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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION FOR-THE-MARKET****Summaries of contributions****-- Session IV --****5-6 December 2019**

This document reproduces summaries of contributions submitted for Session IV at the 18th Global Forum on Competition on 5-6 December 2019.

More documentation related to this discussion can be found at oe.cd/mcdym.

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Competition for-the-Market

-- Summaries of contributions --

Abstract

This document contains summaries of the various written contributions received for the discussion on "Competition for-the-Market" held during the 18th meeting of the Global Forum on Competition in Paris, France (5-6 December 2019, Session IV). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Albania

Based on the article 69 of the Albanian competition law no. 9121 dated 28.07.2003 “On competition Protection”-amended, “Duties of central and local administration structures”, central and local administration bodies require from the Albanian Competition Authority (ACA) to assess any draft normative act which, in particular, deals with: a) quantitative restrictions concerning trading and market access; b) establishment of exclusive rights or special rights in certain zones, for certain undertakings or products; c) imposing uniform practices in prices and selling conditions. The ACA assesses the level of restriction or prevention of competition from draft normative acts *ex-ante* and *ex-post*.

The concessions are assessed under the article 8 of the competition law “Appraisal of dominant position”. The dominant position of one or more undertakings shall be determined particularly by establishing the following: a) the relevant market share of the investigated undertaking/s and that of the other competitors; b) the barriers to entry to the relevant market; c) the potential competition; ç) the economic and financial power of the undertakings; d) the economic dependence of the suppliers and purchasers; dh) the countervailing power of buyers/customers; e) the development of the undertaking's distribution network, and access to the sources of supply of products; ë) the undertaking's connections with other undertakings; f) other characteristics of the relevant market such as the homogeneity of the products, the transparency of the market, the undertaking cost and size symmetries, the stability of the demand or the free production capacities.

During the recent years, nine (9) cases of concession assessment have been evaluated by ACA. Two (2) cases related to predatory pricing, five (5) cases related to refuse to deal/supply, and two (2) other assessments ending by giving recommendations by the CC to the relevant regulators in the relevant markets.

Two cases in abuse of dominant position were described in the paper: a) refusing to supply in the loading and unloading services and related activities for bulk cargo at the East Terminal, Port of Durrës provided by the concessioner undertaking "EMS-Albanian Port Operator", case which ended with giving obligations by the Competition Commission Decision, and b) in the market of the mandatory technical control of motor vehicles and their trailers for abuse of the dominant position of the exclusive rights services offered by the concessioner undertaking SGS Automotive Albania LTD, case which ended with imposing of fine and giving obligations by the Competition Commission Decision. In both cases recommendations to relevant ministries that regulate and monitor these concessions were given as well.

The main challenges related to concession assessments are related to the implementation of the recommendations given to the public institutions that results in a partial or moderated fulfilment of Competition Commission Decisions.

Colombia

This contribution intends to study some key issues regarding the concept of “Competition for -the-market” in the context of antitrust enforcement. Competition and regulatory notions are integrated into the analysis, as well as a relevant case for example. The case “Puerto Nuevo”, to which we refer all through the document, appears pertinent to the subject matter because it highlights several considerations regarding the evolution of market dynamics over time. “Puerto Nuevo” raised both theoretical and practical enforcement challenges related to the structure of the market; first, with the interactions among firms competing for the market, and later on, with the competition in the market that was constituted with a concession. Issues regarding merger review in the context of a concession, vertical and horizontal integrations, the debate between natural monopoly vs. dominance of the firm that was granted the concession and the following exclusionary behaviors against market agents are all at the heart of this case.

The SIC identified three enforcement challenges. The first one was that in order to establish the position of an agent in a relevant market, the Antitrust Division had to perform a dynamic economic analysis that involved a temporary assessment of market definition and the behavior of agents. Second, that in dealing with the assessment of potential restrictive behaviors during the operation of a concession it had to consider the previous decisions from the authority regarding the same facts but in the context of a merger review. Third, in assessing a joint administration situation in the context of an anticompetitive behavior investigation the SIC had to consider its decision when reviewing the merger of agents relevant to that investigation.

Ecuador

A natural monopoly is a scenario where a single firm could perform total market production at a lower cost than several firms could offer, by accomplishing economies of scale at any level on the long-term production.

The Liquefied Petroleum Gas (GLP, for its acronym in Spanish) market in Ecuador, in accordance with article 323 of the Constitution of the Republic, is a strategic sector and the State reserves its regulation and administration exclusively.

The Ecuadorian State since 1992 subsidized 80% of the value of the GLP service for domestic use, this becomes especially relevant if it observes 85% of the GLP consumed in Ecuador is imported and the remaining 15% came from the national production, the State must regulate this market optimally in order to generate benefits for the citizens, in consideration for its significant social impact.

