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**COMPETITION AND POVERTY REDUCTION**

**Contribution from BIAC**

-- Session I --

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## COMPETITION AND POVERTY REDUCTION

-- BIAC --

1. Competition policy can play a significant role in alleviating poverty in developing countries. Normative competition policy principles can promote accountability and transparency in government-business relations and reduce corruption, thereby encouraging a sound investment climate that is conducive to economic growth. In particular, normative competition policy principles should lead to accelerated entry and expansion of firms in the market, thereby increasing efficiency, innovation and global competitiveness, and concurrently giving rise to lower prices for purchasers, including consumers, in that market. As a leader in the international fight against corruption, the OECD is well-positioned to promote and guide the adoption of appropriate competition policy. Any initiatives made on this front would be fully compatible with and would build upon the OECD's existing recommendations on competition law and policy,<sup>1</sup> as well as the fundamental principles underpinning the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("Anti-Bribery Convention").<sup>2</sup>

2. This paper examines the relationship between competition policy, anti-corruption, and the reduction of poverty in developing countries. Clearly, poverty is not a problem that is limited to developing economies; however, this paper focuses on the significant role competition policy can play in fighting poverty in developing economies, in particular. The paper begins with an overview of market conditions in developing economies and proceeds to consider the efficacy of competition policy as an instrument for reducing poverty within such economies. The paper concludes with some reflections on the OECD's role in encouraging the adoption of sound competition policy, noting particularly that the promotion of strong competition policies in developing countries would complement the OECD's efforts in connection with its Anti-Bribery Convention.

### 1. Market Conditions in Developing Countries

3. Too often, market conditions in developing economies discourage competition. These conditions include weak infrastructure, inadequate resources, slow and imperfect market structures, networks of

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<sup>1</sup> For instance, the OECD's *Recommendation Concerning Effective Action against Hardcore Cartels* (March 25, 1998) advocates for international cooperation and comity in enforcing effective laws against hardcore cartels. Other competition policy work by the OECD includes its *Recommendation on Fighting Bid Rigging in Public Procurement* (July 17, 2012), which calls for governments to assess their procurement laws and practices on all levels with a view to reducing the risk of bid-rigging in public tenders, as well as its *Recommendation on Competition Assessment* (October 22, 2009), which calls for governments to identify and revise public policies that unduly restrict competition.

<sup>2</sup> *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, S.Treaty Doc. No. 105-43, 37 I.L.M. 1 (entered into force 15 February 1999). As explained in greater detail herein, the objectives behind the OECD's Anti-Bribery Convention include fighting corruption and creating a level playing field for all companies. More generally, the Anti-Bribery Convention recognizes that corruption distorts the allocation of resources and reduces competition in the marketplace, thereby undermining investment, growth and development.

informal markets, monopolies (private and state-owned) and a disproportionate number of dominant firms, and weak government support systems.<sup>3</sup>

4. More significantly, developing economies are often characterized by deficiencies in transparency of procedure and accountability of public authorities. Such deficiencies, when coupled with higher levels of corruption, can result in markets distorted by “privilege, preference, and cronyism”,<sup>4</sup> as well as high barriers to entry.

5. The pervasive and disruptive influence of corruption emerges in numerous studies of market dynamics in developing countries. In some countries, for instance, enterprises fully or partially owned by the ruling party (“party-statals”) receive preferential treatment with regard to market access, procurement, taxation, and credit access, allowing them to foreclose competition by private firms.<sup>5</sup> Similarly, other party-statals are alleged to have formed cartels for fertilizer and seed through market-sharing agreements, thereby raising the price of products and the costs to farmers.<sup>6</sup> Elsewhere, incumbent state-owned enterprises in various fields enjoy exemptions from the operation of domestic competition legislation.<sup>7</sup> In another developing country, several politicians have allegedly cartelized the sugar market.<sup>8</sup> More generally, a recent study of four product markets across five developing countries describes the tendency of the state to overlook or protect uncompetitive market conditions if the state stands to benefit in some way from those conditions.<sup>9</sup>

6. The foregoing examples highlight a need for transparency, accountability, and anti-corruption measures in developing economies, both in the realm of competition law and in the broader policy environment. The nature of the difficulties faced by many developing economies is aptly captured by Dr. Obiageli K. Ezekwesili’s observations about challenges faced by Nigeria:

Our politics and those who run it have become our albatross. The political system has unfortunately frequently attracted those who do not seek to create any new value but simply desire to be given a share of wealth that is already available.<sup>10</sup>

<sup>3</sup> Louise Plessis et al., “Competition law in the developing world: A fish out of water?” (Paper delivered at the Fifth Annual Competition Law, Economics and Policy Conference, Oct 4-5, 2011) at para 2.1.

