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Please contact 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

- Contribution from BIAC -

1. Introduction

1. *Business at OECD* appreciates the opportunity to submit comments to the OECD roundtable on competition for the market. Competition for the market occurs when products have characteristics that result in firms competing to be the supplier for a whole market of products or services, instead of competing for market share. The categories of products specifically identified in the OECD Background Note are natural monopolies, publicly-funded monopolies, legal monopolies (e.g., intellectual property rights) and platform monopolies.[1] *Business at OECD* supports a discussion on this important topic.

2. Introducing competition "for the market" is one way of opening up sectors that were traditionally controlled by the government. In doing so, governments may mobilize competitive constraints on incumbents in markets that can only accommodate a limited number of firms. Although there are different ways and models to bring about competition for the market, *Business at OECD* will focus, in particular, on concessions as a tool to drive and protect competition.[2]

3. The four categories of competition for the market as identified by the OECD Background Note are briefly commented upon below.

1. *Natural monopolies:* Natural monopolies are characterized by "steeply declining long-run average and marginal-cost curves."[3] High fixed costs associated with the functioning of a natural monopoly mean that usually there would only be one firm producing the good. Examples of natural monopolies are "essential services," which traditionally remain under government control in most countries. This applies traditionally, to network industries such as telecommunications, postal services, energy, and transport. *Business at OECD* takes the view that where a market displays natural monopoly characteristics, competition can have an important role to play in increasing the overall efficiency of the market. Competition *in* the market in natural monopolies might not be efficient or possible, which is why advantages to consumers can be provided by way of competition *for* the market,[4] which would be preferred where it best promotes economic efficiency in the regulated market.

[1] *See* OECD, COMPETITION FOR THE MARKET, BACKGROUND NOTE BY THE SECRETARIAT § 2 (Oct. 22, 2019), *available at* https://one.oecd.org/document/DAF/COMP/GF(2019)7/en/pdf [hereinafter OECD BACKGROUND NOTE].

[2] This follows from the OECD Secretariat's Background Note and its focus on concessions. *See id.* § 3.

[3] *Id.* ¶ 17.

[4] OECD, POLICY BRIEF: COMPETITION POLICY AND CONCESSIONS 1 (May 2007), *available at* https://www.oecd.org/daf/competition/sectors/38706036.pdf [hereinafter OECD POLICY BRIEF].

2. *Publicly Funded Monopolies:* Publicly funded monopolies are those in which "sufficient provision of the product is non-economic,"[5] unless it is provided for by the State. Competition for the market takes place when the government decides to purchase exclusively from one firm.

3. *Legally Protected Monopolies:* Legally protected monopolies are characterised by products which enjoy legal protection provided to them by the State, or in some cases products which enjoy exclusive intellectual property rights.[6] *Business at OECD* takes the view that these cases constitute a separate category that does not lend itself for a discussion whether competition for the market is warranted alongside natural monopolies. Indeed, whether the exclusive rights granted under intellectual property regimes are efficient and produce the dynamic efficiencies that they are intended to create is first and foremost a question of efficient regulation in the area of innovation and intellectual property.

4. *Platform Monopolies:* The OECD Background Note also considers platform monopolies as a category where competition for the market might be an option to consider, making the argument that certain platforms—such as social networks and digital search products—could have burgeoning network effects and thus become strong enough to drive competition for the market. The Background Note presents platform-based industries as largely unassailable; as a "sector" where only one company is able to operate and, therefore, potentially as a sector where governments may step in to introduce competition or otherwise regulate. While some network-based markets may, on an *ex-post* basis, superficially display some characteristics that might suggest that those markets should be qualified as markets where only competition for the market is possible, *Business at OECD* does not agree that this is always the case, or even that this should be the starting point of the analysis. In *Business at OECD*'s view, it would be incorrect to assume that markets characterised by platform industries with significant market power are akin to natural monopolies.

5. In particular, *Business at OECD* does not agree with the suggestion made in the Background Note that "these" markets are not likely to re-tip without "the interoperability measures that were applied in mobile telecoms" and that "[p]olicymakers may therefore want to put in place mechanisms to ensure that the monopolies that these firms construct can, after an appropriate period of time, be deconstructed (allowing rents to revert to users)."[7] In fact, the Background Note appears to take the view that, as intellectual property rights, land rights and concessions are typically time-limited, it might also be legitimate to deconstruct platform monopolies after a certain period of time.[8] While *Business at OECD* welcomes a discussion on the welfare effects of the various platform-based industries and the proper identification of competition law violations, it does not agree with the assumptions made in the Background Note.

