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Global Forum on Competition

COMPETITION FOR-THE-MARKET

--Summary of Discussion--

5-6 December 2019

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Session IV of the 18th meeting of the Global Forum on Competition on 5-6 December 2019.

More documents related to this discussion can be found at: oe.cd/cmkt.

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Summary of Discussion

By the Secretariat

1. The **Chair** opened the discussion on how to organise competition in cases where there is a possible trade-off between competition in-the-market and for-the-market. He explained that the discussion would focus on concessions, firstly in which markets one should organise competition for-the-market as opposed to competition in-the-market, and secondly how to deal with enforcement issues in concessionary markets.
2. Two guest speakers were introduced: **Elisabetta Iossa**, Professor of Economics at the University of Rome and **Rory MacMillan**, a founding partner at Macmillan Keck and a member of the New York Bar. The Chair said the talk would be structured in two parts: in the first section of the discussion will consider whether to offer concessions, the advantages of the incumbent, and how to create more effect competition. In the second section the discussion would shift to the challenges of enforcing competition law in concessionary markets and in particular on abuse of dominance and mergers. The Chair invited the Secretariat to begin the discussion by presenting the background note.
3. The **Secretariat** defined competition for-the-market as being when products have characteristics that lead firms to compete to be the supplier of the whole market rather than for a share of it. The paper sets out four different types of market in which this can occur: 1) natural monopolies, 2) publicly funded monopolies, 3) legally protected monopolies and 4) platform monopolies. The paper is focused on the first two and argues that wherever possible competition in-the-market should be used rather than competition for-the-market – but where in-the-market competition is not possible, concessions can be helpful in at least facilitating some degree of competition.
4. The extensive challenges involved in designing competitive concessionary processes were set out. In particular it was emphasised that when considering offering a concession it was important not to underestimate the difficulty and cost of writing a sufficiently complete contract specification and then enforcing that contract effectively (for example if the concessionaire tries to renegotiate). Amongst other considerations, the secretariat suggested that agencies consider whether it is possible to use a continuous auction. For example, granting a concession that requires the winner to self-assess the value of the concession, and to pay a tax on that self-assessed price, while the contract specifies that the concessionaire must release the concessionary contract to any bidder that offers to pay the self-assessed price.
5. The **Secretariat** said that the second half of the paper concentrates on enforcement challenges in concessionary markets. For example, how to define markets, whether to cluster markets, when to identify a change of control, and tools to analyse past bidding information and the credibility of different bidders. The risks of exclusionary conduct, collusion and the imposition of anticompetitive remedies in concessionary markets were also identified.
6. The **Chair** invited **Professor Elisabetta Iossa** to speak and explained that the first part of the discussion would be on whether and how to choose a concessionaire for a market.

7. **Professor Iossa** took the floor and started by giving a summary on where economic theory currently stands with regard to competition for-the-market – competition for the market may be suitable when the market or a single lot may be more efficiently served by a single firm. She said she thinks there are cases where competition for the market can deliver efficiency gains, lower costs without compromising quality and maybe even better quality. She added this suggests if there is a level playing field, bidding for the contract will allow us to obtain offers that realise the best cost and quality combinations.

8. A problem she said is when looking at Europe there are worrying signs showing competition is not always working and she highlighted problems at the tendering stage. She noted that a recent report by the EU on public procurement in Europe finds that the number of public tenders with only one bid has grown in the period 2006-16 from 17% to 30%, and that the average number of bidders per tender is falling, and there is evidence of public contracts repeatedly won by the incumbent.

9. A number of issues can limit the effectiveness of competition. These can include badly designed tenders and contracts which can discourage competition by creating barriers to entry that put the incumbent in a strong position. She added that incumbency advantage is almost by definition a problem whenever they want to open up a market for competition.

10. Professor Iossa continued by asking why this problem has not been addressed sufficiently. She added that problems with public buyers are a big issue, as is the risk that tenders are influenced by a political agenda. She believes we should look to strengthen competence and empower public authorities and support them through the use of standardised contracts and guidance on the use of tenders.

11. Ultimately she said they the first thing required is to tackle incumbency advantage, because if that is not looked at from the start, then anything planned later will be ineffective as the incumbent will be locked in.