<sup>4</sup> Eleanor M. Fox, “Economic Development, Poverty, and Antitrust: The Other Path”, 13 SW. J.L. & Trade Am. 211 (2007) at 119; “Advocacy and Competition Policy”, (Report presented at the 2002 ICN Conference by the Advocacy Working Group) at 37.

<sup>5</sup> Nilgün Gökgür, “Rwanda’s ruling party-owned enterprises: Do they enhance or impede development?” (Discussion paper for the Universiteit Antwerpen, Institute of Development and Policy Management (IOB)) at 29-30.

<sup>6</sup> R. S. Khemani, “Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries” (2007), *FIAS Occasional Papers* No. 19 at 31.

<sup>7</sup> Plessis, *supra* note 3 at para 3.10.

<sup>8</sup> Frederic Jenny, “Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence” (2006) *World Competition* 29(1) at 115.

<sup>9</sup> Karen Ellis & Rohit Singh, “Assessing the Economic Impact of Competition” (Report for the Overseas Development Institute, July 2010) at 88-89.

<sup>10</sup> Obiageli K. Ezekwesili, “Nurturing an Entrepreneurial Mindset – the Pathway to a New Nigeria”, (Paper delivered at the SADC Enterprise Awards Dinner, November 3, 2012), available at <http://kobostart.com/business/nurturing-an-entrepreneurial-mindset-the-pathway-to-a-new-nigeria-by-dr-mrs-oby-ezekwesili>.

## 2. The Role of Competition Policy in Developing Countries

### 2.1 Promoting Accountability, Transparency, and Anti-Corruption

7. Competition policy can play a vital role in reducing the close and opaque connections between state actors and incumbent businesses in developing economies. The enactment of competition legislation does not necessarily offer a panacea against corruption, and in certain instances, corruption can coexist alongside otherwise competitive processes (for example, businesses may be asked to pay bribes before being allowed to participate in competitive procurement processes).<sup>11</sup> Nonetheless, a robust competition policy signals to incumbent enterprises that certain behaviours and commercial practices are illegal, and provides for due process by which marginalized players can seek relief for anticompetitive acts.<sup>12</sup> In this way, competition policy helps combat market distortions created by corrupt business practices.

8. Some skeptics argue that developing countries' lack of supporting institutions – such as independent judiciaries and well-paid civil service – will lead to a misuse of competition policy that continues the cycle of corruption, instead of curbing it.<sup>13</sup> However, this argument applies equally to other important domains of government services and should not be an impediment to the adoption of competition policy or other policies aimed at reducing corruption.<sup>14</sup> Rather, appropriate care should be taken in the design and implementation of competition policy so as to minimize the risk of abuse by incumbent powers.<sup>15</sup>

9. In this regard, policy work by the International Competition Network (“ICN”) constitutes a valuable source of guidance. In particular, the ICN’s Unilateral Conduct Working Group (“UCWG”) has issued recommended practices for competition authorities in developing and transition economies, recognizing that such authorities face unique enforcement issues involving unilateral conduct by state-owned or state-created monopolies, as well as recently privatized firms.<sup>16</sup> For instance, the UCWG recommends that competition authorities in developing and transitioning economies “treat state-created monopolies like private undertakings by using standard antitrust analysis to assess dominance/substantial market power regardless of state ownership or legal status of the firm”, to the extent that such monopolies are not exempt from unilateral conduct rules for public interest reasons.<sup>17</sup> With regards to effective advocacy instruments for competition authorities in developing and transition economies, the UCWG recommends, among other measures, that competition authorities publish their opinions in order to

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<sup>11</sup> “Collusion and Corruption in Public Procurement: Discussion Points” (Contribution by the Business and Industry Advisory Committee to the OECD Global Forum on Competition Discussion on Collusion and Corruption in Public Procurement, February 19, 2010) at para 11.

<sup>12</sup> Khemani, *supra* note 6 at 15-16.

