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LATIN AMERICAN COMPETITION FORUM

Session I: Competition and Poverty Reduction

Contribution from the United States Federal Trade Commission

18-19 September 2012, Santo Domingo, Dominican Republic

The attached document from the United States Federal Trade Commission is circulated to the Latin American Competition Forum FOR DISCUSSION under Session I of its forthcoming meeting to be held on 18-19 September 2012 in Santo Domingo, Dominican Republic.

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LATIN AMERICAN COMPETITION FORUM

-- 18-19 September 2012, Santo Domingo (Dominican Republic) --

Session I: Competition and Poverty Reduction

-- CONTRIBUTION FROM THE UNITED STATES FEDERAL TRADE COMMISSION --

1. Competition has a direct relationship to poverty reduction. When competition leads to lower prices for the basic necessities of life, the greatest benefits may accrue to the least well off, as their access to necessities improves and, potentially, resources are freed up for discretionary spending that can allow them to invest in improvements to their lives. By focusing on anticompetitive conduct that increases costs to disadvantaged individuals, competition agencies may directly improve the lives of their countries' poorest citizens. Further, by addressing governmentally-imposed measures that prevent the benefits of competition from reaching the poor, they allow the potential of free markets to enable the poor to lift themselves from poverty.

2. This submission will review the basic relationship between competition and poverty reduction, briefly identify the potential for competition to benefit the poor, and then focus on the experience of the United States, emphasizing the agencies' activities in the health care sector.

I. Competition's Effect on Markets for Essential Items, in Principle

3. Economies with competitive domestic markets tend to have higher levels and rates of growth in per capita income.¹ Competition in the domestic market, regardless of its origin, begets efficient, productive firms that are better able to compete on global markets, which in turn increases economic growth and standards of living. This relationship is demonstrated by a 12-year study by the McKinsey Global Institute that sought to determine why some nations remain wealthy, while others remain poor even after years of international aid. In his book presenting the results of the study, William Lewis explained that, "economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can't replace less efficient ones.

¹ World Bank, *Global Economic Prospects and the Developing Countries Report*, 2003; R. S. Khemani, *Competition Policy and Promotion of Investment, Economic Growth and Poverty alleviation in Least Developed Countries*, FIAS, Occasional Paper, 19, 2007.

Economic growth slows and nations remain poor.”² While competition may thus have great potential for improving the lot of impoverished economies as a whole, it also has potential to improve the lives of individual consumers.

4. Similarly, the World Development Report 2000-01 states that, “markets work for the poor because poor people rely on formal and informal markets to sell their labor and products, to finance investment, and to insure against risks. Well-functioning markets are important in generating growth and expanding opportunities for poor people.” It follows that when anticompetitive practices interfere with the functioning of markets, such as through cartels that raise the price of a farmer's fertilizer or of a family's basic foodstuffs, or through exclusionary practices that keep poor people from setting up small businesses or that keep telecommunications costs artificially high, the poor will pay the price.

5. That price falls most heavily on the poor. While the more affluent may be able to absorb anticompetitive overcharges by reducing discretionary spending — possibly without even recognizing that they are doing so — a poor person living on a few dollars a day may have to curtail spending on basic necessities such as food or health care. Paying more for necessities means that fewer resources will be available to make longer-term investments, such as opening a small business, investing in equipment that will make a farmer more productive, or investing in education.³

6. Further, in many cases, poorly designed government policies impose undue, and perhaps unintended, burdens on the poor. When unnecessary regulations impede competition, the poor often pay higher prices, face limited access to goods and services, and receive lower-quality goods and services than a competitive market would deliver.⁴ Regulation may also make it difficult for poor consumers to legally establish small businesses, such as farms, retail establishments, and taxis that might compete with established firms. Through their competition advocacy functions, competition agencies can seek to remove some of the more burdensome of these regulations.