12. Professor Iossa then asked how do we tackle these incumbent advantages? She theorised that we need to operate along many dimensions. Among these included making a competitive assessment prior to opening the market, and asking whether there is a level playing field on information. Also, we should be very careful about the timing of the tender to guard against bid-rigging agreements.

13. Professor Iossa suggested that when designing tenders public administrations should look long-term and look to preserve competition over a longer period. This may involve dividing contracts despite this not being the most cost minimizing option, however it may reduce cost in the longer term. Linked to this is the importance of incentivising SMEs, who are crucial in ensuring competitive pressure over a longer time span – and avoiding the situation of just one or two firms bidding. This could include things like bid credits for SMEs as well as having shorter and more frequent contracts.

14. The **Chair** thanked Professor Iossa for her contribution and then gave the floor to Hong Kong.

15. **Hong Kong** began by introducing the subject of driving schools. They explained that the main issue in Hong Kong is the Government makes an awful lot of its money through tendering of land use rights. Last year the right to operate the fourth driving school site was auctioned off and this was won by the owner of the other three sites who offered the highest price to the Government which would have cemented their monopoly position.

16. The Hong Kong Competition Commission does have merger powers but had no way of using its powers to address this issue. It therefore focused on advocacy in relation to these issues. This allowed them to engage the public as they could see that prices would increase, and they worked to develop a media strategy to emphasise how consumers would pay more.

17. The media strategy failed but they have nevertheless been working with Government officials who proved receptive to try and identify criteria that both try to maintain competition in the market but also tries to capture some of the consumer benefits and welfare issues so it's not just the highest price bidder wins. He hoped this could provide a model for precisely how to take account of competition, as opposed to just saying that government needs to do more.

18. The **Chair** asked about the criteria.

19. Hong Kong said there had been a change away from a narrow focus on price. The evaluation now has measures such as awarding more points to bidders that do not operate multiple schools. It also awards points not just for how much a bidder pays the Government, but also how much the bidder will charge consumers. In addition the government have been working to attract bids from overseas providers.

20. The **Chair** moved to Russia and the challenges in awarding concession.

21. The **Russian** delegate explained how the legally established set of criteria for tendering is a very significant tool enabling Russian authorities to maintain competition in the tendering of concessions. The Federal Antimonopoly Service of Russia has authority to verify the compliance of tendering procedures with the law. Recent case law shows that tendering authorities sometimes set excessive criteria which leads to the restriction of market competition. For example, bidders are in some cases required to have previous experience providing concessions. However, the presence or absence of previous experience in operating a concession does not in itself prove with reasonable certainty the ability to fulfil obligations under concession agreements. FAS Russia sees experience requirements, as well as other excessive requirements, causing unjust restrictions of access to tenders. It therefore considers that they harm competition by making entrance to the market more complex.

22. A successful example was a public institution's handling of the tendering of the road technological maintenance and paid parking. The Supreme Court examined the institution's actions and agreed with the competition authority that the tender did include requirements which may lead to a restriction of competition. FAS Russia ruled to cancel the tender, to amend the tender requirements and re-run the competitive tendering of the concession.

23. Professor Iossa asked if the decision now applied to other tenders.

24. Russia said advocacy is very important because on the municipal level, not all the organisers of tenders read the decisions of the Supreme Court. There have been repeated violations of these provisions of the law at the municipal level, but on the federal level this works better than before.

25. Ms Iossa said that it is one thing to ask for prior experience in providing precisely such a service, and another thing to make sure the firm has the qualifications necessary to provide the service. She said that while the qualification is a must-have, she does not need specific experience, for example on having built exactly that type of infrastructure. She said she liked the Hong Kong idea of handicapping the incumbent with the view of creating a level playing field, and that Russia is tackling an important point. She lamented how such requirements favouring incumbents are very common.

26. The **Chair** turned to the US and asked how they identify the services for which it could be useful to have a concession, as opposed to having a direct production by the administration.