[5] OECD Background Note, *supra* note 1, ¶ 23.

[6] *Id*. ¶¶ 29-31.

[7] *Id*. ¶¶ 36-37.

[8] *Id*. ¶¶ 33- 37.

4. This paper will focus on the first two categories of competition for the market—natural and publicly-funded monopolies—and introducing competition on the market for them. In many cases *not* introducing competition—through concessions or otherwise—may be costly to society. Accordingly, in those cases, governments are well advised to consider no longer reserving those activities for themselves. This is because private provision fosters efficiency: a focus on profits means that cost-reduction shall be incentivised,[9] which in turn means lower costs for consumers.

5. However, it is sometimes observed that a disadvantage—or unwanted outcome—of privatisation may be that the provider of the services or goods at hand could potentially reduce costs by being lax on quality, which would in turn negatively affect consumers. Alternatively, if the price is not regulated, it could set the price at a monopoly level.[10] One solution in this scenario would be a well-designed concession which "creates a competitive incentive for the firm . . . that wins the concession to provide a better value service than it otherwise would."[11]

6. As a starting point, using concessions as a tool for bringing competition for the market in natural and publicly-funded monopolies is beneficial, as this is often likely to bring significant consumer benefits and fuel growth and greater efficiency in these markets. Indeed, as a matter of principle, government regulation and the reservation of economic activities to the government should not be allowed to persist once it begins to impose cost greater than the efficiency from the regulation.

7. A government's decisions to regulate or deregulate is more often a political decision rather than one based purely on economic efficiency.[12] Accordingly, *Business at OECD* is very much in favour of a debate on the factors that governments and competition agencies should consider when confronted with the option to introduce competition into a particular economic sector. The OECD Competition Committee can—and should—play a valuable role in that discussion. In this respect, it is noteworthy that the OECD 1997 *Summary Report on Regulatory Reform* states that "the most important ingredient for successful regulatory reform is the strength and consistency of support at the highest political level."[13] The OECD is ideally placed to help build that support.

8. Governments and agencies also should "look abroad" to evaluate whether a particular economic activity may merit being subjected to competition. Indeed, the fact that a particular activity is successfully subjected to competition in comparable situations in other jurisdictions can be a valuable indicator to consider deregulation. Early engagement and consultation of the business community regarding these initiatives is encouraged.

9. This paper identifies procedural and substantive issues that governments may face when concessions are used for introducing competition for the market. Section II will discuss the historical shift from government control to privatisation. This shall be followed by Section III, which discusses concessions. Section IV shall assess the challenges

[9] OECD POLICY BRIEF, *supra* note 4, at 2.

[10] OECD Background Note, *supra* note 1, ¶ 53.

[11] *Id*. ¶ 52.

[12] Howard Shelanski, *Antitrust and Deregulation,* 127 YALE L. J. 1922 (2018).

[13] OECD, THE OECD REPORT ON REGULATORY REFORM SYNTHESIS 2 (1997), *available at* https://www.oecd.org/gov/regulatory-policy/2391768.pdf.

associated with using concessions. Finally, Section V shall summarise *Business at OECD*'s overall suggestions.

2. Changing Attitudes Towards Privatisation of Certain Sectors

10. The multiple benefits of competition hardly need discussing: *Business at OECD* refers to the work done by the OECD secretariat which demonstrates that effective competition regimes have a favourable impact on and act as a catalyst for economic growth.[14]

11. History demonstrates that free enterprise and deregulatory-based policies foster innovation, spur competition, lower prices, and increase efficiency. The deregulation policies initiated in many countries in the fields of transportation, energy, telecommunications, and other industries were prompted by the view that as a result "consumers should benefit from more choices, improved products and services, and lower prices."[15] In a very large majority of the cases, the envisaged consumer benefits did, in fact, materialise.

12. Until the 1980s, policy-makers were of the belief that there are certain "'core' activities which inherently belong[ed] to government (maintenance of public order, defence, market regulation, etc.)."[16] The term State Owned Enterprises (SOEs) was used to refer to the government-controlled enterprises set up in these core activities.