7. Finally, supplier collusion in public procurement imposes costs on consumers, especially poor ones. It has been observed that “even small improvements in the performance of public procurement programs can yield large social benefits, especially for the least affluent citizens. Public procurement outlays account for just under twenty percent of GDP in the United States; in formerly planned economies, the state's share can exceed fifty percent. Many of these expenditures are for infrastructure and social services that are designed in large measure to assist economically disadvantaged populations.”⁵

² W. Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability* 13 (2004). See also D. P. Majoras, Chairman, Federal Trade Commission, *National Champions: I Don't Even Think it Sounds Good* (March 27, 2006), available at <http://www.ftc.gov/speeches/majoras/070326munich.pdf>.

³ DFID - Department for International Development Investment Climate Team, *A Competition Assessment Framework: An Operational Guide for Developing Countries*, London, UK, 2007.; See R. S. Khemani, *supra* n. 1.

⁴ For example a World Bank (2004) report states that there was improved quality and delivery of food grains at lower prices when competitive market-oriented measures were introduced in the state-dominated food distribution system. Other studies by the World Bank Group and various development organizations also point out that “the poor pay more or receive lower quality for such services as water, sanitation, electricity, and even primary school education than do residents in the formal economy.” See R.S. Khemani, *supra* n. 1.

⁵ W. E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, Washington University Journal of Law and Policy, 2007.

II. Competition's Effects on Markets for Essential Items, In Reality

8. While in principle the relationship between competition and poverty reduction seems clear, the real challenge is to demonstrate, in practice, how promoting competition can lead to substantially lower prices and be beneficial to poor consumers.

A. Illustrative Experience in Other Countries

9. A brief comparative example of telecommunications liberalization illustrates the relationship. As documented in other papers,⁶ Mexico's state telecom firm was privatized in a way that allowed it to use interconnection fees to preserve not only its fixed line monopoly, but to establish a dominant position in mobile telephony. As a result, prices are higher and penetration rates for fixed line, mobile and broadband services are lower in Mexico than in any other OECD country. A recent OECD study found that the cost to the Mexican economy of the dominant telecom firm's practices amount to USD 13.4 billion per year. Dividing this amount by the population of Mexico means that the cost of anticompetitive practices costs every man, woman, and child in Mexico \$121 per year. The poor are least likely to be able to afford the cost, and are thus least likely to be able to benefit from the innovations and opportunities that this sector offers.

10. In Kenya, by contrast, the privatization of and resulting competition in the telecommunications sector led in significant entry and expansion of capacity. This has resulted in enormous competition for long-distance calls through the Internet, rate reductions, more innovation and increased development of new services.⁷

B. The Experience in the United States: the Health Care Story

11. While poverty is not as endemic in the United States as in other countries attending the Forum, it remains a serious problem. According to the U.S. Census Bureau, the official poverty rate in 2010 was 15.1 percent: 46.2 million people were below the official poverty line.

12. While the U.S. antitrust agencies have addressed competition issues that impact poor people in many sectors, such as food,⁸ gasoline,⁹ electricity,¹⁰ telecommunications,¹¹ and banking,¹² this submission

⁶ OECD (2012), *OECD Review of Telecommunication Policy and Regulation in Mexico*, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264060111-en>.

⁷ *Bringing Competition Into Regulated Sectors: Focus on Kenya*, Contribution by KENYA, submitted to UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 30 October to 2 November 2006.

⁸ *In the Matter of Tops Markets LLC, et al.*, (FTC Docket C-4295), available at <http://www.ftc.gov/os/caselist/1010074/index.shtm>.

⁹ *In the Matter of Irving Oil Limited, a Canadian corporation, and Irving Oil Terminals Inc., a corporation* (FTC File No. 101 0021). available at <http://www.ftc.gov/os/caselist/1010021/index.shtm>. In 2002, the FTC began a project to monitor wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities. Gasoline and diesel prices variation have a large impact on food pricing due largely to the cost of transportation. See <http://www.ftc.gov/ftc/oilgas/index.html>.