27. The **US** brought up the example of the electricity industry, which traditionally has been considered a natural monopoly. The Federal Energy Regulatory Commission (FERC) has gone through various stages of liberalising the transmission market, and the DOJ and FTC have been involved in advocacy at each of these stages. In recent years, orders made by FERC have helped facilitate more competition and access to independent generators, for example in 2011 FERC issued an order which eliminated at the federal level, rights of first refusal which existed for construction of regional transmission facilities. However, at a state level FERC rules do not apply and so a number of states passed rules which granted special rights to incumbent producers.

28. The US said they had also been active in advocacy and gave the example of Texas in which the legislature were considering a bill which would allow the building of new transmission only to in-state existing producers. The law was passed but subsequently a number of out-of-state transmission companies sued Texas, arguing that it was both an anti-competitive measure and an illegal act. The DOJ has intervened and the case is now pending. However, the companies had to rely on the Commerce Clause of the Constitution which prohibits barriers to interstate commerce, rather than relying on the Sherman Act.

29. The US also talked about advocacy by the FTC in the energy sector. Issues that they had focused upon included the reform of procedures whereby electricity generators connect to the transmission grid. Most recently the FTC has advocated on New York 'Reforming the Energy Vision' programme, which is reforming a number of features of the retail electric power market, including retail customers' choice of electric generators in a number of states.

30. The **Chair** turned next to Peru and the issue of the organisation of the concession to operate the tourist transport service to Machu Picchu.

31. **Peru** described the case. It reported that INDECOPI had identified there was only one firm operating in the market since 1995, and that this firm had won the concession every time it was renewed. INDECOPI therefore made recommendations to consider competition in the award of the concession and recommended increased transparency during the bidding process and publicity to foster competition. However, the Machu Picchu authority sued INDECOPI, who won the case before the Supreme Court, and now the enterprise has gone to the Constitutional Tribunal where the case is ongoing. Peru concluded that they expect to win the case but that it showed how hard it is to break monopolies of incumbents by advocating for competition for-the-market.

32. The **Chair** turned next to Ecuador.

33. **Ecuador** began by giving an overview of the liquefied petroleum gas market and the way it is regulated. It outlined a number of options on how to deal with monopolies. These included price regulation, with an associated deadweight loss in efficiency, and subsidised production that eliminates the deadweight loss but means that income no longer cover the cost of production. Ecuador considered that the answer is complex as there are social costs that need to be considered, and whether to deploy public or private is the long-running question. The pros and cons included the inefficiency of some public enterprises and the high entry barriers caused by natural monopolies and the challenges these represent. Professor Iossa referenced a paper by Marty Morris Straub on why it is the case that competition for-the-market has received such bad publicity in the media. The population is very often against it and evidence suggests this was linked to the fact that often, even if the concession is overall cheaper - the balance between the subsidy and the user tariffs is such that the subsidy decreases but the user tariff increases. So users see very clearly that prices rise but do not see clearly that subsidies are going down. A general problem is how to avoid

user opposition to the use of concessions since that creates an enormous regulatory and political risk to using them, even if they are effective.

34. The **Chair** moved on to Thailand and focused on Section 4 of the Trade Competition Act which prescribes that the act shall not apply to the operation of central, regional or local administrations and noted the difference with Russia where the rules also apply to municipal government. He asked how the OTCC can make recommendations to government agencies on competition rules, regulations or orders which may have anti-competitive effects. He asked how binding the recommendations are and also if they planned to issue recommendations regarding implementing the public-private partnership Act of 2019.

35. **Thailand** said it had remained one of the observers of the WTO agreement on government procurement since 3 June 2015, but also said this does not mean they are not doing more about government procurement procedures. Thailand in 2019 has passed two acts, one bringing in rules on government procurement, and the other is the public-private partnership act of 2019. These are intended to complement the 2017 Competition Act that created the OTCC to regulate competition policies and laws attached to it.

36. The Government procurement Act was intended to improve and ensure access to procurement information for stakeholders. It was also hoped that it would enhance accessibility for SMEs to such projects. Thailand concluded by noting that they have been to prescribe recommendations to the cabinet as well as government.

37. The **WTO** thanked Thailand for mentioning the WTO agreement on government procurement agreement (GPA). The WTO said that the GPA does provide an internationally binding legal framework that is pro-competitive, and certain WTO members have chosen to also cover concessionary contracts under GPA rules.