13. Network industries—telecommunications, postal services, energy, and transport—formed part of these core and strategic activities. These sectors were considered "strategic and sensitive" from a national security perspective.[17] There were laws put in place which prevented private sector participation in what were termed "strategic" activities.[18]

14. Network industries were thus traditionally controlled via SOEs. These usually existed to achieve a myriad of objectives,[19] such as:

[14] Sanghoon Ahn, Competition, Innovation and Productivity Growth: A Review of Theory and Evidence (OECD Econ. Dep't Working Paper No. 317, 2002), *available at* https://read.oecd-ilibrary.org/economics/competition-innovation-and-productivity-growth_182144868160#page1.

[15] OECD, Competition Policy, Industrial Policy and National Champions, Submission by BIAC 209, 210 (2009), *available at* http://www.oecd.org/daf/competition/44548025.pdf (internal citation omitted).

[16] OECD, Recent Trends in Privatisation 1, *available at* https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/1898010.pdf.

[17] OECD, Privatisation, Competition and Regulation (OECD 2000), *available at* https://www.oecd-ilibrary.org/governance/privatisation-competition-and-regulation_9789264180581-en.

[18] *Privatization Laws*, World Bank Public-Private-Partnership Legal Resource Center, *available at* https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/privatization#intro.

[19] OECD, Competitiveness in South East Europe, Ch. 6 (2018), *available at* https://www.oecd-ilibrary.org/docserver/9789264298576-11-en.pdf?expires=1569862004&id=id&accname=guest&checksum=5C92CFFF4B928716BC7FF7FD6D6D3A0D

- supporting national and economic strategic interests;[20]
- ensuring continued national ownership of enterprises;
- supplying specific public goods or services (in cases where the market cannot supply these itself);
- performing business operations in a "natural" monopoly situation which are subject to large economies of scale, thus leaving space for only one undertaking in the market;[21] and
- creating or maintaining an SOE monopoly (or oligopoly) where market regulation is infeasible or inefficient.

15. Attitudes toward public ownership changed when nationalised industries began to develop a "reputation for inefficiency and control problems that offset any possible pricing advantage."[22] Thus, more public sector industries started being liberalised. According to the OECD, there were four different angles to this transformation:[23]

1. a political/philosophical change, which signified a shift from a distrust of "foreigners" to recognising politically that consumer welfare "through more, cheaper and better output depends on allocative efficiency with competing producers in factor and product markets and on higher productive efficiency in the use of inputs by individual firms through better incentives and finance mechanisms;"[24]
2. a change in institutional and corporate governance structures: as state ownership became increasingly politicised, privatisation started to be viewed as "a response to the institutional failings of public ownership, to the state's weakness as a corporate governance principal;"[25]
3. a change in economic and industrial organisation; and
4. a change in the financial environment: a major reason why public ownership was so prevalent in the 1950s and 1960s was due to the "lack of resources in the private sector to finance their rapid and wide expansion."[26]

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[20] For example, it has been suggested that Venezuela nationalised its oil industry in 1976 to "increase its status in international politics." *See* Daniel Hellinger, *Venezuelan Oil: Free Gift of Nature or Wealth of a Nation?*, 62 INT'L J. 55 (2006).

[21] Damien Geradin, *Twenty Years of Liberalization of Network Industries in the European Union: Where Do We Go Now?* 2 (Nov. 2006), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=946796 (internal citations omitted).

[22] Antony W. Dnes, *Public Polity for the Private Sector: Franchising and Privatization* 2 (Mar. 1995), *available at* http://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Dnes_Franchising_and_Privatization.pdf.

[23] Stilpon Nestor & Ladan Mahboobi, *Privatisation of Public Utilities: The OECD Experience* 2-7 (1999), *available at* https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/1929700.pdf.

[24] *Id.* at *3.*

[25] *Id.* at 4.

[26] *Id.* at 6.