¹⁰ See, e.g., *United States v. Exelon Corp.*, 1:11-CV-02276, 2012 WL 3018030 (D.D.C. May 23, 2012), available at http://www.justice.gov/atr/public/press_releases/2011/278473.htm.

¹¹ See, e.g., *United States v. AT&T, Inc.*, 1: 11-cv-01S60, 2011 (D.D.C. August 31, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/274615.htm.

will focus on the interaction between competition in markets for health care goods and services and poverty reduction. Health care consumes nearly 18 percent of the U.S. GDP.¹³ Many Americans are uninsured or underinsured and must pay nonemergency health care costs out of pocket or do without needed care or medicines. Even for the insured, the high cost of health care may be reflected in the cost of insurance premiums, various co-payment, deductible or other cost-sharing mechanisms, or reductions in the scope of their insurance benefits, which do not necessarily cover all essential services.¹⁴ Moreover, as our public health agencies have noted, competition is important to improving health care quality, and access to health care, for the publicly insured as well as private consumers.¹⁵ The sector has long been a major priority of the FTC.

1. Hospital Mergers

13. *FTC v. ProMedica Health System* involved a merger of two of the three hospitals serving Toledo, Ohio. Toledo is characterized by a declining industrial base, high unemployment, and a relatively high poverty rate. The FTC challenged the transaction out of concern that it would significantly harm consumers in the Toledo area by creating a combined hospital system with an increased ability to raise prices. This would increase the burden on both uninsured and underinsured poor people seeking elective care,¹⁶ on the insured working poor and near poor because the hospitals could obtain supra-competitive reimbursement rates on necessary services, such as inpatient obstetric care, from commercial health plans, and, ultimately, from their members. At the FTC's request, a court enjoined the merger, and the FTC ultimately determined that it would be anticompetitive.¹⁷

14. In *FTC v. Phoebe Putney Health System*, the FTC challenged the attempt by Phoebe Putney, one of two hospitals in Albany, Georgia, to acquire Palmyra Park Hospital from HCA, Inc. Albany is in one of the poorest counties in the United States. Post-transaction, the combined entity (Phoebe) would have a market share in excess of 85 percent. The FTC alleged that the transaction would enhance Phoebe Putney's ability and incentive to increase reimbursement rates charged to commercial health plans and their members, leading to higher health care costs in the area. Phoebe and Palmyra had been close rivals that competed for patients in the general acute-care hospital services market. That competition spurred each to increase the quality of its patient care; the FTC argued that this important "non-price" competition would

¹² See, e.g., *In the Matter of First Niagara Bank N.A. and HSBC Bank USA N.A.*, available at http://www.justice.gov/atr/public/press_releases/2011/277266.htm.

¹³ See <http://www.ftc.gov/os/testimony/120305appropriationstestimony.pdf>.

¹⁴ See, e.g., Dep't Health and Human Serv's, ASPE Issue Brief, *Essential Health Benefits: Individual Market Coverage* (Dec.2011), available at <http://aspe.hhs.gov/health/reports/2011/IndividualMarket/ib.pdf> (noting, for example, that 62% of enrollees lack maternity coverage and 9% lack prescription drug coverage).

¹⁵ Dep't Health and Human Serv's, Centers for Medicare & Medicaid Serv's, 42 CFR Part 425, Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations, Final Rule, 76 Fed. Reg. 67802, 67809 (Nov. 2, 2011).

¹⁶ Under U.S. law, hospitals may generally not refuse emergency treatment to anyone, whether insured or not. Even the insured may feel effects similar to the uninsured, however. First, high hospital prices may be reflected in high insurance costs, paid both directly and indirectly by individual beneficiaries. Also, in some cases, insurance policies available to poor people may have low maximum benefits and high deductibles, imposing direct out-of-pocket costs for health care services even for the insured .