38. The **Chair** turned to the **BIAC** and their views on the challenges which exist with respect to designing and awarding concessions. He asked whether attitudes towards public ownership were not now more positive since very often privatisation leads in fact to price increases.

39. **BIAC** said that the solution is a well-designed concession, and that this is a preferred option to not introducing competition at all. BIAC believes education is important in making clear the long-term benefits of competition. Designing a concession is a complex decision-making process he said and competition authorities have an important part to play in this through competition advocacy and helping with potential trade-offs that need to be considered.

40. For instance on the length of concession. In any case the awards process should be transparent to guard against the risks of collusion and potential corruption. A useful resource here is the OECD checklist for designing the procurement process to reduce the risks of bid rigging.

41. The **Chair** then moved the debate onto the second half of the discussion: the challenges of enforcing competition law in concessionary markets.

42. **Rory MacMillan** began by explaining the distinction between competition for and in-the-market.

43. He made a distinction between the two in the sense that competition for-the-market may affect how much the granting authority is going to have to pay in subsidies, or will

receive in royalties, whereas competition in-the-market is going to be much more interested in benefits to the consumer directly.

44. Mr MacMillan discussed the possibility of abuse of dominance in the bidding process. He gave the example of the Mediterranean ferry route between Marseille and Corsica where the incumbent operator submitted a bid to renew its Delegation de Service Publics – but bundled together its bid for numerous lines into one global package which made it hard for the granting authority to compare bids as others were submitting individual line bids.

45. He explained that the French competition agency, the *Autorité de la Concurrence*, found this to be an abuse of dominance. They found that the incumbent's advantages were so strong it was dominant, and while the tender process did not prohibit it from putting in a bundled offer - they saw it as having an exclusionary effect as no other rival could place such a global offer. He noted similar cases like the Porto Nuevo case where there was a foreclosure of competition from the behaviour within the tender process itself.

46. He suggested however that abuse of dominance cases involving concessions often concern leverage of upstream control over a facility, infrastructure or some sort of exclusive service into a downstream market, for which it is a required input. In these cases, stronger rules to prohibit discrimination might have reduced the risk of such anti-competitive conduct. He suggested that structural separation might not be the solution, since this can lead to the exclusion of some bidders from the tender. Instead he noted that there are some structural approaches to concessions that reduce incumbency advantages from sunk costs in asset ownership. For example, tangible assets can be made transferable, and allowance can be made in the concession for the resumption of public ownership.

47. Mr MacMillan said that the knowledge that the incumbent has gathered as an inside player in the market and as a contracting party dealing with the granting Authority - knowing its attitude to the contract and its vigor or lack of vigor in enforcing the contract - is golden knowledge. It makes it vital to squeeze or shift the knowledge playing field during the tendering process. He then turned to mergers and how they can harm competition to the market by reducing the number and ability of firms to compete in future tender processes thus strengthening the power of remaining bidders.

48. He gave the example of Veolia Transport and Transdev merger and the concerns of the *Autorité de la Concurrence* and how they resolved these by permitting the merger to proceed on the basis 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 these companies were incumbents. The fund would also pay for consulting advice for public authorities on how to improve competitiveness in future tenders.

49. He moved on to the topic of cartel enforcement and how holding a sequence of tenders run the risk of market sharing and bid rigging. At the same time, the nature of the irregular, infrequent nature of these transactions makes it a little bit more difficult for operators to collude.

50. Next, he turned to the issue of the delegated authority itself and dealing with cases where its role is reducing competition in the market? In some countries an official decision to structure a market like a monopoly may itself be found to be unlawful. For example, in the case of Arriva and Luton Airport, Luton Airport granted a concession to a bus company which was to be exclusive between London and Luton and would pay the airport 20-25% of its revenues. This put its predecessor out of business. The High court found that the airport, by granting an exclusive concession was abusing its dominance and distorting competition in a downstream market. In addition to the bidding rules and the concession itself he said competition enforcement may also need to consider the relationship with sector regulation. For example, the Dutch predatory bidding case described in the secretariat

background note reminded him of the EU Deutsche Telekom case where the European Commission found that the fact that the regulator had approved Deutsche Telekom's prices was no excuse for that price implementing an exclusionary margin squeeze. He suggested this is the crux of the problem in the sense there is so much regulatory content built into concession contracts that it becomes difficult for agencies to work out what is and is not anti-competitive.