<sup>13</sup> For example, see Plessis, *supra* note 3 at para 3.10 and Anthony Amunategui Abad, “Competition law and policy in the framework of ASEAN” in Josef Drexl et al, eds., *Competition Policy and Regional Integration in Developing Countries* (Massachusetts, Edward Elgar Publishing, 2012) at 47-48.

<sup>14</sup> Khemani, *supra* note 6 at 2.

<sup>15</sup> See for instance Dr. Fox’s observations on the design of appropriate competition law for developing countries, which, *inter alia*, should be a “strong law that reaches restrictive and market-blocking acts and anticompetitive practices that the state sponsors or facilitates”: *supra* note 4 at 119 – 121, and “The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy” (UNCTAD Report, 2010).

<sup>16</sup> “State-created Monopolies Analysis Pursuant to Unilateral Conduct Laws – Recommended Practices” (Report by the ICN Unilateral Conduct Working Group, 2007-2008).

<sup>17</sup> *Ibid* at 1.

promote transparency, stimulate public debate, and facilitate the adoption of pro-competitive arguments by other interested parties.<sup>18</sup>

10. More generally, the ICN's report on Advocacy and Competition Policy provides commentary on the appropriate balance between the fields of advocacy and enforcement in developing and transitioning economies, as well as suggestions for the appropriate areas of focus within each field.<sup>19</sup> Other publications by the ICN – including its compilation of good practices on anti-cartel enforcement<sup>20</sup> and its handbook on agency effectiveness<sup>21</sup> – may provide further useful guidance for competition authorities in developing countries.

## 2.2 *Encouraging Wealth Creation*

11. In addition to minimizing costs associated with corrupt markets, an increase in government accountability and transparency boosts investor confidence and maximizes anticipated returns, thereby encouraging foreign investment.<sup>22</sup> Indeed, the value that international investors place on transparency when selecting where to invest is well-documented.<sup>23</sup> This preference for transparent governance is not surprising, given that investment decisions depend heavily on the predictability and fair application of rules. As a practical matter, businesses will be more willing to invest where there is increased transparency and government accountability, such that businesses are assured of a level playing field and a fair opportunity to generate anticipated returns on investment.

12. Indeed, business organizations and the companies they represent are actively participating in the fight against corruption.<sup>24</sup> BIAC, for instance, has been at the forefront of the fight against corruption through its Task Force on Anti-Bribery and Corruption. This Task Force consists of business experts nominated by BIAC member associations. Since its inception in 1997, it supported the development of the OECD's Anti-Bribery Convention and assisted in ensuring its implementation including through participation in consultations in the context of OECD country reviews. BIAC has also been engaged in alerting OECD governments to the on-going problem of bribe solicitation. Other international business organizations are also active on this front. For instance, the International Chamber of Commerce has long been involved in the fight against corruption through its Commission on Anti-Corruption. In 2005, it issued a revised version of its Rules and Recommendations to Combat Extortion and Bribery, first published in 1977. Similarly, the World Economic Forum's Partnering Against Corruption Initiative ("PACI") is a platform for companies to commit themselves to develop, implement and monitor their anti-corruption programmes through peer-network meetings and provision of private sector-driven support tools.<sup>25</sup>

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<sup>18</sup> *Ibid* at 2-3.

<sup>19</sup> "Advocacy and Competition Policy" (Report presented at the 2002 ICN Conference by the Advocacy Working Group) at 34-37.

<sup>20</sup> "Compilation of 'Good Practices' from the Anti-Cartel Enforcement Manual of the ICN Cartel Working Group" (ICN report, April 2011).

<sup>21</sup> See, e.g. "Chapter 1 – Strategic Planning and Prioritisation" (ICN Agency Effectiveness Handbook, March 2010).

<sup>22</sup> Khemani, *supra* note 6 at 24-25; Plessis, *supra* note 3 at para 3.20.

<sup>23</sup> OECD, "Public Sector Transparency and the International Investor" (2003) at 14, available at <http://www.oecd.org/investment/investmentpolicy/18546790.pdf>.

<sup>24</sup> BIAC, *supra* note 11 at para 12, citing "Clean Business is Good Business" (Joint publication by the International Chamber of Commerce, Transparency International, United Nations Global Impact and the World Economic Forum, 2009).

