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Please contact Mr. Chris Pike [E-mail: Chris.Pike@oecd.org] and Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Competition for the market: enforcement issues with concession contracts

- Paper by Rory Macmillan¹ -

Competition enforcement is necessary to address anticompetitive conduct and mergers that may reduce competition in tender processes and so undermine competition for the market. This note briefly discusses how dominance may be abused to exclude rivals in tender processes as well as in downstream markets for which the concession's services are an input. It briefly considers the importance of controlling mergers that may reduce competition in tender processes, as well as merger conditions that might facilitate such competition. It considers the application of competition law to granting authorities whose design of tender processes and concessions may unintentionally reduce competition. It briefly also considers the importance of enforcement of concession contracts as an indirect aspect of preserving the integrity of tender processes that led to their award.

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Rory Macmillan, Founding Partner, Macmillan Keck Attorneys & Solicitors

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1. Competition for and in the market

1. Concessions are agreements between public sector and private firms, typically for the provision of public services such as rail transport, water distribution, waste disposal and energy, or to develop, operate and maintain infrastructure such as toll roads and ports. They entitle the concessionaire to exploit the right to operate the infrastructure and provide the service to customers for its own gain, subject to the contractual restrictions of the concession and any applicable sector regulation.

2. Concessions are typically awarded pursuant to competitive bidding processes. They often have long terms, and are often exclusive. They differ from public service contracts, where the contracted firm provides goods or services to the government. Concessionaires operate commercially in markets for services of general economic interest, and the transfer of commercial opportunity and risk to them is central to the nature of a concession.²

3. This paper concerns competition enforcement in relation to concessions and competition for the market, i.e., the intervention by competition authorities using their enforcement powers in the areas of abuse of dominance, merger control and cartels. It does not speak to advocacy, which concerns ensuring the best design of tender processes and concessions to optimise competition for the market.

4. The distinction between competition in and competition for the market is a neat one. It usefully frames a debate, which valorises the Schumpeterian innovation benefits of competition for the market, particularly where competition in the market is likely or necessarily limited for economic, political or legal reasons. However, the distinction can confuse us into thinking that we are referring to different types of competition relating to the same market.

5. While they are obviously closely related, there can be a basic difference between the market *for* which there is competition, and the market *in* which there is (or more likely is not) competition. Thus the European Commission has held that “the grant of a licence for the exploitation of a particular State-regulated activity is distinguishable from the running of that particular activity.”³ For example, in the case of toll roads, “[t]he grant of toll motorway concessions, usually in tendering procedures, consist in an economic activity where supply is represented by the State and demand by undertakings or consortia of undertakings with an interest in acquiring toll motorway concessions.”⁴ This is different from the provision of toll roads to drivers of vehicles.

6. For instance, when considering competition *in* such a market, the market definition exercise might take into account substitutability of alternative, slower indirect roads and even rail transport or other inter-modal competition. It may quickly settle on geographically defined markets perhaps analysed on an individual route-by-route basis.⁵ From the point of view of drivers, these may not be effectively substitutable by any other means of transport, with the result that a toll road operator may have no competition. In contrast, competition

² Opinion of Advocate General 21 March 2019 in Case C-526/17, *European Commission v Italy*.

³ Case No IV/M.567 Lyonnaise des Eaux/Northumbrien Water, para 12.

⁴ Case COMP/M.4087 EIFFAGE / MACQUARIE / APRR Notification of 11/01/2006 pursuant to Article 4 of Council Regulation No 139/2004, para 9, available at https://ec.europa.eu/competition/mergers/cases/decisions/m4087_20060215_20310_en.pdf.

⁵ See, e.g., the EU Case COMP/M.3770 Lufthansa/Swiss para 14.

for the market in the award of a toll road concession may comprise several toll road operators who might win the right to operate the route.