51. In conclusion he felt the infrastructure centric role of concessions makes them vulnerable to dominance, incumbency advantages, exclusionary conduct. Improving the design of bidding processes and contractual provisions will help. Still, competition enforcement will be needed to address issues such as conflicts of interest or anti-competitive discriminatory treatment. Vigilance on mergers he said is also vital as is creativity in merger remedies and ensuring enforcement of the contract itself.

52. Professor Iossa agreed that renegotiation can be an abuse of dominance and could mean that the best offer at the time of the bid was no longer the best offer by the time that renegotiations were factored in. She therefore supported the application of limits to renegotiation.

53. The **Chair** turned to Albania.

54. **Albania** described how under competition law in Albania they have the legal power to assess the concession and public institutions can ask the competition authority to give some recommendation when the concessions are designed. However in the Duras Port case this advice was not requested.

55. In short, in 2017 an investigation commenced based on a complaint from a company operating in the Port of Duras that the port operator was not allowing them to use essential facilities. The Competition Commission took the decision to give interim measures under article 44 of the law to allow access to all companies and equipment for the operators. Other evidence was subsequently found during the investigation and the commission gave recommendations for collaboration, and required monitoring of the concessionaire to check the implementation of the decisions.

56. The **Chair** moved on to South Africa.

57. **South Africa** presented the case of Eskom the electricity supplier and its long-term agreements with mining companies. The complaint related to the exclusion of smaller players within the market as a result of Eskom having exclusive contracts with the mining companies. Indeed Eskom themselves might be supplied with lower quality coal as they are tied into a contract and not able to negotiate out of it.

58. The **Chair** asked if the situation was more the result of bad management rather than an attempt to exclude by Eskom.

59. South African said this was a function of the apartheid government.

60. The **Chair** asked Italy about the challenges faced in enforcement in concessionary markets.

61. **Italy** said that the authority had intervened on several occasions against different abuses of dominant positions in the sector. Two cases were highlighted, local public transport of passengers in Padua, and the railway infrastructure operator. Two lessons were identified: 1) the crucial role of data, and information on concessions, which is important for allowing entry by new bidders, and 2) the potential use of a concession to monopolise downstream or related markets, and hence the need in some cases for structural separation.

62. The **Chair** turned to Germany.

63. The **German delegate** stated that the Bundeskartellamt had gained experience with competition for the market through many years of proceedings with regard to the award of concessions by government authorities. During this period several abuse proceedings had been launched regarding the award of concessions for electricity and gas networks.

64. The competition authority found, for example, that Neustadt, a small town in southwestern Germany, abused its dominant position by carrying out a discriminatory selection procedure giving preference to one specific bidder without any objective justification, applying inadmissible and unlawful selection criteria and violating the principle of secret competition and the prohibition to agree or grant other benefits than those admissible under the German ordinance on concession fees for electricity and gas. The Bundeskartellamt ruled that municipalities have to conduct tenders for the awards of rights of way for gas and electricity networks in a transparent and non-discriminatory manner. Despite the difficulties and costs of tendering a concession, the Bundeskartellamt also ruled that, a municipality is prohibited from directly providing the service unless it has an objective justification. The Bundeskartellamt argued that the license holder needs to be chosen on the basis that they can ensure a secure, affordable, consumer friendly efficient and environmentally safe supply. The position taken by the Bundeskartellamt was confirmed by the federal court of justice.

65. Mr MacMillan said he was very interested in the description of enforcement action against municipalities, but wondered whether there was not resistance. For example, the secretariat background paper noted that direct provision could be more efficient than competitive tendering given the costs and challenges of generating effective competition. Mr Macmillan pointed out that direct provision by a municipality is bit like a vertically integrated firm discriminating against downstream rivals, which usually we think about as a financial, profit driven decision.

66. The **Chair** turned to Latvia and a case involving the award of an exclusive contract for waste management in Riga.

67. **Latvia** began by focusing on interim mergers decision which they have adopted in the ongoing investigation of the waste management system in Riga.