¹⁷ *ProMedica Health System, Inc.*, FTC Docket No. 9346, available at <http://www.ftc.gov/os/adjpro/d9346/120328promedicabrillopinion.pdf> (noting that the insurers or managed care organizations "would not themselves absorb the higher rates; the higher rates would be passed on to the community-at-large.").

be eliminated by the proposed transaction to the detriment of consumers in Albany.¹⁸ While the court agreed with the FTC's assertion that the merger would reduce competition, the court concluded that the merger was immune from challenge because a regulatory scheme under Georgia law immunized the transaction from federal antitrust review. That conclusion, which was affirmed on appeal, is now under review by the United States Supreme Court, and a decision is expected in the next year.

15. A common argument raised in such cases is that hospitals that are freed from competitive pressures are able to offer more charity care to poor consumers because insured patients, particularly managed care and privately insured patients, cross-subsidize a hospital's charity care.¹⁹ The FTC's Bureau of Economics analyzed the argument that increased competition in the health care sector inhibits a provider's ability to offer charity. In a carefully researched study, it concluded that there is little relationship between absence of competition and the provision of charity care. To the extent that there is a relationship, the study found, in fact, that increased concentration is associated with reduced charity care and that reduced competition may lead to higher prices for uninsured patients. Significantly, the study noted "the lack of any statistically significant evidence for the cross-subsidization hypothesis. The data provides no statistically significant evidence that increased competition leads to reductions in charity care. The claim that hospitals will use market power to increase services to the poor is largely unsupported."²⁰

2. Pharmaceutical Prices

16. Another good example of where competition policy can impact a market for essential goods is in the area of so-called "pay for delay" patent settlement cases. The FTC has challenged agreements between generic and patented drug manufacturers through which patented drug manufacturers settle patent infringement litigation by paying generic manufacturers to stay out of the market. These agreements, which are made possible by a law that specifically governs patent infringement claims in the pharmaceutical sector, effectively block all other generic drug competition for a growing number of branded drugs. According to an FTC study, these agreements cost consumers and taxpayers \$3.5 billion in higher drug costs every year. Since 2001, the FTC has filed a number of lawsuits to stop these deals, and it supports legislation to end such practices.²¹

17. Competitive drug prices may be key to access or compliance with recommended treatment for many people. As an article in *Health Affairs* noted, "when costs are high, people who cannot afford something find substitutes or do without. The higher the cost of health insurance, the more people are uninsured. The higher the cost of pharmaceuticals, the more people skip doses or do not fill their prescriptions."²²

¹⁸ Press Release of 04/20/2011, *FTC and Georgia Attorney General Challenge Phoebe Putney Health System's Proposed Acquisition of Palmyra Park Hospital as Anticompetitive*, available at <http://www.ftc.gov/opa/2011/04/phoebeputney.shtm>.

¹⁹ B.C. Vladeck, *Paying for Hospitals' Community Service*, *Health Affairs*, v25 (#1, January/February), (2006) pp. 34-43.

²⁰ C. Garmon, Bureau of Economics, Federal Trade Commission, *Hospital Competition and Charity Care* (Working Paper No. 285, October 2006).

²¹ Statement of Federal Trade Commission Chairman Jon Leibowitz on K-Dur 20 Matter, available at <http://www.ftc.gov/opa/2012/07/kdur.shtm>; Federal Trade Commission, *Pay-for-Delay: When Drug Companies Agree Not to Compete*, available at <http://www.ftc.gov/opa/reporter/competition/payfordelay.shtml>.

²² W. Sage, D.A. Hyman & W. Greenburg, *Why Competition Law Matters to Health Care Quality*, 22 *Health Affairs* 31, 35 (Mar./Apr. 2003).

3. Professional Services

18. The FTC also has been active in the fight against professionals that band together to raise prices or limit output to the detriment of poor consumers. At least two cases illustrate the FTC's approach to this problem in the healthcare area.

