IMAGINE: PRO-POORER COMPETITION LAW

Professor Eleanor Fox
New York University School of Law
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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
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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

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
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

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?
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

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
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

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?
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

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
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

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