economies of scale required to significantly foster trade. Hence, the development of regional infrastructure is essential to promote trade and economic growth. To be effective in this endeavor, reforms for regional harmonization of policies and legal and regulatory frameworks becomes important for the continent.

In 2000, more than US \$ 7.95 billion was gained by the governments in the Continent in terms of the number of newly privatized enterprises (source: Economic Perspectives for Africa, 2003). In southern Africa alone, the privatization transaction represented about 50% of the total proceeds (Figure 2). The privatisation movement has resulted in a significant decrease in the number of public sector enterprises in the Continent. For example, the number of state-owned enterprises decreased from 6069 to 4058 from 1990 to 1995 according to estimates by the World Bank. Nevertheless, the private sector remains a small participant in infrastructure development in Africa, with the public sector still providing the bulk of financing needed. Hence the role of the public sector in infrastructure investment therefore remains important.

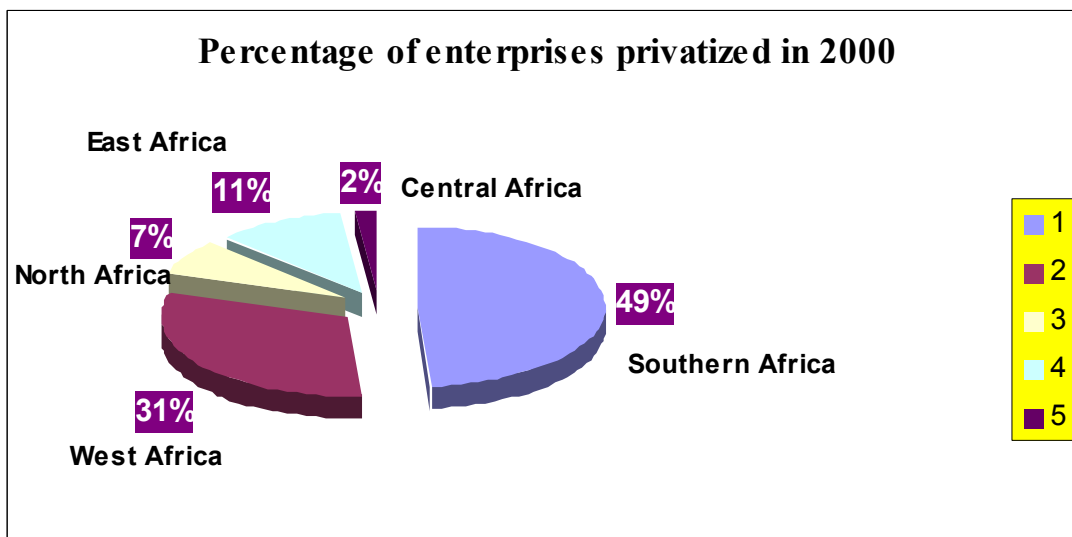


FIGURE 2: MOVEMENT OF REFORM TO DECENTRALISATION ACROSS AFRICA IN 2000

Can better regulatory governance stimulate private investment in infrastructure?

Governments must expand market reforms—and work harder and more visibly—to establish a liberal policy environment that sustains market incentives and investor trust.

Building Credibility Requires Good Governance

There is no single model for the right regulatory system. The litmus test in attracting private investment is whether the regulatory regime—through sustained commitment to a clear set of rules—is credible to investors, producers, and consumers. Credibility can be built in many ways. Weaker independence of the regulator can, for example, be offset by transparent procedures and stronger judicial review and consumer oversight. In building regulatory credibility, reformers should focus on a few key governance principles.

- **Commit to Ethics:** A reputation for being an honest regulator is the bedrock of credibility. Governments should build strong ethics infrastructures to prevent problems such as conflicts of interest. Revolving doors between industry and regulators are particularly damaging, since regulatory leniency is linked to the potential for future employment contracts.
- **Adopt Clear and Simple Rules for the Sector and Enforce Them:** Policies and standards must be unmistakably clear and fairly implemented. Reducing regulatory risk—the risk that governments will change the rules of the market or will apply rules to benefit national incumbents—is critical in increasing investment inflows, because infrastructure sectors are characterized by long-term commitments, high sunk costs, and intricate property rights. In countries with weak legal traditions, simple rules place fewer demands on courts, are less costly to implement and more likely to be accurate, and reduce the risk of corruption.

“It can be more costly and time-consuming to create new institutions than to agree on clear rules for existing institutions to administer”, Richard Posner at the University of Chicago Law School has noted. The PRC, for example, followed the rules-first strategy by introducing modern commercial rules of law when it liberalized its economy. The PRC also moved regulatory powers from line ministries into the State Council, which did not create “independent regulators” but did separate state-owned enterprise management from regulatory decisions, a move that was welcomed by investors.

- **Maximize Sunshine:** Transparency throughout the policy process cures many regulatory failures, such as capture and bias, lack of accountability, inadequate information in the public sector, market uncertainty, and inability to understand policy risk.
- **Strengthen External Checks by Consumers, Competition Authorities, Courts, and Legislative Bodies:** A range of oversight mechanisms—such as the Hong Kong Consumer Council—is another good protection against regulatory capture and abuse. No regulator can be effective alone. The Sri Lankan telecommunications regulator, for example, concluded *“one of our biggest achievements was that instead of...appeals going through back channels, we created a situation where an appeal was submitted to the court of appeals.”* Checks and balances cannot become paralysis, however, and many countries are developing innovative dispute resolution procedures that can work more efficiently and rapidly.