Due to the characteristics of natural monopolies, there are several challenges for competition authorities when regulating it, and to prevent monopolistic abuse of market power that could reduce consumer surplus.

Hong Kong, China

The Hong Kong Competition Commission's (HKCC's) submission focusses on advocacy. In relation to enforcement there is no merger review like process for the award of concessions and no enforcement cases have yet been brought by the HKCC which involve competition for-the-market. One of the HKCC's functions is to advise the Government on competition matters. It is very active in this respect and frequently engages the Government on issues related to competition for-the-market. The HKCC presents a short case study to illustrate a specific concern it identified and its approach to engaging with the Government.

Lithuania

According to Article 46 of the Lithuanian Constitution, as interpreted by the Lithuanian Constitutional Court, public authorities have no absolute discretion as to the method of selection of service providers and are bound by constitutional imperatives to select service providers using a competitive tender. This provision of the Lithuanian Constitution is implemented by the Law on Competition of the Republic of Lithuania (Law on Competition) and, in particular, by the Article 4 thereof. Article 4 of the Law on Competition (Article 4) stipulates that public administration entities shall be prohibited from adopting decisions which grant privileges to or discriminate against any undertakings and which give or may give rise to differences in the conditions of competition for undertakings competing in a relevant market, except where the difference in the conditions of competition may not be avoided when meeting the requirements of the laws.

The Competition Council of the Republic of Lithuania (the Competition Council) has enforcement powers as to the Article 4 and frequently makes use of them. Article 4 applies, in particular, when the public authority appoints a concessionaire without ensuring competition for-the-market in the form of tender. This is considered to grant privileges to the appointee and thus to create differences in the conditions of competition. Besides using its enforcement powers, the Competition Council also on a regular basis engages in advocacy activities vis-à-vis public authorities, especially, when concessions are granted anti-competitively by the parliamentary or governmental acts with regard to which Article 4 is inapplicable. The Competition Council, however, has officially admitted that competition for-the-market may produce suboptimal results in some naturally monopolistic market structures.

Private market power gained through collusion can also effectively restrict competition for-the-market. Enforcement against bid-rigging provides deterrent effect on such practices. Thus, prohibition of bid-rigging and provisions of Article 4 complement each other with a view to enhancing competition for-the-market.

Russian Federation

Discussing the issue of competition for the market and different forms of collaboration between governmental and business structures, it is worthy of note that the legislation of the Russian Federation recognizes a number of forms of public-private partnership.

The current regulation provides the possibility of partnership between the state or municipal body, on the one side, and the private partner, on the other side, (hereinafter – PPP) based on an agreement of public-private partnership, concession agreement, special investment contracts, production sharing contracts.

Currently, one of the most common forms of PPP is a concession agreement. The FAS Russia takes part in the preparation of draft regulatory legal acts of federal importance on concession agreements and PPP agreements, as well as monitors compliance with antimonopoly legislation when concluding and implementing concession agreements. In particular, the FAS Russia considers complaints about tendering process under such agreements and requests indicating signs of restriction or elimination of competition.

The FAS Russia advocates concessions, competitive tendering of concession and lowering the government presence in the competitive markets. In addition, the FAS Russia is continuously seeking to improve legislation on PPP in order to unify the rules for competitive selection of private partner, and introduce electronic tenders that will reduce barriers and anticompetitive behavior in the field of concession's awarding, on the one hand, and encourage risk-taking, investment and innovation, on the other hand.

South Africa

Competitive bidding for contracts is predominantly used in various markets to ensure that an efficient firm is identified and selected to offer services to the customers. Competitive bidding principles were embedded in the public transport policy documents. Competition for the market was analysed using the two case studies in the public transport sector in South Africa and these two case studies produced different outcomes.

Competitive tendering was envisaged to be used by government to procure commuter bus services. The envisaged principles of competitive tendering have not been routinely followed in practice due to funding concerns by government. Government is of the view that competitive bidding process is going to be expensive and relying on contract extensions. The perpetual contract extensions in the bus sector has not promoted innovation and the quality of the service has been declining over time. The current system has created de facto monopolies due to the use of perpetual contract system that impeded competition. This has led to inefficiencies in the provision of the commuter bus services. Government has funding constraints to issue new tenders and this affects negatively on service quality.

Gautrain, on the other hand, was instituted from a competitive tender process and is achieving better outcomes due to adequate funding from the provincial government. As part of the procurement process, the Gauteng Provincial Government (“GPG”) issued a Request for Qualifications which was open to all potential bidders both in and outside of South Africa. In the Gautrain project, competition for the market yielded some benefits and has been successful in helping the government to achieve its public transport objectives. The Commission is of the view that competition for the market, as seen with the Gautrain, better suits the South African transport market and has some efficiency benefits for the commuters.