16. In its paper for the October 2009 roundtable on competition policy, industrial policy and national champions, *Business at OECD* noted that total or partial nationalisation of industries has the final consequence of impairing innovation and encouraging inefficiency.[27] Economists also generally agree that "SOEs are . . . less efficient than privately-held firms and in many cases may actually reduce consumer welfare."[28]

17. Deciding whether a certain sector should be opened up to competition is usually a macro-economic choice for a government. For example, governments might consider it deleterious to liberalise sectors that are impacted by public policy and national security interests. Consequently, while we generally support liberalising markets and opening markets up to competition in light of overwhelming consumer welfare benefits, we also agree that in exceptional cases, this may not be the preferred route. In particular, if there are overriding public policy or national security issues, it might sometimes be best for certain markets to remain under government control. However, in cases where public policy and national security considerations are invoked, governments and agencies seek to engage in a rational discussion on the pros and cons of deregulation, with due consideration how economic activities in comparable situations have been dealt with in other jurisdictions and with an open eye to insights provided by authoritative international organisations, such as the OECD.

18. *Business at OECD* notes that, in such a situation, where governments decide to not open up markets to competition in certain sectors, they are protected from antitrust laws owing to the state action doctrine, which "exempt[s] a state government's conduct from liability under the federal antitrust laws when the state acts in its sovereign capacity."[29] Thus, in markets in which SOEs compete with private companies, exemption from antitrust laws or regulatory regimes acts as a significant competitive advantage which can have severe negative repercussions on markets and the functioning of competition.

19. *Business at OECD* has previously suggested that governments should "strike a balance that limits the role SOEs play in the economy to the extent necessary to reach the policy goals the state is seeking to achieve, and for competition agencies to take an active part in meeting this objective."[30]

20. The *OECD Guidelines on Corporate Governance of State-Owned Enterprises* provide that if economic activities are carried out by SOEs, they must be carried out in a manner that does not jeopardise competition on the marketplace.[31] There must be a level playing field. This is sometimes easier said than done, especially where SOEs combine economic activities with non-trivial public policy objectives. *Business at OECD* agrees with these observations.

[27] OECD, COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS, *supra* 15, at 210.

[28] OECD, STATE OWNED ENTERPRISES AND THE PRINCIPLE OF COMPETITIVE NEUTRALITY, SUBMISSION BY BIAC 289 (2010), *available at* http://www.oecd.org/daf/competition/46734249.pdf.

[29] *State Action Doctrine,* PRACTICAL LAW, *available at* https://uk.practicallaw.thomsonreuters.com/w-010-4180.

[30] OECD, STATE OWNED ENTERPRISES, *supra* note 28, at 290.

[31] OECD, GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 47 (2015), *available at* https://www.oecd-ilibrary.org/docserver/9789264244160-en.pdf?expires=1574186616&id=id&accname=guest&checksum=4C708610D6FAD0EE8D1A20657EA9D0DB.

21. In conclusion, *Business at OECD* notes that, as a starting point, it may be highly beneficial to open up markets to competition unless states decide that doing so would be detrimental to national interest.

3. Using Concessions for Competition on the Market

22. There are several different ways of introducing competition on a market, depending upon the nature and characteristics of the industry. For example, according to the World Bank, introducing competition on the market works best when the goal is to delineate a monopoly franchise. Competition could also be introduced among networks, such as railways competing with trucks. Introducing competition is easiest in those industries where sunk costs are irrelevant. Conversely, in those industries where sunk costs matter (e.g., electricity and natural gas) "smart competitive pools" might be the preferred approach.[32]

23. For industries exhibiting natural monopoly characteristics (such as publicly-funded monopolies), governments may "auction[] off the right to be a monopoly" by offering a concession.[33] Concessions are partnerships between the public sector and mostly private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (e.g., ports, water distribution, parking garages, toll roads) or provide services of general economic interest (e.g., energy, water distribution and waste disposal).[34]

24. Designing a concession involves a complex decision-making process. These decisions pertain to the format of the concession, length of the concession contract, whether a new sector regulator needs to be created, etc. The end goal is to ensure that competition in the market is maximised post-concession.[35]

25. The process of awarding the concession contract is the stage where competition for the market occurs. There are several enforcement and advocacy challenges that may arise during this stage, and it is in the best interests of all stakeholders that the award process remains effective and transparent, reducing risks of collusion amongst bidders/bid-rigging and corruption.[36] Economic literature strongly suggests that auctions are the most effective means of awarding concessions. *Business at OECD* generally agrees with this view.

26. *Business at OECD* also agrees with the Secretariat's view that competition authorities need to assess value provided by the concessionaire with a dual lens: consumers must gain value from the concessionaire's services (and not be vulnerable to monopoly

[32] Michael Klein & Philip Gray, *ViewPoint: Competition in Network Industries – Where and How to Introduce It* 3 (Jan. 1997), *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/11597/multi0page.pdf?sequence=1&isAllowed=y.

