

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION FOR-THE-MARKET****-- Session IV A -- Call for country contributions**

This document is a call for country contributions for Session IV A of the Global Forum on Competition to be held on 5-6 December 2019. GFC participants are invited to submit their contributions by **31 October 2019** at the latest.

More documentation related to this discussion can be found at: oe.cd/2Fv.

JT03450068

TO ALL GLOBAL FORUM PARTICIPANTS

RE: Roundtable on “Competition For-the-Market”

18th Global Forum on Competition (5 and 6 December 2019)

Dear GFC participant,

On 6 December 2019, the OECD Global Forum on Competition will hold a roundtable on *Competition For-the-Market*. I am writing to you in order to provide you with some background about the topic, and to invite you to submit a written contribution, if possible with relevant case examples.

Competition for-the-market occurs when firms compete, not for market share, whether it be a share of units, of contracts, or of consumers, but instead to serve either an entire market. These might for example include: a) natural monopolies (with large economies of scale); b) publicly-funded monopolies (which would otherwise not be provided); c) legally-protected monopolies (e.g. products protected by intellectual property); and d) platform monopolies (e.g. digital platforms with powerful direct or cross-platform network effects that generate increasing value from scale). This Roundtable will focus on the first two of these categories, and particularly on the *enforcement and advocacy challenges that arise when concessions are offered on natural and publicly-funded monopolies*.

1. Background

In cases where the alternatives to a service are insufficiently substitutable, and the production of the service involves large economies of scale, for instance an electricity grid, a railway or a port, the service might constitute an entire market.

Although these products may qualify as a market, and hence a monopoly, under the standard approach to market definition, they may nevertheless face competitive constraints from potential competitors who might enter the market if the chance arises, and so the market may potentially be subjected to some degree of competition.

In these circumstances, a government may choose to build and own the infrastructure required to deliver the service. For instance to build a tunnel, a bridge, a port or airport. This might allow them to ensure that the efficiencies that flow from the economies of scale can be captured for the benefit of taxpayers (rather than extracted by a privately owned monopolist. They may then competitively tender for an efficient provider to operate the service under a concession. In these cases, competition for the concession would represent *competition-for-the-market*.

In contrast, where the product or service is not a natural monopoly, for example a natural resource (oil, minerals, water, electromagnetic spectrum), a government may offer multiple concessions to firms to maintain and operate the service. In these cases, competition for the concessions might be followed by *competition-in-the-market*.

In both cases an alternative to offering concessions is for the government to directly provide the service itself, or to leave private firms to build and operate the infrastructure (or to privatise the infrastructure if it has already built it).

2. Enforcement Challenges

Competition agencies will face a number of enforcement challenges when concessions are offered. They might assess mergers between the existing concessionaire and a potential future bidder. They may also need to investigate allegations of exploitative or exclusionary conduct by the concessionaire that restricts or distorts competition in downstream markets.

For instance, does winning a concession require a competitive assessment, similar to that undertaken within a merger review? Is there a structural separation requirement to that assessment that prevents the operator of the natural monopoly from acquiring downstream firms? What consideration, if any, is given to future competition for that concession? How do agencies assess the strength of potential competition, both in the context of merger control and of investigations of potential infringements? Do agencies consider the magnitude of harm as well as the likelihood of harm in such cases? Do we have the right rebuttable presumptions in place? And to what extent do the answers depend on whether the concession is for-the-market or for a place within-the-market?

3. Advocacy Challenges

In recent years, there have been numerous examples of outsourcing failures (train franchises, prisons, security), and there is growing scepticism on the benefits of outsourcing. In this context competition agencies can play an important role in advising governments and tendering authorities on whether to use concessions for these types of services, and if so, how to design them and competitive tendering processes to benefit users and taxpayers.

In doing so they might highlight risks such as incomplete contracts (when service quality is multi-dimensional); bid-rigging; asymmetric and excessive barriers to participation; predatory bidding; weak incentives for quality and innovation; the impact of uncertainty on future award processes; and tendering processes that maximise short-run competition but which may limit the scope future competition.

This roundtable therefore offers competition agencies an opportunity to share their experience in advocating to governments and tendering authorities on the design of concessions. In particular, it would be interesting to hear what advice agencies have offered to governments on the use of concessions, and how this has differed when competition is for-the-market as opposed to in-the-market.