7. Given that many concessions are infrastructure-based and geographically specific, a key concern in competition for the market will be the level of competition among bidders for given concessions. Winning in a market for award of a concession will typically result in an exclusive right to provide the services, and so establish or perpetuate dominance in the market for the given service to customers. This is not inevitable, as the prospect of regular rebidding in intensely competitive tenders may act as an important constraint on the concessionaire's conduct.⁶ However, where concessions have long terms or strong contract renewal rights, such constraints may be weak. And as we will see below, a firm's power in the market for services provided under the concession may also contribute to dominance in the market for the award of the concession itself when it comes up for renewal.⁷

2. Bidding processes and abuse of dominance

8. The incumbency advantage is deep and difficult to correct for in a tender process,⁸ and a tender process may even enable an incumbent to abuse its dominance. When *Société Nationale maritime Corse Méditerranée* (SNCM), the incumbent operator of the Marseille–Corsica ferry lines, submitted a bid to renew its *Délégation de Service Public* (DSP), it globally bundled all of the network lines in its proposal. This made it difficult for the maritime authority to compare bids to supply different individual lines from Marseille to different ports on Corsica.⁹ As a result, the French Autorité de la concurrence (AdC) found SNCM to be abusing dominance in the market for renewal of the *délégation* of the maritime ferry routes between Marseille and Corsica.

9. SNCM argued that it was the broader retail market and behaviour of passenger and freight consumers (whose demand meets the offer of transport) from the continent to Corsica that should be taken into account when assessing market participants' market power and conduct. However, the AdC found that the *délégation* had imposed such conditions (capacity, size, age of boats and required deployment timing) that only three firms could realistically compete to win it. Further, even if the *délégation* did not confer an exclusive right to serve any of the lines, SNCM's advantages (particularly in terms of existing number, type and capacity of boats) had become indispensable for transport

⁶ See the Hong Kong Competition Commission's Guideline on the Second Conduct Rule, which provides guidance on the Commission's approach to market power in bidding markets, available at https://www.compcomm.hk/en/legislation_guidance/guidance/second_conduct_rule/files/Guideline_The_Second_Conduct_Rule_Eng.pdf. The guidance notes that effective competition at the bidding stage may mean that a high market share may not reflect long term market power, and that it may be appropriate to assess market power over an extended period.

⁷ See OECD, Global Forum on Competition, Competition for the Market: Tackling the Incumbency Advantage, Paper by Elisabetta Iossa, 6 December 2019.

⁸ Autorité de la concurrence, Décision 10-DCC-198 du 30 décembre 2010, *Veolia Transport and Transdev*.

⁹ Autorité de la concurrence, Décision 09-D-10 du 27 février 2009 relative à des pratiques mises en œuvre dans le secteur du transport maritime entre la Corse et le continent (SNCM), available at <https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/09d10.pdf>

between Marseille and Corsica. As a result, SNCM was dominant in the market for the renewal of the *délégation*.

10. The tender process did not prohibit submission of a global offer covering all lines from Marseille to Corsica. However, the AdC, recalling *Hoffmann Laroche*¹⁰, found that SNCM was effectively tying the granting authority to obtain all of its requirements exclusively from SNCM, which was an abuse of dominance. This was not merely exploitative, but was exclusionary, because no other rival for the *délégation* could place such a global offer. SNCM's pricing did not deliver benefits of efficiencies of scale that might have arguably justified such a bid.

11. The ongoing Puerto Nuevo port case presented by the Colombian delegation offers another illustration of how exclusionary conduct may arise in a tender process.¹¹ A tender for the design, construction, operation and management of the port for export of coal was won by four coal exporters, i.e., users of the port, that belonged to the same group. The capacity of the port that they proposed, and that was accepted by the granting authority in the concession contract, was designed only for their own needs as coal exporters. As a result, the port would not have capacity to serve their downstream competing coal exporters.

12. Abuse of dominance cases involving concessions often concern leverage of upstream control over a facility or exclusive service into a downstream market for which it is an input, as in the *Puerto Nuevo* case. This may thus raise conflicts of interest and enforcement against anticompetitive discrimination and exclusionary foreclosure of rivals from markets.