[33] *Competition for the Market,* BODY OF KNOWLEDGE ON INFRASTRUCTURE REGULATION, *available at* http://regulationbodyofknowledge.org/market-structure-and-competition/competition-market/.

[34] Eur. Comm'n, Directive of the European Parliament and of the Council on the award of Concession Contracts – Frequently Asked Questions (Jan. 14, 2014), *available at* https://europa.eu/rapid/press-release_MEMO-14-19_en.htm?locale=en.

[35] OECD, CONCESSIONS 7 (2006), *available at* https://www.oecd.org/daf/competition/39531515.pdf.

[36] *Id* at 8.

market power). But at the same time, the concessionaire must also provide value to the government (who might be vulnerable to monopsony market power). *Business at OECD* believes that competition authorities have potentially an extremely important role to play with the government in competition advocacy during the design and award phase in concessions or in the creation of a regulatory regime. The regulation of concessions is also an important factor, which helps prevent "exploitative abuse of the dominant position"[37] acquired by the concessionaire.

4. Challenges Associated With Concessions

27. According to the European Parliament, "[i]ndustries in need of regulation due to market failure tend to feature various characteristics that make it possible for particular interests to exert undue influence over contractual arrangements. Furthermore, the complexity of the activities and number of players involved may prevent effective monitoring and greater transparency of market decisions."[38] As alluded to above, all stages surrounding the concession involve complex decision-making procedures and meticulous research to ensure that the concession is as effective and as economically efficient as possible. Accordingly, certain challenges can arise at each stage: from designing the concession to awarding it. Indeed, *Business at OECD* does not disagree with the notion that, in many cases, awarding a concession to a firm translates to a state-sanctioned dominant position, which can additionally trigger competition law issues.

4.1. Designing the Concession

28. In this section, we shall focus on how to tackle the challenges that arise with concessions and how an effective competition law regime can be used to ensure that the concessionaire does not abuse their dominant position or indulge in exclusionary conduct.

29. Designing the concession involves decisions pertaining to its "structure . . . and the duties and obligations of the concessionaire."[39] *Business at OECD* stresses upon utilising the design stage to allow for as much competition as possible. This view has also been taken by UNCTAD[40] and by the OECD in its Background Note.

30. Natural monopolies might necessitate that there be only one concessionaire in order to be the most effective; but in other scenarios, it may be desirable to offer multiple concessions.[41]

31. Another aspect of concession design is its length. Here, a dichotomy exists: longer concessions are sometimes preferred as this ensures that the capital investment made by

[37] OECD BACKGROUND NOTE, *supra* note 1, ¶ 50.

[38] Eur. Parliament, *Risks of Corruption and Collusion in the Awarding of Concession Contracts*, IP/A/IMCO/NT/2012-10, at 12 (June 2012), *available at* http://www.europarl.europa.eu/RegData/etudes/note/join/2012/475127/IPOL-IMCO_NT(2012)475127_EN.pdf.

[39] OECD POLICY BRIEF, *supra* note 4, at 2.

[40] UNCTAD, *Public monopolies, Concessions and Competition Law and Policies* 11 (Apr. 28, 2009), *available at* https://unctad.org/en/Docs/ciclpd2_en.pdf.

[41] *Id*. at 16.

the concessionaire has a stable long-term period of revenue returns to ensure its financing. According to the World Bank, a concession should be "long enough at least to fully amortise major initial investments."[42] However, in such a case, a concessionaire might not have enough incentive to constantly innovate due to there being no perceived competitive threat.[43] Conversely, shorter concessions imply that competitive tenders take place more often "which can facilitate entry and ensure that any benefits of increased competition are reflected more promptly."[44]

4.2. Awarding the Concession

32. Awarding the concession is the most important aspect as competition for the market occurs at this stage.[45] The risks of corruption and collusion at this stage can be significant and require particular attention.

33. Corruption is harmful not only to consumers but also to business interests. "Corruption goes against the long-term interests of the business community, because it affects overall economic growth. It undermines the acceptance of free trade, democracy and the rule of law, which OECD countries believe are the necessary conditions for sustained economic development."[46]

34. The way corruption can affect a bidding procedure in a concession contract is twofold. First, it can disrupt the entire competitive process by awarding the concession to whoever pays the highest illegal payment. Second, targeted competitors could be incentivized through bribes or other quid-pro-quo arrangements to get them to not participate, thus impacting the winning bid.