The quality and utility of this roundtable will be greatly strengthened by written contributions. In order to assist you with the preparation of your contribution we provide in the annex a number of questions and issues on which you may wish to focus in your contribution.

The OECD webpage on “[Competition For-the-Market](http://www.oecd.org/competition/globalforum/competition-for-the-market.htm)” (long URL: <http://www.oecd.org/competition/globalforum/competition-for-the-market.htm> and short URL: oe.cd/2Fv) will be the primary vehicle for conveying documentation and related links on this subject. It will become available on the main roundtables page at www.oecd.org/competition/roundtables. Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on the site.

I would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. I invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively, the Secretariat will produce a summary, but given the time constraints, you might not be in a position to check it before distribution on O.N.E.

In order to ensure an effective preparation of the roundtable discussion, I would be grateful if you could advise the Secretariat **by Friday 13 September 2019** at the latest if you are planning to make a written contribution on the topic. Written submissions are due **by Thursday 31 October 2019** and failure to meet this deadline may result in your contribution not being distributed to delegates via O.N.E. in a timely fashion in advance of the meeting.

All communications regarding the documentation for this roundtable should be sent to Ms Angélique Servin (Email: Angelique.SERVIN@oecd.org). Please address all substantive queries relating to this discussion to Chris Pike (Email: Chris.Pike@oecd.org) and Matteo Giangaspero (Email: Matteo.Giangaspero@oecd.org).

Annex: questions

This Annex includes a list of suggested questions for consideration in preparing your submission. A submission does not need to cover every listed question. Based on your experience, you may wish to address other issues that are not listed here. You should also discuss relevant cases where appropriate to illustrate your answers. Please prepare a submission as an integrated essay rather than a list of answers to questions. You may wish to include an annex with short case references.

Enforcement

1. In what circumstances, if any, would contract awards require a merger review?
2. In what circumstances, if any, would contract awards require a competition assessment?
3. In what circumstance might a concessionary contract constitute a relevant market for the purposes of merger control or of an antitrust investigation?
4. How do you assess potential competition-for-the-market (either of merging firms or third party firms)? E.g. do you use valuation analysis? Or bidding data?
5. What are the main challenges when you assess cases involving competition-for-the-market (e.g. accuracy of data, more uncertainty to assess the counterfactual)?
6. Do you consider the magnitude of harm as well as the likelihood of harm when deciding competition-for-the-market cases? If so, how?
7. Please describe any rebuttable (or non-rebuttable) presumptions that you make in enforcing in cases where competition is for-the-market. Do these differ in any way from cases where competition is in-the-market?
8. Which types of exclusionary theories of harm have you examined in relation to products where there is competition-for-the-market? E.g. Refusal to deal based on existence of an essential facility? Margin squeeze? Predatory bidding?

Advocacy

1. What advice have you given to government on whether to organise concessions?
 - a. In which types of markets have you advocated for or against the use of concessions?
 - b. What difference did the nature of competition (for-the-market vs. in-the-market) make to the advice you provided?
 - c. What advantages/disadvantages did you identify over direct provision or full privatisation in these different cases?
 - d. What evidence did you rely on to support that advice?

2. What advice have you given to government on how to organise concessions?
 - a. When, and when not, to award exclusive rights
 - b. Use of structural separation
 - c. Use of lots
 - d. Contract length
 - e. Use of set-asides for local/national firms
 - f. Measures for preserving future competition (setting a minimum number of winners, requirements for information sharing by winners)
 - g. Joint bidding arrangements
 - h. Bidding credits for new entrants
 - i. Renegotiation bonds/penalties to allocate risk of incomplete contracts
 - j. Measures for dealing with uncertainty over volumes
 - k. Measures to address predatory bidding
 - l. Auction design (ascending-bid, first-price sealed-bid)
 - m. Measures to address bid-rigging
 - n. Awarding a reserve winner to maintain competitive pressure post-award.
3. What difference did the nature of competition (for-the-market vs. in-the-market) make to the advice you provided?
4. What responsibilities, if any, do you have to provide oversight of the competitive tendering of concessions?