- **Staff Well:** Expert staffing is vital for the efficient functioning of a regulator. A 2000 survey in Southeast Asia, for example, found that the new regulatory commissions were not fully staffed and governments had not been able to fill these vacancies. Salary flexibility may be necessary to hire and retain scarce expertise. This mandates the need for an effective and robust HRM policy in regulatory governance. Our experience in Africa indicates that most African regulators are facing this challenge as well.

Criteria for Good Governance

There is considerable consensus on the criteria for good governance in regulatory agencies. The following are some of the generally accepted principles of good regulatory governance:

1. A strong legal framework where the rule of law is observed, contracts can be enforced and there are sound courts which make their decisions in a timely manner.
 - Reliable and well-defined legal processes are crucial as are appeal provisions.
 - Trying to develop effective regulatory institutions in the absence of an effective rule of law is, at best, extremely difficult and, at worst, impossible.
2. The formal legal attributes of regulation must be clearly articulated and preferably in a primary law. This implies
 - Clarity of roles and objectives between the regulator, Government and regulated entities – coherence of the assignment of functions
 - Autonomy of the regulatory agency e.g. in funding, staffing, appointments and dismissals
 - Accountability of the regulator e.g. responsibilities to legislature, rights of appeals and redress
3. The regulatory agency must operate in ways that encourage good practice and consistent, reliable decision-making – adequacy on informal attributes of regulation. This implies
 - **Transparency**, e.g., publication of licenses, methodologies, decisions and the reasons for decisions
 - **Participation**, e.g., the involvement of major stakeholders in the regulatory process via consultations and published responses to consultations
 - **Predictability**, e.g., constraints on arbitrary changes of regulatory or regulated companies' powers and obligations, publication and use of regulatory principles, consistency of decision making

It is worth noting that regulatory governance becomes more important the more discretion the regulatory agencies are allowed under the prevailing law. Some regulatory discretion is inevitable even if regulatory laws are written to try to eliminate it. However, regulatory discretion should be minimized and hence concentrated on the legal context in (1) above. Many analysts have placed much more emphasis on the governance aspects of the regulatory agency e.g. on the issues in 2.) and 3.) above.

It has also been increasingly recognized that the effectiveness of regulatory agencies depends on adequate human resources – especially the number of qualified professionals. This is particularly important for regulators operating with more discretion.

6. Features of Regulated Industry Sectors

The AFFUR Annual Conference is focusing on some of the regulated industries. However, the above principles are broadly applicable to any industry sector. In the context of the AFFUR Conference, let us examine the following industry sectors for their peculiar features, which must be considered during their regulation:

1. Electricity
2. Petroleum products
3. Water and sanitation
4. Telecommunication
5. Civil aviation

These industry sectors have their own peculiarities and some of these peculiarities are presented in Table 8.

**TABLE 8
TYPICAL FEATURES OF FEW INDUSTRY SECTORS**

No.	Industry Sector	Typical Features
1.	Electricity	<ul style="list-style-type: none"> • Use it as and when produced • Availability on demand necessitating maintenance of sufficient generation surplus and capacity charges • Complicated pricing schemes • The transmission and distribution system must be shared among the competitors • Life-line rates and government policies on subsidies, especially in developing countries and emerging economies • Regulation is matured but needs further reform
2.	Petroleum products	<ul style="list-style-type: none"> • If transported through pipelines, must be shared among the competitors • Regulation is maturing
3.	Water and sanitation	<ul style="list-style-type: none"> • Limited storage facility • The main infrastructure must be shared • Need for high subsidy in most developing countries • Regulation can be said to be still born
4.	Telecommunication	<ul style="list-style-type: none"> • No need to share the transmission system • Regulation is matured • Customer service is rapidly improving and prices are coming down due to worldwide competition
5.	Civil aviation	<ul style="list-style-type: none"> • No need to share the facilities and airports are different entities • Privatization and BOT concessions seem to be working well • Regional air traffic control has clear cost and efficiency advantages • Regulation is mostly related to safety and security aspects

7. Conclusion

Transparency, non-discriminatory policies, and level playing competition in the regulatory process are important preconditions for a well-functioning market. Investors base their business decisions on the formal and informal regulatory framework as well as the predictability of regulatory changes. Also, lack of clear knowledge of the existing framework can foster non-compliance by businesses and create possibilities for unethical or illegal behavior. Different transparency tools and mechanisms, including new information and communication technologies, (e-governance) are available worldwide and offer a good source for African regulators to devise their own respective regulatory procedures.

Rapid changes in legislation though needed have one serious negative effect - instability in the regulatory environment. This is considered as a risk, which is an obstacle for investors especially for those who come from abroad and this generally impedes economic growth.

On the other hand the governments are often pressed by tight time frames and certain milestones agreed with their counterparts (World Bank, European Commission) or determined by the political priorities of the party in power. The result is often laws with poor quality and the need for continuous amendments.

Law making is a rather complicated and exhaustive process. It requires the involvement of many experts in different fields who must also have a certain expertise and experience in the drafting of laws. A key in law making is proper assessment of the impacts of the law when it is implemented. This process sometimes is expedited at the expense of completeness and thoroughness. Normally the number of such experts in many governments is limited. These problems are well known and the governments must strive for practical improvements in the law making process, bringing more transparency and involvement of the private sector

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