68. There had been four operators active in the market and the Riga municipality replaced the existing operators with a single one. The competition agency advocated strongly against this. They had to analyse this and so looked at sectoral regulation and the model for the Riga municipality was to enter into a public-private partnership with the caveat that it's an institutional public-private partnership which allows the municipality to be active in day-to-day operations.

69. It concluded that a partner which possesses the administrative capacity to regulate competition in the market is abusing that if it only contracts with one partner and the rest of the operators have to exit the market. They asked themselves, why would the municipality switch from the model of competition in-the-market to competition for-the-market?

70. The only answer presented was that the municipality wanted to introduce one price in the market and this is beneficial for customers which the competition agency saw as debatable. As the abuse of dominance stemmed from the award of the concession, they imposed an interim decision to stop the operation of the concession decision.

71. Latvia said the case is ongoing and that national legislation provides for a model in which there is competition for-the-market. The case has caught a lot of attention and parliament is now debating whether to amend the law and introduce a model where the authority municipality can organise waste management systems according to competition in-the-market.

72. For small municipalities it seems ok where this is the one operator but he concluded for Riga, there is room for several operators who compete with one another and present regulation seems to disallow this option for the municipality.

73. The **Chair** moved on to mergers and Colombia.

74. **Colombia** said the Puerto Nuevo case highlighted several considerations regarding the evolution of market dynamics over time. He said it raised both practical and theoretical enforcement challenges related to the structure of the market, firstly with the interaction among firms competing for-the-market and later on with competition in-the-market.

75. The competition agency identified three enforcement challenges: 1) in order to establish the position of an agent in a relevant market, a dynamic economic analysis was required that involved a temporary assessment of market definition and the behaviour of agents, 2) in dealing with the assessment of potential restrictive behaviours during the operation of a concession, it had to consider the previous decisions from the authority regarding the same facts but in a context of a merger review – which is a key point about the questions and 3) in assessing a joint administration situation in the context of an anti-competitive behaviour investigation the agency had to consider each decision when reviewing the merger of agents relevant to that investigation.

76. Colombia concluded that the relevant market definition changed over time. They also concluded that even a competition authority being involved in a merger process does not exclude the possibility that the same authority can investigate a restricted behaviour and the factual circumstances analysed in the merger process may not coincide with those in the competition restriction case.

77. Thirdly these cases by the Antitrust Division show the risks that can be mitigated by structural remedies being imposed in a merger evaluation. Mr MacMillan said he enjoyed reading about this case as it had so much going on, and right at the heart of this tender process was a deep failure he said to prepare a port for the needs of the coal exporters of that region.

78. The **Chair** turned to Mexico.

79. **Mexico** explained that the state grants leases, licenses concessions, permits and so on to the private sector for the construction or operation of infrastructure needed to provide public services. COFECE analyses all documents for a tender and decides if pro-competitive measures are needed. Resolutions by COFECE aim to ensure maximum possible competition for-the-market and to prevent bid rigging.

80. The commission applies an assessment similar to a merger between economic agents in order to determine if the award facilitates or allows the unilateral setting of higher prices, provision of lower quality services, or the foreclosure of competitors. The assessment takes four steps and in cases where assessments show that the award confers substantial power in the relevant market to a participant, COFECE issues a non-favourable opinion.

81. An example of a non- favourable opinion from 2014 was when the energy regulator announced two tenders related to a permit for distributing natural gas through ducts in two geographical areas of the country. One competitor was a distributor with the largest LP gas market shares in both regions and if awarded to them COFECE were concerned that it would have the incentive to deploy natural gas infrastructure in locations where it does not face considerable competition in LP gas.

82. The analysis suggested that if it were awarded the permits, it would face little competitive pressures and few incentives to improve prices and quality of distribution in both fields.

83. The **Chair** remarked that it is clear that COFECE is in a much better position by being able to intervene at the critical stage of the design of the tender and to say which candidates should not take part.

84. Mr MacMillan rounded up by suggesting that advocacy is important for strengthening the understanding of those authorities who are ultimately handing over the responsibility for public services.

85. The **Chair** concluded by saying that the institutional set up for advocacy makes a big difference and that those differences have been evident in delegates contributions. He then thanked everyone for their contributions.