19. In 2000, the South Carolina legislature eliminated a statutory requirement that a dentist examine each child before a hygienist could perform preventive dental care in a public health setting. The goal was to allow schoolchildren, particularly those from low-income families, to receive preventive dental care. In July 2001, however, the South Carolina Board of Dentistry adopted an emergency regulation that re-imposed the dentist examination requirement. As a result of the Board's actions, a hygienist-owned company that had begun sending hygienists to schools to provide preventive care was forced to change its business model and was able to serve far fewer patients. The FTC challenged the Board's action, alleging that they "hindered competition in the delivery of preventive dental services to school-aged children and deprived thousands of school children – particularly economically disadvantaged children – of the benefits of preventive oral health care." The case was resolved by a consent order that required the Board to publicly announce its support for the current state policy – that hygienists can provide such care in public health settings without a dentist's examination – and to notify the Commission before adopting rules or taking other actions related to preventive dental services provided by dental hygienists in public health settings.²³

20. Another recent example involved the use of competition advocacy to seek to eliminate anticompetitive state scope-of-practice regulations that made it more difficult for lower-cost health care practitioners to serve low income patients. In the state of Louisiana, state law prohibited Advanced Practice Registered Nurses (APRNs) to serve Louisiana health care consumers unless they had written "collaborative practice" agreements with physicians before they can offer health care services within the APRNs' scope of practice. Those agreements may be costly or difficult to establish in some areas, with competitive effects extending to the least well off individuals. FTC staff wrote to the Louisiana state legislature in support of a proposed law that would remove this requirement for certain APRNs who practice in medically underserved areas or treat medically underserved populations. The letter noted reports of shortages affecting both the availability and accessibility of primary health care providers in many parts of Louisiana, and a recent Institute of Medicine (IOM) report pointing out that excessive regulatory restrictions impede APRNs' ability to help alleviate such shortages. The staff letter stated that removing undue restrictions on APRNs "may improve access and consumer choice for primary care services, especially for rural and other underserved populations, and may also encourage beneficial price competition that could help contain health care costs." The FTC staff asked the legislature to carefully consider expert findings on APRN safety – such as those of the IOM – and its own experience, to determine whether such formal regulations are in fact necessary to assure patient safety.²⁴

4. Conclusion

21. If poor consumers have to pay more for health care due to anticompetitive mergers or conduct, they may sometimes have to do without it. Moreover, to the extent that they can afford care, they will have less money available to spend on other basic necessities. In many developing countries, this concern is

²³ See <http://www.ftc.gov/opa/2007/06/dentists.shtm>.

²⁴ Letter from Susan DeSanti, Director of Office of Policy Planning, Richard Feinstein, Director of Bureau of Competition, and Joseph Farrell, Director of Bureau of Economics, to Louisiana State Representatives Thomas PWillmott and Patrick C. Williams (April 20, 2012), *available at* www.ftc.gov/opa/2012/04/louisiana.shtm.

even more obvious. The poorest in those countries are often malnourished, sick, and illiterate, which severely curtails their productivity and ability to improve their economic well-being.

III. Conclusion

22. Most jurisdictions have policies to combat malnourishment, poor health, and illiteracy. While the bulk of the responsibility will fall on government programs that directly confront these problems, competition law has an important role to play. Competition law enforcement may focus on ensuring access to goods and services that have the most direct impact on the nutritional, health, and educational needs of the poorest in developing countries. Challenges to anticompetitive conduct in those sectors can bring disproportionate benefits to low income sectors of society.²⁵

23. The lower prices that can result from increased competitive pressures expand markets and make goods and services more affordable especially to poor population. Therefore, an inclusive growth strategy aimed at alleviating poverty should include an appropriate competition policy component. Indeed, “through the use of its research and advocacy tools, the competition agencies can identify barriers to competition and seek to persuade legislatures and regulatory bodies to adopt measures that yield important economic and social benefits.”²⁶

²⁵ T. K. Cheng, *Convergence and its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 Chi. J. Int'l L. 478.

²⁶ W. E. Kovacic, *supra* n. 6.