13. For instance, according to its submission, Albania's Competition Commission investigated EMS-Albanian Port Operator (EMS-APO) in relation to its vertically integrated control over the infrastructure and facilities of the eastern port terminal of Durras and the loading and unloading of freight (stevedore) and other services at the port. The port operator was found to have discriminated against competing stevedores, denying them access to equipment and requiring them to subcontract to it for provision of services to the port's customers, thereby restricting the customers' ability to select their stevedores of choice.

14. In that case, the Albanian Competition Commission took the view that such conduct amounted to abuse of dominance causing harm to competition in the market, and required the port operator to correct its conduct and pay fines of 10% of its annual revenue. The Commission also introduced ongoing enforcement monitoring, including requiring contracts with stevedores to be submitted to the Competition Commission for its prior approval.¹²

¹⁰ "An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of article 86 of the treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate." CJCE, 13 February 1979 *Hoffman Laroche*, Case 85/76.

¹¹ OECD Global Forum on Competition, Competition for the Market, Contribution from Colombia, Session IV, 6 December 2019.

¹² OECD Global Forum on Competition, Competition for the Market, Contribution from Albania, Session IV, 6 December 2019, and Competition Commission decision no. 477, dated 12 October 2017 (available at http://caa.gov.al/uploads/cases/Vendimi_nr.477_dt.12.10.2017_1.pdf), and Competition Commission decision no. 567, dated 7 November 2018 (available at http://caa.gov.al/uploads/decisions/Vendim_nr.567_dat.07.11.2018.pdf).

15. In the Colombian *Puerto Nuevo* case mentioned above, the coal exporters that won the concession to build and operate the port were also affiliated with the only railway that would access the port. This compounded the concern that they had abused their position as concessionaire by preventing access by their competing coal exporters.

16. In these cases, competition enforcement steps in where effective use of stronger rules in the concession contract itself to prevent conflicts of interest or to prohibit discrimination might have reduced the risk of such anticompetitive conduct occurring. A deeper regulatory capacity on the part of granting authorities might reduce the necessity for *ex post* competition enforcement.

17. A claim of abuse of dominance may need to consider the impact of sector regulation. As mentioned in the Secretariat's briefing note, this was illustrated when N.V. Nederlandse Spoorwegen won a tender to operate rail networks in a region of the Netherlands and was found by the Dutch Competition Authority to have engaged in predatory pricing by having submitted a loss-making bid. This decision was annulled by the court, among other reasons because the assessment of its market power had not taken into account the economic regulation in the concession which required it to incur certain costs to operate trains on certain routes and capped its prices, thus potentially limiting its ability to act independently (and presumably to recoup its losses).¹³ However, the existence of regulation did not mean that competition law did not apply.

18. Some conduct by concessionaires may also violate competition law prohibitions on exploitative abuse of dominance. A finding of competition violation may have its foundation in contractual violations of pricing terms set in the concession award process, indicating again the important interaction between the concession's regulatory provisions and anticompetitive conduct. In Chile¹⁴, for instance, a Santiago airport terminal operator was found to have engaged in excessive pricing to freight forwarders in violation of tariff limits in bidding specifications for the concession.¹⁵

19. Concessions can be structured to minimise incumbency advantages from sunk costs and asset ownership. Tangible assets may be transferrable, as may be intellectual property, software, data and even personnel. Thus build-operate-transfer (BOT), build-transfer-operate (BTO) and other concession structures allow for the resumption of public ownership of the assets (e.g., a communications network, port terminal or transport depot). This makes such assets available for transfer to or use by new successful bidders.

20. However, an incumbent operator will have gained important experience during its term, such as the characteristics of demand, operation of the asset, or insights into the costs and risks of compliance with the contractual and sector regulatory requirements. This makes it important from a competition advocacy standpoint to improve information made

¹³ OECD Global Forum on Competition, Competition for the Market, Background Note from the Secretariat, , Session IV, 6 December 2019; see also Van de Sander, M. and T. Beetstra (2019), Abuse of dominance fine of € 41 million for Dutch railway operator annulled, available at <http://competitionlawblog.kluwercompetitionlaw.com/2019/07/09/abuse-of-dominance-fine-of-e-41-million-for-dutch-railway-operator-annulled/>

¹⁴ UNCTAD Intergovernmental Group of Experts on Competition Law and Policy 2009, Part I: Public Monopolies, Concessions and Competition Law and Policies, Chile submission.