<sup>25</sup> BIAC, *supra* note 11 at paras 13-14.

13. Certainly, developing a positive investment climate takes time, but positive changes can and do occur.<sup>26</sup> Often, investments in a given country by high-profile multinational enterprises send an encouraging message about the investment climate in that country, resulting in additional follow-on investments. As will be discussed more fully in the next section, such investments can give rise to numerous benefits, including lower prices, enhanced productivity, better job opportunities, and a reduction in poverty levels.

14. Moreover, competition policy facilitates foreign investment by allowing the effects of trade reform, deregulation and privatization to be fully realized. In the absence of robust competition policy, trade liberalization reforms may fail to maintain and encourage effective competition if they do not address restrictive business practices emanating from the private sector<sup>27</sup> – that is, if they simply result in a transfer of monopolies from the hands of public owners to those of politically connected private owners, together with the usual economic incentives to engage in anticompetitive acts. One illustrative example of such a problematic transition occurred in 2007, when concerns were expressed that a developing country’s “public sector monopolies are being transferred into private sector monopolies, due to the lack of enforcement of the competition regime”.<sup>28</sup> By contrast, transition market economies which have effectively implemented competition policy tend to experience broad-based markets and expansion of more efficient private-sector firms, among other benefits.<sup>29</sup> As noted by Dr. Frédéric Jenny, there exists a clear nexus between policies on industry, trade, competition, investments, and state-owned enterprises, and “it is their combination which determines the real level of competition in a country”.<sup>30</sup>

15. In this regard, the ICN recommends that competition authorities should participate in the liberalization and privatization process to “help ensure post-privatization/liberalization competitive operation of the relevant market/sector”.<sup>31</sup> Further, these authorities should “advocate for an expeditious liberalization of barriers to entry in markets with state-created dominant enterprises”.<sup>32</sup>

### 2.3 Reducing Poverty

16. The connection between corruption and poverty is well-established.<sup>33</sup> In the competition context, market-restricting practices by corrupt vested interests levy a substantial cost on the community, including

<sup>26</sup> See e.g. “Improving the Private Investment Climate for Recovery and Growth” (World Bank Global Monitoring Report 2009) at 55-56.

<sup>27</sup> R. S. Khemani and Ana Carrasco-Martin, “The Investment Climate, Competition Policy, and Economic Development in Latin America” (2008), 83 Chi-Kent Law Rev 67 at 69.

<sup>28</sup> Nick Godfrey, “Why is Competition Important for Growth and Poverty Reduction?” (Paper submitted at the OECD Global Forum on International Investment, 2008) at 7-8.

<sup>29</sup> Khemani, *supra* note 6 at 16-17.

<sup>30</sup> Arun S, “Competition laws bring economic democracy” – Interview with Frédéric Jenny, *The Hindu Business Line* (May 3 2011) available at <http://www.thehindubusinessline.com/opinion/article1985879.ece>.

<sup>31</sup> ICN, *supra* note 16 at 2.

<sup>32</sup> *Ibid.*

<sup>33</sup> For instance, Nuhu Ridabu, the former head of Nigeria’s anti-corruption commission, has remarked that attacking corruption is the best way to attack poverty: Stephanie Hanson, “Corruption in Sub-Saharan Africa” (Background note for the Council on Foreign Relations, 2009), available at <http://cfr.org/democracy-and-human-rights/corruption-sub-saharan-africa/p19984>. See also Obiageli K. Ezekwesili, Mo Ibrahim and Jay Naidoo, “Corruption, Violence, Security and Development”, *Afronline* (April 29, 2011), available at <http://afronline.org/?p=15232>.

its most impoverished segments.<sup>34</sup> Moreover, studies have shown that an improvement in a country's Transparency International corruption score correlates strongly to a significant increase in productivity.<sup>35</sup> As such, sound competition policy serves to alleviate poverty insofar as it reduces opportunities and incentives for corrupt business practices in developing countries.

