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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## Global Forum on Competition

### COMPETITION FOR-THE-MARKET

#### --Executive Summary--

5-6 December 2019

This executive summary by the OECD Secretariat contains the key findings from 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](http://oe.cd/cmkt).

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## *Executive Summary*

*By the Secretariat\**

From the discussion at the roundtable, the delegates' and experts' written contributions, and the Secretariat's background paper, several key points emerged:

- (1) *Competition in-the-market is more intense than competition for-the-market, however in the context of natural monopolies and publicly-funded monopolies, competition for-the-market may be the only option for creating a competitive incentive. Offering concessionary rights to serve such markets can help to strengthen these incentives. However, awarding concessionary rights present significant challenges including the risk of incomplete contracts, and the scope for opportunistic renegotiation.*

Some products have characteristics that lead firms to compete to be the supplier of a whole market of products or services, rather than for market share (whether it be a share of units, of contracts or of consumer relationships). This competition for-the-market is not the same thing as competition for a contract. The relevant market identifies those other products that place significant competitive constraints upon the product in question. However, in some cases there may be no other product imposing a sufficiently strong constraint and so competition for-the-market might be the only competition that is possible. Although by definition these types of products are monopolies and face no strong competitive constraints that prevent them from increasing their price for an extended period, they may still face weaker competitive constraints from competitors outside that market, who might compete for-the-market. For example, constraints from outside the market might mean that a monopolist could raise price by a small but significant degree, but would be unable to raise it by a larger degree. In that case, such a market would evidently entail larger mark-ups and be less competitive than a market in which there was competition in-the-market from a rival product.

In such markets, offering a concession is one way to reduce barriers to entry, facilitate market churn, and strengthen competition and therefore offers more efficiency than simply privatising the monopoly. In other types of monopoly, limiting the length of patent protection or imposing portability or interoperability standards might achieve the same goal. One of the main challenges for those selling concessionary rights is to draft a sufficiently complete concessionary contract that ensures that competition on measured and contracted dimensions of value does not lead to bidders reducing value on non-measured non-contracted dimensions. However, given the possibility of unexpected events, there is often a need to allow some scope for (post-award) renegotiations. This can mean that a concessionaire has the opportunity to push for renegotiation not only when unexpected events occur, but also when little has changed except a strengthening of the concessionaire's bargaining position. To mitigate these risks, in some jurisdictions, there are provisions that regulate contract modifications and set limits to the ability of contracting authorities to renegotiate concessions.

Agencies reported value in undertaking a competition assessment before tendering. Where this suggests the risks cannot be resolved direct provision may be preferable, though some agencies consider that tenders by municipalities are always necessary. An alternative is to consider

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\* This executive summary does not necessarily represent the consensus view of the Global Forum on Competition. It encapsulates key points from the discussion at the roundtable, the delegates' written submissions, the panellists' presentations and the Secretariat's background paper.

granting concessionary rights under a licence that a) requires the winning bidder to self-assess the value of the concessionary right, and pay a tax on that value, and b) allows that if any other firm at any time wished to pay the stated value, the concession would then be transferred to them. This would ensure allocative efficiency and preserve investment incentives. Retaining a publicly-owned operator to compete for concessions or to serve as an outside option when required may also help ensure a healthy degree of competition both prior to and after the tendering of the concession.

Competition agencies undertake a range of advocacy initiatives in concessionary markets. The effectiveness of advocacy initiatives depends on institutional settings and powers conferred to competition agencies. One way to improve the effectiveness of advocacy is to encourage public agencies to design tenders that encourage firms to compete on dimensions of quality that are visible to users, and not only to the seller of the concession.

Competition agencies undertake a range of advocacy initiatives in concessionary markets. These initiatives seek to encourage public authorities' to consider long-term effects of their decisions to award concessionary rights. Examples were given with regard to various sectors, including transport services, driving schools, electricity transmission and gas. They included taking steps to prevent excessive concentration amongst concessionaires who might be expected to compete for future tenders. Reducing barriers to entry for SMEs, potential overseas bidders and new entrants by breaking concessions into lots and ensuring a level playing field with regard to access to information.

From these experiences, it emerged that competition agencies can contribute more effectively to a well-functioning competition for-the-market if consulted at an early stage (i.e. when designing the process, and before concessions are assigned). Furthermore, the effectiveness of advocacy initiatives varies widely depending on the institutional set up and the powers conferred to agencies. For example, some agencies are able to directly challenge the award of concessions, or must be consulted on tendering processes.