¹⁵ In *Bodson v Pompes funèbres libérées*, [1998] ECR 2479, it was found to be a valid question whether a firm holding exclusive concessions for funeral services in a large number of French communes had engaged in excessive pricing.

available before and during tender processes to reduce bidders' "cost of information acquisition."¹⁶

3. Merger enforcement and remedies

21. Mergers may harm competition for the market by reducing the number and ability of potential bidders to compete in future tender processes, and strengthening the power of those bidders that remain. The theory of harm will depend partly on the structure of such concessions. In some cases, consolidation might lead to higher prices paid by the consumer or a reduction in quality, quantity or innovation. In other cases, the concession may include a subsidy, and the concern may be that the price paid by the authority granting the concession may increase.

22. An example of the latter case arose in the merger between French urban transport providers *Veolia Transport / Transdev*.¹⁷ Urban transport is often heavily subsidised, either operated by local authorities or tendered competitively for the lowest subsidy. With little likelihood of reducing retail pricing, the merger efficiencies might be realised through reduced public subsidies to the operator – if there is sufficient ongoing competition for the concessions. The French AdC was concerned that the merger might lead to a reduction in competition for such tenders and to a rise in the subsidies and decline in innovation rather than pass the benefit of the efficiencies through to the local authority by way of a lower subsidy.

23. However, mergers may be proposed in order to create efficiencies of scale and scope, which might benefit the performance of the concession activity and ultimately quality, innovation, coverage or price of the services. Where this is so, remedies may be used to mitigate harm to competition for the market after the merger. In *Veolia Transport / Transdev*, the AdC permitted the merger on condition that the parties contribute to a fund that would indemnify other bidders for their costs of bidding unsuccessfully for transport network concessions in areas where they are incumbents.¹⁸ The fund would also pay for procurement of consulting advice for public authorities on how to improve competitiveness by design of future tenders.

24. Another remedy is akin to a divestment transaction. When GDF Suez acquired Ne Varietur, leading to greater concentration in the market for managing local authorities' heating networks, the French AdC allowed the acquisition on condition of early termination of Ne Varietur contracts in two areas to enable competitors to compete for those concessions.¹⁹

¹⁶ Decision 10-DCC-198, *cit.*

¹⁷ Decision 10-DCC-198 of 30 December 2010, available at <https://www.autoritedelaconurrence.fr/sites/default/files/commitments//10DCC198decisionoccultee.pdf>

¹⁸ Decision 10-DCC-198, *cit.*

¹⁹ The Belgian Competition Council imposed a similar remedy in the merger of highway catering service providers that gave them control of nearly all highway restaurants. They were prohibited from seeking renewal of certain of their concessions, or from seeking certain new ones. *Autogrill/Carestel Group*, 2006-C/C-20, 9 October 2006.

4. Cartel enforcement

25. Competition for the market in concessions faces some basic vulnerabilities to coordination. In addition to the fact that there are often a small number of competitors for concessions, tender processes have a potential for extensive exchange of information, such as in Q&A processes and bidder meetings. The infrequent granting of concession processes can also weaken enforcement authorities' ability to obtain data to identify patterns, making detection more difficult.

26. However, at the same time, the infrequent and often-unique nature of individual concessions makes coordination and rules of mutual compensation among cartel members more difficult to achieve, except for example in concessions for multiple lots. The incentives for and vulnerability to collusion are thus highly context specific, and will be partly (even largely) driven by the design of the award process and concession contracts themselves.

27. Where concession operators are active in multiple markets, there is potential for deviation in one market to lead to retaliation in another. This can "strengthen the stability of a possible coordination"²⁰ that is difficult for the authority conferring the concession and possibly even the competition authority to detect, especially if the operators are multimodal.

28. As a result, prohibitions on bid-rigging are relatively well developed in most countries and are not explored further here.