17. Further, by encouraging investment, competition policy drives economic growth: higher levels of investment can lead to accelerated entry of firms and enhanced competition, thereby not only leading to lower prices for purchasers, including consumers, but also increasing efficiency, innovation, and global competitiveness (e.g. resulting in higher levels of exports), and allowing for the production and sale of more affordable goods and services.<sup>36</sup> Additionally, foreign investment can create quality local employment opportunities. Such developments are expected to create sustained increases in human welfare, including a reduction in poverty levels.<sup>37</sup> Indeed, evidence suggests that direct investment by top-tier companies into open and undistorted marketplaces can confer immense productivity benefits on developing economies, even in the face of obstacles such as scarce local capital or low education levels.<sup>38</sup> More generally, economies with competitive domestic markets tend to exhibit higher levels and rates of growth in per capita income, higher rates of domestic and foreign investment, and lower rates of poverty.<sup>39</sup> Finally, lower prices stemming from increased competitive pressures may convey a specific benefit to the poor, given that the poor suffer disproportionately from higher costs of essential goods and services.<sup>40</sup>

18. As such, competition policy represents an important policy component to the reduction of poverty in developing countries. By restraining opportunities and incentives for corruption, appropriate competition policy, when implemented as part of a sound overall policy mix, attracts foreign investment and allows developing economies to fully reap the rewards of transparent and competitive markets.

### 3. The Role of the OECD

19. The OECD is a leader in the international fight against corruption. To date, 40 countries have adopted the OECD's Anti-Bribery Convention. The Anti-Bribery Convention strives to coordinate a diverse array of legal systems to establish a minimum standard against bribery, a practice which "raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions".<sup>41</sup> By mandating and monitoring the imposition of criminal sanctions in signatory countries for the bribery of foreign public officials, the OECD pursues the dual

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<sup>34</sup> For instance, see Gökgür, *supra* note 5 at 24, 34.

<sup>35</sup> Hanson, *supra* note 33.

<sup>36</sup> Khemani, *supra* note 6 at 14, 16-19, 36.

<sup>37</sup> UNCTAD, "The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy" (2010) at para 52; Plessis, *supra* note 3 at para 3.31.

<sup>38</sup> Khemani, *supra* note 6 at 14.

<sup>39</sup> *Ibid.* Khemani also notes that such trends are "consistent with the broad empirical finding that barriers to competition impede innovation, growth, and prosperity."

<sup>40</sup> Zsofia Tari and Jeremy West, "Does Competition in Markets for Essential Goods and Services Reduce Poverty?" (Background Note at the OECD Latin America Competition Forum's Session on Competition and Poverty Reduction, Sep 18-19, 2012) at paras 3, 38; Khemani, *supra* note 6 at 14-15.

<sup>41</sup> *Supra* note 2 at Preamble; "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (IMF report prepared by the Policy Development and Review Department, September 18, 2011) at 2.

objectives of fighting corruption and creating a level competitive playing field for all companies.<sup>42</sup> On a broader level, the Anti-Bribery Convention reflects a consensus by OECD members on the harms of corruption, including its devastating impact on investment, growth, and development.<sup>43</sup> The OECD has also issued recommendations, best practices, and roundtable discussion summaries on various aspects of competition law and policy, including effective action against cartels,<sup>44</sup> combatting bid-rigging in public procurement,<sup>45</sup> and ensuring procedural fairness and transparency in competition law enforcement.<sup>46</sup>

20. In light of the foregoing, the OECD is well-positioned to guide the adoption of competition policy in developing countries with an aim to reducing corruption and its attendant economic harms. Further normative policy recommendations provided by the OECD in this respect would be fully compatible with and would build upon the fundamental principles behind the OECD's existing work on competition law and policy, as well as its anti-bribery instruments. Specifically, such work would allow the OECD to further its anti-corruption and pro-growth goals, encourage more effective competition, stimulate greater investment, and enhance economic efficiencies, all of which would result in overall wealth creation with a consequent reduction in poverty.

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<sup>42</sup> OECD, *No Longer Business as Usual: Fighting Bribery and Corruption* (Paris: OECD Publications, 2000) at 3.

<sup>43</sup> Enery Quiñones, "What is Corruption?" OECD Observer (2000), available at [http://www.oecdobserver.org/news/archivestory.php/aid/233/What\\_is\\_corruption\\_.html](http://www.oecdobserver.org/news/archivestory.php/aid/233/What_is_corruption_.html).

<sup>44</sup> *Supra* note 1.

<sup>45</sup> *Ibid.*

<sup>46</sup> OECD Competition Committee, "Procedural Fairness and Transparency: Key Points" (OECD Publications, April 30, 2012).