35. Moving away from a traditional price-only auction may be an effective way of ensuring that the tendering process is less susceptible to corruption. However, a price-only auction involves another conundrum. If the price at which the auction is won is too high and the concession is awarded to the highest bidder, there is a potential increase in prices for the final consumer as the concessionaire may try to recover the high amount it has paid during the auction. While this may be remedied by having a contract provision that sets a price-cap, a purely price-only auction might still have disadvantages.

36. One way to remedy this situation could be to use a scoring auction, which according to the OECD entails "more subjectivity than price-only auctions and require[s] the use of judgment in specifying the quality attributes and the weight to attach to each one of them."[47] Indeed, economists have stressed that scoring auctions under some circumstances "may let

[42] *Concessions, Build-Operate-Transfer (BOT) and Design-Build-Operate (DBO) Projects,* WORLD BANK PUBLIC-PRIVATE-PARTNERSHIP LEGAL RESOURCE CENTER (2018), *available at* https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos.

[43] P.A Geroski, *Competition in Markets and Competition for Markets*, 3:3 J. OF INDUS., COMPETITION & TRADE 151, 151 (2003).

[44] OECD, CONCESSIONS, *supra* note 35, at 48.

[45] OECD POLICY BRIEF, *supra* note 4, at 3.

[46] OECD, COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT, SUBMISSION BY BIAC 469 (2010), *available at* http://www.oecd.org/daf/competition/cartels/46235399.pdf (internal citation omitted).

[47] OECD, EXECUTIVE SUMMARY OF THE HEARINGS ON THE USE OF AUCTIONS AND TENDERS 3 (Oct. 1, 2015), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2/M(2015)1/ANN7&docLanguage=En.

procurers to obtain more valuable contracts at the same time promoting participation by more bidders and not lowering sellers' expected profits, with so increasing value for both parties."[48]

37. This, too, can present risks. "The risk of undue influence on regulatory decisions [such as by collusion] is present whenever competition is limited."[49] This makes markets regulated by concessions an easy target. Collusion enables the bidders to know the offers of other competing bidders, thus increasing the potential for collective low bids.

38. This brings us to bid-rigging, a particular form of collusive behaviour. It takes place when businesses, that would normally compete against each other "secretly conspire to raise prices or lower the quality of goods or services for purchasers."[50] According to the OECD, bid-rigging can unfold in two ways: (i) by submitting common bids and hence eliminating competition; and (ii) by firms coming to an agreement regarding who the lowest bidder will be, ensuring each firm wins a previously-agreed number of contracts.[51]

39. Bid-rigging is caught by Article 101(1) of the TFEU (and by similar competition rules in other jurisdictions) which prohibits restrictive agreements among competitors. While there is significant guidance regarding bid-rigging in the public procurement arena, bid-rigging as a challenge in concessions has not gained as much attention. *Business at OECD* agrees with the OECD and suggests that the OECD *Checklist for Designing the Procurement Process to Reduce the Risks of Bid Rigging* may be used by governments to identify bid-rigging.[52] Competition law agencies in the EU have already taken a proactive approach to this issue, and some have published their own guides to help contracting authorities recognise and tip-off bid-rigging. Examples include the Croatian[53] and Belgian[54] competition authorities.

40. Apart from challenges arising during the design and award stage of concessions, *Business at OECD* would also like to shed light on competition law concerns to take into context. These are centred around merger control and abuse of dominance.

41. In some cases, the award of concessions may involve the acquisition of control over an undertaking within the meaning of merger control law, and encourages competition

[48] Paul Milgrom, *Putting Auction Theory to Work* (2012), *available at* https://www.cambridge.org/core/books/putting-auction-theory-to-work/63FA2A2D332E9E3A3238B6D5B650F2A5.

[49] Eur. Parliament, *Risks of Corruption, supra* note 38, at 12.

[50] OECD, GUIDELINES FOR FIGHTING BID-RIGGING IN PUBLIC PROCUREMENT 1 (2009), *available at* https://www.oecd.org/competition/cartels/42851044.pdf [hereinafter OECD BID-RIGGING GUIDELINES].