5. Competition law enforcement and the delegating authority

29. Having seen above in section 2 how the granting authority's approach to the tender may unintentionally allow or even enable anticompetitive conduct, the question arises as to the role of the granting authority and whether it may fall foul of competition law.

30. In some cases, an official decision to structure a market as a monopoly might be found to be unlawful, such as the decision (discussed in Peru's submission) of Peru's Ministry of Transport and Communications to refuse to grant authorisations for vehicle inspection services in the city of Lima. While the decision respected an exclusivity clause in a concession agreement for such services granted to another provider, Indecopi, Peru's competition authority found the refusal to be an unlawful bureaucratic barrier.²¹

31. In *Arriva v Luton Airport*²² (discussed in the Background note of the Secretariat²³), Luton Airport granted bus company National Express a seven year exclusive concession for the route between the airport and London and a right of first refusal over new routes. The High Court found that Luton Airport had dominance in the market for access to the airport, and had unlawfully abused this dominance in granting exclusivity which distorted

²⁰ Decision 10-DCC-198, *cit.*

²¹ OECD Global Forum on Competition, Competition for the Market, Contribution from Peru, Session IV, 6 December 2019.

²² *Arriva the Shires Ltd vs London Luton Airport Operations Ltd*, Case No. HC13d01784.

²³ OECD Global Forum on Competition, Competition for the Market, Background Note from the Secretariat, Session IV, 6 December 2019.

the downstream market for bus transport to the airport. In particular, the airport's 20%–25% revenue share in the contract gave it an interest in the downstream market. It was found to have committed an exclusionary abuse of dominance that harmed potential competitors of National Express.

32. There are typically limits to competition law's reach into public services. In some jurisdictions, this will be determined by the line between public activities of an industrial or commercial nature (which may be subject to competition law) and the exercise of official authority (typically excluded from competition law).

33. For instance, in EU case *Cali & Figli v Servizi ecologici porto di Genova SpA (SEPG)*²⁴, SEPG provided preventive anti-pollution services in the oil port of Genoa. When faced with a competition law claim, SEPG claimed that as a concessionaire, it was carrying on a public function of the State and so could not be an 'undertaking' subject to the competition provisions of the EU Treaty. The Court found that it did not matter that SEPG's activities were carried out under an exclusive concession. What mattered was that the activity of environmental surveillance and protection in maritime areas was more akin to the exercise of powers by a public authority and not an economic nature to which the competition rules would apply.²⁵

34. Such exemptions are limited, however, where a broad view of services as a commercial activity is taken. In another EU case, *Ambulanz Glöckner v Landkreis Sudwestpfalz*²⁶, the Court held that the public ambulance services are not the exercise of public authority because providing services is generally an economic activity and even ambulance services are not inherently necessarily provided by a public body.

35. The extent to which concessions are subject to competition laws depends on how vigorously a country seeks to build competition into its public services. Some countries have taken strong legislative positions to embed competition principles in their laws governing concessions. In line with the European Concessions Directive²⁷, Bulgaria's recent amendments to its law on concessions involves the Competition Protection Authority throughout the concession granting process, giving it a quasi-judicial function of review and powers to suspend potential bidders for not complying with competition rules.²⁸

6. Competition law enforcement and the concession framework

36. Ensuring effective competition for the market may involve interaction between on the one hand competition laws and on the other hand the laws and rules governing the

²⁴ Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova SpA (SEPG)* Court of Justice, [1997] ECR I-1547, [1997] 5 CMLR 484..

²⁵ See also *FENIN v Commission*, C-205/03; *Selex v Commission*, C-113/07; and A Sanchez-Graells, *Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It* (2009) University of Oxford, Centre for Competition Law and Policy, CCLP(L).23, available at <http://ssrn.com/abstract=1458949>.

²⁶ Case C-475/99 *Ambulanz Glöckner v Landkreis Sudwestpfalz* [2001] ECR I-8089.

²⁷ Directive 2014/23/EU of 26 February 2014 on the award of concession contracts.

