

# IMAGINE: PRO-POORER COMPETITION LAW

Professor Eleanor Fox  
New York University School of Law  
Paris 28 February 2013  
OECD GLOBAL COMPETITION FORUM

## outline

- ▣ I Introduction
- ▣ II The Concept
  - A multidimensional response to poverty
  - Horizontal and vertical
- ▣ III What pro-poorer, pro-outsider competition law and policy demand
- ▣ IV Competition Law
- ▣ V Competition Policy
- ▣ VI Conclusion

## I. Introduction

- ▣ The concept of pro-poorer, pro-outsider competition law and policy
- ▣ The multidimensional approach
  - Horizontal
    - ▣ All policies pull together:
      - Education, health, infrastructure
  - Vertical
    - ▣ A continuum: the outsider, the poorer, the poor

3

## II The Focus of This Presentation

- ▣ Not on priorities, although that is really important
- ▣ Not on poorer populations everywhere
  - but on developing nations
- ▣ In terms of:
  - ▣ 1) The **reach** of the competition law
  - ▣ 2) The **formulation** of competition law principles
  - ▣ 3) The special **thrust** of competition policy

4

## A body of knowledge?

- ▣ How do we think about what poorer developing countries' competition authorities should do to help their poor(er) populations?
- ▣ We ask them
- ▣ We observe what they are doing
- ▣ This is what they do every day
- ▣ Lessons from
  - Kenya
  - Tanzania
  - West Africa

5

## III. What Pro-Poorer Means for Competition LAW

- ▣ 1 Setting the stage: Free and open competition **without privilege or favor**
- ▣ 2 Scope of the law – state anticompetitive acts?
- ▣ 3 Exemptions and non coverage
- ▣ 4 Procedure: can the poor(er) get recompense?
- ▣ 5 Formulating the law
  - Is there a pro-poorer, pro-outsider perspective?

6

## 2. Scope – Reaching state acts

- ▣ Project with UNCTAD Research Partnership
- ▣ Five principles
  - The law should cover SOEs
  - The law should cover complicit state officials
    - Esp. in procurement bidding rings
  - When private parties use state action as a shield
    - narrow the defense
  - Empower the competition authority to trigger a challenge to unduly anticompetitive state legislation
  - Use a robust preemption doctrine to trump state measures that affront the competition system
    - Absolutely necessary for common markets

7

## 3. Exemptions and non-coverage

- ▣ Minimize exemptions
  - Worry about restraints in agriculture, banking
- ▣ Regulated industries
  - Worry about capture and favoritism
- ▣ Intellectual property
  - Importance of competition in medicines, technology
- ▣ Off-shore acts
  - Potash as example of need to reach offshore acts
    - so as not to handicap efficiency of developing world
      - This is a big input into fertilizers needed by poor farmers

8

## 4. Procedure

- Stopping harmful anticompetitive practices; compensating for harms
  - Is the law fair to the poor in fact as well as in law?
  - **Access to justice**
    - Poorer populations often do not have access to justice

9

## 5 Is there a pro-poorer, pro-outsider view of best principles?

- **There is often a perspective that is more rather than less friendly to the poorer**
  - (and can be good for total welfare too)
- A first step is raising consciousness
  - So often arguments for one rule or another are in equipoise
    - Something tips the balance
    - A pro-poorer advocate will ask: Is this rule more pro-outsider or more pro-establishment?

10

## Five pro-poor modalities

- 1 A principle of freedom to discount
- 2 Choices for market definition
  - when preserving a segment is esp. important to the poor
- 3 Leveraging, foreclosure and access violations
  - Loyalty rebates: Was the victim equally efficient?
- 4 Excessive pricing
- 5 Buyer power
- 6 Intellectual property and medicines and technology
- 7 Simpler rules

11

## IV. What Pro-poorer means for competition POLICY

- **ADVOCACY** –
  - a greater priority vis-à-vis enforcement than in mature jurisdictions
- 1. **Against** anticompetitive acts of one's state
  - Analyze the measures, advocate against unnecessarily restrictive measures
  - Border restraints, regulatory restraints
    - The OECD toolkit
    - ICN project on analyzing regulation



12

## Competition policy – Advocacy FOR

- ▣ 2. Fair (and efficient) international obligations
  - Not to impose or allow export cartels
    - Compare The Basil Convention on Hazardous Waste
      - If your neighbor doesn't want the hazardous waste, you cannot ship it there
    - This is politically difficult but still
    - A pro-poorer competition policy would not/could not lose sight of this hole in the world system that systematically harms and disempowers the poor
  - Home of price-fixers who export their crime should be authorized to help in discovery against the criminals

13

## CONCLUSION

- ▣ COMPETITION IS PRO-POORER POLICY
  - Free and open markets without privilege or favor empowers worthy outsiders and insiders alike
- ▣ All barriers – public and private - that stand in the way of the poorer populations' helping themselves
  - through efficient participation in the market are wise targets for competition law and policy
- ▣ A first step is **consciousness**; ask: What is the pro-poorer perspective, and consider it

14