Advocacy efforts can also be made more difficult by the design of concession tendering processes which lead them to generate (at least in the short term) price increases for users that are immediately perceived by citizens, while (long-term) beneficial effects such as reduced subsidies from government would not be self-evident. Such considerations may limit the selling of concessionary rights.

- (2) *Abuses of dominance, in particular through exclusionary conducts, can arise in concessionary markets. The ability to offer a concessionary contract may not protect the seller of the concessionary right (or the users) from the consequences of such abuse. There are some challenges to identifying bid-rigging in the cases of concessions, however the risks are lower due to the length of concessions and the possibility that concessionaires will also need to compete in-the-market once they have won the concession.*

Abuse of dominance can arise when a regulated upstream monopolist designs and sells a concessionary right that allows it to extend its market power into a downstream market where it can evade regulation and better exploit its market power. An incumbent bidder can also exclude rivals by restricting access to data and information for potential new entrants when concessionary rights are (re-)tendered. Similar exclusionary effects can arise if a bidder bundles its bids, or submits a predatory bid that undercuts rivals and allows the bidder to subsequently recoup the sacrificed profit by renegotiating the terms of the contract. In some instance, to preserve competition for-the-market, agencies have adopted interim measures or similar measures preventing the award of the tender.

In exclusionary cases, the fact that an incumbent concessionaire with market power has a contract does not remove the possibility that the concessionaire excludes rivals. Similarly, the ability to offer a new concession in the event that quality deteriorated would not necessarily prevent an incumbent concessionaire with market power from reducing quality.

Particular challenges in enforcing against bid rigging of concessions include the bespoke nature of concessions, and the fact that they may take place across multiple markets, which can make efforts to screen for suspicious bidding patterns more difficult. However, collusive agreement to rotate winners are less likely due to the length of concessions. In addition, any competition in-the-market following the award of a concession is likely to reduce the scope for collusive agreements since such agreements would need to remain stable at both stages of competition.

- (3) *Challenges in reviewing concessionary mergers include the need to identify when there is a change of control. Bespoke concessions may often constitute markets in and of themselves. Remedies Merger control in concessionary markets takes into account the need to preserve long-term competition.*

Merger control is a key tool for ensuring competition for the sale of concessionary rights. In the case of many concessions, the concession itself might be an undertaking, and so the tendering of the concession will trigger a change of control and hence a merger review. This assessment depends on the specific terms of the concessionary contract. However, some jurisdictions have specific rules that ensure an effective merger assessment takes place. In any case, the simple existence of a concessionary contract through which the seller of the concessionary right may constrain the behaviour of the concessionaire, does not mean there has been no change of control if the concessionaire merges with a rival. This is because it is simply not possible for the seller to contract for, and hence control, every aspect of the concessionaire's behaviour.

Bespoke concessions may often constitute markets in and of themselves. This is because the seller of a concessionary right typically has little or no ability to substitute away and sell a different type of right, even if a hypothetical monopsonist purchaser were to reduce the price it pays. This means that market definition is no longer a useful analytical tool and that agencies instead quickly move towards a competitive assessment that identifies the credible bidders for the concession. Depending on the data that is available agencies can use a range of tools to analyse bidding data and identify credible bidders. Competition agencies typically conduct an assessment covering both the market for the award of the concession (competition for-the-market), where potential competition plays a key role, and, if there is one, the market for the provision of services once the concession had been awarded (competition in-the-market). Given the important role of potential competition in concessionary markets, and the uncertainty that this brings, agencies will need a probabilistic analysis of the likelihood of different scenarios on participating bidders in future tenders. The expected harm test that has been proposed by various digital competition reviews to address potential competition concerns would therefore be useful in the case of mergers in concessionary markets.

Where mergers lessen competition, behavioural and structural remedies have been imposed. It is however important that these remedies consider the impact on future tenders. For example, behavioural remedies that prevent merging parties from bidding for certain concessions may remove two potential bidders and hence restrict competition for those markets. Meanwhile behavioural remedies that need to be monitored over the course of what might be a 40-year concession are going to be costly to review and this may lead to them being removed further down the line. In such cases, a structural remedy is likely to be more effective.