²⁸ Concessions Act, Promulgated, SG No. 96/1.12.2017, effective 1.01.2018, supplemented, SG No. 103/28.12.2017, effective 1.01.2018.

tender process at the time of bid and award, the contractual provisions of the concession that apply throughout its term (unless amended by agreement), and applicable sector regulations.

37. For instance, as seen above in the Corsican ferry case, a tender process might not prohibit – and might even facilitate – an approach to bidding that will have an anticompetitive object or effect. Contractual provisions or regulations may specify certain maximum prices or technical standards, but a firm might comply with these in a manner that nevertheless harms competition. In each case, the question may arise whether the country’s competition laws can still consider it unlawful.

38. The relationship between concession processes and contractual terms on the one hand and competition law on the other has echoes of the relationship between sector regulation and competition law in the 2003 EU *Deutsche Telekom* margin squeeze case. There, the European Commission found that the fact that Deutsche Telekom’s regulator, RegTP, had approved its prices did not excuse it from its responsibilities as a dominant undertaking not to exclude competitors from the market through a margin squeeze. So, even if a national law (and in the case of concessions a tender process or contractual terms) encourages or makes it easier for a dominant firm to engage in autonomous anticompetitive conduct, the firm may remain subject to the competition law prohibition on abuse of dominance.

39. The concession’s contractual provisions may be very relevant to competition law enforcement. Such provisions may apply to a variety of factors that have implications for revenues and costs, and could be parameters of competition in a competitive market, such as pricing, geographic coverage, capacity/volume and quality. As a result, while enforcement of the concession agreement is a question of contract law and not competition law enforcement as such, the former is nevertheless vital to the latter. A concession is typically won through competitive bidding for a contract. The ability to overpromise and underdeliver on the contractual obligations will fundamentally undermine the integrity of the competitive process by which a concession is awarded. Precision in the technical specifications of the service contractually permitted to be provided under the concession is thus a necessary condition for effective competition for the market.

40. The more that the contract polices the commercial and technical operation of the business, the more it takes on regulatory characteristics. These may frame the concessionaire’s conduct in the market, and – particularly if effective competition for the market is achieved – leave little need for competition law enforcement unless pursuant to breach of the contract.

41. As concessions involve a service of general economic interest, concession contracts also often include clauses obligating the concessionaire to provide the given service to those who request it, subject to general commercial feasibility, creditworthiness and eligibility factors. This public service provision might specify that the service will be provided on non-discriminatory terms and conditions. As concessions also often involve infrastructure that is to be provided to customers active in downstream markets, the contractual enforcement of such provisions may be particularly important to competition. Indeed, where they are essentially designed to ensure non-discriminatory provision of services to a downstream market, contractual enforcement of such terms is, functionally if not formally, a sort of competition enforcement.

42. Drafting of concessions with competition-oriented foresight can therefore support competition enforcement. For instance, the Zambian Competition Commission found the

concessionaire of the Mpulungu Port on Lake Tanganyika in Zambia to have enabled its subsidiary, an agricultural fuel producer and downstream user of the port, to enjoy preferential access and pricing. The concession agreement's express obligation to provide access on arms' length terms without prejudice to the public and other commercial users was an important element of the finding that the concessionaire had leveraged its dominance into the downstream market.²⁹

7. Conclusion

43. The infrastructure-centric role of concessions makes them vulnerable to dominance, incumbency advantage and exclusionary conduct. It is unlikely that improving the design of bidding processes or contractual provisions in concession contracts will alone suffice to prevent conflicts of interest or prohibit anticompetitive discriminatory treatment. Competition enforcement may be needed to address anticompetitive conduct that would be legitimate under the terms of the tender process and contract. Vigilance as to the impact of mergers on future competition in tenders for concessions is necessary, but so also is creativity in forming merger approval conditions that promote better competition in concession tenders. Ensuring enforcement of the concession contract itself is also an important element in keeping concessionaires honest and maintaining the discipline of the competition for the market, and so indirectly also of competition enforcement.

²⁹ OECD Global Forum on Competition, Abuse of Dominance in Regulated Sectors. Case submitted by Zambia, Session III. (DAF/COMP/GF/WD(2005)21 of 14 January 2005).