[51] OECD, GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 16, *available at* http://www.oecd.org/regreform/sectors/2376087.pdf.

[52] OECD BID-RIGGING GUIDELINES, *supra* note 50, at 4.

[53] *Croatian Guide for Contracting Authorities in Detecting and Tipping-Off Bid-Rigging Cartels in Public Procurement,* EUR. COMM'N, *available at* https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/guide-contracting-authorities-detecting-and-tipping-bid-rigging-cartels-public-procurement.

[54] *Belgian Competition Authority Publishes Guide on Bid Rigging,* LEXGO (Mar. 21, 2017), *available at* https://www.lexgo.be/en/papers/distribution-concurrence-consommation/competition-law/belgian-competition-authority-publishes-guide-on-bid-rigging,111811.html.

agencies in those cases to take due account of the fact that the activity at hand is subject to a concession from the government, as well as the reasons therefore.

42. As evidenced by economic research, exclusive concessions may, depending on the facts of the case, raise the risk of a (temporary) monopolist engaging in anti-competitive conduct and abusing its dominance. The OECD Background Note emphasises the need to choose competition *in* the market in operating a service and pick competition for the market only if there are "large and well-evidenced efficiency losses from such competition,"[55] as in the case of natural monopolies. Where there is an exclusive concessionaire, there may a risk of it engaging in anti-competitive conduct, and there may be room to apply abuse of dominance laws where anti-competitive conduct takes place. However, "setting prices at a rate higher than . . . in the concessionary contract" would not in and of itself be sufficient to conclude that a competition law violation has taken place.[56]

43. Conversely, having too much competition for the market might also be pernicious. This is because firms need to make significant investments in the form of fixed and sunk costs. According to Geroski, although the presence of a large number of firms rectifies the lack-of-incentive problem, too many entrants incurring massive fixed and sunk costs would be undesirable.[57]

44. The final challenge deals with practical issues, such as effective contract drafting. The OECD has previously stressed the importance of the design and implementation of concession contracts to guarantee efficient results.[58] Thus, the way a concession contract is drafted forms an important aspect of how successful the concession is going to be.[59]

45. As noted by the OECD, it is difficult to foresee all future costs and revenues involved in a concession contract. While there may be unanticipated changes in such a scenario, *Business at OECD* would like to refer to previous OECD Guidance, where the OECD calls for "[p]roper tender and contract design [which] bind[] bidders to specifications that are adequate and put[s] an onus on bidders to demonstrate their capability to undertake the project."[60] *Business at OECD* suggests that contracts should be as specific as possible, including "criteria and penalties for early termination, procedures for resolution of conflicts, and well-defined triggers for renegotiation"[61] to tackle the problems associated with poorly drafted contracts.

[55] OECD BACKGROUND NOTE, *supra* note 1, ¶ 60.

[56] *Id.* ¶ 100.

[57] Geroski, *supra* note 43, at 159.

[58] OECD, SUMMARY OF DISCUSSION OF THE HEARING ON [ON DEC. 14, 2014] THE USE OF TENDERS AND AUCTIONS 2 (June 17, 2015), *available at* http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2/M(2014)3/ ANN2/FINAL&docLanguage=En.

[59] *Id.*

[60] OECD, EXECUTIVE SUMMARY, supra note 47, at 6.

[61] OECD, CONCESSIONS, *supra* note 35, at 49.

5. *Business at OECD* Final Observations

46. *Business at OECD* is supportive of a debate aimed at identifying in which specific settings the award of concessions may bring about significant positive welfare effects and how tenders for concessions can best be structured.

47. Deregulation policies initiated in many countries in the fields of transportation, energy, telecommunications, and other industries were prompted by the view that "consumers should benefit from more choices, improved products and services, and lower prices."[62] In a very large majority of the cases, the envisaged consumer benefits did, in fact, materialise. Governments should apply an economic efficiency-based test when deciding on introducing competition in a particular market. Experience gained by other governments and agencies in comparable situations, as well as the insights of authoritative international organisations, such as the OECD, should inform governments' choices.

48. Governments and competition agencies should be vigilant that opening up an economic sector to competition by introducing competition for the market, in particular by giving out concessions, does not give rise competition law violations.

[62] OECD, COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS, *supra* 15, at 210 (internal citation omitted).